UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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FARM SANCTUARY, ANIMAL EQUITY, ANIMAL LEGAL DEFENSE FUND, CENTER FOR BIOLOGICAL DIVERSITY, MERCY FOR ANIMALS, INC., NORTH CAROLINA FARMED ANIMAL SAVE, ANIMAL OUTLOOK,

Plaintiffs, 6:19-CV-06910

v.

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

Defendants.

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

Plaintiffs, 6:20-CV-06081

v.

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

Safety and Inspection Service
Administrator,

Defendants.

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## INTRODUCTION

Plaintiffs are nonprofit organizations working to protect animals, people, and environments from industrial animal agriculture, and to ensure that laws intended to regulate industrial animal agriculture are properly implemented. In the above two captioned lawsuits, they challenge certain actions by Defendants related to the slaughtering of pigs. Specifically, on December 18, 2019, Plaintiffs Farm Sanctuary, Animal Equity, Animal Legal Defense Fund, Center for Biological Diversity, Mercy for Animals, Inc., North Carolina Farmed Animal Save, and Animal Outlook filed a complaint against Defendants United States Department of Agriculture ("USDA"), the Food Safety and Inspection Service ("FSIS"), and the FSIS Administrator, challenging the implementation of the Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 11, 2019), promulgated by the FSIS and the USDA (hereinafter, the "Slaughter Rule"), which Plaintiffs allege "will allow nearly all of the pigs slaughtered in the United States to be slaughtered at unlimited speeds with very little federal oversight, posing serious risks to animal welfare, consumer health and safety, and the environment." (*See Farm Sanctuary v. USDA*, Docket No. 19-CV-06910, Dkt. 22 at ¶ 1 (the "2019 Action")).

Additionally, on February 6, 2020, Plaintiffs Farm Sanctuary, Animal Legal Defense Fund, Animal Outlook, Animal Welfare Institute, Compassion in World Farming, Farm Forward, and Mercy for Animals, Inc., filed a complaint against the USDA, FSIS,

the USDA Secretary, and the FSIS Administrator, challenging Defendants' failure to ban the slaughter of all non-ambulatory, or "downed" pigs. (*See Farm Sanctuary v. USDA*, Docket No. 20-CV-06081, Docket No. 13 at ¶ 1 (the "2020 Action")).

Defendants have filed motions to dismiss Plaintiffs' amended complaints in both actions. (*See* 2019 Action, Dkt. 25; 2020 Action, Dkt. 14). Defendants raise virtually the same arguments in both cases: that Plaintiffs' amended complaints must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), because Plaintiffs lack standing to sue. (*Id*.). For the following reasons, the motions are denied.

## BACKGROUND

The following facts are taken from Plaintiffs' amended complaints. (2019 Action, Dkt. 22; 2020 Action, Dkt. 13). As is required at this stage of the proceedings, the Court treats Plaintiff's well-pleaded allegations as true.

### I. The 2019 Action

Plaintiffs are seven nonprofit organizations "dedicated to protecting the animals, people, and environments that suffer due to industrial animal agriculture and to ensuring that laws intended to protect against this suffering are faithfully implemented." (Dkt. 22 at ¶ 1). Under the Humane Methods of Slaughter Act ("HMSA"), the USDA has responsibility to ensure humane handling of all animals at slaughterhouses. (*Id*. at ¶ 65). The HMSA is incorporated by reference into the Federal Meat Inspection Act ("FMIA"), which is a "self-contained, comprehensive statutory inspection scheme that prohibits meat from covered species, including pigs, from entering interstate commerce unless both pre-slaughter (ante-mortem) and post-slaughter (post-mortem) inspections are conducted by

federal inspectors." (*Id*. at ¶¶ 66-67). The FMIA requires USDA inspection of animals both before they enter a slaughtering establishment and after slaughter to ensure that no part of any carcass determined to be "adulterated" passes into the human food supply. (*Id*. at ¶ 71).

As relevant to this case, the ante-mortem provision of the FMIA expressly requires that USDA inspectors inspect all animals upon arrival at the slaughterhouse, before they enter the slaughterhouse. (*Id*. at ¶ 79). If an inspector's ante-mortem inspection reveals an animal showing any signs of abnormality or disease, that animal must be set aside into a separate pen for examination by a USDA veterinarian. (*Id*. at ¶ 85). The ante-mortem inspection "has long been recognized by the USDA and experts as critical to protect against outbreaks of foreign animal diseases that pose devastating risks to animals, human health, and the U.S. economy." (*Id*. at ¶ 90). Pigs who pass ante-mortem inspection are sent down a conveyor line for slaughter processes. (*Id*. at ¶ 93). USDA inspectors also ensure the humane handling of animals during their time in the slaughterhouse. (*Id*. at ¶¶ 94, 95). USDA regulations set maximum slaughter line speeds, which are based on the number of animals per hour inspectors are able inspect. (*Id*. at ¶ 99).

Pursuant to the National Environmental Policy Act ("NEPA"), federal agencies, including the USDA, are required to prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment." (*Id*. at ¶ 103). This statement is referred to as an Environmental Impact Statement ("EIS") and it must describe and disclose the environmental impact of the proposed action. (*Id*. at ¶ 104). Under certain circumstances, a federal agency may prepare an Environmental Assessment

("EA") to evaluate whether an EIS is necessary. (*Id*. at ¶ 111). An EIS or EA need not be prepared for a major federal agency action when the action is "categorically excluded" from NEPA review because it does not have a significant effect on the human environment. (*Id*. at ¶ 112).

In 1997, as part of a pilot program called the HACCP-Based Inspection Models Project ("HIMP"), the USDA granted five pig slaughterhouses a "waiver" from regulatory mandates, authorizing them to operate without any maximum line speeds and with fewer agency inspectors. (*Id*. at ¶ 121). Plaintiffs allege that while the stated goals of this pilot program were to increase food safety and plant efficiency, neither humane handling nor environmental impacts were considered. (*Id*. at ¶ 122). Numerous government audits have raised concerns about HIMP, including that the plants involved in the pilot program may have a higher potential for food safety risks. (*Id*. at ¶¶ 123-24). Likewise, a 2015 undercover investigation documented instances of inhumane handling and slaughter as workers attempted to keep animals moving in pace with high-speed lines. (*Id*. at ¶ 125).

On February 1, 2018, the USDA published a proposed rule announcing its plans to "establish a new inspection system" for pig slaughterhouses that would make the HIMP program available to any pig slaughterhouse, and allow them to opt out of line speed limits, reduce the number of federal inspectors, and have slaughterhouse personnel take on inspection responsibilities historically performed by agency officials, including examining and sorting animals upon arrival at the slaughterhouse. (*Id*. at ¶ 131). In proposing the rule, the USDA stated that it had determined that "40 high volume establishments that exclusively slaughter market hogs" and that "account for 92 percent of total swine

slaughter" were "expected to" take advantage of the proposed provisions allowing for high-speed slaughter and reduced agency oversight. (*Id*. at ¶ 133).

The USDA received more than 83,000 comments on the proposed rule. (*Id*. at ¶ 134). Most of the comments were negative, and reflected concerns that the Slaughter Rule would put animals at increased risk of inhuman handling, (*id*. at ¶¶ 134, 138-47), and also detailed the "direct, indirect, and cumulative environmental consequences of the proposed rule" (*id*. at ¶¶ 148-62).

Despite these comments and opposition, on October 1, 2019, the USDA finalized the Slaughter Rule "largely as proposed, with only minor modifications." (*Id*. at ¶ 163). The first "key element" of the Slaughter Rule is "[r]equiring establishment personnel to sort and remove unfit animals before ante-mortem inspection by [USDA] inspectors." (*Id*. at ¶ 164). In other words, establishment employees—rather than specially-appointed USDA inspectors and public health veterinarians—are responsible for identifying and removing pigs that are not fit for slaughter. (*Id*.). The establishment employees performing these responsibilities are not required to undergo any training. (*Id*.). In addition, the Slaughter Rule "revok[es] maximum line speeds and authoriz[es] establishments to determine their own line speeds," while simultaneously reducing the number of federal inspectors on the line from a maximum of seven to a maximum a three. (*Id*. at ¶ 166). The final rule states that the USDA "will implement" high-speed, reduced-inspection pig

slaughter "at all pig slaughterhouses that notify the agency of their intent to take advantage of the Slaughter Rule." (*Id*. at ¶ 172).[1]

Despite these "significant regulatory changes," the USDA did not prepare an EIS or an EA pursuant to NEPA before finalizing them—rather, it found that the FSIS, the USDA agency issuing the regulation, was categorically excluded from having to perform a NEPA review. (*Id*. at ¶ 168). The USDA further explained that it did not anticipate that the changes implemented by the Slaughter Rule would have any individual or cumulative effects on the environment, because "expected sales of pork products to consumers will determine the total number of hogs that an establishment slaughters, not the maximum line speed under which it operates." (*Id*. at ¶ 169).

Plaintiffs contend that, due to Defendants' implementation of the Slaughter Rule, they have been injured. For example, Plaintiff Farm Sanctuary alleges that since it was

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[1] On April 6, 2021, Plaintiffs filed a "Notice of Recent Events," informing the Court that March 31, 2021, in *United Food & Com. Workers Union v. U.S. Dep't of Agric.*, No. 19-cv-2660(JNE/TNL), 2021 WL 1215865 (D. Minn. Mar. 21, 2021), the United States District Court for the District of Minnesota partially granted the plaintiffs' motion for summary judgment, finding that "FSIS's elimination of line speed limits in the NSIS was arbitrary and capricious in violation of the APA" *id*. at *25, but "stay[ed] its order and entry of judgment in this case for 90 days," to "allow the agency to decide how to proceed in light of this opinion and give regulated entities time to prepare for any operational change" *id*. at *29. (*See* Dkt. 44 at 1). Plaintiffs note that this decision leaves intact the remainder of the deregulatory rule, including the delegation of ante-mortem inspection responsibilities—which Plaintiffs also challenge—and does not address Defendants' failure to consider the environmental impacts of the Slaughter Rule. (*Id*. at 2-3). It appears from a review of the docket in that case that an appeal has been filed with the Eighth Circuit Court of Appeals (*see United Food and Com. Workers Union v. U.S. Dep't of Agric.*, Case No. 19-cv-2660 (D. Minn. June 3, 2021), Dkt. 174), and the district court recently denied a motion to stay pending appeal (*id*. at Dkt. 189 (June 16, 2021)). Thus, at this time, the impact of the decision remains unclear.

founded in 1986 it has engaged in the rescue of farm animals. (*Id*. at ¶ 13). Since that time, it has rescued over 15,000 farm animals, and receives more than 1,000 requests for assistance to place animals in need annually. (*Id*.). Farm Sanctuary further alleges that by authorizing high-speed pig slaughter and reducing government oversight, the Slaughter Rule "increase[es] the number of pigs subjected to inhumane handling," and therefore "directly conflicts with, impairs, and frustrates Farm Sanctuary's mission." (*Id*. at ¶ 15). As a result, Farm Sanctuary alleges that it has been "forced to redirect its limited time and resources away from its existing farmed animal protection work to publicize and counteract the Slaughter Rule," including by redirecting 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; *see also id*. at ¶ 17 ("By significantly increasing the number of pigs raised for slaughter, the Slaughter Rule also forces Farm Sanctuary to divert additional resources to find placement, and provide transport and care for, increased numbers of pigs in need.")). The remaining plaintiff organizations also allege that the promulgation of the Slaughter Rule impairs their mission-critical activities and has forced them to divert their limited resources from these activities to combat the rule. (*See, e.g., id*. at ¶¶ 23-24, 27, 43-44, 51-52).

Some of the plaintiff organizations further allege that their members include consumers who eat pork products and are concerned about the increased health risks they

face from consuming products from pigs who have not been adequately inspected. (*Id*. at ¶ 18; *see also id.* at ¶¶ 30, 39). These organizations also have members who live and work in communities adjacent to slaughterhouses that will take advantage of the Slaughter Rule's deregulatory provisions, and these members will suffer harms to their health and aesthetic enjoyment of their communities. (*Id*. at ¶ 19; *see also id.* at ¶¶ 28, 36).

## II. The 2020 Action

Plaintiffs are animal-welfare advocacy groups that believe the USDA should ban the slaughter of all non-ambulatory, or "downed" pigs.[2] (Dkt. 13 at ¶¶ 1, 17, 25, 35, 43, 57, 63, 71).

Under the HMSA, the USDA regulates the slaughter of animals, including pigs, and it mandates that the handling and slaughtering of livestock be carried out only by humane methods. (*Id*. at ¶¶ 82-84). In 2002, Congress amended the HMSA specifically to address concerns about the humane treatment of downed animals, including pigs. (*Id*. at ¶ 89 (the "2002 mandates")). Specifically, the mandate provided that:

> The Secretary of Agriculture shall investigate and submit to Congress a report on—
> (1) the scope of nonambulatory livestock;
> (2) the causes that render livestock nonambulatory;
> (3) the humane treatment of nonambulatory livestock; and
> (4) the extent to which nonambulatory livestock may present handling and disposition problems for stockyards, market agencies, and dealers.

[2] At oral argument, the Court clarified that the current regulations prohibit non-ambulating pigs from being used in the human food supply; however, if a pig is non-ambulatory and then forced to rise, the regulations permit that it be used for human consumption. (*See* Dkt. 27 at 4).

(*Id*. (citing HMSA, 7 U.S.C. § 1907(a)). Based on the findings of the report, the Secretary was required to promulgate regulations to provide for the humane treatment, handling, and disposition of downed livestock. (*Id*. at ¶ 90). The FSIS is responsible for implementing these mandates. (*Id*. at ¶ 91).

In 2007, FSIS promulgated a rule prohibiting the slaughter of downed cattle for food, as these animals had a higher incidence of bovine spongiform encephalopathy (BSE) than ambulatory cattle. (*Id*. at ¶ 102). Due to humane handling concerns, which reflected that producers have an incentive to send weakened animals to slaughter and to force non-ambulatory cattle to rise, the FSIS subsequently expanded this slaughter prohibition to include cattle that are ambulatory when they arrive at a slaughterhouse, but subsequently become non-ambulatory, and also to include veal calves. (*Id*. at ¶¶ 103-08).

Plaintiffs allege that, despite strictly prohibiting the slaughter of non-ambulatory cattle, the FSIS is not consistent in its treatment of downed pigs, which may be slaughtered if they are forced to rise. (*Id*. at ¶ 111). Plaintiffs allege that, since Congress' 2002 mandates, the Secretary of Agriculture has never investigated or submitted a report to Congress on the scope of downed pigs; the causes that render them non-ambulatory; the humane treatment of downed pigs; or the extent to which downed pigs present handling and disposition problems (*id*. at ¶ 114), and therefore, no regulations were ever promulgated (*id*. at ¶ 115). Although the FSIS has stated that it plans to evaluate measures necessary to ensure the humane handling of livestock other than cattle, it has not followed through with these plans. (*Id*. at ¶¶ 116-17).

According to an FSIS official, before the prohibition on slaughtering downed calves was promulgated, a review of HMSA non-compliance records found "eighteen times as many instances of inhumane handling involving nonambulatory pigs as those involving calves," and that "although more pigs are slaughtered than other species, downed pigs are also inhumanely handled at a disproportionately higher rate." (*Id*. at ¶ 118). This is because female breeding pigs are permitted to deteriorate into a weakened condition, making them likely to become downers, and due to production practices of breeding pigs for "rapid growth, high leanness and extreme muscularity" which makes them prone to stress and causes them to become non-ambulatory. (*Id*. at ¶¶ 121-22). Without regulations to prohibit their slaughter, pig producers are incentivized to send weakened pigs to slaughter. (*Id*. at ¶ 119).

Allowing the slaughter of downed pigs also creates an incentive for establishments to inhumanely force these animals to rise, which often occurs by using inhumane methods. (*Id*. at ¶¶ 134-35). This is because "[t]he flesh from a nonambulatory pig who is forced to rise is worth an estimated $38 to $126 more than one who does not rise." (*Id*. at ¶ 135). Inhumane handling of downed pigs has been "repeatedly documented" by the FSIS, and many instances of inhumane handling occur outside the view of inspection personnel. (*Id*. at ¶ 136). A 2013 audit report found that FSIS's enforcement policies do not effectively deter swine slaughter plants from becoming "repeat offenders," and from otherwise engaging in inhumane treatment, and there have been instances of inspectors failing to issue suspensions and taking inconsistent actions when they identify violations. (*Id*. at ¶¶ 138-41). Accordingly, Plaintiffs allege that "[b]ecause the FSIS allows non-ambulatory

pigs to be slaughtered and does not limit how long they can be set aside and held, and because the flesh of pigs who can be forced to rise sells for more money than the flesh of those who remain downed and are condemned, there is an incentive to hold downed pigs for prolonged periods in the hopes that they might rise and pass inspection." (*Id*. at ¶ 144).

Plaintiffs further allege that the USDA has recognized that downed animals are "the bellwethers of contagion in the herd," the underlying reason for an animal's non-ambulatory condition cannot always be determined when those animals are presented for slaughter, and downed pigs are far more likely to harbor disease than ambulatory pigs. (*Id*. at ¶¶ 147-50). For example, because they are unable to rise from the floor of their pens, downed pigs have prolonged exposure to fecal matter, which contains a host of bacterial pathogens. (*Id*. at ¶¶ 152-54). Non-ambulatory pigs are also more susceptible to carrying swine influenza subtypes H1N1 and H3N2, than are other pigs, as well as other types of bacteria. (*Id*. at ¶¶ 157-59).

On June 3, 2014, Plaintiffs submitted a petition for rulemaking, requesting that the FSIS prohibit the slaughter of all downed pigs. (*Id*. at ¶ 160). The FSIS received at least twenty letters urging it to grant Plaintiffs' petition for rulemaking and did not receive any letters opposing the petition. (*Id*. at ¶¶ 161-62). On September 16, 2019, the FSIS denied the petition, based on the conclusion that "existing regulations and inspection procedures are sufficient and effective in ensuring that [nonambulatory] pigs are handled humanely at slaughter and in preventing diseased animals from entering the human food supply." (*Id*. at ¶ 163). Plaintiffs allege that in denying the petition, Defendants "failed to consider important aspects of the problem of the slaughter of nonambulatory pigs that were

presented in the petition, offered explanations for its decision that run directly counter to the evidence before the agency, and unreasonably treated nonambulatory pigs differently from nonambulatory cattle." (*Id*. at ¶ 169).

Plaintiffs allege that, as a result of Defendants' failure to comply with Congress's 2002 mandates and its denial of Plaintiffs' petition, they have been injured. For example, plaintiff Farm Sanctuary alleges that, since its founding in 1986, it has advocated on behalf of downed animals, and it has also "rescued, rehabilitated, and provided lifelong care to numerous animals who were left for dead at stockyards, including pigs," and "led campaigns on behalf of downed animals, including investigations to expose downed animal abuse and campaigns focused on state and federal legislation and on stockyard policies." (*Id*. at ¶ 19). Farm Sanctuary further alleges that Defendants' actions impair its ability to carry out its mission and, as a result, Farm Sanctuary has had to redirect its limited time and resources away from other work. (*Id*. at ¶¶ 20-21). Specifically, Farm Sanctuary has spent time and resources "requesting information about incidents of inhumane handling and food safety violations involving nonambulatory pigs; fighting to obtain that information in a timely manner, in some cases through litigation; reviewing, analyzing, and digesting that information; and publicizing it to educate its members and the public," and that these activities consume time that could be spent on its other work, including animal rescue efforts. (*Id*. at ¶¶ 19, 21-22).

The remaining plaintiff organizations also allege that Defendants' actions impair their mission-critical activities and force them to divert their limited resources from these activities. (*See id*. at ¶¶ 27-31, 37-40, 45-53, 58, 65-68, 73-76). For example, plaintiff

Animal Outlook, which among other things, conducts undercover investigations to expose animal cruelty, "has been forced to expend significantly more investigative resources documenting downed pigs." (*Id*. at ¶¶ 36, 38). Likewise, plaintiff Animal Welfare Institute alleges that it has "diverted thousands of dollars and hundreds of hours" to address Defendants' failure to address downed pigs such as publishing and updating reports on downed pigs, including a report addressing the transport of downed pigs which, as explained above, is incentivized by Defendants' failure to act. (*Id*. at ¶¶ 46-48, 53).

Some of the Plaintiff organizations further allege that their members include individuals who consume pork products and are concerned about the health risks they face from their potential exposure to meat from downed pigs contaminated with pathogens, and due to Defendants' failure to investigate, report on, and regulate the humane treatment, handling, and disposition of downed pigs, they are at an increased risk for exposure to these pathogens. (*Id*. at ¶ 23; *see also id*. at ¶¶ 33, 61, 69).

## PROCEDURAL HISTORY

### I. The 2019 Action

Plaintiffs filed their complaint on December 18, 2019. (Dkt. 1). On February 18, 2020, the Court granted Plaintiffs' consent motion to file an amended complaint (Dkt. 20; Dkt. 21), which Plaintiffs filed that same day (Dkt. 22). Plaintiffs' amended complaint alleges three causes of action, including: (1) violation of the FMIA, the HMSA and the Administrative Procedures Act (APA), for Defendants' failure to conduct an ante-mortem inspection; (2) violation of the HMSA, FMIA, and APA for Defendants' revocation of

maximum line speeds; and (3) violation of the National Environmental Policy Act (NEPA) and the APA, for Defendants' failure to prepare an EIS or EA. (Dkt. 22 at 43-47).

On March 13, 2020, Defendants filed a motion to dismiss the amended complaint. (Dkt. 25). Plaintiffs filed a response in opposition to the motion to dismiss on April 10, 2020 (Dkt. 30), and Defendants filed reply papers on May 1, 2020 (Dkt. 34). The parties subsequently filed notices of supplemental authority and notices of recent events. (Dkt. 39; Dkt. 42; Dkt. 43; Dkt. 44). The Court held oral argument on March 17, 2021, and reserved decision. (Dkt. 41).

## II. The 2020 Action

Plaintiffs filed their complaint on February 6, 2020. (Dkt. 1). On April 10, 2020, Defendants filed a motion to dismiss the complaint for lack of jurisdiction. (Dkt. 9). Plaintiffs filed an amended complaint on April 20, 2020. (Dkt. 13). Accordingly, the Court denied the motion to dismiss as moot, in light of Plaintiffs' amended complaint. (Dkt. 21).

Plaintiffs' amended complaint alleges three causes of action, including: (1) failure to investigate and report to Congress on downed pigs in violation of the HMSA and APA; (2) failure to regulate the humane treatment, handling, and disposition of downed pigs, in violation of the HMSA and APA; and (3) arbitrary and capricious denial of Plaintiffs' petition for rulemaking, in violation of the APA. (Dkt. 13 at 36-38). On May 4, 2020, Defendants filed a motion to dismiss the amended complaint. (Dkt. 14). Plaintiffs filed a response on May 13, 2020 (Dkt. 16; Dkt. 19), and Defendants filed a reply on May 28, 2020 (Dkt. 18). The Court held oral argument on February 11, 2021, and reserved decision. (Dkt. 26).

## DISCUSSION

In the motions to dismiss both the 2019 and 2020 Actions, Defendants contend that Plaintiffs lack both organizational and associational standing. (*See* 2019 Action, Dkt. 26 at 19-37; 2020 Action, Dkt. 15 at 13-26). Further, in the 2020 Action, Defendants contend that Plaintiffs' first and second causes of action are not redressable. (2020 Action, Dkt. 15 at 26-28). As explained below, the Court finds that Plaintiffs in both the 2019 Action and the 2020 Action have standing to sue, and therefore Defendants' motions to dismiss are denied.

### I. Standard on Motion to Dismiss—Fed. R. Civ. P. 12(b)(1)

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it, such as when . . . the plaintiff lacks constitutional standing to bring the action." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.á.r.l*, 790 F.3d 411, 416-17 (2d Cir. 2015) (quotation and citation omitted). "In order to survive a defendant's motion to dismiss for lack of subject matter jurisdiction, a plaintiff must allege facts 'that affirmatively and plausibly suggest that it has standing to sue.'" *Brady v. Basic Research, L.L.C.*, 101 F. Supp. 3d 217, 227 (E.D.N.Y. 2015) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)).

"When the Rule 12(b)(1) motion is facial, *i.e.,* based solely on the allegations of the complaint or the complaint and exhibits attached to it . . . the plaintiff has no evidentiary burden." *Carter v. HealthPort Technologies, LLC*, 822 F.3d 47, 56 (2d Cir. 2016). "Because standing is challenged [here] on the basis of the pleadings, we accept as true all

material allegations of the complaint, and must construe the complaint in favor of [Plaintiffs]." *Alliance for Open Society Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 227 (2d Cir. 2011), *aff'd*, 570 U.S. 205 (2013) (quoting *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008)) (alterations in original). "[A]t the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 401 (2d Cir. 2015) (quoting *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003)).

## II. Standing

"To satisfy the requirements of Article III standing, plaintiffs must demonstrate '(1) [an] injury-in-fact, which is a concrete and particularized harm to a legally protected interest; (2) causation in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief.'" *Hu v. City of N.Y.*, 927 F.3d 81, 89 (2d Cir. 2019) (quoting *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 257 (2d Cir. 2013)) (alteration in original).

While both the 2019 Action and the 2020 Action involve multiple plaintiffs asserting standing, the Court is not required to examine each Plaintiff's allegations; rather, "[i]t is well settled 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) (citations omitted). However, "a plaintiff must

demonstrate standing for each claim [s]he seeks to press." *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64 (2d Cir. 2012) (alteration in original) (quoting *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 335 (2006)).

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

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

organization must meet the same standing test that applies to individuals . . . by showing actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." (quotations, citation and alterations omitted)).

**A. The 2019 Action**

In the 2019 Action, all named Plaintiffs contend that they have organizational standing. (*See* Dkt. 22). Plaintiffs Farm Sanctuary, Animal Legal Defense Fund, the Center for Biological Diversity, and North Carolina Farmed Animal Save also allege standing to sue on behalf of their members. (Dkt. 22 at ¶¶ 14, 18-19, 28-30, 35-39, 54-57; *see also* Dkt. 30 at 27). In moving to dismiss the amended complaint, Defendants argue that Plaintiffs have failed to show that they have either organizational or associational standing. The Court turns first to Defendants' argument that Plaintiffs lack organizational standing.

Defendants argue that Plaintiffs do not have organizational standing because (1) they have not suffered an actual and particularized injury, as issue advocacy groups use their resources to advocate in the ordinary course, and (2) any alleged injury based on Plaintiffs' voluntary decision to advocate against the Slaughter Rule is self-inflicted and not traceable to Defendants' conduct. (Dkt. 26 at 19-20). In response, Plaintiffs contend that the Second Circuit has consistently found injury where an organization expends time and effort responding to a defendant's actions, that the government's promulgation of the Slaughter Rule without complying with NEPA's mandates has deprived it of information about environmental impacts, and simply because some of the work they perform can be

characterized as "advocacy" work does not deprive them of standing, because the Slaughter Rule has forced them to divert resources from the "classic" or "core" services they were established to provide, including animal rescue and education work. (Dkt. 30 at 22-27).

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. In a footnote, the Court clarified that "[o]f course, HOME will have to demonstrate at trial that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief," *id*. at n.21; however, for purposes of

whether HOME had adequately alleged standing, the Court held that based on the allegations contained in the complaint, it had made such a showing.

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. *See also Moya v. U.S. Dep't of Homeland Sec.,* 975 F.3d 120, 129 (2d Cir. 2020) (finding that plaintiff had organizational standing where it "repeatedly alleged" that the defendants' conduct "frustrated its organizational mission . . . of assisting eligible individuals to naturalize by requiring it to spend substantial time and resources overcoming unlawful discriminatory barriers to the naturalization of [its] clients," including by causing a diversion of resources, because its sole DOJ-accredited representative had to spend additional time servicing clients who required N-648 waiver forms, leaving less time for its other clients (quotations omitted)); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110-11 (2d Cir. 2017) (organization demonstrated injury-in-fact where ordinance impeded organization's ability

to carry out its responsibilities and forced organization to divert money and resources away from its current activities, including devoting "attention, time, and personnel to prepare its response to the Ordinance."); *Mental Disability Law Clinic, Touro Law Ctr. v. Hogan*, 519 F. App'x 714, 717 (2d Cir. 2013) ("In light of the Clinic director's affidavit stating that the Clinic has diverted resources from education and training in order to contest the OMH practice at issue in this case, we affirm the district court's holding that the Clinic has standing to prosecute this action."); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (plaintiff had organizational standing where its services, which included providing information at community seminars about how to fight housing discrimination, had to devote "substantial blocks of time to investigating and attempting to remedy the defendants' advertisements," which conveyed a racially exclusionary message). "While the claimed harm must be concrete, rather than abstract, only scant evidence of an opportunity cost is required," and "[t]he Second Circuit has consistently found injury where an organization expends time and effort responding to the defendant's actions." *N.Y.S. Citizens' Coalition for Children*, 2016 WL 11263164, at *3; *see also Moya*, 975 F.3d at 130 ("we have previously held that a plaintiff needs to allege only some perceptible opportunity cost from the expenditure of resources that could be spent on other activities. . . . [S]ubstantial expenditure of resources and frustration of an organization's mission are sufficient under our precedents to establish injury in fact." (internal citations and quotations omitted)); *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 111 ("where an organization diverts its resources away from its current activities, it has suffered an injury

that has been repeatedly held to be independently sufficient to confer organizational standing").

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 ¶ 17[3]; *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

[3] Defendants argue in a footnote that Plaintiffs' allegation that by significantly increasing the number of pigs for slaughter, they have been forced to divert additional resources to find placement for those pigs, is speculative. (Dkt. 26 at 22 n.7 ("This theory fails because it relies on the speculative assumption that the Rule will cause significantly more hogs to be slaughtered.")). First, the Court notes that "[i]t is well settled . . . that a court need not consider arguments relegated to footnotes[.]" *F.T.C. v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 471 n.1 (S.D.N.Y. 2014); *Primmer v. CBS Studios, Inc.*, 667 F. Supp. 2d 248, 256 n.4 (S.D.N.Y. 2009) ("[B]ecause the argument is made wholly in a footnote . . ., the Court may choose to disregard it."). Second, in making this argument, Defendants misapprehend the standard on a motion to dismiss, where the Court takes Plaintiffs' well-pleaded allegations as true. The amended complaint contains factual allegations supporting Plaintiffs' assertion that the Slaughter Rule will cause more hogs to be slaughtered, including that the Slaughter Rule will allow for the increase in line speeds, and that several additional pork processors will take advantage of the rule. (*See* Dkt. 22 at ¶ 151 (alleging that 12.49 percent increase in line speeds would cause "a net increase in pig production and slaughter of approximately 11.5 million pigs annually"); *id*. at ¶ 171 (alleging that in promulgating the Slaughter Rule, the USDA "reiterated its determination that forty high-volume slaughterhouses accounting for ninety-three percent (a slight increase from the ninety-two percent identified in the proposed rule) of total annual pig slaughter 'will choose to participate' in high-speed slaughter with less oversight as authorized by the regulation")). Following oral argument in this matter, Plaintiffs reported to the Court that a total of eight slaughterhouses have taken advantage of the Slaughter Rule. (*See* Dkt. 42). Accordingly, the Court finds that Plaintiffs' allegation in this respect is not speculative, at least at this stage of the proceedings.

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.

In opposition to Defendants' motion to dismiss and in support of their argument that they have standing, Plaintiffs also submit declarations from some of their members, which further support their allegations that the Slaughter Rule has impaired their ability to engage in their core functions and has forced them to divert their limited resources from these functions.[4] For example, Plaintiffs submit the declaration of Gene Baur, the president and co-founder of plaintiff Farm Sanctuary. (Dkt. 30-5 (hereinafter, the "Baur Decl.") at ¶ 3). Mr. Baur expounds upon the allegations contained in the amended complaint, including that in addition to the 275-acre shelter that Farm Sanctuary operates in New York, it also operates an animal sanctuary in Southern California, which is situated on 26 acres and houses an additional 150 rescued farm animals, and offers educational tours to the public. (*Id*. at ¶ 4). Mr. Baur explains that the Slaughter Rule, which allows slaughterhouses to operate without line speeds and with reduced government oversight, impairs Farm Sanctuary's mission because it will increase the number of pigs who will suffer inhumane handling at slaughterhouses, as well as the overall number of pigs that are factory farmed

[4] The Court may consider the declaration of Mr. Baur, and the other declarations submitted by Plaintiffs in opposing the motion to dismiss for lack of standing. *See White v. First Franklin Financial Corp.*, No. 18-CV-3518 (DRH)(AKT), 2019 WL 1492294, at *3 (E.D.N.Y. Apr. 4, 2019) ("In resolving a motion to dismiss for lack of subject matter jurisdiction, the Court may consider affidavits and other materials beyond the pleadings to resolve jurisdictional questions." (quoting *Cunningham v. Bank of New York Mellon, N.A.*, 2015 WL 4101839, at * 1 (E.D.N.Y. July 8, 2015)).

and slaughtered in the United States. (*Id*. at ¶ 10). Mr. Baur further explains that, due to the significant production increases resulting from the Slaughter Rule, Farm Sanctuary "reasonably anticipates that it will need to divert additional resources to find placement, and provide transport and care for, increased numbers of pigs," which are "among the most difficult farm animals to care for because their breeding predisposes them to a slew of ailments," including "leg issues and other health problems relating to their excessive weight that require specialized and costly care. . . . In short, caring for pigs is very resource and labor intensive." (*Id*. at ¶ 12).

Mr. Baur further explains how Defendants' actions have impaired Farm Sanctuary's ability to perform its core educational work, since such work "relies on access to comprehensive information and analyses of the environmental impacts of federal decision-making as required by [NEPA]." (*Id*. at ¶ 13). Because Defendants promulgated the Slaughter Rule without analyzing its environmental impacts and providing that analysis for public review and comment, Mr. Baur explains that Farm Sanctuary "has been deprived of key information on which it relies to educate the public," and as a consequence has had "to divert its limited resources to seek out such information through other means." (*Id*.). Finally, Mr. Baur highlights Farm Sanctuary's procedural injury, including that Farm Sanctuary has a procedural interest that Defendants fully consider information submitted during the rulemaking process before finalizing and implementing the Slaughter Rule, and that its interests are injured by Defendants' failure to engage in the rulemaking process as required by the APA and conducting adequate environmental review, as required by

NEPA.[5] (*Id*. at ¶ 14). The Court notes that several other Plaintiffs have submitted declarations from their members, which further explain how those organizations have sustained an injury-in-fact. (*See, e.g.*, Dkt. 30-2 (declaration of Cheryl Leahy on behalf of

[5] In their reply papers, Defendants argue that Plaintiffs have failed to establish standing for their NEPA claim for an alleged informational injury, which is based on Defendants' failure to prepare an EA or EIS, because "courts routinely reject NEPA standing when plaintiffs rely on an informational injury and no separate environmental injury." (Dkt. 34 at 10-11). Defendants did not raise this argument in connection with organizational standing in their initial motion papers, and "[a]rguments made for the first time in a reply brief need not be considered by a court." *Playboy Enters., Inc. v. Dumas*, 960 F. Supp. 710, 720 n.7 (S.D.N.Y. 1997). However, the Court notes that courts have found an organization has standing where it has been denied information that it could use to educate the public. *People for the Ethical Treatment of Animals ("PETA") v. USDA*, 797 F.3d 1087, 1095 (D.C. Cir. 2015) ("Because PETA's alleged injuries—denial of access to bird-related AWA information including, in particular, investigatory information, and a means by which to seek redress for bird abuse—are 'concrete and specific to the work in which they are engaged,' we find that PETA has alleged a cognizable injury sufficient to support standing. In other words, the USDA's allegedly unlawful failure to apply the AWA's general animal welfare regulations to birds has 'perceptibly impaired [PETA's] ability' to both bring AWA violations to the attention of the agency charged with preventing avian cruelty and continue to educate the public." (citations omitted)); *see also Nat. Res. Def. Council ("NRDC") v. Dep't of Interior*, 410 F. Supp. 3d 582, 594 (S.D.N.Y. 2019) (finding that plaintiffs had organizational standing where they "sufficiently alleged that the Council's general lack of transparency has caused them to devote greater 'attention, time, and personnel' to monitoring the Council."). Further, Plaintiffs have identified environmental harms because, as alleged in the amended complaint, NEPA's very purpose is to "help public officials make decisions that are based on understanding of environmental consequences," (Dkt. 22 at ¶ 101), and Defendants' failure to comply with NEPA in promulgating the Slaughter Rule has caused a host of environmental issues, including that "a net increase in pig production and slaughter . . . will cause significant environmental impacts at the slaughterhouse level, including through increased waste, wastewater, and carcass treatment and disposal needs; increased demands for plant energy, freshwater, and infrastructure and transportation; and increased air pollution" (*id*. at ¶ 151; *see also id*. at ¶¶ 152-62 (identifying environmental impacts of increased pig slaughter)). The Court finds that the amended complaint, as well as the statements contained in the member declarations, sufficiently establish standing as to Plaintiffs' NEPA claim, at least at this stage of the litigation.

Animal Outlook); Dkt. 30-7 (declaration of John Seber on behalf of Mercy for Animals, Inc.); Dkt. 30-9 (declaration of Lori Ann Burd on behalf of the Center for Biological Diversity); Dkt. 30-11 (declaration of Mark Walden on behalf of the Animal Legal Defense Fund); Dkt. 30-15 (Declaration of Sharon Nunez on behalf of Animal Equality)).

The Northern District for California, in *Ctr. for Food Safety v. Perdue*, No. 20-cv-00256-JSW, 2021 WL 1526388 (N.D. Ca. Feb. 4, 2021) very recently found that the plaintiff advocacy organizations, which like Plaintiffs, also challenged the Slaughter Rule, had both organizational and associational standing. Specifically, the Court focused its inquiry into whether the plaintiffs had organizational standing on the allegations contained in the complaint, including the plaintiffs' allegations that Rule frustrated the organizations' food-safety missions and forced them to divert organizational resources to address the promulgation of the Slaughter Rule. *See, e.g., id*. at *5 ("Plaintiffs allege that the Final Rule has forced them to take action on behalf of their members and consumers that would not be required but for Defendants' alleged violation of the FMIA and APA."); *id*. ("CFS has shifted staff time from other efforts to focus on educating members about the Final Rule.").

Defendants' argument that Plaintiffs lack organizational standing is focused on their contention that Plaintiffs use their resources to advocate in the ordinary course. (*See* Dkt. 26 at 20 ("Generally speaking, Plaintiffs . . . are environmental and animal-welfare advocacy groups"); *id*. at 22-23 ("Plaintiffs here—by publicly advocating against the Final Rule—are performing a normal task that's an everyday part of their missions.")). To that end, Defendants argue that the aforementioned cases are distinguishable because the

organizations involved in them had some social function, other than engaging in pure advocacy work. (*See, e.g., id*. at 22-23; *see also* Dkt. 34 at 9). However, simply because part of an organization's mission involves advocacy work does not divest it of standing. *See Am. Soc. For Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 27 (D.C. Cir. 2011) ("many of our cases finding *Havens* standing involved activities that could just as easily be characterized as advocacy—and, indeed, sometimes are"); *see also Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 110-11 (recognizing advocacy group's standing to challenge ordinance); *Olsen v. Stark Homes, Inc*., 759 F.3d 140, 158 (2d Cir. 2014) (finding "concrete and particularized injury" sufficient to confer standing on organization where complaint alleged that "LIHS, as a not-for-profit corporation devoted to fair-housing advocacy and counseling, had expended resources in investigating and advocating on the [plaintiffs'] behalf," and also "alleged that these activities diverted resources of LIHS from its other advocacy and counseling activities"). While Plaintiffs do engage in advocacy work, they also allege that they provide other services, including what they describe is their "core" animal protection and rescue work, as well as education, which are concrete interests harmed by the diversion of resources to combat the Slaughter Rule.

Defendants principally rely on *Citizens for Responsibility and Ethics in Washington ("CREW") v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *reversed on other grounds*, 953 F.3d 178 (2d Cir. 2020), where the court found that CREW, a nonprofit, non-partisan government ethics watchdog organization did not have standing to challenge the defendant's actions under the Domestic and Foreign Emoluments Clauses because its decision to investigate and challenge those actions at the expense of its other initiatives

"reflect[ed] a choice about where and how to allocate its resources—one that almost all organizations with finite resources have to make." *Id*. at 191. The court further noted that the organization's "entire reason for being [wa]s to investigate and combat corruption and reduce the influence of money in politics through, among other things, education, advocacy, and litigation," and therefore it was "not wasting resources by educating the public and issuing statements concerning the effects of Defendant's alleged constitutional violations or even by filing suit; this is exactly *how* an organization like CREW spends its resources in the ordinary course." *Id*. at 191-92.

As an initial matter, the *CREW* decision was ultimately reversed on other grounds by the Second Circuit, and therefore that case has little to no precedential effect. Second, even considering the analysis in *CREW*, the Court finds that case to be distinguishable, because Plaintiffs' sole purpose is not to advocate against Defendants' alleged constitutional violations. *CREW* failed to allege that the defendant's actions impeded its ability to perform a particular mission-related activity, or that it was forced to expend resources to counteract the adverse consequences or harmful effects of the defendant's conduct; rather, it simply made a choice about how to allocate its resources. *Id*. at 190. While it may have diverted some of its resources to address conduct it considered unconstitutional, that conduct caused "no legally cognizable adverse consequences, tangible or otherwise, necessitating the expenditure of organizational resources." *Id*. As explained above, here, Plaintiffs "were . . . driven to expend resources they would not have otherwise spent to avert or remedy some harm to a definable class of protected interests. .

. caused by [Defendants'] actions or policies." *Id*. Accordingly, the Court does not find the *CREW* decision instructive in this instance.

Defendants also cite *Young Advocates of Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215 (E.D.N.Y. 2019), where the court rejected the plaintiff's theory of standing, which was based on the allegation that it had "spent significant effort opposing the Amendment, both in this Court and through other avenues, and thereby 'shift[ed] valuable resources away from its traditional advocacy and education efforts.'" *Id*. at 231. The Court explained that "if the Court were to accept this argument, it would be difficult to conceive of a case in which an organization or individual would *not* have standing to challenge a statute that they find politically or socially disagreeable." *Id*. It further distinguished many of the cases cited by the plaintiff—including many of the cases discussed above, such as *Havens*, *Centro de la Comunidad*, and *Mental Health Disability Law Clinic*—because "the organizational plaintiffs in these cases did not engage in mere advocacy, but instead provided social services directly to the group harmed by the challenged government policy." *Id*. at 232. The Court finds that this reasoning is difficult to reconcile with existing Second Circuit precedent, which takes a broad view of organizational standing and does not explicitly require that a plaintiff provide a social service to maintain standing. Further, unlike the plaintiff in *Young Advocates*, Plaintiffs in this case plausibly allege that they *do* provide additional services beyond mere issue advocacy (including animal protection and rescue, and education), that those services have been impaired by the Slaughter Rule.

In sum, taking Plaintiffs' allegations as true—as it is required to do at this stage of the proceedings—the Court finds that the amended complaint contains allegations

sufficient to support organizational standing. Having found that Plaintiffs have organization standing, the Court need not reach the issue of associational standing. *See Online Merchants Guild v. Hassell*, No. 1:21-CV-369, 2021 WL 2184762, at *4 (M.D. Pa. May 28, 2021) ("We conclude that the Guild has organizational standing; accordingly, we need not reach the issue of associational standing."); *see also Catholic Legal Immigr. Network v. Exec. Off. for Immigr. Rev.*, No. 20-cv-03812 (APM), 2021 WL 184359, at *9 (D.D.C. Jan. 18, 2021) ("Plaintiffs assert both organizational standing and associational standing. Because the court is satisfied that Plaintiffs have established a substantial likelihood of organizational standing, the court need not reach the question of associational standing."). Accordingly, Defendants' motion to dismiss is denied.

**B. The 2020 Action**

In the 2020 Action, all Plaintiffs allege that they have organizational standing. In addition, Plaintiffs Farm Sanctuary, Animal Legal Defense Fund, and Farm Forward bring suit on behalf of their members. (Dkt. 16 at 26; *see also* Dkt. 13 at ¶¶ 18, 23, 33, 69). In moving to dismiss the amended complaint, Defendants argue that Plaintiffs have failed to show that they have either organizational or associational standing. The Court turns first to Defendants' argument that Plaintiffs lack organizational standing.

**1. Standing**

Defendants in the 2020 Action raise the same issues they did in connection with the 2019 Action; that is, that Plaintiffs lack organizational standing because their alleged injury—using their resources to advocate against Defendants' actions—is entirely consistent with their ordinary activities and organizational missions, and because any

alleged injury based on Plaintiffs' voluntary decision to advocate to protect downed pigs is self-inflicted and not traceable to Defendants' conduct. (Dkt. 15 at 14). In response, Plaintiffs argue that Defendants' abdication of the 2002 mandates and their denial of Plaintiffs' petition to ban the slaughter of all downed pigs harm their ability to fulfill their animal-protection missions, burden their day-to-day work, and force them to divert resources to counteract these harms. (Dkt. 16 at 19).

The Court reaches the same conclusion it did in the 2019 Action: that at this stage of the case, Plaintiffs have alleged organizational standing. The amended complaint includes plausible allegations supporting that Defendants' actions have forced Plaintiffs to divert limited resources from mission-critical activities. For example, plaintiff Farm Sanctuary alleges that since its founding in 1986, it has "advocated on behalf of downed animals," including by rescuing, rehabilitating, and providing lifelong care to numerous animals who were left for dead at stockyards, including pigs. (Dkt. 13 at ¶ 19). Further, Farm Sanctuary has led campaigns on behalf of downed animals and conducted investigations to expose downed animal abuse. (*Id.*). Plaintiffs allege that Defendants' failure to comply with Congress's 2002 mandates, and its denial of Plaintiffs' petition to ban the slaughter of downed pigs, directly impair Farm Sanctuary's mission to provide care for such animals and, as a result, it has been forced to redirect its limited time and resources away from this work, "including by publishing numerous materials to educate its members about and mobilize support for measures to protect downed pigs," and that it has also been forced to "divert time and resources toward requesting information about incidents of inhumane handling and food safety violations involving nonambulatory pigs; fighting to

obtain that information in a timely manner, in some cases through litigation; reviewing, analyzing, and digesting that information; and publicizing it to educate its members and the public." (*Id*. at ¶¶ 20, 21). Plaintiffs allege that these activities consume organizational resources that could otherwise be spent on other work for farmed animals, and that but for Defendants' unlawful actions, Farm Sanctuary would not have to undertake these efforts. (*Id*. at ¶ 22; *see also id*. at ¶¶ 27-32, 37-40, 45-55, 58-59, 65-68, 73-76).

In opposing Defendants' motion to dismiss, Plaintiffs also submit declarations from their members, which lend further support to their allegations that Defendants' failure to comply with the 2002 mandates and their denial of Plaintiffs' petition has forced them to divert limited resources from their core rescue, education, and advocacy work, and that they have therefore sustained an injury-in-fact. For example, Plaintiffs submit the declaration of Gene Baur, the president and co-founder of plaintiff Farm Sanctuary. (Dkt. 19-1 (hereinafter, the "Baur Decl." at ¶ 4)). Mr. Baur explains that Farm Sanctuary, since its founding, has worked to protect downed pigs by rescuing, rehabilitating, and providing them with care. (*Id*. at ¶ 5). He further asserts that the USDA's actions impair Farm Sanctuary's mission-critical activities "by authorizing, incentivizing, and encouraging a host of cruel practices," including by "promoting all manner of cruel handling methods at slaughterhouses to attempt to force downed pigs to rise and move, including kicking, electro-shocking, striking, shoving, and dragging," and as a result, Farm Sanctuary, to counteract these inhumane practices, "has been forced to divert hundreds of staff hours and thousands of dollars away from other activities, including away from its work providing care, shelter, and placement for rescued farm animals and its public education work." (*Id*.

at ¶¶ 26-27, 29). Mr. Baur also explains that Farm Sanctuary has had to divert resources to seek assistance for pigs that have become downed as a result of Defendants' failure to comply with the 2002 mandate, citing specifically to one example in which Farm Sanctuary spent hours advising and consulting with law enforcement on an animal cruelty case. (*Id*. at ¶ 34). Mr. Baur's declaration further supports Plaintiffs' allegations that Farm Sanctuary—which is engaged in the rescue and rehabilitation of down pigs—is directly impacted by the increase in numbers of downed pigs caused by Defendants' failure to ban their slaughter, and that they have had to divert resources to address these harms. *See Havens Realty Corp.*, 455 U.S. at 379 ("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."); *see also Ctr. for Food Safety*, 2021 WL 1526388, at *4 (finding organizational standing where the plaintiffs alleged "that the Final Rule . . . frustrated the organizations' food-safety missions and forced them to divert organizational resources to address the promulgation of the Final Rule").

Mr. Baur also cites to Defendants' failure to investigate and report on the scope of downed pigs as burdening Farm Sanctuary's ability to carry out its activities because it relies on this information to perform its work.[6] (*Id*. at ¶ 30). As a result, Farm Sanctuary

[6] Defendants argue that Plaintiffs cannot show an informational injury—which is relevant only to Plaintiff's first and second causes of action for violation of the HMSA—because "the HMSA says nothing about disclosure." (*See, e.g.*, Dkt. 18 at 9 ("Unable to show that the Agency's conduct impedes any mission-critical activity, Plaintiffs try to rely on an informational injury, but that attempt fails because Plaintiffs cannot show they are entitled to the information.")); *see also Friends of Animals v. Jewell*, 828 F.3d 989, 992

has had to divert resources to obtain this information by other means, "including by submitting FOIA requests for humane handling and food safety records from the USDA, fighting to obtain that information in a timely manner, in some cases through litigation; reviewing, analyzing, and digesting that information; and publicizing it to educate its members and the public." (*Id*. at ¶ 31). For example, Farm Sanctuary is currently involved

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(D.C. Cir. 2016) (plaintiff suffers informational injury when it has "been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it"). In other words, Defendants contend that, even if they acted pursuant to the 2002 mandate, Plaintiffs may not be able to obtain a copy of the report. Plaintiffs rely on both the *PETA* case and *NRDC* cases, *see* n.6, *supra*, in support of their argument that they have sustained an informational injury. (Dkt. 16 at 21, 23). Defendants argue that *PETA* is distinguishable because there, the court found that the combination of two injuries—one of which included lack of access to information—constituted an injury-in-fact, and it is therefore inapplicable here. (Dkt. 18 at 10); *see also Marino v. Nat'l Oceanic and Atmospheric Admin*., 451 F. Supp. 3d 55, 63 (D.D.C. 2020) (explaining that the allegations of injury in *PETA*, which were that the USDA's actions "precluded PETA from preventing cruelty to and inhumane treatment of these animals through its normal process of submitting USDA complaints and it deprived PETA of key information that it relies on to educate the public . . . went beyond the mere deprivation of information," and "the *combination* of the two injuries—'denial of access to bird-related AWA information including, in particular, investigatory information, *and a means by which to seek redress for bird abuse*,'" constituted an injury-in-fact.)

The Court notes that, here, the amended complaint does contain allegations indicating that Defendants' failure to act pursuant to the 2002 mandates have not only deprived Plaintiffs of information, but also that Plaintiffs are dependent on such information for education purposes. (*See, e.g.*, Dkt. 13 at ¶ 21 ("As a result of Defendants' unlawful inaction and action, Farm Sanctuary has been forced to redirect its limited time and resources away from other work, including by publishing numerous materials to educate its members about and mobilize support for measures to protect downed pigs."); Baur Decl., at ¶ 30 (Defendants' failure to investigate and report on the scope of downed pigs burdens Farm Sanctuary's ability to carry out its activities because it relies on this information to perform its work)). However, the Court need not resolve this issue because it has found that, under existing Second Circuit precedent, Plaintiffs have plausibly alleged that Defendants' conduct has forced Plaintiffs to divert resources from mission-critical activities. In other words, a conclusion that Plaintiffs have suffered an informational injury is not necessary to reach a finding that Plaintiffs have standing to assert the first and second causes of action.

in a FOIA lawsuit against the USDA, seeking timely access to humane handling records. (*Id*.). Further, due to Defendants' failure to comply with the 2002 mandates, Farm Sanctuary has been forced to divert resources to work toward the enactment of state-level legislation to protect downed pigs. (*Id*. at ¶ 32).

The Court notes that several other Plaintiffs have submitted declarations from their members, which further explain how those organizations have sustained an injury-in-fact. (*See* Dkt. 16-2 (declaration of Mark Walden on behalf of Animal Legal Defense Fund); Dkt. 19-2 (declaration of Dena Jones on behalf of Animal Welfare Institute); Dkt. 16-4 (declaration of Cheryl Leahy on behalf of Animal Outlook); Dkt. 16-5 (declaration of Rachel Dreskin on behalf of Compassion in World Farming); Dkt. 16-6 (declaration of Andrew deCoriolis on behalf of Farm Forward); Dkt. 16-7 (declaration of John Seber on behalf of Mercy for Animals)).

For the reasons explained above in connection with the 2019 Action, the arguments advanced by Defendants are not persuasive. In other words, Plaintiffs have plausibly alleged that they provide additional services beyond mere issue advocacy, that these services have been impaired by Defendants' actions, and that they have been forced to shift their resources away from those services to oppose the slaughter of downed pigs. Taking Plaintiffs' allegations as true, the Court finds that the amended complaint contains allegations sufficient to support organizational standing. Having found that Plaintiffs have organizational standing, the Court need not reach the issue of associational standing.

**2. Redressability**

Defendants also contend that Plaintiffs' first and second causes of action, which rely on the Defendants' violation of the HMSA, are not redressable because a favorable decision would not remedy Plaintiffs' alleged injuries. (Dkt. 15 at 26). In other words, Defendants contend that even if the Court granted Plaintiffs the relief they seek and compelled Defendants to investigate and submit a report to Congress, it is speculative that Defendants would ever ban the slaughter of downed pigs. (*Id*. at 27-28). This argument is problematic for two reasons.

First, it is well-settled that "standing is not defeated by the possibility that an agency might ultimately wield its discretion in way that does not fix a party's alleged injury." *NTCH, Inc. v. Fed. Commc'ns Comm'n*, 841 F.3d 497, 506 (D.C. Cir. 2016); *see also Mass. v. Env't Protection Agency*, 549 U.S. 497, 518 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.") (quoting *Sugar Cane Growers Cooperative of Fla. v. Veneman,* 289 F.3d 89, 94-95 (C.A.D.C. 2002) ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result")). In other words, simply because Defendants have discretion to ban the slaughter of downed pigs does not render Plaintiffs' alleged injuries not redressable.

Second, Defendants misapprehend the standard on a motion to dismiss, where the Court is required to take Plaintiffs' allegations as true. Here, the amended complaint contains plausible allegations that if Defendants investigated the issues surrounding the slaughter of downed pigs, it would relieve Plaintiffs of the harm they have alleged, including from having to divert resources to seek out such information through alternate means. (*See, e.g.*, Dkt. 13 at ¶ 21 (alleging that due to Defendants' failure to comply with the 2002 mandate, Farm Sanctuary has been forced to divert time and resources toward requesting, fighting to obtain, and analyzing information about incidents of inhumane handling of downed pigs); Baur Decl. at ¶¶ 30, 31 (explaining that Defendants' failure to investigate and report on the scope of downed pigs "deprives Farm Sanctuary of information on which it would rely in its work," and therefore it has been forced to "divert significant resources to obtain information regarding downed pigs through other means")).

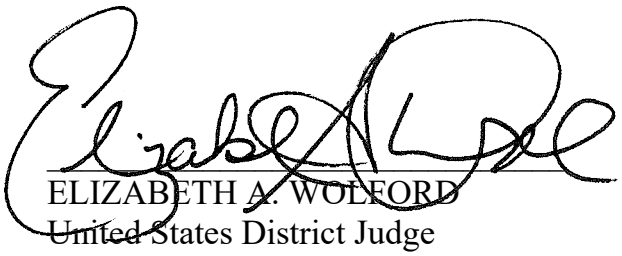
Accordingly, the Court finds that, at this stage of the case, Plaintiffs have standing to sue. The Court's conclusion does not mean that Plaintiffs will ultimately be successful in establishing standing. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting 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.' In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts. . . .' And at the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'"); *see also Havens Realty Corp.*, 455 U.S. at 379 ("[o]f course, HOME will have to demonstrate at trial that it has

indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief"). However, based on the allegations contained in the amended complaint, Defendants are not entitled to dismissal for lack of standing at this juncture.

## CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss (2019 Action, Dkt. 25; 2020 Action, Dkt. 14) are denied.

SO ORDERED.



ELIZABETH A. WOLFORD
United States District Judge

Dated: June 28, 2021
Rochester, New York