

Congress of the United States

Washington, DC 20510

November 2, 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 regarding the Food Safety and Inspection Service's (FSIS) response to comments and information on waiver criteria (the Notice) published in the Federal Register on September 28, 2018.¹ The Notice provides information on FSIS's efforts to permit poultry plants to run their lines at faster speeds. On July 30, 2018, we urged FSIS to abandon this policy because it would exceed the agency's authority and endanger poultry workers' safety.² We appreciate the agency's response of August 17, 2018; unfortunately, according to the Notice, FSIS is still contemplating an unlawful course of conduct that would endanger some of the most vulnerable workers in the country. FSIS's plan to allow plants to run lines at faster speeds increases risks to worker safety. Further, the faster line speed is clearly not directed at improving food safety, as the waivers only require that plants maintain the status quo on food safety. Once again, we urge you to abandon this effort.

Governing FSIS regulations provide that plants operating under the New Poultry Inspection System must operate their line speeds at a rate no faster than 140 birds per minute.³ The FSIS Administrator may waive this rule *only* "for limited periods . . . 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."⁴ The waivers FSIS is considering likely exceed its authority because the agency has not limited the waivers' duration, required a showing of any "definite improvements" or any "new" procedures, equipment and techniques, or considered the impact of such waivers on poultry workers' safety.

In the Notice, FSIS attempts to defend the validity of its waiver policy, but again fails to show that its criteria meet the minimum requirements of current regulations. The agency claims that the waivers are time limited because "if the data generated under the waivers support regulatory changes . . . waivers will be in effect only until the rulemaking process is complete," whereas

¹ See Petition to Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating under the New Poultry Inspection System; Criteria for Consideration of Waiver Requests for Young Chicken Establishments to Operate at Line Speeds of up to 175 Birds Per Minute, 83 Fed. Reg. 49048 (Sept. 28, 2018).

² Letter from Sen. Patty Murray and Rep. Rosa DeLauro to Carmen Rottenberg, Acting Deputy Under Secretary, FSIS (Jul. 30, 2018) available at <https://subscriber.politicopro.com/f/?id=00000166-1de3-d3a5-abf6-1deba78d0001>.

³ 9 C.F.R. § 381.69(a).

⁴ 9 C.F.R. § 381.3(b).

“[i]f the data generated do not support regulatory changes, the waivers will be terminated.”⁵ This “limitation” is no limitation at all; it would render meaningless the restriction on the Administrator’s authority clearly intended by the words “limited periods” since the Administrator could deem any otherwise unlawful waiver to be valid simply by stating an indefinite intent to issue *or not issue* a rule at some undetermined time in the future. The regulations require FSIS to cabin the period of any waiver it grants within actual limits.

FSIS also claims the waivers are premised on “new technology,” even though merely running lines at faster speeds is neither itself a technology nor new: select plants have been authorized to operate at speeds exceeding the current limits since 2007.⁶ FSIS deals with this uncomfortable fact by conceptualizing “new technology” to include “new applications of” existing technology and stating that running lines at a faster speed is a “new application of existing technology *in facilities that have never operated at these higher speeds in the past.*”⁷ Further, FSIS speculates that “some facilities that request waivers would have to install new equipment or reconfigure existing equipment in order to accommodate higher line speeds”⁸ – but fails to require the bona fide experimentation with “new” procedures and equipment that the regulations require. If the agency wishes to grant waivers, it should require they facilitate genuinely “*new* procedures, equipment *and* processing techniques.” Running lines at faster speeds is not a new procedure or a new processing technique and faster lines are certainly not “new equipment.” Waivers must facilitate the use of both new procedures *and* new equipment.⁹

The criteria also fail to require that waivers facilitate “definite improvement” as mandated by the regulations: waiver applicants need only show that they can “maintain process control” while operating at faster speeds. Mere “maintenance” of the status quo is not a “definite improvement.” Rather than specifying actual improvements that applicants must show, the agency argues that “definite improvement” means “*any* improvement of equipment, substances, methods, processes, or procedures,” and increasing “efficiency” of production by running faster lines would itself be the “definite improvement” required by the regulations.¹⁰ This too would render the language of the waiver regulation meaningless. Almost *every* plant that seeks a waiver of the line speed limits does so to run its lines faster and thereby increase production. To protect the public interest, FSIS regulations ensure that such waivers are only granted when justified by some *improvement* produced as a result. While faster line speeds may increase the profitability of the firms FSIS regulates, it does not produce the kind of “improvement” Congress created FSIS to secure.¹¹

⁵ Notice at 49053.

⁶ Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566, 49567 (Aug 21, 2014).

⁷ Notice at 49053 (emphasis added).

⁸ *Id.*

⁹ Compare 9 C.F.R. § 381.3(b) (permitting poultry regulation waivers “so that new procedures, equipment, *and* processing techniques may be tested”) (emphasis added) with 9 C.F.R. § 303.1(h) (permitting meat regulation waivers “so that new procedures, equipment, *and/or* processing techniques may be tested) (emphasis added).

¹⁰ Notice at 49053.

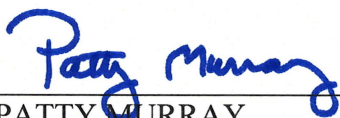
¹¹ With regard to its parallel, almost identically worded waiver rule under the Federal Meat Inspection Act, FSIS explained that the waiver authority “reflects a judgment that certain provisions of the regulations as applied in specific situations should be temporarily suspended *in order to achieve the purposes of the FMIA* and that the alternative course of action pursued during such a limited period is not inconsistent with FMIA provisions. Experimentation With Procedures for Determining Intensity of Inspection Coverage in Processing Establishments; Waivers of Provisions of Regulations, 52 FR 48084, 48086 (Dec. 18, 1987) (emphasis added). Nowhere in the Poultry Products Inspection Act’s declaration of policy did Congress mention the profitability of poultry processing

Lastly, FSIS tries to excuse its failure to consider plant worker safety in developing its waiver criteria by explaining the difference between its mission and that of the Occupational Safety and Health Administration.¹² While FSIS is correct that “OSHA is the Federal agency with statutory and regulatory authority to promote workplace safety and health,”¹³ it cannot ignore its responsibility for the worker safety issue created by its decision to enable plants to run their lines faster.¹⁴ This responsibility for worker safety, in fact, was clearly evidenced by FSIS’s coordination with OSHA during its formulation of the 2014 rule on line speeds. The same consideration should be accorded to worker safety in developing the criteria for these waivers.

Finally, we again note that the workers who will be impacted by FSIS’s decision to allow faster line speeds are some of the most vulnerable workers in the country and already suffer workplace safety and health issues at alarming rates. No agency should take any action to put them at further risk.

For all of the above reasons, we again urge FSIS to abandon its impermissible waiver policy. If the agency wishes to grant waivers, it must issue valid criteria that clearly require compliance with the controlling rules at 9 C.F.R. 381.3(b). Please continue to comply with the ongoing information request in our letter of July 30, 2018, attached for your reference, which requires that FSIS provide updates on the status of pending waivers every thirty days through February 2019. Two thirty-day periods have passed since our last update from FSIS. If you have any questions about this letter, please contact [John DElia@help.senate.gov](mailto:John_DElia@help.senate.gov) and Leticia.Mederos@mail.house.gov. Thank you for your attention to this letter.

Sincerely,



PATTY MURRAY
Ranking Member
U.S. Senate
Committee on Health, Education, Labor and
Pensions



ROSA L. DELAURO
Ranking Member
U.S. House of Representatives
Labor, Health and Human Services, Education,
and Related Agencies Subcommittee on
Appropriations

firms. 21 U.S.C. § 452. Waiving rules to improve firms’ profit margins also runs counter to FSIS’s own statement later in the Notice that “The Acts authorize FSIS to administer and enforce laws and regulations *solely* to protect the health and welfare of consumers.” Notice at 49057 (emphasis added).

¹² Notice at 49057.

¹³ *Id.*

¹⁴ *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency actions violate the Administrative Procedure Act “if the agency has . . . entirely failed to consider an important aspect of the problem . . .”).

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-d54157dcb63a/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](#); 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 fluid and cursive, with the first name "Rosa" being more prominent than the last name "DeLauro".

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