



September 1, 2015

FSIS Docket Clerk  
Department of Agriculture  
Food Safety and Inspection Service  
Room 2534 South Building  
1400 Independence Avenue, S.W.  
Washington, DC 20250-3700

Submitted electronically to [Mary.Porretta@fsis.usda.gov](mailto:Mary.Porretta@fsis.usda.gov)

Dear Ms. Porretta:

On behalf of the Animal Legal Defense Fund, Compassion Over Killing, Farm Forward, Farm Sanctuary, Mercy for Animals, and People for the Ethical Treatment of Animals, I am submitting the attached rulemaking petition to amend regulations related to the Humane Methods of Slaughter Act and Federal Meat Inspection Act, with a focus on improving enforcement of the law.

Please send any communications regarding this petition to my attention:

Bruce G. Friedrich  
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Washington, DC 20012

c: [REDACTED]  
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Thank you very much for your time and attention.

Respectfully submitted,

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UNITED STATES DEPARTMENT OF AGRICULTURE  
FOOD SAFETY AND INSPECTION SERVICE

Petition calling for regulations under the Humane Methods of Livestock Slaughter Act and Federal Meat Inspection Act that will decrease cruelty to farm animals at slaughter.

Docket No. \_\_\_\_\_

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## I. INTRODUCTION

Under both the Humane Methods of Livestock Slaughter Act (HMSA) and the Federal Meat Inspection Act (FMIA), the USDA Food Safety and Inspection Service (FSIS) has a duty to ensure that livestock animals are treated humanely throughout the slaughter process.

After reviewing reports from the USDA's Office of the Inspector General (OIG) and the Government Accountability Office (GAO), undercover investigations,<sup>1</sup> and FSIS's own humane slaughter enforcement records, petitioners have identified critical areas where FSIS is failing to perform its required duty. Currently, the HMSA is enforced inconsistently and arbitrarily, or not at all. Moreover, FSIS inspectors who attempt to properly enforce the HMSA routinely face retaliation for doing so.

Based on this analysis, the undersigned submit this Petition to request that FSIS amend 9 C.F.R. §§ 313 and 500, FSIS Policy Directive 6900.2, and all other appropriate FSIS policy documents to include the provisions enumerated in section III and discussed in section VII of this Petition.<sup>2</sup>

Although our requests involve only small changes to current FSIS policy, they will significantly improve compliance with the mandates of the HMSA and FMIA if implemented. It is impossible to reconcile refusal of our petition requests with FSIS's statutory mandate, either as a matter of statutory interpretation<sup>3</sup> or as a policy choice.<sup>4</sup>

## II. INTERESTS OF PETITIONERS

The Animal Legal Defense Fund (ALDF) is a national nonprofit organization dedicated to protecting the lives and advancing the interests of animals through the legal system. ALDF files high-impact lawsuits to stop animal cruelty and encourages the passage and enforcement of strong animal protection laws. ALDF has a particular interest in protecting animals raised for food from suffering and harm, and frequently advocates for robust enforcement of laws protecting farm animals.

Compassion Over Killing (COK) is a national nonprofit animal advocacy organization working to eliminate cruelty to animals used in agriculture, including livestock at slaughterhouses, since 1995. COK seeks to educate the public about the cruel practices utilized

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<sup>1</sup> See *infra* notes 39-40.

<sup>2</sup> 9 C.F.R. § 392.2 ("For purposes of this part, a 'petition' is a written request to issue, amend, or repeal a regulation administered by FSIS. A request to issue, amend, or repeal a document that interprets a regulation administered by FSIS may also be submitted by petition").

<sup>3</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>4</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

by industrial animal agriculture through investigations, legal advocacy, and outreach campaigns. Many of COK's more than 45,000 supporters are concerned about the treatment of animals when purchasing animal products, and support measures that would help eliminate the inhumane handling of livestock at slaughterhouses.

Farm Forward implements innovative strategies to promote conscientious food choices, reduce farmed animal suffering, and advance sustainable agriculture. Farm Forward serves a broad coalition of farmers, consumers, and institutions dedicated to exposing and eliminating the worst abuses of farm animals.

Farm Sanctuary was founded in 1986 to combat the abuses of factory farming and encourage a new understanding of farm animals. Farm Sanctuary advocates for laws and regulations to decrease suffering, and we reach out to legislators, regulatory agencies, and businesses to bring about institutional reforms.

Mercy For Animals (MFA) is a national animal protection organization dedicated to preventing cruelty to farmed animals and promoting compassionate food choices and policies. Through animal cruelty investigations, legal advocacy, corporate outreach, and consumer education, MFA serves as a voice for the billions of farmed animals who are raised and killed for food each year in this country. MFA has a long history of undercover investigations and legal advocacy efforts that have led to increased legal protections for farmed animals and enforcement of existing animal cruelty laws.

People for the Ethical Treatment of Animals (PETA) is the largest animal rights organization in the world, with more than three million members and supporters. A central tenet of its mission is to protect animals used for food from abuse, neglect, and cruelty. As such, PETA has a clear interest in minimizing abuse of livestock animals throughout the slaughter process and ensuring that the laws intended to protect these animals are strictly enforced.

### **III. ACTION REQUESTED (SUMMARY)**

Under the Right to Petition Government Clause contained in the First Amendment of the United States Constitution,<sup>5</sup> the Administrative Procedure Act,<sup>6</sup> and the USDA's implementing regulations,<sup>7</sup> petitioners submit this Petition for Rulemaking under the Humane Methods of Livestock Slaughter Act<sup>8</sup> and Federal Meat Inspection Act, requesting that USDA take the following regulatory actions, for the reasons detailed in sections VI and VII:

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<sup>5</sup> U.S. Const. amend. I

<sup>6</sup> 5 U.S.C. § 553(e).

<sup>7</sup> 7 C.F.R. §1.28.

<sup>8</sup> 7 U.S.C. §§ 1901-1906.

1. Amend 9 C.F.R. § 500 to provide that FSIS “will” issue at least a Noncompliance Record (NR) for all violations of the HMSA;
2. Amend 9 C.F.R. § 313 to codify the definition of “egregious” violations of the HMSA given by FSIS Directive 6900.2, rev. 2;
3. Amend 9 C.F.R. § 500 to provide that FSIS “will” issue a Notice of Suspension for all “egregious” violations of the HMSA, as defined in 9 C.F.R. § 313;
4. Amend 9 C.F.R. § 500 to require that all intentional cruelty, as well as especially egregious and reckless abuse, be referred for criminal prosecution;
5. Amend 9 C.F.R. § 500 to provide FSIS with a timeline for withdrawal proceedings based on repetitive HMSA violations.

#### **IV. LEGAL BACKGROUND: HMSA AND FMIA**

Congress passed the Humane Methods of Livestock Slaughter Act<sup>9</sup> in order to “establish as a national policy that livestock should be slaughtered and handled in connection with slaughter only by the ‘most humane practicable methods.’”<sup>10</sup> The HMSA authorizes the USDA Food Safety and Inspection Service (FSIS) to “designate methods of slaughter and of handling in connection with slaughter which, with respect to each species of livestock, conform to [that] policy...”<sup>11</sup> The HMSA is incorporated into the Federal Meat Inspection Act,<sup>12</sup> which instructs FSIS to appoint inspectors to enforce humane handling regulations at slaughter facilities and allows the Secretary to refuse inspection at slaughter establishments where animals “have been slaughtered or handled in connection with slaughter . . . by any method not in accordance with [the HMSA].”<sup>13</sup>

The HMSA standardizes and regulates the design of holding pens and equipment, the handling of animals prior to slaughter, and the requirements of various stunning methods.<sup>14</sup> Holding pens and equipment must be designed to minimize the potential for injury to livestock.<sup>15</sup> Animals must be provided with water in all holding pens, and access to feed, if held longer than 24 hours.<sup>16</sup> In order to minimize excitement and injury, animals must not be prodded excessively or with sharp objects, and should be driven at a normal walking pace at all times.<sup>17</sup> Non-

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<sup>9</sup> 7 U.S.C. § 1901 et seq.

<sup>10</sup> H.R. REP. NO. 85-706, at 4 (1957). *See also* 7 U.S.C. § 1902 (“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”).

<sup>11</sup> 7 U.S.C. 1904(b).

<sup>12</sup> 21 U.S.C. § 601 et seq.

<sup>13</sup> 92 Stat. 1069 (1978) (codified at 21 U.S.C. § 603(b)).

<sup>14</sup> 9 C.F.R. § 313 et seq.

<sup>15</sup> *Id.* at § 313.1.

<sup>16</sup> *Id.* at § 313.2(e).

<sup>17</sup> *Id.* at § 313.2(a)-(c).

ambulatory Disabled (NAD) animals must be separated from animals who can walk and must not be dragged, pushed with equipment, or otherwise treated inhumanely.<sup>18</sup> NAD adult cattle who are presented for slaughter must be condemned and humanely euthanized.<sup>19</sup>

All regulations addressing the stunning of animals with chemicals, captive bolt guns, firearms, or electric currents are identical in their requirement that the stunning method be rapid and effective *on the first try*.<sup>20</sup> In other words, the methods must produce immediate unconsciousness on the first shot in the case of the captive bolt gun or other firearms, and in the case of the other methods, immediately after the first application of the chemicals or electric current.<sup>21</sup> For all methods, the animal must remain in a state of complete unconsciousness throughout shackling, sticking, and bleeding.<sup>22</sup>

FSIS inspectors can enforce humane handling regulations in a number of ways. First, they can take remedial regulatory control action to correct violations by, for example, slowing or suspending the slaughter line, rejecting equipment or facilities, or refusing to allow processing of certain products.<sup>23</sup> Second, they are directed to issue a Noncompliance Record (NR) where abuse of animals is not egregious but is illegal.<sup>24</sup> Third, they can temporarily suspend inspections.<sup>25</sup> 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.<sup>26</sup> FSIS does not have to provide prior notification of such suspension where animals are being slaughtered or handled inhumanely.<sup>27</sup> In fact, as discussed in section VII.C.1, HMSA regulations do not allow for such warnings. Fourth, FSIS can refer violations to federal authorities for potential criminal prosecution;<sup>28</sup> thus, inhumane slaughter could result in “imprisonment for not more than one year, or a fine of not more than \$1,000, or both.”<sup>29</sup> If the violation “involves intent to defraud, or any distribution or attempted distribution of an article that is adulterated . . . such

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<sup>18</sup> *Id.* at § 313.2(d).

<sup>19</sup> 9 C.F.R. § 309.3(e).

<sup>20</sup> 9 C.F.R. §§ 313.5; 313.15-16; 313.30

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

<sup>22</sup> *Id.*

<sup>23</sup> 9 C.F.R. § 500.1(a); § 500.2(a)(4).

<sup>24</sup> FSIS Directive 6900.2, Revision 2, *Humane Handling and Slaughter of Livestock*, Aug. 15, 2011, p. 21 (III.B & III.D), available at <http://www.fsis.usda.gov/wps/wcm/connect/2375f4d5-0e24-4213-902d-d94ee4ed9394/6900.2.pdf?MOD=AJPERES>.

<sup>25</sup> 21 U.S.C. 603(b).

<sup>26</sup> *Id.*; 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.”).

<sup>27</sup> 9 C.F.R. § 500.3(b).

<sup>28</sup> 21 USC § 676; see also USDA Blog, *Under Secretary for Food Safety Shares Some Insight on the Humane Handling of Livestock*, Jan. 7, 2011, available at <http://blogs.usda.gov/2011/01/07/under-secretary-for-food-safety-shares-some-insight-on-the-humane-handling-of-livestock/>.

<sup>29</sup> *Id.*

person, firm, or corporation shall be subject to imprisonment for not more than three years or a fine of not more than \$10,000, or both . . . .”<sup>30</sup>

FSIS’s most recent guidance on HMSA enforcement adds another layer to the enforcement scheme.<sup>31</sup> Although the FSIS guide does not require establishments to adopt a “systematic” approach, the guide outlines the features of such an approach. Under such a “systematic approach to humane handling and slaughter,” establishments: 1) assess the ability of their livestock handling and slaughter practices to minimize distress and injury to livestock; 2) design facilities and implement handling practices that minimize distress and injury to livestock; 3) periodically evaluate facilities and handling methods to ensure that they continue to minimize distress and injury to livestock; and 4) when necessary, modify facilities and handling methods to ensure that they continue to minimize distress and injury to livestock.<sup>32</sup>

While encouraged, written humane handling and slaughter plans or records are not required for a “systematic” approach.

The FSIS guide also outlines the features of what it calls a “robust” approach. An establishment employing a “robust” approach must have written records describing “procedures that the establishment will effectively implement to stay in compliance with the regulations” and “actions the establishment will take when it fails to implement the program as written or fails to prevent a noncompliance.”<sup>33</sup> It also requires plants to maintain records demonstrating that the program “is implemented as written” and “will effectively prevent identified potential noncompliances.”<sup>34</sup> Finally, a “robust” approach requires that such written procedures and records be “made available for FSIS review upon request.”<sup>35</sup> Slaughter facilities that have adopted this “robust” approach will be given greater leniency in dealing with HMSA violations, even in cases of “egregious” inhumane treatment. Specifically, such establishments will be given a Notice of Intended Enforcement (NOIE), which allows them three days to take corrective action, in place of an immediate suspension (so long as they have had no recent humane handling-related enforcement actions and are otherwise generally abiding by the HMSA’s requirements and the plant’s written animal handling program).<sup>36</sup>

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<sup>30</sup>*Id.*

<sup>31</sup> FSIS, *Compliance Guide for a Systematic Approach to the Humane Handling of Livestock*, Oct. 2013, available at <http://www.fsis.usda.gov/wps/wcm/connect/da6cb63d-5818-4999-84f1-72e6dabb9501/Comp-Guide-Systematic-Approach-Humane-Handling-Livestock.pdf?MOD=AJPERES>; announced via FSIS Notice 72-13, Nov. 1, 2013, available at: [http://www.fsis.usda.gov/wps/wcm/connect/17b79afb-c3e1-4fae-a33f-e28f26c704af/72-13.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=17b79afb-c3e1-4fae-a33f-e28f26c704af](http://www.fsis.usda.gov/wps/wcm/connect/17b79afb-c3e1-4fae-a33f-e28f26c704af/72-13.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=17b79afb-c3e1-4fae-a33f-e28f26c704af)

<sup>32</sup>*Id.* at p. 6

<sup>33</sup>*Id.* at p. 7

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at p. 8-9

Although FSIS defines “systematic” and “robust” approaches separately, slaughter facilities implementing a “robust” approach are, by definition, also implementing a “systematic” approach. Few facilities implement a “systematic” approach without keeping written procedures and records; hence, the typical scheme is what is referred to as a “robust and systematic” approach.

## **V. FACTUAL BACKGROUND: FSIS’S ENFORCEMENT SCHEME VIOLATES ITS STATUTORY MANDATE UNDER THE HMSA.**

FSIS is currently not meeting its statutory obligations under the HMSA, as indicated by undercover investigations, as well as by every government report that has examined the issue.

### **A. Hallmark/Westland**

In 2007, while working undercover at a California slaughter facility, an investigator for the Humane Society of the United States (HSUS) documented horrific abuse at a California slaughter facility operated by the Hallmark/Westland Meat Packing Company. The investigator filmed non-ambulatory cows—those too weak to walk to their own slaughter—being kicked, shocked, sprayed with high-pressure hoses, and even rammed with forklifts by plant employees in an effort to force the animals to stand and walk.<sup>37</sup> The footage was released in early 2008 and sparked widespread public outrage. The public demanded to know how such terrible abuse could occur despite the continuous presence of FSIS inspection personnel tasked with enforcing the HMSA and third-party auditing of the plant’s humane slaughter performance.<sup>38</sup>

### **B. Bushway Packing**

In the wake of Hallmark/Westland, FSIS contended that it had stepped up enforcement of the HMSA.<sup>39</sup> However, less than two years later, the public was again shocked and outraged by another HSUS investigation into a USDA-inspected slaughterhouse. This time, the investigation documented egregious abuse of days-old veal calves at the Bushway Packing plant in Vermont.<sup>40</sup> In an undercover video, an employee is seen attempting to skin a conscious calf while an FSIS

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<sup>37</sup> USDA OIG, Audit Report: Evaluation of FSIS Management Controls Over Pre-Slaughter Activities, Nov. 2008, available at: <http://www.usda.gov/oig/webdocs/24601-07-KC.pdf> (2008 USDA OIG Report).

<sup>38</sup> *Id.*

<sup>39</sup> See US Senate, Committee on Appropriations, Hearing on Hallmark/Westland Meat Recall, Feb. 28, 2008, (S. Hrg. 110-693), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg44333/html/CHRG-110shrg44333.htm>; see also *Statement of Alfred Almanza before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration Related Agencies*, at 9, available at [http://www.fsis.usda.gov/wps/wcm/connect/50593b21-4150-485c-af2e-5449deb77e89/Testimony\\_Almanza\\_030608\\_592.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/50593b21-4150-485c-af2e-5449deb77e89/Testimony_Almanza_030608_592.pdf?MOD=AJPERES).

<sup>40</sup> The Humane Society of the United States, *More Video of Abused Calves at Vermont Slaughter Plant*, Nov. 2, 2009, available at [http://www.humanesociety.org/news/news/2009/11/veal\\_investigation\\_110209.html#.UqyjuWRDuWY](http://www.humanesociety.org/news/news/2009/11/veal_investigation_110209.html#.UqyjuWRDuWY).



inspector looks on. The inspector tells the employee not to engage in violations with Dr. Dean Wyatt present because otherwise “Doc would shut the plant down.”<sup>41</sup> Prior to the video’s release, Dr. Wyatt had suspended the plant three times in as many months for egregious humane handling violations.<sup>42</sup> Dr. Wyatt later testified in congressional hearings about his experience attempting to enforce the HMSA—facing anger from FSIS management upon reporting HMSA violations, pressure not to enforce the law, and even retaliation from FSIS upper management for writing NRs and suspensions.<sup>43</sup>

### C. Central Valley Meat

Less than three years after Bushway Packing, animal protection organization Compassion Over Killing (COK) conducted an undercover investigation of Central Valley Meat, a California slaughterhouse handling mostly spent dairy cows, and supplying to large national chains as well as the National School Lunch Program and related aid programs. COK presented USDA and other authorities with video evidence and written accounts of clear, consistent, and egregious violations of humane slaughter laws and regulations.

Among other issues, this included: eighteen downed cattle being shot repeatedly with pistols—including seven who required three shots and two who required four shots before they were rendered unconscious; repeated instances where animals were not rendered insensible by the captive bolt, leading workers to suffocate the animals by standing on their nostrils; many instances of downed animals being intentionally and gratuitously abused; and one instance where three workers spent thirty minutes shocking and waterboarding three cattle to try to back them out of the chute.<sup>44</sup>

### D. GAO 2004

FSIS was alerted to deficiencies in its HMSA enforcement years earlier by a 2004 GAO report—nearly four years before Hallmark/Westland. GAO reviewed FSIS enforcement of the HMSA and found that “inspectors did not always document violations of the HMSA because they may not have been aware of regulatory requirements,” and that “[e]nforcement actions to

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<sup>41</sup> Statement of Dr. Dean Wyatt, FSIS Supervisory Public Health Veterinarian, Oversight and Government Reform Committee hearing: *Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter Act*, Mar. 4, 2010, p. 7, available at [http://www.humanesociety.org/assets/pdfs/farm/dr\\_dean\\_wyatt.pdf](http://www.humanesociety.org/assets/pdfs/farm/dr_dean_wyatt.pdf).

<sup>42</sup> USDA FSIS Quarterly Enforcement Report, July 1, 2010 through Sept. 30, 2010, p. 28, available at [http://www.fsis.usda.gov/wps/wcm/connect/39748806-aaf2-4ea5-9117-6446afa86579/QUER\\_Q4\\_FY10\\_Tables1-19.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/39748806-aaf2-4ea5-9117-6446afa86579/QUER_Q4_FY10_Tables1-19.pdf?MOD=AJPERES).

<sup>43</sup> *Supra* note 41.

<sup>44</sup> Compassion Over Killing, “Report Re Undercover Investigation of Central Valley Meat Co., Inc.,” August 16, 2012; Compassion Over Killing, Central Valley Meat, Video, 2012.

address noncompliance” were inconsistent.<sup>45</sup> GAO noted that “FSIS officials may not be using consistent criteria to suspend plant operations,” creating uneven application of the HMSA among plants and across FSIS districts.<sup>46</sup> To ensure that FSIS inspectors “use uniform and consistent criteria when taking enforcement actions,” GAO recommended that the agency “establish additional clear, specific, and consistent criteria for district offices to use when considering whether to take enforcement actions because of repetitive violations.”<sup>47</sup> GAO also suggested that FSIS quantify and assess the sufficiency of inspectors’ efforts to monitor compliance with humane handling and slaughter requirements.<sup>48</sup>

### E. GAO 2010

A subsequent GAO report, issued in March 2010, catalogued the ongoing problems in HMSA enforcement.<sup>49</sup> GAO’s extensive survey of FSIS inspectors and analysis of NRs again showed that “inspectors have not taken consistent actions to enforce HMSA” and “indicate[d] differences in the enforcement actions that inspectors would take when faced with a humane handling violation, such as when an animal was not rendered insensible through an acceptable stunning procedure.”<sup>50</sup> Specifically, “twenty-three percent of inspectors reported they would suspend operations for multiple unsuccessful stuns with a captive bolt gun whereas twenty-seven percent reported that they would submit a noncompliance report.”<sup>51</sup> In other words, although multiple unsuccessful captive bolt stuns is the quintessential “egregious” inhumane handling incident, less than a quarter of inspectors said they would suspend a plant in response, although FSIS guidance dating back to at least 2005 indicates that a suspension is mandated in such instances.<sup>52</sup> Half of inspectors surveyed by GAO *would not even issue a noncompliance report* in this situation, despite clear FSIS guidance that NRs *must* be written for all HMSA violations.<sup>53</sup>

Similarly, “GAO’s review of noncompliance reports also identified incidents in which inspectors did not suspend plant operations or take regulatory actions when they appeared

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<sup>45</sup> GAO Report to Congressional Requesters, *Humane Methods of Slaughter Act: USDA Has Addressed Some Problems but Still Faces Enforcement Challenges*, January 2004, cover page, available at <http://www.gao.gov/new.items/d04247.pdf>.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup> GAO Report to Congressional Requesters, *Humane Methods of Slaughter Act: Actions Are Needed to Strengthen Enforcement*, Feb. 2010, available at <http://www.gao.gov/assets/310/300921.pdf>.

<sup>50</sup>*Id.* at cover page.

<sup>51</sup>*Id.*

<sup>52</sup> Directive 6900.2, rev. 2, at 19 (“When [Inspection Program Personnel] observe a noncompliance that causes injury and distress and is of an egregious nature . . . the [Inspector In Charge] is to take a regulatory control action and recommend that an immediate suspension of operations per 9 CFR 500.3(b) be taken”); *see also* section VII.C.2.

<sup>53</sup> *See* note 24, *supra*.

warranted.”<sup>54</sup> GAO cited the lack of clear guidance indicating “when certain enforcement actions should be taken for an egregious act,” and quoted a noted humane handling expert who “stated that FSIS inspectors need clear directives to improve consistency of HMSA enforcement.”<sup>55</sup> Inconsistency was found not only in inspectors’ responses to the survey and in NRs, but also across FSIS districts. GAO’s analysis of FSIS data from 2005 to 2007 indicated that 10 of the 15 FSIS districts—responsible for overseeing 44 percent of all animals slaughtered nationwide—suspended 35 plants for HMSA violations. In the remaining five districts—responsible for overseeing 56 percent of all livestock slaughtered nationwide—inspectors *did not suspend any plants*.<sup>56</sup> Dr. Wyatt’s testimony suggests that this lack of suspensions is not indicative of a lack of HMSA violations.

GAO concluded that “inspectors are not consistently applying their discretion as to which actions to take when egregious inhumane handling incidents occur” in part because “the guidance states that inspectors-in-charge ‘may’ suspend plant operations.”<sup>57</sup> According to GAO, incidents like Bushway suggest that this discretionary approach has failed. Based on these findings, GAO recommended that FSIS strengthen HMSA enforcement by establishing “clear and specific criteria for when inspectors-in-charge should suspend plant operations for an egregious HMSA violation and when they should take enforcement actions because of repeat violations.”<sup>58</sup>

## F. OIG 2013

A 2013 report from the USDA’s OIG echoed concerns raised in its 2008 report, as well as GAO’s 2004 and 2010 reports—that FSIS inspectors are not taking consistent actions to enforce the HMSA.<sup>59</sup>

Focusing solely on pig slaughter facilities, OIG found that FSIS inspectors did not take appropriate enforcement actions for HMSA violations at 8 of the 30 establishments OIG visited. Specifically, inspectors did not suspend operations at six plants after identifying 10 egregious humane handling violations, and did not issue NRs at two plants after identifying two non-egregious violations.<sup>60</sup> Like the GAO report three years earlier, OIG’s report cited inspectors’ judgment and discretion as the central problem. As OIG said, “although the related FSIS policy was clear and specific, inspectors often made subjective enforcement decisions” which “were

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<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at p. 19.

<sup>57</sup>*Id.* at p. 37.

<sup>58</sup>*Id.* at p. 38-39.

<sup>59</sup> USDA OIG, *Food Safety and Inspection Service – Inspection and Enforcement Activities At Swine Slaughter Plants*, May 2013, available at <http://www.usda.gov/oig/webdocs/24601-0001-41.pdf>.

<sup>60</sup>*Id.* at p. 22.

inconsistent, lenient, and endorsed by district officials. As a result, the plants did not improve their slaughter practices, and *FSIS could not ensure the humane handling of swine.*<sup>61</sup>

In other words, the OIG found, as the GAO had before it, that FSIS was not meeting its legal obligation under the HMSA and FMIA.

Furthermore, despite clear requirements, OIG again found inconsistency in the types of enforcement action inspectors would take in response to the most basic HMSA violation: an unsuccessful stun. Responses from the inspectors surveyed varied widely, ranging from issuing a suspension to informing plant officials verbally during regular meetings. Only eight percent of those surveyed said they would issue a suspension, and only twenty-one percent would issue an NR.<sup>62</sup> In other words, five years after Hallmark, less than one third of the inspectors surveyed said they would take the *required* enforcement action in response to a violation of the most basic mandate of the HMSA.

As one district official told OIG, although directives appear straightforward to outsiders, “there is room for interpretation.”<sup>63</sup> However, as OIG concluded, “when district officials allow inspectors to make subjective enforcement decisions, inspectors will be frequently inconsistent.”<sup>64</sup> And FSIS has taken the opposite view (from that of this district official) elsewhere, stating that it would not use the numerical scoring system developed by Dr. Temple Grandin for assessing plants’ compliance with HMSA stunning requirements because the audit “allows for a certain percentage of stunning failures,” which “would be inconsistent with the HMSA requirement that *all animals* must be rendered insensible on the *first blow*.”<sup>65</sup>

In addition, although FSIS has asserted that additional training and guidance to inspectors is sufficient to address these ongoing problems, OIG expressed doubts about this conclusion.<sup>66</sup> Even after a mandatory humane handling training, OIG found that “the inspector-in-charge and the district official who trains inspectors for humane handling both believed that the unsuccessful stun was *not* a violation,” suggesting that the training was ineffective.<sup>67</sup> Based on these findings,

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<sup>61</sup>*Id.* (emphasis added).

<sup>62</sup>*Id.* at p. 25-26. Specifically, eight percent (three inspectors) would issue a suspension, twenty-one percent (eight inspectors) would issue an NR, thirty-eight percent (fifteen inspectors) would issue a Regulatory Control Action, ten percent (four inspectors) would issue a Memorandum of Interview, thirteen percent (five inspectors) would verbally inform plant officials, and ten percent (four inspectors) were undecided.

<sup>63</sup>*Id.* at p. 26.

<sup>64</sup>*Id.*

<sup>65</sup> 2010 GAO Report, *supra* note 49 at p. 27 (emphasis added).27. As GAO points out in response, as “this requirement has not been met consistently by slaughter plants because of human error, equipment failures, and animal movement,” FSIS has been left to “exercise its discretion in determining which violations require enforcement action,” leading to uneven enforcement and under-enforcement.

<sup>66</sup> See 2013 OIG Report, *supra* note 59 at p. 13; see also 2010 GAO Report, *supra* note 49 at p. 23.

<sup>67</sup> 2013 OIG Report, *supra* note 59 at p. 26 (emphasis added).

OIG recommended that FSIS outline a plan for how it will “minimize reliance on the inspectors’ judgment to ensure consistent application and enforcement of HMSA and related regulations.”<sup>68</sup>

### **G. Retaliation**

Recent reports also indicate that the retaliation for HMSA enforcement and pressure from FSIS management not to enforce the law that Dr. Wyatt experienced at Bushway and other plants persist today. Dr. Jim Schrier, a 29-year veteran of FSIS, came to the whistleblower protection organization Government Accountability Project (GAP) after facing intense opposition to his efforts to enforce the HMSA at a Tyson pig slaughter facility in Iowa.<sup>69</sup> Specifically, Dr. Schrier cited the plant after witnessing conscious animals being shackled and slaughtered, and pigs having to be re-stunned after being stuck and bled.<sup>70</sup> When Dr. Schrier reported these HMSA violations to his supervisor, the supervisor became very angry, and sent Dr. Schrier to work at another slaughter facility 120 miles away. The USDA then decided to reassign him permanently to a plant in another state, hours away from his home.<sup>71</sup> This is similar to the experience that Dr. Wyatt had when he attempted to enforce the HMSA in the months leading up to the Bushway incident in late 2009. Such testimony highlights the inherent danger that HMSA violations will persist and the impossibility of ensuring adequate enforcement when suspensions and NRs are seen as optional and left to district officials’ discretion.

### **H. Arbitrary Enforcement**

A review of recent suspensions and Notices of Intended Enforcement (NOIEs) reflect the still-irregular approach taken to humane handling enforcement. For example, Brooksville Meat Fabrication in Kentucky accumulated nine NRs in less than a year and four suspensions in less than six months for instances of egregious and non-egregious inhumane treatment, yet continued to receive federal inspection service until October 9, 2013.<sup>72</sup> Although some of the suspensions lasted as long as a week, others were held in abeyance within two days. It was not until September 2013 that FSIS sent the facility a “Notice to Show Cause” why the agency should not initiate action to indefinitely suspend or withdraw inspection service.<sup>73</sup> Failing to act upon a near-uninterrupted spate of NRs and suspensions, and holding even repeat suspensions in

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<sup>68</sup>*Id.* at p. 27.

<sup>69</sup> Government Accountability Project – Food Integrity Campaign, *USDA Whistleblower Jim Schrier*, available at <http://www.foodwhistleblower.org/profile/jim-schrier/>.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup> Letter from Paul A. Resweber, Food Safety and Inspection Service, to Keith Wright, Brooksville Meat Fabrication, “Notice of Third Reinstatement of Suspension,” Oct. 9, 2013, p. 1-2, available at <http://www.fsis.usda.gov/wps/wcm/connect/ec376774-6c2a-4b08-9640-9db8696d4685/09173M-NOROS-100913.pdf?MOD=AJPERES>.

<sup>73</sup>*Id.* at p. 1.

abeyance after only days, demonstrates FSIS's lenient and arbitrary approach to HMSA enforcement.

Similarly, over the course of four months, Matkin's Meat Processors of Gibsonville, North Carolina accumulated three NRs for the condition of its barn pens, in addition to four NRs and three suspensions for failure to render animals unconscious on the first shot.<sup>74</sup> Although "stunning of animals and then allowing them to regain consciousness" and "multiple attempts . . . to stun an animal versus a single blow or shot" are both "egregious" violations of the HMSA for which a suspension is warranted, Matkin's was issued an NR rather than a suspension in four such instances, despite its history of violations. Moreover, it was only after the third suspension (and seventh violation) of this requirement that the facility received a "Notice to Show Cause" letter.<sup>75</sup> As GAO pointed out in its 2010 report, FSIS lacks regulations detailing how to address these repeat offenders of the HMSA, allowing egregious violations to continue for months without adequate corrective actions or timely withdrawal of inspection.

On the other hand, FSIS's new compliance manual has allowed other facilities to receive only an NOIE for the *same violation* committed by Brooksville and Matkin's, creating a double standard for these plants. For example, at one Tyson plant, a pig regained consciousness after falling off the line and into the blood pit, and then lunged at an employee trying to stun the animal in the pit. The employee's first shot misfired, and he went to reload the gun and finally successfully stunned the pig.<sup>76</sup> Despite the egregious nature of this incident, the plant was given an NOIE instead of a suspension "due to the unique circumstances of the event, the rarity of this type of occurrence at this establishment, and the plant's 'robust' systematic approach to humane handling of livestock . . . ."<sup>77</sup> Another Tyson plant was given similar leniency after a violation, despite the fact that it had committed the same HMSA violation—driving ambulatory pigs over non-ambulatory animals—only a few months earlier.<sup>78</sup>

## VI. LEGAL ARGUMENT: FSIS'S CURRENT ENFORCEMENT REGIME IS INDEFENSIBLE.

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<sup>74</sup> Letter from Steve Lalicker, Food Safety and Inspection Service, to Jerry Matkins, Matkin's Meat Processors, "Notice of Reinstated Suspension Held in Abeyance," June 27, 2013, p. 2-3, *available at* [http://www.fsis.usda.gov/wps/wcm/connect/82a0e4a9-eaf5-47f8-b9c0-a96784392d6c/07975M\\_NORSHA\\_062713.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/82a0e4a9-eaf5-47f8-b9c0-a96784392d6c/07975M_NORSHA_062713.pdf?MOD=AJPERES).

<sup>75</sup> *Id.*

<sup>76</sup> Letter from Dawn Sprouls, Food Safety and Inspection Service, to Tyson's Fresh Meats, "Notice of Intended Enforcement," Jan. 25, 2013, p. 2, *available at* [http://www.fsis.usda.gov/wps/wcm/connect/83917ba7-abdd-46d2-80e0-94d71f93883b/00244WM\\_NOIE\\_012513.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/83917ba7-abdd-46d2-80e0-94d71f93883b/00244WM_NOIE_012513.pdf?MOD=AJPERES).

<sup>77</sup> *Id.*

<sup>78</sup> Letter from Anna Gallegos, Food Safety and Inspection Service, to Tyson's Fresh Meats, "Notice of Intended Enforcement," Nov. 14, 2013, p. 2, *available at* <http://www.fsis.usda.gov/wps/wcm/connect/35be02b4-e687-419d-ab7e-7ab109889940/M244M-NOIE-111413.pdf?MOD=AJPERES>.

When determining the validity of agency enforcement actions (or lack thereof), three factors are instructive: First, whether the agency has used its enforcement powers in a manner that is “manifestly contrary to statute”<sup>79</sup>; second, whether the agency’s actions represent an arbitrary and capricious policy choice in violation of the Administrative Procedure Act (APA)<sup>80</sup>; and third, whether the agency has effectively repealed a statute through non-enforcement.<sup>81</sup>

### **A. HMSA & FMIA Require FSIS to Ensure the Humane Treatment of Animals.**

In order to qualify as a reasonable interpretation of statutory duties, an agency’s enforcement decisions must be “based on a permissible construction of the statute.”<sup>82</sup> Decisions that are “arbitrary or capricious in substance, or manifestly contrary to the statute” will be reversed.<sup>83</sup> The relevant inquiry is whether the agency’s decision is “reasonable and consistent with the language and purposes of the statute.”<sup>84</sup>

The plain language of HMSA requires that FSIS ensure that “handling of livestock in connection with slaughter *shall* be carried out only by humane methods.”<sup>85</sup> Indeed, “[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.”<sup>86</sup> The use of the term “shall” has long been recognized as imposing a mandatory, rather than discretionary, obligation on an agency tasked with implementing a statute.<sup>87</sup> Furthermore, as has been recognized, by passing the HMSA, Congress intended to “establish as a national policy that livestock should be slaughtered and handled in connection with slaughter only by the ‘most humane practicable methods.’”<sup>88</sup>

As a result of FSIS’s current enforcement policies and practices, livestock are not slaughtered only by humane methods, as HMSA requires. Slaughtering and handling in connection with slaughter are frequently demonstrably (and predictably) inhumane, in derogation

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<sup>79</sup> *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (internal citation omitted); *see also Judulang v. Holder*, 132 S.Ct. 476, 484 (2011) (“[U]nder Chevron step two, we ask whether an agency interpretation is ‘arbitrary or capricious in substance’” (internal citation omitted)); *Mayo Foundation for Medical Ed. and Research v. United States*, 562 U.S. 44, 131 S. Ct. 704, 715 (2011) (finding that the Treasury Department’s interpretation of who was a student under the Social Security Act “further[ed] the purpose of the [Act]” and thus not invalid under *Chevron* step two); *Chevron*, 467 U.S. at 863 (finding in favor of the EPA because “the plantwide definition is fully consistent with one of [the policy] concerns [of the statute]”).

<sup>80</sup> 5 U.S.C. § 706 (2)(A).

<sup>81</sup> *See* Section C, below.

<sup>82</sup> *Id.*

<sup>83</sup> *Mead*, 533 U.S., at 218.

<sup>84</sup> *Arent*, 70 F.3d at 620; *see also Chevron*, 467 U.S. at 844 (internal citation omitted).

<sup>85</sup> 7 U.S.C. § 1901 (emphasis added).

<sup>86</sup> 7 U.S.C. § 1902 (emphasis added).

<sup>87</sup> *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400, 128 S. Ct. 1147, 1157, 170 L. Ed. 2d 10 (2008) (“Congress’ use of the term ‘shall’ indicates an intent to ‘impose discretionless obligations’” (internal citation omitted)).

<sup>88</sup> *See* FN 10, *Supra*.

of this country's expressly declared policy. Because FSIS refuses to implement the recommendations of the GAO and OIG vis-à-vis consistent and structured enforcement, and because it ignores its own legal obligation with regard to criminal violations of the law,<sup>89</sup> FSIS falls far short of this congressional mandate, as indicated by the OIG and GAO reports, undercover investigations, and an analysis of FSIS's own enforcement reports from 2013 to 2014. In short, the current lax regulatory climate allows (indeed, facilitates) facilities to abuse animals, in direct violation of the plain language of the law and FSIS's statutory mandate.

To be clear, FSIS does not have discretion to refuse to enforce the mandatory requirements of the HMSA or selectively exempt regulated entities from those requirements. The plain language of the statute creates an unambiguous mandate that slaughter "shall" be carried out using "only" humane methods. The FSIS's discretion lies only in the manner in which it carries out this mandate—not in whether or when to carry it out.<sup>90</sup>

The FMIA incorporates the HMSA's requirements, such that a violation of the HMSA is a violation of the FMIA.<sup>91</sup> In addition to HMSA's requirements, FMIA requires the establishment of an inspection system to ensure humane slaughter,<sup>92</sup> and also extends HMSA's humane handling requirements to all persons, firms, and corporations.<sup>93</sup>

### **B. The Policies that Motivated Passage of HMSA & FMIA Require FSIS to Ensure the Humane Treatment of Animals.**

In order to qualify as a reasonable policy choice, an agency's enforcement decision cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>94</sup> The validity of agency policy choices depends, among other factors, on whether an agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action."<sup>95</sup> There must be a demonstrated "rational connection between the facts found and the choice made,"<sup>96</sup> and the agency action must not "rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence before the agency, or [be] so

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<sup>89</sup> 21 U.S.C. 676.

<sup>90</sup> See discussion *supra* pp. 2-3.

<sup>91</sup> 21 U.S.C. § 610(b).

<sup>92</sup> *Id.* ("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 amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter").

<sup>93</sup> 21 U.S.C. § 610(b).

<sup>94</sup> 5 U.S.C. § 706 (2)(A); see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

<sup>95</sup> *State Farm*, 463 U.S. at 43.

<sup>96</sup> *Id.*



implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>97</sup>

The policy considerations that motivated passage of the HMSA were the prevention of needless suffering, improved working conditions, and efficiency in slaughter. Because humane slaughter is essential to further these goals, Congress declared that it is “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.”<sup>98</sup> The sole policy motivation for including humane slaughter in the FMIA was “to require that meat inspected and approved under [the FMIA] be produced only from livestock slaughtered in accordance with humane methods.”<sup>99</sup> Thus, these policy motivations cannot be superseded by non-statutory policy motivations when FSIS is determining how to enforce HMSA and FMIA.

As detailed below, the current lax regulatory climate cannot be reconciled with these congressional statements of policy.

### **C. FSIS Does Not Have The Authority to Effectively Repeal FMIA § 676 By Completely Disregarding It Through Non-Enforcement.**

Agencies must enforce the statutes that Congress passes. They are not “free to disregard legislative direction in the statutory scheme that the agency administers.”<sup>100</sup> More specifically, agencies cannot “‘consciously and expressly adopt a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>101</sup>

As discussed in Section VII.D., the criminal provision of FMIA as it applies to inspected slaughterhouses has not been enforced in more than three decades. This lack of enforcement cannot be reconciled with USDA’s statutory mandate.

## **VII. ACTION REQUESTED**

Petitioners believe that USDA cannot meet its statutory and policy obligations under the HMSA and FMIA unless it adopts the following five changes to the Code of Federal Regulations (CFR).

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<sup>97</sup> *Id.*

<sup>98</sup> 7 U.S.C. § 1901.

<sup>99</sup> Pub.L. No. 95-445, Oct. 10, 1978, 92 Stat. 1069.

<sup>100</sup> *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985).

<sup>101</sup> *Id.* at 833.

**A. Amend 9 C.F.R. § 500 to Provide that FSIS “Will” Issue at Least a Noncompliance Record (NR) for All Violations of the HMSA.**

**1. A Mandatory Enforcement Standard is Required under the Plain Text of the HMSA.**

The plain text of the HMSA mandates a “zero tolerance” approach to inhumane treatment generally and ineffective stunning in particular. The HMSA requires “all” animals to be rendered insensible to pain by a “single” blow or gunshot (in the case of the captive bolt or firearm method) and immediately after the application of other stunning methods. After stunning, the animal “shall” remain in a state of unconsciousness through shackling and the remainder of the slaughter process. Moreover, the FMIA lists the slaughtering or handling in connection with slaughter of “any animals in any manner not in accordance with” the HMSA as a “Prohibited Act.” The current lackadaisical enforcement of applicable laws encourages widespread abuse that cannot be reconciled with the text, placing FSIS in violation of its statutory obligation.

As noted above, FSIS views the HMSA compliance audit that allows a slaughter facility to pass if it renders 95% of animals insensible on the first shot as “inconsistent” with the HMSA because it allows for a small measure of ineffective stunning, and the law requires that *all animals* must be rendered insensible on the *first blow*.<sup>102</sup>

Given the plain text of the HMSA and its regulations, along with FSIS’s own views on the subject, allowing inspectors to take a discretionary approach in deciding what constitutes a violation, and whether to respond to violations, goes against the HMSA’s most basic requirements. It seems that FSIS understands this, since the HMSA’s main directive repeatedly requires NRs for non-egregious violations of the law<sup>103</sup> and suspensions for egregious ones.<sup>104</sup> The law’s clear prohibitions on inhumane handling and ineffective stunning call for a uniform and mandatory response to violations. In order to comply with its statutory duty to enforce the HMSA, FSIS needs to make enforcement standards for NRs and Suspensions mandatory through appropriate regulatory codification.

**2. A Mandatory Enforcement Standard is Necessary Because FSIS’s Discretionary Approach to HMSA Compliance Confuses Inspectors.**

Clear enforcement rules are necessary in regulation because the inconsistency and lack of enforcement described above is mirrored by inconsistency in inspectors’ views regarding HMSA compliance. GAO and USDA OIG reports have repeatedly found significant discrepancies

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<sup>102</sup> See *supra* note 65.

<sup>103</sup> See *supra* note 24.

<sup>104</sup> See section VII.C.2.

amongst inspectors on the proper enforcement response to particular violations—and even as to what constitutes a violation—despite the clear guidance in Directive 6900.2, rev. 2, which repeatedly states that inspectors are to issue an NR for all non-egregious violations of HMSA.<sup>105</sup> As discussed, despite increased training, many inspectors are still unaware of what the HMSA requires and lack the knowledge necessary to enforce the law properly.

In 2010, GAO surveyed inspectors regarding which enforcement action they would take in response to a variety of HMSA violations. The survey produced wildly varying responses. Even violations of the HMSA's most basic requirement—that animals be rendered insensible on the first shot—produced confusion and inconsistent responses. For example, 23 percent of inspectors reported they would suspend operations for multiple unsuccessful stuns with a captive bolt gun whereas 27 percent reported that they would submit only a noncompliance report and 38 percent said they would apply a regulatory control action (i.e., apply a tag to the stunning pen).<sup>106</sup> Twelve percent of respondents didn't know which action to take, or would take none of these actions.<sup>107</sup> Notably, the *same violation* (multiple unsuccessful stuns) with the use of a different stunning method produced a still different array of responses.<sup>108</sup>

The 2013 USDA OIG report found similar variation in inspectors' views on proper enforcement responses to HSMA violations. When asked how they would respond if they witnessed one unsuccessful stun, just eight percent—three inspectors—said they would issue a suspension, while twenty-one percent (eight inspectors) said they would issue an NR.<sup>109</sup> The others were divided between applying a regulatory control action, issuing a memorandum of interview (MOI), and verbally informing plant officials, or were undecided.<sup>110</sup> As the OIG concluded, “the varied responses from the thirty-nine inspectors support our concern that when district officials allow inspectors to make subjective enforcement decisions, inspectors will be frequently inconsistent.”<sup>111</sup> This shows the inadequacy of the current discretionary approach and illustrates the need for a uniform, mandatory enforcement scheme.

Such a standard is also needed because FSIS's proffered response to problems in HMSA enforcement—additional humane handling training for inspectors—has failed, as evidenced by recent GAO and USDA OIG surveys. As OIG noted, in the example of the ineffective stun, “the inspector-in-charge and the district official who trains inspectors for humane handling both believed that the unsuccessful stun was not a violation, *even after receiving the training*. These actions indicate the training did not improve the inspectors' ability to identify violations, since

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<sup>105</sup> See note 24, *supra*.

<sup>106</sup> 2010 GAO report, *supra* note 49 at p. 16.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 2013 USDA OIG report, *supra* note 59 at p. 25.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at p. 26.

this incident was a violation of HMSA.”<sup>112</sup> Indeed, even after FSIS had trained its inspectors across the board, a large majority were still unable to identify all the signs of sensibility in livestock animals (a crucial knowledge requirement under the HMSA). As GAO found, even after completing mandatory humane handling training in early 2009, fifty-seven percent of the inspectors-in-charge (surveyed during the summer of 2009) “reported incorrect answers on at least one of six possible signs of sensibility. Specifically, an estimated 133, or eighteen percent . . . failed to identify rhythmic breathing as a sign of sensibility.”<sup>113</sup> Again, these results point to the insufficiency of FSIS’s discretionary, training-based approach in ensuring HMSA compliance.

FSIS’s continued inability to enforce the HMSA consistently—or even agree on what constitutes a violation—indicates that the current enforcement plan is unworkable and broken. The USDA OIG expressed this view in its 2013 report, concluding that “FSIS needs to provide a plan describing how it will minimize reliance on the inspectors’ judgment to ensure consistent application and enforcement of HMSA and related regulations.”<sup>114</sup> In response, the agency proposed further training.<sup>115</sup>

This response is inadequate to address the problems highlighted over the course of 10 years by GAO and the USDA OIG. Absent specific, mandatory steps for inspectors to take in response to discrete HMSA violations, additional training will likely do very little to reduce inspectors’ reliance on their own discretion. Humane handling scenarios are only useful to those inspectors who seek them out on the FSIS website, and an enforcement coordinator only adds another layer of management and oversight without any clarification on what the humane slaughter law requires. Only by adopting the uniform, non-discretionary enforcement rules suggested by petitioners—requiring a suspension for all “egregious” violations (as discussed more below) and an NR for all violations regardless of seriousness—can FSIS comply with its statutory duty of enforcing the humane slaughter requirements.

### **3. A Mandatory Enforcement Standard is Needed to Minimize the Pressure to Ignore Violations and the Potential for Retaliation.**

A streamlined, mandatory enforcement standard is also necessary to address hostility and retaliation reported by past and current FSIS veterinarians and inspectors. The current discretionary enforcement scheme leads to intense pressure from slaughter facilities and even FSIS upper management to ignore and downplay the humane slaughter requirements, in violation of FSIS’s statutory mandate. Even for clearly warranted enforcement actions, such as

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<sup>112</sup>*Id.* (emphasis added).

<sup>113</sup> 2010 GAO report, *supra* note 49 at p. 25.

<sup>114</sup> 2013 USDA OIG report, *supra* note 59 at p. 27.

<sup>115</sup>*Id.*

suspensions for deliberately cruel treatment, inspectors have faced fierce retaliation. This culture of under-enforcement can be traced in part to the malleable standard for enforcement. Because inspectors believe they “may,” but not “must,” issue suspensions and NRs, they may be threatened and coerced easily by plant management or their superiors into ignoring violations and issuing NRs or mere warnings when suspensions are justified. In reality, this practice of treating enforcement actions as discretionary is in opposition to FSIS’s statutory mandate.

This culture of industry protection is especially visible in the case of former FSIS Public Health Veterinarian (PHV) Dr. Dean Wyatt. As detailed above, Dr. Wyatt faced extreme pressure—even outright hostility—from FSIS upper management when he attempted to enforce the HMSA through regulatory control actions, NRs, and suspensions. First at a Seaboard Foods pig slaughter facility and later at Bushway, his reports of noncompliance were watered down or even denied outright by agency personnel who did not witness the incidents, and who routinely sided with the slaughter establishments in enforcement matters.<sup>116</sup> For doing his job and enforcing the law, Dr. Wyatt was punished and humiliated by his superiors—transferred to the graveyard shift in a faraway facility and later forced to do remedial training for new veterinarians, despite his long tenure with the agency. He was treated with contempt, mocked, and derided by plant management, who were emboldened by FSIS’s response to his enforcement efforts. His experience discouraged other inspectors and PHVs from fully enforcing the HMSA; they saw the treatment he was subjected to, and did not want to suffer the same fate.

Dr. Wyatt’s experience is not unique. As noted above, 29-year FSIS veteran Dr. Jim Schrier also faced intense opposition to his efforts to enforce the HMSA at a Tyson pig slaughter facility in Iowa.<sup>117</sup> In late 2012, when Dr. Schrier came to his supervisors after witnessing unsuccessful stunning of pigs and conscious animals on the bleed rail, they became angry and did not believe him. Like Dr. Wyatt, Dr. Schrier was then sent to work at another slaughter facility, in this case 120 miles away.<sup>118</sup> As Dr. Schrier said in a news article on the subject, “We’ve been gagged the last few years if we stop the production line . . . [a]nd our supervisors never back us up.”<sup>119</sup> While several of Schrier’s co-workers substantiated his claims, they asked not to be named for fear that they too would face retaliation.<sup>120</sup>

Even FSIS’s “humane handling ombudsman,” Mark Crowe—whose position was created precisely to handle situations like Dr. Wyatt’s—was, in his words, “largely ignored” by upper

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<sup>116</sup> See Statement of Dr. Dean Wyatt, *supra* note 41.

<sup>117</sup> Government Accountability Project – Food Integrity Campaign, *USDA Whistleblower Jim Schrier*, available at <http://www.foodwhistleblower.org/profile/jim-schrier/>.

<sup>118</sup> *Id.*

<sup>119</sup> Mike McGraw, *Animal Abuse Persists at Some Slaughter Plants*, *KC Star*, June 28, 2013, available at <http://www.foodwhistleblower.org/kansas-city-star-animal-abuse-persists-at-some-slaughter-plants/>

<sup>120</sup> *Id.*

agency management in his pursuit of HMSA enforcement at one slaughter facility.<sup>121</sup> Crowe, whose job was to address humane handling-related complaints from FSIS inspectors and the public, was rebuffed by the USDA's meat inspection division when he tried to assist Judy Kachanes, a 26-year veteran meat inspector, in pursuing enforcement of the HMSA at the facility where she was stationed.<sup>122</sup> Kachanes contacted the ombudsman after her complaints about HMSA violations were ignored by her superiors. But after Crowe's unsuccessful attempt to pursue HMSA enforcement at the plant, Kachanes faced the same fate as Wyatt and Schrier: She was reassigned to another slaughter facility.<sup>123</sup>

The experience of these (and in all likelihood, other) FSIS veterinarians and inspectors points to the hazards of a discretionary enforcement scheme in which FSIS district officials who are not present to witness violations decide whether an incident is "egregious" and merits a suspension. While new regulations alone cannot change a culture of under-enforcement and retaliation, removing one of the many levels of discretion from the enforcement process will help force the hand of agency officials faced with violations of the HMSA. As described further below, codifying the definition of "egregious" incidents in regulations will also help standardize the enforcement process and remove some confusion and unwarranted allowance for discretion.

**B. Amend 9 C.F.R. § 313 to Codify the Definition of "Egregious" Violations of the HMSA Given by FSIS Directive 6900.2, rev. 2.**

The definition of "egregious" inhumane handling or treatment was provided in 2005 and has since been incorporated into numerous FSIS directives and notices. As stated in Directive 6900.2, Revision 2, "[a]n egregious situation is 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 non-ambulatory disabled animals or dragging of conscious animals;
3. Driving animals off semi-trailers over a drop off without providing adequate unloading facilities (animals are falling to the ground);
4. Running equipment over conscious animals;
5. Stunning animals and then allowing them to regain consciousness;
6. Multiple attempts, especially in the absence of immediate corrective measures, to stun an animal versus a single blow or shot that renders an animal immediately unconscious;
7. Dismembering conscious animals, for example, cutting off ears or removing feet;

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<sup>121</sup>*Id.*

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

8. Leaving disabled livestock exposed to adverse climate conditions while awaiting disposition; or
9. Otherwise causing unnecessary pain and suffering to animals, including situations on trucks.<sup>124</sup>

The definition of “egregious” inhumane treatment should be codified in HMSA regulations. Without this standardization, inspectors will continue to make arbitrary decisions, misapply their discretion, and fail to take the proper enforcement steps in response to violations (particularly to egregious inhumane treatment). The continued inability of FSIS inspectors to identify HMSA violations and varying opinions as to the seriousness of discrete violations, as documented in the GAO and USDA OIG reports and our review of two years of enforcement reports, point to the need for this formalized categorization of violations.

Although FSIS first defined “egregious” inhumane treatment as early as 2004, and reiterated that definition in guidance documents from 2005 to 2011, interviews with FSIS agents demonstrate that the agency has not sufficiently communicated the definition to inspectors or articulated its significance in enforcement actions. Recently, district officials interviewed by USDA OIG asserted that “the term ‘egregious’ was not formally defined until the new directive [6900.2] was issued in August 2011,” and thus could not have informed enforcement decisions made prior to that date.<sup>125</sup> This is plainly incorrect, as the OIG pointed out.

This lack of clarity as to the definition and its importance has led inspectors to ignore it entirely and thus fail to take (or even identify) the proper enforcement response for discrete violations. Petitioners urge the USDA to codify the definition of “egregious” inhumane handling and slaughter in the regulations and to incorporate it into the new mandatory enforcement standard. Doing so will remove all doubt as to the proper enforcement responses, leading to robust, consistent application of the HMSA in slaughter facilities in accordance with the HMSA’s clearly stated intent and mandate.

**C. Amend 9 C.F.R. § 500 to Provide that FSIS “Will” Issue a Notice of Suspension for All “Egregious” Violations of the HMSA, as Defined in 9 C.F.R. § 313.**

**1. HMSA Violations Should Always Result in a Clearly Defined Mandatory Response.**

As discussed in section VII.A, a mandatory response to specific violations is required because: 1) the plain text of the FMIA points to the need to eliminate enforcement discretion; 2) FSIS’s discretionary approach has failed completely, as outlined by both the GAO and OIG; and 3) it is the only way to stop plants and supervisors from pressuring inspectors to use their

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<sup>124</sup> See FSIS Directive, *supra* note 24 at 2-3.

<sup>125</sup> 2010 GAO report, *supra* note 49 at p. 25.

discretion on behalf of leniency and against legal compliance and animal welfare. All of the arguments made in that section apply here as well.

## **2. All Egregious Violations should Always Result in Plant Suspension.**

The directive states explicitly that “[w]hen [Inspection Program Personnel] observe a noncompliance that causes injury and distress and is of an egregious nature . . . the [Inspector In Charge] is to take a regulatory control action and recommend that an immediate suspension of operations per 9 CFR 500.3(b) be taken.”<sup>126</sup>

Similarly, the guidance document for District Veterinary Medical Specialists (DVMS) explains that “in the event egregious noncompliance is observed during the course of the review, the DVMS in conjunction with the in-plant inspection team will implement an immediate suspension in accordance with 9 CFR 500.3(b).”<sup>127</sup>

These two policy statements should be codified in regulation.

## **3. The NOIE Loophole is without Statutory or Regulatory Authority**

The very clear enforcement requirement—that egregious violations result in suspension—is, however, directly contradicted both in the directive itself and in FSIS practice: FSIS routinely documents egregious abuse of animals and chooses to issue an NOIE instead of a Notice of Suspension. It takes this extremely lax approach to egregious and criminal cruelty to animals based on parts of the directive that allow for NOIEs where the facility has a robust and systematic plan for HMSA compliance.<sup>128</sup>

In FSIS’s 2013 “Compliance Guide for a Systematic Approach to the Humane Handling of Livestock,” the Agency explains that “9 CFR 500.3(b) authorizes FSIS to suspend inspection without prior notification (Notice of Suspension). Although FSIS is authorized to suspend inspection without prior notification, FSIS may exercise enforcement discretion by providing an establishment prior notification (Notice of Intended Enforcement, 9 CFR 500.4) and an

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<sup>126</sup>*Id.* at 19.

<sup>127</sup> FSIS Directive 6910.1, Revision 1, *District Veterinary Medical Specialist (DVMS)—Work Methods*, Dec. 7, 2009, p. 6, available at <http://www.fsis.usda.gov/wps/wcm/connect/fefdbb5b-e7d4-49a6-88e0-85890dff6cbe/6910.1Rev1.pdf?MOD=AJPERES>; see also FSIS Notice 16-08, “Humane Handling Activities and Documentation in Livestock Slaughter Establishments,” Mar. 10, 2008, at 2, available at <https://aglearn.usda.gov/customcontent/FSIS/FSIS-HumaneHandlingBasics/media/Documents/16-08.pdf>. (I was not able to locate Notice 12-05, either at this link or at another location).

<sup>128</sup> Directive 6900.2, Revision 2, *Humane Handling and Slaughter of Livestock*, *supra* note 124 at 22-23 (“the IIC . . . may recommend in an MOI to the FLS, DO, and DVMS that the egregious act be subject to enforcement discretion and recommend issuance a Notice of Intended Enforcement (NOIE) rather than a notice of suspension . . .”).



opportunity to implement necessary corrective actions to achieve humane handling compliance.”<sup>129</sup>

On the next page FSIS reiterates, claiming that “FSIS may ‘impose a suspension after an establishment is provided prior notification and the opportunity to demonstrate or achieve compliance’ (9 CFR Part 500.4). FSIS acts on this authority by issuing a Notice of Intended Enforcement. Establishments in receipt of a Notice of Intended Enforcement are afforded time (up to 3 days) to demonstrate or achieve compliance. If the establishment does not demonstrate or achieve compliance in 3 days, FSIS issues a Notice of Suspension.”<sup>130</sup>

The agency is misreading its own regulations. In fact, 9 CFR Part 500.4 does not apply to inhumane handling at all—this is not an enforcement action that is available to FSIS for humane slaughter enforcement. In other words, 9 CFR Part 500.4, which is cited by FSIS in support of a policy that is harming animals, focuses on food safety and has nothing to do with humane slaughter.

And if the agency believes it can use the word “may” in 9 CFR 500.3(b) (“FSIS may imposes a suspension without prior notification”) to suggest that it also “may not” (i.e., it can also offer a warning), that option would make 9 CFR 500.4 entirely redundant, since § 500.4 covers the “may not” situation.

This allowance of NOIEs in place of suspension or prosecution for egregious cruelty violates regulations and is inconsistent with FSIS’s statutory obligations. As stated above, the HMSA is unequivocal: Stunning must be rapid and effective on the *first* try. And inhumane slaughter and treatment—*any* deviation from the HMSA’s requirements—are “prohibited” acts. Allowing a plant to violate these requirements simply because it has a written humane handling plan on hand is inconsistent with humane slaughter requirements and promulgated regulations.

Additionally, the inconsistent enforcement only exacerbates the inconsistent application of the HMSA that GAO and USDA OIG reports have long cited as a problem. The imbalanced application of the law’s requirements is unfair to some slaughter facilities while favorable to others, based on arbitrary factors. Having a written plan does not make egregious inhumane treatment any less egregious or any less a violation of the law. Rather, it creates an impermissible loophole for regulated entities to evade their duty to comply with mandatory provisions of the HMSA. FSIS does not have discretion under the HMSA to carve out such exemptions, and its attempt to do so goes well beyond the scope of its permissible authority granted to it under the HMSA.

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<sup>129</sup> FSIS, *Compliance Guide for a Systematic Approach to the Humane Handling of Livestock*, Oct. 2013, *supra* note 31 at 8.

<sup>130</sup> *Id.* at 9.

As evidenced by a review of recent HMSA enforcement actions, the leniency towards facilities implementing a “robust” approach has meant that establishments receive NOIEs for the same conduct which inspectors deem grounds for suspension at other plants. As just one of among many examples (see below), at one Tyson plant, an FSIS inspector witnessed employees driving ambulatory pigs over non-ambulatory animals, which FSIS expressly prohibits as egregiously cruel treatment.<sup>131</sup> Despite the fact that this same plant had engaged in the same HMSA violation only a few months earlier, the plant was given only an NOIE instead of a suspension.<sup>132</sup>

#### **4. Even if NOIEs Could be Justified in Some Cases, They Should Be Reserved for Non-Egregious Violations of the Law.**

Even if such lenience in certain suspension-worthy situations were tenable, it is clearly not appropriate where abuse is egregious. In such a situation—especially in a situation where there is are multiple stuns, which is at the heart of HMSA—an NOIE should not be available to a plant that violates the law, since such egregious abuse is prima facie evidence that the four required conditions for NOIE discretion have not been met. An egregious violation of HMSA is fundamentally at odds with “effectively and consistently implementing all aspects of [a robust and systematic humane handling] program.”

If an NOIE could ever be justified for HMSA violations—and there appears to be no justification for it in the CFR—it should only be allowed for non-egregious activity, as spelled out in both the CFR and Directive 6900.2.<sup>133</sup>

#### **5. Multiple Stuns Should Always Result in At Least Plant Suspension.**

FSIS currently has a lackadaisical policy with regard to multiple stuns that is so unclear that it leads many inspectors to refuse to even issue an NR for this egregious violation of the HMSA. This is grossly inadequate, as the only reasonable enforcement response to multiple stunning attempts is a plant suspension.

The principal humane handling directive for FSIS is 6900.2, “Humane Handling and Slaughter of Livestock.” As this directive makes clear, “[l]ivestock are to be rendered insensible to pain (unconscious) by a single blow or gun shot or an electrical, chemical, or other means that

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<sup>131</sup> Letter from Anna Gallegos, Food Safety and Inspection Service, to Tyson’s Fresh Meats, “Notice of Intended Enforcement,” *supra* note 78, at p. 2.

<sup>132</sup> *Id.*

<sup>133</sup> *See, e.g.,* Directive 6900.2, *supra* note 124 at 11-17.

is rapid and effective.”<sup>134</sup> And a May 2014 FSIS training module for HMSA enforcement explains: “To meet the statutory requirements in the HMSA, all animals must be rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective . . . .”<sup>135</sup>

It is worth noting that the Agricultural Marketing Service (AMS) applies a “zero tolerance” rule to multiple stuns for its own procurement.<sup>136</sup> It is hard to imagine a tenable policy justification from FSIS for having weaker enforcement than AMS.

### **Although Multiple-Stuns are the Quintessential “Egregious” HMSA Violation, Even Multiple Stuns Often Result in Only NRs or NOIEs.**

Despite the fact that the HSMA expressly mandates that stunning methods are to be rapid and effective on the first try,<sup>137</sup> slaughter facility employees routinely fail to render animals insensible to pain without resorting to multiple-stuns. This is considered an “egregious” violation of the HMSA and the appropriate response is a Notice of Suspension. Nonetheless, these instances frequently result in mere NOIEs or NRs.

Here are just a few examples of NOIEs that were offered in 2013 and 2014 because of FSIS’s lax policy with regard to multiple-stuns:

- At CC Meats in North Dakota, an inspector issued an NOIE, despite the fact that the plant had been cited three times for multiple stuns in just four months.
- At Wells, Jenkins, & Wells in North Carolina, a sow was shot through the head and was not rendered insensible to pain for more than 90 seconds. “The animal had a hole in its forehead, was bleeding from the hole, and was circling around the stunning area.”
- At Open Range in Nebraska, an animal required three stuns to be rendered insensible, when the same facility had been given an NR just two days previously.
- At a Tyson plant in Texas, an employee ineffectively stunned five animals while the inspector watched: “Three of the animals displayed distress, two vocalized, and two thrashed vigorously from side to side.”

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<sup>134</sup> FSIS Directive 6900.2, Revision 2, *Humane Handling and Slaughter of Livestock*, *supra* note 124 at 15, Aug. 15, 2011.

<sup>135</sup> FSIS, “Humane handling of Livestock and Good Commercial Practices in Poultry,” May 8, 2014, p. 8, available at [http://www.fsis.usda.gov/wps/wcm/connect/f01f41d1-bc55-42f3-8880-991814f35533/LSIT\\_HumaneHandling.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/f01f41d1-bc55-42f3-8880-991814f35533/LSIT_HumaneHandling.pdf?MOD=AJPERES).

<sup>136</sup> USDA Agricultural Marketing Service, *Federal Purchase Program Specification (FPPS) for Animal Handling and Welfare*, June 2014, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5084518>.

<sup>137</sup> *Supra* note 20.

- At White’s Wholesale Meats in Montana, an employee ineffectively stunned an animal with a rifle on April 29. Although the facility had already received NRs for bad stuns on April 1 and 8, it was only issued an NOIE.
- At CEO Natural in New York: “As soon as the stick was performed, the pig began to vocalize loudly and move about. The employee continued to hoist the pig and several more sticks were attempted, each resulting in additional loud vocalization from the animal. Finally the pig was fully hoisted and began to steadily bleed out; at the same time the vocalization ceased and labored, rhythmic breathing began. The pig ceased breathing and appeared dead about 1-2 minutes after the initial stick.”
- At Dayton Natural in Oregon, four shots were taken at a cull cow, who was not rendered insensible to pain for two full minutes.
- At a Swift plant in Colorado: “The last animal was observed to trip, fall down, and break a hind leg. The plant employee decided to knock the animal in the pen using a .22 caliber rifle. The animal ‘went wild’ after the first shot, circling its head, falling over, running into the fence and, at one point, charged towards the pen supervisor . . . . The animal was shot five (5) more times, which took roughly five minutes . . . .” Remarkably, this same plant had been cited for a similar incident the previous October.
- At JBS Swift in Kentucky, an inspector “observed a conscious hog standing on the bleed table. The hog was stumbling and trying to walk through a pile of approximately eight hogs that had been stunned but were piled up at the end of the bleed table while waiting to be shackled. In addition, there was a pile up of stunned hogs in the drop off area waiting to be shackled, there was one hog lying in the bleed trough and there were three stunned and shackled hogs on the bleed table. A plant employee was observed with a captive bolt stunner attempting to climb through the pile of stunned hogs at the end of the bleed table in order to reach the conscious hog. While attempting to evade the employee, the conscious hog stumbled and fell into a gap between a grate and the outside wall of the building effectively restraining the hog . . . .”
- At NY Custom Meat Processing in New York, from March 1 to September 4, six NRs were issued due to improper stunning, and yet still in September, FSIS gave this plant an NOIE—for its seventh stunning noncompliance.
- At Sam Kane in Texas, after being shot in the head but left conscious, an animal was put through five minutes of sheer agony until two additional shots were fired, and the District office handed down an NOIE.
- At a Cargill plant in Iowa, a pig regained consciousness on the bleed rail and the inspector had to order the worker to stun the animal.
- At Premium Pork in Iowa, two pigs regained consciousness on the bleed rail and another pig was conscious after stunning—still the District office merely handed down an NOIE.
- At a Tyson plant in Iowa, a pig was “more or less hanging from its toes.” The pig fell and regained consciousness in the blood pit.

Our review of NRs over the course of two years found many additional examples of NRs for multiple-stuns. For example:

- JBS Souderton (est. M1311): The NR states that a dairy cow arrived unable to walk, so JBS employees attempted to stun her by trapping her between two metal gates, which did not work. The inspector writes that after she was shot in the head, “she fell forward . . . but that her back legs remained in the standing position, and that she immediately began trying to right herself, and to back her way out of the make-shift animal restrainer . . . she shook her head, started blinking her eyes.” Then, she tried to stand and escape. She was shot again in the head, but that attempt also failed to render her unconscious.
- Premium Iowa Pork (est. M21069): The NR states that four animals regained consciousness on the bleed rail. The inspector wrote that “three hogs were observed on the shackle line with signs of neck arching (dorsal and lateral flexion of the neck). One was observed moving its tongue and pulling its front legs posteriorly and two were observed to be taking breaths.” The inspector stopped the line briefly, and when it resumed, she or he documented that “another hog was observed to display dorsal neck arching, flexion of the front legs and breathing as it approached the steam scald tunnel.”
- Yosemite Meat & Locker Service (est. M548): The NR states that a “market hog was electrically stunned and shackled; it slipped off the chain and slid onto the metal pan below the restrainer and was still conscious with a consistent blink and breathing reflex . . . . It took approximately 2 minutes and he returned with the captive bolt and knocked the hog rendering it unconscious.”
- Rancho Feeding (est. M527): The NR states that the shackled animal vocalized, “thrashed in pain, [and] arched [her] back legs straight in front of [her] body . . . . I observed the animal blinking during this time. I also observed the animal puffing in a rhythmic manner . . . . No actions were taken by the plant for approximately 45 seconds while they attempted to determine what to do and never unshackling or unhoisting the cow. [Redacted] plant personnel knock[ed] the animal a second time. They did so with the hand held captive bolted stunner and after 10 seconds the animal resumed blinking, approximately 5 blinks within a 10 second period.”

There are many more NRs on file for multi-stuns, conscious animals on the bleed rail, and other egregious abuses—all of which confirm what the GAO found in 2004 and 2010, and what the OIG found in 2008 and 2013: that as a result of FSIS’s insufficiently articulated regulations and malleable directives, FSIS inspectors fail to enforce the HMSA’s mandatory requirement that animals must be rendered insensible to pain with a single blow.

Although the HMSA states unambiguously that that animals must be rendered insensible to pain with one blow from a gun or captive bolt, or one jolt of electricity, FSIS consistently gives the equivalent of a wrist-slap to plants that are unable to obey the law. FSIS’s refusal to issue a suspension where animals require multiple stuns—in violation of federal law—violates FSIS’s humane slaughter mandate and the policy goals of HMSA and FMIA.

Thus, to ensure compliance with the HMSA and FMIA, FSIS should amend the CFR and Policy Directive 6900.2 to make clear that Notices of Suspension are required for violations of

HMSA or FMIA that involve more than one stun attempt on an animal. All other FSIS documents that contradict this policy should also be updated.<sup>138</sup>

#### **6. All Other Acts of Egregious Cruelty Should Also Result in Plant Suspension.**

For the same reasons that egregious situations involving multiple stuns require plant suspension under 9 CFR Part 500.3, all egregious abuse should always result in a suspension.

Here are just a few examples of NOIEs that were offered in 2013 and 2014 because of FSIS's policy that stands in derogation of clearly stated congressional intent:

- At a Bartel's plant in Oregon, "three cattle . . . were down in the overcrowded pen and were unable to get up, due to limited space in the pen. One animal was lying on top of another, and the third animal had its leg stuck under the pen fence and was unable to rise." All thirty-five animals were unable to access water. This was an off-hours inspection, so if not for the inspector, these animals would not have gotten any relief.
- At a Smithfield plant in Virginia, a worker trampled a crippled pig with ambulatory pigs.
- At a Swift plant in Iowa, a worker dragged a crippled pig across the concrete floor "to allow a bobcat hauling another [crippled] hog to pass by."
- At a Tyson plant in Iowa, a worker ran over a crippled pig with a skid-steer loader.
- At a Tyson plant in Wisconsin, a worker trampled a crippled pig. This was the plant's third violation of the HMSA in under a year.
- At Rantoul Foods in Illinois, multiple employees ran over a crippled pig. This plant was also suspended both before and after this incident.
- At a Lemay and Sons plant in New Hampshire, the inspector documented a live animal on the bleed rail.
- At Peoria Packing in Illinois, "approximately fifteen ambulatory hogs were unloaded over the downed animal before [redacted] could intervene and request establishment personnel to instruct the driver to cease all unloading activity and address the downed animal."
- At a Tyson plant in Nebraska, a plant employee ran approximately ten ambulatory pigs over the top of a crippled pig. This same plant had been cited for the same abuse just four months before.
- At a Cargill plant in Texas, two employees were told not to move the ten ambulatory steers in the direction of the non-ambulatory steer, but they did it anyway. "The cattle moved down the alleyway in a tight group and trampled the non-ambulatory, disabled steer." This same plant had received an NOIE less than six months before.

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<sup>138</sup> E.g., sample MOI in Directive 6900.2, *supra* note 124 at 37; HIKE scenarios 01-13, 01-10.

Notably, the Agricultural Marketing Service applies a “zero tolerance” rule to live animals on the bleed rail, intentional cruelty, and animals held without water.<sup>139</sup> In order to abide by FSIS’s statutory mandate vis-à-vis eliminating inhumane slaughter and the policy goals that animate the HMSA, FSIS must also give a Notice of Suspension for all instances of similar cruelty.

The persistent failure of FSIS inspectors to take the correct steps in response to inhumane treatment points to the necessity of a uniform, mandatory enforcement scheme. Petitioners urge the USDA to adopt the scheme proposed here, to specify that district officials “will” issue a Notice of Suspension and/or prosecution for all instances of egregious inhumane treatment.

**D. Amend 9 C.F.R. § 500 to Require That all Intentional Cruelty, as well as Especially Egregious and Reckless Abuse, be Referred for Criminal Prosecution.**

**1. FSIS Has Effectively Repealed the HMSA Misdemeanor by Having Never Enforced It in More than 35 Years.**

In almost every state in the nation, if someone were to intentionally abuse a farm animal anywhere other than on the grounds of a federally inspected slaughter facility, he or she would be subject to prosecution under state law. The USDA has the power to enforce the HMSA with criminal sanctions,<sup>140</sup> but its persistent failure to do so emboldens potential abusers because they need not fear criminal prosecution.

In January of 2011, the Undersecretary for Food Safety, Dr. Elisabeth Hagen, posted a blog on the USDA website in which she declared that the USDA “fully supports the investigation of all those involved in alleged violations of the Humane Methods of Slaughter Act. Investigators from our enforcement division and from USDA’s Inspector General, as well as U.S. Attorneys, stand ready to work side by side when such cases arise for prosecution.”<sup>141</sup>

Similarly, FSIS Directive 6910.1 states that “[i]f during the course of conducting a review, a DVMS collects information that demonstrates that an establishment has knowingly or willfully engaged in inhumane practices or the mistreatment of live animals as an effort to intentionally circumvent the law, the DVMS is to immediately contact the District Manager and

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<sup>139</sup> USDA FPPS, *supra* note 136.

<sup>140</sup> 21 USC § 676.

<sup>141</sup> See USDA Blog, *Under Secretary for Food Safety Shares Some Insight on the Humane Handling of Livestock*, (January 7, 2011 at 1:44 PM), available at <http://blogs.usda.gov/2011/01/07/under-secretary-for-food-safety-shares-some-insight-on-the-humane-handling-of-livestock/#sthash.7zGofRV4.dpuf>.

[Office of Program Evaluation, Enforcement and Review] regarding how to handle the matter. In some instances, it may be necessary for OPEER to initiate a criminal investigation.”<sup>142</sup>

We could find no documentation indicating that a DVMS (or anyone else) has ever referred abuse for criminal prosecution. And although FSIS has cooperated at least three times over the past few years with criminal prosecution under the felony provision of the HMSA (which applies to slaughterhouses that are operating illegally), it appears never to have referred a USDA-inspected slaughterhouse for criminal prosecution under the HMSA. Thus, FSIS has effectively repealed the law through its categorical refusal to enforce it.

Criminal penalties have been a possible sanction for inhumane slaughter since the HMSA was incorporated into the FMIA in 1978. However, there have been just these three examples of the USDA “work[ing] side by side” with U.S. attorneys to enforce an HMSA violation, and all three involved the inhumane slaughter of a single animal at an illegal facility (one operating without any state or federal inspection whatsoever). Egregious abuses documented by undercover investigators at USDA-inspected plants, as well as the many and repeated violations documented by FSIS itself, have never resulted in federal prosecution. No Criminal Investigation Division investigation has ever led to the indictment of an inspected plant.

## **2. Flagrant Criminal Activity is Apparently Never Referred for Prosecution.**

The following examples from 2013 to 2014 should have been (and still should be) referred for criminal prosecution:

- At Berry & Sons in Michigan, an employee “grabbed a small running lamb weighing approximately fifty pounds; using both hands, he grabbed the lamb by the neck from behind and proceeded to throw the animal backwards, towards the bed of the truck from which it ran. The lamb was observed to remain airborne until it landed on its side in the truck bed . . . .”
- At Brewer Meats in Indiana, “[a] plant employee was observed dragging a conscious non-ambulatory sheep through the drive alley doorway, through the knock box, and onto the bleeding grate.” This same plant was suspended two more times for egregious abuse over the following five months.
- At Islamic Meat and Poultry in California, a worker “introduced an electric prod through the side of the chute and used it excessively in the animal’s genital, rectal and tail area. He prodded the animal six to seven times using this electric prod. The animal vocalized loudly and became very agitated inside the chute each time . . . .”
- At Wayne Meats Processing in North Carolina, workers had crammed four pigs into a knock box that is designed for two; two were stunned and two had holes in their heads

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<sup>142</sup> Directive 6910.1 at 20.



but were still conscious. Two pigs “were flopping over and under two other hogs which were screaming and attempting to climb out of the knock box and falling back on top of and/or under each other and the two seizing pigs . . . [T]he slaughter floor supervisor and the employee attempted to force the pig forward by pulling its tail forward over its back. This was done with such force that the pig’s hind legs were lifted from the ground.”

- At JJ Meat in California, a driver who was unloading animals “dropped [a] calf from waist high, approximately 2 to 3 feet, onto the concrete flooring. This calf landed on its body and remained recumbent on the concrete. From the adjacent pen, the PHV observed the driver unload a Jersey calf. The driver set the hindquarters down, but was still holding the front leg at least 2-3 feet off the ground; it appeared as though he was still holding up a large portion of the calf’s body weight by this leg. He let go of the leg from approximately 1 foot onto the concrete. The calf was slumped and obtunded after it was on the ground, where it remained in this position. The driver then went back to unload the ambulatory calves from the truck. The driver pushed three calves at a walking pace towards the edge of the trailer; he continued pushing them, now at faster than a walking pace, and they fell off the trailer, chin first onto the concrete, unable to get their footing quickly enough. The calves did not make any attempt to rise and remained recumbent.” A month earlier at the same plant, a “calf was alive and conscious for over two minutes after the initial stunning blow and before the successful third blow that rendered the calf unconscious.” The second blow had “fracture[ed] the skull . . . and caus[ed] bleeding through the opening in the skull.”
- At Halal Meat in North Carolina, an employee “grabbed the tail of [a cow] and began bending the small end up until an audible pop was heard.”

There were at least 32 additional instances of intentional cruelty to animals documented in 2013 and 2014 through suspension and NOIE records that constitute cruelty to animals and should have been referred for prosecution.

Anti-cruelty statutes in all 50 states treat intentional cruelty to animals as a criminal offense, as does the FMIA. FSIS’s refusal to recommend criminal enforcement, no matter how egregious the abuse, cannot be reconciled with its statutory mandate. If slaughtering one pig without first stunning her at a small-scale operation constitutes a felony violation of HMSA, it is arbitrary and capricious to refuse to prosecute based on the consistent and intentional cruelty documented by humane groups and FSIS at much larger facilities.

### **3. FSIS Should Refer Intentional or Especially Egregious Acts to Federal Prosecutors**

Nothing would be more effective in enforcing the HSMA than deterrence through a viable and predictable threat of criminal prosecution. Criminal prosecution is also what is called for by the HSMA, as FSIS clearly knows—as indicated by its January 2011 declaration. FSIS’s

policy in this regard violates their own humane slaughter mandate and the policy goals of both the HMSA and the FMIA, and it goes beyond FSIS's discretionary enforcement authority into the realm of an agency that is usurping the role of the legislature.<sup>143</sup>

Thus, in order to effectuate clearly stated congressional policy and follow the intent of the HMSA, FSIS should amend the CFR and Policy Directive 6900.2 to make clear that all instances of intentional or especially egregious cruelty to animals should result in referral for criminal prosecution. And of course, all other FSIS documents that contradict this policy should also be updated.<sup>144</sup>

#### **E. Amend 9 C.F.R. § 500 to Provide FSIS with a Timeline for Initiating Withdrawal Proceedings Based on Repetitive HMSA Violations.**

Although the USDA's own Office of the Inspector General (OIG) pointed out that FSIS's manner of sanctioning slaughter facilities that violate the HMSA is unclear, FSIS has not yet created a clear structure of enforcement that aligns violations with appropriate penalties. This violates FSIS's statutory duty and the policy goals of both the HMSA and the FMIA.

First, as discussed above, NOIEs are inappropriate for egregious abuse or multiple stuns—FSIS's toothless policy is the equivalent of police officers' giving only warnings for drunk and reckless driving, and it cannot be justified; if an egregious act is committed, a plant should be suspended, at the very least.

Second, for especially egregious abuses, suspensions should be set for an absolute minimum amount of time and prosecutions should be initiated. It makes no sense to treat abuse that leads to absolute agony for animals the same as abuse that is not as extreme. Although possibly not intentional, the animals' suffering is still enormous, and these facilities should be criminally charged and shut down for at least a week where a violation causes this much agony:

- At This Old Farm in Indiana, a shot into a pig's head "tunnel[ed] between the skull and skin, and exit[ed] through the base of the ear on the left rostral side. The hog turned, jumped and ran to the opposite end of the knock box from where it was initially shot . . . . The hog then turned and ran back under the cattle neck squeeze chute where it was shot again with the brown .410 firearm. The firearm operator had to reload the firearm resulting in a delay of actuating an immediate follow-up shot . . . . There were constant animal vocalizations heard from the time of the first shot until the second."

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<sup>143</sup> See note 100 and accompanying text, *supra*.

<sup>144</sup> *E.g.*, the sample MOI in Directive 6900.2; Directive 6910.1 (DVMS Work Methods) (NEED TO FIND A WORKING LINK); HIKE scenarios 01-13 (which—unbelievably—recommends an NOIE for intentional cruelty).

- At Brewer Meats in Indiana, a “calf’s legs buckled and the animal dropped to the ground and slowly rolled over into full lateral recumbency. [REDACTED] noted that the animal was still breathing . . . . The same plant employee returned after a couple of minutes and delivered a second shot using the same .22 caliber rifle.” On another occasion at the same plant, “[a] steer was stun[ned] on the back of the head and the gun got stuck to its head. It took several attempts to remove it, before an employee got the rifle to render it unconscious . . . .”
- At Mitchell & Son Meat Processing, a pig required six minutes and three shots from a .223 and .22 Magnum: “The hog in the knock box was bleeding from the head, was still standing, and had a palpebral reflex. After a period of about three minutes had elapsed, the employee . . . took another shot using a .22 Magnum rifle, but the hog was still not rendered unconscious . . . . After another three minutes (approx.), the employee took a second shot with the .22 Magnum rifle (the third shot overall); this shot finally rendered the animal unconscious.”
- At Imhoff Quality Meats in Indiana, “a Public Health Veterinarian (PHV) observed a hog that had been stunned, stuck, and remained on the rail as employees left the area for a break. The PHV observed that this hog was regaining consciousness . . . . Upon notification of the PHV’s findings to an establishment employee in the break room, the employee returned to the stunning area, assessed the hog, and subsequently reapplied the stick wound to further bleed the hog without first re-stunning it.”
- At J&R Natural Meat and Sausage in California, a “pig remained standing, vocalizing loudly and bleeding from the bullet wound, and moving around in the chute in an attempt to get away. The employee fired again at the forehead in a second attempt to stun the pig, but it still remained standing, fully conscious and loudly squealing, bleeding profusely from the bullet wound, and moving and attempting to get out. The employee partially opened the chute door and fired two more shots in a third and fourth attempt to stun the pig. The shots were placed at the pig’s forehead and at the back of the head behind the ear. These shots also failed to render the pig unconscious, and the pig fell down and immediately scrambled up again as it continued actively attempting to escape the chute. At this time, it was loudly squealing and bleeding copiously from the gunshot wounds to its head. After the fourth shot at 1110 hours, the employee stopped and waited for another person to retrieve another rifle. The pig remained in the box, squealing in pain and bleeding while trying to get out of the chute. At 1112 hours, the ranch owner returned with a new rifle and discharged the weapon at the center of the pig’s forehead. This fifth attempt to stun the pig rendered it immediately unconscious.”
- At Wenneman Market in Illinois, an animal was stunned, hung, stunned again, and then had her neck skinned and was stuck for bleed out—all while she was still conscious.
- At Dakota Pack in Iowa, a pig regained consciousness and hung on the shackle after stunning and sticking for ten to fifteen minutes before being rendered insensible to pain. At the same facility, an employee “placed the piston against the forehead of [a crippled pig] and fired. The hog squealed in pain and rose, completely conscious. The plant employee then attempted to stun the hog again with the captive bolt pistol. The hog jerked as the pistol was fired and the bolt struck the hog on the side of the face under the

right eye and again the hog was fully conscious. The plant employee attempted a third stun placing the stun pistol against the forehead of the hog, fired and again the hog remained fully conscious. The SPHV/IIC then stopped further attempts and notified the Plant Manager, who came to the area and observed the conscious hog. The Plant Manager then successfully stunned and euthanized the hog using the same captive bolt pistol.”

Additionally, there were at least 13 more instances documented by FSIS inspectors of animals regaining consciousness on the bleed rail and many instances of animals requiring between three and nine stuns, and between 3 and 10 minutes, before they were finally rendered insensible to pain. These are situations where criminal activity has taken place, not situations where a plant should be operational again within hours.

Third, FSIS must implement a strict and unambiguous enforcement policy that directs district offices to withdraw a grant of federal inspection under 9 C.F.R. § 500.6(g) for any plant where egregious violations of HMSA occur more than twice in any one-year period. For example, the following plants should have had their grant of federal inspection withdrawn (they also should have been criminally charged):

- Gallo Meats in Washington received two NRs and two suspensions for ineffective stuns over less than six weeks. One of the suspension documents explains that “Mr. Gallo [shot] the hog behind the ear on the side of its head using a .357 magnum pistol. The hog dropped to its knees, and then stood back up. The hog was grunting and walked around the pen. Mr. Gallo then shot a second time with the .357 pistol again behind the ear and the hog again was walking around the pen grunting. Mr. Gallo then shot a third time still behind the ear on the side of the head and the hog still grunted and walked in the pen. The fourth shot with the .357 magnum pistol rendered the hog insensible.”
- JBS Green Bay in Wisconsin was cited four times (two suspensions and two NOIEs). Both of the NOIEs were for stunning attempts that required three tries—clearly these should have been suspensions. One of the suspensions involved a non-ambulatory cow. “The two truck drivers were attempting to get the non-ambulatory beef cow to rise by means of tail jacking her, prior to notifying the JBS barn personnel that there was a non-ambulatory animal present on the truck . . . .” The second suspension also involved a crippled cow. At 9:45 PM, a plant employee shot her through the head with a captive bolt three times and then slit her throat. Forty-five minutes later, “[t]he on-duty CSI . . . noticed the cow kicking excessively in the courtyard . . . . The cow was lying in a large pool of blood with its throat stuck/slit, that it was kicking excessively, breathing/gasping rhythmically, had normal movement of the stomach rising and falling, and had an intact palpebral reflex . . . .” The cow required two more captive bolt shots to render her unconscious.
- Rantoul Foods in Illinois received an NOIE and two suspensions over four months, including for intentional cruelty where an employee pushed a non-ambulatory pig across concrete and for employees’ running ambulatory pigs over a non-ambulatory pig on another occasion. Finally, on a third occasion, a non-ambulatory pig was shot with a

captive bolt so that there was “blood coming from the nasal cavity of the hog which had begun vocalizing, had rhythmic breathing, and had crawled away . . . on its front legs while dragging its hind legs.” This animal suffered for nearly three minutes before he was properly stunned.

- Over less than ten weeks, LRN Processors in California was suspended twice for improper stunning, received two NRs for improper stunning, and had two MOIs for “captive bolt devices [that were] smoking when firing, not firing at full capacity, and misfiring.” One of the suspensions entailed a veal calf who was improperly stunned, after which all LRN employees went home. The animal suffered for at least the forty-five minutes from when the inspector found him to when an employee arrived to properly stun him.
- Redwood Meat in California received two suspensions, six NRs, and two MOIs over just four months. One of the NRs was “due to the malfunctioning of [the] mechanical bolt, which required two different heifers to be knocked twice due to ineffective stunning,” so that should clearly have been another suspension. One of the suspensions involved a lamb who “was now recumbent, bleeding heavily and still conscious after the three unsuccessful stuns.” This animal “was conscious after the initial stun for approximately four minutes.”
- Triple J in Minnesota received four suspensions and five NRs in under a year. All five of the NRs were for egregious abuse that should have been suspensions. Three of the suspensions were for cruelty that involved a two-minute delay between the time of the first captive bolt to the animal’s head and until unconsciousness. The fourth suspension involved the plant manager shooting a cow through the head and then tormenting her for fifteen minutes. The plant manager electrocuted the cow with an electric prod, over and over, trying to get her to leave the stunning box, where two cows were trapped in a space intended to hold one. Because the gate to the stun box was halfway down, the cow’s escape was a “physical impossibility” according to the inspector’s report. Because the electrocution was so painful, the cow tried to cram her body through the gate. The report indicates that due to her attempting the impossible, her “hide [was] peeled back . . . and there was blood and hair throughout the wound, as well as blood and hair on the lift gate.” She also suffered four freshly broken ribs.
- Brooksville Meat Fabrication in Kentucky was suspended four times over five months for egregious stunning incidents, causing animals to suffer horribly for up to four minutes between the first and final shots. The plant also received five NRs during this time, four of which were for egregious stunning violations that should have been suspensions.
- Over five months, Matkin’s Meat Processors was cited seven times for violations of the HMSA, including three suspensions and four NRs for ineffective stuns (these latter should have been suspensions). On one occasion, plant employees would have skinned and processed a conscious cow, if not for the USDA inspector who was present and stopped them.
- Finally, Northern Beef in South Dakota was suspended for egregious and intentional cruelty when an employee intentionally and repeatedly used a shock prod on an animal’s

anus. This same plant had been suspended twice and cited with NRs four times in the previous four months, all for stunning non-compliances.

If FSIS had taken its humane slaughter enforcement mandate seriously, the above eight plants would have had their grants of federal inspection withdrawn.<sup>145</sup>

In the OIG's 2013 analysis of FSIS oversight regarding food safety, it was noted that plants "repeatedly violated the same regulations with little or no consequence."<sup>146</sup> The OIG noted that over the four years of its review, FSIS did not withdraw a grant of federal inspection even once.<sup>147</sup> The OIG recommended that FSIS "develop a strategy to take progressively stronger enforcement action against plants with serious or repetitive violations . . . [and] define the frequency and specify the timeframes when violations would lead to such enforcement actions."<sup>148</sup> Although this section of the report was focused on food safety, both the critique and the recommendations apply equally to the humane slaughter context.

Similarly, the GAO report from 2010, in discussing the Bushway incident, noted that "FSIS has not issued any guidance to the district offices on how many suspensions should result in a request for a withdrawal of a grant of inspection."<sup>149</sup>

Furthermore, GAO noted in its 2004 report that FSIS lacks a streamlined policy to address chronic and escalating HMSA violations. As an example of the problem, the report highlighted "one case in which a district manager did not suspend plant operations after inspectors had issued sixteen [NRs] . . . documenting the plant's failure to properly stun animals. In contrast, another facility's failure to provide access to water and to maintain acceptable pen conditions led to a suspension."<sup>150</sup> GAO concluded that such inconsistency "undermin[es] FSIS efforts to effectively enforce the act," and recommended that the agency "establish additional clear, specific, and consistent criteria" for when "to take enforcement actions because of repetitive violations."<sup>151</sup>

To address this lack of guidance, petitioners urge FSIS to adopt regulations in 9 CFR § 500 to provide that three violations of the HMSA that are egregious or intentional in a one-year period will result in a plant's having its grant of federal inspection revoked.

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<sup>145</sup> Brooksville did have its grant of federal inspection withdrawn, though it is not the worst of the eight. This accentuates the need for clear policy or regulations on this issue.

<sup>146</sup> See 2013 OIG report, *supra* note 59, at p. 4.

<sup>147</sup> *Id.* at p. 5.

<sup>148</sup> *Id.* at p. 9.

<sup>149</sup> 2010 GAO report, *supra* note 49, at p. 24.

<sup>150</sup> GAO report, *supra* note 45 cover page.

<sup>151</sup> *Id.*

Such an established process will put facilities on notice regarding the consequences of inhumane slaughter and treatment, and will improve the consistent application of the HMSA's requirements to slaughter facilities nationwide.

### VIII. CONCLUSION

Violations of the HMSA are serious: A single violation that includes fraud can be charged as a felony, punishable by up to three years in jail and a \$250,000 fine. Any violation at all is a crime punishable by up to a year in prison and a \$1,000 fine.

Yet for thirty-five years, FSIS has treated the law as a recommendation for plants and has done an abysmal job of enforcing it, as documented by reports from the agency's own Office of the Inspector General, the Government Accountability Office, undercover investigations, and our review of the most recent two years of enforcement records.

The proposed regulatory changes will markedly increase compliance with the HMSA. FSIS can only remedy the violations of its statutory and policy obligations demonstrated in this petition by implementing the proposed regulatory changes.

Respectfully submitted,



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