



Making It Up as They Go Along

Swarms of Officers – November 9, 2009

Since the United States Congress enacted the Administrative Procedures Act (APA) into law in 1946, the American people have been bombarded by regulations issued by the federal bureaucracy. Federal agencies are only supposed to implement laws contained in the CFR (*Code of Federal Regulations*). As the following account illustrates, they have been known to make up and implement regulations that are not found in the CFR in violation of the APA.

Anyone that has had a similar experience dealing with a state or federal agency that has made up laws as it went along is encouraged to contact FTCLDF by email at info@farmtoconsumer.org or by phone at 703-208-3276.

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My husband spoke with you a few weeks ago regarding some issues our very small meat processing plant is having with USDA-FSIS [USDA Food Safety Inspection Service]. [He] was supposed to e-mail you with some information regarding our problems, but he has been swamped, and the USDA appeared to be backing off a little, so it all got put on the back-burner. Now the USDA is back to pulling their normal crap and I'm fed up, so I'm going to provide you with some information [about what is happening] . . .

One of our biggest concerns with USDA-FSIS revolves around their National Residue Program. This is a testing program that the USDA requires all federally inspected meat processing plants to participate in. Samples are collected from various species of meats to test for antibiotic residue in the meat. We have been told [that] the number of samples collected at each plant is random, based on the plant's slaughter volume.

It wasn't a "feel good" sort of meeting! Shortly after that meeting took place, we noticed a significant increase in the number of lab samples being collected from our plant.

Last winter, we noticed that the number of samples collected from our very small plant seemed quite high. At a meeting with our Frontline Supervisor and Deputy District Director, my husband brought this up and asked if they could look into it. [He] also had some other complaints that he addressed during that meeting, mainly in regards to our then-new Inspector In Charge (IIC). It wasn't a "feel good" sort of meeting! Shortly after that meeting took place, we noticed a significant increase in the number of lab samples being collected from our plant.

[My husband] has always hated to complain to USDA-FSIS because no matter what, things always seemed to get worse for us afterwards. We tolerated the increased testing until about April, when we found the contact information for someone at the USDA lab that was directly involved with the National Residue Program. [He] started out with a phone call, and after being passed around to several different people, he finally got someone to look into our situation. The response we got from the USDA lab included these comments:

Residue Branch Comments:

- The number of young chickens sampled shows an increase of 150% in 2009 when compared with the number sampled in 2008. Of interest is the fact that the sample requests indicate a 150% increase is only for the first four months of 2009 while the number tested for 2008 is for the entire year.



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- There is no difference between the 2008 and 2009 National Residue Program's scheduled sample sizes for poultry, ducks or rabbits that could justify this increase of young chicken samples analyzed in 2009 or rabbits in 2009.

So, the agency acknowledged that our testing frequency had increased significantly in the first 3 months of 2009 (after we had asked our Frontline Supervisor and Deputy District Director to look into the matter for us) and they couldn't account for why. We spent the next 2 months going back and forth via e-mail with the lab about this, and in early June we were told that they were going to have one of their statistical analysts look into this for us.

By using the information that USDA provides, their testing statistics don't add up.

Our testing frequency remained extremely high (possibly even higher than before) so I contacted the lab again in September. My first e-mail was ignored, so I e-mailed them again on September 25 and carbon copied the e-mail to my congressional aide. I got an apology from the lab within minutes of sending that e-mail, and was now told that they

were trying to find the appropriate staff person to address our concerns. Our last e-mail to the lab was on October 23, and they still are not offering us any solutions. They did, however, provide us with an updated list of all of the samples that they have collected from our very small plant.

By using the information that USDA provides, their testing statistics don't add up. If every small plant in the country is being tested as frequently as we are, then the large plants aren't being tested at all. Or, since we raise our animals without antibiotics, we are being tested at a higher frequency to pad the results. Or, the USDA is retaliating against us for complaining. Or, the USDA is intentionally (and knowingly) creating an economic hardship in a very small plant. Here's the numbers (national slaughter numbers are taken from USDA 2008 Blue Book):

Rabbits

Total number slaughtered nationally - 310,093

Total number slaughtered by us - approx. 1,000 (slaughter ratio 1:310)

Total number of test ran - 45

Number of samples collected from us so far this year - 5 (testing ratio 1:9)

Ducks

Total number slaughtered nationally - 28,026,675

Total number slaughtered by us - approx. 10,000 (slaughter ratio 1:2,802)

Total number of tests ran - 45 (or 345, according to a USDA lab source, even though I had previously been told that there were no changes in duck samples from 2008 to 2009, and there were only 45 tests ran in 2008)

Number of samples collected from us so far this year - 6 (testing ratio 1:7.5)

Young Chickens

Total number slaughtered nationally - 8,901,364,574

Total number slaughtered by us - approx. 40,000 (slaughter ratio 1:222,534)

Total number of tests ran - 600

Number of samples collected from us so far this year - 7 (testing ratio 1:86)

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OK, so it's pretty obvious to us that the numbers don't add up and the USDA isn't going to do anything about it.

Now, out of all of the testing that is done, the rabbits are the species that bother us the most. We have a market for whole rabbits. When the USDA has to collect a rabbit sample, they mutilate the rabbit to obtain enough muscle tissue to perform their tests. And they require organs & tissue from 6 different rabbits, so each time they test we lose 6 rabbits (which we would sell for approximately \$17.85 each for a total of \$107.10). There were weeks when we would only slaughter 30 rabbits, and the USDA would take 6 of those so we would have to short our customers.

While reading the regulations for rabbit slaughter, [my husband] realized that there is [nothing] in the regulations (9 CFR 354) that gives the USDA authority to destroy, confiscate, mutilate, etc rabbits for testing.

To make it even more frustrating, we are required to pay the USDA inspectors for our rabbit slaughter time, since rabbits are considered non-amenable which is about \$60/hour. Our inspector-in-charge is a control freak and he will not allow our line inspectors to collect the lab samples (even though they were sent to special training back in February so they could perform such tasks) so, not only do we have to pay \$60/hour for the line inspector, but we also have to pay \$60/hour for our inspector-in-charge to collect the samples, which takes him about 1/2 an hour, or an additional \$30.

It gets even better! While reading the regulations for rabbit slaughter, [my husband] realized that there is [nothing] in the regulations (9 CFR 354) that gives the USDA authority to destroy, confiscate, mutilate, etc rabbits for testing. It is specifically spelled out in both the red meat and poultry regulations that the USDA can take product without compensation for testing; however, it is not addressed in the rabbit regulations.

[My husband] called the USDA Technical Service Center (part of the USDA's small-plant outreach program that is supposed to answer plant owner questions and help to interpret the regulations) and, lo and behold, they couldn't find any justification in the regulations for the USDA to be able to ruin any of our rabbits either. They suggested that [my husband] contact, the deputy administrator of the Food Safety & Inspection Service. [My husband] sent [the deputy administrator] an e-mail on Oct. 19th and received a response today that said "Sorry I am slow in responding. We will be back to you as soon as possible. Again, I apologize."

I'm guessing that [the deputy administrator] may have heard of us before because a few months back our inspector-in-charge presented us with a new USDA directive that said that we had to provide them with a "pen card" for our red meat slaughter. Basically, the inspectors at the large plants really had no idea of how many animals they were performing antemortem inspection on, so the agency decided that the plants are now responsible for providing the inspectors with a form before each slaughter that states how many animal of each species are being presented for slaughter. In the past, it was the responsibility of the USDA to provide the form and to fill it out. This occurred in the midst of our inspector-in-charge being extremely picky, so I read the regulations (9 CFR 307 & 9 CFR 309) and could not find anything that gave them the authority to make us provide this new form.



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I'm frustrated at this point because, whenever we have a legitimate complaint, the powers that be at the USDA-FSIS either completely ignore it, or they find other things to harass us about.

To date, I still haven't heard anything back from the USDA.

I presented our inspector-in-charge with a written request for either the regulation that gave them the authority to make us provide this new form, or an OMB control number for the form. An OMB control number would have convinced me that the USDA had gone through the proper paperwork channels at least. I waited a few weeks, and asked our inspector-in-charge about my request. He requested that I e-mail him the letter so he could forward it to the appropriate people. The original letter was presented to our inspector-in-charge on August 27, 2009. I e-mailed it to him on September 14. I discussed it with our Frontline Supervisor in September also.

I'm frustrated at this point because, whenever we have a legitimate complaint, the powers that be at the USDA-FSIS either completely ignore it, or they find other things to harass us about. I've gone through the chain of command and it gets me no where! I don't know what else to do at this point. The USDA will not provide me with answers, nor will they change their actions. Any suggestions?