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## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### 7 CFR Parts 210 and 220

[FNS-2005-0002]

RIN 0584-AD64

#### School Food Safety Inspections

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts without change the food safety inspections requirements for the National School Lunch Program (NSLP) and the School Breakfast Program (SBP) set forth in a previous interim rule issued by the Food and Nutrition Service as a result of the Child Nutrition and WIC Reauthorization Act of 2004. Schools participating in the lunch and breakfast programs must obtain two inspections per year, post the most recent inspection report in a visible location, and release a copy of the report to members of the public upon request. This rule enhances the safety of over 38 million meals served to school children daily.

**DATES:** This final rule is effective October 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** William Wagoner or Marisol Benesch, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service at (703) 305-2590.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 111 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265; June 30, 2004) amended section 9(h) of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1758(h)) by increasing the number of mandatory food safety inspections for schools participating in the NSLP and SBP from one to two per

school year, and by requiring schools to post the most recent inspection report in a visible location and to release a copy of the report to the public upon request. Section 111 also requires State agencies to submit to the Food and Nutrition Service (FNS) the number of inspections obtained by schools for each of fiscal years 2006 through 2009. These statutory requirements became effective July 1, 2005.

To implement the above requirements, FNS published an interim rule in the *Federal Register* on June 15, 2005 (70 FR 34627) and received a total of 75 public comments (59 from school food authorities (SFAs) or school districts, 3 from State agencies (SAs), 5 from regulatory agencies responsible for food safety inspections, and 8 from other individuals).

##### II. Public Comments

The main comments or concerns are the following:

###### *Need for Second Inspection*

Most commenters stated that the second inspection is not necessary because school cafeterias are safe places to eat, with well-trained staff and/or a manager who is certified in safe food handling practices.

###### *Inspection Cost*

Commenters noted that funds to pay for the second inspection and to increase inspection staff were not provided by law. For some schools, expanding the inspection requirement has more than doubled the cost for food safety inspections.

###### *Risk Assessment*

Commenters said that State/local regulatory agencies should assess the risk level that school food operations present and establish the frequency of inspections. Some said that schools rarely have critical violations and that regulatory agencies need to focus their resources on high risk food establishments.

###### *Reporting Requirement*

One commenter mistakenly thought that SFAs are required to send paper copies of the inspection reports to the SA. Another commenter stated that collecting data for the required SA report on the number of inspections obtained by schools has no practical utility for the SA and results in

additional paperwork and costs. One commenter, however, indicated that data collected for the report could be useful for planning food safety training activities.

###### *Operational Issues*

In some SFAs, the requirement for a second inspection has created issues or questions surrounding inspection fees, scope of the second inspection, self-inspections, and third-party inspections. Some States exempt schools from paying food service license fees, which limits the ability of the regulatory agencies to financially support school inspections. Commenters noted that in large counties and in rural areas where schools are spread apart, it is difficult for schools to obtain a second food safety inspection.

##### III. Suggestions

Although most commenters opposed the increased inspection requirement, a number of them offered the following suggestions:

- Allow agencies responsible for food inspections to assess the need for additional school inspections.
- Exempt individual schools from the second inspection if they have no major violations on the initial inspection or if they have a food safety program based on Hazard Analysis and Critical Control Point (HACCP) principles.
- Allow schools to do self-inspections based on standards established by the inspection agency.
- Instead of a second inspection, require school food service staff to be certified in food safety principles.
- Minimize the burden of information collection on the respondent schools by allowing the SAs to collect the inspections data as part of an existing data collection system.
- Provide funding to meet all requirements established by Public Law 108-265.
- A director of a local health department recommended that school inspections should only be conducted by the State regulatory agencies. The commenter noted that the Food and Drug Administration Food Code is adopted by a State and, typically, not by local government. The commenter also said that self-inspections should not be allowed because a third-party review of the sanitation conditions in kitchens is needed.

Furthermore, the commenter said the second inspection should not be a routine food safety inspection, and instead it should be a validation of an effective HACCP-based food safety program by a third party such as the State regulatory agency, State-approved local governmental agency, or a private consultant.

#### IV. FNS Response

Food safety has always been a priority for the Child Nutrition Programs. Parents, the public and Congress also have a strong interest in the safety of lunches and breakfasts served to millions of school children daily. The 2005 Dietary Guidelines for Americans, which is the nutritional foundation of the school meal programs, emphasizes food safety as well.

Increasing food safety inspections to two per school year should help program operators identify and correct food safety problems faster, thereby enhancing food safety in meal preparation and service sites. We recognize that obtaining two food safety inspections annually may be difficult for a limited number of schools. However, the reports submitted by the State agencies for school years 2005–2006, 2006–2007, and 2007–2008 show an increase in the number of schools meeting the twice annual inspection requirement. The compliance rate increased from 58 percent in school year 2005–2006 to 70 percent in school year 2007–2008. This increase was possible with FNS' outreach efforts and the collaboration between State/local program operators and inspecting agencies.

Prior to Public Law 108–265, the NSLA statutory provisions and NSLP and SBP regulatory provisions required schools to obtain at least one school food safety inspection per year, or more if mandated by a State or local agency responsible for food safety inspections. In Public Law 108–265, Congress preempted the mandates of State and local agencies to determine the number of food safety inspections required for schools operating the NSLP and SBP.

FNS does not have authority to waive the food safety requirements for individual schools because of food safety certification or implementation of a HACCP-based food safety program. Public Law 108–265 established food safety requirements that apply uniformly to all schools participating in the NSLP and SBP. Furthermore, food safety inspections and a HACCP-based food safety program are two separate but complementary statutory requirements.

Despite the noted cost and administrative burden that may result

from the additional inspection, there is a need to require high food safety standards in the NSLP and SBP. These school meal programs serve over 38 million lunches and breakfasts daily to children ages 2 and above. A foodborne illness in the school meal programs could have devastating consequences, as young children are particularly vulnerable.

This final rule retains the authority of the State and local regulatory agencies to determine the nature and scope of each school food safety inspection. However, a follow-up inspection due to critical violations discovered at the first inspection does not qualify as a second annual inspection. Self-inspections are not qualified inspections, per the regulatory language. The inspections must be conducted by a State or local agency responsible for inspections, or by another entity formally authorized by the State/local regulatory agency.

Regarding the reporting requirement, SAs are only required to collect the number of inspections obtained by schools during the school year and transmit this data to FNS. This information allows the SA and FNS to monitor the level of compliance with this requirement and detect any problems associated with it. FNS provides the SAs a simple optional template to transmit the inspections data electronically.

We are aware that in some states the state or local agency responsible for inspections transmits the inspection data directly to the SA. Although this arrangement is acceptable to FNS, this rule does not place any responsibility on the inspecting agency to provide such information to the SA or to develop a specific tracking and reporting system for this purpose.

In summary, this final rule adopts without change the requirements set forth in the interim rule published on June 15, 2005 at 70 FR 34627 and thus reflects the statutory requirements in Public Law 108–265.

#### IV. Procedural Matters

##### *Executive Order 12866*

This rule has been determined to be not significant and was not reviewed by the Office Management and Budget in conformance with Executive Order 12866.

##### *Regulatory Flexibility Act*

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). It has been certified that this rule will not have a significant economic impact on a substantial

number of small entities. This rule increases the number of food safety inspections in schools participating in the National School Lunch Program and School Breakfast Program.

##### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, FNS must generally prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of \$100 million or more in any one year. Thus, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

##### *Executive Order 12372*

The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance under No. 10.555, and the School Breakfast Program is listed under No. 10.553. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115), these programs are included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

##### *Federalism Summary Impact Statement*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

##### *Prior Consultation With State and Local Officials*

Shortly after passage of Public Law 108–265, FNS held discussions with

State education agencies that administer child nutrition programs and with organizations representing State and local inspection agencies. These discussions provided FNS an opportunity to inform State and local officials about the new inspection requirement and to hear their concerns. FNS also issued an interim rule to solicit public comments.

#### Nature of Concerns and Need To Issue This Rule

The main concern of the State and local program operators and inspection agencies is the cost associated with the increased inspection requirement. Some schools now have to pay or pay more for the food safety inspections, and some inspection agencies have limited staff to handle the increased inspection load. Although we are aware that compliance with this requirement may still be difficult in some areas, it is our responsibility to implement these mandatory statutory requirements which are non-discretionary.

#### Extent to Which FNS Meets Those Concerns

FNS has considered the comments and suggestions offered by State and local program operators, inspection agencies and others, but we are unable to make changes that are inconsistent with the inspection requirement as prescribed by the law. We will continue to provide information and guidance to those affected by this rule and to encourage regulatory agencies to help schools comply with this rule.

To minimize the impact of this rule, FNS will continue to apply the inspections requirement to preparation and service sites rather than to individual meal programs (NSLP and SBP). FNS will allow inspections performed under the Summer Food Service Program and the Child and Adult Care Food Program to count toward this requirement if all the meal programs use the same food service facility.

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule has a preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Date paragraph of this rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative

procedures under section 210.18(q) must be exhausted.

#### Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact Analysis," to identify any major civil rights impacts the rule might have on children on the basis of race, color, national origin, sex, age or disability. After a careful review of the rule's intent and provisions, FNS has determined that it does not affect the participation of protected individuals in the National School Lunch and School Breakfast Programs.

#### Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35, see 5 CFR part 1320) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. The information collection requirements associated with this action were approved by the Office of Management and Budget on May 29, 2009 under OMB Control Number 0584-0006, Expiration date May 31, 2012, which contains the information collection activities in the NSLP.

The entire School Food Safety Inspection data collection burden for both NSLP and SBP operators is contained only in OMB Control Number 0584-0006 and not the SBP (OMB Control Number 2, Expiration May 31, 2012) because the NSLP is a larger nutrition program and food safety inspections conducted in the NSLP count toward the inspection requirement in both meal programs. The burden hours estimate provided in the notice of proposed information collection published on May 12, 2005 (70 FR 25014) has increased from 9,483,231 to 9,558,282 due to an adjustment in the number of School Food Authorities and schools participating in the NSLP and SBP.

#### E-Government Act Compliance

FNS is committed to compliance with the E-Government Act (E-Gov), 2002 which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. FNS has requested that State agencies submit electronically the inspections report required by this rule.

#### Public Participation

In Section 501(b) of Public Law 108-265, Congress specifically afforded the Secretary the option to implement the inspections requirement through an interim rule, while soliciting public comments. State and local program operators and inspection agencies commented on the interim rule published in the **Federal Register** (70 FR 34627) on June 15, 2005.

#### List of Subjects

##### 7 CFR Part 210

Food and Nutrition Service, Grant programs—education, Grant programs—health, Infants and children, Nutrition, Penalties, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

##### 7 CFR Part 220

Food and Nutrition Service, Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, the interim rule that was published at 70 FR 34627 on June 15, 2005 amending 7 CFR parts 210 and 220 is adopted as a final rule without changes.

Dated: August 24, 2009.

**Julia Paradis,**

*Administrator, Food and Nutrition Service.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Parts 1 and 33

[Docket No. 2007-28502; Amendment No. 1-65, 33-30]

RIN 2120-AJ06

#### Airworthiness Standards; Aircraft Engine Standards Overtorque Limits

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule will amend the certification standards for aircraft engines to establish requirements for approval of maximum engine overtorque. Specifically, this action will add a new engine overtorque test, amend engine ratings and operating limits, and define maximum engine overtorque for certain turbopropeller and turboshaft engines. The rule will