

June 24, 2011

U.S. Department of Agriculture (USDA)  
FSIS, Room 2-2127  
George Washington Carver Center  
5601 Sunnyside Ave.  
Beltsville, MD 20705

Regarding Docket No. FSIS-2008-0031  
Docket Title: Mandatory Inspection of Catfish and Catfish Products

Joint Submission  
In Response to the Federal Register Notice  
On Mandatory Inspection of Catfish and Catfish Products

These comments are submitted on behalf of the following organizations and companies, representing farmers, ranchers, processors and exporters of the nation's food and agricultural products.

**American Soybean Association.** The American Soybean Association (ASA) represents America's over 500,000 soybean farmers on domestic and international policy issues.

**Cargill, Incorporated.** Cargill is an international producer and marketer of food, agricultural, financial and industrial products and services. Founded in 1865, our privately held company employs 131,000 people in 66 countries. We help customers succeed through collaboration and innovation, and are committed to sharing our global knowledge and experience to help meet economic, environmental and social challenges.

**Hormel Foods Corporation.** Hormel Foods Corporation is a multinational manufacturer employing over 19,300 and marketer of high-quality, brand-name food and meat products for consumers throughout the world. Hormel offers a wide variety of products including hams, bacon, sausages, franks, canned luncheon meats, stews, chilis, hash, meat spreads, shelf-stable microwaveable entrees and salsas.

**National Council of Farmer Cooperatives.** The National Council of Farmer Cooperatives (NCFC) represents the nearly 3,000 farmer-owned cooperatives across the country whose members include a majority of our nation's more than 2 million farmers.

**National Meat Association.** Since 1946, National Meat Association (NMA) has represented meat packers and processors, equipment manufacturers and food suppliers who provide services to the meat industry. The association has members throughout the United States, as well as in Canada, Australia and Mexico.

**National Milk Producers Federation.** The National Milk Producers Federation (NMPF), based in Arlington, Va., develops and carries out policies that advance the well-being of U.S. dairy producers and the cooperatives they collectively own. The members of NMPF's 30 cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of nearly 40,000 dairy producers on Capitol Hill and with government agencies.

**National Oilseed Processors Association.** The National Oilseed Processors Association (NOPA) is a national trade association that represents 13 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 63 plants located in 19 states throughout the country, including 58 plants that process soybeans.

**National Pork Producers Council.** The National Pork Producers Council (NPPC) is an association of 43 state pork producer organizations and represents the federal and global interests of America's 67,000 pork producers.

**National Turkey Federation.** The National Turkey Federation (NTF) represents all segments of the U.S. turkey industry, including growers, processors, breeders, hatchery owners and allied companies. It is the only national trade association representing the turkey industry exclusively.

**Seaboard Foods.** Seaboard Corporation is an American international food and transportation company with operations in the Americas, Africa and Asia. Its activities range from commodity procurement, to production, to processing, to shipping and truck transport to marketing of grains, poultry and pork products.

**Smithfield Foods.** Smithfield Foods is a global food company that goes above and beyond to provide good food in a responsible manner. Smithfield Foods is the world's largest producer and processor of pork. Our wholly owned independent operating companies and joint ventures produce more than 50 brands of pork products and more than 200 gourmet foods and employ more than 52,400 individuals globally.

**U.S. Dairy Export Council.** The U.S. Dairy Export Council (USDEC) is a non-profit, independent membership organization that represents the global trade interests of U.S. dairy producers, proprietary processors and cooperatives, ingredient suppliers and export traders. Its mission is to enhance U.S. global competitiveness and assist the U.S. industry to increase its global dairy ingredient sales and exports of U.S. dairy products.

**U.S. Grains Council.** The U.S. Grains Council (USGC) develops export markets for U.S. barley, corn, grain sorghum and related products. The Council believes exports are vital to global economic development and to U.S. agriculture's profitability. Founded in 1960, the Council is a private, non-profit corporation with 10 international offices and programs in more than 50

countries. Its unique membership includes producer organizations and agribusinesses with a common interest in developing export markets.

**U.S. Meat Export Federation.** The U.S. Meat Export Federation (USMEF) is a nonprofit trade association working to create new opportunities and develop existing international markets for U.S. beef, pork, lamb and veal.

**USA Poultry & Egg Export Council.** The USA Poultry & Egg Export Council (USAPEEC) is an association comprised of more than 200 members. Members include most major poultry and egg producing companies, international trading companies, and businesses that benefit from U.S. poultry and egg exports. USAPEEC members account for more than 95 percent of total U.S. poultry and egg exports.

**Western Growers Association.** The Western Growers Association (WGA) is an agricultural trade association whose members from Arizona and California grow, pack and ship 90 percent of the fresh fruits, nuts and vegetables grown in California and 75 percent of those commodities in Arizona. This totals about half of the nation's fresh produce.

Our groups oppose the implementation of this proposed rule. We recognize that Congress gave FSIS a very difficult task in the 2008 Farm Bill and, as a result, the rule has fundamental flaws in terms of its underlying rationale and objectives. We understand and applaud the desire to ensure that catfish consumed in the United States is safe and wholesome. However, without a demonstrated justification for shifting inspection from the Food and Drug Administration to the Department of Agriculture, we believe the rule may have the unintended consequences of raising doubts about the safety of the product presently on the market and creating an unjustifiable impediment to imports.

#### **Importance to Our Organizations and Our Members**

As agricultural tariff rates among trading partners continue to decline, many domestic industries have employed the practice of raising non-science-based barriers to slow import growth. As a result, U.S. producers of many agricultural products, in particular, have faced the challenges of these barriers.

The catfish rule could easily be seen by foreign exporting nations as such an unjustifiable trade barrier. The U.S. has and continues to successfully remove non-science-based and other unjustifiable barriers that negatively affect U.S. agricultural exports. Implementing such a rule has the potential to weaken future U.S. efforts if it is perceived as engaging in the same type of activity.

Furthermore, if this rule were to be implemented and then challenged under international trade laws, which we believe would happen, we would also face the prospect of retaliation by at least two important and growing export markets for farm products, China and Vietnam.

In fact, several U.S. commodity sectors have already seen significant export losses to China as result of Chinese retaliation. For example, in response to U.S. legislation that banned expenditures by USDA for any risk assessment of cooked poultry imports from China, China both immediately halted the issuance of import licenses for U.S. poultry and challenged the action in the WTO (successfully). China also slapped antidumping duties on U.S. poultry in response to the U.S. decision to impose antidumping duties on Chinese tires. Since 2008, U.S. poultry exports to China dropped by over 75%.

No U.S. product is immune to retaliation by China and Vietnam, and both countries would have many products from which to choose given the breadth and value of our exports to those growing markets now. Since it joined the WTO, U.S. agricultural exports to China have grown by 1,854 percent. Since Vietnam joined, U.S. agricultural exports to that market have increased by 2,433 percent. China is now the number one market for U.S. agricultural exports, with shipments exceeding \$17.5 billion in 2010 and agriculture would be particularly vulnerable to Chinese retaliation. Vietnam is also a growth market for U.S. agricultural products. Of the countries currently participating in the Trans-Pacific Partnership negotiations, Vietnam likely offers the most potential for expanded U.S. food and farm exports.

Of course, any sanitary or phytosanitary measure that is scientifically warranted and defensible under internationally agreed rules is perfectly legitimate. But, for the following reasons, we have serious concerns about this proposed rule.

#### The Change in Catfish Inspection Requirement is not Justified

The Food, Conservation, and Energy Act of 2008 (Public Law 110-246), known as the 2008 Farm Bill, amended the Federal Meat Inspection Act (FMIA) to require that inspection of catfish (as defined by the Secretary of Agriculture) be transferred from the Food and Drug Administration to the Department of Agriculture's Food Safety Inspection Service, which administers the FMIA. To carry out this new responsibility, the Farm Bill requires the appointment of inspectors to perform continuous inspections of catfish prepared for commerce.

This change in inspection responsibility for catfish was not based on any validated problem with microbial contamination or chemical residues in the U.S. catfish supply, and certainly not on problems that distinguished catfish from other fish products consumed in the United States.

As the FSIS proposed rule itself makes clear, "...limited information on the distribution of microbial contamination and chemical residues on catfish limit our ability to make strong statements about the baseline risk." In other words, risk assessors wished to make it clear that the lack of information on the existing health risks makes it difficult to evaluate the impact of the change in inspection responsibilities on those risks.

Rather than imposing a new program for a single fish species on an agency that has no experience with inspection of that species, it would have perhaps been better to mandate a thorough

examination of the safety of catfish under the existing inspection system to determine (1) the scope of the health problem, if any, and (2) the best way to address any identified problems.

Instead, the risk assessment suggests that information on existing health risks will only be identified as the new inspection system is implemented.

### The Risk Assessment is Flawed

FSIS risk assessors no doubt did the best they could with the data available to them, but it is abundantly clear that without meaningful information on the current risk, the value of the risk assessment is minimal, at best.

As the risk assessment, itself, states, it “simply provides insight into the risk reductions that might accompany the implementation of the type of continuous inspection program now required for catfish under the FMIA.” The risk assessment focused on exposure to Salmonella not because of a known problem with that disease from catfish, but rather because “...a broad hazard identification study identified Salmonella as a potential concern in catfish.” (Emphasis added)

Salmonella was chosen as the proxy for all pathogens because, according to the study, “...the general burden of illness from this pathogen in the U.S. remains a concern and there is evidence that at least one outbreak of human salmonellosis may have been related to catfish consumption.” (Emphasis added)

The risk assessors had virtually no documented evidence of a pathogen-related problem associated with catfish on which to base their risk analysis. But, a risk assessment being required by law, they did the best they could. Not having any catfish-specific information available to it, the risk assessors chose to use poultry as the proxy in its analysis of the possible effectiveness of an FSIS continuous inspection program for Salmonella control.

It is clear that the conclusions drawn by any risk assessment are only as good as the data and assumptions used. In this case, since the inputs are largely speculative, so must be the results. This is not a sound basis on which to form public policy on food safety. Rather than determine the level of risk first and then decide the appropriate response, costly changes to the inspection system for catfish will be made without any evidence of their necessity or effectiveness.

### The Action is Inconsistent with WTO Principles and Longstanding U.S. Trade Policy

The United States has a long and largely successful history of challenging foreign sanitary and phytosanitary measures that have the effect, often intended, of limiting imports of U.S. farm and food products. Indeed, the WTO Uruguay Round agreement on sanitary and phytosanitary measures<sup>1</sup> (SPS), which was a U.S. objective of that negotiation and which was largely written

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<sup>1</sup> Agreement on the Application of Sanitary and Phytosanitary Measures.

by the U.S., establishes important rules and disciplines on the use of SPS measures so that they may not be used as disguised import restrictions.

In our view, this rule would cause the U.S. to implement just the sort of measures that we have objected to when used by our trading partners. It would put U.S. trade officials in the unenviable position of having to defend a measure in an eventual and certain dispute settlement proceeding that is counter to arguments they have made numerous times in challenging similar foreign actions. This will seriously weaken U.S. efforts to prevent such measures from being used to block U.S. exports in the future.

The SPS Agreement contains a number of provisions that may be applicable in the case of catfish. Fundamentally, WTO member countries *“have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.”*<sup>2</sup> Such provisions include:

*Article 2.2 -- Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence...*

Shifting catfish inspection to FSIS and applying USDA meat inspection procedures has not been shown to be necessary to protect human health. There is no evidence that the FDA’s Hazard Analysis and Critical Control Point (HACCP) program has not done that effectively.

*Article 2.3 -- Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.*

Shifting catfish inspection to FSIS and applying USDA meat inspection procedures appears to be designed to make it difficult for exporting countries to ship product to the United States.

*Article 5.1 -- Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.*

The following statements in the FSIS risk assessment raise doubts about whether the risk assessment justifies the action to be taken.

- “There is substantial uncertainty regarding the actual effectiveness of an FSIS catfish inspection program.”
- “Sparse information limits [USDA’s] ability to make strong statements about the baseline risk.”

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<sup>2</sup> Article 2.1 of the SPS Agreement

- “The true effectiveness of FSIS inspection for reducing catfish-associated human illnesses is unknown.
- “...the rate at which FSIS inspection will achieve its ultimate reductions is unknown.”

*Article 5.4 -- Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.*

Neither the legislation nor the rule contemplated other possible means of ensuring the safety of catfish that would have had a less negative effect on trade. Might an increase in the level of FDA inspections have been just as effective, less costly and less trade restrictive? Indeed, it appears that shifting catfish inspection to FSIS and applying USDA meat inspection procedures is actually intended to create negative trade effects for imported catfish.

*Article 5.5 -- With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.*

Shifting catfish, and only catfish, inspection to FSIS and applying USDA meat inspection procedures appears to create an arbitrary and unjustifiable distinction in the level of protection in different situations. Is there concrete evidence that the FDA HACCP system is unsafe for use with catfish but is safe for use with other seafood products? If there is no such evidence, this action would definitely result in discrimination and a “disguised restriction” on trade.

It is worth noting that in a previous dispute settlement case involving Australian measures aimed at protecting farm-raised salmon, the WTO ruled against Australia. A WTO panel found in 2000 that Australian measures resulted in the prohibition of certain Canadian salmon without being based on a risk assessment and without sufficient scientific evidence. The panel determined that the measure therefore violated the WTO’s SPS Agreement.<sup>3</sup> The Panel further noted that Australia did not at the same time impose new restrictions on categories of non-salmonid finfish and live ornamental fish, despite the fact that these are known to host many serious disease agents that Australia had used as an excuse for imposing stringent restrictions on salmon imports. The WTO Panel also found that there were other less-trade restrictive measures available to Australia that would provide the appropriate level of protection. The U.S., in its third party submission to the Panel, agreed with Canada’s position against Australia.

#### The Rule will Lead to Retaliation against U.S. Exports

If the catfish rule is implemented and subsequently challenged under the SPS Agreement in the WTO, and if the U.S. loses that challenge, the U.S. will be instructed to bring its system into

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<sup>3</sup> See [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds18sum\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds18sum_e.pdf) and [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds18\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds18_e.htm)

conformity with WTO rules. This would logically mean transferring the inspection program back to FDA. But the U.S. would not have to shift the entire program back to FDA. In reality, WTO rules and dispute settlement decisions only apply to measures applied to trade. It would not matter to the WTO what the U.S. does with respect to inspection of domestically produced catfish, as long as it does not discriminate against imported product.

The U.S., therefore, would be expected to take whatever actions necessary to eliminate the discriminatory or otherwise unfair restrictions on imported catfish. As a sovereign nation, the United States could choose to ignore the ruling under the WTO dispute settlement process. But, in such case, the affected exporting country or countries would be authorized to retaliate against an equal value of U.S. exports. In WTO terms, this is referred to as re-establishing the balance in WTO rights and obligations.

The following table shows the value of U.S. imports from China and Vietnam in the categories of the Tariff Schedule of the United States that cover catfish.

U.S. Imports of Fish Products from China and Vietnam  
In Categories Covering Ictaluridae and Pangasius, 2010

Tariff No.	Description	China	Vietnam
		Million Dollars	
0302695001,04	Fresh/chilled	0	-
03037922,25	Frozen	0	-
0304296032,33,34	Fillets	34	149
Total		34	149

Source: US International Trade Commission

It is not possible to say with precision what level of retaliation a dispute settlement panel would authorize, but the level of trade in catfish from these countries is not insignificant and retaliation would be expected to reflect that.

Of course, as mentioned previously, China in particular has demonstrated its ability and willingness to retaliate against the trade of countries it believes has treated its trade unfairly. So one can presume that China, and perhaps Vietnam, would not await a formal WTO dispute settlement decision before proceeding with retaliation in one form or another.

## Coverage of Pangasiidae Under the Proposed Rule

As previously noted, Congress excluded Pangasiidae from being labeled as “catfish” in the U.S. in the 2002 Farm Bill. Accordingly, a definition for catfish that would include this species, as presented in the proposed rule, would conflict directly with existing law. Therefore, if the Secretary chooses to define catfish for the purpose of the FSIS inspection program as including fish from the family of Pangasiidae, the U.S. government would be placing itself in the paradoxical position of defining Pangasiidae as a catfish for inspection purposes, but at the same time, prohibiting the labeling of it as a catfish. This would be an absurd result that must be rejected.

## Recommendation on Proposed Rule Overall

Because the proposed rule almost certainly violates the trade obligations the Congress and Administration have agreed to implement and are bound to under international agreements, and almost certainly will result in retaliatory measures that would harm U.S. exports, we recommend that implementation of the rule be delayed until the U.S. Government can ensure that any new inspection system complies with U.S. trade obligations. Such a review must ensure that any transfer of catfish inspection to FSIS from the current inspection program carried out by FDA for catfish and other seafood is based on science grounds, a valid risk assessment, and is not more trade restrictive than necessary to achieve valid health objectives.

Even if such a review were to find that there are valid and unique scientific, safety, and health reasons to transfer catfish inspection to FSIS from the inspection program applied to all other seafood by FDA (and we highly doubt this could be found based on existing scientific data), we believe and recommend that USDA must not put a new inspection program into effect until such time that FSIS is able to make equivalency determinations for all affected countries that request such determinations. To immediately prohibit imports of catfish until exporting countries establish and are determined as having FSIS-equivalent continuous inspection requirements, as contemplated in the proposed rule, would immediately halt trade and violate U.S. obligations under the WTO, thus inviting retaliation by affected countries.

In conclusion, to move forward with rulemaking to implement a new inspection system that almost certainly violates the trade obligations to which Congress and Administration have agreed to uphold and implement would be irresponsible. Moreover, to move forward with rulemaking that almost certainly will result in retaliatory actions taken by our trading partners against U.S. exports and therefore would harm U.S. economic interests would be against U.S. national interests.