UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al.,

Plaintiffs,

v.

TOM VILSACK, et al.,

Defendants.

Case No. 15-cv-01590-HSG

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 16

Pending before the Court is Defendants' Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction. *See* Dkt. No. 16. The Court has carefully considered the parties' arguments and, for the reasons set for below, **GRANTS** Defendants' Motion.

I. FACTUAL BACKGROUND

This case arises from a notice promulgated by the United States Department of Agriculture ("USDA") which alters the review process for determining which substances may be used in food certified as "organic" under the Organic Foods Production Act ("OFPA"). The OFPA requires the Secretary of Agriculture to establish a "National List" of substances that fall into either of two groups: (1) synthetic substances permitted to be used in organic products; or (2) non-synthetic substances prohibited from use in organic products. 7 U.S.C. § 6517(b)-(c). The OFPA requires the National Organic Standards Board ("NOSB"), which is composed of fifteen members appointed by the Secretary of Agriculture, to develop the National List for submission to the Secretary. The Secretary cannot exempt a synthetic substance unless the NOSB proposes to do so. 7 U.S.C. § 6517(d).

The OFPA also contains a "sunset provision," which provides that no substances on the National List are "valid unless the [NOSB] has reviewed such exemption or prohibition as provided in this section within 5 years." 7 U.S.C. § 6517(e). Prior to the notice that triggered this

lawsuit, USDA's regulations required the NOSB to consider public comments and vote on "the continuation of specific exemptions and prohibits contained on the National List." NOP, Sunset Review, 70 Fed. Reg. 35,177 at 35,178 (June 17, 2005). Under that framework, a vote of two-thirds of the NOSB was required to recommend that a substance be renewed. *See* 7 U.S.C. § 6518(i). If two-thirds of the NOSB did not favor renewal, the substance was removed from the National List.

The USDA's September 16, 2013 notice enacted a new eight-step sunset review procedure. NOP, Sunset Process, 78 Fed. Reg. 56,811, 56,812 (Sept. 16, 2013). Under the new framework, the entire NOSB does not vote on the renewal of each substance on the National List. 78 Fed. Reg. at 56,814. Instead, a NOSB subcommittee reviews each substance set for sunset review and proposes substances to be removed from the National List to the full NOSB. *Id.* It is only those substances that a member of the NOSB subcommittee proposes to be removed that are voted upon by the full NOSB. *Id.* Significantly, because of this change to the review procedure, Plaintiffs allege that a two-thirds vote is now required remove a substance from the National List (as opposed to renew its inclusion). Plaintiffs (approximately a dozen advocacy and industry groups representing organic farmers, retailers, and consumers) filed this action seeking declaratory and injunctive relief that vacates the September 16, 2013 Rule on the basis that the USDA promulgated the regulation without providing the public the opportunity for notice and comment. Dkt. No. 1.

II. DISCUSSION

To establish standing, a plaintiff must show that "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1224 (9th Cir. 2008) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). In deciding whether a plaintiff has made this showing, the court is to "accept as true all material allegations of the complaint" and "construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

The Supreme Court recently considered the standing of an organizational plaintiff to challenge the type of procedural regulations at issue in this case. *See Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). In *Summers*, the Supreme Court found the plaintiffs (a group of organizations dedicated to protecting the environment) lacked standing to challenge regulations setting forth the post-decisional appeals process of the Forest Service because they had failed to identify an "application of the . . . regulation that threaten[ed] imminent and concrete harm to the interests of [its] members." *Summers*, 555 U.S. at 488.

> To seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Id. at 495. Instead, the Supreme Court found that plaintiffs' showing was "not tied to application of the challenged regulations, because it [did] not identify any particular site, and because it relate[d] to past injury rather than imminent future injury that is sought to be enjoined." It reasoned that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish," *id*. at 493 (citation omitted), and expressly rejected the theory that the procedural deprivation of the opportunity to comment was sufficient to confer standing absent the deprivation of a concrete interest:

> Respondents argue that they have standing to bring their challenge because they have suffered procedural injury, namely that they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied. But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."

Id. at 496 (emphasis in original) (citation omitted).

The sunset review regulations at issue in this case bear no meaningful distinction (for purposes of standing) from the Forest Service appellate procedures at issue in *Summers*. In both

cases, "[t]he regulations under challenge here neither require nor forbid any action on the part of [plaintiffs]. The standards and procedures that they prescribe for [agency] govern only the conduct of [agency] officials . . . ." *Id.* Accordingly, Plaintiffs generalized concern that the USDA's new sunset review procedures, when applied in the future, will "weaken[ ] organic integrity, creat[e] inconsistent organic production standards, and demonstrat[e] arbitrary and capricious application of administrative functions," Compl. ¶ 12, is simply not sufficient. As in *Summers*, Plaintiffs must identify an *application* of the sunset review procedures that threatens a concrete, particularized, injury in fact. The Plaintiffs' complaint identifies no such application.[1]

Harvey v. Veneman, 396 F.3d 28 (1st Cir. 2005), the decision upon which Plaintiffs largely rely, does not stand for a different proposition. In *Harvey*, the First Circuit held that the plaintiff (a producer and handler of organic crops) satisfied the Article III standing requirement because he challenged specific provisions of a USDA final rule that "degrade[d] the quality of organically labeled foods." *Id*. at 34. Plaintiffs did not plead the same here. In this case, the Plaintiffs argue that the procedural sunset review procedures—when applied *in the future*—will cause a weakening of the organic label by making it more difficult to remove exempted substances from the National List. But even setting this factual distinction aside, Plaintiffs' reading of *Harvey* would necessarily contradict the Supreme Court's decision in *Summers*, which this Court is required to follow.

Nor does Plaintiff's submission of a recent decision from another court in this District alter the Court's analysis. On October 1, 2015, Plaintiffs alerted the Court to Judge Corley's September 29, 2015 order denying the Department of Agriculture's motion to dismiss for lack of standing the plaintiff environmental organizations' challenge to a different organic-related

[1] Plaintiffs' opposition represents that the sunset review procedures challenged in this lawsuit have resulted in a synthetic chemical remaining on the National List when, under the original regime, that chemical would have failed to be renewed. *See* Opp. at 2 (discussing consideration of Aqueous Potassium Silicate under the new sunset review procedure). While this type of allegation could very well form the basis for Plaintiffs' Article III standing, the Court cannot consider factual allegations raised for the first time in an opposition. *See, e.g., Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998) ("The 'new' allegations contained in the . . . opposition motion . . . are irrelevant for Rule 12(b)(6) purposes. In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.") (emphasis in original).

regulation. *See Center for Environmental Health, et al. v. Vilsack, et al.*, No. 15-cv-01690-JSC (N.D. Cal. Sept. 29, 2015) (Dkt. No. 41). In that case, plaintiffs challenged a regulation that permitted organic production systems to contain two residential insecticides under certain circumstances. *Id.* at 3. In other words, the regulation actually changed the status of *particular* substances, which Judge Corley found supported the allegation that the regulation "undermines the labeling of a product as organic such that [organizational members] will now have to undertake additional concrete steps to ensure that the products they consume do not contain synthetic materials." *Id*. at 15. In contrast, Plaintiffs' Complaint in this case does not allege that the challenged regulation actually affected the status of a particular substance or substances. More is required under *Summers*.

Accordingly, the Court finds that Plaintiffs have not pled facts sufficient to demonstrate standing.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is **GRANTED** and Plaintiffs' Complaint is **DISMISSED WITHOUT PREJUDICE**. Plaintiffs may file a First Amended Complaint no later than 21 days from the date of this order.

IT IS SO ORDERED.

Dated: October 9, 2015

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California