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THE HUMANE SOCIETY OF THE UNITED STATES
Celebrating Animals : Confronting Cruelty

Fax

To: Secretary Vilsack – U.S. Department of Agriculture **From:** Jonathan Lovvorn

Fax: (202) 720-2166 **Pages:** 7 **(includes fax cover sheet)**

Date: February 1, 2012

RE: Notice of Domestic and International Legal Issues Concerning the Resumption of Horse Slaughter in the United States

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THE HUMANE SOCIETY
OF THE UNITED STATES

February 1, 2012

The Honorable Thomas J. Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Re: *Notice of Domestic and International Legal Issues Concerning the Resumption of Horse Slaughter in the United States*

Dear Secretary Vilsack:

On behalf of The Humane Society of the United States (HSUS), I am writing concerning Congress's decision to reinstitute funding for the inspection of horse slaughter facilities as part of the Fiscal Year (FY) 2012 Agriculture Appropriations Bill. Although funding is now available for inspections for the first time since 2006, such inspections cannot resume without administrative action by the U.S. Department of Agriculture (USDA).

The purpose of this letter is to remind USDA of the domestic and international legal obstacles to the resumption of horse slaughter in the United States, and to inform the agency that HSUS will take aggressive legal action to enforce those obligations. In particular, and as outlined below, prior to the resumption of inspections of horse slaughter facilities, the agency must first prepare an environmental review under the National Environmental Policy Act (NEPA) and modify its existing regulatory framework to comply with the European Union's (EU's) new requirements concerning residues in food products, including horsemeat.

I. Background

In 2006, nearly 105,000 horses were slaughtered in the U.S. for human consumption, with the majority of the horsemeat exported to markets like the EU and Japan. Most of the horses were raised for purposes other than food production and were in good condition before being sent to slaughter. The price per pound of horsemeat, however, outweighed the benefit of keeping the animals alive. Horses that ended up in slaughterhouses did not meet a humane and painless death. Instead, they were subject to terror, pain and suffering both in transport and slaughter. This cruelty, committed to service foreign demand for horsemeat, prompted Congress to add a defunding provision to the FY 2006 Agriculture Appropriations Bill that prohibited the use of federal funds to pay for salaries and expenses of personnel to inspect horses being slaughtered for human consumption.

This effectively precluded the USDA from inspecting horse slaughter facilities as required by section 603 of the Federal Meat Inspection Act (FMIA) and section 903 of the Federal Agriculture Improvement and Reform Act (FAIR).

The three remaining horse slaughter producers in the U.S. petitioned USDA for emergency rulemaking to create a fee-for-service inspection program that would have allowed inspections to continue (underwritten by each company) and, consequently, for horse slaughter facilities to continue operation. Following a significantly truncated notice and comment period, USDA published an interim final rule in the Federal Register. The failure of USDA to comply with the notice and comment requirements under the Administrative Procedure Act (APA), and the failure of USDA to conduct an environmental review under NEPA prior to its decision to restart inspections, was the subject of *The Humane Society of the United States v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007).

In *Johanns*, the court agreed that USDA was required to assess the environmental effects of horse slaughter operations pursuant to NEPA before it issued the interim rule creating a fee-for-service ante-mortem horse slaughter inspection system.[1] As a result, the court vacated the interim rule and permanently enjoined USDA from implementing a fee-for-service inspection system.[2] Without resources for federal inspections, and in light of the court's ruling in *Johanns*, all domestic horse slaughter facilities ceased operation by 2007. Since that time, no horses have been slaughtered for commercial production in the United States.

II. NEPA Review and the Issuance of New Rules and Regulations are Necessary Before Inspections Can Begin

In the FY 2012 Agriculture Appropriations Bill, Congress reinstituted funding for horse slaughter inspections. However, in order to comply with the court's judgment in *Johanns*, USDA must assess the environmental impacts of horse slaughter operations in accordance with NEPA prior to starting horse inspections.

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[1] *Johanns*, 520 F. Supp. 2d at 29.

[2] *Id.*

In finding that USDA violated NEPA and the APA, the court in *Johanns* held that: (1) USDA's decision to restart inspection of horse slaughter facilities was a major Federal action that was the legally relevant cause of the environmental impact; (2) USDA's decision did not simply maintain the status quo; and (3) USDA's failure to scrutinize the decision's eligibility for categorical exclusion from NEPA analysis was arbitrary and capricious.[3] These holdings are directly applicable here.

First, NEPA review would be required for USDA to approve any permit application for inspection of a horse slaughter facility. In order to be eligible for inspection pursuant to the FMIA, a horse slaughter facility must apply for inspection, and review of that application necessarily involves USDA assessing detailed paperwork regarding the premises, standard operating procedures, and management of waste-streams, including sewage and water.[4] It was undisputed in *Johanns* that horse slaughter operations significantly impacted the environment.[5] Indeed, individual plaintiffs living in the vicinity of the horse slaughter plants testified about the daily stench from the plants and the fact that they would find horse blood in their bathtubs, sinks and toilets. USDA must analyze the potential for those and all other environmental impacts before approving any permit applications. This analysis of course is precisely the type of "major Federal action" that triggers NEPA review.[6]

Second, Sections 603(a) and 621 of the FMIA respectively, require the inspection of animals to be slaughtered for meat and meat food products in accordance with "rules and regulations" prescribed by the Secretary, and for the Secretary to "promulgate rules and regulations" to ensure the efficient execution of the provisions of the chapter. Given that horse slaughter operations closed down several years ago, a reopening would require USDA to update existing regulations, directives, or other policy documents to "ensure the efficient execution" of the FMIA, especially in light of new export requirements in the EU – the United States' major export market. As in *Johanns*, any action by USDA to restart slaughter inspections through agency rulemaking, policy documents, alteration of existing programs or adoption of new programs would constitute a "major Federal action" requiring NEPA review.

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[3] *Id.* at 19 - 35.

[4] 9 C.F.R. § 416.2; *see also* General Information, Applying For a Grant of Inspection, USDA, available at **http://www.fsis.usda.gov/PDF/Grant_of_Inspection.pdf** ("Prior to the inauguration of inspection, when the owner or designee believes they have met the necessary requirements (e.g. developed a written Sanitation SOP, conducted a hazard analysis and HACCP plan, prepared labels, and facility), to start operations they will notify their contact person. Upon notification to your assigned contact Frontline Supervisor (FLS), the D M or designee will schedule a date and time to conduct an on-site review of the establishment and documents by inspection personnel. If all items meet regulatory requirements, a "Conditional Grant of Inspection" will be issued. During a period not to exceed 90 days, which new product can be produced for distribution in commerce, the establishment shall validate its HACCP plan adequacy in controlling the food safety hazards identified during the hazard analysis, and shall verify that the plan is being effectively implemented in accordance with 9 CFR 417.4. Refer to 9 CFR Parts 304.3, 305.4, 381.26 and 381.27")

[5] *Johanns*, 520 F. Supp. 2d at 20.

[6] *Id.* at 19-22.

Third, because the majority of horses slaughtered in the U.S. traditionally went to European markets, restarting horse slaughter inspections would likely require USDA to impose far-reaching new procedures and rules related to horse slaughter, and to comply with new EU requirements concerning residues in food products such as horsemeat. Specifically, in 2009, the EU introduced Regulation (EC) No 470/2009 which describes required procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin.[7] The Regulation applies to EU producers and to third countries. As a result of Regulation (EC) No 470/2009, third countries wishing to export to the EU must not only continue to submit a residue control plan, as previously required,[8] but must now also submit an action plan setting out how they will implement new requirements mandating:

- creation of a system of identity verification for equine animals intended for food production;
- a prohibition on the use of anabolic steroids in equidae intended for meat production in the EU or a system of segregating equidae treated with steroids;
- establishment of a system providing that all equidae have lifetime[9] treatment records documenting all substances they have been treated with (food chain information);
- competent third country authorities to guarantee compliance with required withdrawal periods for veterinary medicinal products administered to equidae; and
- third countries exporting equine meat to set up a risk-based program for controls on the use of veterinary medicinal products and substances banned for use in the EU.[10]

Given that U.S. slaughter facilities were not in operation when the 2009 Regulation went into effect, the U.S. has not taken steps to comply with these new requirements. Significant changes to the U.S. regulatory framework governing inspection and export of horsemeat will be needed if the U.S. wishes to resume exportation of horsemeat to the EU. For example, the U.S. does not require that horses for slaughter be accompanied by a document detailing every substance that horse has been treated with over its lifetime. Since horses in the U.S. are regularly

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[7] *See* Regulation (EC) No 470/2009 *available at:* **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:152:0011:0022:EN:PDF**

[8] Prior to the cessation of horse slaughter facilities in the U.S. in 2007, third countries wishing to export horsemeat to the EU were required to submit a residue control plan under Council Directive 96/23/EC. *See* Council Directive 96/23/EC on Measures to Monitor Certain Substances and Residues Thereof in Live Animals and Animal Products (29 April 2006), *available at:* **http://ec.europa.eu/food/food/chemicalsafety/residues/ council_directive_96_23ec.pdf.** If EU authorities accepted the plan, the third country would be placed on an approved list of exporting nations. *See* Commission Decision on the approval of plans submitted by third countries in accordance with Article 29 of Council Directive 96/23/EC (16 March 2011), *available at:* **http://ec.europa.eu /food/food/ chemicalsafety /residues/council_ directive_96_23ec.pdf.** The U.S. was on the approved list.

[9] For a transitional period of three years, third countries have to provide guarantees for horses for the last six months before slaughter. After that period, the guarantees have to be provided for the lifetime of the horse as is required in the EU. *See* Commissioner Dalli response to Parliamentary Question E-9125/2010.

[10] *See Residues of Veterinary Products, Third Countries,* Europa Website, *available at:* **http://ec.europa.eu /food/food/chemicalsafety/residues/third_countries_en.print.htm.**

treated with phenylbutazone,[11] a substance that is banned in all animals intended for human consumption in the EU,[12] the absence of a system providing the horse's sworn medical history will prevent the U.S. from meeting the requirements in EU Regulation (EC) 470/2009. Even in instances where horses may have some treatment records available, there are no guarantees on the veracity of these records.[13]

In addition to the treatment records issue, to resume exportation to the EU, USDA will have to set up a system to segregate horses treated with certain steroids, establish risk-based programs for the use of veterinary medical products and substances prohibited for in the EU, and guarantee that required withdrawal periods are respected. Voluntary or private action to comply with these requirements will not provide the guarantees necessary for approval for export. Instead, it will be incumbent upon USDA to formalize changes to the existing regulatory framework.

As in *Johanns*, these major Federal actions would be the legally relevant cause of the environmental effect of the operation of horse slaughter facilities since horse slaughter could not take place until USDA/FSIS conducts inspections.[14] Moreover, a decision to restart inspections, after horse slaughter facilities have been closed since 2007, is a change in the status quo. The court in *Johanns* explained that the decision to restart inspections constituted a change in the status quo such that USDA's action was not exempt from NEPA review.[15] The same reasoning applies here.

In sum, horse slaughter inspections *cannot* begin without the agency taking extensive proactive steps to comply with the law and binding court precedent.

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[11] *See, e.g.*, Dodman, N., et al., *Association of Phenylbutazone Usage with Horses Bought for Slaughter: A Public Health Risk*, Food Chem. Toxic. (2010), doi:10.106/j.fct.2010.02.021 (explaining that horses are not raised for food production in the U.S., and therefore may be treated with Phenylbutazone - the most widely used anti-inflammatory drug for horses due to availability and cost.)

[12] *See* EUROPA – Food Safety, *Imports of Animals and their Products from Third Countries, available at:* **http://ec.europa.eu/food/food/chemicalsafety/residues/third_countries_en.htm** ("Any horse in the EU treated with phenylbutazone must be excluded from the food chain and be signed out of the food chain in the equine passport.")

[13] Indeed, in response to the EU Regulation, Canada and Mexico had to modify their systems to comply with the new EU requirements. When the FVO carried out inspections in those countries, it found that both systems had gaps for horses originating in the U.S. (but which would be slaughtered in Canada and Mexico for export). *See* EU Final Report of an Audit Carried out in Canada from 23 November 2010 to 6 December 2010, DG (SANCO) 2010-8522 - MR FINAL at 15 (finding that "[t]he imported horses from the U.S. were accompanied by the signed Affidavit (EID) of the last owner, covering medical treatment during the last six months, which in many cases was a horse dealer. Nevertheless, no official guarantee was received...from the US authorities that this guarantee was verified and could be considered reliable."); EU Final Report of a Mission Carried out in Mexico from 22 November 2010 to 3 December 2010, DG(SANCO) 2010-8524 - MR FINAL at 7 (explaining that although imported horses originating in the U.S. were accompanied by a "sworn statement on veterinary medical treatments, USDA does not take any responsibility with regard to the origin of the animals, to the controls over US assembly centers and to the authenticity of the sworn statement.")

[14] *Johanns*, 520 F. Supp. 2d at 27.

[15] *Id.* at 20.

III. Conclusion

For the reasons outlined above, USDA must prepare an environmental review pursuant to NEPA prior to starting inspections for horse slaughter. The agency must also implement changes to its regulatory framework to address new EU standards for trade in horsemeat. Should USDA resume inspections without complying with the court's holding in *Johanns*, the HSUS will take appropriate legal action to enforce the Orders of the court.

Sincerely,

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