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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JCM FARMING, INC., a California
corporation,

Plaintiff,

v.

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

Defendants.

Case No.: 20-CV-1119 TWR (AGS)

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS**

(ECF No. 8)

Presently before the Court is the Motion to Dismiss (ECF No. 8) the Complaint, filed by Defendants Andrew Wheeler and the United States Environmental Protection Agency (collectively, “EPA”). Having carefully reviewed the Motion to Dismiss, Plaintiff’s Opposition (ECF No. 12), the EPA’s Reply (ECF No. 13), and the relevant law, the Court **GRANTS** the Motion to Dismiss and **DISMISSES** the Complaint **WITHOUT PREJUDICE** and **WITH LEAVE TO AMEND**.

BACKGROUND

I. Allegations of the Complaint

Plaintiff JCM Farming, Inc. owns and maintains an agricultural “Ranch” in the Coachella Valley, in Riverside County, California. (Compl. ¶ 19, ECF No. 1.) In 2007,

1 this Ranch “was subjected to repeated low and dangerous hot air balloon overflights.” (*Id.*
2 ¶ 5.) In 2007 and thereafter, “balloon operators were ... exposing their passengers (adults
3 and children alike) to toxic chemicals by continuously contour flying just above ground
4 level and by landing in hot fields where chemicals had recently been applied.” (*Id.* ¶ 30.)
5 Despite “tons and tons of FIFRA [i.e., the Federal Insecticide, Fungicide, and Rodenticide
6 Act] regulated chemicals were being used throughout the Coachella Valley,” Plaintiff has
7 not found any “chemical use warning signs” posted in the area. (*Id.* ¶ 32.) Specifically,
8 “Worker Protection Standard [i.e., WPS] required warning signs have not been posted in
9 the Coachella Valley.” (*Id.* ¶ 49.)

10 “The FIFRA violations Plaintiff observed, logged and photographed throughout the
11 Coachella Valley evidence a complete lack of signage which, if present, would have
12 warned tourists, workers and the public of pesticide usage and potential exposure to toxic
13 chemicals.” (*Id.* ¶ 54.) “The FIFRA signage violations Plaintiff observed run counter to
14 the obligations that the State of California is obligated to adhere to under the permit granted
15 it by Defendant EPA.” (*Id.* ¶ 60.)

16 Plaintiff has engaged in years of negotiations with “the balloonists, local authorities,
17 and federal authorities in efforts to end the low overflights.” (*Id.* ¶ 25.) “Plaintiff has met
18 with members of the Department of Justice, Department of Transportation, and the Federal
19 Bureau of Investigation on at least ten separate occasions and Plaintiff believes they are
20 currently evaluating how to proceed.” (*Id.* ¶ 57.)

21 The Complaint alleges two causes of action pursuant to the Administrative
22 Procedure Act (“APA”), 5 U.S.C. §§ 702, 706, and FIFRA, 7 U.S.C. § 136w-2. (*See id.* at
23 22-23.) The Complaint seeks declaratory and injunctive relief in the form of an order:

- 24 1. Declaring that the information set forth in this Complaint demonstrates a
25 significant violation of the pesticide use provisions of FIFRA and the WPS
26 regulations promulgated pursuant to FIFRA;
- 27 2. Directing the Administrator to refer these allegations to the California
28 Department of Pesticide Regulation and the Riverside County Agriculture
Commissioner for compliance and prosecution;

1
2 3. Directing the Administrator to engage in a process to determine why
3 California is not carrying out its enforcement responsibility for pesticide use
4 violations;

4 4. Directing the Administrator to engage in a process to determine how it is
5 possible the Registrant chemical manufacturers are not enforcing the label
6 laws and allowing illegal use of restricted chemicals; [and]

7 5. Directing the Administrator to fashion and implement a methodology for
8 notifying all persons and guardians of children that may have unknowingly
9 been exposed to dangerous FIFRA regulated chemicals in the Coachella
10 Valley and require medical testing and/or treatment per FIFRA labeling and
11 WPS regulations....

11 (*Id.* at 23-24.)

12 **II. Motion to Dismiss**

13 The EPA moves to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1),
14 12(b)(3) and 12(b)(6), contending that (1) Plaintiff has failed to identify an applicable
15 waiver of sovereign immunity and (2) venue in this district is not proper.

16 With respect to the sovereign immunity argument, the EPA first contends: “[A]ny
17 purported failures on the part of EPA to refer alleged violations—that EPA was not even
18 made aware of—to the State for prosecution or to determine whether the State is carrying
19 out its enforcement authority do not constitute ‘agency actions’ under the APA and, thus,
20 are not the type of actions that the Court can compel under APA section 706(1).” (Mem.
21 Supp. Mot. to Dismiss at 19, ECF No. 8-1.) The EPA next contends: “Even if this Court
22 finds that a final agency action exists, such action remains unreviewable if it is an agency
23 action ‘committed to agency discretion by law,’” and “[b]ecause Plaintiff relies on section
24 27 of FIFRA, which authorizes EPA to take a number of discretionary enforcement
25 measures, Plaintiff’s claims are unreviewable under the APA.” (*Id.* (quoting 5 U.S.C. §
26 701(a)(2)); citing *Heckler v. Chaney*, 470 U.S. 821 (1985).)

27 With respect to the venue argument, the EPA contends that Plaintiff can only
28 establish venue in this district “if no real property is involved in this action,” 28 U.S.C. §

1 1391(e), and “real property—farmland in Coachella Valley—is involved in this action.”
2 (Mem. Supp. Mot. to Dismiss at 23, ECF No. 8-1.) The EPA requests that the Court
3 dismiss the Complaint for lack of subject matter jurisdiction and improper venue.

4 Plaintiff opposes the Motion to Dismiss. (ECF No. 12.) Plaintiff contends that
5 Section 702 of the APA supplies the waiver of sovereign immunity for this action because
6 the Complaint seeks nonmonetary relief and “seeks to compel Defendants to take a discrete
7 agency action that the EPA is required to take—namely, to refer the matter to State officials
8 for investigation, as mandated by FIFRA.” (*Id.* at 8.) Plaintiff contends that the referral
9 mandated by FIFRA constitutes an “agency action” or its equivalent pursuant to applicable
10 caselaw. (*Id.* at 8-10.) Plaintiff contends that venue is proper in this district because this
11 case does not “involve” real property as that term has been construed by caselaw because
12 this case does “not concern the right, title or interest in real property, nor does it involve a
13 dispute over real property interests.” (*Id.* at 12.)

14 LEGAL STANDARDS

15 I. Rule 12(b)(1)

16 A Rule 12(b)(1) jurisdictional attack may be facial or factual. *Id.* As is the case
17 here, in a facial attack, the challenger asserts that the allegations contained in the complaint
18 are insufficient on their face to invoke federal jurisdiction. *See Safe Air for Everyone v.*
19 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When considering this type of jurisdictional
20 attack, a court must consider the allegations of the complaint to be true and construe them
21 in the light most favorable to the plaintiff. *See id.*; *Love v. United States*, 915 F.2d 1242,
22 1245 (9th Cir. 1988). When subject matter jurisdiction is challenged, the plaintiff bears
23 the burden of persuasion. *See Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092
24 (9th Cir. 1990).

25 II. Rule 12(b)(6)

26 Federal Rule of Civil Procedure 8(a)(2) requires “a short and plain statement of the
27 claim showing that the pleader is entitled to relief,” in order to “give the defendant fair
28 notice of what the ... claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v.*

1 *Twombly*, 550 U.S. 544, 555 (2007). While a complaint attacked by a Rule 12(b)(6) motion
2 to dismiss “does not need detailed factual allegations,” it must set forth “more than labels
3 and conclusions, and a formulaic recitation of the elements of a cause of action will not
4 do.” *Id.* at 555. To survive a motion to dismiss, a complaint must contain sufficient factual
5 matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.* at 570.

6 A dismissal without leave to amend is improper unless it is beyond doubt that the
7 complaint “could not be saved by any amendment.” *Harris v. Amgen, Inc.*, 573 F.3d 728,
8 737 (9th Cir. 2009).

9 ANALYSIS

10 I. FIFRA

11 The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§
12 136-136y, “is a comprehensive regulatory scheme aimed at controlling the use, sale, and
13 labeling of pesticides.” *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1204 (9th Cir.
14 2002) (citing *Wisc. Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991)). FIFRA gives
15 States primary enforcement responsibility for pesticide use violations if either (1) the EPA
16 determines the State has an adequate pesticide use enforcement program or (2) the EPA
17 enters into a cooperative agreement with the State. *See* 7 U.S.C. §§ 136i, 136u, 136w-1(a)-
18 (b); *see also Wisc. Pub. Intervenor*, 501 U.S. at 601. California has entered into a
19 cooperative agreement with the EPA. (*See* Mot. to Dismiss, Ex. A, ECF No. 8-2.)

20 If a State with primary enforcement responsibility fails to enforce pesticide use
21 violations, the EPA may take different actions under FIFRA. *See* 7 U.S.C. §§ 136w-1(c),
22 136w-2; *see also* 40 C.F.R. Part 173.1. As relevant to this case, 7 U.S.C. § 136w-2 states:

23 Upon receipt of any complaint or other information alleging or indicating a
24 significant violation of the pesticide use provisions of this subchapter, the
25 [EPA] Administrator shall refer the matter to the appropriate State officials
26 for their investigation of the matter consistent with the requirements of this
27 subchapter. If, within thirty days, the State has not commenced appropriate
28 enforcement action, the Administrator may act upon the complaint or
information to the extent authorized under this subchapter.

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