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 ON THEIR THIRD CLAIM FOR RELIEF

Mitchell S. Bernard (MB 5823)
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, New York 10011
(212) 727-2700
(212) 727-1773 (fax)
mbernard@nrdc.org

Avinash Kar, *admitted pro hac vice*
Jennifer A. Sorenson, *admitted pro hac vice*
Natural Resources Defense Council, Inc.
111 Sutter Street, 20th Floor
San Francisco, California 94104
(415) 875-6100
(415) 875-6161 (fax)
akar@nrdc.org; jsorenson@nrdc.org

Counsel for Plaintiffs

Dated: February 21, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE ADJUDICATIONS

STATUTES AND REGULATIONS

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTRODUCTION

In November 2011, the U.S. Food and Drug Administration (FDA) denied two citizen petitions urging it to rescind approvals for nontherapeutic uses in livestock of antibiotics critical to human medicine. The petitions cited and discussed voluminous, reliable scientific data demonstrating that the use of antibiotics to stimulate animal growth and improve feed efficiency threatens human health by promoting antibiotic resistance in bacteria that can be transferred to and infect human beings. In denying the petitions, FDA did not engage with the scientific evidence on which the petitioners relied. Instead, defying its statutory duty to ban previously approved drug uses that are unsafe or not shown to be safe for human health, FDA denied the petitions in favor of an unenforceable plea for industry cooperation.

FDA's approach finds no basis in the Federal Food, Drug, and Cosmetic Act (Food and Drug Act) and is thus not in accordance with law within the meaning of the Administrative Procedure Act (APA). Moreover, FDA has failed to articulate a rational connection between its professed concerns about nontherapeutic antibiotic use in livestock and its decision not to take binding action. Nor has the agency presented a shred of evidence that its alternative, extrastatutory method will work. The lack of such evidence deprives FDA's action of a reasoned basis, in further violation of the APA. For these reasons, detailed below, plaintiffs seek an order vacating the denials and remanding the matter to FDA with instructions to address the petitions promptly on their merits.

PERTINENT BACKGROUND

The Food and Drug Act

The "overriding purpose" of the Food and Drug Act is "to protect the public health." *Nutritional Health Alliance v. FDA*, 318 F.3d 92, 98 (2d Cir. 2003) (quoting *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 246 (2d Cir. 1977)); *see also* 21 U.S.C.

§ 393(b)(1)-(2) (setting forth FDA's mission to promote and protect the public health). The Act directs FDA to withdraw approval for an animal drug, and revoke the regulation setting forth approved conditions of use, if the agency finds that the drug is "unsafe" or "not shown to be safe" for human health. *Id.* § 360b(e)(1)(A)-(B), (i). FDA 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(a).

The 1999 Petition

In March 1999, plaintiffs Center for Science in the Public Interest (CSPI), Food Animal Concerns Trust (FACT), Public Citizen, and Union of Concerned Scientists (UCS) petitioned FDA to "rescind approvals for subtherapeutic uses in livestock of any antibiotic used in (or related to those used in) human medicine." Citizen Petition (1999 Petition) 1-2 (Mar. 9, 1999), Ex. I to Decl. of Jennifer A. Sorenson, Oct. 5, 2011 (Sorenson Decl.) (Dkt. 33-9). The petition defined "subtherapeutic use" of antibiotics as "the administration of those drugs at a dosage less than is necessary and/or for a period of time longer than is necessary to treat an infection." *Id.* at 5. The petition included in this category uses of antibiotics in livestock for "growth promotion, improved feed efficiency, and disease prevention." *Id.* at 2. Today, such uses may also be referred to as "nontherapeutic." *See*, *e.g.*, FDA, Draft Guidance No. 209, at 4 (June 28, 2010), Sorenson Decl. Ex. O (Dkt. 33-15) (noting that "the use of medically important antimicrobial drugs in food-producing animals for production or growth-enhancing purposes" is often referred to as "nontherapeutic" or "subtherapeutic" use).

The 1999 Petition is thirty-seven pages long and discusses in detail the science supporting the petitioners' request. It refers to and explains studies relating to the widespread subtherapeutic use of antibiotics in livestock; how such use leads to development of antibiotic-resistant bacteria; how antibiotic-resistant bacteria can be transferred from animals to human

beings; how bacteria may transfer resistance genes to other bacteria; and how subtherapeutic antibiotic use reduces the effectiveness of medically important antibiotics, jeopardizing public health. *See* 1999 Petition 9-23. The 1999 Petition also includes a review of expert support for a phase-out of subtherapeutic antibiotic use in livestock. *See id.* at 23-25.

The 2005 Petition

In April 2005, FACT and UCS submitted a second petition to FDA, this time asking the agency to "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)." Citizen Petition (2005 Petition) 1 (Apr. 7, 2005), Sorenson Decl. Ex. K (Dkt. 33-11). The petition covered penicillins, tetracyclines, aminoglycosides, streptogramins, macrolides, lincomycin, and sulfonamides. *Id.* The 2005 Petition was prompted by a 2003 FDA guidance (Guidance for Industry No. 152), in which the agency described a risk-based approach for evaluating proposed new drugs for food-producing animals. *See* FDA, Guidance for Industry No. 152 (Oct. 23, 2003), Sorenson Decl. Ex. M (Dkt. 33-13). Guidance No. 152 includes a table presenting assessments of overall risk from the use of medically important antibiotics in livestock, based on factors FDA considers pertinent. *See id.* at 21. Using FDA's own risk assessment method, the 2005 Petition demonstrates that the approved uses challenged by the petitioners present an unacceptable level of risk. *See* 2005 Petition 9-16.

Draft Guidance No. 209

In June 2010, FDA published for public comment Draft Guidance No. 209, entitled *The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals*. In the opening paragraph, the Draft Guidance states: "The development of resistance to this important class of drugs [i.e., antimicrobials or antibiotics], and the resulting loss of their effectiveness as

antimicrobial therapies, poses a serious public health threat." Draft Guidance No. 209, at 3. The agency reprised this theme on the following page: "Antimicrobial resistance, and the resulting failure of antimicrobial therapies in humans, is a mounting public health problem of global significance." *Id.* at 4.

FDA went on to review forty years' worth of "key scientific reports" by leading public health and government authorities, such as the Institute of Medicine (of the National Academy of Sciences), the World Health Organization (WHO), the European Commission, the Food and Agriculture Organization of the United Nations, and the U.S. Government Accountability Office (GAO). *See id.* at 4-13. Based on its review, FDA concluded that "the overall weight of evidence available to date supports the conclusion that using medically important antimicrobial drugs for [livestock] production purposes is not in the interest of protecting and promoting the public health." *Id.* at 13. FDA also quoted the comments of its parent agency, the U.S. Department of Health and Human Services (HHS), after HHS had reviewed a 2004 GAO report and eleven additional studies: "'We believe that there is a preponderance of evidence that the use of antimicrobials in food-producing animals has adverse human consequences. . . . There is little evidence to the contrary.'" *Id.* at 12.

Draft Guidance No. 209 concludes with a set of recommendations for the "judicious use" of antibiotics in livestock. *Id.* at 15-17. FDA has not finalized the Draft Guidance. Even in final form, FDA's guidance documents "do not establish legally enforceable responsibilities." *Id.* at 2. They offer suggestions or recommendations; they do not impose requirements. *Id.*

The Petition Denials

In November 2011, twelve and six years after the citizen petitions were filed, and one day before FDA's opposition to plaintiffs' initial motion for summary judgment was due in this Court, FDA denied the petitions in two nearly identical letters, on identical grounds. Final

Response to Citizen Petition, New Dkt. No. FDA-1999-P-1286 (Denial of 1999 Petition) (Nov. 7, 2011), Ex. A to Decl. of Mitchell S. Bernard, Feb. 21, 2012 (Bernard Decl.); Final Response to Citizen Petition, New Dkt. No. FDA-2005-P-0007 (Denial of 2005 Petition) (Nov. 7, 2011), Bernard Decl. Ex. B. The denial letters did not address, much less dispute, the science underlying the petitions. To the contrary, FDA acknowledged that it "share[s] [petitioners'] concern about the use of medically important antimicrobial drugs in food-producing animals for growth promotion and feed efficiency indications (i.e., production uses)." Denial of 1999 Petition 1; Denial of 2005 Petition 1. Nonetheless, FDA wrote that "for various reasons the Agency has decided not to institute formal withdrawal proceedings at this time and instead is currently pursuing other alternatives to address the issue of antimicrobial resistance related to the production use of antimicrobials in animal agriculture." Denial of 1999 Petition 3; Denial of 2005 Petition 2. The "other alternative[]" the denial letters identify is the set of voluntary recommendations embodied in Draft Guidance No. 209. Denial of 1999 Petition 3-4; Denial of 2005 Petition 3-4.

The agency expressed confidence in the efficacy of the cooperative measures contemplated by the Draft Guidance, stating: "Based on feedback this Agency has received following the issuance of draft [Guidance No. 209], FDA believes that the animal pharmaceutical industry is generally responsive to the prospect of working cooperatively with the Agency to implement the principles recommended in [the] draft [guidance]." Denial of 1999 Petition 4; Denial of 2005 Petition 3. FDA asserted its belief that "the current proposed approach will accomplish" the goal of judicious antibiotic use in livestock "in a more timely and resource-efficient manner than would otherwise be the case." Denial of 1999 Petition 4; Denial of 2005 Petition 4.

The denial letters present no evidence supporting FDA's professed confidence in voluntary measures. Nor do the letters mention the steady stream of industry comments challenging the conclusion on which the Draft Guidance is predicated: that nontherapeutic uses of antibiotics in livestock threaten human health.

ARGUMENT

I. Standard of Review

Under FDA regulations, the denial of a citizen petition is final agency action subject to judicial review. *See* 21 C.F.R. § 10.45(d). The APA provides that a reviewing court "shall . . . 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). Although the court may not "substitute its judgment for that of the agency," the court's review "must be searching and careful." *Natural Res. Def. Council* (*NRDC*) *v. EPA*, 658 F.3d 200, 215 (2d Cir. 2011) (internal quotation marks omitted). 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." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Additionally, agency action is arbitrary and capricious if the agency has "'relied on factors which Congress has not intended it to consider'" or has "'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.'" *NRDC*, 658 F.3d at 215 (quoting *State Farm*, 463 U.S. at 43).

II. FDA's Reasons for Denying the Petitions Find No Basis in the Food and Drug Act

The petition denials are "not in accordance with law," 5 U.S.C. § 706(2)(A), because they "rest[] on reasoning divorced from the statutory text" of the Food and Drug Act. *Massachusetts*

v. EPA, 549 U.S. 497, 532 (2007). The question whether FDA must withdraw approval for a previously approved animal drug turns on a scientific judgment about the drug's safety. FDA cannot refuse to regulate on the ground that it is pursuing a voluntary program that has no basis in the statute. Because the petition denials are blind to FDA's statutory mandate to protect the public health by promptly removing from the market drugs that are unsafe or not shown to be safe, they must be set aside. *See* 5 U.S.C. § 706(2)(A).

A. FDA's Refusal to Address the Merits of the Petitions Is Invalid under *Massachusetts v. EPA*

The Secretary of HHS, "through the Commissioner" of FDA, 21 U.S.C. § 393(d)(2), regulates antibiotics used in livestock 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 unsafe or 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 experience or scientific data *show that such drug is unsafe for use under the conditions of use upon the basis of which the application was approved* . . . ; [or] 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)(A)-(B) (emphases added); *see also id.* § 360b(i) (requiring FDA, upon withdrawing approval for an animal drug, to "revoke . . . the regulation" setting forth the drug's conditions of use). The petitions asked FDA to regulate antibiotics used in livestock under this provision.

In *Massachusetts v. EPA*, the Supreme Court invalidated the U.S. Environmental Protection Agency's (EPA's) denial of a rulemaking petition under Clean Air Act section 202(a)(1). 549 U.S. at 510-11, 534-35. That section provides that the EPA Administrator "shall"

prescribe standards "applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . *which in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (emphasis added); *see also Massachusetts*, 549 U.S. at 506. The petition requested that EPA regulate greenhouse gases because they constitute air pollution that contributes to climate change, which endangers public health and welfare. 549 U.S. at 510. EPA denied the petition, claiming that it did not have the statutory authority to regulate greenhouse gases and that, even if it did have the authority, it would be unwise to regulate. *Id.* at 511-12.

In concluding that it would be unwise to regulate, EPA relied on several nonstatutory grounds. For example, the agency asserted that the regulation of motor vehicle emissions was a "piecemeal approach" to climate change in conflict with the President's more "comprehensive approach," which relied in part on "nonregulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions." *Id.* at 513.

The Supreme Court rejected the agency's arguments, ruling that while "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies," "once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute." *Id.* at 533. EPA could "avoid taking further action only if it determine[d] that greenhouse gases do not contribute to climate change" or provided a "reasonable explanation" for why it could not or would not determine whether they do. *Id.* The Court rejected EPA's "laundry list of reasons not to regulate," including its "policy judgments" that existing voluntary programs responded effectively to the threat of global warming, and that curtailing motor vehicle emissions would be an "inefficient, piecemeal approach" to address climate change. *Id.* As the Court explained, it was "evident [EPA's reasons

not to regulate] have nothing to do" with the statutory inquiry whether greenhouse gas emissions contribute to air pollution that endangers public health, and "[s]till less do they amount to a reasoned justification for declining to form a scientific judgment." *Id.* at 533-34.

The animal drug withdrawal provision of the Food and Drug Act, 21 U.S.C. § 360b(e)(1), parallels the Clean Air Act provision at issue in *Massachusetts*, and FDA's rationales for denying the petitions echo the justifications the Court rejected in that case. The Food and Drug Act mandates that FDA withdraw approval for an animal drug if the agency determines that the drug is "unsafe" or "not shown to be safe." 21 U.S.C. § 360b(e)(1)(A)-(B). Section 202 of the Clean Air Act mandates that EPA promulgate emission standards for an air pollutant "[i]f EPA makes a finding of endangerment." *Massachusetts*, 549 U.S. at 533. In both cases, the question whether the agency must regulate turns on a single factor: the outcome of the agency's safety evaluation. The Supreme Court required EPA, when faced with a petition seeking regulation of greenhouse gases, to "form a scientific judgment" whether an endangerment exists or provide a "reasonable explanation" for its inability or refusal to do so. *See id.* at 533-34. Similarly here, when confronted with petitions seeking regulation of antibiotics in animal feed, FDA must determine on the merits whether the challenged drug uses have been shown to be safe for human health or, at the very least, provide an explanation grounded in the statute as to why it cannot or will not make that determination.[1] *See id.* at 533, 535.

---

[1] FDA has already made findings that subtherapeutic uses in animal feed of two of the drugs covered by the petitions, penicillin and tetracyclines, have not been shown to be safe for human health. *See* Tetracycline (Chlortetracycline and Oxytetracycline)-Containing Premixes (Tetracyclines Notice), 42 Fed. Reg. 56,264, 56,288 (Oct. 21, 1977), Sorenson Decl. Ex. B (Dkt. 33-2); Penicillin-Containing Premixes (Penicillin Notice), 42 Fed. Reg. 43,772, 43,772 (Aug. 30, 1977), Sorenson Decl. Ex. A (Dkt. 33-1). These findings are the subject of plaintiffs' First Claim for Relief, briefed previously. *See* Mem. of Law in Supp. of Pls.' Mot. for Summ. J. 8-13, Oct. 6, 2011 (Dkt. 20).

FDA did not conform its conduct to the contours of its authorizing statute. Citing voluminous science, including studies commissioned and endorsed by FDA itself, the petitions raised the question whether, under the Food and Drug Act, the challenged drug uses were unsafe or not shown to be safe and therefore had to be banned. In denying the petitions, FDA did not answer or confront that question. Instead, it stated a policy preference for pursuing voluntary reform. The Food and Drug Act nowhere mentions a voluntary approach to reducing the use of a previously approved drug that is unsafe or not shown to be safe for human health. Rather, it commands FDA to withdraw approval for such a drug. *See* 21 U.S.C. § 360b(e)(1)(A)-(B) (providing that the Secretary "shall . . . issue an order withdrawing approval" upon finding that a drug use is unsafe or not shown to be safe). Thus, the reasons FDA gave for denying the petitions, like those tendered by EPA when it refused to determine whether greenhouse gases endanger the public welfare, are unmoored from the governing statute. Consistent with the Court's ruling in *Massachusetts*, the FDA denials are not in accordance with law and must be vacated under the APA, 5 U.S.C. § 706(2)(A).

B. FDA's Issuance of Voluntary Guidance Cannot Excuse Its Failure to Conduct the Required Statutory Inquiry

The Food and Drug Act conditions withdrawal of approval for a drug use on an FDA finding. *See* 21 U.S.C. § 360b(e)(1). But the grant of limited discretion in the phrase "if the Secretary finds" is "not a roving license to ignore the statutory text" but rather "a direction to exercise discretion within defined statutory limits." *See Massachusetts*, 549 U.S. at 532-33. FDA's issuance of nonbinding recommendations cannot excuse its failure, in response to the citizen petitions, to make safety findings and then to withdraw approval for animal drugs that are unsafe or not shown to be safe. The agency's policy judgments about the effectiveness of voluntary approaches versus regulation are irrelevant to the statutory question whether the

evidence proves that the challenged drug uses are "unsafe" or "not shown to be safe." *See id.* at 533-34; 21 U.S.C. § 360b(e)(1)(A)-(B).

Voluntary guidelines are not equivalent to binding regulations. *See Massachusetts*, 549 U.S. at 513 (noting that voluntary programs are "not actual regulation"). An agency "ordered by Congress to promulgate binding regulatory requirements may not issue a non-binding policy statement that encourages but does not compel action." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1261 (D.C. Cir. 2004) (summarizing holding of *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 157 (D.C. Cir. 1990)). For example, where EPA had found that certain chemicals were subject to a mandatory testing regime under the Toxic Substances Control Act, the court rejected the agency's "negotiation and acceptance of voluntary testing agreements by the manufacturers." *NRDC v. EPA*, 595 F. Supp. 1255, 1261 (S.D.N.Y. 1984). Finding "no support for EPA's decision to utilize negotiated testing agreements instead of the statutorily-prescribed initiation of rulemaking proceedings either on the face of the statute or based on some vague assertion of agency discretion," the court held that "[t]he agency charged with implementing the statute is not free to evade the unambiguous directions of the law merely for administrative convenience." *Id.* (internal quotation marks omitted).

The same constraint applies to FDA. The agency's protestation that formal withdrawal proceedings "can consume extensive periods of time and Agency resources," Denial of 1999 Petition 3; Denial of 2005 Petition 2-3, is irrelevant because formal withdrawal proceedings are what Congress has ordered. If a drug is unsafe or not shown to be safe, the Food and Drug Act directs FDA to remove the drug from the market, not simply to *recommend* that its use be curtailed. "To the extent that this constrains agency discretion to pursue other priorities . . . , this is the congressional design." *Massachusetts*, 549 U.S. at 533.

C. The Petition Denials Are Blind to the Purpose of the Food and Drug Act

FDA's petition denials are more than unmoored from the plain language of the Food and Drug Act; they are blind to the Act's purpose and legislative history. The animal drug withdrawal provision at issue here, 21 U.S.C. § 360b(e)(1), mirrors the provision for withdrawal of human drugs, *id.* § 355(e)(1)-(2), and FDA has recognized that the same legislative history underlies both provisions. *See* Withdrawal of Approval of the New Animal Drug Application for Enrofloxacin in Poultry, No. 2000N-1571, at 86 n.122 (FDA July 27, 2005) (final decision of Comm'r), Ex. N to Decl. of Amy A. Barcelo, Jan. 9, 2012 (Barcelo Decl.) (Dkt. 44-14). The purpose of both provisions is to ensure the prompt removal from the market of drugs that are unsafe or not shown to be safe. Congress mandated withdrawal of approval for drugs "not shown to be safe" 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." *See* Drug Amendments of 1962, Pub. L. No. 87-781, § 102(d), 76 Stat. 780, 781-82; S. Rep. No. 87-1744, at 1 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2884, 2884 (emphasis added). Rapid removal from the market of drugs not shown to be safe serves the Food and Drug Act's "overriding purpose": "protect[ing] the public health." *Nutritional Health Alliance*, 318 F.3d at 98 (quoting *Nova Scotia Food Prods. Corp.*, 568 F.2d at 246); *see also* 21 U.S.C. § 393(b)(1)-(b)(2)(B) (setting forth FDA's mission to "promote the public health by promptly and efficiently reviewing clinical research and taking appropriate action on the marketing of regulated products in a timely manner" and to "protect the public health by ensuring that . . . human and veterinary drugs are safe and effective").

By failing to rule on the substantive question raised by the petitions and then prohibit drug uses that are unsafe or not shown to be safe, FDA has been "blind to the nature of [its] mandate." *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 7 (D.C. Cir. 1987) (holding that an agency

action reflecting a compromise showing solicitude for the interests of horse owners, in the face of a statute meant only to protect horses, demonstrated that the agency was "blind to the nature of [the agency's] mandate from Congress"). The petition denials betray an undue focus on "working with . . . stakeholders in developing a strategy to address antimicrobial resistance concerns," Denial of 1999 Petition 4; Denial of 2005 Petition 4, at the expense of the agency's mandate to protect public health by removing unsafe and potentially unsafe drugs from the market. *Cf. W. Harlem Envtl. Action v. EPA*, 380 F. Supp. 2d 289, 296 (S.D.N.Y. 2005) ("EPA is not in the business of reaching consensus with the 'stakeholders' it regulates."). Because the petition denials flout the purpose and legislative history of the Food and Drug Act, they are "not in accordance with law" and must be vacated pursuant to the APA, 5 U.S.C. § 706(2)(A).

III. FDA's Reasons for Denying the Petitions Are Arbitrary

FDA has failed to draw a rational connection between its professed safety concerns regarding livestock antibiotic use and its decision not to regulate. Moreover, in denying the petitions, FDA presented no factual evidence that the voluntary approach the agency is pursuing as an extrastatutory alternative to regulation will achieve the public health protection mandated by the Food and Drug Act. Indeed, comments by industry representatives indicate their antipathy to FDA's conclusion that nontherapeutic antibiotic use in livestock jeopardizes human health. This arbitrary treatment of the citizen petitions presents an independent ground for invalidating the agency's actions. *See* 5 U.S.C. § 706(2)(A).

A. FDA Pronouncements Convey Agreement with the Premise of the Petitions

This is an egregious case of agency dereliction not only because public health is at stake, but because FDA has effectively conceded that science supports the relief the petitioners seek. A consistent stream of FDA pronouncements indicates the agency's agreement with the petitions' central premise that nontherapeutic antibiotic use in livestock endangers human health. *See, e.g.*,

Gov't Resp. to Pls.' Statement of Facts ¶¶ 4 (detailing the dangers of antibiotic-resistant infections), 6-8 (characterizing antibiotic resistance as a "serious public health threat"), 23 (admitting that antibiotic use in livestock leads to the development of antibiotic-resistant bacteria that can be and have been transferred to humans), 32-33 (concluding that using medically important antibiotics for livestock production purposes "is not in the interest of protecting and promoting the public health"), Jan. 9, 2012 (Dkt. 45). In the petition denials themselves, FDA says it shares the petitioners' concerns about the pernicious effects of using antibiotics for livestock production purposes. *See* Denial of 1999 Petition 1; Denial of 2005 Petition 1. The substance of the agency's stated views *supports* the petitions, but the agency denied the petitions anyway.

FDA "considers an antimicrobial new animal drug to be 'safe' if the agency concludes that there is 'reasonable certainty of no harm to human health' from the proposed use of the drug in food-producing animals." Draft Guidance No. 209, at 13. Given the current state of the science, FDA has not explained how it could draw such a conclusion regarding the nontherapeutic use of medically important antibiotics in livestock. For example, as recently as 2010, the Centers for Disease Control and Prevention (CDC), FDA's sister division within HHS, confirmed that there is "strong scientific evidence of a link between antibiotic use in food animals and antibiotic resistance in humans," resulting in "adverse human health consequences." Letter from Thomas R. Frieden, Director, CDC, to the Honorable Frank Pallone, Jr., Chairman, Subcommittee on Health, House Committee on Energy and Commerce (July 13, 2010), Sorenson Decl. Ex. W (Dkt. 33-23); Gov't Resp. to Pls.' Statement of Facts ¶ 38. CDC's statement reinforces findings by WHO, the Institute of Medicine, GAO, and HHS, as well as FDA's own finding in Draft Guidance No. 209: "the overall weight of evidence available to date [2010]

supports the conclusion that using medically important antimicrobial drugs for production purposes is not in the interest of protecting and promoting the public health." Draft Guidance No. 209, at 13; Gov't Resp. to Pls.' Statement of Facts ¶¶ 35-37, 39. If such drug uses are "not in the interest of protecting and promoting the public health," then they are "not shown to be safe." *See* 21 U.S.C. § 360b(e)(1)(B).

By FDA's own admission, then, the Food and Drug Act requires the action the petitions seek: rescission of approvals for nontherapeutic uses of medically important antibiotics in livestock. The petition denials are therefore arbitrary. *See Ass'n of Irritated Residents v. EPA*, Nos. 09-71383, 09-71404, 2012 WL 251912, at *6 (9th Cir. Jan. 27, 2012) (holding that, where EPA's obligation to take action is triggered by a finding that a state air pollution plan is substantially inadequate, ignoring "strong evidence" "indicating an existing [plan] might be substantially inadequate and choos[ing] to do nothing" is arbitrary and capricious). FDA must explain how its decision not to regulate can be squared with its own safety findings. *See Am. Lung Ass'n v. EPA*, 134 F.3d 388, 388, 391-93 (D.C. Cir. 1998) (holding that EPA had not adequately explained its decision not to strengthen air quality standards for sulfur dioxide (SO_2), in light of agency findings suggesting that as many as 41,500 asthmatics experience "substantial physical effects . . . from exposure to short-term, high-level SO_2 bursts" each year). The petition denials offer no such explanation. Because FDA has failed to articulate a "rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43 (internal quotation marks omitted), the petition denials must be set aside.

B. FDA Presents No Evidence Supporting the Efficacy of Voluntary Measures

It is axiomatic that administrative agencies must support their decisions with credible reasons. *See State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action . . . ."). In denying the petitions, FDA explained

that it is "currently pursuing other alternatives to address the issue of antimicrobial resistance related to the production use of antimicrobials in animal agriculture" because withdrawing approvals as outlined in the Food and Drug Act "would take many years and would impose significant resource demands on the Agency." Denial of 1999 Petition 3; Denial of 2005 Petition 2-3. FDA's alternative approach is to suggest voluntary actions by industry to reduce the use of antibiotics, pursuant to Draft Guidance No. 209. *Id.*

Assuming for the purpose of this argument the legal legitimacy of the agency's approach, FDA must provide evidence supporting its professed belief that voluntary measures will result in prompt removal from the market of drug uses that are unsafe or not shown to be safe for human health. The denial letters provide no such evidence. Instead, FDA offers a veritable primer in equivocation: "Based on feedback this Agency has received following the issuance of draft [Guidance] #209, FDA believes that the animal pharmaceutical industry is generally responsive to the prospect of working cooperatively with the Agency to implement the principles recommended in" the Draft Guidance. Denial of 1999 Petition 4; Denial of 2005 Petition 3. FDA does not specify the feedback that feeds its *belief* that industry is *generally* responsive to the *prospect* of cooperation.

FDA goes on to write that it "intends to work with sponsors who approach FDA and are interested in working cooperatively with the Agency to phase out production uses of medically important" antibiotics. Denial of 1999 Petition 4; Denial of 2005 Petition 3. The denial letters include no evidence that *any* drug sponsor has so approached FDA. Indeed, industry comments on Draft Guidance No. 209 tended to question whether the use of antibiotics to promote animal production poses any threat at all to human health. For instance, the Animal Health Institute, the national trade association representing manufacturers of animal drugs, complained that "the

proposed guidance does not claim existing uses are unsafe, but rather not judicious. This suggests current science cannot implicate existing indications for growth promotion as unsafe uses of antibiotics, but certain opinion leaders believe the use is inappropriate." Comments of Animal Health Inst., Document No. FDA-2010-D-0094-0403, at 1-2 (Aug. 27, 2010), Bernard Decl. Ex. C. The association then cited a "listing of key publications that do not support the contention that animal use of antibiotics necessarily represents a significant risk to human health." *Id.* at 2. Alpharma, an animal drug manufacturer, "maintain[ed] [that] approved uses of our products—which help to safely and efficiently provide high quality, affordable meat, milk and eggs for a growing world population—are in fact in the interest of protecting and promoting public health; i.e., these are judicious uses." Comments of Alpharma, LLC, Document No. FDA-2010-D-0094-0392, at 1-2 (Aug. 25, 2010), Bernard Decl. Ex. D. Similarly, the American Farm Bureau Federation opined that "antibiotic use in animals is not a major risk to human health." Comments of Am. Farm Bureau Fed'n, Document No. FDA-2010-D-0094-0386, at 3 (Aug. 26, 2010), Bernard Decl. Ex. E.

Given the comments cited above; the pharmaceutical industry's economic interest in maximizing the use of the antibiotics it markets; livestock producers' economic interest in promoting weight gain and feed efficiency; and FDA's passive, work-with-sponsors-who-approach-us stance, there is no reason in logic or fact to credit the agency's professed (and counterintuitive) belief in the efficacy of the purely voluntary, unenforceable measures it has offered. The petition denials themselves contain no such supporting evidence. That renders them arbitrary. It is FDA's responsibility to explain the "factual basis for its decision." *Detsel by Detsel v. Sullivan*, 895 F.2d 58, 63 (2d Cir. 1990) (quoting *Bowen v. Am. Hosp. Ass'n*, 476 U.S.

610, 626-27 (1986) (plurality opinion)). Courts "can hardly accept an agency's reliance on 'evidence' that is itself mere speculation." *Id.* at 64.

IV. Plaintiffs Have Standing to Pursue this Claim

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). For the following reasons, and the reasons set forth in the memorandum supporting their initial motion for summary judgment, plaintiffs satisfy this three-part test. *See* Mem. of Law in Supp. of Pls.' Mot. for Summ. J. 19-22, Oct. 6, 2011 (Dkt. 20).[2]

This suit is germane to plaintiffs' institutional missions. *See* Decl. of Michael F. Jacobson (CSPI) ¶¶ 2-4, June 29, 2011 (Dkt. 25); Decl. of Linda Lopez (NRDC) ¶¶ 5-7, July 5, 2011 (Dkt. 28); Decl. of Jennifer Norris (UCS) ¶ 6, Sept. 28, 2011 (Dkt. 31); Decl. of Robert Weissman (Public Citizen) ¶ 5, Sept. 28, 2011 (Dkt. 34). Because plaintiffs seek only declaratory 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.

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 denial of the petitions and is likely to be redressed by a favorable judicial decision.

---

[2] As the other plaintiffs have standing, FACT, which is not a membership organization, need not show standing. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Nonetheless, FDA's regulations provide that an "interested person" that "submits a petition" has "standing to obtain judicial review" of the agency's final decision on the petition. 21 C.F.R. §§ 10.3, 10.45(d)(1)(ii). FACT signed both petitions.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). When a litigant "is vested with a procedural right"—here, the right to petition FDA pursuant to 21 C.F.R. § 10.25—the redressability prong of the standing inquiry is met "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518.

Plaintiffs' members 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 are given routine doses of medically important antibiotics. *See Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc); Decl. of Jasanna Britton (Britton Decl.) ¶¶ 6-7, Sept. 30, 2011 (Dkt. 22); Decl. of Amanda J. Fleming (Fleming Decl.) ¶¶ 7-8, Sept. 28, 2011 (Dkt. 23); Decl. of Anne Kapuscinski (Kapuscinski Decl.) ¶¶ 8-9, Oct. 3, 2011 (Dkt. 27); Decl. of Ilana Slaff-Galatan ¶¶ 4-5, 8, Sept. 28, 2011 (Dkt. 32); *see also* Pls.' Statement of Material Facts in Supp. of Mot. for Summ. J. (First Statement of Facts) ¶¶ 26-28, Oct. 6, 2011 (Dkt. 21) (citing 2009 data on percentages of retail meat contaminated with antibiotic-resistant bacteria). 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, Oct. 3, 2011 (Dkt. 29); Decl. of Rachel Mlinarchik ¶¶ 3-6, Sept. 28, 2011 (Dkt. 30). 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 181-83; *see also Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 133-34 (2d Cir. 2011).

Plaintiffs' members' injuries are directly traceable to FDA's denial of the petitions. Until FDA withdraws approvals for nontherapeutic uses of medically important antibiotics in livestock, these drug uses will persist, generating bacteria that are resistant to life-saving drugs. *See* First Statement of Facts ¶ 25. A favorable judicial decision would redress plaintiffs' injuries because it would require FDA to reconsider the petitions. *See Massachusetts*, 549 U.S. at 517-18. Were FDA to grant the petitions and withdraw approvals for antibiotic uses that are unsafe or not shown to be safe, the prevalence of bacteria in livestock with resistance to these drugs would stop increasing, and would likely decrease. *See* First Statement of Facts ¶¶ 42-43. As a result, plaintiffs' members would face a reduced risk of exposure to drug-resistant bacteria from consuming or handling meat products. They would have less need to alter their behavior to avoid these risks. *See* Britton Decl. ¶ 8; Fleming Decl. ¶ 9; Kapuscinski Decl. ¶¶ 5, 9; Melum Decl. ¶ 7.

CONCLUSION

For the reasons detailed above, plaintiffs urge the Court to invalidate the petition denials and remand the matter to FDA with instructions promptly to address the petitions on their merits.

Dated: February 21, 2012

Respectfully submitted,

s/ Mitchell S. Bernard
Mitchell S. Bernard (MB 5823)
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, New York 10011
(212) 727-2700
(212) 727-1773 (fax)
mbernard@nrdc.org

Avinash Kar, admitted *pro hac vice*
Jennifer A. Sorenson, admitted *pro hac vice*
Natural Resources Defense Council, Inc.
111 Sutter Street, 20th Floor
San Francisco, California 94104
(415) 875-6100
(415) 875-6161 (fax)
akar@nrdc.org; jsorenson@nrdc.org

Counsel for Plaintiffs

Of Counsel for Plaintiff Center for Science in the Public Interest:

Stephen Gardner (SG 3964)
Center for Science in the Public Interest
5646 Milton Street, Suite 211
Dallas, Texas 75206
(214) 827-2774
(214) 827-2787 (fax)
sgardner@cspinet.org