



NATIONAL
EMPLOYMENT
LAW
PROJECT



VIA ELECTRONIC MAIL

March 19, 2019

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Dear Administrator Rottenberg and Assistant Administrator Wagner:

Re: RIN 0583-AD62

The National Employment Law Project (NELP) and United Food and Commercial Workers International Union (UFCW) write with serious concerns about the decision by the USDA Food Safety and Inspection Service (FSIS) to hide from public comment a critical analysis used by the agency in the current rulemaking on swine slaughter inspections. On November 28, 2018, the FSIS denied both NELP's and the UFCW's request to add to the docket the newly released agency analysis of the impact of the proposed rule on worker safety and reopen the comment period to allow the public to submit comments on this information.

FSIS Has Failed and Refused to Provide for Public Comment the Analysis and the Data That Led to Its Conclusion that Plants With Faster Line Speeds Have Lower Worker Injury Rates in the Pending Rulemaking

In its proposed rule, Modernization of Swine Slaughter Inspection, 83 FR 4780 (February 1, 2018), FSIS stated that it conducted a preliminary analysis and compared in-establishment injury rates between HIMP plants - five plants in the USDA's pilot program that received waivers to run faster lines - and traditional plants from 2002-2010. (83 FR 4796). FSIS claimed that "HIMP establishments had lower mean injury rates than non-HIMP establishments." (83 FR 4796). However, the agency did not make the analysis, data, or methodology used to support this claim available when it issued the proposed rule for comment, and therefore, the public was unable to provide comments to FSIS on the agency's analyses or conclusions.

Prior to the May 2, 2018 comment period closing date, both NELP and Dr. Celeste Monforton, DrPH, MPH Lecturer, Department of Health & Human Performance, Texas State University, made Freedom of Information Act (FOIA) requests for USDA's analysis, data and methodology. Dr. Monforton sent a FOIA request letter on February 14, 2018, and NELP on March 6, 2018 (FOIA 18-227). The NELP letter specifically requested expedited processing because the information is "pertinent to the public's understanding of the proposed rule, and the commenters' ability to advise FSIS of their views." However, the USDA did not provide the data until September 14, 2018, six months after the requests were made and four months after the comment period on the proposed rule closed. Both the UFCW and NELP made it clear in comments that we and the public were unable to comment on the agency's conclusions as to the proposed rule's impact on worker safety because its preliminary study was not publicly available for review.¹

On September 26 and October 2, 2018 respectively, UFCW and NELP wrote to the USDA and requested that the agency add its preliminary analysis, data and methodology to the docket and reopen the comment period to allow the public to submit comments on this analysis.

On November 28, 2019, FSIS rejected UFCW and NELP's request. In declining to reopen the record, FSIS stated that, "[a]ll the information that FSIS used in its analysis was publicly available. FSIS provided links to . . . OSHA data in the proposed rule. And, while FSIS did not post the exact data that the Agency pulled from the Public Health Information System (PHIS) to select swine slaughter establishments present in the

¹ NELP comments, available at <https://www.regulations.gov/document?D=FSIS-2016-0017-76250>; UFCW comments, available at <https://www.regulations.gov/document?D=FSIS-2016-0017-80091>.

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OSHA data set, the same information can be found in other formats on our website. Establishment level production volume information is available at <https://www.fsis.usda.gov/wps/portal/fsis/topics/data-collection-and-reports/data>.” These assertions are false. The public could not have ascertained the methodology or the plants used in the analysis without an actual copy of the methodology, data, and analysis.

Moreover, contrary to FSIS’s claim above, it did not provide the link to worksite injury data in the proposed rule. FSIS provided the following link: <http://www.bls.gov/iif/data.htm> (83 FR 4796), which provides only aggregate, industry-wide workplace injury, illness and fatality data collected by the Bureau of Labor Statistics. There is absolutely no establishment-specific injury and illness information available via this link. Therefore, FSIS’s claim that BLS statistics support a comparison of injury rates at individual meat processing plants is demonstrably untrue.

In fact, we believe that the data the agency actually relied on came from a different agency. This data came from the Occupational Safety and Health Administration (OSHA), and was collected as part of the OSHA Data Initiative (ODI): https://www.osha.gov/pls/odi/establishment_search.html. If this is indeed the case, the conclusions drawn by FSIS are not supported by the data. The ODI collected a very limited sample of company-maintained summary injury data. This was a random sample of 80,000 high-hazard work sites that sent data to OSHA voluntarily. Every year of the ODI, OSHA requested summary injury data from different workplaces. Therefore, for some hog plants, OSHA collected no data between 2002 – 2010. For others it collected only one year of data; for others it collected three years of data; and for others it collected five or more years of data. There was absolutely no way for the public to ascertain the methodology that FSIS used in their analysis. And once we received the analysis, we learned it involved comparing plants with one year of data with plants with three or more years of data. Comparing incongruous injury data does not reveal any meaningful information about worker injury rates in hog slaughter plants

FSIS’s response also incorrectly maintains that the public could have determined which plants were involved in its analysis. The letter and the proposed rule state, “[f]ifty-six FSIS inspected market hog slaughter establishments voluntarily submitted injury rate data to OSHA (approximately 9% of all market hog slaughter establishments.) From these 56 establishments, 27 low volume establishments were excluded, leaving 29 plants in the analysis (5 HIMP and 24 Traditional).” However, FSIS did not provide information about the actual volume of hog slaughter plants and which are the 27 “low volume plants.” FSIS’s letter cited a website that the agency says the public could have used to find production volume information, but this website does not actually

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contain production volume information.² The website merely assigns all plants a rating from 1-5 regarding volume, and also uses the terminology “small,” “very small,” and “large”. It does not include actual production volumes, or define “low volume plants.” It does, however, list over 6,400 facilities. There was absolutely no way that the public could have determined which of the 6,400 facilities were the low volume “traditional” plants that FSIS used in its analysis without the actual data.

FSIS’s Preliminary Analysis Was Fundamentally Flawed

In addition to the fact that FSIS used OSHA data that compared injury rates collected over different amounts of time, other parts of its analyses were fundamentally flawed. FSIS’s five-page draft analysis consisted mostly of heavily redacted e-mails and a few charts. Dr. Monforton and a research scientist at Texas State University reviewed these e-mails and charts, and concluded that the FSIS analysis cannot be used to draw any statistically valid conclusions about worker injury rate differences in pilot plants versus traditional plants.³ As outlined above, the methodology of comparing average injury rates from a non-random sample of plants from different years is inappropriate and does not produce any kind of reliable information.⁴ Further, comparing data from 24 plants to data from five plants is also a flawed methodology. The analysis also compared injury rates in very different types of plants. For example, the FSIS compared plants that kill approximately 100,000 hogs a year to plants that kill over 3 million hogs a year. These are inaccurate and unreliable comparisons.

NELP and the UFCW urge FSIS to Add the Preliminary Analysis, Data and Methodology to the Docket and Re-open the Comment Period to Allow the Public to Submit Comments on the Newly Added Information.

As explained above, FSIS’s failure to add to the docket the data, methodology, and analysis it relied upon in formulating the proposed rule prevented members of the public from meaningfully commenting on FSIS’s conclusions with respect to employee safety. In light of FSIS’s own recognition “that evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety,” (83 FR 4796), NELP and the UFCW urge FSIS to re-open the record, add the information on the data, methodology and analysis, and allow the public to provide the agency with comments on this new information. The agency should allow an additional 60 days for stakeholders to submit comments. FSIS’s issuance of a final rule

² <https://www.fsis.usda.gov/wps/portal/fsis/topics/data-collection-and-reports/data>

³ <https://s27147.pcdn.co/wp-content/uploads/Monforton-Vaughan-Review-USDA-FSIS-Injury-Data.pdf>

⁴ <https://s27147.pcdn.co/wp-content/uploads/Monforton-Vaughan-Review-USDA-FSIS-Injury-Data.pdf>

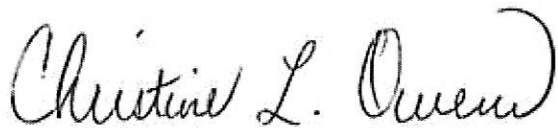
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on swine slaughter inspections without doing so would violate the requirements that agencies provide meaningful opportunity to comment on proposed rules, and make decisions in a manner that is not arbitrary or capricious.

Sincerely,

Handwritten signature of Christine L. Owens in cursive script.

National Employment Law Project (NELP)

Handwritten signature of Anthony M. Senore in cursive script.

United Food and Commercial Workers
International Union (UFCW)