

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
Affiliated with the AFL-CIO
80 F St. N.W., Washington, D.C. 20001-1583

7ps/FSIS/306142

May 25, 2012

Docket Clerk
U.S. Department of Agriculture (USDA)
Food Safety and Inspection Service (FSIS)
Patriots Plaza 3
355 E Street S.W., 8-163A
Mailstop 3782
Washington, D.C. 20250-3700

Re: Comments by AFGE Concerning Proposed Changes to 9 C.F.R. Parts 381 and 500, Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (Jan. 27, 2012)

Food Safety and Inspection Service, USDA
Docket no. FSIS-2011-0012

Dear Food Safety and Inspection Service:

The American Federation of Government Employees, AFL-CIO, (“AFGE”) hereby submits its comments to the changes proposed by the USDA Food Safety and Inspection Service (“FSIS” or the “Agency”) to the regulations contained in 9 C.F.R. Part 381, Poultry Products Inspection Regulations (“Part 381”), and 9 C.F.R. Part 500, Rules of Practice (“Part 500”). According to FSIS, the proposed changes are intended to “improve food safety and the effectiveness of poultry slaughter inspection systems, remove unnecessary regulatory obstacles to innovation, and make better use of the Agency’s resources.” 77 Fed. Reg. 4408.

AFGE strongly urges that FSIS reject the proposed changes to Part 381 in their entirety. The proposed changes to the current poultry slaughter inspection system for young chicken and turkey slaughter establishments will not improve food safety as the Agency suggests. Rather, by implementing these changes, FSIS will ensure that increased numbers of adulterated poultry enter the marketplace thereby endangering the health and safety of the American consumer. The proposed changes to Part 381 are a direct violation of the Poultry Products Inspection Act of 1957, 21 U.S.C. § 451 *et seq.* as amended, and thus they cannot be allowed to proceed.

I. Statutory Background

Since 1957, the Poultry Products Inspection Act (the “PPIA” or the “Statute”), 21 U.S.C. § 451 *et seq.*, has ensured that poultry and poultry products entering the marketplace are wholesome, not adulterated, and appropriately labeled and packaged. 21 U.S.C. § 451. The Statute provides that “[t]he Secretary . . . shall cause to be made *by inspectors* post mortem inspection of *the carcass of each bird processed . . .*” *Id.* § 455(b) (emphasis added). The PPIA defines “inspector” as an employee or official of the United States Government or the government of any State or the District of Columbia. *Id.* § 453(k). A “carcass” is defined under the Regulations as “all parts, including viscera, of any slaughtered poultry.” 9 C.F.R. § 381.1. FSIS is the agency responsible for enforcing the provisions of the PPIA. *Id.* § 300.2.

All poultry carcasses found to be adulterated are required to be condemned and destroyed unless the carcass (or a portion thereof) may be rendered fit for human consumption after reprocessing. 21 U.S.C. § 455(c). According to the Statute, poultry or poultry products are considered adulterated and thus unfit for human consumption if they meet any of eleven circumstances. 21 U.S.C. § 453(g). For example, a poultry product is deemed adulterated if it “bears or contains any poisonous or deleterious substance which may render it injurious to health,” if it “consists in whole or in part of any filthy, putrid, or decomposed substance,” or if it “has been prepared, packed, or held under insanitary conditions.” *Id.* at §§ (g)(1), (g)(3), (g)(4). In addition, the Regulations require inspectors to condemn poultry carcasses with certain diseases, including “any one or more of the several forms of the avian leukosis complex.” 9 C.F.R. § 381.82. Further, when poultry products are condemned because of disease, “the reason for condemnation in such instances shall be *supported by scientific fact, information, or criteria*, and such condemnation . . . shall be achieved through *uniform inspection standards and uniform applications thereof.*” 21 U.S.C. § 452 (emphasis added).

II. The proposed changes to Part 381 violate the Poultry Products Inspection Act.

A. The New Poultry Inspection System (“NPIS”) violates the PPIA because FSIS inspectors are not inspecting each poultry carcass.

FSIS inspectors are required to inspect the carcass of each processed bird. 21 U.S.C. § 455(b). In *AFGE v. Glickman*, 215 F.3d 7 (D.C. Cir. 2000) (“*Glickman*”), the Union challenged the Agency’s implementation of its HACCP-based inspection models project (“HIMP”) because FSIS inspectors were inspecting *people*, not poultry. 215 F.3d at 10. The Circuit Court held that, under the PPIA, FSIS inspectors were not permitted to delegate inspection activities to industry personnel. *Id.* at 11. In so holding, the Circuit Court explained that the lack of a statutory definition for the word “inspection” required that it have an ordinary, common meaning. *Id.* at 10.

Proposed Part 381 violates the Statute because the *inspection* performed is so unreasonable and contrary to the ordinary, common meaning of the word that the NPIS

undoubtedly violates law, specifically 21 U.S.C. § 455(b). *Inspection* is defined as “A careful examination of something, such as goods (to determine their fitness for purchase) or items produced in response to a discovery request (to determine their relevance to a lawsuit).” BLACK’S LAW DICTIONARY 14c (9th ed. 2009). The operative phrase here is “careful examination.”

Under the New Poultry Inspection System (as under the HIMP program at issue above), there will be two government inspectors: one online carcass inspector responsible for making a final adulteration determination before poultry enters the chiller, and one offline verification inspector. 77 Fed. Reg. 4421-22. Incredibly, FSIS decided that the maximum line speed permitted under NPIS for young chicken slaughter establishments ought to be 175 birds per minute (“BPM”). 77 Fed. Reg. 4454. There is no possible way that one FSIS online carcass inspector can legally *inspect* 175 BPM.¹

The basic workweek for an FSIS inspector is 5 consecutive 8-hour days. 9 C.F.R. § 381.37(c). During each 8-hour shift, an online carcass inspector is expected to inspect each and every poultry carcass for wholesomeness and to ensure that the carcass is not adulterated. It exceeds the bounds of logic and common sense to reasonably contend that one person can *carefully examine* more than 80,000 chickens per workday when the carcasses are whizzing past the inspector at a rate of 3 chickens per second.

The ordinary, common meaning of the word “inspection” must be more than the mere observation of a continuous blur. Here, the FSIS online carcass inspector under the NPIS will spend his days not *inspecting* anything under any rational interpretation of the word. Instead, the online NPIS inspector will be tasked with the meaningless job of watching 80,000 chickens flash by while diseased, contaminated, and otherwise adulterated poultry enters the chiller.

In passing the PPIA, Congress clearly stated that its intent was to protect the health and welfare of consumers by creating a government-facilitated inspection system. It is not a rational and consistent interpretation of the word “inspection” to demote FSIS inspectors to simple observers. While the NPIS inspectors are not inspecting people as under the rejected 1998 HIMP program, they are surely not *inspecting* poultry either. “Every inspection entails an observation, but not every observation amounts to an inspection.” *Glickman*, 215 F.3d at 11.

¹ Under the NPIS, the online carcass inspector will be responsible for inspecting 2.92 birds per second, which amounts to approximately 84,000 chickens during one 8-hour shift. As a stark comparison, current processing under the Streamlined Inspection System (“SIS”) has a maximum line speed of 35 BPM per inspector (0.58 birds/second, or, 16,800 birds/8-hour shift). 9 CFR § 381.76(b)(3)(ii)(b). Under the New Line Speed Inspection System (“NELS”), the maximum line speed is 30.33 BPM per inspector (0.51 birds/second, or, 14,560 birds/8-hour shift). *Id.* § 381.76(b)(4)(iv). The maximum line speed under the current Traditional Inspection system varies by number of inspectors present, but in no instance does it exceed 25 BPM per inspector (0.42 birds/second, or, 12,000 birds/8-hour shift). *Id.* § 381.67.

B. The New Poultry Inspection System violates the PPIA and FSIS Regulations because inspectors are not inspecting the viscera of each bird processed.

The Statute requires that each poultry carcass be inspected by government inspectors, and the Agency's regulations define "carcass" as "all parts, *including viscera*, of any slaughtered poultry." 21 U.S.C. § 455(b); 9 C.F.R. § 381.1. Thus, in accordance with law, a government inspector must inspect the carcass and viscera of every bird processed. *Glickman*, 215 F.3d at 11 (The PPIA "clearly contemplate[s] that when inspections are done, it will be federal inspectors—rather than private employees—who will make the critical determination whether a product is adulterated or unadulterated. . . . Delegating the task of inspecting carcasses to plant employees violates the clear mandates of the FMIA and PPIA.").

Under the four existing inspection systems—Traditional Inspection, Streamlined Inspection System ("SIS"), New Line Speed Inspection System ("NELS"), and New Turkey Inspection System ("NTIS")—"one or more FSIS online inspectors inspect every carcass, with its viscera . . . immediately following the separation of the viscera from the interior of the carcass (9 C.F.R. 381.76(b))." 77 Fed. Reg. 4410; 9 C.F.R. § 381.76(b)(3)(iii) ("Each inspector shall inspect the inside, viscera, and outside of all birds presented.")² FSIS inspectors perform an organoleptic inspection of each bird processed, physically touching the bird as well as visually observing it, to identify and condemn adulterated carcasses or take other appropriate corrective action. *Id.*

Under the proposed new rule, 9 C.F.R. § 381.76 is entirely rewritten. 77 Fed. Reg. 4454. Proposed § 381.76(b) mandates that there are only three systems of post-mortem inspection permitted under the new rule: NPIS (optional for young chickens and turkeys – this supplants SIS, NELS, and NTIS), Traditional Inspection (mandatory for all poultry other than ratites if NPIS is not used), and ratite inspection. *Id.* By the Agency's own admission, these changes to Part 381 will completely remove the requirement that viscera be identifiable to its respective bird for inspection as mandated by the PPIA and the non-amended portions of Part 381.

Amazingly, the New Poultry Inspection System completely eliminates any requirement that an inspector examine the viscera of each bird or that an inspector be able to identify each bird's respective viscera for inspection:

Under [NPIS], because the online carcass inspector will be positioned immediately before the chiller and will not conduct a carcass inspection until after sorting, trimming, and reprocessing has been completed by establishment employees, *viscera will not be presented together with the carcasses as in the current inspection systems.*

² § 381.76(b)(3)(iii) governs the post-mortem inspection procedures for SIS. However, the procedures for NELS, § 381.76(b)(4)(i)(a), and NTIS, § 381.76(b)(5)(i)(a), all have the same requirement that the inspector must inspect the inside, viscera, and outside of all birds presented.

77 Fed. Reg. 4421 (emphasis added). This new system directly and explicitly violates the mandate of the PPIA that an inspector, specifically a government employee, inspect the carcass of each bird, which the Regulations define as including viscera. Under this new system, poultry parts will be sold to the public that have never been inspected by a federal inspector in violation of federal law. Further, an examination of the viscera is vital to determining whether or not a bird is diseased, contaminated, or otherwise adulterated.

Under the current Regulation, 9 CFR § 381.76, FSIS inspectors are presented with a carcass, including viscera, for inspection.³ This ensures that viscera, which is reprocessed and sold in various forms as a product for human consumption,⁴ has been adequately and properly inspected for wholesomeness and to ensure that it is unadulterated. This inspection process is necessary to protect the health and safety of consumers.

The NPIS radically eliminates the requirement that FSIS inspectors examine both the carcass and the viscera. Due to the location of the online carcass inspector, right before the chiller, the inspector will be looking solely at the carcass. Additionally, even under the “optional” Traditional Inspection system retained by the proposed changes to Part 381, there is no guarantee that an inspector will be able to inspect a bird along with its respective viscera.⁵ Proposed 9 C.F.R. § 381.76(c)(1) only vaguely requires that the identity of each bird’s viscera be “maintained in a manner satisfactory to the inspector until such inspection is made.” *Id.* at p. 4454. This is an incredible departure from the requirements under current § 381.76 and, without any guarantee that the viscera is identifiable to its respective bird and available for inspection by a government inspector, the “new” Traditional Inspection system violates the Statute as well.

FSIS proposed Part 381 is a clear violation of the PPIA’s requirements. For half a century, American consumers have depended on the government to inspect their poultry for wholesomeness and to ensure that the chicken they purchase is not adulterated. The government has played a vital role in ensuring food safety since Theodore Roosevelt’s administration over a century ago, yet today the FSIS proposes to eschew its mandate and delegate poultry inspection to profit-minded corporations with little accountability or responsibility for food safety. Congress long ago determined that government inspection of poultry is “essential to the public interest,” 21 U.S.C. § 451, and FSIS cannot unilaterally decide to privatize poultry inspection in contravention of a federal statutory mandate. The PPIA requires government inspectors to inspect the carcass, including viscera, of each bird processed for human consumption, and proposed Part 381 blatantly violates the Statute and its requirements.

³ “No viscera or any part thereof shall be removed from any poultry processed in any official establishment, except at the time of post-mortem inspection, unless their identify [sic] with the rest of the carcass is maintained in a manner satisfactory to the inspector until such inspection is made.” 9 CFR § 381.76(a).

⁴ For example, some poultry parts are sold individually (e.g. a box of chicken livers) while others, such as the giblets, are reinserted into a bird (though not the same bird) to increase poundage.

⁵ As discussed below, *infra* p. 11, slaughter establishments are not provided a meaningful choice between Traditional Inspection and the NPIS.

III. The proposed changes to Part 381 do not ensure that processed poultry is unadulterated and safe for human consumption because the NPIS does not require that the carcass and viscera of each bird be identified together for inspection which is necessary for discovering the presence of the avian leukosis complex.

9 C.F.R. § 381.80 requires that poultry contaminated with the diseases detailed in other sections of that subpart “shall be disposed of in accordance with the section pertaining to the disease or condition.” 9 C.F.R. § 381.80(a). The Regulations thus require that “Carcasses of poultry affected with any one or more of the several forms of the avian leukosis complex shall be condemned.” 9 C.F.R. § 381.82. According to the PPIA, condemnation on the basis of disease shall be supported by scientific fact, information, or criteria. 21 U.S.C. § 452. Even under the proposed changes to Part 381, poultry with the avian leukosis complex must still be condemned. 77 Fed. Reg. 24874 (“The regulations that prescribe conditions for condemnation in 9 CFR 381.81-381.93 would still apply.”).

The avian leukosis complex is defined as “any of a group of diseases (as lymphoid leukosis) of poultry that are caused by strains of a retrovirus (species *avian leukosis virus* of the genus *Alpharetrovirus*), that involve disturbed blood formation, and that are distinguished individually by special manifestations (as paralysis, tumor formation, leukemia, and eye damage).”⁶ The Food and Agriculture Organization of the United Nations (“FAO”) explains that the “Avian leucosis complex occurs in four separate disease entities: (1) Leucosis-sarcoma group (Lymphoid leukosis), (2) Marek’s disease (MD), (3) Reticuloendotheliosis group (REV), and (4) Lymphoproliferative agent of turkey.”⁷ The first entity, Lymphoid leukosis, is evidenced by “Grey tumour lesions in the liver, spleen and bursa [and] Other organs such as lung, heart, proventriculus, gonads, bone marrow and mesentery are sometimes affected.” *Id.* The second entity, Marek’s disease, is likewise observed via “Skin neoplasia [and] Enlarged spleen.” *Id.* FAO explains that both iterations of the avian leukosis complex require condemnation of the poultry. *Id.* In essence, the avian leukosis complex is a broad category of avian diseases which cause paralysis and even death of the chickens and are readily observed in the affected poultry’s viscera.

By creating a system whereby the inspected poultry is separated from its viscera, however, the NPIS will make it impossible for inspectors to identify poultry affected with the avian leukosis complex. The Agency contends that visual observation of a bird’s exterior will permit an inspector to identify any adulterating diseases “with the exception of one condition, i.e., visceral leukosis.” 77 Fed. Reg. 4421.⁸ In fact, FSIS openly admits that “[a]vian visceral leukosis can only be detected by observing the viscera.” *Id.*

⁶ Merriam-Webster, “avian leukosis,” <http://www.merriam-webster.com/medical/avian%20leukosis>.

⁷ D. Herenda, *Manual on meat inspection for developing countries*, “Chapter 7. Specific Diseases of Poultry,” (reprinted 2000), available at <http://www.fao.org/docrep/003/t0756e/T0756E08.htm>.

⁸ “. . . observing the viscera is not required to identify the presence of a condemnable condition, *with the exception of visceral leukosis*” (emphasis added).

FSIS inconsistently contends that poultry affected with the avian leukosis complex “does not present a human health concern” while at the same time the avian leukosis complex “render[s] poultry unwholesome or otherwise unfit for human food.” *Id.* at 4421-22. The Agency cannot have it both ways. For decades, the presence of the avian leukosis complex has rendered poultry adulterated, condemnable, and unfit for human consumption. In fact, the United Nations’ FAO instructs condemnation of poultry affected with the avian leukosis complex in all of its different forms. Undoubtedly, this determination is based on scientific fact, information, and criteria as mandated by the Statute. And yet, now, FSIS has decided that harm from the avian leukosis complex (while present and real) is not significant enough to require that inspectors should have the opportunity to inspect the viscera of marketed poultry.

Instead, the NPIS seeks to detect for the presence of the avian leukosis complex by having an offline inspector observe “the first 300 birds of each flock.” *Id.* at 4422. Ignoring the confusing fact that there is not a definition of “flock” anywhere in the Statute or Agency’s regulations,⁹ this suggested method is untried, untenable, and creates real dangers for the consuming public.

The risks associated with the “first 300” method are underscored when the proposed practice is viewed in light of the NPIS’s other requirements. Proposed § 381.36(c)(3) states that NPIS establishments must provide:

a location at a point along the production line after the carcasses are eviscerated at which an inspector may safely and properly inspect for leukosis the first 300 carcasses of each flock together with associated viscera either uniformly trailing or leading, or otherwise identified with the corresponding carcass.

77 Fed. Reg. 4453.¹⁰ Incredibly, *this* is the most explicit requirement regarding FSIS inspection of viscera for the avian leukosis virus. Proposed § 381.76(d)(3)(v), as discussed above, requires establishments to notify the inspector-in-charge when they intend to slaughter a new flock so that FSIS may inspect the viscera “as provided in [Proposed] § 381.36(c)(3) of this part.” 77 Fed. Reg. 4455. But, under the current

⁹ Nowhere in 9 CFR Part 381 Poultry Products Inspection Regulations, nor anywhere else in the Code of Federal Regulations, is there a definition of the word “flock.” The absence of a definition for “flock” makes the concerns here even more valid since the proposed process for detecting the avian leukosis complex under the NPIS is already vague and unworkable. The FSIS Proposed Rule Discussion states “In general, a flock constitutes birds raised under similar circumstances on the same premises.” 77 Fed. Reg. 4422. However, this attempt at clarifying “flock” is imprecise at best and the concept is still absent from any statute or federal regulation.

¹⁰ Curiously, the text of proposed § 381.36(c)(3) is incongruent with the Agency’s discussion of the “first 300” proposed method. 77 Fed. Reg. 4422. In the Proposed Rule Discussion, the FSIS claims that “an offline inspector will observe the viscera of the first 300 birds slaughtered.” *Id.* However, the requirement that the inspector be an *offline* inspector is absent from the text of proposed § 381.36(c)(3). This inconsistency is indicative of the dichotomy between the Agency’s proffered justifications for the NPIS and the dangerous reality which the New Poultry Inspection System will create.

language of Proposed § 381.36(c)(3), there is nothing mandatory about the “first 300” method at all.

Indeed, Proposed § 381.36(c)(3) only requires that establishments “provide a location” for inspecting for the avian leukosis complex, but the inspection itself is purely optional (“ . . . at which an inspector *may* safely and properly inspect for leukosis . . .”). *Id.* at 4453. Requiring a location along the line for inspection, without actually requiring that an inspection be performed, is not a legally sufficient regulation considering 9 CFR § 381.82 commands that “Carcasses of poultry affected with any one or more of the several forms of the avian leukosis complex shall be condemned.” Rather than rescind § 381.82’s mandate, FSIS is attempting an end-run around its obligations to inspect for and condemn birds with the avian leukosis complex by designing a convoluted, unspecific, and purely optional “first 300” detection method. This oversight will have grave consequences for the health and safety of poultry consumers who depend on FSIS to ensure that processed chickens are not afflicted with a condemnable disease: the avian leukosis complex.

The vagueness of this requirement is more astounding when one considers the incredible specificity of proposed § 381.36’s other requirements. For example, the online carcass inspection station platform “must be designed with a 42-inch high rail on the back side and with ½-inch foot bumpers on both sides.” 77 Fed. Reg. 4452. Additionally, FSIS has taken the effort to require that “[a] minimum of 200-foot candles of shadow-free lighting with a minimum color rendering index value of 85 must be provided” *Id.* Proposed § 381.36 even goes so far as to mandate that establishments provide a separate *clipboard holder* for the online carcass inspector. *Id.*

The level of detail which the FSIS has given to such seemingly mundane facilities requirements serves only to accentuate the complete and utter lack of attention the Agency has given to crafting a proposed rule which ensures the health and safety of consumers. While FSIS is preoccupied with making sure that “hand rinsing facilities must provide water at a temperature between 65 and 120 degrees Fahrenheit,” *Id.*, the Agency only cursorily promulgates a rule intended to prevent the avian leukosis complex from exiting the slaughterhouse and entering the marketplace.

It cannot be emphasized strongly enough that the NPIS—for the first time ever—explicitly separates a bird from its viscera. 77 Fed. Reg. 4421. Under each of the existing inspection systems, the Regulations require that the viscera be “uniformly trailing or leading.” 9 C.F.R. § 381.76. With the adoption of NPIS, this important requirement—the standard in poultry inspection for decades—will be eliminated.

Considering that FSIS’s Proposed Part 381 is explicitly optional with respect to the inspection of the first 300 birds of a flock for the avian leukosis complex, there is absolutely no guarantee that the “first 300” will be inspected at all. Under the current language of Proposed § 381.76, there is no telling whether the offline inspector will inspect the first 300, a sampling of 300 birds, or no birds whatsoever. Also, there is no guarantee that the birds inspected will come from the same “flock” because that is not a concrete, defined concept in any federal statute or regulation. And most importantly,

there is no guarantee that, upon finding viscera affected with the avian leukosis complex, the FSIS inspectors will be able to locate the carcass from which it came. 9 C.F.R. § 381.82 requires that the *carcasses of poultry affected* with the avian leukosis complex must be condemned. Rather than follow the Statute and its own Regulations, the FSIS is unnecessarily placing corporations' profit margins before the health and safety of the American poultry consumer.

IV. Many important elements of the NPIS and FSIS's justifications in the Proposed Rule Discussion lack a sufficient and persuasive scientific basis.

A. Proposed Part 381 displays a complete lack of concern for the potential occupational hazards that online carcass inspectors will face under the NPIS and increased line speeds.

Increasing line speed to 175 BPM under the NPIS creates health and safety concerns for the online carcass inspectors which are unaddressed in the FSIS's Proposed Rule Discussion. While it is highly doubtful that actual inspection at this speed is even scientifically possible, there is strong reason to believe that worker injuries will increase when the line speed accelerates to 175 BPM.

FSIS does nothing to assuage these concerns about potential work-related injuries that may occur to online carcass inspectors as a result of increased line speeds under the NPIS. The Agency details a National Institute for Occupational Safety and Health ("NIOSH") study which FSIS requested to study safety effects on *establishment* personnel. 77 Fed. Reg. 4423.¹¹ However, FSIS completely ignores its responsibility to study the safety hazards and occupational dangers presented to online carcass inspectors. The FSIS online carcass inspector, standing alone at the end of the inspection line and directly before the chiller, is tasked with inspecting three chickens per second as they move at 175 BPM. It is surprising that FSIS finds itself more concerned with protecting establishment personnel's safety than with adequately anticipating and protecting its *own* carcass inspectors' safety.

At most, the Agency mentions that NIOSH will study "five non-HIMP establishments that applied through the SIP to receive waivers of existing regulations restricting line speeds." 77 Fed. Reg. 4423. This alleviates none of AFGE's concerns, as this study is only vaguely intended to "gather additional data of the effects of line speeds on the worker safety" without saying how increased line speeds have the potential to cause unintended and/or foreseeable safety issues, how this plan to "gather additional data" will relate to ensuring FSIS online carcass inspectors are adequately protected, or how actual safety issues will be remedied. *Id.* While it cannot be expected that the Agency can predict all possible safety dangers from increased line speeds, the likelihood of increased worker safety issues becomes substantial when chickens are whizzing past FSIS inspectors at such rapid speeds.

¹¹ "NIOSH has expressed its willingness to evaluate the effects of increased production volume on employee health, with a focus on musculoskeletal disorders and acute traumatic injuries." *Id.*

Before FSIS decides to implement the NPIS, thereby requiring one online carcass inspector to stand inches away from chickens flying by at 175 BPM, it should make a serious, scientific inquiry into the potential dangers related to the inspector's new position. There is a high potential for occupational injuries, including but not limited to orthopedic injuries or possible vision-related injuries from attempting to inspect these rapidly-moving chickens. By solely suggesting some future studies on occupational health and safety under the NPIS, the FSIS has not given AFGE reason to believe that inspectors' safety is ensured or even seriously considered. Again, the rush to implement the NPIS is evidence that the Agency wants to give poultry producers excessive freedom to implement dangerous practices without fully considering the health and safety of FSIS inspectors or the effects these practices will have on the well-being of American poultry consumers.

- B. The elimination of a mandatory chiller temperature under the NPIS is not based on science and is an overt attempt to accommodate processors who cannot meet the new standard of 175 BPM.

9 C.F.R. § 381.66 governs the chilling and freezing procedures and temperature requirements for poultry that has passed inspection. Currently, the Regulations mandate very specific post-processing instructions. For example, “[a]ll poultry . . . shall be chilled immediately after processing so that the internal temperature is reduced to 40 °F.” and “[m]ajor portions of poultry carcasses . . . shall be chilled to 40 °F. or lower” within a specified number of hours depending on the carcass' weight. *Id.* § 381.66(b); *see also* §§ 381.66(c)(4) (“Giblets must be chilled to 40 °F [sic] or below within 2 hours”) and (e) (requiring that air-chilled poultry “shall be reduced to 40 °F. or less within 16 hours”). The purpose of these requirements is to “preserve the condition and wholesomeness of the poultry, and assure that the products are not adulterated.” *Id.* § 381.66(a).

Proposed Part 381 does away with these time and temperature requirements entirely. 77 Fed. Reg. 4430. Subsection (b), which prescribes the maximum permissible temperature, is perversely revised to remove any temperature requirement whatsoever. Instead of requiring that processed poultry be immediately chilled to 40 °F or lower, the NPIS puts processors on the honor system. FSIS no longer cares how cold the chiller is so long as poultry slaughter establishments “ensure . . . that there is no outgrowth of pathogens” 77 Fed. Reg. 4453.

In the Proposed Rule Discussion, FSIS admits that current “temperature limits in these regulations were based on the fact that most relevant foodborne bacteria have not been reported as being capable of multiplying at temperatures below 40 °F.” 77 Fed. Reg. 4430. Under the current Regulations, American consumers can rest easy that the chicken they buy has been refrigerated at the temperature scientifically adequate to ensure food safety; under proposed Part 381, this assurance is no longer provided. FSIS is not proposing to remove time and temperature requirements based on some new scientific evidence or conclusive study that other temperatures and chilling procedures are adequate. In fact, FSIS freely admits that the proposed rule is intended to give poultry processors “flexibility” to implement “alternative approaches.” *Id.* The Agency's decision

to eliminate time and temperature requirements in proposed Part 381 is not a reasoned policy choice based in scientific fact.

FSIS, in proposed Part 381, purports to offer chicken and turkey slaughter establishments the choice “whether to operate under the traditional inspection system or under the proposed new inspection system.” *Id.* at 4408. In reality, however, this “choice” is meaningless. Establishments that choose the NPIS will be absolutely limited to one online carcass inspector. *Id.*¹² Yet, for those establishments which choose to continue operating under the Traditional Inspection system, “FSIS is proposing to limit the number of online inspectors . . . to two.” *Id.* Currently, the Traditional Inspection system permits up to four online inspectors. 9 C.F.R. § 381.67. If proposed Part 381 is allowed to go into effect, these establishments operating under the Traditional Inspection system will be forced to operate at half speed.

By allowing chicken slaughter establishments to opt in to NPIS and process up to 175 BPM, FSIS is forcing medium and small slaughter establishments into a difficult choice. An establishment may not have the capacity to safely process 175 BPM, but it has little ability to resist NPIS when it is rapidly out-produced and out-sold by its larger competitors. Since poultry slaughter establishments can select any chilling technique they please under the proposed rule (so long as it *ensures* there is no outgrowth of pathogens), small and medium establishments may eviscerate 175 BPM now and worry about adequate chilling later. The elimination of time and temperature requirements in proposed Part 381 is a naked attempt by the Agency to accommodate those small and medium-sized slaughter establishments which cannot safely increase production to 175 BPM under the NPIS but which have no choice except to acquiesce to the new system. FSIS’s proposed revisions to 9 C.F.R. § 381.66 are not based in science or fact and do absolutely nothing to ensure the health, safety, and wellbeing of the American consumer.

- C. By failing to mandate the location of Critical Control Points (“CCPs”), FSIS is encouraging a faulty inspection system whereby adulterated poultry increasingly passes federal inspection and establishments’ noncompliance data will be exceptionally skewed.

FSIS’s decision to eliminate the requirement that establishments position the critical control point (“CCP”) at a specific location along the evisceration line is a dangerous omission which will have significant implications for health and safety. CCPs are necessary for ensuring that poultry is not contaminated with disease or fecal matter. In non-HIMP establishments, CCPs for Infectious Conditions (FS-1) and Fecal Material Contamination (FS-2) are located before the FSIS inspector so that the Agency can “reinspect carcasses that have passed FSIS online inspection and have been trimmed and

¹² “Key elements of the new inspection system include . . . (2) reducing the number of online FSIS carcass inspectors to one per line . . .” *Id.*

washed by the establishment.”¹³ When FSIS finds that poultry has passed the CCP but is still contaminated or adulterated, the inspector produces a noncompliance report.

However, under HIMP and the NPIS, the Agency “does not prescribe where establishments must locate CCPs.” 77 Fed. Reg. 24874. Instead, establishments are given the freedom to locate CCPs “either before or after the FSIS carcass inspection station.” HIMP Evaluation, *supra* n. 13, at 10. The establishments did not always have this freedom. From the start of the HIMP pilot project until 2009, the CCPs were located before the FSIS carcass inspection station. FSIS granted the establishments the “freedom” of locating the CCPs after the carcass inspector shortly before FSIS began collecting data in support of these proposed regulations. Unsurprisingly, “all 20 of the young chicken establishments have the CCP for FS-2 (fecal material) located after the” online carcass inspector. *Id.*

Online carcass inspectors “do not create noncompliance records for visible fecal material when the CCP for fecal material is located after” the online carcass inspector. *Id.* The timing of this “freedom” strongly suggests that the primary purpose for allowing establishments to place the CCP after the FSIS inspector was to reduce the number on noncompliance reports issued to HIMP establishments. The absence of a CCP location requirement in HIMP served only to ensure that the Agency’s quality control study would be buttressed by inflated compliance statistics. This “freedom” substantially undermines the credibility of FSIS’s study asserting that NPIS may be safer.

D. FSIS supports its decision to implement the NPIS on the purely speculative basis that the new system *may* reduce the presence of disease in processed poultry.

In the Proposed Rule Discussion, FSIS suggests that “there may be fewer illnesses attributable to both *Salmonella* and *Campylobacter* when additional unscheduled offline inspection procedures are performed.” 77 Fed. Reg. 4420. This bold assertion is based on the USDA’s FSIS Risk Assessment published in November 2011.¹⁴ However, FSIS’s attempt to justify the NPIS on this basis is flawed because the predictions are purely conjecture.

The FSIS Risk Assessment employs a “[l]ogistic regression analysis . . . to estimate the relationship between off-line inspection procedures and contamination of carcasses with either *Salmonella* or *Campylobacter*.” FSIS Risk Assessment, *supra* n. 14, at 8. In the Agency’s own calculations, then, FSIS predicts that “additional offline procedures . . . could lead to as many as 4286 fewer *Salmonella*-related illnesses and 986 fewer *Campylobacter*-related illnesses per year.” 77 Fed. Reg. 4420.

¹³ U.S. Department of Agriculture, Food Safety and Inspection Service, “Evaluation of HACCP Inspection Models Project (HIMP),” at 10-11 (August 2011), (hereinafter “HIMP Evaluation”) *available at* http://www.fsis.usda.gov/PDF/Evaluation_HACCP_HIMP.pdf.

¹⁴ Risk Assessment Division, Office of Public Health Science, “FSIS Risk Assessment for Guiding Public-Health Based Poultry Slaughter Inspection,” (updated Nov. 2011), *available at* http://www.fsis.usda.gov/PDF/Poultry_Slaughter_Risk_Assess_Nov2011.pdf.

Notwithstanding the fact that the FSIS Risk Assessment is an incredibly complicated statistical prediction method developed and performed by the Agency's own Risk Assessment Division (thereby raising serious concerns about agency bias), these calculations are nothing more than simple mathematical extrapolations based on self-selected variable criteria. Tellingly, the FSIS Risk Assessment is rife with uncomfortable words such as "suggests," "could," "predicts," "assumes," and various others. By the Agency's own admission, the uncertain sources of its own chosen criteria "translate[s] into substantial uncertainty about forecasted changes in illness rates." FSIS Risk Assessment, *supra* n. 14, at 11.

Moreover, the FSIS Risk Assessment is based on faulty data. Under normal operating conditions, the chilling system contains chlorinated water containing 20 parts per million ("ppm") available chlorine. However, on days when FSIS conducted *Salmonella* testing it was not unusual for the establishments to increase the amount of available chlorine to 50 PPM. While this higher concentration is still within the parameters permitted by the regulations, it is not indicative of the true conditions at HIMP plants on an average day. Thus, the FSIS Risk Assessment's predictions were not based on typical operating conditions and are not reliable. Therefore, FSIS's claims that the NPIS may reduce the number of *Salmonella* and *Campylobacter* related illnesses are highly speculative and unlikely to be realized.

VII. Conclusion

AFGE thanks FSIS for allowing it the opportunity to submit these comments. For all the foregoing reasons, AFGE requests that FSIS reject proposed Part 381 and prevent the implementation of the New Poultry Inspection System. Finally, AFGE notes that by submitting these comments, AFGE does not waive any rights or challenges that it may have, now or in the future, concerning any aspect of FSIS's changes to 9 C.F.R. Part 381 and reserves its right to bargain with the Agency over the application of these regulations should they go into effect.

Sincerely,

s/ Matthew Milledge

Matthew Milledge
Assistant General Counsel
American Federation of Government Employees, AFL-CIO