

# Proposed Rules

Federal Register

Vol. 73, No. 169

Friday, August 29, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

#### 9 CFR Part 309

[Docket No. FSIS-2008-0022]

RIN 0583-AD35

#### Requirements for the Disposition of Cattle That Become Non-Ambulatory Disabled Following Ante-Mortem Inspection

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** On May 20, 2008, the Secretary of Agriculture announced that the Food Safety and Inspection Service (FSIS) would begin working on a proposed rule to prohibit the slaughter of all non-ambulatory disabled cattle, without exception. As announced by the Secretary, FSIS is proposing to amend the Federal meat inspection regulations to remove the provision that states that FSIS inspection personnel will determine the disposition of cattle that become non-ambulatory disabled after they have passed ante-mortem inspection on a case-by-case basis. This proposed rule will require that all cattle that are non-ambulatory disabled at the time they are presented for ante-mortem inspection at an official establishment, and all those that become non-ambulatory disabled after passing ante-mortem inspection, be condemned and properly disposed of.

**DATES:** Submit comments on or before September 29, 2008.

**ADDRESSES:** FSIS invites interested persons to submit comments on this proposed rule. Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. FSIS prefers to receive comments through the Federal eRulemaking Portal.

Go to <http://www.regulations.gov> and, in the "Search for Open Regulations" box, select "Food Safety and Inspection Service" and "Proposed Rules" from the agency drop-down menu and then click on "Submit." In the Docket ID column, select the FDMS Docket Number to submit or view public comments and to view supporting and related materials available electronically. After the close of the comment period, the docket can be viewed using the "Advanced Search" function in Regulations.gov.

- *Mail, including floppy disks or CD-ROM's, and hand- or courier-delivered items:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 2534 South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250. All submissions received by mail or electronic mail must include the Agency name and docket number FSIS-2008-0022. Documents referred to in this proposal, and all comments submitted in response to this notice will be available for public inspection in the FSIS Docket room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday. Comments will also be posted on the Agency's Web site at: <http://www.fsis.usda.gov/>.

Individuals who do not wish FSIS to post their personal contact information—mailing address, e-mail, telephone number—on the Internet may leave this information off their comments.

**FOR FURTHER INFORMATION CONTACT:** Dr. Daniel Engeljohn, Deputy Assistant Administrator, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250-3700, (202) 205-0495.

#### SUPPLEMENTARY INFORMATION:

##### Background

On July 13, 2007, FSIS published the final rule, "Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle; Prohibition of the Use of Certain Stunning Devices Used To Immobilize Cattle During Slaughter" (72 FR 38700). Hereafter in this preamble, that rule will be referred to as the Specified Risk Material (SRM) final rule. The SRM final rule affirmed, with

certain amendments, interim regulations implemented by FSIS in 2004 to prevent potential human exposure to the bovine spongiform encephalopathy (BSE) agent (see "Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle" (69 FR 1862, January 12, 2004)). One of the interim measures that the SRM final rule affirmed was the prohibition of the slaughter of non-ambulatory disabled cattle offered for slaughter for human food (9 CFR 309.3(e)).

Consistent with the interim final rule, the SRM final rule requires that non-ambulatory disabled cattle be condemned on ante-mortem inspection because these animals present a sufficient risk of introducing the BSE agent into the human food supply to render their carcasses "unfit for human food" under section 1(m)(3) of the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601(m)(3)) (72 FR 38700). In the preamble to the SRM final rule, FSIS also acknowledged that requiring the condemnation of non-ambulatory disabled cattle that are offered for slaughter may be necessary to ensure that these animals are humanely handled in connection with slaughter as required under the Humane Methods of Slaughter Act (HMSA) of 1978 (7 U.S.C. 1901 *et seq.*) (72 FR 38721).

In addition to affirming the requirement that non-ambulatory disabled cattle be condemned on ante-mortem inspection, the SRM final rule amended 9 CFR 309.3(e) to provide that FSIS personnel would determine, on a case-by-case basis, the disposition of cattle that become non-ambulatory disabled after they have passed ante-mortem inspection. The Agency made this revision to codify existing practices formerly described in FSIS Notice 5-04 ("Interim Guidance for Non-Ambulatory Disabled Cattle and Age Determination") and FSIS Notice 05-06 ("Re-examination of Bovine that become Non-Ambulatory After Passing Ante-mortem Inspection"). These notices instructed FSIS public health veterinarians (PHVs) on the actions they were to take when cattle became non-ambulatory disabled after passing ante-mortem inspection.

Under the current regulations, slaughter establishments are expected to notify inspection personnel when cattle that have passed ante-mortem

inspection subsequently become non-ambulatory disabled before slaughter. If an FSIS PHV can verify that the animal became non-ambulatory disabled because it suffered an acute injury, such as a broken appendage or a severed tendon or ligament, it is tagged as "U.S. Suspect" (and is not tagged as "U.S. Condemned") and is eligible to proceed to slaughter (9 CFR 309.2). To ensure that non-ambulatory disabled cattle are humanely handled, the regulations require that establishment personnel move the animals to slaughter on equipment suitable for such purposes, or that establishment personnel stun the animals (9 CFR 313.2(d)). FSIS inspection personnel track "U.S. Suspect" cattle through the slaughter process for post-mortem (after slaughter) evaluation and reinspection (see FSIS Directive 6100.1, Ante-Mortem Livestock Inspection). If the PHV cannot determine whether the animal became non-ambulatory disabled from a specific injury, the animal is tagged as "U.S. Condemned" and is disposed of as provided in 9 CFR 309.13.

All provisions in the SRM final rule, including the prohibition on the slaughter of non-ambulatory disabled cattle, apply to official establishments and custom slaughter operations. As discussed in the preamble to the SRM final rule, although custom slaughter operations are exempt from inspection under section 23(a) of the Federal Meat Inspection Act, the meat and meat food products prepared in custom operations are still subject to the FMIA's adulteration and misbranding provisions (21 U.S.C. 623). Thus, custom operators are prohibited from slaughtering and preparing products from non-ambulatory disabled cattle because the carcasses of these animals are considered unfit for human food (72 FR 38704). In the preamble to the SRM final rule, FSIS noted that FSIS inspectors are not available to determine the disposition of cattle that become non-ambulatory disabled in a custom operation. Therefore, as explained in the SRM final rule preamble, if an animal becomes non-ambulatory disabled from an acute injury after its owner has delivered it to a custom operation for slaughter, the custom operator may slaughter the animal for human food if both the operator and the owner of the animal did not observe any other clinical abnormalities that could be consistent with BSE before the animal sustained the acute injury (72 FR 38704).

#### **Recent Events—Non-Ambulatory Disabled Cattle**

The SRM final rule allowed a case-by-case reinspection of cattle to address the rare situations where an animal that is deemed by FSIS as fit for human food at ante-mortem inspection subsequently suffers an acute injury. However, a recent significant event highlighted a vulnerability in the inspection system that needs to be addressed. This event indicated that the case-by-case disposition provision in 9 CFR 309.3(e) does not always ensure the proper disposition of cattle that become non-ambulatory disabled after ante-mortem inspection. Establishments may present weakened cattle for slaughter in the hope that such cattle will remain ambulatory long enough to enter the slaughter operation.

Although establishments must notify FSIS inspection program personnel when cattle become acutely injured after ante-mortem inspection so that FSIS inspection personnel can determine the disposition of the cattle, FSIS became aware of an incident in which inspection personnel were not notified. On January 30, 2008, FSIS received allegations regarding the inhumane handling of non-ambulatory disabled cattle at the Hallmark/Westland Meat Packing Company. An investigation into the allegations found evidence that the establishment did not consistently notify FSIS inspection personnel when cattle became non-ambulatory disabled after initial ante-mortem inspection. Instead of notifying FSIS inspectors, the establishment attempted to force animals that had gone down after passing ante-mortem inspection to rise by using electric prods and water sprays. Under the FMIA (21 U.S.C. 603(b)), any cattle that are slaughtered must be handled in accordance with the Humane Methods of Slaughter Act (HMSA) (7 U.S.C. 1901 *et seq.*). Under the meat inspection regulations, establishments are required to handle cattle to minimize excitement, discomfort, or injury (9 CFR 313.2). FSIS found that the establishment had treated the cattle inhumanely.

Also, following the Hallmark/Westland incident, on March 10, 2008, FSIS issued new instructions to inspection personnel concerning humane handling activities. FSIS Notice 16-08 instructs inspection personnel to vary from day-to-day the times during their tour of duty that they verify that animals are being handled and treated humanely. The notice also instructs inspection personnel to encourage establishments to develop and

implement a systematic approach for the humane handling of animals.

On April 22, 2008, FSIS received a petition submitted jointly by three meat and dairy industry associations requesting that the Agency amend its regulations to prohibit the case-by-case determination of the status of non-ambulatory disabled cattle that have passed ante-mortem inspection. According to the petition, consumer confidence in the U.S. beef supply has been damaged because the re-inspection of cattle did not occur as required under the current regulations. The petition asserts that the requested amendment is needed to bolster public confidence in the U.S. beef supply. FSIS has also received letters supporting this change to the regulations from an animal welfare organization and members of Congress.

However, FSIS also received five letters, from State meat processors associations and a national meat processors association, opposing the petition. These letters request that the current regulations remain unchanged. The letters state that it is important to have the option for re-inspection of cattle that become non-ambulatory disabled after they have passed ante-mortem inspection to address situations where accidents may occur or animals may become exhausted during the stress of travel.

#### **Proposed Amendment to 9 CFR 309.3(e)**

FSIS is proposing to remove the provision in 9 CFR 309.3(e) that allows FSIS inspection personnel to determine the disposition of cattle that become non-ambulatory disabled after they have passed ante-mortem inspection on a case-by-case basis. If FSIS finalizes this proposed rule, cattle that become non-ambulatory disabled from an acute injury after ante-mortem inspection will no longer be eligible to proceed to slaughter as "U.S. Suspects." Instead, FSIS inspectors will tag these cattle as "U.S. condemned" and prohibit these animals from proceeding to slaughter.

If this proposal is adopted as a final rule, all non-ambulatory disabled cattle would be considered unfit for human food and thus adulterated. Moreover, cattle that become non-ambulatory disabled cattle after ante-mortem inspection will always be condemned. The case-by-case disposition determinations of non-ambulatory disabled cattle by inspection program personnel will be discontinued, increasing the time inspection program personnel can focus on other inspection activities. Because all non-ambulatory disabled cattle would be considered adulterated, FSIS would expect custom

operators not to slaughter cattle that become non-ambulatory disabled after they are delivered to the custom operation.

In addition to proposing that all non-ambulatory disabled cattle be condemned, FSIS is also proposing to require in 9 CFR 309.3(e) that establishments notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection. The Agency is doing so to make clear that establishments have an affirmative obligation to make FSIS personnel aware when an animal goes down. This regulatory requirement should preclude establishments from attempting to force such animals to rise.

FSIS is proposing this rule under 21 U.S.C. 621, which gives FSIS the authority to adopt regulations for the efficient administration of the FMIA. The amendment in this proposal would better ensure effective implementation of ante-mortem inspection pursuant to 21 U.S.C. 603(a) and of humane handling requirements established pursuant to 21 U.S.C. 603(b).

#### Executive Order 12988

This proposed rule has been reviewed under the Executive Order 12988, Civil Justice Reform. Under this proposed rule: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) no retroactive proceedings will be required before parties may file suit in court challenging this rule.

#### Executive Order 12866 and the Regulatory Flexibility Act

This rule was reviewed by the Office of Management and Budget under Executive Order 12866 and was determined to be significant.

This proposed rule will require that all cattle that are non-ambulatory disabled at any time prior to slaughter, including those that become non-ambulatory disabled after passing ante-mortem inspection, be condemned and properly disposed of. This rule is necessary to better ensure effective implementation of ante-mortem inspection pursuant to 21 U.S.C. 603(a) and of humane handling requirements established pursuant to 21 U.S.C. 603(b).

#### Cost of the Proposed Action

Under this proposed rule, the beef industry will lose the market value of the non-ambulatory disabled cattle that the establishments could have slaughtered and harvested for human food after the cattle passed the re-inspection. Based on the Agency's 2007

survey data, out of the approximately 33.7 million cattle slaughtered in 2007,<sup>1</sup> FSIS estimates that about 1,300 cattle—about 600 cull cattle (i.e., mostly cows and bulls) and 700 steers and heifers—were in this category.<sup>2</sup> The August 2008 data from the Agricultural Marketing Service (AMS) indicate that the market value for a cull cattle carcass and parts is between \$500 and \$1,000, and the market value for a steer or heifer carcass and parts is between \$900 and \$1,100. Therefore, the estimated total market value of the carcasses and parts from cattle that would be condemned under this proposed rule would be in the range of \$930,000 to \$1,370,000 per year.<sup>3</sup> This estimate is conservative in that it does not take into account the salvage value less the cost for handling and disposal of the condemned carcasses.

Although the above discussion focuses on costs to the beef industry, the industry eventually will pass at least some part of the additional cost to consumers through higher prices or reduced production. This is an indirect cost to the consumers and is difficult to estimate ex-ante without data.

This rule is expected to have an insignificant impact on U.S. trading partners, because the number of animals affected is extremely small, particularly given the existing ban on non-ambulatory disabled cattle and the overall quantity of animals involved in the U.S. beef trade.

#### Benefits of the Proposed Rule

If adopted as a final rule, the proposed amendment would ensure effective implementation of ante-mortem inspection. This action will provide additional efficiencies to food safety inspection by removing the step that requires the inspection workforce to determine whether cattle can be tagged

as “U.S. Suspect” if those cattle become non-ambulatory disabled after passing ante-mortem inspection. Countries exporting beef to the U.S. would realize the same efficiencies in their inspection programs dedicated to the inspection of beef destined for the U.S. The Agency believes that the total benefits (quantifiable and unquantifiable) of this proposed rule exceed the cost.

#### Regulatory Flexibility Analysis

The FSIS Administrator has made an initial determination that this proposed rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). In the Final Regulatory Impact Analysis of SRM final rule<sup>4</sup>, the Agency estimated that the rule would possibly affect 3,340 small and very small beef slaughter establishments. This includes 680 federal inspected establishments, 1,346 state inspection establishments, and 1,314 custom exempt facilities. This proposed rule could potentially affect all these establishments because they may have cattle that become non-ambulatory disabled after ante-mortem inspection.

The estimated total annual cost of this proposed rule of \$930,000 to \$1,370,000 is for the entire beef industry. The Agency estimates that small and very small establishments slaughter about 95% to 98% of the 1,300 downers estimated from the survey. Therefore, the estimated annual cost to the small and very small establishments would be about \$883,500 to \$1,342,600, which is insignificant compared to the value of their annual production of about \$8.4 billion.<sup>5</sup>

#### Paperwork Reduction Act

This proposed rule has been reviewed under the Paperwork Reduction Act and imposes no new paperwork or record-keeping requirements.

#### Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of

<sup>1</sup> FSIS Animal Disposition Reporting System (ADRS) database, 2007. Number does not include veal calves or other calves.

<sup>2</sup> To estimate the number of such cattle, FSIS conducted two surveys on the number of cattle that became non-ambulatory after ante-mortem inspection then passed the re-inspection in July through December 2007. One survey focused on establishments that slaughter predominantly cull cattle, and the other focused on ones that slaughter steers and heifers. FSIS extrapolated the 6-month data to annual figures.

<sup>3</sup> The survey did not include custom exempt slaughter. To estimate the number of non-ambulatory disabled cattle in custom exempt slaughter that would likely be affected by this proposed rule, we applied the percentage of such cattle (0.004%) to the total number of custom-exempt slaughter cattle, which is 192,000 annually (data from National Agricultural Statistical Service, USDA and Association of Food and Drug Officials.) The result is about eight cattle per year at all custom slaughter facilities. Since the number is very small, including custom-exempt slaughter is expected to minimally change the analysis.

<sup>4</sup> See Economic Analysis: Final Regulatory Impact Analysis Final Rule, Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle Offered for Slaughter, and Prohibition of the Use of Certain Stunning Devices Used to Immobilize Cattle during Slaughter (FSIS Docket No. 03-025F), FSIS/USDA, June 28, 2007. [http://www.fsis.usda.gov/Regulations\\_&Policies/2007\\_Interim\\_&Final\\_Rules\\_Index/index.asp](http://www.fsis.usda.gov/Regulations_&Policies/2007_Interim_&Final_Rules_Index/index.asp).

<sup>5</sup> The value is measured by dressed carcass equivalent, *ibid*, pp.161-169.

this proposed rule, FSIS will announce it online through the FSIS Web page located at [http://www.fsis.usda.gov/Regulations\\_&Policies/2008\\_Proposed\\_Rules\\_Index/index.asp](http://www.fsis.usda.gov/Regulations_&Policies/2008_Proposed_Rules_Index/index.asp). FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at [http://www.fsis.usda.gov/news\\_and\\_events/email\\_subscription/](http://www.fsis.usda.gov/news_and_events/email_subscription/). Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

#### List of Subjects in 9 CFR Part 309

Ante-Mortem Inspection.

For the reasons discussed in the preamble, FSIS is proposing to amend 9 CFR Chapter III as follows:

#### PART 309—ANTE-MORTEM INSPECTION

1. The authority citation for part 309 continues to read as follows:

**Authority:** 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

2. Section 309.3(e) is revised to read as follows:

#### § 309.3 Dead, dying, disabled, or diseased and similar livestock.

\* \* \* \* \*

(e) Establishment personnel must notify FSIS inspection personnel when cattle become non-ambulatory disabled after passing ante-mortem inspection. Non-ambulatory disabled cattle that are offered for slaughter must be condemned and disposed of in accordance with § 309.13.

\* \* \* \* \*

Done at Washington, DC, on August 25, 2008.

**Alfred Almanza,**  
Administrator.

[FR Doc. E8–20159 Filed 8–28–08; 8:45 am]

BILLING CODE 3410–DM–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2008–0750; Directorate Identifier 2008–NE–21–AD]

RIN 2120–AA64

**Airworthiness Directives; Dowty Propellers R175/4–30; R184/4–30–4; R193/4–30–4; R.209/4–40–4.5; R212/4–30–4; R.245/4–40–4.5; R251/4–30–4; R257/4–30–4; and R.259/4–40–4.5 Model Propellers**

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede an existing airworthiness directive (AD) for all Dowty Rotol propellers. That AD currently requires, for all Dowty Rotol propellers, visual inspections for seizure and for cadmium plating of the blade pitch change operating links and eyebolt fork assemblies. That AD also requires replacement or heat-treatment of the blade pitch change operating links and eyebolt fork assemblies, if necessary. This proposed AD would require the same actions, but only for certain model Dowty Propellers. This proposed AD results from the FAA determining that AD 70–16–02 does not apply to all propellers, since current Dowty Rotol propellers are differently designed. We are proposing this AD supersedure to specify the affected propeller models, and to prevent seizure or embrittlement and cracking of the blade pitch change operating links and eyebolt fork assemblies, which could result in reduced controllability of the airplane. **DATES:** We must receive any comments on this proposed AD by October 28, 2008.

**ADDRESSES:** Use one of the following addresses to comment on this proposed AD.

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- **Mail:** Docket Management Facility, U.S. Department of Transportation, 1200

New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

• **Hand Delivery:** Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• **Fax:** (202) 493–2251.

Contact Dowty Propellers, Anson Business Park, Cheltenham Road East, Gloucester GL 29QN, UK; *telephone:* 44 (0) 1452 716000; *fax:* 44 (0) 1452 716001, for the service information identified in this proposed AD.

#### FOR FURTHER INFORMATION CONTACT:

Terry Fahr, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; *e-mail:* [terry.fahr@faa.gov](mailto:terry.fahr@faa.gov); *telephone* (781) 238–7155; *fax* (781) 238–7170.

#### SUPPLEMENTARY INFORMATION:

#### Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2008–0750; Directorate Identifier 2008–NE–21–AD” in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

#### Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments