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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Part 309

[Docket No. FSIS-2008-0022]

RIN [0583-AD35]

Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending the Federal meat inspection regulations to require that all cattle that are non-ambulatory disabled at an official establishment, including those that become non-ambulatory disabled after passing ante-mortem inspection, be condemned and disposed of properly. In addition, this rule requires that establishments notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection. FSIS is taking this action to better ensure effective implementation of inspection and humane handling requirements at official establishments.

DATES: Effective Date: This regulation is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Dr. Daniel Engeljohn, Deputy Assistant Administrator, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250-3700, (202) 205-0495.

SUPPLEMENTARY INFORMATION:

Background

On August 29, 2008, FSIS published a proposed rule to amend the regulations in 9 CFR 309.3(e) to remove the provision that allows FSIS inspection personnel to determine, on a case-by-case basis, the disposition of cattle that become non-ambulatory disabled after they have passed ante-mortem inspection ("Requirements for the Disposition of Cattle That Become Non-Ambulatory Disabled Following Ante-Mortem Inspection" (73 FR 50889)). In that proposed rule, FSIS also proposed to require that establishments notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection.

The Agency issued the proposed rule in response to a January 2008 investigation into events at the Hallmark/Westland Meat Packing Company that highlighted a vulnerability in our inspection system and that disclosed instances where cattle had been inhumanely handled. Based on these findings, FSIS determined that the proposed amendments

to 9 CFR 309.3 were necessary to ensure that animals that may be unfit for human food do not proceed to slaughter, and to improve the effectiveness and efficiency of our inspection program. The Agency concluded that the revision proposed would reduce uncertainty in determining the proper disposition of non-ambulatory disabled cattle and would eliminate the time FSIS public health veterinarians (PHVs) spend determining whether or not an animal can be tagged as "U.S. Suspect", proceed to slaughter, and then re-inspected after slaughter, thereby increasing the time inspection program personnel can focus on other inspection activities (73 FR at 50890-50891). FSIS also concluded that the proposal would improve humane handling practices and preclude establishments from attempting to force non-ambulatory disabled cattle to rise.

FSIS also proposed to clarify in 9 CFR 309.3(e) that establishments are required to specifically notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection. The Agency proposed to make clear that establishments have an affirmative obligation to make FSIS personnel aware when an animal goes down.

This final rule adopts the proposed amendments to 9 CFR 309.3(e) without changes. These amendments will ensure more

effective and efficient inspection procedures under the Federal Meat Inspection Act (FMIA), 21 U.S.C. 603, and improved compliance with the humane handling requirements established pursuant to 21 U.S.C. 603(b).

In the preamble to the proposed rule, FSIS stated that it would expect custom operators not to slaughter cattle that become non-ambulatory disabled after they are delivered to the custom operation (73 FR at 50890-50891). Based on comments received and after further consideration of the issue, FSIS has decided to continue to permit custom operators to slaughter for human food cattle that become non-ambulatory disabled after they are delivered to a custom operation if the custom operator does not observe any other condition that would render the animal unfit for human food.

Comments and Responses

FSIS received approximately 58,000 comments in response to the proposed rule. Among the commenters were private citizens, animal welfare advocacy organizations, meat and dairy trade associations, consumer advocacy organizations, organizations that represent meat processors, cattlemen and cattle feeders associations, a stockgrowers association, a state department of agriculture, a veterinary medical association, a physician's committee, and a national

restaurant chain. The majority of comments were form letters submitted by private citizens and animal welfare organizations concerned about the humane treatment of animals.

Comment: The majority of private citizen, animal welfare advocacy organization, and consumer advocacy organization comments supported the adoption of the proposed rule requiring the condemnation of all non-ambulatory disabled cattle, including those that become non-ambulatory disabled after passing ante-mortem inspection. The commenters asserted that the rule is necessary to improve food safety and to ensure the humane handling of non-ambulatory disabled cattle at slaughter.

The commenters asserted that the current regulatory provision for a case-by-case determination concerning the disposition of certain non-ambulatory disabled cattle created the unintended effect of encouraging establishments to present weakened cattle for ante-mortem inspection. The commenters argued that this unintended circumstance encourages the abusive treatment of cattle.

Response: FSIS agrees with the commenters that this rule will foster more efficient and effective ante-mortem inspection procedures and better ensure compliance with humane handling requirements. FSIS also agrees with commenters that the rule is necessary to preclude establishments from

attempting to force non-ambulatory disabled animals to rise for FSIS re-inspection. The Agency also believes that it is important to clarify whether establishments must specifically notify FSIS when cattle become non-ambulatory disabled after passing ante-mortem inspection to ensure that animals not eligible for slaughter do not enter the slaughter operation, and that they are properly and humanely handled and disposed of in accordance with regulatory requirements.

Comment: Several meat processor and cattlemen associations requested that the Agency reevaluate the decision regarding the custom slaughter exemption for personal use.

Response: After carefully considering this issue, the Agency has decided to continue to allow custom operators to slaughter for human food cattle that become non-ambulatory disabled after they are delivered to a custom slaughter facility if the operator does not observe any other condition that would render the animal unfit for human food. Cattle slaughtered under a custom exemption and the associated beef products are not sold in commerce to the public. Custom exempt product is required to be delivered to the owner of the livestock and only for the owner's personal use.

In addition, based upon the 2007 FSIS survey data discussed below, the Agency estimates that the number of animals that would become non-ambulatory disabled after

arriving at a custom operation is so small as to be de minimis.

Comment: Most of the private citizen, animal welfare advocacy organization, and consumer advocacy organization comments that supported the proposed prohibition on the slaughter of all non-ambulatory disabled cattle requested that the Agency extend the ban to cover all livestock.

Response: The proposed rule addressed ante-mortem inspection and humane handling issues related to non-ambulatory disabled cattle, not other livestock. This issue is outside the scope of this rulemaking. However, as the Agency has noted in a prior rulemaking (72 FR 38722), it plans to evaluate measures that may be necessary to ensure the humane handling of livestock.

Comment: Most of the private citizen, animal welfare advocacy organization, and consumer advocacy organization comments that supported the ban on the slaughter of non-ambulatory disabled cattle requested that the Agency extend this prohibition to auction markets, stockyards, and transport vehicles.

Response: FSIS is making no changes based upon these comments. The Agency has jurisdiction only at official establishments. FSIS has no authority over the handling of

cattle at auction markets, stockyards, or in transport vehicles before they reach official establishments.

Comment: Several of the private citizen, animal welfare advocacy organization, and consumer advocacy organization comments recommended that non-ambulatory disabled cattle be immediately euthanized. Several animal welfare advocacy organizations comments also recommended that FSIS take additional actions to ensure humane handling of livestock, including assigning more inspectors to enforce humane handling procedures, requiring video surveillance, and conducting undercover investigations.

Response: The Humane Methods of Slaughter Act of 1978 (HMSA) (Section 1901, 1902, and 1906) requires that livestock, including non-ambulatory disabled cattle, be humanely handled in connection with slaughter. Because the HMSA and regulations require that non-ambulatory disabled cattle be humanely handled, FSIS has determined that it is not necessary to amend this regulation because humane handling requires that such cattle be promptly euthanized. FSIS does not believe that it is necessary to require video surveillance. FSIS has issued instructions to field personnel concerning humane handling requirements for non-ambulatory disabled livestock (Directive 6900.1). FSIS will revise instructions to the field and its operational procedures as necessary to implement this final

rule to include consideration of an increase, when appropriate, in the number of humane handling verification activities that inspection program personnel perform.

Comment: Several industry commenters who supported the proposal recommended that FSIS make clear its procedure for determining when a bovine animal is non-ambulatory disabled.

Response: FSIS determined that no additional changes to the regulations were necessary to address this comment. The regulations define non-ambulatory disabled livestock, which includes bovine, as, "livestock that cannot rise from a recumbent position or cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column or metabolic conditions" (9 CFR 309.2(b)).

FSIS Directive 6100.1 "Ante-mortem Livestock Inspection" and an associated "Q and A" document provide guidance to FSIS inspection personnel for determining whether an animal is non-ambulatory disabled. FSIS PHVs are trained to determine when a bovine is unable to rise or unable to walk. FSIS will, of course, revise its directives as necessary to ensure implementation of this final rule.

Comment: Several industry commenters who opposed the proposed amendment stated that the current regulatory provision should remain unchanged, allowing cattle that become

non-ambulatory disabled after passing ante-mortem inspection to be reevaluated by an FSIS PHV.

Response: FSIS disagrees with the comment. The events at the Hallmark/Westland establishment demonstrate that FSIS inspection personnel are not always notified when cattle become non-ambulatory disabled after they pass ante-mortem inspection. Thus, under the former regulations, and specifically at Hallmark/Westland, non-ambulatory disabled cattle that had not consistently received proper and adequate ante-mortem inspection were slaughtered for human food. In addition, the events at Hallmark demonstrate that requiring re-inspection of cattle that become non-ambulatory disabled after ante-mortem inspection may have created an incentive for establishments to inhumanely attempt to force these animals to rise. Therefore, FSIS has 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.

Comment: Several industry commenters opposed the proposed amendment because they believed that changing the regulation would be a significant expense for small and very small meat processors. However, the comments did not include any data to support this assertion. The commenters stated that having FSIS PHVs re-evaluate the animal provides the

establishments with the ability to salvage an animal that may have slipped and broken a leg, or temporarily became too exhausted to move to slaughter.

Response: As noted above, FSIS inspection personnel have not always been notified when cattle become non-ambulatory disabled after they pass ante-mortem inspection. In addition, requiring re-inspection of cattle that become non-ambulatory disabled after ante-mortem inspection may have created an incentive for establishments to inhumanely attempt to force these animals to rise. Allowing this re-inspection may have encouraged establishments or livestock producers to hold ill or injured cattle from slaughter longer in an attempt to allow them to sufficiently recover to pass the initial ante-mortem inspection before collapsing.

Further, the re-inspection rule may have provided an incentive for livestock producers to hold cattle until they were already weakened. Holding dairy cattle until they become exceptionally old or weak before sending them to slaughter allows producers to extract as much milk as possible in the hope that they are able to pass the initial ante-mortem inspection before going down. Sending such weakened cattle to slaughter increases the chances that they will go down and then be subjected to conditions that are inhumane. This revision of the rule removes the incentive to send such

weakened cattle to slaughter and decreases the chances of inhumane conditions.

Therefore, the amendments in this rule are needed to ensure the effective implementation of ante-mortem inspection and humane handling requirements at all official establishments, including small or very small facilities. Also, as discussed below, the Agency's analysis of the estimated cost of this rule to small and very small establishments would be about \$883,500 to \$1,342,600 annually, which is insignificant compared to the value of their annual production of about \$8.4 billion. These commenters did not explain the basis for their assertion or offer alternative data demonstrating the inadequacy of the data used by the Agency to estimate the costs of this rule.

Comment: Several industry commenters who opposed the proposed amendment stated that the risk of BSE is very low because of interlocking safeguards that the U.S. has implemented, and that, thus, the change to current policies is unnecessary.

Response: This final rule may help to reinforce the existing prohibition on the slaughter of non-ambulatory disabled cattle by ensuring the humane disposition of such animals at official establishments. In addition, FSIS has concluded that this final rule will better ensure more

efficient and effective implementation of inspection and humane handling requirements at official establishments.

Comment: One industry commenter criticized the economic analysis because FSIS stated that it is difficult to estimate the passing-through of industry cost to consumers.

Response: FSIS calculated the cost impact using the best data that are available to the Agency, which includes both survey data and market data. The cost impact is at most 0.01% of small and very small establishments' annual production. Therefore, there is strong evidence for concluding that the cost of the rule is not significant. The costs that industry will pass through to consumers do not affect the total cost estimate. In the proposed and final Executive Order 12866 and Regulatory Flexibility Act analyses, FSIS recognizes that industry will pass some of its costs to consumers.

The commenter did not explain the basis for concluding that the data used by FSIS was inadequate. In addition, the Agency did not receive any data suggesting the cost estimates that it presented in the proposal were inaccurate. Therefore, the Agency is not revising its original cost estimates.

Comment: One meat association that supported the proposal stated that the Agency should make clear that the amendments in this final rule that prohibit the slaughter of non-ambulatory disabled cattle, including those that become non-

ambulatory disabled after passing ante-mortem inspection, do not affect the current regulatory provisions concerning the setting aside of non-ambulatory veal calves.

Response: The provisions of this final rule do not affect 9 CFR § 309.13. Under the final rule, all non-ambulatory disabled cattle that are offered for slaughter, including non-ambulatory veal calves, must be condemned and disposed of in accordance with 9 CFR § 309.13. Section 309.13 of 9 CFR applies after livestock, including veal calves, have been condemned. Among other provisions, 9 CFR § 309.13(b) provides that veal calves that are unable to rise from a recumbent position and walk because they are tired or cold may be set apart and held for treatment but only under appropriate FSIS supervision.

Comment: One industry commenter requested that the Agency clarify that the prohibition of the slaughter of non-ambulatory disabled cattle has no bearing on the stunning of some breeds in the outside pen prior to entering the slaughter facility.

Response: All cattle, regardless of the breed, are subject to ante-mortem inspection at official establishments. Some cattle breeds, such as Longhorns and Watusis, are typically stunned in outside pens after ante-mortem inspection because the width of their horns prevents them from entering

slaughter facilities. After stunning, these animals are then moved inside the facility. This proposed rule has no effect on this practice. However, if such cattle are non-ambulatory disabled, they cannot proceed to slaughter and must be condemned and properly disposed of.

Executive Order 12988

This final rule has been reviewed under the Executive Order 12988, Civil Justice Reform. Under this rule: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) no retroactive proceedings will be required before parties may file suit in court challenging this rule. Following the proposed rule, FSIS did not obtain any new data or receive specific comments concerning the effects of this rule that would lead FSIS to change its estimates in the proposed Executive Order 12866 and Regulatory Flexibility Act analysis. Therefore, the Executive Order 12866 and the Regulatory Flexibility Act analysis below are consistent with the analyses in the proposed rule (73 FR 50891).

Executive Order 12866 and the Regulatory Flexibility Act

This rule was reviewed by the Office of Management and Budget under Executive Order 12866 and was determined to be significant.

This rule will require that all cattle that are non-ambulatory disabled at any time prior to slaughter in official establishments, including those that become non-ambulatory disabled after passing ante-mortem inspection, be condemned and disposed of properly. This rule is necessary to better ensure effective and efficient implementation of inspection procedures and of humane handling requirements.

Cost of the final action

Under this rule, the beef industry will lose the market value of certain non-ambulatory disabled cattle that the establishments could have slaughtered for human food after the cattle passed the re-inspection. Based on the Agency's 2007 survey data, out of the approximately 33.7 million cattle slaughtered in 2007,¹ FSIS estimates that about 1,300 cattle - about 600 cull cattle (i.e., mostly cows and bulls) and 700 steers and heifers - were in this category.² Data from the Agricultural Marketing Service (AMS) indicate that the market value for a cull cattle carcass and parts is between \$500 and \$1,000, and the market value for a steer or heifer carcass and parts is between \$900 and \$1,100 (National Weekly Cattle and

¹ FSIS Animal Disposition Reporting System (ADRS) database, 2007. Number does not include veal calves or other calves.

² To estimate the number of such cattle, FSIS conducted two surveys on the number of cattle that became non-ambulatory after ante-mortem inspection then passed the re-inspection in July through December 2007. One survey focused on establishments that slaughter predominantly cull cattle, and the other focused on ones that slaughter steers and heifers. FSIS extrapolated the 6-month data to annual figures.

Beef Summary and National Weekly Cow and Boneless Beef Summary, USDA Livestock & Grain Market News (www.ams.usda.gov/LSMarketNews), June 2008). Therefore, the estimated total market value of the carcasses and parts from cattle that would be condemned under this final rule would be in the range of \$930,000 to \$1,370,000 per year. This estimate is conservative in that it does not take into account the salvage value less the cost for handling and disposal of the condemned carcasses.

Although the above analysis focuses on costs to the beef industry, the industry eventually will pass at least some part of the additional cost to consumers through higher prices or reduced production. This is an indirect cost to the consumers and is difficult to estimate ex-ante without data.

Benefits of the final rule

This final rule is intended to ensure more effective and efficient implementation of inspection procedures and improve compliance with humane handling requirements. This action will provide efficiencies to food safety inspection by removing the regulatory provision that permits establishments to seek re-inspection to determine whether certain non-ambulatory cattle can be tagged as "U.S. Suspect" if those cattle become non-ambulatory disabled after passing ante-mortem inspection.

Regulatory Flexibility Analysis

The FSIS Administrator has determined that this final rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). In the Final Regulatory Impact Analysis of SRM final rule³, the Agency estimated that the rule would possibly affect 2,026 small and very small beef slaughter establishments. This includes 680 federally inspected establishments and 1,346 state inspected establishments. Such potential effects are not, however, expected to be significant given the very small number of cattle involved.

The estimated total annual cost of this rule of \$930,000 to \$1,370,000 is for the entire beef industry. The Agency estimates that small and very small establishments slaughter about 95% to 98% of the 1,300 non-ambulatory disabled cattle estimated from the survey. Therefore, the estimated annual cost to the small and very small establishments would be about

³ See Economic Analysis: Final Regulatory Impact Analysis Final Rule, Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle Offered for Slaughter, and Prohibition of the Use of Certain Stunning Devices Used to Immobilize Cattle during Slaughter (FSIS Docket No. 03-025F,) FSIS/USDA, June 28, 2007.
[http://www.fsis.usda.gov/Regulations & Policies/2007 Interim & Final Rules Index/index.asp](http://www.fsis.usda.gov/Regulations%20&%20Policies/2007%20Interim%20&%20Final%20Rules%20Index/index.asp)

\$883,500 to \$1,342,600, which is insignificant compared to the value of their annual production of about \$8.4 billion.⁴

Paperwork Reduction Act

This rule has been reviewed under the Paperwork Reduction Act and imposes no new paperwork or record-keeping requirements.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this proposed rule, FSIS will announce it online through the FSIS Web page located at http://www.fsis.usda.gov/regulations_&_policies/2009Interim_&_Final_Rules_Index/index.asp. FSIS will also make copies of this Federal Register publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, Federal Register notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be

⁴ The value is measured by dressed carcass equivalent, *ibid*, pp.161-169.

included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at http://www.fsis.usda.gov/news_and_events/email_subscription/. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

List of Subjects

9 CFR Part 309

Ante-Mortem Inspection.

For the reasons discussed in the preamble, FSIS is amending 9 CFR Chapter III as follows:

PART 309 - ANTE-MORTEM INSPECTION

1. The authority citation for part 309 continues to read as follows:

Authority: 21 U.S.C. 601-695; 7 CFR 2.18, 2.53.

2. Section 309.3(e) is revised to read as follows:

§ 309.3 Dead, dying, disabled, or diseased and similar
livestock.

* * * * *

(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 disposed of in accordance with § 309.13.

Done at Washington, DC, on: March 16, 2009.

Alfred Almanza,
Administrator.

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