IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, INC.; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; FOOD ANIMAL CONCERNS TRUST; PUBLIC CITIZEN, INC.; and UNION OF CONCERNED SCIENTISTS, INC.,	)	
Plaintiffs,	)	11 CIV 3562 (THK)
	)	ECF Case
v.	)	
UNITED STATES FOOD AND DRUG ADMINISTRATION; MARGARET HAMBURG, in her official capacity as Commissioner, United States Food and Drug Administration; CENTER FOR VETERINARY MEDICINE; BERNADETTE DUNHAM, in her official capacity as Director, Center for Veterinary Medicine; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; and KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Antibiotics are critical to human health. They can cure bacterial infections that might otherwise be untreatable. But the more we have used—and misused—antibiotics, the less useful they have become, because bacteria have developed resistance to them. Public health organizations worldwide have warned that unless we change our practices, we are now in danger of losing these life-saving drugs. SUMF ¶¶ 1, 7, 10, 39.[1] The Institute of Medicine of the National Academy of Sciences cautions that "[t]he specter of untreatable infections—a regression to the pre-antibiotic era—is looming just around the corner." *Id.* ¶ 11.

Nearly 80 percent of all antibiotics sold in the United States today are administered to livestock. SUMF ¶ 12. Most of these drugs are not used to treat disease. *Id.* ¶ 14. Instead, antibiotics like penicillin and tetracyclines are given to healthy animals in their feed or water, both to promote faster growth and to prevent infection. *Id.* ¶¶ 14, 16. Antibiotics used for these purposes are typically dispensed at "subtherapeutic" levels, or in doses too low to treat disease. *Id.* This routine use of antibiotics in livestock puts human health at risk because it leads to the development of drug-resistant bacteria that can be, and have been, transferred from animals to people. *Id.* ¶¶ 23, 33-35.

The U.S. Food and Drug Administration (FDA) regulates the use of antibiotics in livestock. The Federal Food, Drug, and Cosmetic Act (the Food and Drug Act) requires FDA to withdraw approval of an animal drug if the agency finds that the drug is not shown to be safe for human health. *See* 21 U.S.C. § 360b(e)(1). More than three decades ago, FDA found that certain subtherapeutic uses of penicillin and tetracyclines in animal feed were not shown to be safe,

[1] Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment.

because they promoted the development of antibiotic-resistant bacteria that could be transferred to humans. SUMF ¶¶ 51-55. FDA has never reversed or retracted those findings. *Id.* ¶ 61. Recent science confirms the conclusion that subtherapeutic uses of penicillin and tetracyclines in animal feed present serious risks to human health. *Id.* ¶¶ 33-35, 43, 61. Nonetheless, despite the statutory requirement that it do so, FDA has never withdrawn its approvals for penicillin and tetracyclines in animal feed.

Frustrated by FDA's failure to act, several of the plaintiffs in this action submitted citizen petitions to the agency in 1999 and 2005 (the Petitions). SUMF ¶¶ 70-74. The Petitions requested that FDA withdraw approvals for nontherapeutic uses of antibiotics in livestock, including penicillin and tetracyclines, if those antibiotics are also important to human medicine. *Id.* Twelve and six years later, the agency has not ruled on either Petition. *Id.* ¶ 75.

In the face of a growing and dangerous trend of antibiotic resistance, FDA has neglected its duty to safeguard public health. By failing to withdraw approvals for subtherapeutic uses of penicillin and tetracyclines in animal feed, FDA has unlawfully withheld agency action in violation of the Food and Drug Act, 21 U.S.C. § 360b(e)(1). In addition, FDA has delayed unreasonably in ruling on the Petitions, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 555(b). Pursuant to the APA, 5 U.S.C. § 706(1), this Court should compel FDA, within one year, to complete the statutorily prescribed withdrawal proceedings for penicillin and tetracyclines and, within six months, to approve or deny the Petitions.

STATUTORY AND REGULATORY FRAMEWORK

Withdrawal of Approval of New Animal Drug Applications

The Secretary of the U.S. Department of Health and Human Services (HHS), "through the Commissioner" of FDA, 21 U.S.C. § 393(d)(2), regulates antibiotics in animal feed as "new animal drugs" under section 512 of the Food and Drug Act, 21 U.S.C. § 360b. The statute directs

FDA to withdraw its existing approval of a new animal drug application if the agency finds that the drug is not shown to be safe:

> The Secretary *shall*, after due notice and opportunity for hearing to the applicant, issue an order withdrawing approval of an application . . . if the Secretary finds . . . that new evidence not contained in such application . . . evaluated together with the evidence available to the Secretary when the application was approved, *shows that such drug is not shown to be safe for use under the conditions of use upon the basis of which the application was approved* . . . .

21 U.S.C. § 360b(e)(1)(B) (emphasis added). FDA considers a new animal drug "safe" for human health if it concludes that "there is reasonable certainty of no harm to human health from the proposed use of the drug in food-producing animals." FDA, Guidance for Industry No. 152, *Evaluating the Safety of Antimicrobial New Animal Drugs with Regard to Their Microbiological Effects on Bacteria of Human Health Concern* 2 (2003), Ex. M to Decl. of Jennifer A. Sorenson (Sorenson Decl.).

Once FDA has found that a previously approved animal drug is not shown to be safe and has proposed to withdraw the existing approval, the drug sponsor may request an administrative hearing. *See* 21 C.F.R. §§ 514.200, 514.201 & pt. 12. If the sponsor cannot show that the drug is safe, FDA must withdraw the approval. *See Rhone-Poulenc, Inc. v. FDA*, 636 F.2d 750, 752 (D.C. Cir. 1980).

Citizen Petitions

FDA's regulations allow citizens to petition the agency to "issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action." 21 C.F.R. § 10.25; *see also* 5 U.S.C. § 553(e) (granting "an interested person the right to petition [an agency] for the issuance, amendment, or repeal of a rule."). FDA must rule on each petition filed. 21 C.F.R. § 10.30(e)(1). Within 180 days of receipt, the agency must approve or deny the

petition, or provide a tentative response indicating why the agency has not yet been able to reach a decision. *Id.* § 10.30(e)(2).

FACTUAL BACKGROUND

Human Health Risks Posed by Antibiotics in Animal Feed

FDA has approved the use of penicillin, tetracyclines, and other antibiotics as animal feed additives since the 1950s. SUMF ¶¶ 15, 18, 44-45. The drugs appear to promote faster animal growth on less feed, which saves livestock producers money because the animals reach slaughter weight sooner. *Id.* ¶¶ 14, 40. The drugs may also act as a prophylactic against infections that can occur when animals are kept in cramped, unsanitary conditions. *Id.* ¶¶ 14, 19. Antibiotics used for these purposes are typically administered flock- or herdwide at levels too low to treat disease. *Id.* ¶¶ 14, 16.

According to reports by HHS, FDA, the U.S. Government Accountability Office (GAO), the Centers for Disease Control and Prevention (CDC), and other agencies, the use of antibiotics in livestock leads to the development of antibiotic-resistant bacteria that can be, and have been, transferred from animals to people. SUMF ¶¶ 23, 29, 33, 35, 38. HHS has concluded that "there is a preponderance of evidence that the use of antimicrobials [or antibiotics] in food-producing animals has adverse human consequences." *Id.* ¶ 35.

When antibiotics are given to livestock, especially at low levels over extended periods of time, drug-resistant bacteria develop in the animals receiving the antibiotics. SUMF ¶¶ 16, 17, 24. These bacteria include *Salmonella*, *Campylobacter*, and *E. coli*, all of which may cause foodborne illness in humans. *Id.* ¶ 24. Government data indicate that retail meat products are frequently contaminated with *Salmonella*, *Campylobacter*, *E. coli*, and other bacteria that are resistant to one or more classes of antibiotics, often including penicillin and tetracyclines. *Id.* ¶¶ 26-28. According to FDA and other government agencies, epidemiological studies have

confirmed that drug-resistant bacteria have been transferred from animals to humans through the food supply. *Id.* ¶¶ 23, 29, 38.

Humans can also be exposed to antibiotic-resistant bacteria from animals through other pathways. For example, there are several documented cases of the transfer of drug-resistant bacteria from livestock to farmworkers and others who came in contact with the animals. SUMF ¶ 30. According to GAO, resistant bacteria may also be spread to fruits, vegetables, and fish products through soil, well water, and water runoff contaminated by animal waste from livestock production facilities. *Id.* ¶ 31.

It is undisputed that antibiotic-resistant bacteria that are transferred from animals to humans may cause drug-resistant infections, or they may transfer resistance traits to other bacteria that can cause infections. SUMF ¶ 32. It is also undisputed that people who contract antibiotic-resistant infections are more likely to have longer hospital stays, may be treated with less effective and more toxic drugs, and may be more likely to die as a result of the infection. *Id.* ¶ 4.

FDA's Failure to Withdraw Approvals for Penicillin and Tetracyclines in Animal Feed

In the mid-1960s, FDA became concerned that the long-term use of antibiotics in animals might pose threats to human health. SUMF ¶¶ 46-48. In 1973, the agency proposed to withdraw all approvals for subtherapeutic uses of antibiotics in animal feed unless the drug sponsors submitted data demonstrating that the drugs were safe. *Id.* ¶¶ 49-50. After evaluating the information it received from drug sponsors, FDA concluded that certain subtherapeutic uses of penicillin and tetracyclines in animal feed were not shown to be safe for human health. *Id.* ¶¶ 51-55.

The Director of FDA's Bureau of Veterinary Medicine (now the Center for Veterinary Medicine, or CVM) issued notices of opportunity for hearing on proposals to withdraw approvals

for subtherapeutic uses of both drugs. *See* Penicillin-Containing Premixes (Penicillin Notice), 42 Fed. Reg. 43,772 (Aug. 30, 1977), Ex. A to Sorenson Decl.; Tetracycline (Chlortetracycline and Oxytetracycline)-Containing Premixes (Tetracyclines Notice), 42 Fed. Reg. 56,264 (Oct. 21, 1977), Ex. B to Sorenson Decl.; SUMF ¶¶ 51-55. The Director proposed to withdraw approvals for "all penicillin-containing premixes [i.e., feed supplements] intended for use in animal feed on the grounds that . . . new evidence shows that the penicillin-containing products have not been shown to [be] safe for subtherapeutic use." Penicillin Notice, 42 Fed. Reg. at 43,772. Regarding tetracyclines, the Director found that "the results of the studies submitted and the data available are clear—the affected parties have failed to show that extensive subtherapeutic use of the tetracyclines is safe." Tetracyclines Notice, 42 Fed. Reg. at 56,267. With limited exceptions, the Director proposed to withdraw all approvals for "tetracycline-containing premix products intended for subtherapeutic uses in animal feed . . . on the grounds that they have not been shown to be safe." *Id.* at 56,288. The exceptions related to "unique, essential" drug uses, primarily for the control of specific diseases. *Id.* at 56,287.

Shortly after the notices were issued, the House and Senate appropriations committees requested that FDA conduct further research before completing its withdrawal proceedings. SUMF ¶¶ 56-60. Although FDA had satisfied these requests by 1988, the agency has never withdrawn the approvals. *Id.* ¶¶ 60, 64. The 1977 notices remain pending. *Id.* ¶ 63. These notices contain FDA's formal, unretracted findings that subtherapeutic uses of penicillin and tetracyclines in animal feed are not shown to be safe for human health.

Rather than act on its 1977 findings and withdraw approvals for subtherapeutic uses of penicillin and tetracyclines in animal feed, FDA has issued a series of nonbinding guidance documents. Most recently, in 2010, FDA issued Draft Guidance No. 209, which concludes that

"using medically important antimicrobial drugs for production purposes [i.e., increasing rate of weight gain or improving feed efficiency] is not in the interest of protecting and promoting the public health." SUMF ¶ 68. The Draft Guidance recommends that livestock producers use medically important antibiotics in food-producing animals only when necessary to ensure the animals' health. *See id.*

Today, the science continues to compel the elimination of subtherapeutic uses of penicillin and tetracyclines in animal feed. FDA admits that these drug uses promote the development of antibiotic-resistant bacteria, which may be resistant not only to penicillin and tetracyclines but also to other medically important drugs. SUMF ¶ 25. CDC reports that there is a "compelling body of evidence" demonstrating that the "[u]se of antibiotics in animals results in resistant bacteria in food animals; [r]esistant bacteria are present in the food supply and transmitted to humans; [and] [r]esistant bacteria result in adverse human health consequences . . . such as increased hospitalizations." *Id.* ¶ 38. The World Health Organization and the Institute of Medicine of the National Academy of Sciences both recommend that government agencies ban the use of antibiotics for growth promotion if those antibiotics are also used in human medicine. *Id.* ¶ 39. FDA has not done so.

FDA's Unreasonable Delay in Ruling on the Citizen Petitions

On March 9, 1999, plaintiffs Center for Science in the Public Interest (CSPI), Food Animal Concerns Trust (FACT), Public Citizen, and Union of Concerned Scientists (UCS) submitted a petition to FDA requesting that the agency "rescind approvals for subtherapeutic uses in livestock of any antibiotic used in (or related to those used in) human medicine." SUMF ¶¶ 70-72. On April 7, 2005, FACT and UCS submitted a second petition to FDA, this time requesting that the agency "withdraw approvals for herdwide/flockwide uses of [specific] antibiotics in chicken, swine, and beef cattle for purposes of growth promotion (including weight

gain and feed efficiency) and disease prevention and control (except for non-routine use where a bacterial infection has been diagnosed within a herd or flock)." *Id.* ¶¶ 73-74. The 2005 Petition covered penicillins, tetracyclines, aminoglycosides, streptogramins, macrolides, lincomycin, and sulfonamides. It did not cover any uses of those drugs for disease treatment. *Id.* ¶ 73.

Although the agency issued non-substantive tentative responses to both Petitions shortly after they were filed, twelve and six years later FDA still has not ruled on either Petition. *Id.* ¶¶ 75-77.

ARGUMENT

I. FDA's Failure to Withdraw Approvals for Penicillin and Tetracyclines in Animal Feed Violates the Food and Drug Act

A. The Food and Drug Act Imposes a Nondiscretionary Duty on FDA to Withdraw Approval of Drug Uses It Finds Are Not Shown to Be Safe

The Food and Drug Act directs that FDA "*shall* . . . issue an order withdrawing approval" of a new animal drug application if the agency "finds . . . that new evidence . . . shows that such drug is not shown to be safe." 21 U.S.C. § 360b(e)(1)(B) (emphasis added). As the D.C. Circuit has explained, this language imposes a nondiscretionary duty on the agency: "the FDA Commissioner *must* withdraw [her] approval *whenever* [she] finds that . . . '[an animal] drug is not shown to be safe.'" *Rhone-Poulenc*, 636 F.2d at 752 (citing 21 U.S.C. § 360b(e)(1)(B)) (emphasis added); *compare* 21 U.S.C. § 360b(e)(1) (setting forth situations in which FDA "shall" withdraw approval of an animal drug) *with id.* § 360b(e)(2) (listing additional situations in which FDA "may" withdraw approval of an animal drug); *see also Cutler v. Hayes*, 818 F.2d 879, 893 n.116 (D.C. Cir. 1987) (noting that the nearly identical provision of the Food and Drug Act directing the agency to withdraw approval of human drugs not shown to be safe is an "enforceable statutory directive" (citing 21 U.S.C. § 355(e))). Once FDA makes the predicate

finding that an animal drug is not shown to be safe, the agency's duty to withdraw approval is triggered, and is subject to judicial enforcement.

B. FDA's 1977 Findings Require It to Withdraw Approvals for Subtherapeutic Uses of Penicillin and Tetracyclines in Animal Feed

It is beyond dispute that FDA has made the predicate findings requiring the agency to withdraw approvals for certain subtherapeutic uses of penicillin and tetracyclines in animal feed. In 1977, the Director of CVM proposed to withdraw approvals for "all penicillin-containing premixes intended for use in animal feed on the grounds that . . . [they] have not been shown to [be] safe for subtherapeutic use." Penicillin Notice, 42 Fed. Reg. at 43,772. The Director likewise proposed to withdraw "all approvals for tetracycline-containing premix products intended for subtherapeutic uses in animal feed, other than those cited, . . . on the grounds that they have not been shown to be safe." Tetracyclines Notice, 42 Fed. Reg. at 56,288. The Director made these findings pursuant to his delegated authority to "issue notices of an opportunity for a hearing on proposals . . . to withdraw approval of new animal drug applications." 21 C.F.R. § 5.84 (1977); *see* FDA, Staff Manual Guides § 1410.503 (2011).

FDA has consistently treated these findings as formal safety findings triggering the duty to withdraw prior approvals. Contemporaneously with making the findings, the Director proposed to withdraw approvals for subtherapeutic uses of penicillin and tetracyclines in animal feed, citing 21 U.S.C. § 360b. Years later, FDA continued to characterize its notices of opportunity for hearing as representing "the Director's formal position that use of the drugs is not shown to be safe." Penicillin and Tetracycline in Animal Feeds, 48 Fed. Reg. 4554, 4555-56 (Feb. 1, 1983), Ex. DD to Sorenson Decl. FDA has never rescinded or altered its 1977 safety findings, and as recently as 2003, FDA confirmed that the 1977 notices "remain pending." New

Animal Drugs; Removal of Obsolete and Redundant Regulations, 68 Fed. Reg. 47,272, 47,275 (Aug. 8, 2003), Ex. E to Sorenson Decl.

Consistent with current science and its own pronouncements, FDA could not retract its 1977 findings. *See* SUMF ¶¶ 23-43 (citing data or analysis of CDC, Institute of Medicine, GAO, National Antimicrobial Resistance Monitoring System, World Health Organization, HHS, and FDA). CDC has cited the "compelling body of evidence" demonstrating the "adverse human health consequences" of antibiotic use in animals. *Id.* ¶ 38. That evidence led the World Health Organization and the Institute of Medicine to recommend banning antibiotic use for growth promotion if the same antibiotics are used in human medicine. *Id.* ¶ 39. HHS has concluded that "the use of [antibiotics] in food-producing animals has adverse human consequences." *Id.* ¶ 35. And in its 2010 Draft Guidance, FDA itself declared that using medically important antibiotics for livestock production purposes "is not in the interest of protecting and promoting the public health." *Id.* ¶ 33.

The Food and Drug Act places squarely on drug sponsors the burden of proving that a drug is safe: the statute requires FDA to withdraw approval not only of drugs that are proven *unsafe*, but also of drugs that are not shown to be safe. *Compare* 21 U.S.C. § 360b(e)(1)(A) *with id.* § 360b(e)(1)(B). As the unambiguous findings of reputable authorities, including FDA itself, prove beyond dispute, subtherapeutic uses of penicillin and tetracyclines in animal feed have not been shown to be safe. Accordingly, FDA must withdraw its prior approvals for such uses.

C. FDA Has Unlawfully Withheld Agency Action by Failing to Take a Discrete Action It Is Required to Take

The APA empowers reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 62 (2004). A failure to act is remediable under the APA if the action not taken is

both "discrete" and "legally required." *SUWA*, 542 U.S. at 63 (emphasis omitted). Such an action is unlawfully withheld, and should be compelled by a reviewing court, if the governing statute implies an "immediate and continuous obligation" for the agency to act, or prescribes a "date-certain deadline[]" for agency action. *See S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1225 n.5 (10th Cir. 2002) (internal quotation marks omitted), *rev'd on other grounds*, 542 U.S. 55; *see also Natural Res. Def. Council v. Train*, 545 F.2d 320, 322, 324, 328 (2d Cir. 1976) (upholding district court order compelling the U.S. Environmental Protection Agency (EPA) to list lead as a pollutant, where EPA's finding that lead has adverse health effects gave rise to a statutory duty to list the contaminant), *aff'g* 411 F. Supp. 864 (S.D.N.Y.).

Under the Food and Drug Act, FDA's duty to initiate and conclude withdrawal proceedings for drugs not shown to be safe is both immediate and continuous. The statute speaks in mandatory terms, and, by requiring FDA to withdraw approval of drugs not shown to be safe, it places on drug sponsors the burden of showing that a drug is safe and should therefore remain on the market. *See* 21 U.S.C. § 360b(e)(1)(B). Although the Food and Drug Act already required FDA to withdraw approval of *unsafe* drugs, Congress amended the Act in 1962, directing in addition that FDA withdraw approval of drugs "not shown to be safe." *See* Drug Amendments of 1962, Pub. L. No. 87-781, § 102(d), 76 Stat. 780, 781-82. It did so to "permit the *prompt removal from the market* of such drugs when new evidence . . . establishes that the drug should not have been cleared for safety in the first instance." S. Rep. No. 87-1744, at 1 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2884, 2884 (emphasis added). There would have been no need to amend

the Act if Congress were content to allow potentially unsafe drugs to remain on the market until proven unsafe.[2]

In a case involving the parallel Food and Drug Act provision instructing the agency to withdraw approval of human drugs that lack substantial evidence of effectiveness, the court held that "it could not be clearer that the Secretary *must* begin the procedures to withdraw a drug when he concludes that there is no substantial evidence of efficacy." *Am. Pub. Health Ass'n v. Veneman*, 349 F. Supp. 1311, 1315 (D.D.C. 1972); *compare* 21 U.S.C. § 355(e)(3) *with id.* § 360b(e)(1)(B). The court found FDA's contrary argument—that it was "not required by law" to undertake withdrawal proceedings "immediately" upon publishing its findings—"unpersuasive in view of the clear language of the statute and regulations and the Congressional intent to rid the marketplace of ineffective drugs." *Id.* at 1315-16. The court's reasoning applies with even greater force when a drug's safety is in question, because the fundamental purpose of the Food and Drug Act is to protect human health. *See* 21 U.S.C. § 393(b)(1)-(2) (setting forth FDA's mission).

Withdrawing approval of an animal drug is a discrete agency action. In *SUWA*, the Supreme Court contrasted "compliance with [a] broad statutory mandate"—which is not a discrete action and therefore cannot be compelled under APA § 706(1)—with the "circumscribed, discrete agency actions" set forth in the APA's definition of "agency action," including "agency rule, order, license, sanction [or] relief." 542 U.S. at 62, 66-67 (quoting 5

[2] The Food and Drug Act provision requiring FDA to withdraw approval of animal drugs not shown to be safe, 21 U.S.C. § 360b(e)(1)(B), was enacted in 1968. Because this provision "was taken, almost word for word," from § 355(e)(1)(B), the provision directing the agency to withdraw approval of human drugs not shown to be safe, FDA has recognized that "the legislative history of [§ 355(e)(1)(B)] is also the legislative history of [§ 360b(e)(1)(B)]." Enrofloxacin in Poultry, No. 2000N-1571, at 86 n.122 (FDA July 27, 2005) (final decision of the Commissioner).

U.S.C. § 551(13)). "[I]ssu[ing] an order withdrawing approval of [a new animal drug] application," 21 U.S.C. § 360b(e)(1), is covered by the list of discrete agency actions explicitly enumerated by the Court.

By failing to withdraw approvals for subtherapeutic uses of penicillin and tetracyclines in animal feed, FDA has unlawfully withheld agency action. This Court should enforce the Food and Drug Act by compelling the agency to complete the withdrawal proceedings required by law.

II. FDA's Delay in Ruling on the Citizen Petitions Violates the APA

A. FDA Has a Discrete, Nondiscretionary Duty to Rule on Citizen Petitions

FDA's regulations grant any interested person the right to petition the agency to "issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action." 21 C.F.R. § 10.25; *see also* 5 U.S.C. § 553(e). An agency must "'conclude a matter' presented to it," including a petition, "'within a reasonable time,' . . . and a reviewing court may 'compel agency action . . . unreasonably delayed.'" *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (quoting 5 U.S.C. §§ 555(b), 706(1)); *see also Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 540 (S.D.N.Y. 2009) (holding that an agency "is required to at least definitively respond to . . . [a] petition—that is, to either deny or grant the petition"); Answer ¶ 28. Ruling on a citizen petition is a "circumscribed, discrete agency action[]." *SUWA*, 542 U.S. at 62. Because FDA has a discrete, mandatory duty to reach a final decision on each citizen petition presented to it, this Court can compel FDA to issue a final response that has been unreasonably delayed. *See SUWA*, 542 U.S. at 65; *Families for Freedom*, 628 F. Supp. 2d at 540.

B. The *TRAC* Factors Demonstrate that FDA's Delay Is Unreasonable

The D.C. Circuit has suggested criteria by which to assess the reasonableness of agency delay. *See Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984). Courts apply a rule of reason, considering the length of the delay; any indication by Congress of the speed with which it expects the agency to proceed; the nature of the interests at stake; competing agency priorities; and prejudice generated by delay. *See id.*; *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992). The Court "need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *TRAC*, 750 F.2d at 80 (internal quotation marks omitted). While the *TRAC* factors are "hardly ironclad," they provide "useful guidance." *Id.* Here, they demonstrate that FDA's twelve- and six-year delays in ruling on the Petitions are unreasonable.

1. Twelve- and Six-Year Delays Are Unreasonably Long

While "[t]here is no *per se* rule as to how long is too long to wait for agency action, . . . a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade." *Am. Rivers*, 372 F.3d at 419 (internal citations and quotation marks omitted). In *American Rivers*, the D.C. Circuit held that a six-year-plus delay in ruling on a citizen petition was "nothing less than egregious." *Id.* Courts have repeatedly found delays of shorter than six years unreasonable. *See Families for Freedom*, 628 F. Supp. 2d at 541 (two-and-a-half-year delay in ruling on plaintiffs' petition); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113-15 (D.D.C. 2003) (five-year delay in ruling on plaintiffs' petition), *motion for partial relief from judgment granted on other grounds by* 323 F. Supp. 2d 7 (D.D.C. 2004); *see also Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (five-year delay in holding a hearing); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157-59 (D.C. Cir. 1983) (three-year delay in initiating a rulemaking); *MCI Telecomms. Corp. v. FCC*,

627 F.2d 322, 324-25, 340-42 (D.C. Cir. 1980) (four-year delay in evaluating proposed tariffs). FDA's twelve- and six-year delays "smack[] of unreasonableness on [their] face." *Fund for Animals*, 294 F. Supp. 2d at 113. The sheer length of time FDA has delayed in ruling on the Petitions militates in favor of judicial relief.

2. FDA's Delay Undermines the Food and Drug Act

Although the Food and Drug Act prescribes no specific deadline for responding to citizen petitions, courts "seek guidance from the scheme and purposes of the [governing statute]" in reviewing an agency's speed in carrying out its regulatory duties. *Cutler*, 818 F.2d at 897 n.158; *see Int'l Chem. Workers Union*, 958 F.2d at 1149. "When an agency is charged with the administration of a statutory scheme whose paramount concern is protection of the public health, the pace of agency decisionmaking must account for this statutory concern." *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984); *see also TRAC*, 750 F.2d at 80 ("[D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake . . . ."). The Food and Drug Act requires the "*prompt* removal from the market" of drugs that "should not have been cleared for safety in the first instance." S. Rep. No. 87-1744, at 1 (emphasis added). The reason for this is that drugs not shown to be safe can harm human health.

A plethora of public health authorities, including CDC, the Institute of Medicine, and the World Health Organization, warn that continued nontherapeutic use of antibiotics in livestock imperils public health. *See* SUMF ¶¶ 23-43 and p. 10 above. FDA itself has recommended that antibiotics be given to livestock only when necessary to ensure animal health, and not to promote growth or improve feed efficiency. SUMF ¶ 68. Given these facts, and the statutory directive promptly to disallow drug uses not shown to be safe, FDA's delay in ruling on the Petitions is inexcusable.

3. FDA's Delay Is Unreasonable Because Human Health and Welfare Are at Stake

As noted above, agency delays "are less tolerable when human health and welfare are at stake." *TRAC*, 750 F.2d at 80. Even when the agency's docket involves many health issues, courts give this factor significant weight. *See, e.g.*, *Auchter*, 702 F.2d at 1158 n.30 ("[I]n the context of the [Occupational Safety and Health] Act, designed to protect workers' health, . . . [the agency's] protracted course [of three years] in the face of potentially grave health risks cannot be characterized as reasonable."); *Pub. Citizen Health Research Grp. v. FDA*, 724 F. Supp. 1013, 1021 (D.D.C. 1989) (holding that "a more than seven year delay in issuing a regulation impacting on women's health is certainly an unreasonable delay"). This court held in *Families for Freedom* that the Department of Homeland Security's two-and-a-half-year delay in responding to a petition concerning conditions in immigration detention facilities was "that much more egregious" because "concerns of human health and welfare" were "undeniably at stake." 628 F. Supp. 2d at 541.

Critical human health concerns are at stake in this case. It is undisputed that the use of antibiotics in livestock leads to the development of antibiotic-resistant bacteria that can be, and have been, transferred from animals to people. SUMF ¶ 23. People exposed to antibiotic-resistant bacteria may become ill themselves or may pass resistant bacteria on to others. *Id.* ¶ 4. The results can be longer illnesses, more hospitalizations, treatment with less effective and more toxic drugs, and even death. *Id.* ¶¶ 4, 38. These health risks are real, serious, and irrefutable. *Id*. ¶¶ 4, 23-43. FDA "simply cannot debate that pressing human health concerns . . . demand prompt review" of the Petitions. *Fund for Animals*, 294 F. Supp. 2d at 114. FDA has not provided that review.

4. FDA Has Acknowledged that Addressing the Problem of Antibiotic Resistance Is a High Priority

Plaintiffs concede that FDA confronts an array of pressing regulatory issues. Antibiotic resistance is unquestionably one of them. FDA considers antibiotic resistance to be "a serious public health threat" and "a mounting public health problem of global significance." SUMF ¶ 6. It recognizes that it is "critically important that antimicrobial drugs be used as judiciously as possible in an effort to minimize resistance development." *Id.* ¶ 34. According to FDA, "[p]reserving the effectiveness of current antimicrobials . . . [is] vital to protecting human . . . health against infectious microbial pathogens . . . ." *Id.* ¶ 7. CDC, a division of defendant HHS, identifies antibiotic resistance as one of its "top concerns." *Id.* ¶ 9.

These statements testify to the priority the government prudently places on preserving the efficacy of antibiotics to treat human disease. While an agency can always seek to justify delay based on the "practical difficulty in carrying out a legislative mandate, or [the] need to prioritize in the face of limited resources," such justifications "become less persuasive as delay progresses, and must always be balanced against the potential for harm." *Cutler*, 818 F.2d at 898. In this case, the delay has progressed to twelve and six years, and the potential for harm is both severe and undeniable, as FDA's own statements make clear. *See Int'l Chem. Workers Union*, 958 F.2d at 1150 ("We are not unmindful of OSHA's need to juggle competing rulemaking demands on its limited scientific and legal staff, but we think the delay in promulgating a final rule that OSHA believes is necessary to workers' well-being has been too lengthy [over six years] for us to temporize any longer." (internal citations and quotation marks omitted)).

5. FDA's Delay Prejudices Plaintiffs' Interests

FDA's delay in ruling on the Petitions prejudices plaintiffs by denying them either the relief they seek or the right to judicial review of an adverse decision. While plaintiffs wait, the

health of their members, and of members of the public, is continually threatened by exposure to antibiotic-resistant bacteria of livestock origin. As this court has recognized, when human health and welfare are at stake, "the risk of prejudice due to further delay" in responding to a citizen petition may be "severe." *Families for Freedom*, 628 F. Supp. 2d at 541.

Moreover, FDA's delay "collide[s] with the right to judicial review." *Cutler*, 818 F.2d at 897; *see Am. Rivers*, 372 F.3d at 419 (explaining that the "primary purpose" of compelling an agency to respond to a petition "is to ensure that an agency does not thwart our jurisdiction by withholding a reviewable decision"); *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 232 (E.D.N.Y. 2006) ("By its inaction in making a final determination on the Citizen Petition, one way or the other, the agency has evaded judicial review of its decisionmaking . . . ."). This is a pernicious aspect of FDA's delay in ruling on the Petitions: the agency, in effect, insulates itself from judicial review of its tacit decision not to withdraw the challenged approvals.

The petition process provides citizens with an opportunity to bring to FDA's attention important public health issues the agency has not adequately addressed. Excessive delay drains the process of meaning and stymies basic citizen rights. The point of the Petitions is to compel FDA, consistent with current science and the demands of the Food and Drug Act, to ban certain nontherapeutic uses of antibiotics in livestock. The right to petition is effectively lost where, as here, the agency simply does not rule on the merits of a petitioner's request. As this court observed in *Families for Freedom*, the agency's delay "in even responding to [the Petitions] 'saps the public's confidence in [the] agency's ability to discharge its responsibilities,' and therefore runs afoul of the APA." 628 F. Supp. 2d at 541 (quoting *Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1034 (D.C. Cir. 1983)).

* * *

The essential question under the APA is whether, in light of all pertinent facts, FDA's delay in ruling on the Petitions is reasonable. It is not. The Petitions seek withdrawal of approvals for drug uses that endanger human health. FDA's own statements acknowledge the serious risks posed by these drug uses. Reputable domestic and international public health authorities agree. The actions sought by the Petitions are mandated by the Food and Drug Act when FDA finds that approved drug uses are not shown to be safe. FDA has long since made that finding for two of the antibiotics covered by the Petitions, penicillin and tetracyclines. These facts, together with the *TRAC* factors, demonstrate the need for judicial intervention. Without it, FDA will be free to ignore plaintiffs' pleas to protect their members' and the public's health.

III. Plaintiffs Have Standing to Bring this Action

A. Plaintiffs Have Standing to Challenge FDA's Failure to Withdraw Approvals for Subtherapeutic Uses of Penicillin and Tetracyclines

To establish Article III standing, an associational plaintiff must show that (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to its organizational purposes; and (3) the litigation will not require its members' individual participation. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Bldg. & Constr. Trades Council v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006). Plaintiffs satisfy this three-part test.

This suit is germane to plaintiffs' institutional missions. *See* Decl. of Michael F. Jacobson (CSPI) ¶¶ 2-4; Decl. of Linda Lopez (Natural Resources Defense Council (NRDC)) ¶¶ 5-7; Decl. of Jennifer Norris (UCS) ¶ 6; Decl. of Robert Weissman (Public Citizen) ¶ 5. Because plaintiffs seek only declarative relief and an order compelling agency action, the participation of individual members is not required. *See Bldg. & Constr. Trades Council*, 448 F.3d at 150 (finding the third prong of the associational standing test satisfied where an organization "seeks a purely legal

ruling without requesting . . . individualized relief" for its members (internal quotation marks omitted)).

Members of NRDC, CSPI, Public Citizen, and UCS would have standing on their own because they suffer concrete, particularized, and imminent "injury in fact" that is fairly traceable to FDA's failure to act and is likely to be redressed by a favorable judicial decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). These members' injuries fall into two categories. First, members face an increased risk of harm from antibiotic-resistant bacteria in food and the environment. *See Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (holding that, in the context of food and drug safety suits, enhanced risk is a cognizable injury for standing purposes); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) (holding that increased risk of environmental injury is cognizable harm for standing purposes). Second, members forgo activities in which they would otherwise like to engage, or incur otherwise unnecessary costs, because of their "reasonable fear" of harm from antibiotic-resistant bacteria. *Laidlaw*, 528 U.S. at 181-83; *see also Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 133-34 (2d Cir. 2011).

Plaintiffs' memberships include consumers who face an increased risk of contracting a drug-resistant infection as a result of handling or eating meat or poultry products from animals that were given routine doses of penicillin and tetracyclines. Decl. of Jasanna Britton (Britton Decl.) ¶¶ 6-7; Decl. of Amanda J. Fleming (Fleming Decl.) ¶¶ 7-8; Decl. of Anne Kapuscinski (Kapuscinski Decl.) ¶¶ 8-9; Decl. of Ilana Slaff-Galatan ¶¶ 4-5, 8; *see also* SUMF ¶¶ 26-28 (citing 2009 data on percentages of retail meat contaminated with antibiotic-resistant bacteria). NRDC member Dennis Haller is a recreational fisherman who faces an increased risk of exposure to drug-resistant bacteria as a result of using rivers and streams contaminated by nearby

livestock facilities. Decl. of Dennis Haller (Haller Decl.) ¶¶ 6-7. As in *Baur*, two "critical factors . . . weigh in favor of concluding that standing exists": government studies and statements confirm that plaintiffs' members face a "credible threat of harm," and the risk of harm "arises from an established government policy," namely, FDA's existing approvals of subtherapeutic uses of penicillin and tetracyclines in animal feed. 352 F.3d at 634, 637, 640-42.

In addition, because of their reasonable concerns about the risks they face, plaintiffs' members have reduced their meat consumption or spend more time or money than they otherwise would to buy meat from animals raised without antibiotics. Britton Decl. ¶¶ 4-6; Fleming Decl. ¶¶ 3-6; Kapuscinski Decl. ¶¶ 4-6; Decl. of Melissa Melum (Melum Decl.) ¶¶ 4-7; Decl. of Rachel Mlinarchik ¶¶ 3-6. Mr. Haller avoids using the waterways near his home as much as he would like to because he is concerned about his exposure to antibiotic-resistant bacteria. Haller Decl. ¶ 7. And NRDC member Dr. Max Kahn, a pediatrician, is not able to prescribe the drugs he would prefer to prescribe, at the doses he would prefer, because many common infections are now antibiotic resistant. Decl. of Max Kahn ¶¶ 6-8. These injuries provide an independent basis for standing, in addition to the increased risk of harm faced by plaintiffs' members. *See Laidlaw*, 528 U.S. at 183-85; *Amnesty Int'l*, 638 F.3d at 134.

Plaintiffs' members' injuries are directly traceable to FDA's failure to withdraw approvals for subtherapeutic uses of penicillin and tetracyclines in animal feed. Until FDA withdraws the approvals, livestock producers will continue to feed these drugs to their animals, generating bacteria that are resistant to penicillin, tetracyclines, and other antibiotics. SUMF ¶ 25. Members will face a continuing risk of harm from exposure to the resistant bacteria.

It is likely that a favorable judicial decision would redress plaintiffs' injuries: if FDA were to withdraw approvals for subtherapeutic uses of penicillin and tetracyclines in animal feed,

the prevalence of bacteria in livestock with resistance to these and other important drugs would stop increasing, and would likely decrease. SUMF ¶¶ 42-43. As a result, plaintiffs' members would face a reduced risk of exposure to drug-resistant bacteria from consuming or handling meat products or from using ground or surface water near livestock facilities. *Id.* They would have less need to alter their behavior to avoid these risks. *See* Britton Decl. ¶ 8; Fleming Decl. ¶ 9; Haller Decl. ¶ 9; Kapuscinski Decl. ¶ 9; Melum Decl. ¶ 7.[3]

B. Plaintiffs Have Standing to Challenge FDA's Unreasonable Delay in Ruling on the Citizen Petitions

In more than twelve years, CSPI, FACT, Public Citizen, and UCS have not received a final response to their 1999 Petition. FACT and UCS have waited more than six years for a final response to their 2005 Petition. FDA's delay has injured CSPI, FACT, Public Citizen, and UCS by depriving them of a decision on the merits of the Petitions and the opportunity to seek judicial review of that decision, if necessary. While these plaintiffs await a final decision on the Petitions, the health of CSPI's, Public Citizen's, and UCS's members is continually threatened by their exposure to meat and poultry products contaminated with bacteria resistant to medically important antibiotics. A final response either approving or denying the Petitions would redress CSPI, FACT, Public Citizen, and UCS's injuries by either (1) granting them the relief they seek or (2) giving them an opportunity to seek judicial review of a denial of the Petitions. These plaintiffs have standing to seek a final response to their Petitions. *See Families for Freedom*, 628 F. Supp. 2d at 539 (noting that plaintiffs who submit a petition to an agency have standing to seek a response).

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[3] As the other plaintiffs have standing, FACT, which is not a membership organization, need not show standing on this claim. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

IV. The Judicial Intervention Plaintiffs Seek Is Necessary and Limited

The judicial intervention plaintiffs seek is both necessary and limited. The Court's intervention is necessary to effectuate the purposes of the Food and Drug Act, enacted to protect the "health of people [who], in the circumstances of modern industrialism, are largely beyond self-protection." *United States v. Dotterweich*, 320 U.S. 277, 280 (1943). As discussed in part I, Congress amended the Act in 1962 to direct FDA to withdraw approval of drugs not shown to be safe. The purpose of the 1962 amendments was "to strengthen the laws designed to keep unfit drugs off the market in the first instance and *speed their removal* should they reach the market." S. Rep. No. 87-1744, at 1 (1962) (emphasis added). Because FDA has failed for decades to act on its own safety findings, and has delayed for years in ruling on plaintiffs' Petitions, this Court must intervene to effectuate Congress's intent.

The judicial intervention requested by plaintiffs is limited: plaintiffs ask this Court to compel the agency to act, without dictating *how* it should act. *See SUWA*, 542 U.S. at 65. With respect to the first claim, the Court should compel FDA immediately to complete the withdrawal proceedings prescribed by law for the drug uses implicated by its 1977 safety findings. *See* 21 C.F.R. §§ 514.200, 514.201 & pt. 12. Similarly, with respect to the second claim, this Court should compel the agency to approve or deny the Petitions within a prescribed time. FDA's delays are unpardonable, and there is every reason to believe that, absent a Court order, the delays will continue into an indefinite and more perilous future.

CONCLUSION

For the reasons set forth above, and based on the accompanying declarations and the undisputed material facts, plaintiffs urge this Court to find that FDA has violated (1) the Food and Drug Act by failing to withdraw approvals for subtherapeutic uses of penicillin and tetracyclines in animal feed and (2) the APA by delaying unreasonably in ruling on the Petitions.

Plaintiffs ask the Court to compel FDA, within one year of entry of judgment, to complete the statutorily prescribed withdrawal proceedings for subtherapeutic uses of penicillin and tetracyclines and, within six months of entry of judgment, to approve or deny the Petitions.

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Respectfully submitted,

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