

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FOOD & WATER WATCH, INC., et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 TOM VILSACK, et al., )  
 )  
 Defendants. )

Civil Action No. 1:14-cv-01547 (KBJ)

**BRIEF OF GOVERNMENT ACCOUNTABILITY PROJECT,  
CONSUMER FEDERATION OF AMERICA, CENTER FOR FOODBORNE ILLNESS,  
SOUTHERN POVERTY LAW CENTER,  
AND NEBRASKA APPLESEED AS *AMICUS CURIAE*  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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## **INTEREST OF THE *AMICI***

The Government Accountability Project (GAP) is a nonprofit, nonpartisan public interest organization that promotes corporate and government accountability by protecting whistleblowers and advancing occupational free speech. GAP advocates for effective whistleblower protections throughout private industry, international institutions and the federal government. Through its Food Integrity Campaign, GAP promotes transparency and accountability in the food industry by facilitating truth-telling within the industry and protecting the rights of individuals who witness practices that compromise food safety and integrity.

Approximately 15 years ago, the USDA began experimenting with a new inspection system, which the agency piloted under the name “HACCP-Based Inspection Models Project,” or “HIMP,” under which many of the duties traditionally performed by federal inspectors were delegated to employees of the poultry processing establishments. Since then, GAP has worked with USDA inspectors in poultry processing establishments participating in the pilot program to investigate and inform the public about the program. In 2012, the USDA published a Notice of Proposed Rulemaking proposing to codify a new inspection system, called the New Poultry Inspection System (NPIS), modeled after the HIMP pilot program. 77 Fed. Reg. 4408. That spring, seven USDA inspectors provided GAP with sworn affidavits describing their experiences with and concerns about the program outlined in the NPIS rules. Fearing retaliation, these inspectors provided their affidavits on condition that GAP not reveal their names or any other personally identifiable information. During the rulemaking proceeding at issue in this case, GAP submitted a comment expressing concerns about the proposed rules, to which GAP attached these affidavits. *See* Corrigan Ex. H. Based on information shared by numerous USDA

inspectors during the past 15 years, GAP is concerned that Defendants' NPIS rules violate the Poultry Products Inspection Act (PPIA) and compromise the safety and wholesomeness of the poultry supply.

The Southern Poverty Law Center (SPLC) is a nonprofit, nonpartisan public interest organization dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of our society through litigation, education, and other forms of advocacy. Nebraska Appleseed Center for Law in the Public Interest is a nonprofit, nonpartisan law and policy organization that fights for justice and opportunity for all Nebraskans. SPLC and Nebraska Appleseed have significant experience researching the poultry and meatpacking industries and working with poultry and meatpacking workers. Each organization has published reports detailing the relentless pressure that workers face to keep up with mechanized processing lines, the serious illnesses and injuries that result, and the industry's repeated disregard for worker safety and health in favor of production and profit.<sup>1</sup> This concern for profits and production – at the expense of worker safety – has resulted in a climate of fear in which reporting injuries, inquiring about workplace safety, or simply asking for a restroom break can result in retaliation. The resulting underreporting of injuries has been well documented.<sup>2</sup> The NPIS rules

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<sup>1</sup> See Alabama Appleseed and Southern Poverty Law Center, "Unsafe at These Speeds: Alabama's Poultry Industry and its Disposable Workers" (2013), at 7-8, available at [http://www.splcenter.org/sites/default/files/downloads/publication/Unsafe\\_at\\_These\\_Speeds\\_web.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/Unsafe_at_These_Speeds_web.pdf); Nebraska Appleseed, "The Speed Kills You: The Voice of Nebraska's Meatpacking Workers" (2009), at 27-29, available at <https://neappleseed.org/library#publications>.

<sup>2</sup> The latest government data revealed that nonfatal workplace injuries and illnesses occurred at an incidence rate of 4.9 and 8.7 per 100 workers for poultry and meatpacking plants, respectively, see Bureau of Labor Statistics, *Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types* (2013), available at <http://www.bls.gov/iif/oshwc/osh/os/ostb3581.pdf>. Medical and government studies, however, have reported rates that far exceed official rates. See, e.g., Kristin Musolin et al., Nat'l Inst. for Occupational Safety & Health, HHE No. 2012-0125-3204, *Evaluation of Musculoskeletal Disorders and Traumatic Injuries Among Employees at a Poultry Processing Plant* (March 2014); Michael S. Cartwright et al., *The Prevalence of Carpal Tunnel Syndrome in Latino-*

largely transfer inspection duties from federal inspectors to poultry plant employees. SPLC and Nebraska Appleseed are concerned that this climate of fear and intense pressure to keep up production speed at all costs raises serious concerns that these employee-inspectors will face similar barriers to reporting food safety problems, with potentially dangerous consequences for consumer safety.

Consumer Federation of America is a nonprofit association of nearly 280 nonprofit consumer organizations that was founded in 1968 to advance the consumer interest through research, education and advocacy. CFA member organizations include local, state and national consumer advocacy groups, consumer cooperatives, and national organizations representing senior citizens, anti-hunger advocates, farmers and trade unionists. CFA advocates pro-consumer policies at national and state levels of government and the courts. CFA's Food Policy Institute conducts research and advocacy to promote a safer, healthier, and more affordable food supply.

Center for Foodborne Illness Research and Prevention is a national, nonprofit health organization dedicated to preventing foodborne illness by amplifying research, protecting its integrity, and translating it into public policies that provide better food protections for all Americans. CFI is concerned that USDA's New Poultry Inspection System rule needs further public discussion so that all stakeholders are better informed about the impacts that this rule may have on food safety and public health.

On April 13, 2012, various nonprofit groups, including Plaintiff Food & Water Watch and several of the undersigned *amici*, submitted a letter to the USDA requesting that the agency

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*Poultry Processing Workers & Other Latino Manual Workers*, 54(2) J. of Occupational & Environmental Med. 198, 199 (Feb. 2012); Government Accountability Office, GAO-05-96, *Workplace Safety and Health: Safety in the Meat and Poultry Industry, while Improving, Could be Further Strengthened* (2005).

hold a public meeting to provide the groups and other interested stakeholders with an opportunity to discuss and present their views concerning the proposed NPIS rules. *See* GAP Ex. A. Despite that 21 U.S.C. § 463 requires the agency to provide all interested persons with an opportunity to present their views orally in any rulemaking proceeding to implement the PPIA, the agency did not grant this request.

## **INTRODUCTION**

On September 11, 2014, Plaintiffs filed a Motion for Preliminary Injunction seeking to prevent Defendants from implementing the NPIS rules. A preliminary injunction is appropriate where the moving party demonstrates “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. National Resources Defense Council*, 555 U.S. 7, 20 (2008). This brief addresses the first and fourth factors, both of which weigh in favor of entering a preliminary injunction, and incorporates statements from federal inspectors to illustrate how the NPIS rules function in practice and their consequences.

As explained below, under the NPIS rules, poultry establishments, rather than government inspectors, determine when carcasses should be condemned or reprocessed, and government inspectors do not supervise their destruction or reprocessing. As a result, the NPIS rules violate Section 6 of the PPIA, 21 U.S.C. § 455. Additionally, in its rulemaking proceeding, the agency did not provide interested persons an opportunity to present their views orally, in violation of Section 14 of the PPIA, 21 U.S.C. § 463. Finally, a preliminary injunction

preventing the agency from implementing its NPIS rules would serve the public interest. For these reasons, Plaintiffs' Motion for Preliminary Injunction should be granted.

## **ARGUMENT**

### **I. Defendants' NPIS Rules Violate 21 U.S.C. § 455.**

The PPIA requires the USDA, “whenever processing operations are being conducted,” to ensure that a government inspector performs a “post mortem inspection of the carcass of each bird processed ... in each official establishment processing such poultry and poultry products for commerce....” 21 U.S.C. § 455(b) (emphasis added). The PPIA defines the term “processed” to mean “*slaughtered*, canned, salted, stuffed, rendered, boned, cut up, or otherwise manufactured or processed.” 21 U.S.C. § 453(w) (emphasis added). Therefore, the PPIA unambiguously requires that a government inspector inspect the carcass of every bird slaughtered in any establishment processing poultry for human food. *See Stenberg v. Charhart*, 530 U.S. 914, 942 (2000) (“When a statute includes an explicit definition” for a particular term, the court “must follow that definition”); *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) (“Statutory definitions control the meaning of statutory words.”). The PPIA further states that any “poultry carcasses and parts thereof ... found to be adulterated shall be condemned and, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector.” 21 U.S.C. § 455(c). The Act provides an exception to this condemnation requirement only for carcasses and parts “which may by reprocessing be made not adulterated” and only “if so reprocessed under the supervision of an inspector and thereafter found not to be adulterated.” 21 U.S.C. § 455(c).

As the agency has recognized for decades, the PPIA plainly requires that a government inspector determine whether each carcass is adulterated and should be condemned or reprocessed.<sup>3</sup> Put another way, Congress clearly intended “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.” *AFGE v. Glickman*, 215 F.3d 7, 11 (D.C. Cir. 2000). This requirement ensures that decisions concerning whether carcasses should be condemned or whether portions may be made unadulterated through reprocessing are made by trained government inspectors acting in the public interest and exercising independent judgment. Defendant’s NPIS rule violate this mandate, allowing the establishment to determine which carcasses should be condemned and destroyed, and which can be made unadulterated through reprocessing, all before any of the carcasses are even seen by an inspector. *See* 79 Fed. Reg. at 49635 (amending 9 C.F.R. § 381.76 to require, for establishments under the new NPIS system, that the “establishment ... conduct carcass with associated viscera sorting activities, dispose of carcasses and parts exhibiting condemnable conditions, and conduct appropriate trimming and reprocessing activities *before* carcasses are presented to the online inspector.”) (emphasis added).

Under Defendants’ NPIS rules, determinations concerning which carcasses should be condemned and which can be reprocessed are based on maximizing production output and profit

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<sup>3</sup> *See* 9 C.F.R. § 381.76(b)(3)(iii)(c) (“The inspector shall determine which birds shall be salvaged, reprocessed, condemned, retained for disposition by the veterinarian, or allowed to proceed down the line as a passed bird” in establishments operating under the SIS system); 9 C.F.R. § 381.76(b)(4)(i)(a) (“The inspector shall determine which birds shall be salvaged, reprocessed, condemned, retained for disposition by the veterinarian, or allowed to proceed down the line as a passed bird” in establishments operating under the NELS system); 9 C.F.R. § 381.76(b)(5)(i)(a) (“The inspector shall determine which birds shall be salvaged, reprocessed, condemned, retained for disposition by the veterinarian, or allowed to proceed down the line as a passed bird” in establishments operating under the NTI system).

rather than protecting the public.<sup>4</sup> As one inspector put it, the establishments, whose sorters are given primary responsibility for those determinations under the new system:

“... are mostly concerned with the production and the maintenance of the production line at high speeds. They are not stewards of the public interest and their goals differ from the Food Safety Inspection Service and the USDA.... The piloting of the HIMP system ... made it very clear that plants do not care about protecting consumers and should not be trusted to come up with their own inspection plans.”

Corrigan Ex. H 048. Even those sorters who aim to protect the public from unsafe and unwholesome poultry lack the necessary independent judgment and authority enjoyed by federal inspectors.<sup>5</sup> Moreover, because the agency imposes no minimum requirements for the training of sorters on establishments, they lack the training given to their federal inspector counterparts required to consistently identify the many defects that can render carcasses unsafe or unwholesome.<sup>6</sup>

While establishments are given responsibility for determining which carcasses are adulterated and which are capable of being made unadulterated through reprocessing, the role of federal inspectors under the NPIS rules is reduced tremendously. Carcass inspection by federal inspectors under the NPIS rules is limited to watching the carcasses fly at a rate of over two birds

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<sup>4</sup> See Corrigan Ex. H 028 (“My experience ... is that poultry plants are concerned with making money and not protecting the consumer, inspectors fulfill this crucial role instead.”); Corrigan Ex. H 038 (“When I worked under the HIMP system I felt like I was working more for the plant than for the USDA and the plant is concerned with making money, not protecting those that are eating its products.”); Corrigan Ex. H 041 (“the proposed rule gives poultry plants that are concerned primarily with production and profit the ability to self-inspect and tailor their inspection systems to their goals”).

<sup>5</sup> See Corrigan Ex. H 026-027 (“I’ve seen sorters attempt to slow down or stop the line to move birds to the reprocessing line, only to be rebuked by their supervisors.”); Corrigan Ex. H 045-046, 048 (“If sorters find a carcass that doesn’t look right, they have to hang it back and cannot do anything with it until their supervisor approves. By contrast, in a traditional plant, USDA inspectors have the ability to have birds that appear as though they may pose a threat to consumers removed from the line.... I have seen plant leadership fire those who bring food safety or quality assurance issues to their attention.”)

<sup>6</sup> See Corrigan Ex. H 0029 (“Plant ‘sorters’ are supposed to pull birds from the line with little, if any, training about what to look for.”); Corrigan Ex. H 039 (“From what I could tell, the plant sorters were given roughly two days of training in what to look for in terms of Food Safety and OCP problems. In contrast, for my USDA inspector training, I had almost two weeks of training in addition to continual training throughout the year.”); Corrigan Ex. H 048 (“I have yet to see a plant properly train their employees in poultry sorting....”)

per second past the carcass inspection stand, from which the inspector is only able to see the back side of each carcass, and periodic hands-on “verification inspections” of small samples of birds pulled from the line. *See* 79 Fed. Reg. 49567. As a result, their ability to examine each carcass is diminished, and they are unable to spot defects affecting safety and wholesomeness, particularly where those defects occur inside or on the front of the carcass.<sup>7</sup> Furthermore, establishment employees are able to thwart inspectors’ efforts by mixing birds with defects among better quality birds, and by stepping up their removal of defects when an inspector prepares to pull a sample for verification inspection.<sup>8</sup> The end result is establishment self-inspection aimed at maximizing profit while doing the minimum required to get carcasses past the agency inspectors, rather than the sort of independent inspection focused on protecting the public that Congress intended.

As explained above, the PPIA requires inspectors to supervise the destruction of any condemned carcasses and parts, and to supervise any reprocessing of carcasses capable of being made unadulterated. These requirements, which are set forth in subsection (c) of 21 U.S.C. § 455, ensure that reprocessing is performed properly and that adulterated product will remain

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<sup>7</sup> *See* Corrigan Ex. H 025 (Explaining that because inspectors “only see the backside of the bird” during carcass inspection, they are unable to see defects like breast blisters, tumors, fecal matter, inflammatory process, and other defects that frequently appear inside or on the front of the birds); Corrigan Ex. H 028-029 (Explaining that because the “production line is set up so that inspectors can only see the back of” each carcass, they are unable to see many defects like feathers, blisters, tumors, and fecal contamination that occur inside the carcasses or on the breast tissue of the birds); Corrigan Ex. H 033 (“As a CI in a HIMP plant, however, I do not look inside the bird, and only see the back of it as it goes down the line.... With these limitations, I know I cannot detect all of the carcasses with Food Safety Defects, and it is reasonable to assume that some are going out to the public.”); Corrigan Ex. H 042 (“When we are on [carcass inspection] duty, it is difficult to determine the wholesomeness of birds because they are going by so fast and even if we could see every bird at that speed and we detect problems, we are not permitted to stop the line.”)

<sup>8</sup> *See* Corrigan Ex. H 030 (“The plant seems to note when I’m getting ready to do VI testing. I’ve gotten up on the stand to pull my ten bird sample, and watched the quality of the birds improve for the next two minutes or so after I get on the stand. After two minutes pass, I’ll see birds with feathers and tails go down the line again. It’s clear that the plant is trying to manipulate the VI tests.”); Corrigan Ex. H 040 (“[W]hen the plant supervisors saw us preparing for a ‘random’ sample, they would slow the line down and pull out any suspicious looking birds.... The plant supervisors would even instruct the sorters to pull suspicious looking birds off the line before our [verification tests].”)

under the inspector's oversight until it is destroyed so that it may not be diverted back into the food supply. Together with the mandates set forth in subsections (a) and (b) that require federal inspectors to perform any necessary ante-mortem inspections of birds and inspect each and every carcass slaughtered in a facility that processes poultry for human food, § 455 sets up a coherent scheme that effectively prevents the introduction of unsafe and unwholesome poultry into commerce by enabling inspectors to account for every carcass and part processed in a facility until it is either found to be safe and wholesome or sufficiently destroyed to prevent subsequent introduction into commerce as food.

In contrast, under Defendants' NPIS rules, establishment employees condemn and reprocess carcasses before any are even seen by the carcass inspector, who sees only those carcasses and parts that aren't removed by the establishment. *See* 79 Fed. Reg. 49567. These establishment sorters face pressure to keep the production line moving and minimize the amount of product removed.<sup>9</sup> Without supervision by federal inspection personnel, carcasses are reprocessed despite showing signs of disease that may render them unsafe or unwholesome.<sup>10</sup> Moreover, as one inspector and former poultry plant supervisor explained, establishment employees face pressure to circumvent federal inspection by hiding "diseased or dirty chicken carcasses" from inspectors and diverting them to be processed for sale to consumers, an activity no doubt made easier under the NPIS rules, under which establishments conduct condemnation and reprocessing without supervision by inspection personnel. *Corrigan Ex. H 049-050.*

## **II. Defendants' Rulemaking Process Violated 21 U.S.C. § 463.**

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<sup>9</sup> *See* *Corrigan Ex. H 043* ("Having worked for plants, I know that the sorters are under extreme pressure to keep the production line moving and to understand that most of the carcass should be for consumption.")

<sup>10</sup> *See* *Corrigan Ex. H 043* ("As a result" of pressure to maximize product output, "suspicious birds are 'reworked' instead of discarded ... even though their carcasses may have signs of disease that could be harmful if not distasteful to consumers.")

On January 27, 2012, the agency published its proposed rule outlining the proposed NPIS regulations and inviting interested persons to submit written comments by April 26, 2012. 77 Fed. Reg. 4408. On April 13, 2012, various nonprofit groups, including several of the undersigned *amici* and plaintiff Food & Water Watch, submitted a letter to the agency's Under Secretary and Deputy Under Secretary for Food Safety requesting that the agency hold a public meeting concerning the proposed rule for the groups and other interested persons "to discuss the various components of the proposal" and "provide feedback to the agency in a public forum." See GAP Ex. A. On April 26, 2012, the agency published a notice extending the deadline for the submission of written comments to May 29, 2012. 77 Fed. Reg. 24873. However, the agency never granted the groups' request for a public meeting.

In addition to the opportunity to present written comments required under 5 U.S.C. § 553, Section 14 of the PPIA requires the agency, in any rulemaking proceeding to implement the PPIA, to provide "an opportunity for the oral presentation of views" to "all interested persons." 21 U.S.C. § 463(c). By failing to provide an opportunity for all interested persons to present their views orally, the agency violated this unambiguous requirement.

### **III. A Preliminary Injunction Will Serve the Public Interest.**

As explained above, Defendants' NPIS rules violate the PPIA by allowing establishments to self-inspect and perform functions that Congress required to be performed by government inspectors and under agency supervision. Under the NPIS system, inspectors' ability to prevent the sale to consumers of unsafe and unwholesome poultry products is diminished. Finally, Defendant's rulemaking process violated 21 U.S.C. § 463 by failing to provide interested members of the public with an opportunity to discuss the NPIS rules and present their views

orally. For these reasons, a preliminary injunction enjoining their implementation is in the public interest. *See Mylan Pharms. Inc. v. Shalala*, 81 F.Supp.2d 30, 45 (D.D.C. 2000) (“It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers.”); 21 U.S.C. §451 (“It is essential in the public interest that the health and welfare of consumers be protected by assuring that poultry products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.”).

### CONCLUSION

Because Defendants’ NPIS rules are contrary to law and because a preliminary injunction is in the public interest, Plaintiffs’ Motion for Preliminary Injunction should be granted.

Respectfully submitted,

*/s/ Jeffery S. Gulley*

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