UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ANIMAL WELFARE INSTITUTE and
FARM SANCTUARY,

Plaintiffs,

vs.

TOM VILSACK[1], *in his official capacity as Secretary of Agriculture;* UNITED STATES DEPARTMENT OF AGRICULTURE; FOOD SAFETY AND INSPECTION SERVICE; and PAUL KIECKER, in his official capacity as Food Safety and Inspection Service Administrator,

Defendants.

DECISION AND ORDER

20-CV-6595 (CJS)

Plaintiffs Animal Welfare Institute ("AWI") and Farm Sanctuary filed this action pursuant to 5 U.S.C. § 706(2)(A), the Administrative Procedure Act ("APA"), alleging that Defendants' denial of Plaintiffs' rule-making petitions regarding the treatment of chickens and other birds prior to slaughter by poultry producers was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Compl., Aug. 13, 2020, ECF No. 1. Defendants have filed a motion to dismiss the complaint, arguing that Plaintiffs lack standing to bring the action, and that the Court lacks subject matter jurisdiction to hear it. Mot. to Dismiss, Nov. 23, 2020, ECF No. 10. For the reasons stated below, Defendants' motion to dismiss [ECF No. 10] is denied, and Defendants must file and serve an answer to Plaintiffs' complaint within thirty (30) days of the date of this order.

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Tom Vilsack is substituted for Sonny Perdue as the Secretary of Agriculture. The Clerk of Court is directed to update the docket.

BACKGROUND

Plaintiff AWI is a non-profit membership organization whose mission is to reduce animal suffering caused by humans. Compl. at ¶ 11. Of particular relevance to the present case, AWI seeks to reduce the suffering of farm animals by "identifying and promoting policies that improve the welfare of animals on farms, during transport, and at slaughter," and it seeks to reduce the risk of poultry "adulteration caused by the inhumane handling of poultry at the slaughterhouse . . . ." Compl. at ¶ 11. Plaintiff Farm Sanctuary is a nonprofit membership organization headquartered in Watkins Glen, New York, where it offers educational tours and operates a 275-acre shelter that rehabilitates and provides life-long care to more than 800 rescued farm animals, including more than 350 birds. Compl. at ¶ 23. Farm Sanctuary also operates a shelter in Southern California, which is home to approximately 150 rescued farm animals, including more than 60 birds. Compl. at ¶ 23.

Defendant United States Department of Agriculture ("USDA") is an arm of the executive branch charged by Congress to, among other things, prevent "adulterated"[2]

[2] Under the Poultry Products Inspection Act ("PPIA"), the meaning of the term "adulterated" is quite complex. 21 U.S.C. § 453(g) provides that:

> (g) The term "adulterated" shall apply to any poultry product under one or more of the following circumstances:
>
> (1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;
>
> (2)(A) if it bears or contains (by reason of administration of any substance to the live poultry or otherwise) any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive, which may, in the judgment of the Secretary, make such article unfit for human food;

poultry products from entering the food supply. Compl. at ¶ 1–2. Through its agency, Defendant Food Safety and Inspection Service ("FSIS"), the USDA promulgates and enforces rules and regulations necessary to carry out this charge. Compl. at ¶ 3.

In December 2013, Plaintiffs submitted a petition for rule-making ("2013 Petition") to FSIS, identifying several reasons to prevent the inhumane handling of poultry – including its link to adulterated poultry products – at slaughterhouses, and proposing regulations FSIS could issue to prohibit such conduct. Compl. at ¶ 76–77. In May 2016,

---

> (B) if it is, in whole or in part, a raw agricultural commodity and such commodity bears or contains a pesticide chemical which is unsafe within the meaning of section 346a of this title;
>
> (C) if it bears or contains any food additive which is unsafe within the meaning of section 348 of this title;
>
> (D) if it bears or contains any color additive which is unsafe within the meaning of section 379e of this title: Provided, That an article which is not otherwise deemed adulterated under clause (B), (C), or (D) shall nevertheless be deemed adulterated if use of the pesticide chemical, food additive, or color additive in or on such article is prohibited by regulations of the Secretary in official establishments;
>
> (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;
>
> (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;
>
> (5) if it is, in whole or in part, the product of any poultry which has died otherwise than by slaughter;
>
> (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;
>
> (7) if it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to section 348 of this title;
>
> (8) if any valuable constituent has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor; or if damage or inferiority has been concealed in any manner; or if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

AWI submitted more information to FSIS, and sought stronger regulations to prevent the inhumane treatment of poultry at slaughterhouses, and increased authority for FSIS inspection personnel. Compl. at ¶ 79. Over three years later, in November 2019, FSIS construed AWI's 2016 submission as a second petition ("2016 Petition"), and denied both the 2013 Petition and the 2016 Petition (the "rule-making petitions"). Compl. at ¶ 80.

Plaintiffs filed the instant complaint in August 2020, challenging Defendants' denial of Plaintiffs' rule-making petitions as violations of both the Administrative Procedures Act ("APA") and the Poultry Products Inspection Act ("PPIA"). Defendants then filed the motion to dismiss that is presently before the Court, arguing that this case should be dismissed because Plaintiffs do not have standing to bring their claims, and because the Court does not have subject matter jurisdiction to review an agency's action if that action has been committed by law to agency discretion. Def. Mem. of Law, Nov. 23, 2020, ECF No. 10-1.

PLAINTIFFS' STANDING

Defendants maintain that Plaintiffs' pleadings "lack the required injury, traceability, and redressability elements for both organizational and associational standing." Def. Mem. of Law at 10. Plaintiffs disagree.

Legal Standard

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 37 (1976) (citation omitted). The Supreme Court recently summarized the concept of standing, which is an

essential part of this limitation of jurisdiction:

> To satisfy the Constitution's restriction of [the jurisdiction of federal courts] to "Cases" and "Controversies," Art. III, § 2, a plaintiff must demonstrate constitutional standing. To do so, the plaintiff must show an "injury in fact" that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)). This Court has also referred to a plaintiff's need to satisfy "prudential" or "statutory" standing requirements. *See* [*Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27, and n. 4 (2014)]. In *Lexmark*, we said that the label "'prudential standing'" was misleading, for the requirement at issue is in reality tied to a particular statute. *Ibid*. The question is whether the statute grants the plaintiff the cause of action that he asserts.

Bank of Am. Corp. v. City of Miami, Fla., 137 S. Ct. 1296, 1302–03 (2017).

Organizations such as Plaintiffs may establish standing in one of two ways. First, a plaintiff has "organizational standing" if it can show that "it was directly injured as an organization." *Connecticut Parents Union v. Russell-Tucker*, 8 F.4th 167, 172 (2d Cir. 2021) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1992)). Alternatively, a plaintiff has "associational standing" to bring suit in its own name on behalf of its members if: "(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." *Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006) (quoting *Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 343 (1977)). Further, it is well-settled in the Second Circuit that where multiple parties seek the same relief, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Centro de la Comunidad Hispana de Locust*

Valley v. Town of Oyster Bay, 868 F.3d 104, 109 (2d Cir. 2017) (collecting cases).

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (citing, *inter alia*, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883–889 (1990)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (quoting *National Wildlife Federation*, 497 U.S. at 889). *See also Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003). "Because standing is challenged on the basis of the pleadings, we accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Bldg. & Const. Trades Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006) (citations and internal question marks omitted).

Application to Plaintiffs' Claims

Defendants maintain that Plaintiffs' pleadings "lack the required injury, traceability, and redressability elements for both organizational and associational standing." Def. Mem. of Law at 10. In this respect, the Court agrees with Judge Wolford's analysis of standing issues that arose in a separate action brought by Plaintiff Farm Sanctuary to address similar concerns in the pork industry. In *Sanctuary v. United States Dep't of Agric.*, No. 6:19-CV-06910, 2021 WL 2644068 (W.D.N.Y. June 28, 2021), Judge Wolford

explained:

> In *Havens Realty Corp. v. Coleman*, individuals and an organization brought an action against the owner of an apartment complex, alleging that its racial steering practices violated the Fair Housing Act. 455 U.S. 363, 366-67 (1982). The Supreme Court considered whether petitioner Housing Opportunities Made Equal (HOME) had organizational standing. *Id*. at 378-79. In looking to the allegations contained in the complaint, the Supreme Court held that it did, citing specifically to the allegation that "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id*. at 379. Focusing again on the allegations in the complaint, the Supreme Court explained:
>
> > If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests[.]
>
> *Id*. at 379. * * *
>
> Since that time, the Second Circuit has taken a broad view of what constitutes organizational standing, confirming that "[i]njury exists when an organization is forced to expend its limited resources, resulting in an 'opportunity cost' such that there is a 'perceptible impairment' of its activities." *N.Y.S. Citizens' Coalition for Children v. Velez*, No. 10-CV-3485, 2016 WL 11263164, at *3-5 (E.D.N.Y. Nov. 7, 2016) (citation omitted) (finding that coalition had standing where it alleged that it was forced to expend its limited staff time answering phone calls), *adopted*, 2017 WL 4402461 (E.D.N.Y. Sept. 29, 2017). In *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011), the Second Circuit recognized that some circuits have taken a "narrower view" of *Havens Realty*, but emphasized that even "scant" evidence of a diversion of resources, so long as it is not "abstract," is sufficient to confer standing. *Id*. at 156-57. * * * *
>
> The Court has reviewed the amended complaint in light of this Second Circuit precedent and finds that Plaintiffs have plausibly alleged that they have been forced to divert resources from mission-critical activities to

> oppose the Slaughter Rule. For example, Plaintiffs allege in the amended complaint that Farm Sanctuary is a 275-acre shelter that provides a home to more than 800 rescued farm animals and offers educational tours to the public, and that they perform their mission through "public education, animal rescue efforts, and advocacy." (Dkt. 22 at ¶¶ 11, 12). Farm Sanctuary receives voluminous requests for animal rescue annually and expends "significant resources caring for farm animals at its own sanctuaries, as well as coordinating placement of and transporting animals to other sanctuaries and members of Farm Sanctuary's Farm Animal Adoption Network." (Id. at ¶ 13). Plaintiffs further allege that the Slaughter Rule, "[b]y authorizing high-speed pig slaughter and reducing government oversight of pig handling at slaughterhouses, and increasing the number of pigs subjected to inhumane handling," conflicts with, impairs, and frustrates its mission. (*Id*. at ¶ 15). Plaintiffs offer specific examples of how Farm Sanctuary has been forced to redirect its limited time and resources away from its animal protection and rescue work to counteract the Slaughter Rule, including that, "[a]mong other things, the Slaughter Rule forces Farm Sanctuary to redirect resources away from its core rescue, education, and advocacy work toward requesting information about incidents of inhumane handling and food safety risks at high-speed slaughterhouses; fighting to obtain that information; reviewing, analyzing, and digesting that information; and publicizing it to educate its members and the public in order to counteract inhumane handling and food safety violations." (*Id*. at ¶ 16). Further, Plaintiffs allege that "[b]y significantly increasing the number of pigs raised for slaughter, the Slaughter Rule ... forces Farm Sanctuary to divert additional resources to find placement, and provide transport and care for, increased numbers of pigs in need." (Dkt. 22 at ¶ 173; *see also id*. at ¶¶ 23-24, 27, 35, 38, 44-46, 52). In other words, Plaintiffs have plausibly alleged that Defendants' unlawful practices have impaired and frustrated their ability to engage in mission-related activities and caused a consequent drain on their limited resources, which "constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp*., 455 U.S. at 379. These allegations are sufficient to survive a motion to dismiss.

Sanctuary, 2021 WL 2644068 at *8–9.

Similarly in this case, Plaintiff Farm Sanctuary alleges that it "works to protect farm animals from cruelty . . . [and] promotes its mission by providing rescue, rehabilitation, and care for abused and neglected farm animals, offering services involving adoptions, animal placement assistance . . . and conducting a variety of programs disseminating

literature and information to educate the public about farm animal issues." Compl. at ¶ 24. Farm Sanctuary also plausibly alleges that as a result of Defendants' denial of Plaintiffs' rulemaking petitions, Farm Sanctuary "is forced to redirect its limited time and resources away from other work . . . ." Compl. at ¶ 27. This diversion of limited time and resources is an allegation of concrete harm, as it "is causing and will continue to cause a drain on Farm Sanctuary's resources by requiring it to spend additional resources . . . that could otherwise be spent on Farm Sanctuary's other work on behalf of farm animals, including the provision of sanctuary to abused, neglected, and abandoned farm animals." Compl. at ¶ 28. Farm Sanctuary alleges that these injuries will be redressed if Plaintiff's prevail in this action. *Id.*

Defendants maintain that the present case is distinguishable from Judge Wolford's *Sanctuary* decision because the instant complaint fails "to plausibly allege that denying [the] rulemaking petition has impaired any mission-critical activity . . . . [and] presents conclusory assertions of harm." Def. Reply, 2, Jul. 8, 2021, ECF No. 16. While the Court acknowledges that the Plaintiffs before Judge Wolford in *Sanctuary* provided a far more extensive factual basis for their allegations, the Court nevertheless finds that, construing all ambiguities and drawing all inferences in Plaintiffs' favor, Farm Sanctuary's factual allegations in the present action are sufficient to survive a motion to dismiss. The term "conclusory" means "[e]xpressing a factual inference without stating the underlying facts on which the inference is based." CONCLUSORY, Black's Law Dictionary (11th ed. 2019). With respect to Farm Sanctuary, the allegations in the instant complaint are not conclusory because the underlying facts have been stated. First, in addition to its

advocacy work, Farm Sanctuary operates a sanctuary for mis-treated animals and provides educational tours. Compl. at ¶ 23–25. Second, Farm Sanctuary alleges that as a result of Defendants' denial of their rule-making petitions, they have had to divert resources from their "provision of sanctuary to abused, neglected, and abandoned farm animals" to conduct additional research and advocacy to achieve more humane treatment of poultry at slaughterhouses. Compl. at ¶ 28. Such allegations amount to more than bald allegations or "formulaic recitation[s] of the elements" of a claim, and are entitled to the presumption of truth at this stage of the proceedings. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009) (discussing "conclusory allegations" at length).

In sum, taking Plaintiff Farm Sanctuary's allegations as true, the Court finds that the amended complaint contains sufficient allegations of direct injury to survive the motion to dismiss on the issue of standing. Moreover, because only one plaintiff in a multi-plaintiff suit is required to establish standing at this stage, the Court need not consider whether Plaintiff Animal Welfare Institute is able to establish standing independent of Farm Sanctuary. *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 109.

COMMITTED TO AGENCY DISCRETION

Defendants' second principal argument supporting their motion to dismiss is that the Court lacks jurisdiction to hear this action because regulations that protect against poultry adulteration are committed to Defendants' discretion by law, and that the PPIA provides no "meaningful standard" the Court could apply to review the agency's decision in this matter. Def. Mem. of Law at 23–25. Plaintiff counter-argues that Defendant's position in this regard is without merit because there is a clear statutory framework upon

which the Court could conduct judicial review, namely, the PPIA and its implementing regulations.

Legal Standard

Judicial review of actions by federal administrative agencies is governed by the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 702 (stating that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof"). The APA embodies a "basic presumption of judicial review" for agency action. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). However, the APA also provides that judicial review may be precluded both by statute, and where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)–(2).

Where "agency action is committed to agency discretion by law," the Supreme Court has stated that:

> § 701(a)(2) makes it clear that "review is not to be had" in those rare circumstances where the relevant statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." [*Heckler v. Chaney*, 470 U.S. 821, 830 (1985).] *See also Webster v. Doe*, 486 U.S. 592, 599–600 (1988); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410. "In such a case, the statute ('law') can be taken to have 'committed' the decision[-]making to the agency's judgment absolutely." *Heckler*, *supra*, at 830.

Lincoln v. Vigil, 508 U.S. 182, 191 (1993). Therefore, "§ 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based, and requires dismissal when there is no law to apply." *Lunney v. United States*, 319 F.3d 550, 558 (2d Cir. 2003) (quoting *Webster v. Doe*, 486 U.S. 592, 600 (1988); *Overton Park*, 401 U.S. at 410) (internal quotation marks omitted). Further, "where the language of the statute is not

in itself sufficient evidence of whether Congress intended to grant unreviewable discretion, the court will look to other indications of congressional intent[,] [including] the nature of the agency action involved . . . ." *N.Y. Racing Ass'n, Inc. v. N.L.R.B.*, 708 F.2d 46, 51 (2d Cir. 1983).

In the present case, Plaintiffs challenge FSIS' exercise of the functions of the Secretary of Agriculture under the PPIA, and the agency's denial of Plaintiffs' rule-making petitions. *See* 9 C.F.R. § 300.2 (delegating the authority and responsibilities of the Secretary under the PPIA to FSIS). The Congressional policy animating the PPIA is expressed in 21 U.S.C. § 452: "to provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of such articles . . . to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded." Congress found that "regulation by the Secretary of Agriculture and cooperation by the States . . . as contemplated by [the PPIA] are appropriate to . . . effectively regulate such commerce, and to protect the health and welfare of consumers." 21 U.S.C. § 451.

To this end, 21 U.S.C. § 463 empowers the Secretary to promulgate rules and regulations to implement the PPIA:

> **(a) Storage and handling of poultry products; violation of regulations**
>
> The Secretary may by regulations prescribe conditions under which poultry products capable of use as human food, shall be stored or otherwise handled by any person engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, or importing, such articles, whenever the Secretary deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer. Violation of any such regulation is prohibited.

> **(b) Other necessary rules and regulations**
>
> The Secretary shall promulgate such other rules and regulations as are necessary to carry out the provisions of this chapter.

21 U.S.C. § 463(a)–(b). Further, 21 U.S.C. § 455 vests the Secretary with broad powers for inspection of poultry at the producers' respective facilities:

> **(a) Ante mortem inspection**
>
> For the purpose of preventing the entry into or flow or movement in commerce of, or the burdening of commerce by, any poultry product which is capable of use as human food and is adulterated, the Secretary shall, where and to the extent considered by him necessary, cause to be made by inspectors ante mortem inspection of poultry in each official establishment processing poultry or poultry products for commerce or otherwise subject to inspection under this chapter.
>
> **(b) Post mortem inspection; quarantine, segregation, and reinspection**
>
> The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed, and at any time such quarantine, segregation, and reinspection as he deems necessary of poultry and poultry products capable of use as human food in each official establishment processing such poultry or poultry products for commerce or otherwise subject to inspection under this chapter.

21 U.S.C. § 455 (a)–(b).

The Court is not persuaded by Plaintiffs' statutory argument relying on the language of 21 U.S.C. § 463(b) – that "[t]he Secretary *shall* promulgate such other rules and regulations as *are* necessary to carry out the provisions of" the PPIA – to suggest that the Secretary had limited discretion by which to prevent adulterated poultry products from entering the stream of commerce. Pl. Mem. of Law, 24, Jan. 22, 2021, ECF No. 13. (Emphasis to the statutory language added.) In fact, the Court finds that the statutory scheme of the PPIA affords the Secretary of Agriculture a broad degree of discretion in

determining what regulations are and are not appropriate in that regard. For instance, in language similar to that which both the Supreme Court and the Second Circuit have found to preclude judicial review, the PPIA provides that the Secretary may regulate the storage and handling of poultry in the stream of commerce "whenever the Secretary deems such action necessary to assure that such articles will not be adulterated." 21 U.S.C. § 463(a). *See Webster*, 486 U.S. at 600 (finding the statutory language allowing employee termination whenever the agency director "shall deem such termination necessary or advisable in the interests of the United States" to "foreclose the application of any meaningful standard of review"); *Greater New York Hosp. Ass'n v. Mathews*, 536 F.2d 494, 497 (2d Cir. 1976) (concluding that statutory language stating the "'provider of services shall be paid, at such time or times as the Secretary believes appropriate' . . . commit[ed] the timing of Medicare payment dates to agency discretion by law within the meaning of 5 U.S.C. § 701(a)(2)."). The PPIA gives the Secretary similarly broad discretion over when and how ante mortem and post mortem poultry inspections are to occur. 21 U.S.C. § 455(a)–(b).

Nevertheless, a review of Supreme Court precedent indicates that a denial of a rule-making petition is not in that "narrow class" of administrative decisions that courts traditionally have regarded as "committed to agency discretion." *Lunney v. United States*, 319 F.3d 550, 558 (2d Cir. 2003) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992)). As the Supreme Court has explained:

> As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–845 (1984). That discretion is at

> its height when the agency decides not to bring an enforcement action. Therefore, in *Heckler v. Chaney*, 470 U.S. 821 (1985), we held that an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review. Some debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking.
>
> There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. *See American Horse Protection Assn., Inc. v. Lyng*, 812 F.2d 1, 3–4 (C.A.D.C.1987). In contrast to nonenforcement decisions, agency refusals to initiate rulemaking "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." *Id*., at 4; *see also* 5 U.S.C. § 555(e). They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is "extremely limited" and "highly deferential." *National Customs Brokers & Forwarders Assn. of America, Inc. v. United States*, 883 F.2d 93, 96 (C.A.D.C.1989).

Massachusetts v. E.P.A., 549 U.S. 497, 527–28 (2007).

Consistent with the Supreme Court's reasoning, the Court finds in the present case that FSIS' denial of Plaintiffs' rule-making petitions was not an agency decision that has been precluded from judicial review as an action "committed to agency discretion" under the APA. Rather, FSIS' denial is subject to the Court's review to determine whether it must be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See also Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv*., 139 S. Ct. 361, 370 (2018).

CONCLUSION

According, it is hereby,

ORDERED that Defendants' motion to dismiss for lack of jurisdiction [ECF No. 10] is denied, and it is further

ORDERED that Defendants shall file an answer to Plaintiffs' complaint within thirty (30) days from the date of this order.

SO ORDERED.

Dated: October 13, 2021
Rochester, New York

ENTER:

Charles J. Siragusa

CHARLES J. SIRAGUSA
United States District Judge