

Plaintiff's May 2014 rulemaking petition ("Petition").¹ Defendants have failed to respond to Plaintiff's rulemaking request, made four-and-a-half years ago, to modernize regulations governing the use of animal welfare and environmental stewardship claims on meat and poultry product labels, and have provided no explanation or justification for their failure to act. The requested actions are necessary to address evolving market conditions and practices, and to prevent consumer deception caused by misleading labeling claims on meat and poultry products.

2. Over the course of many years, AWI has conducted careful, detailed studies of FSIS' pre-market label approval process. FSIS currently implements its pre-market label approval process through guidance documents, including its "Prior Label Approval Process" guidance. This guidance document requires that "only [animal production] claims that have been approved by FSIS, through submission of a label application, may appear on 'retail labels.'" USDA, *A Guide to Federal Food Labeling Requirements for Meat, Poultry, and Egg Products* 18 (Aug. 2007), https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling_Requirements_Guide.pdf?MOD=AJPERES. Additionally, AWI has commissioned in-depth surveys and compiled extensive reports to identify and assess consumer expectations associated with labels on meat and poultry products asserting animal welfare and environmental stewardship claims.² Based on its research findings, Plaintiff submitted its Petition that sought FSIS rulemaking to amend labeling regulations

¹ Animal Welfare Institute, *Petition: To Amend Labeling Regulations under the Federal Meat Inspection Act and the Poultry Products Inspection Act to Require Third-Party Certification for the Approval of Animal Welfare and Environmental Stewardship Claims* (May 2014) (attached to this Complaint) [hereinafter Petition].

² *Id.* at 33–41.

under the Federal Meat Inspection Act (“FMIA”), 21 U.S.C. §§ 603–622 (2012), and Poultry Products Inspection Act (“PPIA”), 21 U.S.C. §§ 451–472 (2012), to require independent third-party certification for the approval of animal welfare and environmental stewardship claims on meat and poultry product labels. The requested third-party certification process would establish standardized criteria for approving these specialized labeling claims on animal products, alerting producers of their obligations and arming consumers with the tools to make more informed purchasing decisions. This, in turn, would simplify producer compliance with existing standards set out in the FMIA and the PPIA that proscribe misleading labeling practices.³

3. FSIS has neither responded to AWI’s Petition nor commenced any action that would address the regulatory gaps identified by AWI’s request. While FSIS has updated its Labeling Guideline in the interim, recent research by AWI confirms that the label approval process remains inadequate. USDA, *Food Safety Inspection Service Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions* (Sept. 2016), <https://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES> (“Labeling Guideline”).⁴
4. FSIS’ unreasonable delay of more than four-and-a-half years in responding to Plaintiff’s straightforward Petition has resulted in FSIS’ continued failure to properly implement the PPIA and FMIA, a failure that FSIS could have avoided by adopting the changes requested in the Petition. FSIS continuously fails to enforce its own statutory mandates under the FMIA and PPIA, and its inaction violates the APA.

³ *Infra* ¶¶ 22–32.

⁴ *Infra* ¶¶ 34–36, 46.

5. Congress enacted the FMIA and the PPIA to protect consumers from misleading labeling and adulteration of meat and poultry products. Defendants' failure to properly regulate labels under these acts has resulted in producers taking advantage of the existing lax approval process, betrayed consumer confidences, and harmed producers making legitimate use of these added-value claims.
6. AWI thus files this Complaint against Defendants USDA, USDA Secretary Sonny Perdue in his official capacity, FSIS, and FSIS Acting Administrator Paul Kiecker in his official capacity, and seeks both a declaratory judgment that Defendants have violated the APA, as well as injunctive relief to compel Defendants to respond substantively to Plaintiff's Petition.

JURISDICTION AND VENUE

7. This lawsuit is brought pursuant to the APA, 5 U.S.C. §§ 551–559, 701–706, and Plaintiff seeks judicial review under 5 U.S.C. § 706(1).
8. This Court has subject matter jurisdiction over the claim for relief set forth herein pursuant to 28 U.S.C. § 1331 (2012) (federal question jurisdiction), 28 U.S.C. § 1346 (2012) (providing original jurisdiction to district courts for actions against the United States), 28 U.S.C. §§ 2201–02 (2012) (establishing power to issue declaratory judgments in cases of actual controversy), and 5 U.S.C. § 702 (APA jurisdiction for those adversely affected by agency action).
9. Venue properly lies in this Court under 28 U.S.C. § 1391(e)(1), as this civil action is brought against officers and employees of the United States acting in their official capacities and under the color of legal authority. Additionally, a substantial part of the

events giving rise to the claim occurred in the District of Columbia, no real property is involved in this action, and Plaintiff maintains an office in this judicial district.

PARTIES

10. Plaintiff AWI is a 501(c)(3) nonprofit, membership-based organization, which was founded in 1951 with the primary purpose of alleviating the suffering of nonhuman animals. AWI's advocacy focuses on issue areas including animal experimentation, wildlife and endangered species, and large-scale industrial animal farms that raise pigs, cows, chickens, and other animals for slaughter. Specifically, AWI aims to support higher-welfare farms, and to protect consumers who wish to align their purchasing decisions with such principles. AWI aims to achieve these goals through engagement with policymakers, scientists, industry, non-governmental organizations, farmers, veterinarians, teachers, and the public.
11. AWI's interests in farm animal welfare, the protection of which is threatened when on-farm practices are loosely regulated, are injured by FSIS' failure to respond to AWI's Petition.
12. Since its inception, AWI has pursued both legislative and judicial initiatives to end cruel practices committed against animals, including lobbying for the passage of important animal protection legislation and advocating for regulations to effectively implement and enforce such legislation. AWI has worked to educate consumers, government officials, and the food industry about food animal production labeling claims used to market food products. AWI continually takes actions, such as issuing press releases, posting action alerts, and creating advocacy campaigns, to educate its membership and the public about animal farming practices. *See, e.g., AWI, Press Releases, [5](https://awionline.org/press-</i></div><div data-bbox=)*

releases (last visited Nov. 9, 2018); AWI, *Action Alerts*, <https://awionline.org/action-alerts> (last visited Nov. 9, 2018); AWI, *Farm Animals*, <https://awionline.org/content/farm-animals> (last visited Nov. 9, 2018); AWI, *A Consumer's Guide to Food Label and Animal Welfare*, <https://awionline.org/content/consumers-guide-food-labels-and-animal-welfare> (last visited Nov. 9, 2018).

13. Because FSIS has failed to adequately regulate this field, AWI must continually monitor FSIS' compliance with the FMIA and PPIA and the agency's enforcement to apprise its membership of current circumstances. AWI also has dedicated resources to remind FSIS of its failure to respond to Plaintiff's straightforward, well-supported request for administrative action, further injuring Plaintiff.
14. Further, AWI also must constantly research animal production standards and continuously educate its members on its findings. This work includes informing members of the availability of meat and poultry products raised to standards they deem acceptable and explaining how to parse misleading claims. These necessary actions drain AWI's time and resources. If animal welfare and environmental stewardship claims were verified by independent third parties, in contrast to the current practice of arbitrarily, capriciously, and indiscriminately using labels that have no basis in fact, then more consistent, verifiable standards would exist, thereby promoting regulatory stability and consumer clarity.
15. AWI has more than 120,000 members and constituents across the United States. Many AWI members purchase or consume, or seek to purchase and consume, animal products from farms on which animals are raised in higher welfare environments. Defendants'

failure to act on the Petition directly and irreparably harms Plaintiff's members because unsubstantiated animal welfare and environmental stewardship claims on product labels impair its members' ability to make purchasing decisions consistent with their interests.

16. Defendant USDA is an agency of the United States government, charged with enforcing federal statutes related to farming, agriculture, and food, and with implementing those statutes by promulgating regulations.

17. Defendant Sonny Perdue is the United States Secretary of Agriculture, responsible for overseeing the USDA and its divisions, including FSIS.

18. Defendant FSIS is an agency under the USDA and is responsible for ensuring the safety of the nation's supply of meat, poultry, and egg products. FSIS is responsible for inspecting federally regulated slaughter and food processing operations daily to ensure product safety. Central to the case at bar, the agency is vested with the responsibility and authority for ensuring the proper labeling of meat and poultry products. FSIS takes a risk-based approach that is intended to allow FSIS to anticipate, and quickly respond to, food safety challenges before they impact public health. FSIS also is tasked with promulgating necessary regulations under its authorizing statutes. USDA, *Celebrating 100 Years of FMIA*, https://www.fsis.usda.gov/wps/wcm/connect/fsis-content/fsis-questionable-content/celebrating-100-years-of-fmia/overview/ct_index (last modified Feb. 21, 2014) ("*Celebrating 100 Years of FMIA*").

19. Defendant Paul Kiecker is the Acting Administrator of FSIS.

STATUTORY BACKGROUND

The Administrative Procedure Act

20. The APA requires that “each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). The APA further requires that “within a reasonable time, each agency shall proceed to conclude a matter presented to it,” *id.* § 555(b), and that agencies give “prompt notice” if they deny a petition, providing “a brief statement of the grounds for denial.” *Id.* § 555(e).
21. The APA provides a cause of action to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” *Id.* § 702. Under the APA, agency action includes an agency’s “failure to act.” *Id.* § 551(13). The APA requires the reviewing court to: “(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706.

Federal Meat Inspection Act

22. Congress enacted the FMIA, 21 U.S.C. §§ 603–622, in 1907 in response to *The Jungle*, by Upton Sinclair, and a report commissioned by President Theodore Roosevelt which confirmed many of the animal welfare and public health concerns documented in the book. *Celebrating 100 Years of FMIA*. Before the FMIA’s passage, inspectors in the Chicago stockyards observed that the labels used on products from inspected facilities did not accurately represent the products, thereby misleading consumers. H.R. Rep. No. 873, at 7–8 (1906) (“[The label] deceives and is plainly designed to deceive the average

purchaser, who naturally infers from the label that the Government guarantees the contents of the can to be what it purports to be.”).

23. In enacting the FMIA, Congress found that

[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are . . . properly marked, labeled, and packaged. . . . [M]isbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for . . . properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers.

21 U.S.C. § 602.

24. Decades later, Congress enacted the Wholesome Meat Act of 1967 to amend the FMIA and impose minimum federal meat inspection standards on states’ inspection systems.

Wholesome Meat Act of 1967, Pub. L. No. 90-201, 81 Stat. 584 (1967); H.R. 12144, 90th Cong., at 1 (1967). The House Committee on Agriculture believed that this act “*would give the Department of Agriculture new legislative authority to eliminate numerous opportunities now present to defraud consumers and endanger the public health.*” H.R. Rep. No. 653, at 2 (1967) (emphasis added). The committee report also explained that the bill would “clarif[y] the authority of the Department of Agriculture for regulating the marking, labeling, and packaging of carcasses, meats, and meat food products capable of use as human food.” *Id.* at 3. In its section-by-section analysis, the House Committee on Agriculture explained that the bill would “prevent the use of false, deceptive or misleading marks, labels, or containers.” *Id.* at 23.

25. This legislative history demonstrates that Congress’ commitment to protecting consumers from false or misleading advertisements was a major impetus for introducing and enacting the FMIA. Discussing House Bill 1043, a precursor to the FMIA, the Honorable

Abraham J. Multer explained that “[t]he introduction of the bill [was] prompted by the fact that we have much advertising and sale of meat, in the retail stores particularly, with the purchasers being misled.” 105 Cong. Rec. 12539 (1959) (extension of remarks by the Hon. Abraham J. Multer). Further, he expressed that he “would not be at all surprised if to a certain extent, some of the advertising was deliberately misleading.” *Id.*

26. The FMIA proscribes the sale of any item that bears a “marking or labeling which is false or misleading.” 21 U.S.C. § 607(d).
27. The FMIA gives the USDA the authority to promulgate regulations to effectuate the goals of the statute. These goals, as expressed above, include within the concept of consumer protection an explicit focus on the role played by mislabeling. 21 U.S.C. § 601 (referencing numerous instances in which the Secretary of Agriculture was able to promulgate regulations regarding mislabeling); *see also* 21 U.S.C. § 607, 601(n).

Poultry Products Inspection Act

28. Congress enacted the PPIA, 21 U.S.C. §§ 451–472, in 1957, and, in 1968, enacted the Wholesome Poultry Practices Act to clarify and amend the PPIA, imposing minimum federal standards on criteria set out in state regulations. Wholesome Poultry Products Act, Pub. L. 90-492, 82 Stat. 791 (1968); H.R. 16363, 90th Cong. (1968).

29. In enacting the PPIA, Congress found that

[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that poultry products distributed to them are . . . properly marked, labeled, and packaged. . . . [M]isbranded poultry products impair the effective regulation of poultry products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for . . . properly labeled and packaged poultry products, and result in sundry losses to poultry producers and processors of poultry and poultry products, as well as injury to consumers.

21 U.S.C. § 451.

30. Reports by both the House Committee on Agriculture and Senate Committee on Agriculture and Forestry state that the purpose of the PPIA was to establish compulsory inspections to ensure the “correct and informative labeling” of meat and poultry products. H.R. Rep. No. 465, at 1 (1957); S. Rep. No. 2622, at 1 (1956).
31. In later recommending the passage of the Wholesome Poultry Practices Act, the House Committee on Agriculture hoped to “bring poultry inspection services up to the high standards required for the protection of all consumers throughout this nation.” In its report, the Committee stated that
- [o]ne of the more serious dangers to the consumer has been in the labeling of poultry and the lack of proper labeling. . . . [T]his bill would provide for standards . . . for containers which are not deceptive, and for labeling limitations by States. Opportunities to deceive the consuming public would be reduced through application of uniformity to the elements in labels.
- H.R. Rep. No. 1333, at 3 (1968).
32. The PPIA gives the USDA the authority to promulgate regulations to effectuate the goals of the statute. 21 U.S.C. §§ 457, 458.

Regulatory Framework under the FMIA and PPIA

33. FSIS has the authority to promulgate regulations under the FMIA and PPIA, and is tasked with the responsibility of rescinding and refusing to approve labels and marks FSIS deems inappropriate. 9 C.F.R. § 500.8(a).
34. While FSIS has developed guidance documents in an attempt to provide direction, its efforts have been inadequate. One such document, FSIS’ Labeling Guideline, was produced as recently as 2016, yet fails to address the labeling process deficiencies

identified in AWI's Petition.⁵ While FSIS was promulgating its Labeling Guideline, AWI's Petition languished in the agency's office.

35. The Labeling Guideline instructs that producers must submit meat and poultry packaging labels with animal raising claims to FSIS, accompanied by particular documentation. The documents typically needed are (1) a report on the producer's operational protocol, (2) an affidavit describing how the animals were raised, (3) a description of the product's tracing and segregation mechanism, (4) a description of the process for handling nonconforming animals, and (5) if a third party certifies a claim, a copy of the certificate. USDA, *Food Safety Inspection Service Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions* 8 (Sept. 2016), <https://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES>.
36. During the comment period for the Labeling Guideline, FSIS received over 4,600 comments. According to Plaintiff's analysis, over 99% of commenters opposed the proposed Labeling Guideline. *See* Docket ID: FSIS-2016-0021, *Food Safety and Inspection Service Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions*, <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=FSIS-2016-0021> (last visited Oct. 29, 2018) (showing that only 21 of the 4,651 comments received supported the proposed guidance).
37. In its comment letter on the Labeling Guideline, AWI pointed out that the Labeling Guideline made consumers responsible for determining the meaning and relevance of

⁵ *Supra* ¶ 3.

label claims, that FSIS continually approved unsubstantiated animal welfare and environmental stewardship labeling claims, and that FSIS was deficient in defining particular animal housing terms, among other concerns. Michelle Pawliger, AWI Farm Animal Policy Associate, Comment Letter on FSIS Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions (Dec. 5, 2016), <https://www.regulations.gov/document?D=FSIS-2016-0021-4557>.

38. Although AWI expressed its concerns to FSIS through its Petition and subsequent comments on the Labeling Guideline, FSIS remains unresponsive. Instead, FSIS produced a guidance document that was insufficient to address the regulatory gaps that AWI identified and continued to approve labels without sufficient substantiation. The Labeling Guideline was offered by FSIS to alert regulated producers regarding FSIS' expectations and suggestions on how to meet those expectations. The Labeling Guideline does not establish a legally enforceable regulatory requirement that an independent third party verify label claims before FSIS approval.

FACTUAL BACKGROUND

The Federal Meat and Poultry Labeling Claim Verification

39. Over 9 billion animals are raised for food in the U.S. each year,⁶ and common industry practices allow for them to experience intensive confinement, barren and stressful housing conditions, and painful mutilations in order to increase production.

⁶ The following slaughter statistics were reported by the USDA in 2017: 31,704,200 head of cattle, 503,300 calves, 120,516,600 hogs, 1,936,600 lambs and sheep, 9,049,974,000 chickens slaughtered, 241,643,000 turkeys, and 26,628,000 ducks in the United States. USDA Nat'l Agric. Statistics Serv., *Poultry Slaughter 2* (Jan. 2018), available at https://www.nass.usda.gov/Publications/Todays_Reports/reports/psla0118.pdf; USDA Nat'l Agric. Statistics Serv., *Livestock Slaughter 5* (Jan. 2018), available at https://www.nass.usda.gov/Publications/Todays_Reports/reports/lstk0118.pdf.

40. These conventional industry practices include the use of sow gestation crates and cramped battery cages that prevent the animals from even turning around. Gestation crates are 2.5-foot by 6.5-foot metal stalls that confine individual pigs for the duration of their pregnancy. Battery cages confine laying hens in tight spaces that measure between 67 and 86 square inches. Am. Veterinary Med. Ass'n, *Welfare Implications of Gestation Sow Housing* (Nov. 11, 2015), <https://www.avma.org/KB/Resources/LiteratureReviews/Documents/WelfareImplicationsOfGestationSowHousing.pdf>; A.S. Kiess et. al., *A Standardized Cage Measurement System: A Versatile Tool for Calculating Usable Cage Space*, 21 J. APPLIED POULTRY RESEARCH 658 (Sept. 1, 2012).
41. Conventional factory farms also perform painful mutilations on farm animals including beak trimming,⁷ castration,⁸ tail docking,⁹ and dehorning without adequate anesthesia.¹⁰
42. These practices cause harm to farm animals, depriving them of the ability to exist in their natural conditions and to satisfy their behavioral needs. "Evidence [] show[s] the harm of a barren environment, devoid of interest or natural stimuli, on complex, intelligent, social species and the importance of providing an enriched environment for normal neutral

⁷ Am. Veterinary Med. Ass'n, *Welfare Implications of Beak Trimming* (Feb. 7, 2010), <https://www.avma.org/KB/Resources/LiteratureReviews/Pages/beak-trimming-bgnd.aspx>.

⁸ Am. Veterinary Med. Ass'n, *Welfare Implications of Castration in Cattle* (July 15, 2014), <https://www.avma.org/KB/Resources/LiteratureReviews/Pages/castration-cattle-bgnd.aspx>; Isabel Davies, *NPA Research Shows Global Pig Welfare Differences*, *Farmers Weekly* (May 8, 2017), <https://www.fwi.co.uk/livestock/npa-research-shows-pig-welfare-differences-across-world>.

⁹ Am. Veterinary Med. Ass'n, *Welfare Implications of Tail Docking of Cattle* (Aug. 29, 2014), <https://www.avma.org/KB/Resources/LiteratureReviews/Pages/Welfare-Implications-of-Tail-Docking-of-Cattle.aspx?PF=1>.

¹⁰ Am. Veterinary Med. Ass'n, *Literature Review on the Welfare Implications of the Dehorning and Disbudding of Cattle* (July 15, 2014) https://www.avma.org/KB/Resources/LiteratureReviews/Documents/dehorning_cattle_bgnd.pdf.

development and the prevention of abnormal behavior.” Sara Shields, et. al., *A Decade of Progress toward Ending the Intensive Confinement of Farm Animals in the United States*, 7 ANIMALS § 3.2 (2017), available at <https://www.mdpi.com/2076-2615/7/5/40/htm>.

43. Despite these conditions, meat and poultry producers continue to market their animal products using animal welfare and environmental stewardship claims on packaging labels. Such labeling claims include “Animal Compassionate,” “Animal Friendly,” “Humane & Sustainable,” “Humanely Raised,” “Humanely Raised and Handled,” “Humanely Raised on Family Farms,” “Humanely Treated,” “Raised Humanely,” “Raised in a Humane Environment,” “Raised in a Stress Free Environment,” “Raised with Care,” “Socially Raised,” “Sustainable Agricultural Practices,” “Sustainable and Environmentally Friendly,” “Sustainable Farms,” “Sustainably Farmed,” and “Thoughtfully Raised.”¹¹
44. The animal welfare and environmental stewardship claims described above are “special statements and claims,” the use of which requires FSIS approval. 9 C.F.R. § 412.1(c)(3). However, FSIS does not meaningfully enforce this regulation because the agency requires little to no justification for label claims before approval.
45. Prior to filing its Petition, AWI conducted an in-depth review of FSIS’ pre-market approval process. It reviewed files, obtained through Freedom of Information Act requests, for 25 claims appearing on the packaging labels of 19 meat and poultry products. These files revealed that FSIS regularly approves the use of animal welfare and environmental stewardship labeling claims despite the lack of supporting evidence

¹¹ See Petition, *supra* note 1, at 4, 5, 42–60; *infra* note 13 (discussing additional claim approval files and FOIA non-responsive document letters not included in AWI’s 2014 petition that show new raising claims found on animal product labels).

documenting their accuracy. For 20 out of the 25 labeling claims reviewed by AWI, FSIS was unable to provide any documentation supporting the claims, and for the 5 remaining claims, FSIS provided documents with as little as one-sentence statements in support of the claims.¹²

46. Since submitting the Petition, AWI has continued to monitor FSIS' pre-market label approval process. With only the insufficient 2016 update to its Labeling Guideline, FSIS continues to regularly approve animal welfare and environmental stewardship claims with little to no supporting evidence.¹³

Consumer Protection and Misleading Practices

47. FSIS' failure to satisfy its mandate under the FMIA and PPIA to properly regulate misleading labeling has contributed to consumer deception, a lack of industry transparency, and decreased consumer confidence. Consumers believe that animal welfare and environmental stewardship claims have substance because they receive FSIS approval, when in fact the opposite is true, as exemplified by FSIS' own documents.¹⁴

48. Consumers' purchasing decisions often are deliberate. According to a 2018 survey by the National Chicken Council, 89% of consumers want more information about the chicken they buy and eat and 57% would look for this information on the product's packaging if it were available. Nat'l Chicken Council, *Survey Shows US Chicken Consumption Remains*

¹² See Petition, *supra* note 1, at 42–43.

¹³ AWI is in the process of preparing a comprehensive report of the agency's responses to its FOIA requests. While the final report is pending, the files corroborating the continuation of FSIS' shortcomings are available from Erin Thompson, Staff Attorney, AWI Farm Animal Program, on request.

¹⁴ Petition, *supra* note 1, at 4, 5, 42–60; *supra* note 13.

Strong (July 24, 2018), <https://www.nationalchickencouncil.org/survey-shows-us-chicken-consumption-remains-strong/>.

49. A survey commissioned by AWI in September of 2018 showed that 63% of consumers who frequently purchase animal products have checked the package label for information about how the animals were raised when shopping for meat, poultry, dairy, or eggs. AWI, *Survey of Consumer Attitudes about Animal Raising Claims on Food (Part I)* (Sept. 2018).¹⁵ Additionally, 71% of frequent purchasers of food animal products consider labeling claims when purchasing meat, poultry, dairy or egg products. *Id.*

50. Many consumers have expectations when they purchase products bearing animal welfare and environmental stewardship claims. A recent Consumer Reports survey found that consumers were in fact misled by the use of terms such as “humanely raised” on eggs, dairy, or meat labels:

82% believed that the producing farm was inspected to verify the claim;

77% believed that the animals had adequate living space;

71% believed that the animals were slaughtered humanely;

68% believed that the animals went outdoors;

65% believed that the animals were raised in houses with clean air; and

57% believed that the animals were raised without cages.

Consumer Reports Nat'l Research Ctr., *Food Labels Survey: 2016 Nationally-Representative Phone Survey 4* (April 6, 2016), available at http://greenerchoices.org/wp-content/uploads/2016/08/2016_CRFoodLabelsSurvey.pdf.

¹⁵ On file with Erin Thompson, Staff Attorney, AWI Farm Animal Program.

51. In an October 2018 survey conducted on AWI's behalf, 82% of those polled agreed that food producers should not be allowed to use the claim "humanely raised" on their product labels unless they exceed minimum industry animal care standards. AWI, *Survey of Consumer Attitudes about Animal Raising Claims on Food (Part II)* (Oct. 2018).¹⁶ Further, 86% agreed that the government should not allow the use of claims like "humanely raised" on food product labels unless the claims are verified through an independent inspection, and 83% agreed that it was important to them that the claims on food packaging about how farm animals were raised were verified by an independent inspection. *Id.* Independent third-party certification programs provide consistent, verifiable animal welfare criteria that typically exceed—or far exceed—conventional industry animal care practices. *See, e.g.,* Whole Foods Market, *5-Step® Animal Welfare Rating*, <https://www.wholefoodsmarket.com/mission-values/animal-welfare/5-step-animal-welfare-rating> (last visited Nov 13, 2018); A Greener World, *Certified Animal Welfare Approved by AGW*, <https://agreenerworld.org/certifications/animal-welfare-approved/> (last visited Nov. 13, 2018).¹⁷
52. Labeling claims verified by uniform and transparent independent third-party certification programs result in accurate product labeling that meets consumer expectations and facilitates informed food purchasing decisions; voluntary standards and certification systems assure consumers that their preferences are being met. Tracy M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 *ECOLOGY L.Q.* 107, 124 (2013); *see generally* AWI, *Label Confusion: How*

¹⁶ *Id.*

¹⁷ *See also* Petition, *supra* note 1, at 61.

“Humane” and “Sustainable” Claims on Meat Packages Deceive Consumers (May 2014), https://awionline.org/sites/default/files/publication/digital_download/FA-AWI-Food-Label-Report.pdf (describing the deceptive impacts of misleading food labels on consumers); AWI, *A Consumer’s Guide to Food Labels and Animal Welfare*, <https://awionline.org/content/consumers-guide-food-labels-and-animal-welfare> (last visited Nov. 13, 2018) (explaining the substantive meaning behind common animal welfare and environmental stewardship claims made on food labels).

Plaintiff’s Rulemaking Petition and Agency Response

53. To resolve deceptive and inaccurate labeling problems, AWI proposed commonsense and easily implementable regulatory amendments in its Petition. The amendments proposed that FSIS: (1) approve animal welfare and environmental stewardship label claims only after certification has been obtained from an independent third party that has audited practices pertaining to the claim; (2) obligate third-party certifiers to publish the standards producers must comply with in order to obtain certification under their respective programs; (3) require that all third-party standards for animal welfare and environmental stewardship claims exceed conventional meat and poultry industry standards related to the claim; and (4) not allow the Agricultural Marketing Service (“AMS”) to be used as a third-party certification program for animal welfare and environmental stewardship claims unless the standards employed by AMS exceed those of the conventional industry and are published for public review and comment, or the standards employed by AMS mirror those of an established third-party certification program for animal welfare and/or environmental stewardship.

54. After four-and-a-half years, Plaintiff still has not received any response from FSIS.

Defendants' failure to initiate rulemaking procedures or otherwise issue a substantive response to Plaintiff's Petition during this time can only be described as unreasonable, as the request was straightforward and Plaintiff provided ample, compelling evidence that producers are misbranding their products with animal welfare and environmental stewardship claims. FSIS also has not initiated rulemaking on its own initiative or addressed Plaintiff's concerns through its most recent Labeling Guideline.

55. Since Plaintiff filed its Petition, misleading labeling claims have continued to prevail in the industry, resulting in injuries to Plaintiff and its members that would have been prevented had FSIS promptly responded to and implemented Plaintiff's Petition.¹⁸ Each day that Defendants delay responding to and implementing Plaintiff's Petition, conventional farming practices continue to masquerade under higher animal welfare and environmental stewardship claims.

56. Defendants' failure to address the use of animal welfare and environmental stewardship claims on meat and poultry products in any systematic or meaningful way stands in derogation of their statutory duties under the FMIA and PPIA to protect consumers from misleading labeling practices, *see* 21 U.S.C. § 607(d), and their duties under the APA to provide Plaintiff with a prompt response to its Petition. This inaction harms Plaintiff and its members.

57. If an agency fails to respond to a Petition within a "reasonable time," courts will direct the agency to act. 5 U.S.C. § 555(b) (providing that "within a reasonable time, each agency shall proceed to conclude a matter presented to it").

¹⁸ *Supra* note 13 and accompanying text.

58. Because of the Defendants' ongoing delay, a court-ordered deadline is necessary to ensure that Defendants respond to the Petition within a specified time frame.

CAUSE OF ACTION

59. Plaintiff repeats and incorporates herein by reference each of the allegations set forth above.

60. On May 14, 2014, Plaintiff submitted a petition to amend labeling regulations under the FMIA and the PPIA to require third-party certification for the approval of animal welfare and environmental stewardship labeling claims. On June 9, 2014, AWI received an acknowledgement of receipt from FSIS.

61. The APA, 5 U.S.C. §§ 551–559, 701–706, provides for judicial review for a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.” *Id.* at § 702. “Agency action” includes the “failure to act.” *Id.* at § 551(13).

62. Defendants have a duty to respond timely to Plaintiff's Petition. *See id.* § 555(b). When unreasonable delay occurs, courts may “compel agency action unlawfully withheld or unreasonably delayed,” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* at §§ 701(1), 706(2)(A); *see also Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (deciding that a five-year delay in adjudicating an unemployment claim was unreasonable, explaining that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake,” and citing to “cases involving review of tariff revisions under 47 U.S.C. § 204, [where] we found a four year delay to be unreasonable”);

Telecomm. Research and Action Center v. Fed. Comm'n's Comm'n, 750 F.2d 70, 80–81 (D.C. Cir. 1984) (giving the Federal Trade Commission 30 days to resolve refund disputes that had been delayed for almost five years); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (“Three years from announced intent to regulate to final rule is simply too long given [a] significant risk of grave danger”); *Biodiversity Legal Found. v. Norton*, 285 F. Supp.2d 1, 16 (D.D.C. 2003) (finding that the Fish and Wildlife Service’s four-year delay in revising the Cape Sable seaside sparrow’s critical habitat designation after the issuance of a multi-species recovery plan resulted in serious consequences for a species’ chances for survival).

63. The APA also requires that agencies give “prompt notice” if they deny a petition and, “[e]xcept in affirming a prior denial or when the denial is self-explanatory,” give “a brief statement of the grounds for denial.” 5 U.S.C. § 555(e).
64. Despite these statutorily-imposed mandates, Defendants have failed to initiate rulemaking procedures or otherwise respond to Plaintiff’s Petition. This four-and-a-half-year delay is beyond the bounds of an ordinary, reasonable response time for an agency under the APA.
65. Defendants’ violation is ongoing. Their failure to properly regulate the use of animal welfare and environmental stewardship claims on meat and poultry product labels allows for intolerable deception to continue.
66. Due to Defendants’ failure to respond within a reasonable time, this Court should compel Defendants to act. *Id.* § 706(1).

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for judgment as follows:

67. A declaratory judgment that Defendants' inaction in response to the Plaintiff's Petition constitutes "unreasonable delay" in violation of the APA;
68. An order that Defendants respond substantively to the Plaintiff's Petition requesting third-party certification for animal welfare and environmental stewardship claims and that they do so within 60 days; and
69. Any other relief this court finds just and proper.

Respectfully submitted,

/s/ Shannon M. Arata

Shannon M. Arata (N.C. Bar No. 47544; U.S.D.C. Bar No. NC0006)

Lecturing Fellow

Michelle B. Nowlin (D.C. Bar No. 444060; U.S.D.C. Bar No. 444060)

Clinical Professor of Law & Supervising Attorney

Leigh Markowitz (certification pending)

Student Attorney

DUKE ENVIRONMENTAL LAW & POLICY CLINIC

210 Science Drive, Box 90360

Durham, NC 27708-0360

Phone: (919) 613-7873

Fax: (919) 613-7262

E-mail: shannon.arata@lawnet.duke.edu

nowlin@law.duke.edu

leigh.markowitz@lawnet.duke.edu

Dated: November 14, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, I caused a copy of the foregoing COMPLAINT to be electronically filed with the Clerk of the Court using the CM/ECF system. I further certify that I have served the same via first class mail, postage prepaid, in envelopes addressed as follows:

Stephen Vaden
Principal Deputy General Counsel
USDA Office of the General Counsel
Room 107W, Whitten Building
1400 Independence Avenue, SW
Washington, D.C. 20250-1400

Carrie Ricci
Associate General Counsel
Marketing, Regulatory, and Food Safety Programs Division
USDA Office of the General Counsel
Room 107W, Whitten Building
1400 Independence Avenue, SW
Washington, D.C. 20250-1400

Matthew G. Whitaker
Acting Attorney General of the United States
Office of the Attorney General
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Jessie K. Liu
United States Attorney for the District of Columbia
United States Attorney's Office
555 4th Street, NW
Washington, D.C. 20530

/s/ Shannon M. Arata
Shannon M. Arata (N.C. Bar No. 47544; U.S.D.C. Bar No. NC0006)
Lecturing Fellow
DUKE ENVIRONMENTAL LAW & POLICY CLINIC
210 Science Drive, Box 90360
Durham, NC 27708-0360
Phone: (919) 613-7873
Fax: (919) 613-7262
E-mail: shannon.arata@lawnet.duke.edu