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15 **UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

17 JEFF ANDERSON, *et al.*,
18 Plaintiffs.

19 v.

20 GINA McCARTHY, *et al.*,
21 Defendants,

22 and

23 CROPLIFE AMERICA, *et al.*,
24 Defendant-Intervenors.

Case No. 3:16-cv-00068-WHA

**EPA'S NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

Date: October 27, 2016
Time: 8:00 a.m.
Courtroom: 8, 19th Floor
Judge: Hon. William Alsup

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INTRODUCTION

1
2 Plaintiffs bring this action under the Administrative Procedure Act (“APA”) in the guise
3 of a challenge to an EPA guidance document they contend is a final agency action exempting
4 treated seed from regulation under the Federal Insecticide, Fungicide, and Rodenticide Act
5 (“FIFRA”), 7 U.S.C. § 136-136y. In addition, Plaintiffs allege that EPA has failed to perform a
6 nondiscretionary duty to enforce FIFRA against those that sell or distribute treated seed.

7 The threshold problem for Plaintiffs is that this Court lacks jurisdiction to hear their
8 claims. The EPA guidance document they challenge is not a judicially reviewable agency
9 action—much less a final agency action—regarding the regulatory status of treated seed.
10 Additionally, Plaintiffs have not identified any discrete, mandatory duty or action that EPA has
11 failed to perform under FIFRA. Without these prerequisites for judicial review, this Court lacks
12 jurisdiction to hear Plaintiffs’ claims, and the complaint must be dismissed.

13 First, the May 2013 “Guidance for Inspecting Alleged Cases of Pesticide-Related Bee
14 Incidents” (“Inspection Guidance”) is not final agency action. The document does not represent
15 the culmination of any decisionmaking with respect to treated seed (or any other topic), and in no
16 way determines any rights or obligations with respect to treated seed. Rather, the Inspection
17 Guidance is part of EPA’s continuing efforts to protect pollinator health by encouraging federal,
18 state, and local agencies to collect consistent data and information in order to help those agencies
19 determine whether an incident of bee deaths is associated with the legal or illegal use of
20 pesticide. Declaration of Martha Mann (“Mann Decl.”) Attachment 1 (Inspection Guidance) at 1.

21 Plaintiffs claim that a single sentence of the Inspection Guidance is a “new
22 interpretation” regarding the regulation of treated seed. *See* ECF No. 1 ¶ 40. But the text of the
23 Inspection Guidance does not contain any definitive statement regarding the regulation of any
24 particular treated seed, and is completely consistent with FIFRA’s implementing regulation at 40
25 C.F.R. § 152.25(a) relating to treated articles. The mention of treated seed in the Inspection
26 Guidance is also consistent with EPA’s longstanding statements about treated seed. *See*
27 “Harmonization of Regulation of Pesticide Seed Treatment in Canada and the United States,”
28 jointly published by EPA and the Pest Management Regulatory Agency of Canada (Apr. 11,

1 2003)) (Mann Decl. Attachment 2). And as the Inspection Guidance expressly states, no rights or
2 obligations are imparted as a result of the document.

3 Second, Plaintiffs have repeatedly failed to cite any nondiscretionary duty to enforce or
4 regulate under FIFRA that EPA has not performed. Instead, Plaintiffs cite provisions of FIFRA
5 that generally authorize EPA to regulate and enforce the Act. Those provisions, and other
6 provisions of FIFRA, make clear that EPA’s enforcement authority is discretionary.

7 This action should be dismissed for lack of subject matter jurisdiction.

8 BACKGROUND

9 A. Statutory and Regulatory Background

10 FIFRA governs the sale, distribution and use of pesticides. The Act makes it unlawful,
11 subject to certain exceptions, for any “person in any State [to] distribute or sell to any person any
12 pesticide that is not registered” under the Act. 7 U.S.C. § 136a(a); *see also* 7 U.S.C. §
13 136j(a)(1)(A). Thus, a registration granted by EPA under FIFRA is a license that establishes the
14 terms and conditions under which the pesticide may be lawfully sold, distributed, and used. *See* 7
15 U.S.C. §§ 136a(c)(1)(A)-(F), 136a(d)(1); *see also Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d
16 1199, 1204 (9th Cir. 2002) (observing that FIFRA sets forth a comprehensive regulatory scheme
17 for controlling the use, sale, and labeling of pesticides).

18 Under FIFRA Section 3(c)(5), EPA must approve the registration of a pesticide if the
19 Agency determines that (1) the pesticide’s composition warrants the claims to be made with it,
20 (2) the materials submitted by a registration applicant, including the labeling, comply with
21 FIFRA’s requirements, (3) the pesticide will perform its intended function without “unreasonable
22 adverse effects on the environment,” and (4) when used “in accordance with widespread and
23 commonly recognized practice,” the pesticide will not cause unreasonable adverse effects on the
24 environment. 7 U.S.C. § 136a(c)(5).¹ The burden of demonstrating that a pesticide meets this
25 standard is on the applicant seeking registration of that pesticide, and continues as long as the

26 _____
27 ¹ The phrase “unreasonable adverse effects on the environment” is defined in section 2(bb). 7
28 U.S.C. § 136(bb).

1 registration remains in effect. 7 U.S.C. § 136a(c)(1)(F); *Indus. Union Dep't, AFL-CIO v. Am.*
2 *Petroleum Inst.*, 448 U.S. 607, 653 n.61 (1980).

3 The Administrator is authorized to exempt a pesticide from regulation under FIFRA
4 when she determines that the pesticide is either (1) adequately regulated by another federal
5 agency, or (2) of a character not requiring FIFRA regulation in order to carry out the purposes of
6 the Act. 7 U.S.C. § 136w(b). EPA has promulgated regulatory exemptions under both categories.
7 40 C.F.R. § 152.20 (exemptions for pesticides regulated by another federal agency); *id.* § 152.25
8 (exemptions for pesticides of a character not requiring regulation under FIFRA). Relevant here,
9 40 C.F.R. § 152.25(a) conditionally exempts “treated articles or substances” from regulation
10 under FIFRA as follows:

11 *Treated articles or substances.* An article or substance treated with, or
12 containing, a pesticide to protect the article or substance itself (for example, paint
13 treated with a pesticide to protect the paint coating, or wood products treated to
14 protect the wood against insect or fungus infestation), if the pesticide is registered
for such use.

15 In the 2003 Harmonization Document, EPA and its counterpart in Canada noted that where the
16 conditions of the treated article exemption are met, “[s]eeds for planting which are treated with
17 pesticides registered in the U.S. are exempt from registration as pesticides and may be freely
18 distributed and sold within the U.S.” Mann Decl. Attachment 2 at 1-2.²

19 With respect to judicial review, FIFRA Section 16(a) authorizes civil actions in United
20 States district courts to challenge “the refusal of the Administrator to cancel or suspend a
21 registration or to change a classification not following a hearing and other final actions of the
22 Administrator not committed to the discretion of the Administrator by law.” 7 U.S.C. § 136n(a).

23 **B. Factual Background and Procedural History**

24 Pollinators—bees, wasps, flies, butterflies, moths, bats, beetles, birds, and other
25 species—are “crucial members of various ecosystems, from farmland to wilderness to urban
26

27 ² The Harmonization Document was issued following the publication in 2000 of a discussion
28 paper on how pesticide seed treatment products are regulated in the United States and Canada.
See 65 Fed. Reg. 52,752 (Aug. 30, 2000).

1 environments.” Mann Decl. Attachment 3, *National Strategy to Promote the Health of Honey*
2 *Bees and Other Pollinators*, Report of the Pollinator Health Task Force (May 19, 2015) at 3.
3 Several hundred thousand flowering plant species depend on pollinators to reproduce. *Id.*
4 (citation omitted).

5 The number of honey bees has been in decline for over six decades in the United States.
6 “Status of Pollinators in North America” at 40 (National Academy of Sciences 2007), available
7 at <<http://www.nap.edu/catalog/11761/status-of-pollinators-in-north-america>>. More recent
8 declines in honey bee colonies were noted following the introduction in 1987 of an external
9 parasitic mite (*Varroa destructor*) that feeds on honey bee hemolymph (blood), and again around
10 2006 with the first reports of a condition called Colony Collapse Disorder, in which bee colonies
11 experience a rapid loss of adult worker bees, leaving too few bees to service the needs (food
12 collection; rearing of young) of the colony. Mann Decl. Attachment 3, *National Strategy to*
13 *Promote the Health of Honey Bees and Other Pollinators*, at 3. Researchers studying Colony
14 Collapse Disorder and other honey bee losses believe that losses of honey bee colonies are the
15 result of a complex set of interacting stressors. The primary stressors believed to impact Colony
16 Collapse Disorder and the broader declines in honey bee health are poor nutrition (due in part to
17 decreased availability of high-quality forage lands), exposure to pests such as *Varroa* mites,
18 disease (viral, bacterial, and fungal), bee biology, genetics, and breeding, and exposure to
19 pesticides and other environmental toxins. *Id.* (citing reports by the United States Department of
20 Agriculture and National Research Council).

21 Since 2007, EPA, along with its state and federal partners, has been actively working to
22 better understand the causes of the decline of some species of bees and other pollinators, and to
23 promote pollinator health. Among other things, EPA has established a process for beekeepers
24 and others to report bee deaths so that these losses may be investigated³; worked with the United
25 States Department of Agriculture (“USDA”) and other agencies to study and respond to Colony
26

27
28 ³ See <https://www.epa.gov/pollinator-protection/report-bee-kills>.

1 Collapse Disorder and other threats to pollinator health⁴; and co-hosted national stakeholder
2 meetings on honey bee health.⁵

3 In June 2014, President Obama issued a memorandum in which he concluded that it was
4 “critical to expand Federal efforts and take new steps to reverse pollinator losses and help restore
5 populations to healthy levels.” Available at [https://www.whitehouse.gov/the-press-](https://www.whitehouse.gov/the-press-office/2014/06/20/presidential-memorandum-creating-federal-strategy-promote-health-honey-b)
6 [office/2014/06/20/presidential-memorandum-creating-federal-strategy-promote-health-honey-b.](https://www.whitehouse.gov/the-press-office/2014/06/20/presidential-memorandum-creating-federal-strategy-promote-health-honey-b)
7 The President directed the establishment of a Pollinator Health Task Force, which is co-chaired
8 by EPA’s Administrator and the Secretary of the USDA and includes the heads of many federal
9 agencies and executive departments. *Id.* The President further directed the Pollinator Health Task
10 Force to develop a national strategy with explicit goals, milestones, and metrics to measure
11 progress. *Id.*

12 The national strategy addresses four objectives: conducting research to understand,
13 prevent, and recover from pollinator losses; expanding public education programs and outreach;
14 increasing and improving pollinator habitat; and developing public-private partnerships across all
15 these activities. Mann Decl. Attachment 3. EPA’s efforts are currently focused on carrying out
16 the national strategy, and EPA has continued its work to further the strategy by taking the
17 following actions:

- 18 • Proposing new risk management approach for protecting the monarch butterfly.
- 19 • Proposing restrictions on all toxic pesticides to prohibit their use on crops under
20 contracted pollinator services.
- 21 • Promoting the development of state and tribal pollinator protections plans and best
22 management practices.

23
24 ⁴ See <http://www.usda.gov/documents/ReportHoneyBeeHealth.pdf> (October 2012 Report on the
25 National Stakeholders Conference on Honey Bee Health) and
26 http://www.ree.usda.gov/ree/news/CCD-HBH_Action_Plan_05-19-2015-Dated-FINAL.pdf
(May 2015 Colony Collapse Disorder and Honey Bee Health Action Plan).

27 ⁵ See e.g., [https://www.epa.gov/pollinator-protection/2013-summit-reducing-exposure-dust-](https://www.epa.gov/pollinator-protection/2013-summit-reducing-exposure-dust-treated-seed)
28 [treated-seed.](https://www.epa.gov/pollinator-protection/2013-summit-reducing-exposure-dust-treated-seed)

- 1 • Informing registrants that EPA is unlikely to approve new outdoor neonicotinoid
- 2 pesticide uses until new bee data are submitted and pollinator risk assessments are
- 3 complete.
- 4 • Expediting the re-evaluation of the neonicotinoid family of pesticides, as well as other
- 5 pesticides, using the harmonized risk assessment process.
- 6 • Expediting the review of new *Varroa* mite control products for bees.
- 7 • Implementing a plan for new bee exposure and effect testing priorities.
- 8 • Incorporating pollinator protection at EPA facilities, on www.epa.gov, and in other EPA
- 9 programs.

10 See <https://www.epa.gov/pollinator-protection/federal-pollinator-health-task-force-epas-role>.

11 As part of EPA's continuing efforts to protect pollinators, in May 2013 EPA's Office of
12 Enforcement and Compliance Assurance transmitted a document entitled "Guidance for
13 Inspecting Alleged Cases of Pesticide-Related Bee Incidents" ("Inspection Guidance") to the
14 FIFRA Compliance and Enforcement Managers in all ten EPA Regions. See Mann Decl.
15 Attachment 1. As stated in the memorandum that accompanied the Inspection Guidance, the
16 guidance is a supplement to the national FIFRA Inspection Manual (available at
17 [https://www.epa.gov/compliance/guidance-federal-insecticide-fungicide-and-rodenticide-act-](https://www.epa.gov/compliance/guidance-federal-insecticide-fungicide-and-rodenticide-act-fifra-inspection-manual)
18 [fifra-inspection-manual](https://www.epa.gov/compliance/guidance-federal-insecticide-fungicide-and-rodenticide-act-fifra-inspection-manual)). *Id.* (Transmittal Memorandum). The Inspection Guidance was
19 developed "to identify unique considerations that federal, state, and tribal inspectors should take
20 into account when they are conducting [FIFRA] inspections as a result of the death of honey bees
21 and other social bees." *Id.* at 1. More specifically, the guidance is intended to encourage federal,
22 state, and local agencies to collect consistent data and information in order to help those agencies
23 determine if an incidence of bee deaths is associated with the use of pesticide (whether legal or
24 illegal). *Id.* The data and information may also be used by EPA to determine whether there are
25 patterns of bee deaths associated with specific pesticides or pesticide uses so as to inform future
26 agency decisionmaking.

27 The Inspection Guidance contains recommended procedures for collecting preliminary
28 information, completing pre-inspection planning, conducting inspections of hives, and

1 identifying potential pesticide sources. Mann Decl. Attachment 1 at 2-8. The Inspection
2 Guidance also includes information about bees and beekeeping, photographs of healthy and
3 unhealthy bee colonies, detailed recommendations for collecting and analyzing samples, and an
4 inspection checklist. *Id.* at 9-31.

5 Although the Inspection Guidance identifies some of the unique considerations EPA
6 recommends should be taken into account when inspecting incidents of bee deaths, the document
7 is not binding on inspectors or any other party, as stated in the prefatory disclaimer:

8 This guidance represents EPA's *recommended* procedures for [federal, state, and
9 tribal] inspectors when they are conducting FIFRA inspections as a result of an
10 incident involving bee deaths. This guidance is *not a regulation* and, therefore,
11 *does not add, eliminate or change any existing regulatory requirements*. The
12 statements in this document are intended solely as guidance. *This document is not*
13 *intended, nor can it be relied on, to create any rights enforceable by any party in*
14 *litigation with the United States. EPA, state and tribal officials may decide to*
15 *follow the guidance provided in this document, or to act at variance with the*
16 *guidance, based on analysis of site-specific circumstances. This guidance may be*
17 *revised without public notice to reflect changes in EPA's policy.*

18 Mann Decl., Attachment 1 inside cover page (emphases added).

19 More than two-and-a-half years after the Inspection Guidance was transmitted to the EPA
20 Regional Compliance and Enforcement Managers, Plaintiffs filed this action. ECF No. 1.
21 Plaintiffs are a group of beekeepers, farmers, and public interest organizations. ECF No. 1 ¶ 10.
22 They do not take issue with the recommended procedures for inspecting suspected incidents of
23 pesticide-related bee deaths that are set forth in the Inspection Guidance. Rather, Plaintiffs'
24 claims are founded on a single sentence in the Inspection Guidance, ECF No. 1 ¶ 40, in the
25 section entitled "Identifying and Inspecting Potential Pesticide Sources." Mann Decl. Attachment
26 1 at 7. In that section, the Inspection Guidance provides:

27 Inspectors may also want to take into account any locations of treated seed
28 planting when identifying locations of potential pesticide sources. Note: Treated
seed (and any resulting dust-off from treated seed) may be exempted from
registration under FIFRA as a treated article and as such its planting is not
considered a "pesticide use." However, if the inspector suspects or has reason to

1 believe a treated seed is subject to registration (*i.e.*, the seed is not in compliance
2 with the treated article exemption), plantings of that treated seed may nonetheless
3 be investigated.

4 Mann Decl. Attachment 1 at 7-8. Plaintiffs contend that the second sentence of the paragraph is
5 “a ‘new interpretation’ of the scope of the treated article exemption with respect to coated
6 seeds.” ECF No. 1 ¶ 40; *see also id.* ¶¶ 68-71, 78.

7 In Counts I, III, and IV, Plaintiffs seek review of the Inspection Guidance and assert that
8 the alleged final agency action is (1) in excess of EPA’s statutory authority (Count I; ECF No. 1
9 ¶ 78); (2) invalid for failing to comply with the rulemaking requirements of the APA (Count III;
10 ECF No. 1 ¶ 91); and (3) arbitrary and capricious and contrary to FIFRA and the APA (Count
11 IV; ECF No. 1 ¶ 101). In the remaining claim, Count II, Plaintiffs allege a “failure to regulate
12 and enforce” FIFRA with respect to pesticide-treated seeds. ECF No. 1 at 25-26.

13 On March 10, 2016, EPA moved to dismiss Plaintiffs’ complaint on the same grounds
14 raised in this motion for summary judgment, *i.e.*, that this Court lacks jurisdiction to hear
15 Plaintiffs’ claims. ECF Nos. 20, 21. Although the Court stated that EPA “put forth a strong
16 argument in support of dismissal,” the Court denied the motion to dismiss, deferring a decision
17 on the jurisdictional issue. ECF No. 62 at 6 (Order of May 13, 2016). The Court’s decision was
18 based on the Court’s finding that in the Ninth Circuit, “essentially all environmental cases
19 concerning subject-matter jurisdiction are decided only after reviewing the administrative record,
20 typically at the summary judgment stage.” ECF No. 62 at 5. EPA moved for clarification of the
21 Court’s Order with respect to the legal argument raised by EPA with respect to Count II. ECF
22 No. 66. The Court directed the parties to brief the issue in summary judgment briefing. ECF No.
23 74.

24 The Court set a schedule for EPA to lodge the administrative record and for summary
25 judgment briefing. *Id.* at 8-9. EPA lodged and produced the record on July 28, 2016, and filed a
26 corrected record index on September 6, 2016. ECF Nos. 76, 83. On September 2, 2016, Plaintiffs
27 filed a motion to “complete or supplement” the administrative record to include all deliberative
28 materials, to compel production of a privilege log, and to allow discovery as to Count II. ECF

1 No. 81. The Court denied without prejudice Plaintiffs' request to conduct discovery, but ordered
2 the Agency to submit for *in camera* review all "documents that relate to the development of the
3 guidance that are *not* a part of the administrative record" by October 4, 2016. ECF No. 86 at 1
4 (emphasis in original). The Court added that it would then "determine the extent to which these
5 documents should be part of the administrative record." *Id.*

6 STANDARD OF REVIEW

7 Federal courts are courts of limited jurisdiction and may hear cases only to the extent
8 expressly provided by statute. Therefore, the first and fundamental question presented by every
9 case is whether the court has jurisdiction to hear it. *Steel Co. v. Citizens for a Better Env't*, 523
10 U.S. 83, 94 (1998) ("jurisdiction [must] be established as a threshold matter"). Where subject
11 matter jurisdiction does not exist, "the court cannot proceed at all in any cause." *Id.* (internal
12 quotation marks and citation omitted).

13 The burden of establishing subject matter jurisdiction rests with the plaintiff. *Kokkonen v.*
14 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (it is "to be presumed that a cause lies
15 outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party
16 asserting jurisdiction" (citations omitted)). *See also Kingman Reef Atoll Invs., L.L.C. v. United*
17 *States*, 541 F.3d 1189, 1197 (9th Cir. 2008) (plaintiff bears burden of establishing jurisdiction).
18 To establish subject matter jurisdiction in a suit against the United States, the plaintiff bears the
19 burden of showing that his or her claims fall within an applicable waiver of sovereign immunity.
20 *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

21 As the Supreme Court has recognized, "[i]t is axiomatic that the United States may not be
22 sued without its consent and that the existence of consent is a prerequisite for jurisdiction."
23 *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Waivers of sovereign immunity "must be
24 unequivocally expressed in [the] statutory text, and will not be implied." *Lane v. Pena*, 518 U.S.
25 187, 192 (1996) (citations omitted). Even when a statute provides an express waiver of sovereign
26 immunity, that waiver is strictly construed in favor of the government. *See United States v.*
27 *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992). Further, the United States may define the terms and
28 conditions upon which it may be sued, *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979),

1 and the terms of its consent are jurisdictional. *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 26
 2 (1989). If the conditions of the waiver are not met, the claim must be dismissed. *Hodge v.*
 3 *Dalton*, 107 F.3d 705, 707 (9th Cir. 1997).

4 ARGUMENT

5 Plaintiffs' complaint asserts that this Court has jurisdiction under five federal statutes.
 6 ECF No. 1 at ¶¶ 4-5. Plaintiffs acknowledge that the following statutes do not provide the
 7 necessary waiver of sovereign immunity: 28 U.S.C. § 1331 (the federal question statute), 28
 8 U.S.C. § 1346 (United States as a Defendant), and 28 U.S.C. §§ 2201-02 (the Declaratory
 9 Judgment Act). ECF No. 57 at n.2; *see* Memorandum in Support of Motion to Dismiss, ECF No.
 10 21 at 5-7. Plaintiffs contend, however, that the APA and FIFRA do provide a waiver of
 11 sovereign immunity for their claims. ECF No. 1 ¶¶ 4, 5. They are wrong.

12 I. Plaintiffs have not identified any final agency action.

13 Both FIFRA and the APA include a waiver of sovereign immunity that authorizes review
 14 of final actions of the Administrator not committed to the discretion of the Administrator by law.
 15 *See* 7 U.S.C. § 136n(a) (FIFRA); 5 U.S.C. §§ 701(a), 702, 704 (APA).

16 As an initial matter, even where there is final agency action, a cause of action may exist
 17 under either the APA or another judicial review provision, but not both. The APA authorizes
 18 judicial review of final agency actions where "there is no other adequate remedy in a court." 5
 19 U.S.C. § 704. This is because APA "does not provide additional judicial remedies in situations
 20 where the Congress has provided special and adequate review procedures." *Bowen v.*
 21 *Massachusetts*, 487 U.S. 879, 903 (1988); *accord Coos Cty. Bd. of Cty. Comm'rs. v.*
 22 *Kemphorne*, 531 F.3d 792, 802 (9th Cir. 2008). Where there is an opportunity for judicial
 23 review under another statute, review under the APA is unavailable. *Bowen*, 487 U.S. at 903
 24 ("Congress did not intend the general grant of review in the APA to duplicate existing
 25 procedures for review of agency action."). Thus, jurisdiction to hear a challenge to final agency
 26 action taken under FIFRA must be founded on FIFRA's waiver of sovereign immunity and not
 27 the APA.
 28

1 In any event, in this case there is no final agency action here for purposes of either
2 FIFRA or the APA. The Inspection Guidance does not represent any decisionmaking with
3 respect to the regulation of treated seed and thus imposes no rights or obligations.

4 **A. The Inspection Guidance is not an “agency action.”**

5 An “agency action” is “the whole or part of an agency rule, order, license, sanction,
6 relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). In *Norton v.*
7 *Southern Utah Wilderness Alliance*, the Supreme Court held that “agency action” is limited to
8 the specific categories defined by the APA and is properly understood as a “circumscribed” and
9 “discrete” action. 542 U.S. 55, 62 (2004). Because the APA only allows for review of specific
10 categories of actions, Plaintiffs “cannot demand a general judicial review of the [agency’s] day-
11 to-day operations.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 899 (1990); *see also S. Utah*
12 *Wilderness Alliance*, 542 U.S. at 67 (warning against “injecting the judge into day-to-day agency
13 management”).

14 Here, the Inspection Guidance does not constitute a “rule, order, license, sanction, relief,
15 or the equivalent or denial thereof” as those terms are further defined in the APA. 5 U.S.C. §
16 551(4), (6), (8) (10), (11). Plaintiffs allege that the Inspection Guidance is “the equivalent of a
17 rule” because it “is an ‘agency statement’ of ‘general applicability’ to producers and users of
18 coated seeds with ‘future effect’” regarding the “law and/or policy on exemption of coated
19 seeds.” ECF No. 1 ¶¶ 67, 70 (quoting 5 U.S.C. § 551(4)). To the contrary, the Inspection
20 Guidance is a set of non-binding recommendations for the use of federal, state, and tribal
21 inspectors rather than the general public, and includes only three sentences regarding treated
22 seeds:

23 Inspectors may also want to take into account any locations of treated seed
24 planting when identifying locations of potential pesticide sources. Note: Treated
25 seed (and any resulting dust-off from treated seed) *may be* exempted from
26 registration under FIFRA as a treated article and as such its planting is not
27 considered a “pesticide use.” However, *if the inspector suspects or has reason to*
28 *believe a treated seed is subject to registration (i.e., the seed is not in compliance*
with the treated article exemption), plantings of that treated seed may nonetheless
be investigated.

1 Mann Decl. Attachment 1 at 7-8 (emphasis added).

2
3 At oral argument on EPA's motion to dismiss, Plaintiffs relied on the above language, as
4 well as a portion of an attachment to the Inspection Guidance that is an example outline for a
5 report on an inspection of bee deaths. Mann Decl. Attachment 4 (Transcript of May 12, 2016
6 Hearing) at 27:10-14, 31-32. The portion of the outline at Attachment 1 of the Inspection
7 Guidance recommends that inspectors, as part of identifying and inspecting potential pesticide
8 sources, should document (1) whether the seeding equipment was pneumatic, (2) the identity of
9 the pesticide product used to treat the seed, (3) a copy of any label for treated seed, and (4) where
10 the treated seed is suspected not to meet the treated article exemption at 40 C.F.R. § 152.25(a),
11 the dates of purchase and identity of the distributor of the treated seed and a copy of sale or
12 distribution records. Mann Decl. Attachment 1 (Inspection Guidance) at 11-12.

13 Plaintiffs have interpreted these excerpts to mean something far different than the plain
14 language of the document. *See* Mann Decl. Attachment 4 (Transcript of May 12, 2016 Hearing)
15 at 28:9-12 (arguing about what the Inspection Guidance is "really saying"). These two excerpts
16 at page 7 and 12 of the Inspection Guidance are a far cry from a legal or policy prescription as to
17 exemption of any particular type of treated seed as a treated article under 40 C.F.R. § 152.25(a),
18 as they in no way implement, interpret, or prescribe law or policy. Instead, these excerpts of the
19 Inspection Guidance are merely a recommendation to inspectors to "document" certain
20 information pertaining to treated seed when investigating potential sources of pesticide exposure.
21 Mann Decl. Attachment 1 (Inspection Guidance) at 11. The excerpts say nothing about whether
22 any particular treated seed do or do not meet the conditions of the treated article exemption
23 found at 40 C.F.R. § 152.25(a).

24 Moreover, EPA does not make exemption determinations for each treated article that may
25 fall under the treated article exemption, as Plaintiffs' complaint suggests. ECF No. 1 ¶¶ 68-71.
26 As noted above, under FIFRA, with few exceptions, a pesticide cannot be sold or distributed in
27 the United States without a registration. 7 U.S.C. § 136a(a). FIFRA Section 25(b) allows EPA to
28 exempt, by regulation, a pesticide from the requirements of FIFRA, such as registration, if it is of

1 a character that is unnecessary to be subject to the Act. *Id.* § 136w(b). Pursuant to this authority,
 2 in 1988, EPA promulgated the treated article exemption in 40 C.F.R. § 152.25(a). The rule is
 3 self-executing; if an article meets the criteria of the exemption, the person selling or distributing
 4 the product is not required to obtain a pesticide registration or any other form of approval from
 5 EPA.⁶ If EPA determines that a person is selling or distributing an article that is not covered by
 6 the treated article exemption, EPA may take enforcement action against that person for the sale
 7 or distribution of an unregistered pesticide. *See* ECF No. 21 at 15 (discussing enforcement
 8 discretion and citing example of an administrative enforcement action).

9 Where EPA has found it appropriate, the Agency has issued guidance to the public as to
 10 the applicability of the treated article exemption. *See* “Pesticides; Final Guidance for Pesticide
 11 Registrants on Applicability of the Treated Articles Exemption to Antimicrobial Pesticides,” 65
 12 Fed. Reg. 82,345-01 (Dec. 28, 2000). Unlike the guidance EPA has previously issued regarding
 13 the applicability of the treated article exemption, the portions of the Inspection Guidance relied
 14 on by Plaintiffs do not in any way govern the applicability of the treated article exemption.

15 In sum, the language of the Inspection Guidance plainly demonstrates that EPA has taken
 16 no agency action for which Plaintiffs may seek review.

17
 18 ⁶ The exemption at 40 C.F.R. § 152.25(a) conditionally exempts “treated articles or substances”
 19 from regulation under FIFRA as follows:

Treated articles or substances. An article or substance treated with, or
 20 containing, a pesticide to protect the article or substance itself (for example, paint
 21 treated with a pesticide to protect the paint coating, or wood products treated to
 22 protect the wood against insect or fungus infestation), if the pesticide is registered
 for such use.

In addition to the two examples of exempt treated articles listed in the regulation (paint and
 23 wood), a wide variety of articles in commerce rely on the exemption. *See, e.g., In the Matter of:*
 24 *Home Depot U.S.A., Inc., & As Am., Inc.*, Dkt. No. FIFRA-04-2008-3010(b) Consent Agreement
 and Final Order, 2008 WL 2437824 (EPA Region IV, June 3, 2008) (addressing tubs and toilets);
 25 *In the Matter of: Harmsco Inc.*, Dkt. No. FIFRA-04-2007-3014(B) Consent Agreement and Final
 Order, 2007 WL 2285828 (EPA Region IV, June 14, 2007) (addressing pool filters); *In the*
 26 *Matter of: Mountville Mills, Inc.*, Dkt No. FIFRA-04-2002-3010(b), 2002 WL 31744972 (EPA
 27 Region IV, July 26, 2002) (addressing floor mats). Plaintiffs’ assertion that the exemption “does
 not mention treated seeds,” ECF No. 57 at 16, is nondispositive.

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B. Even if the Inspection Guidance were an “agency action,” it is not final.

“Final agency action” is a term of art. The Supreme Court has established that two conditions must be satisfied for an agency action to be final: (1) the action must mark the “consummation” of the agency’s decisionmaking process, and not be “of a merely tentative or interlocutory nature”; and (2) the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted). *See also Or Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006); 5 U.S.C. § 704 (limiting actions reviewable under the APA to “final agency action for which there is no other adequate remedy in a court”). Neither part of the finality test is met here. Counts I, III, and IV each seeks review of the Inspection Guidance. ECF No. 1 ¶¶ 68-69, 78, 86, 96. Plaintiffs allege that the Inspection Guidance “is the consummation of agency decision-making as to neonicotinoid-coated seeds,” ECF No. 1 ¶ 68, that “affects the rights and obligations” of those who use treated seeds and those who produce or sell treated seeds, *id.* ¶ 69.⁷ Plaintiffs’ allegations are refuted by the plain language of the Inspection Guidance.

1. The Inspection Guidance does not consummate any relevant agency process or decisionmaking as to any topic, much less treated seed.

⁷ Although the complaint alleges that the 2013 Inspection Guidance and “other actions as alleged herein that enabled the use of unregulated coated seeds” are “sufficiently final agency actions for judicial review,” ECF No. 1 ¶ 71, the only purported “action” identified in the complaint that is within the applicable six-year statute of limitations for the APA is the 2013 Inspection Guidance. *See S. Utah Wilderness Alliance*, 542 U.S. at 62 (describing the specific categories of “actions” defined by the APA); *see also Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991) (28 U.S.C. § 2401(a) six-year statute of limitations for civil action commenced against United States applies to actions brought under the APA). In their response to EPA’s motion to dismiss, Plaintiffs vaguely referred to registrations that authorize the sale and use of pesticides for, *inter alia*, seed treatment. ECF No. 57 at 9:11-13. But Plaintiffs do not identified any registration that speaks to whether the treated article exemption applies to seeds treated with those pesticides.

1 Although Plaintiffs allege that the Inspection Guidance “is the consummation of agency
2 decision-making as to neonicotinoid-coated seeds,” ECF No. 1 ¶ 68, that document does not
3 discuss (or even refer to) neonicotinoid pesticides or seeds that are treated with neonicotinoid
4 pesticides. Rather, the Inspection Guidance recommends how to conduct an inspection when
5 there is an incidence of bee deaths that might be associated with the use of a pesticide. Mann
6 Decl. Attachment 1 at 1. As noted above, the Inspection Guidance suggests considerations for
7 inspectors in investigating potential pesticide sources. Almost as an aside, the Inspection
8 Guidance provides the following: “Note: Treated seed (and any resulting dust-off from treated
9 seed) *may be* exempted from registration under FIFRA and as such its planting is not considered
10 a pesticide use.”⁸ *Id.* at 7 (emphasis added). This sentence is conditional at best, and does not
11 amount to a “definitive statement of the agency’s position” as to whether all treated seed (or any
12 specific treated seed) must be separately regulated under FIFRA. *Or. Nat. Desert Ass’n*, 465 F.3d
13 at 982.

14 Indeed, the note in the Inspection Guidance does nothing more than reflect EPA’s
15 longstanding view regarding the applicability of the treated article exemption to treated seed. As
16 Plaintiffs are well aware, the 2003 Harmonization Document provides that where the conditions
17 of the treated article exemption are met, “[s]eeds for planting which are treated with pesticides
18 registered in the U.S. are exempt from registration as pesticides and may be freely distributed
19 and sold within the U.S.” Mann Decl. Attachment 2 at 1-2. Nothing in the Inspection Guidance
20 states that the Harmonization Document has been amended or superseded, or that EPA’s views
21 have changed since the publication of the Harmonization Document. The language in the
22 Inspection Guidance neither adds to nor is at odds with the statement in the Harmonization
23 Document.

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25
26 ⁸ The following sentence of the Inspection Guidance states, “However, if the inspector suspects
27 or has reason to believe that a treated seed is subject to registration (i.e., the seed is not in
28 compliance with the treated article exemption), plantings of that treated seed may nonetheless be
investigated. Mann Decl., Attachment 1 (Inspection Guidance) at 7-8.

1 The Supreme Court recently distinguished between a conditional and final agency
2 decision in a way that is instructive. In *United States Army Corps of Engineers v. Hawkes Co.*,
3 136 S. Ct. 1807, 1811 (2016), the Court considered whether an “approved jurisdictional
4 determination” issued by the Corps of Engineers, delineating the extent of “waters of the United
5 States” on a landowner’s property for purposes of the Clean Water Act, was final agency action.
6 Applying the test for finality set out in *Bennett v. Spear*, the Court noted that the Corps of
7 Engineers did not dispute that an approved jurisdictional determination met the first *Bennett*
8 requirement, as it represented the “‘consummation’ of the Corps’ decisionmaking process.” *Id.* at
9 1813. The Court agreed, and noted that while a “preliminary” jurisdictional determination
10 “simply indicate[s] that there ‘may be waters of the United States’ on a parcel of property,” an
11 “approved” jurisdictional determination is issued after extensive factfinding and is typically not
12 revisited. *Id.* at 1813-14. The Court thus recognized the conditional nature of a statement that a
13 property “may” contain waters of the United States.

14 The Ninth Circuit has similarly concluded that statements containing the word “may” are
15 conditional in nature. In *American National Fire Insurance Co. v. Hungerford*, the circuit court
16 held that the district court had improperly exercised its discretionary jurisdiction in a declaratory
17 judgment suit on the issue of insurance coverage where there was a concurrent state court
18 proceeding involving the same issues. 53 F.3d 1012 (9th Cir. 1995), *overruled on other grounds*,
19 *Gov’t Employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998). The Ninth Circuit focused on
20 the “tentative nature” of the district court’s decision, which was “peppered throughout with
21 conditional statements and littered with words like ‘may,’ ‘possible,’ and ‘if.’” *Am. National*
22 *Fire*, 53 F.3d at 1017; *cf. Sierra Club v. Johnson*, 614 F. Supp. 2d 998, 1003 (N.D. Cal. 2008)
23 (Alsup, J.) (stating that the “customary meaning of the word *may* . . . is permissive” and “is not
24 generally considered to mean *shall*”). Indeed, if a conditional statement were reviewable as a
25 final agency action, there would be no limit to what actions would be susceptible to judicial
26 review, and the advisory nature of that review. *See In re Murray Energy Corp. v. EPA*, 788 F.3d
27 330, 334-35 (D.C. Cir. 2015) (rejecting attempt to seek judicial review of proposed rule to
28 address carbon dioxide emissions from existing coal-fired and natural gas-fired power plants).

1 Thus, the “note” in the Inspection Guidance is neither a “recommendation,” *see* ECF No.
2 62 at 5, nor a determination by EPA regarding the applicability of the treated article exemption.
3 ECF No. 62 at 5. To the contrary, the statement is nothing more than the unremarkable
4 reiteration of EPA’s longstanding view of the treated article exemption in 40 C.F.R. § 152.25(a)
5 set forth in the 2003 Harmonization Document (Mann Decl. Attachment 2 at 2). An agency’s
6 restatement of an established interpretation of its regulations is not a judicially reviewable final
7 agency action. *Az. Mining Ass’n v. Jackson*, 708 F. Supp. 2d 33, 39-40 (D.D.C. 2010) (citing
8 *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004).

9 Plaintiffs’ reliance on the example outline for inspection reports, Mann Decl. Attachment
10 1 at 11-12, is even more misplaced, as the recommendation of what information to collect
11 regarding treated seed in no way indicates that all treated seed, or any specific treated seed, is or
12 is not exempt under the treated article exemption. In fact, the example outline echoes the note in
13 the body of the Inspection Guidance in making clear that not all treated seed is per se exempt as
14 a treated article. *See* Mann Decl. Attachment 1 (Inspection Guidance) at 12 (noting which
15 information should be collected “if the treated seed is suspected not to meet the exemption at 40
16 C.F.R. § 152.25(a)”). This statement is consistent with the Harmonization Document’s statement
17 that treated seed that meets the conditions of the treated article exemption is exempt from
18 regulation under FIFRA. Attachment 2 (Harmonization Document) at 1-2.

19 Moreover, the Inspection Guidance includes a statement that the document is “an
20 inspection support tool,” and “not a regulation.” Mann Decl. Attachment 1, at inside cover. The
21 disclaimer also provides that the guidance “does not add, eliminate, or change any existing
22 regulatory requirements,” and that EPA reserves the right to “revise[]” the guidance “without
23 public notice to reflect changes in EPA’s policy.” *Id.* Although EPA developed the Inspection
24 Guidance after seeking input from the Michigan Department of Agriculture and Rural
25 Development, the State FIFRA Issues Research and Evaluation Group, and the Tribal Pesticide
26 Program Council, and others, *see* Mann Decl. Attachment 1 (Inspection Guidance) at cover
27 memorandum, the Inspection Guidance was not published in the Federal Register and EPA did
28 not publish the guidance for public comment. If EPA intended the Inspection Guidance to set

1 forth a new decision as to how treated seed should be treated for purposes of FIFRA, it would
2 not have buried that decision in a conditional statement in a guidance document that pertains to a
3 different topic and includes a disclaimer of any change to regulatory requirements, rights, or
4 obligations.

5 The plain language of the Inspection Guidance makes clear that the Inspection Guidance
6 is not the culmination of agency decisionmaking with respect to the question of whether treated
7 seed should be separately registered under FIFRA. Thus, Plaintiffs have failed to demonstrate the
8 first prerequisite for finality established by the Supreme Court in *Bennett v. Spear*.

9 **2. The Inspection Guidance determines no legal rights or obligations,
10 and no legal consequences flow from the Inspection Guidance.**

11 Plaintiffs have also failed to satisfy the second prerequisite for finality, as no “rights or
12 obligations have been determined” and no “legal consequences will flow” as a result of the
13 Inspection Guidance. *Bennett*, 520 U.S. at 177; *see also Cal. Dep’t of Water Res. v. FERC*, 341
14 F.3d 906, 909 (9th Cir. 2003) (considering whether action “has a direct and immediate effect on
15 the day-to-day operations” of the subject party or if “immediate compliance is expected”). The
16 disclaimer on the inside cover specifically provides that the guidance document “does not add,
17 eliminate or change any existing regulatory requirements,” and cannot “be relied on[] to create
18 any rights enforceable by any party in litigation with the United States.” Mann Decl. Attachment
19 1 (Inspection Guidance) at inside cover.

20 Moreover, EPA, state, and tribal officials are entirely free to act at variance with the
21 document. *Id.* The memorandum transmitting the Inspection Guidance “request[s]” that the EPA
22 regional managers “distribute this guidance to your state lead agencies and tribal pesticide
23 programs and encourage you to discuss implementation with them.” Mann Decl. Attachment 1
24 (cover memorandum). This statement is further evidence that the Inspection Guidance is not
25 binding or mandatory in any sense on inspectors. The Inspection Guidance thus has no legal
26 effect on inspectors or others. *Cf. Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 252-53 (D.C.
27 Cir. 2014) (considering the agency’s characterization of its guidance in determining that EPA
28 guidance document was not a reviewable final agency action); (*Friends of Potter Marsh v.*

1 *Peters*, 371 F. Supp. 2d 1115, 1120-22 (D. Alaska 2005) (dismissing claims seeking review of
2 Federal Highway Administration guidance documents on the grounds the guidance documents
3 have no independent legal effect).

4 This is particularly true with respect to enforcement of FIFRA or the treated article
5 exemption. While the Inspection Guidance provides that “if the inspector suspects or has reason
6 to believe a treated seed is subject to registration (i.e., the seed is not in compliance with the
7 treated article exemption), plantings of that treated seed may nonetheless be investigated,” Mann
8 Decl., Attachment 1 at 7-8, the document is focused on how to conduct inspections to determine
9 if an incidence of bee deaths is associated with the use of pesticide—not whether any pesticides
10 should or should not be registered—and does not place any limits or requirements on inspectors
11 or federal, state, or tribal enforcement. With respect to those who sell or distribute treated seed,
12 the Inspection Guidance provides no assurance that any specific kind of treated seed will or will
13 not be deemed to have met the treated article exemption. For this same reason, the Inspection
14 Guidance in no way limits the enforcement of FIFRA where EPA finds that the treated article
15 exemption does not apply.

16 Plaintiffs have failed to meet their burden to demonstrate that the Inspection Guidance (or
17 any other action) constitutes “final agency action” as that term is used in the APA, and thus they
18 have not met their burden of demonstrating jurisdiction.

19 **II. Count II must be dismissed because there is no nondiscretionary duty identified**
20 **by Plaintiffs that is unreasonably delayed or unlawfully withheld.**

21 In Count II of the Complaint, Plaintiffs assert that “EPA has categorically failed to
22 enforce any FIFRA requirements against neonicotinoid-coated seeds,” and that EPA has made a
23 “policy choice not to regulate the sale, labeling, and planting of neonicotinoid-coated seeds” in
24 “abdication of the Agency’s statutory responsibilities.” ECF No. 1 ¶¶ 82, 83. Missing from
25 Count II is any citation to a nondiscretionary duty that EPA has failed to perform, a prerequisite
26 to an APA suit alleging a failure to act.

27 As noted above, the APA authorizes courts to “compel agency action unlawfully
28 withheld or unreasonably delayed.” 5 U.S.C. § 706(1). A claim seeking to compel agency action

1 asserted to be unreasonably delayed or unlawfully withheld can proceed only where a plaintiff
2 asserts that an agency has failed to take a *discrete action* that it is *required to take*. *S. Utah*
3 *Wilderness Alliance*, 542 U.S. at 64. A “discrete action” is a rule, order, license, sanction, or
4 relief. *Id.* at 62–63; *see* 5 U.S.C. § 551(13) (defining “agency action”); *see also S. Utah*
5 *Wilderness Alliance*, 542 U.S. at 63 (offering as examples of “discrete” agency action “the
6 failure to promulgate a rule or take some decision by a statutory deadline”). In addition, the
7 purportedly withheld action must not only be “discrete,” but also “legally *required*”—in the
8 sense that the agency's legal obligation is so clearly set forth that it could traditionally have been
9 enforced through a writ of mandamus. *S. Utah Wilderness Alliance*, 542 U.S. at 63; *see also*
10 *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010).

11 In *Southern Utah Wilderness Alliance*, the plaintiffs asserted that the Bureau of Land
12 Management failed to perform a nondiscretionary duty under the Federal Land Policy and
13 Management Act to manage wilderness study areas “in a manner so as not to impair the
14 suitability of such areas for preservation as wilderness.” 542 U.S. at 65 (citing 43 U.S.C. §
15 1782(c)). The Supreme Court affirmed the Tenth Circuit’s dismissal of the plaintiffs’ claim,
16 finding that the purpose of Section 706(1) of the APA is to order agencies to act only where the
17 agency fails to carry out a mandatory, nondiscretionary duty. *Id.* at 61-64. The Court further
18 recognized that the purpose of this limitation in failure to act claims under the APA is to “protect
19 agencies from undue judicial interference with their lawful discretion, and to avoid judicial
20 entanglement in abstract policy disagreements which courts lack both expertise and information
21 to resolve.” *Id.* at 66. As stated by the Supreme Court:

22 If courts were empowered to enter general orders compelling compliance with
23 broad statutory mandates, they would necessarily be empowered, as well, to
24 determine whether compliance was achieved—which would mean that it would
25 ultimately become the task of the supervising court, rather than the agency, to
26 work out compliance with the broad statutory mandate, injecting the judge into
day-to-day agency management.

27 *Id.* at 66-67.
28

1 Like the plaintiffs in *Southern Utah Wilderness Alliance*, the Plaintiffs in this case cite to
2 EPA's broad authority to implement FIFRA rather than any discrete action that EPA is required
3 to take. Plaintiffs point to EPA's authority to "enforce registration requirements and prevent
4 sales of misbranded pesticides," "to register pesticides," and "to exempt a pesticide from FIFRA
5 requirements." ECF No. 1 ¶ 81 (citing 7 U.S.C. §§ 136a(a), 136a(c)(5), 136k(a), 136l, 136(q),
6 and 136w(b)). Plaintiffs further allege that EPA has "failed to enforce any FIFRA requirements
7 against neonicotinoid-coated seeds." ECF No. 1 ¶ 82. But such "[g]eneral deficiencies" in
8 implementing FIFRA "lack the specificity requisite for agency action." *Southern Utah*
9 *Wilderness Alliance*, 542 U.S. at 66. Count II of the Complaint is nothing more than a "broad
10 programmatic attack" on the Agency's implementation of FIFRA, which is prohibited. *Id.* at 64;
11 *see also San Luis Unit Food Producers v. United States*, 709 F.3d 798, 803 (9th Cir. 2013)
12 (dismissing claim of a failure to act because the Bureau of Reclamation was not legally required
13 to operate the Central Valley Project to deliver plaintiffs' preferred amount water for irrigation
14 before it provided water for other purposes).

15 The Supreme Court's decision in *National Association of Home Builders v. Defenders of*
16 *Wildlife*, 551 U.S. 644 (2007), further clarified what types of agency actions are discretionary. In
17 concluding that EPA did not have discretion in the decision to transfer permitting authority to
18 state officials pursuant to Clean Water Act Section 402(b), 33 U.S.C. § 1342(b), the
19 Court stated that "[a]gency discretion presumes that an agency can exercise 'judgment' in
20 connection with a particular action." *Id.* at 668 (citing *Citizens to Pres. Overton Park, Inc. v.*
21 *Volpe*, 401 U.S. 402, 415-16 (1971)). The Court looked to the definition of "discretion" as "the
22 power or right to decide or act according to one's own judgment; freedom of judgment or
23 choice." *Id.* (citing Random House Dictionary of English Language 411 (unabridged ed. 1967)).

24 As *Home Builders* makes clear, and as set forth in greater detail below, actions that
25 involve an agency's exercise of judgment, such as the authority to enforce FIFRA requirements,
26 are necessarily discretionary. Plaintiffs recognize EPA's authority to regulate under and enforce
27 FIFRA, ECF No. 1 ¶ 81. Plaintiffs also acknowledge that in order to bring an action against EPA
28 under the APA for failure to act, they must identify a discrete action that EPA is required to take.

1 ECF No. 57 at 27-28 (citing *Southern Utah Wilderness Alliance*). But they do not cite any
2 nondiscretionary duty to enforce or regulate under FIFRA that EPA has failed to perform.

3 To the extent Plaintiffs assert that EPA has failed to perform a nondiscretionary duty in
4 the conduct of its pesticide registration program with respect to treated seeds, Plaintiffs
5 misapprehend the statutory and regulatory scheme governing that registration program, set forth
6 in 7 U.S.C. § 136a and 40 C.F.R. Part 152. EPA responds to applications for pesticide
7 registration submitted by persons who wish to become pesticide registrants; EPA grants or
8 denies applications depending upon whether those applications meet the statutory standards for
9 registration. 7 U.S.C. §136a(5), (6), and (7). EPA does not have any authority under FIFRA to
10 require any particular companies or individuals to apply for pesticide registrations; it is thus
11 axiomatic that EPA has no nondiscretionary duty under FIFRA to require the submission of an
12 application for pesticide registration.

13 To the extent that Plaintiffs contend that EPA has failed to perform a nondiscretionary
14 duty to pursue an enforcement action, Plaintiffs argument must be rejected. While FIFRA does
15 not require that any person or company ever obtain a pesticide registration, the statute does make
16 it illegal generally to sell a pesticide product in the United States if the pesticide product has *not*
17 been registered by EPA. See 7 U.S.C. §§136a(a), 136j(a)(1)(A). EPA is authorized to bring
18 enforcement actions against any person that the Agency finds is unlawfully selling or distributing
19 an unregistered pesticide, but that authority is discretionary and cannot be the basis for a claim
20 that the Agency has failed to perform a discrete, nondiscretionary duty.

21 **III. Enforcement of FIFRA is a discretionary action not subject to review.**

22 The APA precludes review of any agency action or inaction that is “committed to agency
23 discretion by law,” 5 U.S.C. § 701(a)(2), that is, when a statute is “drawn in such broad terms
24 that in a given case there is no law to apply.” *Citizens to Pres. Overton Park*, 401 U.S. at 410
25 (internal quotation marks and citation omitted). The Supreme Court made clear in *Heckler v.*
26 *Chaney* that an agency’s decision not to prosecute or enforce is generally committed to the
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28

1 agency's discretion and where the governing statute is written "in such broad terms that . . . there
2 is no law to apply." 470 U.S. 821, 830 (1985).⁹

3 Under FIFRA Section 13(a), the Administrator "may" take enforcement action when
4 certain circumstances are presented. 7 U.S.C. § 136k(a). The statute in no way removes the
5 Agency's discretion to enforce, and the *Heckler* presumption of non-reviewability applies. *See*
6 *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1032 (D.C. Cir. 2007) (discussing language
7 of governing statute in claims seeking to compel agency enforcement). FIFRA provides no
8 "meaningful standard" as to when or how EPA must act when deciding whether to commence an
9 enforcement action to prohibit distribution or sale of an unregistered pesticide. *See Nalco Co. v.*
10 *EPA*, 786 F. Supp. 2d 177, 184 (D.D.C. 2011) (recognizing that *Heckler* presumption applies to
11 bar claims to compel enforcement by agency under FIFRA); *see also In re Martex Farms, S.E.*,
12 13 E.A.D. 464, FIFRA Appeal 07-01, 2008 WL 429631, at *20 (E.P.A. Feb. 14, 2008)
13 ("Prosecutorial discretion may also extend to decisions regarding when to commence
14 enforcement actions, within the parameters of applicable statutes of limitations."). Under the
15

16 ⁹ In light of the *Heckler* decision, courts have uniformly held that an administrative agency
17 cannot be ordered to take an enforcement action. *See Sierra Club v. Whitman*, 268 F.3d 898,
18 902-03 (9th Cir. 2001) (Clean Water Act provision stating that EPA "shall issue an order"
19 requiring compliance with permit "does not mandate enforcement by the Administrator, even
20 after a finding of violation"); *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1172 (9th Cir.
21 2001) (holding that "the FERC's decision not to investigate the alleged violations of Tacoma's
22 license was within the Commission's discretion and is therefore unreviewable by this court"),
23 *amended on other grounds*, 282 F.3d 609 (9th Cir. 2002); *N.Y. Pub. Interest Research Grp. v.*
24 *Whitman*, 321 F.3d 316, 332 (2d Cir. 2003) ("Allowing parties outside an agency to trigger its
25 enforcement mechanism would invariably entangle reviewing courts in its internal operations
26 and would involve technical and prudential judgments lying largely outside the expertise of
27 courts."); *Salmon Spawning & Recovery Alliance v. U. S. Customs & Border Prot.*, 550 F.3d
28 1121, 1128 (Fed. Cir. 2008) (lower court properly dismissed plaintiffs' action for lack of subject
matter jurisdiction because the agency's alleged failure to enforce an import ban on ESA-listed
species was not reviewable).

1 Supreme Court’s test in *Heckler* and *Citizens to Preserve Overton Park*, FIFRA provides no
 2 “law to apply” in reviewing a decision *not* to enforce FIFRA in a particular way.

3 Indeed, Plaintiffs acknowledge that FIFRA assigns EPA the discretion to enforce
 4 FIFRA’s registration requirements. ECF No. 1 ¶¶ 74, 81; *see, e.g., In the Matter of Home Depot,*
 5 *U.S.A., Inc.*, Consent Agreement and Final Order, 2008 WL 2437824 (E.P.A. Region IV June 3,
 6 2008) (entered after EPA made findings of noncompliance with treated article exemption of 40
 7 C.F.R. § 152.25(a)). Because EPA maintains the discretion to decide when and how to enforce
 8 FIFRA’s requirements, Plaintiffs may not seek review of their claim that “EPA has categorically
 9 failed to enforce any FIFRA requirements against neonicotinoid-coated seeds.” ECF No. 1 ¶ 82.

10 Further, Congress also specifically considered—but decided against—giving private
 11 litigants like Plaintiffs the right to enforce FIFRA. *See Almond Hill School v. U.S. Dep’t of*
 12 *Agric.*, 768 F.2d 1030, 1037-38 (9th Cir. 1985) (recounting legislative history of FIFRA’s
 13 enforcement scheme, including Congress’s proposal and eventual rejection of a provision for
 14 private right of action); *see also No Spray Coal. v. City of New York*, 252 F.3d 148, 150 (2d Cir.
 15 2001) (“FIFRA is not enforceable by a private right of action.”). This Court lacks jurisdiction to
 16 hear Plaintiffs’ attempt to compel EPA to enforce FIFRA in the way Plaintiffs deem appropriate.

17 CONCLUSION

18 Plaintiffs have failed to identify an applicable waiver of sovereign immunity, and the
 19 Complaint must be dismissed for lack of jurisdiction.

20
 21 Dated: September 16, 2016

Respectfully Submitted,

22 JOHN C. CRUDEN

23 Assistant Attorney General

24 Environment & Natural Resources Division

25 /s/ Martha C. Mann

26 Martha C. Mann

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2016, a true and correct copy of the foregoing document was filed electronically with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Martha C. Mann
Martha C. Mann
United States Department of Justice