April 9, 2013

Via Electronic Mail and Facsimile

Deputy Administrator Dominic Mancini
Office of Information and Regulatory Affairs
White House Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Re: Unaddressed Environmental Implications of USDA Poultry Inspection Rule

Dear Mr. Mancini:

We are writing to you today to request a meeting regarding how your office intends to conduct interagency review of a final rule from the Department of Agriculture (USDA) that would remove federal inspectors from the production line at poultry processing plants.[1] This rule could have severe adverse effects on the environment. We are concerned that the Office of Information and Regulatory Affairs (OIRA) will once again reveal its bias against protective regulation by excluding the Environmental Protection Agency (EPA) from such review.

As you know, Executive Order 12866 instructs OIRA to conduct interagency reviews of regulatory proposals to ensure that, among other things, "decisions made by one agency do not conflict with the policies or actions taken or planned by another agency."[2] In the past, OIRA has wielded this authority to roll back regulation, mustering agencies and departments that oppose such rules (*e.g.*, the Department of Defense) to oppose the agencies assigned responsibility for writing them (*e.g.*, the EPA). Or, in other words, interagency review has not served as a dispassionate effort to ensure the development of the best public policy, but rather as a weapon to kill strong protections.

OIRA will soon receive, if it has not already, a final rule that would remove federal inspectors from the production lines at poultry processing plants. This proposal is opposed by a large coalition of public health, safety, and labor organizations because it would result in significantly higher rates of poultry contaminated with *Salmonella* and *Campylobacter* and would also speed up the line

[1] Modernization of Poultry Slaughter Inspection, 77 FED. REG. 4408 (proposed Jan. 27, 2012), *available at* http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/2011-0012.pdf.
[2] Exec. Order No. 12,866 § 2(b), 3 C.F.R. 638, 640 (1993), reprinted as amended in 5 U.S.C.A. § 601 note (West 2010).

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as much as two-fold or more, severely endangering worker health.[3] Because poultry has become an increasingly popular source of relatively inexpensive protein, rampant bacterial contamination could cause outbreaks of food-borne diseases. Workers in these plants are largely Hispanics and African Americans who already suffer a disproportionate share of acute (knife cuts) and chronic (crippling muscle and nerve disorders) workplace injuries.

When the proposed rule first came to OIRA, your predecessor, Cass Sunstein, adopted it as a poster child for the President's campaign to produce regulatory savings for business.[4] Mr. Sunstein was so anxious to get the proposal out the door before the election that the interagency review process was truncated, standing in stark contrast to OIRA's approach of subjecting protective proposals to excruciatingly harsh and lengthy interagency review. Specifically, OIRA did not give the Occupational Safety and Health Administration (OSHA) an opportunity to comment on the rule.[5] The proposal was approved without any significant change, further tarnishing OIRA's reputation for objective and comprehensive policy analysis. Now, as OIRA prepares to review the USDA's final rule, we certainly hope that you will bend over backwards to guarantee a fair, inclusive, and well-rounded interagency review process, ensuring specifically that the EPA has a meaningful opportunity to analyze and comment on the rule's environmental implications.

As proposed, the rule will lead to a sharp increase in the use of sanitizing, toxic chemicals, which poultry processors will then discharge into nearby water bodies. Most poultry plants do not even have limits for these chemicals in their wastewater permits, so additional discharges will generally go undetected and unaddressed. In addition, the much faster line speeds permitted by the rule will enable poultry plants to increase dramatically the number of birds they slaughter every day, producing potentially overwhelming quantities of pollutant-filled wastewater that will also be discharged into surface waters. In the last three years, 68 percent of poultry plants with data available exceeded their effluent limits for one or more pollutants; a significant rise in slaughtering would only increase and intensify these permit violations.[6] The USDA did not acknowledge any of these damaging outcomes in its *Federal Register* notice explaining the proposal, adopting the same "hear no evil, see no evil" position on these issues as it did on the worker safety ones.

Increased Use of Antimicrobial Chemicals

Under current regulations, poultry carcasses visibly contaminated with feces, bile, feathers, or other defects may be identified by visual inspection and taken to a separate station for "offline reprocessing" by some combination of trimming, washing, vacuuming, or treatment with chlorinated water. By contrast, "online reprocessing" (OLR) subjects all carcasses, whether or not they are visibly

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[3] *See, e.g.*, Letter from Consumer, Labor, Public Health, and Civil Rights Groups and Individuals to Tom Vilsack, Sec'y, USDA (Sep. 20, 2012), *available at* http://www.sensiblesafeguards.org/assets/documents/coalition_letter_poultry_proposal_final.pdf; SOUTHERN POVERTY LAW CENTER & ALABAMA APPLESEED CENTER FOR LAW & JUSTICE, UNSAFE AT THESE SPEEDS: ALABAMA'S POULTRY INDUSTRY AND ITS DISPOSABLE WORKERS (2013), *available at* http://www.splcenter.org/sites/default/files/downloads/publication/Unsafe_at_These_Speeds_web.pdf.

[4] *See, e.g.*, Testimony of Cass R. Sunstein, OIRA Admin'r, before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary 2 (Mar. 21, 2012), *available at* http://judiciary.house.gov/hearings/Hearings%202012/Sunstein03212012.pdf.

[5] Letter from Members of the Amer. Pub. Health Ass'n to USDA/FSIS Officials 5-6 (May 29, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=FSIS-2011-0012-2164.

[6] We obtained these data from searching EPA's Enforcement & Compliance History Online (ECHO) database for facilities with an SIC code of 2015. EPA, ICIS-NPDES Data Search, http://www.epa-echo.gov/echo/compliance_report_water.html (last visited Jan. 28, 2013).

contaminated, to a series of "automatic bird washers and antimicrobial spraying or drenching equipment" at various points without having to move them off the line.[7] Naturally, OLR requires much larger quantities of chemicals than offline processing alone. One manufacturer of a chemical poultry wash suggests using 1.2 or 1.3 liters of an antimicrobial chemical *per carcass* at each rinsing station.[8]

The new rule would allow poultry slaughter facilities to use any approved antimicrobial chemicals for either method of reprocessing, removing the safeguard of the existing legal regime that use of any chemical for online reprocessing, or any chemical other than chlorinated water for offline reprocessing, requires obtaining a waiver from the USDA.[9]

As we mentioned earlier, the new rule will pave the way for much faster line speeds—up to 175 carcasses a minute for young chickens—and will retain only one government inspector on each evisceration line.[10] This change means that it will be nearly impossible to identify contaminated carcasses through visual inspection and take them off the line for reprocessing. The use of OLR will become far more popular than it is now, as companies try to compensate for the lack of meaningful visual inspection and prevent outbreaks that would injure their reputations and expose them to potential liability and enforcement actions.

Before this rule, the USDA had already granted 144 waivers to permit OLR of poultry carcasses and parts.[11] With 289 poultry slaughter plants in the United States, the rule would allow an additional 145 plants not already operating under a waiver (289 minus 144) to immediately begin using large quantities of chemicals for OLR, with attendant increases in effluent discharges.[12] In light of the changes to inspection and line speed, even those companies already permitted to use OLR may have reason to increase their reliance on it, perhaps by installing spray washers at additional points on the line.

The USDA Failed to Adequately Assess the Environmental Impact of a Rise in Chemicals

Out of at least 13 different chemicals used for OLR,[13] the USDA briefly addressed—and dismissed—the environmental impact of only one chemical, trisodium phosphate (TSP):

> [TSP] can result in high levels of phosphorus as a byproduct, which, if untreated, could overcome local municipal water systems. FSIS [USDA's Food Safety and Inspection

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[7] Modernization of Poultry Slaughter Inspection, 77 FED. REG. at 4432. For a photograph of OLR in use, *see* Scott M. Russell, *Intervention Strategies for Reducing Salmonella Prevalence on Ready-to-Cook Chicken*, ENGORMIX.COM, Oct. 20, 2011, http://en.engormix.com/MA-poultry-industry/health/articles/intervention-strategies-reducing-salmonella-t1780/165-p0.htm.

[8] *See* James Dickens et al., *Effects of Safe2O™ brand Poultry Wash, a Highly Acidic Calcium Sulfate Solution, Used as a Poultry Wash Pre and Post Evisceration on Total Aerobes,* E. coli., Salmonella, *and* Campylobacter (2002), *available at* http://www.mionix.com/safe20_studies/pdf_formated_studies/studies_newpage/F1-%20Effects%20of%20Safe2O%20Poultry%20Wash%20-%20A%20highly%20ACS%20Solution.pdf.

[9] Modernization of Poultry Slaughter Inspection, 77 FED. REG. at 4409, 4432-33. For a list of currently approved antimicrobial agents, *see* Food Safety & Inspection Serv., Safe And Suitable Ingredients Used In The Production of Meat, Poultry, and Egg Products, FSIS Directive 7120.1, Revision 13, at 6-34 (Nov. 21, 2012), *available at* http://www.fsis.usda.gov/oppde/rdad/fsisdirectives/7120.1.pdf (listed under "Antimicrobials").

[10] Modernization of Poultry Slaughter Inspection, 77 FED. REG. at 4434.

[11] *Id.* at 4412.

[12] *See id.* at 4435 (approval for online reprocessing would apply to all 289 poultry plants).

[13] *See* Russell, *supra* note 7.

> Service] estimates that approximately 5–7 of the 144 establishments operating under regulatory waivers for OLR are using TSP as an antimicrobial agent. As noted above, regardless of the substance that an establishment chooses to use for its OLR system, it is required to meet all local, State, and Federal environmental requirements. The waste water from the few poultry establishments that use TSP is handled routinely by existing water treatment systems or recycled as byproducts without entering the plant's systems, municipal water systems, or the ground water. Thus, FSIS has determined that allowing establishment to use approved OLR antimicrobial systems will not have a significant individual or cumulative effect on the human environment.[14]

The USDA did not address the environmental implications of any other chemicals that could be used, or estimate the extent of any increase in their use and how such an increase might challenge current water treatment or recycling systems.

Existing Regulations Are Inadequate to Address New Discharges of Antimicrobials

Current effluent guidelines and permit programs are ill-equipped to handle any significant increase in discharges of the chemicals used in OLR. The EPA must be given the opportunity to comment on the poultry rule, and if necessary, update water quality guidelines to adjust for the new pollution risks or suggest ways to lessen the rule's environmental impacts.

According to a 2006 survey of the poultry industry, the three most commonly used chemicals for OLR are: (1) *acidified sodium chlorite*, used by 33 percent of companies; (2) *trisodium phosphate (TSP)*, used by 24 percent; and (3) *chlorine dioxide*, used by 15 percent.[15] The EPA has found sodium chlorite and chlorine dioxide to have a range of toxicities for aquatic life.[16] Moreover, both chemicals can react with organic material in water to form toxic compounds.[17] The use of TSP produces high levels of phosphorus, which can result in excessive algae growth that leads to fish kills and loss of biodiversity.[18]

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[14] Modernization of Poultry Slaughter Inspection, 77 FED. REG. at 4451.

[15] *See* Russell, *supra* note 7 (citing John T. Rice, presenting for Elizabeth A. Krushinskie, U.S. Poultry & Egg Ass'n, *Salmonella* Interventions in the U.S. Broiler Industry 6, FSIS Public Meeting on Advances in Post-Harvest Interventions to Reduce Salmonella in Poultry (Feb. 24, 2006), *available at* http://www.fsis.usda.gov/PDF/Slides_022406_EKrushinskie.pdf). The chemicals preferred by the industry for OLR may have changed considerably in the seven years since this survey, and may continue to change, in light of the fact that the EU bans imports of poultry processed with acidified sodium chlorite, TSP, chlorine dioxide, and peroxyacids, and Russia—one of the largest importers of U.S. poultry—allows only three chemicals to be used on poultry imports: cetylpyridinium chloride, hydrogen peroxide, and peroxyacetic acid. *See* WTO, Dispute DS389: European Communities — Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States, Feb. 24, 2010, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds389_e.htm; Helena Bottemiller, *Russia Agrees to Lift Ban on U.S. Poultry Imports*, FOOD SAFETY NEWS, Jun. 25, 2010, http://www.foodsafetynews.com/2010/06/russia-agrees-to-lift-ban-on-us-poultry-imports/#.UQhU4fI3mSo. S*ee also* notes 31-38 *infra* and accompanying text (describing the role of poultry exports).

[16] *See, e.g.*, EPA, REREGISTRATION ELIGIBILITY DECISION (RED) FOR CHLORINE DIOXIDE AND SODIUM CHLORITE (CASE 4023), at 38-39 (2006), *available at* http://www.epa.gov/oppsrrd1/REDs/chlorine_dioxide_red.pdf.

[17] *See, e.g.*, EPA, TECHNICAL DEVELOPMENT DOCUMENT FOR THE FINAL EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE MEAT AND POULTRY PRODUCTS POINT SOURCE CATEGORY (40 CFR 432), at 7-15, *available at* http://water.epa.gov/scitech/wastetech/guide/mpp/index.cfm [hereinafter POULTRY EFFLUENT GUIDELINES DEVELOPMENT]; U.S. DEP'T OF HEALTH & HUMAN SERVS., TOXICOLOGICAL PROFILE FOR CHLORINE DIOXIDE AND CHLORITE 89-94 (2004), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp160.pdf (transformation to chloride); EPA, Ambient Water Quality Criteria for Chloride—1988, *available at* http://water.epa.gov/scitech/swguidance/standards/criteria/upload/chloride1988.pdf (chloride toxicity).

[18] POULTRY EFFLUENT GUIDELINES DEVELOPMENT, *supra* note 17, at 7-12.

In 2004, the EPA established "effluent guidelines" for poultry processors. In general, effluent guidelines set national limits for discharges of specified pollutants to surface waters, such as rivers, lakes, and streams. These limits are then incorporated into the National Pollutant Discharge Elimination System (NPDES) permit program, which is typically administered by the states. Individual facilities (here, poultry processing plants) must meet these discharge limits in order to comply with the Clean Water Act (CWA) and avoid enforcement actions and penalties.

In the 2004 rulemaking, the EPA proposed, but decided against, establishing limits for "total residual chlorine" and "total phosphorus," two pollutants whose discharges are likely to rise with greater use of chemicals for OLR.[19] As a result, existing NPDES permits do not contain effluent limits for these pollutants, except where such limits are specified by state law. Of the 82 poultry plants with permit data available, at least 47 plants (57 percent) have no limits on chlorine discharges, and at least 65 plants (79 percent) have no limits on phosphorus discharges.[20] Some of the plants without specified limits are nevertheless required to monitor for these discharges, but these are also relatively few (2 for chlorine, 21 for phosphorus). In this regulatory environment—for the most part, unlimited and unmonitored—most states will not even detect the extent of additional chemical discharges from OLR, much less have the tools to ensure that such discharges do not impair water quality.

From looking at the 35 plants that do have limits for chlorine in their NPDES permits, we can see that a quarter of them (9 plants) were found to have violated those limits during at least one three-month period in the last three years. One of these plants was in violation for nine such periods, with exceedences of between 150 and 400 percent for seven of them, and yet there is no record of any enforcement action taken by the state.[21] Increased reliance on OLR following the poultry rule would only exacerbate such patterns of chronic non-compliance, while imposing additional burdens on state environmental departments that will have to devote greater attention and resources to monitoring and enforcement.

Increases in the Number of Birds Slaughtered and Associated Wastewater Discharges

We are also concerned about an entirely separate consequence of the poultry rule that could be detrimental to water quality: the likelihood that poultry plants will increase the number of birds they slaughter every day, as a result of faster line speeds, with accompanying increases in water use and discharges of pollutant-filled wastewater. Because poultry processing facilities use water for virtually every operation (*e.g.*, scalding, washing, chilling, equipment cleaning), they produce enormous

[19] The EPA decided that existing wastewater treatment processes reduced the health risks presented by chlorine, and the agency was unsatisfied with the cost of technologies that would be required to comply with a phosphorous limit. Effluent Limitations Guidelines and New Source Performance Standards for the Meat and Poultry Products Point Source Category, 69 FED. REG. 54476, 54489 (Sep. 8, 2004), *available at* http://www.gpo.gov/fdsys/pkg/FR-2004-09-08/pdf/04-12017.pdf. While the EPA did set limits for ammonia, these discharges are unlikely to increase as a result of companies adopting OLR because ammonia is not used as an anti-microbial agent for poultry processing; the USDA approves this kind of use only for beef products. *See* Food Safety & Inspection Serv., *supra* note 9, at 11.

[20] We conducted an "EZ Search" of data from Discharge Monitoring Reports submitted by "poultry slaughtering and processing" facilities (SIC Code 2015), specifying "chlorine" and "phosphorus" as the pollutants and 2011 as the reporting year. We obtained the above estimates by subtracting the numbers of plants with chlorine limits and phosphorus limits, respectively, from the number of plants with data available. EPA, Discharge Monitoring Report (DMR) Pollutant Loading Tool, http://cfpub.epa.gov/dmr/ez_search.cfm (last visited Jan. 28, 2013).

[21] We performed the same search, as described in note 20 *supra*, this time viewing the Compliance Report for all 35 facilities. For the plant with non-compliance in nine quarters, *see* EPA, Enforcement & Compliance History Online (ECHO): Detailed Facility Report for Tyson Foods, Sedalia, MO, www.epa-echo.gov/cgi-bin/get1cReport.cgi?tool=echo&IDNumber=MO0115061 (last visited Jan. 28, 2013).

quantities of wastewater—on average, 9.3 gallons per bird for chicken and 31.2 gallons per bird for turkey.[22] With processing capacities up to 175 young chickens per minute and 55 turkeys per minute, up from previous maximums of 70-140 and 45 respectively, poultry plants will have the ability to process many more birds over a daily processing shift than they do now.[23]

The USDA insists that the poultry rule will have a minimal effect on the number of birds slaughtered and the amount of wastewater produced:

> [FSIS] predicted that, because of the efficiencies in the proposed new poultry inspections system, the price of chicken products would decrease by two cents per bird. FSIS projected that the predicted price reduction could lead to an increase in sales of poultry products of about a quarter of one percent or less. ….
>
> Expected sales of poultry products will determine the number of birds that poultry establishments slaughter. Allowing establishments to operate at faster lines speeds will allow them to slaughter the birds more efficiently. It will also allow them to reduce their hours of operation while maintaining production at a rate necessary to meet market demands. Thus, by 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….[24]

But we find it hard to accept that the poultry industry will greet such dramatic increases in line speed by reducing work hours proportionately, maintaining essentially the same levels of production because they would be unable to achieve more than a trivial increase in sales. In fact, the USDA's analysis of the rule's effects on the price and consumption of poultry contains a number of serious flaws and omissions, which suggest that the number of birds slaughtered and the amount of wastewater produced are likely to be much greater than it acknowledges.

The USDA Underestimated the Rule's Effect on Poultry Price

First, the USDA's prediction that the price of chicken products would decrease by only two cents per bird was derived by assuming only a 6-percent increase in line speeds under the proposed rule. The agency itself admitted this estimate was "very conservative" and then proceeded to understate just how conservative it was.[25] The proposed maximum line speeds actually represent much more drastic increases over current speeds that might have a greater effect on the price—and thus consumption—of poultry products.

Facilities processing young chickens have between two and four government inspectors per line: lines with two inspectors can process 70 birds per minute, lines with three inspectors can process 105 birds per minute, and lines with four inspectors can process 140 birds per minute. The proposed rule would allow just one government inspector per line, and permit line speeds up to 175 birds per

[22] POULTRY EFFLUENT GUIDELINES DEVELOPMENT, *supra* note 17, at 6-7 to 6-8.
[23] *See* Modernization of Poultry Slaughter Inspection, 77 FED. REG. at 4434 tbl.8.
[24] *Id.* at 4451.
[25] *Id*. at 4438 n.16 (again underestimating the proposed increase in maximum line speed of 175 birds per minute by comparing it with only the highest current maximum speed, 140 birds per minute, which applies only to lines with four inspectors).

minute.[26] The new maximum speed represents a 25-percent increase for lines that currently have four inspectors, and a 150-percent increase for lines that currently have two inspectors. In general, then, *line speeds could potentially increase by between 25 and 150 percent*—a far cry from the 6-percent estimate assumed by the USDA. To be sure, the USDA was attempting to estimate the average increase in line speeds, not the maximum, and the agency requested comments on the precision of this estimate.[27] But the USDA also failed to give any explanation for why, on average, companies would take so little advantage of the new limits and instead adopt only a "relatively low marginal increase in line speed."[28] Indeed, at plants operating under the pilot program that this rule seeks to expand, speeds of 175 birds per minute or greater are common, according to federal inspectors.[29]

The USDA Underestimated the Rise in Poultry Consumption

Compounding its flawed analysis of price effects, the USDA then underestimated the potential increase in the quantity of poultry demanded by considering only the short-term changes in *domestic* consumption. In its calculations, the agency used an estimate for the price elasticity of demand that describes only the domestic market, admitting that its numbers do "not take into account either the increased long-term production or expanded exports."[30]

If anything, it is the enormous, growing market for U.S. poultry exports that will provide the most likely avenue for increased sales—thus enabling companies to take fuller advantage of their new production capacities and resulting in greater quantities of poultry wastewater discharges. The United States is the world's largest broiler meat producer, and the second largest exporter, shipping approximately 7.2 billion pounds of broiler meat to other countries in 2012.[31] For the period from January through May 2012, broiler shipments were 13 percent higher than they were for the same period in 2011, mainly due to increasing demand in the United States' top six export markets: Mexico, Russia, Cuba, Canada, Angola, and Taiwan.[32] Even with high feed costs slowing production, exports remained strong in November 2012.[33]

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[26] This description and the following discussion of line speed changes apply to the 194 large and small poultry facilities that operate under the USDA's non-traditional inspection regimes, as compared to 70 very small and small facilities that will not have their speeds affected by the rule. *Id.* at 4433, 4434 tbl.8.
[27] *Id.* at 4438.
[28] *Id.*
[29] *See* Government Accountability Project, Food Integrity Campaign, HIMP: A Disaster Waiting to Happen with Poultry Inspection, http://www.foodwhistleblower.org/the-lifecycle-of-food/the-problems-of-processing/insufficient-government-oversight/himp (last visited Mar. 17, 2013) (Affidavits 1, 2, 5, and 6).
[30] In 2006, a contractor compiled estimates of demand elasticity for the poultry processing sector, including estimates for both domestic and export markets. The USDA relied only on the average values for domestic demand: -0.43 for chicken and -0.58 for turkey. *See* Modernization of Poultry Slaughter Inspection, 77 FED. REG. at 4438, 4438 n.17; MARY K. MUTH ET AL., RTI INT'L, POULTRY SLAUGHTER AND PROCESSING SECTOR FACILITY-LEVEL MODEL 2-14 tbl.2-6 (2006).
[31] *See* USDA Foreign Agric. Serv., Livestock and Poultry: World Markets and Trade, Oct. 2012, at 23, *available at* http://www.fas.usda.gov/psdonline/circulars/livestock_poultry.pdf [hereinafter 2012 Livestock and Poultry]; USDA Foreign Agri. Serv., Broiler Meat at a Glance (2012), *available at* http://www.fas.usda.gov/htp/CP2012/Broiler%20Meat-2012-Final.pdf; Rachel J. Johnson, USDA Econ. Research Serv., Livestock, Dairy, and Poultry Outlook, Jan. 17, 2013, at 16 tbl., *available at* http://www.ers.usda.gov/media/984422/ldpm223.pdf.
[32] *See US Poultry Exports Set Records Again*, WORLDPOULTRY, Jul. 23, 2012, http://www.worldpoultry.net/Broilers/Markets--Trade/2012/7/US-poultry-exports-set-records-again-WP010663W.
[33] Johnson, *supra* note 31, at12.

Not only is demand for U.S. poultry exports growing because of improvements in foreign economies,[34] but it is also significantly more responsive to changes in price (elasticity of -1.44) than U.S. demand for poultry (-0.43 for chicken and -0.58 for turkey).[35] An elasticity of -1.44 means that a 1-percent reduction in the price of poultry results in a 1.44-percent increase in the quantity of poultry demanded in export markets. The USDA's Foreign Agricultural Service (FAS) has found that "[d]emand for animal protein particularly in China, Brazil and India continues to stimulate global poultry production as a highly competitively priced option."[36] In light of such intense competition, even a small decrease in price could have significant impacts on demand for U.S. poultry exports overseas.[37] Considering that the price of poultry is likely to decrease by more than the USDA predicts, as described above, the resulting growth in exports could very well justify much higher levels of U.S. poultry production under the rule.[38]

Environmental Implications of a Significant Rise in Slaughtering

A major increase in the number of birds slaughtered will produce more waste materials that poultry processing facilities have to treat and dispose of. Greater quantities of blood, urine, feces, feathers, fat, and bone will mean greater discharges of a wide range of pollutants like biochemical oxygen demand (BOD), chemical oxygen demand (COD), total suspended solids (TSS), oil and grease, and fecal coliform bacteria, as well as nitrogen, ammonia, and phosphorus.[39] With the exception of COD and phosphorus, the EPA established limits for all of these pollutants in its 2004 effluent guidelines. As a result, the majority of NPDES permits contain limits or monitoring requirements for these pollutants, although such limits may warrant reevaluation given the likelihood of increased slaughtering.[40] These pollutants are already released at high concentrations: while the quantities vary with the size of the plant, the EPA's Toxics Release Inventory (TRI) shows that many plants currently

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[34] *See id.*; 2012 Livestock and Poultry, *supra* note 31, at 22 (attributing growing export demands to "rising incomes, an expanding middle class and stronger demand for animal protein").

[35] MUTH ET AL., *supra* note 30, at 2-14 tbl.2-6.

[36] 2012 Livestock and Poultry, *supra* note 31, at 22.

[37] *See also* Johnson, *supra* note 31, at12 ("Among the reasons for the [39.5-percent] growth in exports to Mexico are … competitive U.S. leg quarter prices.").

[38] Ironically, a number of foreign countries do not allow imports of chemically treated U.S. poultry products, so the rule's further entrenchment of antimicrobial OLR makes the prospect of exporting to these countries even less likely. Since 1997, the EU has banned U.S. poultry treated with four of the most commonly used chemicals, claiming that there is not enough evidence of their safety to human health, and that such dubious treatments are made necessary only by poor sanitary standards earlier in the process. As a result, the EU does not currently import any U.S. poultry meat—even though many poultry plants do not yet use chemicals for OLR, they often use chemicals in other operations, such as offline reprocessing or disinfection during chilling. *See* RENEÉ JOHNSON, CONG. RESEARCH SERV., U.S.-EU POULTRY DISPUTE 2, 5 (2010), http://www.fas.org/sgp/crs/row/R40199.pdf; Russell, *supra* note 7. But even without access to European markets, U.S. poultry exports are still thriving due to growing demand in other regions. Moreover, the EU is under increasing pressure to lift the ban: the U.S. has filed a complaint with the World Trade Organization (WTO) claiming that the ban is an unnecessary barrier to trade, and the ban is also likely to be addressed in negotiations over a possible EU-U.S. free trade agreement (FTA). *See* WTO, *supra* note 15; *EU-U.S. Free Trade Deal Offers Painless Stimulus for Both*, BLOOMBERG, Jun. 17, 2010, http://www.bloomberg.com/news/2012-06-17/eu-u-s-free-trade-deal-offers-painless-stimulus-for-both.html. If the ban is lifted, either by a WTO dispute settlement or an FTA, then the U.S. would gain a major new source of demand for U.S. poultry exports: the 27 member countries of the EU. In 2010, Russia attempted a similar ban on U.S. poultry, but six months later agreed to allow imports of poultry treated with three chemicals it deemed acceptable. Bottemiller, *supra* note 15. *See also* note 15 *supra*.

[39] POULTRY EFFLUENT GUIDELINES DEVELOPMENT, *supra* note 17, at 6-9 to 6-12.

[40] Effluent Limitations Guidelines and New Source Performance Standards for the Meat and Poultry Products Point Source Category, 69 FED. REG. 54476, 54489 (Sep. 8, 2004), *available at* http://www.gpo.gov/fdsys/pkg/FR-2004-09-08/pdf/04-12017.pdf.

discharge thousands of pounds of ammonia and hundreds of thousands of pounds of nitrates into water bodies each year.[41]

A quick review of facility compliance reports also reveals frequent violations of existing permit limits at current production levels. There are 82 poultry plants with permit data available, and 56 of them (68 percent) exceeded their effluent limits for one or more of these pollutants in the past three years. Of the 56 plants with exceedences, 14 are located near "impaired waters," where pollution controls have been identified as insufficient to maintain the water quality standards set by the state.[42] Only nine of the 56 plants were required to pay penalties (averaging about $28,000), which suggests that states are already finding it difficult to keep up with monitoring and enforcing such violations.[43] A rise in slaughtering would only increase and intensify permit violations, further impair nearby waters, and exacerbate the challenges of enforcement.

Conclusion

The significant, adverse environmental implications of the USDA's poultry rule warrant the EPA's careful scrutiny during the interagency review process. At the least, the EPA must be given the opportunity to estimate the extent of any potential increases in discharges of chemicals and poultry wastewater, analyze the scale and nature of any environmental impacts from both kinds of pollutants, and provide its expert perspective on the advisability of the rule or how it might be changed to better protect the environment. This review process will also provide the EPA with an opportunity to reevaluate its 2004 decision not to establish national effluent limits for some of the relevant chemicals in light of these potential increases, and to assess the additional challenges that state environmental departments might face in ensuring water quality under the rule.

Thank you for considering these views. Catherine Jones will call your office to arrange a date and time for a meeting.

Sincerely,

Rena Steinzor,
President, Center for Progressive Reform
Professor of Law, University of Maryland
Carey School of Law

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[41] We conducted a search of the TRI database for facilities with a NAICS code of 311615 (poultry processors). *See* EPA, TRI Search, http://www.epa.gov/enviro/facts/tri/search.html (last visited Jan. 28, 2013).
[42] *See* EPA, Overview of Impaired Waters and Total Maximum Daily Loads Program, http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/intro.cfm#section303 (last visited Jan. 28, 2013).
[43] For the data on impaired waters and penalties, we conducted searches of EPA's Enforcement & Compliance History Online (ECHO) database for facilities with an SIC code of 2015. EPA, ICIS-NPDES Data Search, http://www.epa-echo.gov/echo/compliance_report_water.html (last visited Jan. 28, 2013).