



Christine L. Owens
Executive Director

www.nelp.org

NELP National Office
75 Maiden Lane
Suite 601
New York, NY 10038
212-285-3025

Washington DC Office
2040 S Street NW
Lower Level
Washington, DC 20009
202-640-6520

California Office
2030 Addison Street
Suite 310
Berkeley, CA 94704
510-982-5945

Washington State Office
317 17th Avenue South
Seattle, WA 98144
206-324-4000

April 16, 2018

FSIS Freedom of Information Act Office
Room 2168-South Building
1th and Independence Avenue, SW
Washington, DC 20250

Transmitted by email to: fsis.foia@usda.gov

RE: Expedited Appeal of Denial of Request for Expedited Processing (FOIA Request No: FOIA-2018-0227)

To whom it may concern:

Pursuant to 5 U.S.C. § 552, please accept this letter as the National Employment Law Project's (NELP) timely appeal of the Department of Agriculture's Food Safety and Inspection Service (FSIS) denial of the organization's request for expedited processing of Freedom of Information Act (FOIA) request No. FOIA-2018-0227. Like the request itself, NELP seeks expedited processing of this appeal.

FSIS improperly denied NELP's request for expeditious processing for its FOIA request. As detailed below, the requested information would shed substantial light on the agency's evaluation of the risks posed by the proposed Modernization of Swine Slaughter Inspection rule. See 83 Fed. Reg. 4780. FSIS has only afforded the public until May 2, 2018 to submit comments on the proposed rule. A failure to make this information public prior to the close of the comment period would prevent the public from scrutinizing the agency's evaluation of the risks posed by the proposed new rule, and it would prevent members of the public from being able to comment on this evaluation.

On March 6, 2018, NELP requested expedited processing of the referenced FOIA request pursuant to 5 U.S.C. § 552(a)(6)(E)(i), 7 C.F.R. § 1.9, and 9 C.F.R. § 390.5(a)(4). The NELP FOIA requested the data, spreadsheets, reports and preliminary analysis conducted by FSIS, or obtained by FSIS, to compare the in-establishment employee injury rates between HIMP (HACCP- Based Inspection Models Project) and traditional swine slaughter plants from 2002-2010. The agency refers to this analysis in the preamble of the final rule:

"FSIS recognizes that evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety. FSIS compared in-establishment injury rates between HIMP and traditional establishments from 2002 to 2010. The preliminary analysis shows that HIMP establishments had lower mean injury rates than non-HIMP establishments." See 83 Fed.Reg.4796

Further, then FSIS requested comments from the public on the effects of faster line speed on

worker safety:

“FSIS is requesting comments on the effects of faster line speeds on worker safety. Specifically, FSIS is requesting comments on whether line speeds for the NSIS should be set at the current regulatory limit of 1,106 hph or some other number. The Agency is also interested in comments on the availability of records or studies that contain data that OSHA or the National Institute for Occupational Safety and Health (NIOSH) may be able to use in analyzing the effects of increased line speed on the safety and health of employees throughout the establishment, including effects prior to and following the evisceration line. FSIS is also requesting comments on whether the Agency should maintain the 1,106 hph maximum line speed for establishments operating under NSIS but grant waivers from the maximum line speed to establishments that agree to work with the National Institute for Occupational Safety and Health NIOSH to evaluate the effects of waivers of line speed restrictions on employee health. FSIS is requesting comments on best practices and other measures that establishments can take to protect workers throughout the plant, including possible protective factors such as increasing the size of the workforce, rotating assignments, increased automation, or improved tools and techniques.” 83 Fed.Reg.4 796

It is not possible for the public, however, to comment on the FSIS preliminary analysis on worker safety risks referenced above since the FSIS has not made the analysis available for review. How is the public to comment on the analysis without any ability to review it, how it was conducted, what methods were employed to assure it was statistically appropriate, how many and which Non-HIMP plants were chosen to participate and whether FSIS collected information about actual line speeds, staffing and hours worked, dates of plant operation, and number of shifts operating? How can the public comment on a review of the impact of this rule on worker safety that is not made available to the public? This is the very information NELP requested in its FOIA. Expedited processing of the FOIA request is clearly most necessary given the pending close of the public comment period on May 2, 2018. Further, NELP also requested in the FOIA: 1) any data, spreadsheets, reports, analysis studies of employee injury and illness rates in swine slaughter establishments conducted by FSIS using data after 2011 and 2) the identity of the 35 establishments that FSIS stated in their “risk assessment” that are the most probable to adopt the new inspection system and the reasons and criteria used by the agency to make this determination. This data must also be made available to the public before the comment period closes on May 2, so that the public can evaluate the agency’s public health risk assessment, as well as the agency’s assessment on the impact on worker safety of the new proposal, and submit comments on this to the agency.

The Department’s regulations provide that expedited processing is available where there is “[a]n urgency to inform the public about an actual or alleged federal government activity, if made by an individual primarily engaged in disseminating information.” 7 C.F.R. § 1.9(b)(2).

NELP's request satisfies the "urgency" requirement as provided by the Department's FOIA regulations. FSIS has issued a new proposed rule: Modernization of Swine Slaughter Inspection, published on February 1, 2018. See 83 Fed.Reg.4780. The proposed rule would increase line speeds in swine slaughter establishments with potentially serious health consequences for in- establishment workers. The FSIS is fully aware of the potential impact to worker safety and health of the new proposed rule, and as stated above, specifically requested that the public submit comments on such potential impact. The proposed rule contained a few line summary of an agency evaluation of the risks of the new proposed rule to worker safety, but failed to make the analysis public so the public can comment on the agency's evaluation. The information requested in this FOIA is critical to the public's understanding of the agency's evaluation of the impact of the proposed rule on worker safety and public health, and to commenters' ability to advise FSIS of their views. The deadline for public comment on the proposed rule is May 2, 2018. See 83 Fed. Reg. 4780-4823. Absent expedited processing, the FSIS's analysis of the impact of the proposed rule on worker safety may not be made available before the May 2 comment deadline, and the public's ability to comment on the analysis and the proposed rule will be lost. See 7 C.F.R. § 1.9(b)(2) (providing that "urgency" is established where "the information has a particular value that will be lost if not disseminated quickly").

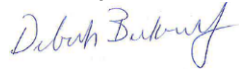
Second NELP is "primarily engaged in disseminating information" for purposes of this FOIA request. The Department's regulations provide that requesters need not be members of the news media to meet this requirement, but may establish that "their primary activity involves publishing or otherwise disseminating information to the public as a whole." *Id.* As a workers' rights education and advocacy organization, NELP regularly publishes reports, policy analysis, and fact sheets on federal activity for the purpose of educating the public of the import of federal policy on the economic well-being of low-wage, unemployed, or vulnerable workers. See, e.g., Fact Sheet, *Responding at the Federal and State Levels to the Needs of Unemployed Families Resulting from Hurricanes Harvey and Irma* (Sept. 12, 2017), available at <http://bit.ly/2A64LiT>; Fact Sheet, *Wait Staff and Bartenders Depend on Tips for More Than Half of Their Earnings (January 2018)*, available at <http://www.nelp.org/content/uploads/NELP-ROC-Data-Brief-Tip-Rule>; see also generally <http://www.nelp.org/publications/>. NELP distributes its publications to a wide audience through means such as our website, email blasts, social media, blog posts and the internet. NELP uses email to convey much of this information, through email updates that are sent many times a month to more than 170,000 people, many of whom are decision-makers, activists and members of the general public. NELP also distributes much of this information through its website as well, which is updated regularly. In 2018, NELP had an average of 20,000 unique visits to its website a month. NELP has engaged for years on public education regarding the issue of meat and poultry line worker safety and the impact of high line speeds. See, e.g., Deborah Berkowitz, NELP, *Congressional Testimony on Harsh Conditions Endured by America's Poultry Workers* (Sept. 8, 2017), available at <http://bit.ly/2xMQmq3>. In addition, as explained above, NELP intends to use any requested records it receives to further educate the public on the Department's new proposed rule on swine slaughter inspections, and to comment on the proposed rule, which will be posted online (on both the

NELP website and at www.regulations.gov) for public dissemination. NELP therefore meets the requirement that it be “primarily engaged in disseminating information” for purposes of justifying this request for expedited FOIA processing. *See* 7 C.F.R. § 1.9(b)(2).

NELP is therefore entitled to the expeditious processing of FOIA request No. FOIA-2018-0227 and it urges FSIS to grant NELP’s appeal. FSIS improperly denied NELP’s request for expeditious processing for this request, as this information would shed substantial light on the agency’s evaluation of the risks posed by the proposed new rule *Modernization of Swine Slaughter Inspection*, and the period for the public to comment on such agency evaluation is closing on May 2, 2018. The public must have this information to be able to scrutinize the agency’s evaluation of the risks of the proposed rule and thus be able to comment by May 2. NELP is primarily engaged in disseminating information to the general public and has demonstrated an urgency to inform the public of the agency’s evaluation of the risks posed by the proposed new rule prior to May 2.

Pursuant to 7 C.F.R. § 1.9(c), I certify that the information supporting this request for expedited processing is true and correct to the best of my knowledge.

Sincerely,

A handwritten signature in blue ink, appearing to read "Deborah Berkowitz".

Deborah Berkowitz
Senior Fellow, Worker Safety and Health
National Employment Law Project
2040 S Street NW
Washington, DC 20009
dberkowitz@nelp.org
Month Day, Year