UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United Food and Commercial Workers Union, Local No. 663; United Food and Commercial Workers Union, Local No. 440; United Food and Commercial Workers Union, Local No. 2; and United Food and Commercial Workers Union, AFL-CIO, CLC,

Plaintiffs,

v.

United States Department of Agriculture,

Defendant.

Case No. 19-cv-2660 (JNE/TNL)
ORDER

Under the Federal Meat Inspection Act ("FMIA"), federal inspectors with the Department of Agriculture's Food Safety and Inspection Service ("FSIS") monitor pork slaughterhouses to ensure that safe and wholesome pork products are sold to the public. These inspectors examine all swine that will become meat products before and after slaughter. *See* 21 U.S.C. § 604. To ensure adequate post-mortem inspections, FSIS regulates the speed of evisceration lines. *See* 9 C.F.R. § 310.1(b)(3). In October 2019, FSIS adopted the New Swine Inspection System ("NSIS"), an optional program that implemented several reforms, including the elimination of evisceration line speed limits. *See* Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,315 (Oct. 1, 2019) ("Final Rule").

On behalf of workers at pork processing plants, the United Food and Commercial Workers Union ("UFCW") and three of its local chapters challenged the Final Rule under

the Administrative Procedure Act ("APA"). The case is now before the Court on the parties' cross-motions for summary judgment and USDA's motion for remand without vacatur. For the reasons discussed below, Plaintiffs have standing to bring this case and have shown that the agency violated the APA. When FSIS proposed the NSIS, it expressly identified worker safety as an important consideration and requested public comment on whether increasing line speeds would harm workers. Then, after receiving many comments raising worker safety concerns, FSIS rejected the comments and eliminated line speed limits without considering worker safety. In doing so, the agency failed to satisfy the APA's requirement of reasoned decision-making. Therefore, the Court will vacate the Final Rule's elimination of line speed limits under the NSIS, codified at 9 C.F.R. § 310.26(c), but will not set aside any other aspect of the Final Rule. To give the agency and regulated entities an opportunity to adapt to the vacatur, the Court will stay this order and entry of judgment for 90 days.

BACKGROUND

I. Regulatory and Industry Background

A. The Traditional Swine Inspection System

"Meat and poultry plants are generally designed for an orderly flow from point of entry of the living animal to the finished food product." GAO, GAO-18-12, Workplace Safety and Health: Better Outreach, Collaboration, and Information Needed to Help Protect Workers at Meat and Poultry Plants 5–6, fig. 2 (2017), https://www.gao.gov/assets/gao-18-12.pdf ("2017 GAO Report"), Admin. R. ("AR") 101383. The process begins on the kill floor, "where the animal is rendered unconscious and slaughter occurs."

Id. at 5. Then, the animals are hung on shackles attached to a mechanized line, the evisceration line, that carries the carcasses through evisceration and inspection. *Id.* at 6, fig. 2. After evisceration, carcasses are chilled and then, on the processing line, cut "into small portions that can be transported directly to supermarkets." *Id.* at 5.

Under the FMIA, FSIS conducts ante- and post-mortem inspections of all hogs that will be sold as pork products. *See* 21 U.S.C. §§ 603–04; 9 C.F.R. § 310.1(a). FSIS inspectors assess the hogs after slaughter while they are both on and off the evisceration line. 2017 GAO Report at 5. During evisceration, plant employees trim the animals and federal inspectors conduct an inspection. Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780, 4783–84 (proposed Feb. 1, 2018) ("Proposed Rule"). If the animals are found fit for consumption, inspectors then conduct an offline examination that includes testing for foodborne pathogens, like salmonella. *Id.* at 4785.

Under the traditional inspection system, most slaughterhouses voluntarily segregate obviously unfit animals, so FSIS only needs to inspect the animals the facility has deemed appropriate for slaughter. *Id.* at 4783. After slaughter, however, most establishments do not inspect the carcasses again to identify and remove correctable defects or flag carcasses that should be condemned. *Id.* at 4784. This means that FSIS inspectors conduct this time-intensive sorting, which slows down inspection rates and leaves less time to inspect apparently healthy carcasses for foodborne pathogens. *Id.*

In 1996, FSIS adopted a new framework of inspection that required slaughterhouses to develop more preventive controls to ensure they produced safe meat products: the hazard analysis and critical control point system ("HACCP"). *Id.* at 4780.

FSIS then launched a pilot program, the HACCP-Based Inspection Models Project ("HIMP"). *Id.* One goal of HIMP was to give federal inspectors more time to prioritize testing for foodborne pathogens by making pork processing establishment employees, instead of FSIS staff, responsible for sorting activities. *Id.* at 4784.

The first HIMP model FSIS proposed did not involve an examination of each animal carcass by FSIS inspectors, which the D.C. Circuit found violated the FMIA. *See Am. Fed'n Gov't Emps., AFL-CIO v. Glickman*, 215 F.3d 7, 11 (D.C. Cir. 2000). FSIS consequently modified HIMP to include an inspection of each carcass by federal agents, which the court found complied with the FMIA. *Am. Fed'n Gov't Emps., AFL-CIO v. Veneman*, 284 F.3d 125, 130 (D.C. Cir. 2002).

In 2013, the USDA Office of Inspector General ("OIG") audited HIMP and concluded that FSIS had not adequately overseen the program, potentially increasing food safety risks. Proposed Rule at 4788 (citing OIG, USDA, Audit Rep. 24601-0001-41, Food Safety and Inspection Service – Inspection and Enforcement Activities at Swine Slaughter Plants (2013), https://www.usda.gov/sites/default/files/24601-0001-41.pdf ("2013 OIG Report")). It also found that three of the five HIMP plants had some of the highest noncompliance records in the industry "because of FSIS' lack of oversight." 2013 OIG Report at 17. The Government Accountability Office ("GAO") similarly reviewed HIMP, finding that FSIS had not adequately evaluated it and that it led to faster line speeds, creating food and worker safety concerns. GAO, GAO-13-775, Food Safety: More Disclosure and Data Needed to Clarify Impact of Changes to Poultry and Hog Inspections (2013), https://www.gao.gov/assets/gao-13-775.pdf ("2013 GAO Report"),

AR 101277; 2017 GAO Report at 1. In response to these reports, FSIS evaluated the HIMP program and reached the opposite conclusion. *See* Proposed Rule at 4790. It found that HIMP establishments had more food safety inspections and demonstrated improved compliance with sanitation standards. *Id.*

B. The New Swine Inspection System

In February 2018, USDA published a notice of proposed rulemaking ("NPRM") that proposed establishing the NSIS. *Id.* at 4780. NSIS would replicate features tested in the HIMP pilot, including: requiring slaughterhouses to conduct ante- and post-mortem sorting to remove defective or contaminated animals; reducing the number of FSIS online inspectors, which would allow FSIS to increase offline inspections; and increasing maximum line speeds. *Id.* at 4780–81. In the NPRM, FSIS relied upon a preliminary analysis of OSHA data to state that HIMP facilities had lower worker injury rates. *Id.* at 4796. FSIS specifically requested comment on the effects increased line speeds may have on worker safety:

> FSIS recognizes that evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety. . . . FSIS is requesting comments on the effects of faster line speeds on worker safety. Specifically, FSIS is requesting comments on whether line speeds for the NSIS should be set at the current regulatory limit of 1,106 hph or some other number.

Id.

Many interested parties answered the agency's call for comments about line speeds. Citing Bureau of Labor Statistics data and studies by OSHA and GAO, these commenters noted that eliminating line speed limits would harm workers, increase injury rates, and reduce the quality of meat products. *See, e.g.*, Professor Melissa J. Perry, ScD,

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