

Fighting for the U.S. Cattle Producer!



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January 27, 2009

The Honorable Tom Vilsack
Secretary of Agriculture
Attn: David Lazarus
Special Assistant to the Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Sent via Electronic Mail

Re: Follow-up on Urgent Rulemaking Priority Regarding USDA OTM Rule

Dear Secretary Vilsack,

Beginning in 2003, the U.S. Department of Agriculture (USDA) began dismantling longstanding safeguards that were established to prevent the introduction into the United States of bovine spongiform encephalopathy (BSE) from countries known to be affected by the always fatal disease. Since 2004, R-CALF USA filed three lawsuits to prevent USDA's systematic dismantling of U.S. disease prevention safeguards, and it won three separate preliminary injunctions against the agency. The latest preliminary injunction was against the agency's final rule published on Sept. 18, 2007, at 72 Fed. Reg., 53,314-379. This final rule, known as the over-30-month rule (OTM Rule), allows older Canadian cattle and beef from older Canadian cattle – both of which are considered of higher-risk for BSE – into the United States. The latest preliminary injunction resulted in the remand of the OTM Rule to USDA for reconsideration, and the rule remains open today.

Since 2003, nine BSE-positive cattle in Canada were found to be born after March 1, 1999, the date after which cattle born in Canada are eligible for importation into the United States under the OTM Rule. In other words, over half of Canada's BSE cases detected in Canadian-born cattle (9 of 16 cases) met the OTM Rule's import eligibility requirement as they were born after the March 1, 1999, date USDA claims that BSE was not likely circulating in the Canadian herd at sufficient levels to cause infection. In fact, Canada continues to detect BSE in cattle born years after infected material supposedly was removed from the Canadian feed system and Canada did not take steps until mid-2007 to close the loophole in its feed system that the World Organization for Animal Health (OIE) stated presented a "risk of recycling and amplification of the BSE agent within the country."¹

¹ Report of the Meeting of the OIE Scientific Commission for Animal Diseases, International Committee, World Organization for Animal Health (OIE), Paris, France, February 26-28, 2007, at 21.

Moreover, Canadian reports show that hundreds of herd mates of BSE-positive cattle have been slaughtered in Canada, creating potential further avenues of BSE infection, and at least 22 herd mates of Canadian BSE cases are known to have been imported into the United States.² These herd mates are themselves known to be of higher-risk for BSE, as they, like each BSE-positive animal, likely were exposed to the same BSE-contaminated feed. USDA's own risk modeling for the OTM Rule predicts that the rule will result in the introduction into the U.S. of between 19 to 105 BSE-infected Canadian cattle, resulting in 2 to 75 infections of U.S.-born cattle over the next 20 years.³

Canada is detecting more BSE cases under its *relaxed* testing regime than are being detected under the more thorough, *mandatory* testing regimes of many European Union countries where BSE risks are known to be high. In each of the years 2006 and 2007, Canada detected more BSE cases than Belgium, the Czech Republic, Denmark and the Netherlands; and in 2007, Canada detected more cases than did Switzerland – a country that has detected hundreds of BSE cases since 1990.⁴ The U.S. Centers for Disease Control and Prevention (CDC) estimates that Canada's BSE prevalence likely is between 18-fold and 48-fold higher than is the prevalence in the United States.⁵

The United States' increased risk of BSE-exposure resulting from the OTM Rule helps explain why the U.S. continues to experience severe difficulty in reopening lost export markets – a problem that has persisted for over five years, even though the United States has never detected the type of BSE in its native-born cattle herd that was responsible for the BSE outbreaks in the UK and Canada.⁶ The BSE strain found in the two cases detected in older U.S. cattle was an atypical strain not yet known to be spread by the consumption of contaminated feed, as is the classical strain found in the UK and Canada. Even today, the countries of Japan, South Korea and Mexico, each considered important U.S. export markets, refuse to accept U.S. beef derived from cattle over 30 months of age when slaughtered (Japan accepts only beef from animals less than 21 months of age when slaughtered), and both Japan and Mexico continue their refusal to import any ground beef from the United States.⁷

The OTM Rule significantly exacerbates the risk of introducing BSE as manifest in the previous USDA rule (known as the minimal-risk region rule (MRR Rule)), which first allowed the importation of live cattle and beef from Canada despite Canada's ongoing BSE problem. In March 2005, R-CALF USA won a preliminary injunction against the MRR Rule delaying the

² See Summary Reports 1-13, Completed Investigations, Canadian Food Inspection Agency, available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/comenqe.shtml>.

³ See 72 Fed. Reg., 1109, col. 2; 72 Fed. Reg., 53347, col. 1.

⁴ See Number of Reported Cases of Bovine Spongiform Encephalopathy (BSE) in Farmed Cattle Worldwide (Excluding the United Kingdom), World Organization for Animal Health (OIE), available at http://www.oie.int/eng/info/en_esbmonde.htm.

⁵ See Attachment 1, BSE (Bovine Spongiform Encephalopathy or Mad Cow Disease), Centers for Disease Control and Prevention, United States Department of Health and Human Services, available at <http://www.cdc.gov/ncidod/dvrd/bse/index.htm>.

⁶ See *id.*

⁷ See Global Beef Trade: Effects of Animal Health, Sanitary, Food Safety, and Other Measures on U.S. Exports, U.S. International Trade Commission, USITC Publication No. 4033, September 2008, at xvii.

rule's implementation for several months. In issuing the preliminary injunction against the MRR Rule, the U.S. district court judge stated, *inter alia*:

Therefore, the evidence demonstrates, in all probability, that the USDA's failure to conduct a proper risk assessment, and its failure to articulate any standards by which it has judged the risks of those potentially fatal outcomes to be acceptable, renders its action arbitrary and capricious and unsupported by the record.⁸

USDA appealed the preliminary injunction, and the 9th U.S. Circuit Court of Appeals (9th Circuit) ultimately upheld the MRR Rule, largely because it concluded it must be highly deferential in reviewing USDA's scientific conclusions. And although the 9th Circuit acknowledged that the numerous additional cases of BSE found in Canadian cattle, contrary to USDA predictions, "are certainly cause for concern,"⁹ the 9th Circuit concluded it could not consider that information because it was not information available to USDA when USDA adopted the MRR Rule at the end of 2004. Unfortunately, the MRR Rule is in effect and not subject to the Jan. 20, 2009, White House memorandum regarding regulatory review (although R-CALF USA believes that subsequent events demonstrate the invalidity of the assumptions on which the MRR Rule was based, and therefore USDA should revisit that rule). The OTM Rule, however, is subject to the White House memorandum.

R-CALF USA, five national consumer groups, the South Dakota Stockgrowers Association and other plaintiffs sought a preliminary injunction against the OTM Rule in U.S. district court. In granting a preliminary injunction against the OTM Rule on July 3, 2008, the U.S. district court considered only a fraction (seven) of the numerous arguments raised by R-CALF USA et al. in their verified complaint that justified overturning the OTM Rule entirely. The first argument raised by R-CALF USA et al. was that USDA failed to provide proper notice and opportunity for comment on its decision to allow imports of Canadian beef from cattle of any age (OTM beef) – meaning that OTM beef imports are not restricted by the March 1, 1999, cutoff date established for live cattle. The U.S. district court found that this first argument justified remand of the OTM Rule to USDA for additional administrative proceedings, and the court, therefore, did not reach a decision on any of the other numerous arguments raised in the case.¹⁰ The preliminary injunction order, *inter alia*, states:

That the case is remanded to the USDA to promptly provide notice and comment on the OTM beef provisions, to consider comments made by Plaintiffs and other interested parties, and to revise any provisions of the OTM Rule it deems necessary.¹¹

Emphasis added. In compliance with the preliminary injunction order, USDA's Animal and Plant Health Inspection Service (APHIS) published a request for comments at 73 Fed. Reg., at

⁸ See Attachment 2, Order of Preliminary Injunction and Opinion, March 2, 2005, at 9, 10.

⁹ 499 F.3d at 1117-18.

¹⁰ See Attachment 3, Memorandum Opinion and Order on Motion for Preliminary Injunction, July 3, 2008, at 12.

¹¹ *Id.*, at 21.

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54,083-89 and stated that the agency would “revise the rule as USDA deems necessary.” *Id.*, at 54,088, col. 2.

APHIS established Nov. 17, 2008, as the deadline for public comments on its request for comments, and R-CALF USA filed extensive comments on that date. Subsequently, the USDA Office of Inspector General (OIG) issued an audit report on the Evaluation of FSIS Management Controls Over Pre-Slaughter Activities that found that BSE mitigation measures critical to the protection of human health have not been properly performed or enforced.¹² In response to this OIG report, R-CALF USA submitted supplemental comments to APHIS on Dec. 10, 2008. APHIS did not publish a final agency action in this matter on or before noon on Jan. 20, 2009, and, therefore, the court-ordered decision to revise the OTM Rule is now under the purview of your Administration.

For the past six years, R-CALF USA members, numerous Members of Congress and State Attorneys General, consumer groups representing millions of U.S. citizens, and untold other individuals and organizations waged an intense, costly fight to prevent the weakening of our nation’s critical disease prevention safeguards. And during those six years, the previous Administration ran roughshod over all of us. However, our unwavering commitment to protect our cattle herd health and human health has resulted in our ability to deliver to you the opportunity to fully reverse the final and most egregious act of disease-safeguard abandonment committed by the past Administration – the act of throwing open our nation’s borders to cattle and beef known to be of increased risk for an always fatal disease.

Please accept this opportunity, which is only now available because of our tireless efforts, to begin to re-establish our nation’s disease prevention safeguards by swiftly and decisively overturning in its entirety the USDA OTM Rule. We stand ready, in any way possible, to help you achieve this crucial goal.

We are available to meet with you and/or your staff at your convenience to further discuss the urgent need for this action. Please contact R-CALF USA CEO Bill Bullard at 406-670-8157 or billbullard@r-calfusa.com should you require any additional information.

Respectfully,



R.M. Thornsberry, D.V.M.
President, R-CALF USA Board of Directors

Attachments 1-3

cc: Select Members of Congress

¹² See Audit Report, Evaluation of FSIS Management Controls Over Pre-Slaughter Activities, U.S. Department of Agriculture, Office of Inspector General, Great Plains Region, Report No. 24601-0007-KC, November 2008.