

Congress of the United States
Washington, DC 20510

July 30, 2018

Carmen Rottenberg
Acting Deputy Under Secretary for Food Safety
Food Safety and Inspection Service
United States Department of Agriculture
Jamie L. Whitten Building #331E
Washington, D.C. 20250

Dear Acting Deputy Under Secretary Rottenberg,

We write to urge the Food Safety and Inspection Service (FSIS) to abandon its new policy for waiving rules limiting line speeds for certain poultry plants and to request a periodic update of records requested in this letter regarding applications received and waivers issued under this policy. Poultry workers suffer work-related injury and illness at rates 60 percent higher than the average worker and suffer work-related illnesses at a rate six times higher than the average worker.¹ As one example, workers in the poultry industry suffer finger amputations at the single highest rate of any U.S. industry.² These are among the most vulnerable and exploited workers in the country, and FSIS must prioritize their welfare and safety when crafting line speed rules.

We previously wrote to express our opposition to a September 2017 petition by a special interest group asking FSIS to implement an unlawful “waiver system” to exempt young chicken establishments from line speed limits.³ Appropriately, FSIS denied the petition.⁴ However, according to new FSIS guidance, the agency may allow poultry plants to run their lines faster than current law permits if they meet certain enumerated criteria.⁵ It appears the agency is

¹ See Deborah Berkowitz & Hooman Hedayatti, “OSHA Severe Injury Data From 29 States: 27 Workers a Day Suffer Amputation or Hospitalization, NATIONAL EMPLOYMENT LAW PROJECT (Apr. 27, 2017) *available at* <https://www.nelp.org/publication/osha-severe-injury-data-from-29-states/>; “Incidence rates of nonfatal occupational illness, by industry and category of illnesses, 2016,” BLS *available at* https://www.bls.gov/iif/oshwc/osh/os/snr08_00_2016.xlsx (showing illness rate for poultry workers is 6.3 times as high as the average). In 2007, the illness rate for poultry workers was 5.3 times as high. “Highest incidence rates of total nonfatal occupational illness cases, private industry, 2007,” BLS *available at* <https://www.bls.gov/iif/oshwc/osh/os/ostb1906.pdf>

² Nevin, Bernt, & Hodgson, *Association of Poultry Processing Industry Exposures With Reports of Occupational Finger Amputations*, 59 J. OCCUPATIONAL AND ENVTL. MED. E159 et. seq. (Oct. 2017).

³ Letter from Senator Murray and Representative DeLauro to FSIS Acting Deputy Under Secretary Rottenberg (Nov. 17, 2017) *available at* <https://www.fsis.usda.gov/wps/wcm/connect/d37f5e41-cea5-4260-9eca-d54157dc63a/17-05-Ltr-TwoCongress-Opposing-Petition110617.pdf?MOD=AJPERES>.

⁴ Letter from FSIS Acting Deputy Under Secretary Rottenberg to Michael Brown, President, National Chicken Council (Jan. 29, 2018) *available at* <https://www.fsis.usda.gov/wps/wcm/connect/235092cf-e3c0-4285-9560-e60cf6956df8/17-05-FSIS-Response-Letter-01292018.pdf?MOD=AJPERES>.

⁵ Food Safety and Inspection Service, *FSIS’ Criteria for Consideration of Waiver Requests from Young Chicken Slaughter Establishments to Operate at Line Speeds Up to 175 Birds Per Minute*, 21 FSIS Constituent Update 19 (Feb. 23, 2018) *available at* <https://www.fsis.usda.gov/wps/wcm/connect/ee977696-7f87-4b87-8717->

attempting to effectively grant the September petition by other means. We have serious concerns that increased line speeds will further jeopardize the safety of these already vulnerable workers, and it appears the agency lacks the authority to grant these waivers.

FSIS regulations restrict the Administrator's authority to waive line speed limits to a narrow set of circumstances. The agency's regulations under the Poultry Products Inspection Act permit the FSIS Administrator to:

Waive for *limited* periods any provision of the regulations in order to permit appropriate and necessary action in the event of a public health emergency or to permit experimentation so that *new* procedures, equipment, and processing techniques may be tested to facilitate definite improvements: Provided, [t]hat such waivers . . . are not in conflict with the purposes or provisions of the Act.⁶

As FSIS identifies no public health emergency, its regulations authorize waivers here *only* if they “permit experimentation so that new procedures, equipment, and processing techniques may be tested to facilitate definite improvements.” The waivers FSIS contemplates fail to meet these criteria. Faster line speeds may result from new procedures or equipment, but they are not, standing alone, a “new procedure[], equipment, [or] processing technique[].” FSIS itself acknowledged as much in a 2003 Federal Register notice.⁷ Further, merely running lines at faster speeds is not “new”: twenty select plants have been authorized to operate above current limits since 2007.⁸

Additionally, the agency does not instruct applicants to demonstrate that waivers will “facilitate definite improvement” as required by FSIS regulation. According to the agency's announcement, waiver applicants need only show that they can “maintain process control” while operating their lines at speeds exceeding the current limits.⁹ To be valid, a waiver must accomplish more: it may not merely “maintain” the status quo, but must produce something appreciably better (“improve[d]”). Also, FSIS has not limited the waivers to temporary periods as required by the regulation.¹⁰

Finally, FSIS must consider worker safety as it administers the law.¹¹ The agency's new waiver policy implicates worker safety yet fails to consider or even mention the adverse effects of faster

[15a824ce0a81/ConstiUpdate022318.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ee977696-7f87-4b87-8717-15a824ce0a81](https://www.fsis.usda.gov/oc/constitutive/15a824ce0a81/ConstiUpdate022318.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ee977696-7f87-4b87-8717-15a824ce0a81); 9 C.F.R. § 381.69(a) (establishing a line speed limit of 140 birds per minute (bpm)).

⁶ 9 C.F.R. § 381.3(b) (emphasis added).

⁷ FSIS Procedures for Notification of New Technology, 68 Fed. Reg. 6,873, 6,874 (Feb. 11, 2003) (“Following are . . . examples of new technologies that could adversely affect product safety, inspection procedures, inspection program personnel safety, or Agency regulations: A new technology that changed the line speeds for poultry would require a waiver to the regulations for a limited time to test the new technology . . .”).

⁸ Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49,566, 49,567 (Aug. 21, 2014) (“since 2007, HIMP young chicken establishments have been authorized to operate at line speeds of up to 175 bpm . . .”).

⁹ *Supra* note 5.

¹⁰ See *id.*

¹¹ FSIS recently acknowledged that its Poultry Products Inspection Regulations (which include the waiver rules) derive their statutory authorization in part from the Humane Methods of Slaughter Act (7 U.S.C. § 1901 et seq.).

line speeds on the people working those lines every day. Strikingly, within the waiver criteria themselves, FSIS acknowledges the danger accompanying faster line speeds, but only requires facilities seeking a waiver to demonstrate how increased speeds “will not negatively impact *FSIS employee safety* nor interfere with inspection procedures.”¹² Poultry plant workers vastly outnumber FSIS inspectors and work in closer proximity to the lines for many more hours than FSIS inspectors. They deserve at least the same degree of concern and regulatory protection. It would be unconscionable to suggest otherwise.

In order to understand how the agency is issuing waivers and whether waivers would impact worker safety, we request the following information:

1. A list of all applications received by FSIS since February of 2018 for any waiver of the requirements established in 9 C.F.R. § 381.69 (maximum line speeds under the new poultry inspection system) by name, petition or application number, and disposition (granted, denied, or pending FSIS review);
2. An explanation about whether and how the agency factored worker safety into its analysis of the decision to grant or deny a waiver; and
3. An explanation of the time limitations placed on any waivers granted.

Please produce the requested documents no later than August 15, 2018. Please update this list of requested documents every 30 days thereafter through February 15, 2019. We understand that FSIS has already received applications for line speed waivers from Ozark Mountain Poultry,¹³ Pilgrim’s Pride Corporation,¹⁴ Gerber Poultry, Inc.,¹⁵ and Peco Foods.¹⁶

We urge FSIS to abandon its waiver policy, fully consider the impact of its actions upon poultry worker safety, and reaffirm a commitment to the law. While FSIS is appropriately afforded some discretion in the administration of its programs, it must take into account the safety of workers and comply with its own regulations. If you have any questions, please contact

Elimination of Trichinae Control Regulations and Consolidation of Thermally Processed, Commercially Sterile Regulations, 83 Fed. Reg. 25,302, 25,308 (May 31, 2018). Congress premised that Act in part on its finding that humane methods in the slaughter industry result in “safer and better working conditions.” 7 U.S.C. §1901. Thus, FSIS must understand that Congress intended for the agency to consider worker safety as it administers its programs. *See also Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010) quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir.2008) (en banc), *overruled on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008) (“[W]e will reverse a decision . . . if the agency . . . entirely failed to consider an important aspect of the problem . . .”).

¹² *Supra* note 5 (emphasis added).

¹³ Ozark Mountain Poultry, Petition to the Food Safety and Inspection Service for line speed waiver, Apr. 11, 2018. On file with Senate Committee on Health, Education, Labor and Pensions.

¹⁴ Pilgrim’s Pride Corp., Request for line speed waiver from the Food Safety and Inspection Service, Mar. 22, 2018. On file with Senate Committee on Health, Education, Labor and Pensions.

¹⁵ Gerber Poultry, Inc., Request for line speed waiver from the Food Safety and Inspection Service, Mar. 16, 2018. On file with Senate Committee on Health, Education, Labor and Pensions.

¹⁶ Food Safety and Inspection Service, Response to FOIA request from Tony Corbo, May 11, 2018. On file with Senate Committee on Health, Education, Labor and Pensions.

John_DElia@help.senate.gov and Leticia.Mederos@mail.house.gov. We look forward to hearing from you.

Sincerely,

A handwritten signature in blue ink that reads "Patty Murray". The signature is fluid and cursive, with the first name "Patty" being more prominent than the last name "Murray".

Patty Murray
U.S. Senator
Ranking Member
Committee on Health, Education,
Labor, and Pensions

A handwritten signature in blue ink that reads "Rosa L. DeLauro". The signature is cursive and elegant, with the first name "Rosa" and last name "DeLauro" clearly visible.

Rosa L. DeLauro
U.S. Representative
Ranking Member
Subcommittee on Labor, Health
and Human Services, Education, and
Related Agencies
Committee on Appropriations