

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

URSACK, Incorporated, JACQUELINE) No. 08-1808 SC
FLORINE, GARY FISHER, and PHOENIX)
VAMVAKIAS,)
)
Plaintiffs,) ORDER RE: CROSS-
) MOTIONS FOR SUMMARY
) JUDGMENT
v.)
)
SIERRA INTERAGENCY BLACK BEAR)
GROUP; NATIONAL PARK SERVICE;)
UNITED STATES FOREST SERVICE;)
SEQUOIA & KINGS CANYON NATIONAL)
PARKS; CRAIG AXTELL,)
Superintendent; YOSEMITE NATIONAL)
PARK; MICHAEL TOLLEFSON,)
Superintendent; INYO NATIONAL)
FOREST; JIM UPCHURCH, Forest)
Supervisor,)
)
Defendants.)
)
_____)

I. INTRODUCTION

This suit arises from the Sierra Interagency Black Bear Group's ("SIBBG") decision to withdraw conditional approval of a particular soft-sided, bear-resistant canister, effective in portions of national parks and forests located in the Sierra-Nevada Crest (the "Sierras"). Now before the Court is a Motion for Summary Judgment, brought by Plaintiff Ursack, Incorporated ("Ursack"), together with Jacqueline Florine, Gary Fisher, and Phoenix Vamvakias (collectively, "Individual Plaintiffs"). Docket No. 30 ("Ursack Motion"). A Cross-Motion for Summary Judgment has

1 been filed by Defendants, including SIBBG, the National Park
2 Service ("NPS"), the United States Forest Service ("USFS"),
3 Sequoia and Kings Canyon National Parks ("SEKI"), Craig Axtell as
4 Superintendent for SEKI, Yosemite National Park ("Yosemite"),
5 Michael Tollefson as Superintendent for Yosemite, Inyo National
6 Forest ("Inyo"), and Jim Upchurch as Forest Supervisor for Inyo
7 (collectively, "Defendants"). Docket No. 36 ("Defendants'
8 Motion"). Plaintiffs and Defendants both submitted Replies.
9 Docket Nos. 39 ("Ursack Reply"), 43 ("Defendants' Reply").¹
10 Having considered the papers filed by both parties, the Court
11 GRANTS Defendants' Motion and DENIES Ursack's Motion.

12
13 **II. BACKGROUND**

14 **A. Regulations Relating to Bear-Resistant Containers**

15 The NPS is charged with the duty of administering and
16 conserving the National Parks (including Yosemite and SEKI), and
17 to conserve "the wildlife therein and to provide for the enjoyment
18 of the same in such a manner and by such means as will leave them
19 unimpaired for the enjoyment of future generations." 16 U.S.C.
20 § 1. Similarly, the USFS exists to regulate the "occupancy and
21 use" of public forests (like Inyo), and "to preserve the forests
22 thereon from destruction." 16 U.S.C. § 551. To this end, both
23 agencies are involved in managing the interaction between humans
24 and black bears. To more effectively address common issues, the

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26 _____
27 ¹ Defendants submitted a stipulation and request for leave to
28 file a reply that exceeds the required page limit. Docket No. 41.
The Court hereby GRANTS this request.

1 Superintendents of Yosemite and SEKI and the Forest Supervisor of
2 Inyo entered into a Memorandum of Understanding in May of 2001,
3 creating SIBBG "to share information, techniques, and ideas; to
4 coordinate policies and information; and to eliminate political
5 barriers to progress -- all with the ultimate goal of preserving a
6 healthy black bear population free of human influences on a
7 regional scale." SIBBG at 3.² The agency consists of members
8 from key positions in Yosemite, SEKI, and Inyo. Id. at 3-4. One
9 of SIBBG's key directives is to "adopt uniform testing standards
10 and approval protocols for SIBBG approved bear-resistant food
11 storage containers." Id. at 3.

12 A "bear-resistant food storage container" is just what it
13 sounds like: a portable container that is designed for use by
14 hikers and backpackers, designed to protect their food and garbage
15 from curious or hungry bears. Bear-resistant containers are
16 typically hard-sided cans or jars that weigh between two and three
17 pounds. SIBBG at 308-09. While these canisters provide visitors
18 with more freedom than do the stationary storage lockers that can
19 be found at various points in the parks and forest, many
20 backpackers find their weight and bulk to be cumbersome. Id. at
21 683. Nevertheless, there are a number of obvious reasons why a
22 backpacker may wish to use a bear-resistant container, and why the
23 parks and forest wish to regulate them -- including a desire to

24
25 ² The Administrative Record for the decision at issue is
26 divided into four parts, corresponding to the SIBBG and the
27 individual parks or forest that were involved in the decision
(YOSE, SEKI, and INYO). Throughout this order, citations to the
28 Administrative Record will consist of the name of the agency,
followed by a page number (e.g., YOSE at 112).

1 keep individual bears from becoming conditioned to human food.
2 Conditioned bears may alter their behavior, and begin habitually
3 visiting camp sites to forage through belongings in search of
4 food. See INYO at 4-6. Once a bear becomes conditioned, it may
5 increase its contact with humans, which poses a risk to people and
6 could eventually lead to euthanization of the bear. See YOSE at
7 278-79; SEKI at 354; INYO at 4-6. It is not clear how much
8 anthropogenic food is necessary to make a wild bear into a
9 "problem bear;" it could take several encounters, or perhaps just
10 a taste or smell of human food. SIBBG at 527.

11 To better keep human food away from bears, SIBBG has created
12 and refined a protocol for testing and evaluating bear-resistant
13 containers. Id. at 711-749. SIBBG uses this protocol to grant
14 approvals to containers that it deems effective. Id. These
15 approvals are essentially recommendations to NPS and USFS
16 officials, who have the legal authority to make final
17 determinations as to which containers will be allowed in the
18 "restricted areas" of particular national parks or forests. See
19 Defs.' Mot. at 18; SIBBG at 846, 852. As such, certain parks and
20 forests may be more or less restrictive than others. See, e.g.,
21 YOSE at 185. In April of 2004, the use of approved canisters
22 became mandatory in certain areas of Yosemite, namely, any place
23 within 7 miles of a roadway, or anywhere above the tree line
24 (about 1.8 miles in elevation). YOSE at 269; SIBBG at 646.
25 Yosemite also prohibited the practice of suspending food from
26 trees (i.e., the "counterbalance method") in the canister-only
27 areas. YOSE at 269. That same year, SEKI issued requirements

1 that food in certain designated areas be stored in approved
2 canisters, and also prohibited the counterbalance method in those
3 areas. SEKI at 253-54. Inyo has also issued forest orders that
4 require visitors to use approved containers at certain times and
5 in certain places within Inyo. INYO at 4-18.

6 The Sierras are popular destinations for campers and
7 backpackers. Yosemite alone drew an estimated 80,000 people for
8 overnight use in 2003. SIBBG at 643. As Yosemite, SEKI and Inyo
9 officials appear to give great weight to SIBBG's approvals,
10 SIBBG's determinations can have a substantial economic impact on
11 the manufacturers of bear-resistant canisters. For example,
12 Ursack has contended that the nationwide retailer REI will only
13 carry products that are approved by SIBBG. Id. at 308.
14 Manufacturers of bear-resistant containers, like Ursack, therefore
15 have a strong financial incentive to win SIBBG's approval for
16 their products.

17 **B. The Development and History of the Ursack S29 Hybrid**

18 Since 2001, Ursack has manufactured and sold a number of
19 different soft-sided, bear-resistant containers called "Ursacks,"
20 which have been made from a variety of "bullet proof" fabrics
21 including Kevlar, Vectran and Spectra. Ursack Mot. at 1-2. The
22 Ursacks were originally designed to be tied to trees, to prevent
23 bears from crushing the contents. SIBBG at 530. In contrast to
24 the two-to-three pound, hard-sided containers, Ursacks weigh only
25 eight ounces, and their light weight has made them attractive to
26 backpackers who prefer to travel light. SIBBG at 309, 525. The
27 earliest Kevlar models were apparently successful in tests
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1 performed using captive bears, and SIBBG granted these conditional
2 approval in 2001. YOSE at 187. However, approval of the early
3 models proved to be "somewhat disastrous." SIBBG at 526. When
4 the Ursacks were used in the field, bears repeatedly gained access
5 to their contents by tearing through the seams or fabric. YOSE at
6 187. In late 2003, Ursack began producing bags made of Spectra,
7 which were stronger than the Kevlar models, and which were
8 accompanied by aluminum inserts that wrapped around the bag's
9 contents to offer more protection. Id. at 188. This product,
10 referred to variously as the Ursack TKO, S29 (a reference to its
11 29 yarns-per-inch) or S29 Hybrid (a reference to the aluminum
12 insert), is the container at issue in this litigation.

13 On October 24, 2003, SIBBG members voted to test extensively
14 the S29. Id. at 189; SIBBG at 767. SIBBG designed a rigorous
15 testing protocol to address a number of concerns related to the
16 Ursacks, including:

- 17 a) Bag may leak food through puncture holes;
- 18 b) Bag integrity may decrease with successive
bear encounters;
- 19 c) Marmots or other rodents may compromise the
integrity of the bags;
- 20 d) Bags which are properly secured may cause
damage to trees;
- 21 e) Bags which are not adequately secured may be
carried off and become wilderness litter that
will be very slow to deteriorate;
- 22 f) Users may need to cut cord because the knots
have become too tight to untie after being
23 pulled on by a bear, eliminating the users'
ability to secure the bag;
- 24 g) The bag cannot be secured adequately above
[the] tree line;
- 25 h) The bag can easily be used correctly as
prescribed by the manufacturer or in
26 accordance with any special Federal
requirements.

1 SIBBG 525-26.

2 The S29 performed well in the ensuing tests, which involved
3 leaving baited Ursacks in areas with known "problem" bears. Id.
4 at 544. For the most part, the Spectra held up, and only suffered
5 from numerous micropunctures that apparently did not weaken the
6 surrounding fabric. Id. Leakage of solid food through the
7 micropunctures appeared to be "insignificant,"³ although liquids
8 stored in the Ursacks apparently leaked as its packaging was
9 destroyed. Id. Some kind of rodent (probably a mouse) was able
10 to chew a hole through two of the S29s, but no bear was able to
11 access the solid food. Id. at 544.

12 Even though the bags succeeded in keeping bears away from the
13 food, most of the food was "mutilated," or was rendered inedible
14 after being mixed with bear slobber, which partially digested the
15 food and gave it a noxious odor. Id. at 544, 558-59. This also
16 posed at least a speculative risk for rabies. Id. The aluminum
17 added some protection, but in some instances it was crushed or
18 torn, and dangerous metal fragments got mixed into the food. Id.
19 at 558. The study's author expressed two concerns with the
20 condition of the food. First, backpackers may choose to dump,
21 rather than carry out, the mutilated food, thereby allowing bears
22 access to anthropogenic food and defeating the container's primary
23 purpose. Id. at 564. Second, if a backpacker witnesses a
24 confrontation between a bear and an Ursack, the backpacker may

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26 ³ The study's author later qualified this characterization:
27 "Whether this small loss of food would be sufficient to effect
28 [sic] future behavior of bears that are not yet conditioned to
human food is unknown for the Sierra Nevada." SIBBG at 553.

1 attempt to frighten the bear away to save the food, rather than
2 allow the bear have its way with the container. Id. This could
3 endanger the backpacker, who presumably would not interfere if the
4 bear was interacting with a hard-sided container that could better
5 protect the food from mutilation and bear slobber. Id.

6 The test also addressed environmental concerns. To test
7 whether bears may carry away the Ursacks, resulting in non-
8 biodegradable litter, several Ursacks were intentionally left
9 untied to trees or rocks. Id. at 545. The bears in the tests
10 apparently did not carry these units very far (the furthest having
11 been carried as far as sixty-seven meters). Id. However, where
12 the bags were tied to trees, the trees tended to experience some
13 degree of damage to their bark, and the substrate around the
14 Ursacks was also generally disturbed. Id. at 545, 560-62.

15 On October 16, 2004, roughly a month after the study was
16 complete, SIBBG voted to deny conditional approval of the S29.
17 YOSE at 117. In a letter to Ursack, the NPS explained that the
18 S29 damaged the natural environment, presented a threat of human
19 injury, and created a risk that Ursack users may dump their
20 mutilated food. Id. at 117-18. The letter explained that Ursack
21 users would remain free to use the bags in areas that were not
22 subject to the canister-only requirements. Id. at 118.

23 In early 2005, Ursack produced a new "heavy-duty" or
24 "reinforced" insert, which was intended to cure some of the
25 defects that were apparent from the previous year's study. Id. at
26 188, 190. However, in 2005 the U.S. military requisitioned all
27 available Spectra, which became unavailable for civilian use. Id.

1 This forced Ursack to use Vectran as a fabric, and it produced the
2 "V21" model instead of the S29 during 2005 and 2006. Id. at 188.
3 The V21 was not heavily tested in 2005, but it was conditionally
4 approved for use in 2006. Id. at 188-89. Unfortunately, the
5 Vectran proved ineffective. After numerous reports of incidents
6 in which bears were able to access food from V21s, SIBBG pulled
7 conditional approval on October 12, 2006. Id. at 189-90. By this
8 time there was a "general dislike for the product" among at least
9 the Yosemite members of SIBBG. SIBBG at 452. After extensive
10 discussions, SIBBG eventually decided to further consider the
11 "V27" (another Vectran model using a denser weave) and the S29,
12 but would subject these to further in-house testing, rather than
13 grant conditional approval.⁴ YOSE at 189-90. The NPS notified
14 Ursack of this decision via a letter dated January 25, 2007.
15 SIBBG at 16-17.

16 Of course, if SIBBG only allowed in-house testing of the S29,
17 this would mean that the public could not use it in restricted
18 areas during 2007. Ursack would therefore lose significant appeal
19 to potential customers who intended to use these restricted areas.
20 Tom Cohen ("Cohen"), an inventor of the Ursack and the person
21 running the company, contacted SEKI employee and SIBBG member
22 Harold Werner ("Werner"), who invited Cohen to attend SIBBG's 2007
23 spring meeting. Id. at 224. Although Cohen attended the meeting,
24 SIBBG did not change its decision. Id. at 458. On March 19,

26 ⁴ Ursack discontinued the V27s because of the renewed
27 availability of Spectra, apparently before any further testing had
28 occurred. Ursack Reply at 2 n.3.

1 2007, Cohen sent a letter to Barbara Goodyear, the Field Solicitor
2 for the U.S. Department of Interior, requesting a "pre-litigation
3 meeting" and threatening that, "[u]nless Ursack is promptly
4 provided with a rational basis for SIBBG's decision, it would seem
5 that a preliminary injunction is the only way to save our selling
6 season." YOSE at 23-26.

7 On March 23, 2007, in response to Cohen's letter, the
8 Superintendent of SEKI suggested that the other members of SIBBG
9 conditionally approve the S29, subject to a number of conditions,
10 including 1) the bags could not be tied to trees or rocks (i.e.,
11 they had to be placed on the ground like any other approved bear-
12 resistant container); and 2) if there were two or three reported
13 failures, the product would lose its conditional approval. SEKI
14 at 184-85. On April 10, 2007, members of SIBBG conferred and
15 agreed to conditionally approve the S29, provided that the
16 approval be recalled if three or more containers fail during the
17 2007 field season. YOSE at 191-92. SIBBG also cancelled the
18 planned in-house testing. Id. This decision was discussed with
19 Ursack at a meeting on May 9, 2007. YOSE at 146, 149.

20 Time passed, and visitors used the S29s throughout the 2007
21 summer season. After the season ended, SIBBG met to discuss a
22 total of nineteen "bear incidents" that had involved S29s,
23 including six alleged "failures." SIBBG at 461-62. The SIBBG
24 members unanimously voted to remove conditional approval of the
25 S29. Id. This decision was transmitted to Ursack by a letter
26 dated November 27, 2007, which cited the S29's "disproportionately
27 high failure rate" as the primary reason for rescinding
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conditional approval. YOSE at 163-172.

SIBBG's decision to rescind conditional approval of the S29 is the subject of the current suit. Plaintiffs contend that the decision was arbitrary and capricious, and that SIBBG violated the Administrative Procedures Act ("APA") as well as Ursack's due process rights and its right to equal protection under the law. See Ursack Mot. at 12, 15, 17. Plaintiffs further contend that SIBBG is an "advisory committee" that operates in violation of the Federal Advisory Committee Act ("FACA"). Compl., Docket No. 1, § 79.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure may be granted where the pleadings and materials on file show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Where a case involves review of a final agency determination under the APA, 5 U.S.C. § 706, resolution generally "does not require fact finding on behalf of [a] court." Northwest Motorcycle Ass'n v. United States Dep't of Agric., 18 F.3d 1468, 1471-72 (9th Cir. 1994); see also Wilderness Soc'y v. Bosworth, 118 F. Supp. 2d 1082, 1089 (D. Mont. 2000) ("Summary judgment is a particularly appropriate means of resolving claims against forest management decisions by the U.S. Forest Service."). As the scope of review is confined, by and large, to the administrative record, this case presents no questions of material fact that would render

1 it inappropriate for resolution by summary judgment.

2 **B. Scope of Review Under the APA**

3 Judicial review of an agency's final determination is
4 governed by the APA. See 5 U.S.C. § 706; Thomas Jefferson Univ.
5 v. Shalala, 512 U.S. 504, 512 (1994). An agency action is
6 improper if it is "contrary to [a] constitutional right, power,
7 privilege, or immunity." 5 U.S.C. § 706(2)(B). In addition, a
8 reviewing court must "hold unlawful and set aside" an agency
9 action if it is "arbitrary, capricious, an abuse of discretion, or
10 otherwise not in accordance with law." 5 U.S.C. § 706(2)(A);
11 Thomas Jefferson Univ., 512 U.S. at 512. An agency's
12 determination is arbitrary or capricious if the agency has
13 "entirely failed to consider an important aspect of the problem,
14 [or] offered an explanation for its decision that runs counter to
15 the evidence before the agency" Motor Vehicle Mfrs. Ass'n
16 v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
17 However, "[t]he court is not empowered to substitute its judgment
18 for that of the agency," and may only determine whether the
19 agency's decision "was based on a consideration of the relevant
20 factors and whether there has been a clear error of judgment."
21 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416
22 (1971). A court's deference to an agency "is especially
23 appropriate where the challenged decision implicates substantial
24 agency expertise." Mount Graham Red Squirrel v. Espy, 986 F.2d
25 1568, 1571 (9th Cir. 1993).

1 **IV. DISCUSSION**

2 **A. Defendants' Motion to Strike**

3 The Court first addresses Defendants' Motion to Strike, which
4 relates to three items submitted by Plaintiffs in support of their
5 Motion for Summary Judgment: 1) a Request for Judicial Notice
6 ("RJN"); 2) a declaration submitted by Cohen; and 3) a Statement
7 of Undisputed Facts ("SUF"). Docket Nos. 31, 32, 34. Defendants
8 filed a motion to strike these items as material that falls
9 outside of the administrative record. Docket No. 35.

10 In general, a Court's review of a final administrative action
11 under the APA is limited to the administrative record. As stated
12 by the Supreme Court in Florida Power & Light Co. v. Lorion:

13 "[The] focal point for judicial review should be
14 the administrative record already in existence, not
15 some new record made initially in the reviewing
16 court." The task of the reviewing court is to apply
 the appropriate APA standard of review, 5 U.S.C.
 § 706, to the agency decision based on the record
 the agency presents to the reviewing court.

17 470 U.S. 729, 743-44 (1985) (quoting Camp v. Pitts, 411 U.S. 138,
18 142 (1973)). Courts in the Ninth Circuit have recognized numerous
19 exceptions to this general rule, particularly where extra-record
20 information is used to determine whether an agency considered all
21 of the relevant factors, to explain an agency determination, or to
22 determine whether an agency's "course of inquiry was insufficient
23 or inadequate." Alpine Lakes Protection Society v. U.S. Forest
24 Serv., 838 F. Supp. 478, 481 (W.D. Wash. 1993); see also Hells
25 Canyon Pres. Council v. Jacoby, 9 F. Supp. 2d 1216, 1223 (D. Or.
26 1998) (collecting cases).

27 Plaintiffs request judicial notice of three facts. The first
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1 two are items posted on the NPS web site, which provide relevant
2 background information that may shed light on the context of
3 SIBBG's decision. See RJN ¶¶ 1-2. Because these facts are not
4 subject to reasonable dispute, and are capable of determination
5 using sources whose accuracy cannot reasonably be questioned, the
6 Court may take judicial notice of them. See New Mexico ex rel.
7 Richardson v. BLM, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking
8 judicial notice of data on web sites of federal agencies). The
9 first fact relates to the number of "reported bear incidents" in
10 Yosemite as of October 13, 2007 (456, of which only 33 happened in
11 the wilderness). Id. ¶ 1. The second fact evidences that one S29
12 "failure" that took place during the 2007 testing season occurred
13 in an area where only metal storage bear boxes could be used
14 (i.e., canisters of any kind were disallowed). Id. ¶ 2. The
15 Court notes that this information was readily available to the
16 decision makers when making the determination at issue. As such,
17 these facts could potentially help explain the decision, or show
18 that the agency failed to consider a factor, and the Court takes
19 judicial notice of them.

20 Plaintiffs also ask the Court to take judicial notice of the
21 patent for the Ursack bag, to show that it was designed to be tied
22 to a tree. RJN ¶ 3. There is no evidence that the patent itself
23 was before SIBBG, the NPS or USFS, and the Court sees no need to
24 supplement the record with information not before the agencies.

1 The Court declines to take judicial notice of the patent.⁵

2 The Court GRANTS Defendants' motion to strike portions of
3 Cohen's declaration that are not based upon the administrative
4 record. The declaration contains information related to Ursack's
5 revenue and the impact of SIBBG's determinations, information
6 related to Cohen's personal investigation into several of the
7 alleged S29 failures in 2007,⁶ and information on Ursack's in-
8 house tests. Cohen Decl. ¶¶ 2-5. The Court does not find that
9 this extra-record information illuminates or explains SIBBG's
10 decisions. Where information in the declaration was clearly made
11 known to SIBBG, the Court will still consider the record, see,
12 e.g., SIBBG at 167-69 (Cohen's e-mail to SIBBG member regarding
13 investigation into alleged failure), but not the declaration.

14 Finally, the Court declines to strike Plaintiffs' SUF, as
15 this document simply repeats arguments and characterizations found
16 in Plaintiffs' Motion. The Court will accept the SUF as true only
17 where it is grounded in the record. As such, the Court's decision
18 to not strike the SUF has no impact on the outcome of these
19 Motions.

20 **B. Standing**

21 Individual Plaintiffs are each backpackers who express a
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23 ⁵ Doing so makes no difference to the outcome of the Court's
24 determination. The fact that Ursacks were originally intended to
25 be tied to trees, and had to be redesigned to accommodate SIBBG's
concerns, is adequately reflected in the administrative record.
See, e.g., SIBBG at 530, 789, 933-34.

26 ⁶ To the extent that Plaintiffs merely wish to raise the point
27 that SIBBG never gave them a chance to contest the alleged
failures, they need not submit to this Court the evidence that they
would use to directly refute those failures.

1 desire to use Ursacks in restricted areas. Compl. ¶¶ 11-16.
2 Defendants challenge the standing of the Individual Plaintiffs, on
3 the basis that the Individual Plaintiffs have not adequately
4 articulated or proven a basis for standing. Defs.' Mot. at 22-23.
5 Defendants do not challenge the standing of Ursack, which has an
6 obvious financial stake in SIBBG's determination and the outcome
7 of this litigation. The Individual Plaintiffs are represented by
8 the same counsel as Ursack, and have not submitted separate briefs
9 or made any separate arguments. Their presence has no bearing on
10 the outcome of this Motion. Because Ursack has clear and
11 uncontested standing to challenge SIBBG's determination, the Court
12 declines to inquire into the basis for the standing of the
13 Individual Plaintiffs. See Arlington Heights v. Metro. Hous. Dev.
14 Corp., 429 U.S. 252, 264 n.9 (1977) ("Because of the presence of
15 this plaintiff, we need not consider whether the other individual
16 and corporate plaintiffs have standing to maintain the suit.");
17 County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081,
18 1084 (9th Cir. 2003) ("Whatever questions exist as to the standing
19 of the various appellants, they are represented by the same
20 counsel and make the same arguments, and [one appellant] . . .
21 indisputably has standing. We accordingly proceed to the
22 merits.").

23 C. Whether SIBBG's Determinations Were Arbitrary or
24 Capricious

25 Plaintiffs contend that SIBBG arbitrarily and capriciously
26 "banned" Ursack by withdrawing its conditional approval after the
27 2007 summer season. Ursack Mot. at 12-15. Throughout its briefs,
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1 Plaintiffs raise a number of different arguments to characterize
2 SIBBG's determination as arbitrary and capricious, and the Court
3 addresses each in turn below.

4 **1. The "Three-Failures" Standard**

5 Plaintiffs first contend that SIBBG acted arbitrarily and
6 capriciously by concluding that conditional approval of the S29
7 would be rescinded if there were three reported failures of the
8 model during the 2007 field season. Id. at 12-13; YOSE at 192.
9 Plaintiffs claim that "there was no reasoned analysis among its
10 members, no scientific basis for selecting the number three . . .
11 no input from the public" Ursack Mot. at 12. According
12 to Plaintiffs, this decision was particularly arbitrary because
13 the BearVault, a competing hard-sided container, failed twelve or
14 thirteen times in 2005 without being banned. Id. at 13.

15 The Court concludes that it was not arbitrary or capricious
16 for SIBBG to pick a fixed number of failures that would trigger
17 revocation of conditional approval. The record reflects that
18 SIBBG had previously set fixed targets for earlier Ursack models,
19 because Ursack had explicitly requested a fixed standard for
20 approval. See, e.g., SIBBG at 817-18, 825-26, 865. These numbers
21 were typically very low; for example, in 2002, the conditions were
22 set at three failures where bags were used correctly, or five
23 where bags were used incorrectly. Id. at 819-20. The record also
24 reflects SIBBG's reasons for setting the number so low. Shortly
25 after Ursack began its contact with SIBBG, Cohen complained about
26 what he characterized as a "100% success rate" requirement. Id.
27 at 808. SIBBG responded as follows:

1 We agree that 100% success is impossible, but [the
2 Ursack's] rate of failure is unacceptable. It only
3 takes one incident of a bear getting human food to
4 potentially change its behavior. We currently have
hundreds of people in SIBBG areas every week using
hard-sided canisters without complaint or failure.

5 Id. at 816. In other words, SIBBG set the number of failures low
6 because 1) it deemed each failure to have real consequences, which
7 posed risks for both bears and humans, and 2) the bar was set high
8 by the hard-sided canisters already in use.

9 Nor was it arbitrary or capricious to set the number far
10 lower than the number of times that the BearVault failed in 2005.
11 The administrative record relevant to BearVault is not before the
12 Court, however, minutes from the SIBBG meeting in the fall of 2005
13 state that there were eleven or twelve BearVault failures in SEKI,
14 and one additional failure in Yosemite. Id. at 789. Cohen raised
15 the issue of the failing BearVaults in an e-mail to Werner dated
16 October 7, 2005. Id. at 950-51. Werner responded:

17 We did not pull the approval on the BearVault
18 because all of the problems were focused on a small
19 area suggesting that one bear figured out how to
20 break into them. If those same incidents were
21 spread over a large area indicating a fundamental
problem with the design or the way people use it, I
suspect that we would have pulled their approval.
The protocol leaves SIBBG a lot of room for
applying common sense.

22 Id. at 949. Indeed, at SIBBG's spring meeting in 2007, the group
23 concluded that, if there was one more failure outside of Rae Lake
24 (the "small area" in question), the approval for the BearVault
25 would be pulled. Id. at 458. In light of this rationale, if
26 SIBBG had rescinded its conditional approval of the S29 based
27 solely on three failures in a single location, then the Court may
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1 agree that treatment of the S29 was capricious. However, SIBBG
2 rescinded conditional approval after six recorded failures spread
3 throughout the region. Id. at 301-302.⁷ SIBBG's decision to
4 withhold the forbearance that it had shown BearVault was therefore
5 reasonable, as the basis for that forbearance simply did not apply
6 to the Ursack.

7 Finally, when SIBBG actually rescinded conditional approval
8 of the Ursacks, the letter notifying Ursack of the revocation,
9 sent by the Solicitor for the Department of Interior on November
10 27, 2007, provided an independent justification for revocation,
11 besides the absolute number of reported failures. The letter
12 stated that the Ursacks' rate of failure was also a significant
13 basis for determination:

14 Compared to other portable food-storage devices,
15 Ursacks were rarely observed (3% of documented use
16 at Sequoia and Kings Canyon National Parks, n =
17 476). Since only one failure was reported for all
other portable food-storage units within areas
managed by SIBBG members, the Ursack had a
disproportionately high failure rate.

18 YOSE at 163. This indicates that the three-failure standard was
19 not the sole basis for revocation. Even if the number three had
20

21 ⁷ The record from the October 24, 2007 SIBBG meeting actually
22 lists seven "failures," but includes an incident on July 30, 2007,
23 in which a bear spent five minutes with an Ursack before it was
chased away by a camper wielding a hiking pole. SIBBG at 302. The
24 bear received no food, and the Ursack had only small tooth holes.
Id. When SIBBG notified Ursack of the revocation by letter, it
25 attached a list of the six failures, including the July 30
incident. YOSE at 165. Defendants have explained that the July
26 30, 2007 incident was inadvertently included on the list, but
another reported failure, which occurred in August in Inyo, was
27 excluded. Defs.' Mot at 7 n.3. Defendants base their decision on
the six reported failures excluding the incident on July 30, 2007.
Id.

1 not been a rational and scientifically-chosen figure, there
2 existed a separate rational basis for rescinding approval: Ursack
3 performed significantly worse than did other available canisters.
4 Id. The Court finds that SIBBG did not act arbitrarily or
5 capriciously when it set or applied the three-failures standard.

6 **2. SIBBG's Consideration of the Issue of Compliance**

7 Plaintiffs make a strong argument for approving the Ursack:
8 The primary cause of bear-related incidents is not cannister
9 failure, but visitor noncompliance with food-storage requirements.
10 See Ursack Mot. at 3. Many backpackers dislike cumbersome hard-
11 sided containers, and may not bother to use a container at all; at
12 the same time, because most containers are cumbersome and heavy,
13 it is unlikely that even well-meaning backpackers will bring more
14 than one, and many visitors may therefore have "overflow" food.
15 See SIBBG at 683. Unlike hard-sided containers, Ursacks are
16 collapsible and relatively light. Id. at 309. Therefore, even if
17 the S29 has a high failure rate, its availability could make
18 backpackers more willing to bring and use a bear-proof container -
19 - or even a second container to prevent overflow. Plaintiffs
20 contend that "there is no indication in the [administrative
21 record] that SIBBG ever considered this most important factor in
22 establishing its criteria for Ursack," therefore the decision was
23 arbitrary and capricious. Ursack Reply at 8-9; see also American
24 Horse Protection Ass'n v. Lyng, 812 F.2d 1, 6-7 (D.C. Cir. 1987)
25 (overturning agency determination where agency failed to consider
26 significant aspect of problem agency was trying to address).

27 The Court agrees that the compliance consideration is
28

1 significant -- however, the Court may not substitute its judgment
2 for that of the agency. The Court must instead determine whether
3 SIBBG's conclusion was "based on a consideration of the relevant
4 factors and whether there has been a clear error of judgment."
5 Overton Park, 401 U.S. at 416. "As long as the agency gives fair
6 consideration to the relevant factors mandated by law, the
7 importance and weight to be ascribed to those factors is the type
8 of judgment that courts are not in a position to make." Florida
9 Manufactured Hous. Ass'n v. Cisneros, 53 F.3d 1565, 1577 (11th
10 Cir. 1995). The question before the Court is therefore: Did
11 SIBBG ignore the important consideration of visitor compliance?
12 Or did it consider this factor and nonetheless declined to allow
13 the use of Ursacks because of countervailing concerns?

14 The record reflects that SIBBG members clearly saw the
15 advantage that Ursacks offered over other products, and explicitly
16 considered the impact that Ursacks might have on visitor
17 compliance with food-storage requirements. SIBBG had previously
18 told Ursack that "[o]ur wilderness users, our park staff, and your
19 company all want to see this product succeed because we all want a
20 lightweight way to carry food." SIBBG at 845. When SIBBG studied
21 the Ursack in 2004, it observed that "[t]here is some interest in
22 this product since backpackers (especially the go-light types)
23 generally don't want to carry unnecessary weight." Id. at 45.

24 At critical points in the record, SIBBG members explicitly
25 cited the possibility that Ursacks may improve compliance. In
26 November of 2006, SIBBG members conducted a vote via e-mail to
27 determine how to treat three different Ursack models. In voting
28

1 to conditionally approve the V27 and the S29, Werner stated:

2 I suspect that this product improves compliance,
3 and I cannot help but wonder if the low number of
4 incidents last summer [in 2006] was related to
5 better compliance. The only obvious difference in
last year compared to previous years was the
authorization to use Ursacks in canister-required
areas.

6 Id. at 207. The group nonetheless voted to test the Ursacks in-
7 house rather than to allow the public to test them by issuing a
8 conditional approval. YOSE at 189-90. Cohen was thereafter
9 invited to SIBBG's spring meeting in 2007, where he clearly made
10 this same compliance argument to SIBBG. Id. at 309. When SIBBG
11 did not alter its determination and Ursack threatened suit, the
12 Superintendent of SEKI proposed that SIBBG reconsider the matter,
13 specifically because of the possibility that Ursacks may affect
14 visitor compliance. The Superintendent wrote:

15 [W]e recognize that most wilderness users carry
16 some form of portable bear-proof storage device;
17 many of them dislike the weight of approved units.
A lighter approved unit should improve compliance
which is important to achieving our bear management
objectives.

18
19 Id. at 175.

20 The record amply reflects that SIBBG members were aware of
21 the impact that Ursacks may have on visitor compliance, and that
22 they considered this argument in reaching their conclusion. In
23 fact, it suggests that the Ursacks made it so far in the approval
24 process because of this consideration. However, the record also
25 reflects that many SIBBG members did not believe that the Ursacks
26 were an effective way of protecting food from bears. Whether
27 container effectiveness should be sacrificed for the purpose of

1 improving compliance is precisely the kind of determination that
2 is best left to agency expertise. See Florida Manufactured Hous.
3 Ass'n, 53 F.3d at 1577. SIBBG could reasonably conclude that the
4 best course was to encourage and require use of containers that
5 were more reliable than the S29. Having satisfied itself that the
6 agency gave consideration to this important issue, the Court will
7 not second-guess SIBBG's conclusion.

8 **3. SIBBG's Determination That There Were Six**
9 **"Failures" and SIBBG's Definition of "Failure"**

10 Plaintiffs contend that SIBBG's determination was arbitrary
11 and capricious because they had no consistent definition of
12 "failure." Ursack Reply at 5-6. They state that the term
13 "'failure' remains a vaguely defined term subject to the whims of
14 SIBBG, which remains free to apply one standard to Ursack and
15 another to its competitors." Id. Plaintiffs liken this case to
16 Alaska State Snowmobile Ass'n v. Babbitt, 79 F. Supp. 2d 1116 (D.
17 Alaska 1999), in which a district court concluded that the NPS's
18 failure to define "traditional activities" made it impossible for
19 the court to conduct a proper APA review of the NPS's
20 determination. Id.

21 Although SIBBG's testing standards do not explicitly define
22 the term "failure," they do state that:

23 Revocation of a products' [sic] approval may occur
24 at any time based upon SIBBG consensus in response
25 to the field evaluation of the container. This may
26 include evidence that bears have mastered the
27 container/device, use which results in
28 environmental damage, common misuse by users of the
method or device, or structural failure due to
elements of weather or exposure.

1 SIBBG at 748. The Court reads this as a reasonable indicator of
2 what SIBBG understood to constitute a "failure."

3 Plaintiffs devote much of their discussion to arguing that
4 SIBBG's notion of "failure" was slippery and ill-defined. See,
5 e.g., Ursack Reply at 5-6. The record reflects that SIBBG was
6 well aware of the potential difficulties that they faced in
7 creating objective testing standards, and there was substantial
8 discussion within SIBBG, and between SIBBG and Ursack, regarding
9 exactly what should constitute a "failure" for soft-sided
10 containers. SIBBG clearly recognized that the Ursacks "present a
11 variety of issues that do not exist for hard-side units (e.g.,
12 [t]hey can be carried off if not secured to something sturdy; they
13 don't protect fragile food from being crushed or protect liquids
14 from leaking out of the Ursack; attaching them to trees may cause
15 damage to trees; etc.)." SIBBG at 575. In an e-mail to Cohen,
16 Werner explained that "[h]ard-sided units either break or they
17 don't. Soft-sided units with small punctures seem to fall into a
18 grey zone that has led to us interpreting the same results
19 different in the past." Id. at 867. The record therefore
20 reflects that SIBBG reasonably determined that soft-sided
21 containers faced additional concerns not presented by hard-sided
22 containers, and could therefore be subject to a broader standard
23 for "failure."

24 Plaintiffs claim that SIBBG never explicitly stated this
25
26
27
28

1 broader standard of "failure."⁸ Ursack Reply at 5-6. The Court
2 finds this to be irrelevant, because when SIBBG concluded that
3 there were six reported failures, five of the six failures were
4 situations that were explicitly listed by SIBBG's protocol as a
5 basis for revocation. Id. at 302. SIBBG therefore did not need
6 to invoke a broader definition of "failure" than that used for
7 hard-sided containers. Five of these failures involved either a
8 bear that "mastered" the device by extracting food, or (as Ursack
9 contends) "misuse by users," see id., both of which are named by
10 SIBBG's testing protocol as grounds for revocation of conditional
11 approval, id. at 748. Thus, SIBBG did not need to (or claim to)
12 apply a special definition of "failure" when it concluded that the
13 S29 had suffered from more than three failures.

14 In the sixth reported failure, a mouse chewed a hole into an
15 Ursack and accessed the food inside. YOSE at 169. Plaintiffs
16 contend that this should not have been considered a "failure"

17
18 ⁸ The Court will assume that this is true. SIBBG did state a
19 clear standard for "failure" in its April 10, 2007 Briefing
20 Statement, which was circulated internally within SIBBG. YOSE at
21 191-92. The Statement provides that: "A failure constitutes a
22 container that is lost or abandoned, if the food inside is no
23 longer edible after an encounter with an animal, if an animal
24 receives a food reward/the fabric is compromised, and/or the
25 container presents a safety hazard to humans or wildlife." Id. at
26 192. All six reported "failures" clearly meet this definition.
27 Plaintiff claims that this definition is invalid because the record
28 does not indicate that it was ever published or shared with Ursack
(indeed, it appears to have been restricted because of Ursack's
litigation threats). Ursack Reply at 3. Plaintiffs do not provide
a legal basis for their contention that SIBBG needed to publish
these standards. The Court need not reach the propriety of the
standards articulated in the briefing statement, however, because
it concludes that even if SIBBG had failed to articulate separate
standards for soft-sided containers, its decision was not arbitrary
and capricious given the nature of the failures that were reported.

1 since it did not constitute "evidence that bears have mastered the
2 container." Ursack Reply at 5. However, the record explains why
3 individual SIBBG members believed this to be a "failure." Members
4 of SIBBG had previously expressed a concern that rodents could
5 weaken the bag for future bear encounters. SIBBG at 529. In
6 addition, at least one member of SIBBG stated that food-storage
7 methods that could not protect against other animals were still
8 inconsistent "with 'Keeping Wildlife Wild' principles. . . . We
9 note that while most agree the high bar for a hard-sided container
10 is a bear, the high bar to a bag may be a rodent." SIBBG at 231.
11 In light of these concerns, SIBBG's characterization of this
12 incident as a failure was reasonable.⁹

13 In short, SIBBG gave considerable thought to the definition
14 of "failure" for soft-sided containers, but the evident challenge
15 of defining this term did not result in an arbitrary or capricious
16 decision in this case. The criteria for revocation included in
17 SIBBG's testing protocols, and the broader record relating to
18 SIBBG's consideration of this issue, provide the Court with a
19 sufficient standard to evaluate SIBBG's conclusion. The Court
20 finds this conclusion to be far from arbitrary or capricious.

21
22 ⁹ Plaintiffs also mention that one of the Ursack failures was
23 tested by a Yosemite Wildlife Biologist in Yosemite Valley, an area
24 that does not even allow hard-sided containers and requires all
25 visitors to store food in storage lockers. Ursack Mot. at 14-15.
26 Plaintiffs do not develop this point, but they seem to suggest that
27 this test shouldn't "count" just because it took place in an area
28 where visitors could not use canisters. They do not suggest that
conditions in Yosemite Valley were in any way different from those
that the Ursacks would normally face when used by the public, or
why it would be unreasonable to consider this a "failure." As
such, the Court defers to SIBBG's finding that this bear incident
constitutes an S29 failure.

4. SIBBG's Determination that Ursack Could Not Be Tied to Trees

Plaintiffs next contend that SIBBG acted capriciously by determining that Ursacks had to be used the same way as "free standing" bear containers, and could not be tied to trees or rocks. Ursack Mot. at 13. Plaintiffs contend that this prevented backpackers from using the S29s as intended, which lessened their effectiveness during the public trials and led "directly to several alleged Ursack failures in 2007." Id. at 14.

Tying food to trees is permitted and even required in certain areas of the parks and forests. See, e.g., 36 C.F.R. 2.10(d). However, bear-resistant containers, with the exception of Ursacks, are not typically tied to trees, and the parks have explicitly prohibited the practice of tying food to trees as a method of food protection in areas where bear-resistant containers are required. See YOSE at 269 ("All other food storage systems are prohibited in the designated area."); SEKI at 254 ("The technique of counterbalancing or hanging food . . . [is] prohibited within the restricted areas"). Communications between SIBBG and Ursack reflect that at the time SIBBG was reviewing the Ursacks, it "really want[ed] to move away from storing anything in trees." SIBBG at 958. When SIBBG conditionally approved the S29 in 2007, it ultimately decided that the Ursacks "must not be tied to trees or rocks. It has to be used like any other portable food-storage

product." YOSE at 182.¹⁰

Although SIBBG did not explicitly describe its reasons for this restriction in 2007, it had previously imposed similar restrictions, and had thoroughly explained its reasoning at that time. When SIBBG declined to approve the Ursacks after its 2004 testing, the first reason it cited was the cumulative damage that the bags could inflict upon the trees that they were tied to. Id. at 901, 904-05. In response, Ursack retained a silviculture specialist from the University of California, Dr. Kevin O'Hara, to opine on the extent of the damage; he wrote in a letter to SIBBG that an "Ursack's effect on the natural environment would approximate the routine disturbance" of bark and soil caused by wild bears. Id. at 906-08. Werner's reasoned response to Dr. O'Hara's opinion, in an e-mail dated November 11, 2004, explained that even if the damage caused by the Ursacks was similar in scope

¹⁰ Plaintiffs contend that, as of October 6, 2005, "SIBBG determined that campers must clearly be advised that Ursacks should be tied to trees." Ursack Mot. at 13. This is misleading. Plaintiffs cite to a portion of the record that only shows that SIBBG was concerned about Ursack's instructions that the bags be tied to branches. When SIBBG was discussing approval during the October 6, 2005 meeting (but not actually granting approval), the meeting minutes state: "According to tag, user can tie Ursack to branch -- we need to make sure that it is clear that it can only be approved for use if it is tied to the trunk." SIBBG at 789. These minutes suggest that SIBBG briefly anticipated permitting the Ursack to be tied to tree trunks for the 2006 season. However, later portions of the record indicate that when SIBBG actually granted conditional approval for 2006, it prohibited tying Ursacks to anything in restricted areas. Shortly after the October 6, 2005 meeting, and after the V2ls were granted conditional approval for 2006, a communication between Werner and Cohen recounts that "SIBBG parks do not want them tied to trees or rocks," and the two discuss the instructions that Ursack should include to account for this restriction. Id. at 958-959. Contrary to Plaintiffs' characterization, SIBBG never held the position that the Ursacks must be tied to trees.

1 to "natural" disturbances caused by bears, SIBBG had made a policy
2 determination to distinguish between natural and human-induced
3 disturbances and wildlife behaviors. Id. at 911-12. Even if
4 bears damage trees without Ursacks, when a bear damages a tree
5 during an Ursack encounter, "[t]he basic cause [of the damage] is
6 anthropogenic, not natural. This should not be compared to bears
7 ripping apart logs or rolling rocks to forage for natural food."
8 Id. at 911. As Werner explained, this distinction is reasonable
9 in light of the agency's reading of NPS's directive that
10 wildernesses "be administered . . . as will leave them
11 unimpaired," and the definition of wilderness as "untrammelled by
12 man" and "retaining its primeval character and influence." Id.
13 (quoting 16 U.S.C. §§ 1131-1136). The Court finds that SIBBG had
14 a reasonable basis for making this determination.

15 Of course, Ursacks (and all other containers) could still be
16 tied to trees in areas without food-storage restrictions, where
17 counterbalancing is not prohibited. Plaintiffs argue that this is
18 inconsistent: "Either tying a bear bag to a tree harms the
19 environment or it does not." Ursack Reply at 11. However, the
20 fact that there are different use restrictions in different areas
21 of the parks does not render unreasonable SIBBG's decision to
22 restrict the use of Ursacks within restricted areas. Plaintiffs'
23 argument amounts to little more than an assertion that "all evils
24 of the same genus [must] be eradicated or none at all." C.f.
25 Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949)
26 (rejecting proposition in equal protection context).
27 Administrative agencies are permitted to take a nuanced approach
28

1 when facing a variety of competing and conflicting problems. An
2 administrative decision is not arbitrary and capricious merely
3 because it does not eradicate a problem by a single stroke, or
4 because it tolerates the problem in certain contexts. See
5 Louisiana ex rel. Guste v. Verity, 853 F.2d 322, 332 (5th Cir.
6 1988) (rejecting "novel proposition that regulations failing to
7 address all of the causes of a problem are, for that reason,
8 arbitrary and capricious. . . . [This proposition] ignore[s] the
9 well established rule that regulations need not remedy all evils,
10 or none").

11 **D. Whether SIBBG Violated Ursacks' Due Process Rights**

12 Plaintiffs contend that SIBBG denied Ursack its due process
13 rights by denying it the opportunity to challenge the evidence
14 that supported SIBBG's decision to rescind conditional approval,
15 i.e., the reported S29 failures that took place in 2007.
16 Plaintiffs primarily argue that SIBBG violated 5 U.S.C. § 558 (c),
17 which requires "an opportunity to demonstrate or achieve
18 compliance with all lawful requirements" before a license is
19 withdrawn. Ursack Mot. at 16. Defendants oppose this statutory
20 due process argument, and also seek summary judgment on the
21 question of Plaintiffs' constitutional due process claims, Defs.'
22 Mot. at 16-19, which were raised in Plaintiffs' Complaint, Compl.
23 §§ 68-75.

24 **1. Whether Conditional Approval Was a "License"**

25 Plaintiffs first argue that SIBBG's conditional approval of
26 the S29 for 2007 was a "license" as defined by the APA. Ursack
27 Mot. at 16. If so, then 5 U.S.C. § 558(c) requires the agency to

1 grant Ursack notice and "an opportunity to demonstrate or achieve
2 compliance with all lawful requirements" before the license is
3 subject to "withdrawal, suspension, revocation, or annulment."¹¹
4 The record indicates that Cohen engaged in frequent, informal
5 communication with SIBBG members and did in fact know of and
6 contest many of the failure reports that SIBBG received throughout
7 the 2007 season. See, e.g., SIBBG at 167. However, Defendants do
8 not claim that this amounted to an "opportunity to demonstrate
9 compliance" under § 558(c); rather, Defendants argue that SIBBG's
10 conditional approval was never a "license" as the term is used by
11 the APA, but was instead a "resource management decision that
12 regulated the use of the National Parks and National Forest by
13 visitors." Defs.' Mot. at 17. Therefore, according to
14 Defendants, § 558(c) did not apply.

15 At first glance, Defendants face something of an uphill
16 battle. The APA defines a license as "including the whole or a
17 part of an agency . . . approval" 5 U.S.C. 551(8).¹² "The
18 definition of license in the APA is extremely broad." Air North
19 America v. Dept. of Transp., 937 F.2d 1427, 1436-38 (9th Cir.
20 1991). Courts have read the term to include various types of
21 certificates and approvals:

23 ¹¹ Plaintiffs have not claimed that § 558(c), or any other
24 provision, entitles Ursack to a hearing as part of the process of
25 applying for a license. They only claim that they were entitled to
a hearing as to the basis for withdrawal.

26 ¹² "'[L]icense' includes the whole or a part of an agency
27 permit, certificate, approval, registration, charter, membership,
statutory exemption or other form of permission." 5 U.S.C.
§ 551(8).

1 In other cases, courts have determined that the
2 language was broad enough to cover a permit to
3 graze on national forest land, to "specifically
4 approved stockyard" status under the Cattle
5 Contagious Diseases Act; to veterinarian
6 accreditation; to designation by the Immigration
7 and Naturalization Service of a facility as an
8 approved laboratory for conducting medical
9 examination; and to approval granted to an
10 institution of higher learning authorizing entry of
11 nonimmigrant alien students for study; among
12 others.

13 Horn Farms, Inc. v. Veneman, 319 F. Supp. 2d 902, 922 (N.D. Ind.
14 2004), rev'd by 397 F.3d 472 (7th Cir.) (citations omitted)
15 (collecting cases).

16 After reviewing the unique and particular facts of this case,
17 the testing protocol that SIBBG had established, and the specific
18 context in which SIBBG issued its conditional approval of the S29,
19 the Court concludes that the APA did not entitle Ursack to notice
20 and a hearing prior to SIBBG's termination of conditional approval
21 for the S29, for two independent reasons.¹³

22 First, the Court finds that, in spite of the "extremely
23 broad" definition of license under the APA, the unique facts of

24 ¹³ In so finding, the Court will assume, contrary to
25 Defendants' claims, that full approval of a bear-resistant
26 container would constitute a "license" under the APA, even though
27 the parks and forest are actually just approving the containers for
28 use by visitors within their land, and are not directly granting
the manufacturers permission to do anything. C.f. Horn Farms, Inc.
v. Johanns, 397 F.3d 472, 478-79 (7th Cir. 2005) (finding no
"license" application where plaintiff "does not need any federal
official's permission under [16 U.S.C.S. §§ 3821-24] either to
engage in farming or to drain wetlands. It is free to do as much of
either as it wants (subject to other legal constraints)"); but see
New York Pathological & X-Ray Labs., Inc. v. Immigration and
Naturalization Service, 523 F.2d 79 (2d Cir. 1975) (finding
withdrawal of "license," where Immigration and Naturalization
Service removed designation of laboratory as approved to conduct
examinations of certain aliens seeking permanent resident status).

1 this case make SIBBG's 2007 conditional approval of the S29 an ill
2 fit for a "license." SIBBG's testing protocol makes it clear that
3 "conditional approval" is no guarantee of "approval" -- rather, it
4 only entitles the container to a "field evaluation," which serves
5 as another stage of testing "which the container must successfully
6 complete before it is considered to be 'approved.'" SIBBG at 745.
7 "If, at any point during the field evaluation, the container is
8 unsuccessful, conditional approval will be rescinded" Id.
9 at 748. Notably, SIBBG's treatment of the S29 was even more
10 explicitly a "testing stage" than most conditional approvals.
11 After SIBBG voted to test the S29 in-house, rather than allow the
12 public to test it through a conditional approval, Ursack
13 threatened to bring suit, and only then did SEKI respond that it
14 was "willing to entertain being a test area for the S29 by the
15 public under park 'conditional approval' to help fulfill the
16 testing that SIBBG voted to accomplish while also giving a wider
17 market to Ursack to help defer their R&D expenses." YOSE at 185.
18 It would therefore be a distortion to claim that the S29s were
19 "approved" for anything more than public tests, in lieu of in-
20 house testing. See id. at 192.

21 Under the narrow facts presented by this case, where an
22 agency tentatively allows the public to use a product only as a
23 means of testing the product to determine whether it is
24 appropriate for "approval," at the applicant's insistence and as
25 an alternative to in-house testing, then there has not been
26 "approval" under the APA. Instead, SIBBG's grant and withdrawal
27 of conditional approval for the S29 is most aptly characterized as
28

1 a failed license application, rather than the withdrawal of a
2 prior APA "license." Withdrawal of conditional approval for the
3 S29 therefore did not implicate the notice and hearing
4 requirements of § 558(c).

5 Second, even assuming that the conditional approval was a
6 "license" as understood by § 551(8), it was a conditional license
7 that expired according to its own terms, and was not subject to
8 "withdrawal, suspension, revocation, or annulment" so as to
9 trigger § 528(c). This was the conclusion reached by one circuit
10 court that determined that a particular "conditional approval" was
11 a "license" as defined by the APA. In Atlantic Richfield Co. v
12 United States, 774 F2d 1193, (D.C. Cir. 1985) (hereinafter
13 "ARCO"), the Maritime Administration ("MA") had conditionally
14 approved requests by two shippers to engage in domestic trade with
15 their subsidized vessels. Shippers that operate subsidized
16 vessels were normally restricted to international shipping, and
17 barred from domestic trade; however, if the MA determined that
18 suitable domestic vessels were unavailable to carry domestic
19 cargo, the MA could approve the use of a subsidized vessel for
20 that purpose. Id. at 1195-96. In ARCO, the MA had granted
21 approval, subject to the condition that approval would terminate
22 "if any one of four unsubsidized [i.e., domestic] ships were not
23 'fixed for suitable employment' when their charters expired." Id.
24 at 1197. After several months, the MA noted that two domestic
25 ships were not "fixed for suitable employment," and it terminated
26 the subsidized shippers' approval. Id. The subsidized shippers
27 brought suit against the MA, claiming that they were entitled to a
28

1 hearing under § 558(c) to challenge whether the domestic ships
2 were in fact "fixed for suitable employment," or whether they had
3 instead willfully turned down suitable employment. Id. The
4 circuit panel concluded that the conditional approval was a
5 "license" within the broad definition of the APA.¹⁴ Id. at 1200.
6 However, the panel also concluded that the shippers were not
7 entitled to a hearing, because the license was not subject to
8 "withdrawal, suspension, revocation, or annulment" are required by
9 § 558(c). Id. at 1200-02. Rather, the approval had expired on
10 its own terms. Id. A hearing would have been fruitless because
11 the record indicated that the condition of "suitable employment"
12 was unqualified (i.e., it didn't matter if the domestic shippers
13 had passed up other employment opportunities), the subsidized
14 shippers could do nothing to affect or change the condition, and
15 there was no dispute that the domestic shippers were, in fact,
16 available for employment. Id.

17 As previously discussed, SIBBG's testing protocol
18 specifically states that "conditional approval" would be revoked
19 if there is "evidence that bears have mastered the
20 container/device, use which results in environmental damage,
21 common misuse by users of the method or device, or structural
22 failure due to elements of weather or exposure." SIBBG at 748.
23 With respect to the S29, the SIBBG explicitly stated that three
24 failures would result in the revocation of conditional approval.

25
26 ¹⁴ The Court notes that this conclusion is distinguishable from
27 the "conditional approval" at issue in this case, for the reasons
28 stated above. Namely, unlike the MA's conditional approval,
SIBBG's "approval" was nothing more than a public testing phase.

YOSE at 185, 192. Six failures were reported to SIBBG -- at that point, the license expired on its own terms, and Ursack is not entitled to a hearing under § 558(c). See ARCO, 774 F.2d at 1200. As in ARCO, the purpose of the hearings that the Plaintiffs now seek would be irrelevant to the conditions at play. By their pleadings, Plaintiffs indicate that Ursack would use these hearings to challenge the evidence and show that several of the "failures" were actually the fault of the user. See Ursack Mot. at 15. However, SIBBG has never indicated that a bear receiving food due to "user error" is any less a "failure" than a bear that receives food from a properly-tied unit.¹⁵ This is similar to ARCO, where the Plaintiffs sought to challenge the circumstances surrounding the domestic shippers' lack of "suitable employment," even though these circumstances were irrelevant to the conditions set by the MA. The Court finds that § 558(c) did not require notice or a type of hearing before conditional approval of the S29 was rescinded.

2. Whether SIBBG Violated Plaintiffs' Constitutional Due Process Rights

Defendants have sought summary judgment as to Plaintiffs'

¹⁵ As previously noted, SIBBG did distinguish "user-error failures" from other failures when it conditionally approved the Ursacks for 2002. It stated that approval may be revoked if bears gain access to bags on three separate occasions when the bag is used correctly, or on five occasions when used incorrectly. SIBBG at 820. Even in this instance, a user error was still considered a "failure." In contrast to the 2002 conditional approval, in 2007 SIBBG did not give any distinct treatment to failures caused by user error. SIBBG at 747-48; YOSE at 192. Plaintiffs provide no compelling reason why such instances may not reasonably be considered "failures."

1 constitutional due process claims as well. Defs.' Mot. at 16-19.
2 Plaintiffs claim that revocation of the S29's conditional approval
3 violated the Plaintiffs' due process rights under the Fifth
4 Amendment of the Constitution. Compl. ¶ 71. The Fifth Amendment
5 holds: "No person shall be . . . deprived of life, liberty, or
6 property, without due process of law." Plaintiffs claim that
7 their interest in the conditional approval was a property
8 interest. Id.

9 A "procedural due process claim hinges on proof of two
10 elements: (1) a protectable liberty or property interest in
11 obtaining the permit; and (2) a denial of adequate procedural
12 protections." Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584,
13 588 (9th Cir. 1998). Plaintiffs will have a protectable liberty
14 interest if they can show "a legitimate claim of entitlement" that
15 stems from an independent source (such as state law) as opposed to
16 a "unilateral expectation" or an "abstract need or desire for it."
17 Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972). Where a
18 decision maker has discretion over the conferral of a benefit,
19 this indicates that there is no entitlement to the benefit. See,
20 e.g., Thornton v. City of St. Helens, 425 F.3d 1158, 1164-65 (9th
21 Cir. 2005) (describing test as spectrum, with property interest
22 and no discretion at one end, and total discretion but no property
23 interest at other). For example, "an applicant does not have a
24 property interest in the renewal of a license if the reviewing
25 body has discretion to deny renewal or to impose licensing
26 criteria of its own creation." Id. The question therefore turns
27 on whether a law or regulation restricts SIBBG's discretion with
28

1 respect to conferring approval on bear-resistant containers. Id.

2 Plaintiffs can cite to no law or regulation that restricts
3 SIBBG's discretion when approving or testing bear-resistant
4 canisters. They can point only to the testing protocols
5 established by SIBBG itself. SIBBG at 744; YOSE at 192. However,
6 criteria formulated and articulated by the decision maker, if it
7 is not elevated to the level of law by statute or regulation, does
8 not create a legal entitlement sufficient to establish a
9 constitutionally-protectable property interest. See Morley's Auto
10 Body v. Hunter, 70 F.3d 1209, 1214 (11th Cir. 1995) (rejecting
11 plaintiff's argument that sheriff's detailed written "wrecker
12 rotation policy" created property interest for inclusion on
13 wrecker rotation list, "because there is no Florida state law
14 authority that elevates that policy to the status of a regulation
15 with the force of law"). The Ninth Circuit has stated on several
16 occasions that "[t]here is no protected property interest if 'the
17 reviewing body has discretion . . . to impose licensing criteria
18 of its own creation.'" Shanks v. Dressel, 540 F.3d 1082, 1091
19 (9th Cir. 2008) (quoting Thornton, 425 F.3d at 1165 (9th Cir.
20 2005)); see also Pinnacle Armor, Inc. v. United States, 2008 U.S.
21 Dist. LEXIS 23109, at *19 (finding no property interest in
22 remaining on list of approved bullet-proof vests, where National
23 Institute of Justice maintained list according to its own
24 requirements, which gave it broad discretion). SIBBG's policies
25 clearly do not carry the force of law. SIBBG's authority comes
26 from a memorandum of understanding between NPS and USFS officials,
27 which makes no mention of any conferral or delegation of

1 regulatory authority, and indeed, does not even commit NPS or USFS
2 officials to finally approve the containers that SIBBG has
3 approved.¹⁶ SIBBG at 2-5.

4 In addition, Plaintiffs may not claim a property interest
5 that had been "based on the conduct and representations of
6 government officials when their actions lead to the creation of a
7 'mutually explicit understanding.'" Thornton, 425 F.3d at 1164-
8 65. SIBBG explicitly used the conditional approval process as a
9 testing phase, and the record contains no guarantees that SIBBG
10 would finally approve any product that it conditionally approved.
11 Instead, the testing protocols explicitly state that SIBBG may
12 rescind even final approval due to "successive product failures."¹⁷
13 SIBBG at 748. This does not amount to a "mutually explicit
14 understanding." C.f., Lucas v. Monroe County, 203 F.3d 964, 978
15 (6th Cir. 2000) (holding that written policies of sheriff's
16 department, even if unfair, do not create claim of entitlement
17 where they "explicitly provide that a wrecker company may be
18 immediately removed from the list" upon certain conditions).

19 **E. Equal Protection**

20 Plaintiffs claim that Defendants' actions have violated the

21
22 ¹⁶ Indeed, SIBBG's discretion is arguably irrelevant, given the
23 fact that NPS and USFS officials are actually the ones to make the
24 ultimate legal decision as to which containers are approved for use
in which parks or forests. This makes Plaintiffs' due process
claims even weaker, as NPS and USFS officials apparently have no
restrictions on their discretion, self-imposed or otherwise.

25 ¹⁷ It is also worth noting that Plaintiffs base many of their
26 other arguments on the discretion afforded by SIBBG's policies, and
27 the "impenetrable vagueness" of their standards. See, e.g., Ursack
Mot. at 19. This undercuts Plaintiffs' claim that there had been a
"mutually explicit understanding."

1 Equal Protection Clause of the Fourteenth Amendment, as applied to
2 the Federal Government via the Fifth Amendment. Ursack Mot. at
3 17-19. They claim that SIBBG privileges some businesses over
4 others, because "SIBBG's unwritten failure standard distinguishes
5 between Ursack, a soft-sided canister and manufacturers of hard-
6 sided canisters (e.g., BearVault)." Id. at 18. Plaintiffs
7 concede that manufacturers of soft-sided containers are not a
8 protected class. See id. As such, the Court will apply a
9 rational basis test to determine if there is, at least, a loose
10 but reasonable "fit" between legislative objectives and methods
11 used to meet those objectives. See, e.g., Cornwell v. Hamilton,
12 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999).

13 The Court finds no basis for Plaintiffs' argument that hard-
14 sided and soft-sided containers, or their manufacturers, are
15 similarly situated or should be subject to identical standards.
16 Stated otherwise, the Court finds a rational basis for different
17 treatment. The record is replete with thoughtful and convincing
18 explanations as to why soft-sided containers must be subject to
19 different considerations than hard-sided containers, as the Court
20 described in Part IV.A.3, supra. Notably, Cohen himself once
21 complained that SIBBG had "impermissibly applied a hard-container
22 standard to a soft-sided container. It's apples to oranges."
23 SIBBG at 831.

24 As to Plaintiffs' repeated comparisons between the S29 and
25 BearVault (which failed as many as thirteen times, primarily in
26 one location), the Court has already addressed this in Part
27 IV.A.1., supra, and now concludes that there was a rational basis
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1 for treating a container that failed continuously in one location
2 (BearVault) differently from a container that failed continuously
3 throughout the region (Ursack).

4 **F. The Federal Advisory Committee Act ("FACA")**

5 In their Complaint, Plaintiffs claim that "the SIBBG was
6 established and/or utilized by Defendants in violation of" FACA,
7 for "failure to be formally recognized by [the] head[s] of" the
8 NPS and USFS and "failure to conduct open meetings." Compl.

9 ¶¶ 79. However, the cited portions of FACA apply only to "advisory
10 committees," 5 U.S.C. App. III, §§ 9-10, and an agency is not an
11 "advisory committee" if it "is composed wholly of full-time, or
12 permanent part-time, officers or employees of the Federal
13 Government." 5 U.S.C. App. III, § 3(2)(i). The record contains
14 no evidence that SIBBG contained anyone who was not a federal
15 employee, and the Memorandum of Understanding that created SIBBG
16 refers only to federal employees. SIBBG at 2-5. Plaintiffs' only
17 response is to point to several non-federal employees who were
18 occasionally present at SIBBG meetings. Ursack Reply at 17.

19 However, the bare fact that non-federal employees attended SIBBG
20 meetings, without more, does not even raise a question of fact as
21 to the composition of SIBBG. See In re Cheney, 406 F.3d 723, 728
22 (D.C. Cir. 2005) ("Congress could not have meant that
23 participation in committee meetings or activities, even
24 influential participation, would be enough to make someone a
25 member of the committee."). Cohen himself attended a meeting to
26 represent Ursack, SIBBG at 224, but does not purport to be a
27 member of SIBBG. Based solely on Plaintiffs' allegations, no

1 reasonable jury could conclude that SIBBG was an advisory
2 committee. Based on the record before the Court and the
3 allegations of the parties, the Court holds that FACA does not
4 apply to SIBBG.

5
6 **V. CONCLUSION**

7 For the reasons stated above, the Court GRANTS Defendants'
8 Motion and DENIES Plaintiffs' Motion. Judgment shall be entered
9 in favor of Defendants and the case is hereby DISMISSED.

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11 IT IS SO ORDERED.

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13 August 6, 2009

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15 UNITED STATES DISTRICT JUDGE
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