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9  
10 **UNITED STATES DISTRICT COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 JCM FARMING, INC., a  
13 California corporation,

14 Plaintiff,

15 v.

16 ANDREW WHEELER,  
17 Administrator, United States  
18 Environmental Protection  
19 Agency; and UNITED STATES  
ENVIRONMENTAL  
PROTECTION AGENCY,

20 Defendants.  
21

Case No.: 3:20-cv-01119-TWR-AGS

**PLAINTIFF JCM FARMING, INC.'S  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS (ECF No. 8)**

Judge: Hon. Todd W. Robinson  
Hearing Date: October 19, 2020

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Toxic pesticides blanket the Coachella Valley's agricultural fields.  
3 Federal law and regulations require signage around "hot" fields, to warn of  
4 exposure to these dangerous chemicals. But these signs have been nowhere  
5 to be found in the Coachella Valley over the past ten years, even while  
6 pesticides are actively being sprayed. Plaintiff JCM Farming, Inc. has  
7 documented the lack of signage, and notified State, local, and federal  
8 officials, to no avail.

9 Plaintiff JCM Farming, Inc. now brings this action to compel  
10 Defendants to do something about this persistent hazardous condition.  
11 More precisely, Plaintiff seeks to compel compliance with mandatory  
12 provisions of the Federal Insecticide, Fungicide and Rodenticide Act  
13 ("FIFRA"), including the following command: "Upon receipt of any  
14 complaint or other information alleging or indicating a significant violation  
15 of the pesticide use provisions of this subchapter, the Administrator shall  
16 refer the matter to the appropriate State officials for their investigation of  
17 the matter ...." 7 U.S.C. § 136w-2(a) (underlining added). That provision  
18 later provides that the Administrator may act upon the complaint or  
19 information if the State does not take action within thirty days of the  
20 referral. *Id.*

21 Plaintiff seeks to compel Defendants to refer the lack of signage  
22 violations to the appropriate State officials for investigation. Plaintiff  
23 seeks injunctive relief pursuant to the Administrative Procedure Act  
24 ("APA"), which authorizes the Court to "compel agency action unlawfully  
25 withheld or unreasonably delayed." 5 U.S.C. § 706(1). A failure to act  
26 claim can proceed "where a plaintiff asserts that an agency failed to take a  
27 discrete agency action that it is required to take." *Norton v. S. Utah*  
28 *Wilderness Alliance*, 542 U.S. 55, 64 (2004).

1 Defendants move to dismiss the complaint (ECF No. 8), asserting the  
2 APA’s “agency action” requirement is not met because FIFRA’s  
3 enforcement options are discretionary, and therefore the APA’s waiver of  
4 sovereign immunity does not apply. This argument glosses over the  
5 referral provision, which is mandatory – the Administrator “shall” refer the  
6 matter – and skips instead to the federal enforcement option that arises if  
7 the State fails to act on the referral. Defendants’ motion also overlooks  
8 Ninth Circuit authority distinguishing the APA’s judicial review provision  
9 from the APA’s much broader waiver of sovereign immunity.

10 Defendants also argue this case should be dismissed for improper  
11 venue because it “involves” real property for purposes of the venue statute.  
12 Defendants misconstrue the venue statute and the thrust of this lawsuit.  
13 For venue purposes, cases “‘involve real property’ when they involve  
14 disputes over real property interests.” *Earth Island Inst. v. Quinn*, 56  
15 F. Supp. 3d 1110, 1116 (N.D. Cal. 2014). This lawsuit does not concern the  
16 right, title or interest in real property, but rather the failure to enforce  
17 statutory and regulatory requirements. Venue is therefore proper in this,  
18 the district where Plaintiff resides.

19 Accordingly, the Court should deny Defendants’ motion in its entirety.

## 20 **II. BACKGROUND**

### 21 **A. Statutory Overview of FIFRA and the APA.**

#### 22 **1. FIFRA and related regulations.**

23 The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”),  
24 7 U.S.C. § 136 *et seq.*, provides for federal regulation of pesticide  
25 distribution, sale, and use. The revision of FIFRA through the adoption of  
26 the Federal Environmental Pesticide Control Act of 1972 transformed  
27 FIFRA from a labeling law into a comprehensive regulatory statute. As  
28 amended, FIFRA regulates the use, as well as the sale and labeling, of

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