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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEFF ANDERSON; BRET ADEE; DAVID
HACKENBERG; LUCAS CRISWELL;
GAIL FULLER; CENTER FOR FOOD
SAFETY; AMERICAN BIRD
CONSERVANCY; PESTICIDE ACTION
NETWORK NORTH AMERICA;
POLLINATOR STEWARDSHIP COUNCIL,

No. C 16-00068 WHA

**ORDER RE MOTION TO
DISMISS AND MOTION
TO INTERVENE**

Plaintiffs,

v.

GINA MCCARTHY; ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

INTRODUCTION

In this challenge to federal agency action, defendants move to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1). In addition, several trade associations that would be affected by the outcome of this case move to intervene. To the extent stated below, the motion to dismiss is **DENIED**. The motion to intervene is **GRANTED**.

STATEMENT

This case challenges the United States Environmental Protection Agency’s regulation of pesticides. Plaintiffs are several bee keepers, farmers, and organizations concerned about the effect of pesticides on honey bees and other pollinators. Defendants are the EPA and its Administrator, Gina McCarthy.

1 According to plaintiffs' complaint, many crop seeds, like corn and soybean seeds, are
2 coated with pesticides called neonicotinoids. After the coating is applied, the seeds absorb a
3 small portion of the chemical coating. The rest of the coating, however, "is either scraped off
4 the seeds and blown away as dust during machine planting, or sloughed off into the surrounding
5 soil and groundwater" (Compl. ¶ 34). The effects of the chemical "dust off" extend beyond the
6 full-grown plants, the seeds themselves, and result in the death of honey bees, catastrophic
7 hazard to aquatic systems, and "destruction of rural invertebrate life across a vast portion of the
8 United States" (*id.* at ¶ 37).

9 The EPA regulates pesticide use via the Federal Insecticide, Fungicide, and Rodenticide
10 Act. Under FIFRA, a pesticide is defined as a "mixture of substances that are intended to
11 prevent, destroy, repel or mitigate a pest." 7 U.S.C. 136(u)(1). Pesticides must be registered
12 with the EPA before they can be used, meaning that the EPA must grant a license that
13 establishes the terms and conditions under which the pesticide may be lawfully sold,
14 distributed, and used. FIFRA allows the EPA to exempt by regulation any pesticide which the
15 Administrator determines will not have "unreasonable adverse affects on the environment." 7
16 U.S.C. 136w(b); 7 U.S.C. 136a(c)(5).

17 In 1988, the EPA exempted from FIFRA certain "treated articles." If an article were
18 treated with a pesticide that had already been registered, and the treatment was for the
19 protection of the article itself, then that new use of the pesticide to treat that article would be
20 exempt from new registration under FIFRA. For example, "paint treated with a pesticide to
21 protect the paint coating, or wood products treated to protect the wood against insect or fungus
22 infestation" are exempt if the specific pesticide has already been registered for such use. 40
23 C.F.R. 152.25(a).

24 In 2003, the EPA clarified the "treated article" exemption as it related to coated seeds,
25 as set forth in a release titled "Harmonization of Regulation of Pesticide Seed Treatment in
26 Canada and the United States" (Compl. ¶ 36). Through this action, the EPA stated that
27 pesticide-coated seeds were pesticides under FIFRA, but would be exempt as "treated articles"
28

1 if they had been treated with an already-registered pesticide and their effects did not “*extend*
2 *beyond the seed itself*” (*ibid*) (emphasis added).

3 In 2013, the EPA issued a “Guidance for Inspecting Alleged Cases of Pesticide Related
4 Bee Incidents,” which announced that a “[t]reated seed (and any resulting dust-off from a
5 treated seed) may be exempted from registration under FIFRA as a treated article and as such its
6 planting is not considered a pesticide use” (*id.* at ¶¶ 39–40). This new policy was never
7 promulgated in a formal regulation and did not undergo the typical process that would
8 accompany a formal regulation. “The 2013 Guidance directly affects beekeepers and other
9 Plaintiffs in that it states there will not be investigation or enforcement against any of their bee
10 kills or other harm caused by neonicotinoid-coated seeds or resulting contaminated dust because
11 the kills and other harm incidents are not considered a ‘pesticide use’” (*id.* at ¶ 41).

12 In January 2016, plaintiffs brought this lawsuit, alleging that the 2013 Guidance
13 constituted a final agency action reviewable under the Administrative Procedure Act. In Claims
14 I, III, and IV, plaintiffs assert that the 2013 Guidance is (1) in excess of the EPA’s statutory
15 authority, (2) is arbitrary and capricious, and (3) failed to comply with the rulemaking
16 requirements set forth in the APA. Claim II alleges the EPA failed to regulate and enforce
17 FIFRA by neglecting to enforce pesticide regulations in regards to treated seeds. Now,
18 defendants move to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction, asserting
19 that the 2013 Guidance did not constitute final agency action and is thus unreviewable under the
20 APA. Furthermore, several trade associations that would be affected by the outcome of this
21 case move to intervene. This order follows full briefing and oral argument.

22 ANALYSIS

23 1. MOTION TO DISMISS.

24 The issue presented by the instant motion to dismiss is whether the 2013 Guidance and
25 the EPA’s actions constituted final agency action, such that subject-matter jurisdiction is proper
26 under the APA. Dismissal is appropriate under Rule 12(b)(1) when the district court lacks
27 subject-matter jurisdiction over the claim. There are two permissible jurisdictional attacks
28 under Rule 12(b)(1): a facial attack, where the court’s inquiry is limited to the allegations in the

1 complaint; or a factual attack, which permits the court to look beyond the complaint at
2 affidavits or other evidence. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2
3 (9th Cir. 2003). If the moving party asserts a facial challenge, the court must assume that the
4 factual allegations asserted in the complaint are true and construe those allegations in the light
5 most favorable to the plaintiff. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139
6 (9th Cir. 2003). If the moving party asserts a factual attack, a court may resolve the factual
7 disputes by “look[ing] beyond the complaint to matters of public record, without having to
8 convert the motion into one for summary judgment.” *White v. Lee*, 227 F.3d 1214, 1242 (9th
9 Cir. 2000).

10 Importantly, however, “jurisdictional finding of genuinely disputed facts is
11 inappropriate when the jurisdictional issue and the substantive issues are so intertwined that the
12 question of jurisdiction is dependent on the resolution of factual issues going to the ‘merits’ of
13 an action.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (internal
14 citations and quotations omitted). The question of jurisdiction and the merits of an action are
15 intertwined where “a statute provides the basis for both the subject-matter jurisdiction of the
16 federal court and the plaintiff’s substantive claim for relief.” *Ibid.*

17 As stated above, the issue raised by this motion is whether the 2013 Guidance
18 constituted final agency action. “As a general matter, two conditions must be satisfied for
19 agency action to be final: First, the action must mark the consummation of the agency’s
20 decisionmaking process — it must not be of a merely tentative or interlocutory nature. And
21 second, the action must be one by which rights or obligations have been determined, or from
22 which legal consequences will flow.” *Fairbanks N. Star Borough v. U.S. Army Corps of*
23 *Engineers*, 543 F.3d 586, 591 (9th Cir. 2008) (internal quotation omitted).

24 Here, this order finds that the factual dispute between the parties — whether the 2013
25 Guidance constituted final agency action — is “so intertwined” with the merits that a
26 “jurisdictional finding of genuinely disputed facts is inappropriate.” If the 2013 Guidance did
27 consummate a new rule, and thus a final agency action, then defendants clearly violated federal
28 law by failing to comply with rulemaking requirements. If the 2013 Guidance did not constitute

1 final agency action, then subject-matter jurisdiction is lacking, and the case must be dismissed.
2 Plaintiffs allege that the 2013 Guidance qualifies as a final agency action because it extended
3 the 2003 rule from exempting treated seeds whose effects did not “extend beyond the seed
4 itself,” to something much broader, namely exempting all coated seeds, whether or not their
5 environmental affects were contained to the seeds themselves or extended far beyond (such as
6 affecting honey bees and other wildlife).

7 In our circuit, essentially all environmental cases concerning subject-matter jurisdiction
8 are decided only after reviewing the administrative record, typically at the summary judgment
9 stage. *See, e.g. High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004); *River*
10 *Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010); *Northcoast Env’tl. Ctr. v.*
11 *Glickman*, 136 F.3d 660 (9th Cir. 1998); *Or. Natural Desert Ass’n v. U.S. Forest Service*, 465
12 F.3d 977 (9th Cir. 2006). So too here. At this stage, without the benefit of the entire
13 administrative record, this order cannot find as a matter of law that the 2013 Guidance did not
14 constitute final agency action.

15 Defendants argue that the 2013 Guidance is not an agency action because it is not “the
16 whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial
17 thereof, or a failure to act.” 5 U.S.C. 551(13). Instead, defendants contend the 2013 Guidance,
18 at least in regards to coated seeds, merely constituted a recommendation. An agency action,
19 however, “is meant to cover comprehensively every manner in which an agency may exercise
20 its power.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 478 (2001). Based on the
21 current record, without resolving factual disputes, it is plausible that defendants’ decision to
22 exempt coated seeds from FIFRA, without regard to their effects beyond the seeds themselves,
23 constituted agency action.

24 Next, defendants argue that even if the 2013 Guidance constituted agency action, it was
25 not final within the meaning of the APA. Specifically, the sentence in the 2013 Guidance
26 which states “[t]reated seed (and any resulting dust-off from treated seed) may be exempted
27 from registration under FIFRA and as such its planting is not considered a pesticide use” (Mann
28 Decl. Exh. 1 at 7), does not amount to a “definitive statement of the agency’s position.” *Or.*

1 *Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). While defendants
2 may ultimately prevail on this issue, the current record does not support this conclusion as a
3 matter of law. Plaintiffs allege that defendants' action determined rights and obligations, and
4 due to changing the policy regarding the coated seeds exemption, "legal consequences will
5 flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Specifically, plaintiffs allege and assert in
6 declarations that the EPA's action will result in use of neonicotinoid-coated seeds on 150
7 million agricultural acres, which will introduce millions of pounds of insecticides into
8 agricultural areas, leading to devastating effects on the business of the bee-keeper plaintiffs
9 (Opp. at 18). Without resolving genuine factual disputes, and without the benefit of the full
10 administrative record, this order cannot determine, as a matter of law, that defendants' action
11 was insufficiently final.

12 This motion presents a close call, as defendants put forth a strong argument in support of
13 dismissal of the lawsuit at the Rule 12 stage, even without the benefit of the full administrative
14 record. Defendants, however, do not cite one decision from our court of appeals affirming a
15 Rule 12 dismissal in a case similar to ours. In the most analogous case to ours, *Oregon Natural*
16 *Desert Association*, 465 F.3d at 979, our court of appeals reversed the district court's dismissal
17 under Rule 12(b)(1) and remanded for a determination on the full administrative record. This
18 precedent is in line with other decisions from our court of appeals, in which essentially all
19 environmental/administrative cases concerning subject-matter jurisdiction are decided only after
20 reviewing the administrative record, typically at the summary judgment stage. Accordingly,
21 this order finds the matter better suited for adjudication at the summary judgment stage and thus
22 defendants' motion to dismiss for lack of subject-matter jurisdiction is **DENIED**.

23 **2. MOTION TO INTERVENE.**

24 Separate from defendants' motion to dismiss, several not-for-profit trade associations
25 move to intervene in our case as a matter of right. They include CropLife America, the
26 American Seed Trade Association, the Agricultural Retailers Association, the American
27 Soybean Association, the National Cotton Council of America, the National Association of
28 Wheat Growers, and the National Corn Growers Association. All are represented by the same

1 counsel. These proposed intervenors seek to “protect their members’ vital interests in the
2 development, distribution, sale, and use of the seed treatments and treated seed that are at issue
3 in this case and in an effective, efficient regulatory process for these products” (Br. at 1).

4 Under Rule 24(a)(2), a party is entitled to intervene as a matter of right if (1) the motion
5 is timely, (2) the movant claims a significantly protectable interest relating to the property or
6 transaction which is the subject of the action, (3) the disposition of the action may as a practical
7 matter impair or impede the movant’s ability to protect that interest, and (4) the movant’s
8 interest is inadequately represented by the parties to the action. *Wilderness Soc’y v. U.S. Forest*
9 *Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc). “A liberal policy in favor of intervention
10 serves both efficient resolution of issues and broadened access to the courts. By allowing
11 parties with a practical interest in the outcome of a particular case to intervene, we often prevent
12 or simplify future litigation involving related issues; at the same time, we allow an additional
13 interested party to express its views before the court.” *United States v. City of Los Angeles*, 288
14 F.3d 391, 397–98 (9th Cir. 2002) (internal quotation omitted).

15 Defendants do not oppose intervention by proposed intervenors. Plaintiffs do oppose,
16 solely on the basis that proposed intervenors have failed to demonstrate a protectable interest
17 sufficient to warrant intervention. Plaintiffs assert, in essentially conclusory fashion, that the
18 economic harm alleged is insufficient to warrant intervention. For the reasons stated below,
19 however, the proposed intervenors, whose interests can be broken down into three separate
20 groups, all satisfy Rule 24(a)(2)’s test for intervention.

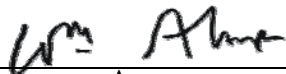
21 Each intervenor has demonstrated a protectable interest. *First*, as demonstrated by the
22 voluminous declarations accompanying the motion, CropLife members own more than two
23 dozen neonicotinoid seed treatment registrations issued by the EPA through FIFRA (Lattimore
24 Decl. at ¶ 4). If plaintiffs obtain the relief they seek, seeds treated with these registered
25 products will likely be removed from the market. Furthermore, CropLife asserts that many of
26 its members have seed treatment registrations pending, which could become null if plaintiffs
27 win this lawsuit, thus affecting CropLife members’ development work.

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1 would constitute final agency action. The deadline for any party to file a summary judgment
2 motion shall be **AUGUST 11, 2016**, to be heard on the normal 35-day track.

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4 **IT IS SO ORDERED.**

5 Dated: May 13, 2016.


6 WILLIAM ALSUP
7 UNITED STATES DISTRICT JUDGE

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