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State of West Virginia
DEPARTMENT OF AGRICULTURE
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United States Department of Agriculture
FSIS Docket Clerk
Docket #03-025IF
Room 102, Cotton Annex
300 12th and C Street, SW
Washington, DC 20250-3700

On behalf of the State of West Virginia, I am submitting our additional comments concerning the interim final rule on *Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle*, as promulgated by the Food Safety and Inspection Service in the *Federal Register* of January 12, 2004. Please note that the comments below are offered in addition to our previous extensive comments submitted to the FSIS Docket Clerk on February 11, 2004.

During a further analysis of the interim final rule, we have noted that the rule does not address shipment of cattle carcasses, 30 months of age and older, without the removal of Specified Risk Materials (SRMs) before shipment. We are aware that, following promulgation of the interim final rule, the Food Safety and Inspection Service (FSIS) issued their field inspection personnel five (5) FSIS Notices that interpret the provisions of the interim final rule. One of the internal documents, FSIS Notice 9-04, dated January 23, 2004, on page 5, question 5, implies that an official establishment may ship out carcasses which contain SRMs.

In our judgment, in order to avoid potential exposure to the BSE prion, carcasses containing SRMs must not be allowed to leave any official slaughter establishment. We disagree with FSIS' current policy that allows official slaughter establishments to ship carcasses with SRMs to official processing establishments under an assumption that those processing plants will remove SRMs. Further, such a policy raises the issue of significance of the inspection mark ("Inspected and Passed") on carcasses with SRMs. Since SRMs are inedible, a carcass containing inedible parts must not carry inspection marks. Otherwise, the public's confidence in marks of inspection, as symbols of meat safety in the U.S., may deteriorate. We believe that such half-measures may compromise public health protection. Therefore, we propose a regulatory provision that will prohibit the shipment of bovine carcasses containing SRMs to another establishment. Such a regulatory measure will eliminate the possibility that SRMs reach the consumer due to an error or negligence at a processing plant.

Should FSIS reject the above proposal, the agency must make it clear that carcasses with SRMs must not be shipped to uninspected establishments such as retail stores or restaurants. The interim final rule makes no reference to such a prohibition. Some comments made by FSIS officials after promulgation of the interim final rule suggested that carcasses with SRMs could be shipped to retail outlets, which would be responsible for removal of SRMs. This is a totally unrealistic expectation. FSIS would need to have an army of compliance officers to enforce the requirement at the retail store level. Previously cited FSIS Notice 9-04 further clouded the issue by posing a question inspection personnel may seek answers to while verifying an establishment's compliance with the new rules: "*Does it [the shipping establishment] have procedures to ensure that the SRMs are removed at the receiving establishment?*" First, a shipping establishment cannot have verifiable procedures that will be performed at the receiving establishment. Second, the term "establishment" is quite broad and, in addition to an official establishment, encompasses retail stores, restaurants, custom-exempt establishments, etc. (9CFR Part 303). Therefore, a clear prohibition on the shipment of carcasses with SRMs to all uninspected establishments, if not all establishments, is necessary. This prohibition must be included in the final rule, not in an FSIS internal document, in order that public health protection will not be compromised.

We note that four of the five FSIS Notices interpreting the final interim rule will expire on February 1, 2005, and FSIS Notice 10-04 will expire on March 1, 2005. Thus, in the absence of such guidance in the future, we doubt that uniform interpretation of the final rule by FSIS inspection personnel will occur.

Finally, we have a broader comment on FSIS' rule-making approach. It is evident that FSIS Notices are far more extensive and detailed than the interim final rule. Although intended only as FSIS internal documents, they carry the weight of regulatory requirements. They will expire early next year; but for years to come, FSIS inspection personnel will equate them with FSIS regulations. In addition, explanations and interpretations in FSIS Notices quite often go far beyond the regulatory provisions. Therefore, FSIS should propose more inclusive rules that would incorporate all of the permanent regulatory provisions. Such an approach would eliminate the unfavorable impression that internal FSIS documents are used to circumvent the open rule-making process.

On behalf of the State of West Virginia,

Gus R. Douglass
Commissioner

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