

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL No. 227, *et al.*

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE.

Defendant.

Case No. 1:20-cv-02045

DEFENDANT’S MOTION FOR VOLUNTARY REMAND

Defendant United States Department of Agriculture (“USDA”), by and through undersigned counsel, hereby moves for an Order remanding this matter to USDA for further consideration of the issues presented. In support of this motion, Defendant submits the accompanying Memorandum of Points and Authorities and proposed Order.

Pursuant to Local Civil Rule 7(m), USDA has conferred with counsel for Plaintiffs, who stated that they oppose the relief requested, and with counsel for Defendant-Intervenor, who stated that it cannot form a position on the requested relief without having an opportunity to review the motion.

Dated: November 23, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Assistant Attorney General

ERIC R. WOMACK
Assistant Branch Director

/s/ Cormac A. Early

CORMAC A. EARLY

D.C. Bar. No. 1033835

Trial Attorney, U.S. Department of Justice

Civil Division, Federal Programs Branch

1100 L Street, N.W.

Washington, D.C. 20005

Tel.: (202) 616-7420

cormac.a.early@usdoj.gov

Counsel for Defendants

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**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR VOLUNTARY REMAND**

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INTRODUCTION

Defendant U.S. Department of Agriculture (“USDA”) respectfully moves this Court for an order granting voluntary remand so that USDA can revisit the poultry line-speed waivers at issue in this case on its own initiative in light of recent developments regarding the closely related issue of line speeds at swine slaughter establishments. In this Circuit, as in others, “an agency’s motion to remand for reconsideration of its own decision is usually granted,” *American Wild Horse Preservation Campaign v. Salazar*, 115 F. Supp. 3d 1, 3 (D.D.C. 2012), and that remedy is appropriate in this case.

Following a decision in the District of Minnesota striking down a regulatory provision that removed line-speed limitations for certain swine slaughter establishments, USDA announced that it will accept applications from swine slaughter establishments to participate in “Time Limited Trials” that would allow evisceration lines to operate at faster speeds. Applications for a Time Limited Trial “need to implement worker safety measures included in an agreement with the workers’ union or worker safety committee that represents [the establishment’s] employees,” and “should include the mechanism by which [the] establishment would collect data that measure the impact of line speed on workers.” *See* Declaration of Paul Kiecker, Exhibit A. Applications for a Time Limited Trial therefore represent cooperative efforts between labor and management to increase efficiency while protecting food and worker safety and allowing USDA to “collect data to share with [the Occupational Safety and Health Administration (“OSHA”)], which could inform a future rulemaking in this area.” *Id.* USDA developed its position over the course of seven months, with extensive consultation with OSHA.

USDA now intends to review the line-speed waivers for poultry slaughter establishments, which are the subject of this litigation, to determine whether they should be retained, revoked, or modified in light of its position on Time Limited Trials for swine slaughter

establishments. USDA anticipates that the review process will take six months to complete, and it accordingly seeks an order granting voluntary remand without vacatur to allow it to reconsider the agency actions challenged in this case. USDA would not oppose the Court's retention of jurisdiction on remand during this process, but would request that the case be stayed to permit USDA's consideration of these important issues. USDA proposes to file a Status Report updating the Court on its progress five months from the date of an Order granting voluntary remand.

BACKGROUND

I. REGULATION OF EVISCERATION LINE SPEEDS AT POULTRY SLAUGHTER ESTABLISHMENTS

This case concerns waivers issued by the Food Safety and Inspection Service ("FSIS"), an agency of the USDA, allowing poultry slaughter establishments operating under FSIS's New Poultry Inspection System ("NPIS") to operate evisceration lines at speeds in excess of the otherwise-applicable regulatory maximum. Established in 2014, NPIS aims to streamline and modernize FSIS's poultry inspection activities to improve efficiency while ensuring food safety. *See* Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49,566 (Aug. 21, 2014).

Most poultry slaughterhouses operate using an "automated evisceration system" that allows them to process poultry at a faster slaughter "line speed" than is possible when poultry is eviscerated by hand. Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4,408, 4,410 (Jan. 27, 2012). When it initially proposed the NPIS regulations, FSIS proposed capping evisceration line speeds at 175 birds per minute ("bpm"), but the final regulations instead capped line speeds at 140 bpm, to allow FSIS to assess facilities' ability to maintain process control as they transitioned to NPIS. *See* Petition to Permit Waivers of Maximum Line Speeds for Young Chicken Establishments, 83 Fed. Reg. 49,048 (Sept. 28, 2018); *see also* 9 C.F.R. § 381.69(a). In

the final NPIS regulations, FSIS explained that after the implementation of NPIS on a wide scale for at least a year, the agency would consider line speeds at which NPIS facilities are capable of consistently producing safe poultry. 83 Fed. Reg. at 49,049. FSIS’s regulations allow the FSIS Administrator to “waive . . . any provisions of the [poultry inspection] regulations in order . . . to permit experimentation so that new procedures, equipment, and processing techniques may be tested to facilitate definite improvements.” 9 C.F.R. § 381.3(b).

In 2017, the National Chicken Council petitioned FSIS to use its authority under 9 C.F.R. § 381.3(b) to implement a new waiver system that would allow poultry facilities to apply to waive the 140 bpm limit and operate without any maximum line speed (“Petition”). 83 Fed. Reg. at 49,049.¹ FSIS posted the petition on its website and solicited comments from the public. *Id.*

After considering all timely comments, FSIS issued its response to the Petition on January 29, 2018. 83 Fed. Reg. at 49,049. In that response, FSIS denied the Petition to the extent it sought to establish a new waiver-request system for NPIS (separate from the one already established in 9 C.F.R. § 381.3(b)). *Id.* The agency indicated, however, that “in the near future” FSIS would consider, under its already existing waiver procedures, requests to operate at line speeds of up to 175 bpm from facilities that could meet certain criteria. *Id.* at 49,049-50.

A month later, FSIS issued a “Constituent Update” (“2018 Constituent Update”) announcing those criteria, including the requirement that a facility must have been operating under the NPIS for at least one year to receive a waiver.² 83 Fed. Reg. at 49,050. FSIS also explained

¹ See Letter from Michael J. Brown, President, National Chicken Council to Carmen Rottenberg, Acting Deputy Under Secretary for Food Safety, FSIS (Sept. 1, 2017), https://www.fsis.usda.gov/sites/default/files/media_file/2020-07/17-05-Petition-National-Chicken-Council-09012017.pdf (last visited Nov. 23, 2021).

² FSIS, Constituent Update, FSIS’ Criteria for Consideration of Waiver Requests from Young Chicken Slaughter Establishments to Operate at Line Speeds Up to 175 Birds Per Minute (Feb. 23,

that because it would be “evaluat[ing] the establishment’s ability to maintain process control” at speeds in excess of 140 bpm, facilities receiving waivers must consistently utilize the higher speeds. *Id.* at 49,051. The 2018 Constituent Update concluded by stating that FSIS would provide additional information in a future Federal Register notice, which FSIS issued on September 28, 2018 (“2018 Notice”). *Id.* at 49,048. Among other things, the 2018 Notice stated that FSIS would use the data collected from establishments receiving waivers “to assess the ability of NPIS establishments to maintain process control at higher line speeds and to inform future rulemaking, if supported.” *Id.* at 49,052.

FSIS issued a total of 53 waivers under the criteria set out in the 2018 Notice, between October, 2018, and April, 2020. *See* Exhibit A, Declaration of Paul Kiecker ¶ 5. UFCW brought this lawsuit in July, 2020, to challenge the waiver criteria as well as individual waivers granted by FSIS to poultry establishments at which UFCW members work.

II. REGULATION OF EVISCERATION LINE SPEEDS AT SWINE SLAUGHTER ESTABLISHMENTS

FSIS is also responsible for inspecting swine slaughter establishments to ensure that pork products sold to the public are safe and wholesome. *See generally* 21 U.S.C. § 604 *et seq.* In October 2019, FSIS established the New Swine Inspection System (“NSIS”), along similar lines to the NPIS system for poultry establishments. *See* Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019). Unlike NPIS, however, NSIS eliminated the existing maximum evisceration line speed of 1,106 head per hour for participating establishments. *Id.*; *see also* 9 C.F.R. § 310.1(b)(3).

2018), <https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-february-23-2018-0> (last visited Nov. 23, 2021).

In response to comments opposing any increase in line speeds on worker-safety grounds, FSIS “agree[d] that safe working conditions in swine slaughter establishments are important,” but concluded that “the Agency has neither the authority nor the expertise to regulate issues related to establishment worker safety,” and noted that “OSHA is the Federal agency with statutory and regulatory authority to promote workplace safety and health.” 84 Fed. Reg. at 52,315.

UFCW brought suit in the District of Minnesota challenging USDA’s decision to eliminate the maximum line speed, arguing that it harmed worker safety. *See United Food & Commercial Workers Union, Local No. 663 v. USDA*, --- F. Supp. 3d ---, 2021 WL 1215865, at *1 (D. Minn. Mar. 31, 2021) (“*UFCW*”). On March 31, 2021, the court granted UFCW’s motion for summary judgment in part, concluding that the decision to eliminate the line-speed caps was arbitrary and capricious. *Id.* The court concluded that FSIS’s position on the scope of its legal authority was inconsistent with the agency’s previous position without adequate explanation for the change, and that even if correct, FSIS could not “disregard important policy considerations it had previously identified because of a conclusion about the scope of its legal authority.” *Id.* at *24. The court did not, however, strike down the remainder of the rule, concluding that the agency’s decision on line speeds was severable from the remainder of the regulation. *Id.* at *26. The court stayed entry of judgment for 90 days. *Id.* at *29. Since its order took effect on June 30, 2021, all NSIS establishments have been subject to a maximum line speed of 1,106 head per hour. *See Kiecker Decl.* ¶ 7.

In the months following the court’s partial vacatur of the NSIS regulation, FSIS received applications from swine establishments for waivers allowing them to operate at line speeds in excess of the regulatory limit. *See Kiecker Decl.* ¶ 8. As part of its waiver application, one establishment presented an agreement with the union representing its workers addressing the

establishment's plans for ensuring a safe working environment at higher line speeds. *Id.* FSIS consulted extensively with OSHA in determining how to respond to the applications, and ultimately decided to invite all NSIS establishments to submit applications to conduct Time-Limited Trials experimenting with ergonomics, automation, and crewing to create custom work environments that will protect food and worker safety while increasing productivity. *Id.* Applications will be reviewed by FSIS on a case-by-case basis, and all labor-management agreements and worker-safety data-collection plans will be reviewed by the appropriate OSHA Regional Administrator. *Id.* On November 10, 2021, FSIS invited each swine slaughter establishment operating under NSIS to submit an application to participate in such a Time Limited Trial. *See* Kiecker Decl. Ex. A. FSIS issued a Constituent Update announcing the call for applications for Time Limited Trials on November 12, 2021.³

In light of that decision, FSIS now intends to reconsider the NPIS line speed waivers that are currently in operation. *See* Kiecker Decl. ¶ 11. FSIS intends to take into account its actions under NSIS in deciding whether the NPIS waivers should continue or whether those waivers should be terminated or modified. *Id.* FSIS seeks a voluntary remand without vacatur to allow the agency to make that decision in the first instance at the administrative level.

STANDARD OF REVIEW

“Administrative agencies have the inherent power to reconsider their own decisions through a voluntary remand.” *Code v. McHugh*, 139 F. Supp. 3d 465, 468 (D.D.C. 2015). “Courts in this Circuit ‘generally grant an agency’s motion to remand so long as the agency intends to take further action with respect to the original agency decision on review.’” *WildEarth Guardians v. Bernhardt*, 2020 WL 6255291, at *1 (D.D.C. Oct. 23, 2020) (quoting *Util. Solid Waste Activities*

³ Available at <https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-november-12-2021> (last visited Nov. 23, 2021).

Grp. v. Env'tl. Prot. Agency, 901 F.3d 414, 436 (D.C. Cir. 2018)). An agency may request remand in a range of circumstances, including where it seeks “to reconsider its previous position.” *Clark v. Perdue*, 2019 WL 2476614, at *2 (D.D.C. June 13, 2019) (quoting *Util. Solid Waste Activities Grp.*, 901 F.3d at 436). To obtain a voluntary remand, an agency “need [not] confess error or impropriety.” *Limnia, Inc. v. U.S. Dep’t of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017). Instead, the agency must “profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.” *Id.* Remand is appropriate when an agency has raised “substantial and legitimate” concerns in support of its request, *SKF USA, Inc. v. U.S.*, 254 F.3d 1022, 1029 (Fed. Cir. 2001), and remand will not unduly prejudice the plaintiff. *Clark*, 2019 WL 2476614, at *2. Because granting voluntary remand does not constitute a judgment on the merits, *see Am. Hawaii Cruises v. Skinner*, 893 F.2d 1400, 1403 (D.C. Cir. 1990), it does not trigger the Court’s power to “set aside agency action” that it “hold[s] unlawful,” 5 U.S.C. § 706(2), and vacatur would thus be improper. *Cf. e.g., Nat’l Parks Conservation Ass’n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

ARGUMENT

I. VOLUNTARY REMAND IS APPROPRIATE TO ALLOW USDA TO RECONSIDER THE CHALLENGED LINE-SPEED WAIVERS

This case presents substantial grounds for voluntary remand. As noted above, FSIS has determined that reconsideration of the waivers that UFCW challenges here is appropriate in light of its recent decision to accept applications for Time Limited Trials of higher line-speeds in swine establishments that seek to protect food and worker safety while increasing productivity. *See* Kiecker Decl. ¶ 11. As part of that process of reconsideration, FSIS intends to review whether the poultry line-speed waivers should continue or whether they should be terminated or modified. *Id.* That review will have obvious implications for the present case, including the potential to render

the present dispute moot in its entirety. FSIS could decide, for example, to terminate the existing line-speed waivers. Alternatively, FSIS could approve modified waivers, subject to labor-management worker safety agreements, in the plants where UFCW represents workers in this litigation, eliminating the harm that UFCW claims from the increase in line speed.

But whatever the agency decides on remand, it is undisputable that it will materially alter the present dispute, which is certainly sufficient to satisfy the standard for voluntary remand in this Circuit. “Courts in this Circuit ‘generally grant an agency’s motion to remand’ where, as here, ‘the agency intends to take further action with respect to the original agency decision on review.’” *WildEarth Guardians*, 2020 WL 6255291, at *1 (remanding for agency to reconsider leasing decisions). *See also, e.g., Util. Solid Waste Activities Grp.*, 901 F.3d at 437 (granting voluntary remand where the agency “explained that it plans to reconsider” certain regulatory provisions, “thereby satisfying the requirement for remand that it ‘take further action with respect to the original agency decision on review’” (citation omitted)); *Clean Wisconsin v. Env’t Prot. Agency*, 964 F.3d 1145, 1175-76 (D.C.Cir. 2020) (granting voluntary remand for agency to reconsider Clean Air Act designations).

Remand is also the most efficient course forward in this litigation, and would not unduly prejudice Plaintiffs. To begin with, the review that FSIS proposes to undertake of the existing poultry line-speed waivers would likely not take substantially longer than summary judgment, and may indeed be faster. FSIS hopes to complete its review within six months. *See* Kiecker Decl. ¶ 12. Under the current schedule governing this case, merely completing briefing on summary judgment will take at least four months, assuming that the Court were to deny voluntary remand as soon as briefing on the issue closes. *See* Minute Order, Nov. 11, 2021 (setting December 17, 2021 deadline for reply in support of voluntary remand) *and* Dkt. 23 (setting deadline for final

briefs on cross-motions for summary judgment 96 days after denial of the motion for voluntary remand).

Moreover, even if Plaintiffs were to prevail on their legal claims, immediate vacatur of the challenged waivers would not automatically follow. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110-11 (D.C. Cir. 2014) (decision whether to vacate agency action “depends on the “seriousness of the [action’s] deficiencies’ and the likely ‘disruptive consequences’ of vacatur.” (citation omitted)); *Stand Up for California! v. U.S. Dep’t of Interior*, 2013 WL 12203229, at *3 (D.D.C. Dec. 16, 2013) (noting that even if a plaintiff prevails in a challenge under the APA, any decision to vacate a regulation is based on equitable considerations, including “the disruptive consequences of an interim change that may itself be changed” (citation omitted)). For example, in the closely related context of swine line-speed litigation, the District Court in Minnesota determined that the potential “disruptive effect” of immediately reinstating line-speed limitations was too great, and stayed its order for 90 days to “give regulated entities time to prepare for any operational change.” *UFCW*, 2021 WL 1215865, at *29.

Finally, USDA intends to complete work on its review of the existing poultry line-speed waivers within six months, and proposes to submit a status report apprising the Court of its progress five months after a grant of voluntary remand, and thus “has submitted a proposed timeline to the court,” *Util. Solid Waste Activities Grp.*, 901 F.3d at 437. Developing the application process for Time Limited Trials in the swine context took FSIS, in consultation with OSHA, seven months. *See Kiecker Decl.* ¶ 12. USDA anticipates that a similar timeframe will be required to allow it to examine, among other things, the similarities and differences between implementing Time-Limited Trials in eligible poultry establishments versus swine establishments, options for data collection and analysis, the impact of any revision or withdrawal of the waivers on the facilities

that currently operate under waivers, and the potential for collaboration with OSHA to address worker health and safety. *See* Kiecker Decl. ¶ 12.

In the meantime, USDA does not object to the Court retaining jurisdiction on remand (should the Court conclude that such retention of jurisdiction is appropriate), thus further minimizing any possible prejudice to UFCW. *See Cobell v. Norton*, 240 F.3d 1081, 1108-09 (D.C. Cir. 2001) (retaining jurisdiction on remand is “within [a Court’s] broad equitable powers”); *cf.*, *e.g.*, *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 2021 WL 14929, at *2 (D.D.C. Jan. 1, 2021) (retaining jurisdiction is “often appropriate” when a court “remand[s] the action without vacatur to permit supplementation or clarification of the record or to permit the agency to clarify reasoning that was not pellucid.”).

CONCLUSION

For the foregoing reasons, USDA respectfully requests that the Court grant its motion for voluntary remand, and, should the Court decide to retain jurisdiction, further requests that the Court stay proceedings in this case pending further action from USDA on remand.

Dated: November 23, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Assistant Attorney General

ERIC R. WOMACK
Assistant Branch Director

/s/ Cormac A. Early
CORMAC A. EARLY
D.C. Bar. No. 1033835
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel.: (202) 616-7420
cormac.a.early@usdoj.gov

Counsel for Defendants

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Plaintiff,

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UNITED STATES DEPARTMENT OF
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Defendant.

Case No. 1:20-cv-02045

PROPOSED ORDER

Upon consideration of Defendant's Motion for Voluntary Remand, it is hereby **ORDERED** that the motion be **GRANTED**. This matter is **REMANDED** to the United States Department of Agriculture for further consideration of the issues presented. Defendant shall file a status report updating the Court on its progress five months from the date of this Order.

SO ORDERED

Date: _____, 202_

HONORABLE TIMOTHY J. KELLY
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 227, <i>et al.</i>)	
)	
Plaintiffs,)	Case No. 1:20-cv-02045
v.)	
)	
UNITED STATES DEPARTMENT OF AGRICULTURE,)	
)	
Defendant.)	
)	

DECLARATION OF PAUL KIECKER

I, Paul Kiecker, hereby declare and certify as follows:

1. I am the Administrator for the U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS). I have held this position since March, 2020. In this role, I spearhead the planning and implementation of FSIS’ Strategic Goals of: preventing foodborne illness and protecting public health; modernizing inspection systems, policies and use of scientific approaches; and achieving operational excellence.
2. Since 1988, I have held various positions within FSIS. I joined FSIS as a Food Inspector. I then served as Deputy District Manager in Madison, Wisconsin; District Manager in Madison, Wisconsin; and District Manager in Springdale, Arkansas. I later moved to Washington, D.C. to serve as Executive Associate for Regulatory Operations and, subsequently, Deputy Assistant Administrator for the Office of Field Operations.
3. From August 2017 through January 2019, I served as the Acting FSIS Administrator, and from January 2019 through March 2020, I served as the FSIS Deputy Administrator. In these roles, I oversaw the modernization of the Agency’s slaughter inspection

systems for both poultry and swine. For poultry, the modernized inspection system is called the New Poultry Inspection System (NPIS); for swine, the modernized inspection system is called the New Swine Slaughter Inspection System (NSIS).

4. On August 21, 2014, FSIS issued a final rule establishing NPIS. *See* Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49,566 (Aug. 21, 2014). NPIS is a poultry inspection system designed to facilitate pathogen reduction in poultry products by prioritizing Agency resources to allow FSIS inspectors to perform more offline inspection activities that are more effective in ensuring food safety, while providing for a more efficient and effective online carcass-by-carcass inspection. Poultry establishments subject to inspection by FSIS may choose to operate under the NPIS or may continue operating under the pre-existing inspection system.

5. The NPIS regulation provides for a maximum evisceration line speed of 140 birds per minute (“bpm”). In 2018, FSIS issued a constituent update, and subsequently a notice in the *Federal Register*, announcing criteria for NPIS establishments to apply for waivers to the line-speed limitation, pursuant to 9 C.F.R. § 381.3(b), to enable the Agency to collect data to inform a possible future rulemaking. From October, 2018, to April, 2020, FSIS granted 53 applications for waivers allowing qualifying NPIS establishments to operate at line speeds up to 175 bpm.

6. On October 1, 2019, FSIS issued a final rule establishing NSIS. *See* Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,314 (Oct. 1, 2019). Similar in many ways to NPIS, NSIS is an optional swine inspection system that allows FSIS inspectors to be presented with presorted animals and carcasses that have defects identified, which results in a more efficient inspection of each animal and each carcass. The Agency is able to assign fewer FSIS inspectors to online inspection in NSIS establishments, freeing up Agency

resources to conduct more offline inspection activities that are more effective in ensuring food safety and humane handling requirements.

7. Prior to the finalization of the NSIS rule in October, 2019, swine slaughter establishments were subject to an evisceration line speed limit of 1,106 head per hour. NSIS removed that line speed limitation for participating establishments, provided that they maintained process control and that inspectors were able to maintain proper inspection. *Id.* However, a March 31, 2021 court order issued by the U.S. District Court for the District of Minnesota vacated the unlimited line speed portion of the regulation, holding that USDA did not give adequate consideration to issues of worker safety in removing the line speed limitation. *See United Food & Commercial Workers Union, Local No. 663 v. USDA*, --- F. Supp. 3d ---, 2021 WL 1215865, at *1 (D. Minn. March 31, 2021). As a result, since that order became effective on June 30, 2021, all NSIS establishments were again capped at line speeds of 1,106 head per hour.

8. In June, 2021, FSIS, received applications from several swine establishments for waivers allowing them to operate at line speeds in excess of 1,106 head per hour, one of which included an agreement between the establishment and the union representing its workers addressing the establishment's plans for ensuring a safe working environment at higher line speeds. FSIS consulted extensively with the Occupational Safety and Health Administration ("OSHA") in determining how to respond to the applications. FSIS ultimately decided to invite all NSIS establishments to submit applications to conduct Time-Limited Trials experimenting with ergonomics, automation, and crewing to create custom work environments that will protect food and worker safety while increasing productivity, pursuant to 9 C.F.R. 303.1(h).

Applications are reviewed by FSIS on a case-by-case basis. Additionally, all labor-management

agreements and worker-safety data-collection plans will be reviewed by the appropriate OSHA Regional Administrator.

9. On November 10, 2021, FSIS invited each swine slaughter establishment operating under NSIS to submit an application to participate in such a Time Limited Trial. A true and correct copy of the template letter that FSIS sent to each NSIS establishment is attached as Exhibit A to this Declaration.¹

10. NSIS establishments that are approved on a case-by-case basis to participate in a Time-Limited Trial will be permitted to operate at an increased line speed for a period of up to one year during which time they will collect data that measures the impact of line speed on worker health and safety. That data will be used to inform any future rulemaking regarding NSIS, and will also be shared with OSHA.

11. In light of the announcement of applications to participate in the Time-Limited Trials for certain establishments operating under NSIS, FSIS intends to reconsider the NPIS line speed waivers that are currently in operation. FSIS intends to take into account its actions under NSIS in deciding whether those waivers should continue or whether those waivers should be terminated or modified.

12. The application process for Time-Limited Trials for NSIS establishments has taken seven months to develop because it involves extensive coordination between FSIS and OSHA, as well as between processing facilities and their unions. USDA envisions a similar process for reconsidering the existing NPIS waivers, and expects to be able to complete that process in 6 months. During that 6-month period, the Agency anticipates examining, among

¹ The November 12, 2021, Constituent Update announcing the Time Limited Trials is available at <https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-november-12-2021> (last visited Nov. 23, 2021).

other things, the similarities and differences between implementing Time-Limited Trials in eligible poultry establishments versus swine establishments, options for data collection and analysis, the impact of any revision or withdrawal of the waivers on the facilities that currently operate under waivers, and the potential for collaboration with OSHA to address worker health and safety.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 23, 2021

A handwritten signature in black ink, appearing to read "Paul Kiecker", written over a horizontal line.

Paul Kiecker
FSIS Administrator

EXHIBIT A



United States Department of Agriculture

Food Safety and
Inspection Service1400 Independence
Avenue, SW,
Washington, D.C.
20250

November 10, 2021

Dear [REDACTED]:

As you are aware, on March 31, 2021, the U.S. District Court for the District of Minnesota found that USDA violated the Administrative Procedure Act by eliminating line speed limits in its New Swine Slaughter Inspection System (NSIS) Final Rule without meaningfully considering comments on how this could impact worker safety. The judge vacated the NSIS Final Rule only insofar as it eliminated line speed limits for establishments operating under NSIS. When the Court's Order went into effect on June 30, 2021, all NSIS establishments were required to operate at evisceration line speeds that do not exceed 1,106 head per hour (hph) (the maximum inspection rate with heads attached allowed under existing regulations for traditional swine inspection).

After consulting with the Occupational Safety and Health Administration (OSHA), FSIS has decided to invite existing NSIS establishments to apply for a time-limited trial that would allow them to operate at an increased evisceration line speed for a period of up to 12 months. The time-limited trial is intended to facilitate experimentation with different ergonomics, automation, and crewing to design custom work environments that increase productivity and protect food safety while, at the same time, decreasing the probability of worker injuries. It would also allow FSIS to collect data to share with OSHA, which could inform a future rulemaking in this area.

If your establishment would like to participate in the time-limited trial, you would need to implement worker safety measures included in an agreement with the workers' union or worker safety committee that represents your employees. Your application should include the mechanism by which your establishment would collect data that measure the impact of line speed on workers.

FSIS is interested in receiving requests for time-limited trials from NSIS establishments that:

- Have been operating under the NSIS for at least 120 days and have followed all NSIS requirements during that time; have demonstrated a history of regulatory compliance (i.e., the establishment has not received a public health alert for the last 120 days); have not had an enforcement action as a result of a Food Safety Assessment conducted in the last 120 days; have not received an enforcement

action for humane handling in the last 120 days; and have not been the subject of a public health related enforcement action in the last 120 days; and

- Have not received an OSHA citation in the prior three years, are not the subject of a current OSHA inspection, and are not currently contesting any OSHA citation.

FSIS recommends that any request for a time-limited trial include:

- A fully executed agreement related to worker safety with a union or worker safety committee, particularly an agreement that meets the requirements of a certified health and safety management system like OSHA's Voluntary Protection Programs (VPP), ISO 45001, or American National Standards Institute ANSI Z10 (if/when certification for ANSI Z10 is available).
- Detailed information about safety protocols and line configurations.
- Details about the establishment's Hazard Analysis and Critical Control Point (HACCP) plan.
- Information about how the establishment maintains process control, including one year of microbial data, methodology for evaluating that microbial data (e.g., upper and lower control limits), correlation of that microbial data to the establishment's sanitary dressing process control data, correlation of that microbial data to FSIS' *Salmonella* data and interventions to address seasonality.
- Information on how the establishment will maintain or improve food safety while operating at higher line speeds.
- Information on the type of records that will be maintained that will assist FSIS in performing appropriate rulemaking analysis (e.g., laboratory results, weekly or monthly summary production reports).
- Information on the type of records that will be maintained related to worker safety (e.g., past and future establishment employee injury numbers from employee reports of symptoms, OSHA logs and workers' compensation reports, recordable rates, time and motion study data, and data on injury type, root cause analysis, implementation of controls, and line location). In addition, information related to leading and lagging metrics for worker safety should be maintained. Lagging metrics are: trends in the numbers and rates for injuries reportable on OSHA Form 300 (location, cause, area of the body), workers compensation reports, first aid reports, employee turnover, and results

of root cause analyses performed for those injuries with a focus on engineering controls. Leading metrics are: symptom surveys; updated job hazard analyses including ergonomics (i.e., quantitative measures of hazard assessment, including strain index, National Institute for Occupational Safety and Health (NIOSH) lift equation, Liberty Mutual push/pull/carry tables, American Conference of Governmental Industrial Hygienists (ACGIH) hand activity Threshold Limit Value (TLV), upper limb localized fatigue TLV); and amputation hazards (e.g., machine pinching, knife and saw use); regular meetings of the safety and health teams that identify/and control hazards (mostly through engineering controls) and employee training in hazard identification/control and recognition of symptoms; periodic (at least annual) safety audits that include interviews with employees and supervisors; tracking of safety recommendations and whether they lead to controls; and assessment of the medical unit, as well as training, licensing and scope of practices to ensure staff have the appropriate skill level, professional scope of practice, and supervision, together with adequate infrastructure available in the first aid stations or employee/medical clinics, recordkeeping staff responsible for relevant recordkeeping that can manage appropriate OSHA documentation and clinician decisions being made independent of recordability.

- A description of policies designed to ensure that no one, including companies and third-party contractors, discriminates or takes adverse action against any worker or other person who raises a concern about meatpacking operation safety practices or hazards to the employer, the employer's agent, other workers, a government agency, or to the public, including through print, online, or social media.
- A description of policies designed to ensure that no policies, programs, or procedures are in place or implemented during the period of the time-limited trial that discourage or penalize the reporting of injuries or illness by workers to their employer.

Consistent with existing policy, if an establishment is granted the time-limited trial, FSIS would require establishments to notify the FSIS inspector-in-charge (IIC) when they are operating at evisceration line speeds higher than 1,106 hph to allow FSIS to evaluate the establishment's ability to maintain process control at a given line speed. In addition, FSIS would require that establishments submit information on their intended maximum line speed.


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If your establishment is interested in applying for the time-limited trial, please submit your request through [askFSIS](#). Applications will be reviewed by FSIS on a case-by-case basis under 9 CFR 303.1(h); this notification does not entitle any NSIS establishment to obtain authorization for a time-limited trial. Additionally, all labor-management agreements and worker safety data-collection plans will be reviewed by the appropriate OSHA Regional Administrator.

Sincerely,



Rachel Edelstein
Assistant Administrator
Office of Policy and Program Development