

poultry processing plants have fallen ill to COVID-19 and at least twenty workers have died. Accordingly, through this petition, OSHA must issue an emergency temporary standard (ETS) to protect workers in meat and poultry processing plants.

PETITIONER'S INTERESTS

Center for Food Safety (CFS) is a nonprofit public interest organization that empowers people, supports farmers, and protects the earth from the harmful impacts of industrial agriculture through groundbreaking legal, scientific, and grassroots action. Our membership includes more than 950,000 consumer and farmer supporters across the country. A particular programmatic focus of CFS is the industrialization of the food production process, including how food animals are raised and slaughtered. In addition to animal cruelty, industrial animal factories and slaughter plants put workers' lives at risk. Workers at meat and poultry processing plants in the U.S. are "three times more likely to suffer serious injury than the average American worker, and pork and beef workers nearly seven times more likely to suffer repetitive strain injuries."² Many of these workers are immigrants, refugees, and people of color.³ Public health is also at serious risk from the overuse of animal drugs, both antibiotic and otherwise, which enable large-scale industrial operations to remain economically viable despite inhumane and unsanitary conditions, by accelerating growth rates and preventing diseases that would otherwise threaten their productivity.

Now, in addition to these underlying public health concerns, the COVID-19 pandemic is further undermining worker safety and public health. Simply put, workers in meat and poultry processing plants are not being protected with adequate spacing and personal protective equipment, increasing the spread of COVID-19 throughout these plants and their surrounding communities. If workers are forced to work without adequate protections in place, it is also highly likely to affect job performance. Consequently, more diseased meat could find its way onto store shelves and dinner plates across the country. The last thing hospitals need during this

² Andrew Wasley, et al., *Two amputations a week: the cost of working in a US meat plant*, The Guardian (July 5, 2018), <https://www.theguardian.com/environment/2018/jul/05/amputations-serious-injuries-us-meat-industry-plant>.

³ Gosia Wozniacka, *Poor Conditions at Meatpacking Plants Have Long Put Workers at Risk. The Pandemic Makes it Much Worse*, Civil Eats (Apr. 17, 2020), <https://civileats.com/2020/04/17/poor-conditions-at-meatpacking-plants-have-long-put-workers-at-risk-the-pandemic-makes-it-much-worse/>; see also Arielle Zions, *Minority groups hit hardest by COVID-19 in South Dakota*, Rapid City Journal (Apr. 29, 2020) (noting that nearly 80% of workers at Smithfield Foods' pork plant in Sioux Falls, South Dakota, are people of color), https://rapidcityjournal.com/news/local/minority-groups-hit-hardest-by-covid-19-in-south-dakota/article_ebc803cb-797f-5683-89ab-af0fadc8b196.html.

pandemic is a spike in foodborne illnesses caused by unsafe working conditions at meat and poultry processing plants. CFS's consumer members are concerned about and have suffered with foodborne illness, and have an interest in keeping our food supply safe, especially during the deadly pandemic.

The Food Chain Workers Alliance (FCWA) is a coalition of worker-based organizations whose members plant, harvest, process, pack, transport, prepare, serve, and sell food, organizing to improve wages and working conditions for all workers along the food chain. FCWA works together to build a more sustainable food system that respects workers' rights, based on the principles of social, environmental and racial justice, in which everyone has access to healthy and affordable food. Currently, FCWA has 31 members representing over 375,000 food workers in the US and Canada.

PETITION RULEMAKING ACTIONS REQUESTED:

In light of the above flaws and the current grave conditions caused by the COVID-19 pandemic, and pursuant to the Right to Petition Government Clause contained in the First Amendment of the United States Constitution,⁴ the Administrative Procedure Act (APA),⁵ and OSHA regulations,⁶ Petitioners contend that OSHA has a mandatory duty to promulgate an ETS to immediately protect workers in meat and poultry processing plants. At a minimum, an ETS must include the following:

- Each meat and poultry processing plant must develop a COVID-19 assessment and control plan.
- Each plant must implement physical distancing measures to protect workers. This requires workers to be at least six feet apart from each other throughout their shifts and the use of physical barriers to separate workers.
- Each plant must provide essential protective gear, including face masks and other protective equipment to prevent the spread of COVID-19.
- Each plant must prohibit sick workers from coming to work and continue to pay and provide health care for sick workers.
- Each plant must be required to slow line speeds if they pose a threat to worker or food safety.
- Each plant must educate and train workers on how to reduce the spread of COVID-19.

⁴ U.S. CONST. amend. I.

⁵ 5 U.S.C. § 553(e).

⁶ 29 C.F.R. § 1911.3.

- Each plant must ensure regular cleaning and disinfecting of tools and equipment.
- Each plant must be required to notify workers of possible exposure if a worker is confirmed to have COVID-19 and carry out deep cleaning after confirmed cases.
- OSHA must increase its plant inspections to ensure compliance with the ETS and take necessary enforcement actions against plants in non-compliance.

Failure to take the requested action would severely harm Petitioners’ interests. It also would violate the mandates of the OSH Act in “assur[ing] . . . safe and healthful working conditions”⁷ and would be arbitrary and capricious.

APPLICABLE LEGAL AND REGULATORY BACKGROUND

Under the First Amendment to the U.S. Constitution, the people have a right “to petition the Government for a redress of grievances.”⁸ This right “is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression.”⁹ The Petition Clause ensures “that people ‘may communicate their will’ through direct petitions to the legislature and government officials.”¹⁰ The right to petition “extends to all departments of the Government.”¹¹

Under the APA, “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”¹² If an agency denies a petition, “[p]rompt notice shall be given of the denial . . . accompanied by a brief statement of the grounds for denial.”¹³ The denial of a petition is subject to judicial review.¹⁴

⁷ 29 U.S.C. § 651(b).

⁸ U.S. CONST. amend. I.

⁹ *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

¹⁰ *Id.* (quoting James Madison, 1 Annals of Cong. 738 (1789)).

¹¹ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

¹² 5 U.S.C. § 553(e).

¹³ 5 U.S.C. § 555(e). *See Auer v. Robbins*, 519 U.S. 452, 459 (1997).

¹⁴ 5 U.S.C. §§ 702, 706. *See Auer v. Robbins*, 519 U.S. at 459.

OSHA regulates workplace safety under the OSH Act.¹⁵ Pursuant to this statute, OSHA is charged with “assur[ing]” that every worker has “safe and healthful working conditions.”¹⁶ The statute authorizes the Secretary of Labor to “set mandatory occupational safety and health standards.”¹⁷ The statute specifically highlights the importance of “establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems” because “of the fact that occupational health standards present problems often different from those involved in occupational safety.”¹⁸ The statute further specifically requires the use of “medical criteria” to ensure that “no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience.”¹⁹

In addition to setting the mandatory standards for worker safety and health discussed above, OSHA is required to provide an ETS when necessary to protect “employees [that] are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards[.]”²⁰ When OSHA issues an ETS, it “shall . . . take immediate effect upon publication in the Federal Register” and shall remain in effect until superseded by a subsequent standard that is later promulgated.²¹ Upon publication of the ETS in the Federal Register, OSHA “shall commence” a proceeding in the same manner as it would any other standard with the published ETS “serv[ing] as a proposed rule for the proceeding.”²² OSHA “shall promulgate a standard . . . no later than six months after publication of the emergency standard[.]”²³ “Because of the shortness of this period, the conduct of the proceeding shall be expedited to the extent practicable.”²⁴

¹⁵ See 29 U.S.C. § 651 et seq.

¹⁶ 29 U.S.C. § 651(b).

¹⁷ *Id.* § 651(b)(3). The statute sets out a process for the promulgation, modification, and revocation of standards. See 29 U.S.C. § 655(b).

¹⁸ *Id.* § 651(b)(6).

¹⁹ *Id.* § 651(b)(7).

²⁰ *Id.* § 655(c)(1).

²¹ *Id.* § 655(c)(2); see also 29 C.F.R. § 1911.12(a)(2) (the ETS “shall be considered issued at the time when the standard is officially filed in the Office of the Federal Register.”).

²² *Id.* § 655(c)(3); see also 29 C.F.R. § 1911.12(a)(1).

²³ *Id.*; see also 29 C.F.R. § 1911.12(c).

²⁴ 29 C.F.R. § 1911.12(c).

Section 6(c) is noteworthy for several reasons. First, it “is mandatory in nature; once the appropriate findings are made, the agency ‘shall’ issues an ETS.”²⁵ Second, an ETS is “short-lived” and “triggers commencement of permanent rulemaking proceedings . . . and a permanent rule must issue ‘no later than six months’ after publication of the ETS.”²⁶ Third, ETS determinations are exempted from the Administrative Procedure Act’s rulemaking requirements.²⁷ Nevertheless, OSHA’s decision not to issue an ETS is subject to the APA’s arbitrary and capricious standard of review.²⁸

FACTUAL BACKGROUND AND ARGUMENT

The Spread of COVID-19 in Meat and Poultry Processing Plants

In December 2019, the first reports about COVID-19 surfaced in China with the first case in the U.S. reported on January 21, 2020.²⁹ COVID-19 is an infectious respiratory disease that “spreads primarily through droplets of saliva or discharge from the nose when an infected person coughs or sneezes.”³⁰ Transmission can also occur through tiny droplets that remain in the air even after the ill person is no longer near.³¹ Symptoms of COVID-19 include fever, tiredness, dry cough, shortness of breath, aches and pains, sore throat, and, to a lesser extent, diarrhea,

²⁵ *Int’l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Donovan*, 590 F.Supp. 747, 749 (D.D.C. 1984) (citing *Pub. Citizen Health Research Group v. Aucther*, 702 F.2d 1150, 1156 (D.C. Cir. 1983)).

²⁶ *Id.* (citations omitted).

²⁷ *Id.* (citations omitted).

²⁸ *Id.*

²⁹ Anita Patel, et al., *Initial Public Response and Interim Clinical Guidance for the 2019 Novel Coronavirus Outbreak – United States, December 31, 2019-February 4, 2020*, CDC Morbidity and Mortality Weekly Report (Feb. 7, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6905e1-H.pdf>.

³⁰ World Health Organization, *Coronavirus – Overview*, https://www.who.int/health-topics/coronavirus#tab=tab_1.

³¹ Johns Hopkins Medicine, *Coronavirus Disease 2019 vs. the Flu*, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu>.

nausea, or a runny nose.³² As a result of the ease of transmission, most states in the U.S. issued stay-at-home orders throughout March and early April, 2020.³³

As COVID-19 spread across the U.S., meat and poultry processing plants have become the focus of major outbreaks that threaten worker health and safety.³⁴ The first reported case of COVID-19 at a meat processing plant occurred in late March 2020.³⁵ One month later, “[m]ore than 150 of America’s largest meat processing plants operate in counties where the rate of coronavirus infection is already among the nation’s highest[.]”³⁶ The infection rate around these plants, which represent one-third of the nation’s biggest beef, pork and poultry processing plants, are “higher than those of 75% of other U.S. counties[.]”³⁷ As of April 27, 2020, outbreaks of

³² World Health Organization, *Coronavirus – Symptoms*, https://www.who.int/health-topics/coronavirus#tab=tab_3.

³³ Sarah Mervosh, et al., *See Which States and Cities Have Told Residents to Stay at Home*, *The New York Times* (last updated Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

³⁴ See e.g., Liz Crampton, *USDA leaves meat inspectors hunting for safety gear*, *Politico* (Apr. 22, 2020), <https://www.politico.com/news/2020/04/22/usda-meat-inspectors-safety-gear-201717>; Leah Douglas, *Mapping Covid-19 in meat and food processing plants*, *Food & Environment Reporting Network* (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>; Bibi van der Zee, Tom Levitt and Andrew Wasley, *‘No way food safety not compromised’: US regulation rollbacks during Covid-19 criticized*, *The Guardian* (Apr. 20, 2020), <https://www.theguardian.com/environment/2020/apr/20/no-way-food-safety-not-compromised-us-regulatory-roll-backs-during-covid-19-criticised>; Kyle Bagenstose, Sky Chadde, and Matt Wynn, *Coronavirus at meatpacking plants worse than first thought, USA Today investigation finds*, *USA Today* (Apr. 22, 2020), <https://www.usatoday.com/in-depth/news/investigations/2020/04/22/meat-packing-plants-covid-may-force-choice-worker-health-food/2995232001/>.

³⁵ Lydia Mulvany, Deena Shanker, and Isis Almeida, *The Workers Who Supply the World’s Food Are Starting to Get Sick*, *Bloomberg* (Mar. 26, 2020), <https://www.bloomberg.com/news/articles/2020-03-27/food-workers-getting-sick-is-the-latest-threat-to-world-supply>.

³⁶ Kyle Bagenstose, Sky Chadde, and Matt Wynn, *Coronavirus at meatpacking plants worse than first thought, USA Today investigation finds*, *USA Today* (Apr. 22, 2020), <https://www.usatoday.com/in-depth/news/investigations/2020/04/22/meat-packing-plants-covid-may-force-choice-worker-health-food/2995232001/>.

³⁷ *Id.*

COVID-19 have occurred in more than 30 plants run by Tyson Foods, JBS USA and Smithfield Foods.³⁸ Approximately 5,000 workers have been sickened at these and other plants and at least twenty have died.³⁹

At the Tyson Foods meat processing plant in Logansport, Indiana, at least 890 of the plant's 2,200 workers have tested positive for COVID-19.⁴⁰ This represents nearly 75 percent of the positive COVID-19 cases in Cass County, where Tyson's plant is located.⁴¹ In Nobles County, Minnesota, the number of COVID-19 cases grew from one case on April 13 to 940 on May 3.⁴² "The outbreak is centered around the massive JBS pork processing plant in Worthington, and it's the largest outbreak in Minnesota outside the Twin Cities and the largest by far relative to the county's population."⁴³ In Dakota City, Nebraska, 669 workers at Tyson Fresh Meats' beef plant have tested positive for COVID-19, which "represents over 15 percent of the Dakota City workforce."⁴⁴ "The workers also equals over 40 percent of the 1,526 total cases combined in Dakota and Woodbury counties."⁴⁵ In South Dakota, nearly 90 percent of the

³⁸ Taylor Telford and Kimberly Kindy, *As they rushed to maintain U.S. meat supply, big processors saw plants become covid-19 hot spots, worker illnesses spike*, The Washington Post (Apr. 25, 2020), <https://www.washingtonpost.com/business/2020/04/25/meat-workers-safety-jbs-smithfield-tyson/>.

³⁹ Ctrs. for Disease Control and Prevention, *COVID-19 Among Workers in Meat and Poultry Processing Facilities – 19 States, April 2020*, Morbidity and Mortality Weekly Report, at 1 (May 1, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e3-H.pdf>. (Note that these figures likely underestimate the number of infections and deaths because "not all states with COVID-19 cases in meat and poultry facilities submitted data for this report" and there is a "lag time in reporting to the local and state health departments"). *Id.* at 4.

⁴⁰ Richard Essex, *Nearly 900 at Tyson Foods plant test positive for coronavirus*, WISH-TV (Apr. 29, 2020), <https://www.wishtv.com/news/nearly-900-at-tyson-foods-plant-test-positive-for-coronavirus/>.

⁴¹ *Id.*

⁴² *MN COVID-19 latest: Death toll passes 400, 6,663 positive cases*, MPR News (May 3, 2020), <https://www.mprnews.org/story/2020/05/03/latest-on-covid19-in-mn>.

⁴³ *Id.*

⁴⁴ Dave Dreeszen, *Source: 669 Tyson workers at Dakota City, Nebraska, plant test positive for COVID-19*, Sioux City Journal (Apr. 30, 2020), https://siouxcityjournal.com/news/local/source-669-tyson-workers-at-dakota-city-nebraska-plant-test-positive-for-covid-19/article_fa2bdc32-97f3-535b-8a6e-2b50008758fe.html.

⁴⁵ *Id.*

state's COVID-19 cases “are from Minnehaha and Lincoln counties and about half are tied to Smithfield Foods['] [pork plant], where nearly 80% of workers are people of color[.]”⁴⁶

The spread of COVID-19 through meat and poultry processing plants illustrates the failure of industrial animal agriculture in the U.S., which prioritizes profits over worker health and safety. These failures not only put workers' health and safety at risk but also undermine food safety. For example, “as a wave of plants announce[d] closures, US meat plants are being granted permission to increase the speed of their production lines . . . despite warnings that the waivers for higher speeds on slaughter and processing lines will compromise food safety.”⁴⁷ In other words, in addition to the COVID-19 pandemic, doctors and nurses must be prepared for a spike in foodborne illnesses resulting from unsafe and unsanitary conditions at meat and poultry processing plants.

OSHA's Response to COVID-19 Pandemic and Immediate Need for an ETS

Although COVID-19 was spreading through meat and poultry processing plants for well over a month, it was not until April 26, 2020 that OSHA, in conjunction with the Centers for Disease Control and Prevention, issued specific guidance for meat and poultry processing workers and employers.⁴⁸ This guidance, however, is voluntary and, therefore, unenforceable. For example, the guidance says that employers “should” promote social distancing and “should” ensure regular cleaning and disinfecting of tools. Such non-binding measures are woefully insufficient to deter the spread of COVID-19 in meat and poultry processing plants.

Instead of unenforceable guidance, OSHA must immediately promulgate an ETS to protect all workers at meat and poultry processing plants. The COVID-19 pandemic certainly constitutes a “grave danger . . . from [a] new hazard[.]”⁴⁹ It should not be complicated for OSHA

⁴⁶ Arielle Zions, *Minority groups hit hardest by COVID-19 in South Dakota*, Rapid City Journal (Apr. 29, 2020), https://rapidcityjournal.com/news/local/minority-groups-hit-hardest-by-covid-19-in-south-dakota/article_ebc803cb-797f-5683-89ab-af0fad8b196.html.

⁴⁷ Bibi van der Zee, Tom Levitt and Andrew Wasley, *'No way food safety not compromised': US regulation rollbacks during Covid-19 criticized*, The Guardian (Apr. 20, 2020), <https://www.theguardian.com/environment/2020/apr/20/no-way-food-safety-not-compromised-us-regulatory-roll-backs-during-covid-19-criticised>.

⁴⁸ See, Ctrs. for Disease Control and Prevention, *Meat and Poultry Processing Workers and Employers: Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA)* (Apr. 26, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>.

⁴⁹ 29 U.S.C. § 655(c)(1).

to develop an ETS as it could largely be based on the guidance it has already published. Instead of being voluntary, however, the ETS would be mandatory and OSHA could inspect, take enforcement action, and assess civil and criminal penalties against plants that fail to comply with the ETS.⁵⁰ As stated above, at a minimum, an ETS must include the following:

- Each meat and poultry processing plant must develop a COVID-19 assessment and control plan.
- Each plant must implement physical distancing measures to protect workers. This requires workers to be at least six feet apart from each other throughout their shifts and the use of physical barriers to separate workers.
- Each plant must provide essential protective gear, including face masks and other protective equipment to prevent the spread of COVID-19.
- Each plant must prohibit sick workers from coming to work and continue to pay and provide health care for sick workers.
- Each plant must be required to slow line speeds if they pose a threat to worker or food safety.
- Each plant must educate and train workers on how to reduce the spread of COVID-19.
- Each plant must ensure regular cleaning and disinfecting of tools and equipment.
- Each plant must be required to notify workers of possible exposure if a worker is confirmed to have COVID-19 and carry out deep cleaning after confirmed cases.
- OSHA must increase its plant inspections to ensure compliance with the ETS and take necessary enforcement actions against plants in non-compliance.

Development of an ETS for meat and poultry processing plants is even more important in light of the fact that the President is purporting to use the Defense Production Act to delegate authority to order meat processing plants to stay open.⁵¹ Without a mandatory ETS in place that specifically focuses on the unique and grave threats from COVID-19, workers are unlikely to be protected and the spread of the virus throughout these plants and their surrounding communities is almost certain to worsen.

⁵⁰ See 29 U.S.C. §§ 657, 659, and 666.

⁵¹ See White House, *Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* (Apr. 28, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>; see also Liz Crampton and Gabby Orr, *Trump to order meat packing plants to stay open as worker deaths rise*, Politico (Apr. 28, 2020), <https://www.politico.com/news/2020/04/28/trump-to-order-meat-plants-to-stay-open-215555>.

CONCLUSION

OSHA is failing to meet its statutory duty of “assur[ing] . . . safe and healthful working conditions” in meat and poultry processing plants.⁵² The non-binding guidance it issued is insufficient to remedy this situation and the President’s executive order that is purporting to use the Defense Production Act to delegate authority to order these plants to stay open is almost certain to make a grave situation even worse. Therefore, OSHA must issue an ETS to protect workers at meat and poultry processing plants. Such mandatory, enforceable standards will provide much better protection to workers in these plants. In addition, if these workers are protected, it is likely to reduce the threat of foodborne illness outbreaks.

REQUEST FOR EXPEDITED REVIEW

Pursuant to 29 C.F.R. § 1911.12(c), OSHA “shall” expedite proceedings for an ETS. Given the rapid spread of COVID-19 and the grave danger it poses to workers in meat and poultry processing plants, Petitioners request that OSHA respond to this petition within seven (7) days. Failure to do so will be considered an unlawfully withheld or unreasonably delayed agency action.⁵³

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Respectfully submitted,



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⁵² See 29 U.S.C. § 651(b).

⁵³ See 5 U.S.C. § 706(1).

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