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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al.,  
Plaintiffs,  
v.  
SONNY PERDUE, et al.,  
Defendants.

Case No. 15-cv-01590-HSG

**ORDER GRANTING DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING PLAINTIFFS’ MOTION  
FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 96, 97

United States District Court  
Northern District of California

On April 7, 2015, a collective of non-profit organizations and commercial entities (“Plaintiffs”) brought suit against representatives of the United States Department of Agriculture (“USDA”), the Agricultural Marketing Service, and the National Organic Program (“NOP”) (collectively, “Defendants”), asserting claims for declaratory and injunctive relief under the Administrative Procedures Act (“APA”), 5 U.S.C. § 553, and the Organic Foods Production Act (“OFPA”), 7 U.S.C. §§ 6501–6523. Currently pending before the Court are the parties’ motions for summary judgment. *See* Dkt. Nos. 96 (“Defs. Mot.”), 97 (“Pls. Mot.”), 99 (“Defs. Opp.”), 100 (“Pls. Opp.”). On November 9, 2017, the Court heard argument on the motions. After carefully considering the parties’ arguments, the Court **GRANTS** Defendant’s motion for summary judgment, and **DENIES** Plaintiff’s motion for summary judgment.

**I. BACKGROUND**

The basic facts are not in dispute. This case arises from a notice (“the Sunset Notice” or “the Notice”) promulgated by USDA that alters the review process for determining which substances may be used in food certified as “organic” under the OFPA. The OFPA requires the Secretary of Agriculture (“the Secretary”) to establish a “National List” of substances that fall into specific groupings, including synthetic substances permitted to be used in organic products

1 (referred to as “exempted substances”), and non-synthetic substances that are prohibited from use  
2 in organic products (referred to as “prohibited substances”). *See* Defs. Mot. at 2; 7 U.S.C. §  
3 6517(b)-(c). The OFPA requires the National Organic Standards Board (“NOSB”) to develop the  
4 National List for submission to the Secretary. The NOSB is composed of fifteen members  
5 appointed by the Secretary. The Secretary cannot exempt a synthetic substance unless the NOSB  
6 proposes to do so. 7 U.S.C. § 6517(d).

7 The OFPA also contains a “sunset provision,” which provides that no substances on the  
8 National List are “valid unless the [NOSB] has reviewed such exemption or prohibition as  
9 provided in this section within 5 years.” 7 U.S.C. § 6517(e). Prior to the Notice that triggered this  
10 lawsuit, USDA’s regulations required the NOSB to consider public comments and vote on “the  
11 continuation of specific exemptions and prohibitions contained on the National List.” NOP,  
12 Sunset Review, 70 Fed. Reg. 35,177 at 35,178 (June 17, 2005). Under that framework, a vote of  
13 two-thirds of the NOSB was required to recommend that a substance be renewed. *See* 7 U.S.C. §  
14 6518(i). If two-thirds of the NOSB did not favor renewal, the substance expired and the Secretary  
15 was required to remove the substance from the National List. *See* Pls. Mot. at 5; 7 U.S.C. §  
16 6517(d).

17 The USDA’s September 16, 2013 notice enacted a new eight-step sunset review procedure.  
18 NOP, Sunset Process, 78 Fed. Reg. 56,811, 56,812 (Sept. 16, 2013). Pursuant to that new  
19 procedure, the full NOSB does not vote to renew each substance on the National List. *Id.* at  
20 56,814. Instead, a NOSB subcommittee examines each substance set for sunset review and  
21 proposes to the full NOSB a list of substances to be removed from the National List. *Id.* It is only  
22 those substances that a NOSB subcommittee member proposes for removal, and that a member of  
23 the NOSB subsequently moves to remove, that are voted upon by the full NOSB. *Id.* A motion to  
24 remove must receive two-thirds of the votes cast by the NOSB to pass. *See* Defs. Mot. at 6. Once  
25 all motions have been voted on, the full NOSB completes its sunset review. 78 Fed. Reg. 56,814.

26 Following the NOSB’s final vote, the NOSB Chair compiles all reviews and  
27 recommendations for removal, and transmits it to USDA for consideration. *Id.* USDA then  
28 examines this document, and if it elects to renew substances that have undergone sunset review,

1 USDA publishes in the Federal Register a list of all substances that are renewed for another five  
2 years on the National List. *Id.* If USDA initiates a proposed removal of a substance from the  
3 National List, USDA publishes in the Federal Register the proposal to remove a substance and  
4 requests public comment. *Id.* at 56,815. Based on comments received, USDA determines whether  
5 to finalize a substance’s removal from the National List. *Id.*

6 Following issuance of the Notice, Plaintiffs filed this action for declaratory and injunctive  
7 relief. *See* Dkt. No. 1. On July 17, 2015, Defendants moved to dismiss the complaint for lack of  
8 jurisdiction, or alternatively, for failure to state a claim. Dkt. No. 16. The Court granted  
9 Defendant’s motion on October 9, 2015, but provided Plaintiffs with leave to amend their  
10 complaint. Dkt. No. 49. On October 30, 2015, Plaintiffs filed the first amended complaint. Dkt.  
11 No. 50 (“FAC”). Defendants moved to dismiss the FAC, and the Court denied the motion. Dkt.  
12 Nos. 53, 61 (“Prior Order”). The parties finalized the Administrative Record on August 11, 2017.  
13 *See* Defs. Mot. at 8–9.

## 14 **II. DISCUSSION**

15 Defendants move for summary judgment on two alternative grounds. First, Defendants  
16 argue that the Notice is not “final agency action” under the APA, and is therefore immune from  
17 judicial review. Defs. Mot. at 10–13. Second, if review is permissible, Defendants contend that  
18 the Notice satisfies the APA’s procedural requirements and is fully consistent with the OFPA. *Id.*  
19 at 13–22. Plaintiffs also move for summary judgment on the merits of their OFPA and APA  
20 claims. Pls. Mot. at 10–24. Specifically, Plaintiffs argue that the Notice contravenes the  
21 substantive provisions of the OFPA, and is therefore arbitrary and capricious. In addition,  
22 Plaintiffs argue that the Notice violates the APA because it is a legislative rule enacted without  
23 prior notice-and-comment. The Court turns first to the issue of whether the issuance of the Notice  
24 is reviewable.

25 Final agency action is a prerequisite to judicial review under the APA. 5 U.S.C. § 704  
26 (“Agency action made reviewable by statute and final agency action for which there is no other  
27 adequate remedy in a court are subject to judicial review.”). As the parties acknowledged at oral  
28 argument, there is no dispute that this requirement applies to Plaintiffs’ claims. *See also* Defs.

1 Mot. at 10; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (“When, as here, review is  
2 sought not pursuant to specific authorization in the substantive statute, but only under the general  
3 review provisions of the APA, the agency action in question must be final agency action.”).

4 For agency action to be final, “the action must (1) ‘mark the consummation of the agency’s  
5 decisionmaking process’ and (2) ‘be one by which rights or obligations have been determined, or  
6 from which legal consequences will flow.’” *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465  
7 F.3d 977, 982 (9th Cir. 2006) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). “The core  
8 question is whether the agency has completed its decisionmaking process, and whether the result  
9 of that process is one that will directly affect the parties.” *Id.* (quotation omitted). In applying  
10 *Bennett*’s principles “certain factors provide an indicia of finality, such as whether the action  
11 amounts to a definitive statement of the agency’s position, whether the action has a direct and  
12 immediate effect on the day-to-day operations of the party seeking review, and whether immediate  
13 compliance with the terms is expected.” *Indus. Customers of Nw. Utilities v. Bonneville Power*  
14 *Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (quotation and alterations omitted).

15 Defendants argue that the Notice does not satisfy either of *Bennett*’s requirements for final  
16 agency action. Defs. Mot. at 9. Defendants claim that the Notice does not consummate the  
17 USDA’s decisionmaking process regarding renewal or removal of substances from the National  
18 List; rather, the Notice simply alters the method by which substances are proposed for removal or  
19 renewal from the National List. *See* Defs. Mot. at 3–6, 11. Defendants similarly contend that the  
20 Notice does not itself impart or remove any public rights or legal obligations. *Id.* at 12–13. On  
21 the other hand, Defendants acknowledge that USDA’s actual renewal or removal decision does  
22 constitute final agency action. *See id.* at 11–12. According to Defendants, Plaintiffs may  
23 accordingly challenge that “consummating” agency action. *See id.*

24 In response, Plaintiffs present three reasons why they satisfy *Bennett*. First, Plaintiffs  
25 argue that the Notice is final in that it “definitively mark[s] the consummation of USDA’s process  
26 in overhauling the sunset review process.” Pls. Mot. at 20; Pls. Opp. at 21. Second, Plaintiffs  
27 highlight that the Notice requires immediate compliance by USDA, even if final renewal and  
28 removal decisions are subsequently made. Pls. Opp. at 21–22. Third, Plaintiffs claim that the

1 Notice’s change to voting procedures shifts the presumption in favor of automatic renewal, instead  
 2 of removal. *See* Pls. Mot. at 13–14; Pls. Opp. at 21–22. Plaintiffs accordingly assert that this shift  
 3 directly impacts their day-to-day operations, as new voting procedures will discourage individuals  
 4 from participating in the sunset review process. *See* Pls. Opp. at 22; FAC, Ex. A, A–67. Plaintiffs  
 5 also claim that this change will reduce the quality of organic foods by making it easier to include  
 6 synthetic materials in organic products. Pls. Opp. at 26; *see* FAC Ex. B.

7 The Court concludes that the Notice is not reviewable final agency action. The Notice  
 8 works a change to the method by which a substance is proposed for inclusion on the National List.  
 9 That change is dispositive only of a follow-on substantive decision: the Secretary’s  
 10 renewal/removal determination. USDA’s judgment on whether to renew or remove a substance,  
 11 in turn, represents the agency’s consummating action. The Notice does not itself alter any criteria  
 12 or standards for the evaluation of a particular substance. Though Plaintiffs are correct that  
 13 Defendants must immediately comply with the Notice’s provisions, *see* Pls. Mot. at 20, that itself  
 14 is not sufficient to create final agency action under the APA. *See Indus. Customers of Nw.*  
 15 *Utilities*, 408 F.3d at 646 (“The fact that a statement may be definitive on some issue is  
 16 insufficient to create a final action subject to judicial review.”); *Ctr. For Food Safety v. Johanns*,  
 17 451 F. Supp. 2d 1165, 1188 (D. Haw. 2006) (finding that publication of “coordinated, internal  
 18 protocols relating to issuing of permits” was not final agency action because the procedures did  
 19 not call for “any site-specific action” or “specific actions directly impacting the physical  
 20 environment” (quotation and alterations omitted)).

21 Though the parties recognized at oral argument a lack of analogous binding authority,  
 22 several decisions of the Ninth Circuit support the Court’s conclusion. For instance, in *Indus.*  
 23 *Customers of Nw. Utils v. Bonneville Power Admin.*, the Ninth Circuit held that there was no final  
 24 agency action created by an agency’s decision to commence a power rate hearing that in turn  
 25 determined whether a power rate adjustment would be triggered. 408 F.3d 638, 641–42 (9th Cir.  
 26 2005). In that case, the Bonneville Power Administration (“BPA”) had responsibility for deciding  
 27 whether to hold an initial rate hearing. *Id.* The Federal Energy Regulatory Commission  
 28 (“FERC”) had limited authority to “affirm or remand” BPA’s rate, but could not modify BPA’s

1 proposed rate. *Id.* at 644. BPA argued that its trigger determination was not subject to judicial  
2 review until FERC confirmed and approved the rate, thereby rendering a final rate determination.

3 The *Industrial Customers* court agreed with BPA. It turned first to whether jurisdiction  
4 existed under the Northwest Power Act (“NPA”), which provided review of “final actions,”  
5 including “final rate determinations” by FERC. The plaintiffs argued that FERC’s limited role in  
6 the rate-setting process would deny them the “opportunity to challenge the BPA’s trigger  
7 decision” once the rates were set. *Id.* at 645. Plaintiffs contended that independent review of the  
8 BPA’s decision to commence a rate hearing was warranted. Notably, the Ninth Circuit stated:

9 [T]he absence of FERC review does not preclude judicial review of  
10 the BPA’s trigger determination after final FERC action. Indeed,  
11 the BPA concedes that the petitioners have the full right to judicial  
review of its trigger decision as part of the petition for review of the  
ultimate FERC rate decision.

12 *Id.* at 645. The Court therefore concluded that the petitions were not ripe, but would be “a proper  
13 part of a petition for review of the final FERC rate decision.” *Id.*

14 Turning then to a “catchall” jurisdictional provision in the NPA, the *Industrial Customers*  
15 court considered whether the BPA’s trigger determination comprised final agency action under the  
16 “more general doctrine of finality in administrative agency law.” *See id.* (citing *Puget Sound*  
17 *Energy, Inc. v. United States*, 310 F.3d 613, 624 (9th Cir. 2002)). Following the two-step inquiry  
18 set forth in *Bennett*, the Court held that the BPA’s trigger determination did not satisfy the test’s  
19 first prong. Specifically, the Court found that the BPA’s decision was merely “interlocutory,”  
20 constituting only the “beginning of the decision-making process.” *Id.* at 646. The court observed:  
21 “Although it is the predicate act for rate readjustment, the trigger determination itself has no final  
22 consequences. The trigger decision only determines whether a hearing will or will not occur.” *Id.*  
23 at 647. Though recognizing that BPA’s trigger determination could have “profound” economic  
24 consequences, the Court concluded that the plaintiffs could bring a judicial challenge only when  
25 FERC actually approved a rate readjustment. *Id.*

26 Similarly, in *F.T.C. v. Standard Oil Co. of California*, the U.S. Supreme Court held that  
27 the Federal Trade Commission (“FTC”) did not act with finality by serving a complaint averring  
28 that it had “reason to believe” that the plaintiff had violated the Federal Trade Commission Act.

1 See 449 U.S. 232, 239 (1980). In reaching this holding, the Court observed that it had previously  
2 dealt with the APA’s finality requirement in a “pragmatic way.” *Id.* For instance, the Court found  
3 final agency action subject to judicial review in *Abbott Laboratories v. Gardner*, where the  
4 challenged action imposed a risk of “serious criminal and civil penalties” on non-compliant  
5 manufacturers. *Id.* at 242 (citing 387 U.S. 136, 149 (1967)). In contrast, the Court observed that  
6 FTC’s averment was “materially different,” in that it “represent[ed] a threshold determination that  
7 further inquiry is warranted and that a complaint should initiate proceedings.” *Id.* at 240–41. The  
8 Court explained:

9 To be sure, the issuance of the complaint is definitive on the  
10 question whether the Commission avers reason to believe that the  
11 respondent to the complaint is violating the Act. But the extent to  
12 which the respondent may challenge the complaint and its charges  
13 proves that the averment of reason to believe is not ‘definitive’ in a  
14 comparable manner to the regulations in *Abbott Laboratories* and  
15 the cases it discussed.

16 *Id.* at 241. Drawing on ripeness principles, the Court concluded that if and when the FTC made a  
17 final decision as to the plaintiff’s liability, he could seek judicial review. *See id.* at 242 (observing  
18 that judicial review of the complaint “at the least is inefficient and upon completion of the agency  
19 process might prove to have been unnecessary . . . delay[ing] resolution of the ultimate question  
20 whether the Act was violated”). The Court recognized, moreover, that allowing for review at that  
21 early stage would entitle “every respondent to a Commission complaint” to judicial redress just by  
22 virtue of the agency’s process. *Id.* at 242–43. The Court rejected that result, concluding that  
23 judicial review “should not be a means of turning prosecutor into defendant before adjudication  
24 concludes.” *Id.* at 243.

25 The Ninth Circuit recently reaffirmed this reasoning in *Int’l Bhd. of Teamsters v. U.S.*  
26 *Dep’t of Transportation*, 861 F.3d 944, 952 (9th Cir. 2017). In *Teamsters*, the Ninth Circuit  
27 considered the finality of three actions by the Federal Motor Carrier Safety Administration  
28 (“FMCSA”): first, the grant of a permit allowing an internationally-domiciled trucking company,  
Trajosa SA de CV (“Trajosa”), to operate in the United States; second, the denial of the plaintiff’s  
challenge to the FMCSA’s decision to grant that permit; and third, the issuance of a “Pilot  
Program Report,” which set forth findings of a pilot study on which the FMCSA based its

1 permitting decision. *See* 861 F.3d at 947–49, 951–52. Considering each action in turn, the Ninth  
 2 Circuit found that FMCSA’s grant of Trajosa’s permit was final agency action because it “marked  
 3 the consummation of the agency’s decisionmaking process to grant long-haul permits to Mexico-  
 4 domiciled carriers.” *Id.* at 952. The court reasoned that “[l]egal consequences flowed from the  
 5 decision, because it allowed Trajosa to operate lawfully anywhere in the United States.” *Id.*  
 6 Similarly, the court held that the FMCSA acted with finality when it denied the plaintiff’s  
 7 challenge to Trajosa’s permit: that denial “marked the consummation of the agency’s resolution of  
 8 the [the plaintiff’s] challenge, and had legal consequences because it enabled Trajosa to proceed  
 9 with its operations.” *Id.* (citing *Wind River Mining Corp. v. United States*, 946 F.2d 710, 716 (9th  
 10 Cir. 1991)).

11 In contrast, even though the FMCSA decided to accept applications pursuant to the Pilot  
 12 Program Report, the *Teamsters* court concluded that the report was not final agency action. *Id.*  
 13 The Ninth Circuit explained:

14 The report had no legal consequences. To be sure, it was the final  
 15 step in completing the pilot program, clearing the way for the  
 16 permitting of Mexico-domiciled carriers. But the submission of the  
 17 report did not change the legal situation, because the FMCSA  
 18 maintained discretion over whether or not to begin issuing permits  
 to Mexico-domiciled carriers. In other words, the FMCSA could  
 have lawfully declined to issue permits despite completing the pilot  
 program. Therefore, we may not review the Pilot Program Report,  
 and must dismiss the petition challenging it.

19 *Id.* (emphasis in original and citation omitted).

20 The reasoning in *Teamsters* applies here with particular force. Like the Pilot Program  
 21 Report, the NOSB voting process merely “clear[s] the way” for the agency’s subsequent  
 22 substantive decision: whether to actually remove or renew a substance on the National List. *See*  
 23 *id.* Even Defendants admit that Plaintiffs can file suit when USDA undertakes its actual removal  
 24 or renewal decision. Defs. Mot. at 11–12; *cf. Oregon Nat. Desert Ass’n*, 465 F.3d at 985–89  
 25 (finding reviewable agency procedures governing grazing licenses because the decision to license  
 26 determined permittees’ legal rights and concomitant enforcement actions). As with the FMCSA in  
 27 *Teamsters*, individual NOSB members still have discretion to approve or deny a substance’s  
 28 renewal during sunset review. *See* 861 F.3d at 952. USDA also maintains discretionary authority



1 in deciding whether to accept NOSB’s renewal or removal recommendation.

2 Plaintiffs argue that the Notice has a direct and immediate impact on their operations by  
 3 shifting the presumption in favor of renewal, making it more likely that synthetic substances will  
 4 be improperly incorporated into organic products. Pls. Mot. at 20–21, 24–26; Pls. Opp. at 20.<sup>1</sup>  
 5 Even accepting Plaintiffs’ claim, this presumptive shift in no way guarantees that a substance is  
 6 actually renewed or removed. In other words, there is no binding outcome or definitive result  
 7 worked by the Notice’s procedural change. Rather, it is the final renewal/removal determination  
 8 that represents the agency’s “last word from which binding obligations flow,” and that has a  
 9 “direct and immediate effect on the day-to-day business of” the relevant stakeholders. *Oregon*  
 10 *Nat. Desert Ass’n.*, 465 F.3d at 990 (quotations and alterations omitted); *cf. Defs. of Wildlife v.*  
 11 *Tuggle*, 607 F. Supp. 2d 1095, 1112 (D. Ariz. 2009) (reasoning that the agency’s action was final  
 12 because it was “couched in terms of an operating instruction,” and that operating instructions are  
 13 final because they represent the agency’s “the last word on a discrete, site-specific action from  
 14 which binding obligations flow that have a direct and immediate effect on the day-to-day business  
 15 of the permit holders” (citing *Oregon Nat. Desert Ass’n.*, 465 F.3d at 977, 984–86)).

16 Plaintiffs’ challenge also presents ripeness concerns similar to those in *Teamsters*.  
 17 Because Plaintiffs challenge a procedural change, as opposed to the agency’s final  
 18 removal/renewal decision, the harms identified in the FAC—for instance, the unlawful inclusion  
 19 of certain compounds in organic foods—may never materialize. Plaintiffs’ desired outcome might  
 20 even occur should the NOSB vote against renewing a harmful substance. These scenarios  
 21 illustrate that it would be premature for the Court to intervene at this stage. *See Sierra Club v.*

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 23 <sup>1</sup> For support, Plaintiffs rely on a list of voting tallies for synthetic substances taken at the fall  
 24 2015 NOSB meeting. *See* Plts. Mot. at 20–21, 25; FAC, Ex. B (providing a “list of substances and  
 25 respective outcomes on motions to remove” synthetic ingredients from the National List).  
 26 According to Plaintiffs, this document shows that the Notice has increased the propensity for  
 27 harmful synthetics to enter organic products. Defendants argue that this document is not properly  
 28 before the Court, as it contains post-decisional information outside the administrative record. *See*  
*Tri-Valley CAREs v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012). Even if the Court  
 considers this document, this list of substances and voting outcomes does not show that the Notice  
 was dispositive for any member’s particular vote: in other words, the list does not show that  
 NOSB members would have voted differently (or that a substance would have appeared on the  
 National List) but for the Notice. Nor does this table address the fact that USDA ultimately  
 retains discretion to remove or renew a given substance.

1 *United States Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1362 (9th Cir. 1987) (“We will not  
2 entertain a petition where pending administrative proceedings or further agency action might  
3 render the case moot and judicial review completely unnecessary.”). This is particularly so given  
4 that Plaintiffs can incorporate their process-based claims into any future challenge to the agency’s  
5 renewal/removal decision. *See* Defs. Opp. at 17 n.10; *City of San Diego v. Whitman* (“If and when  
6 the city is aggrieved by the EPA’s decision regarding its application, the City’s recourse is to  
7 appeal to the Environmental Appeals Board . . . It is the [Board’s] decision that will constitute the  
8 ‘consummation of the agency’s decision-making process.’”). Plaintiffs do not explain how they  
9 are precluded from challenging the Notice if and when a harmful substance is wrongly renewed.

10 Plaintiffs’ primary authorities can be distinguished on this basis. At oral argument,  
11 Plaintiffs identified *Salmon River Concerned Citizens v. Robertson* as providing Plaintiffs with  
12 some independent right to challenge USDA’s internal procedural change. *See* Pls. Opp. at 24 n.8  
13 (citing 32 F.3d 1346, 1348 (9th Cir. 1994)). In *Salmon River*, the Ninth Circuit held that citizen  
14 groups had standing to challenge a Final Environmental Impact Statement (“FEIS”) prepared by  
15 the U.S. Forest Service, which authorized “district foresters” to use herbicides on certain National  
16 Forest lands. *See* 32 F.3d 1348, 1355. Drawing on its prior decision in *Idaho Conservation*  
17 *League v. Mumma*, the Ninth Circuit rejected the Forest Service’s position that a challenge to the  
18 FEIS would not be ripe “until a district forester authorizes a specific herbicide application,  
19 because only a specific herbicide application would harm [the plaintiffs].” *Id.* at 1355 (citing 956  
20 F.2d 1508, 1515 (9th Cir. 1992)). The *Salmon River* court read *Idaho Conservation League* as  
21 holding that:

22 [P]laintiffs need not wait to challenge a specific project when their  
23 grievance is with an overall plan. If the agency action only could be  
24 challenged at the site-specific development stage, the underlying  
25 programmatic authorization would forever escape review. To the  
26 extent that the plan pre-determined the future, it represents a  
27 concrete injury that plaintiffs must, at some point, have standing to  
28 challenge. That point is now, or it is never.

26 *Id.* (alterations and quotations omitted). The court in *Salmon River* subsequently held that “[t]o  
27 the extent that the FEIS here sets guidelines that determine future herbicide applications, the

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1 Service’s failure to comply with NEPA represents a concrete injury.” *Id.* The court accordingly  
2 found that the challenged FEIS was “ripe for review.” *Id.*


3 The issues presented in *Salmon River* are different from those in this action in several  
4 respects. First, the *Salmon River* court addressed whether the plaintiff’s harm was cognizable in  
5 the context of standing; the court did not squarely address the issue of finality. Second, and  
6 assuming that the court’s reasoning applies, the Notice does not “pre-determine” USDA’s actual  
7 renewal/removal decision. As discussed above, the Notice does not alter any substantive criteria  
8 for deciding which substances are included on the National List, and USDA retains ultimate  
9 discretion over whether to accept NOSB’s renewal recommendation. Defs. Mot. at 15–16. Third,  
10 Plaintiffs here are not precluded from asserting procedural harms stemming from the Notice in a  
11 suit challenging a substance’s allegedly wrongful renewal. Plaintiffs must accordingly await that  
12 decision for the Court to properly review USDA’s actions.<sup>2</sup>

13 **III. CONCLUSION**

14 For these reasons, the Court **GRANTS** Defendants’ motion for summary judgment, and  
15 **DENIES** Plaintiffs’ motion. The clerk is directed to enter judgment in accordance with this order  
16 in favor of Defendants and to close the case.

17 **IT IS SO ORDERED.**

18 Dated: 5/24/2018

19   
20 HAYWOOD S. GILLIAM, JR.  
21 United States District Judge

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28 <sup>2</sup> Because the Court concludes that it lacks jurisdiction to review USDA’s actions, the Court does not address the merits of Plaintiff’s APA and OFPA claims. *See* Defs. Mot. at 10.