

June 10, 2013

The Honorable Richard Martinez
New Mexico State Senator
P.O. Box 762
Española, NM 87532

Re: Attorney General Opinion Request—New Mexico Food Act

Dear Senator Martinez:

You have requested our advice regarding the New Mexico Food Act, NMSA 1978, Sections 25-2-1 to -19 (1951, as amended through 1993) (“NM Food Act”). You ask two questions: (1) Is horse meat from U.S. horses adulterated under the Act? (2) Is the manufacture of horse meat from U.S. horses illegal under the Act? According to your letter: “I am very concerned that New Mexico is about to become the first state to allow the slaughter of horses since 2007... despite the fact that to do so may be in violation of New Mexico’s laws that prohibit the manufacture of any food that is adulterated.” Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude horse meat from U.S. horses would fit the legal definition of an adulterated food product under the NM Food Act if the meat came from horses that had been treated with chemical substances that the federal Food and Drug Administration (“FDA”) has deemed unfit for human consumption. We also conclude that if horse meat were an adulterated food product, the NM Food Act would prohibit its manufacture, sale or delivery.

1. Status of Horse Meat from U.S. Horses under the NM Food Act

The NM Food Act, in relevant part, reads:

A food shall be deemed to be adulterated...if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such [food] does not ordinarily render it injurious to health.

NMSA 1978, § 25-2-10(A)(1) (1965). “Food,” for the purposes of the Act, includes “articles used for food or drink for man or animals....” Id. § 25-2-2(F).

The NM Food Act does not provide a definition for “poisonous” or “deleterious.” Statutory language should be given its plain meaning. See Cooper v. Chevron, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61. The dictionary definition of poison is “a substance ... that in suitable quantities has properties harmful or fatal to an organism when it is brought into contact with or absorbed by the organism.” Webster’s Third New International Dictionary 1751 (1st ed. 1986). The dictionary definition of deleterious is “hurtful, destructive, noxious, pernicious.” Id. at 596.

In 2010, the scientific journal Food and Chemical Toxicology published an article titled “Association of phenylbutazone usage with horses brought for slaughter: A public health risk.” Nicholas Dodman, Nicolas Blondeau & Ann Marini, *Association of phenylbutazone usage with horses brought for slaughter: A public health risk*, 48 Food and Chemical Toxicology 1270 (2010). The study stated: “Phenylbutazone (PBZ) was marketed in the United States for the treatment of rheumatoid arthritis and gout in 1952. Serious and often fatal adverse effects such as aplastic anemia and agranulocytosis appeared in the literature within three years of its use.” Id. at 1270. The study stated: “Because of the bone marrow toxicity caused by PBZ in humans, the Food and Drug Administration (FDA) has set no safe levels of PBZ in animals intended for food” and “bans the administration of this drug in any horse sent to slaughter for human consumption.” Id.; see also 21 CFR § 1720d (2003) (FDA regulation prohibiting use of PBZ “in horses intended for food”).

The study attempted to track sixty-eight American race horses that were scheduled, or sent, to American or international slaughter houses from 2004 to 2008. See id. at 1271. The study was able to obtain health records for thirty-four of the horses. PBZ is “the most widely used” anti-inflammatory drug given to race horses. See id. at 1270. The study found that all thirty-four horses, including all of the horses that were actually sent to a slaughter houses, had “a positive history of PBZ administration.” Id. at 1271. The data showed:

the time interval from the last known dose of PBZ to the animal being bought for slaughter varies from about one week to four years. In our study, four years may be a safe withdrawal time since a horse was given PBZ prior to being sent to slaughter. However, the FDA does not allow any use of PBZ in horses destined for human consumption and neither does the United Kingdom (UK) or the European Union (EU) regardless of withdrawal time.

Id. at 1272. The study also noted that: “Domestic horses may need medications to treat bacterial or viral infections... parasitic infections and certain vaccines are also required by law. Many of the drugs used to treat ... [these] illnesses are also banned if the animal is sent to slaughter for human consumption.” Id. at 1273.

The study concluded: “the FDA, like the EU and UK, specifically bans the use of PBZ in any horse destined for slaughter for human consumption. Yet, this ban is being circumvented because there is no pre-slaughter mechanism to determine and remove horses that receive PBZ during

their lifetime.” *Id.* at 1273.¹ “The lack of oversight to prevent horses given PBZ from being sent to slaughter for human consumption ... indicates a serious gap in food safety and constitutes a significant public health risk....” *Id.*

There are other studies and scientific statements on this matter. For example:

In 2007, the USDA Food Safety and Inspection Service stated that “phenylbutazone is considered to be one of the most toxic non-steroidal anti-inflammatory drugs. It is not approved for use in food animals and there are no regulatory limits, such as acceptable daily intake or safe concentration for meat, established by the Food and Drug Administration. Therefore, the presence of any amount of phenylbutazone in food animal tissue will be considered a violation and likely to be unsafe for human consumption.”

News-Medical Net website, [www.news-medical.net/phenylbutazone in horsemeat detected by Thermo Fisher Scientific Test](http://www.news-medical.net/phenylbutazone_in_horsemeat_detected_by_Thermo_Fisher_Scientific_Test) (Apr. 4, 2013).

Another example is a recent statement issued by the European Union’s Food Safety Authority regarding horse meat sold to its member counties/states:

Controls in Member States have revealed the presence of phenylbutazone in horse carcasses intended for the food chain.... The Committee for Veterinary Medicinal Products assessed the consumer safety for phenylbutazone in 1997 and identified the main risks for the consumer as idiosyncratic blood dyscrasias and the genotoxic/carcinogenic potential for which no thresholds could be identified and no maximum residue limits could be established. The substance can therefore not be used in animals destined to enter the food chain.

European Food Safety Authority, *Joint Statement of EFSA and EMA on the presence of residues of phenylbutazone in horse meat*, 11(4) European Food Safety Authority Journal 3190 (2013).

The NM Food Act states a “food shall be deemed to be adulterated ... if it bears or contains any poisonous or deleterious substance which may render it injurious to health....” NMSA 1978, § 25-2-10(A)(1) (1965). As discussed above, scientific studies and the FDA have concluded that PBZ and other chemicals used to treat U.S. horses are “deleterious” and “injurious to health”

¹ Reportedly, the European Union requires a slaughtered horse to have a health record “passport” prior to entering the food chain, but failure in this system has recently been subject to criticism. See New York Times website, www.nytimes.com, Stephen Castle, *Europe Says Tests Show Horse Meat Scandal is “Food Fraud”*, New York Times (Apr. 16, 2013) (“Two months after a horse meat scandal first gripped Europe, tests conducted by European Union countries showed ... Britain had detected the most traces of a painkiller banned from the human food chain.”).

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within the Act's definition. Accordingly, horse meat originating from U.S. horses that have been treated with PBZ and other deleterious substances would be deemed "adulterated."

2. Manufacture of Adulterated Horse Meat

The NM Food Act provides: "The following acts and the causing thereof within the state of New Mexico are hereby prohibited: the manufacture, sale or delivery, holding or offering for sale of any food that is adulterated or misbranded." NMSA 1978, § 25-2-39(A) (1951). The Act applies to the "manufacture" of food in New Mexico regardless of where the food is ultimately sold or consumed. Therefore, we conclude the manufacture of horse meat from U.S. horses, if adulterated as stated above, is prohibited and illegal under the Act. A violation of the Act is a serious matter and may result in a criminal misdemeanor charge, imposition of monetary fines and seizure of the food product. See NMSA 1978, § 25-2-5(A) (1982); § 25-2-6(A) (1982).

Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Zachary Shandler
Assistant Attorney General

cc: Deborah Peacock, Chair, N.M. Environmental Improvement Board
Bill Sauble, Chair, N.M. Livestock Board