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Food Safety and Inspection Service
1400 Independence Avenue SW
Jamie L. Whitten Building, Room 350-E
Washington, DC 20250-3700

Re: Docket No. FSIS-2022-0014: Revised Guideline for Controlling Retained Water in Raw Meat and Poultry

Dear Mrs. Edelstein,

The National Chicken Council (NCC) appreciates the opportunity to comment on the *Revised Guideline for Controlling Retained Water in Raw Meat and Poultry* (Revised Guideline). NCC is the national, non-profit trade association that represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States. The Revised Guideline will have significant impacts on NCC member companies, while providing little to no justification as to why FSIS believes the changes are necessary or what issue the Agency is attempting to solve.

Since 2002, industry has followed FSIS guidance using FSIS Directive 6700.1 and the existing compliance guideline (Existing Guideline) on how to meet the regulatory requirements for calculating and declaring retained water in raw meat and poultry. In the recent issuance of the Revised Guideline, FSIS fails to identify any change in raw poultry or raw poultry processing related to retained water that is not adequately captured by the Existing Guideline which has been in place for more than two decades.

NCC understands the Agency asserts the new updates are “based on the latest scientific information,” according to the Revised Guideline. However, FSIS has provided no new scientific information, but merely a revised mathematical formula to justify the need for the Revised Guideline. As discussed below, concerns and implications regarding the Revised Guideline are significant. The Revised Guideline will impact thousands of product labels, impact product specifications, challenge customer and consumer expectations regarding label statements, and may even impact the industry’s ability to export chicken from the United States. Given the significant concerns and potential implications, the industry is unable to fully comment on the Revised Guideline and related formula change without additional information from the Agency regarding the basis for the Revised Guideline and an explanation for the development of the new formula. Industry respectfully asks FSIS to provide this information and further engage with industry to assess the claimed new science behind the Revised Guideline prior to implementing any changes.

The remainder of these comments highlight the known concerns and implications, including the following:

- The Agency is engaging in rulemaking without rulemaking;
- The Revised Guideline will cause inconsistencies between current and future retained water reporting with no product or processing changes;
- The Agency should clarify the revised calculations;
- Inconsistency with other Agency policies;
- The Revised Guideline may lead to consumer confusion;
- Potential impacts on trade and compliance with customer specifications; and
- The timeline proposed and cost analysis are inadequate.

Rulemaking without rulemaking

FSIS published its final rule, *Poultry Chilling Requirements* on January 9, 2001, which set limits for water retained by raw, single-ingredient meat and poultry products from post-evisceration processing, such as carcass washing and chilling.¹ Following issuance of this rule, FSIS released the Existing Guideline which, for the last two decades, has guided the industry on how to calculate retained water. In the Revised Guideline, FSIS is essentially changing the requirements of the Poultry Chilling Requirements rule without following rulemaking procedures under the Administrative Procedures Act (APA). To put it simply, today, a product bearing a retained moisture statement calculated following the Existing Guideline would be approved by FSIS. If the proposed updates to the Existing Guideline were to go into effect, FSIS would consider this exact same product bearing the exact same moisture declaration to be misbranded. Further, as we understand it, FSIS would not approve moisture protocols or retained moisture statements unless they were calculated following the Revised Guideline. FSIS is, in effect, amending its longstanding definition of “retained water.” This is the very definition of a substantive (or legislative) rule, and as such, requires full notice and comment rulemaking under the APA.²

Through the Revised Guideline, the Agency seeks to change the definition of retained water by modifying both the process for calculating the relevant moisture percentage and the formula used to calculate the moisture percentage. These changes set new standards and impose new requirements.

Further, the Revised Guideline reflects arbitrary and capricious Agency action in violation of the APA. Under the APA, Agency actions cannot be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³ Courts have held that Agency action is “arbitrary and capricious” when the Agency has “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁴ In determining whether an Agency action is arbitrary and capricious, courts review the information available in the administrative record.

¹ 66 Fed. Reg. 1750 (Jan. 9, 2001).

² 5 U.S.C. § 553(b).

³ 5 U.S.C. § 706(2)(A).

⁴ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

The proposed change to the retained moisture calculation reflects an arbitrary and capricious Agency action in that FSIS has failed to adequately support the need or rationale for the change and because FSIS will require companies to make retained moisture statements that are misleading. FSIS has not pointed to any material change in processing that makes the Existing Guideline no longer accurate nor has FSIS identified any consumer confusion around the current use of retained moisture statements. Further, FSIS has not provided any scientific evidence it asserts justifies the changes or has shown why the Existing Guideline is inconsistent with the requirement that product labels declare the percentage of moisture retained during processing. Moreover, FSIS's proposed calculation will create drastic and arbitrary changes to retained moisture declarations without any change to the actual products produced.

As explained in the remainder of these comments, the Revised Guideline is unnecessary, cost prohibitive, and will only serve to cause confusion. However, if the Agency chooses to move forward with the Revised Guideline, it should provide a response to stakeholder comments and do so through the full notice and comment rulemaking process.

Inconsistencies between current and future retained water reporting

Since 2002, industry has followed the Agency's Existing Guideline and labeled products with a retained water statement consistent with this guidance. There will be significant reporting and label differences between following the Existing Guideline and the Revised Guideline without an explanation as to why the Existing Guideline is no longer accurate. The new calculation, as proposed in the Revised Guideline, will result in significantly different results in retained water percentages. These results are not based on any changes in poultry processing or product formulation that could impact retained moisture, but solely on changes to the mathematical formula used in the calculation. These varied outcomes did not occur prior to the Agency's mathematical revisions. Retained water percentages will differ for a variety of reasons completely unrelated to the calculation methodology including, but not limited to: dwell time, antimicrobial used, pH of the chiller, amount of time from the chiller to point of pack, temperature in second processing, and type of chicken part. Even calculating the percent retained water for the exact same chicken part at two different establishments under the same corporate umbrella using the current calculation and the proposed Revised Guideline will be different. The bottom line is that differences in processes, including those related to pathogen control, will impact moisture retention and there is no way to "standardize" this process such that the same chicken part has the same retained moisture percentage, even under the Revised Guideline.

Further, it is up to individual establishments to determine if they want to use the dry or wet method as described in the Revised Guideline, and there will be variability between these two methods as well. More specifically, industry has demonstrated that using the Revised Guideline results in values that increase the retained moisture percentage from 50% to over 400% of the currently reported value. In other words, if the Revised Guideline goes into effect on April 1, 2025, a product labeled on March 14, 2025, and again on April 2, 2025, may have labels where the retained water percentage differs by as much as 400%. This is true even though products were manufactured at the same facility using the same production process and contain a substantially similar amount of retained water. A rational assumption would be that this label difference means the product now contains 400% more retained water than it used to, when, in fact, there has been no actual change in the product itself. The only change is the calculation in the Revised Guideline, which consists of an additional step on top of the Existing Guideline FSIS has had in place for the last two decades. The change comes without any indication that the Revised Guideline calculation is consistent with how the industry, customers, or consumers think about retained water or based on an error in FSIS's Existing Guideline. As such, prior to implementing the Revised Guideline on water retention, we urge FSIS to engage with consumers

and customers to fully understand how they interpret retained water statements and what those statements truly mean to end users.

While industry has made some changes in production practices over the last two decades, these changes were accompanied by updated retained water protocols (RWP) to adequately document shifts in retained water percentages. However, the industry has not made changes in production practices that would increase the amount of retained water in a product by the exaggerated percentages the Revised Guideline would produce – in some cases over 400%. When industry does make changes in production practices, these changes would be captured by compliance with the Existing Guideline through the submission of an updated RWP.

In fact, some of the percentages obtained by industry using the Revised Guideline represent moisture retention that is physically impossible to achieve. For example, even with product being injected with a marinade, where the objective is to achieve moisture pickup, industry processes cannot achieve such high numbers. It is difficult to understand how the Revised Guideline formula provides accurate water retention values when they vary so drastically from those achieved under the Agency's Existing Guideline, and when they reflect percentages that cannot be achieved.

It is also important to note that FSIS makes a distinction between the calculation of moisture percentage for products with water added incidentally due to processing and for products with solutions, including water, added purposefully to change the nature of the product. (ex. marination). As written, the Revised Guideline only covers single ingredient products. Water added incidentally is retained water. Aqueous solution added purposefully is also "retained" yet calculated based on formulation. As an example, 90 pounds of chicken blended with 10 pounds of solution (*i.e.*, 90% chicken and 10% solution) would be calculated using the formula:

$$X\% \text{ solution added} = \text{weight of added solution} \div \text{weight of product prior to treatment}$$

The resulting percent added solution would be 11%. This analysis has always been different than how FSIS required moisture percentage to be calculated when water is added purposefully to change the nature of the product, despite the fact that in both instances something is added to the product.

The percent of moisture retained in products for which water has been incidentally **or** purposefully added is specific to every processing establishment and every product. Extensive data collection is necessary to determine the maximum retained water to include on the product label. The maximum retained water determination allows for product-to-product variations. Values are established so that with 95% statistical confidence, any package retains no more water than is unavoidable and no more than stated on the label. Establishments have historically determined the retained water by weighing a sample of product before being exposed to water and after completion of the process to calculate the amount of retained water from processing. The Agency's Revised Guideline would change how establishments calculate this figure, which in turn reflects a change in how retained water is defined and how it must be declared. It therefore marks a change in substantive requirements, requiring rulemaking.

Clarification for revised calculations is needed

The only explanation industry received for the Revised Guideline is that some establishments subtract the pre-pack moisture percentages from the post-evisceration moisture percentages to calculate retained water. FSIS does not explain why this subtraction, which would yield the amount of retained water, is not correct. When using the "wet method" for calculating retained moisture, FSIS continues to use the same approach described above. It is when establishments use the drying method or

laboratory method that FSIS alters the mathematical equations without specific understanding of what has changed.

Industry would appreciate clarification on where the “100%” comes from in the denominator of the “dry basis moisture content calculation” and how it more accurately calculates retained moisture than the Existing Guideline.

2. **Dry basis moisture content** is the ratio of the moisture weight to the total weight of the sample described as a percentage:

$M_d = \text{weight of water} / \text{weight of the dry matter}$

When the laboratory analysis provides moisture content on a dry basis, the establishment would use the following formula to determine the retained water percentage.

$$\text{Percentage Retained Water} = (M_{\text{pre-pack}} - M_{\text{post-evisceration}}) / (100\% + M_{\text{post-evisceration}})$$

Example:

The laboratory determined that the **dry basis moisture contents** of post-evisceration and pre-pack carcasses are 194 percent and 209 percent, respectively.

$$\begin{aligned} \text{Percentage Retained Water} &= (M_{\text{pre-pack}} - M_{\text{post-evisceration}}) / (100\% + M_{\text{post-evisceration}}) \\ &= (209.0\% - 194.0\%) / (100\% + 194.0\%) \\ &= 5.0\% \end{aligned}$$

The calculation appears to present retained water as a percentage based on the original pre-intervention weight, rather than based on the finished product weight as declared in the net weight statement. This presents an extremely confusing point of reference, as a consumer would not know what the original weight was and would likely interpret the retained water percentage as a percentage of the finished product weight declared on the label, when in fact that would further overstate the amount of water picked up during processing.

Inconsistency with other Agency policies

The Revised Guideline causes confusion with, and may be inconsistent with, other Agency policies. For example, [FSIS Directive 6700.1](#) states that certain post-evisceration activities involving the use of water are not subject to the retained moisture declaration requirements of 9 C.F.R. § 441.10. Specifically, this Directive states:

- B. The following are examples of post evisceration processes involving the use of water that would not subject products to 9 CFR 441.10.....
- 3. Flushing the gizzard with water to remove digestive tract contents.

The Revised Guideline, however, does not address this policy, and it references applying the Revised Guideline to giblets at multiple points. The Revised Guideline is completely silent on how to account for moisture added through the flushing process addressed in Directive 6700.1. Likewise, it does not address how the policy in the Directive would apply to a situation where chilling is part of the process used to flush and wash the gizzard.

Revisions will lead to consumer confusion

Consumers are familiar with the retained moisture percentages shown on products and have been exposed to this information for over 20 years. As mentioned, the Revised Guideline will cause significant percentage changes to retained moisture declarations for the same product consumers have been purchasing for two decades. These percentage changes will occur even with no change to the

product itself. In other words, if the Revised Guideline goes into effect on April 1, 2025, a consumer who purchases the same product on March 30, 2025, and again on April 2, 2025, may see a label where the retained water percentage differs by as much as 400%. This is true even though the products were manufactured at the same plant using the same production process and actually contain the exact same or substantially similar amount of retained water. The consumer, though, would almost certainly interpret the change to mean that the product now contains 400% more retained water than it used to, leading to tremendous consumer confusion and significant and unfounded reputational harm to the company marketing the product.

When consumers see “may contain up to 5% retained water” on a package of chicken, they assume they are purchasing at least 95% chicken (that includes naturally occurring water) and at most 5% water picked up during processing. As written, the Revised Guideline could result in statements now reading “may contain up to 25% retained water” on a package of chicken when nothing has changed about the product. Consumers will be confused and concerned about these abrupt changes which, in turn, could lead to not only distrust in the industry, but also FSIS who approved the RWPs and created the long-standing, Existing Guideline. As such, we urge FSIS to engage with consumers and customers to fully understand how they interpret retained water statements and what they truly mean to end users.

Potential impacts on trade and customer specifications

Countries like Georgia limit the retained water in imported poultry. The European Union (EU), too, is considering implementing similar limits for imported poultry. The percentages obtained using the Revised Guideline have the potential to impact trade and the ability of the U.S. industry to export poultry products. Even if trading partners do not currently have standards in place, this significant change in reporting could influence the export of poultry products.

Additionally, in many cases, customers of NCC member companies include limits on retained water. With the changes in the Revised Guideline, NCC member companies will not be able to comply with customer specifications and may be in breach of contract. The potential loss of customers could be financially devastating to the entire industry but especially to small and very small poultry establishments.

The timeline for implementation and estimated cost impact are inadequate

Our members maintain thousands of Stock Keeping Units (SKUs) – many of which are required to have retained water statements printed on their labels. As stated in the Revised Guideline, companies must develop and maintain a RWP that has been approved by FSIS. FSIS has indicated that establishments have until April 1, 2025, to submit and receive approvals of their revised RWPs. This timeline will present a significant challenge for the regulated industry and FSIS, will impose substantial and needless costs on the industry, and will result in wasted packaging materials.

Label changes are inherently time and resource-intensive and require careful coordination and advance planning. Establishments typically maintain many months of pre-printed film, which has increased in recent years given the supply chain disruptions experienced during the COVID-19 pandemic. For some products, an establishment might maintain a year of label stock. Establishments would need time to work through current packaging supplies and order new supplies, or else existing stock would have to be needlessly sent to a landfill. Sending existing stock to a landfill is wasteful for any size establishment – large or small. It imposes financial costs and undermines sustainability efforts. Moreover, the Revised Guideline will require that the entire poultry sector (as well as other meat products impacted by the Revised Guideline) obtain new labeling and film supplies at the same time

(and as all FSIS-regulated establishments are preparing for the January 1, 2026, uniform labeling compliance date). This surge in demand will likely cause a backlog in packaging availability, given that there are a limited number of suppliers for these products. In addition, obtaining new pre-printed film takes time to manufacture given that dyes must be cast (this step in the manufacturing process is likely to cause the greatest delay).

In addition to the timeline, the Agency has not adequately considered the cost of making the labeling changes, costs which will only increase if the entire meat and poultry industry must update voluminous labels and film before the proposed deadline. This is especially true considering the industry will be forced to make these updates prior to the uniform compliance date.

At a minimum, we respectfully request that FSIS align the compliance date in the Revised Guideline with the uniform compliance date of January 1, 2026, or later depending on when the Agency finalizes revisions. The uniform compliance date was established by FSIS on December 20, 2022, as the compliance date for new meat and poultry product labeling requirements issued between January 1, 2023, and December 31, 2024. As explained above, the Revised Guideline very much imposes a new labeling requirement, and establishments understand they will be required to update their labels consistent with the Revised Guideline by the effective date. The uniform labeling compliance date is designed specifically to ensure that these types of mandatory labeling changes can be made in an organized, fair, and efficient manner. It makes no sense – and wastes substantial resources – to require companies to update thousands of labels with revised retained moisture statements by 2025, only to again have to update those same labels less than a year later. This is especially true where, as here, FSIS has not identified any issue, much less a time sensitive one, as the basis for the Revised Guideline.

Conclusion

In conclusion, given the substantial challenges with understanding and meeting the Revised Guideline, we respectfully ask that FSIS continue to engage with industry to resolve the numerous issues and concerns discussed above and provide clarification on the need for such change. The financial burden on industry is significant. Further, these changes may not only negatively impact NCC member companies, but also FSIS, and could spur distrust from consumers, customers, and potentially our trading partners. Given this, we also ask that FSIS delay implementation of the Revised Guideline to allow more time for all entities involved to fully understand and correctly implement what changes may be necessary. We agree that all chicken products must be correctly labeled, and we will work with the Agency to ensure that all chicken products produced meet the required standards.

Respectfully submitted,



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