

Comment of the Animal Legal Defense Fund, Farm Sanctuary, and the Animal Welfare Institute in support of proposed rule published in the Federal Register by the Food Safety and Inspection Service on May 13, 2015, “Requirements for the Disposition of Non-Ambulatory Disabled Veal Calves” (80 FR 27269)

The Animal Legal Defense Fund, Farm Sanctuary, and the Animal Welfare Institute (commenters) submit this comment in support of the Food Safety and Inspection Service’s (FSIS) proposed rule regarding the disposition of non-ambulatory disabled veal calves (9 CFR 309.13(b)). We also write in support of FSIS’s proposed clarification to the requirement that all non-ambulatory disabled cattle be *promptly* euthanized after they have been condemned (9 CFR 309.3(e)), with the additional proposed clarification that non-ambulatory disabled cattle are protected by this requirements as soon as their transport vehicle arrives on the premises of the slaughter establishment.

I. COMMENTERS FULLY SUPPORT FSIS’S PROPOSED RULE ELIMINATING THE EXEMPTION REGARDING THE DISPOSITION OF NON-AMBULATORY DISABLED VEAL CALVES

USDA’s exclusion of veal calves from the requirement that all non-ambulatory cattle be immediately and humanely euthanized is inconsistent with the plain language of the Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901 et. seq. (HMSA), and irreconcilable with USDA’s own rules and determinations. The only way to bring 9 CFR 309.13(b) into conformity with both the statutory mandate of the HMSA as well as USDA’s own regulatory posture is to eliminate the second sentence in 9 CFR 309.13(b), which currently allows establishments to “set aside” and later slaughter veal calves who are deemed too tired or cold to rise or walk.

A. FSIS’s Proposed Rule Will Bring USDA Regulation of Non-Ambulatory Disabled Veal Calves Into Compliance With the Statutory Mandate of the HMSA

The HMSA provides that “handling of livestock in connection with slaughter shall be carried out *only by humane methods*” and directs USDA’s Secretary to designate methods of handling that conform to this policy.¹ The provision in 9 CFR 309.13(b) exempting veal calves

¹ 7 U.S.C. § 1901.

from the requirement that all non-ambulatory cattle be immediately and humanely euthanized directly contravenes this HMSA mandate by incentivizing abusive handling practices.

In fact, removal of this very incentive was the goal of the 2009 Final Rule promulgated in 74 FR 11463-01, wherein FSIS specifically noted that allowing for the re-inspection of non-ambulatory disabled cattle “created an incentive for establishments to inhumanely attempt to force these animals to rise.”² Therefore, FSIS “determined that a change in the regulation is needed to ensure more effective and efficient implementation of inspection procedures and compliance with humane handling requirements at official establishments.”³ This same reasoning supports removal of the provision in 9 CFR 309.13(b) allowing certain downed veal calves to be “set apart and held” for treatment and re-inspection. **The cause of the animals’ non-ambulatory status (i.e., injury/disease versus cold/fatigue) is irrelevant in light of the agency’s stated goal to disincentivize inhumane attempts to force these animals to rise.**

Indeed, the cruelty that results from the loophole for non-ambulatory disabled veal calves has been observed time and again at veal processing plants across the country:

- In 2014, at the JJ Meat Co. establishment in Madera, California, an FSIS inspector observed the driver of a veal calf transport truck attempting to unload a shipment of calves, some of whom were non-ambulatory. The driver carried one collapsed calf from the truck to the holding pen, where he dropped the animal from waist high, approximately 2.5 to 3 feet, onto the concrete floor. The calf landed on his back and remained immobile on the concrete. The driver then unloaded another non-ambulatory calf, this time holding up a large portion of the calf’s body weight by his leg. When the driver let go, the calf slumped to the ground and obtunded, unable to rise. The driver then went to unload three more calves, whom he pushed off the edge of the trailer, chin first onto the concrete. The calves simply lay there on the ground at the foot of the truck, incapable of rising.⁴

² Final Rule, 74 Fed. Reg. 11463-01, 11464 (Mar. 18, 2009) (Exhibit 1).

³ Id.

⁴ “Reinstatement of Notice of Suspension,” letter from Hany Sidrak, Executive Associate for Regulatory Operations, Food Safety and Inspection Service, to Javier Juarez, Owner, JJ Meat Co. (Feb. 26, 2014), *available at* <http://www.fsis.usda.gov/wps/wcm/connect/88d10964-a974-44d6-9ed9-592207af1636/M4969-RONOS-022614.pdf?MOD=AJPERES> (Exhibit 2).

- Also in 2014, at the LRN Processors, Inc. establishment in Newman, California, an inspector observed week-old veal calves being unloaded from the transport truck. Several non-ambulatory calves had been unloaded from the truck and were laying on the ground in a holding pen where they were lying amongst dead and dying calves and being stepped on by ambulatory calves.⁵
- In 2013, at the Catelli Bros. establishment in Shrewsbury, New Jersey, an investigator documented numerous egregious attempts to move downed veal calves. One calf was dragged by a chain around his neck; others were punched, sprayed with water, and shocked with an electric prod. Plant managers twisted calves' sensitive ears and tails in an effort to get them to stand. Several workers even lifted the entire weight of calves by their tails.⁶
- In 2009, at the Bushway Packing plant in Grand Isle, Vermont, workers repeatedly shocked and kicked non-ambulatory veal calves in their necks, faces, and torsos in an effort to force the collapsed animals to move. Immobilized calves lying on their sides on transport trucks were shocked so hard their bodies jerked involuntarily from the electric current. Other calves who had gone down during transport were shocked, grabbed by their ears and tails, and yanked off the trucks. Once unloaded, downed calves could be heard crying as workers repeatedly shocked and kicked them on the ground. Attempts to make calves stand by picking them up by their hips and pushing them forward only resulted in their shaky legs giving way and their frail bodies collapsing back to the ground.

All of the foregoing took place in front of an FSIS inspector, who did nothing to

⁵ Noncompliance Record MXN3418040911N-1, LRN Processors, Inc., Est. No. M27300 (April 11, 2014); *see* Table 1: NRs for Requested Establishments FOIA 14-326 (Exhibit 3).

⁶ "Notice of Suspension Revised," letter from Steven Lalicker, District Manager, Office of Field Operations, Food Safety and Inspection Service, to Catelli Brothers, Inc. (Jan. 27, 2014), *available at* <http://www.fsis.usda.gov/wps/wcm/connect/e5b67320-9fc5-4303-b323-3327d852ea4d/01809AM-Suspension-012414.pdf?MOD=AJPERES> (Exhibit 4); *see also* Humane Society of the United States, *USDA Shuters Calf Slaughter Plant in New Jersey in Wake of HSUS Investigation*, Jan. 27, 2014, http://www.humanesociety.org/news/press_releases/2014/01/Catelli_investigation_012714.html (last visited Aug. 11, 2015) (Exhibit 5).

stop the abuse because 9 CFR 309.13(b) gave him discretion to allow the workers the opportunity to “rehabilitate” the downed animals.⁷

In response to FSIS’s proposed rule, several industry trade associations have commented that allowing non-ambulatory veal calves time to rest and gain warmth is “inherently humane.” Yet these claims are both inaccurate and disingenuous. First, where an animal is unable to walk, he is certainly suffering extreme frustration, and it would be hard to imagine a condition that would render a calf non-ambulatory that would not involve physical pain. Thus, where there are two options—either humane euthanasia or continuing to suffer and then being processed for food—humane euthanasia is clearly the more humane choice. Only one who profits from allowing him to continue to suffer and then slaughtering him would even attempt to argue otherwise. Additionally, as demonstrated by the tragic examples detailed above, slaughter establishments that exercise the option of setting aside downed calves frequently handle these animals cruelly, as they attempt to force the animals to stand, so that they can profit from selling them. By removing the option of setting aside non-ambulatory disabled veal calves for so-called “recovery” and re-inspection, USDA would remove this abhorrent incentive and instead foster the only practice consistent with the HMSA in these circumstances: *immediate humane euthanasia*.

B. Removing the Current Exclusion of Veal Calves From the Requirement that All Non-Ambulatory Cattle Be Promptly Euthanized Is Necessary to Reconcile Section 309.13(b) With USDA’s Own Rules and Determinations

USDA has specifically interpreted the HMSA to require prompt euthanasia of *all* non-ambulatory cattle.⁸ The current exemption for veal calves is clearly inconsistent with this interpretation. Moreover, the current exemption directly undermines USDA policy by generating uncertainty and perpetuating inefficient use of agency resources by requiring re-inspection by FSIS agents.

⁷ Humane Society of the United States, *Abused Calves at Vermont Slaughter Plant*, Oct. 30, 2009, available at http://www.humanesociety.org/news/news/2009/10/calf_investigation_103009.html (last visited Aug. 11, 2015) (Exhibit 6).

⁸ See Press release, United States Department of Agriculture, Agriculture Secretary Ed Schafer Announces Plan to End Exceptions to Animal Handling Rule (May 20, 2008), available at http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=true&contentid=2008/05/0131.xml (last visited Aug. 11, 2015) (Exhibit 7).

The USDA has repeatedly made clear the need for an absolute, unqualified prohibition against the slaughter of non-ambulatory “downer” cattle.⁹ In light of this publicly stated goal to eliminate all exceptions to the downer cattle rule, we expect USDA will adopt FSIS’s proposed rule eliminating the 9 CFR 309.13(b) exemption of veal calves from the HMSA’s humane euthanasia requirement.¹⁰

II. COMMENTERS SUPPORT FSIS’S PROPOSED CLARIFICATION THAT ALL NON-AMBULATORY DISABLED CATTLE OFFERED FOR SLAUGHTER MUST BE PROMPTLY EUTHANIZED AFTER CONDEMNATION BUT REQUEST AN ADDITIONAL AMENDMENT CLARIFYING THE TERM “OFFERED FOR SLAUGHTER” TO MEAN CATTLE ON TRANSPORT VEHICLES UPON ARRIVAL ON THE SLAUGHTER ESTABLISHMENT PREMISES

Commenters support the proposed amendment to 9 CFR 309.3(e) clarifying that non-ambulatory disabled cattle offered for slaughter must be condemned and *promptly* disposed of properly. “Promptly” should further be defined to mean *without any undue delay* in light of all facts and circumstances.

In its Proposed Rule, FSIS expressly states that this prompt-euthanasia requirement applies to all non-ambulatory disabled cattle *offered for slaughter*, “including veal calves.” Yet, without defining the point at which cattle are “offered for slaughter,” this regulation continues to harbor significant uncertainty. As pointed out by FSIS Field Operations Executive Associate Keith Gilmore in his comment on this Proposed Rule, “[i]f this rule is to be effective, the phrase ‘offered for slaughter’ should be rethought so as to close a possible loophole.”¹¹

The loophole foreseen by Mr. Gilmore and others exists if “offered for slaughter” is interpreted to mean “presented for ante-mortem inspection.”¹² Without including clarifying language to the contrary, such an interpretation is likely, making this perceived loophole a real problem. Upon receiving a shipment of veal calves, this interpretation would allow a slaughter

⁹ Id.

¹⁰ FSIS has previously recognized that the HMSA and regulations require that non-ambulatory disabled cattle be humanely handled and that such “humane handling requires that such cattle be promptly euthanized.” 74 Fed. Reg. at 11464 (Exhibit 1).

¹¹ Comment by Keith Gilmore on FSIS Proposed Rule “Requirements for the Disposition of Non-ambulatory Disabled Veal Calves” (80 FR 27269), posted June 12, 2015, available at <http://www.regulations.gov/#!documentDetail;D=FSIS-2014-0020-0005> (last visited Aug. 11, 2015) (Exhibit 8).

¹² Id.

plant to present only the ambulatory calves for ante-mortem inspection while setting aside the downed calves in hopes that they might regain ambulation. The ambiguity in when an animal is “offered for slaughter” would also allow a truck driver to only “offer for slaughter” the ambulatory veal calves, while keeping the non-ambulatory calves on the truck for disposition off-site, at a stockyard or rendering plant outside the safeguards of FSIS inspection. Consequently, the loophole posed by the undefined phrase “offered for slaughter” poses numerous risks. It indirectly fosters the same troubling incentive described above, to inhumanely force non-ambulatory disabled veal calves to rise so that they may be presented/offered for slaughter. And it also fosters the equally troubling incentive to recoup the lost money from injured, sick, and weakened veal calves who may not be slaughtered at FSIS-inspected slaughter plants, by transporting them to uninspected sites for slaughter and processing, endangering not only calves’ welfare, but food safety as well.

USDA’s authority to ensure that animals are treated humanely on slaughterhouse grounds is clear. For example, the Supreme Court found that the Federal Meat Inspection Act’s (FMIA) “scope includes not only ‘animals that are going to be turned into meat,’ but animals on a slaughterhouse’s premises that will never suffer that fate.”¹³ In that case, *National Meat Association v. Harris*, the Court decided that California could not regulate the types of animals that could enter a slaughterhouse without impeding on USDA’s jurisdiction under the FMIA. The Court found that the FMIA applied to all animals that entered or were poised to enter into the property of a slaughterhouse, whether they were presented/offered for slaughter or not.

Thus, in order to avoid this unintended loophole and effectuate the purpose of 9 CFR 309.3(e), “offered for slaughter” must be clarified to mean the time at which the cattle transport vehicle arrives at the slaughter plant premises. To that end, we propose amending section 309.3(e) to read as follows:

(e) Establishment personnel must notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection. Non-ambulatory disabled cattle that are offered for slaughter must be condemned and *promptly* disposed of in accordance with § 309.13. *For purposes of this subsection, cattle en*

¹³ *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 973 (2012)

*route to a slaughter establishment are considered “offered for slaughter” upon the arrival of their transport vehicle at the establishment or at any nearby property that is used by the establishment or arriving trucks for animal sorting.*¹⁴



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¹⁴ Proposed additions appear in italics.