

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

THE HUMANE SOCIETY OF THE  
UNITED STATES, et al.,

Plaintiffs,

v.

SONNY PERDUE, et al.,

Defendants.

Case No. 20-cv-01395-LB

**ORDER GRANTING MOTION TO  
DISMISS**

Re: ECF No. 25

**INTRODUCTION**

The plaintiffs are non-profit organizations challenging rules set by the U.S. Department of Agriculture (USDA) on chicken-slaughter line speeds at certain chicken slaughterhouses. A 2014 regulation from the USDA’s Food Safety and Inspection Service (FSIS) allows line speeds of 140 chickens per minute. In 2018, FSIS began allowing waivers for slaughterhouses that permit line speeds of 175 chickens per minute. Then in 2022, after the change in leadership, the 2018 waivers were terminated and modified waivers were allowed under new criteria (though the new criteria incorporate the 2018 line-speed increase). The plaintiffs challenge the 2018 line-speed-increase decision on the ground that it violates the Administrative Procedure Act (APA).

The defendants (USDA, FSIS, and agency officials) moved to dismiss the complaint on the following grounds: (1) lack of standing; (2) the 2018 criteria are not final agency action; and (3)

1 improper venue (assuming that Marin Humane lacks standing). Alternatively, the defendants ask  
2 for transfer to the District of Columbia under 28 U.S.C. § 1404(a).

3 The plaintiffs lack standing: given the changed regulatory landscape, they have not met their  
4 burden on traceability or redressability (but may be able to do so in an amended complaint). (The  
5 plaintiffs do not have organizational standing, but The Humane Society has demonstrated  
6 associational standing, at least absent the redressability issues.) The court reserves the other issues  
7 for consideration after the filing of an amended complaint.

## 8 9 STATEMENT

### 10 1. The Challenged Waiver Decision

11 From 2012 to 2014, FSIS engaged in rulemaking that resulted in the “New Poultry Inspection  
12 System,” an optional federal inspection system for chicken slaughterhouses. Under this system,  
13 opt-in slaughterhouses could operate at line speeds up to 140 chickens per minute. During the  
14 rulemaking, FSIS considered and rejected allowing all opt-in slaughterhouses to use line speeds of  
15 up to 175 chickens per minute, but it did allow up to twenty slaughterhouses to do so.<sup>1</sup>

16 FSIS made its 2018 line-speed-increase decision through a February 2018 Constituent Update  
17 and a September 2018 Federal Register notice (and not a rulemaking). The defendants allegedly  
18 did not provide “any acceptable justification,” failed to consider issues such as worker safety, and  
19 failed to conduct a National Environmental Policy Act (NEPA) review. The 2018 decision, which  
20 applies to slaughterhouses that use the New Poultry Inspection System, “clear[ed] the way for  
21 dozens of slaughterhouses to kill chickens at an increased rate of 175 [chickens] per minute . . . if  
22 [the slaughterhouses] meet certain minimal requirements.” That is, the decision sets out criteria for  
23 waivers from the 2014 line-speed regulation. (The plaintiffs thus allege that the 2018 decision  
24 amended the 2014 rule.) “Nearly half” of chicken slaughterhouses using the New Poultry  
25 Inspection System are eligible for a waiver.<sup>2</sup>

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27 <sup>1</sup> Am. Compl. – ECF No. 22 at 3 (¶ 4), 36–38 (¶¶ 165–74). Citations refer to material in the Electronic  
Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

28 <sup>2</sup> *Id.* at 2–3 (¶¶ 3–4), 27–28 (¶ 108), 38–46 (¶¶ 175–222).

1 The plaintiffs allege that the 2018 decision “will result in more inhumane treatment of  
2 chickens, which FSIS has long recognized seriously threatens food safety,” and “will also cause  
3 harm to the environment and result in increased risk of injury for slaughterhouse employees.”  
4 These problems exist even at line speeds of 140 chickens per minute, but they will be exacerbated  
5 at increased line speeds.<sup>3</sup>

6 The plaintiffs describe the chicken-slaughter process, from transportation from the factory  
7 farm, to upside-down shackling on a conveyor line, to passage through electrified water to render  
8 the chickens unconscious, to carotid-artery severing by a blade, to submersion of the deceased  
9 chickens into a hot-water tank. The plaintiffs allege that each step entails a margin of error such  
10 that the intended result at that step is not achieved for a certain number of chickens (but those  
11 chickens still proceed to the next step).<sup>4</sup> The adverse effects from higher line speeds are essentially  
12 that these error rates increase, resulting in problems such as bruising and broken bones (which  
13 threaten food safety), inhumane treatment (for example, conscious chickens entering scalding  
14 water at the final step), worker injuries (including exposure to chickens’ waste), and  
15 environmental harm (such as from increased water and fossil-fuel consumption).<sup>5</sup>

## 16 17 **2. FSIS’s 2022 Waiver Decision**

18 The parties do not dispute that in 2022, FSIS “terminated all line-speed waivers issued  
19 pursuant to the 2018 Constituent Update and Federal Register notice and allowed establishments  
20 that had received waivers under the 2018 criteria to apply for modified waivers subject to criteria  
21 announced in a July 29, 2022 Constituent Update.”<sup>6</sup>

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26 <sup>3</sup> *Id.* at 3 (¶ 3), 27 (¶ 105), 28 (¶ 110).

27 <sup>4</sup> *Id.* at 28–30 (¶¶ 113–23).

28 <sup>5</sup> *Id.* at 30–36 (¶¶ 124–64).

<sup>6</sup> Joint Status Report – ECF No. 53 at 2.

### 3. The Plaintiffs and Their Alleged Interests in the Challenged Waivers

The plaintiffs are five non-profit organizations: The Humane Society of the United States, Animal Outlook, Government Accountability Project, Mercy for Animals, and Marin Humane. Their missions relate to animal protection.<sup>7</sup> The plaintiffs, again, challenge only FSIS’s 2018 waiver decision.<sup>8</sup>

The Humane Society is headquartered in the District of Columbia and has regional offices throughout the country. It “is the largest animal protection organization in the United States, representing millions of members and constituents nationwide.” It “actively advocates for better laws and regulations to protect animals and the environment; conducts mission-specific campaigns to increase protections for domestic animals and wildlife; and advocates against practices that injure, harass, or otherwise harm animals.” Through its farm-animal-welfare campaign, it “endeavors to raise awareness about farm animal confinement, raising, and slaughter practices,” including their effect on pollution and public health, and “advocates to regulate such farm animal practices through efforts with administrative agencies, Congress, state legislatures, and the courts.” FSIS’s 2018 waiver criteria has required The Humane Society to “divert resources . . . to the issue.”<sup>9</sup>

Some of The Humane Society’s members “spend time near” slaughterhouses operating at higher line speeds and some “live near factory farms that supply such slaughterhouses, including members in Batesville, Arkansas; Imboden, Arkansas; and West Columbia, South Carolina.” “These members are subject to aesthetic, health, environmental, and/or other harm resulting from these slaughterhouses’ operations.” In particular, the members are subject to “the noxious stench emitted from such slaughterhouses,” “pollution from trucks carrying chickens on their way to be killed at such facilities,” and the sight of chickens “kept in cruel conditions on the trucks.” These harms “very likely have been and will continue to be worsened because of the increased speeds at which such slaughterhouses operate under the 2018” decision.<sup>10</sup>

<sup>7</sup> Am. Compl. – ECF No. 22 at 5–21 (¶¶ 11–75).

<sup>8</sup> *Id.* at 27 (¶ 106).

<sup>9</sup> *Id.* at 5–7 (¶¶ 11–14).

<sup>10</sup> *Id.* at 7–8 (¶ 16).

1 The Humane Society also alleges procedural and informational injuries on behalf of itself and  
2 its members. They allegedly have a procedural interest in participating in FSIS’s development of  
3 regulations, including FSIS’s considering information submitted by the public and its considering  
4 the environmental impacts of its actions. “These interests were injured by FSIS’s failure to engage  
5 in the rulemaking process required by the APA and to conduct adequate environmental review as  
6 required by NEPA before making the 2018” decision. Regarding the lack of a NEPA  
7 environmental review, The Humane Society’s members were allegedly deprived of relevant  
8 information. And “[i]f FSIS had conducted notice-and-comment rulemaking . . . and conducted an  
9 environmental review . . . , then [The Humane Society] and its members’ procedural injuries  
10 would be redressed” because they would have raised relevant objections.<sup>11</sup>

11 Animal Outlook has its principal place of business in the District of Columbia. It “works to  
12 challenge the status quo of animal agribusiness,” including by “conduct[ing] undercover  
13 investigations of factory farms and industrialized slaughterhouses,” advocating against  
14 government policies, and coordinating public campaigns and public education. “A consistent core  
15 component of its messaging has been education on the link between environmental degradation  
16 and animal agriculture.” For example, “[i]n November 2018, [Animal Outlook] released an  
17 investigation of Amick Farms, a chicken slaughterhouse on Maryland’s Eastern Shore that FSIS  
18 allows to operate at line speeds of up to 175 [chickens per minute].” Animal Outlook also alleges  
19 that it “suffered direct economic harm because of the increased line speeds at Amick Farms  
20 because the organization was required to compensate its investigator more than anticipated,  
21 specifically because of the investigator’s injuries caused by the increased line speeds.” And  
22 Animal Outlook alleges that it will be forced to reallocate resources as a result of FSIS’s 2018  
23 decision, because it will have to do more investigations of chicken slaughterhouses to document  
24 the alleged cruelty resulting from increased line speeds.<sup>12</sup>

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<sup>11</sup> *Id.* at 7–9 (¶¶ 15, 17–21).

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<sup>12</sup> *Id.* at 9–13 (¶¶ 22–39).

1 Mercy for Animals’ principal place of business is in Los Angeles. Its mission “is to construct a  
2 compassionate food system by reducing suffering and ending the exploitation of animals for  
3 food.” The organization “works with companies to adopt animal welfare policies and plant-based  
4 alternatives to animal products, advocates for government policies that reduce the suffering of  
5 animals used for food, and educates the public regarding farm animal welfare and the dire  
6 environmental consequences of animal agriculture.” “In particular, [Mercy for Animals] works  
7 with companies to transition away from the hanging and shackling of live birds during the  
8 slaughter process.” The organization alleges that “[b]y enabling facilities to operate at higher line  
9 speeds, FSIS allows companies to continue the inhumane practices of hanging and shackling more  
10 live birds — frustrating [Mercy for Animals’] corporate outreach work that is specifically aimed at  
11 eliminating live hanging and shackling.” Because of FSIS’s 2018 decision, Mercy for Animals has  
12 allegedly had to divert resources from other activities (such as investigations related to other  
13 animals “or other aspects of farmed animal welfare”).<sup>13</sup>

14 The Government Accountability Project is based in the District of Columbia. Its mission “is to  
15 promote corporate and government accountability by protecting whistleblowers and promoting  
16 social and political awareness of the accountability whistleblowers provide to our democratic  
17 society.” “Food safety has been an area of interest . . . since the organization’s founding.” The  
18 organization “provides educational outreach to food industry employees, promotes legislative  
19 initiatives, initiates litigation, and provides multimedia resources to promote transparency.”<sup>14</sup>

20 The Government Accountability Project alleges two injuries from FSIS’s 2018 decision. The  
21 first is in the form of the decision’s reduced reliance on federal poultry inspectors. The  
22 organization has “invested significant expense and personnel time in outreach to public sector  
23 employees” because of their statutory whistleblower protections. It relies on food-industry  
24 whistleblowers, “including federal inspectors in chicken slaughterhouses.” It thus alleges that a  
25 shift from public-sector to private-sector inspectors “would greatly reduce the value of [its]  
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27 <sup>13</sup> *Id.* at 13–15 (¶¶ 40–47).

28 <sup>14</sup> *Id.* at 15–16 (¶¶ 48–49).

1 outreach to public sector employees.” The 2018 decision’s changes will force the organization to  
 2 “develop outreach for private . . . whistleblowers, which will put a drain on other areas of  
 3 expenditure.” It will also lose access to the attorney’s fees awards available under the  
 4 Whistleblower Protection Enhancement Act of 2012 for successful public-sector whistleblower  
 5 claims.<sup>15</sup>

6 The second injury alleged by the Government Accountability Project is that “increased  
 7 slaughter line speeds reduce the ability of the inspectors working in facilities operating at such  
 8 speeds to see food industry practices that compromise food safety (and therefore such inspectors’  
 9 ability to blow the whistle on food safety issues).” The Government Accountability Project “has  
 10 seven affidavits from current USDA/FSIS employees describing the impossible task of inspecting  
 11 nearly three birds per second.” Thus, “the quality of disclosures of food inspector whistleblowers  
 12 will decrease, frustrating [the Government Accountability Project’s] mission further and forcing  
 13 [it] to shift resources to deal with this issue.”<sup>16</sup>

14 The last plaintiff, Marin Humane, is based in Novato, California. As the animal-services  
 15 agency for Marin County, it “offers refuge, rehabilitation, and support services to more than  
 16 10,000 animals each year.” It also “has an active anticruelty and advocacy program and routinely  
 17 supports legislation directed at reducing cruelty to all animals.” It investigates farm-animal  
 18 cruelty, “rescues chickens from abusive situations, and monitors chickens moving through Marin  
 19 on their way to slaughter.” For example, it “was involved in an extensive investigation of cruelty  
 20 to broiler chickens, who fell off a truck in Marin, on the way to slaughter.” It has also “been  
 21 actively involved in monitoring and investigations of local agricultural businesses, including local  
 22 custom slaughter facilities.” It runs an annual Animal Law Enforcement Academy that includes  
 23 “issues surrounding slaughter” and is attended by people involved “in the application of state  
 24 statutes addressing animal cruelty issues.” Because of FSIS’s 2018 decision, Marine Humane will  
 25 allegedly “need to divert its resources dedicated to its core programs in order to evaluate and  
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27 <sup>15</sup> *Id.* at 16–18 (¶¶ 50–61).

28 <sup>16</sup> *Id.* at 18–19 (¶ 62).

1 investigate the possibility that chickens who will be subject to increased line speeds will be  
 2 transported through Marin County.” The increased line speeds will allegedly “increase the number  
 3 of incidents of animal cruelty throughout [California],” causing Marin Humane to “respond by  
 4 increasing its monitoring of trucks loaded with chickens that travel through the County.”<sup>17</sup>

#### 6 **4. Procedural History**

7 The plaintiffs assert four claims that FSIS’s 2018 decision violated the APA: (1) the decision  
 8 was “not in accordance with law,” 5 U.S.C. § 706(2)(A), because it did not comply with FSIS’s  
 9 regulation setting requirements for regulatory waivers, 9 C.F.R. § 381.3(b); (2) the decision  
 10 amended existing regulations (the 2014 line-speed limit of 140 chickens per minute, 9 C.F.R.  
 11 § 381.69(a), and the regulation setting requirements for regulatory waivers, 9 C.F.R. § 381.3(b))  
 12 without complying with the APA’s rulemaking requirement, 5 U.S.C. § 553; (3) the decision was  
 13 arbitrary and capricious, 5 U.S.C. § 706(2)(A), because it will cause increased violation of the  
 14 Poultry Products Inspection Act, 21 U.S.C. §§ 453, 455 & 458, and that Act’s regulations,  
 15 9 C.F.R. §§ 381.89–90, which also means the decision violates FSIS’s regulation setting  
 16 requirements for regulatory waivers, 9 C.F.R. § 381.3(b); and (4) the decision violated the APA, 5  
 17 U.S.C. § 706(2)(A) & (D), because FSIS did not prepare an environmental-impact statement as  
 18 required by NEPA, 42 U.S.C. § 4332(2)(C).<sup>18</sup> The plaintiffs ask for declaratory and injunctive  
 19 relief, including an order vacating FSIS’s 2018 decision and all waivers issued under that decision.  
 20 The plaintiffs also ask for remand to the agency to enjoin “any future chicken slaughterhouse line  
 21 speed increases unless the agency complies with the APA, the [Poultry Products Inspection Act],  
 22 and NEPA.”<sup>19</sup>

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26 <sup>17</sup> *Id.* at 19–21 (¶¶ 63–75).

27 <sup>18</sup> *Id.* at 46–52 (¶¶ 223–67).

28 <sup>19</sup> *Id.* at 5 (¶ 7), 53–54 (Prayer for Relief).



1 The court has subject-matter jurisdiction (assuming the plaintiffs have standing). 28 U.S.C.  
2 § 1331. All parties consented to magistrate-judge jurisdiction.<sup>20</sup> *Id.* § 636(c). The court held a hearing  
3 on February 15, 2024.

#### 4 STANDARD OF REVIEW

5 A complaint must contain a short and plain statement of the grounds for the court’s  
6 jurisdiction. Fed. R. Civ. P. 8(a)(1). The party asserting jurisdiction has the burden of establishing  
7 jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Ass’n of Am.*  
8 *Med. Colls. v. United States*, 217 F.3d 770, 778–79 (9th Cir. 2000).

9 A defendant’s Rule 12(b)(1) jurisdictional attack can be facial or factual. *White v. Lee*, 227  
10 F.3d 1214, 1242 (9th Cir. 2000). “A ‘facial’ attack asserts that a complaint’s allegations are  
11 themselves insufficient to invoke jurisdiction, while a ‘factual’ attack asserts that the complaint’s  
12 allegations, though adequate on their face to invoke jurisdiction, are untrue.” *Courthouse News*  
13 *Serv. v. Planet*, 750 F.3d 776, 780 n.3 (9th Cir. 2014). If the defendant mounts a factual attack, he  
14 may rely on “affidavits or any other evidence properly before the court,” in which case it  
15 “becomes necessary for the party opposing the motion to present affidavits or any other evidence  
16 necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter  
17 jurisdiction.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). In such cases, “[t]he  
18 district court obviously does not abuse its discretion by looking to this extra-pleading material in  
19 deciding the issue, even if it becomes necessary to resolve factual disputes.” *Id.*

20 Dismissal of a complaint without leave to amend should be granted only when the jurisdictional  
21 defect cannot be cured by amendment. *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052  
22 (9th Cir. 2003).

#### 23 ANALYSIS

##### 24 1. Article III Standing

25 “The ‘irreducible constitutional minimum’ of standing consists of three elements.” *Spokeo,*  
26 *Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560  
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28 <sup>20</sup> Consents – ECF Nos. 47–48.

1 (1992)). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the  
2 challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial  
3 decision.” *Id.* (citing *Lujan*, 504 U.S. at 560). “The plaintiff, as the party invoking federal  
4 jurisdiction, bears the burden of establishing these elements.” *Spokeo*, 1578 U.S. at 1547.

### 5 **1.1 Whether the Plaintiffs’ Injuries are Fairly Traceable to the 2018 Waiver Criteria**

6 The defendants contend that the plaintiffs’ injuries stem from waivers issued pursuant to the  
7 2018 waiver criteria, not the criteria themselves. Put another way, if no waivers had issued, then the  
8 harms alleged — harms to the animal-welfare mission and the members’ environmental interests —  
9 would not have occurred. Instead, the plaintiffs challenge only FSIS’s 2018 decision (that is, the  
10 waiver criteria for slaughterhouses to use maximum line speeds of 175 rather than 140 chickens per  
11 minute).<sup>21</sup> Another issue is that on March 20, 2020, FSIS stopped accepting waiver applications  
12 under the 2018 waiver criteria.<sup>22</sup> Then, in July 2022, FSIS terminated all waivers under the 2018  
13 criteria and allowed establishments with existing waivers to apply for modified line-speed waivers  
14 by September 1, 2022.<sup>23</sup> FSIS is not accepting line-speed waivers on any basis.<sup>24</sup>

15 The plaintiffs respond that “the higher line speeds authorized by the 2018 [d]ecision” are fairly  
16 traceable to their injuries because the increased line speeds caused the plaintiffs to suffer resource  
17 diversion and mission frustration. The plaintiffs also point out that the 2022 waiver criteria and  
18 subsequent waivers build on the 2018 decision.<sup>25</sup>

19 At least on the injury prong, the fact that the plaintiffs challenge only the 2018 waiver criteria,  
20 and not the 2022 criteria or any actual waivers, does not necessarily mean the plaintiffs lack  
21 standing. The 2018 criteria increased FSIS’s line-speed maximum to 175 chickens per minute, and  
22 the parties do not dispute that the 2022 criteria incorporate that line-speed increase, which is what  
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25 <sup>21</sup> Defs.’ Second Suppl. Br. – ECF No. 58 at 7.

26 <sup>22</sup> *Id.* at 10 (citing Constituent Update, available at <https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-april-24-2020>).

27 <sup>23</sup> *Id.* (citing Constituent Update, July 29, 2022).

28 <sup>24</sup> *Id.*

<sup>25</sup> Pls.’ Opp’n to Defs.’ Second Suppl. Br. – ECF No. 60.

1 the plaintiffs challenge in this case. They allege diversion of resources as a result. And where third  
 2 parties engage in “injurious [conduct] that would have been illegal without [the challenged  
 3 government] action,” the plaintiff’s injury is fairly traceable to that government action. *Simon v. E.*  
 4 *Kentucky Welfare Rts. Org.*, 426 U.S. 26, 45 n.25 (1976). That is, but for the 2018 criteria, no  
 5 slaughterhouses would be operating at 175 chickens per minute.

6 That said, an issue is redressability, which bleeds into the traceability prong. The plaintiffs ask  
 7 for declaratory and injunctive relief addressing the line-speed increase, and they assert that a  
 8 favorable decision would redress their alleged injuries. The defendants counter that while  
 9 invalidating the 2018 criteria might imply that current waivers are invalid, it would not invalidate  
 10 the waivers. Thus, absent invalidating the waivers, the court cannot redress the plaintiffs’ injuries.<sup>26</sup>

11 Even if the court construed the request for equitable relief as a request to invalidate the  
 12 waivers, the problem is that the 2022 criteria added criteria to those contained in the 2018 criteria.  
 13 Also, the plants can operate above the 140-chicken limit only if they receive a waiver from the  
 14 agency. FSIS can issue waivers under the regulations. 9 U.S.C. § 381.3(b). The validity of a  
 15 waiver seemingly turns on whether it complies with the waiver regulation and the Poultry  
 16 Products Inspection Act, not merely on the 2018 criteria (or the 2022 criteria predicated on the  
 17 2018 criteria).<sup>27</sup> The plaintiffs challenge 2018 agency guidance that is part of the authorization for,  
 18 but not the ultimate action that authorized, third-party injurious conduct. And there was no  
 19 entitlement to the waivers, which in any event were suspended. The operative complaint predates  
 20 the changed regulatory landscape. The court thus cannot easily evaluate standing or justiciability.

21 Another issue is that not only has FSIS terminated all waivers under 2018, but also, its attempt  
 22 to return to the 2018 criteria is possible but discretionary.

23 In sum, the regulatory landscape has changed since the initial complaint and the initial motion to  
 24 dismiss. There are now eight briefs that update arguments based on the new landscape, but the  
 25 complaint does not have any of that information. The defendants raise substantial arguments about  
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27 <sup>26</sup> Defs. Suppl. Reply Br. – ECF No. 61 at 6.

28 <sup>27</sup> *Id.* at 9 (making this point).

1 the effect of the termination of the waivers and the effect on standing and the justiciability of the  
 2 dispute.<sup>28</sup> The plaintiffs have the burden of establishing standing. They have not established that  
 3 injuries from the poultry establishments were traceable to the 2018 waiver criteria or are redressable.  
 4 They can try to do so in an amended complaint that addresses the changed regulatory landscape,  
 5 including the termination of the waivers and the issuance of modified waivers under the 2022 criteria.

## 6 **1.2 Organizational and Associational Standing**

7 The next issue is whether the plaintiffs have established organizational or associational  
 8 standing (leaving aside the issues around redressability).

### 9 **1.2.1 Direct Standing**

10 An organization has “direct standing to sue” when it shows “a drain on its resources from both  
 11 a diversion of its resources and frustration of its mission.” *Fair Hous. of San Fernando Valley v.*  
 12 *Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012). The organization’s standing “must be  
 13 established independent of the lawsuit filed by the plaintiff.” *Id.* That is, “[a]n organization cannot  
 14 manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a  
 15 problem that otherwise would not affect the organization at all.” *Valle del Sol Inc. v. Whiting*, 732  
 16 F.3d 1006, 1018 (9th Cir. 2013) (cleaned up). A mere “setback to the organization’s abstract social  
 17 interests” is also not enough. *Ctr. for Food Safety v. Perdue*, 517 F. Supp. 3d 1034, 1041 (N.D.  
 18 Cal. 2021). But “a diversion-of-resources injury is sufficient to establish organizational standing at  
 19 the pleading stage, even when it is broadly alleged.” *Id.* (quoting *Nat’l Council of La Raza v.*  
 20 *Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015)).

21 Even though a diversion-of-resources injury can be broadly alleged, “[a]n organization may sue  
 22 only if it was forced to choose between suffering an injury and diverting resources to counteract the  
 23 injury.” *La Asociacion de Trabajadores de Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 n.4  
 24 (9th Cir. 2010). The organization must “show that it would have suffered some other injury if it had  
 25 not diverted resources to counteracting the problem.” *Id.* at 1088. Alleging a diversion of resources,  
 26 without more, is not enough. *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir.  
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28 <sup>28</sup> Joint Status Report – ECF No. 53 at 4.

1 2015) (“The complaint specifically alleges that Plaintiffs expended additional resources that they  
 2 would not otherwise have expended, and in ways that they would not have expended them.”); *In*  
 3 *Def. of Animals v. Sanderson Farms, Inc.*, No. 20-cv-05293-RS, 2021 WL 4243391, at \*4 (N.D.  
 4 Cal. Sept. 17, 2021) (it is not enough that an organization “investigat[ed] conduct or start[ed] a new  
 5 campaign against someone who frustrates its general mission”). But it is enough to allege that the  
 6 organization diverted resources rather than spending time, staff, and money on other activities  
 7 related to their organizational mission. *League of Women Voters of Cal. v. Kelly*, No. 17-cv-02665-  
 8 LB, 2017 WL 3670786, at \*6–7 (N.D. Cal. Aug. 25, 2017) (collecting and analyzing cases holding  
 9 that it is sufficient at the pleadings stage to show a drain on resources both from a diversion of  
 10 resources and a frustration of the organization’s mission).

11 First, as to The Humane Society, the plaintiffs contend only that it has associational standing  
 12 (discussed below). In any event, the allegation — that it has had to “divert resources . . . to the  
 13 issue” of increased line speeds<sup>29</sup> — is not enough for organizational standing.

14 Second, Animal Outlook did not allege that it diverted resources and alleges only that it will  
 15 have to do more investigations of chicken slaughterhouses in response to the 2018 decision. Its  
 16 investigator suffered an injury in 2018 but that is not fairly traceable to the 2018 decision (at  
 17 minimum) because it preceded any waivers issued pursuant to the decision.<sup>30</sup>

18 Third, Mercy for Animals alleges that its corporate outreach work related to live hanging and  
 19 shackling of chickens has been frustrated and that it has had to divert resources to conduct  
 20 investigations. But it does not allege that it was unable to conduct its programmatic activities. It  
 21 alleges harm to its interests, not frustration of its activities.

22 Fourth, Marin Humane’s diversion-of-resources-injury allegations are focused on the trucks  
 23 that transport chickens to slaughterhouses: because there will allegedly be increased incidence of  
 24 animal cruelty due to increased line speeds, Marin Humane (in its role as the county animal-  
 25 services agency) will have to increase its monitoring of the trucks. But if Marin Humane plays no  
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27 <sup>29</sup> Am. Compl. – ECF No. 22 at 6 (¶ 13).

28 <sup>30</sup> Opp’n – ECF No. 26 at 19.

1 role with the slaughterhouses themselves, then it is not clear that Marin Humane has suffered an  
2 injury that forces it to increase monitoring of the trucks. It perhaps chose to increase monitoring,  
3 but on these allegations, the trucks are too removed from the slaughter lines for the resource  
4 diversion to have been forced. It also is future harm.

5 Fifth, the Government Accountability Project alleges that in response to the 2018 decision, it  
6 will have to develop outreach for private-sector as opposed to public-sector whistleblowers. This  
7 is allegedly because the decision has caused more slaughterhouses to opt in to the New Poultry  
8 Inspection System (because the decision applies to slaughterhouses that use that system), which  
9 “removes federal inspectors from the front lines and replaces them with private sector  
10 employees.”<sup>31</sup> But the waivers that give rise to any injury in fact here are for line-speed increases;  
11 the increased line speeds are what the plaintiffs challenge in this case.<sup>32</sup> Thus, any harm to the  
12 Government Accountability Project’s whistleblower program that forces a shift in resources is not  
13 fairly traceable to the challenged conduct (the 2018 line-speed-waiver criteria) and instead is  
14 traceable to the 2014 New Poultry Inspection System.

15 The Government Accountability Project also alleges that increased line speeds reduce or  
16 eliminate inspectors’ ability to see “food industry practices that compromise food safety (and  
17 therefore such inspectors’ ability to blow the whistle on food safety issues),” which in turn  
18 frustrates the Government Accountability Project’s mission and forces it to “shift resources to deal  
19 with this issue.”<sup>33</sup> These allegations might establish organizational standing if not for the fact that  
20 “[u]nder the [New Poultry Inspection System], additional offline verification inspectors will check  
21 to see to that inspection protocols are being followed and [will] conduct pathogen testing.” *Food*  
22 *& Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 916 (D.C. Cir. 2015). Because the “complaint  
23 makes no allegation regarding the impact of increased offline verification inspectors,” the court is  
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25 <sup>31</sup> Am. Compl. – ECF No. 22 at 17 (¶¶ 55–57).

26 <sup>32</sup> *See, e.g., id.* at 50 (¶¶ 249–51) (discussing FSIS inspectors and alleging that “[w]aivers issued  
27 pursuant to the 2018 Line Speed Increase Decision will cause an increased risk of loss of process  
28 control at those facilities that operate at higher speeds”).

<sup>33</sup> *Id.* at 18–19 (¶ 62).

1 “prevent[ed] . . . from inferring” that the Government Accountability Project has established an  
 2 injury in fact. *Id.* That is, it is unclear why the organization can’t simply continue outreach to the  
 3 (now offline) public-sector inspectors and achieve the same result.

4 An overarching issue for all plaintiffs is that — despite the filing of the complaint in February  
 5 2020, after the 2018 decision and after waivers had been in effect for some time — their diversion-  
 6 of-resources-injury allegations are cast in future terms. That implies that the plaintiffs didn’t suffer  
 7 injury. The amended complaint does allege a sharp increase in waivers shortly before the amended  
 8 complaint was filed in June 2020.<sup>34</sup> But plausible allegations in these circumstances require  
 9 current injury.

10 In sum, the plaintiffs have not established organizational standing.

### 11 **1.2.2 Associational Standing**

12 The plaintiffs contend that The Humane Society has associational standing.

13 “The doctrine of associational standing permits an organization to ‘sue to redress its members’  
 14 injuries, even without a showing of injury to the association itself.” *Or. Advoc. Ctr. v. Mink*, 322  
 15 F.3d 1101, 1109 (9th Cir. 2003) (quoting *United Food & Com. Workers Union Local 751 v.*  
 16 *Brown Grp., Inc.*, 517 U.S. 544, 552 (1996)). “[A]n association has standing to bring suit on  
 17 behalf of its members when: (a) its members would otherwise have standing to sue in their own  
 18 right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither  
 19 the claim asserted nor the relief requested requires the participation of individual members in the  
 20 lawsuit.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

21 The defendants contest only the first prong: whether the members have standing to sue  
 22 themselves.<sup>35</sup> The Humane Society alleges that its members “are subject to aesthetic, health,  
 23 environmental, and/or other harm resulting from . . . slaughterhouses’ operations, including from  
 24 the noxious stench emitted from such slaughterhouses,” and that these harms “very likely have  
 25 been and will continue to be worsened because of the increased speeds at which such

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<sup>34</sup> *Id.* at 3–4 (¶ 5).

28 <sup>35</sup> Mot. – ECF No. 25 at 24–27.

1 slaughterhouses operate under the 2018” decision.<sup>36</sup> The defendants contend (among other things)  
2 that The Humane Society must identify an injured member and that no member’s injury is “actual  
3 or imminent” because the organization alleges only that the injuries have “very likely” happened  
4 (an allegation that, again, came after line-speed waivers were in effect for a time). These points are  
5 related.

6 In *National Council of La Raza*, the Ninth Circuit addressed whether an organization must  
7 identify its members by name to establish associational standing and said: “We are not convinced  
8 that *Summers* . . . stands for the proposition that an injured member of an organization must  
9 always be specifically identified in order to establish Article III standing for the organization.” 800  
10 F.3d at 1041 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)). “Where it is relatively  
11 clear, rather than speculative, that one or more members have been or will be adversely affected  
12 by a defendant’s action, and where the defendant need not know the identity of a particular  
13 member to understand and respond to an organization’s claim of injury, we see no purpose to be  
14 served by requiring an organization to identify by name the member or members injured.” *Id.* The  
15 Ninth Circuit thus held that the organizations had standing even though they did not identify their  
16 members by name. *Id.* at 1037, 1041–42 (citing *Ala. Legislative Black Caucus v. Alabama*, 575  
17 U.S. 254, 269 (2015)); *Cal. Rest. Ass’n v. City of Berkeley*, 65 F.4th 1045, 1063 (9th Cir. 2023)  
18 (“[I]t’s unclear whether the requirement that an organizational plaintiff specifically identify  
19 injured members even applies at the pleading stage.”) (Baker, J., concurring).

20 A plaintiff does not need to plead its evidence; it needs only to allege a claim plausibly.  
21 The Humane Society thus need not identify particular members at the pleadings stage.

22 The question remains, though, whether The Humane Society has established that any  
23 member’s injury is “actual or imminent.” *Cal. Rest. Ass’n*, 65 F.4th at 1049 (an injury in fact must  
24 be “actual or imminent, rather than conjectural or hypothetical”). The Ninth Circuit has held that  
25 “[t]o establish ‘actual or imminent’ injury, the [plaintiff] must show a credible threat that a  
26 probabilistic harm will materialize.” *Id.* (cleaned up). But that standard is for when the challenged  
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28 <sup>36</sup> Am. Compl. – ECF No. 22 at 7–8 (¶ 16).



1 conduct, by its nature, poses a “threat of future harm.” *Id.*; *Nat. Res. Def. Council v. EPA*, 735  
2 F.3d 873, 878 (9th Cir. 2013) (where the challenged conduct “increases the threat of future harm,”  
3 the “threatened harm is by nature probabilistic,” and the court’s “goal in these cases is to ensure  
4 that the concept of ‘actual or imminent’ harm is not stretched beyond its purpose”) (cleaned up);  
5 *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) (“A plaintiff threatened with future  
6 injury has standing to sue if the threatened injury is certainly impending, or there is a substantial  
7 risk that the harm will occur.”) (cleaned up).

8 Here, by contrast, the challenged conduct was ongoing, the plaintiffs were subject to the  
9 relevant sights and smells coming from slaughterhouses and transport trucks, and the issue is  
10 whether those sights and smells worsened due to increased line speeds. If the increased line speeds  
11 can cause harm to The Humane Society’s members, that harm is already at hand. *Deal v. Mercer*  
12 *Cnty. Bd. of Educ.*, 911 F.3d 183, 189 (4th Cir. 2018) (“[O]ngoing injuries are, by definition,  
13 *actual* injuries for purposes of Article III standing.”). Thus, it should be possible for the members  
14 to allege actual harm.

15 That isn’t the same as saying that certainty is required, though. When it comes to  
16 environmental or aesthetic harms, the harm is (in some sense) “probabilistic” by nature, even if the  
17 challenged conduct is already occurring. Thus, the plaintiff must be near the alleged harm and the  
18 harm must be credible: “An individual bringing a substantive claim related to environmental  
19 harms may establish an injury in fact by showing a connection to the area of concern sufficient to  
20 make credible the connection that the person’s life will be less enjoyable — that he or she really  
21 has or will suffer in his or her degree of aesthetic or recreational satisfaction — if the area in  
22 question remains or becomes environmentally degraded.” *W. Watersheds Project v. Kraayenbrink*,  
23 632 F.3d 472, 484 (9th Cir. 2011) (cleaned up); see *Ecological Rts. Found. v. Pac. Lumber Co.*,  
24 230 F.3d 1141, 1151 (9th Cir. 2000) (“[T]o require actual evidence of environmental harm, rather  
25 than an increased risk . . . , misunderstands the nature of environmental harm[.]”).

26 The Humane Society has satisfied these standards by alleging that its members “spend time  
27 near slaughterhouses” operating at higher line speeds and that the alleged aesthetic and  
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1 environmental harms “very likely have . . . worsened because of the increased speeds.”<sup>37</sup> It stands  
 2 to reason that higher line speeds increase the amount of slaughtered chickens, which increases the  
 3 aesthetic harms alleged. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S.  
 4 167, 185 (2000) (“[W]e see nothing ‘improbable’ about the proposition that a company’s  
 5 continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents  
 6 to curtail their recreational use of that waterway and would subject them to other economic and  
 7 aesthetic harms.”). And The Human Society need not allege a more specific geographical nexus.  
 8 *Cal. Rest. Ass’n*, 65 F.4th at 1049 (at the pleading stage, “general factual allegations of injury  
 9 resulting from the defendant’s conduct may suffice”). Thus, The Humane Society would have  
 10 associational standing if the issues around redressability were not present.

11 The defendants also contend that the plaintiffs have not alleged a sufficient procedural injury  
 12 to support their NEPA claim.<sup>38</sup> “To satisfy the injury in fact requirement” for “a procedural claim  
 13 under NEPA,” a plaintiff “asserting a procedural injury must show that the procedures in question  
 14 are designed to protect some threatened concrete interest of his that is the ultimate basis of his  
 15 standing.” *W. Watersheds Project*, 632 F.3d at 484. Here, The Humane Society satisfies that  
 16 requirement because it has standing as to independent concrete interests and the procedural NEPA  
 17 claim — that The Humane Society was deprived of environmental-impact information — is  
 18 directly related. The other plaintiffs cannot establish standing based only on the alleged procedural  
 19 injury, though.

20 \* \* \*

21 In sum, the court grants the motion to dismiss for lack of standing for all plaintiffs. The  
 22 dismissal is without prejudice.

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 28 <sup>37</sup> *Id.* at 7 (¶ 16).

<sup>38</sup> Mot. – ECF No. 25 at 28–29.

**2. Failure to State a Claim**

In their supplemental briefing, the defendants argue that the amended complaint does not state a claim under the APA because the 2018 decision was not final agency action.<sup>39</sup> The court's intent in allowing supplemental briefing was to permit only refinement of previous arguments.<sup>40</sup> See *TeleSign Corp. v. Twilio, Inc.*, No. CV 15-3240 PSG (SSX), 2015 WL 12662344, at \*1 (C.D. Cal. Oct. 9, 2015) (“[A] court does not need to consider facts or arguments raised for the first time in a reply brief.”). Given the justiciability issues that attend a changed regulatory landscape, the issue is better addressed in the context of an amended complaint.

**3. Venue Dismissal or Transfer**

The court reserves the issues of venue and transfer for consideration after the filing of any amended complaint. See *Immigrant Assistance Project of Los Angeles Cnty.*, 306 F.3d at 867 & n.20; *ACLU of N. Cal. v. Burwell*, No. 16-cv-03539-LB, 2017 WL 4551492, at \*3–5 (N.D. Cal. Oct. 11, 2017) (analyzing § 1391(e) and pendent venue).

**CONCLUSION**

The court dismisses the complaint with leave to amend. The plaintiffs must file any amended complaint with twenty-one days and must attach as an exhibit a blackline of the amended complaint against the current complaint. If the plaintiffs do not amend the complaint, the court will enter judgment in favor of the defendants. This resolves ECF No. 25.

**IT IS SO ORDERED.**

Dated: February 22, 2024




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LAUREL BEELER  
United States Magistrate Judge

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<sup>39</sup> Defs.’ Second Suppl. Br. – ECF No. 58 at 13–14.

<sup>40</sup> Order – ECF No. 54.