United States District Court
Northern District of California

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-01537-RS

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' CROSS MOTION, AND DENYING PLAINTIFFS' MOTION TO COMPLETE THE ADMINISTRATIVE RECORD

I. INTRODUCTION

This case stems from an ongoing debate about whether hydroponics, a form of soil-less agriculture, may be certified organic. In a rulemaking petition, Plaintiff Center for Food Safety ("CFS") asked the United States Department of Agriculture ("USDA") to prohibit the organic certification of hydroponic production systems. USDA declined the request. CFS now seeks review of the USDA's denial letter. As set forth in detail below, Defendants' motion for summary judgment is granted and Plaintiffs' corresponding motion is denied because USDA's denial of the rulemaking petition reasonably concluded the applicable statutory scheme does not exclude hydroponics from the organic program. Plaintiffs' motion to complete the administrative record is also denied.

II. BACKGROUND

A. Statutory Background

The Organic Foods Production Act of 1990 ("OFPA"), 7 U.S.C. §§ 6501-6524, established

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national certification and production standards for organic produce. Designed to remedy the inconsistencies among varying state organic certification schemes, OFPA authorized the creation of the National Organic Program ("NOP"), which sets the national standards and administers the certification process. 7 U.S.C. § 6503. OFPA additionally created the National Organic Standards Board ("NOSB), a fifteen-member coalition of farmers, handlers, retailers, conservationists, scientists, certifiers, and consumer advocates "to assist in the development of standards for substances to be used in organic production and to advise the Secretary" on other aspects of implementation. 7 U.S.C. § 6518. USDA "shall consult" with the NOSB in developing the organic program. 7 U.S.C. § 6503(c).

B. Procedural Background

On January 16, 2019 CFS submitted to USDA a "Petition Seeking Rulemaking Excluding Organic Certification of Hydroponic[1] Agricultural Production Systems and Products" ("Petition"). Administrative Record ("AR") 4. Specifically, CFS asked USDA to (1) issue regulations excluding organic certification of hydroponic agricultural production, (2) amend 7 C.F.R. § 205.105 (titled "Allowed and prohibited substances, methods, and ingredients in organic production and handling") to prohibit hydroponic systems, (3) "[e]nsure that ecologically integrated organic production practices are maintained as a requirement for organic certification as defined by OFPA and its regulations[,]" and (4) revoke all existing organic certifications already issued to hydroponic operations. AR 4-5. About six months later, USDA denied the Petition. CFS filed for review of the denial on March 2, 2020.

III. MOTION TO COMPLETE OR SUPPLEMENT THE ADMINISTRATIVE RECORD

In reviewing an agency decision, courts apply the appropriate Administrative Procedure Act ("APA") standard of review, 5 U.S.C. § 706, based on the administrative record compiled by the agency and submitted to the court. See *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th

[1] The Petition defines "hydroponics" as "a catch-all for a diverse array of systems which incorporate, to some degree, containers that house plant roots in either a liquid solution or various solid substrates[.]" AR 8.

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Cir.1986); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). An agency's designation and certification of the administrative record is treated like other established administrative procedures, and thus entitled to a presumption of regularity. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir.1993). Accordingly, "[i]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *United States v. Anderson*, 517 U.S. 456, 464 (1996). To meet this burden, a plaintiff must identify the allegedly omitted materials and "non-speculative grounds" to believe that the agency considered the materials in coming to its decision. *Oceana, Inc. v. Pritzker*, 2017 WL 2670733, at *2 (N.D. Cal. June 21, 2017). The presumption can also be rebutted on a showing that the agency applied the wrong standard in compiling the record. *Id.* Plaintiffs need not show bad faith or improper motive. *People of the State of Cal. ex rel Lockyer v. U.S. Dep't of Agric.*, 2006 WL 708914, at *2 (N.D. Cal. Mar. 16, 2006).

CFS seeks introduction of six types of non-privileged documents: (1) excerpts of transcripts from NOSB Board meetings in 2002, 2006, 2008, 2016, and 2017; (2) written comment letters to NOSB and the NOP from 2016 and 2017 on the topic of organic certification of hydroponic operations; (3) emails between the USDA and organic certifiers in which certifiers respond to a 2016 survey regarding certification of hydroponic operations; (4) an Agriculture Marketing Service ("AMS"), a branch of USDA, staff email chain discussing the 2016 certifier survey; (5) a January 2016 email from an organic certifier to the AMS; and (6) slides from a presentation given by the AMS to the NOP on March 23, 2016. The arguments regarding the propriety of including each set of documents are considered in turn.

First, CFS complains USDA excluded every oral comment from the NOSB board meetings regarding the compatibility of hydroponic operations with soil-based regulations. It contends these comments belong in the record both because they stem from deliberations and processes described in the Petition and because the existing record refers to them repeatedly. USDA counters by admitting that while its denial letter purported to rely on "the substantial deliberation and input on hydroponics between 1995 and 2017 from a variety of sources, including the NOSB," it never

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claimed to have reviewed *every* public comment. AR 1377. CFS has not provided anything other than narrative, speculative evidence suggesting USDA must have considered these excerpts because it considered other types of public input on this topic. More importantly, CFS focuses on the excerpts' impact on the question of hydroponic certification at large rather than the actual denial of their petition.

Second, CFS argues a variety of anti-hydroponics comment letters were improperly left out. It asserts USDA admitted it considered comment letters, but only included a letter in favor of organic certification of hydroponic systems. In particular, CFS highlights a letter from OFPA's original drafter, Senator Leahy. USDA has conceded that Senator Leahy's letter should have been included in the Administrative Record and has updated it accordingly. As to the other letters, however, USDA takes the same position as against the excerpts – it did not consider every public comment relating to this longstanding controversial issue. CFS has provided no evidence showing USDA considered each, or even many, of the comments individually in coming to the decision to deny CFS's petition.

Third, CFS argues that the survey responses should be included because USDA considered "deliberation and input on [hydroponics] between 1995 and 2017 from a variety of sources, including . . . public stakeholders[.]" AR 1377. The responses CFS seeks to include indicate some certifiers were willing to certify hydroponic operations. These variances, CFS argues, show how certification of hydroponics has resulted in inconsistent standards. That they may be subject to such an interpretation ultimately has no bearing on whether they were indirectly considered by USDA. Again, the contention that USDA must have considered these particular survey responses because it considered twenty-three years of "deliberation and input" from a variety of sources is conclusory. *See* AR 1377.

Last, CFS groups together items (4) through (6) above under the heading "internal communications and draft documents." Motion to Complete or Supplement Administrative Record ("Mot.") at 11. It argues these communications are "essential to this Court's understanding of [CFS's] claims." *Id.* Moreover, it contends the slides were viewed by staff members within USDA

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responsible for administering OFPA, meaning that they were directly considered. The emails, it argues, demonstrate USDA's knowledge of how organic standards were being applied. USDA is again correct that Plaintiffs have not met their burden in showing that the agency considered these materials in handing down the decision at issue, even if some USDA employee has at some point considered the information in the larger debate surrounding the certification of hydroponics.

In the alternative, Plaintiffs urge supplementation of the record with these documents. Courts may look beyond the administrative record in four scenarios: when extra-record evidence is necessary (1) to determine whether the agency has considered all relevant factors and explained its decision; (2) to determine whether the agency has relied on documents not in the record; (3) to explain technical terms or complex subjects; or (4) to make a showing of agency bad faith. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992-93 (9th Cir. 2014).

CFS couches its argument in the first and third scenarios. It contends the materials provide insight into OFPA's legislative history, application of statutes and regulations, and the inconsistent results. It also argues that they aid in explaining complex subjects. Though the subject matter of this action is undoubtedly complicated, the question at issue in this motion is not one of scientific complexity. Even if it were, these documents do not seek to clarify the mechanics of hydroponic production. Furthermore, though CFS may be correct that USDA cherry-picked its records, as in the case of the pro-hydroponics letter, it makes no argument that the excluded records are necessary to USDA's ultimate determination. While including the materials may result in a fuller record, CFS are not seriously contending in their actual motion for summary judgment that the agency did not consider all the relevant documents or factors. Because CFS can neither overcome the burden on completion nor show that supplementation is warranted, the motion is denied.

IV. CROSS MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or

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