

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PINEROS Y CAMPESINOS UNIDOS DEL
NOROESTE, et al.,

Plaintiffs,

v.

E. SCOTT PRUITT, et al.,

Defendants.

Case No. 17-cv-03434-JSW

**ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. No. 33

Now before the Court is the motion for summary judgment filed by Plaintiffs. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and the Court finds the motion suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). For the reasons stated below, the Court **HEREBY GRANTS** Plaintiffs' motion for summary judgment.

A. Background.

Because the parties are familiar with the factual and procedural background contained in the administrative record, the Court provides only a brief summary.

In January 2017, the Environmental Protection Agency ("EPA") promulgated a rule which strengthened the regulations surrounding the certification and use of "restricted use pesticides" ("RUP"). ("Pesticide Rule") The Pesticide Rule had an effective date of March 6, 2017, and established a three-year implementation schedule which required States to submit certification plans consistent with the Pesticide Rule by March 4, 2020. *See* 40 C.F.R. § 171.5 (a), (b), (c). During this three year period, EPA was to work with the States and other pesticide certifying-authorities to develop revised certification plans to ensure compliance with the Pesticide Rule. Starting on January 26, 2017, however, the EPA abruptly reversed course and began delaying the

1 March 6, 2017 effective date of the Pesticide Rule, largely without notice and comment.¹ (*See* AR
 2 100, 103, 105, 111.) In response, Plaintiffs, a number of farmworker unions and related advocacy
 3 groups, filed the instant action, seeking a declaratory judgment that (1) declares EPA’s delaying of
 4 the Pesticide Rule failed to comply with the Administrative Procedures Act (“APA”), (2) vacates
 5 the EPA’s various rules delaying the Pesticide Rule’s effective date, and (3) declares the Pesticide
 6 Rule to be in effect.

7 **B. Plaintiffs’ Have Standing to Challenge EPA’s Delay.**

8 The Court finds that Plaintiffs have standing to bring this declaratory judgment action. *See*
 9 *Thomas v. Mundell*, 574 F.3d 756, 760 (9th Cir. 2009) (“[s]tanding is a necessary element of
 10 federal-court jurisdiction” and a “threshold question in every federal case”). To establish Article
 11 III standing, a plaintiff must show it “(1) suffered injury in fact, (2) that is fairly traceable to the
 12 challenged conduct of the defendant, (3) that is likely to be redressed by a favorable judicial
 13 decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of*
 14 *Wildlife*, 504 U.S. 555, 561 (1992)). Under the doctrine of associational standing, an association
 15 has standing to sue on behalf of its members when: “(1) its members would otherwise have
 16 standing to sue in their own right; (2) the interests it seeks to protect are germane to the
 17 organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the
 18 participation of individual members in the lawsuit.” *Regents of Univ. of Cal. v. U.S. Dep’t of*
 19 *Homeland Security*, 279 F. Supp. 3d 1011, 1034 (N.D. Cal. 2018).

20 Plaintiffs have suffered an injury in fact because EPA’s delay of the Pesticide Rule’s
 21 effective date has created a threat that implementation of the Pesticide Rule, and the regulatory
 22 protections it provides, will likewise be delayed. In promulgating the Pesticide Rule, EPA made
 23 numerous findings about the inadequacy of the current regulations related to RUPs and the threat
 24 RUPs posed to agricultural workers and others. (*See, e.g.*, AR 4-6, 11-14.) The farmworker union
 25 Plaintiffs have proffered undisputed evidence showing that their members mix, apply, and are
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 28 ¹ On May 15, 2017 EPA proposed delaying the Pesticide Rule until May 22, 2018 and provided
 only four days for interested parties to provide comments. This is the only notice and comment
 period that was offered by EPA.

1 exposed to pesticides, including RUPs. Plaintiffs’ evidence also suggests that their members have
2 observed first hand problems with inadequate training and safety measures related to pesticides
3 generally. (*See, e.g.*, Dkt No. 33-3, Nicholson Decl. ¶¶ 5-6; Dkt. No. 33-4, Ramirez Decl. ¶¶ 5-7;
4 Dkt. No. 33-6, Rios Decl. ¶¶ 7-9; Dkt. No. 33-7, Rojas Decl. ¶¶ 6-10.) If implementation of the
5 Pesticide Rule is delayed, Plaintiffs’ members will continue to be exposed to these dangers and
6 will not benefit from the more stringent regulations provided by the Pesticide Rule. Further, those
7 Plaintiffs who engage in worker health and safety advocacy have averred that a delay in the
8 implementation of the Pesticide Rule will require them to commit more time and resources to
9 educating and informing their members and public about the dangers of RUPs—resources which
10 otherwise could be devoted to its other goals. (*See, e.g.*, Dkt. No. 33-1, Economos Decl. ¶¶ 16-17;
11 Dkt. No. 33-2, Katten Decl. ¶ 24.) Thus, either directly or through their members, Plaintiffs have
12 suffered an injury as a result of the delay of the Pesticide Rule.

13 EPA responds, however, that the delay of the Pesticide Rule’s effective date did not affect
14 the rule’s implementation schedule. EPA contends that in the absence of additional rule-making
15 to alter the implementation schedule, States still will be required to submit their revised RUP
16 certification plans by March 2020. Thus, according to EPA, Plaintiffs and their members will not
17 be deprived of the protections of the Pesticide Rule for any period of time as a result of the delay
18 of the rule’s effective date.

19 The Court is unconvinced by EPA’s assurances. First, until quite recently, EPA
20 consistently stated that it intended to delay the actual implementation of the Pesticide Rule, not
21 just its effective date. EPA’s very purpose in delaying the effective date was to prevent States and
22 other regulated entities from making changes to comply with the Pesticide Rule while the rule was
23 being reviewed for potential revision or repeal. (*See, e.g.*, AR 106, 112.) Further, prior to the
24 filing of this lawsuit, EPA expressly stated that it “intend[ed] to make corresponding changes to
25 the implementation dates . . . in a subsequent rulemaking” contained in the Pesticide Rule. (AR
26 113.) Finally, Plaintiffs have introduced evidence that in November 2017—mere days after EPA
27 represented to this Court that the Pesticide Rule’s implementation schedule was unchanged and
28 that Plaintiff’s concerns to the contrary amounted to the “height of conjecture”—an EPA official

1 informed stakeholders that EPA intended to delay the implementation schedule by 14 months to
 2 correspond to the delay in the effective date. (See Dkt. No. 35-1 Liebman Decl. ¶ 4 & Ex. B; Dkt.
 3 No. 35-2, Jordan Decl. ¶ 4.)² EPA’s actions and statements therefore demonstrate that Plaintiffs
 4 face a real, credible threat that implementation of the Pesticide Rule will be delayed as a result of
 5 EPA’s delay of the effective date. See, e.g., *Cent. Delta Water Agency v. United States*, 306 F.3d
 6 938, 950 (9th Cir. 2002) (“[A] credible threat of harm is sufficient to constitute actual injury for
 7 standing purposes . . .”).³

8 This threat is made more concrete when considered in light of the practical consequences
 9 of EPA’s delay of the Pesticide Rule’s effective date. Under the prior Administration, EPA
 10 determined, after extensive notice and comment, that the Pesticide Rule required a flexible, three
 11 year implementation schedule because EPA would have to “engage in open and transparent
 12 discussions and negotiations” with States to develop revised certification plans consistent with the
 13 Pesticide Rule. (AR 73.) Additionally, EPA noted that certifying authorities would have to
 14 “devote resources to additional training, manual development, exam development and review,
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16 ² The Court may consider this evidence, even though it is outside the Administrative Record,
 17 because it is offered in support of Plaintiffs’ standing. See, e.g., *N.W. Envmtl. Defense Ctr. v.*
Bonneville Power Admin., 117 F.3d 1520, 1528 (9th Cir. 1997).

18 ³After Plaintiffs filed their reply brief and highlighted EPA’s stated intention to delay the
 19 implementation schedule, EPA abruptly performed an about face and promulgated a notice
 20 declaring, in relevant part:

21 EPA is also announcing that the implementation dates in [the
 22 Pesticide Rule] for certifying authorities to submit revised
 23 certification plans, and for EPA to act on those plans remain in
 24 effect; EPA has no plans to change those implementation dates.
 25 Therefore, if a certifying authority submits its modified certification
 26 plan by March 4, 2020, the existing approved certification plan
 27 remains in effect until EPA has approved or rejected the modified
 28 plan or March 4, 2022, whichever is earlier.

(Dkt. No. 37-1.) The Court finds this non-binding, made-during-litigation policy change does not
 vitiate Plaintiffs’ standing. Cf. *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1117 (C.D. Cal. Dec.
 2008) (“The Court knows of no authority for the proposition that a defendant can defeat a
 plaintiff’s claim on standing grounds through the unilateral offering of a remedy of the defendant’s
 choosing.”).

1 exam administration and other services” in order to bring their certification regime into
 2 compliance with the Pesticide Rule. (*Id.*) Thus, EPA originally concluded, after extensive notice
 3 and comment, that implementation of the Pesticide Rule would involve a long, ongoing
 4 collaborative process between multiple governmental entities. EPA’s abrupt decision to delay the
 5 effective date so as to prevent “confusion” and to keep States from “adopt[ing] new measures to
 6 comply with” the Pesticide Rule has effectively prevented this process from even beginning. (AR
 7 106.) Over one-third of the contemplated three year implementation period has now been lost to
 8 delay. Each week that passes without EPA and the States beginning the process of implementing
 9 the Pesticide Rule makes it that much more likely that the rule cannot be implemented by March
 10 2020 as originally intended.

11 In summary, EPA’s actions have created a substantial risk that the entire implementation
 12 of the Pesticide Rule, and the protections it would provide Plaintiffs and their members, will be
 13 delayed. *See In re Zappos.com, Inc.*, — F.3d —, 2018 WL 1189643 (9th Cir. Mar. 8, 2018) (“A
 14 plaintiff threatened with future injury has standing to sue ‘if the threatened injury is certainly
 15 impending, or there is a substantial risk that the harm will occur.’” (citation omitted)). This risk
 16 can be alleviated, to a degree, by the declaratory judgment Plaintiffs seek. Plaintiffs’ therefore
 17 have standing to challenge EPA’s actions.⁴

18 **C. EPA’s Delay of the Pesticide Rule’s Effective Date Violated the APA.**

19 In its opposition brief to Plaintiffs’ motion for summary judgment, EPA does not attempt
 20 to justify, either substantively or procedurally, its repeated delays of the Pesticide Rule’s effective
 21 date. The Court has carefully reviewed the Administrative Record and finds that EPA violated the
 22 Administrative Procedures Act (“APA”) by failing to provide notice and opportunity to comment
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 25 ⁴ In the alternative, for the reasons stated in Plaintiffs’ motion for summary judgment and reply
 26 brief, the Court finds that Plaintiffs have standing insofar as they have alleged a procedural injury
 27 resulting from EPA’s failure to provide them with notice and an opportunity to be heard prior to
 28 delaying the Pesticide Rule’s effective date. *See Citizens for Better Forestry v. U.S. Dep’t of*
Agriculture, 341 F.3d 961, 969-70 (9th Cir. 2003) (discussing the standing requirements for
 plaintiffs alleging a procedural injury). Plaintiffs are among the direct intended recipients of the
 added protections afforded by the Pesticide Rule. They therefore had a concrete interest in
 participating in the APA rulemaking process for contemplated alteration or delay of that rule. By
 depriving Plaintiffs of that opportunity, EPA has injured Plaintiffs.

1 before delaying the Pesticide Rule’s effective date.

2 By repeatedly delaying the effective date of the Pesticide Rule, EPA engaged in
3 substantive rulemaking and was thus required to comply with the requirements of the APA. *See,*
4 *e.g., Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (“EPA’s stay, in other words, is
5 essentially an order delaying the rule’s effective date, and this court has held that such orders are
6 tantamount to amending or revoking a rule.”); *see also FEC v. Fox Television Stations, Inc.*, 556
7 U.S. 502 (2009) (“The [APA] makes no distinction, however, between initial agency action and
8 subsequent agency action undoing or revising that action.”). The APA requires that EPA give
9 interested persons notice and an opportunity to comment before promulgating any final rule. *See* 5
10 U.S.C. § 553(b), (c).

11 It is undisputed that when EPA delayed the Pesticide Rule in January, March, and June
12 2017, it did so without providing any notice or opportunity to comment. EPA justified this failure
13 by relying on the “good cause” exception to the notice and comment requirements. *See, e.g.,*
14 *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 824-25 (N.D. Cal. 2017) (discussing
15 the good cause exception). EPA argued that “good cause” existed because more time was needed
16 for “further review and consideration of new regulations” and confusion could result if the rule
17 went into effect but was “subsequently substantially revised or repealed.” (*See* AR 101, 103, 112.)
18 The good cause, exception, however, is extraordinarily narrow and is reserved for situations where
19 delay would do real harm. *See, e.g., United States v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir.
20 2010). A new administration’s simple desire to have time to review, and possibly revise or repeal,
21 its predecessor’s regulations falls short of this exacting standard. *Cf. Clean Air Council*, 862 F.3d
22 at 9 (“Agencies obviously have broad discretion to reconsider a regulation at any time. To do so,
23 however, they must comply with the [APA], including its requirements for notice and
24 comment.”).⁵

25 **D. Conclusion.**

26 For the reasons stated above, Plaintiffs’ motion for summary judgment is GRANTED.

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28 ⁵ For the reasons stated in Plaintiffs’ motion for summary judgment, the Court similarly finds that
the four day notice and comment period offered prior to the May 22, 2017 delay was inadequate.

1 The final rules located in the following locations are VACATED to the extent they purport
2 to delay the effective date of the Pesticide Rule:

- 3 (1) 82 Fed. Reg. 8499-501 (Jan. 26, 2017)
4 (2) 82 Fed. Reg. 14324-25 (Mar. 20, 2017)
5 (3) 82 Fed. Reg. 22294-96 (May 15, 2017)
6 (4) 82 Fed. Reg. 23148-50 (May 22, 2017)
7 (5) 82 Fed. Reg. 25529-32 (June 2, 2017)

8 The Court further DECLARES that the Pesticide Rule went into effect on March 6, 2017.

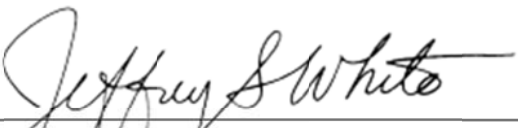
9 *See* 40 C.F.R. 171.5(a).

10 A separate judgment shall issue.

11 **IT IS SO ORDERED.**

12 Dated: March 21, 2018

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JEFFREY S. WHITE
United States District Judge