UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR FOOD SAFETY, et al., Plaintiffs, v. SONNY PERDUE, et al., Defendants.	Case No. 20-cv-00256-JSW **ORDER DENYING MOTION TO DISMISS** Re: Dkt. No. 28

Now before the Court for consideration is the motion to dismiss filed by Defendants Sonny Perdue, in his official capacity as the Secretary of the U.S. Department of Agriculture, Mindy Brashears in her official capacity as the Deputy Under Secretary for Food Safety, the Food Safety and Inspection Services ("FSIS"), and the U.S. Department of Agriculture ("USDA") (collectively, "Defendants"). The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it finds the motion suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). The Court HEREBY DENIES Defendants' motion.

BACKGROUND

Plaintiffs Center for Food Safety ("CFS"), Food & Water Watch, Inc. ("FWW"), and the Humane Farming Association ("HFA"), as well as an individual Robin Mangini (collectively, "Plaintiffs") bring this action challenging the implementation of the Modernization of Swine Slaughter Inspection, 85 Fed. Reg. 52, 300 (Oct. 11, 2019), promulgated by the FSIS of the USDA, which became effective on December 2, 2019 ("Final Rule").

CFS is an environmental advocacy organization working to protect human health and the environment by curbing the use of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. (FAC ¶ 8.) FWW is a consumer advocacy

organization working to ensure safe food and clean water. (*Id.* ¶ 9.) HFA is an animal protection and consumer advocacy organization working to advance the welfare of farm animals and protect the health of Americans consuming animal products. (*Id.* ¶ 10.) Plaintiff Robin Mangini is a member of CFS and FWW and a regular consumer of pork. (*Id.* ¶ 12.)

Plaintiffs allege that the Final Rule, which implements the New Swine Inspection System ("NSIS"), eliminates important aspects of the inspection process in violation of the Administrative Procedure Act ("APA") and the Federal Meat Inspection Act, 21 U.S.C. section 601, *et seq.* ("FMIA"). (*Id.* ¶ 1.) Congress passed the FMIA to ensure that meat and meat food products distributed to consumers are wholesome, not adulterated, and properly marked, labeled, and packaged. (*Id.* ¶ 19.) To achieve this goal, Congress authorized the Secretary of Agriculture to issue regulations aimed at protecting consumers from unwholesome and adulterated meat food products. (*Id.*) Regulations under the FMIA establish a scheme requiring federal government inspection of animals, including swine, before they are slaughtered and inspection of carcasses after slaughter. (*Id.* ¶ 20.)

Plaintiffs allege that the Final Rule's adoption of the NSIS marks a "radical transformation" of the federal government's inspection of swine and swine carcasses. (*Id.* ¶ 21.) The prior inspection scheme required federal government inspectors to inspect swine before slaughter, tagging and separating animals indicating signs of disease from other animals. (*Id.* ¶¶ 21, 28-48.) After slaughter, federal inspectors appraised the carcass of each animal, condemned animals found to be adulterated, and supervised the disposal of the condemned animals to ensure they did not enter the food supply. (*Id.* ¶¶ 21, 49-79.)

Plaintiffs allege that the NSIS permits plant employees to conduct the pre- and post-slaughter inspections instead of federal inspectors. (*Id.* ¶¶ 22-23.) Plaintiffs allege that under the Final Rule, plant employees are not required to receive inspection training, which will increase the amount of adulterated or contaminated swine products entering the food market and will increase the risk of foodborne illness and increased prices. (*Id.* ¶ 23.) Plaintiffs also allege that the NSIS calls for increased line speeds, which will diminish the ability of inspectors to identify potentially diseased or adulterated carcasses. (*Id.* ¶ 62.) Plaintiffs allege that the Final Rule revokes *E. coli*

and *salmonell*a testing standards and gives establishments the ability to determine microbiological sampling plans independently. (*Id.* ¶¶ 85, 181-183.) It is anticipated that plants producing ninety-three percent of the slaughtered swine in the United States will adopt the NSIS within five years. 84 Fed. Reg. 52, 322.

Plaintiffs allege that their interests, organizationally and through their members, are being and will be adversely affected by the implementation of the Final Rule. (FAC ¶ 322.) Plaintiffs allege that the NSIS puts the health and safety of their members in jeopardy by increasing the risk of contracting foodborne illness. (*Id.*) Plaintiffs allege that although their members would like to continue consuming pork, they will be unable to avoid pork produced in plants that have adopted the NSIS procedures outlined in the Final Rule. (*Id.*) Plaintiffs seek declaratory and injunctive relief.

The Court will address additional facts as necessary in the analysis.

ANALYSIS

A. Applicable Legal Standard.

Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Article III of the Constitution requires that a plaintiff have standing to assert claims in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Challenges to Article III standing implicate a court's subject matter jurisdiction and therefore are properly raised under Federal Rule of Civil Procedure 12(b)(1). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "Federal courts are courts of limited jurisdiction," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction" unless otherwise shown. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Where a defendant challenges plaintiff's standing based on the allegations in the complaint, the challenge is known as a facial challenge. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (citations omitted).

B. Plaintiffs Sufficiently Allege Associational Standing.

Defendants move to dismiss the claims of individual Plaintiff Robin Mangini and the organizational Plaintiffs on behalf of their members for lack of Article III standing. To establish

standing, a plaintiff must show it "(1) suffered injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Under the doctrine of associational standing, an association has standing to sue on behalf of its members when: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Security*, 279 F. Supp. 3d 1011, 1034 (N.D. Cal. 2018).

The parties disagree about the standard that should be applied to analyze standing in an increased risk of harm situation such as this. Defendants argue that the "certainly impending" standard set forth in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) applies. Plaintiffs, however, argue that allegations establishing a credible threat of future harm suffices to establish standing in this case.

In *Clapper*, the Supreme Court addressed whether plaintiffs had standing based on the risk that surveillance procedures authorized by the Foreign Intelligence Surveillance Act would cause them future harm. The plaintiffs were "attorneys and human rights, labor, legal, and media organizations whose work allegedly require[d] them to engage in sensitive and sometimes privileged telephone and e-mail communications with ... individuals located abroad," and they sued to invalidate a portion of the act because there was "an objectively reasonable likelihood that their communications [would] be acquired […] at some point in the future." *Id.* at 401. The Supreme Court held that the plaintiffs' injury was too speculative to be "certainly impending" because no interceptions had yet occurred and because the alleged injury rested on a series of inferences. *Id.* at 410-11. Defendants argue that Plaintiffs' injury here, like in *Clapper*, rests on a series of inferences that render it too speculative to establish Article III standing.

In support of their argument, Defendants rely heavily on *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015), which addressed a rule making similar changes to the poultry inspection process. In that case, the D.C. Circuit found that to satisfy Article III's standing

requirements, the plaintiffs had to demonstrate that the final rule at issue substantially increased the risk of contracting foodborne illness, which required the plaintiffs to allege *both* a substantially increased risk of harm and a substantial probability of harm with that increase taken into account. 808 F.3d at 914.

The Court is not persuaded that the approach applied by the D.C. Circuit and advocated by Defendants here is widely used in the Ninth Circuit in cases like this one. Although Defendants point to several Ninth Circuit decisions post-*Clapper* that applying the "certainly impending" and "substantial risk" standard, none expressly applies the two-prong approach taken in *Food & Water Watch II*. Moreover, Defendants' cited Ninth Circuit cases are factually distinguishable from the present case. For example, in *Munns v. Kerry*, 782 F.3d 402 (9th Cir. 2015), the Ninth Circuit determined that the plaintiff lacked standing to challenge a State Department policy where the policy was no longer in effect and the plaintiff no longer worked as a security contactor. *Id.* at 409. The alleged injury would have occurred only if the plaintiff were rehired, sent to Iraq to perform security services, the State Department reinstated the policy, and it did so in a way that created a "lawless atmosphere" leading to the plaintiff's kidnapping. *Munns*, 782 F.3d at 409-10. Here, the chain of occurrences leading to Plaintiffs' alleged future injury is far less speculative than the future harms alleged in *Munns*.[1]

Moreover, the Ninth Circuit has held that the credible threat standard is not clearly irreconcilable with *Clapper* and that a credible threat of harm is sufficient to constitute actual or imminent injury for standing purposes.[2] In *In re Zappos.com, Inc.*, 888 F.3d 1020 (9th Cir. 2010),

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[1] The same is true of Defendants' other cited authorities. *See, e.g.*, *Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1235 (9th Cir. 2017) (finding injury was speculative under *Clapper* where intervenors challenged two DEA administrative subpoenas related to a prescription, but the subpoenas did not include records related to any of the intervenors, and the intervenors presented no evidence that the DEA would seek records related to them); *Montana Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1189 (9th Cir. 2014) (finding no "substantial risk" of harm to organization's members where alleged injury would occur only if a certain application was approved and finding plaintiffs had failed to allege a "substantial risk" that the application would be approved).

[2] The Court acknowledges that one court in this district has held that *Clapper*'s "certainly impending" and "substantial risk" abrogated the "credible threat" standard. *See Backus v. General Mills, Inc.*, 122 F. Supp. 909, 922 (N.D. Cal. 2015). However, the Court declines to follow that approach in light of the Ninth Circuit's continued application of the credible threat standard since *Clapper*.

a data breach case, the Ninth Circuit applied the credible threat standard in analyzing standing based on the risk of future harm and concluded that the plaintiffs had alleged a credible threat of real and immediate harm sufficient to establish standing where hackers had stolen their personal information from the defendant's servers, thereby exposing the plaintiffs to an increased risk of identity theft. 888 F.3d at 1025-1027 (citing *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010). In distinguishing *Clapper*, the court noted that *Clapper*'s standing analysis was "especially rigorous" due to the "sensitive national security context" and because the Supreme Court was being asked to "declare actions of the executive and legislative branches unconstitutional." *In re Zappos.com, Inc.*, 888 F.3d at 1026.

The credible threat standard continues to be applied within the Ninth Circuit particularly in cases involving threatened environmental harm. *See, e.g.*, *Nat'l Family Farm Coal. v. U.S. Envtl. Prot. Agency*, 966 F.3d 893, 909 (9th Cir. 2020) (finding that "a credible threat of harm is sufficient to constitute actual injury for standing purposes") (citing *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 645 n.49 (9th Cir. 2014) ("[A] credible threat of harm is sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred."); *see also Peckerar v. Gen. Motors, LLC*, No. EDCV182153DMGSPX, 2020 WL 6115083, at *4 (C.D. Cal. Aug. 17, 2020) (citing *NRDC v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013)) ("The Ninth Circuit has consistently held that standing exists "where there is a 'credible threat' that a probabilistic harm will materialize."). This is because "[t]he ability to challenge actions creating threatened environmental harms is particularly important because in contrast to many other types of harms, monetary compensation may well not adequately return plaintiffs to their original position," given that "[t]he extinction of a species, the destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy." *Cent. Delta Water Agency*, 306 F.3d at 950.

This reasoning also applies to food safety cases such as this one. For example, in *Levine v. Johans*, No. C 05-04764 MHP, 2006 WL 8441742 (N.D. Cal. Sept. 6, 2006), the plaintiffs were members of the Humane Society of the United States and the East Bay Animal Advocates who

filed an action seeking declaratory and injunctive relief from allegedly unlawful USDA policies concerning the slaughter of exotic animals. 2006 WL 8441742, at *2. The plaintiffs argued that a new USDA policy regarding the slaughter of poultry increased their risk of becoming ill each time they ate poultry. *Id.* The *Levine* court found the plaintiffs' alleged injury—the risk of contracting foodborne illness from meat products—was concrete and imminent enough to satisfy Article III's requirements. *Id.* at *5. In food and drug safety cases, the court explained, "exposure to increased risk of harm establishes standing if the threat is 'credible.'" *Id.* at *6 (citing *Baur v. Veneman*, 352 F.3d 625 (2d. Cir. 2003)). "Exposure to risk, not the actual onset of disease, must be imminent." *Id.* This is because "[l]ike threatened environmental harm, the potential harm from exposure to dangerous food products or drugs is by nature probabilistic, yet an unreasonable exposure to risk may itself cause cognizable injury." *Baur*, 352 F.3d at 634 (internal citation and quotations omitted). Accordingly, the Court concludes that Plaintiffs can establish standing in this case if they "allege an increased risk of concrete injury that results from a series of credible occurrences." *Levine*, 2006 WL 8441742, at *7.

Here, Plaintiffs allege that the new NSIS procedures outlined in the Final Rule erode several important features of the traditional inspection process increasing the likelihood that adulterated pork products will enter the food supply and thus putting their members at risk of illness from consuming adulterated pork. Plaintiffs allege that under the Final Rule, responsibilities for ante-mortem and post-mortem inspections will fall to plant employees who are not required to receive specific training or certification related to inspections. Additionally, the Final Rule allows for line speeds at plants to increase, which will decrease the amount of time each inspector can devote to examining a carcass for potential disease. According to Plaintiffs, the data provided by Defendants shows that the NSIS plants tagged twenty-five to thirty-percent fewer animals than plants using the traditional inspection process. Plaintiffs also point to provisions of the Final Rule that rescind current testing requirements for *E. coli* and *salmonella*. Moreover, because approximately forty plants producing roughly ninety-three percent of the domestic pork supply will adopt the new NSIS rules, Plaintiffs allege that their members, who desire to continue to consume pork, will be unable to avoid pork from NSIS plants given the number of plants likely

to adopt the procedures and absence of consumer-facing labeling and disclosures regarding the location of the swine slaughter. (*Id.* ¶ 323; *see also* Dkt. No. 29-5, Declaration of Robin Mangini ¶¶ 4, 9-13.) Defendants argue that this theory is too speculative because the number of plants adopting NSIS is not certain; however, by Defendants' own estimate, NSIS plants will account for seventy-eight percent of the total pork slaughter nationwide, which is still a significant amount. (*See* Reply at 7.)

Accordingly, accepting Plaintiffs' allegations as true, the Court concludes there is a credible threat that Plaintiffs' members face an increased risk of illness from consuming adulterated pork products because of the Final Rule, sufficiently establishing standing based on potential future harm.[3]

C. Plaintiffs Sufficiently Allege Organizational Standing.

To allege organizational standing under Article III, plaintiffs must demonstrate: "(1) frustration of its organizational mission; and (2) diversion of its resources to combat" defendant's alleged wrongful conduct. *See Smith v. Pacific Properties & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (citing *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). A frustration of mission injury in fact occurs "where a defendant's conduct has 'perceptibly impaired' an organizational plaintiff's 'ability to provide [services to its clients]…'" *Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1138 (N.D. Cal. 1999) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)). "[A] diversion-of-resources injury is sufficient to establish organizational standing at the pleading stage, even when it is broadly alleged." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015). In brief, plaintiffs must allege "a concrete and demonstrable injury to its activities, not simply a setback to the organization's abstract social interests." *Project Sentinel*, 40 F. Supp. 2d at 1138.

Here, Plaintiffs allege that the Final Rule has frustrated the organizations' food-safety

[3] Because the Court finds that Plaintiffs' allegations regarding the increased risk of illness sufficient to establish standing, it will not address the allegations and arguments related to injury stemming from increased pork prices.

missions and forced them to divert organizational resources to address the promulgation of the Final Rule. Plaintiffs allege that the Final Rule has forced them to take action on behalf of their members and consumers that would not be required but for Defendants' alleged violation of the FMIA and APA. FWW has created a webpage to help the public determine which products come from which slaughter plants and has submitted FOIA requests in an effort to discover the plants that will switch over to the NSIS. CFS has shifted staff time from other efforts to focus on educating members about the Final Rule. Accordingly, the organizations have sufficiently alleged that they have altered their resource allocation to combat the Final Rule. *See Nat'l Council of La Raza*, 800 F.3d at 1039 (organizational standing established where civil rights groups "expend[ed] additional resources" that "they would have spent on some other aspect of their organizational purpose"); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (finding organizational standing where the plaintiffs "had to divert resources to educational programs to address its members' and volunteers' concerns about the [challenged] law's effect"); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (finding organizational standing where the plaintiff, in response to the defendant's challenged practices, "started new education and outreach campaigns targeted at discriminatory roommate advertising"). The Court finds these allegations sufficient to support the Plaintiff organizations' standing at this stage.

CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' motion to dismiss. The parties shall appear for a case management conference on April 16, 2021 at 11:00 a.m. The parties shall submit a joint case management statement by no later April 9, 2021.

IT IS SO ORDERED.

Dated: February 4, 2021

JEFFREY S. WHITE
United States District Judge