Docket Clerk
U.S. Department of Agriculture
Food Safety and Inspection Service
Room 2534, South Agriculture Building
1400 Independence Avenue, SW
Washington, DC 20250


The Center for Science in the Public Interest (CSPI) appreciates this opportunity to comment on the United States Department of Agriculture’s (USDA) proposed rule on the disposition of non-ambulatory cattle following ante-mortem inspection [Docket No. FSIS-2008-0022, Aug. 29, 2008]. CSPI is a non-profit consumer advocacy and education organization that focuses largely on food safety and nutrition issues. It is supported principally by the more than 950,000 subscribers to its Nutrition Action Healthletter and by foundation grants.

CSPI supports the proposed rule, but urges the agency to implement it immediately. There is no justification for not publishing this as a final rule.

I. Background and Reason for Action.

The proposed rule addresses a flaw in current regulations that places public health at risk. It does this by amending section 309.3(e) of title 9 of the Code of Federal Regulations to require condemnation and disposal of non-ambulatory cattle at all stages leading up to slaughter.

Section 309.3(e) in its current form encourages abusive treatment and slaughter of sick cattle, thus increasing the risk of introducing Bovine Spongiform Encephalitis (BSE) and other contaminants into the human food supply. The section prohibits the slaughter for food of cattle that are non-ambulatory disabled at the time of ante-mortem inspection. USDA added it in 2004 to eliminate the potential for BSE entering the food supply. Another concern is that non-ambulatory cattle are at greater risk for shedding Salmonella and E. coli. O157: H7. This increases the potential for contaminated meat entering the slaughterhouse and, ultimately, reaching consumers. However, shortly after publishing section 309.3(e) as an interim final rule, USDA created a loophole that permitted public health veterinarians to approve on a case-by-case basis the slaughter of cattle that fall after ante-mortem inspection. While only intended to permit slaughter of cattle suffering a traumatic injury, the loophole instead opened the door to abuses within the industry. This included mistreatment by employees of Westland/Hallmark Meat

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1 Dead, Dying, Disabled, or Diseased and Similar Livestock, 9 C.F.R. § 309.3(e) (Jan. 1, 2008).
Company to force non-ambulatory cattle to their feet for ante-mortem inspection. It was this scandal which contributed most directly to issuance of the proposed rule.

The problem posed by permitting the slaughter of non-ambulatory cattle is sufficiently serious to warrant attention from the industry that previously had supported the more permissive stance of section 309.3(e). The proposed rule responds to a citizen petition from the meat industry\(^3\) and public outcry over the abuses discovered at Westland/Hallmark Meat Company in 2007. USDA announced its intention to issue this rule May 20, 2008, and did so Aug. 29, 2008.

II. USDA Has Adequate Justification for Acting Quickly to Implement the Rule.

A. Prior Practice Supports Issuance as a Final Rule.

Issuance of a proposed rule instead of a final rule is a departure from past practice. Because section 309.3(e) deals with a serious public health threat, every prior action to issue or amend the rule has been accomplished through publication of a final rule. Following the 2003 discovery of a BSE infected cow in the United States, USDA issued an interim final rule that was effective immediately on Jan. 12, 2004.\(^4\) The agency used an affirmation of the interim final rule on July 13, 2007, to add the loophole provision permitting slaughter of cattle that become non-ambulatory after ante-mortem inspection on a case by case basis.\(^5\) In the first case, immediate action was warranted to minimize human exposure to materials with a demonstrated risk of containing BSE.\(^6\) The agency cited the same justification and the need to make the interim rule permanent in the July 13, 2007, rulemaking.\(^7\) Instead of following this precedent, USDA is using a more dilatory notice and comment process by issuing a proposed rule.

Any claim that notice and comment rulemaking is required is unfounded and also departs from prior practice. USDA has used the fact that it collected extensive public comments on the interim final rule creating section 309.3(e) as justification for an amendment issued under a final rule. This happened in 2005 when USDA amended the interim final rule to permit the use of beef small intestines in human food.\(^8\) It specifically cited comments received in response to the 2004 rulemaking and a subsequent notice as justifying issuance of the amendment by a final rule. While USDA does not provide a count of the number of comments (referencing only “several”), it is safe to assume the agency has received far more comments on section 309.3(e). By 2007 when the agency last amended the section, it had received approximately 23,000 comments with the majority supporting a prohibition on the slaughter of non-ambulatory cattle.\(^9\) Based on this precedent, the agency has allowed for adequate comment to justify making the amendment in the proposed rule effective immediately.

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\(^6\) 69 Fed. Reg. at 1862.
\(^7\) 72 Fed. Reg. at 38700.
\(^9\) 72 Fed. Reg. at 38701.
B. Economic and Public Health Concerns Support Issuance as a Final Rule.

Other justifications for making the proposed rule effective immediately are found in prior actions by the agency. In its 2005 beef intestines rule, the agency pointed to the adverse impact on business without any provision of public health benefits as justifying quick action.\textsuperscript{10} There is adequate support for similar action here on a basis of the amendment remedying an adverse economic impact. The citizen petition filed by the meat industry identifies significant economic harm caused by the current rule. It cites the need to restore public confidence in the safety of meat products and the need to improve international trade relations by amending section 309.3(e).\textsuperscript{11} Not only does the petition cite adequate economic justifications for proceeding with a final rule, it also highlights the risk to public health from “possible errors of judgment on the part of [public health veterinarians].”\textsuperscript{12} Combined with the threats of BSE, \textit{Salmonella} and \textit{E. coli} noted above, economic and public health factors weigh in favor of immediately implementing a final rule.

Even if the industry had not explicitly cited economic justifications sufficient to support immediate implementation, issuing a final rule would still be the proper course for the agency to follow. This is because there is no reason to believe the industry will suffer undue harm from such an action. USDA called on industry to voluntarily abide by the ban in June 2008 and believes the majority of slaughter plants are already doing this.\textsuperscript{13} Meanwhile, the public health consequences of failing to act are significant, as noted above. Therefore, the impact of moving immediately would be neither burdensome nor costly for industry while providing significant public health benefits. Under these circumstances, the weight, again, favors issuance of a final rule.

III. Conclusion.

CSPI congratulates the agency on proposing an amendment to section 309.3(e) that will end the unsafe practice of permitting meat from non-ambulatory disabled cattle into the food supply. However, the agency has chosen to take this critical action through standard notice and comment rulemaking rather than following its precedent of acting quickly on measures that prevent economic harm and protect the public health. The agency should correct this inconsistency by making the rule effective immediately.

Respectfully submitted,

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\textsuperscript{10} 70 Fed. Reg. at 53048.
\textsuperscript{11} Citizen Petition, supra note 3, at 5.
\textsuperscript{12} Id.
\textsuperscript{13} USDA Release No. 0167.08, Secretary Shafer Calls on Beef Industry to Voluntarily Adhere to Non-Ambulatory Cattle Ban While Final Rule is Being Processed, June 25, 2008.