

November 1, 2019

VIA HAND DELIVERY

FSIS Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
Room 6065 South Building
1400 Independence Avenue, SW
Washington, D.C. 20250-3700

Deborah M. Shelton

Partner
202.857.6321 DIRECT
202.857.6395 FAX
deborah.shelton@arentfox.com

Re: Supplement to Petition No. 19-04: Request to Repeal the
Definition of “Spring Lamb” in 9 C.F.R. § 317.8(b)(4)

Dear FSIS Docket Clerk:

On behalf of The Lamb Company (the “Company” or “Petitioner”), we hereby respectfully submit this supplement to our Petition No. 19-04. This supplemental information is provided in response to the comments, dated October 14, 2019, submitted by the American Sheep Industry Association (ASI) opposing the Company’s Petition (“ASI Comments”).

ASI’s opposition is grounded wholly in inaccurate assertions, unsupported claims, and contradictory statements. In the absence of having any legal or other substantive grounds to advance in support of its position that the definition of “spring lamb” should be retained, ASI resorts to an overly simplistic protectionist narrative.

First, ASI misrepresents the Petition’s objective as allowing for “a foreign interest” to increase the quantity of lamb imported into the U.S. and “misleadingly” market its lamb products to U.S. consumers. This is false. As apparent from even a superficial reading of the Petition, the Company seeks the repeal of an obscure regulation promulgated decades ago in a specific time for a specific purpose that has no applicability in the 21st Century. The retention of this regulation in modern times only serves to confuse and mislead U.S. consumers into thinking that the exact same product labeled one way is different than that exact same product labeled another. In reality, however, the only difference between those two products is the label on that product.¹

Second, ASI’s comments are contradictory. On the one hand, ASI suggests that the significant adverse consequences of the current definition of “spring lamb” is an outlier applicable only to Company. Yet, just a few sentences later, ASI acknowledges quite the opposite. Specifically, ASI

¹ As the Company noted previously in its Petition, perhaps one representative of the sheep industry described this dilemma best when noting “[c]onsumers should not have to pay the higher price that some butchers get by calling ‘spring lamb’ at certain times of the year when there is really no difference.” (Petition at 7; note 25.)

states that “the issues stated by the Petitioner about having to pull product” and “[that it] must market its products under two different sets of labeling. . .” *“are also issues faced by U.S. lamb industry stakeholders.”* (ASI Comments at 2 (emphasis added)). In other words, the significant regulatory burden that results from being compelled to satisfy the antiquated definition of “spring lamb” does not somehow exclude the U.S. segment of the lamb industry; the adverse impact spans across the entire industry, as well as to consumers.

Third, ASI’s opposition to repeal of the definition of “spring lamb” relies on unsupported claims that U.S. consumers expect “spring lamb” to be “lambs born during the northern hemisphere season.” (ASI Comments at 2.) ASI elsewhere claims that consumers expect “spring lamb” to be produced “in accordance with the northern hemisphere seasonable patterns.” (ASI Comments at 3.) ASI offers no supporting data or other evidence for these assertions. Instead, ASI merely repeats them.

Moreover, in response to The Lamb Company’s evidence, including that of the government and of survey data, demonstrating the contrary – that is, consumers make no real distinction between “lamb” and “spring lamb,” understanding both to mean a young sheep (i.e., lamb versus sheep) - - ASI summarily seeks to dismiss all of it as somehow irrelevant or dated.² ASI’s position cannot be explained. Consumer understanding of a product name on a label is certainly relevant; indeed the label and the information provided therein is for the consumer. Presumably, in ASI’s view, consumer expectations only lack relevance when they are different than ASI would wish them to be.

As to ASI’s summary dismissal of Petitioner’s evidence being dated, it is factually correct that some of the Petitioner’s supporting references were published some time ago. Notably, however, those publications were issued decades *after* the issuance of the “spring lamb” definition. In other words, beginning years ago, there was already widespread recognition that the “spring lamb” definition promulgated years prior no longer had relevance. The references supplied in the Company’s Petition make clear that, over time, consumer consumption patterns and understanding of “spring lamb” changed dramatically. Indeed, the absence of newer references only serves to support Company’s position: the change in U.S. consumers’ expectations and practices has been in place for years and are well-established such that the “spring lamb” definition has been rendered obsolete. Finally, Company would be remiss if it did not also note that, on the one hand, ASI argues that that the “spring lamb” definition should be retained to fulfill consumer expectations, while, on the other, seems to suggest that the USDA should only focus on industry stakeholders’ point of view.

² The supporting information provided by the Lamb Company in support of its Petition has been compiled from a diverse set of resources, including the government (i.e., the governmental entity that issued the “spring lamb” regulation, the War Food Administrator, prior to its functions being transferred to the USDA).

The additional miscellaneous arguments advanced by ASI in support of its opposition also fall flat. For example, ASI posits that consumers are willing to pay a premium for “spring lamb” products and that if the definition was outdated that would not be the case.³ Even if taken at face value, however, the fact that consumers are willing to pay more for product labeled “spring lamb” fails to demonstrate that any such willingness is due to the consumer understanding “spring lamb” to be tied to a specific time of slaughter: during the period of March and the first week of October in accordance with the “spring lamb” definition at 9 C.F.R. 317.8(b)(4).

In sum, and as ASI acknowledges,⁴ U.S. lamb production has evolved in response to cultural and economic factors at all stages in the production and marketing chain. To put it simply: the marketplace has evolved, consumers have evolved, the U.S. lamb industry has evolved, and now the regulatory definitions need to evolve accordingly. The definition of “spring lamb” in the FSIS regulation is outdated. It is out of step with modern U.S. domestic production practices and the role of international operations in supplying lamb to the U.S. market.

Thus, the Company reiterates its Petition request that FSIS grant its petition by repealing the “spring lamb” regulation. In the interim, the Company requests that FSIS exercise its enforcement discretion to permit lamb products to be marketed on a year-round basis with labeling that includes the term “spring lamb,” provided that labels otherwise fully comply with the Agency’s laws, regulations, and policies.

Respectfully,



Deborah M. Shelton, Esq.

Arent Fox LLP

1717 K Street, NW

Washington, DC 20006

Telephone: (202) 857-6321

Email: deborah.shelton@arentfox.com

Counsel for the Lamb Company, Petitioner

³ In making this assertion, ASI engages in fallacious reasoning at best. Thus, ASI does not and cannot provide any evidence to support this claim. There simply is no evidence to suggest that customers “willingly” pay a “premium price” for product labeled as “spring lamb” because of some sort of belief that “spring lamb” represents superior product. In fact, if customers were to hold such a belief, that would only serve to demonstrate the threat of consumer deception created by having the exact same product labeled two different ways – “lamb” versus “spring lamb” depending on the time of the year that the lamb were slaughtered. And, in any case, there certainly is no evidence that customers would not be even more “willing” to purchase lamb product at a lower price.

⁴ ASI Comments at 3.

cc: Paul Kiecker, Deputy Administrator
Roberta Wagner, Assistant Administrator, Office of Policy and Program Development
Roselyn Murphy-Jenkins, Director, Labeling and Program Delivery Staff