



Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003

December 12, 2017

Carmen Rottenberg
Acting Deputy Undersecretary for Food Safety
Food Safety and Inspection Service
U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250-3700

SUBMITTED VIA REGULATIONS.GOV

**RE: Docket No. FSIS-2017-0045
Request for Comments on the National Chicken Council's Petition to Permit Waivers
of Maximum Line Speed Rates**

Dear Acting Deputy Undersecretary Rottenberg,

The Animal Welfare Institute (AWI) submits these comments in opposition to granting the National Chicken Council's (NCC) petition for the Food Safety and Inspection Service (FSIS) to implement a new waiver system allowing processors to operate without line speed limitations. AWI was established in 1951 to reduce the suffering caused by humans to all animals, including poultry at slaughter. Because treatment of poultry affects food safety, and a waiver system providing for unlimited line speeds will ultimately negatively impact poultry welfare, AWI opposes the proposed waiver system and requests that the FSIS deny the NCC's petition.

I. Allowing poultry processors to run at unlimited line speeds will result in loss of process control and impact animal welfare.

Absent from the NCC petition is any mention of the potential ramifications of the proposed change on the billions of chickens killed every year in US poultry establishments. In addition, there is no evidence that the FSIS has attempted to study the impact of increased slaughter line speed on the handling of live birds, the level of carcass adulteration, or the incidence of loss of process control. This should be done prior to any changes being made in the current system.

While the FSIS has declined to cover birds under the federal humane slaughter law, it has acknowledged that humane handling of birds at slaughter is "good commercial practice" under the Poultry Products Inspection Act (PPIA), because employing humane methods of handling and slaughter increases the likelihood of producing unadulterated product. According to the FSIS, birds who have not been treated humanely are more likely to be bruised or to die other than by slaughter.

The proposed rule will permit faster slaughter line speeds than are allowed under the current inspection systems, and this heightened speed increases the possibility that individual birds will

be bruised or otherwise injured, and that birds will die other than by slaughter. Increased line speed poses a risk to animal welfare in the following ways:

- Workers stressed by the demands of increased speed may act out their frustrations by physically abusing live birds, resulting in injuries to birds like bruises and fractures.
- Less time for shackling birds can lead to less care in handling and increased incidence of injuries like bruises and fractures.
- Less time can lead to more incidents of improper shackling, such as shackling by one leg or by a wing or the head. Improper shackling can result in birds not being properly stunned, which leads to birds missing the cutter and entering the scald tank alive.
- Less time for birds to settle after being shackled can result in increased flapping at the entrance to the water-bath stunner, which can lead to pre-stun shocks, delayed or interrupted stunning and even birds missing the stunner altogether.
- Less time in the water-bath stunner can result in inadequate stunning, which can lead to a greater number of birds missing the throat-cutting machine, which in turn can result in birds entering the scalding tank while still alive and dying other than by slaughter.
- Faster line speeds will shorten the length of time available to administer a back-up stun if needed, which can lead to a greater number of birds missing the throat-cutting machine and entering the scalding tank while still alive and dying other than by slaughter.
- A decreased bleed time can also result in more birds entering the scald tank alive and dying other than by slaughter.

The problems presented by increased speed are exacerbated by the fact that the FSIS has failed to adopt any regulations governing the humane handling and slaughter of poultry. In addition to denying the NCC petition, we strongly recommend that the FSIS grant the Animal Welfare Institute's petition (#13-08) calling for the implementation of humane handling regulations for poultry under the PPIA. Recent undercover investigations at federal slaughter plants have documented abuse of birds that is not currently covered by regulation, including throwing birds against a wall, burying live birds in piles of dead birds, breaking birds' legs by violently slamming them into shackles, and jabbing birds with metal hooks to remove them from their cages. In certain plants this inhumane handling occurs repeatedly, and inspectors are powerless to stop it. The regulations called for in the AWI petition would not only help reduce inhumane handling of birds, but they would also reduce instances of loss of process control and carcass adulteration.

II. Implementing a Waiver System Without Engaging in Formal Rulemaking Violates the Administrative Procedure Act.

The Administrative Procedure Act (APA) requires that agencies meet certain minimum procedural requirements when creating or amending a rule. 5 U.S.C. § 553. As proposed, the waiver system creates a new rule in violation of these procedural requirements. *Id.* Because granting the petition and creating a waiver system amounts to rulemaking in violation of the APA, FSIS should deny the NCC's petition.

Currently, the FSIS regulations establish a line speed at 140 birds per minute (BPM). 9 C.F.R. § 381.69(a). The NCC's petition asks the FSIS to waive the maximum BMP limit – and allow processors to operate at any chosen speed – if a three-factor test is met and process control is maintained. If the FSIS implemented NCC's proposed waiver system, it would create a rule. The

waiver system is “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing . . . procedure . . . of an agency.” *Id.* § 551(4). The waiver system meets the APA’s rule definition in several ways. First, the waiver system is prospective, as it would apply to future interested parties. Second, the waiver system is generally applicable and implements agency policy or procedure – under the new rule, the agency will have a policy or procedure of accepting waivers based on the system proposed by NCC. Third, the proposed waiver system has the effect of amending the existing line speed limit by allowing producers to operate at any chosen speed instead of at a maximum speed set by regulation – this amendment is a new rule. *Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992) (agency adoption of a new construction of a rule repudiating or substantially amending the effect of an older rule is a new rule requiring § 533 process).

Because the waiver system would be a new rule, the FSIS is required to meet the procedural requirements of the APA prior to implementation. Agency rulemaking requires that notice of proposed rules be published in the Federal Register, 5 U.S.C. § 553(b), so that interested parties may have the opportunity to participate via written comments. *Id.* § 553(c). The FSIS’s Constituent Update regarding the petition and the public comment period provided on regulations.gov all but concede that the agency should have undergone APA rulemaking. For example, the Constituent Update states “FSIS anticipates that it will receive a significant number of comments” and therefore opens a docket on the matter to “facilitate submission and public posting” of comments on the petition.¹ Posting notice in the Constituent Update does not meet the requirement of publication in the Federal Register.

Additionally, because the rule making procedure has been inadequate, any comments collected in response to the petition would not be sufficient under the requirements of the APA. Comments need to be in direct response to an agency proposal for rulemaking, and the agency is required to respond to comments in a reasoned manner and explain how the agency resolved significant problems raised by commenters. 5 U.S.C. § 553(c); *Action on Smoking & Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983).

Finally, the proposed waiver system does not qualify as an exception to APA rulemaking. 5 U.S.C. § 553(b). The proposed waiver system cannot be an interpretative rule because it is not a statement of general policy nor a rule of organization or procedure. *Id.* § 533(b)(3)(A). Nor has the agency demonstrated that notice and comment is impracticable, unnecessary or contrary to the public interest. *Id.* § 533(b)(3)(B).

If FSIS granted the NCC’s petition without engaging in proper rulemaking procedure, it would be arbitrary and capricious and without observation of procedures required by law. 5 U.S.C. § 706(2)(A); (D).

¹ U.S. DEP’T OF AGRIC., FOOD SAFETY AND INSPECTION SERV., *FSIS Constituent Update*, Vol. 21, No. 2 at 1 (Oct. 13, 2017) available at https://www.fsis.usda.gov/wps/wcm/connect/a54d5331-372e-4df3-ac4d-8c2953969039/ConstiUpdate101317.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=a54d5331-372e-4df3-ac4d-8c2953969039.

III. Implementing a Waiver System is Contrary to the Purpose of the PPIA and its Regulations.

The PPIA was created to prevent contaminated or adulterated products from entering the food system. To implement this purpose, the FSIS regulations create a system of oversight and inspection. If adopted, the proposed waiver system would violate the PPIA's regulations, statutory language, and purpose.

While the Administrator does have discretion to waive provisions of FSIS regulations, she may do so only under certain circumstances. 9 C.F.R. § 381.3(b). Specifically, the Administrator may only do so for "limited periods" and only in the event of a public health emergency or for experimentation to facilitate *definite* improvements if the waivers are not in conflict with the purposes or other provisions of the PPIA. *Id.*

NCC's petition does not demonstrate how the waiver requirements have been met, and granting the petition would be arbitrary and capricious. 9 C.F.R. § 381.3(b); 5 U.S.C. § 706(2)(A). NCC's petition proposed a *permanent* waiver system. This is not allowed under the express language of § 381.3(b). Additionally, the proposed waiver system is not meant to address a public health emergency or for experimentation. *Id.* It is clearly proposed to increase output. The purpose of the petition – to allow increased line speeds – is a profit-motivated objective. Increased speeds allow NCC operators to produce more processed chicken with less inputs; it takes less time, money, and human capital to process chickens if they are whizzing by at faster rates. Finally, the improvements described in the petition are far from *definite*.

Granting this waiver would also present a direct conflict with the purposes of the PPIA. The PPIA was created to prevent adulterated poultry products from entering the food system and ensure poultry products are slaughtered and processed under sanitary conditions. This waiver directly conflicts with these purposes because operation of unlimited line speeds puts food safety at risk and increases poultry adulteration. A higher line speed means less time per bird for inspection, and will lead to more adulterated carcasses related to bird handling, such as bruising, broken limbs, and entering the scald tank without being properly bled.

Finally, the PPIA also requires a hearing be held for "oral presentation of views" for interested parties when the agency engages in rulemaking related to its subject matter. 21 U.S.C. § 463(c). The FSIS has not held such a public hearing, and a public comment period provided on regulations.gov is not a lawful substitute for the hearing requirement.

Granting the petition and creating a waiver system without following the FSIS's regulations or the PPIA's statutory requirements would be arbitrary, capricious, an abuse of discretion, 5 U.S.C. § 706(2)(A), and without observance of procedure required by law, *id.* § 706(2)(D). As such, the FSIS should deny NCC's petition.

IV. Granting NCC's Petition Would be Arbitrary and Capricious Because the Agency Already Determined not to Permit Faster Line Speeds.

As the FSIS is aware, in 2014 considered line speeds when it implemented the New Poultry Inspection System. 79 Fed. Reg. 49,566. During the rulemaking process, the FSIS expressly considered whether higher line speeds were necessary and would fulfill the purpose of the PPIA, but ultimately determined to set line speeds at 140 bpm. *Id.* at 49,635. To address the concerns of poultry processors who asked for higher line speeds during the rulemaking process, the FSIS

created a system in which it would reconsider line speeds when certain circumstances were met. *Id.* at 49,591. None of these circumstances have been met – and NCC’s petition for a waiver system fails to address why the FSIS should reverse course and not require these circumstances to be met. To grant the petition without the same kind of APA rule making process described in Section II and provided last time the FSIS considered line speeds would be to reverse course without a reasoned explanation would be unreasonable and arbitrary and capricious. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983); 5 U.S.C. § 706(2)(A).

Conclusion

There is every indication that increasing line speeds will negatively impact the welfare for billions of birds by increasing incidents of loss of process control. If FSIS granted the NCC’s petition and created a waiver system, it would not only violate the APA, it would violate the PPIA’s purpose and waiver regulations. As such, AWI respectfully requests the FSIS deny the NCC’s petition. Thank you for considering AWI’s comments. Please feel free to contact Dena Jones, Director of the Farm Animal Program, dena@awionline.org or Erin Thompson, Staff Attorney, erin@awionline.org should any questions arise.

Sincerely,



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Erin Thompson
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