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Description of document: US Department of Justice (DOJ) Antitrust Division  
Business Review Letter giving permission to USDA to  
Oversee a Voluntary Swine Depopulation Program during  
the COVID-19 Pandemic 2020

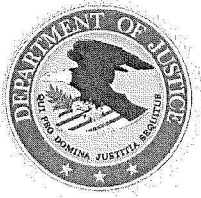
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September 30, 2021

BY EMAIL

Re: Freedom of Information Act Request No. ATFY21-124

This letter is a final response to your July 25, 2021 Freedom of Information Act (“FOIA”) request to the Department of Justice Antitrust Division for a copy of the Business Review Letter issued by the Antitrust Division that gave permission to the United States Department of Agriculture (“USDA”) to oversee a voluntary swine depopulation program during the COVID epidemic and a copy of any correspondence or emails from USDA regarding this Letter since April 2020. Your request was received and assigned control number ATFY21-124 on July 26, 2021. Please refer to this control number in any future correspondence regarding your request.

We are enclosing 51 pages of documents responsive to your request. Thirty-three pages are released in full and eighteen pages released in part. Redacted portions of certain of these documents reflect attorney work product and the deliberative process of Antitrust Division staff, and information the disclosure of which would constitute a clearly unwarranted invasion of an individual’s personal privacy, and are withheld from public disclosure pursuant to 5 U.S.C. §§ 552(b)(5) and (6), respectively.

Because 31 pages, originated with the USDA, we have referred that material to the USDA for processing and direct response to you. You may contact the USDA by writing to Departmental FOIA Officer, United States Department of Agriculture, 1400 Independence Avenue, SW, South Building, Room 4104, Washington, DC 20250-0706 or email at [USDAFOIA@usda.gov](mailto:USDAFOIA@usda.gov).

If you are not satisfied with the Antitrust Division's determination in response to this request<sup>1</sup> you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

You may contact Wayne Foster, FOIA Public Liaison, at the telephone number listed above for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services ("OGIS") at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

/s/

Kathy Hsu  
Attorney Advisor  
FOIA/Privacy Act Unit

Enclosures

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<sup>1</sup> For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

April 29, 2020

**VIA ELECTRONIC DELIVERY**

The Honorable Makan Delrahim  
Assistant Attorney General  
U.S. Department of Justice  
Main Justice Building, Room 3109  
950 Pennsylvania Ave NW  
Washington, DC 20530  
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**Re: Urgent COVID-19-Related Request for a Business Review Letter**

Dear Mr. Delrahim:

On behalf of the National Pork Producers Council (“NPPC”), its affiliated state associations, and its member hog farmers, we write to seek a Business Review Letter related to the COVID-19 crisis. NPPC wishes to confirm that its efforts to keep pork products available for America’s tables and to facilitate the orderly euthanization of hogs for which there is no market do not violate the antitrust laws. Due to the crisis that hog farmers face in this rapidly changing environment, NPPC respectfully requests that the Antitrust Division issue a favorable response on an expedited basis, pursuant to the Department of Justice and the Federal Trade Commission’s Joint Antitrust Statement Regarding COVID-19 (“March 24 Joint Statement”).

The NPPC is the nation’s leading association for pork producers. Through its national offices in Des Moines, Iowa and Washington, DC, and its 42 affiliated state associations, the NPPC works on behalf of America’s 60,000 hog farmers to ensure that the U.S. pork industry can responsibly provide high-quality pork to consumers. NPPC is funded by investments made through voluntary producer payments. NPPC’s investors, the equivalent of members, include independent hog farmers which vary in size and scope of operation, as well as vertically-integrated pork packing companies who own hogs. Through public-policy outreach, NPPC fights for reasonable legislation and regulations, and protects the livelihood of America’s hog farmers.

The current situation is an unprecedented, dire national emergency. The SARS-CoV-2 coronavirus and the disease it causes (“COVID-19”) have impacted all sectors of American industry. The supply of meat and poultry is no exception—the President has determined that meat and poultry are “a scarce and critical material essential to the national defense.”<sup>1</sup> Similarly, the

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<sup>1</sup> Attachment 1, 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, Exec. Order No. \_\_.

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Antitrust Division has recognized that “agriculture is an essential part of the American economy” and “well-functioning agricultural markets are not only a matter of economic efficiency, but a matter of national security and public health.”<sup>2</sup>

Yesterday, President Trump issued an Executive Order, invoking the Defense Production Act of 1950, and delegating broad authority to the Secretary of Agriculture (“USDA”) to respond to the crisis facing the meat and poultry supply chain. (Attachment 1, “April 28 Executive Order”). The President found that, “[i]t is important that processors of beef, pork, and poultry (‘meat and poultry’) in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans. However, outbreaks of COVID-19 among workers at some processing facilities have led to the reduction in some of those facilities’ production capacity. . . . Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency.”<sup>3</sup> Accordingly, pursuant to Section 101(b) of the Defense Production Act of 1950, the President delegated to USDA the power to “take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA.”<sup>4</sup> Relatedly, the April 28 Executive Order directed that the “Secretary of Agriculture shall use the authority under section 101 of the Act, in consultation with the heads of such other executive departments and agencies as he deems appropriate, to determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry, consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA.”<sup>5</sup>

Prior to the April 28, 2020 Executive Order, the USDA’s Animal and Plant Health Inspection Service (“APHIS”) issued a statement concerning its work in response to the COVID-19 crisis (Attachment 2, “USDA Statement”).<sup>6</sup> There, the USDA emphasized that, “American livestock and poultry producers are facing an unprecedented emergency due to COVID-19, particularly with the closing of meat processing plants in several states.”<sup>7</sup> Among other things, USDA committed to “leading the federal response by working in coordination with the Vice President’s Task Force, the CDC, OSHA, Department of Labor, industry, state and local governments, and others across the federal family to mitigate the impacts of COVID-19 on

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\_\_ Fed. Reg. \_\_ § 1 (2020), <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>; see 50 U.S.C. § 4511(b).

<sup>2</sup> U.S. Dep’t of Justice., *Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward* 2 (May 2012) (quoting Christine A. Varney, Assistant Att’y Gen., U.S. Dep’t of Justice, *A Shared Vision for American Agricultural Markets* 2 (Mar. 12, 2010)), <https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf>.

<sup>3</sup> April 28 Executive Order § 1.

<sup>4</sup> *Id.*

<sup>5</sup> April 28 Executive Order § 2.

<sup>6</sup> Attachment 2, USDA, Animal & Plant Health Inspection Serv., *USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures* (Apr. 24, 2020), [https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2020/sa-04/meat-processing-coordination-center](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2020/sa-04/meat-processing-coordination-center).

<sup>7</sup> *Id.*

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producers” and to “establish[] a National Incident Coordination Center to provide direct support to producers whose animals cannot move to market as a result of processing plant closures due to COVID-19.”<sup>8</sup>

As discussed more fully below, NPPC believes a coordinated industry and governmental response is necessary to bring packing plant capacity back online as quickly and safely as possible, and to assure an uninterrupted supply chain of pork from farms to grocery stores. Restarting of capacity will help to minimize the need for euthanization of hogs. Nevertheless, NPPC, USDA, and industry analysts understand that the need to euthanize a large number (approximately 700,000 per week) of hogs will be unavoidable.<sup>9</sup> Accordingly, NPPC and its members also seek a coordinated implementation of an orderly euthanization process that is consistent with legal and ethical requirements.

NPPC appreciates the Antitrust Division’s recognition that responding to the COVID-19 crisis “will require unprecedented cooperation between federal, state, and local governments and among private businesses,” which is a “necessary response to exigent circumstances [to] provide Americans with products or services that might not be available otherwise.”<sup>10</sup> That cooperation between the public and private sectors is necessary to continue feeding the United States and to ensure the humane treatment of its livestock.

## 1. Background

In response to the COVID-19 crisis, a number of large, primary pork packing plants have shut down.<sup>11</sup> Others are operating at severely diminished capacity, both to protect their employees and under threat of sanctions by states and localities.<sup>12</sup> In total, as of today, about 44% of pork processing capacity is offline. The price for hogs has crashed and is projected to remain significantly below average throughout 2020. Hog farmers were projected to lose almost \$5 billion

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<sup>8</sup> *Id.*

<sup>9</sup> Jacob Bunge & Kirk Maltais, *Pork Industry, USDA Discuss Euthanizing Hogs After Coronavirus Closes Plants*, WALL STREET JOURNAL (Apr. 27, 2020) (“The industry typically slaughters around 510,000 pigs daily for bacon, hams and sausage. Covid-19 outbreaks among plant workers have forced closures of facilities that typically process roughly one-fifth of the daily total, or 105,000 pigs a day, leading to a backup on farms and raising the prospect of having to euthanize them and then render or bury the carcasses.”), <https://www.wsj.com/articles/pork-industry-usda-discuss-euthanizing-hogs-after-coronavirus-closes-plants-11588015611>.

<sup>10</sup> March 24 Joint Statement.

<sup>11</sup> See Jacob Bunge et al., *Grocers Hunt for Meat as Coronavirus Hobbles Beef and Pork Plants*, WALL STREET JOURNAL (Apr. 23, 2020), <https://www.wsj.com/articles/grocers-hunt-meat-as-coronavirus-hobbles-beef-and-pork-plants-11587679833>.

<sup>12</sup> See, e.g., Chauncey Alcorn, *Tyson Will Close Its Biggest Pork Plant After Workers Call Out Sick With Coronavirus*, CNN BUSINESS (Apr. 22, 2020) (quoting CEO of Smithfield Foods stating, “It is impossible to keep our grocery stores stocked if our plants are not running”), <https://www.cnn.com/2020/04/22/business/tyson-pork-plant-iowa-coronavirus/index.html>; Danielle Wiener-Bronner, *One of the Largest Pork Processing Facilities in the US is Closing Until Further Notice*, CNN BUSINESS (Apr. 13, 2020), <https://www.cnn.com/2020/04/12/business/meat-plant-closures-smithfield/index.html>.

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collectively, even before packing facilities began to close.<sup>13</sup> At the current pace, hog farmers, their families, and their communities face grave economic consequences resulting from decreased packer capacity.

The reduced foodservice and restaurant demand for pork products and the limited processing capacity in the pork supply chain have caused an overwhelming oversupply of live hogs in the United States, in turn severely decreasing the value of each hog. Indeed, an economist in the industry notes, “We haven’t seen a situation in our lifetime where the industry has contracted as quickly as we have seen in the last month.”<sup>14</sup> Pork packing companies are exercising the force majeure clauses in their contracts with hog farmers because the sharp reduction in pork plant capacity precludes them from accepting the total number of hogs for which they contracted.

The U.S. pork industry utilizes a just-in-time production system and only hogs of a certain size fit within equipment used on processing plant production lines. Due to the severely decreased national pork packing capacity caused by the pandemic, thousands of hog farmers across the country are unable to send their hogs into the food chain when they reach market weight. As such, there are now hundreds of thousands of hogs across the country that cannot be sold and harvested as they would be in the ordinary course of business absent the pandemic. Moreover, as these hogs continue to grow and exceed a certain weight of about 330 pounds, they are no longer marketable—no one will buy them as they do not fit on the production line equipment at the packing plants. With no packing company able to buy such hogs, producers will have little choice but to humanely euthanize and then attempt to dispose of these animals. It is a tragic choice, but one that thousands of hog farmers are being forced to make because of COVID-19 closures of pork packing facilities.

The prospect of hog farmers across the country being forced to euthanize thousands of unmarketable hogs poses numerous challenges that will require an urgent response from all levels of government and the industry itself if this crisis is to be handled responsibly. In the ordinary course, hog farmers do not euthanize or dispose of large numbers of hogs. Instead, they sell their hogs to packers who operate facilities that harvest them and distribute the meat in the food supply chain. Thus, hog farmers generally lack the knowledge, equipment, and facilities needed to humanely euthanize large numbers of animals, and then dispose of them in a manner that mitigates the environmental impact. Hog farmers care passionately about the humane care and treatment of their animals. Yet, none have ever faced a challenge like this before and will require education and guidance regarding methods, protocols, equipment, and processes to humanely euthanize an unprecedented and unexpected number of unmarketable hogs.

The meat packing industry is in a unique position to offer euthanasia services to producers who have hogs that have grown too large to satisfy processing specifications required to be processed at existing facilities. Some facilities have already volunteered to help with the process of humanely euthanizing animals. In areas where such facilities are unavailable, it may be

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<sup>13</sup> See NATIONAL PORK PRODUCERS COUNCIL, *Hog Farmers Face COVID-19 Financial Crisis* (Apr. 14, 2020), <https://nppc.org/hog-farmers-face-covid-19-financial-crisis/>.

<sup>14</sup> Bunge, *supra* note 11 (quoting Will Sawyer, CoBank Economist).

necessary to work with veterinarians to develop processes and protocols by which producers who choose to do so can humanely euthanize their unmarketable animals themselves.

Similarly, disposing of thousands of euthanized animals will pose significant challenges. State and local laws may dictate how and where producers can dispose of such animals, as well as what forms of euthanasia may implicate local animal abuse laws. In some situations, producers may be able to safely dispose of animals on their farms, while in others, it may be preferable to utilize off-site locations. Again, regardless of which disposal methods are best in each area, to ensure that animals are disposed of in an environmentally responsible manner, the NPPC, working under the direction and supervision of the USDA and state and local officials, must be prepared to provide clear and consistent guidance with regard to how producers should dispose of these animals. The potential health and safety impact on Americans is real and immediate without an extraordinary response to this crisis.

NPPC believes a coordinated approach to euthanization and disposal among private industry and federal, state, and local governmental officials is necessary to comply with myriad legal and ethical constraints. Uncoordinated euthanasia may also result in too many hogs being euthanized.

## **2. The Proposed Conduct**

In conjunction with officials from the USDA, relevant state and local governments, the National Pork Board, the American Association of Swine Veterinarians and the Swine Health Information Center, pork packing companies, and guidance from NPPC's antitrust counsel, NPPC and its members seek to discuss and coordinate activities to: (1) work to bring pork packing capacity back online as quickly and safely as possible, and to assure an uninterrupted supply chain of pork from farms to grocery stores; (2) implement an orderly euthanization and disposal process that is consistent with legal and ethical requirements, with NPPC acting as an informational clearinghouse for farmers with respect to methods, protocols, equipment, processes, and the like; (3) assist USDA/APHIS, and state and local government representatives, in communicating with farmers who may need assistance humanely euthanizing and disposing of unmarketable hogs; and (4) help USDA/APHIS, and state and local government representatives develop policies and initiatives designed to address the logistical, economic, ethical, and environmental challenges pork-processing facility closures and capacity constraints caused by the COVID-19 outbreak have caused for hog farmers. NPPC envisions that most discussions will not touch on competitively sensitive matters (for example, scientific and logistical information about euthanization). NPPC also expects that most discussions will include government representatives or be at the direction of government representatives. Nevertheless, to respond quickly and flexibly to this crisis, it may be necessary for discussions to take place among hog farmers; among pork packers; and among hog farmers and pork packers without government officials present (collectively, "Proposed Conduct").



NPPC commits to follow several safeguards to assure antitrust compliance:

- (a) Any collaboration between and among NPPC and hog farmers related to the supply of hogs will be limited to that necessary to coordinate supply chain issues caused by the COVID-19 crisis and will not stray into competitively sensitive areas beyond that necessary to effectuate the response to the crisis;
- (b) NPPC will not facilitate any coordination or discussion of prices between NPPC members, and will prohibit any discussion of prices at meetings involving competitors;
- (c) While discussion of euthanization will be necessary, absent direct government participation, NPPC will not facilitate any coordination or discussion between NPPC members about the number of hogs to be euthanized by any individual farmer, and will prohibit any discussion of specific euthanization numbers at meetings involving competitors;
- (d) NPPC and hog farmers will not use any collaboration to engage in COVID-19 profiteering;
- (e) NPPC's collaborations will be limited to the time period necessary to respond to COVID-19 related pork supply chain issues.

NPPC commits to follow these safeguards at all times and will work with the Antitrust Division to ensure necessary oversight. Importantly, the Proposed Conduct will be limited in duration and scope—it will only occur as long as COVID-19 substantially impairs pork processing capacity. NPPC hopes and anticipates that this current COVID-19 situation will only last for approximately up to six months, depending on the duration of the ongoing pandemic. Due to the fast-moving and ever-changing nature of the COVID-19 crisis, the nature of the assistance the NPPC may be required to provide to help hog farmers responsibly address the crisis is continuing to evolve in real time. Thus, the Antitrust Division's review of the NPPC's behavior may require flexibility on the part of the Antitrust Division and the NPPC.

### 3. Analysis

NPPC believes the Proposed Conduct does not violate the antitrust laws. First, much of the Proposed Conduct will simply not raise antitrust concerns at all, as it will relate to non-competitively sensitive issues, such as medical and technical information, availability of euthanization services, legal and ethical requirements for euthanization, health and safety information, and the like. To the extent that discussions involving competitors get into competitively sensitive topics, the Proposed Conduct is legal as (1) conduct compelled by or taken to assist a federal agency and state authorities; and (2) a pro-competitive competitor collaboration.

- (a) First, as the Antitrust Division recently affirmed, "Conduct by federal agencies is not subject to scrutiny under the antitrust laws. Courts have extended this immunity to conduct by private parties acting individually or together when (i) the collaboration is compelled by an agreement with a federal agency or a clearly

defined federal government policy and (ii) a federal agency supervises the conduct. The Department will not challenge conduct that satisfies this standard in responding to the COVID-19 pandemic and its aftermath.”<sup>15</sup> Moreover, “[c]ollaboration among competitors in aid of a federal agency, even if it does not satisfy the standard described above, may still offer unique benefits and therefore be consistent with the antitrust laws.”<sup>16</sup> Similarly, the state action doctrine immunizes activity that is “clearly articulated and affirmatively expressed as state policy,” and (2) “actively supervised” by the state.<sup>17</sup> NPPC intends to undertake the Proposed Conduct pursuant to the April 28 Executive Order, and at the direction and supervision of the USDA and state and local government officials.<sup>18</sup> Thus, the Proposed Conduct qualifies for antitrust immunity.

- (b) Second, the Proposed Conduct is a bona fide pro-competitive competitor collaboration.<sup>19</sup> The Antitrust Division has recognized the pro-competitive nature of competitor collaborations that are designed to increase market output, and achieve efficiencies.<sup>20</sup> The Proposed Conduct and any ancillary collaborations are purposefully designed to achieve the long-term pro-competitive purpose of maintaining an adequate pork supply in the U.S. market during the COVID-19 crisis. The need to euthanize a large number of surplus hogs is unfortunately inevitable. By definition, however, hogs to be euthanized will be those that are unmarketable to processors and have little value. Thus, the Proposed Conduct will not result in the reduction of marketable supply. Moreover, implementing an orderly euthanization process through an NPPC-government collaboration will avoid inefficient and potentially unnecessary euthanizations by farmers, who do not specialize in euthanizing large numbers of hogs. Thus, the Proposed Conduct is likely to increase market efficiencies. Finally, the Proposed Conduct is a “necessary response to exigent circumstances” to “provide Americans with products . . . that [will] not be available otherwise.”<sup>21</sup>

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<sup>15</sup> Letter from Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice, to Lori A. Schechter, McKesson Corporation, et al. (Apr. 4, 2020), <https://www.justice.gov/atr/page/file/1266511/download>.

<sup>16</sup> *Id.* (citing Letter from J. Mark Gidley, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Stuart M. Pape, Patton, Boggs & Blow (Jan. 14, 1993)).

<sup>17</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

<sup>18</sup> See Letter from Lori A. Schechter, McKesson Corporation, et al., to Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice (Mar. 30, 2020) (outlining similar safeguards), <https://www.justice.gov/atr/page/file/1266516/download>.

<sup>19</sup> Such collaborations are subject to the rule of reason. See Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 8–9 (Apr. 2000), <https://www.justice.gov/atr/page/file/1098461/download>.

<sup>20</sup> See *id.* at 6.

<sup>21</sup> March 24 Joint Statement.

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April 29, 2020

WHITE & CASE

#### 4. Conclusion

Hog farmers are critical infrastructure and keeping pork products available for the public is a national security issue. Hog farmers and the pork industry are in a disastrous situation caused by circumstances completely beyond their control. The Proposed Conduct would be carried out pursuant to government direction and supervision and be limited in scope and duration. We therefore request an expedited Business Review Letter confirming that the Antitrust Division has no present intention to bring an enforcement action against the Proposed Conduct.

Sincerely,

(b)(6)

Martin M. Toto  
David E. Bond  
Sean M. Sigillito

Enclosures

cc: The Honorable George Ervin "Sonny" Perdue, III  
Secretary, U.S. Department of Agriculture

Neil Dierks  
Chief Executive Officer  
National Pork Producers Council

# ATTACHMENT 1

EXECUTIVE ORDERS

**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**

LAND & AGRICULTURE

Issued on: April 28, 2020



By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the “Act”), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. Policy. The 2019 novel (new) coronavirus known as SARS-CoV-2, the virus causing outbreaks of the disease COVID-19, has significantly disrupted the lives of Americans. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak), I declared that the COVID-19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. Since then, the American people have united behind a policy of mitigation strategies, including social distancing, to flatten the curve of infections and reduce the spread of COVID-19. The COVID-19 outbreak and these necessary mitigation measures have taken a dramatic toll on the United States economy and critical infrastructure.

It is important that processors of beef, pork, and poultry (“meat and poultry”) in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans. However, outbreaks of COVID-19 among workers at some processing facilities have led to the reduction in some of those facilities’ production capacity. In addition, recent actions in some

States have led to the complete closure of some large processing facilities. Such actions may differ from or be inconsistent with interim guidance recently issued by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor entitled “Meat and Poultry Processing Workers and Employers” providing for the safe operation of such facilities.

Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency. Given the high volume of meat and poultry processed by many facilities, any unnecessary closures can quickly have a large effect on the food supply chain. For example, closure of a single large beef processing facility can result in the loss of over 10 million individual servings of beef in a single day. Similarly, under established supply chains, closure of a single meat or poultry processing facility can severely disrupt the supply of protein to an entire grocery store chain.

Accordingly, I find that meat and poultry in the food supply chain meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA. Under the delegation of authority provided in this order, the Secretary of Agriculture may identify additional specific food supply chain resources that meet the criteria of section 101(b).

Sec. 2. Ensuring the Continued Supply of Meat and Poultry. (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the authority of the President to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and to implement the Act in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, 4559, 4560), is delegated to the Secretary of Agriculture with respect to food supply chain resources, including meat and poultry, during the national emergency caused by the outbreak of COVID-19 within the United States.

(b) Secretary of Agriculture shall use the authority under section 101 of the Act, in consultation with the heads of such other executive departments and agencies as he deems appropriate, to determine the proper nationwide priorities and allocation of all the materials, services, and

facilities necessary to ensure the continued supply of meat and poultry, consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA.

(c) The Secretary of Agriculture shall issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,

April 28, 2020.

# **ATTACHMENT 2**



# **USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures**

American livestock and poultry producers are facing an unprecedented emergency due to COVID-19, particularly with the closing of meat processing plants in several states. USDA is leading the federal response by working in coordination with the Vice President's Task Force, the CDC, OSHA, Department of Labor, industry, state and local governments, and others across the federal family to mitigate the impacts of COVID-19 on producers. We will continue to seek solutions to ensure the continuity of operations and return to production as quickly, safely and as health considerations allow at these critical facilities.

While this work continues, the USDA's Animal and Plant Health Inspection Service (APHIS) is establishing a National Incident Coordination Center to provide direct support to producers whose animals cannot move to market as a result of processing plant closures due to COVID-19. Going forward, APHIS' Coordination Center, State Veterinarians, and other state officials will be assisting to help identify potential alternative markets if a producer is unable to move animals, and if necessary, advise and assist on depopulation and disposal methods.

Additionally, APHIS will mobilize and deploy assets of the National Veterinary Stockpile as needed and secure the services of contractors that can supply additional equipment, personnel, and services, much as it did during the large-scale Highly Pathogenic Avian Influenza emergency in 2015.

Additionally, the USDA's Natural Resources and Conservation Service (NRCS) will be providing state level technical assistance to producers and will provide cost share assistance under the Environmental Quality Incentives Program (EQIP) in line with program guidelines for disposal.

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May 8, 2020

**VIA ELECTRONIC DELIVERY**

The Honorable Makan Delrahim  
Assistant Attorney General  
U.S. Department of Justice  
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**Re: Urgent COVID-19-Related Request for a Business Review Letter**

Dear Mr. Delrahim:

On behalf of the National Pork Producers Council (“NPPC”), its affiliated state associations, and its member hog farmers, we write to seek a Business Review Letter related to the COVID-19 crisis. NPPC wishes to confirm that its efforts to keep pork products available for America’s tables and to facilitate the orderly euthanization of hogs for which there is no market do not violate the antitrust laws.<sup>1</sup> Due to the crisis that hog farmers face in this rapidly changing environment, NPPC respectfully requests that the Antitrust Division issue a favorable response on an expedited basis, pursuant to the Department of Justice and the Federal Trade Commission’s Joint Antitrust Statement Regarding COVID-19 (“March 24 Joint Statement”).

The NPPC is the nation’s leading association for pork producers. Through its national offices in Des Moines, Iowa and Washington, DC, and its 42 affiliated state associations, the NPPC works on behalf of America’s 60,000 hog farmers to ensure that the U.S. pork industry can responsibly provide high-quality pork to consumers. NPPC is funded by investments made through voluntary producer payments. NPPC’s investors, the equivalent of members, include independent hog farmers which vary in size and scope of operation, as well as vertically-integrated pork packing companies who own hogs. Through public-policy outreach, NPPC fights for reasonable legislation and regulations, and protects the livelihood of America’s hog farmers.

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<sup>1</sup> This letter describes a limited scope of NPPC’s activities related to depopulation of hogs in response to the COVID-19 crisis. The fact that conduct that may be taken by NPPC, its state organizations, or members is not described herein is not an admission that such conduct violates the antitrust (or any other) laws. NPPC, its state organizations, and members reserve all rights and defenses as to all of their conduct. Moreover, NPPC, its state organizations, and members reserve all rights to argue that conduct described herein is legal for reasons not specifically addressed in this letter or in the Antitrust Division’s response to this letter.

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The current situation is an unprecedented, dire national emergency. The SARS-CoV-2 coronavirus and the disease it causes (“COVID-19”) have impacted all sectors of American industry. The supply of meat and poultry is no exception—the President has determined that meat and poultry are “a scarce and critical material essential to the national defense.”<sup>2</sup> Similarly, the Antitrust Division has recognized that “agriculture is an essential part of the American economy” and “well-functioning agricultural markets are not only a matter of economic efficiency, but a matter of national security and public health.”<sup>3</sup>

On April 28, 2020, President Trump issued an Executive Order, invoking the Defense Production Act of 1950, and delegating broad authority to the Secretary of Agriculture (“USDA”) to respond to the crisis facing the meat and poultry supply chain. (Attachment 1, “April 28 Executive Order”). The President found that, “[i]t is important that processors of beef, pork, and poultry (‘meat and poultry’) in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans. However, outbreaks of COVID-19 among workers at some processing facilities have led to the reduction in some of those facilities’ production capacity . . . . Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency.”<sup>4</sup> Accordingly, pursuant to Section 101(b) of the Defense Production Act of 1950, the President delegated to USDA the power to “take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA.”<sup>5</sup> Relatedly, the April 28 Executive Order directed that the “Secretary of Agriculture shall use the authority under section 101 of the Act, in consultation with the heads of such other executive departments and agencies as he deems appropriate, to determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry, consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA.”<sup>6</sup>

Prior to the April 28, 2020 Executive Order, the USDA’s Animal and Plant Health Inspection Service (“APHIS”) issued a statement concerning its work in response to the COVID-19 crisis (Attachment 2, “USDA Statement”).<sup>7</sup> There, the USDA emphasized that, “American

<sup>2</sup> Attachment 1, 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, Exec. Order No. 13917, 85 Fed. Reg. 26313 § 1 (2020), <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>; see 50 U.S.C. § 4511(b).

<sup>3</sup> U.S. Dep’t of Justice., *Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward 2* (May 2012) (quoting Christine A. Varney, Assistant Att’y Gen., U.S. Dep’t of Justice, *A Shared Vision for American Agricultural Markets 2* (Mar. 12, 2010)), <https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf>.

<sup>4</sup> April 28 Executive Order § 1.

<sup>5</sup> *Id.*

<sup>6</sup> April 28 Executive Order § 2.

<sup>7</sup> Attachment 2, USDA, Animal & Plant Health Inspection Serv., *USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures* (Apr. 24, 2020),

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livestock and poultry producers are facing an unprecedented emergency due to COVID-19, particularly with the closing of meat processing plants in several states.”<sup>8</sup> Among other things, USDA committed to “leading the federal response by working in coordination with the Vice President’s Task Force, the CDC, OSHA, Department of Labor, industry, state and local governments, and others across the federal family to mitigate the impacts of COVID-19 on producers” and to “establish[] a National Incident Coordination Center to provide direct support to producers whose animals cannot move to market as a result of processing plant closures due to COVID-19.”<sup>9</sup>

As discussed more fully below, due to severe capacity restrictions at pork packing plants, NPPC, USDA, and industry analysts understand that the need to euthanize a large number (approximately 700,000 per week) of hogs will be unavoidable.<sup>10</sup> NPPC believes a coordinated industry and governmental response is necessary to ethically and efficiently euthanize as few hogs as possible. Accordingly, NPPC and its members seek a coordinated implementation of an orderly euthanization process that is consistent with legal and ethical requirements.

NPPC appreciates the Antitrust Division’s recognition that responding to the COVID-19 crisis “will require unprecedented cooperation between federal, state, and local governments and among private businesses,” which is a “necessary response to exigent circumstances [to] provide Americans with products or services that might not be available otherwise.”<sup>11</sup> That cooperation between the public and private sectors is necessary to continue feeding the United States and to ensure the humane treatment of its livestock.

## 1. Background

In response to the COVID-19 crisis, a number of large, primary pork packing plants have shut down.<sup>12</sup> Others are operating at severely diminished capacity, both to protect their employees and under threat of sanctions by states and localities.<sup>13</sup> In total, as of April 29, about 44% of pork-

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[https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2020/sa-04/meat-processing-coordination-center](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2020/sa-04/meat-processing-coordination-center).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Jacob Bunge & Kirk Maltais, *Pork Industry, USDA Discuss Euthanizing Hogs After Coronavirus Closes Plants*, WALL STREET JOURNAL (Apr. 27, 2020) (“The industry typically slaughters around 510,000 pigs daily for bacon, hams and sausage. Covid-19 outbreaks among plant workers have forced closures of facilities that typically process roughly one-fifth of the daily total, or 105,000 pigs a day, leading to a backup on farms and raising the prospect of having to euthanize them and then render or bury the carcasses.”), <https://www.wsj.com/articles/pork-industry-usda-discuss-euthanizing-hogs-after-coronavirus-closes-plants-11588015611>.

<sup>11</sup> March 24 Joint Statement.

<sup>12</sup> See Jacob Bunge et al., *Grocers Hunt for Meat as Coronavirus Hobbles Beef and Pork Plants*, WALL STREET JOURNAL (Apr. 23, 2020), <https://www.wsj.com/articles/grocers-hunt-meat-as-coronavirus-hobbles-beef-and-pork-plants-11587679833>.

<sup>13</sup> See, e.g., Chauncey Alcorn, *Tyson Will Close Its Biggest Pork Plant After Workers Call Out Sick With Coronavirus*, CNN BUSINESS (Apr. 22, 2020) (quoting CEO of Smithfield Foods stating, “It is impossible to keep our grocery stores stocked if our plants are not running”), <https://www.cnn.com/2020/04/22/business/tyson-pork-plant-iowa-coronavirus/index.html>; Danielle Wiener-Bronner, *One of the Largest Pork Processing Facilities in the US is Closing*

processing capacity is offline. The price for hogs has crashed and is projected to remain significantly below average throughout 2020. Hog farmers were projected to lose almost \$5 billion collectively, even before packing facilities began to close.<sup>14</sup> At the current pace, hog farmers, their families, and their communities face grave economic consequences resulting from decreased packer capacity.

The reduced foodservice and restaurant demand for pork products and the limited processing capacity in the pork supply chain have caused an overwhelming oversupply of live hogs in the United States, in turn severely decreasing the value of each hog. Indeed, an economist in the industry notes, “We haven’t seen a situation in our lifetime where the industry has contracted as quickly as we have seen in the last month.”<sup>15</sup> Pork packing companies are exercising the force majeure clauses in their contracts with hog farmers because the sharp reduction in pork plant capacity precludes them from accepting the total number of hogs for which they contracted.

The U.S. pork industry utilizes a just-in-time production system and only hogs of a certain size fit within equipment used on processing plant production lines. Due to the severely decreased national pork packing capacity caused by the pandemic, thousands of hog farmers across the country are unable to send their hogs into the food chain when they reach market weight. As such, there are now hundreds of thousands of hogs across the country that cannot be sold and harvested as they would be in the ordinary course of business absent the pandemic. Moreover, as these hogs continue to grow and exceed a certain weight of about 330 pounds, they are no longer marketable—no one will buy them as they do not fit on the production line equipment at the packing plants. With no packing company able to buy such hogs, producers will have little choice but to humanely euthanize and then attempt to dispose of these animals. It is a tragic choice, but one that thousands of hog farmers are being forced to make because of COVID-19 closures of pork packing facilities.

The prospect of hog farmers across the country being forced to euthanize thousands of unmarketable hogs poses numerous challenges that will require an urgent response from all levels of government and the industry itself if this crisis is to be handled responsibly. In the ordinary course, hog farmers do not euthanize or dispose of large numbers of hogs. Instead, they sell their hogs to packers who operate facilities that harvest them and distribute the meat in the food supply chain. Thus, hog farmers generally lack the knowledge, equipment, and facilities needed to humanely euthanize large numbers of animals, and then dispose of them in a manner that mitigates the environmental impact. Hog farmers care passionately about the humane care and treatment of their animals. Yet, none have ever faced a challenge like this before and will require education and guidance regarding methods, protocols, equipment, and processes to humanely euthanize an unprecedented and unexpected number of unmarketable hogs.

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*Until Further Notice*, CNN BUSINESS (Apr. 13, 2020), <https://www.cnn.com/2020/04/12/business/meat-plant-closures-smithfield/index.html>.

<sup>14</sup> See NATIONAL PORK PRODUCERS COUNCIL, *Hog Farmers Face COVID-19 Financial Crisis* (Apr. 14, 2020), <https://nppc.org/hog-farmers-face-covid-19-financial-crisis/>.

<sup>15</sup> Bunge, *supra* note 12 (quoting Will Sawyer, CoBank Economist).

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The meat packing industry is in a unique position to offer euthanasia services to producers who have hogs that have grown too large to satisfy processing specifications at existing facilities. Some facilities have already volunteered to help with the process of humanely euthanizing animals. In areas where such facilities are unavailable, it may be necessary to work with veterinarians to develop processes and protocols by which producers who choose to do so can humanely euthanize their unmarketable animals themselves.

Similarly, disposing of thousands of euthanized animals will pose significant challenges. State and local laws may dictate how and where producers can dispose of such animals, as well as what forms of euthanasia may implicate local animal abuse laws. In some situations, producers may be able to safely dispose of animals on their farms, while in others, it may be preferable to utilize off-site locations. Again, regardless of which disposal methods are best in each area, to ensure that animals are disposed of in an environmentally responsible manner, the NPPC, working under the direction and supervision of the USDA and state and local officials, must be prepared to provide clear and consistent guidance with regard to how producers should dispose of these animals. The potential health and safety impact on Americans is real and immediate without an extraordinary response to this crisis.

NPPC believes a coordinated approach to euthanasia and disposal among private industry and federal, state, and local governmental officials is necessary to comply with myriad legal and ethical constraints. Uncoordinated euthanasia may also result in too many hogs being euthanized.

## **2. The Proposed Conduct**

NPPC and hog farmers across America are proceeding with two clear goals: (1) to maximize the total number of hogs processed into food for consumers; and (2) to minimize the total number of hogs that must be euthanized or otherwise destroyed because of this crisis. To accomplish these goals, in conjunction with officials from the USDA, relevant state and local governments, the National Pork Board, the American Association of Swine Veterinarians and the Swine Health Information Center, pork packing companies, and guidance from NPPC's antitrust counsel, NPPC and its members seek to collaborate to: (1) assist federal, state, and local authorities to ethically and efficiently depopulate unmarketable hogs; (2) implement an orderly euthanasia and disposal process that is consistent with legal and ethical requirements, with NPPC acting as an informational clearinghouse for farmers with respect to non-competitively sensitive information, such as methods, protocols, equipment, processes, and the like; (3) assist USDA/APHIS, and state and local government representatives, in communicating with farmers who may need assistance humanely euthanizing and disposing of unmarketable hogs; and (4) help USDA/APHIS, and state and local government representatives develop policies and initiatives designed to address the logistical, economic, ethical, and environmental challenges pork-processing facility closures and capacity constraints caused by the COVID-19 outbreak have caused for hog farmers (collectively, "Proposed Conduct").

NPPC expects that discussions among competitors will include government representatives or be at the direction of government representatives. NPPC does not have any present intention to

initiate formalized meetings among hog farmers for the purpose of responding to the COVID-19 crisis, absent government compulsion, direction, or participation.

To aid in your review of this request, we provide the following scenario as an example of the type of collaboration hog farmers may rely on to respond to this crisis as quickly and efficiently as possible:<sup>16</sup>

- (a) To aid farmers in their unprecedented need to depopulate large numbers of hogs, NPPC is assisting its state organizations, state governments, and farmers in identifying sources of euthanasia equipment and is participating in discussions regarding the organization of centralized euthanasia and disposal stations. This process includes disseminating projections as to the number of hogs those facilities may handle each day. NPPC and its members may seek to collaborate to discuss the most orderly and efficient euthanization process.

NPPC commits to follow several safeguards to assure antitrust compliance:

- (a) Decisions to euthanize hogs in response to the COVID-19 crisis will be made unilaterally by individual farmers;
- (b) NPPC will not facilitate any coordination or discussion of prices between NPPC members, and will prohibit any discussion of prices at meetings involving competitors;
- (c) NPPC and hog farmers will not use any collaboration to engage in COVID-19 profiteering;
- (d) The Proposed Conduct will be limited to the time period necessary to respond to the COVID-19 crisis.

NPPC commits to follow these safeguards at all times and will work with the Antitrust Division to ensure necessary oversight. Importantly, the Proposed Conduct will be limited in duration and scope—it will only occur as long as COVID-19 substantially impairs pork-processing capacity. NPPC hopes and anticipates that this current COVID-19 situation will only last for approximately up to six months, depending on the duration of the ongoing pandemic. Due to the fast-moving and ever-changing nature of the COVID-19 crisis, the nature of the assistance the NPPC may be required to provide to help hog farmers responsibly address the crisis is continuing to evolve in real time. Thus, the Antitrust Division's review of the NPPC's behavior may require flexibility on the part of the Antitrust Division and the NPPC.

### 3. Analysis

NPPC believes the Proposed Conduct does not violate the antitrust laws. First, much of the Proposed Conduct will simply not raise antitrust concerns at all, as it will relate to non-competitively sensitive issues, such as medical and technical information, availability of

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<sup>16</sup> This is not an exhaustive list of possible activities, but merely an example of the type of activities contemplated.

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euthanization services, legal and ethical requirements for euthanization, health and safety information, and the like. To the extent that discussions involving competitors get into competitively sensitive topics, the Proposed Conduct is legal as (1) conduct compelled by or taken to assist a federal agency and state authorities; and (2) a pro-competitive competitor collaboration.

- (a) First, as the Antitrust Division recently affirmed, “Conduct by federal agencies is not subject to scrutiny under the antitrust laws. Courts have extended this immunity to conduct by private parties acting individually or together when (i) the collaboration is compelled by an agreement with a federal agency or a clearly defined federal government policy and (ii) a federal agency supervises the conduct. The Department will not challenge conduct that satisfies this standard in responding to the COVID-19 pandemic and its aftermath.”<sup>17</sup> Moreover, “[c]ollaboration among competitors in aid of a federal agency, even if it does not satisfy the standard described above, may still offer unique benefits and therefore be consistent with the antitrust laws.”<sup>18</sup> Similarly, the state action doctrine immunizes activity that is “clearly articulated and affirmatively expressed as state policy,” and (2) “actively supervised” by the state.<sup>19</sup> NPPC intends to undertake the Proposed Conduct pursuant to the April 28 Executive Order, and at the direction and supervision of the USDA and state and local government officials.<sup>20</sup> In addition, the Proposed Conduct will serve the unique pro-competitive benefit of increasing marketable supply and decreasing the number of destroyed hogs. Thus, the Proposed Conduct qualifies for antitrust immunity.
- (b) Second, the Proposed Conduct is a bona fide pro-competitive competitor collaboration.<sup>21</sup> The Antitrust Division has recognized the pro-competitive nature of competitor collaborations that are designed to increase market output, and achieve efficiencies.<sup>22</sup> The Proposed Conduct and any ancillary collaborations are purposefully designed to achieve the long-term pro-competitive purpose of maintaining an adequate pork supply in the U.S. market during the COVID-19 crisis. The need to euthanize a large number of surplus hogs is unfortunately inevitable. By definition, however, hogs to be euthanized will be those that are unmarketable to processors and have little value. Thus, the Proposed Conduct will not result in the reduction of marketable supply. Moreover, implementing an

<sup>17</sup> Letter from Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice, to Lori A. Schechter, McKesson Corporation, et al. (Apr. 4, 2020), <https://www.justice.gov/atr/page/file/1266511/download>.

<sup>18</sup> *Id.* (citing Letter from J. Mark Gidley, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Stuart M. Pape, Patton, Boggs & Blow (Jan. 14, 1993)).

<sup>19</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

<sup>20</sup> See Letter from Lori A. Schechter, McKesson Corporation, et al., to Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice (Mar. 30, 2020) (outlining similar safeguards), <https://www.justice.gov/atr/page/file/1266516/download>.

<sup>21</sup> Such collaborations are subject to the rule of reason. See Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 8–9 (Apr. 2000), <https://www.justice.gov/atr/page/file/1098461/download>.

<sup>22</sup> See *id.* at 6.



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May 8, 2020

orderly euthanization process through an NPPC-government collaboration will avoid inefficient and potentially unnecessary euthanizations by farmers, who do not specialize in euthanizing large numbers of hogs. Thus, the Proposed Conduct is likely to increase market efficiencies by reducing waste and allowing farmers to focus on their core competencies. Finally, the Proposed Conduct is a “necessary response to exigent circumstances” to “provide Americans with products . . . that [will] not be available otherwise.”<sup>23</sup>

#### 4. Conclusion

Hog farms are critical infrastructure and keeping pork products available for the public is a national security issue. Hog farmers and the pork industry are in a disastrous situation caused by circumstances completely beyond their control. The Proposed Conduct would be carried out pursuant to government direction and supervision and be limited in scope and duration. We therefore request an expedited Business Review Letter confirming that the Antitrust Division has no present intention to bring an enforcement action against the Proposed Conduct.

Sincerely,

(b)(6)

Martin M. Toto  
David E. Bond  
Sean M. Sigillito

Enclosures

cc: The Honorable George Ervin “Sonny” Perdue, III  
Secretary, U.S. Department of Agriculture

Neil Dierks  
Chief Executive Officer  
National Pork Producers Council

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<sup>23</sup> March 24 Joint Statement.

# ATTACHMENT 1

EXECUTIVE ORDERS

**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**

LAND & AGRICULTURE

Issued on: April 28, 2020



By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (50 U.S.C. 4501 *et seq.*) (the “Act”), and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. Policy. The 2019 novel (new) coronavirus known as SARS-CoV-2, the virus causing outbreaks of the disease COVID-19, has significantly disrupted the lives of Americans. In Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak), I declared that the COVID-19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. Since then, the American people have united behind a policy of mitigation strategies, including social distancing, to flatten the curve of infections and reduce the spread of COVID-19. The COVID-19 outbreak and these necessary mitigation measures have taken a dramatic toll on the United States economy and critical infrastructure.

It is important that processors of beef, pork, and poultry (“meat and poultry”) in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans. However, outbreaks of COVID-19 among workers at some processing facilities have led to the reduction in some of those facilities’ production capacity. In addition, recent actions in some

States have led to the complete closure of some large processing facilities. Such actions may differ from or be inconsistent with interim guidance recently issued by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor entitled “Meat and Poultry Processing Workers and Employers” providing for the safe operation of such facilities.

Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency. Given the high volume of meat and poultry processed by many facilities, any unnecessary closures can quickly have a large effect on the food supply chain. For example, closure of a single large beef processing facility can result in the loss of over 10 million individual servings of beef in a single day. Similarly, under established supply chains, closure of a single meat or poultry processing facility can severely disrupt the supply of protein to an entire grocery store chain.

Accordingly, I find that meat and poultry in the food supply chain meet the criteria specified in section 101(b) of the Act (50 U.S.C. 4511(b)). Under the delegation of authority provided in this order, the Secretary of Agriculture shall take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA. Under the delegation of authority provided in this order, the Secretary of Agriculture may identify additional specific food supply chain resources that meet the criteria of section 101(b).

Sec. 2. Ensuring the Continued Supply of Meat and Poultry. (a) Notwithstanding Executive Order 13603 of March 16, 2012 (National Defense Resources Preparedness), the authority of the President to require performance of contracts or orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense, and to implement the Act in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, 4559, 4560), is delegated to the Secretary of Agriculture with respect to food supply chain resources, including meat and poultry, during the national emergency caused by the outbreak of COVID-19 within the United States.

(b) Secretary of Agriculture shall use the authority under section 101 of the Act, in consultation with the heads of such other executive departments and agencies as he deems appropriate, to determine the proper nationwide priorities and allocation of all the materials, services, and

facilities necessary to ensure the continued supply of meat and poultry, consistent with the guidance for the operations of meat and poultry processing facilities jointly issued by the CDC and OSHA.

(c) The Secretary of Agriculture shall issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.

Sec. 3. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,  
April 28, 2020.

# **ATTACHMENT 2**

# **USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures**

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While this work continues, the USDA's Animal and Plant Health Inspection Service (APHIS) is establishing a National Incident Coordination Center to provide direct support to producers whose animals cannot move to market as a result of processing plant closures due to COVID-19. Going forward, APHIS' Coordination Center, State Veterinarians, and other state officials will be assisting to help identify potential alternative markets if a producer is unable to move animals, and if necessary, advise and assist on depopulation and disposal methods.

Additionally, APHIS will mobilize and deploy assets of the National Veterinary Stockpile as needed and secure the services of contractors that can supply additional equipment, personnel, and services, much as it did during the large-scale Highly Pathogenic Avian Influenza emergency in 2015.

Additionally, the USDA's Natural Resources and Conservation Service (NRCS) will be providing state level technical assistance to producers and will provide cost share assistance under the Environmental Quality Incentives Program (EQIP) in line with program guidelines for disposal.

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**U.S. DEPARTMENT OF JUSTICE**  
Antitrust Division

**MAKAN DELRAHIM**  
Assistant Attorney General

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May 15, 2020

Martin M. Toto  
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New York, NY 10020

Re: National Pork Producers Council Business Review Request Pursuant to  
COVID-19 Expedited Procedure

Dear Mr. Toto:

This letter responds to your request, on behalf of the National Pork Producers Council (“NPPC”), for the issuance of a business review letter under the Department of Justice’s Business Review Procedure, 28 C.F.R. § 50.6. Specifically, the Department understands that NPPC’s request is made under the expedited, temporary review procedure as detailed in the Joint Antitrust Statement Regarding COVID-19 dated March 2020 (“Joint Statement”).<sup>1</sup> As indicated in the Joint Statement, the Department’s statement of its current enforcement intentions as set out in this letter will be in effect for one year from the date of this letter.

In the Joint Statement, the Department indicated its aim to address COVID-19 related requests “addressing public health and safety” within seven days of receiving all necessary information. In a request on May 8, 2020, you sought a statement of the Department’s current antitrust enforcement intentions with respect to (i) NPPC and its members assisting the United States Department of Agriculture (“USDA”) in humanely and efficiently depopulating unmarketable hogs and (ii) NPPC sharing information with its members about best practices for depopulating unmarketable hogs (“Proposed Conduct”).<sup>2</sup>

Your request arises amidst a challenging time in the pork industry. As explained in an Executive Order issued by President Donald J. Trump on April 28, 2020, the closure

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<sup>1</sup> Dep’t of Justice & Fed. Trade Comm., Joint Antitrust Statement Regarding COVID-19 (Mar. 2020), <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19> [hereinafter “Joint Statement”].

<sup>2</sup> Letter from Martin M. Toto, National Pork Producers Council, to the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice (May 3, 2020) [hereinafter “Request Letter”] at 5.



of processing facilities has led to a “reduction in some of those facilities’ processing capacity.”<sup>3</sup> The Executive Order addresses bringing those facilities back online, but in the meantime, processing capacity reductions have had impacts up and down the supply chain. Your request explains that those impacts have included some hogs becoming unmarketable due to the inability to process them in a timely manner. As a result, some farmers may need to humanely euthanize unmarketable hogs—a “tragic choice [they] are being forced to make because of COVID-19 closures of pork packing facilities.”<sup>4</sup>

In the midst of these challenges, competition remains critically important to consumers and market participants in the pork and other meat industries, and addressing anticompetitive conduct in these industries is therefore a top priority for the Department. At the same time, it is also important to provide antitrust guidance to hog farmers and others that have been adversely impacted by the current pandemic, especially where they seek to cooperate with the government in beneficial and procompetitive ways. Following an expedited review, the Department can conclude that it does not presently intend to challenge the Proposed Conduct by the NPPC. Based on your representations, most of this conduct will occur at the direction and under the supervision and coordination of the USDA—a government agency—and therefore should not raise concerns under the antitrust laws. Moreover, NPPC’s communication of non-competitively sensitive information to its members, *e.g.*, best practices for depopulating unmarketable hogs, even if not occurring at the direction of and under the supervision and coordination of the USDA, similarly is unlikely to raise concerns. In accordance with the Department’s usual practice, however, it reserves the right to challenge the conduct in the future if it is later revealed to be anticompetitive in purpose or effect.

While for the reasons explained below your Proposed Conduct appears procompetitive, the Department would have serious concerns if industry participants, such as meat processors, engaged in coordination that facilitated price fixing, output restrictions, market allocation, anticompetitive exchanges of information, or other anticompetitive conduct.<sup>5</sup> As always, the Department would welcome the NPPC’s assistance, its members, or that of any other industry participant in preventing and identifying violations of the antitrust laws in this critical industry.

## ***I. Background***

The spread of COVID-19 has created unprecedented challenges for industries across America. Major disasters have been declared in all 50 states, more than 1,250,000 Americans have been infected with the virus, and more than 75,000 have died from it.<sup>6</sup>

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<sup>3</sup> Exec. Order. No. 13,917, 85 Fed. Reg. 26 (April 28, 2020).

<sup>4</sup> Request Letter at 4.

<sup>5</sup> See Joint Statement.

<sup>6</sup> Fed. Emergency Mgmt. Agency, *Disasters*, <https://www.fema.gov/disasters> (last visited May 8, 2020); Johns Hopkins University, *Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering*, <https://coronavirus.jhu.edu/map.html> (last visited May 8, 2020); see also Letter from the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice to Lori A. Schechter, McKesson Corp., Jessica L. Mayer, Cardinal Health, Inc., Michael S. Ettinger, Henry Schein, Inc., Alex Liberman, Medline Indus., Inc., & Nicholas J. Pace, Owens & Minor, Inc. (Apr. 4, 2020),

Measures to mitigate the spread of COVID-19, moreover, “have taken a dramatic toll on the United States economy and critical infrastructure.”<sup>7</sup>

The meat and poultry industries are among the industries affected. For example, facilities processing meat, *e.g.*, pork, have been forced to reduce capacity or close entirely, affecting the entire supply chain.<sup>8</sup> As a result of these closures, hog farmers and others who supply Americans with pork are facing unprecedented hardships. In response, President Donald J. Trump issued an Executive Order recognizing that “the continued functioning of the national meat and poultry supply chain” is “critical” to the health and security of Americans.<sup>9</sup> The President therefore directed the Secretary of the USDA, pursuant to the Defense Production Act, to “take all appropriate action . . . to ensure that meat and poultry processors continue operations” and “determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry.”<sup>10</sup>

The USDA’s Animal and Plant Health Inspection Service (“APHIS”) has also recognized that “American livestock and poultry producers are facing an unprecedented emergency due to COVID-19, particularly with the closing of meat processing plants in several states.”<sup>11</sup> USDA’s Under Secretary for Marketing and Regulatory Programs is initiating a program to facilitate the depopulation of unmarketable hogs. The Under Secretary has directed APHIS’s National Incident Coordination Center (“NICC”) to carry out activities under the program. APHIS’s NICC will help hog producers “whose animals cannot move to market as a result of processing plant closures” by identifying alternative markets or, “if necessary,” advising “on depopulation and disposal.”<sup>12</sup>

The NPPC is a national association representing pork producers, *i.e.*, hog farmers. Its business review request arises based on the exigent circumstances described above.

## ***II. NPPC’s Efforts to Maintain Pork Supply and Facilitate Depopulation***

The facts set forth in this section regarding NPPC’s Proposed Conduct are based on your representations to the Department, the Department’s discussions with the USDA, and publicly available information.

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<https://www.justice.gov/atr/page/file/1266511/download> [hereinafter “PPE Distributor BRL”] and Letter from the Honorable Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice to John G. Chou, AmerisourceBergen (Apr. 20, 2020), <https://www.justice.gov/atr/page/file/1269911/download> [hereinafter “AmerisourceBergen BRL”].

<sup>7</sup> Exec. Order. No. 13,917, 85 Fed. Reg. 26, 313 (April 28, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Dep’t of Agric., Animal & Plant Health Inspection Serv., *USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures* (Apr. 25, 2020), [https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2020/sa-04/meat-processing-coordination-center](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2020/sa-04/meat-processing-coordination-center).

<sup>12</sup> *Id.*

In a normally functioning market, hog producers deliver their hogs to pork packers, *i.e.*, companies that process hogs into pork. Producers sell to packers based on preexisting contracts or on the spot market.<sup>13</sup> As a result of the pandemic and reduced packing capacity, however, hog producers are unable to sell all of their hogs previously raised “just-in-time” for slaughter to packers. Producers also cannot keep these hogs until packing capacity rebounds because when hogs “exceed a certain weight . . . they are no longer marketable—no one will buy them as they do not fit on the production line equipment at the packing plants.”<sup>14</sup> This has created “an overwhelming oversupply of live hogs in the United States.”<sup>15</sup> Maintaining unmarketable hogs is expensive and limits farmers’ ability to make space in barns to raise hogs for future supply.<sup>16</sup>

Unable to sell or keep these unmarketable hogs, many farmers plan to “humanely euthanize” them.<sup>17</sup> Hog farmers, however, “generally lack the knowledge, equipment, and facilities needed to humanely euthanize large numbers of animals.”<sup>18</sup> By contrast, pork packers have the ability to do so. Several packers have even volunteered to help producers with whom they have contracts depopulate their unmarketable hogs.<sup>19</sup> In some areas, though, these services may not be available or packers might be unable to depopulate enough hogs. Producers who sell on the spot market and lack existing contractual relationships with packers may also struggle to depopulate their unmarketable hogs at scale.

In response to these circumstances, NPPC explains that it and its members propose to engage in two categories of conduct.

First, NPPC proposes to work “in conjunction with officials from the USDA” or “relevant state and local governments” to “implement an orderly euthanization and disposal process” and “communicat[e] with farmers who may need assistance humanely euthanizing and disposing of unmarketable hogs.”<sup>20</sup> As noted above, one initiative in this area involves APHIS’s NICC. The Department understands from NPPC and USDA that APHIS’s NICC will work with farmers and packers to facilitate hog depopulation and that any coordination among farmers to implement USDA’s policies will happen at the direction and under the supervision of the USDA or state governmental authorities.

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<sup>13</sup> Some packers are also vertically integrated, meaning they process their own hogs as well.

<sup>14</sup> Request Letter at 4.

<sup>15</sup> *Id.*

<sup>16</sup> Int’l Trade Comm’n, *Pork and Swine Industry & Trade Summary* (Oct. 2014) at 18, [https://www.usitc.gov/publications/332/pork\\_and\\_swine\\_summary\\_its\\_11.pdf](https://www.usitc.gov/publications/332/pork_and_swine_summary_its_11.pdf) (noting that hogs are typically marketable “at 5–6 months of age”).

<sup>17</sup> Request Letter at 4 (“It is a tragic choice, but one that thousands of hog farmers are being forced to make because of COVID-19 closures of pork packing facilities.”).

<sup>18</sup> *Id.* at 4-5 (noting the difficulty that individual producers would have depopulating in a humanely and “environmentally responsible manner”).

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.*

Ultimately, though, each producer will unilaterally decide how many of their hogs to depopulate.

Second, NPPC proposes to help federal and state agencies develop other initiatives “to address the logistical, economic, ethical, and environmental challenges pork-processing facility closures and capacity constraints caused by the COVID-19 outbreak have caused for hog farmers.”<sup>21</sup> The Department’s understanding is that, to the extent NPPC helps implement these initiatives, it would do so at the direction and under the supervision of federal or state agencies, *e.g.*, APHIS’s NICC or State Veterinarians, or that NPPC’s conduct would involve relaying best practices for supply chain management and depopulation, rather than competitively sensitive information, to its members, based on publicly available information or information from federal or state agencies.<sup>22</sup>

### **III. Legal Framework and Analysis**

#### **a. Collaboration and Cooperation with Federal and State Agencies**

The Department has indicated that it will not challenge conduct aimed at addressing COVID-19 if it is (i) “compelled by an agreement with a federal agency or a clearly defined federal government policy” and (ii) “supervised by a federal agency.”<sup>23</sup>

NPPC and its members, *i.e.*, hog producers, working with APHIS’s NICC fits within this two-part framework.<sup>24</sup> First, while producers may not have a formal agreement with APHIS’s NICC, they “will be acting at [its] direction in the context of a clearly defined federal program” and in furtherance of that program.<sup>25</sup> Second, their actions will be “at the direction and supervision of the USDA.”<sup>26</sup> In particular, while producers will unilaterally decide whether to depopulate their hogs and in what quantities, APHIS’s NICC will tell those producers where they should take those hogs to be depopulated. The Department understands that this conduct is necessary as a result of the situation created by the current pandemic. The Department further understands that the conduct will not be used as a mechanism to depopulate more hogs than necessary, *i.e.*, the conduct is limited to the depopulation of hogs that become unmarketable due to a reduction in processing plant

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<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 7.

<sup>23</sup> AmerisourceBergen BRL at 8 (internal brackets omitted); *see also* PPE Distributors BRL at 7 n.30 (“[T]he Department stands ready to work with federal agencies to ensure their efforts promote competition”).

<sup>24</sup> The Department expresses no view on packers sharing of information with APHIS or state governments. The Department does note, however, that “bilateral communication with [a federal agency], as opposed to communication [among competitors], should not raise antitrust concern.” PPE Distributors BRL at 8.

<sup>25</sup> AmerisourceBergen BRL at 8; *see also* Exec. Order. No. 13,917, 85 Fed. Reg. 26, 313 (April 28, 2020) (directing USDA “to determine the proper . . . allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat”).

<sup>26</sup> Request Letter at 7.

capacity. Given the above caveats, the Department is satisfied that this and similar conduct should not raise concerns under the antitrust laws.<sup>27</sup>

#### **b. Collaboration and Cooperation Among Competitors**

Although NPPC represents that much of the Proposed Conduct will be under the direction and supervision of USDA or other government officials, NPPC's request also covers collaborations independent of government involvement.

NPPC also intends to provide its members with "clear and consistent guidance with regard to how producers should dispose of [their hogs]."<sup>28</sup> For example, producers who elect to depopulate their unmarketable hogs without the help of packers must navigate a patchwork of local, state, and federal laws along with other safety and environmental considerations. To the extent NPPC communicates with its members to help USDA, APHIS's NICC, and other agencies, under their direction and supervision, the Department is satisfied that this conduct should not raise concerns under the antitrust laws.<sup>29</sup> Likewise, NPPC sharing information about euthanization methods, protocols, equipment, or processors with its members – even if not at the direction of USDA or another governmental entity – is unlikely to raise concerns under the antitrust laws.<sup>30</sup>

By contrast, the Department would have concerns if industry participants shared competitively sensitive information or otherwise engaged in coordination that facilitated price fixing, output restrictions, market allocation, anticompetitive exchanges of information, or other anticompetitive conduct. While your request does not address the communication of competitively sensitive information, we note that further guidance is available in the Antitrust Guidelines for Collaborations Among Competitors issued jointly by the Antitrust Division and the Federal Trade Commission.<sup>31</sup>

#### ***IV. Conclusion***

This letter expresses the Department's current enforcement intention and is predicated on the accuracy of the information and assertions you have provided, as well as the additional qualifications set forth in the letter. It expresses the Department's current enforcement intention in the exercise of its prosecutorial discretion in the context of the

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<sup>27</sup> In some circumstances, state authorities, *e.g.*, a state veterinarian or animal health authority, may direct producers to specific facilities for depopulating their unmarketable hogs (based on information from USDA or otherwise). The Department would analyze this conduct using the same two-part framework discussed above.

<sup>28</sup> Request Letter at 5.

<sup>29</sup> AmerisourceBergen BRL at 9 (quoting PPE Distributors BRL at 9).

<sup>30</sup> The same is true for NPPC seeking to "help USDA/APHIS, and state and local government representatives develop policies and initiatives" to addressing the effects of COVID-19. Request Letter at 5. *See* AmerisourceBergen BRL at 11–12 (discussing *Noerr-Pennington* immunity).

<sup>31</sup> Fed. Trade Comm'n and U.S. Dep't Of Justice, Antitrust Guidelines for Collaborations Among Competitors at § 2.1 (2000), <https://www.justice.gov/atr/page/file/1098461/download>.

antitrust laws.<sup>32</sup> The letter also reflects the outcome of an expedited, temporary review procedure that is necessarily less thorough than ordinary business review procedures and should not be interpreted as applying to any matter other than the Proposed Conduct as it relates strictly to, or arises directly out of, the COVID-19 pandemic. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 U.S.C. § 50.6, and subject to the limitations and reservations of rights therein. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data you have submitted will be made publicly available within thirty days of the date of this letter, unless you request that part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Makan Delrahim

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<sup>32</sup> The Department therefore expresses no opinion on whether the Proposed Conduct or other actions by NPPC or its members implicates the Packers and Stockyards Act.

**From:** [Mazumdar, Chan \(ATR\)](#)  
**To:** [Dinh, Mai - OGC, Washington, DC](#)  
**Subject:** Re: 2020-4-29 National Pork Producers Council Request for a Business Review Letter.pdf  
**Date:** Wednesday, April 29, 2020 7:35:01 PM

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Thanks.

We'd like to set up a time to talk to you all about [REDACTED] (b)(5) [REDACTED] for Friday. Do you have 10 minutes to chat tomorrow morning?

Refer to USDA

**From:** [Mazumdar, Chan \(ATR\)](#)  
**To:** ["Dinh, Mai - OGC, Washington, DC"](#)  
**Subject:** RE: (b)(5)  
**Date:** Wednesday, April 29, 2020 2:46:00 PM  
**Attachments:** [image001.png](#)

Thanks, Mai.

One other thing I forgot to raise with you when I had your attention. (b)(5)

(b)(5)

(b)(5)

Questions are pasted below.

(b)(5)

Refer to USDA



**From:** [Mazumdar, Chan \(ATR\)](#)  
**To:** [Dinh, Mai - OGC, Washington, DC](#)  
**Subject:** Re: 2020-4-29 National Pork Producers Council Request for a Business Review Letter.pdf  
**Date:** Wednesday, April 29, 2020 8:14:45 PM  
**Attachments:** [image001.png](#)

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Great. I'll give you a call around 10 am tomorrow. Have a good evening.

Refer to USDA

**From:** [Mazumdar, Chan \(ATR\)](#)  
**To:** ["Dinh, Mai - OGC, Washington, DC"](#)  
**Subject:** RE: Antitrust Issues Discussion  
**Date:** Thursday, April 30, 2020 10:28:00 AM  
**Attachments:** [image001.png](#)

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Thanks, Mai.

Here's our availability tomorrow:

8:30 a.m. to 11:30 a.m.

Noon to 1 p.m.

2:30 p.m. to 3:30 p.m.

4 p.m. for the rest of the day

Refer to USDA

**From:** [Mazumdar, Chan \(ATR\)](#)  
**To:** ["Dinh, Mai - OGC, Washington, DC"](#)  
**Subject:** RE: Antitrust Issues Discussion  
**Date:** Thursday, April 30, 2020 11:13:00 AM  
**Attachments:** [image001.png](#)

---

Thanks, Mai

Refer to USDA

**From:** Mazumdar, Chan (ATR) (b)(6)  
**Sent:** Thursday, April 30, 2020 10:29 AM  
**To:** Dinh, Mai - OGC, Washington, DC (b)(6)  
**Subject:** RE: Antitrust Issues Discussion

Thanks, Mai.

Here's our availability tomorrow:

8:30 a.m. to 11:30 a.m.

Noon to 1 p.m.

2:30 p.m. to 3:30 p.m.

4 p.m. for the rest of the day

Refer to USDA

**From:** [Mazumdar, Chan \(ATR\)](#)  
**To:** ["Dinh, Mai - OGC, Washington, DC"](#)  
**Subject:** RE: Antitrust Issues Discussion  
**Date:** Thursday, April 30, 2020 4:29:00 PM  
**Attachments:** [image001.png](#)

---

That works on my end. I'll send you a list of people on my end later today.

Refer to USDA

**From:** Mazumdar, Chan (ATR) (b)(6)  
**Sent:** Thursday, April 30, 2020 11:14 AM  
**To:** Dinh, Mai - OGC, Washington, DC (b)(6)  
**Subject:** RE: Antitrust Issues Discussion

Thanks, Mai

Refer to USDA

**From:** Mazumdar, Chan (ATR) (b)(6)

**Sent:** Thursday, April 30, 2020 10:29 AM

**To:** Dinh, Mai - OGC, Washington, DC (b)(6)

**Subject:** RE: Antitrust Issues Discussion

Thanks, Mai.

Here's our availability tomorrow:

8:30 a.m. to 11:30 a.m.

Noon to 1 p.m.

2:30 p.m. to 3:30 p.m.

4 p.m. for the rest of the day

Refer to USDA

**From:** Mazumdar, Chan (ATR)  
**To:** "Dinh, Mai - OGC, Washington, DC"  
**Subject:** RE: Antitrust Issues Discussion  
**Date:** Thursday, April 30, 2020 5:02:00 PM  
**Attachments:** image001.png

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Great!

Refer to USDA

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**From:** Mazumdar, Chan (ATR) (b)(6)  
**Sent:** Thursday, April 30, 2020 4:29 PM  
**To:** Dinh, Mai - OGC, Washington, DC (b)(6)  
**Subject:** RE: Antitrust Issues Discussion

That works on my end. I'll send you a list of people on my end later today.

Refer to USDA

**From:** [Mazumdar, Chan \(ATR\)](#)  
**To:** ["Dinh, Mai - OGC, Washington, DC"](#)  
**Subject:** RE: Antitrust Issues Discussion  
**Date:** Thursday, April 30, 2020 5:04:00 PM  
**Attachments:** [image001.png](#)

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Of course.

Titles below for the folks from the Antitrust Division.

Chan Mazumdar, Attorney, Transportation, Energy & Agriculture  
Section

Karina Lubell, Assistant Chief, Competition Policy & Advocacy Section

Eric Dunn, Attorney, Competition Policy & Advocacy Section

Erica Mintzer, Attorney, Competition Policy & Advocacy Section

Ben Baldwin, Paralegal, Competition Policy & Advocacy Section

Diane Owen, Economist, Economic Analysis Group

Refer to USDA

duplicate

**From:** Mazumdar, Chan (ATR)  
**To:** "Dinh, Mai - OGC, Washington, DC"  
**Subject:** Accepted: (b)(5)

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**From:** Mazumdar, Chan (ATR)  
**To:** Dinh, Mai - OGC, Washington, DC  
**Subject:** Re: Letter  
**Date:** Sunday, May 10, 2020 2:28:42 PM

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Hi Mai - I don't think (b)(5)  
I'll hopefully have a better sense of timing tomorrow. Chan

Refer to USDA

**From:** Mazumdar, Chan (ATR)  
**To:** "Dinh, Mai - OGC, Washington, DC"  
**Subject:** RE: NPPC request  
**Date:** Monday, May 4, 2020 10:04:00 AM  
**Attachments:** [image001.png](#)

Probably easiest to chat by phone. I should be free for a few minutes between 10:30 a.m. and 11 a.m. and then again after 11:30 a.m. Are you available?

Refer to USDA

**From:** Mazumdar, Chan (ATR) <(b)(6)>  
**Sent:** Sunday, May 3, 2020 4:20 PM  
**To:** Dinh, Mai - OGC, Washington, DC (b)(6)  
**Subject:** RE: NPPC request

Hi Mai – I (b)(5)

(b)(5)

(b)(5) I hope you're having a nice weekend. Chan

Refer to USDA

**From:** Mazumdar, Chan (ATR) on behalf of Dinh, Mai - OGC, Washington, DC  
**To:** Lepore, Robert (ATR); Corcoran, Patricia (ATR); Walker, Lorren - OSEC, Washington, DC; Celeste, Katherine A (ATR); Shere, Jack A - APHIS; Crosswhite, Caleb - APHIS; Ibach, Greg - OSEC, Washington, DC; Ricci, Carrie - OGC, Washington, DC; Novak, Sheila - OGC, Washington, DC; Healey, Burke L - APHIS; Helming, Sarah J - APHIS; Mazumdar, Chan (ATR)  
**Subject:** FW: (b)(5)

Refer to USDA

**From:** Mazumdar, Chan (ATR) on behalf of Dinh, Mai - OGC, Washington, DC  
**To:** Lubell, Karina (ATR); Mintzer, Erica (ATR); Walker, Lorren - OSEC, Washington, DC; Dunn, Eric (ATR); Shere, Jack A - APHIS; Baldwin, Benjamin (ATR); Crosswhite, Caleb - APHIS; Owen, Diane (ATR); Ibach, Greg - OSEC, Washington, DC; Ricci, Carrie - OGC, Washington, DC; Novak, Sheila - OGC, Washington, DC; Healey, Burke L - APHIS; Helming, Sarah J - APHIS; Mazumdar, Chan (ATR)  
**Subject:** FW: (b)(5)

Refer to USDA

Refer to USDA

**From:** Mazumdar, Chan (ATR) [REDACTED]  
**Sent:** Monday, May 4, 2020 10:05 AM  
**To:** Dinh, Mai - OGC, Washington, DC [REDACTED] (b)(6)  
**Subject:** RE: NPPC request

Probably easiest to chat by phone. I should be free for a few minutes between 10:30 a.m. and 11 a.m. and then again after 11:30 a.m. Are you available?

Refer to USDA

**From:** Mazumdar, Chan (ATR) [REDACTED] (b)(6)  
**Sent:** Sunday, May 3, 2020 4:20 PM  
**To:** Dinh, Mai - OGC, Washington, DC [REDACTED] (b)(6)  
**Subject:** RE: NPPC request

Hi Mai – [REDACTED] (b)(5)

(b)(5)

. I'll be in touch tomorrow when hopefully I know more. I hope you're having a nice weekend. Chan

Refer to USDA