

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR ENVIRONMENTAL
HEALTH, et al.,

Plaintiffs,

v.

TOM VILSACK, et al.,

Defendants.

Case No. 15-cv-01690-JSC

**ORDER RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 57 & 59

Three environmental nonprofits contend that the United States Department of Agriculture (“USDA”) violated the Administrative Procedures Act (“APA”) by issuing a guidance document without providing public notice and comment. Plaintiffs insist that formal rulemaking was required because the document amended existing national organic food regulations to permit certified organic producers to use compost materials that contain synthetic pesticides. The parties’ cross-motions for summary judgment are now pending before the Court. (Dkt. Nos. 57 & 59.) Having considered the parties’ submissions, and having had the benefit of oral argument on May 26, 2016, the Court GRANTS Plaintiffs’ motion and DENIES Defendants’ cross-motion.¹ The guidance document at issue is a legislative rule subject to the APA’s notice and comment requirements.

STATUTORY AND REGULATORY FRAMEWORK

The Organic Foods Production Act, 7 U.S.C. § 6501 et seq., (“the Organic Foods Act”) required the Secretary of Agriculture to “establish an organic certification program for producers

¹ All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 17 & 18.)

1 and handlers of agricultural products that have been produced using organic methods.” 7 U.S.C. §
 2 6503. The certification program is known as the National Organic Program or NOP. 7 C.F.R. §
 3 205 et seq.

4 The Organic Foods Act established standards an agricultural product must satisfy to be
 5 sold or labeled as organic. *See* 7 U.S.C. § 6504. Specifically, the agricultural product must:

6 (1) have been produced and handled without the use of synthetic chemicals, except
 7 as otherwise provided in this chapter;

8 (2) except as otherwise provided in this chapter and excluding livestock, not be
 9 produced on land to which any prohibited substances, including synthetic
 10 chemicals, have been applied during the 3 years immediately preceding the harvest
 11 of the agricultural products; and

12 (3) be produced and handled in compliance with an organic plan agreed to by the
 13 producer and handler of such product and the certifying agent.

14 *Id.* The Organic Foods Act also directed the establishment of a “National List” of approved and
 15 prohibited synthetic substances for use in organic production. 7 U.S.C. § 6517(a) & (b); 7 C.F.R.
 16 § 205.601. National Organic Program regulations specifically prohibit use of “[a]ny fertilizer or
 17 composted plant and animal material that contains a synthetic substance not included on the
 18 National List of synthetic substances allowed for use in organic crop production.” 7 C.F.R. §
 19 205.203(e)(1).

20 Compliance with the National Organic Program is monitored pursuant to a USDA program
 21 which accredits individuals and state officials as agents “for the purpose of certifying a farm or
 22 handling operation as a certified organic farm or handling operation.” 7 U.S.C. § 6514(a).

23 Producers seeking organic certification must demonstrate their compliance with the Organic
 24 Program requirements to these certifying agents, subject to appeal. *See* 7 C.F.R. §§ 205.400-
 25 205.406, 205.681. The certifying agents may also investigate compliance with National Organic
 26 Program regulations. *See* 7 C.F.R. § 205.661.

27 **BACKGROUND**

28 The California Department of Food and Agriculture (CDFA) is the California agency
 certified to administer the National Organic Program. *See* Cal. Food & Agric. Code § 46000(a).
 In August through October 2009, CDFA inspectors found detectable levels of bifenthrin—a

1 residential insecticide—in three compost products listed for use in organic agriculture.
2 (Administrative Record (“AR”) 726-27, 927.) As bifenthrin is not on the National List of
3 approved synthetic substances, and National Organic Program regulations prohibit any compost
4 used in organic production from containing a synthetic substance not on the National List, 7
5 C.F.R. § 205.203(e)(1), the CDFA banned all three compost products from use in organic
6 production. (*Id.*)

7 Nortech Waste LLC (“Nortech”), a producer of one of the banned composts, thereafter
8 contacted the National Organic Program to ask whether the National Organic Program was going
9 to “back the action of the [CDFA]”. (AR 659-60.) Mark Bradley, Chief of National Organic
10 Program Accreditation, responded that “[b]ifenthrin is a synthetic substance which is not on the
11 NOP National List of Allowed and Prohibited Substances. We have consulted with the State of
12 California on this issue and concur that compost containing the substance bifenthrin is not eligible
13 for use in organic farming operations.” (AR 662.) Nortech replied that “[b]ifenthrin in compost is
14 going to become a nationwide problem and just saying that contaminated compost can not be used
15 in organic agriculture is not the answer.” (AR 661.) Mr. Bradley responded that he had advised
16 the new Deputy Administrator of the National Organic Program of the situation. (*Id.*)

17 Several months later, the USDA issued the guidance document at issue in this lawsuit—
18 NOP 5016. NOP 5016, entitled “Guidance Allowance of Green Waste in Organic Production
19 Systems,” states that its purpose is to “provide[] clarification on the allowance of green waste and
20 green waste compost in organic production systems under the National Organic Program (NOP)
21 regulations.” (AR 1103.) It recites the regulation’s requirement that “[t]he producer must not use:
22 (1) Any fertilizer or composted plant and animal material that contains a synthetic substance not
23 included on the National List of synthetic substances allowed for use in organic crop production.”
24 (AR 1104 (citing 7 C.F.R. § 205.203(e).) The Guidance then notes:

25 However, the NOP regulations were established with recognition
26 that background levels of synthetic pesticides may be present in the
27 environment and, therefore, may be present in organic production
28 systems. This is referred to as unavoidable residual environmental
contamination (UREC) in the regulations. Furthermore, the NOP
standards are process based and do not mandate zero tolerance for
synthetic pesticide residues in inputs, such as compost. Compost that
is produced from the approved feedstocks, listed above, is

1 acceptable for use in organic production, provided that any residual
pesticide levels do not contribute to the contamination of crops, soil
2 or water.

3 Green waste and green waste compost that is produced from
approved feedstocks, such as, non-organic crop residues or lawn
4 clippings may contain pesticide residues. Provided that the green
waste and green waste compost (i) is not subject to any direct
5 application or use of prohibited substances (i.e. synthetic pesticides)
during the composting process, and (ii) that any residual pesticide
6 levels do not contribute to the contamination of crops, soil or water,
the compost is acceptable for use in organic production.

7 (*Id.*)

8 PROCEDURAL HISTORY

9 Plaintiffs filed this lawsuit nearly five years later contending that NOP 5016 “changed the
10 legal status of bifenthrin and other pesticides that are prohibited for use in organic production but
11 are now being allowed in green waste used in organic production.” (Dkt. No. 1 ¶ 54.) Plaintiffs
12 allege that Defendants, the USDA and various governmental officials and agencies (collectively
13 “Defendants” or “the Agency”) violated the APA by issuing NOP 5016 without first providing the
14 notice and comment period required by the APA’s rulemaking provisions. Plaintiffs seek remand
15 and vacatur of NOP 5016 until the proper procedures are followed.

16 Defendants responded to the complaint by moving to dismiss pursuant to Federal Rules of
17 Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that Plaintiffs lacked standing and that the
18 challenged decision was exempt from APA rulemaking as either a general statement of policy or
19 as an interpretive rule. (Dkt. No. 24.) The Court denied Defendants’ motion. (Dkt. No. 41.)

20 The now pending cross-motions for summary judgment followed. (Dkt. Nos. 57 & 59.)
21 The day after the last brief on the cross-motions was filed, the Western Growers Association
22 moved for leave to appear as amicus curiae and file a brief in support of Defendants. (Dkt. No.
23 63.) Nearly a week later, the California Certified Organic Farmers and the Organic Trade
24 Association asked to appear as amici curiae and submit declarations joining in the Western
25 Grower’s Association brief. (Dkt. No. 72.) Plaintiffs objected to both requests as untimely,
26 prejudicial, and as not useful to the Court. (Dkt. Nos. 70 & 73.) The Court subsequently granted
27 in part the motions to appear as amici in connection with the appropriate remedy should the Court
28 find an APA violation. (Dkt. No. 75.)

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LEGAL STANDARD

The APA provides for judicial review of final agency decisions. 5 U.S.C. §§ 702, 706. Courts routinely resolve APA challenges to agency administrative decisions by summary judgment. *Nw. Motorcycle Ass’n v. U.S. Dept. of Agric.*, 18 F.3d 1468, 1481 (9th Cir. 1994). “Because the presence of the administrative record, which the parties have stipulated to, usually means there are no genuine disputes of material fact, it allows the Court to decide whether to set aside the agency determination on summary judgment without a trial.” *Sodipo v. Rosenberg*, 77 F. Supp. 3d 997, 1001 (N.D. Cal. 2015) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam)).

Under the APA, a court may set aside an agency’s final action if the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This is a “highly deferential” standard under which there is a presumption that the agency’s action is valid “if a reasonable basis exists for its decision.” *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). A reviewing court may also “hold unlawful and set aside agency action, findings, and conclusions” that are “without observance of procedure required by law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C), (D). Unlike substantive challenges, “review of an agency’s procedural compliance is exacting, yet limited.” *Kern Cty. Farm Bureau*, 450 F.3d at 1076. The reviewing court determines “the adequacy of the agency’s notice and comment procedure, without deferring to an agency’s own opinion of the . . . opportunities it provided.” *Id.* (internal citation and quotation marks omitted).

DISCUSSION

This case asks whether the Agency was required to give public notice and an opportunity to comment prior to adoption of NOP 5016. Plaintiffs contend that because NOP 5016 altered a practice that was previously prohibited by the Organic Foods Act and its implementing regulations—use of compost that contains pesticides—it is a legislative rule which triggered the APA’s notice and comment requirements. Defendants counter that NOP 5016 was exempt from

1 formal rulemaking because it merely clarified that organic producers can use green waste compost
 2 with *de minimis* background levels of pesticide residue such that NOP 5016 qualifies as an
 3 interpretive guidance, or alternatively, a general statement of policy for which formal rulemaking
 4 is not required.

5 **I. The APA’s Rulemaking Requirements**

6 The APA requires a federal agency to follow specific procedures before issuing a rule.
 7 “These procedures include: (1) publication of notice of the proposed rule in the Federal Register, 5
 8 U.S.C. § 553(b); (2) a period for interested individuals to comment on the proposed rule, *id.* §
 9 553(c); and (3) publication of the adopted rule not less than thirty days before its effective date, *id.*
 10 § 553(d).” *Mora–Meraz v. Thomas*, 601 F.3d 933, 939 (9th Cir. 2010). Whether the procedures
 11 apply depends on whether a rule is “substantive” or “legislative” or instead “interpretative.” If a
 12 rule is substantive or legislative, the agency must use the notice and comment procedure unless “it
 13 publishes a specific finding of good cause documenting why such procedures ‘are impracticable,
 14 unnecessary, or contrary to the public interest.’” *Hemp Indus. Ass’n v. Drug Enf’t Admin.*, 333
 15 F.3d 1082, 1087 (9th Cir. 2003) (quoting 5 U.S.C. § 553(b), (b)(B)). The notice and comment
 16 requirement does not apply to “interpretive rules, general statements of policy, or rules of agency
 17 organization, procedure, or practice.” 5 U.S.C. § 553(b)(3)(A). The exceptions to the APA’s
 18 notice and comment requirements “will be narrowly construed and only reluctantly
 19 countenanced.” *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) (internal citation and
 20 quotation marks omitted). “This is consistent, of course, with Congress’s clear intent to preserve
 21 the statutory purpose of informal rulemaking by making sure those exceptions did not become
 22 ‘escape clauses,’ which an agency could utilize at its whim.” *Id.* (internal citation and quotation
 23 marks omitted).

24 **A. NOP 5016 is a Legislative Rather Than Interpretative Rule**

25 “Generally, agencies issue interpretive rules to clarify or explain existing law or
 26 regulations so as to advise the public of the agency’s construction of the rules it administers.”
 27 *Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001). “[I]nterpretive rules merely explain,
 28 but do not add to, the substantive law that already exists in the form of a statute or legislative rule.

1 Legislative rules, on the other hand, create rights, impose obligations, or effect a change in
 2 existing law pursuant to authority delegated by Congress.” *Hemp Indus. Ass’n.*, 333 F.3d at 1087
 3 (internal citation omitted). Legislative rules, unlike interpretative rules, have the force of law.
 4 *See Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004). A rule has the “force of law”:

5 (1) when, in the absence of the rule, there would not be an adequate
 6 legislative basis for enforcement action;

7 (2) when the agency has explicitly invoked its general legislative
 8 authority; or

9 (3) when the rule effectively amends a prior legislative rule.

10 *Hemp Industries*, 333 F.3d at 1087 (internal quotation marks and citation omitted). “If the answer
 11 to any of these questions is affirmative,” the rule is legislative, not interpretive. *Oregon v.*
 12 *Ashcroft*, 368 F.3d 1118, 1133 (9th Cir. 2004) (internal quotation marks and citation omitted),
 13 *aff’d sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006).

14 **1) NOP 5016 Amends the Existing Regulation**

15 Section 205.203(e)(1) prohibits the use in organic production of any compost “that
 16 contains a synthetic substance not on the National List” of approved synthetic substances. In
 17 contrast, NOP 5016 states that an organic producer *can* use a synthetic substance even if it is not
 18 on the National List provided the synthetic substance (1) is not applied during or used in the
 19 composting process, and (2) does not contaminate crops, soil, or water. Whereas before the
 20 adoption of NOP 5016 an organic producer could not use compost if it contained a synthetic
 21 substance not on the National List, under NOP 5016 it can so long as (1) the synthetic substance
 22 was not directly applied and (2) does not “contribute to contamination.” (AR 1104.) NOP 5016
 23 therefore amends Section 205.203(e)(1) by creating an exception to the prohibition on the use of
 24 compost that contains unapproved synthetic substances.

25 Defendants’ insistence that NOP 5016 merely clarifies the meaning of the word “contains”
 26 in Section 205.203(e)(1) is unpersuasive. Defendants contend that “administrative practicability
 27 demands” that “contains” mean something “less than [to] categorically forbid the presence of any
 28 scintilla of any synthetic substance not on the National List.” (Dkt. No. 59 at 19:21-23.²) Thus,

² Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the

1 according to Defendants, NOP 5016 sought to define “contains” in the context of green waste
2 compost such that the compost only “contains” a non-approved synthetic substance if it was added
3 during the composting process or it will contribute to contamination of crops, soil, or water. In
4 other words, NOP 5016 “clarifies that an organic farmer may use green waste compost with a pre-
5 existing, *de minimis* amount of non-approved synthetic substances, because in that scenario the
6 compost does not ‘contain’ a synthetic substance that is not allowed per the National List.” (Dkt.
7 No. 59 at 22:3-6.) Not so.

8 First, nowhere does NOP 5016 itself suggest that it is defining the word “contains” as used
9 in section 205.203(e)(1). “Contains” is used twice in NOP 5016. It states that “[t]he NOP does not
10 allow the use of compost that **contains** synthetic substances that are not on the National List.” (AR
11 1004 citing 7 C.F.R. § 205.203(e) (emphasis added).) It also recites that “[g]reen waste and green
12 waste compost that is produced from approved feedstocks, such as, non-organic crop residues or
13 lawn clippings may **contain** pesticide residues.” (AR 1004 (emphasis added).) Neither use of
14 “contains” suggests that NOP 5016 is defining the word as used in the regulation. Indeed,
15 elsewhere NOP 5016 defines the terms “green waste” and “feedstocks” which suggests that
16 Defendants recognized that it should explicitly define terms where needed. It did not define
17 “contains” in NOP 5016.

18 NOP 5016’s assertion that “green waste” and “green waste compost” that contain pesticide
19 residues can be used in organic production provided the pesticides are not applied during the
20 composting process and do not contribute to the contamination of crops, soil or water is further
21 evidence that Defendants were not interpreting the word “contains” as used in section
22 205.203(e)(1). The regulation prohibits any compost, not just green waste compost, from
23 “containing” a non-listed synthetic substance. 7 C.F.R. § 205.203(e)(1). If Defendants were
24 actually clarifying the meaning of “contains” as used in the regulation, as they now claim, then
25 NOP 5016 should apply to all compost, not just green waste compost. That NOP 5016 is limited
26 to green waste compost is consistent with Defendants making an exception, that is, an amendment,
27

1 to section 205.203(e)(1), rather than clarifying it.

2 Indeed, NOP 5016 uses “contains” in a manner inconsistent with the meaning the Agency
3 now ascribes to the word. NOP 5016 states: “Green waste and green waste compost that is
4 produced from approved feedstocks . . . may **contain** pesticide residues.” (AR 1104.) The next
5 sentence states that “[p]rovided that the green waste and green waste compost” are not directly
6 applied or used during the composting process and do not otherwise contaminate the environment,
7 “the compost is acceptable for use in organic production.” (*Id.*) In other words, NOP 5016 itself
8 states that even if the compost **contains** a non-approved synthetic substance, it can still be used in
9 certain circumstances. NOP 5016 thus uses “contains” to mean “is found in” or “is present in” the
10 compost; it never defines “contains” to mean more than a *de minimis* amount.

11 Second, Defendants’ purported clarification of “contains” in NOP 5016 is inconsistent
12 with Defendants’ own prior interpretation of the rule. After CDFA banned the three composts
13 containing bifenthrin, the National Organic Program repeatedly confirmed that because bifenthrin
14 is a synthetic substance not on the National List, compost containing the substance bifenthrin was
15 not eligible for use in organic farming. (AR 662; 741; 786; 848.) There is nothing in the
16 administrative record that suggests that prior to NOP 5016 the Agency ever interpreted section
17 205.203(e)(1) as allowing compost that contains any unapproved synthetic substance.

18 Third, the Agency’s December 21, 2000 final rulemaking commentary undermines
19 Defendants’ currently proffered definition of “contains.” In discussing the compost practice
20 standard, the Agency stated:

21 The [organic] producer’s first responsibility is to identify the
22 source of the feedstocks used in the composting system. This
23 requirement ensures that only allowed plant and animal materials are
24 included in the composting process, *that they are not contaminated*
25 *with prohibited materials*, and that they are incorporated in
26 quantities suitable to the design of the composting system.
27 Certifying agents will exercise considerable discretion for
28 *evaluating the appropriateness of potential feedstock materials and*
may require testing for prohibited substances before allowing their
use. For example, a certifying agent could require a producer to
monitor off-farm inputs such as leaves collected through a municipal
curbside program or organic wastes from a food processing facility.
Monitoring may be necessary to protect against contamination from
residues of prohibited substances such a motor oil or heavy metals,
or gross inert materials such as glass shards that can enter the

organic waste stream.

1
2 (AR 480; *see also* AR 347 (the proposed rules “prohibit the use of any commercially blended
3 fertilizer product that contains a prohibited substance”); *id.* (“We acknowledge the need to
4 examine carefully commercial blended fertilizers and soil amendments *to ensure that such*
5 *products do not contain prohibited substances*” (emphasis added)).) In the rulemaking process,
6 the Agency’s focus was on ensuring that compost material *did not contain* any prohibited
7 substance; not, as it now suggests, on whether whatever prohibited substance found in the compost
8 not cause some undefined contamination of crops, soil or water. There is no suggestion in the
9 record that the potentially required testing of the feedstock was to determine whether the
10 prohibited substance was directly applied during the composting process or whether the prohibited
11 substance found in the feedstock when used in compost will contaminate food, soil or water;
12 instead, the Agency’s focus was on ensuring that the compost does not contain a prohibited
13 substance, consistent with the plain language of the rule ultimately adopted.

14 Fourth, the unavoidable residual environmental contamination (UREC) rules do not
15 support Defendants’ position. The Organic Foods Act provides that an “agricultural product shall
16 not be sold or labeled as organically produced” if it contains a residue that is “(A) the result of
17 intentional application of a prohibited substance; or (B) present at levels that are greater than
18 unavoidable residual environmental contamination.” 7 U.S.C. § 6511(c)(2). Unavoidable residual
19 environmental contamination is defined as “[b]ackground levels of naturally occurring or synthetic
20 chemicals that are present in the soil or present in organically produced agricultural products that
21 are below established tolerances.” 7 C.F.R. § 205.2. Defendants argue that because the UREC
22 rules contemplate that some unavoidable contamination of products will be tolerated, it makes
23 sense for Defendants to interpret section 205.203(e)(1) as allowing compost to contain prohibited
24 synthetic substances provided they are not directly applied or do not contaminate crops, soil or
25 food. The UREC rules, however, apply to the final product—the organic produce. Further, they
26 only apply to “unavoidable” residues that are below certain levels. There is nothing inconsistent
27 about the Agency prohibiting an organic producer from using a compost that contains a synthetic
28 substance (something the producer can avoid), while at the same time acknowledging that some
amount of prohibited substance may nonetheless be found in the finished product and therefore

1 will be tolerated provided it is below certain levels.

2 In any event, even if Defendants could adopt some UREC standard for compost, they did
3 not do so. NOP 5016 is not limited to “unavoidable” contamination of compost; rather, even if
4 having the compost contain the pesticide is avoidable, NOP 5016 allows the synthetic substance.
5 More problematic for Defendants’ argument, however, is that in response to the concerns of the
6 banned compost producers, Defendants contemplated adopting a UREC for compost. (AR
7 741,749-50, 783, 786, 790.) Specifically, on October 14, 2009, the National Organic Program
8 circulated internally a first “draft policy for pesticide residues in compost.” (AR 748.) It proposed
9 applying UREC standards to compost with the threshold level of UREC in compost set at 5% of
10 the lowest tolerance level of that pesticide in food as established by the Environmental Protection
11 Agency (EPA). (AR 749-50.) Two days later, the Program circulated a revised draft which
12 omitted reference to the UREC standard and just proposed applying the EPA standard to compost;
13 that is, the lowest tolerance level of that pesticide in food. (AR 757-59.) The National Organic
14 Program ultimately rejected this approach, however, because to “establish a tolerance for compost
15 and other inputs we should obtain lots of scientific justification for the levels that we establish,
16 have the NOSB approve of the tolerance levels, *and go through a rule making process.*” (AR 771
17 (emphasis added).)

18 The Program then adopted NOP 5016 which provides “no tolerance levels for pesticide
19 contaminants in compost.” (AR 763, 867.) This was done, not as a matter of scientific judgment
20 or in the exercise of technical expertise, but because the Agency determined that it would be too
21 difficult and too time consuming to set tolerance levels. While Defendants refer to NOP 5016 as
22 only allowing *de minimis* amounts of non-approved substances, under NOP 5016 there are *no*
23 tolerance levels. Indeed, even if the Court were to accept Defendants’ suggestion that *de minimis*
24 levels of residue have always been allowed, the levels of bifenthrin at issue here are not *de*
25 *minimis*. (AR 741 “the bifenthrin residue amounts found range from 0.07 to 0.41 ppm. The EPA
26 tolerance level for bifenthrin varies depending upon the crop (e.g. 0.05 ppm for peanuts, pistachio;
27 0.10 ppm for root vegetables. The bifenthrin residues in the compost exceed the EPA tolerance
28 level and the UREC level.”). If the Agency believed rulemaking is required to go from no

1 unapproved synthetic substances in compost to adopting tolerance levels for those synthetic
 2 substances, it certainly requires rulemaking to change from no synthetic substances to synthetic
 3 substances allowed with no tolerance levels and, indeed, with synthetic substances present in
 4 amounts greater than that allowed under the UREC standards for agricultural products.

5 Defendants' insistence that an agency can change its mind misses the point. The question
 6 here is not whether NOP 5016 would pass muster under an APA substantive challenge; rather, the
 7 question is whether it was adopted consistent with the APA's procedural requirements. Indeed, it
 8 is telling that the cases Defendants cite on this issue involved an agency "changing its mind"
 9 following formal rulemaking. *See Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1273 (9th
 10 Cir. 2015), cert. granted, 136 S. Ct. 890 (2016), and vacated and remanded, (U.S. June 20, 2016);
 11 *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032 (D.C. Cir. 2012). That is what the Agency
 12 was required to do here.

13 * * *

14 "An agency is not allowed to change a legislative rule retroactively through the process of
 15 disingenuous interpretation of the rule to mean something other than its original meaning." *Hemp*
 16 *Indus. Ass'n*, 333 F.3d at 1091. National Organic Program regulations (legislative rules)
 17 specifically prohibit use of "[a]ny fertilizer or composted plant and animal material that contains a
 18 synthetic substance not included on the National List of synthetic substances allowed for use in
 19 organic crop production." 7 C.F.R. § 205.203(e)(1). Pesticide residues are not on the National
 20 List. Thus, NOP 5016's assertion that "green waste and green waste compost" can contain
 21 pesticide residues "[p]rovided that the green waste and green waste compost (i) is not subject to
 22 any direct application or use of prohibited substances (i.e. synthetic pesticides) during the
 23 composting process, and (ii) that any residual pesticide levels do not contribute to the
 24 contamination of crops, soil or water" amends Section 205.203(e). It is legislative, not
 25 interpretative, and required formal rulemaking.

26 **B. NOP 5016 is Not a General Statement of Policy**

27 Defendants contend that even if NOP 5016 is not exempt from formal rulemaking as an
 28 interpretative rule, it is exempt because it is a general statement of policy. "The critical factor to

1 determine whether a directive announcing a new policy constitutes a rule or a general statement of
2 policy is the extent to which the challenged [directive] leaves the agency, or its implementing
3 official, free to exercise discretion to follow, or not to follow, the [announced] policy in an
4 individual case.” *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987) (internal
5 quotation marks and citation omitted). “To the extent that the directive merely provides guidance
6 to agency officials in exercising their discretionary powers while preserving their flexibility and
7 their opportunity to make ‘individualized determination[s],’ it constitutes a general statement of
8 policy.” *Id.* “In contrast, to the extent that the directive ‘narrowly limits administrative discretion’
9 or establishes a ‘binding norm’ that ‘so fills out the statutory scheme that upon application one
10 need only determine whether a given case is within the rule’s criterion,’ it effectively replaces
11 agency discretion with a new ‘binding rule of substantive law.’ In these cases, notice-and-
12 comment rulemaking proceedings are required, as they would be for any other substantive rule,
13 and they will represent the only opportunity for parties to challenge the policy determinations
14 upon which the new rule is based.” *Id.* Thus, to qualify for the “statement of policy” exception to
15 formal rulemaking two requirements must be satisfied: (1) the policy operates only prospectively,
16 and (2) the policy does “not establish a binding norm, or be finally determinative of the issues or
17 rights to which [it] address[es]” and instead leaves officials “free to consider the individual facts in
18 the various cases that arise.” *Id.* NOP 5016 is not a general statement of policy.

19 As a preliminary matter, the Agency has not explained how NOP 5016 can be a general
20 statement of policy if the Court rejects (as it has) the Agency’s first argument that it is
21 interpretative rather than legislative. In other words, having concluded that NOP 5016 amended 7
22 C.F.R. § 205.203(e)(1) and thus has the force of law, it cannot merely be a general statement of
23 policy.

24 In any event, NOP 5016 does not satisfy either of the two requirements of a general
25 statement of policy. First, it operates retroactively as well as prospectively. For this, the Court
26 need look no further the National Organic Program’s repeated observation that if the guidelines set
27 forth in NOP 5016 were adopted, CDFA would have to withdraw the ban on the three compost
28 products found to contain bifenthrin. (*See, e.g.*, AR 759 (“CDFA would have to rescind their

1 orders and the compost with bifenthrin residues would be allowed in organic crop production”);
 2 AR 763 (CDFA “will need to withdraw the notices prohibiting the 3 California compost
 3 products”).) Rescission is necessarily retroactive. *See Welles v. Turner Entm’t Co.*, 503 F.3d
 4 728, 738 (9th Cir. 2007) (“rescind [] conveys a retroactive effect”); *Am. Bus Ass’n v. United*
 5 *States*, 627 F.2d 525, 531 (D.C. Cir. 1980) (concluding that the Interstate Commerce
 6 Commission’s determination that “restrictions previously imposed on carriers’ freedom have been
 7 lifted” necessarily operated retroactively).

8 Second, NOP 5016 creates a binding norm. Defendants’ argument that the lack of any
 9 tolerance level in NOP 5016 means that implementation is left to each individual certifying
 10 agent’s discretion ignores the Guidance and how the Agency itself interpreted it. The certifying
 11 agents no longer have discretion to ban products which contain synthetic substances not on the
 12 National List unless the presence of the synthetic substances contributes to contamination or was
 13 directly applied. “[C]abining of an agency’s prosecutorial discretion can in fact rise to the level of
 14 a substantive, legislative rule.” *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).
 15 Indeed, that is precisely how the Agency interpreted the Guidance. In considering the effect of a
 16 guidance document that states “that there are no tolerance levels for pesticide contaminants in
 17 compost,” Miles McEvoy, the Deputy Administrator of the National Organic Program, reasoned
 18 that such document would require the Program to notify the CDFA that

19 *they should not prohibit compost that contains bifenthrin residues*
 20 *unless they have evidence that the compost is contaminating the*
 21 *crops, soil or water. So far I have not seen any evidence the*
 22 *bifenthrin is contaminating the crops, soil or water. They will need*
 23 *to withdraw the notices that prohibited the 3 California compost*
 24 *products.*

25 (AR 763 (emphasis added); *see also* AR 759 (“CDFA would have to rescind their orders and the
 26 compost with bifenthrin residues would be allowed in organic crop production”). Thus, according
 27 to the National Organic Program, in light of NOP 5016 certifying agents *do not have discretion* to
 28 ban compost that contains unapproved synthetic substances; instead, they must withdraw the bans
 on those products. “If it appears that a so-called policy statement is in purpose or likely effect one
 that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of

1 substantive law.” *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658,
2 666 (D.C. Cir. 1978).

3 *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014), is distinguishable. There, the
4 DC Circuit held that a final guidance document was a general statement of policy because it did
5 “not tell regulated parties what they must do or may not do in order to avoid liability. The Final
6 Guidance imposes no obligations or prohibitions on regulated entities. State permitting authorities
7 ‘are free to ignore it.’” *Id.* at 252. Here, in contrast, neither state certifying agents nor organic
8 producers are “free to ignore” NOP 5016. *Id.*; *see also Appalachian Power Co. v. E.P.A.*, 208
9 F.3d 1015, 1023 (D.C. Cir. 2000) (“[the guidance] reads like a ukase. It commands, it requires, it
10 orders, it dictates. Through the Guidance, EPA has given the States their “marching orders” and
11 EPA expects the States to fall in line, as all have done, save perhaps Florida and Texas.”).

12 For the same reason, the Court rejects Defendants’ suggestion that NOP 5016 is nothing
13 more than a “field-level instructional guide” because it is part of the “National Organic Program
14 Handbook: Guidance and Instructions for Accredited Certifying Agents and Certified Operations”
15 which seeks to “provide standard operating procedures and specific review and enforcement
16 approaches to help ensure that all parties implement the program’s mandate in an effective, fair,
17 and consistent manner.” (Dkt. No. 59 at 28:24-26.) Although Defendants emphasize that the
18 handbook contains a disclaimer suggesting that its policies are not legally binding, the Court is not
19 required to accept the Agency’s interpretation of the legal effect of the guidance. *See Hemp Indus.*
20 *Ass’n*, 333 F.3d at 1088 (“fact that an agency claims that its rule does not bind tribunals outside
21 the agency, however, does not end the inquiry into whether the rule is legislative.”); *see also*
22 *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014) (“courts
23 consider whether the practical effects of an agency’s decision make it a final agency action,
24 regardless of how it is labeled.”).

25 Finally, Defendants make a confusing argument that NOP 5016 is a general statement of
26 policy because it only binds lower-level implementing agents and the Secretary of the USDA has
27 the discretion as to how to implement the Organic Foods Act. The cases upon which Defendants
28 rely, however, are inapposite. For example, *Erringer v. Thompson*, 371 F.3d 625, 631 (9th Cir.

1 2004), involved whether a rule was interpretative, not a general statement of policy. In any event,
 2 the court held the rule was interpretative rather than legislative because it did not amend an
 3 existing legislative rule; here, in contrast, NOP 5016 amends a regulation and thus has the force of
 4 law. In *Nguyen v. United States*, 824 F.2d 697, 702 (9th Cir. 1987), the court reiterated that
 5 “notice must be given both to make and to change [a] ‘law.’” Here, NOP 5016 changed the law, 7
 6 C.F.R. § 205.203(e)(1). The Agency did not have the discretion to amend an existing regulation
 7 without formal rulemaking.

8 Further, to hold that because the Agency could change NOP 5016 at any time it has no
 9 binding effect would allow an agency to perpetually amend the rules and evade the APA’s
 10 procedural requirements. “[A]n agency’s characterization of its action as being provisional or
 11 advisory is not necessarily dispositive, and courts consider whether the practical effects of an
 12 agency’s decision make it a final agency action, regardless of how it is labeled.” *Columbia*
 13 *Riverkeeper*, 761 F.3d at 1094-95; *see also Appalachian Power Co.*, 208 F.3d at 1022 (rejecting
 14 an argument that “because the Guidance, is subject to change, it is not binding and therefore not
 15 final action” because “all laws are subject to change. Even that most enduring of documents, the
 16 Constitution of the United States, may be amended from time to time. The fact that a law may be
 17 altered in the future has nothing to do with whether it is subject to judicial review at the
 18 moment.”). Defendants’ interpretation of the general statement of policy exception to the APA’s
 19 rulemaking provisions would effectively insulate agency decisions from review by requiring
 20 deference to senior officials’ interpretation of rules even where those interpretations represent a
 21 substantive change to that rule. The APA is not so toothless.

22 * * *

23 NOP 5016 amended 7 C.F.R. § 205.203(e)(1) and was therefore a legislative rule change.
 24 Because it was not accompanied by a “specific finding of good cause documenting why such
 25 procedures ‘are impracticable, unnecessary, or contrary to the public interest,’” it was subject to
 26 the APA’s notice and comment provisions. *See Hemp Industries*, 333 F.3d at 1087 (quoting 5
 27 U.S.C. § 553(b), (b)(B)). Defendants’ failure to follow these procedural rulemaking requirements
 28 was unlawful. *See* 5 U.S.C. § 706(2)(D).

1 **II. Remedy**

2 There remains the question of remedy. The parties agree that if the Court finds that
3 Defendants violated the APA the appropriate remedy is remand; however, their views diverge as
4 to the status of NOP 5016 during remand. Plaintiffs argue for vacatur whereas Defendants request
5 that the Agency be allowed to cure the procedural error while leaving NOP 5016 in place.

6 The remedy for a procedural APA violation is for the reviewing court to “hold unlawful
7 and set aside agency action.” 5 U.S.C. § 706(2). Thus, where an agency’s “finding is not
8 sustainable on the administrative record made, then the [] decision must be vacated and the matter
9 remanded [to the agency] for further consideration.” *Camp v. Pitts*, 411 U.S. 138, 143 (1973). In
10 the Ninth Circuit, remand without vacatur is the exception rather than the rule. *See California*
11 *Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012) (“we have only
12 ordered remand without vacatur in limited circumstances.”); *Humane Soc’y v. Locke*, 626 F.3d
13 1040, 1053 n.7 (9th Cir. 2010) (“In rare circumstances, when we deem it advisable that the agency
14 action remain in force until the action can be reconsidered or replaced, we will remand without
15 vacating the agency’s action.”); *Ctr. for Food Safety v. Vilsack*, 734 F.Supp.2d 948, 951 (N.D.
16 Cal. 2010) (“[T]he Ninth Circuit has only found remand without vacatur warranted by equity
17 concerns in limited circumstances, namely serious irreparable environmental injury.”). Courts
18 “leave an invalid rule in place only when equity demands that we do so.” *Pollinator Stewardship*
19 *Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015). “When determining whether to leave an
20 agency action in place on remand, [courts] weigh the seriousness of the agency’s errors against the
21 disruptive consequences of an interim change that may itself be changed.” *Id.* (internal citation
22 and quotation marks omitted).

23 **A. Seriousness of the Agency’s Errors**

24 The error here is serious. In issuing NOP 5016, the Agency effectively amended Section
25 205.203(e) and withdrew a prior basis for enforcement without the APA-required notice and
26 comment. While the record reflects that the prevalence of bifenthrin in green waste compost is—
27 or was in 2010—an emerging issue which the National Organic Program may not have considered
28 when these regulations were adopted, these circumstances do not excuse the Agency from the

1 notice and comment requirement. This result is especially true where, as here, the reach of the
 2 Agency's new rule stretches beyond bifenthrin and instead allows green waste or green waste
 3 compost used in organic production to contain any synthetic pesticide of which bifenthrin is just
 4 one example. (AR 1103-1104.) Moreover, if the presence of bifenthrin was unexpected and
 5 created an issue that had to be addressed immediately, the APA exempts an agency from the
 6 notice and comment requirement if "the agency for good cause finds . . . that notice and public
 7 procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §
 8 553(b). The Agency chose not to invoke this exemption.

9 "In enacting the APA, Congress made a judgment that notions of fairness and informed
 10 administrative decisionmaking require that agency decisions be made only after affording
 11 interested persons notice and an opportunity to comment." *Paulsen v. Daniels*, 413 F.3d 999, 1004
 12 (9th Cir. 2005) (internal citation and quotation marks omitted). Defendants may be correct that
 13 they could adopt the same rule on remand, but whether they will do so after the required notice
 14 and comment procedures is far from certain. Under these circumstances, the severity of the error
 15 weighs in favor of vacatur.

16 **B. Consequences of Vacatur**

17 "In considering whether vacatur is warranted, [the Court] must balance the [Agency's]
 18 errors against the consequences of such a remedy." *California Communities Against Toxics*, 688
 19 F.3d at 993. Defendants contend that in the absence of NOP 5016 there would be significant
 20 environmental harms because the green waste currently being used for green waste compost would
 21 be dumped in landfills rather than contributing to compost nutrient cycling. They suggest further
 22 that even if this were not the result, and the green waste was instead sold for use in non-organic
 23 agriculture, there would be fewer incentives to produce environmentally friendly compost.
 24 Plaintiffs counter that there is little evidentiary support for Defendants' arguments and that the
 25 record reflects that only a small portion of green waste compost is actually used by organic
 26 farmers as it is. Further, Plaintiffs suggest that there are several sources of synthetic-substance
 27 free compost available on the market. Plaintiffs identify testing performed by the Washington
 28 State Department of Agriculture (which tests for pesticide contamination because it is required for

1 Canadian organic certification) that showed of the 13 tested composts, only 5 had pesticide
2 residues. (AR 1115.)

3 The Court is not persuaded that vacating NOP 5016 pending formal rulemaking will result
4 in environmental harm sufficient to warrant leaving the invalid rule in place. Those “limited
5 circumstances” in which the Ninth Circuit has declined to vacate on remand because of the
6 potential for interim environmental harm involved irreparable injuries such as the potential
7 extinction of an animal species. *See, e.g., Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392,
8 1405 (9th Cir. 1995) (concluding that equity warranted leaving the rule in place during remand
9 because of the potential extinction of a snail species); *Pollinator Stewardship Council*, 806 F.3d at
10 532 (concluding that “given the precariousness of the bee population, leaving the EPA’s
11 registration of sulfoxaflor in place risks more potential environmental harm than vacating it.”).
12 Ensuring a secondary use for green waste is certainly an important environmental cause, but the
13 record does not establish that a significant a share of that market is represented by the organic
14 community. (AR 846.) The record also does not suggest that the result of vacatur will be a lack of
15 available compost for organic producers, especially given the State of Washington’s experience.

16 The Court thus turns to the thrust of the parties’ and amici’s arguments—economic harm.
17 The Ninth Circuit has declined vacatur because of potential economic consequences (among
18 others) at least once. In *California Communities Against Toxic*, the EPA admitted its rulemaking
19 process had been flawed and voluntarily sought remand following the plaintiffs’ APA challenge.
20 *Id.* at 992-93. The court remanded without vacatur because the “delay and trouble vacatur would
21 cause [was] severe” as it would have delayed construction of a Southern California power plant.
22 *Id.* at 993. Without the power plant, the region might not have had enough power which could
23 have resulted in rolling blackouts and such blackouts have negative environmental consequences
24 which the Clean Air Act sought to avoid. *Id.* Further, the consequences of vacatur would be
25 “economically disastrous [because] [t]his is a billion-dollar venture employing 350 workers.” *Id.*
26 at 994.

27 Defendants contend that the organic industry will likewise suffer significantly if NOP
28 5016 is vacated because organic growers will no longer be able to use green waste compost and

1 composting operations will lose a significant market for their products. However, there is
2 insufficient evidence in the record to support their assertion, let alone quantify it. Defendants also
3 suggest that because NOP 5016 was adopted five years ago and organic farmers have since
4 applied the compost to their soil there is considerable uncertainty regarding what will happen with
5 a farmer’s organic certification if the rules change. Plaintiffs, however, limit their request to
6 prospective vacatur only such that any compost purchased and/or used between 2010 and the
7 Court’s Order would be grandfathered in and the Court is not going to order otherwise.

8 The amici, for their part, contend that withdrawing NOP 5016 would cause “profound
9 disruptions to the organic industry” (Dkt. No. 72-1 at ¶ 8 (Declaration of Laura Batcha, Executive
10 Director of the Organic Trade Association)), would “impose an irreparably harmful burden on
11 certifying agents” by forcing them to develop an “astronomical...testing regime” (AR 64-3 at ¶¶
12 10-11 (Declaration of Jake Lewin, President of CCOF Certification Services), and could make it
13 “immediately necessary to halt shipments of crops presently in the field until USDA sorts out the
14 compliance plan” (AR 64-1 at ¶ 14 (Declaration of Hank Giclas, Senior Vice President with
15 Western Growers Association)). Amici contend that these harms will occur because in the
16 absence of NOP 5016 (1) they would be required to develop a new compost testing regime which
17 would be impossible or at least impossibly expensive, (2) the bulk of this burden would fall on
18 organic farmers who can ill-afford it, and (3) Plaintiffs have not shown that NOP 5016 has had
19 any negative environmental impacts in the five years since it was adopted. Amici suggest that
20 even if the testing only cost \$100/ton because compost is applied at a rate of 1-8 tons per acre and
21 Western Growers Association members use more than a million acres, the cost to its members
22 alone could be as high as \$100 million per year.

23 These arguments are not supported by the record or the law. Vacatur merely reinstates the
24 status quo. *See Paulsen*, 413 F.3d at 1008 (“The effect of invalidating an agency rule is to
25 reinstate the rule previously in force.”). From 2000 through 2010—before the adoption of NOP
26 5016—the organic industry thrived. Moreover, as NOP 5016 did not rescind some sort of
27 mandatory testing regime, vacating the guidance does not re-impose a mandatory testing regime;
28 instead, as always, testing is performed at the discretion of certifiers and state organic programs

1 “when there is reason to believe that the agricultural input or product has come into contact with a
2 prohibited substance or has been produced using excluded methods.” 7 C.F.R. § 205.670(b).
3 Further, some states like California and Washington have pre-existing residue testing programs.
4 The Washington State Department of Agriculture’s program for residue testing reviews inputs
5 (including compost) at the expense of the commercial compost producer to insure that the inputs
6 are not contaminated with prohibited substances and provides a list of approved composts for
7 organic farmers. (AR 1115-1116.) Additionally, the National Organic Program issued a final rule
8 requiring organic certifiers to periodically test organic products for residues of prohibited
9 substances in 2012—just two years after NOP 5016. *See* Final Rule, Periodic Residue Testing, 77
10 Fed. Reg. 67,239 (November 9, 2012).³ And, any such testing is performed at the certifiers’
11 expense, not that of the farmer. 7 C.F.R. § 205.670(b). (“Such tests must be conducted by the
12 applicable State organic program’s governing State official or the certifying agent at the official’s
13 or certifying agent’s own expense.”). The burden then is on the certifier and not the farmer to
14 ensure that all inputs (such as commercially made compost) meet the requirements for labeling as
15 organic. 7 C.F.R. §§ 205.201, 205.670. Amici’s testing argument makes no sense.

16 Finally, any argument regarding the disastrous effect of vacatur of the rule is undermined
17 by the fact that any prospective vacatur would put the industry in the same position the California
18 organic industry was in from 2009-2010 between the time when CDFPA prohibited the three
19 compost products containing bifenthrin for use in organic production and NOP 5016 was enacted.
20 When asked about how the industry fared during this time at oral argument, amici stated that the
21 compost manufacturer whose compost was banned “stopped selling, and they found other
22 composts” and “it was just business as usual while this worked itself out.” (Transcript at 52:19-
23

24 ³ The purpose of the rule is to “clarify[y] a provision of OFPA and the regulations issued
25 thereunder that requires periodic residue testing of organically produced agricultural products by
26 accredited certifying agents. The rule ensures consistency of the regulations with OFPA by
27 ensuring that all certifying agents are conducting residue testing of organic products on a regular
28 reoccurring basis. Residue testing plays an important role in organic certification by providing a
means for monitoring compliance with the NOP and by discouraging the mislabeling of
agricultural products. This action further ensures the integrity of products produced and handled
under the NOP regulations.” National Organic Program; Periodic Residue Testing, 77 FR 67239-
01.

1 23.) In other words, the sky did not fall.

2 In sum, Defendants' and the amici's arguments regarding the severity of the consequences
 3 of vacatur are overstated, at best. Given the apparent prevalence of bifenthrin in green waste,
 4 vacating NOP 5016 will likely affect the availability of this green waste for use in organic
 5 compost. But neither Defendants nor the amici have demonstrated that this would be
 6 unacceptably harmful to the environment or the organic industries' economy or that the
 7 consequences are anywhere near the level of the consequences in *California Communities Against*
 8 *Toxics*. On the other hand, Plaintiffs did not challenge NOP 5016 until nearly five years after its
 9 adoption and this delay must factor into the Court's analysis. Ultimately, however, given that
 10 vacatur is the presumptive remedy for a procedural violation such as this, it is Defendants' burden
 11 to show that vacatur is unwarranted. Defendants have not done so. The Agency's unlawful
 12 rulemaking must be set aside and the matter remanded for compliance with 5 U.S.C. § 553.

13 CONCLUSION

14 For the reasons stated above, Plaintiffs' Motion for Summary Judgment is GRANTED and
 15 Defendants' cross-motion is DENIED. (Dkt. Nos. 57 & 59.) NOP 5016 is VACATED
 16 prospectively and the matter is REMANDED to the Agency for compliance with the APA. The
 17 Court's vacatur is effective as of August 22, 2016. Any green waste compost purchased or used
 18 between 2010 and August 22, 2016 is grandfathered in and not subject to this Order.

19 **IT IS SO ORDERED.**

20 Dated: June 20, 2016

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 23 JACQUELINE SCOTT CORLEY
 24 United States Magistrate Judge
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