

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PHYSICIANS COMMITTEE FOR
RESPONSIBLE MEDICINE,
5100 Wisconsin Avenue, NW, Suite 400
Washington, DC 20016,

Plaintiff

v.

U.S. DEPARTMENT OF AGRICULTURE
Jamie Whitten Building
1400 Independence Avenue, SW,
Washington, DC 20250,

Defendant.

Case No.: 19-1069

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This is an action under the Administrative Procedure Act, 5 U.S.C. § 706, and the Freedom of Information Act, 5 U.S.C. § 552, by the Physicians Committee for Responsible Medicine (“Physicians Committee”), seeking injunctive relief ordering the United States Department of Agriculture (“USDA”) to provide a substantive response to a petition submitted by the Physicians Committee on March 14, 2013, and a related Freedom of Information Act request, submitted by the Physicians Committee on April 7, 2017. The Physicians Committee’s petition requested that USDA regulate feces as an adulterant under the Federal Meat Inspection Act and the Poultry Products Inspection Act. Under the Administrative Procedure Act and USDA’s implementing regulations, the Physicians Committee is entitled to a response to its petition within a reasonable period of time, but nearly six years have passed, and the Physicians Committee has not yet

received such a response. USDA's unreasonable delay exposes the Physicians Committee's members to increased risk of harm from food contamination, deprives the Physicians Committee of the response to its petition, and violates the Administrative Procedure Act's requirement that the agency conclude matters presented to it in a reasonable time. In addition, USDA's failure, after more than two years, to respond to the Physicians Committee's information request seeking documentation of fecal contamination rates detected in poultry slaughter plants and other data related to poultry inspection and slaughter line speed violates the Freedom of Information Act.

JURISDICTION AND VENUE

1. Pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, and USDA's petition regulations, 9 C.F.R. § 392.5 and 7 C.F.R. § 1.28, and the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552(a)(6)(C)(i), the Physicians Committee has exhausted all administrative remedies and now seeks judicial review. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552, 706. This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1361. Venue lies in this district under 5 U.S.C. § 703.

PARTIES

2. Plaintiff Physicians Committee is a nonprofit public health advocacy organization that advocates for preventive medicine through proper nutrition and encourages higher standards for ethics and effectiveness in medical research. The Physicians Committee is a national organization representing more than 175,000

members, including 12,000 physicians, as well as other medical professionals, scientists, and lay persons.

3. Defendant USDA is a United States agency within the meaning of 5 U.S.C. § 552(f)(1). USDA regulates matters concerning agriculture.

STATEMENT OF FACTS

4. The Physicians Committee submitted a petition dated March 14, 2013, pursuant to USDA's petition regulations, 9 C.F.R. § 392.5 and 7 C.F.R. § 1.28, requesting that USDA regulate feces as an adulterant under the Federal Meat Inspection Act and the Poultry Products Inspection Act and take other related actions. On May 6, 2013, the Physicians Committee submitted an addendum to the petition. This complaint henceforth refers to the petition and addendum collectively as the "petition."

5. The Physicians Committee's petition asserted that meat and chicken that is contaminated with feces regularly passes USDA inspection. Although USDA implements a "zero tolerance" policy for fecal contamination, this policy applies to visible fecal contamination only. The result is that fecally contaminated meat and chicken products pass inspection as long as the feces on them are not visible to the naked eye. A federal inspector said, "We often see birds going down the line with intestines still attached, which are full of fecal contamination. If there is no fecal contamination on the bird's skin, however, we can do nothing to stop that bird from going down that line. It is more than reasonable to assume that once the bird gets into the chill tank (a large vat of cold water), that contamination will enter the water and contaminate all of the other carcasses in the chiller. That's why it is sometimes called 'fecal soup.'" The petition argued that the public deserves fair notice that food products deemed "wholesome" by USDA would be

deemed disgusting by the average consumer and adulterated under any reasonable reading of federal law.

6. The Physicians Committee's petition asked 1) that USDA regulate feces as an adulterant; 2) that USDA amend sections 317.2(1)(2), 381.125(b)(2)(i), and 381.125(b)(2)(ii) of Title 9 of the Code of Federal Regulations such that all meat and poultry product labels disclose the presence of feces; and 3) that USDA amend section 381.96 of Title 9 of the Code of Federal Regulations to remove the word "wholesome" from the official inspection legend so that it does not appear on poultry products. As set forth in the petition, the Federal Meat Inspection Act and the Poultry Products Inspection Act require USDA to protect consumers from adulterated and misbranded meat and poultry, not only through inspections at plants but also through officially approved labels affixed to meat and poultry products. The petition provided evidence that meat and poultry products regularly test positive for fecal contamination and as a result should be deemed adulterated and not labeled as "wholesome."

7. By letter dated April 15, 2013, USDA acknowledged receipt and declared that it considered the petition a rulemaking petition under the Administrative Procedure Act.

8. USDA published, and continues to publish, the petition in its "listing of petitions for rulemaking and policy change submitted to FSIS that have generated public interest" at <https://www.fsis.usda.gov/wps/portal/fsis/topics/regulations/petitions/>.

9. The Physicians Committee met with USDA officials in person to discuss the petition on August 19, 2014.

10. During this meeting, USDA officials stated that the petition was “actively under review” and had been assigned for technical review within USDA’s Food Safety and Inspection Service (“FSIS”). USDA officials indicated that a response to the petition had been delayed due to USDA’s focus on the impending New Poultry Inspection System described below.

11. In response to inquiries about the status of the petition from the Physicians Committee on January 6, 2014, February 18, 2015, January 4, 2016, and October 24, 2016, USDA responded that the petition was still open and under consideration.

12. To date, USDA has not provided a substantive response to the Physicians Committee’s petition.

13. On April 7, 2017, the Physicians Committee submitted a records request to USDA under the Freedom of Information Act, 5 U.S.C. § 552. The request sought records regarding the number of USDA poultry inspectors, detection rates for visible fecal contamination in poultry, average poultry line speed, USDA poultry inspection rates, and inspection training.

14. On April 18, 2017, USDA acknowledged receipt of the Freedom of Information Act request and assigned it tracking number FOIA-2017-00181.

15. On June 13, 2017, FSIS’s Freedom of Information Act officer contacted the Physicians Committee regarding the pending request. At FSIS’s suggestion, the Physicians Committee agreed to exclude USDA poultry inspection rates from the request to decrease FSIS’s administrative burden and thereby speed up FSIS’s response time.

16. On December 5, 2017, FSIS’s Freedom of Information Act officer again contacted the Physicians Committee regarding the pending request. At FSIS’s suggestion,

the Physicians Committee agreed to exclude noncompliance records from the request and focus instead on national compliance summaries to decrease FSIS's administrative burden and thereby speed up FSIS's response time.

17. On February 11, 2019, the Physicians Committee emailed FSIS's Freedom of Information Act officer to ask for an update on the status of FSIS's response to the pending information request. To date, the Physicians Committee has not received a response to this message or to the records request.

18. The risk of fecal contamination has increased in the six years since the Physicians Committee petitioned USDA. In August 2014, USDA created the New Poultry Inspection System, the codification of a pilot project that transferred most slaughter line inspection duties from USDA inspectors to private company employees and allowed an increase in slaughter and processing line speeds to between 140 and 175 birds per minute. Under the traditional inspection scheme, up to four USDA inspectors were assigned to a slaughter line. Only one USDA inspector is assigned to a slaughter line under the new system. Data have consistently shown that poultry slaughter plants operating under this privatized inspection model are more likely to fail USDA's performance standards for *Salmonella*, a bacteria found in feces, than those operating under the traditional inspection scheme. As of May 2018, 55 poultry plants had converted to the new inspection system. Nearly a third of these failed USDA's *Salmonella* performance standards. Furthermore, the New Poultry Inspection System rescinded the regulation that required poultry slaughter plants to test carcasses for generic *E. coli*, another bacteria found in feces. The new system leaves which tests to perform to the discretion of the slaughter plant.

19. In January 2018, USDA proposed codifying a similar privatized inspection pilot project at pig slaughter plants. The agency proposed this new system despite evidence that pig slaughter plants operating under the model were more likely to be cited for carcass contamination than plants operating under the traditional inspection system. A comparison of noncompliance reports from January 2012 to November 2016 for slaughter plants with privatized inspection versus those of similarly sized plants operating under traditional inspection showed that plants with privatized inspection were responsible for 73 percent of the reports filed for carcass contamination with feces, bile, hair, or dirt and 65 percent of the reports filed for general carcass contamination.

20. The Physicians Committee is harmed by USDA's failure to respond to its petition. Despite the passage of six years, USDA has not shared its determinations regarding the actions requested by the Physicians Committee in the petition. This has made it more difficult and costly for the Physicians Committee to achieve its organizational objective of protecting its members and the public from the negative health effects of consuming harmful products. USDA has deprived the Physicians Committee of valuable information concerning the reasons and justifications for failing to carry out the actions requested in the petition, thereby requiring the Physicians Committee to expend additional resources monitoring fecal contamination in meat and poultry products and sharing its findings with the public.

21. Due to USDA's failure to respond to its petition, the Physicians Committee sought to obtain some of this valuable information by submitting several information requests. On April 23, 2013, the Physicians Committee requested a copy of a training video used for FSIS poultry inspectors. USDA fulfilled the request on May 3,

2013. The Physicians Committee also submitted a 2017 request for documentation of fecal contamination rates detected in poultry slaughter plants and other data related to poultry inspection and slaughter line speed. USDA failed to respond to the 2017 Freedom of Information Act request, thereby exacerbating the harms noted in the preceding paragraph.

22. Educating the public about fecal contamination has been an area of involvement for the Physicians Committee and its members since 2001, when the Physicians Committee conducted a survey showing that consumers do not realize that most meat and poultry products contain feces and urged USDA to take action. In 2011, the Physicians Committee conducted a study, described in detail in the petition, testing 120 poultry products sold by 15 grocery store chains in 10 U.S. cities for the presence of fecal bacteria. Forty-eight percent of the products tested positive for feces. The Physicians Committee performed additional testing in other cities the following year and issued reports on its findings in 2012 and 2013. The Physicians Committee circulated these reports to its members and the public through its website, blog, and other media channels. As noted above, the Physicians Committee met with USDA in 2014 to discuss the petition and continues to monitor USDA's conduct and inspection trends. Absent a substantive response from USDA about how it will or will not address the petition's concerns about feces in meat and poultry, the Physicians Committee must continue to expend its own resources independently investigating and gathering information about the presence of feces in meat and poultry, as well as submitting Freedom of Information Act requests for relevant information, followed by subsequent reporting to its members and the public.

23. Members of the Physicians Committee and their children are also harmed by USDA's failure to respond to the petition and related Freedom of Information Act request. The Physicians Committee's members and their children are unwittingly exposed to fecal contamination through consumption of meat and poultry because USDA does not consider feces an adulterant. As a result of USDA's unreasonable delay and failure to act, the Physicians Committee's members and their children—not to mention the public in general—will continue to be at risk of harm from consumption of fecal matter in meat and poultry.

CLAIMS FOR RELIEF

CLAIM ONE

(Failure to timely respond to petition)

24. The Physicians Committee realleges and incorporates by reference paragraphs 1–23.

25. According to the Administrative Procedure Act, 5 U.S.C. § 555(b), each agency shall proceed to conclude a matter presented to it “within a reasonable time.”

26. According to USDA's petition regulation, 7 C.F.R. § 1.28, “petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.”

27. USDA's failure to provide a substantive response to the Physicians Committee's petition in a reasonable time constitutes agency action “unlawfully withheld or unreasonably delayed” under the Administrative Procedure Act, 5 U.S.C. § 706(1).

28. USDA's actions harm the Physicians Committee as described in paragraphs 18–23 above.

CLAIM TWO
(Failure to timely respond to Freedom of Information Act request)

29. The Physicians Committee realleges and incorporates by reference paragraphs 1–23.

30. According to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), an agency shall, within 20 business days of a request, determine whether or not it will comply with the request and notify the requester of its determination and reasoning.

31. USDA’s failure to provide a determination to the Physicians Committee within 20 business days constitutes a violation of the Freedom of Information Act.

RELIEF REQUESTED

WHEREFORE, the Physicians Committee respectfully requests that this Court:

- A. Declare that USDA violated the Administrative Procedure Act and USDA’s implementing regulations by failing to respond to the Physicians Committee’s petition;
- B. Declare that USDA violated the Freedom of Information Act by failing to respond to the Physicians Committee’s request;
- C. Order USDA to respond to the Physicians Committee’s petition by a date certain;
- D. Order USDA to respond to the Physicians Committee’s Freedom of Information Act request by a date certain;
- E. Award the Physicians Committee its reasonable attorney fees and litigation costs incurred in this action; and
- F. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Deborah Press

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