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Re: Petition Submitted by National Chicken Council (Sep 1, 2017), Docket Number: FSIS-2017-0045.

Dear Acting Deputy Undersecretary Rottenberg:

The Center for Science in the Public Interest urges you to deny the National Chicken Council petition to implement a “waiver system” for young chicken slaughter establishments participating in the New Poultry Inspection System (NPIS) and *Salmonella* Initiative Program (SIP) to operate at unlimited line speeds.¹ Such a system would be an abuse of SIP waiver authority and has the potential to compromise food safety.

I. Poultry Inspection Background

Safe poultry is a key public health priority. The Centers for Disease Control and Prevention estimates that poultry contaminated by *Salmonella*, *Listeria*, *Campylobacter*, and other pathogens accounts for over 900,000 cases of foodborne illness and 278 deaths in the United States annually, more deaths than any other commodity.²

The USDA addresses this contamination risk in part by monitoring and inspecting poultry slaughter establishments through the NPIS and other inspection systems authorized under the Poultry Products Inspection Act (PPIA). The NPIS is a relatively new system, established by final rule on August 21, 2014.³ Poultry slaughter establishments currently have the option to opt in to NPIS or remaining in one of several longer-running USDA inspection systems.⁴

¹ Petition by the National Chicken Council to Carmen Rottenberg, Acting Deputy Undersecretary for Food Safety, Food Safety and Inspection Service, U.S. Department of Agriculture. September 1, 2017.

www.fsis.usda.gov/wps/wcm/connect/7734f5cf-05d9-4f89-a7eb-6d85037ad2a7/17-05-Petition-National-Chicken-Council-09012017.pdf?MOD=AJPERES. [“NCC Petition”]

² Painter JA, Hoekstra RM, Ayers T, Tauxe RV, Braden CR, Angulo FJ, Griffin PM. Attribution of foodborne illnesses, hospitalizations, and deaths to food commodities by using outbreak data, United States, 1998-2008. *Emerg Infect Dis*. 2013;19(3):407-15. wwwnc.cdc.gov/eid/article/19/3/pdfs/11-1866.pdf.

³ Modernization of Poultry Slaughter Inspection. 79 Fed. Reg. 49566 (August 21, 2014) [“Final Rule”]

⁴ Final Rule. 79 Fed. Reg. at 49569.

NPIS shifts key inspection duties from federal inspectors employed by USDA to private employees of the slaughter establishment. With prior inspection systems, up to four federal inspectors were assigned to each poultry slaughter line to visually inspect every carcass, and line speeds were capped to allow inspectors adequate time to assess each bird. For chicken carcasses, the maximum speed allowed was 140 birds per minute (bpm).⁵

Under NPIS, all but one USDA on-line inspector is eliminated. That single inspector checks every bird on the line following initial sorting, washing, and processing by company employees.⁶ A second federal inspector performs off-line inspection activities, including pulling a sample of carcasses off the line periodically to check for the presence of visible fecal material.⁷

The NPIS model was based on data from the USDA's Hazard Analysis and Critical Control Point Systems (HACCP)-Based Inspection Models Project (HIMP) pilot study.⁸ Twenty young chicken establishments initially opted-in to the HIMP pilot. These establishments were permitted to make changes under the pilot that included shifting inspectional duties and increasing line speeds above the 140 bpm maximum.⁹

In its final rule establishing NPIS, the USDA extended many features of the HIMP pilot, but capped NPIS line speeds at 140 bpm.¹⁰ In doing so, the agency noted that the average line speed for HIMP establishments under the pilot was 131 bpm, and most HIMP establishments did not operate at 175 bpm, although authorized to do so. The USDA also stated that it would re-assess the question of line speeds after the NPIS had been implemented on a wider scale.

The USDA allowed the 20 young chicken establishments that participated in HIMP to continue to operate at line speeds of up to 175 bpm. This was done under the authority of SIP, a regulatory program launched in 2007 to improve microbial testing efforts and promote innovation and testing of new procedures, equipment, and processing techniques to better control foodborne pathogens.^{11,12,13} In granting these SIP waivers to former-HIMP establishments, the agency stated that it would compare the data from former-HIMP establishments to data from the other NPIS establishments as a means of evaluating the new program.¹⁴ Any efforts by the agency to conduct such an assessment have not yet been published.

⁵ *Ibid.* at 49567.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.* at 49566.

⁹ Initially, HIMP pilot establishments operated at speeds of up to 180 bpm. See "Evaluation of HACCP Inspection Models Project (HIMP), August 2011. www.fsis.usda.gov/wps/wcm/connect/fcd9ca3e-3f08-421f-84a7-936bc410627c/Evaluation_HACCP_HIMP.pdf?MOD=AJPERES. In 2007, HIMP establishments were capped at line speeds of 175 bpm. Final Rule. 79 Fed. Reg. at 49567.

¹⁰ Final Rule. 79 Fed. Reg. at 49567.

¹¹ *Ibid.* at 49583.

¹² Salmonella Verification Sampling Program: Response to Comments and New Agency Policies. 73 Fed. Reg. 4767, 4770 (January 28, 2008).

¹³ US Department of Agriculture. Salmonella Initiative Program Criteria. June 17, 2013.

¹⁴ Final Rule. 79 Fed. Reg. at 49583.

II. The NCC Petition

The NCC petition requests that the USDA implement a “waiver system” to allow NPIS establishments to enroll in SIP, lift the current “arbitrary” 175 and 140 bpm caps, and operate indefinitely at “any line speed at which they can maintain process control.”¹⁵ This means that establishments will be able to operate at speeds of 200 bpm or higher, which were not tested in the HIMP pilot.

The only criteria outlined for receiving such a waiver, beyond participation in NPIS and SIP, is that each establishment receiving a waiver “develop a process for monitoring and ensuring it is maintaining process control at its chosen line speed, along with corrective actions to regain process control.”¹⁶

NCC does not assert that the proposed waiver system will facilitate experimentation with new methods, better data collection, or otherwise lead to improvements that will reduce contamination by *Salmonella* and other foodborne pathogens. Instead, it asserts that the waiver program “will encourage more establishments to opt into NPIS, will not compromise food safety, and will promote and enhance Agency and industry efficiency.”¹⁷ The NCC also argues that current regulation imposes costs on industry and creates competitive disparities, and that increasing line speeds will not impact worker safety.

We urge USDA to deny the NCC’s petition in full, as a waiver program operating under these criteria violates the applicable SIP regulations and has the potential to compromise food safety.

III. Abuse of the SIP Waiver Authority

The NCC’s requested actions would be an abuse of the SIP program, which is designed to facilitate definite improvements in ongoing efforts to control *Salmonella*, *Campylobacter* and other foodborne pathogens.¹⁸ Under the program, regulatory waivers allow for new procedures, equipment, or processing techniques, serving as an incentive for volunteer meat and poultry slaughter and processing establishments to increase process control efforts and improve data collection and sharing with federal regulators.¹⁹

SIP is authorized in relevant part by 9 C.F.R. § 381.3(b), which provides that the USDA:

[M]ay in specific classes of cases waive for limited periods any provisions of the regulations in order to ... permit experimentation so that new procedures, equipment, and processing techniques may be tested to facilitate definite improvements.²⁰

¹⁵ NCC Petition at 1.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Salmonella Verification Sampling Program: Response to Comments and New Agency Policies. 73 Fed. Reg. 4767, 4770 (January 28, 2008).

¹⁹ *Ibid.*

²⁰ 9 C.F.R. § 381.3(b).

The 9 C.F.R. § 381.3(b), waiver provision was promulgated in 1972 as part of a larger body of regulations implementing changes required under the Wholesome Poultry Products Act.²¹ The preamble to the 1972 rule did not speak to the purpose of the waiver provision. However, the USDA did further elaborate on the purpose of this language in extending identical waiver language to meat inspection regulations under the Federal Meat Inspection Act (FMIA) in 1986.²² At that time, the agency explained that the purpose of the waiver language was to allow the agency to explore methods to maximize regulatory compliance and thus achieve the purposes of the PPIA and FMIA:

[USDA] believes that the efficiency and effectiveness of the meat and poultry inspection program in utilizing available resources to maximize the level of compliance with regulatory requirements, and thus achievement of the purposes of the FMIA and PPIA...can be improved by adjusting the frequency and manner of government inspection.

... [T]he waiver decision reflects a judgement that certain provisions of the regulations as applied in specific situations should be temporarily suspended in order to achieve the purposes of FMIA.²³

Accordingly, the purpose of the regulatory waiver provisions is to facilitate experimentation with improvements that will advance the USDA's statutory mission, which is to ensure food safety.²⁴ Waivers under 9 C.F.R. § 381.3(b) should be specific, time-limited, and authorized for the purpose of "experimentation" towards "definite improvements" with respect to that mission.

The program requested in the NCC petition would meet none of these criteria. The requested program is not specific or time limited, but instead applies indefinitely to all young chicken slaughter establishments participating in the New Poultry Inspection System (NPIS), asking only the vague promise that they "develop a process for monitoring and responding to loss of process control."

More fundamentally, the petition offers no rationale for why such waivers would promote experimentation aimed at "definite improvements" in furtherance of the USDA's statutory mission. Instead, it simply asks that the "arbitrary" line speed caps that have been incorporated into the final NPIS regulations be lifted, and that doing so will provide economic benefits to industry and will not impair food safety. Granting of SIP waivers under such circumstances would be an abuse of the SIP process, which is intended to facilitate experimentation, not implement industry-wide changes. Any such changes to the regulations must be appropriately carried out through rulemaking.

²¹ Pub. L. No. 90-492, 82 Stat. 791 (1968).

²² Experimentation with Procedures for Determining the Intensity of Inspection Coverage in Processing Establishments; Waivers of Provisions of the Regulations. 52 Fed. Reg. 10028, 10029 (March 30, 1987)

²³ *Ibid.* at 10029-10031.

²⁴ The purpose of the PPIA is to prevent the introduction of adulterated or misbranded poultry into interstate or foreign commerce. *See* 21 USC § 452.

IV. Compromise to Food Safety

Increasing line speeds also raises food safety concerns. The potential for human error increases with speed, and workers forced to perform the same repetitive activities at a faster pace will become increasingly fatigued, making them more likely to make mistakes or fail to notice and address safety risks.

Under NPIS, the company employees who perform important initial sorting, washing, and processing functions to prevent contamination may make mistakes when operating under increased time pressure. For example, in a recent survey of poultry workers conducted by the Northwest Arkansas Workers' Justice Center, over half (54%) of respondents answered "yes" to the question, "Have you ever been forced to do things because of time pressure or line speed that might harm the health and safety of the consumer?"²⁵

In addition, higher speeds could compromise the ability of USDA on-line inspectors to detect and address fecal contamination and other issues on the line. Notably, under NPIS a single USDA inspector is required to inspect every carcass on his or her assigned line. That means at line speeds of over 200 bpm the federal inspector would have less than a third of a second to check each bird. Such a cursory inspection is unlikely to serve as a meaningful check on food safety.

Faster line speeds will also reduce the percentage of carcasses assessed through off-line inspections. Under NPIS, each line is assigned one off-line verification inspector.²⁶ These off-line inspectors are required to conduct eight 10-bird carcass checks for each line, each shift.²⁷ The number of assigned carcass checks does not vary with line speed, meaning a smaller percentage of birds will be inspected for fecal contamination as line speeds increase.

The petitioners argue that higher speeds will not impact food safety because HIMP establishments have been authorized to operate at line speeds of up to 175 bpm, and that these establishments did not perform worse than non-HIMP establishments with line speeds capped at 140 bpm. In support of this assertion, NCC cites to data evaluating the HIMP pilot program published in 2001 and 2011, as well as a more recent, previously-unpublished survey of NCC members conducted between December 1, 2016 and May 31, 2017.²⁸ None of these sources found higher contamination rates in HIMP establishments relative to non-HIMP establishments.

This evidence does not establish that food safety will be maintained should the line speed caps be lifted. First, HIMP establishments have not generally operated at speeds above 175 bpm,²⁹ meaning data from these establishments does not provide insight into operations at higher speeds, should this cap be lifted.

²⁵ The Northwest Arkansas Worker's Justice Center. Wages and Working Conditions in Arkansas Poultry Plants. February 1, 2016.

www.uusc.org/sites/default/files/wages_and_working_conditions_in_arkansas_poultry_plants.pdf.

²⁶ Final Rule. 79 Fed. Reg. at 49567.

²⁷ US Department of Agriculture. FSIS Directive: New Poultry Inspection System: Post-Mortem Inspection and Verification of Ready-to-Cook Requirement. 6500.1. February 1, 2017.

www.fsis.usda.gov/wps/wcm/connect/abf00353-f493-4ca6-9347-807aabb119d3/6500.1.pdf?MOD=AJPERES.

²⁸ NCC Petition at 4.

²⁹ See *supra* at note 9.

Second, the data from the HIMP pilot and NCC survey do not provide convincing evidence that HIMP establishments perform as well or better than non-HIMP establishments. The HIMP pilot was carried out during a period when antimicrobial sanitizers sprayed on poultry carcasses in HIMP establishments were causing interference with microbial testing, potentially resulting in a larger number of “false negative” results.³⁰ The FSIS did not begin using a buffered testing solution designed to mitigate this interference until July 1, 2016.³¹ The more recent NCC data, gathered after introduction of the buffered solution, are not peer-reviewed and the survey methodology suffers from numerous potential sources of bias. These include lack of a pre-specified analysis plan, which could allow for selective reporting; as well as reliance on what appears to be a convenience sample of NCC members collected in winter months, a time period during which *Salmonella* rates are typically lower.³²

Third, even assuming HIMP establishments compare favorably to non-HIMP establishments, this information does not necessarily shed insight into wisdom of lifting the current line speed caps, as HIMP establishments have generally operated at line speeds well below the current regulatory caps, averaging 131 bpm in the pilot. HIMP establishments are also different from their non-HIMP counterparts, further complicating any attempt at comparison. As the GAO has pointed out in previous assessments of the HIMP pilot, HIMP participants represent a selective group that opted in to the program, and their performance therefore does not necessarily predict performance of industry as a whole.³³ Comparisons between HIMP and former-HIMP establishments therefore should not be used as evidence to justify lifting the current line speed caps.

Lastly, lifting line speed caps across NPIS will lead to new competitive pressures that could undermine food safety in ways not predictable from currently available data. The USDA and NCC have recognized that establishments determine line speeds at least in part on their ability to maintain process control, meaning a decision is sometimes made to reduce line speeds when necessary to ensure food safety.^{34,35} As noted, during the HIMP pilot, establishments exercised self-moderation, operating with an average line speed of 131 bpm, even though authorized to operate at much higher speeds. It is not clear that this behavior will continue outside the context of the pilot. Limited data from the NCC petition indicate that the 16 former-HIMP establishments recently surveyed had an average line speed of 152 bpm, higher than the average in the HIMP pilot. It is certainly conceivable that lifting line speed caps across industry would create competitive pressure to push line speeds even higher than observed previously, potentially compromising food safety.

³⁰ Gary R. Gamble et al. Effect of simulated sanitizer carryover on recovery of *Salmonella* from broiler carcass rinsates. *J Food Prot.* 2016; 79:710–714.

³¹ See FSIS Notice 41-16. “New Neutralizing Buffered Peptone Water to Replace Current Buffered Peptone Water for Poultry Verification Sampling.” June 8, 2016. www.fsis.usda.gov/wps/wcm/connect/2cb982e0-625c-483f-9f50-6f24bc660f33/41-16.pdf?MOD=AJPERES

³² See, e.g., Williams, M.S., et al. Temporal Patterns in the Occurrence of *Salmonella* in Raw Meat and Poultry Products and Their Relationship to Human Illnesses in the United States. *Food Control.* 2014; 35:267-273.

³³ U.S. Government Accountability Office, “More Disclosure and Data Needed to Clarify Impact of Changes to Poultry and Hog Inspections.” GAO-13-775. Aug. 2013. www.gao.gov/assets/660/657144.pdf

³⁴ NCC Petition at 5.

³⁵ Final Rule. 79 Fed. Reg. at 49567.

V. The Economics and Worker Safety

NCC argues that the requested waiver system would be consistent with the President’s regulatory reform agenda and assure competitiveness with other countries, including Brazil, Canada, and Europe.³⁶ Yet enhanced competitiveness and reduced regulatory burden are not justifications for the agency to take an action that abuses its regulatory authority and potentially compromises food safety. Moreover, examples from foreign countries do not necessarily constitute an appropriate model for food safety in the United States. Notably, the USDA currently prohibits poultry imports from Brazil, and recently also halted imports of fresh beef from that country due to recurring concerns about the safety of products from that source.^{37,38} The “competitiveness” argument thus ensures a race to the bottom in food production standards.

NCC also argues that the action requested would not compromise worker safety, stating that workplace injury among poultry workers has decreased overall across the industry, and that establishments will mitigate time pressures on workers by hiring more employees to process the additional birds as production increases. While employer-reported injury rates may have declined, the rates in poultry processing remain above the national average for the manufacturing industry.³⁹ In addition, a 2015 report by the Government Accountability Office (GAO) found evidence of under-reporting of injuries in the meat and poultry industries, including multiple cases in which slaughter plant health units avoided reporting of injuries by repeatedly offering first aid (for example, pain cream for a fractured wrist) rather than refer serious injuries to a doctor.⁴⁰ Similar concerns were reiterated in a GAO report publicly released on December 7, 2017, which described interviews in which meat and poultry workers stated that “they fear dismissal or other punishment if they complain to [the Department of Labor’s Occupational Safety and Health Administration] or their state [Occupational Safety and Health] agency about their workplace concerns, such as sustaining injuries or being discouraged from using the bathroom.”⁴¹

Additionally, while it may be possible for slaughter establishments to reduce time pressure on individual workers by hiring more employees, reports by the GAO, Oxfam, The Northwest Arkansas Worker’s Justice Center, and the Southern Poverty Law Center have documented that in many cases, staffing has not in fact been adequate to keep up production demands.^{42,43,44,45,46}

³⁶ NCC Petition at 12.

³⁷ US Department of Agriculture. Eligible Foreign Establishments. Last Modified Nov 22, 2017. www.fsis.usda.gov/wps/portal/fsis/topics/international-affairs/importing-products/eligible-countries-products-foreign-establishments/eligible-foreign-establishments.

³⁸ US Department of Agriculture. Perdue: USDA Halting Import of Fresh Brazilian Beef. June 22, 2017. www.usda.gov/media/press-releases/2017/06/22/perdue-usda-halting-import-fresh-brazilian-beef.

³⁹ Bureau of Labor Statistics. Table 1. Incidence rates of nonfatal occupational injuries and illnesses by industry and case types, 2015. October 27, 2016. www.bls.gov/iif/oshwc/osh/os/ostb4732.pdf.

⁴⁰ Government Accountability Office. Workplace Safety and Health. Additional Data Needed to Address Continued Hazards in the Meat and Poultry Industry. April 2016. www.gao.gov/assets/680/676796.pdf. Pages 35-6.

⁴¹ Government Accountability Office. Better Outreach, Collaboration, and Information Needed to Help Protect Workers at Meat and Poultry Plants. GAO-18-12. Published November 9, 2017. Publicly Released December 7, 2017.

⁴² *Ibid.* at 38, footnote 82.

⁴³ Government Accountability Office. Workplace Safety and Health. Additional Data Needed to Address Continued Hazards in the Meat and Poultry Industry. April 2016. www.gao.gov/assets/680/676796.pdf. Page 22.

⁴⁴ The Northwest Arkansas Worker’s Justice Center. Wages and Working Conditions in Arkansas Poultry Plants. February 1, 2016. www.uusc.org/sites/default/files/wages_and_working_conditions_in_arkansas_poultry_plants.pdf.

Instead, faster line speeds have resulted in current employees being placed under intense time pressure, potentially contributing to injuries as well as food safety concerns.

VI. Conclusion

For the foregoing reasons, CSPI urges you to deny the NCC's petition. The USDA should instead maintain the current line speed caps authorized under NPIS and SIP as it continues to evaluate the new program.

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⁴⁵ Southern Poverty Law Center. Unsafe at These Speeds. February 28, 2013. www.splcenter.org/20130228/unsafe-these-speeds.

⁴⁶ Oxfam America. Lives on the Line: The High Human Cost of Chicken. 2015. www.oxfamamerica.org/livesontheline/#.