



April 2, 2018

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Submitted online via www.regulations.gov

**Re: Modernization of Swine Slaughter Inspection
Docket No. FSIS-2016-0017**

On behalf of the Animal Legal Defense Fund (ALDF), a national nonprofit organization dedicated to protecting the lives and advancing the interests of animals through the legal system, we submit these comments in response to the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service's (FSIS) proposed Modernization of Swine Slaughter Inspection rule (Proposed Rule), 83 Fed. Reg. 4780-4823 (Feb. 1, 2018). FSIS's Proposed Rule, creating the New Swine Slaughter Inspection System (NSIS), would have disastrous effects on animal welfare and food safety, in derogation of FSIS's statutory mandates to ensure the humane treatment of hogs at slaughter and the safety of our nation's meat supply. ALDF urges FSIS not to adopt the Proposed Rule, and to end the failed HACCP-Based Inspection Models Project (HIMP) immediately.

Statutory Background

FSIS is charged with ensuring that the American meat supply is safe under the Federal Meat Inspection Act (FMIA). To that end, FSIS has a complementary duty under both the Humane Methods of Slaughter Act (HMSA) and FMIA to ensure that animals are treated humanely during slaughter.

The FMIA requires FSIS to ensure sanitary conditions at all establishments in which swine are slaughtered; if the conditions are such that the products thereof are rendered adulterated, inspectors must refuse to allow such products in commerce.¹ FSIS regulations require thorough ante- and post-mortem inspections of each animal to ensure that only healthy animals and wholesome, non-adulterated meat enter the food supply.²

The FMIA also incorporates the HMSA,³ which establishes a "national policy" of slaughtering animals humanely.⁴ In the HMSA Congress explicitly commanded that "the handling of livestock in connection with slaughter *shall* be carried out *only* by humane

¹ 21 U.S.C. § 608.

² 9 C.F.R. Parts 309-10.

³ 21 U.S.C. § 601 et seq.

⁴ H.R. Report No. 85-706, at 4 (1957).

methods,”⁵ to “prevent[] needless suffering” of animals and ensure “safer and better working conditions for persons engaged in the slaughtering industry.”⁶ The HMSA further states that “[n]o method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane.”⁷ In order for slaughter of pigs to be humane, each individual pig must be “rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.”⁸ These requirements cannot be superseded by non-statutory policy motivations when FSIS is determining how to regulate facilities under the HMSA and FMIA.

The FMIA requires FSIS to establish an inspection system to ensure humane slaughter,⁹ and also extends humane handling requirements to all persons, firms, and corporations.¹⁰ The HMSA likewise instructs FSIS to appoint inspectors to enforce humane handling regulations at slaughter facilities and allows the Secretary to refuse inspection at slaughter establishments where animals “have been slaughtered or handled in connection with slaughter . . . by any method not in accordance with [the HMSA].”¹¹ A violation of the HMSA is a violation of the FMIA.¹²

FSIS regulations outline requirements for the humane unloading, moving, housing, feeding, stunning, and slaughter of individual animals. These regulations explicitly and consistently emphasize that animal welfare is paramount to efficiency and speed: throughout the slaughter process, each animal must be moved or handled calmly, comfortably, and with minimal force or intervention that would cause discomfort or suffering.¹³

FSIS regulations and decisions with regard to slaughter under the FMIA and HMSA must comply with both the spirit and letter of both laws, and cannot be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.¹⁴ The validity of FSIS action depends, among other factors, on whether FSIS has “examine[d] the relevant

⁵ 7 U.S.C. § 1901 (emphasis added).

⁶ *Id.*

⁷ *Id.* § 1902.

⁸ *See id.* § 1902(a).

⁹ *Id.* (“For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter”).

¹⁰ 21 U.S.C. § 610(b).

¹¹ 92 Stat. 1069 (1978) (codified at 21 U.S.C. § 603(b)).

¹² 21 U.S.C. § 610(b).

¹³ 9 C.F.R. § 313.2(a), (b) (animals must be moved with a “minimum of excitement and discomfort”); *id.* § 313.5(a) (anesthesia must be administered “quickly and calmly, with a minimum of excitement and discomfort to the animals”); *id.* § 313.15 (captive bolt stunning must minimize discomfort); *id.* § 313.30 (driving, conveying, and electrocuting animals must be performed “with a minimum of excitement and discomfort” and “[d]elivery of calm animals to the place of [stunning or slaughter] is essential . . .”).

¹⁴ 5 U.S.C. § 706 (2)(A); *see also Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (State Farm), 463 U.S. 29, 41 (1983).

data and articulate[d] a satisfactory explanation for its action.”¹⁵ FSIS must demonstrate a “rational connection between the facts found and the choice made,”¹⁶ and cannot “rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence before the agency, or [be] so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁷

FSIS Adoption of HIMP

As FSIS states in the Proposed Rule, in 1997 USDA developed HIMP pursuant to its authority under the FMIA, allowing five large hog slaughtering plants to operate under a new pilot program.¹⁸ HIMP revoked the maximum slaughter line speed for these plants, allowing them to operate at speeds that averaged 1,099 hogs per hour; the fastest plant reached nearly 1,300 hogs an hour.¹⁹ HIMP also transferred responsibility for key food safety oversight duties from FSIS inspectors to slaughter plant workers.

Although FSIS has touted HIMP, and now NSIS, as a successful effort to “modernize inspection systems through science-based approaches to food safety,”²⁰ as further detailed below, HIMP has been an abject failure, with dismal results for both food safety and animal welfare. The USDA’s own Office of the Inspector General (OIG) was highly critical of this “privatization-plus-speedup formula,”²¹ stating in a 2013 report that “since FSIS did not provide adequate oversight, HIMP plants may have a higher potential for food safety risks.” OIG concluded that “the swine HIMP program has shown no measurable improvement to the inspection process,” and in fact, “three of five HIMP plants had some of the highest numbers of NRs [non-compliance reports] nationwide.”²²

FSIS ignored or discounted OIG’s findings. Instead, in a 2014 assessment, the agency lauded HIMP as a success.²³ FSIS’s conclusions were based on irrelevant factors and a flawed assessment of the facts, as 60 members of Congress explained in a letter urging

¹⁵ *State Farm*, 463 U.S. at 43.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780 (Feb. 1, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-02-01/pdf/2018-01256.pdf>.

¹⁹ Evaluation of HACCP Inspection Models Project (HIMP) for Market Hogs, FSIS Final Report, Nov. 2014, p. 12, <https://www.fsis.usda.gov/wps/wcm/connect/f7be3e74-552f-4239-ac4c-59a024fd0ec2/Evaluation-HIMP-Market-Hogs.pdf?MOD=AJPERES> (hereafter, “FSIS HIMP Report”).

²⁰ “USDA Announces Proposed Rule to Modernize Swine Inspection,” USDA, Jan. 19, 2018, <https://www.usda.gov/media/press-releases/2018/01/19/usda-announces-proposed-rule-modernize-swine-inspection>.

²¹ “USDA Whistleblowers Tell All—and You May Never Eat Bacon Again,” *Mother Jones*, Feb. 27, 2015, <https://www.motherjones.com/food/2015/02/usda-whistleblowers-report-gross-condition-hog-slaughterhouses/>.

²² “Food Safety and Inspection Service—Inspection and Enforcement at Swine Slaughter Plants,” USDA Office of Inspector General, Audit Report 24601-0001-41, May 2013, p. 17-19, <https://www.usda.gov/oig/webdocs/24601-0001-41.pdf> (hereafter, “OIG Report”).

²³ FSIS HIMP Report, *supra* note 19, at 8.

the agency not to expand HIMP.²⁴ Despite widespread criticism from watchdog organizations, damning testimony from FSIS inspectors in HIMP hog plants, and failing grades from OIG and members of Congress, FSIS proceeded full steam ahead to expand HIMP nationwide—and now proposes the NSIS. For the reasons explained below, FSIS’s decision to expand and continue its disastrous program through the NSIS proposal is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

Effects of NSIS on Animal Welfare

While FSIS touts NSIS as producing better outcomes for humane treatment and slaughter of hogs, the opposite is true. Thus, as detailed below, adopting the Proposed Rule and implementing NSIS nationwide would run contrary to FSIS’s statutory obligations under the FMIA and HMSA, and would be arbitrary and capricious and an abuse of discretion.

Quality Pork Processors’ Abuse of Animals

The negative effects of HIMP—particularly its increased slaughter line speeds—on hog welfare and food safety are illustrated in a 2015 investigation conducted by Compassion Over Killing (COK) of HIMP plant Quality Pork Processors (QPP), which supplies meat exclusively for Hormel Foods.²⁵ QPP slaughters approximately 1,300 pigs per hour, or at least one pig every five seconds, representing the high end of HIMP and contrasting with standard line speeds of 571 to 1,149 pigs per hour at non-HIMP plants.²⁶

The QPP investigation revealed plant employees, under pressure to keep up with the facility’s high line speeds, dragging, kicking, beating, and excessively shocking pigs with electric prods.²⁷ The investigator recorded several non-ambulatory disabled hogs, animals too sick or injured to move, “enduring horrific abuses as they were forced to the kill floor in a desperate attempt to keep the slaughter lines moving as fast as possible.”²⁸

The investigation also documented numerous instances of improper stunning and slaughter.²⁹ After slitting the throat of a pig showing signs of consciousness, a QPP

²⁴ Letter from Members of Congress to Hon. Tom Vilsack, Sec. of Agric. (Jan. 19, 2016), <https://delauero.house.gov/sites/delauro.house.gov/files/Hog-HIMP-Letter-1-19-16.pdf> (hereafter, “Letter to USDA”).

²⁵ “New COK Exposé: High-Speed Slaughter Hell at Hormel, Makers of SPAM,” Compassion Over Killing, <http://cok.net/inv/hormel/> (hereafter, “QPP Investigation”).

²⁶ FSIS HIMP Report, *supra* note 19, at 12; “America’s horrifying new plan for animals: highspeed slaughterhouses,” *The Guardian*, Mar. 6, 2018, <https://www.theguardian.com/commentisfree/2018/mar/06/ive-seen-the-hidden-horrors-of-high-speed-slaughterhouses>; Affidavit of Joe Ferguson (USDA Hog Inspector #4), Government Accountability Project Food Integrity Campaign, <https://www.foodwhistleblower.org/wp-content/uploads/2015/01/Affidavit-4—Joe-Ferguson.pdf> (hereafter, “Affidavit 4”).

²⁷ QPP Investigation, *supra* note 25.

²⁸ “America’s horrifying new plan for animals: highspeed slaughterhouses,” *The Guardian*, Mar. 6, 2018, <https://www.theguardian.com/commentisfree/2018/mar/06/ive-seen-the-hidden-horrors-of-high-speed-slaughterhouses>.

²⁹ QPP Investigation, *supra* note 25.

employee states on the video, “That one was definitely alive.”³⁰ Another pig hanging on the line arched her back in a righting motion, another sign of possible consciousness.³¹ A QPP supervisor who was supposed to be overseeing the stunning process was filmed literally sleeping on the job.³² The abuse of hogs at QPP prompted COK to file a criminal animal cruelty complaint against the plant in Minnesota state court.³³

After seeing footage of the QPP investigation, USDA called the actions depicted in the video “appalling and completely unacceptable.”³⁴ FSIS’s own Office of Investigation, Enforcement, and Audit (OIEA) concluded that the establishment was out of compliance with humane handling regulations, and stated that “[h]ad these actions been observed by FSIS inspectors, they would have resulted in immediate regulatory action against the plant.”³⁵ Indeed, in the QPP video a worker shouted, “Too many sensibles. If USDA is around, they could shut us down.”³⁶ But FSIS Inspectors weren’t around.³⁷

In the Proposed Rule, FSIS states that NSIS will “allow FSIS inspectors to conduct a more efficient inspection . . . freeing up Agency resources to conduct more offline inspection activities,” including “verifying compliance with . . . humane handling requirements.”³⁸ Yet when QPP employees were repeatedly mistreating the sows and animals were showing signs of consciousness on the slaughter line—a major humane slaughter violation—FSIS inspectors were nowhere to be found. And even in response to the “appalling” abuses captured by the COK investigator, FSIS only issued Notice of Intended Enforcement (a threatened suspension) to QPP, rather than suspending inspection at the plant.³⁹ Closing its inquiry into the plant in January 2017, OIEA explained in a letter to COK, “The actions depicted in the video occurred at times when U.S.D.A. inspection personnel were not performing verifications.”⁴⁰ In other words, because FSIS was absent and not observing the

³⁰ *Id.*; “‘That one was definitely alive’: An undercover video at one of the nation’s biggest pork processors,” *Washington Post*, Nov. 11, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/11/11/that-one-was-definitely-alive-an-undercover-video-at-one-of-the-fastest-pork-processors-in-the-u-s/>.

³¹ QPP Investigation, *supra* note 25.

³² *Id.*

³³ Application for Warrant and Investigation of Cruelty Complaint, *Compassion Over Killing, Inc. v. Quality Pork Processors, Inc.*, No. 50-cv-16-2658 (Third Judicial District Court, Mower County, Minnesota, Dec. 17, 2016), available at http://cok.net/wp-content/uploads/2016/12/QPP-complaint_Dec-2016.pdf.

³⁴ “‘That one was definitely alive’: An undercover video at one of the nation’s biggest pork processors,” *Washington Post*, Nov. 11, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/11/11/that-one-was-definitely-alive-an-undercover-video-at-one-of-the-fastest-pork-processors-in-the-u-s/>.

³⁵ QPP Investigation, *supra* note 25; “Close to the Bone: The Fight Over Transparency in the Meat Industry,” Oct. 5, 2016, *The New York Times*, <https://www.nytimes.com/interactive/2016/10/09/magazine/meat-industry-transparency-fight.html> (hereafter “Close to the Bone”).

³⁶ QPP Investigation, *supra* note 25.

³⁷ *Id.*

³⁸ 83 Fed. Reg. 4780, 4780-81.

³⁹ Close to the Bone, *supra* note 35; Humane Slaughter Plant Suspension List (1/2008 - 2/2018), Animal Welfare Institute, <https://awionline.org/sites/default/files/uploads/documents/fa-hsplantsuspensionlist.pdf>.

⁴⁰ Close to the Bone, *supra* note 35.

abuse, it would not suspend the plant.⁴¹ Thus, the QPP investigation and FSIS's response to it do not square with the agency's broader conclusions about HIMP.

FSIS's Rampant Lack of Enforcement Under HIMP

The QPP example is emblematic of broader, deeply entrenched problems in FSIS enforcement of humane handling at slaughter plants, which render the agency's conclusions as to HIMP's positive effect on humane slaughter without merit or basis in the evidence before it. Finalizing the Proposed Rule would thus not only be contrary to the FMIA and HMSA, but arbitrary and capricious and an abuse of discretion in light of the existing evidence that increased line speeds and humane slaughter are mutually exclusive.

These problems are starkly illustrated in the 2013 OIG Report, in which OIG concluded that FSIS "could not always ensure humane handling" at swine slaughter plants.⁴²

Indeed, every government report that has examined the issue has confirmed that FSIS has an abysmal record of identifying, correcting, or otherwise addressing FMIA and HMSA violations on slaughter lines. The 2013 OIG report echoed concerns raised in OIG's 2008 report, as well as two prior reports from the Government Accountability Office (GAO), that FSIS inspectors are not taking consistent actions to enforce the HMSA.⁴³ Like the GAO report three years earlier, OIG's report cited FSIS inspectors' judgment and discretion as the central problem.⁴⁴ In particular, OIG found that:

Inspectors did not take appropriate enforcement actions at 8 of the 30 swine slaughter plants we visited. Specifically, the inspectors did not suspend 6 plants after identifying 10 egregious humane handling violations and did not issue NRs at 2 plants after identifying 2 nonegregious violations. This occurred because, although the related FSIS policy was clear and specific, inspectors often made subjective enforcement decisions. At times, these decisions were inconsistent, lenient, and endorsed by district officials. As a result, the plants did

⁴¹ Regarding QPP and Hormel Foods, while not specifically within the scope of this rule, the atrocious food safety and animal welfare records of HIMP hog plants—and in particular, QPP, as detailed herein—may also be contributing to consumer deception in meat labeling, another subject over which FSIS is charged with exercising its authority under the FMIA. Under FSIS's current procedure, the agency allows companies like Hormel to label as "Natural," "100% Natural," and "All Natural" meat from hogs slaughtered at QPP for the company's Natural Choice® brand of deli ham and bacon, merely because the company adds asterisks to the label stating "no artificial ingredients" and "minimally processed." See Meat and Poultry Labeling Terms, USDA, <https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms>. Whether consumers would find the egregious abuse and stomach-churning contamination documented in the QPP video consistent with these labeling claims is dubious.

⁴² OIG Report, *supra* note 22, at 22.

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

not improve their slaughter practices, and FSIS could not ensure the humane handling of swine.⁴⁵

Most alarmingly, even in response to the most basic, core humane slaughter violation for which FSIS policy is clear—unsuccessful stunning—the 39 inspectors OIG interviewed provided wildly varying answers as to the enforcement action they would take (if any).⁴⁶ Their responses “ranged from issuing a suspension to informing plant officials verbally during regular meetings.”⁴⁷

In the Proposed Rule, FSIS states that it reviewed Humane Activities Tracking System (HATS) task data over an 18-month period ending in September 2015. FSIS found that inspectors in the five HIMP hog plants performed a greater number of offline humane handling activities and spent slightly more time verifying humane handling activities as compared to the FSIS humane handling monitoring in the 21 comparable large non-HIMP hog plants FSIS analyzed in its 2014 Hog HIMP Report.⁴⁸ FSIS also claims the rate of NRs in HIMP plants was lower (11 in the five HIMP plants versus 117 in the 21 non-HIMP plants).⁴⁹ Seemingly in response to the QPP investigation, FSIS notes in particular that “none of the 11 NRs recorded in the HIMP establishments documented market hogs being forced to move faster than normal walking speeds to keep up with faster evisceration line speeds.”⁵⁰ On this basis, FSIS concludes that “HIMP establishments have higher compliance with humane handling regulations than non-HIMP establishments.”⁵¹

However, as the QPP investigation and findings from the 2013 OIG Report make clear, an increase in HATS tasks and relatively fewer NRs do not necessarily mean an improvement in humane handling at HIMP plants. This is the case for several reasons. First, more humane handling “tracking” does not mean anything if inspectors either do not know what they are looking for, or knowingly ignore or minimize serious HMSA violations. As the OIG report noted, since inspectors follow FSIS enforcement policy inconsistently—failing to issue NRs or suspensions when they are clearly warranted—humane handling violations often persist, with no enforcement response.⁵² This was certainly the case at QPP, where FSIS was either absent, aware but ignorant, or indifferent to egregious inhumane treatment of sows on the slaughter floor.⁵³

The second reason the agency’s conclusions as to HIMP’s effect on humane handling do not hold water is that the relatively fewer NRs and suspensions can just as easily be attributed to lackluster enforcement of humane handling regulations, not to superior humane handling. Again, where humane handling enforcement knowledge and attitudes vary widely among agency inspectors, a relative lack of NRs may simply mean that, for

⁴⁵ *Id.*

⁴⁶ *Id.* at 25-26.

⁴⁷ *Id.*

⁴⁸ 83 Fed. Reg. 4780, 4790.

⁴⁹ *Id.*

⁵⁰ *Id.* at 4790-91.

⁵¹ *Id.* at 4791.

⁵² OIG Report, *supra* note 22, at 22, 25-27.

⁵³ QPP Investigation, *supra* note 25.

whatever reason, inspectors are not taking regulatory control actions that would otherwise be warranted.⁵⁴

As discussed below, one plausible explanation for this is that in HIMP plants, FSIS inspectors are so preoccupied with trying to avert serious food safety threats—like the failure of plant employees to catch fecal contamination on carcasses—that they have little to no time for offline inspection tasks such as monitoring humane handling. In the words of one HIMP plant inspector, “USDA inspectors are under much more stress under HIMP,” because they are “constantly there making sure that company inspectors are doing it right and verifying the carcass is wholesome,” even as the faster “line speeds make it impossible to monitor everything all at once.”⁵⁵

NSIS will only make matters worse. Rather than freeing up inspectors to focus on offline tasks such as monitoring humane handling, as FSIS claims HIMP does and NSIS will do, it actually forces inspectors to remain chained to their food safety oversight responsibilities. FSIS inspectors in HIMP plants live in fear that an untrained, uninformed company sorter (who is being pressured *not* to segregate carcasses for condemnation) will fail to properly identify contaminants and separate diseased carcasses, leading to adulterated product that could cause an outbreak of food poisoning. In this setting, it is no surprise that humane handling enforcement comes as an afterthought, not a priority.

In sum, faster line speeds have already proven to result directly in inhumane treatment of pigs. Moving FSIS inspectors offline will exacerbate the clear and continuing lack of enforcement that allows food safety and humane slaughter violations to occur even with the current number of on-line inspectors. Restructuring hog slaughter inspection nationwide in a way that has a demonstrated ability to produce markedly poorer outcomes for food safety and animal welfare cannot be justified in light of the evidence, and FSIS cannot rely on its failure to enforce its statutory mandates in the alarmingly frequent instances of egregious humane handling violations as a justification for expanding a disastrous and unlawful program. FSIS’s decision to finalize the Proposed Rule is thus not supported by the evidence and would be arbitrary, capricious, an abuse of discretion, and not in accordance with law.

Effects of Higher Line Speeds and Privatized Inspection on Food Safety

FSIS’s plan to expand HIMP nationwide through NSIS will have dire food safety consequences. Quite simply, “Food safety has gone down the drain under HIMP.”⁵⁶ This is the undeniable conclusion from the 2013 OIG report, testimony from FSIS’s own inspectors inside HIMP plants, and the disgusting footage from the QPP investigation. As detailed below, adopting the Proposed Rule and pushing forward with NSIS in the face of this

⁵⁴ OIG Report, *supra* note 22, at 25-27.

⁵⁵ Affidavit of USDA Hog Inspector #1, Government Accountability Project Food Integrity Campaign, p. 3, https://www.foodwhistleblower.org/wp-content/uploads/2014/10/Affidavit-1-Redacted_.pdf (hereafter, “Affidavit 1”).

⁵⁶ Affidavit of USDA Hog Inspector #3, Government Accountability Project Food Integrity Campaign, p. 4, https://www.foodwhistleblower.org/wp-content/uploads/2015/01/Affidavit-3-Redacted_1.pdf (hereafter, “Affidavit 3”).

evidence would be arbitrary, capricious, an abuse of discretion, and not in accordance with FSIS's statutory mandates.

Under HIMP and, as FSIS now proposes, NSIS, poorly-trained plant employees are enlisted as on-line sorters, replacing FSIS inspectors with expertise in pathology and decades of experience in inspection—while at the same time, slaughter speed increases dramatically.⁵⁷ Company sorters are pressured to ignore contamination and reprimanded or even threatened with termination if they perform inspection duties too rigorously.⁵⁸ Employees lack authority to slow or stop the line to remove contaminants from the carcasses whizzing by, or refuse to follow FSIS inspectors' instructions to condemn parts of carcasses.⁵⁹ FSIS inspectors similarly feel pressured not to stop the line to remove fecal contamination or perform any other of their enforcement responsibilities, with many experiencing threats and retaliation both from the company and higher officials within FSIS.⁶⁰

The sum total is that carcasses contaminated with all manner of contaminants, defects, and diseases—fecal matter, bile, grease, hair, toenails, cystic kidneys, bladder stems, abscesses, lesions, diamond skin, and more—proceed down the slaughter line to be processed into food, while other critical inspection procedures—such as manually inspecting viscera for signs of disease—may be bypassed entirely.⁶¹

Even despite the intense pressure on FSIS inspectors in HIMP plants not to take enforcement action in response to such adulterants and contaminants on hog carcasses, the increase in food safety threats in HIMP plants is borne out by significantly higher NRs at those plants. As OIG reported, of the top 10 hog plants nationally racking up the most food safety NRs in the period of fiscal years 2008 to 2011, three were HIMP plants.⁶² Moreover, by far the most-cited plant in the country during that period—“with nearly 50 percent more NRs than the plant with the next highest number”—was a HIMP plant.⁶³

These numbers are echoed in public records of food safety monitoring obtained by the nonprofit organization Food & Water Watch. The watchdog group obtained records from the five HIMP plants and five comparably-sized plants for the period between January 1, 2012 and November 30, 2016.⁶⁴ They found “22 instances—all occurring in the HIMP

⁵⁷ Affidavit 1, *supra* note 55, at 1-2; Affidavit of USDA Hog Inspector #2, Government Accountability Project Food Integrity Campaign, p. 1-2, https://www.foodwhistleblower.org/wp-content/uploads/2015/01/Affidavit-2-Redacted_.pdf (hereafter, “Affidavit 2”); Affidavit 3, *supra* note 56, at 5-7; Affidavit of USDA Hog Inspector #4, Government Accountability Project Food Integrity Campaign, p. 1-2, <https://www.foodwhistleblower.org/wp-content/uploads/2015/01/Affidavit-4-%E2%80%93-Joe-Ferguson.pdf> (hereafter, “Affidavit 4”).

⁵⁸ Affidavit 1, *supra* note 55, at 3; Affidavit 2, *supra* note 57, at 2; Affidavit 3, *supra* note 56, at 3.

⁵⁹ Affidavit 1, *supra* note 55, at 3; Affidavit 2, *supra* note 57, at 2; Affidavit 3, *supra* note 56, at 6; Affidavit 4, *supra* note 57, at 2.

⁶⁰ Affidavit 1, *supra* note 55, at 3; Affidavit 2, *supra* note 57, at 2-3; Affidavit 3, *supra* note 56, at 3; Affidavit 4, *supra* note 57, at 2.

⁶¹ Affidavit 1, *supra* note 55, at 2; Affidavit 2, *supra* note 57, at 3; Affidavit 3, *supra* note 56, at 4-5; Affidavit 4, *supra* note 57, at 2.

⁶² OIG Report, *supra* note 22, at 17.

⁶³ *Id.*

⁶⁴ “Translating the New Swine Inspection System,” Food & Water Watch, Feb. 15, 2018,

plants—in which a USDA on-line inspector discovered that a plant employee failed to identify a carcass so infected that consumption of the meat could cause food poisoning.”⁶⁵ They further discovered that “HIMP plants received 84% of the non-compliance reports filed for problems with food safety plans; 73% of the reports filed for carcass contamination with feces, bile, hair or dirt; 65% of the reports filed for general carcass contamination; and 61% of the reports filed for equipment sanitation.”⁶⁶

Rather than acknowledge HIMP’s serious food safety failings, FSIS issued a 2014 Report that essentially ignored them, pointing to irrelevant facts and drawing erroneous conclusions from the data. As noted in the January 2016 letter to USDA from 60 members of Congress, for example, simply because a similar number of inspection tasks has been performed at comparable slaughter establishments (HIMP and non-HIMP), that does not mean the resulting meat product is safer, as FSIS concludes.⁶⁷ Moreover, in comparing HIMP hog plant performance in preventing fecal contamination to non-HIMP hog plant performance, FSIS relied only on a baseline study conducted in 1998, and thus erroneously “assumes that non-HIMP hog slaughter plants failed to make any improvement in reducing food safety defects over a 14-year period.”⁶⁸

FSIS must listen to USDA’s watchdog agency, its own veteran inspectors with first-hand knowledge of HIMP, and the facts about carcass contamination, as evidenced in the enforcement records themselves. The only reasonable course of action is to shelve HIMP—and thus, NSIS—as a dangerous and unlawful experiment, not a model for the nation’s hog slaughter establishments. FSIS’s decision to implement NSIS in light of the abundance of evidence of HIMP’s failure to keep the meat supply safe and humane would therefore be arbitrary, capricious, and abuse of discretion, and not in accordance with the FMIA or HMSA.

The Proposed Rule Directly Violates the FMIA and HMSA

FSIS should not implement NSIS because, as explained above, it would run afoul of the statutory mandates the agency is charged with implementing under the FMIA and HMSA. Indeed, increasing line speeds and privatizing slaughter inspection are antithetical to and directly contravene FSIS’s statutory mandates and implementing regulations. The Proposed Rule allows slaughter facilities to sacrifice humane treatment of animals and food safety to maximize efficiency⁶⁹—which FSIS is simply not statutorily authorized to do.

Further, allowing establishments to opt-out of complying with maximum line speeds under federal law, and turning over key food safety oversight responsibilities to company

<https://www.foodandwaterwatch.org/insight/translating-new-swine-inspection-system>; *see also* Sample Violations, https://www.foodandwaterwatch.org/sites/default/files/scanned_nrs_himp_.pdf.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Letter to USDA, *supra* note 24, at 2.

⁶⁸ *Id.* at 3.

⁶⁹ 83 Fed. Reg. 4780, 4812-13 (discussing efficiency gains, noting “increase in line speed is synonymous with an increase in industrial efficiency,” and concluding that faster line speeds will result in a \$47.33 million annual gain to the pork packing industry, with no mention of the rule’s impact on humane treatment of animals).

employees, without any meaningful oversight by FSIS amounts to an abdication of FSIS's statutory duties and/or an unlawful delegation of FSIS's statutory authority to private parties. Neither the HMSA nor FMIA suggest that FSIS can entrust its regulatory duties to slaughter facilities.⁷⁰ Yet the Proposed Rule allows decisions as to the safety and regulatory status of slaughter facilities to be made by private parties—specifically, the very parties that FSIS is statutorily obligated to regulate.

Indeed, while FSIS retains some nominal authority over line speeds in NSIS plants temporarily, the Proposed Rule does not provide that FSIS can require plants that have opted-out to abide by maximum line speeds on an ongoing basis.⁷¹ Moreover, as inspectors in HIMP plants testified, plant employees actively ignore or flout FSIS inspectors' orders regarding condemning carcasses and taking regulatory control actions, and are otherwise powerless to stop or slow the line to remove contaminants. The Proposed Rule thus unlawfully places FSIS's authority in the hands of ineffective and self-interested private entities.⁷² Combined with FSIS's long-standing lack of enforcement of the HMSA, this rule has the practical effect of immunizing NSIS plants from the stringent regulation that the HMSA and FMIA require, and to which non-NSIS plants could still be subjected.⁷³ Thus, the Proposed Rule is unlawful.

Conclusion

FSIS must not implement NSIS. Doing so would be unjustified in light of the evidence, contrary to law, and arbitrary, capricious, and an abuse of discretion. Aside from the agency itself and the large meat companies that stand to profit from privatized, speeded-up hog slaughter, the reaction to HIMP—and now, to NSIS—has been vociferous and almost universally negative. The USDA's own OIG issued a searing critique. FSIS's own HIMP plant inspectors were so alarmed by the program—and by agency leadership's repeated failure to listen to them and take food safety threats seriously—that they became whistleblowers and shared their experiences with lawmakers and the general public. Citing abysmal results for food safety, slaughter plant workers, and animal welfare, a bipartisan coalition of members of Congress further warned FSIS not to proceed with HIMP. A petition opposing HIMP and NSIS has now been signed by over a quarter million people. Numerous news pieces have excoriated HIMP. And now the Proposed Rule has garnered nearly 54,000 comments, many of which appear to be highly critical.

⁷⁰ See *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 20 (D.D.C. 1999) (“The relevant inquiry in any delegation challenge is whether Congress intended to permit the delegatee to delegate the authority conferred by Congress.”) (internal citations and quotations omitted).

⁷¹ See 83 Fed. Reg. 4780, 4823; *The Fund for Animals v. Kempthorne*, 538 F.3d 124, 133 (2d Cir. 2008) (an “agency delegates its authority when it shifts to another party ‘almost the entire determination of whether a specific statutory requirement . . . has been satisfied,’ or where the agency abdicates its ‘final reviewing authority.’”) (internal citations omitted).

⁷² See *Nat'l Park & Conservation Ass'n*, 54 F. Supp. 2d at 20 (holding that an agency cannot shift its responsibility to administer a statute to a private actor, “particularly a private actor whose objectivity may be questioned on grounds of conflict of interest”).

⁷³ See *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 171 (D.D.C. 2000) (“When an agency has employed a formal procedure, such as notice and comment rulemaking, to announce a major policy decision not to regulate certain conduct, courts can use this procedure as a focal point for judicial review.”).

FSIS should heed this chorus of well-placed criticism, and discard HIMP and NSIS as a failed and unlawful experiment.

Sincerely,

A handwritten signature in black ink that reads "Kelsey Eberly". The signature is written in a cursive, slightly slanted style.

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