UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR ENVIRONMENTAL HEALTH, et al.,

Plaintiffs,

v.

SONNY PERDUE, et al.,

Defendants.

Case No. 18-cv-01763-RS

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs, seven nonprofit organizations, bring this action challenging the U.S. Department of Agriculture's ("USDA") withdrawal of the Organic Livestock and Poultry Practices ("OLPP") Rule. Defendants are Sonny Perdue, in his official capacity as the Secretary of USDA, Bruce Sommers, in his official capacity as Acting Administrator of USDA's Agricultural Marketing Service ("AMS"); and Ruihong Guo, Ph.D., in her official capacity as Acting Deputy Administrator of the National Organic Program. Plaintiffs, on behalf of themselves and their members, seek declaratory judgment that the revocation of the OLPP Rule violates the Organic Foods Production Act ("OFPA") and failed to comply with the Administrative Procedure Act ("APA"). They also request an order setting aside or vacating the USDA rule that withdrew the OLPP Rule (the "Withdrawal Rule") and reinstating the final OLPP Rule that was promulgated in January 2017. Defendants move to dismiss the claims for lack of subject matter jurisdiction and failure to state a claim. For the reasons set forth below, the motion is granted in part and denied in

part.

II. BACKGROUND[1]

The Organic Foods Production Act, 7 U.S.C. § 501 *et seq.*, established national standards for organically produced agricultural products, which USDA implements through the National Organic Program, 7 C.F.R. Part 205. Congress created the organic production framework for three general purposes: "(1) to establish national standards governing the marketing of certain agricultural products as organically produced products; (2) to assure consumers that organically produced products meet a consistent standard; and (3) to facilitate interstate commerce in fresh and processed food that is organically produced." 7 U.S.C. § 6501. As with all organic food producers, organic livestock producers may only sell or label their products organic if they are produced in conformance with the provisions of the OFPA and its regulations. Congress set out requirements for organic livestock production in section 6509, and provided for the development of additional standards "for the care" of livestock, pursuant to USDA's authority under the OFPA.

USDA has long exercised its authority under the OFPA to implement regulations regarding the care of organic livestock. These included provisions in the first set of regulations for organic foods in 2000, and the 2010 Access to Pasture Rule, which set out specific feed and living conditions for ruminant animals raised organically. 75 Fed. Reg. 7154 (Feb. 17, 2010) (codified at 7 C.F.R. §§ 205.237; 205.239; 205.240). In 2016, USDA published a proposed version of the OLPP Rule, which included new and detailed standards for raising, transporting, and slaughtering organic livestock. The rule was, and still is, supported by the overwhelming majority of organic producers and consumers, including the National Organic Standards Board (NOSB), a statutorily-created advisory board that Congress created for the purpose of issuing recommendations regarding additional standards for the care of organic livestock.

[1] Unless otherwise noted, this synopsis is based on facts drawn from the First Amended Complaint ("FAC"), which must be taken as true for purposes of a 12(b)(6) motion. Because defendants'12(b)(1) motion is framed as a facial rather than factual attack upon plaintiffs' claim to federal subject matter jurisdiction, the Court "must accept as true the allegations of the complaint." *U.S. ex. rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001).

After more than a decade of administrative process, including public notice and comment, public hearings, and consultation with NOSB, the final rule was published on January 19, 2017, set to become effective on March 20, 2017. Following the change in presidential administration, however, USDA delayed the effective date three times, before finally withdrawing the final rule a year later. *See* National Organic Program; Organic Livestock and Poultry Practices, 83 Fed. Reg. 10775 (Mar. 13, 2018).

USDA provided two rationales for revoking the OLPP Rule. First, USDA took the position that the unambiguous language of the OFPA does not allow it to promulgate the OLPP Rule. 82 Fed. Reg. at 59989-90; 83 Fed. Reg. at 10775-6. Specifically, USDA asserted the OFPA's mandate that the agency promulgate additional standards "for the care" of livestock does not include "stand-alone animal welfare regulations" such as those embodied in the OLPP Rule. 83 Fed. Reg. at 10776. According to USDA, the OFPA provisions at 7 U.S.C. §§ 6509(d)(2) and (g), authorize it only to issue regulations that are "similar to those specified" in Section 6509(d), which "relate to ingestion or administration of non-organic substances," and that are necessary to meet the congressional objectives outlined in 7 U.S.C. § 6501. 82 Fed. Reg. at 5990; 83 Fed. Reg. at 10776. Second, USDA expressed the view that the costs of the OLPP Rule to producers outweighed the potential benefits and that no "material market failure" had been identified to justify the rule. 83 Fed. Reg. at 10779.

This action ensued. Plaintiffs are National Organic Coalition, Center for Environmental Health, Center for Food Safety, Cultivate Oregon, International Center for Technology Assessment, Animal Legal Defense Fund, and Humane Society of the United States. These organizations bring claims on behalf of themselves and on behalf of their members, which include organic food consumers and producers. Plaintiff organic food consumers buy organic food and pay a price premium with the expectation that organically-raised animal products are treated humanely. The OLPP rule is necessary to meet consumer expectations about the welfare of organically raised livestock and to assure customers that organically produced animal products meet a consistent standard, a primary purpose of the OFPA. Plaintiffs contend USDA has adopted

an exceedingly narrow definition of its authority under the OFPA, which is inconsistent with both the statutory language and existing regulations, and represents a total reversal from past interpretations by the agency. They also believe USDA inflated the alleged costs of the rule to producers and is not permitted, in any event, to withdraw a final rule based on purely economic factors.

Plaintiffs assert four claims under the APA: (1) USDA's determination that it lacked statutory authority to promulgate stand-alone animal welfare standards was arbitrary and capricious because the agency's interpretation was contrary to the plain language of the OFPA, the legislative history of its passage, the agency's prior interpretations, and the record before the agency; (2) USDA's analysis of costs to producers in determining whether to withdraw the OLPP Rule was in excess of its statutory authority because the OFPA is not a cost-benefit statute and does not permit the agency to refuse to set standards based on costs to producers; (3) USDA's withdrawal of the OLPP Rule based on alleged costs to producers was arbitrary and capricious because this rationale runs counter to the record before the agency and fails to consider non-quantifiable benefits such as consumer expectations and confidence in the organic label; (4) USDA's withdrawal of the OLPP Rule without involving the NOSB was in excess of USDA's statutory authority and was conducted contrary to appropriate procedure in that the OFPA requires USDA to consult with, and seek recommendations from, the NOSB about organic livestock standards. Plaintiffs seek declaratory judgment and an order setting aside the Withdrawal Rule and reinstating the OLPP Rule.

Defendants move to dismiss the FAC in its entirety, on the grounds that all seven plaintiffs lack standing to sue either directly or on behalf of their members. Even if plaintiffs demonstrate standing, defendants seek dismissal of plaintiffs' claims that USDA exceeded its authority for failure to state a claim. Specifically with respect to Claim 2, defendants argue the OFPA does not prohibit USDA from considering costs when issuing organic livestock regulations, and costs were appropriately taken into account in connection with both the promulgation and withdrawal of the OLPP Rule. As to Claim 4, defendants maintain the OFPA does not require USDA to consult with

the NOSB on every action the agency takes, and the Act does not state or suggest that USDA was required to consult with the NOSB prior to withdrawing the particular rule at issue here.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject matter jurisdiction over the asserted claims. It is the plaintiff's burden to prove jurisdiction at the time the action is commenced. *Tosco Corp. v. Communities for Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001); *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035,l 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction." *Id.* Accordingly, when considering this type of challenge, the Court is required to "accept as true the allegations of the complaint." *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations are not required," a complaint must have sufficient factual allegations to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard asks for "more than a sheer possibility that a defendant acted unlawfully." *Id.* The determination is a context-specific task requiring the court "to draw on its judicial experience and common sense." *Id*. at 679.

A motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be based on either the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699

(9th Cir. 1990). When evaluating such a motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 695 (9th Cir. 1999). "[C]onclusory allegations of law and unwarranted inferences," however, "are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

IV. DISCUSSION

A. Standing

To satisfy Article III's standing requirements, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Generally, an organizational plaintiff can assert standing directly—by alleging injury to itself—or representationally—by basing its standing on that of its members. *See Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004).

Plaintiffs here assert standing under both direct and representational theories. Because at least one plaintiff organization, CFS, has alleged facts sufficient to support standing on behalf of its members, the other standing arguments raised in the briefing need not be addressed. *See Carey v. Population Servs Int'l*, 431 U.S. 678, 682 (1977) (where multiple plaintiffs join in asserting the same claim, if one plaintiff has standing the court need not decide the standing of other plaintiffs); *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.").

An organization may assert standing to sue on behalf of its members by showing: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State*

Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). CFS is a national public interest non-profit organization with more than 900,000 members nationwide who support organic food and farming, grow organic food, and regularly purchase organic products. Its mission is to empower people, support farmers, protect the environment from the harmful impacts of industrial agriculture, and promote truly sustainable agriculture. The organization devotes substantial resources to protecting the integrity of the organic brand, including the dissemination of a wide array of educational and informational materials addressing organic standards and food supply issues to government agencies, members of Congress, and the general public. As part of its advocacy and educational work, CFS has been heavily involved in efforts to promote and support the OLPP Rule.

CFS's members consider it extremely important that organic animals are raised in accordance with high animal welfare standards. They pay a premium for animal products bearing the "organic" label, believing that these federally certified animal products are guaranteed to adhere to certain health, environmental, and animal welfare standards. They expect organically-raised animal products are treated humanely, and that humane treatment includes allowing chickens that produce organic eggs to have meaningful outdoor access and adequate space. These plaintiffs believe that animal welfare measures are intertwined with the prevention of disease and foodborne illnesses caused by animal overcrowding in unsanitary conditions, and with environmental protection due to the effect of concentrated animal waste on air and water pollution. Because USDA withdrew the OLPP rule, the label "organic" gives them no assurance as to whether the organic eggs and other animal products they purchase are in fact produced in accordance with the appropriate animal welfare standards. The Withdrawal Rule forces them to spend money investigating which private labels could be used to determine whether the certified USDA organic animal products they consume are in fact produced without the use of harmful practices.

Claims of a similar sort were found to be sufficient to establish standing in *Center for Environmental Health v. Vilsack*, No. 15-cv-1690, 2015 WL 5698757 (N.D. Cal. Sept. 29, 2015). There, plaintiffs argued that the challenged decision undermined organic food integrity because it

allowed organic food producers to use compost materials treated with synthetic pesticides. Plaintiffs included consumers and farmers who believe organic food production is better for the environment and that products so labeled are not produced with the use of pesticides. The district court rejected defendants' standing challenge, noting plaintiffs had "alleged that the decision undermines the labeling of a product as organic such that they will now have to undertake additional concrete steps to ensure that the products they consume do not contain synthetic materials." *See* 2015 WL 5698757, *8. As in that case, plaintiff consumers here argue that they are forced to take additional steps to investigate whether the products they consume in fact come from animals that are humanely raised.

According to defendants, this case is distinguishable from *Vilsack* because the organic label embraces restrictions on the use of synthetic substances but does not purport to signify high animal welfare standards. That argument goes to the merits of plaintiffs' allegations, which is that the term "organic" *does* mean produced in accordance with high animal welfare standards. Just as the plaintiffs in *Vilsack* were committed to consuming organic produce and believed that "organic" meant produce grown using compost that does not use synthetic material, plaintiffs here are committed to consuming organic animal products and believe "organic" means produced in a manner that is conducive to the health of the animal. The withdrawal of a final rule that would have set organic animal welfare standards undermines the organic label such that plaintiffs' consumer members must undertake their own investigations to determine whether or not the organic products they consume are produced in a healthy and environmentally conscious way. Such harms are "as concrete as the infringement on aesthetic satisfaction found sufficient to establish standing in other environmental contexts." *See Vilsack*, 2015 WL 5698757 at *9 (collecting cases).

The cases cited by defendants are not to the contrary. In *Sierra Club v. Morton*, the Supreme Court found that standing was lacking because Sierra Club failed to allege any of its members used the relevant geographic area for any purpose, and that such use would be affected by the challenged development. *See* 405 U.S. 727, 734-35 (1972). Relying on *Sierra Club*, the

Ninth Circuit found no standing in a case involving an attorney who challenged circuit rules that prohibit citation to unpublished decisions. *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 821-22 (9th Cir. 2002). Because the plaintiff alleged no imminent threat of sanctions to himself or detriment to his clients in litigation resulting from inability to cite unpublished decisions, the Circuit concluded there was no showing of concrete and particularized harm. *Id.* Here, by contrast, CFS avers specifically that its members purchase organic animal products, rely upon the USDA organic label, and have incurred and/or will incur costs due to the withdrawal of the OLPP Rule. Thus, plaintiffs have demonstrated a "direct stake in the outcome" of this litigation above and beyond the "mere interest in a problem" found insufficient in *Sierra Club*. *See* 405 U.S. at 739-40.

Defendants' reliance on *Clapper v. Amnesty International USA* is also misplaced. There, the Supreme Court held plaintiffs could not manufacture standing by making expenditures based on "fears of hypothetical future harm" in the form of government interception of their communications. *See* 568 U.S. 398, 416 (2013). Here, plaintiffs' purported harm is not hypothetical: they aver the Withdrawal Rule allows non-organic animal products to be sold under the organic label. That the OLPP Rule never went into effect does not change the fact of injury. Plaintiffs' theory is that before the promulgation of the OLPP Rule, many consumers mistakenly believed the organic label guaranteed animal products were raised with a high level of welfare. Now that USDA has affirmatively stated it will not regulate animal welfare practices unrelated to the "ingestion or administration of non-organic substances," FAC ¶ 94, consumers must look elsewhere for assurance that the "organic" products they consume meet the requirements USDA has refused to impose.

Accordingly, CFS's consumer members have incurred a particularized injury sufficient to entitle them to sue in their own right.[2] There is no question that the interests identified above are

[2] Because the consumer members of CFS have standing, this Order need not address whether any of the organization's other members may have standing.

germane to CFS's organizational mission, nor is there an apparent need for any individual member consumers to participate in this action for declaratory and injunctive relief. Thus, CFS has made the requisite showing of standing to bring claims on behalf of their member consumers. As noted above, as long as one named plaintiff organization has standing, the other named organizations may proceed as well.

B. Failure to state a claim

a. The USDA's consideration of costs

In the event plaintiffs demonstrate standing, defendants move to dismiss plaintiffs' second claim for relief for failure to state a claim. Plaintiffs allege the withdrawal of the OLPP Rule violated the OFPA because the statute does not permit USDA to refuse to promulgate standards on the basis of alleged costs to producers. They also contend defendants' justification for the withdrawal based on a "lack of market failure" was based on an impermissible extra-statutory factor.

Both sides acknowledge that Congress did not expressly require USDA to consider costs to producers when determining whether to promulgate or refuse to promulgate organic production standards. Section 6509 of the OFPA, which specifically addresses production practices for organic livestock, directs USDA to "develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products provided under this section." 7 U.S.C. § 6509(g). The statute does not otherwise elaborate on what factors USDA should consider when regulating. The parties, however, take different views as to the effect of congressional silence on cost considerations.

Defendants argue that an agency acts *ultra vires* by considering costs only if expressly prohibited by statute from doing so. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) ("It is only where there is clear congressional intent to preclude consideration of costs that we find agencies barred from considering costs."); *Nat. Res. Def. Council, Inc. v. EPA*, 937 F.2d 641, 643 (D.C. Cir. 1991) (permitting cost-benefit analysis in the face of congressional silence); *Int'l Bhd. of Teamsters v. U.S.*, 735 F.2d 1525, 1529 (D.C. Cir. 1984) (permitting consideration of

economic costs in addition to safety metrics when not otherwise prohibited). The Supreme Court has held that agencies are permitted to consider costs in crafting regulations in the face of congressional silence or ambiguity. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *Entergy Corp. v. Riverkeeper, Inc.*, 56 U.S. 208 (2009).

Plaintiffs respond that the OFPA requires the Secretary of Agriculture to promulgate regulations for the care of livestock in addition to those set out in the Act. Thus, plaintiffs maintain, there was no consideration of costs when USDA was deciding *whether* to regulate. Moreover, plaintiffs argue that the OFPA does not preclude USDA from considering costs to producers and other economic factors when determining how best to regulate, but it does not allow the agency to withdraw otherwise required rules due to economic considerations. The crux of plaintiffs' argument is that because the OFPA requires USDA to issue additional regulations regarding detailed livestock standards, considerations of costs cannot be used to justify the withdrawal of a rule implementing this directive.

The problem with plaintiffs' theory, as defendants rightly point out, is that a congressional mandate to issue detailed livestock regulations does not by itself impose on USDA a requirement to issue any particular rule. The claim at issue here is directed at USDA's decision to withdraw a specific regulation. Because the OFPA cannot possibly have anticipated the exact nature of the OLPP Rule in its directive that "detailed regulations" be issued, plaintiffs' claim fails on its face. *See People for the Ethical Treatment of Animals, Inc. v. USDA*, 7 F. Supp. 3d 1, 14 (D.D.C. 2013) (explaining the "shall" language of the Animal Welfare Act "would . . . support[] a judicial decree under the APA requiring prompt issuance of [animal-welfare] regulations, but not a judicial decree setting forth the content of those regulations." (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004)). Plaintiffs can point to nothing in either the text or legislative history of the OFPA that even suggests congressional intent to bar cost-benefit analysis in connection with the promulgation or withdrawal of any particular rule, even where the rulemaking itself is required under the Act. For that reason, defendants' motion to dismiss this claim is granted, without leave

to amend.

b. The USDA's failure to consult with NOSB

Plaintiffs' second *ultra vires* theory, contained in the fourth claim for relief, alleges USDA violated the OFPA by failing to consult with NOSB in withdrawing the OLPP Rule. OFPA section 6503 mandates that USDA "shall consult with the [NOSB] when developing the organic certification program." 7 U.S.C. §§ 6503(a), (c); *id.* § 6518(a) (USDA "shall establish" NOSB "to advise the Secretary on any other aspects of the implementation of this chapter."). With respect to the organic livestock provision specifically, Congress provided that "[NOSB] shall recommend to the Secretary standards in addition to those in paragraph (1) for the care of livestock to ensure that such livestock is organically produced." *Id.* § 6509(d)(2). Finally, section 6509(g) directs that USDA "shall hold public hearings and shall develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products provided under this section," referring to the standards recommended by NOSB. Plaintiffs contend that these provisions, when taken together, show that consultation with the NOSB is required under the statute in connection with the promulgation or withdrawal of any regulations.

A fair reading of the statute, however, indicates that while NOSB is required to advise the Secretary of Agriculture on the implementation of livestock regulations, the converse does not appear to be true—that is, there is no requirement that the Secretary consult with the NOSB before deciding to withdraw a particular rule. By contrast, other sections of the Act do specify when the Secretary is prohibited from acting without consultation with NOSB. For example, the Secretary does not have discretion to deviate from the proposed list of approved and prohibited substances submitted to him by NOSB. *See* §§ 6517(d)(1), (d)(2) (providing that the Secretary "shall" create a National List of approved and prohibited substances, which "may not" include exemptions not approved by NOSB); *see also* § 6506(c)(2) (providing that the Secretary "shall" consult with NOSB regarding the certification and labeling of wild seafood). The specificity of these other statutory provisions show that Congress could have chosen to constrain the Secretary's discretion explicitly with respect to livestock regulations if that was its intent. *See Nat'l Fed'n of Indep. Bus.*

v. Sebelius, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.") (citation omitted). Also unpersuasive is plaintiffs' argument that not requiring the Secretary to follow NOSB recommendations would render superfluous Congress' command that NOSB issue such advice. The history and text of the OFPA, if anything, indicates that Congress intended NOSB to offer its expert assistance to the Secretary in crafting the organic program, without necessarily substituting its judgment for the Secretary's with respect to particular decisions unless otherwise provided by statute. Therefore, to the extent it asserts the OLPP Rule withdrawal was in excess of USDA's statutory authority, this claim fails on its face.

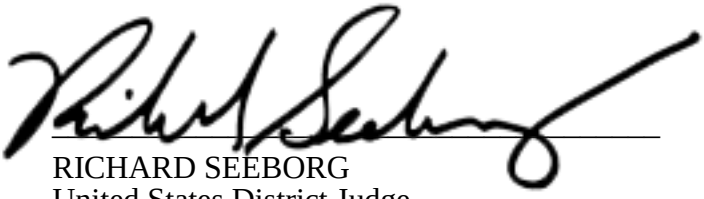
That said, plaintiffs' assertion that USDA has consistently based its rulemaking decisions on NOSB recommendations, and has never before engaged in rulemaking without consultation with NOSB, could support a challenge to the Withdrawal Rule under arbitrary and capricious review. *See* 5 U.S.C. § 706(2)(A). It is unclear from the wording of the operative complaint, however, whether plaintiffs intend the above-mentioned factual allegations to support both their section 706(2)(A)(arbitrary and capricious) and (C)(excess of statutory authority) arguments. As currently pled, plaintiffs appear to stake their section 706(2)(A) challenge entirely upon USDA's allegedly inadequate explanation for acting contrary to NOSB's recommendations to promulgate the OLPP Rule, an accusation that is, by itself, insufficient to support arbitrary and capricious review under the APA. Accordingly, this claim must be dismissed. As plaintiffs may wish to reformulate this claim under the arbitrary and capricious framework, dismissal is with leave to amend.

V. CONCLUSION

For the reasons set forth above, the motion to dismiss is granted in part and denied in part. Any amended complaint must be filed within 21 days of the date of this Order.

IT IS SO ORDERED.

Dated: August 21, 2018



RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California