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REPORT ON LEGISLATION BY THE ANIMAL LAW COMMITTEE

H.R. 3704 **Rep. Ackerman**

AN ACT to amend the Humane Methods of Slaughter Act of 1958 to ensure the humane slaughter of nonambulatory livestock and for other purposes.

Downed Animal and Food Safety Protection Act

THE BILL IS APPROVED WITH RECOMMENDATIONS

The Animal Law Committee of the New York City Bar Association (the "Committee") supports the passage of H.R. 3704, the Downed Animal and Food Safety Act ("the bill"). The Animal Law Committee regularly addresses legal, regulatory and policy issues on a local, state and national level affecting non-human animals, both wild and domestic.

SUMMARY OF THE PROPOSED LAW

The bill would amend Public Law 85-765 (commonly known as the Humane Methods of Slaughter of Act 1958) (7 U.S.C. 1901 et seq.) by inserting provisions relating to the treatment of "nonambulatory livestock" after section 2 (7 U.S.C. 1902).

The bill states that Congress finds that humane euthanization of nonambulatory livestock in interstate and foreign commerce: (1) prevents needless suffering; (2) results in safer and better working conditions for persons handling cattle; (3) brings about improvement of products and reduces the likelihood of the spread of diseases that have great and deleterious impact on interstate and foreign commerce in livestock; and (4) produces other benefits for producers, processors, and consumers that tend to expedite an orderly flow of cattle and cattle products in interstate foreign commerce. Furthermore, the bill states that it is the policy of the United States that all nonambulatory livestock in interstate and foreign commerce shall be immediately and humanely euthanized when such livestock become nonambulatory. Accordingly, the bill proposes the following amendments.

The bill would amend the Humane Methods of Slaughter Act to mandate that a covered entity shall immediately humanely euthanize livestock when an animal becomes nonambulatory. The amendment also states that this amendment shall not limit the ability of the Secretary of Agriculture to test nonambulatory livestock for disease such as Bovine Spongiform Encephalopathy ("BSE"), provided that such livestock are humanely euthanized immediately after being tested for such disease. The bill then specifies that a covered entity may humanely move nonambulatory

livestock, if required for a specific test for disease, if the livestock is unconscious until euthanized in accordance with the above-referenced provision.

Additionally, the bill prohibits inspectors from passing through inspection any nonambulatory cattle or carcass (including parts of a carcass), and that any such material be labeled "inspected and condemned."

The bill caps fines resulting from convictions of violations of the provisions of this section at $5,000 and/or one year's imprisonment and further instructs that this section "shall not be construed to pre-empt any law or regulation of a State or political subdivision of a State containing requirements that are greater than the requirements of this section or which create penalties for conduct regulated by this section."

The bill further mandates that the Secretary of Agriculture shall promulgate regulations to provide for the humane treatment, handling and disposition of all nonambublatory cattle by covered entities, including a requirement that nonambulatory cattle be humanely euthanized. The bill is to take effect one year after the day of its enactment, and it requires the Secretary to promulgate final regulations to implement the amendment on or before the same day

The following relevant terms would be defined in the bill as follows: (1) "Covered Entit[ies]" would mean stockyards, market agencies, dealers, packers, slaughter facilities or establishments (as defined in the Federal Meat Inspection Act [21 U.S.C. 601 et seq.]); (2) nonambulatory livestock would mean "any cattle (including calves), sheep, swine, goats, or horsed, mules, or other equines that will not stand and walk unassisted; and (3) "humanely euthanize" would mean "to immediately render an animal unconscious by mechanical, chemical, or other means, with this state remaining until the death of the animal."

DISCUSSION

This Committee has strongly urged the adoption of legislation protecting nonambulatory animals, both for the purpose of alleviating some of the cruelty to animals in agriculture when they become unable to walk and to address the health concerns involved in sending such animals to slaughter.[1] In recent years, public attention to problems concerning downed animals has grown, as documented inhumane conditions in slaughterhouses such as Hallmark in California resulted in national alarm, subsequent Congressional hearings and proposed legislative changes.[2]

Despite a 2007 federal prohibition against slaughter of nonambulatory cattle for human consumption,[3] a 2008 weeks-long investigation by the Humane Society of the United States

[1] *See* NYC Bar Association Comment: http://www.nycbar.org/pdf/report/AmendAgricultureandMarkets.pdf (concerning state legislation proposing amendments to NY Agriculture and Markets Law relating to downed animals) (2008) (last visited June 5, 2012).

[2] *See* the NYC Bar Association's February 25, 2009 letter to U.S. Secretary of Agriculture Tom Vilsack) at: http://www.nycbar.org/pdf/report/20071682USDA_Policies.pdf (last visited June 5, 2012).

[3] *See* 9 CFR Parts 309, 310, and 318*; See* also: USDA Federal Register, July 13, 2007 at: http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/03-025F.pdf (last visited June 5, 2012).

("HSUS") of the Westland/Hallmark Meat Packing Company revealed practices resulting in a recall of 143 million pounds of beef produced by the company and a flurry of media attention to the egregious health concerns implicated, as well as the widespread mistreatment of nonambulatory cattle.[4] Of the recalled beef, 37 million pounds had been provided to the federal food and nutrition programs.[5] Among other things, the investigations confirmed that sick and downed animals were illegally and inhumanely driven to slaughter and that the number of USDA inspectors are not adequate to enforce the provisions of the Humane Methods of Slaughter Act and applicable regulations.[6]

Additionally, although federal regulations existed to keep downed cattle out of the food supply (for the reason that downed cattle may pose a higher risk of contamination from E. coli, salmonella or mad cow disease since they typically wallow in feces and their immune systems are often weak),[7] a loophole permitted some downed cattle to be slaughtered. Specifically if cattle were ambulatory on first inspection by USDA personnel, they could be approved for slaughter later down the line.[8] This provided incentives for slaughter plants to accept "downers" at slaughter plants initially and then to keep crippled, sick and often abused animals moving into the food system.[9]

By 2009, increased public awareness of issues relating to downed animals and their inclusion in the food supply prompted the introduction of legislation at the federal and state level. In a March 14, 2009 radio address, President Barack Obama addressed the deficiency of existing regulations, and announced a blanket prohibition on slaughtering downed cows for human consumption.[10] The ban was finalized on Saturday March 14, 2009.[11] Moreover, the USDA's Food Safety and Inspection Service ("FSIS") noted that Congress provided additional funds in Fiscal Year 2009 for

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[4] *USDA: Reinspection of downed cattle was key issue in beef recall*, Miriam Falco, February 20, 2008 at: http://www.cnn.com/2008/HEALTH/02/20/downer.cattle/index.html (last visited June 5, 2012); *See also* *The HSUS Applauds President Obama for New Cattle Protections; New Policy Strengthens Food Safety and Improves Animal Welfare*, March 14, 2009 at: http://www.humanesociety.org/news/press_releases/2009/03/hsus_applauds_obama_for_downed_cattle_ban_031409.html (last visited June 5, 2012).

[5] See *Falco* supra.

[6] See NYC Bar Association letter supra.

[7] *Beef Over Cattle Abuse Video Escalates; Animal Rights Groups, Cattle Industry Spar As 143 Million Pounds of Beef Is Recalled*, February 19, 2008, at: http://www.cbsnews.com/stories/2008/02/19/national/main3846461.shtml (last visited June 5, 2012).

[8] *Case Finally Closed on "Downers"* Loophole, March 14, 2009, at: http://hsus.typepad.com/wayne/2009/03/obama-downers.html (last visited June 5, 2012).

[9] *Id*.

[10] *Obama Announces Heightened Protections for "Downers" and Food Safety*, March 14, 2009, at: http://www.humanesociety.org/news/press_releases/2011/02/usda_downed_calves_020711.html (last visited June 5, 2012); *See* also *Weekly Address: Reversing a Troubled Trend in Food* Safety, March 14, 2009 at: http://www.whitehouse.gov/blog/09/03/14/Food-Safety/ (last visited June, 2012).

[11] *Obama bans 'downer' cows from food supply* , March 14, 2009 at: http://www.msnbc.msn.com/id/29691788/ns/health-food_safety/t/obama-bans-downer-cows-food-supply/#.T2SGmFveuSo (last visited June 5, 2012).

humane handling enforcement and that FSIS has attempted to "boost its humane handling verification inspection activities" by creating new in-plant positions to coordinate and monitor humane handling and oversee District Veterinary Medical Specialists.[12] However, it should be noted that the final regulations published by the FSIS in March 2009 included a caveat that downed veal calves, determined to be too tired or cold to stand, could be set aside and held for treatment under FSIS supervision.[13] [14] It is particularly troubling that, nevertheless, more recent investigations have continued to disclose repeated incidents of cruelty against downer animals and/or attempts to make those animals stand. For example, a more recent HSUS investigation of a slaughter plant in Grand Isle, Vermont revealed extreme cruelty being used to force downed calves to stand, including the abusive use of electroshock.[15]

The recent discovery of the fourth U.S. case of BSE in a California cow exhibiting "downer" symptoms further demonstrates the importance of preventing downed animals from entering the food supply – particularly given that the proposed 2013 federal budget decreases funding for cattle health care programs by twenty percent from 2011.[16]

In 2009 and 2010, Congress began to consider implementation of a Downed Animal Food Safety and Protection Act.[17] While prior proposed bills covered only cattle, more recent versions of the legislation cover a broader range of downed animals. Meanwhile, citing the same concerns of food supply safety and the prevention of needless cruelty, a number of states proposed their own regulations banning downed animals in the food supply by mandating humane euthanasia. This past year, one such California law (penal code 599f), requiring the humane euthanasia of non-ambulatory pigs, was challenged in the U.S. Supreme Court by the National Meat Association and other organizations, including the National Organization of Swine Veterinarians.[18] Reversing the 9th Circuit, the Supreme Court held that the Federal Meat Inspection Act's pre-emption clause applied broadly to any additional or different state regulations of slaughterhouses.[19] After considering arguments that the state law regulates only the kind of animal that could be slaughtered, not the

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[12] *See* Exhibit A attached hereto: United States Department of Agriculture, Food Safety and Inspection Service, Kenneth E. Peterson, D.V.M., M.P.H., Assistant Administrator's March 8, 2010 letter in response to a citizen's inquiry.

[13] *Id*. See also 9 CFR 309,13(b).

[14] *Case Finally Closed on "Downers" Loophole*, March 14, 2009, at: http://hsus.typepad.com/wayne/2009/03/obama-downers.html (last visited June 5, 2012).

[15] *Abused Calves at Vermont Slaughter Plant*, October 30, 2010, at: http://www.humanesociety.org/news/news/2009/10/calf_investigation_103009.html (last visited June 5, 2012).

[16] *See USDA Reveals More Details About Latest "Mad Cow,"* Dan Flynn, Food Safety News April 28, 2012 at: http://www.foodsafetynews.com/2012/04/usda-gets-more-details-out-about-latest-mad-cow/ (last visited June 5, 2012). And *see Analysis: U.S. Mad Cow Find: Lucky Break or Triumph of Science?* Charles Abbott, April 25, 2012 at: http://www.reuters.com/article/2012/04/25/us-usa-madcow-testing-idUSBRE83O1LE20120425 (last visited June 5, 2012)

[17] *See* H.R.4356, 111th Congress.

[18] *See National Meat Association v. Harris* 2012 WL 171119 (2012).

[19] *Id*.

slaughter itself, the Court found that pre-emption prevents a state from imposing humane slaughter requirements even where state law does not conflict with the federal law.

The bill is needed to enhance protection to the food system.[20] Furthermore, the requirement for immediate euthanasia would prevent animals from suffering extreme cruelties such as that revealed in the HSUS investigation. By setting slaughter requirements for downed animals at the federal level, the bill would also follow the guidelines set forth in *Harris*. Given that the *Harris* decision has clearly prevented the states from regulating against the inclusion of downed animals in the food supply and/or from requiring their humane euthanasia, it has become even more imperative that such protections be implemented at a federal level. The Committee applauds and approves this measure for these reasons.

However, we recommend that (1) the legislation, like the previously proposed H.R. 4356, specify that animals which must be moved for testing be rendered unconscious by a method that would cause them to remain unconscious until death and (2) a more specific definition of and method for unconsciousness be added with regard to those instances in which downer animals absolutely must be moved.

Given that the purpose of the bill is to require the immediate euthanasia of downer livestock, it appears that the legislation was drafted with intent to, among other things, alleviate the suffering of downer animals. Indeed, the lead item among enumerated reasons for adopting the bill is that "…Congress finds the humane euthanization of nonambulatory livestock in interstate and foreign commerce…prevents needless suffering…." The goal of preventing needless suffering of downer animals would be further achieved by ensuring that the method of inducing unconsciousness be specified. We further note that there appears to be no justification legally or ethically for permitting any method other than the most humane alternative.

While we do not claim expertise in this area, we suggest Congress consider that an injection, such as a barbiturate overdose, to be administered by a licensed veterinarian as a humane method of rendering an animal unconscious.[21] Not only is this method the most humane alternative; it would have the added benefit of ensuring that the downer animal absolutely be excluded from the food chain for human or pet food. As hereinabove cited, the HSUS investigation of Westland/Hallmark highlighted numerous cruel methods by which downed animals were moved and ultimately kept in the slaughter process.

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[20] It should also be noted that, the proposed legislation would help clarify and harmonize the *Harris* decision and existing federal regulations, given that permitting any downed animals into the food chain arguably violates 21 U.S.C. §331, which prohibits the receipt into interstate commerce of adulterated food, the definition of which includes whole or partial products of diseased animals.

[21] *The Emergency Euthanasia of Sheep & Goats; Consideration for Owners, Producers, Auction Market Operators, Livestock Transporters, and Law Enforcement Officers (November, 1999)*, Paul Hullinger, DVM and Carolyn Stull, PhD, November, 1999, at: http://www.vetmed.ucdavis.edu/vetext/INF-AN/INF-AN_EMERGEUTH-SHEEPGOAT.HTML (last June 5, 2012).

See also: AVMA Guidelines on Euthanasia (2000), at: http://www.avma.org/issues/animal_welfare/euthanasia.pdf *stating*: "[a]ll barbituric acid derivatives used for anesthesia are acceptable for euthanasia when administered intravenously. **There is a rapid onset of action, and loss of consciousness induced by barbiturates results in minimal or transient pain associated with venipuncture**" (emphasis added). (Last visited June 5, 2012).

In addition, the use of a captive bolt gun *operated by a trained professional*[22] appears to represent a humane alternative.[23] A captive bolt gun consists of a steel bolt powered by compressed air or a blank cartridge, and when used properly it is supposed to painlessly render an animal unconscious by inducing "instant insensibility by both concussion and physical destruction of the brain."[24] This method is both more reliable than electrical stunning (which has been documented not to work well on dehydrated animals, among other problems).[25] A study by Temple Grandin of the Colorado State University's Department of Animal Science (revised 2008) noted that, "Captive bolt stunning induces instant insensibility by both concussion and physical destruction of the brain."[26] This study also shows that for this method to be reliably humane, however, it is essential to ensure that stunners are operated by trained individuals, and are properly maintained.[27] Moreover, the USDA report cited herein notes that the use of multiple stuns of an animal are considered inhumane under the Humane Slaughter Act, as amended in 1978.[28]

CONCLUSION

This Committee fully supports the bill and believes that enacting H.R. 3704 would be a step toward reducing the food safety risks and the animal suffering related to the treatment of downed

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[22] See USDA Food Safety And Inspection Service *Special Survey on Humane Slaughter and Ante-Morten Inspection*, prepared by Technical Service Center, Omaha, NE, at: http://www.fsis.usda.gov/OA/pubs/antemort.pdf (last visited June 5, 2012) (citing "…inexperienced operators, misplacement of the stunner or misfiring of the stunner," as the usual reasons why the use of a captive bolt gun resulted in an ineffective stun).

Similarly, the FSIS stated in a recent report that a well trained and experienced establishment employee must operate stunning devices. See *Disposition, Food Safety: Humane Handling of Livestock*, August 26, 2009, at http://www.fsis.usda.gov/PDF/LSIT_HumaneHandling.pdf (last visited June 5, 2012).

[23] Several types exist, including a penetrating captive bolt gun consisting of a steel bolt powered by compressed air or a blank cartridge, a non-penetrating captive bolt (which strikes the forehead then retracts), and a free-bolt stunner, for emergency situations (which must be pressed directly against the animal's head). *See: Animal Welfare and Humane Slaughter*, Temple Grandin and Gary C. Smith, Department of Animal Sciences, Colorado State University, updated November 2004, at: http://www.grandin.com/humane/captive.bolt.html and: http://www.grandin.com/references/humane.slaughter.html (both last visited June 5, 2012).

[24] *Recommended Captive Bolt Stunning Techniques for Cattle*, Temple Grandin, updated March 2009, at: http://www.grandin.com/humane/cap.bolt.tips.html (2009) (last visited June 5, 2012).

[25] *Id*.; See also *How to Determine Insensibility in Cattle, Pigs, and Sheep in Slaughter Plants*, Temple Grandin, Dept. of Animal Science, Colorado State University, revised October 2008, at: http://www.grandin.com/humane/insensibility.html (last visited June 5, 2012).

[26] *Id.*

[27] *See: Captive Bolt* Stunning *and Animal Welfare and Humane Slaughter*, Temple Grandin and Gary C. Smith Department of Animal Sciences, Colorado State University, updated November 2004 http://www.grandin.com/humane/captive.bolt.html and http://www.grandin.com/references/humane.slaughter.html (both last visited June 5, 2012).

[28] *See* the USDA Food Safety and Inspection Service *Special Survey on Humane Slaughter and Ante-Morten Inspection*, prepared by Technical Service Center, Omaha, NE at: http://www.fsis.usda.gov/OA/pubs/antemort.pdf (last visited June 5, 2012).

cattle at covered entities. We make certain recommendations. First, the bill's protections should be extended to specify that, if the Secretary of Agriculture deems it necessary to move certain downed animals to test them for disease, it should be mandated that the method used to render the animals unconscious be one that causes the animal to remain unconscious until death. This addition would reduce the suffering of these animals and would fully harmonize this legislation with the 2010 bill offered to address the same issues and policy concerns with regard to cattle alone. Second, we recommend that the bill narrowly define the methods by which downed animals be rendered unconscious prior to being moved, as this would further reduce the unnecessary suffering of slaughtered animals.

June 2012

Exhibit A
June 2012 New York City Bar
Association Animal Law Report

United States Department of Agriculture
Food Safety and Inspection Service
Washington, D.C. 20250

March 8, 2010

Dear Sir or Madam:

Thank you for your correspondence to the Department of Agriculture (USDA) regarding the handling of veal calves at a Vermont facility. USDA's Food Safety and Inspection Service (FSIS) has been asked to provide a response to you. We appreciate the opportunity to address your concerns.

As you know, USDA launched an immediate investigation upon learning of an undercover video produced by the Humane Society of the United States (HSUS) that depicted animal abuse at Bushway Packing, Inc., of Grand Isle, Vermont. The deplorable scenes recorded in the video released by HSUS are unequivocally unacceptable. USDA's FSIS is continuing its investigation into alleged violations depicted in the video.

In addition to its ongoing investigation, FSIS immediately suspended inspection at the plant, effectively shutting it down. USDA fully supports the investigation of all those involved in these alleged violations of the Humane Methods of Slaughter Act (HMSA), which requires that all livestock at federally inspected establishments be handled and slaughtered in a humane way. To this end, the Secretary has also called on USDA's Inspector General to conduct a criminal investigation of the events in the video.

FSIS has a rigorous program to train inspection program personnel in verifying humane handling and slaughter at establishments. When an FSIS employee observes behaviors that are not in compliance with the HMSA, they are obligated to take immediate action. FSIS takes its obligation to enforce this law very seriously, and our inspection program personnel are authorized and expected to stop production if they witness egregious violations of the regulations. Our goal is to prevent the needless suffering of animals while protecting the safety of the food supply.

Congress provided additional funds in Fiscal Year 2009 for humane handling enforcement. FSIS has created additional positions to further boost its humane handling verification inspection activities. FSIS already has strategically placed most of these additional in-plant personnel at locations where they can enhance humane handling enforcement. The Agency has also established a headquarters-based humane handling coordinator position. This new position has primary responsibility for providing consistent oversight of field level humane handling activities, particularly those of the District Veterinary Medical Specialists.

Under the final rule that FSIS published in March 2009, all non-ambulatory disabled cattle that are offered for slaughter, including non-ambulatory veal calves, must be condemned and disposed of in accordance with Title 9 of the Code of Federal Regulations (CFR), section 309.13. However, we should point out that 9 CFR 309.13(b) does provide that veal calves that are unable to rise from a recumbent position and walk because they are tired or cold may be set apart and held for treatment, but only under appropriate FSIS supervision.

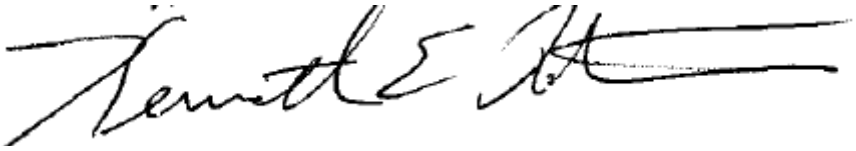
USDA regulates the treatment of livestock under the authority of the HMSA. The HMSA protects animals when they are presented for slaughter at federally inspected establishments. For animals within FSIS' jurisdiction, the Agency does not hesitate to take enforcement action against those establishments that fail to meet humane handling requirements. However, implementing policies for the humane handling of animals requires the combined efforts of Federal, State, and local authorities, as well as those of private industry.

Regarding the transportation of calves, please be aware that FSIS jurisdiction and food safety responsibilities begin when the animal reaches the slaughter establishments, not at the farm. State laws generally govern the treatment of farm animals.

Further information about FSIS' regulation of humane methods of livestock slaughter can be found at the following Web site:
http://www.fsis.usda.gov/regulations_&_policies/Humane_Methods_of_Slaughter/index.asp.

Thank you again for your message. We hope this information is helpful to you.

Sincerely,



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