

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATURAL GROCERS, et al.,
Plaintiffs,
v.
THOMAS VILSACK, et al.,
Defendants.

Case No. 20-cv-05151-JD

ORDER RE SUMMARY JUDGMENT

In 2016, Congress amended the Agricultural Marketing Act of 1946 to enact the first national mandatory bioengineered food disclosure standards. *See* 7 U.S.C. § 1639 (the disclosure statute). The purpose of the disclosure statute is to establish uniformity in the way that bioengineered food is labeled and described to consumers. Plaintiffs are retail stores that sell natural and organic food products, and organizations engaged in food safety advocacy. Defendants are the United States Department of Agriculture (USDA), the USDA Secretary, and the Administrator of the Agricultural Marketing Service (AMS), which is a USDA agency responsible for the marketing of agricultural commodities, among other programs.

Plaintiffs filed a 115-page amended complaint that alleges a number of challenges to the disclosure statute and implementing regulations promulgated by the USDA. Dkt. No. 19. In pertinent part, plaintiffs challenge under the Administrative Procedure Act, 5 U.S.C. § 706 (APA), regulations that: (1) permit a text message disclosure option as an alternative to an electronic or digital link disclosure; (2) require disclosures to use the word “bioengineered”; and (3) exclude highly refined foods that do not contain detectable amounts of modified genetic material. Plaintiffs also say that the word-use regulations restrict their speech in violation of the First and

Fifth Amendments to the United States Constitution, and that a provision in the disclosure statute

preempting state labeling laws for genetically engineered (GE) seeds violates the Tenth Amendment.

Plaintiffs filed a motion for summary judgment, Dkt. No. 54, which the government opposed, Dkt. No. 56. The Court granted applications to intervene by the United States Beet Sugar Association, the American Sugarbeet Growers Association, and the American Farm Bureau Federation, *see* Dkt. Nos. 29, 46, and intervenors filed a consolidated opposition to plaintiffs' summary judgment motion. Dkt. No. 57.

Summary judgment is granted in favor of plaintiffs under the APA for the text message disclosure regulation. In all other respects, plaintiffs' motion is denied.

BACKGROUND

I. THE DISCLOSURE STATUTE

The salient facts are undisputed. In 2016, in response to the adoption of state laws regulating the labeling of GE and genetically modified (GM or GMO) food and seeds, Congress amended the Agricultural Marketing Act of 1946 to establish the first-ever national standard of consumer disclosures for bioengineered foods. AR248811.¹ Congress declared that the purpose of the disclosure statute was "to preempt state and local actions that mandate labeling of whether a food or seed is genetically engineered, and establish a mandatory uniform national disclosure standard for human food that is or may be bioengineered." *Id.*

As used in the disclosure statute, "bioengineering" with respect to a food means a food "(A) that contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques; and (B) for which the modification could not otherwise be obtained through conventional breeding or found in nature." 7 U.S.C. § 1639(1). "Food" takes the definition in 21 U.S.C. § 321(f) of "(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article." *See* 7 U.S.C. § 1639(2). A "food derived from an animal" may not "be considered a bioengineered food solely because the animal consumed feed" containing bioengineered substances. *Id.* § 1639b(b)(2)(A).

1 Congress did not specify a threshold of “the amounts of a bioengineered substance” in a food to
2 trigger a bioengineering classification. *Id.* § 1639b(b)(2)(B).

3 Congress directed the USDA to implement regulations “with respect to any bioengineered
4 food and any food that may be bioengineered,” and to “establish such requirements and
5 procedures as the [USDA] determines necessary to carry out the standard.” *Id.* § 1639b(a). The
6 statute mandates that “[a] food may bear a disclosure that the food is bioengineered only in
7 accordance with regulations promulgated by the [USDA] in accordance with this subchapter.” *Id.*
8 § 1639b(b)(1).

9 Congress issued a number of specific directives to the USDA for the regulations. Among
10 others, Congress required that a bioengineering disclosure on labels for consumers take the form
11 of “a text, symbol, or electronic or digital link,” with the “disclosure option to be selected by the
12 food manufacturer.” *Id.* § 1639b(b)(2)(D). It required that the electronic or digital link be
13 accompanied by “on-package language” indicating that the link provides access to food
14 information, along with “a telephone number that provides access to the bioengineering
15 disclosure.” *Id.* § 1639b(d)(1), (4).

16 The disclosure statute also directed the USDA to “conduct a study to identify potential
17 technological challenges that may impact whether consumers would have access to the
18 bioengineering disclosure through electronic or digital disclosure methods.” *Id.* § 1639b(c)(1). If
19 the study determined “that consumers, while shopping, would not have sufficient access to the
20 bioengineering disclosure through electronic or digital disclosure methods,” the USDA was to
21 “provide additional and comparable options to access the bioengineering disclosure.” *Id.*
22 § 1639b(c)(4).

23 In addition to the consumer disclosure elements, the statute contains a section that
24 preempts state labeling laws for GE food and seeds. This section declares that “[n]o State or a
25 political subdivision of a State may directly or indirectly establish under any authority or continue
26 in effect as to any food or seed in interstate commerce any requirement relating to the labeling of
27 whether a food (including food served in a restaurant or similar establishment) or seed is

28 genetically engineered (which shall include such other similar terms as determined by the

[USDA]) or was developed or produced using genetic engineering, including any requirement for claims that a food or seed is or contains an ingredient that was developed or produced using genetic engineering.” *Id.* § 1639i(b). Plaintiffs acknowledged in a reply brief that the preemption provision properly regulates private actors with respect to food labeling, but they challenge preemption with respect to seed labeling. Dkt. No. 58 at 18-19.

II. THE DISCLOSURE REGULATIONS

The USDA delegated to AMS the task of formulating regulations responsive to Congress’s directives. 83 Fed. Reg. at 65814. To that end, AMS posted 30 questions for public comment on its website in June 2017, and received over 112,000 responses. AR282-90; 83 Fed. Reg. at 19860. In May 2018, AMS published a notice of proposed rulemaking, and received approximately 14,000 comments. 83 Fed. Reg. at 19860, 65814. AMS published the final regulations in December 2018, with a mandatory compliance date of January 1, 2022. *Id.* at 65814; 7 C.F.R. § 66.1.

The regulations apply to a “regulated entity,” which is defined as “the food manufacturer, importer, or retailer that is responsible for making bioengineered food disclosures under § 66.100(a).” 7 C.F.R. § 66.1. A manufacturer or importer is responsible for disclosures for foods that are “packaged prior to receipt by a retailer.” *Id.* § 66.100(a)(1). A retailer is responsible for foods the retailer packages itself, or sells in bulk. *Id.* § 66.100(a)(2). The retailer plaintiffs, Natural Grocers, Good Earth Natural Foods, and Puget Consumers Co-op, are regulated entities to the extent they package or sell food in bulk in their stores. *See id.*

A. The Electronic Disclosure Study

AMS hired Deloitte Consulting to conduct the study on the accessibility of the electronic disclosure mandated by Section 1639b(c)(1) of the statute. *See* AR250043-118. The study found that “key technological challenges,” including a lack of technical knowledge and a lack of infrastructure, “prevented nearly all participants from obtaining the information through electronic or digital disclosure methods.” AR250046. It also found that the telephone numbers accompanying the electronic disclosure “do not provide a viable means of accessing the

bioengineering disclosure.” AR250001. The study recommended “an online identification”

1 such as “a landline-enabled bioengineering disclosure” with “24-hour disclosure information via
2 an automated recording,” and “a text message alternative for consumers who have access to a
3 mobile phone.” AR250111.

4 Based on the study, AMS concluded that “consumers would not have sufficient access to
5 the bioengineering disclosure through electronic or digital means under ordinary shopping
6 conditions at this time.” 83 Fed. Reg. at 65828. To improve consumer access to the
7 bioengineering information, and to satisfy Congress’s directive to “provide additional and
8 comparable options to access the bioengineering disclosure,” 7 U.S.C. § 1639b(c)(4), AMS
9 created a fourth disclosure option of text messaging separate from the electronic disclosure
10 method. 83 Fed. Reg. at 65828-29; 7 C.F.R. §§ 66.100(b)(4), 66.108.

11 The final regulations provide that regulated entities can comply with the disclosure
12 requirement by adding one of the following to a food label: (i) the statement “Bioengineered
13 food” or “Contains a bioengineered food ingredient” (the text disclosure); (ii) a symbol that says
14 “bioengineered” (the symbol disclosure); (iii) an electronic or digital disclosure link and
15 accompanying text (the electronic disclosure); or (iv) text message instructions (the text message
16 disclosure). *Id.* §§ 66.100(b)(1)-(4), 66.102, 66.104, 66.106, 66.108.²

17 For the electronic disclosure, a food label must have an electronic or digital link printed on
18 the label, and the link must be accompanied by the statement “Scan here for more food
19 information” and “Call [1-000-000-0000] for more food information.” *Id.* § 66.106. The link
20 must connect directly to a product information page that includes the text disclosure or the symbol
21 disclosure, and the page must exclude marketing and promotional information. *Id.* § 66.106(b).

22 For the text message disclosure, a food label must say “Text [command word] to [number]
23 for bioengineered food information.” *Id.* § 66.108(a). The number must send “an immediate
24 response to the consumer’s mobile device” with the text disclosure or the symbol disclosure, and
25 the response must not contain any marketing or promotional information. *Id.* § 66.108(a)-(c).

26
27
28 ² The regulations also provide alternative disclosure options for small food manufacturers and for



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