

BEFORE THE UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE

THE HUMANE SOCIETY OF THE UNITED STATES

Petitioner.

v.

HONORABLE TOM VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE
JEROLD R. MANDE DEPUTY UNDER SECRETARY FOR FOOD SAFETY

Respondent.

Gina Tomaselli
Peter A. Brandt
The Humane Society of the United States
2100 L Street, NW
Washington, DC 20037
Telephone: (202) 452-1100
Facsimile: (202) 778-6132

I. INTRODUCTION

This petition is submitted on behalf of The Humane Society of the United States ("The HSUS") to request closure of a regulatory loophole that facilitates the cruel mistreatment of calves too weak, sick or injured to stand and walk.¹ Specifically, Petitioner requests that the United States Department of Agriculture, Food Safety and Inspection Service (USDA), repeal a provision in section 309.13(b) of the Code of Federal Regulations that allows veal calves who are unable to rise from a recumbent position because they are thought to be "tired or cold" to be "set apart and held" for treatment and potential slaughter for human consumption.

Although USDA has repeatedly made clear the need for an absolute, unqualified prohibition against the slaughter of non-ambulatory "downer" cattle,² the current regulations undermine that humane policy with a regulatory exemption that allows establishments to "set aside" and later slaughter veal calves who are deemed too tired or cold to rise or walk.³ This provision directly contravenes both USDA's publicly stated goal of

¹ Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11,463 (March 18, 2009) (to be codified at 9 C.F.R. pt. 309) ("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.*") (emphasis added) (hereinafter 2009 Final Rule).

² 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 Oct. 21, 2009) (hereinafter Schafer Press Release); see generally, 2009 Final Rule, 74 Fed. Reg. at 11,463.

³ 9 C.F.R. § 309.13(b).

eliminating all exceptions to the downer cattle rule,⁴ and the overarching purposes of the Humane Methods of Slaughter Act (HMSA),⁵ which USDA has specifically interpreted to require “prompt[] euthan[asia]” of *all* non-ambulatory cattle.⁶

As explained below, USDA has ample legal authority under the Humane Methods of Slaughter Act and the Federal Meat Inspection Act (FMIA)⁷ to include veal calves within the prohibition against the slaughter for human consumption of non-ambulatory cattle and to require that they be promptly euthanized.

As graphically demonstrated by a recent investigation into practices at the Bushway Packing plant in Grand Isle, Vermont, veal calves too sick, weak or injured to stand at slaughterhouses endure horrific abuse. Non-ambulatory calves were regularly and repeatedly kicked and shocked in their necks, faces, and torsos in an effort to force them to move off arriving trucks, to holding pens, or to the slaughter line. Moreover, this egregious cruelty took place in front a Food Safety and Inspection Service (FSIS) inspector, who routinely failed to take any remedial action or halt the abuse. Both the conduct of the slaughterhouse employees and the inaction on the part of the inspector were facilitated by USDA regulations, which, as explained below, are confusing and burdensome. Moreover, these regulations inadvertently incentivize slaughterhouses to move downed calves by inhumane methods

⁴ See generally, Schafer Press Release, *supra* note 2.

⁵ 7 U.S.C. §1901 et seq. (2006).

⁶ 2009 Final Rule, 74 Fed. Reg. 11,463, 11,464-65 (emphasis added).

⁷ 21 U.S.C. 601 et. seq. (2006).

and allow these calves, who likely suffer from illness, injury, or debilitating and irreversible weakness, to be kept alive and in agony indefinitely.⁸

The HMSA clearly states that “handling in connection with slaughtering” does not “comply with the public policy of the United States unless it is humane.”⁹ Because USDA has interpreted that Act as mandating prompt euthanasia for mature cattle too sick or injured to stand, and because the same humane-spirited reasons and the same legal standard apply to calves, Petitioner respectfully requests that the agency grant this petition and require that prone immobilized calves, as well as mature cattle, be humanely and immediately euthanized.

II. INTERESTS OF THE PETITIONERS

Petitioner The Humane Society of the United States (HSUS) is a non-profit organization that promotes the protection of all animals. The HSUS maintains its headquarters in Washington, DC and is the largest animal protection organization in the United States, with more than eleven million members and constituents. The HSUS actively advocates against practices

⁸ The regulation that allows non-ambulatory calves to be “set apart” and “held” provides no time frame for how long the calves may be kept alive nor does it have any requirement that after a certain amount of time they must be killed if they cannot rise or walk. See 9 C.F.R. § 309.13(b). This is especially problematic as noncompliance reports reveal that such calves are regularly denied water, contrary to USDA regulation 9 C.F.R. § 313.2(e), thus subjecting them to further unnecessary suffering. See, e.g., United States Department of Agriculture, Food Safety and Inspection Service, Noncompliance Record No. 25-2002-2775 (Nov. 21, 2002) (noting failure to provide water and that “some feeble attempts have been made at providing water to the outside pen. None of them assure there is water accessible at all times.”) (see Attach. 1); NR No. 0011-2005-5699 (June 30, 2005) (observing that calves who had no access to water in 90 degree weather were “foaming at the mouth and gasping for breath”) (see Attach. 2); NR No. 0005-2003-2775 (Feb. 19, 2003) (see Attach. 3); NR No. 0012-2006-6525 (March 9, 2006) (calves, cattle and 150 goats either had empty water containers or frozen solid water) (see Attach. 4); NR No. 3-2004-3564 (Feb. 23, 2004) (see Attach. 5).

⁹ 7 U.S.C. § 1902 (see Attach. 6).

that injure or abuse farm animals and promotes more humane slaughter of animals killed for human consumption. Furthermore, The HSUS offers information regarding the inhumane treatment of animals on a wide spectrum of topics, including the effects of the stress and inhumane treatment that occur in slaughterhouses.

III. ACTION REQUESTED

Pursuant to the Right to Petition Government Clause contained in the First Amendment of the United States Constitution,¹⁰ the Administrative Procedure Act,¹¹ and USDA's implementing regulations,¹² Petitioner submits this petition for rulemaking under the Humane Methods of Slaughter Act requesting that the Secretary take action to comply with the express intent of Congress to protect the welfare of all livestock held at slaughterhouses. The requested relief is also appropriate under the Federal Meat Inspection Act, which requires the Secretary to maintain the safety of our nation's meat supply.¹³ Specifically, Petitioner requests that USDA:

1. Remove the exemption allowing non-ambulatory veal calves to be set aside and eventually slaughtered for human consumption; and
2. Require that all non-ambulatory veal calves be immediately and humanely euthanized.

¹⁰ U.S. Const. amend. I.

¹¹ 5 U.S.C. § 553(e).

¹² 7 C.F.R. §1.28.

¹³ 21 U.S.C. § 601 et. seq.

IV. LEGAL BACKGROUND

A. The Humane Methods of Slaughter Act and Implementing Regulations

In response to widespread public pressure to reform slaughterhouse cruelty, Congress enacted the Humane Methods of Slaughter Act (HMSA) in 1958, which mandates that “the slaughtering of livestock and the handling of livestock...shall be carried out only by humane methods.”¹⁴ Congress made plain that by promoting humane slaughter it also intended to promote food safety, slaughterhouse worker safety, and the protection of both interstate and foreign commerce.¹⁵ In general, the HMSA governs two types of conduct: (1) the actual act of slaughtering, and, more relevant here, (2) “handling...in connection with slaughter,” which includes handling of animals once they arrive at a regulated slaughterhouse.¹⁶ The Act provides, “No method of slaughtering *or handling in connection with slaughtering* shall be deemed to comply with the public policy of the United States unless it is humane.”¹⁷

In order to carry out the requirement of humane slaughter, Congress directed USDA to designate “humane” methods of slaughter for “each species

¹⁴ 7 U.S.C. § 1901.

¹⁵ In full, Congress’s “Findings and declaration of policy” provides:

The Congress finds that the use of humane methods in the slaughter of livestock *prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations;* and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce. It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.

Id. (emphasis added); see also id. § 1902 (mandating that humane slaughter methods be applied to all “cattle, *calves*, horses, mules, sheep, swine, and other livestock”) (emphasis added).

¹⁶ Id.

¹⁷ Id. § 1902 (emphasis added).

of livestock,¹⁸ specifically including calves among those enumerated animals.¹⁹ In the enacted 1958 version, Congress prohibited the federal government from purchasing inhumanely slaughtered livestock products, but did not explicitly provide USDA authority to inspect slaughterhouses for compliance.²⁰ However, in 1978, Congress amended the Federal Meat Inspection Act to provide USDA with inspection authority to ensure that those animals slaughtered in accordance with the FMIA’s food safety requirements were *also* slaughtered in accordance with the HMSA of 1958.²¹ Specifically, Congress provided USDA with authority to suspend mandatory inspection if the Secretary found that certain livestock animals had been slaughtered by any method not in accordance with the HMSA.²²

At the same time, Congress amended the HMSA,²³ but specifically retained the policy findings and the provision requiring humane slaughter and handling.²⁴ In response, USDA issued regulations implementing standards for handling of animals at slaughter facilities,²⁵ noting in the preamble that the language, “handling in connection with slaughtering,”

¹⁸ Id. § 1904.

¹⁹ Id. § 1902(a).

²⁰ Id. § 1903.

²¹ Federal Meat Inspection Act, Pub. L. No. 95-445, 92 Stat. 1069 (1978). This 1978 amendment was also called a “Humane Methods of Slaughter Act.”

²² Id.

²³ For example, Congress removed the 1958 Act’s procurement restriction, 7 U.S.C. § 1903. Id.

²⁴ See 7 U.S.C. § 1902 (providing that “[n]o method of slaughtering *or handling in connection with slaughtering* shall be deemed to comply with the public policy of the United States unless it is humane”) (emphasis added); id. § 1901 (retaining the findings that “the use of humane methods in the slaughter of livestock prevents needless suffering” and “results in safer and better working conditions for persons engaged in the slaughtering industry.”).

²⁵ Humane Slaughter Regulations, 44 Fed. Reg. 68,809 (Nov. 30, 1979) (to be codified at 9 C.F.R. pts. 301, 304, 305, 313, 327, 335, 390, 391) (hereinafter 1979 Final Rule).

encompasses all handling of livestock on a regulated slaughterhouse's premises.²⁶

As relevant here, the 1979 regulations concerning humane handling have remained largely unchanged for the past three decades. Since it was promulgated, 9 C.F.R. Section 313.2, entitled "Handling of livestock," has proscribed various inhumane handling methods, such as "forcing [livestock] to move faster than a normal walking speed" and any use of "pipes, sharp or pointed objects, and other items which, in the opinion of the inspector, would cause injury or unnecessary pain to the animal..."²⁷ Section 313.2 requires that "[e]lectric prods, canvas slappers, or other implements employed to drive animals shall be used as little as possible in order to minimize excitement and injury."²⁸ In addition, that regulation addresses handling disabled and non-ambulatory livestock, providing:

(d) Disabled livestock and other animals unable to move.

(1) Disabled animals and other animals unable to move shall be separated from normal ambulatory animals and placed in the covered pen provided for in § 313.1(c).

²⁶ *Id.* at 68,811 (*quoting* S. Comm. Rep. No. 95-1059, at 4 (1978) ("It is the committee's intent that handling in connection with slaughter be interpreted by the Secretary to begin at the time livestock come into the custody of the slaughtering establishment, up to and including the moment of slaughter.")). Accordingly, FSIS has determined that these humane handling duties of the HMSA apply "[o]nce a vehicle carrying livestock enters an official slaughter establishment's premises," at which point "the vehicle is considered to be a part of that establishment's premises. The animals within that vehicle are to be handled in accordance with [9 C.F.R. §] 313.2." Humane Handling and Slaughter of Livestock, FSIS Directive 6900.2 Rev. 1, at 1 (Nov. 25, 2003); *see also*, Humane Handling and Slaughter Requirements and the Merits of a Systematic Approach To Meet Such Requirements, 69 Fed. Reg. 54,625-02, 54,625 (Sept. 9, 2004) ("The HMSA is referenced in the FMIA (21 U.S.C. 603) and is implemented by FSIS humane handling and slaughter regulations[.] Therefore, establishments must meet the humane handling and slaughter requirements in the regulations the entire time they hold livestock in connection with slaughter.").

²⁷ 9 C.F.R. § 313.2(a), (c).

²⁸ *Id.* § 313.2(b).

(2) The dragging of disabled animals and other animals unable to move, while conscious, is prohibited. Stunned animals may, however, be dragged.

(3) Disabled animals and other animals unable to move may be moved, while conscious, on equipment suitable for such purposes; e.g., stone boats.²⁹

Although this regulation allows for moving of “disabled livestock and other animals unable to move” – a class that logically must include non-ambulatory disabled animals – USDA nevertheless recently and unequivocally announced that cattle in this condition must be immediately euthanized:

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.*³⁰

Finally, USDA’s regulations empower FSIS inspectors to take a range of actions, including filing a Non-compliance Record (NR) to bringing all slaughtering to a halt if the establishment is handling or slaughtering animals inhumanely.³¹

B. Federal Meat Inspection Act and Implementing Regulations

Congress enacted the FMIA in 1907 to protect the health and welfare of meat consumers.³² The FMIA sets forth requirements that federal government personnel use to inspect animals intended to be slaughtered for use as human food after such animals arrive at federally-inspected

²⁹ *Id.* § 313.2(d).

³⁰ 2009 Final Rule, 74 Fed. Reg. at 11,463 (emphasis added).

³¹ 9 C.F.R. § 500.3(b) (2008).

³² 21 U.S.C. § 602.

slaughterhouses.³³ As noted above, in 1978 Congress amended the FMIA to provide USDA with inspection authority to ensure that those animals already slaughtered in accordance with the FMIA’s food safety requirements were *also* slaughtered in accordance with the HMSA.³⁴

To protect food safety, the FMIA establishes an essentially binary classification system under which FSIS’s paramount duties are to determine whether meat products are “adulterated”³⁵ and to prevent such “adulterated” products from entering the human food supply.³⁶ Sections 604 and 606 of the FMIA impose on FSIS the duty to inspect animals capable for use as human food, both before and after slaughter, to ensure that no part of a carcass determined to be adulterated passes into the human food supply.³⁷ As discussed below, the FMIA incorporates by reference the HMSA, including that Act’s prohibition against inhumane handling of animals in connection with slaughter.³⁸ The FMIA further directs the Secretary to appoint inspectors, promulgate regulations and take other actions to ensure that animals are handled humanely in connection with slaughter.³⁹ Additionally, the FMIA provides FSIS with broad inspection authority as well as broad

³³ 21 U.S.C. §§ 603, 604.

³⁴ Pub. L. No. 95-445, 92 Stat. 1069 (1978).

³⁵ Section 601(m) of the FMIA broadly defines “adulterated” to apply to:
any carcass, part thereof, meat or meat food product...(m)(1) if it bears or contains any poisonous or deleterious substance that may render it injurious to health...(m)(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food.

³⁶ 21 U.S.C. § 601 *et seq.*

³⁷ *Id.* §§ 603, 604, 606.

³⁸ *Id.* §§ 603(b), 610 (“No person, firm, or corporation shall...slaughter or handle in connection with slaughter any such animals in any manner not in accordance with the [HMSA]”) (emphasis added).

³⁹ *Id.* § 603(b).

authority to promulgate rules and regulations necessary to give effect to the Act.⁴⁰

The Secretary of USDA administers the FMIA through the Food Safety and Inspection Service.⁴¹ Under the FMIA, federal personnel inspect animals before they are slaughtered for human food (known as “ante-mortem inspection”).⁴² If a slaughterhouse chooses to present cattle for inspection, federal inspectors may either pass them for slaughter or condemn them.⁴³ There are many reasons that cattle may be identified as “condemned,” such as showing symptoms of disease or being unable to rise or walk.⁴⁴

C. FSIS’ Enforcement Authority

The FMIA, which incorporates the HMSA by reference, contemplates humane handling enforcement in a number of ways. First, USDA inspectors may take remedial regulatory control action, such as slowing or suspending the slaughter line, rejection of equipment or facilities, or refusal to allow

⁴⁰ Section 621 provides,

The Secretary shall appoint from time to time inspectors to make examination and inspection of all amenable species, inspection of which is hereby provided for...and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared...and shall perform such other duties as are provided by this chapter and by the rules and regulations to be prescribed by said Secretary; and said Secretary shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this chapter, and all inspections and examinations made under this chapter, shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary not inconsistent with provisions of this chapter.

⁴¹ See, e.g., id. §§ 601, 603.

⁴² Id. § 603.

⁴³ 9 C.F.R. §§ 301.2, 309.2.

⁴⁴ Id. § 309.3.

processing of certain products, in order to correct violations such as the inhumane handling or slaughter of animals.⁴⁵

Second, inspectors may temporarily suspend inspections if violations are found⁴⁶ and need not provide prior notification where animals are being slaughtered or handled inhumanely.⁴⁷ Such suspension has the effect of halting the slaughter line since regulated entities cannot lawfully process animals for human consumption if federal inspectors are not present.⁴⁸ However, USDA may only suspend inspections temporarily until the establishment provides satisfactory assurance that the slaughtering method is humane.⁴⁹ This applies even where the inhumane treatment is “egregious,” which USDA has defined as

⁴⁵ 9 C.F.R. § 500.1(a); id. § 500.2(a)(4).

⁴⁶ Section 603(b) provides,

For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which cattle, sheep, swine, goats, horses, mules, or other equines are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this Act. The Secretary may refuse to provide inspection to a new slaughtering establishment or may cause inspection to be temporarily suspended at a slaughtering establishment if the Secretary finds that any cattle, sheep, swine, goats, horses, mules, or other equines have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with sections 1901 to 1906 of Title 7 until the establishment furnishes assurance satisfactory to the Secretary that all slaughtering and handling in connection with slaughter of livestock shall be in accordance with such a method.

⁴⁷ 9 C.F.R. § 500.3(b);

⁴⁸ 21 U.S.C. 603(b); see 9 C.F.R. § 500.1(c) (“A ‘suspension’ is an interruption in the assignment of program employees to all or part of an establishment.”).

⁴⁹ 9 C.F.R. § 313.50 (instructing inspectors who observe inhumane slaughter or handling to inform the establishment operator, request that the operator take steps to prevent recurrence; if the operator fails to provide the inspector “with satisfactory assurances that such action will be taken,” the inspector is to attach a “U.S. Rejected” tag to the area where the inhumane treatment occurred, which is to be removed only by the inspector once assurances are provided).

...any act that is cruel to animals or a condition that is ignored and leads to the harm of animals such as:

1. making cuts on or skinning conscious animals,
2. excessive beating or prodding of ambulatory or nonambulatory disabled animals,
3. dragging conscious animals,
4. driving animals off semi-trailers over a drop off without providing adequate unloading facilities (animals are falling to the ground),
5. running equipment over animals
6. stunning of animals and then allowing them to regain consciousness,
7. multiple attempts, especially in the absence of immediate corrective measures, to stun an animal verses a single blow or shot,
8. dismembering live animals, such as removing feet from live animals,
9. leaving disabled livestock left exposed to adverse climate conditions while awaiting disposition , [or]
10. otherwise causing intentional unnecessary pain and suffering to animals, including situations on trucks.⁵⁰

Finally, the FSIS Administrator may file a complaint to withdraw altogether a grant of federal inspection because of an establishment's failure to slaughter or handle livestock humanely.⁵¹ This would have the effect of shutting down the establishment, since, as explained above, federal inspectors must be present in order to lawfully process animals for food.⁵²

D. Regulations Governing the Disposition of Non-Ambulatory Cattle

Over the past five years, USDA has issued numerous and often conflicting regulations, directives, notices, and rules regarding the disposition

⁵⁰ Humane Handling Activities and Documentation in Livestock Slaughter Establishments, FSIS Notice 21-09, at 2-3 (April 1, 2009); FSIS Notice 12-05, at 6; see also 9 C.F.R. § 313.2(d)(2) (“The dragging of disabled animals and other animals unable to move, while conscious, is prohibited.”).

⁵¹ 9 C.F.R. § 500.6(g); see id. § 500.1(b) (“A ‘withholding action’ is the refusal to allow the marks of inspection to be applied to products. A withholding action may affect all product[s] in the establishment or product[s] produced by a particular process.”).

⁵² 21 U.S.C. § 603(b); see 9 C.F.R. § 500.1(c) (“A ‘suspension’ is an interruption in the assignment of program employees to all or part of an establishment.”).

of non-ambulatory cattle. While facilities have always had the option to euthanize nonambulatory animals,⁵³ USDA has increasingly required euthanasia with respect to downed cattle. This began in response to USDA's December 23, 2003, diagnosis of a positive case of bovine spongiform encephalopathy (BSE) in a cow in the United States.⁵⁴ Several weeks later, USDA issued an interim final rule amending FMIA regulations by designating certain cattle parts as "specified risk materials" (SRMs) and prohibiting their use for human food.⁵⁵ USDA further required that all non-ambulatory disabled cattle who are presented for slaughter be "condemned."⁵⁶ Since clinical signs of BSE cannot always be observed in non-ambulatory cattle infected with BSE, as they mirror signs of many other diseases and conditions affecting downed cattle,⁵⁷ USDA announced its decision to exclude "all non-ambulatory disabled cattle from the human food supply, *regardless of*

⁵³ Ante-Mortem Livestock Inspection, FSIS Directive 6100.1 Rev. 1, at 5 (April 16, 2009) ("NOTE: Alternatively, the establishment may elect to condemn and humanely destroy the non-ambulatory disabled cattle before the PHV inspects and makes a disposition."),

⁵⁴ Prohibition of the use of specified risk materials for human food and requirements for the disposition of non-ambulatory disabled cattle; meat produced by advanced meat/bone separation machinery and meat recovery (AMR) systems; prohibition of the use of certain stunning devices used to immobilize cattle curing slaughter; bovine spongiform encephalopathy surveillance program; interim final rules and notice, 69 Fed. Reg. 1862 (Jan. 12, 2004) (to be codified at 9 C.F.R. pts. 309, 310, 311, 318, and 319) (hereinafter 2004 Interim Final Rule).

⁵⁵ Id.

⁵⁶ Id. All condemned livestock must be tagged with a serially numbered metal ear tag bearing the term "U.S. Condemned," 9 C.F.R. § 309.18(c), and the tag must be affixed by a Public Health Veterinarian or an establishment employee, but only under the Veterinarian's observation. FSIS Directive 6100.1 Rev. 1, at 7 (April 16, 2009). All condemned livestock must be killed by the establishment, and shall not be taken into the establishment, except for veal calves or livestock whose reason for condemnation is one of those enumerated in section 309.13(b). 9 C.F.R. § 309.13(a),(b). In that case, the animals may be "set apart and held for treatment under supervision of a Program employee or official designated by the area supervisor." Id. § 309.18(b). The condemnation tag may be removed only by a program employee following treatment. Id.

⁵⁷ Id. at 1870.

*the reason for their non-ambulatory status or the time at which they became non-ambulatory.*⁵⁸ USDA went on to make very clear that such animals must be treated and euthanized humanely:

Thus, if an animal becomes non-ambulatory in route to the establishment due to an acute injury, it must *humanely removed from the truck, humanely euthanized*, and the carcass properly disposed of. Likewise, cattle that become non-ambulatory on the establishment premises, such as an animal that breaks its leg as it is unloaded from the truck, are also required to be *humanely moved, humanely euthanized*, and the carcass properly disposed of.⁵⁹

However, later that day USDA issued Notice 5-04, which instructed inspectors to allow downed cattle to be slaughtered for human consumption if they initially appeared otherwise healthy but then collapsed in the slaughter plant itself due to an acute injury (e.g., if the animal falls and breaks a leg).⁶⁰ This mandate was extremely problematic since, as USDA itself noted, underlying diseases are often undetectable and may make an animal disoriented, weak, or uncoordinated, thereby predisposing the animal to injury.⁶¹

⁵⁸ Id. (emphasis added); see also id. (emphasizing that the definition of “non-ambulatory disabled livestock...includes livestock that are non-ambulatory due to an acute injury in route to the slaughter facility, such as a broken leg, as well as livestock that are non-ambulatory due to an underlying pathological condition.”).

⁵⁹ Id. (emphasis added).

⁶⁰ Interim Guidance for Non-Ambulatory Cattle and Age Determination, FSIS Notice 5-04, at 3 (Jan. 12, 2004) (now expired) (“If an otherwise normal healthy animals that has passed ante-mortem inspection and is on it way to the knock box and suffers an acute injury..., the VMO should verify that the animal suffered such an acute injury and allow the animal to proceed to slaughter and post-mortem inspection.”) (hereinafter FSIS Notice 5-04).

⁶¹ See 2004 Interim Final Rule, 69 Fed. Reg. at 1870 (noting that “typical clinical signs associated with BSE cannot always be observed in non-ambulatory cattle ... because the signs...often cannot be differentiated from the typical clinical signs of the many other diseases and conditions affecting non-ambulatory cattle); see also P Hisey, *USDA Plans to Ease Restrictions on Slaughter of Downer Cattle*, meatingplace.com, April 21, 2005 (noting that determining the cause of an animal’s inability to rise or walk is nearly impossible) (see Attach. 7.)

In 2006, USDA Office of the Inspector General (OIG) issued an audit report in which it criticized the agency for its “inconsistent” application of policies and regulations related to downed animals, specifically citing Notice 5-04, after observing non-ambulatory cattle processed at slaughter plants.⁶² In a review of 12 slaughter plants observed over the period of June 17, 2004, to April 12, 2005, the OIG found that 29 downed cattle were slaughtered for human food and “observed use of a forklift and a rail above the pens to transport non-ambulatory cattle to the slaughter area.”⁶³ The audit further noted the lack of documentation on the animals’ fitness for human consumption.⁶⁴

In July of 2007, USDA decided to make permanent its general ban on slaughtering downer cattle but the agency also simultaneously created the veal calf loophole at issue here.⁶⁵ In addition, instead of closing the mature cattle loophole identified by the OIG, the agency codified it, acknowledging that some downer cattle have been, and will continue to be, processed for

⁶² U.S. Department of Agriculture Office of Inspector General, Audit report: Animal and Plant Health Inspection Service Bovine Spongiform Encephalopathy (BSE) Surveillance Program Phase II and Food Safety and Inspection Service Controls over BSE Sampling, Specified Risk Materials, and Advanced Meat Recovery Products - Phase III, Report No. 50601-10-KC, at 67 (Jan. 2006), *available at* www.usda.gov/oig/webdocs/50601-10-KC.pdf (“[The] policy that allows cattle that become nonambulatory due to an acute injury after it passes ante mortem policy to proceed to slaughter...is inconsistent with both published regulations and public policy announcements, and is not consistently interpreted and applied by FSIS inspectors.”).

⁶³ *Id.* at 68-69.

⁶⁴ *Id.* at 69.

⁶⁵ Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle; Prohibition of the Use of Certain Stunning Devices Used To Immobilize Cattle During Slaughter, 72 Fed. Reg. 38,700 (July 13, 2007) (to be codified at 9 C.F.R. pts. 309, 310, and 318) (hereinafter 2007 Final Rule).

human food.⁶⁶ The 2007 Final Rule specified that “FSIS inspection personnel will determine the disposition of cattle that become non-ambulatory after they have passed ante-mortem inspection on a case-by-case basis.”⁶⁷ In other words, cattle that were able to stand or walk when initially inspected by USDA but then keeled over and were unable to rise again could nonetheless be slaughtered upon re-inspection, and the meat could be sold to the public. USDA issued this rule in spite of the fact that more than 99% of the approximately 22,000 public comments USDA received in response to the 2004 Interim Rule urged USDA to maintain and strengthen the downer ban and make the prohibition permanent.⁶⁸

On January 30, 2008, Petitioner released the findings of an undercover investigation documenting horrific animal cruelty at the federally-inspected slaughter and processing establishment Hallmark Meat Packing Company and Westland Meat Company, Inc. (“Hallmark/Westland”), located in Chino, California. The investigation revealed flagrant, systemic, and egregious acts of animal cruelty, which not only caused substantial pain and suffering to the animals involved, but also potentially jeopardized the safety of the nation’s food supply. The investigation documented cruel

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ See The Humane Society of the United States, Comments on: Requirements for the Disposition of Cattle That Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, Docket No. FSIS-2008-0022, at 3 (Sept. 29, 2008) (*citing* The Humane Society of the United States, *Public Comments on USDA’s Downed Animal Ban: Major Retailers and the Vast Majority of Americans Support No-Downer Policy; Some Industry Groups Reverse Their Support for the Ban*, June 24, 2004, available at http://files.hsus.org/web-files/PDF/2004_06_16_rept_USDA_comments.pdf (last visited Oct. 21, 2009)) (see Attach. 8).

practices being used to force animals to slaughter who were too sick and injured to stand and walk. These practices included:

ramming cows with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks to sensitive areas, dragging them with chains pulled by heavy machinery, and torturing them with a high-pressure water hose to simulate drowning, all in attempts to force crippled animals through the slaughter process.⁶⁹

All of these actions took place while no fewer than five federal inspectors were present at the facility.⁷⁰

The Hallmark scandal led Secretary of Agriculture Ed Schafer to call for “the end of the exceptions in the so called ‘downer rule.’”⁷¹ He stated aptly,

To maintain consumer confidence in the food supply, eliminate further misunderstanding for the rule and, ultimately, to make a positive impact on the humane handling of cattle, I believe it is sound policy to simplify this matter by initiating a complete ban on the slaughter of downer cattle that go down after initial inspection.⁷²

Subsequently, in March of 2009 USDA issued a final rule removing the re-inspection provision. USDA concluded that this provision had not only allowed non-ambulatory disabled cattle that had not received proper ante-mortem inspection to be slaughtered for human food, but also “created an incentive for establishments to inhumanely attempt to force these animals to

⁶⁹ Testimony by Wayne Pacelle before the California State Assembly Committee on Public Safety in Support of A.B. 2098 2, at 1 (April 1, 2008) (ER 258) (see Attach. 9); see also R Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouse*, Wash. Post, Jan. 30, 2008, at A4, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/29/AR2008012903054.html> (last visited Oct. 14, 2009) (“Video footage being released today shows workers at a California slaughterhouse delivering repeated electric shocks to cows too sick or weak to stand on their own; drivers using forklifts to roll the “downer” cows on the ground in efforts to get them to stand up for inspection; and even a veterinary version of waterboarding in which high-intensity water sprays are shot up animals’ noses...”).

⁷⁰ Id. at 4.

⁷¹ Schafer Press Release, *supra* note 2.

⁷² Id.

rise.”⁷³ The revision would therefore ensure both the “humane disposition of...animals” and the “efficient and effective implementation of inspection and humane handling requirements at official establishments.”⁷⁴ Further, the rule would benefit both consumers and the beef industry by enhancing public confidence in the U.S. beef supply, by “eliminating any controversy surrounding the condemnation of cattle that become non-ambulatory disabled after ante-mortem inspection and by preventing the slaughter of cattle that may be unfit for human food.”⁷⁵

Nonetheless, USDA maintained a loophole by announcing that the new ban would have no effect on 9 C.F.R. section 309.13,⁷⁶ which exempts veal calves from the mandatory euthanasia of condemned cattle⁷⁷ and allows them to be “set apart,” “held,” and then slaughtered for human consumption after “treatment.”⁷⁸ As a result, non-ambulatory veal calves, who may be extremely sick, weakened, injured or dying (unbeknownst to facility personnel who are almost universally without veterinary medical training), are left to linger in pain, without any legally imposed time-frame within which they must be treated, euthanized or slaughtered for human consumption.

⁷³ 2009 Final Rule at 11,464.

⁷⁴ Id. at 11,465.

⁷⁵ USDA Statement of Regulatory Priorities, Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 73 Fed. Reg. 71,112-01, 71,130 (Nov. 24, 2008) (to be codified at 9 C.F.R. pt. 309.3) (hereinafter 2008 USDA Statement).

⁷⁶ 2009 Final Rule at 11,465.

⁷⁷ See 9 C.F.R. § 309.13(a) (“Except as otherwise provided in this part, livestock identified as U.S. Condemned shall be killed by the official establishment, if not already dead.”).

⁷⁸ 9 C.F.R. § 309.13(b).

V. FACTUAL BACKGROUND

A. Veal Calves Are Highly Susceptible to Disease and Injury as a Direct Result of Industry Standards

In the United States, veal calves are raised according to practices that have become obsolete in other western nations. These practices and low standards of care produce calves who are acutely susceptible to conditions and injuries that increase their likelihood of going down, either before or upon arrival at the slaughter facility.

Two types of veal are recognized by USDA: bob veal, produced from calves slaughtered at up to three weeks of age, and special-fed veal, produced from calves slaughtered around 16-18 weeks.⁷⁹ Calves raised for both bob and special-fed veal are fed liquid milk-replacement diets.⁸⁰ Of the nearly one million calves raised for veal in the United States annually,⁸¹ approximately 15% are marketed as bob veal, with special-fed veal, also known as white (for its very pale hue), milk-fed, or formula-fed veal, comprising the bulk of the industry.⁸² The majority of calves raised for veal in the United States are

⁷⁹ United States Department of Agriculture, Food Safety and Inspection Service, *Veal from Farm to Table*, at 1 available at www.fsis.usda.gov/PDF/Veal_from_Farm_to_Table.pdf (last visited Oct. 7, 2009) (hereinafter *Veal from Farm to Table*).

⁸⁰ Id.

⁸¹ See USDA Livestock Slaughter 2008 Summary 5, March 2009, available at <http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-03-06-2009.pdf> (reporting that commercial calf slaughter totaled 956,600 head in 2008).

⁸² Though not identified by USDA in its FSIS “Veal from Farm to Table” fact sheet, a third type of veal, grain-fed or non-special fed veal, is marketed in North America and produced from calves who receive a diet that contains grain and forage, as well as liquid milk replacer. See LL Wilson et al., *Veal Perspectives to the Year 2000: Scientific Advancements and Legislation Addressing Veal Calves in North America*, Proceedings of the International Symposium in Le Mans, France, at 3 (Sept. 12-13, 1995) (see Attach. 10). These calves are typically housed in group pens or loose housing after weaning at 6-8 weeks old. Ontario Farm Animal Council, *Veal Farming in Ontario*, http://www.ofac.org/issues/resources_veal.php (last visited Oct. 14, 2009).

reared indoors in tiny individual stalls typically measuring 66-76 cm (26-30 in) wide by 168 cm (66 in) long.⁸³ Calves are tied to the front of the stall with a fiber or metal tether, restricting virtually all movement until they reach slaughter weight.⁸⁴

Veal calves are typically separated from their mothers within a few hours of birth, a practice that is acutely distressing for both calf and dam⁸⁵ and has numerous health-related repercussions. Newborn calves have insufficient antibodies to fight infection and are therefore dependent on immunoglobulin in mother's milk for immunological protection.⁸⁶ A study of eight commercial veal units in the United States revealed that 92% of ill calves had not received sufficient transfer of passive immunity from their dams.⁸⁷ Of those calves who died from diarrhea, all had had complete failure of immunoglobulin transfer.⁸⁸ Thus, adequate intake of colostrum, the milk dams produce the first few days after calving, is critical for the calves' future

Grain-fed veal production in the U.S. is extremely rare, although it makes up greater than 70% of the Canadian veal industry. Id.

⁸³ Wilson, *supra* note 82, at 4. Some states, including California, Michigan, and Maine, have resolved through legislation or ballot initiative to phase out veal crates, and even the American Veal Association also officially recommends that they be phased out by the year 2017. See Humane Society of the United States, Think Outside the Crate Campaign, <http://www.hsus.org/farm/camp/totc/> (last visited Oct. 12, 2009); American Veal Association, Resolution, *available at* <http://www.vealfarm.com/lib/pdf/1225128571.pdf> (last visited Oct. 8, 2009). Nonetheless, USDA and the American Veal Association (AVA) cite individual housing as the standard method and advocate this method as "invaluable to the health of the animal," despite conclusive scientific evidence that individual intensive confinement subjects calves to increased stress, deprives them of crucial rest and muscle development, and exacerbates iron-deficiency, among other things. *Veal from Farm to Table*, *supra* note 79, at 1.

⁸⁴ Wilson, *supra* note 82, at 4.

⁸⁵ FC Flower & DM Weary, *The Effects of Early Separation on the Dairy Cow and Calf*, 12 *Animal Welfare* 339, 339-340 (Aug. 2003) (see Attach. 11).

⁸⁶ Id.

⁸⁷ SP McDonough et al., *Enteric Pathogens in Intensively Reared Veal Calves*, 55 *Am. J. of Vet. Res.* 1516, 1518 (1994) (see Attach. 12).

⁸⁸ Id.

health.⁸⁹ Yet veal calves are often deprived of such intake and consequentially have weakened immune systems even before arriving to the facilities where they will be raised.

After separation, calves are further subjected to practices that suppress their immune systems and subject them to potential disease and injury, including the provision of an all-liquid diet. The veal industry has concluded that such a diet produces more desirable carcasses as compared to calves who are fed grain or allowed to graze on pasture.⁹⁰ The formula is intentionally deficient in iron in order to produce meat that is of a pale hue,⁹¹ as the veal industry's unsubstantiated perception is that consumers assess veal quality based on color.⁹² This liquid-based diet has direct consequences on calves' health, predisposing them to diseases such as enteritis, which is the inflammation of the small intestine caused by infection that may lead to diarrhea, abdominal pain, fever and dehydration.⁹³ At fattening period, the already low iron content of the all-liquid milk replacer is further reduced, resulting in reduced hemoglobin concentrations and often eventual anemia.⁹⁴

⁸⁹ Flower, *supra* note 85, at 343.

⁹⁰ Wilson, *supra* note 82, at 7.

⁹¹ American Veterinary Medical Association, Background: Welfare Implications of the Veal Calf Husbandry, Oct. 13, 2008, http://www.avma.org/issues/animal_welfare/veal_calf_husbandry_bgnd.asp (last visited Oct. 8, 2009).

⁹² TM Ngapo & C Gariépy, *Factors Affecting the Meat Quality of Veal*, 86 J. of the Sci. of Food and Agric. 1412, 1413 (2006) (see Attach. 13). In fact, there is no empirical evidence that most consumers in the United States prefer paler veal, and it has been shown that consumers have limited knowledge of veal meat attributes, such as color. GE West et al., *Consumer Confusion over the Significance of Meat Attributes: The Case of Veal*, 25 J. of Consumer Pol'y 65, 69 (2002) (see Attach. 14).

⁹³ University of Pennsylvania Health System, Encyclopedia, *General Gastroenterology: enteritis*, at 1 (2007) (hereinafter U. Penn, *General Gastroenterology*) (see Attach. 15).

⁹⁴ CL Stull & SP McDonough, *Multidisciplinary Approach to Evaluating Welfare of Veal Calves in Commercial Facilities*, 72 J. of Animal Sci. 2518, 2518 (1994)

In turn, low blood hemoglobin has been found to impair performance and increase disease susceptibility.⁹⁵

In addition to creating meat that is pale, the provision of an iron-deficient liquid-based diet is specifically designed to prohibit rumen development, which the industry has determined alters the flavor of veal meat.⁹⁶ Cattle are natural ruminants, animals who digest their food in two stages. However, because veal calves are kept in the pre-ruminant stage,⁹⁷ the result is the slow development of the gut and prevention of normal maturation, which predisposes calves to fever, diarrhea, and dehydration.⁹⁸

Intensive confinement, imposed as a result of the industry's conclusion that this produces tender meat,⁹⁹ is also extremely detrimental to the health of calves.¹⁰⁰ Since individually confined calves cannot properly lie down and thus cannot relax certain muscles, they are deprived of critical rest and sleep as well as the ability to thermoregulate adequately.¹⁰¹ Further, lack of

(evaluating ten commercial U.S. veal units and finding 1 in 4 calves was marginally anemic, and 1 in 10 was clinically anemic) (see Attach. 16).

⁹⁵ European Commission, Scientific Veterinary Committee Animal Welfare Section, *Report on the Welfare of Calves*, at 50-51 (Nov. 9, 1995), available at http://ec.europa.eu/food/fs/sc/oldcomm4/out35_en.pdf (last visited Oct. 8, 2009) (hereinafter European Commission Report).

⁹⁶ American Veterinary Medical Association, *Backgrounder: Welfare Implications of the Veal Calf Husbandry*, at 2 (Oct. 13 2008), available at http://www.avma.org/reference/backgrounders/veal_calf_husbandry_bgnd.pdf (last visited Oct. 14, 2009).

⁹⁷ *Id.* at 1.

⁹⁸ U. Penn, *General Gastroenterology*, *supra* note 93, at 1.

⁹⁹ Reuters, *Top New York Restaurants Stop Serving White Veal*, at 1, July 6, 2000 (see Attach. 18).

¹⁰⁰ See generally European Food Safety Authority, *Scientific Report on the Risks of Poor Welfare in Intensive Calf Farming Systems: An Update of the Scientific Veterinary Committee Welfare of Calves*, 366 Annex to The EFSA J. 1, 26, 45, 78, 111-25 (May 24, 2006), available at www.efsa.europa.eu/cs/BlobServer/Scientific_Opinion/ahaw_report_calveswelfare_en_1.pdf (last visited Oct. 8, 2009) (hereinafter EFSA Scientific Report).

¹⁰¹ *Id.* at 28-29.

exercise and normal muscle growth contributes to iron deficiency, stifles red blood cell production,¹⁰² and can lead to abnormal bone and muscle development as well as joint disorders.

In the United States, calves have no appropriate bedding and are mostly kept on bare wooden slats or plastic-coated metal grating.¹⁰³ These floors become slippery from excrement and urine and can lead to leg disorders and joint damage.¹⁰⁴ Wooden crates also harbor microorganisms, facilitating the transfer of diseases such as diarrhea and pneumonia, which are prevalent in commercial veal production facilities.¹⁰⁵

Maternal deprivation, intensive confinement, and lack of activity also combine to produce extremely high stress levels in veal calves. Stress in mammals is often reflected in stomach-wall damage, and indeed calves raised for veal frequently show damage of the abomasal wall.¹⁰⁶ Stress is exacerbated during transport, during which death and injury are common occurrences for calves.¹⁰⁷ A study by Staples and Haugse found that 60.3% of calves transported before two weeks old fell ill during the following four weeks and 21.7% died.¹⁰⁸ Another study recorded a mortality rate of 23% among calves transported for long distances during their first two weeks of

¹⁰² WO Reece & DK Hotchkiss, *Blood Studies and Performance Among Calves Reared by Different Methods*, 70 J. of Dairy Sci. 1601 (1987) (see Attach. 17).

¹⁰³ Wilson, *supra* note 82, at 4.

¹⁰⁴ EFSA Scientific Report, *supra* note 100, at 62-63.

¹⁰⁵ AJF Webster, *Control of Infectious Disease in Housed Veal Calves*, in J.H.M. Metz, New Trends in Veal Calf Production 103-11 (C.M. Groenestein ed.) (1991) (see Attach. 19).

¹⁰⁶ PR Wiepkema et al., *Behaviour and Abomasal Damage in Individual Veal Calves*, 18 Applied Animal Behav. Sci. 257 (1987) (see Attach. 20).

¹⁰⁷ See HR Trunkfield & DM Broom, *The Welfare of Calves During Handling and Transport*, 28 Applied Animal Behav. Sci. 135 (1990) (see Attach. 21).

¹⁰⁸ *Id.* at 137 (citing GE Staples & CN Haugse, *Losses in Young Calves after Transportation*, 130 Brit. Vet. J. 374 (1974)).

life.¹⁰⁹ These figures are consistent with a USDA noncompliance record reporting that after being transported on a truck with a 75-calf capacity, 20 calves arrived dead.¹¹⁰ The calves were packed to such high capacity that they could not lie down.¹¹¹

Transport stress is manifested in part by excessive defecation and urination, looseness of feces, and thickening of the skin, which indicates dehydration.¹¹² Calves suffer increased temperatures and blood cortisol concentrations during transport as a result of the trauma of walking for the first time after a lifetime of intensive confinement.¹¹³ Many calves must endure the stress and discomfort of transport three times during their lifetimes: at 7-10 days old they are trucked to the livestock markets where they are auctioned, then to the purchasing farm (although some are sold directly to the veal facility),¹¹⁴ and then finally to the slaughterhouse after 16-18 weeks of fattening.¹¹⁵ Pursuant to federal law, which has not substantively changed since 1906, calves may be transported by truck for up to 28 continuous hours without being provided feed, water, or even space to rest during such transport.¹¹⁶

¹⁰⁹ TG Knowles, *A Review of Post Transport Mortality Among Younger Calves*, 137 *The Vet. Rec.* 406 (1995) (see Attach. 22).

¹¹⁰ United States Department of Agriculture, Food Safety and Inspection Service, Noncompliance Record No. 28-2002-2775 (Dec. 5, 2002) (see Attach. 23). (The total number of calves on the truck was redacted from the report.)

¹¹¹ *Id.*

¹¹² JE Kent & R Ewbank, *The Behavioural Response of 3-Month-Old Calves to 18 Hours Road Transportation*, 26 *Applied Animal Behaviour Sci.* 289, 289 (1990) (see Attach. 24).

¹¹³ Trunkfield, *supra* note 107, at 146.

¹¹⁴ Wilson, *supra* note 82, at 3.

¹¹⁵ *Veal from Farm to Table*, *supra* note 79, at 1. Of course, “bob” veal calves are sent to slaughter much earlier, around 3 weeks of age.

¹¹⁶ 49 U.S.C. § 80502 (2006).

In sum, immune system compromise as a result of inadequate immunoglobulin transfer, nutritional inadequacies of an all-liquid iron-deficient diet, over-intensive stocking, total activity restriction, and the stresses of transport predispose calves to pathogens and render them acutely susceptible to injury and disease. Scientific research uniformly demonstrates that these problems could be substantially reduced or even eliminated by group housing on straw, teat-feeding and the provision of solid food, among other things.¹¹⁷ Thus, the connection between industry practices and the problem of calves becoming non-ambulatory cannot be underestimated. In fact, Temple Grandin, Associate Professor at Colorado State University and

¹¹⁷ See AJF Webster et al., *The Effect of Different Rearing Systems on the Development of Calf Behaviour*, 141 *British Vet. J.* 249, 249, 257-59, 263 (1985) (see Attach. 25); I Andrighetto et al., *Effect of Type of Housing on Veal Calf Growth Performance, Behaviour and Meat Quality*, 57 *Livestock Production Sci.* 137, 144 (1999) (“Group pen calves had the opportunity for locomotion and social behaviour and were allowed to adopt more comfortable resting postures. The improved welfare of calves kept in group pens was confirmed by the higher haemoglobin levels at the end of the growing cycle.”) (see Attach. 26); A. Sabbioni et al., *Effects of Housing Type on Veal Calf Performance*, XXV *Annali Facoltà Medicina Veterinaria di Parma* 111, 113 (2005), available at <http://www.unipr.it/arpa/facvet/annali/2005/111.pdf> (last visited Oct. 22, 2009) (finding that compared to individually housed calves, group-housed calves had higher growth performance, better food conversion ratios, and lower stress levels (confirmed by lower cortisol levels)); European Commission Report, *supra* note 95, at 57 (“general comparisons indicate that the housing of calves in individual pens, and the tethering of calves, result in problems for their welfare which are significantly reduced when the calves are group-housed on straw”); JP Morisse et al., *Influence of Dry Feed Supplements on Different Parameters of Welfare in Veal Calves*, 8 *Animal Welfare* 43, 43 (1999) (concluding that supplying calves with straw-cereal pellets helped reduce non-nutritive chewing and was “positive for the physiological aspects of welfare”) (see Attach. 27); G Cozzi et al., *The Provision of Solid Feeds to Veal Calves: I. Growth Performance, Forestomach Development, and Carcass and Meat Quality*, 80 *J. of Animal Sci.* 357, 365 (2002) (finding that providing solid feed to veal calves promoted forestomach development and improved calves’ health status, with fewer iron treatments for anemia and medical treatments for respiratory and gastrointestinal diseases) (see Attach. 28); G Van Putten, *Welfare in Veal Calf Units*, 111 *The Veterinary Record* 437 (1982) (“Although calves are sucklings of social-living ruminants, veal calves are not allowed to suck, to have a social life or to ruminate. This, added to anaemia in order to obtain white meat, and the high rate of morbidity caused by high density of the animals, sums up the welfare problems which arise.”) (see Attach. 29).

leading livestock handling and slaughter specialist, noted more than 18 years ago in *Meat & Poultry* that as many as “[n]inety percent of all downers are preventable.”¹¹⁸ This is especially true in the case of veal calves.

Recognizing that the practices described above are both inhumane and threaten human and animal health by encouraging the spread of pathogens, other industrialized nations began to alter their practices years ago and continue to make improvements. For example, as of 1999 more than 70% of the Canadian veal industry was made up of grain-fed or non-special fed veal,¹¹⁹ produced from calves who receive a diet containing grain and forage (hay, silage, or pasture)¹²⁰ and who are typically housed in group pens or loose housing after weaning at 6-8 weeks old.¹²¹ Individual housing beyond eight weeks old has been prohibited in the United Kingdom since 1990,¹²² and fibrous food and bedding have been required since 2000.¹²³ In the rest of the European Union, group housing after eight weeks of age and daily fibrous food rations after two weeks of age have been mandatory since January 1, 2007.¹²⁴ In addition, tethering in individual housing is prohibited and may

¹¹⁸ Temple Grandin, *Pro-active Activism*, *Meat & Poultry*, Aug. 1991, at 29 (see Attach. 30).

¹¹⁹ Ontario Farm Animal Council, *Veal Farming in Ontario*, www.ofac.org/issues/resources_veal.php. (last visited Oct. 8, 2009) (hereinafter *Veal Farming in Ontario*).

¹²⁰ Wilson, *supra note* 82, at 3.

¹²¹ *Veal Farming in Ontario*, *supra note* 119.

¹²² House of Commons: Hansard Written Answers for 5 May 2004 (pt 4), www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040505/text/40505w04.htm (last visited Oct. 8, 2009).

¹²³ The Welfare of Farmed Animals (England) Regulations 2000, Statutory Instrument 2000 No. 1870, www.opsi.gov.uk/SI/si2000/20001870.htm (last visited Oct. 8, 2009).

¹²⁴ Council of Europe, Council Directive 97/2/EC of 20 January 1997 amending Directive 91/629/EEC laying down minimum standards for the protection of calves, http://ec.europa.eu/food/fs/aw/aw_legislation/calves/97-2-ec_en.pdf (last visited Oct. 8, 2009).

only be used in group housing for a maximum of one hour following each feed.¹²⁵ While the United States has been slow to follow suit, even Strauss Veal & Lamb International, one of the nation's largest veal producers, conceded that transitioning to the European-style, group-raised method is "the right thing to do,"¹²⁶ and the American Veal Association has urged veal producers to convert to such method by the year 2017.¹²⁷ Some states, through ballot initiatives or legislative enactments, have also chosen to phase out veal crates.¹²⁸ Furthermore, the traditional myth that keeping animals in dismal conditions – unable to move, deprived of social contact, and iron-deficient – somehow produces more desirable meat is breaking down.¹²⁹

These trends demonstrate both the feasibility and desirability of providing more sustainable, healthy and humane conditions for veal calves. Industry commenters have argued that because the percentage of veal calves who are or become non-ambulatory is higher than that of mature cattle,

¹²⁵ European Commission, Commission Decision of 24 February 1997 amending the Annex to Directive 91/629/EEC laying down minimum standards for the protection of calves (Text with EEA relevance) (97/182/EC). http://ec.europa.eu/food/fs/aw/aw_legislation/calves/97-182-ec_en.pdf (last visited Oct. 8, 2009).

¹²⁶ B Salvage, *Revolutionizing the Veal Industry*, Meat Processing, at 14 (Dec. 2006).

¹²⁷ American Veal Association, Resolution, *available at* <http://www.vealfarm.com/lib/pdf/1225128571.pdf> (last visited Oct. 8, 2009), but see also, American Veal Association, The Veal Farm, *Industry Information: Facts*, <http://www.vealfarm.com/industry-info/facts.asp> (last visited Oct. 12, 2009) (extolling the virtues of individual intensive confinement).

¹²⁸ See Humane Society of the United States, Think Outside the Crate Campaign, <http://www.hsus.org/farm/camp/totc/> (last visited Oct. 12, 2009) (noting that Maine, Colorado, California, Michigan and Arizona have all banned veal crates).

¹²⁹ See M Burros, *Veal to Love, Without the Guilt*, N.Y. Times, April 18, 2007, *available at* <http://www.nytimes.com/2007/04/18/dining/18veal.html> (last visited Oct. 8, 2009) (noting that some farmers "finally got the message" and are beginning to change the way their calves are raised; describing grass- or grain-fed veal raised outside crate as having "real character and flavor" and "delightfully clean, subtle" taste as opposed to the "bland old-fashioned veal," and comparing it to "biting into your first heirloom tomato from the garden after a lifetime of eating supermarket tomatoes bred for durability.").

USDA must exempt calves from the mandatory euthanasia of all downer cattle.¹³⁰ However, the foregoing discussion reveals that the higher incidence of downer calves is directly attributable to the industry's own dismal practices. It is common sense that animals who are weak, sick, and injured may lack the strength to rise or walk. Thus, it is neither appropriate nor reasonable for the U.S. veal industry to be granted an exemption to the requirement that all non-ambulatory cattle be euthanized when it has the power and the means, through improved animal husbandry, to prevent calves from ever becoming non-ambulatory.

B. Food Safety Implications of Offering Non-Ambulatory Veal Calves for Slaughter

In addition to the animal welfare implications of allowing slaughterhouses to process non-ambulatory calves for consumption, there are also a number of food safety concerns. Because non-ambulatory animals spend more time lying down, they are often forced to lie in their own excrement, which can lead to contamination of meat with fecal matter.¹³¹ Many studies have shown that hide contamination is strongly correlated with carcass contamination, likely as the result of cross-contamination during processing.¹³² Hide contamination is therefore considered a key source of fecal

¹³⁰ See, e.g., American Meat Institute, Comments on: Requirements for the Disposition of Cattle That Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, Docket No. FSIS-2008-0022-0316.1 0583-AD35 (Sept. 29, 2008) (hereinafter AMI Comments) (see Attach. 31); 2009 Final Rule, 74 Fed. Reg. at 11,465 (industry commenters urged USDA to clarify that the prohibition against the slaughter for human food of all downer cattle does not apply to veal calves).

¹³¹ Temple Grandin, *A.M.I. Sponsors Stunning and Handling Conference*, Meat & Poultry, at 48 (March, 1999) (see Attach 32).

¹³² DM Brichta-Harhay et al., *Salmonella and Escherichia coli O157:H7 Contamination on Hides and Carcasses of Cull Cattle Presented for Slaughter in the United States: an Evaluation of Prevalence and Bacterial Loads by Immunomagnetic*

cross contamination.¹³³ Calf fecal matter may contain a number of zoonotic pathogens including *Giardia*, *Salmonella*, and toxin-producing *E. coli*.¹³⁴ *E. coli* O157:H7 infects tens of thousands of Americans every year, causes dozens of deaths,¹³⁵ and is the leading cause of acute kidney failure in previously healthy U.S. children.¹³⁶

Although USDA has determined that cattle younger than 30 months do not present a serious risk of BSE,¹³⁷ calves in fact pose a greater threat of diseases like *E. coli* and *Salmonella*. Studies have shown that fecal samples from calves are more likely to test positive for Shiga-like-toxin-producing *E. coli* such as *E. coli* O157:H7 than adult cows.¹³⁸ In one study, 8% of adult cows and 19% of heifers and calves tested positive.¹³⁹ Other research revealed that the prevalence of *E. coli* O157:H7 in calves can be up to 20.0% prior to weaning, and often increases after weaning.¹⁴⁰ Shedding of *E. coli* O157:H7 in fecal material also lasts longer in calves than in adults.¹⁴¹ When *E. coli*

Separation and Direct Plating Methods, 74 *Applied and Env'tl. Microbiology* 6,289, (2008) (see Attach. 33).

¹³³ KD Childs et al., *Molecular Characterization of Escherichia coli O157:H7 Hide Contamination Routes: Feedlot to Harvest*, 69 *J. of Food Prot.* 1,240 (2006) (see Attach. 34).

¹³⁴ McDonough, *supra* note 87.

¹³⁵ Centers for Disease Control and Prevention, *Questions & Answers: Sickness Caused by E. coli* (Dec. 10, 2006), *available at* http://www.cdc.gov/ecoli/qa_ecoli_sickness.htm (last visited Oct. 22, 2009).

¹³⁶ S Razzaq, *Hemolytic Uremic Syndrome: An Emerging Health Risk*, 74 *Am. Fam. Phys.* 991, 991 (Sept. 15, 2006), *available at* <http://www.aafp.org/afp/20060915/991.pdf> (last visited Oct. 20, 2009).

¹³⁷ 2004 Interim Final Rule, 69 *Fed. Reg.* 1862.

¹³⁸ See, e.g., JG Wells et al, *Isolation of Escherichia Coli Serotype O157:H7 and Other Shiga-like-toxin-producing E. Coli from Dairy Cattle*, 29 *J. of Clinical Microbiology* 985 (1991) (see Attach. 35).

¹³⁹ Id.

¹⁴⁰ EFSA Scientific Report, *supra* note 100, at 65.

¹⁴¹ WC Cray, Jr. & HW Moon, *Experimental Infection of Calves and Adult Cattle with Escherichia Coli O157:H7*, 61 *Applied Env'tl Microbiology* 1586 (1995) (see Attach. 36).

endotoxin was experimentally administered to calves, they became recumbent within 15-25 minutes,¹⁴² highlighting the correlation between disease and a calf's non-ambulatory status.

Furthermore, as described above, calves experience particularly high levels of stress and exhaustion as a result of substandard rearing conditions combined with long-distance transport. Research has shown that stress triggers excretion of *Salmonella* from calves who are carriers.¹⁴³ As with *E. coli*, calves are more likely to harbor *Salmonella* than adult cows. In one study, 102 dairy cattle in a herd with a history of calf scours (diarrhea) were tested.¹⁴⁴ Of the 36 calves in the study, 22 fecal samples tested positive for *Salmonella* Typhimurium, while none of the adult cow fecal samples were positive, even though nearly twice as many cows were tested.¹⁴⁵ In the United States, approximately 40,000 cases of salmonellosis are reported each year, but the actual number may be more than 30 times greater, because mild cases may go unreported.¹⁴⁶

¹⁴² B Tennant B et al., *Metabolic Response of Calves Following Acute Experimental Endotoxemi*, 4 *Annales de Recherches Veterinaires* 135, __ (1973) (see Attach. 37).

¹⁴³ H Grønstøl et al., *Experimental Salmonella Infection in Calves, 2. Virulence and the Spread of Infection*, 72 *The Journal of Hygiene* 163 (1974) (see Attach. 38); see also JS Spika et al., *Chloramphenicol-resistant Salmonella Newport Traced Through Hamburger to Dairy Farms: a Major Persisting Source of Human Salmonellosis in California*, 316 *New England J. of Med.* 565 (1987) (“Stressed animals are more likely to shed *Salmonella* in large numbers.”) (see Attach. 39).

¹⁴⁴ Nolan LK, Giddings CW, Boland EW, Steffen DJ, Brown J, and Misek A. 1995. Detection and characterization of *Salmonella typhimurium* from a dairy herd in North Dakota. *Veterinary Research Communications* 19(1):3-8 (see Attach. 40).

¹⁴⁵ Id.

¹⁴⁶ Centers for Disease Control and Prevention, *Salmonellosis* (2008), www.cdc.gov/nczved/dfbmd/disease_listing/salmonellosis_gi.html#1 (last visited Oct. 21, 2009).

C. Recent Investigation of Inhumane Treatment of Veal Calves

Just like the dairy cows in the Hallmark videos, veal calves arriving at slaughterhouses too weak, sick, or injured to stand and walk are acutely susceptible to egregiously inhumane treatment, as slaughterhouses use whatever means necessary to force these animals to move. This became exceedingly clear during a recent investigation at the Bushway Packing plant, where workers and the plant owner himself were recorded electrically shocking and kicking downed calves,¹⁴⁷ all under the supervision of FSIS inspection personnel. Thus, just as the Hallmark scandal prompted USDA to issue an unqualified ban on the slaughter for human food of non-ambulatory cattle, the horrific conduct at Bushway demonstrates that extending this ban to apply to downer veal calves is desperately needed in order to eliminate any confusion and discretion as to the proper disposition of non-ambulatory calves, and to thereby avoid further abuses.

On August 18, 2009, an investigator (“investigator”) employed by Petitioner embarked upon a 21 day investigation into the egregious practices at the Bushway Packing plant.¹⁴⁸ On the first day, the investigator watched a worker using a shock pole to repeatedly shock non-ambulatory calves in order to get them up and moving. If, after numerous attempts, the calves still wouldn’t rise, the worker would hit them at the top of their skulls with a

¹⁴⁷ See also USDA, FSIS NR Summary Report, NR No. 0001-2003-2568 (Jan. 2, 2003) (describing a disabled calf being dragged by its hind legs, which were tied together, and the foreman’s failure to take any corrective action after being notified of this behavior by the inspector) (see Attach. 41).

¹⁴⁸ The video footage for August 18, 19, and 21, 2009, is unavailable because it is lost inside a damaged hard drive. The drive was sent to a company specializing data retrieval but it could be not recovered.

captive bolt tool, the calves often remaining conscious – bleeding and kicking – for minutes, sometimes hours, after application.

On the same day, the investigator witnessed an owner of the plant, Frank Perretta, repeatedly shocking calves who could not rise or walk. Perretta would push the electric prod downward against non-ambulatory calves as they were laying on their side, or sideways against calves who were pinned up against wall. On one occasion, Perretta shocked and kneed a calf in the abdomen, pushed him across the trailer, and then shocked him again such that the force of the shock jerked him halfway across the trailer. Perretta would shock a calf again and again and when his efforts failed he would lift the calf up manually. When one of the calves finally collapsed after managing to walk about a foot, Perretta took no action, allowing the calf to be trampled by other calves; when Perretta finally bolted him, he did so incorrectly, allowing the calf to remain conscious, kicking and breathing. Incredibly, all of this conduct took place in front of an FSIS inspector named Rob McKitty, who made no objections and took no actions to halt this incredibly cruel and unlawful conduct.

The next day, August 19, 2009, the investigator witnessed the same type of conduct. Perretta unloaded the first immobilized calf off the trailer that morning by grabbing the calf by his ears and lifting him to his feet. Another calf was lying on his side inside the doorway near a dead calf; Perretta nudged the live one in the face with his boot and shocked the calf until he stood up. Perretta repeatedly shocked one calf on the trailer who wouldn't rise while he cried out, and when that failed he kicked him in the

face. Again, all of this occurred while Inspector McKitty watched. As was the case the day before, at no point did McKitty protest or take any action.

At one point on the same day, when Perretta bolted a downed calf who would not stand in the trailer, the calf was still kicking for about four minutes later as the owner looked for a USDA tag. The calf lay on his side, breathing and shuddering while kicking his legs. Perretta then stepped on the calf's neck to keep his head from moving in order to read the number on the calf's ear tag. The calf kept shuddering afterwards as Perretta instructed the investigator to place a condemned tag on the calf's ear, but Perretta simply walked off without re-bolting the calf or ensuring that the tag was affixed; the calf continued to move for about seven minutes.

On August 26, 2009, the investigator witnessed a slaughterhouse employee drag a calf (#1762) who was found stuck under a gate in a holding area (along with four other calves who had died). The employee repeatedly shocked the collapsed calf on the ground. The calf jerked from the shocks but could not stand. Finally the employee picked the calf up by his hips and, as he stood on shaking legs, the worker pushed the calf to get him to move. The calf immediately fell down. The employee then dragged the calf by his hips and stood him up again, where he once again stood on shaking legs briefly before falling over. The employee then shocked the calf twice in the face and then on his body while shoving him with his foot to move the calf into a holding pen. This calf, whom workers had failed to bolt and thus was still alive, was eventually left outside where dead calves are placed.¹⁴⁹

¹⁴⁹ Video entitled USDA Complaint – Handling and Inspection; Scenes 4 at 4:03, Scene 5 at 5:56 (hereinafter Handling & Inspection Video).

On September 1, 2009, Inspector McKitty watched Perretta using the electric prod and kneeing calves in order to get them to stand and move.¹⁵⁰ McKitty never objected; in fact, at one point he instructed the investigator to pick up a calf who would not stand or move into the holding pens. The investigator did so, but the calf simply stood without moving. McKitty then confirmed that the calf was “good to go,” and said, “he made it.”¹⁵¹

On September 8, 2009, the investigator witnessed three non-ambulatory calves being trampled in the holding pen.¹⁵² The pens were packed so tightly that the ambulatory calves could not move without stepping over the other, downed calves; no efforts were made to avoid this problem. Later that day, the investigator observed Perretta and a driver from McCracken Livestock shocking a calf whose hindquarters were covered in feces as the calf yelled in protest. As Inspector McKitty watched, Perretta said to him, “Looks like you Friday night,” and McKitty laughed.¹⁵³ As Perretta again lifted the calf to his feet once off the truck, McKitty said, “there you go, hold him up,” before the calf collapsed to the ground again. McKitty allowed another disabled black and white calf walking on his front knees to be driven from the truck onto the holding pen platform. The footage of this calf in the holding pen shows his front legs “swimming” as if he was experiencing neurological difficulties. The calf was not condemned by Inspector McKitty nor set aside for further evaluation.¹⁵⁴ Another weakened calf (#3969) stumbled on the step to the holding pen platform and then

¹⁵⁰ Id., Scene 8 at 10:07.

¹⁵¹ Raw Footage, clip 6 at approximately 6:43, Sept. 1, 2009.

¹⁵² Handling & Inspection Video, Scene 9 at 11:04.

¹⁵³ Id., Scene 11 at 12:04.

¹⁵⁴ Id., Scene 12 at 13:26.

landed on its stomach. At McKitty's instruction to lift the calf, the investigator did so, and then McKitty nodded with approval.¹⁵⁵

On September 15, 2009, another employee instructed the investigator to lift all downed calves, and then when they wouldn't stand, the employee would shock them repeatedly. When one particular calf couldn't stand, the employee lifted him up and watched him fall hard on the floor, then slapped, kicked and repeatedly shocked the calf. When that didn't work, he cupped his hand into a water bucket and poured the water from his hand onto the calf's head before shocking his head again.¹⁵⁶ The calf never stood.

The following day, September 16, 2009, the same employee violently yanked and kicked two calves who had gotten stuck under wooden panels of a wall used to separate a holding pen.¹⁵⁷ The employee proceeded to shock another non-ambulatory calf for a total of 19 seconds in order to get him to rise.¹⁵⁸

On September 23, 2009, two FSIS inspectors – Rob McKitty and a young inspector (name unknown) who is peering in through the side of the truck – watch Perretta and the truck driver as weak calves who had gone down during transport were shocked, grabbed by their ears and tails, and pulled off the truck.¹⁵⁹

Workers who routinely went through the holding pen in the early morning left downed calves, who should have been condemned, in the pens for slaughter. On September 25, 2009, a calf who appeared to have a

¹⁵⁵ Raw Footage, clip 5 at 10:36 (Sept. 8, 2009).

¹⁵⁶ Handling & Inspection Video, Scene 18 at 18:07.

¹⁵⁷ *Id.*, Scene 19 at 19:16.

¹⁵⁸ *Id.*, Scene 20 at 19:54.

¹⁵⁹ *Id.*, Scene 23 at 22:20.

neurological disorder was not euthanized. The calf, whose ear tag reflected 999 on one side and 998 on the other, was unable to stand and his front legs “swam” constantly.¹⁶⁰

These incidents occurred routinely and daily throughout the six-week investigation (during which HSUS’s investigator worked 21 days). Perretta and his employees repeatedly kicked and shocked non-ambulatory calves in their necks, faces, and torsos in order to get them to move, even when they cried out in pain. Dr. Grandin and her colleague Kurt Vogel, M.S., both of whom reviewed the video, confirmed that these practices were “abusive” and “unacceptable.” According to them,

...the plant would have failed the electric prod usage portion of the AMI Animal Welfare Audit...Electric prods were commonly used in an abusive manner to force nonambulatory calves to rise. This is unacceptable and should not continue. It is unacceptable to allow workers to kick calves to make them rise as was observed in scenes 19 and 21. This is a definite act of abuse that would lead to an automatic failure of the American Meat Institute Animal Welfare Audit and subsequent supplier delisting.¹⁶¹

When the calves failed to respond to the shocking and kicking, plant personnel, including Perretta, would manually lift the calves up by the ears, tail, hindquarters, or head, and then let them go, allowing them to crash down to the floor. On the occasions when efforts to force calves to rise and move failed, Perretta or an employee would bolt them (often improperly), and then allow them to thrash, kick their legs, arch their backs, and move their heads around for minutes afterwards, indicating the stun may have been

¹⁶⁰ *Id.*, Scene 28 at 26:00.

¹⁶¹ Temple Grandin & Kurt Vogel, *Letter to Mary Beth Sweetland, Director of Investigations, Humane Society of the United States*, Oct. 17, 2009 (hereinafter Grandin/Vogel Letter) (see Attach. 42).

improper and the animals may have been left to suffer while conscious.¹⁶² At other times, the calves were simply dragged, a practice which Perretta informed Petitioner’s investigator was acceptable even if the animals were kicking and gasping, as long as they had a “hole in [their] head.”

Much of this activity took place within full view of FSIS Inspector McKitty on duty, who failed to take any corrective action. In fact, inspector McKitty informed Petitioner’s investigator that he should not report improperly bolted calves to him because “he’s not supposed to know” and “could shut them down for that.”¹⁶³

VI. LEGAL GROUNDS FOR PETITIONED ACTION

As is clear from the foregoing discussion, USDA’s exclusion of veal calves from the requirement that all non-ambulatory cattle be immediately and humanely euthanized severely compromises the welfare of animals as well as the health and safety of consumers. This exemption cannot be squared with the plain language of the HMSA, which ordinarily must be regarded as conclusive.¹⁶⁴ The HMSA provides that “handling of livestock in

¹⁶² One Scene reveals a calf being skinned alive before having his throat cut, and in another a calf is vocalizing while being bled out, indicating that the calf was “definitely sensible.” *Id.*; Handling & Inspection Video, Scene 12 at 16:04 (Sept. 4, 2009); *id.*, Scene 21 at 23:17 (Sept. 9, 2009).

¹⁶³ Video entitled USDA Complaint: Stunning & Consciousness, Scene 33 at 33:48 (Sept. 18, 2009).

¹⁶⁴ In assessing whether an agency’s regulation is unlawful under the Administrative Procedure Act, 5 U.S.C. section 706(2) – that is, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” – reviewing courts look first to the plain language of the statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); see Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (“As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”) ((internal quotations and citations omitted); see also Consumer Product Safety Comm’n v. GTE Sylvania, 447 U.S. 102, 108 (1980).

connection with slaughter shall be carried out only by humane methods”¹⁶⁵ and directs USDA’s Secretary “to designate methods...of handling in connection with slaughter which, with respect to each species of livestock, conform to [this] policy.”¹⁶⁶ Thus, USDA not only has the authority, but is statutorily required, to regulate slaughterhouse establishments to ensure that animals are being treated humanely. Moreover, the FMIA requires USDA to examine and inspect handling and methods of slaughter in order to prevent inhumane treatment and preserve food safety.¹⁶⁷

USDA’s regulatory treatment of veal calves also contradicts Congress’ clear intent in enacting the HMSA¹⁶⁸ – to ensure that animals are handled humanely in connection with slaughter¹⁶⁹ – as well as USDA’s own determination that similar loopholes for mature cattle were ineffective, wasted FSIS resources, and encouraged inhumane treatment.¹⁷⁰ Thus, there is no rational justification for maintaining a provision that invites egregious cruelty of the kind witnessed at Bushway. In order to keep animals who enter the food chain safe for human consumption and free from inhumane treatment, USDA must eliminate all confusion and inconsistencies by repealing the downer veal calf exception and requiring the immediate, humane euthanasia of all non-ambulatory calves.

¹⁶⁵ 7 U.S.C. § 1901.

¹⁶⁶ Id. § 1904(b).

¹⁶⁷ 21 U.S.C §§ 603, 604, 606.

¹⁶⁸ Courts have made clear that “administrative constructions which are contrary to clear congressional intent” must be “reject[ed].” E.g., Chevron, 467 U.S. at 843 n.9 (1984).

¹⁶⁹ See H.R. Report No. 85-706, at 1 (1957) (“The purpose of this bill is to establish a national policy that livestock should be slaughtered in the most humane practicable manner...”) (see Attach. 43).

¹⁷⁰ See 2009 Final Rule, 74 Fed. Reg. 11,463.

A. The HMSA Requires USDA to Promote the Humane Treatment of Veal Calves

The veal calf loophole violates the plain language of the HMSA because it is inherently inhumane and it encourages conduct – dragging, kicking, excessive shocking and other means of forced movement – which USDA explicitly prohibits.¹⁷¹ As stated above, the plain language of the HMSA provides that “handling of livestock in connection with slaughter shall be carried out only by humane methods.”¹⁷² The Act further directs USDA’s Secretary “to designate methods...of handling in connection with slaughter which, with respect to each species of livestock, conform to [this] policy.”¹⁷³

The veal calf set aside provision, which allows slaughterhouses to prolong indefinitely the lives of potentially sick and injured calves, clearly contravenes the HMSA’s plain language. While Congress did not define “humane” in the HMSA, the dictionary defines “humane” to mean “marked by compassion, sympathy, or consideration for humans or animals.”¹⁷⁴ Similarly, the Marine Mammal Protection Act defines “humane” to “involve[] the least

¹⁷¹ See 9 C.F.R. § 313.2(b) (“Electric prods...shall be used as little as possible...); id. § 313.2(d)(2) (“The dragging of disabled animals and other animals unable to move, while conscious, is prohibited.”); FSIS Notice 21-09, at 2-3 (describing “excessive beating or prodding of...non-ambulatory animals” and “dragging conscious animals” as “egregious” cruelty); Ante-Mortem Livestock Inspection, FSIS Directive 6100.1 Rev. 1, at 6 (April 16, 2009) (“FSIS does not consider forcing an animal to stand or ambulate by kicking or prodding (e.g., electrical prodding) to be humane.”).

¹⁷² 7 U.S.C. § 1901.

¹⁷³ Id. § 1904(b).

¹⁷⁴ Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/humane>, (last visited Nov. 1, 2009); see also Compact Oxford English Dictionary, *available at* http://www.askoxford.com/concise_oed/humane?view=uk (last visited Nov. 1, 2009) (defining “humane” as “having or showing compassion or benevolence”). When interpreting the plain language of a statute, courts typically apply the term’s “ordinary meaning” by consulting dictionary definitions. See United States v. TRW Rifle, 447 F.3d 686, 689 (9th Cir. 2006).

possible degree of pain and suffering practicable...”¹⁷⁵ Under the plain language of the HMSA, Congress could not have intended “humane handling” to mean that veal calves too weak, sick or injured to even stand could be kept alive indefinitely and then forced to slaughter.

Furthermore, failing to require the immediate euthanasia of downer calves creates a financial incentive for slaughterhouses to engage in the type of abusive conduct witnessed at Bushway because a down calf is worthless unless it is slaughtered; the loophole provides a means by which immobilized calves may be cruelly left to linger indefinitely and then eventually forced to slaughter. Thus, allowing weakened and ill non-ambulatory calves to be set aside rather than requiring their immediate euthanasia directly contravenes HMSA’s plain language.

B. The Legislative History of the HMSA Supports a Plain Reading Requiring That Suffering Immobilized Calves Be Promptly Humanely Euthanized

Legislative history is a traditional tool of statutory construction that may shed light on the meaning or language of a statute.¹⁷⁶ However, nothing

¹⁷⁵ 16 U.S.C. § 1362(4); see also USDA regulations implementing the federal Animal Welfare Act, 9 C.F.R. § 1.1 (“Euthanasia means the *humane* destruction of an animal accomplished by a method that produces rapid unconsciousness and subsequent death without evidence of pain or distress, or a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death.”) (emphasis added); 36 C.F.R. § 222.20(b) (“Humane treatment means kind and merciful treatment, without causing unnecessary stress or suffering to the animal.”); Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 434 n.7 (D.C. Cir. 1998) (“...‘humane’ does convey a basic meaning of compassion, sympathy, and consideration for animals’ health, safety, and well-being, and it is not that unusual for this court to apply relatively broad statutory language to particular claims by looking to the normal usage of words, even when different people may disagree as to their application to a variety of factual situations.”).

¹⁷⁶ See, e.g., Chevron, 467 U.S. at 845 (looking to legislative history to ascertain Congressional intent and noting that an agency position which “appears from the statute or its legislative history” to be “not one that Congress would have sanctioned” (internal quotations omitted); Student Loan Fund of Idaho, Inc. v. U.S. Dept. of

in the legislative history of the HMSA indicates that Congress intended veal calves to receive less humane treatment than full-grown cattle or other livestock. In fact, the legislative history references to calves discuss either inhumane calf slaughter methods¹⁷⁷ or methods to humanely slaughter smaller animals such as calves, lambs, and hogs.¹⁷⁸ The only conclusion that can be drawn from the legislative history is that Congress fully intended calves to receive all the protections of the HMSA. Thus, it is clear that the loophole excluding veal calves from the requirement that all downer cattle be euthanized is *not* “the only possible interpretation” Congress intended.¹⁷⁹ To the contrary, the loophole is entirely inconsistent with HMSA’s legislative history, which makes abundantly clear that Congress intended the Act to “establish as a national policy that livestock should be slaughtered and handled in connection with slaughter only by the ‘most humane practicable methods.’”¹⁸⁰ Similarly a Senate Committee on Agriculture and Forestry report noted, “[a]t the hearings, in general, all witnesses have favored the

Educ., 272 F.3d 1155 (9th Cir. 2001) (to determine whether Congress has “directly spoken” on the issue under Chevron step one, courts apply traditional rules of statutory construction, including looking to legislative history, which can “offer[] valuable guidance and insight into Congressional intent.”) (internal quotations omitted).

¹⁷⁷ Cong. Record – House, *85th Congress 2nd Session* Committee of the Whole House on the state of the Union, 1652, 1653, statements of Representative Poage (TX) (Feb. 4, 1958) (see Attach 44) (describing the practice of bleeding conscious calves and other animals to death as involving “an instrument of torture” upon which “[t]he hog – or lamb and in some packing houses the calf – dies from the loss of blood as it is carried ever onward by the inexorable movement of the endless chain to which it is attached by a steel chain around one hind leg.”) (see Attach 44).

¹⁷⁸ See 104 Cong. Rec. 12, 15394, 15398 (1958) *Proposals Relating to Humane Methods of Slaughter of Livestock: Hearing on S. 1213, S. 1497, and H.R. 8308 Before the Committee on Agriculture and Forestry*, 85th Cong. 136 (1958) (statement of Rutherford T. Phillips, Executive Director, American Humane Association) (see Attach. 45).

¹⁷⁹ Sullivan v. Everhart, 494 U.S. 83, 89 (1990).

¹⁸⁰ H.R. Report No. 85-706, *supra* note 169, at 4.

adoption of improvements in the humane handling and slaughtering of food animals. Differences of opinion have been expressed only in the area of how the objective was to be accomplished.”¹⁸¹ Congress has consistently expressed its intent that the “handling of livestock in connection with slaughter...be carried out only by humane methods;”¹⁸² any interpretation of the HMSA must be read in light of this purpose.

C. **Exclusion of Veal Calves From the Requirement that All Non-Ambulatory Cattle Be Promptly Euthanized is Unreasonable As it is Irreconcilable with the HMSA’s Purposes and with USDA’s Own Rules and Determinations**

Interpreting the HMSA to allow less than humane handling of non-ambulatory veal calves is inconsistent not only by the language, history and humane-purpose of the HMSA but also with USDA’s own rules, policies, and conclusions regarding non-ambulatory mature cattle. Even if Congress’s intent to specifically protect calves from abuse were not clear from the HMSA’s plain terms and legislative history, USDA must still implement the Act so as not to frustrate its humane purpose. Thus, USDA must show that its interpretation of the HMSA to allow the very same treatment of calves which the agency deems utterly forbidden by the HMSA with respect to mature cattle is a “reasonable policy choice”¹⁸³ and a “permissible construction” of the statute under Chevron step two.¹⁸⁴ An agency’s decision is not “reasonable” if it “construes a statute in a way that is contrary to

¹⁸¹ S. Rep. No. 85-1724 at 3933 (1958) (see Attach. 46).

¹⁸² 7 U.S.C. § 1902.

¹⁸³ Chevron, 467 U.S. at 845.

¹⁸⁴ Id. at 843.

congressional intent or that frustrates congressional policy.”¹⁸⁵ Further, the agency is required to articulate a rational explanation for its interpretation that fully considers all aspects of the problem, including the statute and its policies.¹⁸⁶

As noted above, the HMSA was enacted expressly to address and improve inhumane livestock handling at slaughter facilities. Accordingly, any implementation of that Act which causes thousands of prone calves to suffer needlessly at slaughterhouses is plainly contrary to the purposes of the HMSA. In addition, as discussed below USDA has already made it abundantly clear that the HMSA requires prompt euthanasia of nonambulatory cattle at slaughterhouses; the agency cannot reasonably justify limiting the ambit of its reasoning based solely on the age and size of cattle.

1. USDA’s Reasons For Requiring Immediate Euthanasia of Downer Mature Cattle Apply With Equal Force to Downer Veal Calves

As outlined above, after five years of shifting regulations regarding what slaughterhouses must do with non-ambulatory cattle, in 2009 USDA abandoned more complicated rules in favor of a simple, across-the-board requirement that *all* non-ambulatory cattle at slaughterhouses be condemned

¹⁸⁵ Ashkar v. Burzynski, 384 F.3d 1193, 1198 (9th Cir 2004).

¹⁸⁶ See Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (“the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (internal quotations omitted); Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (“Where the agency has failed to provide a reasoned explanation, or where the record belies the agency’s conclusion, we must undo its action.”).

and promptly and humanely euthanized.¹⁸⁷ When commenters, including Petitioner The HSUS, asked USDA to change its regulations to require “that non-ambulatory disabled cattle be immediately euthanized,¹⁸⁸ USDA responded that the HMSA’s humane handling provisions “require[] that such cattle be promptly euthanized.”¹⁸⁹ Thus, in the wake of the Hallmark scandal, USDA rightly concluded that its loophole, which had allowed the slaughter of cattle too sick or injured to stand and walk, had to be removed because it invited cruel treatment in violation of the HMSA.¹⁹⁰

In support of its decision to eliminate the downer cattle loophole, USDA offered several reasons, all grounded in HMSA considerations of humane handling. First, USDA explained that the amendment was needed to “reduce uncertainty in determining the proper disposition of non-ambulatory cattle...”¹⁹¹ Second, the amendment will “eliminate the time FSIS public health veterinarians (PHVs) spend determining whether or not an animal

¹⁸⁷ 2009 Final Rule, 74 Fed. Reg. at 11,464.

¹⁸⁸ Id.

¹⁸⁹ Id.

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.* (emphasis added).

[T]he 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.

Id.

¹⁹⁰ Id. at 11,463-64.

¹⁹¹ Id. at 11,463.

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.”¹⁹² Third, the prior rule, which allowed non-ambulatory cattle to be held, re-inspected and slaughtered for human consumption, “may have created an incentive for establishments to inhumanely force these animals to rise;”¹⁹³ thus, eliminating re-inspection of downer cattle was “necessary to preclude establishments from attempting to force non-ambulatory disabled animals to rise for FSIS re-inspection.”¹⁹⁴

Finally, the prior rule

...may have encouraged...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...Sending such weakened cattle to slaughter increases the chances that they will go down and then be subjected to conditions that are inhumane.¹⁹⁵

Each of these humane-handling reasons for mandating the immediate euthanasia of downer cattle likewise supports requiring the immediate euthanasia for all non-ambulatory veal calves. Accordingly, USDA decision’s to set the humane handling bar lower for calves than for mature cattle is irrational. If anything, veal calves are more susceptible to injury, illness and suffering because they are extremely young and uniformly weakened by on-farm treatment and they often arrive at slaughterhouses injured, exhausted and in great pain. USDA must supply a reasoned explanation for treating downer veal calves differently from non-ambulatory mature cattle, and such

¹⁹² Id.

¹⁹³ Id. at 11,464.

¹⁹⁴ Id.

¹⁹⁵ Id. at 11,465.

explanation is simply not possible here.¹⁹⁶ If, as USDA has clearly explained, the humane handling mandate of the HMSA requires immediate euthanasia of downer cattle,¹⁹⁷ there can be no reasoned denial of euthanasia for downer veal calves, who are also plainly protected by the HMSA.

i. *Requiring Immediate Euthanasia Will Reduce Uncertainty in Determining the Proper Disposition of Down Veal Calves*

In its March 2009 Final Rule, USDA concluded that eliminating the downer cattle loophole “would reduce uncertainty in determining the proper disposition of non-ambulatory disabled cattle.¹⁹⁸ As explained above, the same “uncertainty” that resulted in horrific cruelty to downer cattle at Hallmark is just as pervasive when it comes to non-ambulatory veal calves.

Such uncertainty became clear in the aftermath of the Hallmark investigation, which revealed hundreds of violations that went unreported and unpunished by FSIS inspectors. In response to the undercover Hallmark footage, FSIS’ Ken Petersen told the Washington Post that “if he had evidence that the practices in the [Hallmark] video were going on at a slaughterhouse, he ‘would immediately suspend them as an

¹⁹⁶ NSK, Ltd. v. United States, 390 F.3d 1352, 1357-58 (Fed. Cir. 2004) (“If Commerce wants to treat these expenses inconsistently, then under Chevron we still must defer, but only if Commerce reasonably explains the inconsistency and does not act arbitrarily.”); see also Petroleum Communications, Inc., v. FCC, 22 F.3d 1164, at 1172 (D.C. Cir. 1994) (“Where the agency has failed to provide a reasoned explanation, or where the record belies the agency’s conclusion, we must undo its action.”); Airmark Corp. v. FAA, 758 F.2d 685, (D.C. Cir. 1985) (internal quotations omitted) (“Deference to agency authority or expertise, however, is not a license to treat like cases differently.”) (quoting United U.S.tates v. Diapulse Corp., 748 F.2d 56, 62 (2d Cir.1984)); see also Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 872 (D.C. Cir. 1978).

¹⁹⁷ 2009 Final Rule, 74 Fed. Reg. at 11,464.

¹⁹⁸ Id. at 11,463 (citing 2008 Proposed Rule, 73 Fed. Reg. at 50,890-91).

establishment.”¹⁹⁹ “You're done,” Petersen said. “You're suspended. Everything stops. That's what we call an egregiously inhumane handling violation.”²⁰⁰ Nevertheless, in the span of eight weeks, an undercover HSUS investigator at the Hallmark plant video-recorded more than 20 hours worth of overt, severely cruel treatment of cows, most of whom were too sick or injured to stand. Each of these violations should have at bare-minimum generated a Noncompliance Record (NR),²⁰¹ and in fact, according to Dr. Petersen, many should have caused a complete suspension of FSIS inspection and thus a halt of slaughter operations.²⁰² Yet, at Hallmark between 2004 and 2008, the Office of the Inspector General (OIG) reported that it

found no evidence that in-plant inspectors wrote NRs or took suspension actions for humane handling violations. *However, FSIS personnel acknowledged at least two incidents of humane handling violations that occurred during this period, both of which involved active abuse of animals.* The inspectors did not write an NR or pursue any other enforcement actions; only

¹⁹⁹ Weiss, *supra* note 69, at A4.

²⁰⁰ *Id.*

²⁰¹ *See* 9 C.F.R. § 313.50 (requiring inspectors who observe inhumane handling or slaughter to attach a U.S. Rejected tag to area where inhumane treatment has occurred and require activity to cease until receiving satisfactory assurances from the operator that the abuses will not reoccur). A 2008 OIG report further provides,

FSIS regulations, directives and notices state that if a noncompliance with humane handling requirements has occurred - even one in which the inspector has not observed animals actually being injured or abused - FSIS personnel are to document the noncompliance...and verify that the establishment takes the necessary corrective actions. If corrective actions are not taken in response to an NR, or if the inspector sees an animal being injured or treated inhumanely, FSIS is to take progressively stronger actions, such as shutting down the noncompliant portion of an establishment pending the completion of corrective actions, or requiring that an abused animal be immediately euthanized. *If the observed inhumane treatment is of an egregious nature, FSIS must impose a suspension action.*

USDA Office of the Inspector General, Audit Report, Evaluation of FSIS Management Controls Over Pre-Slaughter Activities, Report No. 24601-0007-KC, at 7-8 (Nov. 2008), *available at* <http://www.usda.gov/oig/webdocs/24601-07-KC.pdf> (last visited accessed Oct. 21, 2009) (emphasis added) (hereinafter 2008 OIG Audit Report).

²⁰² Weiss, *supra* note 69, at A4; *see* 9 C.F.R. §500.3(b).

verbal directions were provided to establishment personnel to discontinue the action or practice in question. The inspectors did not believe an NR was necessary because the specific incident was immediately resolved.²⁰³

The simple point is that at this facility, which USDA recognized as its “supplier of the year” in 2005,²⁰⁴ all trained FSIS inspectors did not even follow the Noncompliance Reporting protocol, let alone suspend inspection. Against this backdrop, it is eminently reasonable to assume that FSIS inspectors at other less-decorated establishments also fail to detect, document and punish the unlawful abuse of farm animals. And in fact, as other investigations reveal,²⁰⁵ this type of abuse and illegal activity is not isolated to the Hallmark plant and is not inflicted solely upon mature cattle. As evidenced clearly by the incidents at Bushway, non-ambulatory calves suffer from the same egregiously inhumane attempts at forced movement.

Furthermore, as USDA acknowledged in its March 2009 Final Rule, both assessing and enforcing required conduct when confronted with a non-ambulatory animal has proven exceedingly confounding for FSIS inspectors

²⁰³ 2008 OIG Audit Report, at 8 (emphasis added).

²⁰⁴ Weiss, *supra* note 69, at A4.

²⁰⁵ See C Halsne, *Meat from Dying, Sick or Diseased Cows Getting into Food*, KIRO 7 Eyewitness News, Oct. 31, 200), available at <http://www.kirotv.com/investigations/1868748/detail.html> (last visited Nov. 1, 2009); U.S. Department of Agriculture, *TLC Custom meat owners fined, sentenced, put on probation for meat violations*, FDCH Federal Department and Agency Documents, March 12, 1997; CL Stull et al., *A Review of the Causes, Prevention, and Welfare of Nonambulatory Cattle*, 231 J. of the American Veterinary Medical Ass’n 227, 228 (describing “graphic footage” released on May 3, 1993, “of nonambulatory cows being moved on the tines of a fork lift” (see Attach 49); T Kennedy, *Woman’s Videotape of Animal Suffering Helps Tame Stockyard*, The Associated Press, May 11, 1991, available at <http://www.google.com/search?q=woman%27s+videotape+of+animal+suffering+helps+tame+stockyard&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a> (last visited Nov. 1, 2009).

and slaughterhouse personnel.²⁰⁶ As a matter of common-sense, authorities detect only a fraction of slaughterhouse violations. In addition, because many FSIS inspectors are unclear regarding what crosses the line—or even where the line is drawn—cruel, unlawful treatment of veal calves escapes sanction. The situation is further exacerbated when FSIS inspectors do not even know the appropriate response to a violation, *e.g.* issuing a written N.R., stopping the slaughter, or simply giving “verbal directions.” At Hallmark, even though
OIG

...verified that both the PHV and CSI at Hallmark received training in humane handling requirements, and [OIG] further verified that this training covered the required enforcement actions under Directive 6900.2. Thus, we must conclude that both of these employees were aware of the requirements; however, we have no information beyond the statements they made as to why they failed to follow them.²⁰⁷

Likewise, the results of the recent Bushway investigation demonstrate that FSIS knows that veal calves routinely suffer the very same stomach-turning abuses as the Hallmark cows, and yet the agency has not corrected it.

In short, the cruelty to veal calves described above is indistinguishable from the abuse documented at Hallmark. As noted above, to be considered reasonable USDA must offer a reasoned explanation for treating downer veal calves in opposite fashion from non-ambulatory mature cattle, and such

²⁰⁶ See generally, 2009 Final Rule, 74 Fed. Reg. at 11,463; 2008 OIG Audit Report, at iii (“...there were deliberate actions by Hallmark personnel to bypass required inspections, as well as noncompliance with required inspection procedures by FSIS in-plant staff. Supervisory and other management controls did not detect and/or prevent these incidents....[N]othing came to our attention to indicate that unsuitable animals were passed for slaughter at these establishments.”).

²⁰⁷ Id.

explanation is impossible here.²⁰⁸ Thus, just as the Hallmark scandal prompted the agency to eliminate all confusion about how to deal with non-ambulatory cattle, the examples above show that a similar fix is sorely needed for calves who suffer from the same unconscionable cruelty born in large part from confusion about the rules and the consequences for breaking them.

ii. *Requiring Immediate Euthanasia of Non-ambulatory Veal Calves Will Increase Inspection Efficiency and Deter Noncompliance*

In 2007, USDA amended its regulations to expressly allow FSIS inspectors to pass certain non-ambulatory cattle for human consumption.²⁰⁹ However, after the Hallmark scandal, in its 2009 Final Rule, USDA eliminated this loophole in part because the agency reasoned that, as a result, FSIS inspectors would not have to “spend [time] 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.”²¹⁰ In fact, USDA attributed the egregious violations at Hallmark, in part, to the “shortcuts in

²⁰⁸ NSK, Ltd., 390 F.3d at 1357-58 (If Commerce wants to treat these expenses inconsistently, then under Chevron we still must defer, but only if Commerce reasonably explains the inconsistency and does not act arbitrarily.); see also Petroleum Communications, Inc., 22 F.3d at 1172 (“Where the agency has failed to provide a reasoned explanation, or where the record belies the agency’s conclusion, we must undo its action.”); Airmark Corp., 758 F.2d 685 (quoting Diapulse Corp., 748 F.2d at 62); see also Local 777, 603 F.2d at 872.

²⁰⁹ 2007 Final Rule, 72 Fed. Reg. 38,700, 38,701 (July 13, 2007) (“...FSIS inspection personnel will determine on a case-by-case basis the disposition of cattle that become non-ambulatory after they have passed ante-mortem inspection”).

²¹⁰ 2009 Final Rule, 74 Fed. Reg. at 11,463.

ante-mortem inspection activities” that the PHV’s reported having taken “in order to complete all assigned tasks.”²¹¹

By comparison, the current veal calf set aside provision imposes an even greater burden on FSIS inspectors and PHVs than the former downer cattle loophole because it applies to *all* veal calves, as opposed to only those that go down after passing initial inspection. It forces personnel to waste an inordinate amount of time assessing and supervising every single non-ambulatory veal calf.²¹² This is time that could be spent on ensuring that animals are not overtly abused and that tainted meat does not enter the nation’s food supply. Under current regulations, a supposedly “tired or cold” non-ambulatory calf may be “set apart and held for treatment under the supervision of a Program employee or official designated by the area supervisor.”²¹³ The calf is then moved to a separate area where he is eventually reexamined, and then ultimately may be slaughtered. Finally, FSIS inspectors must inspect the carcass of each of these calves before meat derived from the carcasses can be approved for human consumption.²¹⁴

Furthermore, since presumably only calves who are non-ambulatory as a result of being cold or tired may be set apart – although, as evidenced by the Bushway investigation, this distinction has no practical effect – the

²¹¹ OIG Audit Report, at iv.

²¹² 9 C.F.R. § 309.13(b) (“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...*under the supervision of a Program employee* or official designated by the area supervisor...The U.S. Condemned identification tag will be removed by a Program employee *following treatment under such supervision* if the animal is found to be free from any such disease.”) (emphasis added).

²¹³ Id.

²¹⁴ 9 C.F.R. §§ 309.2(a), 311.1(a) (“no product shall be passed for human food under any such section unless it is found to be otherwise not adulterated.”).

reason for a calf's inability to rise and walk must initially be determined before the set aside occurs. However, the regulations do not make clear whether this determination is to be made by FSIS personnel or establishment employees, but either scenario poses grave problems.

If FSIS personnel are to ascertain the cause of a calf's non-ambulatory status, then this imposes on them yet another burden and decreases the time they "can focus on other inspection activities."²¹⁵ On the other hand, if, as is more likely, establishment employees make the determination, there is an overwhelming incentive to either (1) characterize all non-ambulatory calves as simply "cold or tired," which will result in sick and injured calves being kept alive longer than necessary and subjected to further inhumane treatment, or (2) bypass altogether the set aside provision²¹⁶ – which is understandable since it is confusing, slows down slaughter operations considerably, and consumes slaughterhouse resources (presuming the regulation requiring the provision of food and water to held animals is followed – which, as evidenced by the examples of noncompliance reports cited at footnote 9, it frequently is not). Moreover, as both the Hallmark and Bushway investigations illustrate, there is a strong countervailing financial incentive: an animal who is not singled out for special FSIS scrutiny is far more likely to proceed to slaughter and generate revenue. Finally, slaughterhouse employees have neither the skills nor the training nor the equipment to make medical determinations or to diagnose medical

²¹⁵ 2009 Final Rule, 74 Fed. Reg. at 11,463.

²¹⁶ NR No. 0006-2005-6554 (Dec. 20, 2005) (citing an employee for preparing "to stun [a downed] calf and hoist it to the slaughter area.") (see Attach. 47).

conditions, as there is no requirement that plant personnel who may make this call have even rudimentary veterinary training.

Even for an experienced veterinarian, determining the cause of an animal's non-ambulatory status is nearly impossible. Bovine veterinarian Jim Reynolds of the University of California's School of Veterinary Medicine noted that even for trained veterinarians, it is exceedingly difficult to differentiate the many reasons an animal may be non-ambulatory,²¹⁷ and in fact multiple conditions may present simultaneously.²¹⁸ A 2003 review concluded that "[i]t should always be considered that two or more conditions may present simultaneously" in a non-ambulatory animal,²¹⁹ and former USDA senior staff veterinarian Linda Detwiler asserted that the underlying cause of the non-ambulatory condition "may be impossible to ascertain."²²⁰ Thus, Detwiler advised USDA "to prohibit for human food *any* bovine which cannot walk to the 'knock box' [stunning area] regardless of reason."²²¹ If trained medical professionals cannot determine the cause of an animal's inability to rise or walk, then it is utterly inappropriate to entrust such a determination to slaughterhouse employees, who not only lack appropriate skills and training but who may also face pressure from foremen,

²¹⁷ Hisey, *supra* note 61.

²¹⁸ JPP Harwood, *Tackling the Problem of the Downer Cow: Cause, Diagnosis and Prognosis*, II Cattle Practice 89 (2003) (see Attach. 48).

²¹⁹ Stull, *A Review of the Causes, Prevention, and Welfare of Nonambulatory Cattle*, *supra* note 205.

²²⁰ LA Detwiler, Comments on: Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-ambulatory Disabled Cattle, Docket 03-025IF, at 4, May 7, 2004, available at <http://www.fsis.usda.gov/OPPDE/Comments/03-025IF/03-025IF-634.pdf> (last visited Oct. 5, 2009).

²²¹ Id.

slaughterhouse management or others who have a very strong vested interest in seeing that the maximum number of animals are passed for slaughter.

Ultimately, as the Bushway investigation illustrates, the set aside and monitoring provision is so burdensome and confusing, and allows for such a high degree of discretion as to the disposition of downer calves, that it may be rendered meaningless and is likely to be ignored – especially because there is money to be made by slaughtering and money to be lost by setting aside. The result is a recipe for precisely the kind of egregious abuse that occurred at Hallmark and Bushway. In light of these realities, USDA must offer a reasoned explanation for treating downer veal calves in opposite fashion from non-ambulatory mature cattle, and such a distinction is impossible here.²²² Thus, as was the case with mature cattle requiring *all* non-ambulatory veal calves to be immediately euthanized, regardless of the reason for their inability to rise and walk, would remove this discretion, confusion, and financial incentives to circumvent the HMSA.

iii. *Allowing Non-Ambulatory Calves to be Slaughtered For Human Consumption Creates an Incentive to Inhumanely Force these Animals to Rise*

As with cattle who become non-ambulatory after ante-mortem inspection, allowing slaughterhouses to set aside downed veal calves for re-inspection and slaughter for human consumption creates “an incentive for establishments to inhumanely force these animals to rise.”²²³ Any doubt about the desire of veal slaughterhouses to slaughter calves too sick or injured to stand was eliminated in September of 2008 when the American

²²² NSK, Ltd., 390 F.3d at 1358.

²²³ 2009 Final Rule, 74 Fed. Reg. at 11,464.

Meat Institute (AMI)²²⁴ issued comments on FSIS' Proposed Rule to prohibit the slaughter of all non-ambulatory cattle.²²⁵ AMI urged USDA to “reiterate its policy regarding setting aside non-ambulatory veal calves.” As AMI explained, its members have a financial interest in prolonging the lives of calves in the hopes that some of these animals can eventually proceed to slaughter. Of course, AMI did not state how it can be determined whether calves are non-ambulatory because they are cold and tired or because they are injured, sick, or otherwise weakened, nor what percentage of non-ambulatory calves never rise again; the plain reality is that, as outlined above, such a determination is nearly impossible under slaughterhouse conditions. In its comments AMI does not even attempt to grapple with the humane implications of its preferred policy, despite the fact that the HMSA makes humane handling an essential part of this analysis. Notably, even experts AMI relies upon, disapprove of AMI's position on perpetuating the agony of nonambulatory calves. In response to the Bushway video, Dr. Grandin and Kurt Vogel, M.S., stated, “Calves that are too weak to stand and walk that arrive at the plant should be euthanized.”²²⁶

As was the case at Hallmark, until USDA uniformly and unequivocally prohibits the slaughter of all non-ambulatory cattle and calves, there will be an incentive for establishments to circumvent the HMSA and its implementing regulations and to use any means necessary to force animals to

²²⁴ AMI “represents the interests of packers and processors of beef, pork, lamb, veal, and turkey products and their suppliers throughout North American.” Its members “produce 95 percent of the beef, pork, lamb and veal products...in the United States.” AMI Comments, *supra* note 130, at 1.

²²⁵ *Id.*

²²⁶ Grandin/Vogel Letter, *supra* note 161.

rise and walk for the period of time necessary to slaughter them. Because this incentive exists irrespective of age, it is arbitrary and capricious for FSIS to incentivize the handling and slaughter of non-ambulatory calves. Again, USDA must offer a reasoned explanation for treating downer veal calves in opposite fashion from non-ambulatory mature cattle, and such a distinction is not sustainable.

iv. *Requiring the Immediate Euthanasia of Non-Ambulatory Veal Calves Will Deter Producers from Marketing and Transporting Calves Who Are Too Weak to Rise or Walk*

One of the key problems USDA addressed by eliminating the downer cattle loophole in March 2009 was livestock producers' practice of holding dairy cattle until they became exceptionally old or weak before sending them to slaughter in order to extract as much milk as possible.²²⁷ As USDA articulated, the "revision of the rule removes the incentive to send such weakened cattle to slaughter and decreases the chances of inhumane conditions."²²⁸ Thus, the total ban on the slaughter of non-ambulatory cattle was aimed at improving the treatment of animals not only within the slaughter establishments, but also at the facilities in which the animals are raised. As then-Secretary Schafer explained, "The decision to ban all non-ambulatory cattle from slaughter will positively impact the humane handling of cattle by reducing the incentive to send marginally weakened cattle to market."²²⁹

²²⁷ 2009 Final Rule, 74 Fed. Reg. at 11,465.

²²⁸ Id.

²²⁹ Schafer Press Release, *supra* note 2.

This reasoning is particularly compelling when applied to veal calves, who, as discussed in detail above, are either unweaned or raised in particularly inhumane conditions that render them weak and susceptible to disease and injury. In addition, some calves, such as those received at Bushway, are unweaned and sent to slaughter when they are only days old and therefore extremely weak. Although veal producers do not have precisely the same economic incentive as dairy cattle producers to keep animals as long as possible, the current loophole for veal calves creates an identical disincentive for the veal industry to concern itself with the treatment and health of calves. Under the current scheme veal producers know that the animals they ship to slaughter will very likely be slaughtered and processed for consumption, and thus yield a return, regardless of their inability to stand or walk. As described above, consumers, other developed nations, and even members of the veal industry itself agree that the status quo method of raising calves is desperately in need of reform. Thus, there is no rational explanation for maintaining an exception that encourages the continuation of inhumane treatment of veal calves while seeking to deter such treatment with respect to mature dairy cattle.

For all the reasons discussed above the humane concerns implicated by immobilized veal calves at slaughterhouses are indistinguishable from the humane concerns implicated by immobilized mature cattle. While Courts will defer to USDA on matters within the agency's expertise, "Deference to agency authority or expertise, however, is not a license to...treat like cases

differently.”²³⁰ Thus if USDA is determined to treat like situations in opposite fashion, the agency must supply a rational explanation for that disparate treatment.²³¹ In other words, USDA must reconcile its conclusion that it is categorically humane and thus entirely permissible to prolong the misery of one class of immobilized animals – calves – so that they can be slaughtered for human consumption, with its conclusion that it is categorically *inhumane* and thus entirely forbidden to do likewise with the same species of immobilized animals – mature cattle. Given the overwhelming incentives to inhumanely force downed animals to rise, as well as the indisputable evidence that such conduct regularly occurs, a reasoned explanation for such opposite treatment is simply not possible.

2. A Construction of the HMSA and FMIA that Allows Industry’s Purported Economic Hardships to Justify Needless Cruelty is Unreasonable in Light of the Purpose of Those Acts

Consistent with the plain language and the purposes of the HMSA and FMIA, USDA has repeatedly rejected protests by the livestock industry that restrictions on the slaughter of non-ambulatory mature cattle are prohibitively expensive. To consider cost-based arguments in determining the disposition of non-ambulatory veal calves would thus contradict not only the HMSA and FMIA, but also the position consistently taken by USDA that humane-handling and food safety concerns are of superseding importance.

²³⁰ Airmark Corp. v. FAA, 758 F.2d 685, (D.C. Cir. 1985) (internal quotations omitted) (quoting United States v. Diapulse Corp., 748 F.2d 56, 62 (2d Cir.1984)); see also Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 872 (D.C. Cir. 1978).

²³¹ See also Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (“Where the agency has failed to provide a reasoned explanation, or where the record belies the agency’s conclusion, we must undo its action.”).

Ultimately, as outlined in detail above, the industry itself is responsible for and thus has the power to prevent calves from becoming non-ambulatory. Accordingly and in line with the HMSA and FMIA, the public cannot be required to bear the public health and moral consequences of the industry's own humane handling shortcomings. Moreover to the extent that the FMIA and the HMSA are concerned with protecting U.S. agricultural interests, those statutory purposes are severely undermined by documented scandalous abuse of prone, calves at slaughterhouses.

Arguments that a downer calf ban would be too costly are wholly unpersuasive. History demonstrates that public perception of slaughterhouse cruelty has a far greater economic impact on the meat industry as a whole than the inability of some slaughterhouses to process a small percentage of animals. Thus, it is the mandate of the HMSA and FMIA, as well as in the interests of the public, the slaughter-bound animals, the veal industry, and USDA, to have a consistently-applied, blanket prohibition on the slaughter of non-ambulatory veal calves for human food.

- i. *Elevating Minor Industry Compliance Costs Over Serious Humane Handling and Food Safety Concerns is Contrary to the Purposes of the HMSA, the FMIA, and USDA's Own Policies*

USDA has made clear that the goals of preserving food safety and preventing inhumane treatment of slaughter-bound animals trump unsubstantiated considerations of fiscal impact to the industry. After USDA imposed the 2004 interim rule proscribing the slaughter for human food of non-ambulatory disabled cattle,²³² livestock producers complained that they

²³² See 2004 Interim Final Rule, 69 Fed. Reg. 1862.

had experienced “a serious economic burden” as a result of the rule.²³³ USDA further noted that small meat processors and custom operations “stated that because they do not slaughter or process a large number of animals, they stand to lose a significant source of revenue, and some stated that the prohibition on the slaughter of non-ambulatory disabled cattle will cause them to go out of business.”²³⁴ Nonetheless, USDA swiftly dismissed these arguments, acknowledging that while such prohibitions have “certain economic effects...[,] the carcasses of non-ambulatory disabled cattle offered for slaughter are adulterated and as such cannot be used for human food.”²³⁵ In other words, USDA deemed economic considerations—even where they purportedly might force some operators out of business—insufficient to trump food safety concerns.

Similar economic arguments were made in response to USDA’s 2009 rule proscribing the slaughter for human food of cattle who become non-ambulatory after ante-mortem inspection.²³⁶ Industry commenters protested that the removal of the case-by-case disposition imposed a “significant expense” and deprived them of the benefits of “having FSIS PHVs re-evaluate the animal, [which] 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.”²³⁷ Again USDA maintained its position, this time based solely on a humane handling rationale, stating, “This revision...removes the incentive to send [] weakened cattle to slaughter and

²³³ 2007 Final Rule, 72 Fed. Reg. at 38,705.

²³⁴ Id.

²³⁵ Id.

²³⁶ See 2009 Final Rule, 74 Fed. Reg. at 11,464.

²³⁷ Id.

decreases the chances of inhumane conditions.”²³⁸ Thus, USDA has properly taken the position that humane handling and food safety concerns, either in combination or independently, take precedence over considerations of cost and inconvenience to the regulated industry. Accordingly, USDA’s March 2009 Federal Register preamble demonstrates that even standing alone humane handling considerations outweigh industry’s unsupported complaints about loss of revenue from the slaughter of animals too weak or ill to stand or walk.

Neither the HMSA nor the FMIA authorizes USDA to waste massive public resources, compromise the humane handling of slaughter-bound animals, and sacrifice the public health in an attempt to protect industry's bottom line. The FMIA was *not* intended to maximize the amount of meat in the food supply, but rather was enacted in 1907 for the express purpose of protecting consumers from a flood of unsafe meat products in the marketplace.²³⁹ Similarly, the HMSA is focused on ensuring that slaughtered animals are handled and killed humanely.²⁴⁰

²³⁸ Id. at 11.465.

²³⁹ See 21 U.S.C § 602; Cavel Int’l, Inc. v. Madigan, 500 F.3d 551, 554 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2950 (2008). (noting that the FMIA “is concerned with inspecting premises at which meat is produced for human consumption,...rather than with preserving the production of particular types of meat for people to eat.”); United States v. Stanko, 491 F.3d 408, 417 (8th Cir. 2007) (“[C]ases discussing the FMIA uniformly describe the statute as concerned primarily with protecting public health.”).

²⁴⁰ See 7 U.S.C. § 1901 (“The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry... It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.”).

ii. *Preventing the Incidence of Non-Ambulatory Calves is Almost Entirely Within the Veal Industry's Control*

As explained in great detail above, it is wholly within the power of the veal industry to reduce the number of calves who become non-ambulatory by improving the horrendous conditions in which they are raised, transported, and held at slaughterhouses. Accordingly, USDA should not continue to reward an industry that has decided it is more profitable to cut corners and keep animals in a weakened and unhealthy state, or to truck them off to slaughter when they are days old, by continuing to provide industry with a loophole, particularly when the loophole severely compromises animal welfare and food safety and plainly violates both the purposes of implementing legislation as well as USDA's own stated positions.

iii. *Removing the Downed Veal Calf Exemption Will Enhance Public Confidence in the Veal Industry*

Even if USDA were to take into account the financial impact of a downer calf ban on the veal industry, history has proven that negative perceptions of the slaughter industry's treatment of animals has a far greater economic impact than inability to process for sale a small number of animals. As Dr. Grandin observed, "[o]ne emaciated, downed, suffering cow shown on television can cause more losses to the industry" than all other costs associated with carcass condemnation.²⁴¹ As was the case with Hallmark, it

²⁴¹ T Grandin, *Downers are a Problem*, Meat & Poultry, April, 1995, at 10; see also A Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. Times, Feb. 18, 2008, available at <http://www.nytimes.com/2008/02/18/business/18recall.html> (last visited Oct. 20, 2009) (noting that the undercover video of the Hallmark abuses "has caused an uproar since its release" and prompted "the largest beef recall in U.S. history.").

can even force a \$100 million plant to shut down entirely.²⁴² In fact, following the Hallmark scandal, even meat and dairy trade associations submitted a petition urging USDA to remove the case-by-case disposition provision in order to repair the damage to consumer confidence in the U.S. beef supply.²⁴³ According to *The New York Times*, “the proposal to ban all non-ambulatory cattle from the food supply” was “hailed by the meat industry, which threw its support behind the change...*Industry leaders once favored the exemption, but came around to the view that it was undermining the confidence of consumers and foreign customers.*”²⁴⁴

The impact of public exposure to inhumane treatment is arguably even greater with respect to the veal industry, which experienced debilitating, permanent losses after photographs of confined, tethered calves appeared across the country two decades ago.²⁴⁵ The New York Times described one farmer who said, “In 2003 people were horrified at the idea I would sell veal.”²⁴⁶ It wasn’t until he began to change his practices that customers were willing to purchase veal.²⁴⁷

Just as exposure of the deplorable conditions in which veal calves are raised led to a massive decline in veal sales – which, according to *The New*

²⁴² See M Jones, *The Barnyard Strategist*, N.Y. Times, Oct. 26, 2008, at MM47, available at <http://www.nytimes.com/2008/10/26/magazine/26animal-t.html?pagewanted=1&r=1&sq=hallmark%20westland&st=nyt&scp=2> (last visited Oct. 20, 2009); J Schmit, *Impact of Meat Recall Beginning to Show*, USA Today, March 20, 2008, available at http://www.usatoday.com/money/industries/food/2008-03-30-meat-recall_N.htm (last visited Oct. 20, 2009).

²⁴³ 2008 Proposed Rule, 73 Fed. Reg. at 50,890.

²⁴⁴ A Martin, *U.S. Moves to Prohibit Beef from Sick or Injured Cows*, at C3, May 21, 2008, available at <http://www.nytimes.com/2008/05/21/business/21beef.html> (last visited Oct. 20, 2009) (emphasis added).

²⁴⁵ Burros, *supra* note 129, at 1.

²⁴⁶ *Id.* at 3.

²⁴⁷ *Id.*

York Times, “have never recovered”²⁴⁸ – exempting non-ambulatory veal calves from the euthanasia requirement and thus allowing inhumane treatment to continue poses a major threat to the veal industry. Since one of the asserted goals of an absolute ban on slaughter of non-ambulatory cattle was to “benefit both consumers and the beef industry by *enhancing public confidence* in the U.S. beef supply,”²⁴⁹ it must follow that such a rule as applied to veal calves would also enhance confidence in the U.S. veal supply.

Moreover, any additional income drawn from non-ambulatory veal calves who are forced to proceed to slaughter is negligible, particularly compared to the potentially debilitating industry-wide effect of consumers’ perception of cruelty. Bovine veterinarian Jim Reynolds of the University of California’s School of Veterinary Medicine maintains that non-ambulatory animals bring in less money even if slaughtered for food due to the difficulty of transporting them, processing them and trimming them for food.²⁵⁰ Thus, as Dr. Reynolds so aptly stated, “Sending down cattle to slaughter cannot be supported by economics.”²⁵¹ Congress made plain that one of the benefits of humane slaughter, as mandated by the HMSA, is that it protects both interstate and foreign commerce.²⁵² In light of this Congressional intent and the lessons of the Hallmark scandal it is unreasonable to allow the slaughter of animals too weak sick or injured to stand, and all of the associated cruelty described above.

²⁴⁸ *Id.* at 1.

²⁴⁹ 2008 USDA Statement, 73 Fed. Reg. at 71,130.

²⁵⁰ Hisey, *supra* note 61.

²⁵¹ Hisey, *supra* note 61.

²⁵² 7 U.S.C. § 1901.

D. Banning the Slaughter of Non-ambulatory Veal Calves Will Increase the Public's Faith in USDA Inspection, Which Remains in Serious Question Following the Hallmark Scandal

USDA came under severe scrutiny at a hearing before the Senate Appropriations subcommittee regarding Hallmark.²⁵³ One senator asked, “[w]hy don’t you have a system that uncovers this inhumane treatment of animals,” and called for continuous monitoring of live animals at slaughterhouses through use of video cameras.²⁵⁴ Another senator demanded to know, “How much longer will we continue to test our luck with weak enforcement of federal safety regulations?”²⁵⁵ To the extent that both the meat industry and USDA were able to mitigate the damaging effect of the Hallmark scandal through the notion that it was an isolated incident, the Bushway investigation destroys this myth. USDA promised Congress that it would step up efforts to ensure that slaughter-bound animals are treated humanely.²⁵⁶ USDA’s decision to grant the veal industry an exemption that has been demonstrated to engender egregious abuses and encourage regulatory violations cannot be reconciled with the agency’s promises to Congress. Thus, in consideration of HMSA’s humane handling requirements and the public’s perception of the meat industry and USDA’s enforcement ability, USDA must not await yet another public scandal before taking simple

²⁵³ See, e.g., A Martin, *Agriculture Dpmt. Vows to Improve Animal Welfare*, N.Y. Times, at C3 (Feb. 29, 2008), available at <http://www.nytimes.com/2008/02/29/business/29food.html> (last visited Oct. 22, 2009).

²⁵⁴ *Id.* (quoting Wisconsin Senator Herb Kohl).

²⁵⁵ J Roybal, *Hallmark Gives Industry a California Nightmare*, Beef Magazine (Feb. 22, 2008) (quoting Iowa Senator and chair of the Senate Agricultural Committee Tom Harkin), available at <http://beefmagazine.com/cowcalfweekly/hallmark-gives-industry-california-nightmare/> (last visited Oct. 22, 2009).

²⁵⁶ Martin, *Agriculture Dpmt. Vows to Improve Animal Welfare*, *supra* note __.

and easily implementable steps to address and prevent the grossly inhumane treatment of the most defenseless and weakened animals slaughtered in this country.

VII. CONCLUSION

Petitioner urges USDA to initiate rulemaking to remove this exemption and require that all cattle—including veal calves—who are or become non-ambulatory be euthanized promptly and humanely. The HMSA’s humane handling goals, the FMIA’s food safety goals, and USDA’s own policies and conclusions regarding non-ambulatory cattle demand the removal of the exemption. Allowing calves who are too sick or injured to stand or walk to be kept alive indefinitely and forced or dragged through the slaughter line is extremely inhumane, wastes public resources, reduces confidence in USDA’s inspection system, and is ultimately detrimental to the veal industry itself.

The primary justification for USDA’s decision to remove the re-inspection provision following the Hallmark scandal was to “ensure *effective* implementation of ...humane handling requirements.”²⁵⁷ It would thus be arbitrary and capricious for USDA, after having determined that the case-by-case reinspection provision for mature cattle was ineffective, diverted agency resources, and encouraged inhumane treatment, to fail to remove the veal calf set aside provision, which similarly is inefficient, incentivizes abuse, and, if complied with, wastes an inordinate amount of time and resources.

²⁵⁷ 2008 Proposed Rule, 73 Fed. Reg. at 50,891; see also 2009 Final Rule, 74 Fed. Reg. at 11,464 (asserting that “a change in the regulation [was] needed to ensure more *effective* and efficient implementation of inspection procedure and compliance with humane handling requirements.”).

Respectfully submitted,

/s/

Gina Tomaselli
Litigation Fellow
The Humane Society of the United States
2100 L St. N.W.
Washington, DC 20037

/s/

Peter A. Brandt
Senior Attorney, Farm Animals
The Humane Society of the United States
2100 L St. N.W.
Washington, DC 20037