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December 11, 2017

Carmen Rottenberg
Acting Deputy Under Secretary for Food Safety
Food Safety and Inspection Service
Room 331_E, Jamie L. Whitten Building
12th Street and Jefferson Drive, SW
U.S. Department of Agriculture
Washington DC 20250

Re: Comment Opposing the National Chicken Council Petition for Line Speed Waivers

Dear Acting Deputy Under Secretary Rottenberg:

The National Employment Law Project appreciates this opportunity to comment on the National Chicken Council's petition to permit waivers from the maximum line speed requirements for young chicken slaughter establishments.¹ NELP is a non-profit law and policy organization with 45 years of experience providing research, advocacy, and public education to advance the employment and labor rights of our nation's workers, particularly low wage workers such as poultry workers. We work together with local, state, and national partners to promote policies and programs to create good, safe jobs and ensure that work is an anchor of economic security for all of America's working families.

In August 2014, following a multi-year notice and comment process, the Department of Agriculture finalized a rule establishing a new inspection system for young chicken slaughter establishments.² Among other requirements, establishments opting in to the New Poultry Inspection System, or NPIS, are generally subject to a maximum line speed limitation of 140 birds per minute.³ In deciding to establish a maximum line speed and in determining what that maximum rate should be, the Department considered extensive comments from worker advocates, consumer safety experts, the poultry industry, and other affected stakeholders, and concluded that a 140 bpm maximum rate was best supported by the rulemaking record.⁴

¹ See Nat'l Chicken Council, *Petition to Permit Waivers of the Maximum Line Speed Rates for Young Chicken Slaughter Establishments under the New Poultry Inspection System and Salmonella Initiative Program* (Sept. 1, 2017), available at <https://www.regulations.gov/document?D=FSIS-2017-0045-0001> (the "NCC Petition").

² U.S. Dep't of Agric., Food Safety & Inspection Serv., *Modernization of Poultry Slaughter Inspection; Final Rule*, 79 Fed. Reg. 49,566 (Aug. 21, 2014) (the "2014 Final Rule").

³ See *id.* at 49,590-49,592, 49,635; see also 9 C.F.R. § 381.69(a).

⁴ See 2014 Final Rule, 79 Fed. Reg. at 49,590-49,592, 49,596-49,600.

On September 1, 2017, the National Chicken Council submitted a petition to the Department's Food Safety and Inspection Service (FSIS) asking the agency to implement a "waiver system" permitting establishments participating in the NPIS to be exempted from the maximum line speed rate, and instead to operate at any line speed at which they can maintain process control.⁵ That is, NCC seeks to have FSIS authorize, by waiver, the elimination of the maximum line speed rate that the agency just established by regulation; and instead to permit young chicken slaughter establishments to operate with no maximum line speed at all.

Approving the NCC petition would be inconsistent with the Department's waiver regulations, would undermine the rulemaking process and violate the Administrative Procedure Act, and would greatly endanger workers and consumers alike. For these reasons, we urge you to reject this petition.

I. The petition does not satisfy the Department's waiver requirements. The NCC petition should be rejected because it does not meet any of the requirements established by the Department's regulations for waivers under the Poultry Products Inspection Act. Those regulations provide that the FSIS Administrator may:

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 of the provisions of the regulations are not in conflict with the purposes or provisions of the Act.⁶

The NCC petition meets none of these requirements and should be rejected.

1. The petition fails because it is not time-limited. As an initial matter, FSIS is only authorized to waive regulatory requirements "for limited periods."⁷ This requirement is of course consistent with the waiver regulations' narrow applicability to one of only two scenarios, both of which are time-limited by definition: a "public health emergency," or "experimentation [with] new procedures."

Despite this requirement, the NCC petition includes no discussion or mention of any durational limits, and appears to seek the creation of a waiver system that would allow establishments to exceed the regulatory maximum line speed requirements in perpetuity. A permanent waiver is inconsistent with the Department's waiver regulations, and the petition should be rejected on this basis alone.

2. The petition does not satisfy the "experimentation" prong of the waiver regulations. The NCC petition should also be denied because it does not adequately demonstrate that a waiver from the maximum line speed rate is necessary to allow establishments to experiment with new processing techniques.

⁵ See NCC Petition 1.

⁶ 9 C.F.R. § 381.3(b).

⁷ *Id.*

In order to qualify for a waiver to permit experimentation, a requester must identify “new procedures, equipment, [or] processing techniques [that] may be tested to facilitate definite improvements.”⁸ The NCC petition fails every one of these requirements: the petition (a) does not describe any “new” procedure that may be tested; (b) does not in fact identify *any* procedure or technique at all; and (c) does not describe “definite improvements” that a line speed waiver would facilitate.

Nowhere does the NCC petition identify a new procedure or technique that establishments need a regulatory line-speed waiver to test. To the contrary, FSIS already considered the precise argument NCC is presenting, and determined that the line-speed limitations in the 2014 Final Rule sufficiently permit line-speed experimentation. As FSIS explained in finalizing the 2014 rule, “[s]ome trade associations . . . suggested that the Agency remove the maximum line speed limits and allow establishments to determine their line speeds based on their ability to maintain process control while ensuring inspection of each carcass. The comments said that this would provide options for future changes as both Agency and industry technology evolve and food safety challenges change.”⁹ The Department rejected this request, explaining that “FSIS has determined that maintaining a maximum line speed of 140 bpm under the NPIS will allow the Agency to assess the impact of the various changes and new technologies adopted by establishments operating under the NPIS.”¹⁰

In other words, FSIS already concluded – just three years ago – that eliminating the line speed limitations was not necessary to permit experimentation with new procedures. The NCC petition does not describe any new procedure or technique that FSIS failed to consider in promulgating its 2014 Final Rule; NCC instead appears to be relitigating an argument it has already unsuccessfully presented to the agency only a few years ago.

The petition does describe an industry-conducted survey that purports to compare establishment line speeds, *Salmonella* and *Campylobacter* prevalence, and volume of FSIS inspectional tasks between a subset of NPIS and non-NPIS establishments for a six-month period in 2016 and 2017.¹¹ But this information falls woefully short of compliance with FSIS’s scientific and statistical requirements for consideration as part of the petition.¹² FSIS’s regulations require that any underlying survey or study be included in full with the petition; that the information be “presented in a form that would be acceptable for publication in a peer

⁸ *Id.* The NCC petition is based only on the “experimentation” prong of the Department’s waiver regulations, not the “public health emergency” prong. *See* NCC Petition 2.

⁹ 2014 Final Rule, 79 Fed. Reg. at 49,591.

¹⁰ *Id.*

¹¹ *See* NCC Petition 4-6.

¹² FSIS has determined that it will treat the NCC petition “as a petition for policy change under FSIS’s regulations on petitions (9 CFR part 392).” Letter from Matthew Michael, Food Safety & Inspection Serv., U.S. Dep’t of Agric., to Michael J. Brown, Nat’l Chicken Council (Sept. 8, 2017), available at <http://bit.ly/2A47ZUA>. FSIS’s regulations on petitions include detailed requirements for the supporting documentation that must accompany any petition, including that any underlying report or information be included in full with the petition, 9 C.F.R. § 392.4(a); that the information be “presented in a form that would be acceptable for publication in a peer reviewed scientific or technical journal,” *id.* § 392.4(c); and that all quantitative data “include a complete statistical analysis using conventional statistical methods,” *id.* § 392.4(d).

reviewed scientific or technical journal”; and that all quantitative data “include a complete statistical analysis using conventional statistical methods.”¹³ None of these requirements has been met here; NCC has instead merely described what it asserts are the results of an industry-conducted survey, with no underlying documentation, no publication-quality scientific discussion, and no statistical analysis. And even assuming, *arguendo*, that the industry’s survey is credible and accurate – which other commenters have demonstrated it is not¹⁴ – the survey results do not identify any new procedures that warrant experimentation.

Not only does the NCC petition fail to identify a *new* procedure or technique, it in fact does not identify any processing technique at all. The petition simply asks that FSIS allow establishments participating in NPIS to operate without any line-speed limitations.¹⁵ But FSIS has previously recognized that while faster line speeds may be the *result* of a new procedure or technique, line speed on its own is not a processing technique.¹⁶ In its 2003 notice regarding procedures for notification of new technology, FSIS explained: “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.”¹⁷ The NCC petition fails to identify any such procedure that may be tested to change the line speeds; to the contrary, the petition explicitly equates higher line speeds with new procedures, arguing that the request “will allow establishments to research new procedures (*i.e.*, higher line speeds).”¹⁸ Because the petition does not identify any actual procedure or technique for FSIS to examine, the requirements in the waiver regulations are not met.

Finally, the NCC petition nowhere demonstrates that a line-speed waiver, if granted, would “facilitate definite improvements.”¹⁹ Overwhelming evidence instead supports the conclusion that allowing poultry processing establishments to operate with no line speed limitations would dramatically worsen the already unsafe worker conditions in poultry plants.

¹³ 9 C.F.R. § 392.4(a), (c), (d).

¹⁴ *See, e.g.*, Letter from Wenonah Hauter, Executive Director, Food & Water Watch, to Carmen Rottenberg, Acting Deputy Under Secretary for Food Safety, U.S. Dep’t of Agric, at 7-8 (Oct. 5, 2017), available at <https://www.regulations.gov/contentStreamer?documentId=FSIS-2017-0045-0652&attachmentNumber=1&contentType=pdf>.

¹⁵ *See* NCC Petition 1-2.

¹⁶ Even if faster line speed was considered a processing technique, which it clearly is not, it could not be the basis of a waiver under FSIS’s regulations because it is not new. As the NCC petition itself acknowledges, twenty establishments – participants in the “Hazard Analysis and Critical Control Point Systems (HACCP)-Based Inspection Models Project” pilot – have been authorized since 2007 to operate at line speeds of up to 175 bpm, and this pilot has already been the subject of extensive study. *See* 2014 Final Rule, 79 Fed. Reg. at 49,572-49,579; *see also* NCC Petition 1. There is no reasonable interpretation of the “experimentation” prong of FSIS’s waiver regulations that would allow FSIS to characterize a procedure as “new” when it has already been employed by twenty establishments for ten years.

¹⁷ U.S. Dep’t of Agric., Food Safety & Inspection Serv., *FSIS Procedures for Notification of New Technology*, 68 Fed. Reg. 6873, 6874 (Feb. 11, 2003) (citing 9 C.F.R. §§ 381.67, 381.68).

¹⁸ NCC Petition 2.

¹⁹ 9 C.F.R. § 381.3(b).

In developing its 2014 Final Rule, “[t]he issue that FSIS received the most comments on was the potential effects that increased line speeds may have on the health and safety of workers in poultry slaughter establishments.”²⁰ In response to this input, and “[t]o stress the importance of establishment worker safety,” FSIS codified compliance with worker safety requirements as an explicit element of the maximum line speed regulation.²¹ The line speed provision now provides that “[e]stablishments operating under the line speed limits authorized in this section shall comply with all other applicable requirements of the laws, including, but not limited to,” all OSHA statutes and standards.²² This includes the requirement that employers provide each worker “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”²³

Waiving the maximum line speed rate in this provision would hinder, not improve, establishments’ ability to comply with relevant worker safety requirements under the law and OSHA standards. The evidence shows that poultry workers face harsh and dangerous working conditions, with injury rates 60% above the national average for all private industry, and illness rates more than five times as high.²⁴ Recent studies from the National Institute for Occupational Safety and Health (NIOSH), for example, found alarmingly high rates of carpal tunnel syndrome among poultry line workers. In one study, 34% of workers at a poultry processing plant had carpal tunnel syndrome, and fully 76% had evidence of nerve damage in their hands and wrists.²⁵ In another study, 42% of workers at a processing plant had carpal tunnel syndrome.²⁶ And the NIOSH Director has explained to FSIS that processing line speeds are a key cause of these and other musculoskeletal disorders: “Line speed affects the periodicity of repetitive and forceful movements, which are key causes of musculoskeletal disorders.”²⁷ In other words, the faster the line speed, the greater the risk of harm.

The break-neck pace and myriad other safety hazards facing poultry workers also result in extremely high numbers of very serious injuries. The poultry industry has one of the highest numbers, and the largest poultry companies have among the highest rates, of reported severe injuries such as amputations and injuries that require hospitalization. Among all industries reporting to the federal government, the poultry industry had the 12th highest number of these

²⁰ 2014 Final Rule, 79 Fed. Reg. at 49,591.

²¹ *Id.* at 49,597.

²² 9 C.F.R. § 381.69(d) (citing 29 U.S.C. § 654(a)); *see also* 2014 Final Rule, 79 Fed. Reg. at 49,591.

²³ 29 U.S.C. § 654(a)(1).

²⁴ *See* U.S. Dep’t of Labor, Bureau of Labor Statistics, *2016 Employer-Reported Workplace Injuries and Illnesses (Annual)*, at Summary Tbl. 1 (incidence rates – detailed industry level), Supplemental News Release Tbl. 12 (highest rates for total illness cases), available at <https://www.bls.gov/web/osh.supp.toc.htm>.

²⁵ *See* Nat’l Inst. for Occupational Safety & Health, *Evaluation of Carpal Tunnel Syndrome and Other Musculoskeletal Disorders among Employees at a Poultry Processing Plant* 17 (June 2015), available at <https://www.cdc.gov/niosh/hhe/reports/pdfs/2014-0040-3232.pdf>.

²⁶ *See, Evaluation of Musculoskeletal Disorders and Traumatic Injuries among Employees at a Poultry Processing Plant* 11 (Mar. 2014), available at <https://www.cdc.gov/niosh/hhe/reports/pdfs/2012-0125-3204.pdf>.

²⁷ *See* Letter from John Howard, Director, Nat’l Inst. for Occupational Safety & Health, to Alfred V. Almanza, Administrator, Food Safety & Inspection Serv., at 2-3 (Apr. 7, 2014) (“Line speed affects the periodicity of repetitive and forceful movements, which are key causes of musculoskeletal disorders.”), available at <https://www.cdc.gov/niosh/topics/poultry/pdfs/letterapril72014.pdf>.

severe injuries – higher than much of the construction industry, the auto industry, the steel industry, and the saw mill industry.²⁸ Workers suffered amputations of fingers and hands when companies failed to provide machine safety guards, adequate training, or mandatory protective equipment. Poultry workers required hospitalization for fractured hips from slippery floors, and burns from chemical leaks.²⁹ And a study published just last month in the *Journal of Occupational and Environmental Medicine* concluded that the poultry processing industry accounted for the highest relative reporting risk for occupational finger amputations of all high-risk industries.³⁰

In addition, as high as these recorded injury rates are, they are a dramatic undercount that do not fully capture the hazardous conditions for workers in chicken slaughter establishments. In the 2014 Final Rule, FSIS concluded that “poultry processors’ injury and illness logs often do not reflect the full extent of work-related conditions experienced by poultry workers,” and further recognized that “systematic underreporting of work-related injuries and illnesses could make it difficult to accurately assess the extent to which poultry workers suffer from work related injuries and musculoskeletal diseases and disorders.”³¹ And the Department of Labor’s Occupational Safety and Health Administration (OSHA) concluded after review that the “literature suggests the likelihood of substantial under-reporting of worker injuries and illnesses by poultry industry employers. . . . [T]here is strong evidence that workers in poultry processing facilities are at greatly increased risk of suffering a work-related [musculoskeletal disorder], and that the extent of the problem may be far greater than the elevated risk reported by employers and seen in the [Bureau of Labor Statistics] data.”³²

These conclusions are bolstered by continued OSHA citations of poultry processing plants for failure to record injuries and illnesses requiring more than first aid,³³ and by OSHA findings that some poultry processors are actively discouraging workers from reporting injuries by delaying medical treatment at first aid stations.³⁴ These practices are not isolated incidents, but instead persist at poultry processing plants around the country. In 2016, OSHA cited a

²⁸ See U.S. Dep’t of Labor, Occupational Safety & Health Admin., *Severe Injury Reports* (Jan. 1, 2015 through Mar. 31, 2017), at <https://www.osha.gov/severeinjury/index.html>.

²⁹ See *id.*

³⁰ See Remington L. Nevin, Jon Bernt, & Michael Hodgson, *Association of Poultry Processing Industry Exposures with Reports of Occupational Finger Amputations: Results of an Analysis of OSHA Severe Injury Report (SIR) Data*, 59 J. Occupational & Env’tl. Med. 159 (Oct. 2017).

³¹ 2014 Final Rule, 79 Fed. Reg. at 49,600.

³² See U.S. Dep’t of Labor, Occupational Safety & Health Admin., *Regional Emphasis Program for Poultry Processing Facilities* 4 (Oct. 30, 2017), available at https://www.osha.gov/dep/leps/RegionIV/reg4_fy2018_CPL-18-09_poultry.pdf.

³³ See, e.g., OSHA Citation (July 21, 2016) (citing a Tyson Foods poultry processing plant in Shelbyville, Texas for violating its obligation under 29 C.F.R. § 1904.4(a) to record work-related injuries and illnesses), available at https://www.osha.gov/pls/imis/establishment.inspection_detail?id=1165129.015.

³⁴ See OSHA Regional News Brief, *Deficient Medical Management Leads to Musculoskeletal Injuries at Delaware Poultry Processing Plant* (Sept. 2, 2015) (describing hazard alert findings and noting that “[t]he medical management practices at this facility create an environment of fear and distrust. The use of the first aid station to prevent injuries from being reported as required by law undermines the purpose of on-site treatment and leaves employees at risk of further injury.”), at <https://www.osha.gov/news/newsreleases/region3/09022015>.

Pilgrim's Pride poultry plant in Florida for practices that resulted in severe underreporting of work-related injuries, finding after inspection that the employer "delayed evaluation, care, and/or treatment from a medical provider" and "failed to make timely appropriate medical referrals for employees with injuries related to chronic and acute exposures and incidents."³⁵ This was only the second citation of this kind for delaying necessary medical care in OSHA's nearly fifty-year history.

These studies, statistics, and FSIS's own conclusions in the 2014 Final Rule disprove the National Chicken Council's assertion that the poultry processing industry has made any improvements on its extremely poor worker safety record.³⁶ The Government Accountability Office in fact confirmed just last year that "workers continue to face the hazardous conditions GAO cited in 2005, including tasks associated with musculoskeletal disorders, exposure to chemicals and pathogens, and traumatic injuries from machines and tools."³⁷

Because the NCC petition does not identify any new procedure or technique that warrants experimentation, and because waiving the maximum line speed rate would dramatically jeopardize – not improve – the health and safety of workers in poultry slaughter establishments, the petition does not meet the requirements necessary to justify an "experimentation" waiver under the Agency's regulations. FSIS should reject the petition on this basis.

3. *The National Chicken Council is not a proper requester under the Agency's waiver procedures.* Finally, even if all of the requirements of the waiver regulations at 9 C.F.R. § 381.3(b) were met, which they are not, the National Chicken Council is not a proper requester in any event. FSIS's procedures for reviewing new technology waiver requests provide that requests may be submitted by an "official establishment."³⁸ The Poultry Products Inspection Act defines "official establishment" as "any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this chapter."³⁹ The National Chicken Council is a ten-employee trade association organized as a tax-exempt non-profit with the stated mission of "promot[ing]

³⁵ See Press Release, U.S. Dep't of Labor, Occupational Safety & Health Admin., *Citation and Notification of Penalty to Pilgrim's Pride Corporation 6-7* (July 21, 2016), at <https://www.dol.gov/sites/default/files/newsroom/newsreleases/OSHA20161541b.pdf>.

³⁶ See NCC Petition 9-11. In addition, NCC's reference to a 2017 industry survey on the "Days Away, Restrictions, and Transfers (DART)" rates in NPIS establishments, *see id.* at 10, is unsupported by the kinds of evidence required by FSIS's regulations and therefore may not be considered by the agency in reviewing NCC's petition. *See* 9 C.F.R. § 392.4(a), (c), (d).

³⁷ U.S. Gov't Accountability Office, *Workplace Safety and Health: Additional Data Needed to Address Continued Hazards in the Meat and Poultry Industry*, at i (Apr. 2016), at <https://www.gao.gov/assets/680/676796.pdf>; *see also id.* at 21 ("Since our findings in 2005 on meat and poultry workers facing hazardous work conditions, NIOSH health hazard evaluations and academic studies have found that meat and poultry workers continue to face the types of hazards we cited, including hazards associated with musculoskeletal disorders, chemical hazards, biological hazards from pathogens and animals, and traumatic injury hazards from machines and tools.").

³⁸ See FSIS Directive 5020.2, *The New Technology Review Process* 1, 3 (Oct. 24, 2017), available at <http://bit.ly/2zdpWyq> (new technology notifications and waiver requests are available to "official establishments").

³⁹ 21 U.S.C. § 453(p) (defining "official establishment" for purposes of the Poultry Products Inspection Act).

consumption of chicken by people in the United States.”⁴⁰ NCC does not inspect the slaughter of poultry or the processing of poultry products and is not an “official establishment” as defined by the Poultry Products Inspection Act. Because there is no authorization for FSIS to review waiver requests submitted by third parties that are not themselves poultry processing establishments or companies, NCC has no authority to request a waiver under FSIS’s procedures.

II. Granting the petition would be arbitrary and capricious in violation of the Administrative Procedure Act. In addition to being inconsistent with the Department’s waiver regulations, the NCC petition should be rejected because granting it would violate the Administrative Procedure Act and undermine the rulemaking process.

1. Waiving the line speed limitation would be an arbitrary reversal of agency position. First, granting the NCC petition would require the Department to disregard its own prior analysis and reverse the conclusion it recently reached through extensive notice-and-comment rulemaking. The Department established the current line speed limitation for NPIS establishments in the 2014 Final Rule, issued just a few years ago.⁴¹ That final rule was the result of a comprehensive, two-and-a-half year rulemaking process during which the Department received and considered more than 250,000 public comments.⁴² And as noted above, the question of the maximum allowable line speed – and in particular the detrimental effects of increased line speed on worker safety and health – was the single most commented-upon aspect of the Department’s rulemaking.⁴³

In addition to the public comment record, the Department also closely examined the experience of a pilot group of twenty establishments – participants in the so-called “HIMP”⁴⁴ pilot – that have been authorized since 2007 to operate at line speeds of up to 175 bpm, depending on their ability to demonstrate consistent process control. The 2014 Final Rule explained that FSIS’s “experience from the HIMP pilot has shown that HIMP establishments operate with an average line speed of 131 bpm, and that, although they are authorized to do so, most of the young chicken HIMP establishments do not operate line speeds at 175 bpm.”⁴⁵

Having considered the extensive comments from affected stakeholders on all sides – and in light of evidence that even those establishments authorized to operate at 175 bpm were in fact operating at an average speed of 131 bpm – the Department determined that a maximum line speed of 140 bpm would meet the economic needs of poultry slaughter establishments while still aiming to protect worker safety and consumer health. In reaching this conclusion, FSIS specifically explained that “it is important to assess establishments’ ability to maintain process

⁴⁰ See Nat’l Chicken Council, IRS Form 990 for Calendar Year 2015, at I.1 (organization’s mission) & I.5 (total number of employees), available at <https://projects.propublica.org/nonprofits/organizations/540579473/201612219349301701/IRS990>.

⁴¹ 9 C.F.R. § 381.69(a); see also 2014 Final Rule, 79 Fed. Reg. at 49,567.

⁴² See 2014 Final Rule, 79 Fed. Reg. at 49,566, 49,570 (citing U.S. Dep’t of Agric., Food Safety & Inspection Serv., *Modernization of Poultry Slaughter Inspection; Proposed Rule*, 77 Fed. Reg. 4408 (Jan. 27, 2012)).

⁴³ See *id.* at 49,591.

⁴⁴ The HIMP pilot is the “Hazard Analysis and Critical Control Point Systems (HACCP)-Based Inspection Models Project.” *Id.* at 49,566.

⁴⁵ *Id.* at 49,590-91.

control as they implement changes to operate under the NPIS,” and explained that FSIS intended to conduct this assessment “[a]fter the NPIS has been fully implemented on a wide scale and the Agency has gained at least a year of experience under the new system.”⁴⁶ In other words, FSIS specifically concluded that no reconsideration of the maximum line speed rate would be warranted until there was significant experience with the NPIS system for the agency to analyze. That experience has not yet accrued, because NPIS has not yet been fully implemented on a wide scale.⁴⁷

In light of the conclusions FSIS reached after its recent, painstaking, multi-year rulemaking effort, any decision to reject the approach in the 2014 Final Rule in favor of an approach that conflicts with FSIS’s own prior conclusions would be subject to searching judicial review, and would likely be arbitrary and capricious.⁴⁸

2. *Establishing a waiver process without notice of, and opportunity to comment on, the Department’s intended actions would be arbitrary and capricious.* In addition, because the maximum line speed for NPIS establishments is codified by regulation, any change to that requirement would itself require notice-and-comment rulemaking to accomplish. When an agency intends to adopt a new position inconsistent with existing regulations, it may only do so through notice-and-comment rulemaking.⁴⁹ Posting solely the NCC petition for public comment does not suffice to meet this requirement. The Administrative Procedure Act requires the agency to publish notice of proposed rulemaking that includes a description of the “terms or substance of the proposed rule,” as well as reference to the legal authority for any change.⁵⁰ Indeed, the Department has properly followed notice-and-comment procedures in the past when determining whether and how to authorize waivers from other Poultry Products Inspection Act regulations.⁵¹ Because the Department has not done so here, any waiver or waiver process that authorizes establishments to exceed the codified line speed rate would violate the APA.

3. *There is sufficient basis for concern that FSIS has predetermined the outcome of the NCC petition.* Finally, there appears to be significant grounds for concern that FSIS has already identified its preferred conclusion and may not fairly consider the public comment record in this case. On October 16, 2017 – during the comment period, and just three days after the NCC petition was posted for public comment – Acting Deputy Under Secretary for Food Safety

⁴⁶ *Id.* at 49,591.

⁴⁷ According to records produced by FSIS in response to a recent FOIA request, fewer than sixty chicken slaughter establishments had entered the NPIS program as of October 2017. *See* FSIS Response to FOIA Request 2018-FSIS-00034-F.

⁴⁸ *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

⁴⁹ *See, e.g., Knapp v. U.S. Dep’t of Agric.*, 796 F.3d 445, 457 (5th Cir. 2015) (“Because the regulation is a legislative rule having the ‘force and effect of law,’ the Department may not adopt an inconsistent rule unless it proceeds through notice and comment.” (citation omitted)); *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 234-35 (D.C. Cir. 1992) (“[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.”).

⁵⁰ 5 U.S.C. § 553(b)(2), (3).

⁵¹ *See, e.g., Salmonella Verification Sampling Program: Response to Comments on New Agency Policies and Clarification of Timeline for the Salmonella Initiative Program (SIP)*, 76 Fed. Reg. 41,186 (July 13, 2011); *Salmonella Verification Sampling Program: Response to Comments and New Agency Policies*, 73 Fed. Reg. 4767 (Jan. 28, 2008).

Carmen Rottenberg told NBC News that “[w]e have 20 years worth of data over four administrations supporting line speeds of 175 birds per minute,” and characterized FSIS’s 140 bpm line speed maximum as “arbitrary.”⁵² The news account further described Acting Deputy Under Secretary Rottenberg as “express[ing] sympathy for the industry’s cause.”

It is well-established that prejudgment of agency action that indicates a closed mind by agency decisionmakers can invalidate the agency action.⁵³ Describing the current maximum line speed as “arbitrary” (despite justifying the 140-bpm limit in the 2014 Final Rule)⁵⁴; concluding that the data support a line speed of 175 birds per minute (despite FSIS’s finding in the 2014 Final Rule that pilot establishments authorized to operate at 175 bpm were in fact operating at an average line speed of 131 bpm)⁵⁵; and expressing sympathy for the industry petition (without having reviewed or even yet received contrary views from affected stakeholders) are all strongly suggestive of the kind of closed mind that would violate the Administrative Procedure Act.

III. Conclusion. Because the NCC petition meets none of the requirements under FSIS’s waiver regulations, and because granting the NCC request would likely be arbitrary and capricious in violation of the Administrative Procedure Act, we urge FSIS to reject the petition. Please contact Deborah Berkowitz at 202-640-6519 if you have questions about these comments.

Sincerely,



Christine Owens
Executive Director

⁵² Suzy Khimm, *Another Obama Decision Reversed? Now It’s About Food Safety*, NBC News (Oct. 16, 2017), at <https://www.nbcnews.com/politics/white-house/another-obama-decision-reversed-now-it-s-about-food-safety-n810296>.

⁵³ See *C & W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1564-65 (D.C. Cir. 1991); cf. *CPC Int’l, Inc. v. Train*, 540 F.2d 1329, 1332 (8th Cir. 1976) (noting that “prematurely and arbitrarily rubber stamp[ing]” a prior decision would be invalid under the APA).

⁵⁴ See 2014 Final Rule, 79 Fed. Reg. at 49,590-49,592, 49,596-49,600.

⁵⁵ See *id.* at 49,567, 49,590-49,591, 49,615.