

May 2, 2018

Roberta Wagner
Assistant Administrator
Office of Policy and Program Development
USDA Food Safety and Inspection Service

Re: Modernization of Swine Slaughter Inspection (Docket ID No. FSIS-2016-0017-0001)

Dear Ms. Wagner,

On behalf of our over 10 million supporters and members, Mercy For Animals (MFA),¹ the Humane Society of the United States (HSUS),² and the Humane Society Legislative Fund (HSLF)³ submit the attached comments regarding USDA Food Safety and Inspection Service's (FSIS's) Proposed Rule, Modernization of Swine Slaughter Inspection. These comments are submitted electronically via regulations.gov, and a copy of these comments together with all attachments are hand-delivered to FSIS on May 2, 2018.

Thank you for your time and attention in hearing our concerns.

Sincerely,

Vandhana Bala
Senior Vice President and General Counsel
Mercy For Animals
VandhanaB@MercyForAnimals.org

Stefanie Wilson
Staff Attorney
Mercy For Animals
StefanieW@MercyForAnimals.org



¹ Mercy For Animals is a leading international animal protection charity dedicated to preventing cruelty to farmed animals and promoting compassionate food choices and policies. MFA represents more than 2.5 million members and supporters who are concerned about the welfare of chickens slaughtered for food, the safety of poultry meat produced and consumed in the U.S., and the safety of workers in poultry slaughter facilities.

² As the nation's largest animal protection organization, and on behalf of its millions of members and supporters, HSUS seeks a humane world for people and animals alike. HSUS drives transformational change in the U.S. and around the world by combating large-scale cruelties such as puppy mills, animal fighting, factory farming, seal slaughter, horse cruelty, captive hunts and the wildlife trade. HSUS advocates against unsustainable agricultural practices and the inhumane treatment of birds and other animals raised for food.

³ The Humane Society Legislative Fund ("HSLF") works to pass animal protection laws at the state and federal levels, and to educate the public about animal protection issues.

Peter Brandt
Managing Attorney
The Humane Society of the United States
PeterB@HumaneSociety.org



Keisha Sedlacek
Senior Regulatory Specialist
Humane Society Legislative Fund
KSedlacek@HSLF.org



I. Introduction

After a highly controversial, 16-year pilot program, FSIS introduces the New Swine Inspection System (NSIS) for “market hog slaughter establishments.” NSIS’s two hallmarks are (1) reducing the number of pigs on whom FSIS will conduct ante-mortem inspection by requiring slaughter facilities to first presort and get rid of animals, and (2) eliminating the regulatory cap on line speeds. The stated goals of NSIS are to modernize slaughter inspection, increase offline inspection activities, and increase efficiency of pig slaughter.⁴ These goals are seriously undermined, however, by the plethora of evidence demonstrating that shifting ante-mortem inspection duties and increasing slaughter line speeds will unacceptably jeopardize animal welfare, food safety, and worker safety—contrary to FSIS’s statutory obligations under the Humane Methods of Slaughter Act (HMSA)⁵ and the Federal Meat Inspection Act (FMIA).⁶

As explained below, shifting ante-mortem inspection duties to the slaughter facility is an unexplained, unjustified 180-degree reversal of FSIS’s established interpretation of these statutes, regulations, and policies. As to both shifting ante-mortem inspection and eliminating line-speed maximums, FSIS has ignored relevant data demonstrating that these proposals will be harmful, basing its decisions instead on conclusory assumptions or irrelevant and unreliable data.

Further, the Proposed Rule cannot be finalized because FSIS has not complied with the National Environmental Policy Act (NEPA), which requires an environmental impact analysis. FSIS baldly claims a categorical exemption to NEPA and baselessly asserts that the Proposed Rule will have little environmental impact. This defies common sense and ignores evidence demonstrating significant environmental damage and public health risk.

Agency decisions must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁷ The basic requirement of “reasoned decisionmaking”⁸ is that agency actions be “based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute [T]he agency must examine the relevant data and articulate a satisfactory explanation

⁴ Proposed Rule, Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780, 4785 (Feb. 1, 2018) (hereinafter, NSIS Proposed Rule).

⁵ 7 U.S.C. § 1901 *et seq.*

⁶ 21 U.S.C. § 601 *et seq.*

⁷ 5 U.S.C. § 706(2)(A).

⁸ *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

for its action, including a rational connection between the facts found and the choice made.”⁹

For these reasons, we urge you not to finalize the Proposed Rule unless these deficiencies are properly addressed. If FSIS nevertheless finalizes NSIS, the agency must not shift ante-mortem inspection duties onto the slaughter facility and must retain a maximum line speed.

II. The Proposed Rule Improperly Prioritizes Industry Profits Over Serious Humane Handling and Food Safety Concerns, Contrary to the Purposes of the HMSA, the FMIA, and USDA’s Own Policies

Neither the HMSA nor the FMIA authorizes USDA to compromise public health or the humane handling of slaughter-bound animals in an attempt to *enhance* industry’s bottom line. The FMIA was *never* intended to maximize the amount of meat in the food supply; rather it was enacted in 1907 for the express purpose of protecting consumers from a flood of unsafe, unregulated meat products in the marketplace.¹⁰ The HMSA, which is incorporated into the FMIA by reference,¹¹ contains an unequivocal statutory mandate that “the handling of livestock in connection with slaughter shall be carried out only by humane methods.”¹²

USDA has made clear that the statutory obligations of preserving food safety and preventing inhumane treatment of slaughter-bound animals override considerations of financial impacts on the meat industry. After USDA imposed a 2004 interim rule

⁹ *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

¹⁰ See 21 U.S.C. § 602; *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007) (noting that the FMIA “is concerned with inspecting premises at which meat is produced for human consumption, . . . rather than with preserving the production of particular types of meat for people to eat.”); *United States v. Stanko*, 491 F.3d 408, 417 (8th Cir. 2007) (“[C]ases discussing the FMIA uniformly describe the statute as concerned primarily with protecting public health.”).

¹¹ 21 U.S.C. § 603(b).

¹² See 7 U.S.C. § 1901 (“The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry . . . It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.”).

proscribing the slaughter for human food of non-ambulatory disabled (NAD)¹³ cattle,¹⁴ livestock producers complained that they had experienced “a serious economic burden” as a result of the rule.¹⁵ Small meat processors and custom operations “stated that because they [did] not slaughter or process a large number of animals, they [stood] to lose a significant source of revenue, and some stated that the prohibition on the slaughter of non-ambulatory disabled cattle [would] cause them to go out of business.”¹⁶ Nonetheless, USDA swiftly dismissed these arguments because, despite “certain economic effects,” “the carcasses of non-ambulatory disabled cattle offered for slaughter are adulterated and as such cannot be used for human food.”¹⁷ In other words, USDA affirmed¹⁸ that purported economic losses—even where they might force some operators to close—do not override food safety.

The meat industry made similar economic arguments in response to USDA’s 2009 rule proscribing the slaughter for human food of cattle who become non-ambulatory after ante-mortem inspection.¹⁹ Industry commenters protested that the removal of the case-by-case disposition imposed a “significant expense” and deprived them of the benefits of “having FSIS [veterinarians] re-evaluate the animal, [which] provides the establishments with the ability to salvage an animal that may have slipped and broken a leg, or temporarily become too exhausted to move to slaughter.”²⁰ Again USDA maintained its position, this time on animal welfare grounds, stating, “This revision...removes the incentive to send [] weakened cattle to slaughter and decreases the chances of inhumane conditions.”²¹ Thus, USDA has properly established that its statutory mandates require it to prevent cruel and inhumane handling and slaughter; protect against unwholesome and adulterated meat, and safeguard the health and

¹³ “Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions.” 9 C.F.R. § 309.2(b).

¹⁴ See Interim Final Rule and Request for Comments, Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle, 69 Fed. Reg. 1862 (Jan. 12, 2004).

¹⁵ Final Rule, Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle, 72 Fed. Reg. 38699, 38705 (July 13, 2007).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ This is consistent with the plain language of the FMIA. See 21 U.S.C. § 602 (“It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated”); *id.* § 610(d) (absolute prohibition on “any act” that could result in meat or meat products becoming “adulterated or misbranded”).

¹⁹ See Final Rule, Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11463, 11464 (Mar. 18, 2009).

²⁰ *Id.*

²¹ *Id.* at 11465.

welfare of consumers—notwithstanding any purported cost or inconvenience to the regulated.

Nevertheless, FSIS buttresses its rationale for the Proposed Rule under the guise of increased “industrial efficiency,”²² *i.e.*, increased profits for the pork industry in excess of \$43 million annually.²³ However flawed FSIS’s economic analysis might be,²⁴ it is remarkable and revealing that FSIS believes the profits of the very industry it is charged with regulating is relevant to its analysis. Neither the HMSA nor the FMIA supplies the authority FSIS will need to justify that rationale upon judicial review. The agency points to no other statutory authority to support its proposed plan to help multinational meat companies that already make billions of dollars per year make even more money at the expense of animal welfare and public safety.

III. Slaughter Facility Sorting of Live Animals Violates the HMSA, the FMIA, and FSIS Regulations, and FSIS’s Reasoning Is Unlawful Under the APA

FSIS proposes to reduce the number of pigs inspectors see prior to slaughter by requiring NSIS slaughter facilities to sort pigs “before the animals are presented for ante-mortem inspection.”²⁵ FSIS inspectors and veterinarians would necessarily see animals only after they had been sorted, losing any visibility of DOA and other pigs deemed “unfit for slaughter” by the slaughter facility and disposed of or diverted to another facility.²⁶ FSIS inspectors would observe sorting only twice per shift, though the Proposed Rule does not say for how long. According to William James, a 28-year veteran of FSIS, NSIS as proposed would allow “sorting [of animals] at any time of day or night, without anyone from FSIS present.”²⁷

²² NSIS Proposed Rule, 83 Fed. Reg. at 4812.

²³ *Id.* at 4812–4813.

²⁴ The Proposed Rule notes there are numerous economic factors the agency failed to consider: “[T]his increase in surplus may be an overestimate given that an increase in line speeds may change market hog prices, establishment production costs, retail prices, and export volumes. Additionally, consumer benefits would be conditional on how an increase in line speed affects retail prices. As such, the Agency is seeking comment on the extent to which such an increase in line speeds would affect market hog prices, establishment hours of production, consumer prices, and export volumes.” *Id.* at 4813.

²⁵ *Id.* at 4821–4822 (Proposed text of 9 C.F.R. § 309.19).

²⁶ *Id.* at 4792.

²⁷ Ingrid Mezo, *EXCLUSIVE: Ante-mortem Inspection by Hog Plant Staff Could Lead to Massive Animal Disease Outbreak, Vets Warn*, IEG POLICY (Mar. 2, 2018),

<https://iegpolicy.agribusinessintelligence.informa.com/PL215531/EXCLUSIVE-Antemortem-inspection-by-hog-plant-staff-could-lead-to-massive-animal-disease-outbreak-vets-warn>. (Attachment 1).

As explained below, this proposal is contrary to the HMSA, the FMIA, and FSIS regulations. If finalized, it would also be arbitrary and capricious because FSIS fails to “articulate a satisfactory explanation”²⁸ for the proposal and ignores crucial food safety and animal welfare consequences. We strongly urge FSIS to remove the slaughter facility presorting aspect from NSIS and to stop its current pattern and practice of allowing certain slaughter facility to presort and dispose of animals without legal authority. Additionally, regardless of whether this aspect of NSIS is retained, FSIS should require all plants participating in NSIS to promptly and humanely euthanize NAD pigs.

A. Allowing Live Market Hog Sorting by Establishment Personnel Violates the HMSA, the FMIA, and FSIS Regulations

We first address FSIS’s disturbing admission that it already allows “most”²⁹ market hog slaughter facility to presort and dispose of pigs who arrive at the slaughter facility, without legal authority, transparency, or the benefit of public review and comment. This violates the Administrative Procedure Act (APA),³⁰ since “[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”³¹ As explained below, this is a 180-degree reversal that the Proposed Rule does not acknowledge, let alone attempt to explain.³²

Now the agency plans to use NSIS to double down on this troubling policy to allow untrained facility employees to remove an unlimited number of pigs from the routine ante-mortem inspection that is required by the HMSA and the FMIA and that FSIS once defended to the Supreme Court as a matter of grave public health and economic importance.³³

Slaughter facility sorting of live pigs is contrary to the HMSA, the FMIA, and FSIS regulations. The FMIA requires that “[f]or the purpose of preventing the use in commerce of meat and meat food products which are adulterated, the Secretary shall

²⁸ *State Farm*, 463 U.S. at 43.

²⁹ NSIS Proposed Rule, 83 Fed. Reg. at 4783.

³⁰ 5 U.S.C. § 706(2)(A), (D).

³¹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

³² As “[t]he D.C. Circuit has repeatedly explained... an agency’s unexplained 180 degree turn away from [precedent is] arbitrary and capricious,” and an agency’s decision “to reverse its position in the face of a precedent it has not *persuasively* distinguished is quintessentially arbitrary and capricious.” *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 18–20 (D.D.C. 2009) (quotation marks omitted).

³³ See *infra* note 42.

cause to be made, *by inspectors appointed for that purpose, an examination and inspection of all amenable species* before they shall be allowed to enter into any slaughtering . . . establishment.”³⁴ The FMIA also requires that “[f]or 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.*”³⁵ The term “handled in connection with slaughter” is extremely broad, governing not just handling immediately incident to killing, but rather *all* animal handling *anywhere* on the official premises at a federally inspected facility.³⁶

Similarly, FSIS regulations require that “[a]ll livestock offered for slaughter in an official establishment [] *be examined and inspected on the day of and before slaughter.*”³⁷ Requiring all animals to be examined and inspected by FSIS enables inspectors to prevent inhumane handling of livestock.³⁸ It is also necessary to ensure that FSIS inspectors are able to identify all animals—including “*all seriously crippled animals and non-ambulatory disabled livestock*” — who should be identified as U.S. Suspect.³⁹

Other regulatory requirements are also highly likely to be violated if slaughter facilities are allowed to sort and dispose of sick and NAD animals without any inspector oversight. FSIS regulations require, for example, that local, state, and federal officials be

³⁴ 21 U.S.C. § 603(a) (emphasis added).

³⁵ See *id.* § 603(b) (emphasis added).

³⁶ Final Rule, Humane Slaughter Regulations, 44 Fed. Reg. 68809, 68811 (Nov. 30, 1979) (*quoting* S. Comm. Rep. No. 95-1059, at 4 (1978) (“It is the committee’s intent that handling in connection with slaughter be interpreted by the Secretary to begin at the time livestock come into the custody of the slaughtering establishment, up to and including the moment of slaughter.”)). Accordingly, FSIS has determined that these humane handling duties of the HMSA apply “[o]nce a vehicle carrying livestock enters an official slaughter establishment’s premises,” at which point “the vehicle is considered to be a part of that establishment’s premises. The animals within that vehicle are to be handled in accordance with [9 C.F.R. §] 313.2.” Humane Handling and Slaughter of Livestock, FSIS Directive 6900.2 Rev. 1, at 1 (Nov. 25, 2003); see also Notice, Humane Handling and Slaughter Requirements and the Merits of a Systematic Approach To Meet Such Requirements, 69 Fed. Reg. 54625, 54625 (Sept. 9, 2004) (“The HMSA is referenced in the FMIA (21 U.S.C. 603) and is implemented by FSIS humane handling and slaughter regulations[.] Therefore, establishments must meet the humane handling and slaughter requirements in the regulations the entire time they hold livestock in connection with slaughter.”).

³⁷ 9 C.F.R. § 309.1(a) (emphasis added).

³⁸ See 21 U.S.C. § 603(b) (“For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, and examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter.”).

³⁹ See 9 C.F.R. § 309.2(a), (b) (emphasis added).

given “immediate notification” if any livestock are found to have vesicular disease.⁴⁰ There are also specific requirements for disposing of carcasses of animals tagged as U.S. Suspect.⁴¹ Such requirements will not be met if animals who should be designated as such are never seen by FSIS inspectors or public health veterinarians.

Not long ago, FSIS vigorously argued before the U.S. Supreme Court that inspection by FSIS inspectors and veterinarians of all pigs arriving at the slaughter facility was crucial to preventing a massive disease outbreak—in particular, FSIS argued that it must examine all NAD pigs. According to FSIS, this requirement

ensures that FSIS inspectors and veterinarians will have an adequate opportunity to conduct the *FMIA-required ante-mortem inspection* of nonambulatory animals. Those inspections are often the best way to detect potentially devastating diseases that may be spreading through livestock populations; veterinarians can in turn alert other officials who can act to prevent widespread economic harm and disruption of the meat supply.⁴²

FSIS further explained that its ability to report animal diseases to APHIS for tracing and containment “relies heavily on ante-mortem inspections”: “Such inspections are often the best way to detect serious diseases, especially when standard diagnosis requires observing or taking the temperature of a live animal Ante-mortem inspection is . . . important in detecting, for example, [foot-and-mouth disease], swine vesicular disease, vesicular stomatitis, and classical swine fever or ‘hog cholera.’”⁴³ FSIS argued that a state law that would prevent the live inspection by FSIS of any number of NAD pigs “would *undermine* that system for detecting and responding to serious diseases in livestock” and “would make it difficult for FSIS veterinarians to recognize a number of serious diseases, let alone report them to authorities that can act to contain an outbreak.”⁴⁴ FSIS emphasized that inspection of NAD pigs was especially important because, according to FSIS, “the disease has likely progressed the furthest [in NAD pigs], and [these pigs] are thus the bellwethers of contagion in the herd.”⁴⁵

⁴⁰ 9 C.F.R. § 309.15.

⁴¹ *See* 9 C.F.R. Pt. 311.

⁴² Brief for United States as Amicus Curiae Supporting Petitioner at 15, *Nat’l Meat Assn. v. Harris*, 565 U.S. 452 (2011) (emphasis added). (Attachment 2).

⁴³ *Id.* at 33 (citing FSIS Directive 6000.1).

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.*

B. Sorting by the Slaughter Facility Unacceptably Jeopardizes Animal Welfare

The Proposed Rule also fails to provide adequate justification for presorting of live animals by the slaughter facility. Indeed, the Proposed Rule fails to explain how this aspect of the rule actually modernizes inspection. Rather, the *only* rationale offered is that slaughter facility presorting frees up more inspector time.⁴⁶ But this goal is not authorized by the FMIA or the HMSA; and FSIS should fulfill its statutory responsibilities by hiring an adequate number of inspectors rather than by privatizing food safety and humane handling responsibilities. The Proposed Rule never explains how presorting's only benefit—freeing up inspectors—outweighs actual FMIA and HMSA requirements: ensuring humane handling and protecting public health.

Critically, FSIS overlooks the inherent conflict of interest created by shifting ante-mortem inspection responsibility to the slaughter facility. Slaughter facility employees face much greater threat of retaliation and intimidation by management, who are necessarily focused on production. To protect the integrity of oversight and enforcement, FSIS should not delegate these responsibilities to employees of the companies that FSIS is charged with regulating.

Under the Proposed Rule, slaughter facility employees will sort live pigs as they arrive at the slaughter facility into “Normal” and “Subject” pens. Slaughter facilities can also divert pigs with “localized conditions” or pigs they reject for other reasons to other slaughter facilities without inspector oversight. Under traditional inspection, FSIS inspectors are required to sort animals. Reducing ante-mortem inspection by FSIS violates FSIS's statutory responsibility to prevent inhumane handling of livestock by “examin[ing] and inspect[ing] . . . the method by which amenable species are . . . handled in connection with slaughter.”⁴⁷ Increased line speeds will result in an increased volume of animals being slaughtered. FSIS cannot credibly argue that decreasing inspector oversight of the unloading and sorting of animals while increasing volume of animals slaughtered is consistent with its mandates under the HMSA and the FMIA.

Further, FSIS has utterly failed to address a particular class of animals that is especially at risk of inhumane handling while sorting: NAD pigs. In addition to presenting a food safety risk,⁴⁸ NAD pigs are particularly at risk of being inhumanely handled in violation

⁴⁶ NSIS Proposed Rule, 83 Fed. Reg. at 4793.

⁴⁷ 21 U.S.C. § 603(b).

⁴⁸ NAD pigs spend more time in lairage and, by definition, are laying, sitting, and dragging themselves on the ground, which is a significant source of *salmonella spp.* contamination. European Food Safety Authority, *Scientific Opinion on the Public Health Hazards to be Covered by Inspection of Meat (Swine)*, 9(10)

of the HMSA.⁴⁹ FSIS's own records document inhumane handling of NAD pigs that could be prevented by requiring immediate and humane euthanasia of NAD pigs. We reviewed records of noncompliance records (NRs) issued from January 2015 to February 2017. In the records we reviewed, there were 643 inhumane NRs issued at FSIS-inspected pig slaughter facilities, and of those, 98 NRs involved NAD pigs. Additionally, we identified 200 records of Memoranda of Interview (MOI), Notices of Intended Enforcement (NOIE), and Notices of Suspension (NOS) (collectively, MOI/NOIE/NOS) involving inhumane handling of pigs, of which 56 involved NAD pigs. According to internal emails, FSIS has known since at least 2012 that market hog slaughter facilities have "a disproportionate number of NRs for inhumane treatment of downer animals"⁵⁰ compared to slaughter facilities that kill other animals.

Of particular relevance were several records documenting instances where the slaughter facility failed to properly sort and euthanize animals unfit for slaughter. The following are examples:

- Over the course of several days in January 2017 at Swift Pork Co. (M3S), employees failed to "accurately assess[] NAD pigs during unloading and properly segregat[e] them." An FSIS inspector found four dead pigs in the "slow pen" and no access to water for the live pigs in the pen. The next day the inspector found one dying pig in the slow pen. Two days later, the inspector found two dead pigs in the slow pen and one dying and one condemned pig in the slow pen. The condemned pig had still not been euthanized after 30 minutes. The inspector also noted that condemned pigs were not properly restrained when euthanized, an issue that had been discussed with this slaughter facility in the past.⁵¹
- On January 18, 2016, at Smithfield Farmland Corp. (M717M), a new NAD pig was added to the Suspect pen and marked without being inspected. The inspector had to consult several employees before finding the pig's carcass at the gambreling table about to be eviscerated and processed for consumption. The

EFSA J. 2351 (2011), <http://www.efsa.europa.eu/en/efsajournal/doc/2351.pdf> (Attachment 3); *see also* [Petition of Farm Sanctuary, et al.](#), No. 14-02, 9 (June 3, 2014), and sources cited therein. (Attachment 4).

⁴⁹ *See* FSIS Administrator Alfred V. Almanza, Letter Granting HSUS Petition (Mar. 13, 2013) (Attachment 5); Final Rule, Requirements for the Disposition of Non-Ambulatory Disabled Veal Calves, 81 Fed. Reg. 46570, 46571 (July 18, 2016); Email from Keith Gilmore to Daniel Engeljohn, Mary Porretta, et al. (Dec. 4, 2012, 10:07 PM), cited in Petition No. 14-02, *supra* note 48 at 17 n.123.

⁵⁰ Email from Keith Gilmore to Daniel Engeljohn, Mary Porretta, et al. (Dec. 4, 2012, 10:07 PM), cited in Petition No. 14-02, *supra* note 48 at 17 n.123.

⁵¹ MOI # PUN2412021103G.

inspector condemned the carcass.⁵² The exact same issue (a downer pig marked for slaughter without inspection) happened at another Smithfield slaughter facility (M717CR) on March 16, 2016.⁵³

- On October 30, 2016, at John Morrell & Co. (M17D), FSIS inspectors discussed the issue of mixing inspected and uninspected pigs in the same pens and the fact that the slaughter facility had no system for marking which NAD pigs had passed ante-mortem inspection and which had not yet been inspected. This was the second time in the same month this issue had been raised with the slaughter facility.⁵⁴

There were 22 NRs and nine MOI/NOIE/NOS involving slaughter facilities inhumanely driving or using excessive force on NAD pigs to attempt to get them up or crowding and driving healthy animals over NAD pigs. The following are examples:

- On January 16, 2017, at Swift Pork Co. (M995), an employee repeatedly beat a downed pig who was obviously dragging his rear legs; the employee forced the pig to drag himself 30–35 feet into a different pen.⁵⁵
- On October 11, 2016, at Tyson Fresh Meats, Inc. (M244I), pigs were overcrowded into the Suspect pen, including a large number of NAD pigs; the crowding prevented pigs from accessing the water trough (an issue discussed with the plant two weeks prior). Employees forced injured NAD pigs to rise while attempting to remove a condemned pig.⁵⁶
- On June 2, 2016, at Tyson Fresh Meats, Inc. (M244W), two days in a row, Suspect pigs who had been passed for slaughter were not killed in a timely manner; up to 50 pigs remained in pens for over seven hours, in violation of the plant's own operating procedures. The inspector also documented employees hitting the downer pigs with bats to get them to move, correctly noting that "[i]t is unacceptable and achieves no useful or humane purpose to continue to hit animals unable to ambulate normally."⁵⁷
- Similarly, on January 21, 2017, at Swift Pork Co. (M3W), NAD pigs passed for slaughter were held for over four hours before the slaughter facility began stunning them. The inspector wrote: "Extended delay of stunning slow hogs after they have passed ante-mortem inspection is a humane handling concern."⁵⁸

⁵² MOI # UYI2416011318G.

⁵³ MOI # RZG0715033416G.

⁵⁴ MOI # WLJ3216101230G (linked to MOI # WLJ3822101304).

⁵⁵ NR # RKE2116011216N-1.

⁵⁶ MOI # GEH0017100611G.

⁵⁷ MOI # KGG5414014619G.

⁵⁸ MOI # GJC4003012221G.

Other records document NAD pigs suffering from cruel neglect while in holding. In one disturbing example at Tyson Fresh Meats, Inc. (M244I), two downer pigs were found suffering from extreme cold exposure and frostbitten ears; only because an FSIS inspector was present and found them were the pigs euthanized and their suffering ended.⁵⁹ Another 10 NRs were issued to slaughter s for holding NAD pigs without water or for more than 24 hours without food.

Furthermore, NAD pigs passed for inspection—unsurprisingly—are likely to go down again as they are driven out of the pens into the stunning area. This results in repeated moving of NAD pigs by the automatic push gates, in violation of 9 C.F.R. § 313.2(d), and other animal cruelty. The following are examples:

- In April 2016 there were multiple instances at Swift Pork Co. (M3W).⁶⁰ At least three times within a few days, inspectors observed NAD pigs down in the drive alley, right before CO₂ stunning, and expressed concern that the pigs would be pushed by the gates. On April 5, 2016, an inspector—after hearing a pig screaming in distress—found a downer pig with a leg trapped under the push gate and an employee using a rattle paddle (the employee was ordered to stop). Then another employee released the push gate, moving it forward onto the pig and causing further distress.
- On August 4, 2016, at Tyson Fresh Meats, Inc. (M244W), inspection was suspended after four NAD pigs were pushed multiple times by the push gate leading to the CO₂ gas chamber.⁶¹
- On December 18, 2015, at Swift Pork Co. (M3W), inspection was suspended after an inspector found a pig “sitting down and crying” in the drive alley and observed the pig pushed over three feet across the floor by the gate, with no attempt by the employee involved to stop it.⁶²

While these records show that inhumane handling of NAD pigs is a persistent problem across slaughter facilities, they cannot provide the full picture because of underreporting and inconsistent enforcement.⁶³ But what we do know of egregious

⁵⁹ GEH5513035406N-1.

⁶⁰ MOI #s GJCO601042721G, GJC2600042605G, GJC4122040905G.

⁶¹ MOI # BTD5412082705G and ROS dated Aug. 4, 2016.

⁶² MOI # GJC5916120019G and NOS dated Dec. 18, 2015.

⁶³ See USDA OFF. INSPECTOR GEN. (OIG), AUDIT REPORT 24601-0001-41, FOOD SAFETY AND INSPECTION SERVICE – INSPECTION AND ENFORCEMENT ACTIVITIES AT SWINE SLAUGHTER PLANTS 23–25 (May 2013) (hereinafter, “OIG 2013”) (Attachment 6). In an incident involving the NAD pig, an inspector watched as a slaughter facility employee repeatedly drove a skid loader into a conscious NAD pig, attempting to lift

inhumane handling of NAD pigs is corroborated by whistleblower accounts. FSIS inspector Dr. Dean Wyatt testified before Congress that he had repeatedly been told not to prepare NRs or take other enforcement actions, even after witnessing workers punching an NAD pig in the face and nose eight to 12 times.⁶⁴ In 2015, an undercover investigation in a HIMP plant exposed particularly egregious abuse: NAD pigs being beaten, shocked with electric prods, and dragged.⁶⁵

Inspector sorting is necessary to ensure compliance with the HMSA and humane handling regulations, especially when pigs are being offloaded and driven into sorting pens.⁶⁶ FSIS's sole rationale for the presorting requirements, conserving agency resources, cannot be reconciled with the agency's regulations, policies, and past actions in indistinguishable contexts. We urge you not to retain this aspect if you finalize NSIS.

C. All Pig Slaughter Facilities Should Be Required to Immediately and Humanely Euthanize NAD Pigs

Regardless of whether FSIS changes the ante-mortem inspection requirements, it should require slaughter facilities that butcher any pigs to immediately and humanely euthanize any pig found to be in NAD condition upon inspection; slaughter facilities should also not be permitted to divert or transport NAD pigs. As FSIS has already recognized in materially indistinguishable circumstances, prohibiting the slaughter of NAD animals would "improve the Agency's inspection efficiency" and "improve compliance with the HMSA and inhumane slaughter implementing regulations."⁶⁷ Further, prohibiting the slaughter of NAD pigs would reduce salmonella risks and other threats to human health.⁶⁸ Each of these are FSIS's stated goals in creating NSIS.

the pig into the loader bucket. At one point, the employee lifted only the back half the pig, but the pig fell out of the loader and onto the concrete floor. The slaughter facility was only issued an NR. *Id.* See also U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-203 HUMANE METHODS OF SLAUGHTER ACT, ACTIONS ARE NEEDED TO STRENGTHEN ENFORCEMENT (Feb. 2010) (hereinafter, GAO 2010). (Attachment 7).

⁶⁴ *Continuing Problems in USDA's Enforcement of the Humane Methods of Slaughter Act: Hearing Before Domestic Policy Subcommittee, H. Committee on Oversight and Government Reform, 111th Cong., 4 (Mar. 4, 2010) (testimony of Dr. Dean Wyatt), available at <https://www.gpo.gov/fdsys/pkg/CHRG-111hrg65127/html/CHRG-111hrg65127.htm>.* (Attachment 8).

⁶⁵ *Compassion Over Killing, Horrors at Hormel*, <http://cok.net/inv/hormel/> (last visited April 12, 2018).

⁶⁶ FSIS may attempt to respond that NSIS will increase the number of offline inspectors who perform humane handling enforcement. However, occasional enforcement that relies on the chance that an inspector may be performing that task when inhumane handling occurs during offloading and sorting is no substitute for inspectors being present and directing the sorting of pigs. Especially when under NSIS, sorting will happen "any time day or night," *supra* note 27, removing inspectors from sorting amounts to an abdication of FSIS's statutory duties.

⁶⁷ Letter Granting HSUS Petition, *supra* note 49.

⁶⁸ See Petition No. 14-02, *supra* note 48 at 9–13, and sources cited therein.

When FSIS prohibited slaughter of all NAD mature cattle in 2009, it acknowledged that allowing the slaughter of NAD cattle who rise “may have encouraged . . . livestock producers to hold ill or injured cattle from slaughter longer in an attempt to allow them to sufficiently recover to pass the initial ante-mortem inspection before collapsing.”⁶⁹ FSIS further admitted that this policy “may have created an incentive for establishments to inhumanely force these animals to rise.”⁷⁰

Then, in 2016, FSIS granted HSUS’s petition requesting that NAD calves raised for veal be promptly euthanized, explaining that the agency’s policy of allowing NAD calves to be re-inspected and slaughtered after being “rested” in holding pens “may have created an incentive for establishments to inhumanely force non-ambulatory veal calves to rise and for calf producers to send weakened calves to slaughter.”⁷¹ FSIS reaffirmed that its policies and regulations should not incentivize slaughter establishments to engage in unlawful activities.⁷² FSIS further reaffirmed that prohibiting the slaughter of NAD calves and requiring prompt euthanasia instead would increase efficiency of inspection and HMSA compliance.⁷³

With respect to agency efficiency, currently, FSIS inspectors are required to individually inspect any pig who becomes non-ambulatory.⁷⁴ This means multiple FSIS inspections for individual pigs, especially when a NAD pig goes down again after passing ante-mortem inspection. That animal must be re-inspected while alive, its condition recorded, and inspected again post-mortem. As FSIS’s notices of final rulemaking regarding NAD cattle and calves make clear, these duplicative inspections cost a significant amount of agency time and resources.⁷⁵ FSIS is required to treat similar situations similarly or provide a legitimate explanation. Absent a rational justification,

⁶⁹ 74 Fed. Reg. at 11464, 11465.

⁷⁰ *Id.* at 11463–64.

⁷¹ Letter Granting HSUS Petition, *supra* note 49.

⁷² *Id.*

⁷³ Final Rule, Requirements for the Disposition of Non-Ambulatory Disabled Veal Calves, 81 Fed. Reg. 46570 (July 18, 2016).

⁷⁴ NSIS Proposed Rule, 83 Fed. Reg. at 4792.

⁷⁵ Letter in Support of Petition No. 14-02, Submitted by Mercy For Animals et al. 8 & Ex. 2 (Nov. 1, 2016) (Attachment 9); Comments submitted by HSUS Re. Docket ID No. FSIS-2010-0041: Non-Ambulatory Disabled Veal Calves and Other Non-Ambulatory Disabled Livestock at Slaughter 7, 44–47 (explaining time estimates for inspecting NAD pigs), 54–62 (cattle re-inspection conclusions compared to downer pigs) (submitted Apr. 8, 2011) (Attachment 10).

distinguishing between downed cattle and downed pigs is the epitome of arbitrary and capricious action.⁷⁶

Accordingly, if FSIS finalizes NSIS then it must explain the following:

- How much agency time and resources FSIS currently spends inspecting and examining NAD pigs at FSIS-inspected slaughter facilities.
- How much agency time and resources FSIS predicts will be spent inspecting and examining NAD pigs at slaughter facilities operating under NSIS.
- What time savings FSIS can reasonably expect from pre-sorting as set forth in the Proposed Rule, and why.⁷⁷

FSIS has already been repeatedly made aware that allowing the slaughter of NAD pigs wastes agency time and resources while incentivizing cruelty and threatening human health.⁷⁸ Despite a still-pending 2014 petition⁷⁹ on precisely these issues, FSIS still refuses to grapple with these facts. If FSIS ducks the issue again, the NSIS rule will be highly vulnerable to challenge.

Prohibiting the slaughter of NAD pigs at all slaughter facilities or, at minimum, those opting into NSIS is a reasonable alternative that would actually achieve FSIS's stated goals of increased inspection efficiency and improved HMSA compliance. Therefore, NSIS should require that pigs determined to be NAD be immediately and humanely euthanized.

D. FSIS Should Not Substitute Slaughter Facility Tallies for Actual FSIS Inspection and Documentation

The Proposed Rule also requires employees to identify carcasses removed and intended for destruction and maintain records on the number of carcasses removed per day, but

⁷⁶ *Westar Energy, Inc. v. Federal Energy Regulatory Com'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("A fundamental norm of administrative procedure requires an agency to treat like cases alike."); *Kreis v. Sec'y of Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2005) ("It is axiomatic that an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." (quotation marks omitted)).

⁷⁷ The Proposed Rule touts the time savings from FSIS inspectors not having to tag dead-on-arrival animals as condemned, but animals arrive or become NAD at slaughter facilities in much greater numbers. See Letter in Support of Petition No. 14-02, *supra* note 75; HSUS Comments Re. FSIS-2010-0041, *supra* note 75.

⁷⁸ See Petition No. 14-02, *supra* note 68; Letter in Support of Petition No. 14-02, *supra* note 75; HSUS Comments Re. FSIS-2010-0041, *supra* note 75.

⁷⁹ *Id.*

does not require records on pigs rejected or diverted to other establishments.⁸⁰ FSIS also proposes to rely on employees to identify “notifiable or foreign animal diseases” and then somehow find and alert an FSIS inspector.⁸¹ As FSIS even admits, such reliance on employees increases the risk that identifiable zoonotic diseases will not be caught for outbreak identification and prevention purposes.⁸²

FSIS recognizes that APHIS, in conjunction with the National Pork Board, uses this data to monitor herd-level conditions that can be traced back to the Concentrated Animal Feeding Operations or farms that the affected pigs came from, enabling more efficient response to a potentially deadly or otherwise serious outbreak.⁸³ Without this information, numerical totals of discarded pigs per day are virtually useless in identifying, tracing, and responding to diseases that could impact the U.S. swine herd. As USDA’s general counsel stressed before the Supreme Court,⁸⁴ “[o]utbreaks of certain animal diseases, especially zoonotic diseases, can cause considerable economic and social disruption,” and require “animal quarantine, depopulation, the cleaning and disinfecting of livestock environments, and the mass disposal of animal carcasses.”⁸⁵

We urge FSIS not to use slaughter facilities’ self-kept records as a substitute for FSIS inspector oversight, documentation, and the U.S. condemnation process. This policy is ripe for errors and omissions or even intentional abuse and underreporting. Slaughter facilities are obviously self-interested actors and thus are likely to underreport, something the Proposed Rule never accounts for.

⁸⁰ FSIS proposes to require slaughter facilities to maintain records of the number of animals and carcasses and parts sorted and removed by employees per day; these records would be subject to review by FSIS Inspectors, and the total number of animals sorted and removed by slaughter facility would be entered into PHIS by FSIS Inspectors. NSIS Proposed Rule, 83 Fed. Reg. at 4792–4793. Beyond the obvious issues with removing a significant amount of public health information from FSIS’s control, it deprives the public of access to these records, constituting an informational injury.

⁸¹ NSIS Proposed Rule 83 Fed. Reg. at 4792.

⁸² *Id.* at 4793.

⁸³ *Id.*

⁸⁴ See Brief for the United States, *Nat’l Meat Assn. v. Harris*, *supra* note 42, at 32-33 (describing how ante-mortem inspection is required to produce reports of certain diseases, which are given to APHIS to trace the disease back to the farm and work to contain the spread).

⁸⁵ FSIS Directive 6000.1, Rev. 1: Responsibilities Related to Foreign Animal Diseases (FADs) and Reportable Conditions (Aug. 3, 2006).

IV. FSIS Cannot Eliminate Line Speed Regulations Because This Proposal Is Completely Unjustified and FSIS Ignores Relevant Data

FSIS also proposes to allow NSIS slaughter facilities to set their own line speeds “if Agency personnel verify that process control is maintained.”⁸⁶ This should not happen. Even with the current regulations, slaughter facilities fail to comply with animal welfare and worker safety obligations. This is an industry that consistently refuses to comply with the law, as evidenced by repeat violators of OSHA standards and the HMSA. Removing the existing line-speed cap only validates the slaughter industry’s lawlessness.

It is also unnecessary because, according to FSIS’s own data, barely any slaughter facilities exceed the current regulatory cap on line speeds (indicating how high those speeds already are). Even in 16 years under the HIMP program, slaughter facilities on average have not exceeded the current regulatory cap.⁸⁷ As for the slaughter facilities that can exceed the regulatory cap, FSIS has in a materially similar situation preferred using its existing regulations for issuing line-speed waivers⁸⁸ instead of issuing carte blanche approval. Specifically, when FSIS recently denied a petition by the National Chicken Council to eliminate the maximum line speed for poultry slaughter facilities in the New Poultry Inspection System, its reason was that this waiver system already allowed slaughter facilities to submit new technological processes that allow the slaughter facilities to exceed line-speed regulations.⁸⁹ FSIS is yet again violating the APA by treating similar situations differently without any explanation.⁹⁰

FSIS should not eliminate the regulatory cap on line speeds because the existing evidence clearly demonstrates that unregulated line speeds unacceptably jeopardize animal welfare and worker safety, contrary to the purposes of the HMSA and the Occupational Safety and Health Act (OSH Act).⁹¹

⁸⁶ NSIS Proposed Rule, 83 Fed. Reg. at 4796.

⁸⁷ *Id.*

⁸⁸ See 9 CFR §§ 313.1(h), 303.2(h), 381.3(b).

⁸⁹ Letter from Carmen Rottenberg to Michael J. Brown (Jan. 29, 2018), *available at* <https://www.fsis.usda.gov/wps/wcm/connect/235092cf-e3c0-4285-9560-e60cf6956df8/17-05-FSIS-Response-Letter-01292018.pdf?MOD=AJPERES>. (Attachment 11). Issuing waivers on a case-by-case basis also allows FSIS to assess whether the slaughter facility has adequate equipment, design, and trained staff to handle higher line speeds.

⁹⁰ See *supra* note 76.

⁹¹ 29 U.S.C. § 651 *et seq.*

A. Increasing Slaughter-Line Speeds Unacceptably Jeopardizes Animal Welfare

Increasing line speeds, without specific requirements to mitigate against potential harms,⁹² unacceptably risks animal welfare. As animal protection groups have already raised before FSIS,⁹³ high-speed production (including at current line speeds and certainly at increased line speeds) jeopardizes the welfare of pigs in at least three ways:

- Under the demands of high-speed slaughter, slaughter facility workers may be pressured to move animals at a faster rate, causing the workers to use excessive force to drive pigs.
- Increasing line speeds could result in shortening the length of the stun used on pigs before slaughter, which may cause pigs to regain consciousness.
- Increasing line speeds could prevent FSIS inspectors or slaughter facility personnel from identifying pigs who are conscious on the processing line and prevent them from taking action before a conscious pig is stuck or enters the scald tank.

As discussed below, these issues have been described in the scientific literature and documented in FSIS's own enforcement records. If FSIS finalizes NSIS, it must confront this data and explain why it disregards evidence that "needless suffering"⁹⁴ will increase—contrary to the HMSA's goals.

1. Increased Line Speeds Will Cause Needless Suffering Because Workers Will Be Pressured to Use Excessive Force on Animals

Two key animal welfare issues arise directly from faster slaughter-line speeds: excessive use of force when driving pigs and overcrowding animals into stunning equipment, particularly carbon dioxide (CO₂) gas chambers. As reported in a pig welfare study by

⁹² Specifically, slaughter facility design (such as but not limited to: the length of the alley leading to slaughter, whether pigs are moved into stunning single file or as a group, and the number of chutes and crowd alleys) is necessary to mitigate animal welfare issues from increasing line speeds. *See* Temple Grandin, *The Welfare of Pigs During Transport and Slaughter*, <http://www.grandin.com/references/pig.welfare.during.transport.slaughter.html> (last accessed April 16, 2018). (Attachment 12). Additionally, there must be adequate numbers of properly trained staff. *Id.* Therefore, FSIS should consider the alternative of mandatory design requirements to mitigate against harmful risks to animal welfare caused by increased line speeds.

⁹³ Press Release, ASPCA and AWI, *Animal Welfare Groups Warn USDA Slaughter Rule Will Risk Animal Welfare* (July 25, 2017), <https://www.aspca.org/about-us/press-releases/animal-welfare-groups-warn-usda-pig-slaughter-rule-will-risk-animal-welfare>. (Attachment 13).

⁹⁴ 7 U.S.C. § 1901.

Temple Grandin, one survey of slaughter facilities butchering 500 or more pigs per hour found that the rate at which pigs were shocked with electric prods varied greatly but reached as high as 80% of pigs in some plants.⁹⁵ In another Grandin study, workers at a pig slaughter plant excessively shocked three pigs with electric prods to force them into gondolas designed to hold only two pigs, causing the pigs to jump over one another.⁹⁶ According to multiple studies, frequent electric prodding “during pig handling leading to the stunning area led to pigs turning back, jumping, slipping and/or falling, and also caused injuries, so the carcasses of these animals had a higher degree of bruising and skin damages.”⁹⁷ Even when not excessive, electric prodding is a cruel and stressful experience for pigs.⁹⁸

Relatedly, overcrowding animals into the forcing pen (from which animals are driven into the kill area) increases stress levels in pigs.⁹⁹ Compounding the problems of excessive force and stress is that market hogs are “extremely excitable and difficult to move.”¹⁰⁰ This owes to breeding and the fact that at least 60%–80% of U.S. pigs¹⁰¹ sent to slaughter are fed a growth-promoting drug called ractopamine.¹⁰² Among the most common adverse events for ractopamine are trembling, lameness, broken limbs, reluctance or inability to move, stiffness, hyperactivity, collapse, and death.¹⁰³ Pigs fed

⁹⁵ Temple Grandin, *The Welfare of Pigs During Transport and Slaughter*, *supra* note 92.

⁹⁶ Temple Grandin, *Progress and Challenges in Animal Handling and Slaughter in the U.S.*, 100 APPL. ANIMAL BEHAVIOR SCI. 129 (2006). (Attachment 14).

⁹⁷ Marija Dokmanovic, *et al.*, *The Effects of Lairage Time and Handling Procedure Prior to Slaughter on Stress and Meat Quality Parameters in Pigs*, 98 MEAT SCI. 220, 220 (2014) (citing literature). (Attachment 15).

⁹⁸ G.J. Coleman, *et al.*, *The Relationship Between Beliefs, Attitudes and Observed Behaviors of Abattoir Personnel in the Pig Industry*, 82 APPLIED ANIMAL BEHAVIOR SCI. 189, 190 (2003) (Attachment 16); *see also* J.A. Correa, *et al.*, *Effects of Different Moving Devices at Loading on Stress Response and Meat Quality in Pigs*, 88(12) J. ANIMAL SCI. 4086 (2010) (comparing electric prods against other devices to move pigs, finding electric prods elicit the most stress responses and have worst effect on meat quality, and concluding that electric prods should not be used at all on pigs). (Attachment 17).

⁹⁹ Grandin, *supra* note 95.

¹⁰⁰ Temple Grandin, *Objective Scoring of Animal Handling and Stunning Practices at Slaughter Plants*, 212 J. AM. VET. MED. ASSN. 36 (1998). (Attachment 18).

¹⁰¹ *SwineCast 0719: Ractopamine Clears the Codex Hurdle* (July 6, 2012), available at <http://www.swinecast.com/swinecast-0719-ractopamine-clears-the-codex-hurdle> (quoting Laurie Hueneke, Director of International Trade and Policy for the National Pork Producer’s Council).

¹⁰² Helena Bottemiller, *Dispute Over Drug in Feed Limiting U.S. Meat Exports*, FOOD & ENVIRONMENT REPORTING NETWORK (Jan. 25, 2012), at <https://thefern.org/2012/01/dispute-over-drug-in-feed-limiting-u-s-meat-exports/>. (Attachment 19).

¹⁰³ *See* FDA, FREEDOM OF INFORMATION SUMMARY (2013), Exhibit 4, Letter in Support of Petition No. 14-02 Submitted by Mercy For Animals *et al.*, *supra* note 75; *see also* FDA, Cumulative Veterinary Adverse Drug Experience Reports (Mar. 2011). (Attachment 20).

ractopamine also have higher stress hormone levels.¹⁰⁴ Perhaps because of these symptoms ractopamine-fed pigs are subjected to 52% more pats, slaps, and pushes from handlers.¹⁰⁵

FSIS records corroborate these studies demonstrating that, even at current speeds, the fast speed of slaughter causes excessive force in handling and overcrowding of pigs in stunning equipment. In the above-referenced review of 643 NRs and 200 MOI/NOIE/NOS, we identified at least 43¹⁰⁶ NRs and 14 MOI/NOIE/NOS documenting slaughter facility personnel using excessive force to drive pigs quickly into slaughter. The following are examples:

- On January 9, 2015, at Swift Pork Co. (M3W), an employee repeatedly raised a rattle paddle above his shoulder to beat pigs on their backs with great force to make them move; the inspector spoke to someone about the issue but moments later saw the employee doing it again.¹⁰⁷
- On August 12, 2016, at this same slaughter facility, an inspector noted bruises in the shape of a rattle paddle on at least six pig carcasses; previously that day, the inspector had seen employees raising rattle paddles over their heads before striking the pigs.¹⁰⁸
- On July 21, 2016, at Swift Pork Co. (M3S), an inspector noted “too many” bruise marks on pig carcasses from beatings and electric shocks; the bruises showed that the side and the handle of the electric prod had been used, resulting in bruises over a foot long.¹⁰⁹
- On February 20, 2017, at this same slaughter facility, an inspector noted multiple pigs on the rail with severe electric burns.¹¹⁰

¹⁰⁴ J.N. Marchant-Forde, *et al.*, *The Effects of Ractopamine on the Behavior and Physiology of Finishing Pigs*, 81 J. ANIMAL SCI. 416 (2003); M. Lyte, *Microbial Endocrinology and Infection Disease in the 21st Century*, 12(1) TRENDS MICROBIOLOGY 14 (2004) (Attachment 21); M.J. Toscano, *et al.*, *Cultivation of Salmonella Enterica Serovar Typhimurium in a Norepinephrine-Containing Medium Alters in Vivo Tissue Prevalence in Swine*, 43 J. EXP. ANIMAL SCI. 329 (2007) (Attachment 23).

¹⁰⁵ Jeremy Marchant-Forde, *et al.*, *supra* note 104 (difficulty walking due to use of ractopamine may contribute to a greater incidence of non-ambulatory pigs).

¹⁰⁶ While providing an important snapshot of what happens in slaughter facilities, this number is likely extremely underreported. First, FSIS under-enforces the HMSA. Second, records that did not identify the species of animal involved were excluded from our study.

¹⁰⁷ MOI # GJC5720010109G.

¹⁰⁸ MOI # GJC1917080612G.

¹⁰⁹ MOI # PUN2607070021G.

¹¹⁰ MOI # PUN3610024420G.

- On August 18, 2015, at Smithfield Farmland Corp. (M717), an employee “used both ends of a whip” to strike pigs and force them into the chute for CO₂ stunning, causing the pigs to squeal and jump over one another.¹¹¹

Contrary to FSIS’s assertion that “none of the 11 NRs recorded in the HIMP establishments documented market hogs being forced to move faster than normal walking speeds,” an inspector at a HIMP slaughter facility in Minnesota documented pigs “being moved faster than a normal walking speed”: “The hogs were exiting the circle pen at a run, and all were being prodded with a plastic paddle to maintain this speed.”¹¹² At this same slaughter facility, there were two other instances where workers used a rattle paddle to beat pigs with excessive force.¹¹³

Overcrowding is also a persistent problem as employees attempt to move pigs through slaughter to keep up with the line speed. Of particular concern are the multiple documented instances of too many pigs being forced into CO₂ gas chambers at once. The following are examples:

- On July 1, 2016, at Tyson Fresh Meats, Inc. (M244W), the doors of the chamber couldn’t close properly because there were too many pigs in the gondola; the pigs began asphyxiating from the CO₂ and were frothing at the mouth, gasping, kicking, and thrashing.¹¹⁴
- On January 26, 2016, at Smithfield Farmland Corp. (M717CR), seven pigs were loaded at once into the CO₂ chamber and the door would not close because one pig’s foot was stuck in the machinery. An employee was ordered to kill the pig with a captive bolt, and the plant eventually had to cut the pig’s foot off to remove him from the machine.¹¹⁵
- On April 17, 2015, at Swift Pork Co. (M3W), an employee tried to drive twice as many pigs into the CO₂ chamber as could fit and beat the pigs on the back with a rattle paddle to force them in. The pigs had nowhere to go, and they screamed and piled on top of one another to get away from the beatings.¹¹⁶
- There were also many instances where pigs were trapped by hydraulic gates in the push alleyway or in the CO₂ chamber. The pigs screamed in pain and

¹¹¹ NR # TAE4709080418N.

¹¹² ASPCA and AWI Press Release, *supra* note 93, Animal Welfare Groups Warn USDA Slaughter Rule Will Risk Animal Welfare (July 25, 2017), <https://www.aspc.org/about-us/press-releases/animal-welfare-groups-warn-usda-pig-slaughter-rule-will-risk-animal-welfare>.

¹¹³ *Id.*

¹¹⁴ MOI # BTD1116071801G.

¹¹⁵ MOI # RZG1114012226G.

¹¹⁶ NR # GJC2402043918N-1.

distress, and, in most cases, the inspector ordered the pigs euthanized: John Morrell & Co. (M17D) on March 1, 2017;¹¹⁷ Swift Pork Co. (M3S) on February 4, 2017;¹¹⁸ Indiana Packers Corp. (M17564) on September 30, 2015;¹¹⁹ BEF Foods, Inc., (M952) on March 29, 2017;¹²⁰ and Smithfield Farmland Corp. (M717CR) on June 30, 2015.¹²¹

2. Faster Line Speeds Will Likely Cause Animals to Regain Consciousness on the Line

Most large, high-speed slaughter plants use electric or CO₂ stunning.¹²² Even at current speeds, animals regaining consciousness due to inadequate exposure is a serious problem, one that increased line speeds would very likely exacerbate. In CO₂ systems, faster line speeds may shorten the time that animals are in the gas chamber, decreasing the effectiveness of the stun. In electric stunning systems, the stunning operator must place the electrodes in the proper position, which becomes difficult as line speeds increase; operator fatigue is a significant concern as well.¹²³ Ineffective stunning could cause pigs to be conscious when they are shackled, when their throats are cut, while they are bleeding out, or even when they are scalded. According to FSIS inspector training materials, ineffective stunning and conscious animals on the line are egregious violations of the HMSA.¹²⁴

We identified six NRs and 21 MOI/NOIE/NOS involving pigs regaining consciousness after being shackled or stuck. The following are examples:

- On August 18, 2015, at Tyson Fresh Meats, Inc. (M244I), a pig was still breathing after she had been stuck and bled; but four shackles behind her, another pig fell off the shackle and into the blood pan. An employee ran to deliver a second stun

¹¹⁷ NR # WLJ1622032102N-1.

¹¹⁸ NR # PUN2009023404N-1.

¹¹⁹ NR # MLO4609094330N.

¹²⁰ NR # YUC2208031129N-1.

¹²¹ NR # RZG5813065730N.

¹²² ASPCA and AWI Press Release, *supra* note 112.

¹²³ Grandin, *supra* note 95 (noting that “stunner operator errors due to fatigue greatly increase after 2 hours” and that she has “observed that in larger plants, floor stunning with tongs often gets rough and careless”); *see also* Grandin (1998), *supra* note 100 (noting that ineffective stun attempts “increased late in the shift, when operators were fatigued.”).

¹²⁴ FSIS, Humane Handling of Livestock Training Module (Aug. 26, 2009), *available at* https://www.fsis.usda.gov/shared/PDF/LSIT_HumaneHandling.pdf?redirecthttp=true.

on the fallen pig, causing himself to miss the first pig, who was at that point paddling and trying to right herself.¹²⁵

- On October 27, 2015, at Landes Fresh Meats (M18691), a shackled pig began vocalizing and blinking after being electrically stunned; the inspector tried to call an employee over to help, but by the time anyone came, the pig had already died.¹²⁶
- On January 13, 2017, at Hormel Foods Corp. (M199N), a pig was on the rail in the scalding area and was 100 feet from the scalding tank when he began blinking his eyes and trying to right himself.¹²⁷

As FSIS is well aware, there is significant and incontrovertible evidence that, even under current regulation, the speed of slaughter leads to needless animal suffering in violation of the HMSA. Yet the Proposed Rule never mentions these most serious inhumane handling problems, which is classic arbitrary and capricious decisionmaking.¹²⁸ Equally problematic is that, by omitting this evidence from the Proposed Rule, FSIS is silently and without explanation assuming that speeding up an already cruel process will not make it even crueler.¹²⁹

B. FSIS's Claim That NSIS Will Increase Humane Handling Compliance Is Completely Unsupported

One of the key justifications repeated throughout the Proposed Rule is that NSIS would increase humane handling compliance.¹³⁰ But this claim is disproved by the documented inhumane handling issues directly attributable to fast line speeds and slaughter facility employee presorting, two hallmarks of NSIS as proposed. Furthermore, increasing offline inspection to improve humane handling enforcement is

¹²⁵ MOI # GEH4110083426G and NOS dated August 18, 2015.

¹²⁶ NOS dated Oct 27, 2015.

¹²⁷ NR # NZK4814014813N-1.

¹²⁸ *State Farm*, 463 U.S. at 43 (an agency rule is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem” or if the agency “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” (quotation marks omitted)).

¹²⁹ *Am. Ass'n of Cosmetology Sch. v. Devos*, 258 F. Supp. 3d 50, 72 (D.D.C. 2017) (“When an agency’s reasoning involves a non-obvious, essential factual assumption, the agency must justify that assumption.”).

¹³⁰ *See, e.g.*, NSIS Proposed Rule, 83 Fed. Reg. at 4791.

not a viable justification for this dangerous proposal, because Congress has *already required* FSIS to increase the hours spent inspecting and enforcing the HMSA.¹³¹

In support of NSIS, FSIS reviewed Humane Activities Tracking System (HATS) data in the Public Health Inspection System database (PHIS) from January 2013 through September 2015 for the five HIMP slaughter facilities and 21 large non-HIMP slaughter facilities.¹³² FSIS says it found that inspectors had spent one more hour per shift verifying humane handling activities in HIMP slaughter facilities; five HIMP slaughter facilities had 11 humane handling NRs (versus 117 NRs for the 21 non-HIMP slaughter facilities). Based on its review, it concluded that “HIMP establishments have higher compliance with humane handling regulations than non-HIMP establishments and that increased offline inspection may improve compliance with the HMSA.”¹³³

FSIS’s findings—in addition to being suspect because the analysis was not provided for public review¹³⁴—are undermined by the fact that the USDA Office of the Inspector General (OIG) and the Government Accountability Office (GAO) have *repeatedly* found that FSIS’s humane handling data are unreliable. Particularly damning to FSIS’s HATS data, OIG stated: “[W]e question the reliability of that data and whether the agency can adequately determine its humane handling staffing needs.”¹³⁵ In fact, FSIS’s HATS data are so bad, OIG could not even use the data to confirm that FSIS was complying with Congress’s mandate that FSIS spend 148 full-time equivalent hours on inspecting and enforcing the HMSA.¹³⁶

In an audit released in late 2017, OIG found the following:

FSIS still . . . cannot ensure that the time recorded in its system of record accurately represents time spent on humane handling inspection activities. More specifically, we found a number of inconsistencies with FSIS’ process

¹³¹ P.L. 113-76, Consolidated Appropriations Act (2014) (“[N]o fewer than 148 [full time equivalent] positions shall be employed during a [fiscal year] for purposes dedicated solely to inspections and enforcement related to the Humane Methods of Slaughter Act.”).

¹³² NSIS Proposed Rule, 83 Fed. Reg at 4790.

¹³³ NSIS Proposed Rule, 83 Fed. Reg at 4791.

¹³⁴ By hiding the data that forms the basis for the agency’s conclusions FSIS greatly undermines the purpose of notice and comment rulemaking and makes the rule very vulnerable to a challenge. *See United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 248 (2d Cir. 1977) (“[F]ailure to disclose to interested persons the factual material upon which the agency was relying vitiates the element of fairness which is essential to any kind of administrative action.”).

¹³⁵ OIG, AUDIT REPORT 24016-0001-23, FOOD SAFETY AND INSPECTION SERVICE FOLLOW-UP ON THE 2007 AND 2008 AUDIT INITIATIVES 11 (Nov. 2017) (hereinafter, OIG 2017).

¹³⁶ *Id.* at 47.

for recording data in the HATS. The system only allows for inspectors to record time in 15 minute increments and not by actual time spent performing activities Additionally, inspectors can change HATS data at any time after a reporting period has ended. These issues occurred because FSIS did not design the system to accept actual time spent on humane handling verification activities. In addition, FSIS' Office of Field Operations did not implement policies and procedures to identify and follow up on report anomalies As a result, FSIS may be over- or under-reporting time spent conducting humane handling activities.¹³⁷

This OIG audit is just the latest in at least a decade of reports that have repeatedly found serious deficiencies in FSIS's implementation and enforcement of the HMSA. In 2008, OIG found that FSIS had failed to properly train and oversee inspectors to ensure that they were properly following inspection procedures—and that this failure had contributed to one of the largest meat recalls in history.¹³⁸ Despite this, in 2010, a GAO audit found that enforcement actions taken when FSIS inspectors witnessed animal cruelty, including failure to suspend slaughter facilities when such action was warranted, varied wildly. The audit concluded that this inconsistency was likely due to a failure to properly train inspectors.¹³⁹ Then in 2015, the OIG released an audit on FSIS's PHIS, which found numerous weaknesses, including FSIS's failure to implement OIG's prior recommendations regarding PHIS, inconsistent access and use by inspectors, and inaccurate slaughter facility profiles.¹⁴⁰

In 2017, OIG found, just as GAO had in 2010, that FSIS was not adequately enforcing HMSA requirements because it had failed to properly train inspectors; specifically, OIG found that FSIS inspectors had not taken "appropriate regulatory or enforcement actions when animals were inhumanely treated during inspections."¹⁴¹ OIG further found the pernicious problem of inspectors not issuing NRs when they should have, due to lack of clarity about when NRs should be issued and too much discretion given to inspectors.¹⁴²

¹³⁷ *Id.*

¹³⁸ OIG, AUDIT REPORT 24601-07-KC, EVALUATION OF FSIS MANAGEMENT CONTROLS OVER PRE-SLAUGHTER ACTIVITIES (Nov. 2008). (Attachment 24)

¹³⁹ GAO 2010, *supra* note 63.

¹⁴⁰ OIG, AUDIT REPORT 24601-0001-23, PUBLIC HEALTH INFORMATION SYSTEM FOR DOMESTIC INSPECTION (AUGUST 2015). (Attachment 25).

¹⁴¹ OIG 2017, *supra* note 135, at 23.

¹⁴² *Id.* at 30.

These audits are supported by hotline complaints that FSIS is not enforcing against humane handling violations in slaughter facilities and that FSIS is violating humane slaughter regulations at pig slaughter facilities,¹⁴³ by congressional concerns that FSIS is not adequately enforcing humane handling laws,¹⁴⁴ and by the tens of thousands of letters from the public that FSIS has received expressing concerns about the humane treatment of livestock.¹⁴⁵

In summary, FSIS justifies NSIS by saying that—contrary to the evidence in the record—it will increase humane handling compliance and by citing *only* to data that FSIS knows OIG has repeatedly found to be useless and are contradicted by at least 10 years of OIG and GAO audits and seriously brought into question by whistleblower accounts and concerns raised by members of Congress and the public. There is only one word that comes to mind for this—*chutzpah*.¹⁴⁶

C. Alternatives for Increasing Humane Handling Compliance That Would Be More Efficient and Effective Must be Seriously Considered

The NSIS Proposed Rule is also procedurally deficient because FSIS failed to consider any available alternatives for achieving the goals of modernizing pig slaughter inspection and improving humane handling compliance.¹⁴⁷ In addition to the APA obligation to rationally consider “germane alternatives,”¹⁴⁸ Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). So far, FSIS has considered only four alternatives: (1) no action, (2) implementing only the mandatory portions of the Proposed Rule

¹⁴³ *Id.* at 6 & n.24.

¹⁴⁴ *Id.* at 6–7.

¹⁴⁵ In 2004, FSIS stated that it had received over 20,000 such letters “over the last few years.” Notice, Humane Handling and Slaughter Requirements and the Merits of a Systematic Approach to Meet Such Requirements, 60 Fed. Reg. 54625, 54625 (Sept. 9, 2004).

¹⁴⁶ See *Harbor Ins. Co. v. Schnabel Found.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991) (“It reminds us of the legal definition of *chutzpah*: *chutzpah* is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan.”).

¹⁴⁷ *International Ladies’ Garment Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983) (“[A]n artificial narrowing of options is antithetical to reasoned decisionmaking and cannot be upheld.” (internal quotation marks and citation omitted)).

¹⁴⁸ *Am. Ass’n of Cosmetology Sch. v. DeVos*, 258 F. Supp. 3d 50, 75 (D.D.C. 2017) (“[T]he agency must address obviously germane alternatives proposed by commenters during the notice-and-comment period.”).

(sampling), (3) adopting the Proposed Rule, and (4) requiring all slaughter facilities to switch to NSIS.¹⁴⁹

But glaringly obvious alternatives have not yet been assessed. First, as already discussed above, FSIS could achieve its goals by using the already-existing waiver system. That system allows slaughter facilities, on a case-by-case basis, to experiment with innovations designed to improve food safety outcomes. While there may be a rationale for not using the waiver system here, FSIS is at least obligated to consider this alternative and not reject it *sub silentio*.

Second, FSIS has utterly failed to consider the alternative of simply improving its enforcement of the HMSA to improve compliance. FSIS has many enforcement tools at its disposal, which it has either rarely (if ever) used or has underutilized with respect to repeat offenders of the HMSA and humane handling regulations. For example, there is no evidence that FSIS has ever pursued criminal charges against an FSIS-inspected slaughter facility for humane handling violations, no matter how egregious the documented animal cruelty.

FSIS also has administrative sanctions at its disposal, such as suspension or withdrawal of inspection. Under FSIS's current pattern and practice, suspensions are not always given, even when they are warranted in cases of egregious cruelty to an animal.¹⁵⁰ When they are given, suspensions are a slap on the wrist because they are often lifted within a day, or a few days at the most—even in cases where intentional actions by the slaughter facility resulted in extreme agony for the animals.¹⁵¹ FSIS has underutilized the administrative sanction of withdrawal, even for slaughter facilities that have had multiple suspensions for egregious violations within a year.¹⁵² In 2013, OIG looked at four years' worth of FSIS's HMSA enforcement practices and found that the agency had not withdrawn a grant of federal inspection even once.¹⁵³ As a result, OIG concluded that slaughter facilities "repeatedly violated the same regulations with little or no consequence."¹⁵⁴

If FSIS seriously wanted to improve humane handling compliance, it could do so with much less cost and much greater benefit simply by bringing its enforcement of the

¹⁴⁹ NSIS Proposed Rule, 83 Fed. Reg. at 4817–4818.

¹⁵⁰ See Petition For Rulemaking Submitted by Farm Sanctuary, et al., No. 15-01, Regarding Humane Handling of Livestock 22–30 (submitted Sept. 1, 2015). (Attachment 26).

¹⁵¹ *Id.* at 33–35.

¹⁵² *Id.* at 35–37.

¹⁵³ OIG, AUDIT REPORT 24601-0001-41, FOOD SAFETY AND INSPECTION SERVICE – INSPECTION AND ENFORCEMENT ACTIVITIES AT SWINE SLAUGHTER PLANTS 5 (May 2013). (Attachment 27).

¹⁵⁴ *Id.* at 4.

HMSA in line with statutory requirements. Even withdrawing inspection from a slaughter facility or referring the owner(s) of a slaughter facility for criminal prosecution in a single warranted case would encourage much higher industrywide rates of compliance, as other plants would seek to avoid such consequences. The purpose of these enforcement actions is precisely that they provide a cost-effective deterrent effect, and do not carry the same public health risks that the Proposed Rule does. If FSIS has concluded that the deterrent effect from enforcement is not a cheaper and more effective action than NSIS, then the agency is obligated to explain its reasoning for that conclusion.

Lastly, as discussed above, FSIS could improve humane handling compliance by prohibiting the slaughter of all NAD pigs as it already does the slaughter of NAD cattle and calves.

Therefore, because FSIS has not even raised or considered these available alternatives, its assessment of NSIS is incomplete and the Proposed Rule cannot be finalized. The APA does not allow the agency to take a myopic approach in the aim of doing what it prefers. Agency action taken without considering important aspects of the problems addressed and reasonable alternative means of addressing such problems will be set aside.¹⁵⁵

D. FSIS Has Failed to Consider the Impact of Increasing Slaughter Line Speeds on Worker Safety

FSIS is correct to acknowledge that it should assess the impact of increased line speeds on worker safety.¹⁵⁶ But it should go further. A primary goal of the HMSA is to “make safer and better working conditions for [slaughter facility workers.]”¹⁵⁷ Agencies, when charged with implementing statutes, “must give effect to the unambiguously expressed intent of Congress.”¹⁵⁸ Therefore, it is within the authority and *responsibility* of FSIS to ensure the safety of slaughter facility workers when it regulates the slaughtering of animals for human food, including line speeds.¹⁵⁹ Furthermore, as a federal employer,

¹⁵⁵ See cases cited at *supra* note 128.

¹⁵⁶ NSIS Proposed Rule, 83 Fed. Reg. at 4796.

¹⁵⁷ 7 U.S.C. § 1901.

¹⁵⁸ *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁵⁹ The fact that the Occupational Safety and Health Administration (OSHA) also has jurisdiction to ensure worker safety in slaughter and meatpacking plants does not prevent FSIS from exercising its own jurisdiction to give effect to the goals of the HMSA. Overlapping or concurrent jurisdiction among agencies is nothing new, especially not to FSIS, which shares jurisdiction over food safety with the Food and Drug Administration.

FSIS is also required to ensure the safety and health of its own employees.¹⁶⁰ Thus, it is false for FSIS to claim it lacks jurisdiction over worker safety.

FSIS's jurisdiction over slaughter-facility worker safety issues is further supported by its 1994 Memorandum of Understanding with OSHA, which created a framework for FSIS to work with OSHA to address worker safety issues in slaughter facilities.¹⁶¹ Paramount to this framework was that FSIS promised to do as follows:

- Train FSIS inspectors to improve their ability to recognize serious workplace hazards within the meat and poultry industry;
- Reinforce procedures for inspectors to report to the appropriate authorities unsafe and unhealthy working conditions to which they are exposed;
- Institute new procedures for inspectors to refer serious workplace hazards affecting plant employees to OSHA;
- Coordinate possible inconsistencies between OSHA job safety and health standards and FSIS sanitation and health standards.¹⁶²

In 24 years, however, FSIS and OSHA have not yet fully implemented their MOU, and the agencies are still failing to work together to protect workers in slaughter facilities.¹⁶³

The Proposed Rule makes no meaningful attempt to assess the impact of increased line speeds on slaughter facility worker safety, and it appears to have completely ignored the question of how reducing the number of inspectors while increasing line speeds will impact the safety of its *own* employees in these slaughter facilities.

FSIS has conducted only a “preliminary analysis” of injury rates in HIMP and non-HIMP slaughter facilities from OSHA’s injury reporting forms. This preliminary analysis has not been provided to the public, in violation of the APA.¹⁶⁴ Even on the limited information provided, it is clear that this analysis is flawed because it is based on data that FSIS knows are unreliable and irrelevant.

¹⁶⁰ See 29 U.S.C. § 654(a); see also GAO, GAO-18-12, BETTER OUTREACH, COLLABORATION, AND INFORMATION NEEDED TO HELP PROTECT WORKERS AT MEAT AND POULTRY PLANTS 9 (Dec. 2017), <https://www.gao.gov/assets/690/688294.pdf>. (Attachment 28).

¹⁶¹ MOU Between OSHA and FSIS (Feb. 4, 1994), available at <https://www.osha.gov/laws-regs/mou/1994-02-04>. (Attachment 29).

¹⁶² GAO, *supra* note 160.

¹⁶³ *Id.*

¹⁶⁴ See *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 248 (2d Cir. 1977) (“[F]ailure to disclose to interested persons the factual material upon which the agency was relying vitiates the element of fairness which is essential to any kind of administrative action.”).

The OSHA injury rate measures used are the Total Case Rate (TCR); Days Away, Restricted, or Transfer (DART); and Days Away From Work (DAFW). These data are insufficient to assess line-speed-related injuries for at least two reasons. First, injury rates are underreported and unreliable. Second, none of these injury-rate measures captures the primary injury caused by fast line speeds: musculoskeletal disorders (MSDs).¹⁶⁵ OSHA acknowledged this long ago, stating:

[These data] seriously understate the true risk [because] the data only capture those MSD injuries reported by employers as lost workday injuries. MSDs that force an employee to be temporarily assigned to alternate duty, as well as those MSDs not reported to employers by employees or not recorded by employers, are not included in those risk estimates The actual risks attributable to occupational exposure to ergonomic risk factors may be much higher Many peer-reviewed studies have been published in the scientific literature in the last 18 years that document the underreporting of MSDs on OSHA Logs These studies document extensive and widespread underreporting on the OSHA Log of occupational injuries and illnesses in general.¹⁶⁶

Government audits confirm how inadequate OSHA logs are at capturing the true rate of slaughter facility worker injuries. In 2005, GAO released a report calling meat and poultry slaughter one of the most dangerous industries in the country, even though it found that the government data likely undercounted the number of injuries.¹⁶⁷ Just months before FSIS issued the Proposed Rule, the GAO again issued a report stating that meat and poultry slaughter and processing are the most hazardous jobs in the

¹⁶⁵ Employers are required to report on OSHA Form 300 the following: injuries and illnesses that result in death, loss of consciousness, days away from work, restricted work activity, or medical treatment beyond first aid; injuries and illnesses that are diagnosed by a physician; cases involving cancer, chronic irreversible disease, or broken bones; cases possible contamination from another person's blood or potentially infectious material; cases requiring employees to be medically removed; cases involving tuberculosis; and cases involving severe hearing loss. See OSHA, Recordkeeping and Reporting Requirements, <https://www.osha.gov/recordkeeping/RKforms.html>.

¹⁶⁶ Final Rule, Ergonomics Standard, 65 Fed. Reg. 68261 (Nov. 14, 2000). That was why OSHA promulgated a specific ergonomics standard for workplace safety, however, this rule was rescinded by the Bush Administration. See Rachel Smolkin, *Bush Signs Repeal of Clinton's Workplace Safety Rules*, PITTSBURGH POST-GAZETTE, March 21, 2001, at A14.

¹⁶⁷ GAO, GAO-05-96, SAFETY IN THE MEAT AND POULTRY INDUSTRY, WHILE IMPROVING, COULD BE FURTHER STRENGTHENED (2005), <https://www.gao.gov/products/GAO-05-96>. (Attachment 30).

country and that the agencies best equipped to improve working conditions in this industry—OSHA and FSIS—have failed to do so.¹⁶⁸

Such underreporting is unsurprising, considering that many workers, when surveyed, reveal that they do not realize that their symptoms are from repetitive motion injuries. When asked whether they had been injured in the past year, many workers said no but then described serious pain and other symptoms consistent with MSDs.¹⁶⁹

Underreporting is also unsurprising given the climate of fear in slaughter facilities. Among slaughter facility workers from several slaughter facilities in Nebraska, 80% disagreed with the statement “my supervisor really cares about employee safety” and more than one-third said that they feared reporting an accident or injury because of retaliation.¹⁷⁰ In keeping with these workers’ responses, a Michigan study found that OSHA logs capture just 33% of injuries and 31% of illnesses when compared to other databases.¹⁷¹ Put another way, OSHA worker injury data are as much as 69% underreported.¹⁷²

FSIS’s reliance on OSHA injury rates, which count only injuries requiring medical care beyond first aid, is also problematic because many slaughter facility workers report that they are denied proper medical care by their employers when they are injured on the job.¹⁷³ The workers illustrate the problem in their own words:

- “Two or three times a year I get infections under my fingernails. I think it’s from the dirty water getting into my gloves. When I go to the clinic they freeze my fingertips and cut out the pus. They don’t write anything down about that or do anything to change it.”
- “In 2002 I slipped on remnants on the floor. I hurt my back, my hips and my leg. My knee turned black and blue and was swollen. I could hardly walk. The company doctor told me I was OK and to go back to work. But I couldn’t stand the pain. I went out on sick leave. The company fired me for missing time. They said

¹⁶⁸ GAO, *supra* note 160.

¹⁶⁹ NEBRASKA APPLESEED, “THE SPEED KILLS YOU” 29 (2009), available at https://neappleseed.org/wp-content/uploads/downloads/2013/01/the_speed_kills_you_100410.pdf. (Attachment 31).

¹⁷⁰ *Id.* at 36–37; HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS’ RIGHTS AT U.S. MEAT AND POULTRY PLANTS 40, 53–54 (2005), available at <https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants>. (Attachment 32).

¹⁷¹ J. Leigh, *et al.*, *An Estimate of the U.S. Government’s Undercount of Nonfatal Occupational Injuries*, 46(1) *J. of Occupational and Env’tl. Med.* 10 (2004) (cited in Nebraska Appleseed, *The Speed Kills You* (2009)). (Attachment 33).

¹⁷² *Id.*

¹⁷³ Nebraska Appleseed, *supra* note 169, at 48; Human Rights Watch, *supra* note 170, at 54.

they would take me back but only as a new employee on probation with no benefits.”

- “[I]n September 2002 . . . I slipped on the greasy steps and fell to the bottom. I felt a rubber band kind of pop in my leg. I couldn’t feel my toes. I went to the clinic and told the nurse what happened. I told her I need to see a doctor right away. She said, ‘I don’t see any blood, so I can’t send you to a doctor.’ She didn’t write anything down, she just told me to go back to [work].”¹⁷⁴

FSIS also ignores the plethora of existing evidence demonstrating that slaughter facility workers are already injured at unacceptably high rates because of the speed of slaughter.¹⁷⁵ When workers are surveyed, 62% say that they have been injured in the past year, far more than the OSHA-reported rate.¹⁷⁶ And they consistently identify line speeds as the predominant cause of unsafe conditions and workplace injuries.¹⁷⁷ Confirming what the workers say, studies have demonstrated that increasing line speeds contributes to cumulative trauma disorder by increasing the number of repetitive movements made by workers,¹⁷⁸ by increasing the force needed to accelerate muscular activity to the speed required by the slaughter line, and by increasing the tension in workers’ muscles, even at rest.¹⁷⁹

In sum, no analysis that relies solely on OSHA-reported data is adequate to assess the impact of increased slaughter-line speeds on worker safety. Reliance on data that the agency knows to be unreliable and irrelevant to the issue at stake is the epitome of arbitrary and capricious decisionmaking.¹⁸⁰ FSIS cannot ignore the powerful evidence

¹⁷⁴ Human Rights Watch, *supra* note 170, at 41–42.

¹⁷⁵ See, e.g., OSHA, Meatpacking Hazards and Solutions, https://www.osha.gov/SLTC/meatpacking/hazards_solutions.html (last visited April 13, 2018) (Attachment 34); NIOSH, Participatory Ergonomic Interventions in Meatpacking, <https://www.cdc.gov/niosh/docs/94-124/> (last visited April 13, 2018). (Attachment 35).

¹⁷⁶ Nebraska Appleseed, *supra* note 169.

¹⁷⁷ See *id.*, Human Rights Watch, *supra* note 170; Michael Riley, *Woes at Swift Blamed on Pace, Speed Valued Above All Else, Workers Say*, DENVER POST, Nov. 26, 2002, A1.

¹⁷⁸ Robert Arndt, *Work Pace, Stress, and Cumulative Trauma Disorders*, 12 J. OF HAND SURGERY 866, 868 (1987) (cited in Nebraska Appleseed, *supra* note 169). (Attachment 36).

¹⁷⁹ Willis Goldsmith, *Workplace Ergonomics: A Safety and Health Issue for the ‘90s*, 15 EMPLOYEE REL. L. J. 291, 291 (1989) (cited in Nebraska Appleseed, *supra* note 169).

¹⁸⁰ See *Tripoli Rocketry Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006) (“But where an agency has articulated no reasoned basis for its decision—where its action is founded on unsupported assertions or unstated inferences—we will not abdicate the judicial duty carefully to review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence.” (quotation marks omitted)).

demonstrating that—even at current line speeds—slaughter facilities are unacceptably injuring and even killing workers with near impunity.¹⁸¹

V. The Proposed Rule’s Environmental Impact Analysis Is Legally Deficient

The Proposed Rule fails to satisfy the requirements of the National Environmental Policy Act (NEPA).¹⁸² The environmental impacts of the Proposed Rule at the local, state, and nationwide levels have the potential to be significant. Instead of addressing these, as NEPA requires, the agency overlooks many significant localized and cumulative impacts.

A federal agency planning to take a major action that may significantly affect the “human environment” must prepare an Environmental Impact Statement (EIS) to thoroughly consider the potential impacts to the human environment prior to taking that proposed action.¹⁸³ The federal Council on Environmental Quality (CEQ) regulations implementing NEPA define “Major Federal Actions” as “new or revised agency *rules, regulations, plans, policies, or procedures.*”¹⁸⁴ The Proposed Rule, which will significantly alter the status quo at potentially hundreds of pig slaughter facilities nationwide, is a major federal action.¹⁸⁵

NEPA’s goals include protecting the public health and welfare.¹⁸⁶ Accordingly, for purposes of environmental analysis, the “human environment” is broadly interpreted to include the natural and physical environment and the relationship of people with that environment.¹⁸⁷ Here, the Proposed Rule ignores myriad threats to the environment and public health that it is likely to exacerbate. NEPA requires the agency to take a “hard look”¹⁸⁸ at these impacts. Instead, the Proposed Rule takes a brief and blinkered look at only one: the disposal of additional pig body parts and carcasses that the rule may spur.¹⁸⁹ FSIS’s scant discussion of NEPA improperly ignores other impacts on the human environment from the Proposed Rule, which include at least the following:

¹⁸¹ See cases cited at *supra* note 128.

¹⁸² 42 U.S.C. § 4321, *et seq.*

¹⁸³ 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3.

¹⁸⁴ 40 C.F.R. § 1508.18(a) (emphasis added); *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 22, 27 (D.D.C. 2007) (Interim Final Rule which would allow three facilities to slaughter horses “unquestionably constitute[d] a major Federal action” and was “the legally relevant cause of the environmental effects of the horse slaughter facilities.”) (internal quotation omitted).

¹⁸⁵ NSIS Proposed Rule, 83 Fed. Reg. at 4800.

¹⁸⁶ See 42 U.S.C. §§ 4321; 4331.

¹⁸⁷ *Id.*

¹⁸⁸ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989).

¹⁸⁹ NSIS Proposed Rule, 83 Fed. Reg. at 4819.

- Public health threats, such as the spread of diseases among animals and from animals to workers;
- Increased water usage stemming from an increasing number of pigs slaughtered;
- Heightened water-pollution threats stemming from an increasing number of pigs slaughtered;
- Cumulative significant impairment of air quality, including increased air pollution stemming from slaughter facilities and rendering facilities;
- Cumulative impacts stemming from an increased number of pigs raised and transported to slaughter.

CEQ regulations require agencies to consider “both [the] context and intensity” of potential environmental impacts to determine whether these impacts will be “significant” and should thus be evaluated in an EIS.¹⁹⁰ Importantly, “context” “means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region . . . and the locality.”¹⁹¹ “Intensity” “refers to the severity of impact” and requires consideration of various factors that agencies must address in evaluating whether impacts are sufficiently serious to warrant preparation of an EIS.¹⁹²

Based on these context and intensity criteria, the Proposed Rule appears tailor-made for an EIS. The “presence of one or more of [the CEQ significance] factors should result in an agency decision to prepare an EIS.”¹⁹³ An EIS should be prepared on an agency action that may be significant in either a national or a local context. In this instance, many of the CEQ criteria for significance are present, and the Proposed Rule affects both “society as a whole” and the “localit[ies]” of the specific slaughter plants.¹⁹⁴

First, as described below, NSIS plainly meets the significance factor regarding impacts on public health and safety.¹⁹⁵ But for the Proposed Rule, slaughter facilities could not prevent innumerable animals from undergoing FSIS ante-mortem inspection; nor could

¹⁹⁰ 40 C.F.R. § 1508.27.

¹⁹¹ *Id.* § 1508.27(a) (emphasis added); *see also Anderson v. Evans*, 371 F.3d 475, 492 (9th Cir. 2004) (determining that an EIS was required regarding a whale hunt because, although the hunt would not impact the overall gray whale population, there were “substantial questions’ as to the significance of the effect on the *local area*”) (emphasis in original).

¹⁹² 40 C.F.R. § 1508.27(b).

¹⁹³ *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 218 (D.D.C. 2003),

¹⁹⁴ 40 C.F.R. § 1508.27(a).

¹⁹⁵ *Id.* § 1508.27(b)(2) (“affects public health or safety”).

they slaughter far more animals per year than is presently possible. Respectively, these aspects of NSIS exacerbate major threats to animal and human health and to the environment.¹⁹⁶

Second, the CEQ regulations require consideration of “possible effects on the human environment” from “unique or unknown risks.”¹⁹⁷ Here, the available evidence demonstrates that workers, the environment, public health generally, and communities near slaughter facilities may suffer health and environmental consequences due to increased slaughter operations and FSIS’s abandonment of some of its animal inspection duties. Yet no NEPA document has ever analyzed these risks and impacts.

Finally, CEQ regulations require consideration of the degree to which “the effects” of the rule “on the quality of the human environment” will be “highly controversial.”¹⁹⁸ The Proposed Rule certainly warrants this consideration as extensive media coverage of the Proposed Rule makes obvious.¹⁹⁹

A. The Proposed Rule Improperly Invokes a Categorical Exemption Without Fully Analyzing Its Applicability

In the Proposed Rule, FSIS improperly invokes a categorical exemption to NEPA, without addressing any possible exceptions to that exemption that may apply. Particularly where, as here, the agency action may indeed entail environmental impacts that would otherwise go unstudied, categorical exclusion claims are “deficient [if the agency] fails to explain why [the action] does not fall within an exception to the categorical exclusions.”²⁰⁰

¹⁹⁶ See, e.g., *Tomac v. Norton*, 240 F. Supp. 2d 45, 51 (D.D.C. 2003) (finding Environmental Assessment (EA) inadequate because it did not adequately address impact of decision on “air and water” quality in affected area).

¹⁹⁷ 40 C.F.R. § 1508.27(b)(5).

¹⁹⁸ *id.* § 1508.27(b)(4).

¹⁹⁹ See, e.g., Sarah Jones, *The USDA Goes Hot Wild*, THE NEW REPUBLIC (Apr. 26, 2018), <https://newrepublic.com/article/148135/usda-goes-hog-wild> (Attachment 37); Ingrid Mezo, *EXCLUSIVE: Ante-mortem Inspection by Hog Plant Staff Could Lead to Massive Animal Disease Outbreak, Vets Warn*, IEG POLICY (Mar. 2, 2018), <https://iegpolicy.agribusinessintelligence.informa.com/PL215531/EXCLUSIVE-Antemortem-inspection-by-hog-plant-staff-could-lead-to-massive-animal-disease-outbreak-vets-warn> (Attachment 1); Andrew Wasley, *How US Plans to Speed Up Pig Slaughter Times Could Endanger Food Safety*, The Guardian (Feb. 21, 2018, 7:15 EST), <https://www.theguardian.com/animals-farmed/2018/feb/21/how-us-plans-to-speed-up-pig-slaughter-times-could-endanger-food-safety>. (Attachment 38).

²⁰⁰ *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986); see also *Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173, 1190 (D. Or. 2002) (agency improperly invoked its categorical exclusion and violated NEPA by failing to “negate the presence of extraordinary circumstances” before proceeding with its proposed action); *Alaska State Snowmobile Ass’n, Inc. v. Babbitt*, 79 F. Supp. 2d 1116, 1136-37 (D. Alaska 1999) (agency “abused its

Here, although FSIS is certainly taking an extraordinary action—adopting rules that impact water usage and pollution and forego animal inspection duties, the Proposed Rule contains no hint that FSIS ever considered whether the “extraordinary circumstances” criteria applied to its decision. The local, regional, and national impacts on the human environment of the Proposed Rule are discussed below. But notably, there is no indication that FSIS has undertaken any extraordinary circumstances review.

FSIS also attempts to justify invoking a categorical exemption by claiming that “the number of swine slaughtered, as well as the number of condemned carcasses and parts to be disposed of, will be very small and thus will not have a significant individual or cumulative effect on the human environment.”²⁰¹ But FSIS’s confused and contradictory claims throughout the Proposed Rule belie this purported finding that there will be no significant impacts on the human environment.

According to FSIS, “[i]n 2016, there were approximately 612 swine slaughter establishments under Federal Inspection,” and those facilities killed “roughly 118 million hogs annually.”²⁰² FSIS estimates that eliminating current restrictions on line speeds will result in an average line-speed increase of 12.49% over current speeds.²⁰³ Moreover, FSIS estimates the economic benefits to industry of the Proposed Rule’s allowance for faster slaughter-facility processing will be \$47.33 million per year. FSIS aims to increase the number of pigs slaughtered, and the agency expects the Proposed Rule will achieve that goal, although it admits there are variables it has not yet fully accounted for:

[T]his increase in surplus may be an overestimate given that an increase in line speeds may change market hog prices, establishment production costs, *retail prices*, and export volumes. Additionally, consumer benefits would be conditional on how an increase in line speed affects *retail prices*. As such,

discretion” by merely “restat[ing] the categorical exclusion,” and holding that the agency should, “at a minimum, explain its decision that no exceptions applied”), *vacated as moot on other grounds*, 2001 WL 770442, at *1 (9th Cir. Jan 10, 2001); *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579, 585 (W.D. Wash. 1987) (ruling for plaintiff where agency “provided no reasoned explanation – indeed, no explanation at all—of how [mitigating] conditions would prevent application of an exception to the categorical exclusions”).

²⁰¹ NSIS Proposed Rule, 83 Fed. Reg. at 4819.

²⁰² *Id.* at 4800. In 2017, 121.3 million pigs were slaughtered last year, 3% higher than 2016; barrows and gilts (most likely to be sent as market hogs) comprised 97.2 percent of the total federally inspected pig slaughter. USDA, LIVESTOCK SLAUGHTER 2017 ANNUAL SUMMARY 6 (April 2018), *available at* <http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-04-18-2018.pdf>.

²⁰³ NSIS Proposed Rule, 83 Fed. Reg. at 4813 (“This increase in line speed is synonymous with an increase in industrial efficiency.”).

the Agency is seeking comment on the extent to which such an increase in line speeds would affect market hog prices, *establishment hours of production, consumer prices, and export volumes.*²⁰⁴

Despite the foregoing, in its brief discussion of environmental impacts, FSIS disingenuously suggests that the Proposed Rule will not lead to much of an increase in the number of pigs slaughtered. The Proposed Rule addresses the potential for environmental impacts nationwide in a single paragraph of vague, wishful thinking and flawed assumptions:

Establishments that operate under the proposed NSIS are expected to be able to slaughter and process swine more efficiently than is possible under current regulations, leading to a reduction in production costs. FSIS expects that consumer demand for pork products will determine the number of swine slaughtered rather than production costs. *Because of the efficiencies in the NSIS, the price of pork products may decrease.* The predicted price reduction could lead to a *slight* increase in demand for pork products. With the slight increase in pork product sales, some establishments may choose to increase the number of swine slaughtered, which could result in an increase in the number of condemned carcasses and parts that must be disposed of. *However, because the anticipated change in sales is very small, the Agency has determined that the change in the number of swine slaughtered, as well as the number of condemned carcasses and parts to be disposed of, will be very small and thus will not have a significant individual or cumulative effect on the human environment. Therefore, this regulatory action is appropriately subject to the categorical exclusion from the preparation of an EA or EIS provided under 7 CFR 1b.4(b)(6) of the USDA regulations.*²⁰⁵

FSIS cannot reasonably “conclude” that any increases in the number of pigs slaughtered will be “slight” or “very small” when it acknowledges elsewhere in the same Proposed Rule that it needs more information about “the extent to which such an increase in line speeds would affect market hog prices, establishment hours of production, consumer prices, and export volumes.”²⁰⁶ If, in response to its specific request for more information, FSIS learns that NSIS will cause pork prices to drop or cause many slaughter facilities to export more pork or to extend their operating hours, this

²⁰⁴ *Id.* at 4814 (emphasis added).

²⁰⁵ *Id.* at 4819.

²⁰⁶ *Id.* at 4814.

information should alter FSIS's unsubstantiated belief that the rule will only spur "very small" increases in pork slaughtering.²⁰⁷

Either FSIS knows how much the Proposed Rule will spur an increase in pig slaughtering or it does not. Yet it is impossible to tell what the agency knows in this regard as it stakes out three incompatible positions in the Proposed Rule:

- The agency claims it does not know the extent "to which such an increase in line speeds would affect market hog prices, establishment hours of production, consumer prices, and export volumes."²⁰⁸
- The agency claims "[t]his increase in line speed is synonymous with an increase in industrial efficiency." And this efficiency will lead to greater slaughter industry profits and investments in new technology.²⁰⁹
- The agency claims: "*Because of the efficiencies in the NSIS, the price of pork products may decrease. The predicted price reduction could lead to a slight increase in demand for pork products. With the slight increase in pork product sales, some establishments may choose to increase the number of swine slaughtered...However, because the anticipated change in sales is very small, the Agency has determined that the change in the number of swine slaughtered, as well as the number of condemned carcasses and parts to be disposed of, will be very small.*"²¹⁰

The agency cannot avoid NEPA review based on its unsupported "belief" that any increase in pig slaughtering will be "very small."²¹¹ FSIS not only fails to supply a basis for its purported belief that NSIS will not cause more pig slaughtering but contradicts that belief, as illustrated above, repeatedly in the Proposed Rule. Indeed, the Proposed Rule repeatedly extols the bottom-line enhancing effects of removing the speed limit on killing pigs, and it does not connect eliminating the line-speed limits to any other putative benefits as in the following example:

As a result, traditional inspection limits line speeds, even if establishments can demonstrate that they are able to produce safe, unadulterated, wholesome products at more efficient rates. It also limits large and high volume market hog slaughter establishments' incentive to improve their

²⁰⁷ *Id.* at 4819.

²⁰⁸ *Id.* at 4814 (emphasis added).

²⁰⁹ *Id.* at 4812, 4784.

²¹⁰ *Id.* at 4819 (emphasis added).

²¹¹ *Id.*

processing methods and to develop more efficient slaughter and dressing technologies.²¹²

Thus, FSIS emphasizes how allowing companies to kill pigs at an unlimited rate will incentivize development of “more efficient slaughter” technologies. This appears to be the only basis for removing the line-speed limit, as the agency never claims removing the speed limit will improve food safety or decrease inhumane handling. Instead, as noted above, FSIS estimates the Proposed Rule’s “industrial efficiency” savings to the industry to be 47.33 million dollars per year.²¹³

The Proposed Rule claims allowing slaughterers to kill pigs without a speed limit will help “high volume” slaughter facilities increase efficiency and develop new technologies. Yet when it comes to assessing environmental impacts, FSIS baselessly suggests that the same industry that it expects to invest time and money developing and implementing new technologies will uniformly choose not to recoup those costs by significantly increasing the number of pigs it slaughters. FSIS further compounds the confusion by claiming it needs more information before it can even predict how many more pigs may or may not be slaughtered as a result of removing the line-speed limit.

FSIS’s invocation of a categorical exclusion is baseless and self-contradictory. To the contrary, the evidence strongly demonstrates that extraordinary circumstances—in particular, major threats to public health and the environment—require FSIS to conduct a proper environmental review pursuant to NEPA.

B. The Proposed Rule May Significantly Impact Public Health by Increasing the Risk of a Disease Outbreak

In 2011, before the U.S. Supreme Court, USDA explained the importance of having its public health professionals examine every animal before slaughter:

The Federal regulation of slaughterhouses is designed in part to ensure the safety of particular carcasses for human consumption, and in part to implement a uniform federal policy regarding the humane handling of

²¹² *Id.* at 4784; *see also id.* at 4780 (The Proposed Rule is partly aimed at “remov[ing] unnecessary regulatory obstacles to innovation by revoking maximum line speeds and allowing establishments flexibility to reconfigure evisceration lines.”); *id.* at 4804 (“However, if establishments believe that capital expenditures would result in a benefit they may voluntarily reconfigure or update their facilities so as to fully capture all the potential production efficiencies offered through participation in NSIS.”); *id.* at 4813 (“This increase in line speed is synonymous with an increase in industrial efficiency.”).

²¹³ *Id.* at 4782 (Table 1).

*livestock. But it also serves to detect serious diseases—such as foot-and-mouth disease—that may be spreading through livestock populations, threatening widespread economic harm and disruption of the meat supply.*²¹⁴

FSIS argued that, to prevent such serious harm, it is critical that its trained public health professionals inspect every animal before slaughter.²¹⁵ According to FSIS in 2011, that inspection is part of a protocol that allows the agency to timely detect diseases that may not be timely diagnosed or diagnosed at all after an animal is slaughtered.²¹⁶ FSIS further explained:

FSIS follows an established protocol for handling such diseases. See generally FSIS Directive 6000.1 (Rev. 1, Aug., 3, 2006). As that Directive explains, “[o]utbreaks of certain animal diseases...can cause considerable economic and social disruption, including disruption of livestock marketing and trade,” and require “animal quarantine, depopulation, the cleaning and disinfecting of animal environments, and the mass disposal of animal carcasses.”²¹⁷

FSIS then explained that its trained professionals need to examine every live animal at federally inspected slaughter facilities themselves so that they can timely detect these diseases and report them to state authorities and, in some cases, international bodies such as the World Organisation for Animal Health.²¹⁸ According to FSIS, this system of detecting and reporting diseases in live animals relies “heavily” on inspection of every live animal by FSIS professionals:

*Such inspections are often the best way to detect serious diseases, especially when standard diagnosis requires observing or taking the temperature of a live animal. For example, as FSIS’s training materials for public health veterinarians explain, the initial clinical symptoms of Foot-and-Mouth Disease for swine are “fever * * *, anorexia, reluctance to move,” followed by vesicle (blister) formation. Of those symptoms, only vesicles would be detectable post mortem, and would not be visible on a skinned and dressed carcass. Ante-mortem inspection is similarly important in detecting, for example, swine vesicular disease, vesicular stomatitis; and classical swine fever or “Hog Cholera.”*²¹⁹

²¹⁴ See Brief for the United States, *supra* note 42, at 32 (emphasis added).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* (internal citation omitted).

²¹⁸ *Id.* at 33.

²¹⁹ *Id.* (omission in original) (internal quotation marks omitted) (emphasis added).

FSIS's policy position before the Supreme Court, based on FSIS directives and training materials, was not just that ante-mortem inspection by FSIS expert staff is critical to detecting and halting the spread of diseases. The agency went further and argued that if it were unable to inspect even a small number of animals before their deaths, this would be a serious obstacle to protecting public health and averting serious economic disruptions.²²⁰

As the attached HSUS comments on NAD pigs²²¹ make clear, there are many examples of diseases and conditions present in pigs at slaughter that can only be diagnosed by a trained veterinarian. Notable among these is swine influenza, which can be passed directly from pigs to any humans in proximity to them and which has the potential to quickly kill thousands, if not millions, of people.²²² Indeed, the director of the UN's World Health Organization recently ranked pandemic influenza as one of the three greatest "looming" global threats to human health.²²³ Influenza is also one of the most common causes of respiratory disease in North American pig farms.²²⁴ A collapsed pig at a slaughter facility may be an influenza carrier, as inability to stand is one of the symptoms.²²⁵

This is not just a massive threat to the U.S. economy or a potential cause of mass farm animal quarantining or killing; it is also a human public-health threat of the highest magnitude. Both recent and distant history bears out that influenza originating from a pig or other animal host can quickly become a lethal human epidemic or pandemic.²²⁶ In 2009, a swine influenza outbreak tragically killed thousands of Americans. When the Centers for Disease Control and Prevention (CDC) sequenced the RNA of the swine flu,

²²⁰ *Id.* at 33–34.

²²¹ Attachment 10.

²²² Comments submitted by HSUS Re. Docket ID No. FSIS-2010-0041: Non-Ambulatory Disabled Veal Calves and Other Non-Ambulatory Disabled Livestock at Slaughter 24–27 (submitted Apr. 8, 2011).

²²³ Dr. Margaret Chan, Director-General of the World Health Org., Address to the 61st World Health Assembly in Switzerland (May 19, 2008), <http://www.who.int/dg/speeches/2008/20080519/en/>. (Attachment 39).

²²⁴ Nan Nan Zhou *et al.*, *Genetic Reassortment of Avian, Swine, and Human Influenza A Viruses in American Pigs*, 73 *J. Virol.* 8851 (1999). (Attachment 40).

²²⁵ See Comments submitted by HSUS, *supra* note 222, at 25.

²²⁶ See Comments submitted by HSUS, *supra* note 222, at 24–27; Dr. Margaret Chan, *supra* note 223; WORLD HEALTH ORGANIZATION, HANDBOOK FOR JOURNALISTS: INFLUENZA PANDEMIC 6 (2005), http://apps.who.int/iris/bitstream/handle/10665/69203/WHO_CDS_2005.37_eng.pdf;jsessionid=69ADA260665F227131481037B505743A?sequence=1. (Attachment 41).

it traced the virus's origin to a *single* North Carolina pig farm.²²⁷ A few pigs at that one farm came down with a never-before-seen influenza strain made up of RNA from bird, pig, and human influenza viruses. Within a few years, that virus mutated and spread across North America.²²⁸ The CDC estimates that this pandemic sickened 60.8 million Americans, hospitalized 274,304, and killed 12,469, including more than a thousand children.²²⁹

Contrary to NEPA requirements, FSIS simply fails to discuss how its Proposed Rule may exacerbate these serious threats to public health.²³⁰ The Proposed Rule would allow slaughter facility employees to presort and remove untold numbers of animals, pulling potentially infected animals out of the ante-mortem inspection process—a process that FSIS has long touted as essential to protecting animal and human health.²³¹ The Proposed Rule imposes no veterinary training requirement or even requirements regarding minimum experience or qualifications on the slaughter facilities. Yet FSIS unrealistically expects employees of these slaughter facilities to be able to spot dozens of diseases, which, if left undetected, could cause widespread economic and public health damage.²³² This is deeply troubling in light of USDA's candid recognition that these company-paid sorters will not be as good at diagnosing diseases as FSIS inspectors.²³³ Indeed, FSIS is not even proposing to require NSIS slaughter facilities to “specify in their records the reason that animals were removed from slaughter.”²³⁴

The Proposed Rule focuses only on the potential for salmonella contamination, specifically the agency's belief that NSIS will not make the salmonella problem *worse*

²²⁷ Gavin J. D. Smith, *et al.*, *Origins and Evolutionary Genomics of the 2009 Swine-Origin H1N1 Influenza A Epidemic*, 459 *Nature* 1122 (2009). (Attachment 42). Six out of the virus's eight gene strains matched the virus that emerged in 1998 at that one farm. *Id.*; see also Bernice Wuethrich, *Chasing the Fickle Swine Flu*, 299 *SCIENCE* 5612 (March 2003), <http://science.sciencemag.org/content/299/5612/1502.full>. (Attachment 43).

²²⁹ Sundar S. Shrestha *et al.*, *Estimating the Burden of 2009 Pandemic Influenza A (H1N1) in the United States (April 2009–April 2010)*, 52 *CLIN. INFEC. DIS.* S75 (2011). (Attachment 44).

²³⁰ *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 18 (D.D.C. 2009) (“Public safety” is “indisputably encompassed within the definition of ‘environmental impacts’ that must be considered pursuant to NEPA.”); see also 40 C.F.R. § 1508.8 (defining “environmental impacts” to include “ecological, . . . aesthetic, historic, cultural, economic, social, or health,” effects, “whether direct, indirect, or cumulative”).

²³¹ NSIS Proposed Rule, 83 Fed. Reg. at 4781.

²³² *Id.* (Proposed Rule “require[es] establishment personnel to immediately notify FSIS inspectors if they suspect an animal or carcass with a reportable or foreign animal disease (*e.g.*, African swine fever, classical swine fever, or Nipah virus encephalitis) while conducting sorting activities.”); see also *id.* at 4793.

²³³ *Id.* at 4793.

²³⁴ *Id.* at 4799.

than it already is.²³⁵ FSIS's hope that the NSIS will either not worsen the salmonella problem or might improve it must be weighed against other public health threats that are at least as significant, such as influenza. FSIS must also account for other efficient and practical and less cruel measures that the agency could implement that would reduce the salmonella risk as well as the risks of influenza and other illnesses. FSIS never attempts that weighing. In sum, the agency plans to allow untrained facility employees to remove an unlimited number of pigs from the routine ante-mortem inspection that its prior policies called for and that it defended to the Supreme Court as a matter of grave public health and economic importance. As noted below, The Proposed Rule does not acknowledge this 180, let alone attempt to explain it, and this is a quintessential example of arbitrary agency decisionmaking.²³⁶

C. The Proposed Rule May Significantly Impact Public Health by Increasing Water Pollution

There can be no reasonable dispute that the more than 600 existing federally inspected pork slaughter facilities collectively and individually have the potential to pollute fresh water. Yet the Proposed Rule never mentions this potential, even though six years ago FSIS acknowledged this potential in considering the environmental impacts of poultry-line speed increases:

[B]y allowing establishments to reduce their hours of operations, the faster line speeds permitted under this proposed rule will result in a small, if any, increase in water use or runoff by establishments that operate under the New Poultry Inspection System.²³⁷

The Proposed Rule never addresses potential water use or water pollution impacts stemming from a rule that may implicate all of a nationwide industry. FSIS is not free to simply overlook this aspect without explaining why water usage and pollution

²³⁵ *Id.* at 4785 (“but the model confidently estimates that the level of protection from salmonella illnesses would be at least as good as the current system.”); *id.* at 4781 (“FSIS projects that the new system is unlikely to result in a higher prevalence of salmonella on market hog carcasses and may even result in a lower prevalence of salmonella on market hog carcasses, which in turn may lead to fewer human illnesses.”).

²³⁶ *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 18 (D.D.C. 2009) (quoting *La. Pub. Serv. Comm’n v. Fed. Energy Regulatory Comm’n*, 184 F.3d 892, 897 (D.C.Cir.1999)).

²³⁷ Proposed Rule, Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4407, 4451 (Jan. 27, 2012).

somehow do not matter to the NEPA analysis now, even though the agency thought they did six years ago in a highly similar context.²³⁸

According to EPA, water pollutants discharged from pig slaughtering facilities include blood, viscera, soft tissue, bone, urine and feces, and cleaning and sanitizing compounds. Rendering can “produce additional sources of fat and other soft tissues, as well as substances including brines, cooking oils, and tanning solutions.”²³⁹ Water coming into contact with pig excrement can also contain bacteria capable of causing serious human illness, including *Salmonella ssp.* and *Campylobacter jejuni*, *Ascaris sp.*, *Giardia lamblia*, and *Cryptosporidium parvum*, and enteric viruses.²⁴⁰ Additionally, pig manure and urine “may be significant sources of copper, arsenic, and zinc, because these constituents are commonly added to hog feed.”²⁴¹ Arsenic is a “known carcinogen,” and arsenic exposure has been linked to “cancers of the lung, skin, kidney, bladder, colon, uterus, prostate, stomach, and liver.”²⁴² In addition to cancer, arsenic exposure has been linked to cardiovascular disease, as well as “skin diseases such as hyperpigmentation and keratoses, peripheral neuropathy, and adverse reproductive effects.”²⁴³

FSIS is required to analyze how increased pig slaughter may impact water pollution and how it may affect local communities near slaughter facilities, entire regions, and the national environment as a whole.²⁴⁴ Even if, in general, slaughter rates do not increase nationwide, FSIS wholly fails to analyze more particularized impacts on any given state or community as individual plants or segments of the industry increase slaughter rates.

²³⁸ This failure to explain why FSIS is treating very similar situations in an opposite fashion is arbitrary and capricious. See, e.g., *Ashkar v. Burzynski*, 384 F.3d 11923, 1998 (9th Cir. 2004); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

²³⁹ EPA, EPA-821-R-04-011, TECHNICAL DEVELOPMENT DOCUMENT FOR THE FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE MEAT AND POULTRY PRODUCTS POINT SOURCE CATEGORY 6.1.2, available at http://water.epa.gov/scitech/wastetech/guide/mpp/upload/2008_07_15_guide_mpp_final_tdd07.pdf (citing 40 C.F.R. § 432). (Attachment 45).

²⁴⁰ *Id.* at 6-5.

²⁴¹ *Id.*

²⁴² Marianne Sullivan, *Contested Science and Exposed Workers: Asarco and the Occupational Standard for Inorganic Arsenic*, 123(5) PUBLIC HEALTH REP. 554 (2008). (Attachment 46).

²⁴³ *Id.*

²⁴⁴ See *Center for Biological Diversity v. Nat'l Highway. Traffic Safety Administration*, 538 F.3d 1172, 1223 (9th Cir. 2008) (finding EA deficient where agency failed to supply “any analysis or supporting data” supporting conclusion that “a small reduction (0.2% compared to baseline) in the growth of carbon emissions would not have a significant impact on the environment”).

For example, the pork industry is disproportionately clustered in a few states.²⁴⁵ Thus, environmental impacts that may not be felt in some states may be acutely experienced in Iowa or North Carolina, which are respectively the first- and second-place pork-producing states. Each state has pervasive, well-documented environmental impairments attributed to the pork industry and other industrialized animal farming facilities.²⁴⁶ Even if FSIS had determined that the Proposed Rule's water impacts would not significantly impact the environment in the national context, NEPA requires the agency to look at particular regional contexts, such as Iowa and North Carolina.²⁴⁷

Additionally, NEPA requires review of aggregate environmental impacts. As noted above, FSIS recently began a program that allows poultry slaughter facilities to apply for waivers that, if granted, allow them to increase their line speeds.²⁴⁸ FSIS needs to consider that pig slaughter facilities participating in NSIS are likely to be in counties, regions, and states where poultry slaughter is or will be increasing in parallel with pig slaughtering pursuant to NSIS.²⁴⁹ The Proposed Rule never takes stock of this, and thus ignores the significant potential for cumulative impacts posed by increased pig slaughtering contemporaneous with increased poultry slaughtering.

D. The Proposed Rule Ignores Significant Impacts to Fresh Water Supplies

EPA states:

In meat processing, water is used primarily for carcass washing after hide removal from cattle, calves, and sheep or hair removal from hogs and again after evisceration, for cleaning, and sanitizing of equipment and facilities, and for cooling of mechanical equipment such as compressors and pumps.

²⁴⁵ STATE OF OREGON DEQ, FOOD PRODUCT ENVIRONMENTAL FOOTPRINT LITERATURE SUMMARY: PORK 3 (2017), available at <http://www.oregon.gov/deq/FilterDocs/PEF-Pork-FullReport.pdf> ("U.S. pork production is concentrated in a handful of states, with the top 10 states representing 88% of 2015 hog production...The majority of contemporary pork production in the U.S. comes from large, high-volume "commodity" farms ...producing over 50,000 pigs annually."). (Attachment 47).

²⁴⁶ See Christine Ball-Blakeley, *CAFOs: Plaguing North Carolina Communities of Color*, 18(1) SUSTAINABLE DEV. L. & POL'Y 4 (2018), available at http://digitalcommons.wcl.american.edu/sdlp/vol18/iss1/3/?utm_source=digitalcommons.wcl.american.edu%2Fsdlp%2Fvol18%2Fiss1%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages. (Attachment 48).

²⁴⁷ 40 C.F.R. § 1508.27(a).

²⁴⁸ FSIS, Salmonella Initiative Program (SIP) Table, https://www.fsis.usda.gov/wps/wcm/connect/188bf583-45c9-4837-9205-37e0eb1ba243/Waiver_Table.pdf?MOD=AJPERES (last visited Apr. 23, 2018).

²⁴⁹ *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 51 (D.C. Cir. 2015).

*A large quantity of water is used for scalding of hogs for hair removal before evisceration.*²⁵⁰

EPA has determined that pig slaughter can require between 291 to 442 gallons per 1,000 pounds of live weight killed pigs. This translates to between 82.2 and 124.8 gallons of water for a single pig.²⁵¹

From this, it follows that increasing the number of pigs killed in turn increases the demand on water supplies and the amount of wastewater generated. Again, FSIS must grapple with this impact on the national, regional, and local levels. Some areas will be more seriously impacted by increased water consumption than others. For example, in early 2017, USDA “designated 24 counties in California as primary natural disaster areas due to losses and damages caused by a recent drought.”²⁵² One of these counties, Los Angeles, is also home to the Farmer John pig slaughter facility that butchers about 7,400 pigs per day and also does on-site rendering.²⁵³ If that one facility increases production in response to the Proposed Rule, it will increase the demand on an already-overtaxed water supply in a county that USDA knows is in a state of drought emergency. FSIS is not free to ignore these and other local, regional, and national impacts on the environment and people. FSIS claims that it doesn’t expect individual or cumulative environmental impacts, but that’s because the agency has failed to consider relevant facts that contradict its conclusion.

EPA’s studies of water use at slaughter facilities also directly undermine FSIS’s unsupported conclusion that industrywide changes in pig slaughter practices will *universally* have no individual or cumulative environmental impacts. Not that FSIS could support this sweeping generalization if it tried, as EPA has explained:

[T]he results obtained in these sample episodes in combination with other sources of information *suggests that there is a considerable degree of variation*

²⁵⁰ EPA, *supra* note 239, at 6-5 (emphasis added).

²⁵¹ The typical pig live weight at slaughter is 282.00 pounds. Pork Checkoff Board, Typical Market Pig Today, <https://www.pork.org/facts/stats/consumption-and-expenditures/typical-market-pig-today/> (last visited Apr. 23, 2018). (Attachment 49). So 1000 pounds of liveweight killed is equal to 3.54 pigs. 291 gallons divided by 3.54 pigs = 82.2 gallons per pig; 442 gallons divided by 3.54 pigs = 124.8 gallons per pig.

²⁵² News Release, USDA Designates 24 Counties in California as Primary Natural Disaster Area (Feb. 27, 2017), https://www.fsa.usda.gov/state-offices/California/news-releases/2017/stnr_ca_20170228_rel001. (Attachment 50).

²⁵³ Joel Crews, *Smithfield to Acquire Farmer John, Saag’s From Hormel*, MEAT + POULTRY (Nov. 22, 2016), http://www.meatpoultry.com/articles/news_home/Business/2016/11/Smithfield_to_acquire_Farmer_J.asp?ID=%7BBB76A9BB-D5D7-4505-8F6B-9459B31DD185%7D. (Attachment 51).

among facilities even within each segment of the industry in both the volume of wastewater generated per unit of production and the concentrations of specific pollutants. The sampling episode results demonstrate that the differences between two facilities with the same activity such as only first processing of broilers or first processing of cattle with on-site rendering and hide processing can be substantial. This suggests that differences in plant waste management practices, such as minimizing water use and separate collection of solid wastes, are critical factors in determining the volume of wastewater and the masses of individual pollutants generated per unit of production. Thus, it seems reasonable to conclude that any mean or median values characterized as typical values probably will describe the wastewater generated at a relatively small fraction of the total number of facilities in each segment of the [meat and poultry products] industry.²⁵⁴

Against this evidence, FSIS's sweeping, generalized, and conclusory claims that the Proposed Rule "will not have a significant individual or cumulative effect on the human environment" ring hollow.²⁵⁵ FSIS has arbitrarily ignored the local, regional, and national impacts on water supplies associated with increased slaughter and processing at hundreds of federally inspected pig slaughter facilities.

E. The Proposed Rule Ignores Other Indirect and Cumulative Environmental Impacts

The Proposed Rule also fails to address other cumulative and indirect impacts resulting from increased slaughtering, such as increased pig factory farming near slaughter facilities and increased truck traffic to and from slaughter facilities. To meet the minimum requirements of NEPA, the agency must at least attempt to explain each of these impacts and support its conclusion of no significant impact with a reasoned analysis.

To supply any increased demand for pigs to slaughter, producers in the regions surrounding pig slaughter facilities would expand their operations. Additional buildings would likely need to be built to supply pigs to potentially several hundred slaughter facilities that would be operating under the terms of the Proposed Rule. More pigs mean more waste, more water usage, more feed consumption, more manure and urine, and more fossil fuels required to transport the animals to and from slaughter facilities. These are all impacts that together will have cumulative significance to the

²⁵⁴ EPA, *supra* note 239, at 6-19, 6-20 (quotation marks omitted and emphasis added).

²⁵⁵ NSIS Proposed Rule, 83 Fed. Reg. at 4819.

human environment, triggering the requirement that FSIS conduct an environmental impact review.²⁵⁶ This expansion may be regionally disproportionate, impacting states like Iowa and North Carolina more heavily. Iowa and North Carolina are already enduring significant environmental impacts because the pork industry is overwhelmingly concentrated in those two states.²⁵⁷

An increase in intensive pig farming facilities in any given region, state, or county increases environmental and public health threats faced by rural communities.²⁵⁸ These impacts are well-documented in peer-reviewed scientific literature. They include the pollution of surface water, groundwater, and fresh air. Additionally, the subtherapeutic use of antibiotics in large populations of farmed animals, including pigs, has played a major role in creating organisms that are life-threatening to humans because they are resistant to many powerful human antibiotics.²⁵⁹

One of the most common antibiotic-resistant infections, multidrug-resistant *Staphylococcus aureus* (MRSA), kills more than 11,000 people in the U.S. annually.²⁶⁰ The connection between subtherapeutic use of antibiotics in farmed animals and MRSA is well-established.²⁶¹ MRSA causes painful, pus-filled abscesses and rashes, which can lead to permanent disfigurement.²⁶² A 2013 study of thousands of Pennsylvania

²⁵⁶ “Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7; *see also Resources Ltd. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1993) (section 1508.7 “specifically requires” consideration of the “cumulative impacts from non-Federal actions,” such as the actions of pork producers, and slaughter facilities). An action is significant if “the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(7).

²⁵⁷ *See* Ball-Blakely, *supra* note 246.

²⁵⁸ *See* Johns Hopkins, Center for A Livable Future, *Industrial Food Animal Production in America: Examining the Impact of the Pew Commission’s Priority Recommendations* (2013), https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/pdf/research/clf_reports/CLF-PEW-for%20Web.pdf. (Attachment 55).

²⁵⁹ *Id.* at 1.

²⁶⁰ C. Lee Ventola, *The Antibiotic Resistance Crisis Part 1: Causes and Threats*, 40(4) PHARMACY & THERAPEUTICS 281 (April 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4378521/pdf/ptj4004277.pdf>. (Attachment 53).

²⁶¹ J. Casey, *et al.*, *High-Density Livestock Operations, Crop Field Application of Manure, and Risk of Community-Associated MRSA Infection in Pennsylvania*, 173(21) JAMA INTERNAL MED. 1980, 1980 (2013), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1738717>. (Attachment 54).

²⁶² Johns Hopkins Center for a Livable Future, *Congressional Briefing, Antibiotic Resistance: A Multi-Billion Dollar Health Care Crisis 1* (2009), https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/pdf/research/clf_reports/CLF_BriefingBook.pdf (Attachment 55);

residents shows that proximity to pig manure and fields where pig manure is applied correlates to an up to 30% higher risk of contracting MRSA.²⁶³ The closer one is to these facilities and fields, the greater the risk.²⁶⁴

Lastly, FSIS fails to account for air pollution and other impacts even for the lone environmental impact that it actually acknowledges in the Proposed Rule: an increase in condemned pig carcasses and parts of pigs that must be disposed of. By weight, about 44% of every slaughtered pig is inedible and must be disposed of, rendered, or otherwise processed.²⁶⁵ The rendering process generates noxious and hazardous air emissions, including ammonia and hydrogen sulfide.²⁶⁶ An increase in slaughtered pigs means an increase in rendering and its attendant air and water pollution. This is particularly of concern in regions already suffering from poor air quality. For example, the Farmer John slaughter facility mentioned above has an on-site rendering facility that emits pollutants in Los Angeles County, an area that has long had some of the worst air quality in the nation.²⁶⁷ Again, these impacts (both cumulative and regionally specific) trigger the duty to prepare an EIS.²⁶⁸

In conclusion, FSIS cannot finalize the Proposed Rule without complying with NEPA. FSIS's invocation of a categorical exemption is unjustified and unsupported. Because the impacts of the Proposed Rule to the human environment are likely to be significant (particularly when considered—as FSIS must—at the national, regional, and local levels, as well as in the aggregate), FSIS must prepare an EIS of the Proposed Rule.

Minnesota Department of Health, Fact Sheet: Causes and Symptoms of *Staphylococcus aureus* (2010), <http://www.health.state.mn.us/divs/idepc/diseases/staph/basics.html>. (Attachment 56).

²⁶³ J. Casey, *et al.*, *supra* note 261.

²⁶⁴ *Id.*

²⁶⁵ SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, DRAFT STAFF REPORT: PROPOSED RULE 415—ODORS FROM RENDERING FACILITIES 1.2 (2017), <http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/415/pr-415-dsr.pdf>. (Attachment 57).

²⁶⁶ *Id.* at 1.8 (Table 1-1).

²⁶⁷ Shanika Gunaratna, *This State Has the Worst Air Quality in the Nation*, CBS NEWS (June 20, 2017, 6:26 PM), <https://www.cbsnews.com/news/worst-air-quality-california/>. (Attachment 48).

²⁶⁸ “Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7; *see also Resources Ltd. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1993) (section 1508.7 “specifically requires” consideration of the “cumulative impacts from non-Federal actions,” such as the actions of pork producers, slaughter facilities, and renderers). An action is significant if “the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(7).

VI. Conclusion

In conclusion, FSIS's current approach to animal welfare and worker safety in U.S. slaughter facilities flagrantly disregards statutory mandates and ignores decades' worth of evidence and documentation of egregious human and animal suffering. Rather than taking meaningful steps to address these well-documented problems, FSIS instead will make things even worse by eliminating regulations and privatizing key aspects of inspection. For all the reasons discussed above, we oppose the proposed NSIS rule.