



January 19, 2011

Mr. Alfred Almanza, Administrator
Food Safety and Inspection Service
United States Department of Agriculture
331-E Jamie L. Whitten Building
12th Street and Jefferson Drive, SW
Washington, DC 20250

CITIZEN PETITION FOR RULEMAKING
TO REMOVE THE PEOPLE’S REPUBLIC OF CHINA
AS BEING ELIGIBLE TO EXPORT
POULTRY PRODUCTS TO THE UNITED STATES
UNDER 9 CFR 381.196 (b)

Dear Administrator Almanza:

On behalf of the non-profit consumer organization, Food & Water Watch, I respectfully submit this petition for rulemaking to remove the People’s Republic of China (PRC) as a country that is eligible to export poultry products to the United States (U.S.) under 9 CFR 381.196 (b). I bring this action under the provisions of 7 CFR 1.28 and 5 U.S.C. 533 (e). Food & Water Watch is requesting this action because there is evidence that the rule granting the PRC equivalency status (71 FR 20867 – 20870) was promulgated using flawed procedures. As a consequence, U.S. consumers could be harmed by the importation of unsafe poultry products from the PRC.

I. Background

On November 23, 2005, the Food Safety and Inspection Service (FSIS) proposed a rule to include the PRC on the list of countries that are eligible to export poultry products to the U.S. (70 FR 70746 – 70749). The proposed rule would permit the importation of processed poultry products from the certified establishments in the PRC made “from poultry slaughtered in certified slaughter establishments in other countries eligible to export poultry to the United States.”¹

¹ 70 FR 70746

The comment period closed on January 23, 2006. The agency received 34 comments during this time, and most of them were in opposition to the proposed rule. Among those comments filed in opposition were those from Food & Water Watch.²

On April 18, 2006, the final rule was transmitted to the Office of Management and Budget (OMB) for review.³ It received OMB clearance on April 19, 2006 and was published in the April 24, 2006 Federal Register.⁴ The final rule was announced on April 20, 2006 to coincide with the visit of PRC President Hu Jintao to Washington, DC.⁵

On April 27, 2006, Food & Water Watch sent a letter to then-Secretary of Agriculture Mike Johanns criticizing the rule and the rushed process used to promulgate it.⁶

Between May 24, 2006, when the final rule took effect, and February 9, 2007, the PRC never certified any poultry processing plants to export products to the U.S. under the conditions of the final rule.⁷

On May 23, 2006, the U.S. House of Representatives passed H.R. 5384, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for FY 2007, which contained a provision that would prohibit the expenditure of funds by USDA to implement the new rule.⁸ Because the Congress was not able to complete the appropriations process for FY 2007, the provision was never signed into law.

On December 26, 2007, President George W. Bush signed P.L. 110-161, the Consolidated Appropriations Act for FY 2008, which contained a provision that prohibited USDA from expending any funds to implement any regulations that would permit the importation of poultry products from the PRC.⁹

The statutory funding limitation was continued in FY 2009 when President George W. Bush signed P.L. 111-8, the Omnibus Appropriations Act for FY 2009.¹⁰

² See <http://www.fsis.usda.gov/OPPDE/Comments/05-012P/05-012P-32.pdf>

³ See <http://www.reginfo.gov/public/do/eoDetails?rrid=113053>

⁴ Ibid.

⁵ Quaid, Libby. "U.S. to Allow Processed Poultry Shipments from China," boston.com, April 20, 2006 (see http://www.boston.com/news/local/connecticut/articles/2006/04/20/us_to_allow_processed_poultry_shipments_from_china/)

⁶ See <http://www.foodandwaterwatch.org/press/letters/letter-to-usda-re-china-and-poultry-imports/>

⁷ See http://www.fsis.usda.gov/regulations_&_policies/Eligible_Foreign_Establishments/index.asp

⁸ SEC. 747. None of the funds made available in this Act may be used to implement the final rule published by the Secretary of Agriculture on April 24, 2006, amending part 381 of title 9 of the Code of Federal Regulations to add the People's Republic of China to the list of countries eligible to export poultry products to the United States.

⁹ P.L. 110-161, Division A, SEC. 733. None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China.

¹⁰ P.L. 111-8, Division A, SEC. 727. None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China.

On October 19, 2009, President Barack Obama signed into law P.L. 111-80, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act for FY 2010, that relaxed the funding limitation, but required USDA to report regularly to Congress on the status of the department's review of the food safety system in the PRC as it related to poultry.¹¹

¹¹ P.L. 111-80, Sec. 743. (a) None of the funds made available by this Act may be used to promulgate or implement a poultry products inspection rule allowing processed poultry or processed poultry products to be imported into the United States from the People's Republic of China unless the Secretary of Agriculture formally notifies Congress that the Department will--

- (1) not provide any preferential consideration to any application by the People's Republic of China for authorization to export poultry or poultry products to the United States;
 - (2) conduct audits of inspection systems and on-site reviews of slaughter and processing facilities, laboratories and other control operations before any Chinese facilities are certified as eligible to ship poultry or poultry products to the United States and, in subsequent years, to conduct such audits and reviews at least once annually or more frequently as the Secretary determines necessary;
 - (3) implement a significantly increased level of port of entry re-inspection;
 - (4) establish and conduct a formal and expeditious information sharing program with other countries importing processed poultry or processed poultry products from China that have conducted audits and plant inspections;
 - (5) report to the House and Senate Committees on Appropriations within 120 days of the date of enactment of this Act, and every 180 days thereafter for an indefinite period, with respect to the promulgation or implementation of any poultry products inspection rule authorizing the People's Republic of China to export poultry or poultry products to the United States, including--
 - (A) actions taken or to be taken by the Secretary, including new audits and on-site reviews, to implement any poultry products inspection rule authorizing the People's Republic of China to export processed poultry or processed poultry products to the United States;
 - (B) actions taken or to be taken by the Secretary, including new audits and on-site reviews, to determine whether the poultry inspection system of the People's Republic of China achieves a level of sanitary protection equivalent to that achieved under United States standards;
 - (C) actions taken or to be taken by the Secretary to determine whether the administration and enforcement of the poultry and poultry products inspection system of the People's Republic of China ensures that it achieves a level of sanitary protection equivalent to that achieved under United States standards;
 - (D) the level of port of entry re-inspections to be conducted on processed poultry and processed poultry products offered for importation into the United States from the People's Republic of China; and
 - (E) a work plan incorporating any understandings or agreements between FSIS and relevant authorities of the People's Republic of China with respect to carrying out the Secretary's assessment of the equivalency of the poultry products inspection system of the People's Republic of China;
 - (6) make publicly available, no later than 30 days from the date they are finalized, the reports of any new audits and on-site reviews conducted by the Secretary, and, in addition, when such audit or review is being conducted to determine whether the People's Republic of China's poultry inspection system achieves a level of sanitary protection equivalent to that achieved under United States standards, to make the final report of such audit or review publicly available no later than 30 days prior to the publication of any notice of proposed rulemaking for such determination; and
 - (7) make publicly available a list of facilities in the People's Republic of China certified to export poultry or poultry products to the United States and to notify the House and Senate Committees on Appropriations if the number of facilities certified by the People's Republic of China exceeds ten.
- (b) None of the funds made available by this Act may be used to promulgate any proposed or final rule allowing the importation into the United States of poultry slaughtered or poultry products produced from poultry slaughtered in the People's Republic of China unless such rule is promulgated in accordance with the procedures for significant rules specified in Executive Order 12866.

As a result of the 2009 language, USDA has filed several reports with Congress on the status of processed poultry imports from the PRC.

It should also be noted that the PRC filed a complaint with the World Trade Organization (WTO) on April 17, 2009 regarding the congressional ban on implementing the regulations to permit the importation of poultry products into the U.S. A WTO dispute panel ruled partially in the PRC's favor on September 29, 2010.¹²

II. Freedom of Information Act Request

On March 30, 2009, Food & Water Watch filed a Freedom of Information Act (FOIA) request with FSIS for all information related to the equivalency determination for poultry imports from the PRC. To date, Food & Water Watch has received nearly 10,000 pages of documents from USDA's FSIS, Foreign Agricultural Service (FAS), and Animal and Plant Health Inspection Service (APHIS) in response to the FOIA request.

III. Flaws in the Equivalency Determination Process

Based on the information received to date, it is apparent that the equivalency determination for the importation of processed poultry products from the PRC was flawed on a number of counts.

A. The Beef for Poultry Swap

There is evidence that the equivalency determination for processed poultry imports was based, at least in part, on the efforts by the U.S. to re-open beef trade with the PRC. The PRC banned the importation of U.S. beef after a cow was discovered to have bovine spongiform encephalopathy (BSE) or mad cow disease in Washington State in 2003.¹³ Leading up to the announcement of the April 24, 2006 rule, media reports from the PRC were speculating that there would be an imminent announcement in which poultry imports from the PRC would be permitted into the U.S. in exchange for U.S. beef exports to the PRC.¹⁴

Documents received from the FOIA request also seem to substantiate the beef-poultry nexus. In a series of e-mails among USDA employees, it is obvious that there was discussion in early 2005 concerning beef exports to China and granting poultry equivalence.

(c) This section shall be applied in a manner consistent with United States obligations under its international trade agreements.

¹² See http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds392_e.htm

¹³ See <http://www.cnn.com/2003/BUSINESS/12/24/madcow.reax/index.html>

¹⁴ "Chinese Poultry to U.S., U.S. Beef to China." China Daily, April 12, 2006.

“From: Stuck, Karen
To: Pierson, Merle; Masters, Barbara
Sent: Tue Jan 04 13:35:35:54 2005
Subject: Fw: Penn-Ge letter signed

Letter from JB Penn to China on beef exports, poultry equivalence, etc.”¹⁵

“From: James, William
Sent: Friday, March 11, 2005 2:46 pm
To: McDermott, Steve; REDACTED
Cc: White, Sally
Subject: FW: Re-opening China’s Market for U.S. Beef – The Process and Concerns (incl. AQSIQ Minister Li letter to USDA and USTR)

Where are we in the Chinese equivalence process?

From: REDACTED
Sent: Friday, March 11, 2005 2:47 PM
To: James, William
Cc: White, Sally
Subject: RE: Re-Opening China’s Market for U.S. Beef – The Process and Concerns (incl. AQSIQ Minister Li letter to USDA and USTR)

The reg staff has the rule.”¹⁶

In a June 5, 2005 communication from USDA FAS staff to various USDA officials entitled, “BSE and AI Technical Meetings Concluded in Beijing,” the following observation was made:

“4. AQSIQ also expressed continued frustration regarding FSIS’ slow progress in addressing China’s market access request to ship cooked poultry meat to the United States...Based on numerous exchanges with Chinese officials, FAS Beijing views progress on China’s cooked poultry access to be linked to progress on re-opening the U.S. beef market....”¹⁷

The U.S. meat industry also viewed a quid pro quo between U.S. beef exports to China in exchange for poultry imports from the PRC. In a 2006 letter to Senators Robert Bennett and Herbert Kohl, the then-chair and ranking member respectively of the U.S. Senate Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Subcommittee, a coalition of meat industry trade associations made the following statement regarding the provision adopted by the U.S. House of Representatives

¹⁵ FSIS Response to FOIA 09-156, p. 2662.

¹⁶ Ibid. p. 2599.

¹⁷ FAS Response to FOIA 09-156, June 30, 2010, p. 2495.

to prohibit USDA from expending any funds to implement the April 24, 2006 processed poultry regulation granting equivalency status to the PRC:

“It has come to our attention that China may link this issue as a condition for U.S. market access for beef and pork products. We are at a critical juncture in the beef negotiations in which the United States has put forward the concept of equivalency and using sound science in adopting World Organization for Animal Health (OIE) guidelines. The House language makes it difficult to be consistent in arguing for sound science.

The poultry and meat associations listed on this letter respectfully request that there be no provision in the final, approved agriculture appropriations bill to overturn the Federal Register Notice of April 24, 2006.”¹⁸

Meat industry officials continued to make their assertions during the 2009 consideration of the FY 2010 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations bill.

“China represents one of the largest potential growth markets for U.S. beef-worth in excess of \$100 million. The chicken dispute is likely to impede ongoing efforts to open up China to U.S. beef.”¹⁹

Members of the congressional China Study Group also made the same connection in a September 18, 2009 letter to Representatives Rosa DeLauro, Jack Kingston, David Obey and Jerry Lewis, urging removal of the ban on Chinese poultry imports from the FY 2010 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations bill.

“Of further consequence, the provision is also preventing the United States from negotiating and agreement on US beef exports to China...”²⁰

B. The PRC Received Preferential Treatment

There is ample evidence that there was pressure being brought to bear on FSIS staff to expedite the equivalency determination for the PRC. In several documents and e-mails, the urgency to publish the proposed rule and then the final rule was quite apparent. As a consequence, it also appears that errors were made in the promulgation of the final rule.

¹⁸ Letter signed by Patrick Boyle, American Meat Institute; Alice Johnson, National Turkey Federation; George Watts, National Chicken Council; Terry Stokes, National Cattlemen’s Beef Association; Rosemary Mucklow, National Meat Association; Neil Dierks, National Pork Producers Council to Senators Robert Bennett and Herbert H. Kohl, 2006.

¹⁹ National Cattlemen’s Beef Association. “Agriculture Appropriations Bill Could Impact U.S.-China Trade,” Cattlemen’s Capitol Concerns, June 25, 2009.

²⁰ Congressional China Study Group. Letter to Representatives Rosa DeLauro, Jack Kingston, David Obey and Jerry Lewis, September 18, 2009.

PROPOSED RULE

"From: REDACTED
Sent: Tuesday, October 25, 2005 3:03 PM
To: Cohen, Steven; Engeljohn, Daniel; REDACTED; REDACTED; REDACTED @obpa.usda.gov; REDACTED; White, Sally; REDACTED; Dickey, Lynn
Subject: Docket 05-012P, Adding China to the List of Countries Eligible to Export Poultry and Poultry Products to the U.S.

The above proposed rule is moving to OGC as a RUSH for clearance today. Attached is a copy of the proposed rule.

Steve and REDACTED please let us know if it is ok to publish."²¹

"From: REDACTED
Sent: Tuesday, November 8, 2006
To: REDACTED
Subject: Docket No. 05-012P Addition of the People's Republic of China to the List of Countries Eligible to Export Poultry and Poultry Products to the U.S.

According to a note enclosed in this document, it is to be considered as a RUSH. All dockets considered RUSH need to have the due date posted. The note also states that the Office of International Affairs (OIA) has has (sic) cleared but there's no signature for OIA. Please provide this information a.s.a.p.

Thanks,

REDACTED
Document Management Specialist
Executive Correspondence & Issues Management Staff
Room 1165 – South Building
Phone: (202) 720-9101
Fax: (202) 205 REDACTED
REDACTED fsis.usda.gov"²²

²¹ FSIS Response to FOIA 09-156, p. 2355

²² Ibid. p. 2336

“From: REDACTED
Sent: Tuesday, November 15, 2005 7:50 AM
To: Cohen, Steven; REDACTED; Dickey, Lynn
Subject: FW: 02-019F – Addition of Chile to the List of Countries Eligible to Export Meat and Meat Products to the United States

Please let us know if we can send this docket to the OFR. This is a rush and we would like to send it today.

Thank you

From: Dickey, Lynn
Sent: Wednesday, November 16, 2005 7:55 AM
To: REDACTED REDACTED
Cc: Cohen; REDACTED REDACTED
Subject: FW: - Addition of China

Actually what I spoke with Steve about was the proposed rule on CHINA not Chile so please put this in the appropriate administrative folder. Let (sic) make sure these things don't get confused in the future

Lynn Ellen Dickey, Ph.D.
Director, Regulations and Petitions Policy Staff
Office of Policy, Program and Employee Development
(202) 720-5627
Fax (202) 690-0486”²³

FINAL RULE

Memorandum (April 10, 2006)

“TO: See DISTRIBUTION
FROM: Philip S. Derfler
Assistant Administrator
Office of Policy, Program, and Employee Development
SUBJECT: Additional (sic) of the People's Republic of China to the List of Countries Eligible to Export Processed Poultry Products to the United States

²³ Ibid. p. 2305

The Regulations and Petitions Policy Staff (RPPS) would appreciate your rapid review of and comments on document. Please focus your review on the general concepts and technical substance rather than the wording. Please indicate if concur with the document or provide your comments to REDACTED (phone number 720 REDACTED... by April 14, 2006...

Attachments

DISTRIBUTION:
D. Goldman, OPHS
K. Petersen, OFO
J. Theodule, EMS
B. Quick, OPAAO
REDACTED, CRD
REDACTED, Hotline, FSES
C. Maczka, OFSEP
W. Smith, OPEER
K. Stuck, OIA
W.P. Milton, OM
REDACTED, OFO”²⁴

“From: REDACTED @ obpa.usda.gov
Sent: Monday, April 10, 2006 11:17 AM
To: REDACTED
Cc: Dickey, Lynn; REDACTED
Subject: FW: China rule attached

Please send the attached draft rule to REDACTED as an advance. FSIS is going to follow up with a work plan ASAP. The rule of high policy sensitivity and a rush.

Thanks,

REDACTED”²⁵

Handwritten note dated 4/11/06

“Please note that due to the urgency of this rule, we have not yet received AA clearances. However, the OPI, OIA has approved of the rule and cleared It – on the red jacket.

²⁴ Ibid. p. 1430

²⁵ Ibid. p. 1476

Lynn Dickey”²⁶

Memorandum dated April 11, 2006

“TO: REDACTED
Office of Budget and Program Analysis

FROM: Lynn Dickey
Director
Regulation, Policy, and Petition Staff
Office of Policy, Program and Employee Development

SUBJECT: Workplan on the Addition of the People’s Republic of China
to the List of Countries Eligible to Export Processed Poultry
Products to the United States

I am sending this workplan to you with a request for it to be expedited. Both the Department and our Agency, the Food Safety and Inspection Service, have informed me that it is important to expedite this docket. Please pass this information along to whomever will be reviewing it.”²⁷

C. Questions about the Audits

During the review of the final rule, questions arose among FSIS staff as to whether the 2004 audits of Chinese slaughter and processing facilities were the only ones ever conducted to support the proposed rule.

“From: REDACTED
To: REDACTED
Sent: Fri April 07 15:43:43 2006
Subject: RE: comments discussed yesterday

O.k. Just one question. Is the web site I used for the OIA China audits correct?

Thanks.

From: REDACTED
Sent: Friday, April 07, 2006 5:54 PM
Subject: Re: comments discussed yesterday

²⁶ Ibid. p. 1341

²⁷ Ibid. p. 1353.

Yes, all of the reports are up.

REDACTED
USDA, FSIS
Office of International Affairs”²⁸

“From: Dickey, Lynn
Sent: Friday, April 07, 2006 3:45 PM
To: White, Sally
Cc: Stuck, Karen
Subject: RE: URGENT China RE: comments discussed yesterday

Many, many thanks, Could you please check that the website for the audits is correct and let REDACTED know.”²⁹

“From: Stuck, Karen
Sent: Tuesday, April 11, 2006 12:02 PM
To: White, Sally; REDACTED
Cc: James, William
Subject: China

Sally: I just finished clearing off on the China rule, and have a couple of questions regarding audits. First, in the looking at the website, it would appear there is only one audit related to the processing inspection system. Although there are two audits posted, one is for the slaughter system. Second, I note that the audit schedule indicates that we would go to China during the 4th quarter of FY06, however, it has not been included in any of the audit planning lists for the rest of this fiscal year. I would think that this is an example of an audit that cannot be postponed, given that we are likely to get criticism for the final rule and we (sic)it appears that we haven’t been there since 2004 to look at the processing system. However, it may be that we don’t have the last audit posted yet. I assume it will be up there before the final rule is published. Nevertheless, postponing the China audit should be part of the proposed revised audit schedule that goes to the Under Secretary.

Karen Stuck
Assistant Administrator
Office of International Affairs
FSIS, U.S. Department of Agriculture

²⁸ Ibid p. 1574.

²⁹ Ibid. p. 1593

Phone 202-720-3473
Fax: 2020-690-3856

karen.stuck@fsis.usda.gov³⁰

A majority of the processing plants audited in 2004 were found to have serious food safety problems.³¹ While PRC officials claimed that the problems were resolved, there was no independent verification by FSIS when the proposed rule was published in November 2005 and when the final rule was issued in April 2006. As a consequence, the final rule was based on incomplete and outdated information.

D. Faulty Economic Impact Analysis (EIA)

FSIS provided different sets of data for the potential economic impact of processed poultry imports from the PRC on the domestic poultry processing industry in the Federal Register Notices announcing the proposed and final rules. It is apparent from the documents obtained through the Food & Water Watch FOIA that there was debate within the agency as to validity of the economic impact analysis provided to the public.

In the November 23, 2005 Federal Register Notice announcing the proposed rule, the agency stated:

There are 25 establishments in the People's Republic of China that will be exporting product to the U.S. if this proposal is adopted. The establishments will export shelf stable cooked poultry products. U.S. imports from these establishments are expected to total less than 2,500,000 pounds per year. ³²

However, in response to criticism received in comments to the EIA provided in the proposed rule, FSIS changed its EIA in the final rule.

There are 10 to 25 establishments (based on recent information from the U.S. Embassy in Beijing, China) in the People's Republic of China that may be exporting product to the U.S. when this rule is effective. The establishments will export shelf-stable, fully cooked poultry products. U.S. imports from these establishments are expected to total 2,500,000 pounds (1,134 metric tons) to 6,250,000 pounds (2,835 metric tons) per year, for the next four years. Then, the growth would likely level off.³³

Shortly after the comment period closed on the proposed rule, the following e-mail was circulated within FSIS:

³⁰ Ibid. p. 1345.

³¹ See 2004 Audits for China

http://www.fsis.usda.gov/regulations_&_policies/Foreign_Audit_Reports_Past/index.asp

³² 70 FR 70747

³³ 71 FR 20870

"From: REDACTED
Sent: Wednesday, February 08, 2006 8:16 AM
To: Bowman Blackwell, Quita
Cc: REDACTED; Dickey, Lynn; Derfler, Philip
Subject: 05-012P Addition of the People's Republic of China to the List of Countries Eligible to Export Processed Poultry Products to the United States

...We are also, however, being challenged on the validity of the proposal's Economic Impact Analysis, and this is where your and your staff may face a significant task. The overt complaint about our EIA's is that they are often unrealistically low and that there is no real consideration of the possibility of a greater future impact, in the absence of quotas etc., once a country is approved to export a particular product class to the United States I have discussed this at length with REDACTED and Sally White of OIA, and we believe that the best response is to discuss the realities of the international trade in poultry, the significant internal and external markets other than the U.S. that China is involved in, China's internal demands for poultry, differing consumer preferences {China (heart) dark meat, U.S. (heart) white meat}, potential for export sales of U.S. raw poultry to China, and so on...

REDACTED, Program Analyst
USDA-FSIS-OPPED-RPPS
202 720-REDACTED
FAX 202 690-0486"³⁴

In an e-mail discussing the preparation of the final rule for publication, the following observation was made:

"From: White, Sally
Sent: Thursday, April 06, 2006 5:08 AM
To: James, William; Stuck, Karen
Cc: REDACTED; McDermott, Steve
Subject: China issues reduced

As of now the issue on Economic Analysis is resolved. Additional work will be done in slaughter proposal. REDACTED will revise Issue paper accordingly."³⁵

³⁴ FSIS Response to FOIA 09-156, p. 1917

³⁵ Ibid. p. 1662

PRC poultry industry analysts have estimated that the U.S. could be importing as much as \$750 million of processed poultry products annually from the PRC.³⁶ That could translate into as much as 177,000 metric tons of finished poultry products, or 62 times the amount estimated by FSIS.³⁷

E. Will U.S. Consumers Really Know Where their Poultry Products Come From?

Both the proposed rule and the final rule made the assertions that U.S. consumers would be able to distinguish between imported poultry products from the PRC and domestic poultry products, giving them a choice should they wish not to consume poultry products from the PRC.³⁸

Those statements are inaccurate and agency personnel acknowledged that they were not true.

First, at the time the rule was finalized, there were no mandatory country of origin labeling requirements for poultry and poultry products. That requirement came as a result of the Food, Conservation, and Energy Act of 2008 – some two years later.³⁹

Second, if poultry is used as an ingredient in foods, there is no current legal requirement to label it as to its country of origin.⁴⁰ In fact, during a March 8, 2006 hearing before the House Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations, the following exchange took place between Congressman Virgil Goode (R-VA) and Dr. Richard Raymond, Under Secretary for Food Safety:

Mr. GOODE. So, if I get a can of Campbell's chicken soup, and it has processed Chinese chicken in it, I won't know that it has Chinese processed chicken in it, will I?

Mr. RAYMOND. What you will know is that it has met all the requirements for the food safety system to be consumed by---⁴¹

³⁶ See http://www.chinadaily.com.cn/bizchina/2010-07/29/content_11065286.htm

³⁷ Estimate provided by USDA Foreign Agricultural Service as reported by Dr. Ronald Jones, FSIS Assistant Administrator for International Affairs, at meeting between FSIS Management Council and the Safe Food Coalition, October 26, 2010.

³⁸ "The impact of this proposed rule on U.S. consumers is voluntary in that consumers will not be required to purchase poultry products produced and processed in the People's Republic of China, although they may choose to do so." (70 FR 70747)

"...consumers will not be required to purchase poultry products produced and processed in the People's Republic of China." (71 FR 20870)

³⁹ Section 11002, H.R. 2419, Food, Conservation, and Energy Act of 2008.

⁴⁰ See 21 CFR 101.

⁴¹ U.S. House of Representatives. Hearing before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations, March 8, 2006, p. 83.

As FSIS was preparing the docket for the proposed poultry slaughter rule for the PRC, the following exchange took place among key FSIS personnel:

“From: Schor, Danielle
Sent: Monday, April 16, 2007 1:41 PM
To: Derfler, Philip
Subject: China rule

This is a concern I’ve had before. Docket says that consumers will not be required to purchase products produced in the PRC. While no raw products would be coming in now because of animal health laws, the proposed rule still includes raw products and they may enter U.S. commerce in the future. So I think this is misleading. Any ideas?

Danielle Schor, R.D.
Chief of Staff
Food Safety and Inspection Service
U.S. Department of Agriculture
202-720-6618 (direct)
202 – REDACTED (cell)
danielle.schor@fsis.usda.gov

From: Derfler, Philip
Sent: Monday, April 16, 2007 1:56 PM
To: Schor, Danielle
Subject: RE: China rule

I think that this is a question for Ms. Stuck. I think that the answer that she will give you is that if we find their system equivalent, there is no difference between the poultry from one country or the other, and thus there is no problem if they are commingled. Kind of heartless, I know, but that is the situation.

From: Schor, Danielle
Sent: Monday, April 16, 2007 2:26 PM
To: Derfler, Philip
Subject: RE: China rule

Equivalence is not my issue. My issue is we can’t say in the docket that you don’t have to buy China’s chicken because you wouldn’t know if it’s raw. So it’s an untrue statement.

Danielle Schor, R.D.
Chief of Staff
Food Safety and Inspection Service
U.S. Department of Agriculture

202-720-6618 (direct)
202-REDACTED (cell)
danielle.schor@fsis.usda.gov"⁴²

F. Final Rule Not Cleared by USDA Office of Civil Rights Prior to Publication

In their haste to get the final rule announced in time for the visit of PRC President Hu Jintao, the FSIS and USDA departmental staff failed to send the final rule to the USDA Office of Civil Rights for review as is required by Department Regulation 4300-004.

"From: Sadhna.True@usda.gov
Sent: Monday, May 01, 2006 7:29 PM
To: Derfler, Philip
Cc: REDACTED; REDACTED; REDACTED – USDA; REDACTED
Subject: Regulation for clearance

Mr. Derfler,

The Office of the Assistant Secretary for Civil Rights received the following Final Rule for review from you agency: Addition of the People's Republic of China to the List of Countries Eligible to Export Processed Poultry Products to the United States. The package did not include a Civil Rights Impact Analysis, as required by Departmental Regulation 4300-004. We are unable to complete our review without this documentation. Please ask your staff to forward the Civil Rights Impact Analysis to my attention as soon as possible.

Please note that I contacted the FSIS staff in RPPS last week but have not Received a response. Therefore, I thought I should elevate this matter to your attention. Please let me know if you have any questions.

Thank you,
Sadha True

Sadha True
Director, Office of Civil Rights
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250-9410
Phone: (202) 720-5212
Fax: (202) 720-0953

From: Derfler, Philip

⁴² FSIS Response to FOIA 09-156, p, 2952.

To: Dickey, Lynn
CC: Engeljohn, Daniel
Sent: Tue May 02 06:12:52 2006
Subject: FW: Regulation for clearance

We need to respond to this asap.

From: Dickey, Lynn
Sent: Tuesday, May 02, 2006 8:50 AM
To: Derfler, Philip; REDACTED REDACTED REDACTED Engeljohn, Daniel
Cc: Bowman Blackwell, Quita
Subject: RE: Regulation for Clearance

I have just spoken with Ms. True and she informed me that it is the FSIS Civil Rights Staff this responsible for writing the Civil Rights Impact Analysis. As The Under Secretary's staff is responsible for obtaining Departmental Clearances, Not RPPS or ECIMS it appears that somehow in the rush to get this published the FSIS Civil Rights Staff was either not included in the process or did not include an analysis prior to the rule being published on April 20th. Ms. True was not happy to hear this.

I have also told Ms. True that we will try to facilitate getting this analysis to her, which I envision as our contact the Undersecretary's office and asking them to contact the FSIS Civil Rights Staff. We would happily do more, i.e., REDACTED wrote one up, however, Ms. True stated that REDACTED called her this morning and that she wanted me to inform REDACTED of our conversation and to tell her that she would not be returning REDACTED's earlier morning call.

Phil, do you want to contact the Under Secretary's office (remembering the last time)?"⁴³

IV. USDA Has Not Enforced Current Regulations on Illegal Food Imports

In early 2009, FSIS issued four recall press releases indicating that certain imported foods under its jurisdiction contained ingredients from unapproved sources.⁴⁴ The Federal Meat Inspection, Poultry Products Inspection, and Egg Products Inspection Acts define the jurisdiction of USDA over the inspection of certain foods, but they also create exemptions when those foods have small amounts of meat, poultry and egg products in them. In the implementing regulations for the Poultry Products Inspection Act, for example, an

⁴³ Ibid. p. 157.

⁴⁴ See http://www.fsis.usda.gov/News_&_Events/Recall_006_2009_Release/index.asp;
http://www.fsis.usda.gov/News_&_Events/Recall_009_2009_Release/index.asp;
http://www.fsis.usda.gov/News_&_Events/Recall_010_2009_Release/index.asp;
http://www.fsis.usda.gov/News_&_Events/Recall_014_2009_Release/index.asp

exemption is made for all products that contain less than 2 percent cooked poultry meat (deboned white or dark poultry meat or both) and mechanically separated poultry.⁴⁵ As a result of notification by U.S. Customs and Border Protection personnel in early 2009, FSIS discovered that certain foods that had small amounts of meat, poultry and egg products that exceeded the 2 percent criterion were entering into the U.S. from countries with which FSIS had no equivalency agreements. PRC was among the countries that were exporting foods to the U.S. illegally.

This created controversy within USDA since the Animal and Plant Health Inspection Service (APHIS) is responsible for issuing permits to importers for any foods that contain animal products and it was not coordinating its activities with FSIS.⁴⁶

“From: Jere L. Dick
To: Larry M. Granger; Michael R. Doerrer
cc: Sharon S. Fisher; Catherin S. Fulton; John Clifford; Thomas J Myers
Subject: Fw: As Requested: Summary of Imported Poultry Products from China
Date: 01/27/2009 04:48 PM

As discussed, I just came from a meeting with Administrator Almanza, FSIS, Bill Clay, Acting Associate Administrator. Almanza has already gone to Secretary about this and given him a heads-up, and we will need to scramble our troops to get the information I talked about to you prepared. The Secretary indicated that he was going to call DeLaurio (sic) and let her know about shipment (s) at some point. I suspect she will not be understanding of how this could happen.

Please determine:

1. The number of Certificates (Import Permits) issued for importation of Poultry Products since the DeLaurio (sic) bill was passed disallowing poultry/products importation from China (about September 2007 according to Almanza). We will need to have a list (and copy) of the Permit Numbers/Companies/etc.
2. The number of shipments, total product, product type, import date, etc. related to those issued Certificates.

Obviously, we need to immediately stop issuing these permits. Obviously, this will take collaborative work with VRS and FSIS, and others.

I suggest you also meet with FSIS (and FDA, if necessary) to identify a way to prevent this from happening again. I don't know why we would need to

⁴⁵See 9 CFR 381.15

⁴⁶See http://www.fsis.usda.gov/PDF/Import_Permit_Guide.pdf

rely upon FSIS personal notification of NCIE for FSIS "listed plants" when they are on their website??....but I may be missing something in that regard.

I would like to shoot for having the information here by noon tomorrow. Thanks!"⁴⁷

FSIS and APHIS eventually issued joint guidance in April 2009 to importers on what foods that contain small amounts of meat and poultry products in them are proper for importation into the U.S. There has never been guidance issued for imported foods that contain small amounts of egg products that fall under USDA jurisdiction.⁴⁸

V. The PRC Food Safety System Continues to be Riddled with Problems and Lack of Transparency

Since the 2006 equivalency determination, the PRC has experienced some high profile food safety scandals that prompted its government to enact new food safety legislation in 2009. Even with this new law, there continues to be difficulty in enforcing food safety standards.

In 2007, thousands of U.S. animals died from consuming pet food made with adulterated wheat flour that originated from PRC.⁴⁹ That incident precipitated a massive recall of pet food products in the U.S.⁵⁰ In 2008, during the height of the Beijing Olympic Games, six infants died and 300,000 other PRC consumers were sickened when it was discovered that milk powder had been adulterated with the chemical compound, melamine.⁵¹ News of the scandal was suppressed until after the conclusion of the Olympic Games. That incident also led to recalls and public health alerts of various food products in the U.S. that were made from Chinese dairy products.⁵² While in the PRC at the height of the melamine scandal in the fall of 2008, then- USDA Under Secretary for Food Safety Dr. Richard Raymond made the following observation:

"It's beyond belief what happened," said Raymond, who has authority over the safety of meat and poultry. "You don't have to be a genius to figure out this is a whole lot worse than pet food. You better believe that melamine's going to be tested for in chemical residuals from all of the products that do come in from China."⁵³

Dr. Raymond went on to say that the melamine scandal would make it more difficult for the PRC to export meat products to the U.S.⁵⁴

⁴⁷ Response from the Animal and Plant Health Inspection Service to FSIS FOIA 09-156.

⁴⁸ See http://www.fsis.usda.gov/Regulations_&Policies/Imported_Food_Products/index.asp

⁴⁹ See http://www.usatoday.com/money/industries/food/2007-05-08-fda-melamine-fish_N.htm

⁵⁰ See <http://www.accessdata.fda.gov/scripts/petfoodrecall/index.cfm>

⁵¹ See http://www.msnbc.msn.com/id/28787126/ns/world_news-asia-pacific/

⁵² See <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm179005.htm>

⁵³ <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=azjwzAw2IQAA&refer=asia>

⁵⁴ Ibid.

A new food safety law was enacted in 2009 by the People's Congress in response to the melamine scandal.⁵⁵ Even with the enactment of the new law, PRC health ministry officials were quoted publicly as stating that the food safety situation in the PRC remained "grim" and the food safety system was afflicted with "high risks and contradictions."⁵⁶

Since the enactment of the new food safety law in the PRC, there have been several more incidents of various food products intentionally adulterated with melamine, with the most recent occurring on January 14, 2011.⁵⁷

In its First Written Submission in WTO Case WT/DS392 in defense of the U.S. congressional ban on the importation of poultry products from the PRC, the Office of the U.S. Trade Representative (USTR) cited several analyses of U.S. and international food safety experts who questioned the efficacy and integrity of the PRC food safety system. One such study published by Global Health Governance, made the following observations:

"Food safety enforcement is complicated by weak government capacity, particularly at local levels where many food processors operate. Often, new regulations and dictates from Beijing are unfunded mandates which are ignored by local officials who argue they lack resources to carry out directives. Where some local governments might have the will to enforce regulations and standards, they often lack the means. Local level officials face contradictions in attempting to enforce standards among cottage processors. Rural food processing is encouraged by local authorities as a means to increase rural incomes, a policy strongly endorsed, but poorly supported, by central government authorities. Local officials are reluctant to close businesses that contribute to employment in rural areas, where other economic opportunities are limited. This reluctance to enforce standards or regulations set at the provincial or national level makes it unlikely that food safety can be ensured consistently across the country.

Corruption within the Chinese government poses a further challenge. Local officials often collude with local companies, stymieing attempts by higher level authorities to enforce safety regulations. Corruption in China extends from grass-roots cadres to the highest levels. The State Food and Drug Administration (SFDA) in China has been wracked by a corruption scandal involving its founding director which extends to provincial food and drug administrations."⁵⁸

⁵⁵ See <http://www.chinacsr.com/en/2009/06/01/5351-chinas-food-safety-law-begins-now/>

⁵⁶ See <http://asq.org/qualitynews/qnt/execute/displaySetup?newsID=5725>

⁵⁷ See http://www.msnbc.msn.com/id/35057694/ns/health-food_safety/;
[http://www.foodproductiondaily.com/Quality-Safety/China-uncovers-more-melamine-tainted-dairy-materials](http://www.foodproductiondaily.com/Quality-Safety/China-uncovers-more-melamine-tainted-dairy-materials;);

<http://english.peopledaily.com.cn/90001/90778/7260521.html>

⁵⁸ See http://www.ustr.gov/webfm_send/1501, pp. 19-20.

At the present time, the U.S. Food and Drug Administration (FDA) has 70 Import Alerts for various products exported from the PRC to the U.S. Of those, 40, or 57 percent, involve PRC firms that export human food products to the U.S. The causes for the Import Alerts include microbial contamination, adulteration due to the presence of illegal animal drugs, melamine, heavy metals and pesticides, and refusal to permit FDA inspection of PRC food facilities that export products to the U.S.⁵⁹

On January 17, 2011, a news account from Vietnam warns Vietnamese consumers against purchasing smuggled diseased poultry from the PRC during the celebration of Tet.⁶⁰

VI. Conclusion

For all of the reasons cited above, Food & Water Watch respectfully requests that FSIS opens a docket to remove the PRC as a country that is eligible to export poultry products to the U.S. We understand that agency officials have recently been in the PRC to review the food safety standards of that country. We believe that should the PRC continue to express an interest in exporting poultry and poultry products to the U.S., the results of the most recent audit serve as the basis for a new proposed equivalency determination for processing facilities. In the meantime, the April 24, 2006 rule should be rescinded immediately.

Should you have any questions, please feel free to contact me.

Sincerely,



Wenonah Hauter
Executive Director

⁵⁹ See http://www.accessdata.fda.gov/cms_ia/country_CN.html

⁶⁰ See <http://www.saigon-gpdaily.com.vn/National/Society/2011/1/88957/>