UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FARM SANCTUARY,
ANIMAL LEGAL DEFENSE FUND,
ANIMAL OUTLOOK,
ANIMAL WELFARE INSTITUTE,
COMPASSION IN WORLD FARMING,
FARM FORWARD, and
MERCY FOR ANIMALS, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, FOOD SAFETY AND INSPECTION SERVICE, THOMAS VILSACK, in his official capacity as Secretary of Agriculture, and PAUL KIECKER, in his official capacity as Food Safety and Inspection Service Administrator,

Defendants.

DECISION & ORDER

6:20-CV-06081 EAW

INTRODUCTION

Plaintiffs Farm Sanctuary, Animal Legal Defense Fund, Animal Outlook, Animal Welfare Institute, Compassion in World Farming, Farm Forward, and Mercy for Animals, Inc. (hereinafter collectively "Plaintiffs") are nonprofit organizations working to protect animals, people, and environments from industrial animal agriculture, and to ensure that laws intended to regulate industrial animal agriculture are properly implemented. They challenge certain actions by defendants United States Department of Agriculture

("USDA"), Food Safety and Inspection Service ("FSIS"), USDA Secretary, and FSIS Inspector (hereinafter collectively "Defendants") related to the slaughtering of pigs under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. (the "APA").

Presently pending before the Court are the following motions: (1) Plaintiffs' First Motion for Judicial Notice (Dkt. 51); (2) Plaintiffs' Motion to Complete the Administrative Record (Dkt. 56); and (3) the parties' Cross-Motions for Summary Judgment (Dkt. 52 (Plaintiffs' Motion for Summary Judgment) & Dkt. 60 (Defendants' Motion for Summary Judgment)). For the reasons explained below, Plaintiffs' Motion to Complete the Administrative Record (Dkt. 56) is granted; Plaintiffs' Motion for Judicial Notice (Dkt. 51) is denied; Defendants' Motion for Summary Judgment (Dkt. 60) is granted; and Plaintiffs' Motion for Summary Judgment (Dkt. 51) is denied.

BACKGROUND AND PROCEDURAL HISTORY

On February 6, 2020, Plaintiffs sued Defendants, challenging their failure to ban the slaughter of all non-ambulatory[1] or "downed" pigs. (Dkt. 1). Plaintiffs' amended complaint alleges three causes of action: (1) failure to investigate and report to Congress on downed pigs, in violation of the Humane Methods of Slaughter Act, 7 U.S.C. § 1901 *et seq*. ("the HMSA") and APA; (2) failure to regulate the humane treatment, handling, and disposition of downed pigs, in violation of the HMSA and APA; and (3) arbitrary and

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[1] Non-ambulatory livestock is defined as "livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic condition." (Dkt. 52-2 at ¶ 2); *see also* 9 C.F.R. § 309.2(b).

capricious denial of Plaintiffs' Petition for Rulemaking (hereinafter, the "Petition"), in violation of the APA. (*See* Dkt. 13 at 36-38).

Defendants filed a motion to dismiss the amended complaint for lack of jurisdiction. (Dkt. 14). On June 28, 2021, following briefing and oral argument, the Court denied Defendants' motion to dismiss. (*See* Dkt. 26; Dkt. 32). Defendants answered the amended complaint (Dkt. 34), and the case was referred to United States Magistrate Judge Marian W. Payson for pretrial matters (Dkt. 35).

Defendants filed the administrative record on December 9, 2021. (Dkt. 40). On December 21, 2021, Judge Payson granted Plaintiffs' request to extend the deadline for filing any motion challenging the adequacy of the administrative record until January 12, 2022. (Dkt. 41). No such motion was filed, and Defendants filed a revised administrative record on January 12, 2022. (Dkt. 43). The parties also filed a stipulated scheduling order for the filing of cross-motions for summary judgment. (Dkt. 45; Dkt. 46).

Plaintiffs filed their Motion for Summary Judgment and Motion for Judicial Notice on March 18, 2022. (Dkt. 51; Dkt. 52). Defendants responded to Plaintiffs' Motion for Judicial Notice on April 7, 2022. (Dkt. 54). On April 18, 2022, Plaintiffs filed their Motion to Complete the Administrative Record (Dkt. 56), and Defendants responded to that motion on April 21, 2022 (Dkt. 57). Defendants filed their Cross-Motion for Summary Judgment and opposition to Plaintiffs' Motion for Summary Judgment on June 7, 2022. (Dkt. 60). Plaintiffs responded to Defendants' Motion for Summary Judgment on August 8, 2022 (Dkt. 61), and Defendants filed their reply papers on September 19, 2022 (Dkt. 62).

The Court held oral argument on February 14, 2023 (Dkt. 63; Dkt. 66), at which time it ordered the parties to submit supplemental briefing regarding the issue of standing and reserved decision. Plaintiffs filed their supplemental brief regarding standing on February 27, 2023 (Dkt. 67), and Defendants filed their response thereto on March 10, 2023 (Dkt. 68).

DISCUSSION

I. Motion to Complete Administrative Record (Dkt. 56)

The Court turns first to Plaintiffs' Motion to Complete the Administrative Record, filed on April 18, 2022. (Dkt. 56). Plaintiffs request to supplement the administrative record with four exhibits attached to a November 1, 2016 supplement letter from Mercy for Animals, which were submitted in connection with Plaintiffs' Petition and unintentionally omitted from the revised administrative record filed on January 12, 2022, so that the Court may consider these materials in evaluating the cross-motions for summary judgment. (*See* Dkt. 56-1 at 2). Defendants state in their response that although Plaintiffs' request to supplement the administrative record is untimely, they do not oppose the requested relief, and informed Plaintiffs that they could cite to the exhibits in their summary judgment briefing, given that these materials were considered by the USDA in responding to the Petition. (*See* Dkt. 57 at 1). Based upon the parties' agreement on this issue, and the fact that the materials were before the USDA when it considered the Petition, the Court grants Plaintiffs' Motion to Complete the Administrative Record. (Dkt. 56).

II. Motion for Judicial Notice (Dkt. 51)

On the same date they filed their Motion for Summary Judgment, Plaintiffs also filed a Motion for Judicial Notice, asking that the Court take judicial notice of the USDA Office of Inspector General (OIG) Audit Report 24016-0001-23: Food Safety and Inspection Service Followup on the 2007 and 2008 Audit Initiatives, dated June 2017 (the "2017 OIG Report"), under Federal Rule of Evidence 201(b). (*See* Dkt. 51; *see also* Dkt. 51-2 at 4-129). Plaintiffs contend that in the 2017 OIG Report, the OIG determined that "FSIS'[s] enforcement policies do not deter swine slaughter plants from becoming repeat violators" of the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.* ("FMIA") and the HMSA and, "[a]s a result, plants have repeatedly violated the same regulations with little or no consequence" and that "FSIS could not ensure humane handling of swine." (*See* Dkt. 51-1 at 3). Plaintiffs argue that, despite this relevant information, Defendants did not include the 2017 OIG Report in the administrative record. Plaintiffs contend that Defendants' omission demonstrates that they did not consider any of the relevant factors contained in the report as they analyzed the Petition, arguing that the Court should take judicial notice of the 2017 OIG Report, so it may consider whether Defendants abused their discretion when they failed to consider their own agency reporting regarding the need for improved regulation and oversight of humane handling of pigs, in violation of Section 706 of the APA. (*Id*. at 3-4). Plaintiffs further argue that, as to Federal Rule of Evidence 201, the 2017 OIG Report is on Defendants' official website and therefore "is not subject to reasonable dispute," as it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." (*Id*. at 4-5).

In response, Defendants argue that Plaintiffs never sought to supplement the record to include the 2017 OIG Report, and their deadline to dispute the administrative record "came and went" and therefore the request is untimely. (Dkt. 54 at 5-6). Defendants further argue that courts have rejected the use of Rule 201 as an end-run around the presumption of completeness that attaches to the government's certification of an administrative record. (*Id*. at 4-5); *see Silver State Land, LLC v. Beaudreau*, 59 F. Supp. 3d 158, 172 (D.D.C. 2014) ("Judicial notice is 'typically an inadequate mechanism' for a court to consider extra-record evidence in reviewing an agency action."). Defendants also argue that the exception for consideration of extra-record evidence does not apply because the 2017 OIG Report is not necessary to permit judicial review into whether the agency failed to consider the inhumane treatment of non-ambulatory pigs at slaughterhouses, and also because there is no dispute that the USDA did not consider the 2017 OIG Report in denying the Petition. (*Id*. at 6-7). Finally, Defendants contend that Plaintiffs' substantive use of the OIG report is improper, because when a court in an APA case considers extra-record evidence that was not before the agency, doing so to determine the correctness of the agency's decision is not permitted. (*Id*. at 7); *see also Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("If the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merits of the agency action only for background information . . . or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision," and "not compensate for the agency's dereliction by undertaking its own inquiry into the merits").

Review of agency action under the APA is generally "limited to examining the administrative record to determine whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 184 (2d Cir. 2004) (quoting *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 97 (2d Cir. 2001)). Accordingly, "[w]hen courts evaluate an agency's compliance with the APA, 'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Saget v. Trump*, 375 F. Supp. 3d 280, 340 (E.D.N.Y. 2019) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). The "whole administrative record . . . is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record. Rather, [t]he whole administrative record . . . consists of all documents and materials directly or *indirectly* considered by agency decision-makers, including evidence contrary to the agency's position." *Id*. at 340-41 (quotations and citations omitted). "An agency's designation of the administrative record is entitled to a rebuttable presumption of administrative regularity," and a court "is to assume the agency properly designated the Administrative Record absent clear evidence to the contrary." *Id*. at 341 (quotations and citations omitted).

Despite this general presumption of completeness, courts have delineated several circumstances in which a party may include evidence beyond the scope of the designated administrative record:

> A court may consider extra-record or supplemental evidence when: (1) the agency's designated administrative record is incomplete, and the district court cannot conduct its review in accordance with the APA's "whole

> record" requirement; (2) when supplemental materials would illuminate a complex record; (3) when the court must look to supplemental materials to evaluate whether the agency failed to consider all relevant factors, ignored an important aspect of the problem, or deviated from established agency practices; and (4) when a plaintiff makes a "strong showing" the Government's decision was in bad faith.

Id. Plaintiffs contend that admission of the 2017 OIG report is appropriate because it is "necessary to determine 'whether the agency has considered all relevant factors and has explained its decision.'" (Dkt. 51 at 2 (quoting *Nw. Env't Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1145 (9th Cir. 2006)). Specifically, Plaintiffs argue that the information in the 2017 OIG Report undermines Defendants' determination that there is no need for improved regulation and oversight with respect to non-ambulatory pigs.

The Court has reviewed the 2017 OIG Report, which discusses reports of inhumane treatment of pigs and other livestock—but does not appear to discuss the handling of non-ambulatory pigs specifically. (*See* Dkt. 51-2 at 4-129). This case concerns whether Defendants' failure to ban the slaughter of non-ambulatory pigs was arbitrary and capricious—not the general handling of all swine in general—and Plaintiffs have failed to articulate why the 2017 OIG Report is necessary for the Court to evaluate their claims, particularly in light of their assertion that the administrative record already shows that FSIS enforcement policies were inadequate. (*See, e.g.*, Dkt. 51-1 at 2-3 (discussing 2013 OIG Report, which is included in administrative record)). Moreover, Plaintiffs have failed to explain why they waited until they filed their Motion for Summary Judgment to request that the Court take judicial notice of the 2017 OIG Report, when they could have requested to supplement the administrative record when Defendants first provided them with the

same in December 2021. (*See* Dkt. 40; Dkt. 41; Dkt. 43). Because Plaintiffs have failed to overcome the presumption of administrative regularity, coupled with their lack of explanation for the failure to timely request to supplement the record, the Court will not consider the 2017 OIG Report in assessing the Cross-Motions for Summary Judgment. Accordingly, Plaintiffs' Motion for Judicial Notice (Dkt. 51) is denied.

III. Cross-Motions for Summary Judgment (Dkt. 52 & Dkt. 60)

A. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if the moving party establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court should grant summary judgment if, after considering the evidence in the light most favorable to the nonmoving party, the court finds that no rational jury could find in favor of that party. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986)). Once the moving party has met its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*." *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (quoting *Matsushita Elec.*, 475 U.S. at 586-87). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment . . . ." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986).

Pursuant to Rule 56(a) of the Court's Local Rules of Civil Procedure, the moving party on a motion for summary judgment must include with their papers "a separate, short, and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried," and the party opposing summary judgment must include a response to each statement and, "if necessary, additional paragraphs containing a short and concise statement of additional material facts as to which it is contended there exists a genuine issue to be tried." L. R. Civ. P. 56(a). Plaintiffs have provided a Statement of Undisputed Material Facts in connection with their Motion for Summary Judgment (*see* Dkt. 52-2), and Defendants object to Plaintiffs' inclusion of this statement, on the grounds that it is unnecessary given this is an APA case presenting only questions of law, and because Plaintiffs' Statement of Undisputed Material Facts contains legal argument (*see* Dkt. 60-2).[2] In their response papers, Plaintiffs agree that APA cases are generally decided based on the administrative record, and explain that they included the Rule 56 Statement to comply with the Local Rules. (*See* Dkt. 61 at 7 n.2).

"When a party seeks review of agency action under the APA, the 'entire case on review is a question of law' such that '[j]udicial review of agency action is often accomplished by filing cross-motions for summary judgment.'" *Am. Steamship Owners Mut. Prot. and Indem. Assoc., Inc. v. United States*, 489 F. Supp. 3d 106, 128 (E.D.N.Y. 2020) (quoting *Conn. v. U.S. Dep't of Commerce*, No. 04 Civ. 1271(SRU), 2007 WL

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[2] Although Defendants object to Plaintiffs' inclusion of a Statement of Undisputed Material Facts, they also, out of an "abundance of caution," provided their own brief Statement of Undisputed Material Facts and responded to Plaintiffs' Statement. (*See* Dkt. 60-2 at 2).

2349894, at *1 (D. Conn. Aug. 15, 2007)). "In an APA case, the court relies on the administrative record for the material facts to determine if the agency's decision exceeds the agency's statutory authority or is arbitrary and capricious or an abuse of discretion." *Id*. Under these circumstances, a Rule 56 Statement of Undisputed Facts is "not necessary as the case on review presents only a question of law." *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 372 n.7 (S.D.N.Y. 2012); *see also Vt. Pub. Interest Rsch. Grp. V. U.S. Fish & Wildlife Serv.*, 247 F. Supp. 2d 495, 516 (D. Vt. 2002) (recognizing that Rule 56 Statement is of "limited use" in APA cases, but declining to strike entire statement since "in complicated cases with voluminous records . . . the statement can serve the useful purpose of highlighting areas of agreement and disagreement," but concluding it would not consider portions of the statement that are "argumentative and conclusory or includes information the Court has concluded is outside the record rule"). Accordingly, while the Court has reviewed Plaintiffs' Statement of Undisputed Facts and Defendants' response thereto, and noted any areas of agreement and disagreement between the parties, the proper record before the Court in assessing the Cross-Motions for Summary Judgment is contained in the revised administrative record. (*See* Dkt. 43).

B. The HMSA and Plaintiffs' Petition

Before discussing the merits of Plaintiffs' claims, the Court will provide a brief overview of the events precipitating Plaintiffs' filing their case against Defendants.

On May 13, 2002, Congress amended the HMSA to require the Secretary of Agriculture to submit to Congress a report on "non-ambulatory livestock." Specifically, the amendment stated, in relevant part:

> (a) Report
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> The Secretary of Agriculture shall investigate and submit to Congress a report on—
>
> > (1) the scope of nonambulatory livestock;
> > (2) the causes that render livestock nonambulatory;
> > (3) the humane treatment of nonambulatory livestock; and
> > (4) the extent to which nonambulatory livestock may present handling and disposition problems for stockyards, market agencies, and dealers.
>
> (b) Authority
>
> Based on the findings of the report, if the Secretary determines it necessary, the Secretary shall promulgate regulations to provide for the humane treatment, handling, and disposition of nonambulatory livestock by stockyards, market agencies, and dealers.

(*See* Dkt. 52-2 at ¶ 1; Dkt. 60-2 at ¶¶ 1-2); *see also* 7 U.S.C. § 1907.

Thereafter, in letters dated March 4, 2004, and November 6, 2006, the USDA sent to Congress reports addressing non-ambulatory livestock. (Dkt. 60-2 at ¶¶ 3-4); *see also* Administrative Record[3] ("AR") 02608-21, AR 02622-37 (multiple copies of letters).

In July 2007, FSIS promulgated a rule prohibiting the slaughter of downed cattle for food, noting that these animals had a higher incidence of bovine spongiform encephalopathy than ambulatory cattle. (Dkt. 52-2 at ¶ 3); AR 01886-1917; *see also* 72 Fed. Reg. 38,700 (July 13, 2007); 9 C.F.R. § 309.3(e). FSIS subsequently promulgated a rule to expand its slaughter prohibition to include cattle who are ambulatory when they arrive at the slaughterhouse, but subsequently become non-ambulatory, as well as to

[3] The Administrative Record is contained at Docket 43.

provide protection for veal calves. (Dkt. 52-2 at ¶¶ 4-10); *see also* AR 01808-11; 74 Fed. Reg. 11,463 (Mar. 18, 2009); 81 Fed. Reg. 46,570 (July 18, 2016); 9 C.F.R. § 309.3(e).

In contrast to its handling of non-ambulatory cattle, FSIS allows for the slaughter of non-ambulatory pigs. (Dkt. 52-2 at ¶ 13); *see also* 9 C.F.R. § 309.2(b), (n). Plaintiffs contend that since Congress's 2002 mandate to investigate and report on non-ambulatory livestock, Defendants have not investigated or submitted a report to Congress on the scope of non-ambulatory pigs, the causes that render these animals to become non-ambulatory, the humane treatment of these animals, or the extent to which these animals may present handling and disposition problems. (Dkt. 52-2 at ¶ 15). Further, Plaintiffs contend that although FSIS has stated previously that it planned to evaluate measures that may be necessary to ensure the humane handling of non-ambulatory disabled livestock other than cattle—such as pigs—FSIS has yet to do so. (*Id*. at ¶¶ 17-18).

On or about June 3, 2014, Plaintiffs submitted their Petition to the USDA, requesting that Defendants ban the slaughter of non-ambulatory disabled pigs, and on or about November 1, 2016, Plaintiffs submitted a supplement to their Petition. (Dkt. 52-2 at ¶¶ 77-78; Dkt. 60-2 at ¶¶ 5-6); *see also* AR 00001-30, AR 02025-32. The Petition and Supplement, which totaled thirty-seven pages and were accompanied by thousands of pages of supporting exhibits, detailed why a rule prohibiting the slaughter of non-ambulatory pigs is needed for the same reasons that warranted the prohibition on slaughtering non-ambulatory cattle. (Dkt. 52-2 at ¶ 79). FSIS also received at least twenty letters urging it to grant the Petition. (*Id*. at ¶¶ 80-81).

In a letter dated September 16, 2019, Defendants denied the Petition. (Dkt. 52-2 at ¶ 82; Dkt. 60-2 at ¶ 7); *see also* AR 02037-44. FSIS concluded that "its existing regulations and inspection procedures are sufficient and effective in ensuring that [non-ambulatory] pigs are handled humanely at slaughter and in preventing diseased animals from entering the human food supply." (Dkt. 52-2 at ¶ 83); *see also* AR 02037.

C. Standing

The Court turns first to the issue of standing. Defendants, while acknowledging the Court's earlier ruling at the motion to dismiss stage, argue that Plaintiffs have failed to demonstrate standing at the summary judgment stage. (Dkt. 60-1 at 15). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (citations omitted). "To satisfy the requirements of Article III standing, plaintiffs must demonstrate '(1) [an] injury-in-fact, which is a concrete and particularized harm to a legally protected interest; (2) causation in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief.'" *Hu v. City of New York*, 927 F.3d 81, 89 (2d Cir. 2019) (alteration in original) (quoting *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 257 (2d Cir. 2013)).

Plaintiffs in this case are organizations, and "[a]n organization can have standing to sue in one of two ways. It may sue on behalf of its members, in which case it must show, *inter alia,* that some particular member of the organization would have had standing to

bring the suit individually." *N.Y. Civil Liberties Union v. N.Y.C. Trans. Auth.*, 684 F.3d 286, 294 (2d Cir. 2012). This is often referred to as "associational" standing. *Id*. An organization may show associational standing by demonstrating "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (same).

"In addition, an organization can 'have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.'" *N.Y. Civil Liberties Union*, 684 F.3d at 294 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). "Under this theory of 'organizational' standing, the organization is just another person—albeit a legal person—seeking to vindicate a right. To qualify, the organization itself must meet the same standing test that applies to individuals." *Id*. (quotations and alteration omitted); *see also Irish Lesbian & Gay Org.*, 143 F.3d at 649 (explaining that it is "well established that organizations are entitled to sue on their own behalf for injuries they have sustained," and to make such a showing, "the organization must meet the same standing test that applies to individuals . . . by showing actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." (quotations, citation, and alterations omitted)).

"[S]tanding is not dispensed in gross" and "a plaintiff must demonstrate standing for each claim [it] seeks to press and for each form of relief that is sought." *Town of*

Chester, N.Y. v. Laroe Ests., Inc., 581 U.S. 433, 439 (2017) (quotations omitted). Accordingly, the Court considers below whether Plaintiffs have standing as to each of their asserted causes of action.

1. First and Second Causes of Action

As noted above, Plaintiffs' first cause of action alleges a failure to investigate and report to Congress on downed pigs, in violation of the HMSA and APA. Plaintiffs ask the Court to issue a declaration finding the same, and to compel Defendants to "investigate and report to Congress the scope of nonambulatory pigs, the causes that render these animals nonambulatory, the humane treatment of these animals, and the extent to which these animals may present handling and disposition problems[.]" (Dkt. 13 at 38-39). Plaintiffs' second cause of action alleges a failure to assess the need for regulations to ensure the humane treatment, handling, and disposition of downed pigs, and to promulgate such regulations as necessary, in violation of the HMSA and APA. (*Id.* at 37). Plaintiffs ask the Court to issue a declaration finding the same, and to compel Defendants to "determine whether regulations to ensure the humane treatment, handling, and disposition of nonambulatory pigs are necessary, and, if so, promulgate such regulations." (*Id.* at 39).

Despite having been expressly instructed by the Court at oral argument to separately brief the basis for standing as to each cause of action, Plaintiffs have combined their first and second causes of action in their supplemental briefing, arguing that "the basis for Plaintiffs' standing is the same for both claims[.]" (Dkt. 67 at 8).[4] The Court accordingly

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[4] Defendants have similarly combined their arguments as to the second and third causes of action. (*See* Dkt. 68 at 12-22).

has analyzed the adequacy of Plaintiffs' showing as to these causes of action collectively, but has distinguished between them where appropriate.

Defendants argue that Plaintiffs lack standing to pursue their first cause of action because they have not been injured by the USDA's alleged failure to produce a pig-specific report, and because "this Court cannot order relief that would redress any such injury." (Dkt. 68 at 8-12). Defendants make similar arguments with respect to the second cause of action. (*Id*. at 12-22). Plaintiffs, on the other hand, contend that they have suffered an organizational injury due to the expenditure of significant resources, as well as a "unique informational injury." (Dkt. 67 at 8-22). Plaintiffs further argue that they have shown that a favorable ruling would redress their injuries. (*Id*. at 22-23).

Having carefully considered the parties' arguments and the record before it, the Court concludes that Plaintiffs have not satisfied their burden to show standing as to their first and second causes of action. As to their claimed informational injury, Plaintiffs have not demonstrated that it is sufficiently concrete to satisfy the requirements of Article III.[5] Article III requires "that the plaintiff's injury in fact be 'concrete'—that is, 'real, and not abstract.'" *TransUnion LLC v. Ramirez*, __ U.S. __, 141 S. Ct. 2190, 2204 (2021) (quoting *Spokeo, Inc. v. Robins*, 578 U. S. 330, 340 (2016)). Further, "merely seeking to ensure a defendant's compliance with regulatory law . . . [is] not grounds for Article III standing." *Id*. at 2206 (quotation omitted).

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5 In its Decision and Order issued at the motion to dismiss stage, the Court did not reach the issue of whether Plaintiffs had adequately alleged an informational injury. *See Farm Sanctuary v. United States Dep't of Agric.*, 545 F. Supp. 3d 50, 69 n.6 (W.D.N.Y. 2021).

It is true that "[t]he denial of access to information can, in certain circumstances, work an injury of fact for standing purposes." *Nat. Res. Def. Council v. Dep't of Interior*, 410 F. Supp. 3d 582, 597 (S.D.N.Y. 2019) (quotation omitted). "To establish an injury in fact based on an injury to informational interests, a plaintiff must demonstrate that (1) the law entitles the plaintiff to that information, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Nat. Res. Def. Council v. Bodine*, 471 F. Supp. 3d 524, 535 (S.D.N.Y. 2020); *see also Seife v. U.S. Dep't of Health & Hum. Servs*., 440 F. Supp. 3d 254, 273 (S.D.N.Y. 2020) ("A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016))).

Plaintiffs' first and second causes of action fail at the first of these requirements. Plaintiffs do not allege that the HMSA or the APA requires that Defendants disclose any particular information to them. Instead, they contend that *if* the USDA had investigated and produced to Congress a pig-specific report, "Plaintiffs would be entitled to the report pursuant to the Freedom of Information Act[.]" (Dkt. 67 at 16). Plaintiffs cite to no authority for the proposition that this is sufficient to establish a concrete informational injury, and other federal courts have rejected similar arguments. *See, e.g., Elec. Priv. Info. Ctr. v. U.S. Postal Serv*., No. 1:21-CV-02156 (TNM), 2022 WL 888183, at *3 (D.D.C. Mar. 25, 2022) ("EPIC creatively responds that because Section 208 requires an agency to

'conduct' a PIA, any PIA becomes an agency record disclosable under FOIA, thus meeting the first step of the informational injury test. But EPIC misunderstands FOIA, which does not require the disclosure of any specific information to anyone. FOIA instead requires access to records when a request has been made and FOIA exemptions are inapplicable. And as this Court has noted, FOIA also does not require the government to create documents" (quotations, citations, and alterations omitted)); *Pub. Citizen Health Rsch. Grp. v. Pizzella*, 513 F. Supp. 3d 10, 21 (D.D.C. 2021) ("[T]o hold that FOIA is a statute that satisfies the first requirement for informational injury would all but eviscerate the requirement. . . . The Public Health Plaintiffs have cited no case in which a court found that FOIA satisfied the first requirement for informational injury[.]"). The Court is persuaded by the reasoning of these courts that the potential availability of a to-be-produced report via FOIA is too attenuated to satisfy the first requirement of a concrete informational injury.

Plaintiffs also have made no showing that they have suffered the type of harm that Congress sought to prevent by allegedly requiring investigation and disclosure of information regarding non-ambulatory pigs. Plaintiffs' papers are devoid of any analysis of Congress's purpose in enacting the relevant 2002 amendment to the HMSA. However, the text of the amendment itself indicates that the purpose was not to allow for education and advocacy, but specifically to allow the Secretary of Agriculture to make an informed decision as to whether any additional "regulations to provide for the humane treatment, handling, and disposition of nonambulatory livestock by stockyards, market agencies, and dealers" were necessary. 7 U.S.C. § 1907(b). Plaintiffs have come forward with no

information suggesting that Congress intended the report to educate the public, which is the harm that they claim to have suffered. (*See* Dkt. 67 at 17 ("Plaintiffs' standing declarations are replete with evidence demonstrating the requisite interest, principally due to the extraordinary lengths they have deployed to independently monitor Defendants' compliance with the 2002 Mandates and educate the public about the very information Congress ordered Defendants to investigate and report on[.]")). On the record before it, the Court cannot conclude that Plaintiffs have suffered a concrete, particularized informational injury.

Turning to Plaintiffs' claimed organizational injury, shortly after the Court issued its decision in this matter finding standing at the motion to dismiss stage, the Second Circuit decided *Connecticut Parents Union v. Russell-Tucker*, 8 F.4th 167 (2d Cir. 2021), wherein it rejected "an expansive concept of organizational injury for standing purposes." *Id*. at 173.[6] In particular, the Second Circuit explained:

> [W]here, as here, an organization is not directly regulated by a challenged law or regulation, it cannot establish "perceptible impairment" absent an involuntary material burden on its established core activities. In other words, the challenged law or regulation must impose a cost (e.g., in time, money, or danger) that adversely affects one of the activities the organization regularly conducted (prior to the challenged act) in pursuit of its organizational mission. For example, we have recognized that a cognizable injury may arise via a burden that is imposed on an organization when there is an increased demand for an organization's services. But we think that expenditures or other activities, if incurred at the organization's own initiative, cannot support a finding of injury—that is, when the expenditures are not reasonably necessary to continue an established core activity of the organization

6 Plaintiffs make no attempt to reconcile this express statement by the Second Circuit in *Connecticut Parents Union* with their assertion that "[t]he Second Circuit has taken an expansive view of organizational standing under *Havens* [*Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)]." (Dkt. 67 at 10).

> bringing suit, such expenditures, standing alone, are insufficient to establish an injury in fact for standing purposes. In other words, an organization's decision to embark on categorically new activities in response to action by a putative defendant will not ordinarily suffice to show an injury for standing purposes, even if the organization's own clients request the change.

Id. at 173-74. As another judge in this District recently observed, under *Connecticut Parents Union*, an organization cannot show a "perceptible impairment" to its activities where the defendant's actions "merely perpetuated the *status quo*." *Animal Welfare Inst. v. Vilsack*, No. 20-CV-6595 (CJS), 2022 WL 16553395, at *6 (W.D.N.Y. Oct. 31, 2022).

Connecticut Parents Union stands in contrast to *PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087 (D.C. Cir. 2015), a case on which Plaintiffs heavily rely in arguing that they have established organizational standing. In *PETA*, the D.C. Circuit held that "if an organization expends resources in response to, and to counteract, the effects of the defendants' alleged unlawful conduct . . ., it has suffered a concrete and demonstrable injury that suffices for purposes of standing." *Id*. at 1097 (citations, quotations, and alterations omitted). However, *Connecticut Parents Union* makes clear that this is not the law in the Second Circuit. *See* 8 F.4th at 174 ("an organization's decision to embark on categorically new activities in response to action by a putative defendant will not ordinarily suffice to show an injury for standing purposes, even if the organization's own clients request the change").

With these principles in mind, the Court considers the specific injuries asserted by Plaintiffs. Plaintiffs cite to a declaration submitted by Farm Sanctuary President Gene Baur, arguing that "Defendants' ongoing failure to comply with the 2002 Mandates burdens Farm Sanctuary's ability to carry out its mission-critical activities because it

deprives Farm Sanctuary of information on which it would rely in its work." (Dkt. 67 at 11). This is a repackaging of the informational injury argument that the Court has already rejected. Further, Plaintiffs have not explained how continuing to not have information that they already did not have prior to Defendants' alleged failures has created or increased any burden upon them. As observed in *Animal Welfare Institute*, under *Connecticut Parents Union*, an organization cannot show a "perceptible impairment" to its activities where the defendant's actions "merely perpetuated the *status quo*." 2022 WL 16553395, at *6.

Plaintiffs then contend that they have "been forced to expend funds to investigate and report to the public on downed pigs, essentially fulfilling the government oversight function Congress delegated to USDA." (Dkt. 67 at 11-12). But this kind of expenditure—based on a decision to embark on new activities in response to action (or in this case, inaction) by a defendant—is precisely what *Connecticut Parents Union* says is insufficient to establish organizational standing. *See Connecticut Parents Union*, 8 F.4th at 173 (organization's assertion that it diverted its resources from other opportunities and engaged in advocacy and educational campaigns in response to the Connecticut State Department of Education's issuance of a memorandum requiring that all interdistrict magnet schools in Connecticut enroll at least 25% non-Black and non-Hispanic students was insufficient to state an injury-in-fact); *see also Fam. Equal. v. Becerra*, No. 1:20-CV-2403 (MKV), 2022 WL 956256, at *5 (S.D.N.Y. Mar. 30, 2022) (finding that, under "the principles articulated by the Second Circuit," an organization having "engaged in a widespread and comprehensive education and outreach campaign" in response to governmental agency's

announcement that it would no longer enforce certain provisions of rule was insufficient to establish standing (internal quotation marks omitted)).

The same is true of Plaintiffs' claim that they have "spent significant organizational resources to monitor Defendants' lack of compliance with the 2002 Mandates, including submitting several requests for public records related to the 2002 Mandates through the Freedom of Information Act (FOIA)," have "dedicated significant staff time and other resources to draft and submit petitions to Defendants requesting compliance with the 2002 Mandates, none of which would have been necessary if Defendants had complied with them," and "feel compelled [to] devote staff time and resources to educating [their] members and the public about Defendants' regulatory failures to protect downed pigs, including by continuing to publish and disseminate blogs, news articles, and other communications resources pertaining to the suffering of pigs at slaughter." (Dkt. 67 at 12-13 (internal quotation marks and original alterations omitted)). In other words, while Plaintiffs may well have used their resources to respond to Defendants' alleged inaction, that did not constitute an *involuntary* material burden under the law of the Second Circuit, because Plaintiffs were not required to do so in order to alleviate an obligation placed on them by Defendants.

Plaintiffs also contend that they have been "forced to expend significant organizational resources to monitor and reduce incidents of downed pigs suffering on farms, during transport, at stockyards, and at slaughter." (*Id*. at 13 (internal quotation marks omitted)). However, what is absent from this contention is any proof that the Defendants' alleged inaction either caused the downing of pigs or led to an *increase* in the

number of such incidents, as opposed to failing to reduce the number of such incidents. In other words, Plaintiffs have neither submitted nor cited evidence to show that USDA's alleged failures *caused* pigs to become downed when they otherwise would not have. In the absence of such proof, Plaintiffs have not demonstrated an injury in fact. *See Lawyers' Comm. for 9/11 Inquiry, Inc. v. Garland*, 43 F.4th 276, 283 (2d Cir. 2022) (rejecting organizational standing argument where the "very mission of the plaintiff organizations" was to perform certain activity and the plaintiff organizations had "not identified how defendants imposed additional costs on that activity" by failing to take certain actions), *cert. denied*, 143 S. Ct. 573 (2023).

Plaintiffs' reliance on *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104 (2d Cir. 2017) is misplaced. As the Second Circuit explained in *Connecticut Parents Union*, the decision "in *Centro* demonstrates that the injury-in-fact inquiry should focus on the *involuntary* and *material* impacts on core activities by which the organizational mission has historically been carried out." 8 F.4th at 174-75 (emphasis in original). Here, unlike in *Centro*, there is no evidence that Defendants' actions have impeded Plaintiffs' ability to engage in their core activities, nor that Plaintiffs' members would face a risk of "erroneous arrest" as result of their advocacy activities. 868 F.3d at 111. *Centro* accordingly does not support Plaintiffs' position in this case.

In sum, and particularly in light of the Second Circuit's recent holdings in *Connecticut Parents Union* and *Lawyers' Comm. For 9/11 Inquiry*, the Court concludes that Plaintiffs have failed, at the summary judgment stage, to come forward with sufficient

evidence to demonstrate organizational standing with respect to their first and second causes of action.

2. Third Cause of Action

The Court next considers whether Plaintiffs have satisfied their burden of demonstrating standing as to their third cause of action. Plaintiffs' third cause of action challenges Defendants' denial of their Petition as unreasonable and capricious in violation of the APA. (Dkt. 13 at 37-38). Plaintiffs ask the Court to set aside Defendants' denial of the Petition and order that Defendants "render a new decision on Plaintiffs' petition for rulemaking consistent with the Court's opinion by a Court-ordered deadline." (*Id*. at 39).

Plaintiffs argue that they have both organizational and associational standing with respect to their third cause of action. (Dkt. 67 at 23). The Court is unpersuaded by Plaintiffs' organizational standing argument for reasons substantially similar to those discussed above with respect to the first and second causes of action—namely, that Plaintiffs have not shown an involuntary, material burden on their core activities.

Plaintiffs' organizational standing argument regarding their third cause of action centers on their claims that they have had to "divert organizational resources away from their core mission activities, such as public advocacy, education, and farmed animal care, to combat the effects of Defendants' failure to prohibit the slaughter of nonambulatory pigs." (*Id*. at 24). Again, what is missing from these claims is any evidence that Defendants' denial of the Petition caused pigs to become downed and in need of rescue, versus merely maintaining the *status quo*.

An examination of Mr. Baur's declaration is instructive. Mr. Baur, the President of Farm Sanctuary, explains that "[s]ince its founding in 1986, Farm Sanctuary has worked to protect downed animals," and that "Farm Sanctuary has rescued, rehabilitated, and provided lifelong care to numerous downed animals, including pigs." (Dkt. 19-1 at ¶ 10). Mr. Baur claims that "Farm Sanctuary also has to divert resources to seek assistance for pigs who become downed as a result of the USDA's failure to comply with the 2002 Mandates and Petition Denial," and gives an example of a "a case of cruelty involving a downed pig who was left at a stockyard next to a dead pig whose body was covered in mud and whose snout was partially submerged in muddy water." (*Id*. at ¶ 34). However, Mr. Baur proffers nothing to support the claim that it was the USDA's denial of the Petition that *caused* this pig (or any other pig) to become downed. In other words, there is nothing before the Court to suggest that pigs that would *not* have become downed historically before the USDA denied the Petition *now* will become downed because the Petition has been denied.

While Mr. Baur's unsupported assertion may have been sufficient at the motion to dismiss stage, the elements of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In the absence of any evidence that the denial of the Petition increased the demands on Plaintiffs in terms of caring for downed pigs, Plaintiffs cannot demonstrate a concrete injury in fact on this basis.

Plaintiffs also make arguments regarding their advocacy and actions in response to the denial of the Petition. (*See, e.g.,* Dkt. 67 at 26-30 ("To further combat the Defendants' failure to protect downed pigs, AWI has also diverted resources to petition the USDA's Animal and Plant Health Inspection Service to add 'fitness to travel' requirements to its live animal export regulations and to regularly communicate with FSIS policy and field operations staff, state regulators, and state officials regarding downed pigs. . . . This in addition to AWI's corporate lobbying campaign to establish a standard for humane handling in the private sector because Defendants have refused to establish one on their own or in response to Plaintiffs' petition for rulemaking."; "Farm Forward has diverted organizational resources away from its consumer-education work to promote conscientious food choices to counteract the Petition Denial."; "Defendants' Petition Denial has since caused Animal Outlook to divert its limited organizational resources away from its priority mission activities and campaigns 'to evaluate and consider additional investigations into industrial pig slaughter plants to expose the public to the heightened cruelty inflicted on non-ambulatory pigs.'"; "ALDF has spent decades, thousands of staff hours, and thousands of dollars working to educate the public about and enforce the legal protections afforded to downed pigs destined for slaughter.")). These claims are virtually indistinguishable from the allegations that the Second Circuit found insufficient to support organizational standing in *Connecticut Parents Union*, and thus do not establish an injury in fact. *See* 8 F.4th at 171 (no organizational standing despite the fact that the plaintiff had "vigorously protested the" policy at issue, "including by hosting community events, information sessions, bus tours, and other events in order to educate the public about the [policy's]

harmful effects and leading legislative-reform efforts to repeal the [policy]." (internal quotation marks and original alterations omitted)).

Turning to associational standing, Plaintiffs rely on the Second Circuit's decision in *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003), wherein the court concluded that "an enhanced risk of disease transmission may constitute injury-in-fact," *id*. at 633. The Second Circuit elaborated on its *Baur* holding in *Nat. Res. Def. Council, Inc. v. USDA*, 710 F.3d 71 (2d Cir. 2013), explaining:

> To establish injury in fact based on exposure to a potentially harmful product, a plaintiff must show "a credible threat of harm" due to that exposure. "[T]he injury-in-fact analysis is highly case-specific, and the risk of harm necessary to support standing cannot be defined according to a universal standard." (citation omitted). Under *Baur,* whether a plaintiff has established a credible threat of harm sufficient to confer standing based on exposure to a potentially harmful product is a qualitative inquiry in which the court should consider both the probability of harm and the severity of the potential harm.

Id. (citations omitted).

Here, Plaintiffs have submitted declarations from members explaining that they "consume pork products and are concerned . . . about the potentially fatal health risks that they face from their potential exposure to meat from downed pigs contaminated with pathogens, including *Campylobacter*, *E. Coli*, *Listeria*, *Salmonella*, and *Yersinia enterocolitica*, some of which are drug-resistant." (*See* Dkt. 19-1 at ¶ 8; *see also* Declaration of Mark Walden, Dkt. 16-2 at ¶ 5 ("ALDF's members include individuals who regularly consume pork products and are worried about the health risks associated with consuming meat from downed pigs that is potentially contaminated with pathogens, as well as the risk of purchasing and consuming meat from downed pigs who were inhumanely

handled."); Dkt. 67 at 38-40 (summarizing "declarations of six members who are concerned about the increased disease risks they face as a result of the denial of the petition").

The Court has not previously determined whether these allegations are sufficient to establish associational standing. *See Farm Sanctuary*, 545 F. Supp. 3d at 67 ("Having found that Plaintiffs have organization[al] standing, the Court need not reach the issue of associational standing."). Now, having carefully considered the matter, the Court concludes that the statements made by Plaintiffs' members fail to establish a sufficient probability of harm to support a finding of injury in fact.

The Court finds the analysis in *Animal Welfare Institute* persuasive. There, the members of the plaintiff organizations "express[ed] concern regarding illness caused by *campylobacter* and *salmonella* bacteria that can be transmitted by contaminated poultry products." 2022 WL 16553395, at *8. The court explained that these declarants did not claim that they had ever encountered these pathogens "in their prior decades of consuming and preparing poultry," and that "although Defendants [had] conceded a link between the inhumane handling of birds prior to slaughter and adulterated poultry, Plaintiffs [had] not demonstrated the inability of Defendants' present inspection regime to detect adulterated poultry prior to its entry into interstate commerce." *Id*. Accordingly, the claimed injury was "contingent and far-off rather than imminent." *Id*. at *9.

Similarly, in this case, Plaintiffs have cited only to concerns their members have about potentially encountering the identified pathogens; the declarations on which they rely do not contain any statistical evidence about the likelihood of these individuals actually

encountering these pathogens, nor any evidence of actual exposure. And, as Defendants point out in their supplemental brief, "Plaintiffs also do not account for the role of FSIS inspections in the production process—inspections that are designed to catch and weed out any pork that would be harmful for humans to consume." (Dkt. 68 at 19).[7] As discussed in section III(D)(2) of this Decision and Order, *supra*, the administrative record in this case contains concrete evidence that existing FSIS safeguards are effective at mitigating the risk of foodborne illness associated with non-ambulatory pigs. Particularly considered in the context of that evidence, Plaintiffs' speculative assertions that their members could potentially encounter foodborne pathogens in pork simply are not concrete enough to satisfy the requirements of Article III. *See TransUnion*, 141 S. Ct. at 2211-12 (concluding that "the plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing," because there was not a "sufficient likelihood" that the threatened harm would ever come to pass).

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[7] Farm Sanctuary member David Washburn does state that he is "aware that the USDA's own Office of Inspector General (OIG) has repeatedly found that the agency is failing to ensure food safety and that the FSIS does not deter pig slaughterhouses from being repeat violators of food safety regulations." (Dkt. 16-11 at ¶ 25). However, Mr. Washburn, who is a professional chef (*id*. at ¶ 4), cites no sources for this assertion and does not otherwise explain the basis for this claimed knowledge.

Similarly, while Mr. Washburn claims to be "aware" of a "2018 Environmental Working Group analysis" showing that 71% of pork-chops contained antibiotic resistant bacteria, a copy of this analysis and an explanation of its methodology has not been presented to the Court. Further, the Court has been provided no explanation of what bacteria the pork chops at issue were allegedly contaminated with (*i.e.,* whether they were contaminated with disease-causing bacteria). Mr. Washburn's vague, second-hand recitation of this analysis simply is not sufficient evidence at the summary judgment stage.

Baur is easily distinguishable from the instant case. There, the pathogen at issue—bovine spongiform encephalopathy ("BSE"), commonly known as "mad cow disease"—was known to cause "a fatal neurological disease for which there is no effective treatment or cure[.]" 352 F.3d at 628. In other words, the severity of the potential harm was extraordinarily high. Further, the plaintiff in *Baur* had come forward with specific information regarding "limitations in current BSE testing capabilities[.]" *Id*. at 639. Moreover, *Baur* was decided at the pleading stage, and the Second Circuit acknowledged that at a later stage of the proceedings, the plaintiff would "properly be expected to present a full factual record to meet [the] burden of establishing standing." *Id*. Such a factual record could include "specific statistical evidence of enhanced risk." *Id*. No such showing has been made by Plaintiffs here, despite the case having progressed to the summary judgment stage.[8]

In sum, and for all the foregoing reasons, the Court finds that Plaintiffs have failed to meet their burden of demonstrating standing at this stage of the proceedings. However, even assuming *arguendo* that Plaintiffs could demonstrate standing, their claims would still fail, for the reasons that follow.

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[8] In their supplemental brief, Plaintiffs argue that they have associational standing only with respect to their third cause of action. (*See* Dkt. 67 at 36). However, their initial briefing did not distinguish between their various causes of action when arguing that the Court should find associational standing. (*See* Dkt. 52-1 at 12-13). To the extent Plaintiffs are claiming associational standing as to their first and second causes of action, the same analysis applies, and the Court concludes that associational standing has not been established.

D. The Merits of Plaintiffs' APA Claims

"The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Norton v. S.W. Utah Wilderness All.*, 542 U.S. 55, 61 (2004) (hereinafter "*SUWA*") (quoting 5 U.S.C. § 702). The "agency action" must be "final," and is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*" *Id.* at 62 (quoting § 551(13) (emphasis added)). As explained above, Plaintiffs bring three separate causes of action for violation of the APA: (1) failure to investigate and report to Congress on downed pigs, in violation of the HMSA and APA; (2) failure to regulate the humane treatment, handling, and disposition of downed pigs, in violation of the HMSA and APA; and (3) arbitrary and capricious denial of Plaintiffs' Petition for Rulemaking (hereinafter, the "Petition"), in violation of the APA.

1. Unlawful Withholding or Unreasonably Delaying Required Agency Action, in violation of Section 706(1) of the APA (Plaintiffs' First and Second Causes of Action)

Plaintiffs' first and second causes of action concern whether Defendants complied with the HMSA by investigating and reporting to Congress, and regulating the handling of downed pigs. Defendants contend that they are entitled to summary judgment on these causes of action because: (1) Congressional reporting obligations are not judicially reviewable; (2) with respect to Plaintiffs' claim based on a failure to investigate and report to Congress, even if the reporting obligation under 7 U.S.C. § 1907(a) was reviewable, Defendants complied with Congress's mandate to investigate and report on "non-

ambulatory livestock"; and (3) with respect to Plaintiffs' claim that that Defendants failed to regulate the handling of downed pigs, Congress did not require Defendants to regulate the slaughter of non-ambulatory pigs. (*See* Dkt. 60-1 at 16-21). Because the Court concludes that the second and third arguments advanced by Defendants are determinative and warrant granting relief in their favor, it need not and does not resolve the first argument that Congressional reporting obligations are not judicially reviewable.[9]

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[9] "[J]udicial review of . . . administrative action is the rule, and non-reviewability an exception which must be demonstrated." *Barlow v. Collins*, 397 U.S. 159, 166 (1970). However, "[a] clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose." *Id*. at 167. As Defendants argue, courts have held that "[e]xecutive responses to congressional reporting requirements . . . represent . . . an entirely different sort of agency action." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988) (concluding that where the plaintiff's contention is "not that the Secretary failed entirely to report back to Congress . . . but that the Secretarial response lacked the requisite 'detail,'" it was "a judgment peculiarly for Congress to make in carrying on its own functions in our constitutional system, not for non-congressional parties to carry on as an ersatz proxy for Congress itself."); *see also Guerrero v. Clinton*, 157 F.3d 1190, 1196 (9th Cir. 1998) (explaining that "[w]e recognize that the governments are frustrated and believe that an order to do a better report will help," but noting that "[i]f Congress agrees that more or different information is required, or that a different regime should be put in place, it can 'take what it deems to be the appropriate action,'" and "given the absence of any provision for judicial review of § 1904(e)(2) reports and of any legal consequences flowing from them, 'it is Congress's role to determine the adequacy of the study and report, not the courts'" (citations omitted)). On the other hand, Plaintiffs contend that non-reviewability of Congressional reporting obligations is not a bright-line rule; rather, whether a reporting obligation is reviewable depends on the particular circumstances of the reporting requirement and the nature of the alleged deficiency in the agency's action. (*See* Dkt. 61 at 10); *Hodel*, 865 F.2d at 318 n.33 ("We obviously decide only the issue before us; we have no occasion to pass on the broad, theoretical question whether an interbranch reporting requirement can ever be reviewable in the absence of an express provision for judicial review."); *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 644 (S.D.N.Y. 2019) ("Although they are non-binding, *Guerrero* and *Hodel* give the Court some pause about entertaining Plaintiffs' . . . arguments, if only because there is broad language in the two opinions suggesting that congressional reporting requirements are entirely a matter for Congress, not the courts. But as the Ninth and D.C. Circuits

a. Failure to Investigate and Report (First Cause of Action)

Plaintiffs' first cause of action is that Defendants violated the FMSA by failing to investigate and report to Congress on downed pigs, as required by Section 1907(a). "The APA provides relief for a failure to act in § 706(1): 'The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.'" *SUWA*, 542 U.S. at 62. "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*" *Id*. at 64; *see also Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 20 (D.C.C. 2017) ("It is well established that a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*" (citation and quotations omitted)). These requirements "play different roles: 'The limitation to *discrete* agency action precludes . . . broad programmatic attacks,' while '[t]he limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law.'" *Id*. (alterations omitted) (quoting *SUWA*, 542 U.S. at 65). "The discreteness limitation precludes using 'broad statutory mandates' to attack agency policy, the better to 'avoid judicial entanglement in abstract policy disagreements which courts

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themselves noted, the holdings of the two cases do not extend so far."), *rev'd in part*, 139 S. Ct. 2551 (2019).

The only action required by Section 1907 is that the Secretary of Agriculture submit a report to Congress. However, arguably legal consequences flow from the submission of the report, because the Secretary must promulgate regulations based on the report, if he deems it necessary. In other words, Section 1907 appears to require more than the regulations addressed in *Hodel* and *Guerrero*, which required reports to Congress only. As indicated, the Court need not and does not resolve the issue of whether this distinction is sufficient to cause the reporting requirement at issue here to be judicially reviewable.

lack both expertise and information to resolve.'" *Id*. (quoting *SUWA*, 542 U.S. at 64, 66). "The other § 706(1) requirement—that the law must *mandate* the agency action that the plaintiff seeks to compel—reflects the fact that, prior to the APA, courts compelled executive action via writs of mandamus, which were available only for 'specific, unequivocal command[s]' as to which the agency had 'no discretion whatever.'" *Id*. (quoting *SUWA*, 542 U.S. at 63).

Contrary to Plaintiffs' contention, nothing in the text of Section 1907 states that Defendants are required to report on non-ambulatory *pigs* specifically, nor does it provide that the Secretary must report on "all" species of non-ambulatory livestock. Rather, Section 1907 states only that Defendants are required to report on non-ambulatory livestock generally, and the administrative record before the Court reflects that Defendants submitted letters to Congress in both 2004 and 2006 reporting on non-ambulatory livestock. Plaintiffs challenge the sufficiency of these letters, both because the letters address the handling of cows, sheep, and goats, but not pigs, and also because the letters purportedly do not qualify as reports as contemplated by Section 1907.[10] (*See* Dkt. 52-1 at 14; Dkt. 61 at 13-17).

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[10] The 2004 and 2006 letters to Congress are admittedly brief. However, both letters specifically reference the HMSA, recognizing the requirement that the Secretary "submit a report on practices involving non-ambulatory livestock, including the scope, causes, and humane treatment of non-ambulatory livestock, as well as the extent to which such livestock may present handling and disposition problems." (AR 02620-23). The 2006 letter also states that the Secretary "is pleased to provide an update on the [USDA's] activities in response to this request," and discusses data with respect to the extent of non-ambulatory cows, sheep, and goats. (AR 02622-23). The 2004 letter also discusses policy changes in response to detection of bovine spongiform encephalopathy, noting that these changes "have significantly changed the context of the issue," and "are likely to change

While the Court agrees that pigs are a species of livestock, *see* 7 U.S.C. § 1902(a) (referring to "cattle, calves, horses, mules, sheep, swine, and other livestock"), Section 1907 does not mandate that the Secretary investigate each and every species of livestock, and Plaintiffs have failed to provide any evidence supporting that reading of the statute. Defendants apparently did not report on *all* other species of livestock other than pigs—certainly, Plaintiffs have not offered that Defendants singled out pigs in this respect—which undermines Plaintiffs' argument. Further, although Plaintiffs refer to statements in a 2005 USDA pamphlet indicating that the agency intended to study pigs (*see* Dkt. 52-1 at 15; *see also* AR 02563-64), nothing therein establishes that Section 1907 explicitly requires the investigation of non-ambulatory pigs. Further, nothing in the text of Section 1907 delineates what form the required "report" to Congress should take.

If Congress had desired an investigation and report addressing non-ambulatory pigs—or any other specific kind of livestock—it certainly could have included that language in the statute. Alternatively, after receiving the 2004 and 2006 letters, Congress could have required that Defendants submit a report on non-ambulatory pigs specifically, or informed Defendants that the 2004 and 2006 letters were not sufficient, and they should submit a more detailed report. *Hodel*, 865 F.2d at 318-19 ("If the Secretary's response has

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how cattle producers and processers handle these animals." (AR 02620-21). In other words, it is not as if the 2004 and 2006 letters completely ignored the duty to investigate, or failed to address entirely the issues outlined in Section 1907. Nor is this a case where Defendants failed to submit any report at all. *Cf. Telecomms. Rsch. & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 73, 79-81 (D.C. Cir. 1984) (addressing claim of unreasonable agency delay, where FCC took no action in response to a petition, other than soliciting comments).

indeed been deemed inadequate (in the statutory sense of 'insufficiently detailed') by its recipient, then it is most logically for the recipient of the report to make that judgment and take what it deems to be the appropriate action. It scarcely bears more than passing mention that the most representative branch is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives."). However, Congress did not take any such action.

In short, Plaintiffs' challenge amounts to no more than a disagreement with the sufficiency of the reports, which is not enough to succeed on an APA claim. Plaintiffs have not established that Defendants failed to take a discrete agency action that they were required to take. As a result, Defendants are entitled to summary judgment on the first cause of action.

b. Failure to Regulate (Second Cause of Action)

Plaintiffs' second cause of action is that Defendants failed to regulate the humane treatment, handling, and disposition of downed pigs. Defendants argue that they are entitled to summary judgment on this claim because Section 1907 does not *require* them to regulate the slaughter of downed pigs, and rather that decision is discretionary. Plaintiffs offer virtually no response to Defendants' motion for summary judgment on this issue (*see* Dkt. 61 at 19 ("It follows that in withholding the investigation and report as required by 7 U.S.C. § 1907(a), Defendants are also unlawfully withholding regulation of non-ambulatory pigs based on the findings of the report as required by 7 U.S.C. § 1907(b), in violation of the APA.")), and when questioned at oral argument, counsel for Plaintiffs failed to meaningfully respond to the inquiry (instead focusing on the first cause of action).

Further, in their supplemental brief on standing, Plaintiffs state that they "acknowledge that the discretionary nature of Congress's direction under 7 U.S.C. § 1907(b) to regulate nonambulatory pigs 'if necessary' may render USDA's failure to regulate immune from judicial review." (Dkt. 67 at 8-9). Plaintiffs' failure to significantly advocate in support of their second cause of action is likely due, at least in part, to the absence of any statutory requirement that Defendants ban the slaughter downed pigs. Indeed, absent from Section 1907 is any mandate that Defendants must ban the slaughter of downed pigs, and therefore to the extent Plaintiffs contend that Defendants have violated Section 1907 by not prohibiting the slaughter of all downed pigs, any such contention is simply not supported by the statutory text.

"In determining whether a suit can be brought under the APA, '[w]e begin with the strong presumption that Congress intends judicial review of administrative action.'" *Conyers v. Rossides*, 558 F.3d 137, 143 (citation omitted). "However, the APA explicitly excludes from judicial review those agency actions that are 'committed to agency discretion by law.' The Supreme Court has specified at least two occasions in which that exclusion applies: '[I]n those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply,' and when 'the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (citations omitted); *see also Conyers*, 558 F.3d at 143 ("review under the APA may be excepted where: (i) 'statutes preclude judicial review;' or (ii) 'agency action is committed to agency discretion by law.'" *Id*. (quoting *Nat. Res. Def. Council v. Johnson,* 461 F.3d 164, 171 (2d

Cir. 2006)). "Making this determination requires an examination of both the 'express language' of the statute, as well as 'the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.'" *Id*. (quotations and citations omitted). "Furthermore, in cases that involve agency decisions not to take enforcement action, we begin with the presumption that the agency's action is unreviewable." *Sierra Club*, 648 F.3d at 855.

The express language of Section 1907 provides that, "[b]ased on the findings of the report, *if the Secretary determines it necessary*, the Secretary shall promulgate regulations to provide for the humane treatment, handling, and disposition of non-ambulatory livestock by stockyards, market agencies, and dealers." *See* 7 U.S.C. § 1907(b) (emphasis added). While the statutory text contains the word "shall"—which is "the language of command"—"[w]e must also consider the language and structure of the statute to determine whether the [Secretary] retained discretion in the statutory duty so as to render h[is] decision unreviewable." *Sierra Club*, 648 F.3d at 856. To that end, the "shall" mandate includes qualifying language—that is, "*if the Secretary determines it necessary*." 7 U.S.C. § 1907(b) (emphasis added). In other words, the plain language of Section 1907(b) requires the Secretary to "promulgate regulations" *only* if the Secretary determines it necessary. *See also Forsyth Cnty. v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1041 (11th Cir. 2011) (Section 460d granted Secretary of Transportation "broad discretion to award leases 'for such periods, and upon such terms and for such purposes as he may deem reasonable in the public interest,'" explaining that "[t]he court is not empowered to substitute its judgment for that of the agency . . . when the relevant statute leaves room for

a responsible exercise of discretion and may not require particular substantive results in particular problematic instances" (quotations and citations omitted)); *see also Webster v. Doe,* 486 U.S. 592, 600 (1988) (holding that CIA employee could not seek APA review of his termination because Section 102(c) of the National Security Act permitted "termination of an Agency employee whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States'"); *Sierra Club*, 648 F.3d at 856 (where Congress's mandate to the Administrator was that she shall "take such measures, including issuance of an order, or seeking injunctive relief, as necessary," upon examination of the context and structure of § 7477, agreeing that the Administrator "had sufficient discretion to render her decision not to act nonjusticiable"); *Animal Welfare Inst. v. Vilsack*, 2022 WL 16553395, at *9 (explaining that "[t]he PPIA affords Defendants a broad degree of discretion in determining what regulations are and are not appropriate," and "the PPIA does not provide express statutory authority to mandate the 'humane' treatment of animals"). Because Section 1907 does not require the regulation of the slaughter of downed pigs and that action is committed to Defendants' discretion, Defendants are entitled to summary judgment on Plaintiffs' second cause of action.

2. Arbitrary and Capricious Denial of Plaintiffs' Petition, in Violation of Section 706(2) of the APA (Plaintiffs' Third Cause of Action)

The Court turns lastly to Plaintiffs' third cause of action. Defendants contend that they are entitled to summary judgment on Plaintiffs' third claim because: (1) they reasonably concluded that allowing the slaughter of non-ambulatory pigs would not lead to increased food safety risks; (2) they adequately explained why alleged practices by the

pork production industry do not warrant a ban on the slaughter of non-ambulatory pigs; (3) they were not obligated to treat non-ambulatory pigs in the same manner as they treat non-ambulatory cattle; and (4) they reasonably concluded that allowing the slaughter of non-ambulatory pigs would not incentivize inhumane handling by pork processors. (*See* Dkt. 60-1 at 21-35).

Section 706(2) of the APA gives a reviewing court authority to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The standard of review under 5 U.S.C. § 706(2)(A) is highly deferential and presumes the agency's action to be valid." *Yu v. U.S. Dep't of Transp.*, 440 F. Supp. 3d 183, 195 (E.D.N.Y. 2020) (citation and quotation omitted). This standard "is applied at the high end of the range of deference and an agency refusal is overturned only in the rarest and most compelling of circumstances," *New York v. U.S. Nuclear Regul. Comm'n*, 589 F.3d 551, 554 (2d Cir. 2009) (quotations and citation omitted), and "has been said to be so high as to be 'akin to non-reviewability,'" *id.* at 554 (quoting *Cellnet Comm'n, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992)).

In reviewing an APA claim, "[t]he Court's task is not to engage in an independent evaluation of the cold record, nor to substitute its judgment for that of the agency. Instead, it is for the Court to determine whether the agency has considered the pertinent evidence, examined the relevant factors, and articulated a satisfactory explanation for its action." *Noroozi v. Napolitano*, 905 F. Supp. 2d 535, 541 (S.D.N.Y. 2012) (internal citations and quotations omitted). In other words, "a court is not to substitute its judgment for that of

the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Saget*, 345 F. Supp. 3d at 298 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009)); *see also WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014) (court must determine whether agency "adequately explained the facts and policy concerns it relied on" and whether "those facts have some basis in the record" (citation omitted)); *New York*, 589 F.3d at 554 ("To deny review of a rulemaking petition, a court typically need do no more than assure itself that an agency's decision was 'reasoned,' meaning that it considered the relevant factors." (citation omitted)).

"[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). To that end, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (citation omitted). "[W]here the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Id*.

Further, "[w]here an agency departs from prior agency practice or polices, the APA requires the agency to provide a 'reasoned explanation' for such departure. The Supreme Court has made clear that an 'unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Saget*, 345 F. Supp. 3d at 298 (citations omitted). "To survive arbitrary and capricious review when changing a policy, an agency must 'at least display awareness that it is changing position,' 'show that there are good reasons for the new policy,' and 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Id*. at 298-99 (quoting *Encino Motorcars, LLC*, 579 U.S. at 222). Bearing these principles in mind, the Court turns to Plaintiffs' claim that Defendants' denial of the Petition was arbitrary and capricious.

Following a review of the Petition, FSIS[11] concluded that "existing regulations and inspection procedures are sufficient and effective in ensuring that [non-ambulatory] pigs are handled humanely at slaughter and in preventing diseased animals from entering the human food supply." *See* AR 02037; *see also* AR 02044. Accordingly, FSIS denied the Petition in a letter dated September 16, 2019 ("the September 2019 letter"). *See* AR 02037-44. Plaintiffs advance four arguments as to why Defendants' denial of the Petition was arbitrary and capricious: (1) Defendants' conclusion that the slaughter of non-ambulatory pigs has no impact on public health or food safety was arbitrary and capricious; (2) Defendants arbitrarily and capriciously ignored an important aspect of the problem—that

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[11] Although the Petition was submitted to the USDA, FSIS, an agency within the USDA, was responsible for reviewing the Petition and issuing the denial letter.

widespread producer practices lead to non-ambulatory disability in pigs; (3) Defendants arbitrarily and capriciously discounted evidence documenting producer incentives to handle non-ambulatory pigs inhumanely; and (4) Defendants abused their discretion by failing to consider evidence of the high rate of inhumane treatment suffered by non-ambulatory pigs under existing regulations. (*See* Dkt. 52-1 at 25-38). Plaintiffs cite to *Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin*., 864 F.3d 738 (D.C. Cir. 2017), where the court held that "when an agency denies a petition for rulemaking, the record can be slim, but it cannot be vacuous." *Id*. at 747. However, as further explained below, the record in this case was not "vacuous," and Defendants' response to Plaintiffs' Petition was adequate.

The Court turns first to Plaintiffs' contention relating to public health and food safety. Plaintiffs contend that the Petition "presented ample evidence that the slaughter of non-ambulatory pigs causes adulterated pork to make its way into the food supply," citing to studies demonstrating that ante-mortem contamination is the primary source of *Salmonella* contamination, and the extra time downed pigs spend in lairage, or in a holding pen, the more likely they are to contract an infection and carry disease. (*See* Dkt. 52-1 at 25). The Court disagrees with Plaintiffs' position on this issue. The September 2019 letter plainly addresses issues pertaining to food safety raised by downed pigs, *see, e.g.*, AR 02037 (heading entitled "Food Safety") and, more specifically, Plaintiffs' concern that downed pigs are more likely to be contaminated with *Salmonella* and other pathogens because they spend more time in lairage than ambulatory pigs, and that ante-mortem condemnation of downed pigs is necessary to reduce the risk of contamination. *See* AR

02037-39. In the letter, FSIS acknowledged Plaintiffs' concerns relating to time spent in lairage—including that longer holding times may be associated with pathogen cross-contamination of live animals, *see* AR 02037-38—but further explained:

> FSIS is not aware of, nor did the petition include, data that suggests that products made from [non-ambulatory] pigs that have passed ante-mortem and post-mortem inspection present a higher public health risk than products made from ambulatory pigs. In fact, from 1999-2017, FSIS is aware of only one swine slaughter establishment implicated in an illness outbreak linked to raw pork products contaminated with *Salmonella*, and FSIS's investigation of that *Salmonella* outbreak did not identify consumption of products derived from [non-ambulatory] pigs as a contributing factor. Furthermore, available Centers for Disease Control and Prevention (CDC) data supports that outbreaks linked to *Y. entercolitica* are rare. In addition, the results from FSIS's Raw Pork Products Exploratory Program, launched in April 2015, showed the prevalence of *Campylobacter* and *Y. entercolitica* in raw pork products is very low. These findings also reinforce that slaughter establishments, including those that handle [non-ambulatory] pigs, are consistently and effectively implementing measures to control pathogens that can cause foodborne illness as required under 9 CFR part 417 for all swine. Therefore, FSIS does not believe condemnation of [non-ambulatory] pigs for food safety is warranted because existing FSIS safeguards, including rigorous ante-mortem/post-mortem inspection and verification of process control procedures appear to be effectively preventing public health risks associated with all swine, including [non-ambulatory] pigs.

AR 02038.

In other words, Defendants, while acknowledging and considering Plaintiffs' concerns that longer periods spent in lairage can lead to an increased risk of contamination, explained that measures already in place—including rigorous ante-mortem and post-mortem inspections—effectively control the safety and public health risks presented by the slaughter of downed pigs, and Defendants also supported their explanation with citations to relevant studies and data. Given the highly deferential standard—indeed, one that is "akin to non-reviewability," *see New York*, 589 F.3d at 554—the Court cannot say that

Defendants' actions were arbitrary and capricious, including because Defendants "examine[d] the relevant data and articulate[d] a satisfactory explanation for [their] action[s] including a rational connection between the facts found and the choice made." *Encino Motorcars, LLC*, 579 U.S. at 221.

In connection with their argument pertaining to food and public safety, Plaintiffs contend that Defendants treat the slaughter of non-ambulatory cattle differently and have failed to explain why—namely, that Defendants prohibit the slaughter of downed cattle and "rejected industry pleas to refrain from the prohibition because 'the risk of [bovine spongiform encephalopathy, or BSE] is very low,'" reasoning that "this final rule will better ensure more efficient and effective implementation of inspection and humane handling requirements at official establishments." (*See* Dkt. 52-1 at 26; *see also* Dkt. 61 at 24-25). The Court disagrees. With respect to the treatment of downed cattle, the September 2019 letter addresses why Defendants' approach to the regulation of downed pigs is different than its approach to the regulation of downed cattle. Specifically, cattle become non-ambulatory for different reasons than pigs, and when pigs become non-ambulatory and are at greater risk for contracting disease, FSIS inspectors are able to identify these diseases during ante-mortem and post-mortem inspection. *See, e.g.*, AR 02038-39 (rejecting Plaintiffs' contention that FSIS inspectors are unlikely to detect diseases in downed pigs, including because pigs infected with *Brucella suis* and *Erysipelothrix rhusiopathiae* "typically present with identifiable signs/symptoms other than lameness, such as fever, acute skin lesions, and swollen joints," and "[u]nlike in mature cattle and veal calves, FSIS had found that lameness in swine is typically associated

with chronic and localized musculoskeletal conditions, such as disuse atrophy and arthroses of a joint"); *see also* Dkt. 60-1 at 25 n.5 (in issuing an interim final rule prohibiting the slaughter of non-ambulatory cattle for human food, explaining that rule "was based on data indicating that non-ambulatory cattle were among cattle with greater incidence of BSE, and that the typical signs of BSE often cannot be distinguished from the signs of other diseases and conditions that affect non-ambulatory cattle" (citing 69 Fed. Reg. 1,862 (Jan. 12, 2004)).

The Court turns next to Plaintiffs' contentions regarding producer practices and incentives, which they argue increase the risks that pigs will become non-ambulatory—specifically, that widespread producer practices lead to non-ambulatory disability in pigs, and that there are producer incentives to handle non-ambulatory pigs inhumanely. (*See* Dkt. 52-1 at 27-33). The September 2019 letter addresses Plaintiffs' concerns of humane handling; specifically, their contention that prohibiting the slaughter of downed pigs would improve animal handling from farm to slaughter, and would deter producers from sending older, weaker, or potentially downed animals to slaughter, where the potential exists for them to be inhumanely handled. *See* AR 02039-41.

In response to Plaintiffs' contention regarding inhumane handling, FSIS initially noted that, in its experience, downed pigs are not "routinely" inhumanely handled at slaughter; rather, such incidents are "isolated and do not depict behavior throughout Federally-inspected operations." AR 02039. FSIS further noted that, in response to the 2013 OIG report, FSIS "strengthened its approach to humane handling and made it more data-driven," including by establishing a new "Humane Handling Enforcement

Coordinator" position, which coordinates with the Office of Field Operations to "improve the inspectors' objective analysis when enforcing the humane handling regulations, and to reduce subjective interpretation of inhumane events and their regulatory outcome." AR 02040. The Coordinator also "maintains a database to track the review of humane handling NRs, as well as review and track related suspensions and Notice of Intended Enforcement." *Id*.

Further, contrary to Plaintiffs' contention, the September 2019 letter discusses Plaintiffs' concerns that inhumane handling may contribute to increased numbers of downed pigs. AR 02040-41. Specifically, FSIS acknowledged the industry studies cited by Plaintiffs showing that certain handling processes at production, transport, and slaughter contribute to pigs becoming non-ambulatory, as well as Plaintiffs' assertion that these practices continue because "there are weak financial incentives to keep pigs ambulatory." *Id*. FSIS agreed that inhumane handling can lead to increased numbers of non-ambulatory pigs, explaining that the industry "has pro-actively developed the Pork Quality Assurance and Transport Quality Assurance certification programs," which help pig farmers and their employees use best animal handling practices to promote food safety and minimize downed pigs. AR 02041. These programs rely on experts in agriculture and veterinary medicine to fulfill their mission, and producers and transporters are incentivized to participate in these programs because slaughter establishments require current certifications as a purchase specification. *Id*. Accordingly, FSIS concluded that "while industry studies recognize that inhumane handling can contribute to pigs becoming [non-ambulatory], the

industry has responded to implementing programs to prevent these practices and minimize [non-ambulatory] pigs." *Id*.

As to Plaintiffs' contention regarding financial incentives causing pigs to become non-ambulatory, FSIS responded that it "disagree[d] with the assertion that there are weak financial incentives through the industry to prevent [non-ambulatory] pigs," citing to specific examples of financial incentives that make inhumane handling less likely, including costs incurred by producers, transporters, and establishments. *See* AR 02041. In addition to these incentives, FSIS also pointed to incentives created by the costs an establishment incurs when FSIS observes inhumane animal handling. *See id*. ("The petition asserts that [non-ambulatory] pigs are more likely to be mistreated; however, it is also reasonable to conclude that an establishment that mistreats pigs is more likely to be subject to FSIS regulatory control action and further enforcement."). For example:

> Excess prodding, kicking animals, and dragging non-ambulatory animals are egregious animal handling non-compliance and result in, at a minimum, FSIS effecting an immediate suspension of slaughter operations without notice as authorized by 9 CFR 500.3(b). Costs to the establishment associated with such a suspension can exceed thousands of dollars per hour, depending upon the size of the establishment, lost production, the number of employees affected, and the corrective actions conducted by the establishment required to address the noncompliance.

Id.

In connection with their arguments pertaining producer practices, Plaintiffs also cite to problems caused by the use of ractopamine, which induces growth in pigs. (*See* Dkt. 52-1 at 27-28). The September 2019 letter addresses the use of ractopamine in pigs, and Plaintiffs' contention that FSIS's current policy creates an incentive for producers to

misuse this drug in pigs immediately destined for slaughter. *See* AR 02043. FSIS explained that animals exhibiting lameness, fatigue, or signs more commonly attributed to ractopamine, including heavy musculature and hyperexcitability, are subject to FSIS sampling and testing. *Id*. In addition, FSIS enforces tolerance levels set by the FDA for ractopamine in meat, and carcasses containing violative levels of these substances are adulterated and prohibited for use as human food. *Id*. FSIS further explained that violative residues of drugs found in market pigs "are historically very low," and that it maintains a list of repeat residue violators. AR 02043-44. In other words, FSIS has procedures in place to ensure that ractopamine is not overused by producers.[12]

Plaintiffs' last argument pertaining to their third cause of action is that Defendants abused their discretion by failing to consider evidence of the high rate of inhumane treatment suffered by non-ambulatory pigs under existing regulations. Contrary to Plaintiffs' argument, the September 2019 letter makes clear that Defendants considered inhumane treatment suffered by non-ambulatory pigs under the existing regulations. *See, e.g.*, AR 02039 (discussing review of incidents referenced in the Petition, as well as FSIS humane handling non-compliance records and 2013 OIG report); AR 02040 (discussing

[12] Defendants' explanation with respect to ractopamine—that sampling ensures pigs with high levels of this drug do not make their way into the food supply—addresses food chain concerns, rather than the humane handling concerns raised by Plaintiffs, *i.e.*, that ractopamine causes increased musculature in pigs and causes them to become downed. When the Court inquired about this issue at oral argument, the government referred to the discussion relative to ractopamine in the September 2019 letter, which again discusses only the food supply issues, rather than humane handling concerns. However, given the high standard of review for the petition for rulemaking, the Court does not find this shortcoming to rise to the level of arbitrary and capricious.

that practices in the swine industry, including inhumane handling, contribute to increased numbers of non-ambulatory pigs). Simply because the September 2019 letter does not discuss in detail each incident of inhumane handling under the current regulations cited by Plaintiffs does not render Defendants' determination arbitrary and capricious. When reviewing the September 2019 letter as a whole, it is clear that FSIS considered inhumane handling practices and explained the steps taken to help to curb those practices.

Overlying all of Plaintiffs' arguments pertaining to the Petition is the fact that FSIS treats downed pigs distinctly from downed cattle. (*See, e.g.*, Dkt. 52-1 at 24 (arguing that in denying the Petition and refusing to afford non-ambulatory pigs the same protection as non-ambulatory cows and calves, Defendants violated Section 706(2) of the APA, and given Defendants' decision to prohibit the slaughter of non-ambulatory cattle, Defendants' denial of the Petition is implausible)). However, the September 2019 letter squarely addresses the difference in treatment between non-ambulatory pigs and non-ambulatory cattle; namely, because FSIS has found that "pigs become non-ambulatory for different reasons than mature cattle and veal calves do, and therefore, potential incentives that establishments may have to handle [non-ambulatory] cattle and [non-ambulatory] veal calves inhumanely do not apply to [non-ambulatory] pigs." AR 02039.

> FSIS banned the slaughter of cattle that became [non-ambulatory] after ante-mortem inspection in part because dairy producers had an incentive to hold dairy cattle until they were exceptionally old or weak before sending them to slaughter. This practice allowed producers to extract as much milk as possible in the hope that cattle would pass ante-mortem inspection before going down. Sending such weakened cattle to slaughter increased the chances that they would go down and then be subject to inhumane conditions. In addition, FSIS decided to prohibit the slaughter of [non-ambulatory] veal calves because the Agency determined that there was an incentive for

> establishment[s] to force [non-ambulatory] calves to rise and for veal products to send weakened calves to slaughter. FSIS determined that veal production practices, namely deprivation of colostrum and nutrients to bob veal before slaughter, increase the chance that veal calves will become non-ambulatory at the time of slaughter. *Market swine are not subject to these same practices prior to slaughter and thus do not arrive at slaughter under conditions that increase the risk that they will become non-ambulatory or be inhumanely handled*.

AR 02039-40 (emphasis added). FSIS further explained that pigs often become downed due to a "temporary metabolic condition characterized by profound fatigue," which is "usually completely reversible after the animals are cooled and rested." AR 02040. To support this statement, FSIS cited to research conducted by Dr. Temple Grandin on the science of handling pigs and reducing stress, which demonstrates that allowing potentially downed pigs to recover for a period of time after arriving at the slaughter plant is part of a humane handling strategy, as confirmed by the temporary nature of the non-ambulatory state. *Id*. FSIS concluded that "[t]his research supports FSIS's current policy of allowing for [non-ambulatory] pigs to recover from the stress of transport prior to making a determination on the suitability of these animals for slaughter." *Id*.

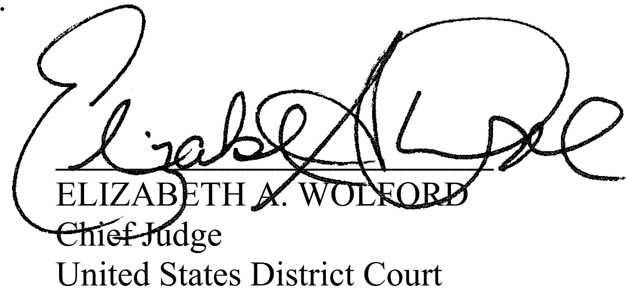
For those reasons, the Court concludes that Defendants' denial of the Petition was not arbitrary and capricious. Particularly given the high level of deference, the Court is satisfied that Defendants have "considered the pertinent evidence, examined the relevant factors, and articulated a satisfactory explanation for [their] action." *Noroozi*, 905 F. Supp. 2d at 541 (citation omitted). Plaintiffs have not put forth any argument which causes the Court to second-guess Defendants' determination under this deferential standard of review. Accordingly, Defendants' denial of the Petition was not arbitrary and capricious, and

Defendants are entitled to summary judgment in their favor on Plaintiffs' third cause of action.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Complete the Administrative Record (Dkt. 56) is granted; Plaintiffs' Motion for Judicial Notice (Dkt. 51) and their Motion for Summary Judgment (Dkt. 52) are denied; and Defendants' Motion for Summary Judgment (Dkt. 60) is granted. The Clerk of Court is directed to enter judgment in favor of Defendants and to close this case.

SO ORDERED.



ELIZABETH A. WOLFORD
Chief Judge
United States District Court

Dated: March 28, 2023
Rochester, New York