

# Keeping Up With The Carnivores: How Legal Authorities Have Responded to Changes in Industrial Agriculture

Tara Summerville

## I. Introduction

Americans are eating more meat now than ever,<sup>1</sup> but regulations on the meat industry have been slow to catch up. The increase in demand has put pressure on the U.S. agricultural system causing a substantial shift in farming. Today nearly all meat products come from Confined Animal Feeding Operations (“CAFOs”), also known as “factory farms.” Each of these large industrial farms holds more than 1000 “animal units” (equal to roughly 55,000 turkeys)<sup>2</sup> on site for more than a month out of the year.<sup>3</sup> Though producers’ ability to maintain considerably higher quantities of livestock has expanded, the land area accessible to animals has exponentially decreased. Consequently, thousands of animals are crammed tightly together in CAFOs, which is creating hazardous conditions for livestock, and subsequently, consumers. Livestock living conditions are extremely unsanitary, often causing animals to become sick. In order to combat illness, farmers use vast amounts of antibiotics. In turn, meat slaughtered for consumption contains pharmaceutical drugs and harmful bacteria. Thus, meat products have been linked to several food-borne illness outbreaks and have been identified as a source for antibiotic resistance in humans.<sup>4</sup> Concerns about CAFOs and meat products are steadily rising, yet very little has been done to regulate the industry or guide consumers’ purchasing decisions. This paper will highlight the progression (and regression) of the law in regards to the CAFO meat industry. Part II provides a focused background of the industry and its negative effects on consumers, while

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<sup>1</sup> U.S. DEP’T OF AGRIC., PROFILING FOOD CONSUMPTION IN AMERICA 15 (2003), <http://www.usda.gov/factbook/chapter2.pdf>.

<sup>2</sup> 40 C.F.R. § 122.23 (2012).

<sup>3</sup> U.S. DEP’T OF AGRIC., *Animal Feeding Operations* (2016), [http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plants\\_animals/livestock/afo/](http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plants_animals/livestock/afo/).

<sup>4</sup> Joseph Mercola, *CDC Reveals Disturbing Truth about Factory Farms and Superbugs*, MERCOLA (Oct. 2, 2013), <http://articles.mercola.com/sites/articles/archive/2013/10/02/factory-farms-superbugs.aspx>.

Part III considers past regulations and litigation related to meat products. Finally, Part IV considers recent developments in the law as well as the potential for future solutions.

## II. Background

### A. The American Meat Industry

The meat and poultry industry is the largest segment of the United States Department of Agriculture, supplying America with more than 93 billion pounds of meat in 2012.<sup>5</sup> Meat consumption in America is at a record high.<sup>6</sup> In 2000, individual consumption of meat reached 195 pounds per person, 57 pounds above the average consumption in the 1950's.<sup>7</sup> For 2017, the USDA predicts a per capita meat consumption of 214.5 pounds per person.<sup>8</sup>

A closer review of the American meat industry reveals that CAFOs provide ninety-nine percent of animals raised for slaughter.<sup>9</sup> The EPA defines CAFOs as large confined Animal Feeding Operations (“AFOs”), with more than a thousand animal units (which can be a minimum of over two-thousand hogs) on site for more than 45 days of the year.<sup>10</sup> CAFOs replaced traditional small farms with large corporate controlled operations.<sup>11</sup> The advancement of technology and pharmaceuticals allowed farmers to produce significantly larger quantities of livestock.<sup>12</sup> Consequently, profit margins rewarded those who had high livestock-to-land ratios,

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<sup>5</sup> AMERICAN MEAT INST., U.S. MEAT AND POULTRY PRODUCTION AND CONSUMPTION: AN OVERVIEW (2009), [www.meatami.com/ht/a/GetDocumentAction/i/48781](http://www.meatami.com/ht/a/GetDocumentAction/i/48781).

<sup>6</sup> U.S. DEP'T OF AGRIC., *supra* note 1, at 15.

<sup>7</sup> *Id.*

<sup>8</sup> U.S. DEP'T OF AGRIC., LIVESTOCK, DAIRY, AND POULTRY OUTLOOK/LDP-M-267 19 (2016), <http://usda.mannlib.cornell.edu/usda/current/LDP-M/LDP-M-10-18-2016.pdf>.

<sup>9</sup> FARM FORWARD, *Ending Factory Farming* (last visited Oct. 31, 2016), <https://farmforward.com/ending-factory-farming/> (citing U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE (2012), [https://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usv1.pdf](https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf)).

<sup>10</sup> U.S. DEP'T OF AGRIC., *supra* note 3.

<sup>11</sup> *See generally*, CARRIE HRIBAR, NAT'L ASS'N OF LOCAL BOARDS OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS (Mark Shultz ed., 2010), [http://www.cdc.gov/nceh/ehs/docs/understanding\\_cafos\\_nalboh.pdf](http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf).

<sup>12</sup> *Id.* at 1.

which has changed the agricultural atmosphere.<sup>13</sup> The CAFO is the modern farm, and its domination of farming has had devastating impacts on the American food landscape.

The most pressing health and agricultural concern is the massive amount of manure produced by the livestock.<sup>14</sup> To address this accumulation of waste, CAFO operators create man-made lagoons to store feces, which can contain harmful pathogens and antibiotics.<sup>15</sup> Accordingly, CAFOs have become a breeding ground for bacteria, and meat products are at a high risk of contamination. The significant number of animals confined to one space substantially increases the likelihood of infection.<sup>16</sup> Furthermore, non-ambulatory (“downer”) livestock – which still make it to the slaughterhouse and into meat products – spend a significant amount of time laying in the manure,<sup>17</sup> causing them to be even more at risk for bacterial infections.<sup>18</sup> In order to combat sickness CAFOs administer large quantities of antibiotics to the animals. In fact, “seventy percent of all antibiotics and related drugs in the U.S.” are given to livestock.<sup>19</sup>

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<sup>13</sup> *Id.* The introduction of advanced farming machinery, specially formulated feeds, and animal pharmaceuticals have allowed farmers to produce more livestock in smaller spaces, thereby increasing profits.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121(6) ENV'T'L HEALTH PERSPECTIVES A182, A186-88 (2013).

<sup>16</sup> *See generally*, HRIBAR, *supra* note 11.

<sup>17</sup> Brief of *Amici Curia* Food & Water Watch and Center for Biological Diversity in Support of Affirmance at 9, *Animal Legal Defense Fund v. Wasden*, No. 15-35960 (9<sup>th</sup> Cir. June 27, 2016). The Food Safety Inspection Service defines non-ambulatory disabled (“downer”) livestock as animals that cannot rise or walk, including, but not limited to, animals with “broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic condition.” Geoffrey S. Becker, *Nonambulatory Livestock and the Humane Methods of Slaughter Act*, 207 CONG. RES. SER. 3 (Mar. 24, 2009), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS22819.pdf>.

<sup>18</sup> *See* J. F. Edwards et al., *A Bacteriologic Culture and Histologic Examination of Samples Collected from Recumbent Cattle at Slaughter*, 207 J. OF THE AM. VET. MED. ASSOC. 1174, 1174–76 (1995).

<sup>19</sup> HRIBAR, *supra* note 11, at 10.

## **B. CAFO Prevalence in North Carolina**

CAFOs are especially prevalent in North Carolina, which is the second leading state in the nation for its quantity of hog farms.<sup>20</sup> In 2012 alone, CAFOs within Sampson County, North Carolina raised 1.8 million hogs for meat production.<sup>21</sup> According to Food & Water Watch,<sup>22</sup> the quantity of CAFOs in North Carolina has increased by 6.2 percent “despite the state’s 1997 moratorium on building new CAFOS.”<sup>23</sup> North Carolina (with Sampson and Duplin County containing a majority of the operations within the state)<sup>24</sup> is one of the top ten leading states in the nation<sup>25</sup> for number of livestock units raised. Accordingly, CAFO prevalence in North Carolina is not only concerning for the environment, but for consumers in the state who are directly affected when they consume meat products.

## **C. Negative Effects of CAFO Meat Products on Consumer Health**

Each year roughly 48 million people fall ill from food eaten in the United States.<sup>26</sup> Of those, approximately 128,000 are hospitalized and about 3,000 die.<sup>27</sup> A study done by the Center for Disease Control (“CDC”) reported that 29% of foodborne illness deaths between 1998 and 2000 were directly related to meat and poultry products.<sup>28</sup> In 2014, the Consumer Report

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<sup>20</sup> U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE: HOG AND PIG FARMING I (2012), [http://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Highlights/Hog\\_and\\_Pig\\_Farming/Highlights\\_Hog\\_and\\_Pig\\_Farming.pdf](http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Hog_and_Pig_Farming/Highlights_Hog_and_Pig_Farming.pdf).

<sup>21</sup> FOOD & WATER WATCH, FACTORY FARM NATION 2015 EDITION 13 (2015), <http://www.factoryfarmmap.org/wp-content/uploads/2015/05/FoodandWaterWatchFactoryFarmFinalReportNationMay2015.pdf>.

<sup>22</sup> FOOD & WATER WATCH, *Factory Farm Map*, <http://www.factoryfarmmap.org/#animal:all;location:NC;year:2012>.

<sup>23</sup> FOOD & WATER WATCH, *NC CAFO Moratorium Fails to Slow Factory Farm Growth*, LOCALLY GROWN NEWS (December 2, 2010), <http://www.locallygrownnews.com/stories/NC-CAFO-Moratorium-Fails-to-Slow-Factory-Farm-Growth,27195>.

<sup>24</sup> *Id.*

<sup>25</sup> U.S. DEP’T OF AGRIC., STATE RANKINGS: LIVESTOCK, IOWA AND 10 LEADING STATES (2010), [https://www.nass.usda.gov/Statistics\\_by\\_State/Iowa/Publications/Annual\\_Statistical\\_Bulletin/2010/73\\_10.pdf](https://www.nass.usda.gov/Statistics_by_State/Iowa/Publications/Annual_Statistical_Bulletin/2010/73_10.pdf).

<sup>26</sup> CDC, *Burden of Foodborne Illness: Findings* (July 15, 2016), <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html>.

<sup>27</sup> *Id.*

<sup>28</sup> John A. Painter et al., *Attribution of foodborne illnesses, hospitalizations, and deaths to food commodities by using outbreak data*, 19(3) EMERGING INFECTIONS DISEASES 407, 409-411 (2013) (discussing data relating to foodborne illness).

revealed that ninety-seven percent of the chicken breasts they tested contained harmful bacteria.<sup>29</sup>

Meat consumption can cause serious bacterial infections by pathogens such as Salmonella and Listeria,<sup>30</sup> which are rampant among livestock. Additionally, several other organisms have been found in meat products, such as Campylobacter and E. coli, which can cause severe illness.<sup>31</sup> In fact, E. Coli alone causes roughly “96,000 illnesses, 3,200 hospitalizations, and 31 deaths in the United States each year.”<sup>32</sup> Bacterial infections can cause fever, nausea, diarrhea, urinary tract infections, septicemia<sup>33</sup> (infection of the blood), gastrointestinal disorders,<sup>34</sup> hemorrhagic colitis<sup>35</sup> (an acute disease causing bloody diarrhea, severe cramping, and serious complications<sup>36</sup>), and hemolytic uremic syndrome<sup>37</sup> (which involves the formation of blood clots that prevents blood from flowing to vital organs<sup>38</sup>).

Furthermore, the “over-consumption of antibiotics in CAFOS” has rendered consumers susceptible to super bugs.<sup>39</sup> The term superbug describes bacteria that do not die when exposed to most existing antibiotics, which can cause modern medicine to be ineffective and can lead to incidents of antibiotic resistance in humans. In fact, the CDC reported that 22% of human

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<sup>29</sup> *Dangerous Contaminated Chicken*, CONSUMER REPORTS (Jan. 2014), <http://www.consumerreports.org/cro/magazine/2014/02/the-high-cost-of-cheap-chicken/index.htm>.

<sup>30</sup> Painter, *supra* note 28 at 409.

<sup>31</sup> PURDUE UNIV., *CAFOs and Public Health: The Issue of Antibiotic Resistance* 1 (2007) 1, <https://www.extension.purdue.edu/extmedia/ID/cafo/ID-349.pdf>.

<sup>32</sup> James Andrews, *CDC Shares Data on E. Coli and Salmonella in Beef*, FOOD SAFETY NEWS (Oct. 2014), <http://www.foodsafetynews.com/2014/10/cdc-shares-mass-of-data-on-e-coli-and-salmonella-in-beef/#.WAOhGvkrKM8>.

<sup>33</sup> MORGAN C. ROGERS & NANCY D. PETERSON, *E. COLI INFECTIONS CAUSES TREATMENT AND PREVENTION*, ix (2011).

<sup>34</sup> *Id.* at x.

<sup>35</sup> *Id.* at xi.

<sup>36</sup> THOMAS G. BOYCE, MD, MPH, *HEMORRHAGIC COLITIS*, MERCK MANUAL (2016).

<sup>37</sup> ROGERS & PETERSON, *supra* note 33, at xi.

<sup>38</sup> DAVID J. KUTER, *THROMBOTIC THROMBOCYTOPENIC PURPURA AND HEMOLYTIC-UREMIC SYNDROME*, MERCK MANUAL (2016).

<sup>39</sup> MAUREEN C. MCMAHON & GLENN R. STRYJEWSKI, *PEDIATRICS A COMPETENCY-BASED COMPANION* 454 (2011).

antibiotic-resistant illnesses are directly linked to food sources.<sup>40</sup> This resistance can escalate curable or preventable infections to life-threatening illnesses.<sup>41</sup> A study done by the University of Texas School of Public Health reported that Methicillin-resistant *Staphylococcus aureus* (“MRSA”) was the most prevalent bacteria found at CAFOs in their area.<sup>42</sup> Accordingly, it is time for administrative and legal authorities to address the growing health concern arising from CAFOs.

### **III. The Progression of CAFO Regulation**

#### **A. Executive Administration Takes Action**

The primary executive authority for regulating food production is the United States Department of Agriculture (“USDA”). Within the USDA is the Food Safety and Inspection Service (“FSIS”) which is responsible for enforcing regulations on the meat industry.<sup>43</sup> One of the most important responsibilities granted to FSIS was given by the Federal Meat Inspection Act (“FMIA”) of 1906,<sup>44</sup> which requires FSIS to inspect cattle within the meat industry to ensure products are safe for human consumption.<sup>45</sup> The importance of FMIA became cognizable in 2003 when contaminated meat became an international issue.

In 2003, America experienced its first severe mad-cow disease outbreak, caused by a downer cow that had been butchered for meat consumption.<sup>46</sup> Though the cow was traced back to Canada, CAFOs in America also allowed downer cows to be slaughtered for consumption at

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<sup>40</sup> See Mercola, *supra* note 4.

<sup>41</sup> CDC, *Questions About Bacteria, Viruses, and Antibiotics*, <http://www.cdc.gov/getsmart/community/about/antibiotic-resistance-faqs.html> (April 17, 2015).

<sup>42</sup> See Shawn G. Gibbs et al., *Isolation of Antibiotic-Resistant Bacteria from the Air Plume Downwind of a Swine Confined or Concentrated Animal Feeding Operation*, 114 ENV'T'L HEALTH PERSPECTIVES, 1032, 1032–1037 (2013). MRSA can cause pneumonia, endocarditis (damage to the heart valves), and other serious diseases. LARRY M. BUSH, STAPHYLOCOCCUS AUREUS INFECTIONS, MERCK MANUAL (2016).

<sup>43</sup> Kevin Briley, *Downed Animals: Can Your Steak Stand Up for Itself?*, 15 San Joaquin Agric. L. Rev. 39, 44 (2006).

<sup>44</sup> 21 U.S.C. §§ 601 *et seq.* (1906).

<sup>45</sup> Briley, *supra* note 43, at 44.

<sup>46</sup> CTRS. FOR DISEASE CONTROL, *BSE Cases Identified in the United States*, <http://www.cdc.gov/prions/bse/case-us.html> (2015).

that time.<sup>47</sup> By December, the USDA banned all downer animals from entering the food supply.<sup>48</sup> FSIS was given the responsibility of enforcing the ban.<sup>49</sup> However, the sanction left a major loophole: cattle that were non-ambulatory *after* arriving to the slaughterhouse were still permitted for human consumption.<sup>50</sup>

An undercover investigator for the Humane Society of the United States (“HSUS”) exposed Westland and Hallmark,<sup>51</sup> a meat processing facility in Southern California, which was physically forcing downed animals to walk to slaughter in order to bypass the USDA’s ban.<sup>52</sup> As a result of the investigation, the facility was forced to recall roughly 149 million pounds of beef in February of 2008<sup>53</sup>—the largest beef recall in history.<sup>54</sup> Though the USDA’s recall required retailers to destroy related products, a multitude of consumers had likely already been exposed to the contaminated meat.<sup>55</sup> Alarming, FSIS had even recognized Westland and Hallmark as Supplier of the Year in 2005, despite having several inspectors on site at the facility while downers were being slaughtered.<sup>56</sup>

After the historic recall, the USDA made great efforts to finalize a thorough rule strictly prohibiting downers from being slaughtered, and in 2009 the Obama administration finalized the rule under Chapter III, Food Safety and Inspection Service, Department of Agriculture.<sup>57</sup> The President commented on FSIS’s lack of enforcement and oversight by stating that the federal

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<sup>47</sup> *Id.*

<sup>48</sup> U.S. DEP’T OF AGRIC., USDA BSE UPDATE (2003), <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2003/12/0452.html>.

<sup>49</sup> *Id.*

<sup>50</sup> Gene Baur, *USDA Broadens Ban on Downed Cattle Slaughter to Include Calves*, *Farm Sanctuary Blog* (July 15, 2016), <https://blog.farmsanctuary.org/2016/07/usda-broadens-ban-on-downed-cattle-slaughter-to-include-calves/>.

<sup>51</sup> *U.S. ex rel. Humane Soc. of U.S. v. Hallmark Meat Packing Co.*, No. EDCV 08-00221-VAP, 2013 WL 5753784, at \*5 (C.D. Cal. Apr. 30, 2013).

<sup>52</sup> *Id.*

<sup>53</sup> *Gen. Mills Operations, LLC v. Five Star Custom Foods, Ltd.*, 703 F.3d 1104, 1106 (8th Cir. 2013).

<sup>54</sup> Jen Pifer, *USDA Orders Recall of 143 Million Pounds of Beef*, CNN (Feb. 18, 2008), <http://www.cnn.com/2008/HEALTH/02/17/beef.recall/>.

<sup>55</sup> *Gen. Mills Operations, LLC v. Five Star Custom Foods, Ltd.*, 703 F.3d 1104, 1106 (8th Cir. 2013).

<sup>56</sup> *U.S. ex rel. Humane Soc. of U.S.*, 2013 WL 5753784, at \*5.

<sup>57</sup> 9 C.F.R. § 309.3 (2009).

food inspection system was a “hazard to public health” and that citizens shouldn’t have to worry about getting sick from their lunch.<sup>58</sup>

## **B. Congress Takes Steps to Address Labeling Legislation**

In correlation with the USDA’s regulations on downer cows, Congress took initiative to refine meat-labeling regulation in an effort to provide consumers with information regarding where their meat was coming from. In 2002, Congress intended to pass, 7 U.S.C. §§ 1638, which would require country-of-origin labeling (“COOL”) on meat products. The Secretary of Agriculture was tasked with defining “country of origin.”<sup>59</sup> However, the term was not defined until 2008 when Congress amended the statute to prevent further delay in COOL implementation.<sup>60</sup> The statute required that meat cuts be labeled with where the cows were “born, raised, and slaughtered.”<sup>61</sup> However, in 2009 the Secretary of Agriculture amended the COOL rule<sup>62</sup> to allow “product of” labeling, which simply stated which country a given cut of meat was from.<sup>63</sup> Nevertheless, the looser provisions were challenged in a complaint submitted to the World Trade Organization (“WTO”) by Canada and Mexico, who criticized the restrictions for their ambiguity.<sup>64</sup> The WTO’s Appellate decision advised Congress to revise the current rule.<sup>65</sup> However, it also explicitly agreed that the directive of COOL was objectively beneficial to consumers.<sup>66</sup>

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<sup>58</sup> Darlene Superville et al., *Obama: Food Safety System a Hazard*, CBS NEWS (Mar. 14, 2009), <http://www.cbsnews.com/news/obama-food-safety-system-a-health-hazard/>.

<sup>59</sup> 7 U.S.C. §§ 1638 (2002).

<sup>60</sup> *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014). Notably this definition was created only after the historic Westland and Hallmark meat recall.

<sup>61</sup> 7 U.S.C. § 1638a(a)(2) (2015).

<sup>62</sup> Mandatory Country of Origin Labeling Final Rule, 78 Fed.Reg. 31,367 (May 24, 2013).

<sup>63</sup> *Id.*

<sup>64</sup> Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 112–113, 122–123, WTO Doc.WT/DS384/AB/R (adopted 23 July, 2012).

<sup>65</sup> *See Am. Meat Inst.*, 760 F.3d at 21.

<sup>66</sup> *Id.*

In 2013, the COOL rule was revised once again to require that the location of *each* production step be included in the label.<sup>67</sup> The rule was not welcomed by the American meat industry, and in 2014 the American Meat Institute brought an action against the United States Department of Agriculture.<sup>68</sup>

### C. The Courts Consider Labeling Legislation Challenges

In *American Meat v. the United States Department of Agriculture*, the American Meat Institute (“AMI”) argued that the COOL rules violated the First Amendment of the Constitution.<sup>69</sup> Additionally, AMI argued that the government had no interest substantial enough to enact the rules, relying on a test set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* for support.<sup>70</sup> The *Zauderer* test balances government interference with advertising rights regarding consumer deception.<sup>71</sup> Accordingly, the court had to decide whether Congress and the USDA overstepped their power in enacting labeling rules.<sup>72</sup>

While the First Amendment generally protects freedom of speech, the court reasoned that the First Amendment only minimally protects an advertiser’s right *not to* provide information.<sup>73</sup> In applying *Zauderer*, the court found that consumer deception alone is not a limiting factor on governmental interests and that the disclosure of factual information is enough to sustain a mandate in favor of consumers (overruling several previous cases).<sup>74</sup> Furthermore, the court concluded that the government did have a substantial interest in COOL.<sup>75</sup> It noted that consumers should be able to make sound meat product choices since “individual health concerns . . . can

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<sup>67</sup> Mandatory Country of Origin Labeling Final Rule, 78 Fed.Reg. 31,367 (May 24, 2013). For instance, a label for a beef product would require information where a cow was born, raised, and slaughtered.

<sup>68</sup> *See Am. Meat Inst.*, 760 F.3d at 18.

<sup>69</sup> *Id.* at 21.

<sup>70</sup> *Id.*

<sup>71</sup> *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985).

<sup>72</sup> *See Am. Meat Inst.*, 760 F.3d at 21.

<sup>73</sup> *Id.* at 22 (quoting *Zauderer*, 471 U.S. at 638 (1985)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 23.

arise in the event of a food-borne illness outbreak.”<sup>76</sup> The outcome of this case not only reaffirmed efforts made by Congress and the USDA to protect consumers, but opened the door for future labeling litigation.

#### **IV. Looking Back In Order To Look Forward**

CAFOs have dominated the agricultural industry. These highly profitable, efficient factories have developed to accommodate the increased demand for meat.<sup>77</sup> However, in order to keep up with the unprecedented quantity of meat eaten by consumers today, products have considerably decreased in quality. Livestock are currently raised in unsanitary, cramped living conditions, which perpetuate bacterial infections among animals. Sick animals are subsequently treated with antibiotics. Accordingly, meat products are likely to contain antibiotics, and numerous types of bacteria, including antibiotic-resistant superbugs. By consuming this meat, individuals are at risk for serious infections, and life-threatening illnesses.<sup>78</sup>

After the 2003 mad cow disease outbreak, and 2008 meat recall, government agencies have identified issues within the meat industry, and have attempted to address them. The prohibition of downed cattle for slaughter and implementation of COOL were great strides forward. However, the meat industry has continued to fight back against regulation.

For instance, since 2009, the meat industry had been exploiting a loophole in the downed cattle regulations, because the ban did not explicitly include “calves” within its definition of downed cattle. Consequently, downer calves were slaughtered for meat consumption for years without notice.<sup>79</sup> However, in July of 2016, the Obama Administration included calves within the

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<sup>76</sup> *Id.*

<sup>77</sup> U.S. DEP’T OF AGRIC., *supra* note 1, at 15.

<sup>78</sup> *See supra* Pt. II. C.

<sup>79</sup> Wayne Pacelle, *Breaking news: Obama Administration closes loophole and forbids slaughtering downer calves*, THE HUMANE SOCIETY OF THE UNITED STATES (July 13, 2016), <http://blog.humanesociety.org/wayne/2016/07/obama-administration-forbids-downer-calves-slaughter.html>.

spectrum of cattle that were not permitted for slaughter.<sup>80</sup> The revision incentivizes CAFOs to work on improving their conditions, or risk large monetary losses.<sup>81</sup> Regulation of industry standards are beneficial in theory, but without proper enforcement they cannot impose change. The 2008 meat recall highlighted just one case of loose enforcement by FSIS, but accountability continues to be an issue evidenced by countless petitions against the USDA.

Growing concerns regarding foodborne illnesses and antibiotic resistance demonstrate the need for another method of regulation. Congress' COOL seemed to be a viable alternative of regulating the industry; by requiring stricter labeling requirements, consumers were given the power to make informed decisions. However, in 2015 the WTO authorized Canada and Mexico to impose significant tariffs on American meat products due to COOL requirements.<sup>82</sup> In response, Congress repealed the COOL statute at the close of 2015, in an effort to avoid potential costs.<sup>83</sup> Consequently, the decision in *American Meat* no longer has any legal effect.

Though *American Meat* is now less significant, it still provides sound legal reasoning that may be adopted in future labeling legislation. The opinion in *American Meat* stressed the importance of a consumer's right to knowledge. Food labeling informs consumers so that they may make decisions regarding their health and safety.<sup>84</sup> It also ensures the food market is a fair forum for residents to engage in.<sup>85</sup> COOL is just the start of labeling legislation as concerns

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<sup>80</sup> U.S. DEP'T OF AGRIC., *USDA Announces Changes to Improve Humane Handling of Veal Calves* (2016), [https://www.fsis.usda.gov/wps/portal/fsis/topics!/ut/p/a0/04\\_Sj9CPyKssy0xPLMnMz0vMAfGjzOINAg3MDC2dDbwMDIHQ08842MTDy8\\_YwN9EvYDbUREA1T1IfA!!/?1dmy&current=true&urile=wcm%3Apath%3A%2FFSIS-Content%2Finternet%2Fmain%2Fnewsroom%2Fnews-releases-statements-and-transcripts%2Fnews-release-archives-by-year%2Farchive%2F2016%2Fnr-071316-01](https://www.fsis.usda.gov/wps/portal/fsis/topics!/ut/p/a0/04_Sj9CPyKssy0xPLMnMz0vMAfGjzOINAg3MDC2dDbwMDIHQ08842MTDy8_YwN9EvYDbUREA1T1IfA!!/?1dmy&current=true&urile=wcm%3Apath%3A%2FFSIS-Content%2Finternet%2Fmain%2Fnewsroom%2Fnews-releases-statements-and-transcripts%2Fnews-release-archives-by-year%2Farchive%2F2016%2Fnr-071316-01).

<sup>81</sup> Dan Flynn, *Animal Rights Mean No Second Chance for Downer Calves*, FOOD SAFETY NEWS (July 2016) <http://www.foodsafetynews.com/2016/07/animal-rights-mean-no-second-chance-for-downer-calves/#.WAVCCvkrKM8>.

<sup>82</sup> *USDA Ends COOL Enforcement With President's Signature on Omnibus Bill*, FOOD SAFETY NEWS (Dec. 2015), <http://www.foodsafetynews.com/2015/12/usda-ends-cool-enforcement-with-presidents-signature-on-omnibus-bill/#.WAVC1vkrKM9>.

<sup>83</sup> *Id.*

<sup>84</sup> T. BURKE & D. DAHL, FEDERAL REGULATION OF THE U.S. FOOD MARKETING SYSTEM 1-2 (1985).

<sup>85</sup> *Id.*

about CAFO products continue to rise. Ideally, all CAFO products would have labels warning consumers of potential antibiotic and bacterial contaminants, but the public may have to settle for any form of improved labeling.

In the future, the Federal Drug Administration (“FDA”) may be utilized to regulate labeling through The Federal Food, Drugs, and Cosmetics Act (“FFDCA”) of 2000.<sup>86</sup> The FFDCA allows the FDA to enact regulatory labeling in order to provide “reasonable definition[s] and standard[s] of identity” as well as “reasonable standard[s] of quality” for food products.<sup>87</sup> In fact, the Natural Resources Defense Council has already called for the FDA to begin utilizing the act to prevent antibiotic resistance through over application of antibiotics in meat production.<sup>88</sup> Several petitions were filed requesting that the FDA “withdraw regulatory approval for sub-therapeutic use of antibiotics in animal feed” in 1999.<sup>89</sup> However, the FDA never responded to the petition, and was consequently sued in 2011.<sup>90</sup> In the 2014 case, *National Resources Defense Council, Inc. v. U.S. Food & Drug Administration*, the FDA finally addressed the issue of antibiotic use on animals (after “37 years of delay”) proposing new legislation that would allow voluntary relabeling by pharmaceutical manufacturers.<sup>91</sup> Though the FDA claimed that the industry had been cooperative with their efforts there does not seem to be any real incentive to encourage substantial progress.

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<sup>86</sup> 21 U.S.C. §§ 341 *et seq.* (2016).

<sup>87</sup> *Id.*

<sup>88</sup> Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 760 F. 3d 151, 155 (2d Cir. 2014).

<sup>89</sup> *Id.* Subtherapeutic antibiotic use refers to the administration of low doses of antibiotics over extended periods of time to animals without an acute illness to prophylactically guard against disease or infection, promote faster growth, and reduce the microbial load in final meat products. *See generally* NAT’L RES. COUNS. COMMITTEE TO STUDY THE HUMAN EFFECTS OF SUBTHERAPEUTIC ANITIBIOTIC USE IN ANIMAL FEEDS, THE EFFECTS ON HUMAN HEALTH OF SUBTHERAPEUTIC USE OF ANTIMICROBIALS IN ANIMAL FEEDS 360–66 (1980), [https://www.ncbi.nlm.nih.gov/books/NBK216513/pdf/Bookshelf\\_NBK216513.pdf](https://www.ncbi.nlm.nih.gov/books/NBK216513/pdf/Bookshelf_NBK216513.pdf).

<sup>90</sup> *Id.* at 156.

<sup>91</sup> *Id.* at 192–193.

Chief Judge Katzman expressed his concerns with the FDA's approach in the case's dissenting opinion. He asserted that both the FDA and the majority had admitted that subtherapeutic antibiotic use on animals is harmful to society. The FDA claimed that it could lead to "a public health problem of global significance" but "refuse[s] to move forward with the statutorily-prescribed process for withdrawing approval from subtherapeutic" use.<sup>92</sup> Additionally, the majority recognized that antibiotic resistance could result in "longer hospital stays, worse side effects of treatment, and a greater likelihood of death."<sup>93</sup> Yet no real progress has been made. Chief Judge Katzman analogizes the issue of antibiotic resistance to global warming, concluding that the combination of small negative effects can cause a much larger problem—one that congress did not give the FDA "discretion to ignore."<sup>94</sup>

Though exploration of regulatory legislation incites hope for the future, the progress has been slow. It seems every step forward is accompanied by a large leap backwards. Concerns about the meat industry are growing as fast as the industry itself, but administration cannot seem to keep up. Though legal authorities have begun to recognize the issues stemming from CAFOs, there cannot be any substantial change if profitability continues to take priority over consumer health.

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<sup>92</sup> *Id.* at 176.

<sup>93</sup> *Id.* at 153.

<sup>94</sup> *Id.* at 192.