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Muddying the Waters: Catfish Inspection Authority Transitions to the Food Safety and Inspection Service

Michelle Johnson-Weider*

SUMMARY

Over the last 20 years, steadily increasing imports into the United States of Vietnamese fish similar to domestically raised catfish have put tremendous strain on an American industry already struggling from natural disasters and rising food and fuel costs.¹ American catfish producers have fought declining market share through trade remedies and intensive lobbying efforts that resulted in federal laws to prohibit Vietnamese fish from being marketed as catfish, an effort bitterly opposed by free trade advocates and which has done little to stem the declining sales of domestic catfish.² The small yet regionally important industry has managed outsized legislative victories thanks to a few well-placed allies in Congress.³ On September 1, 2017, responsibility for the inspection of catfish shifted completely from the Food and Drug Administration, which has jurisdiction over most food and all other seafood, to the Food Safety and Inspection Service of the United States Department of Agriculture, marking the end of an 18-month transitional period.⁴ Because it is generally more difficult legislatively to eliminate existing programs than it is to

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1. *See infra* pp. 3-5.

2. *See infra* p. 10.

3. *See infra* pp. 8-10.

4. Mandatory Inspection of Fish of the Order Siluriformes and Products Derived From Such Fish, Final Rule, 80 Fed. Reg. 75590 (Dec. 2, 2015) (codified at 9 C.F.R. pts. 300).

establish new ones, this shift should insulate domestic catfish producers from further legislative changes, though it remains to be seen whether the new inspection regime is sufficient to save the American catfish industry.

I. Background: Decline of an American Industry

Aquaculture, the “cultivation of aquatic organisms in controlled aquatic environments,” is the source of almost half of all seafood consumed by humans worldwide.⁵ In 2009, the United States was the second largest consumer of seafood and the largest importer, importing between 91 and possibly as much as 94 percent of all seafood eaten in the United States.⁶ In 2016, the seafood trade deficit exceeded \$14 billion.⁷

Domestic aquaculture production is a relatively small business in the United States, accounting for only 0.4 percent of the total market value of agricultural products sold in the United States in 2012.⁸ However, farm-raised catfish is very important to the economy of several southern states, particularly Mississippi, Alabama, and Arkansas.⁹ While total domestic aquaculture farm sales in the United States have grown slowly, the percentage represented by catfish (as reported to the Census of Aquaculture) shrunk from 46 percent in 1998 to 27 percent in 2013:¹⁰

5. Michael Rubino, *What is Aquaculture?* NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (June 2011), <http://www.noaa.gov/stories/what-aquaculture>.

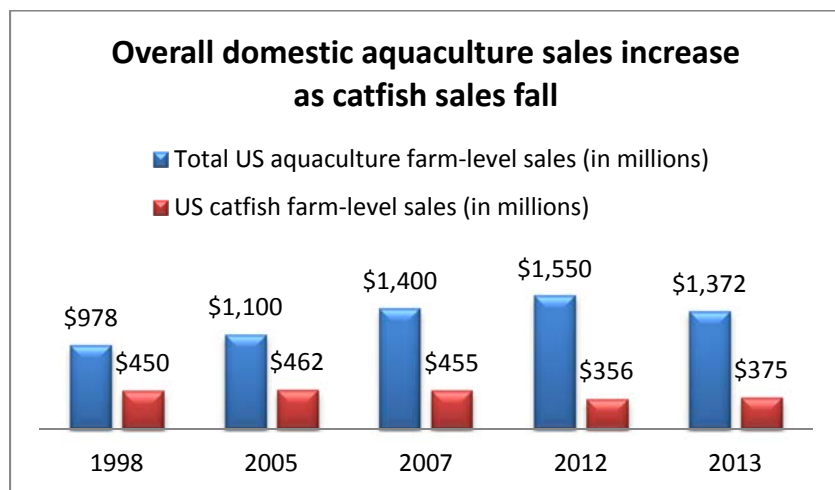
6. *Aquaculture in the United States*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. FISHERIES, http://www.nmfs.noaa.gov/aquaculture/aquaculture_in_us.html (last visited on Sept. 23, 2017) [hereinafter NOAA FISHERIES]; U.S. GOV'T ACCOUNTABILITY OFF., IMPORTED FOOD SAFETY: FDA'S TARGETING TOOL HAS ENHANCED SCREENING, BUT FURTHER IMPROVEMENTS ARE POSSIBLE 1 (2016), <https://www.gao.gov/assets/680/677538.pdf> [hereinafter FDA'S TARGETING TOOL].

7. NOAA FISHERIES, *supra* note 6.

8. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., 2012 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 9 (Vol. 1, Part 51 2014), https://agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf [hereinafter 2012 CENSUS OF AGRICULTURE].

9. *Catfish*, MISSISSIPPI STATE UNIVERSITY EXTENSION SERVICE (Aug. 21, 2014), <http://extension.msstate.edu/agriculture/catfish>.

10. U.S. DEP'T. OF AGRIC., NAT'L AGRIC. STATISTICS SERV., 2005 CENSUS OF AQUACULTURE, 2002 CENSUS OF AGRICULTURE 5 (Vol. 3, Special Studies Part 2 2006) [hereinafter 2005 CENSUS OF AQUACULTURE]; 2012 CENSUS OF AGRICULTURE, *supra* note 8 at 9, 25; U.S. DEP'T. OF AGRIC., NAT'L AGRIC. STATISTICS SERV., 2013 CENSUS OF AQUACULTURE, 2012 CENSUS OF AGRICULTURE 14, 28-29 (Vol. 3, Special Studies Part 2 2014) [hereinafter 2013 CENSUS OF AQUACULTURE].



Beginning in the late 1990s, with the end of the US trade embargo on Vietnam,¹¹ catfish producers in the United States faced increasing competition from foreign imports, primarily frozen fillets of “Vietnamese catfish,” about 14.8 million pounds of which were imported during the first seven months of 2006, a 780-percent increase over the same period in 2004.¹² These imports are a direct result of the normalizing of trade relations between the United States and Vietnam, a process that led to the signing of the U.S.-Vietnam Bilateral Trade Agreement in December 2001 and continued into Obama Administration negotiations over the Trans-Pacific Partnership.¹³

The Vietnamese imports are enormously controversial.¹⁴ American producers argue that the imported fish, raised on small farms in the Mekong River Delta,¹⁵ are not catfish at all, but are

11. See, e.g., Douglas Jehl, *Opening to Vietnam; Clinton Drops 19-Year Ban on U.S. Trade with Vietnam; Cites Hanoi's Help on M.I.A.'s*, NEW YORK TIMES (Feb. 4, 1994), <http://www.nytimes.com/1994/02/04/world/opening-vietnam-clinton-drops-19-year-ban-us-trade-with-vietnam-cites-hanoi-s.html>.

12. DAVID J. HARVEY, U.S. DEP'T. OF AGRIC., *AQUACULTURE OUTLOOK: DOMESTIC AQUACULTURE COMPETING WORLDWIDE 5* (2006), <http://usda.mannlib.cornell.edu/usda/ers/LDP-AQS/2000s/2006/LDP-AQS-10-05-2006.pdf>.

13. MICHAEL F. MARTIN, CONGRESSIONAL RESEARCH SERVICE, *U.S.-VIETNAM ECONOMIC AND TRADE RELATIONS: ISSUES FOR THE 114TH CONGRESS 1, 3* (2016), <https://fas.org/sgp/crs/row/R41550.pdf>.

14. *Id.* at 12-13.

15. See, e.g., David Bennett, *U.S., Vietnam in word battle over catfish*, DELTA FARM PRESS (June 14, 2002), <http://deltafarmpress.com/us-vietnam-word-battle-over-catfish>.

intentionally marketed using a false name to take advantage of American consumers' appreciation of the familiar domestic fish, an appreciation developed, in part, through an expensive advertising campaign paid for by American producers.¹⁶

According to the scientific classification of species, the order *Siluriformes* consists of what are commonly called catfish in English: scaleless, whiskered, naturally bottom-feeding fish with defensive fin spines.¹⁷ These fish are fished, farmed, and eaten throughout the world under a variety of common names.¹⁸ Catfish native to North America are members of the family *Ictaluridae*, found primarily in the southern United States, where they are farmed in open freshwater ponds¹⁹ Vietnamese "catfish" are primarily of the family *Pangasiidae* and known by the common names basa, swai, and tra.²⁰ Airbreathing "catfish" belong to the family *Clariidae* and are found in Africa, Syria, and southern and western Asia.²¹ Throughout this article, the term "catfish" refers to all members of the order *Siluriformes*, unless otherwise specified.

Just as in modern livestock production, competitive advantage in catfish production often depends on reducing both the cost of inputs (feed) and the time required to achieve harvest weight, while increasing the quantity of meat produced from a single animal.²² American channel catfish, native to the Mississippi River Delta, typically take 18 months to 2 years to

16. *Id.*

17. *See id.*

18. John G. Lundberg & John P. Friel, *Siluriformes: Catfishes*, TREE OF LIFE WEB PROJECT, <http://tolweb.org/Siluriformes/15065/2003.01.20> (last updated Jan. 20, 2003).

19. Larry Page & John G. Lundberg, *Ictaluridae: North American Freshwater Catfish, Bullhead Catfishes*, TREE OF LIFE WEB PROJECT, <http://www.tolweb.org/Ictaluridae/15230> (last updated May 23, 2007); *See Background*, U.S. DEP'T OF AGRIC. ECON. RES. SERV., <http://www.ers.usda.gov/topics/animal-products/aquaculture/background.aspx> (last updated Oct. 19, 2016).

20. Bennett, *supra* note 15.

21. *Family Clariidae: Airbreathing Catfishes*, FISHBASE, <http://www.fishbase.org/summary/FamilySummary.php?ID=139> (last visited Oct. 31, 2017).

22. *See, e.g.*, Terrill R. Hanson et al., *Comparative Advantages of the U.S. Farm-Raised Catfish Industry: A Cross-Regional Analysis*, 17 AQUACULTURE ECON. & MGMT. 87 (2013).

reach a harvest weight of 1 to 2 pounds;²³ Vietnamese catfish, native to the Mekong River Delta, are generally harvested after 8 to 10 months, at a weight of 2 to 3 1/2 pounds.²⁴ Vietnam is the world's largest producer of *Pangasius hypophthalmus* and exports frozen fish throughout the world.²⁵

American catfish producers blame the large increase in US imports of Vietnamese fish for declining domestic prices and market share.²⁶ As shown on the following chart (derived from data in the catfish processing reports of the National Agricultural Statistics Service), the quantity of farm-raised catfish processed in the United States has declined steeply as imports of fish belonging to the order *Siluriformes* have increased:²⁷

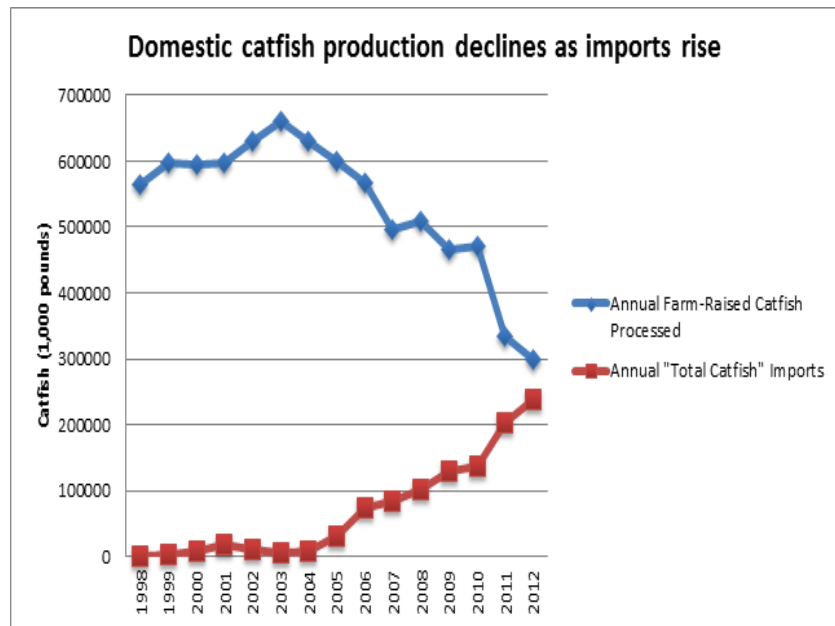
23. *Frequently Asked Questions*, THE CATFISH INSTITUTE, <http://uscatfish.com/faqs/> (last visited Oct. 31, 2017).

24. *Pangasius Farming: An Overview*, THE FISH SITE (Aug. 17, 2015, 1:00 AM), <https://thefishsite.com/articles/pangasius-farming-an-overview>.

25. *Cultured Aquatic Species Information Programme: Pangasius hypophthalmus*, U.S. FOOD AND AGRIC. ORG., http://www.fao.org/fishery/culturedspecies/Pangasius_hypophthalmus/en (last visited Dec. 14, 2017).

26. *E.g.*, Bennett, *supra* note 15.

27. U.S. DEP'T. OF AGRIC. STATISTICS SERV., AGRICULTURAL STATISTICS BOARD, CATFISH PROCESSING 1, 8 (2013), <http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1015> (surveying reports from Dec. 23, 1999, through Mar. 20, 2013).



During the period represented above,²⁸ the average price paid to catfish producers increased from 0.69 cents per pound (January 1998) to 0.82 cents per pound (January 2013), failing to keep pace with soaring commodity costs that made catfish feed almost prohibitively expensive.²⁹

As the total catfish market share has declined, the effects on states has varied. In the following chart (derived from data reported to the 2005 Census of Aquaculture³⁰ and 2012 Census of Agriculture³¹), note in particular the overall decline in Mississippi's total catfish sales and the near total failure of the Louisiana catfish industry (blamed on the devastation of the

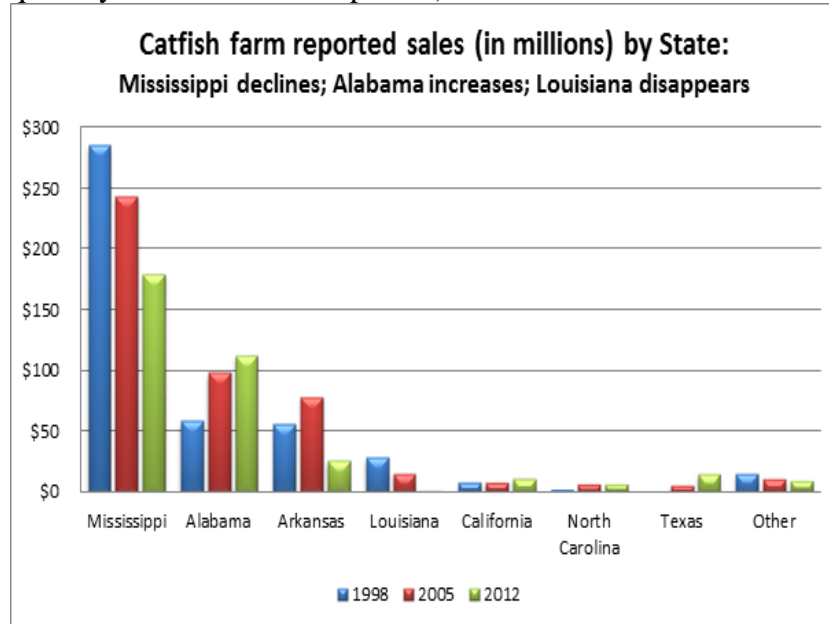
28. See *supra* Figure, domestic catfish production declines as imports rise.

29. E.g., John H. Cushman, Jr., *Catfish Farmers Fight Fish Glut and High Feed Prices*, NEW YORK TIMES (Aug. 31, 2012), <http://www.nytimes.com/2012/09/01/business/markets-and-drought-hurting-us-catfish-producers.html>; David Bennett, *Catfish industry swamped by rising costs*, DELTA FARM PRESS (Aug. 8, 2008), <http://deltafarmpress.com/catfish-industry-swamped-rising-costs>.

30. 2005 CENSUS OF AQUACULTURE, *supra* note 10, at 22.

31. 2012 CENSUS OF AGRICULTURE, *supra* note 8, at 395.

2005 hurricanes, rising fuel and feed costs, and the surging quantity of Vietnamese imports³²):



II. A Complicated Regulatory Framework

Three federal agencies are directly involved in regulating the catfish industry.³³ Catfish producers can choose to voluntarily contract with the Seafood Inspection Program of the National Oceanic and Atmospheric Administration (“Department of Commerce”) to inspect processing facilities on a fee-for-service basis and certify the facilities as Sanitarily Inspected Fish Establishments.³⁴ The Food and Drug Administration (“FDA”) of the Department of Health and

32. E.g., Johnny Morgan, *Economic downturn, imports hurt catfish industry*, DELTA FARM PRESS (Mar. 25, 2011), <http://deltafarmpress.com/markets/economic-downturnimports-hurt-catfish-industry>.

33. Veronique de Rugy, *How Government Cronies Redefined the Catfish*, REASON (Jun. 30, 2016), <https://reason.com/archives/2016/06/30/how-government-cronies-redefined-the-cat/print>.

34. *Program Services*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN. FISHERIES, http://www.seafood.nmfs.noaa.gov/program_services/program_services.html (last visited Sept. 24, 2017); *Long History of Quality*, THE CATFISH INSTITUTE, <http://uscatfish.com/about/> (last visited Sept. 24, 2017).

Human Services regulates the safety of almost all domestic or imported food in the United States and ensures that the food is properly processed, packaged, and labeled;³⁵ until recently the FDA's authority extended to all seafood, including catfish.³⁶ The Food Safety and Inspection Service ("FSIS") of the U.S. Department of Agriculture ("USDA") has similar responsibility over commercial meat, poultry, and egg products and, since September 1, 2017, catfish.³⁷

FDA and FSIS take different approaches to food safety due to the vastly different scopes of their mandates. FDA focuses on establishing guidance and regulations, including a model Food Code for use by state, tribal, and local agencies with a primary responsibility of ensuring retail food safety,³⁸ and Hazard Analysis & Critical Control Points ("HACCP") for specific industries.³⁹ The Seafood HACCP program requires each seafood processor to analyze and address their particular food safety hazards through development and implementation of a plan.⁴⁰ FDA may then verify compliance with the plan through on-site and records inspections or, in the case of foreign processing facilities, examination of records demonstrating processor compliance with equivalent foreign requirements.⁴¹

35. *Ingredients, Packaging and Labeling*, U.S. FOOD AND DRUG ADMIN., <https://www.fda.gov/food/ingredientspackaginglabeling/> (last Updated Dec. 21, 2016).

36. *See generally* Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. §§ 301-399g (West 2017).

37. *See generally* Federal Meat Inspection Act, 21 U.S.C. §§ 601-683 (2015); Egg Products Inspection Act, 21 U.S.C. §§ 1031-1056 (2015); Poultry Products Inspection Act, 21 U.S.C. §§ 451-471 (2015); Agricultural Marketing Act of 1946, 21 U.S.C. §§ 1621-1639j (2016).

38. *FDA Food Code*, U.S. FOOD AND DRUG ADMIN., <https://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/default.htm> (last updated Nov. 19, 2017).

39. *Id.*; U.S. FOOD AND DRUG ADMIN., OFFICE OF FOOD SAFETY, SEAFOOD HACCP AND THE FDA FOOD SAFETY MODERNIZATION ACT: GUIDANCE FOR INDUSTRY 3 (2017), <https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM569798.pdf>.

40. FDA'S TARGETING TOOL, *supra* note 6, at 7.

41. *Id.*

FDA's approach to seafood safety, particularly in regards to imported seafood, has been widely criticized as ineffective.⁴² FDA does not conduct annual site inspections of all domestic seafood processors and directly inspects only a small percentage of domestic or imported seafood (around 1 percent in the case of imported seafood).⁴³ In 2006, FDA conducted 2,456 inspections out of an estimated total 13,400 domestic seafood processors.⁴⁴

In the case of foreign-processed seafood, FDA targets high-risk imports for inspection at ports of entry and carries out other compliance activities through sampling.⁴⁵ FDA sends only a few inspection teams each year to inspect foreign processors directly.⁴⁶ FDA estimates that about 159 countries export the majority of seafood to the United States, with approximately 14,900 registered foreign firms that export seafood into the United States and a much greater number involved in processing.⁴⁷ However, in each of fiscal years 2004 and 2005, FDA sent inspection teams to only ten countries.⁴⁸ Of the approximately 2,660 importers of seafood into the United States, in 2006, FDA inspected 529.⁴⁹ For many years, domestic catfish producers pointed to the fact that, because FDA inspected such a small percentage of imported fish and foreign processors, and failed to follow through on more criminal prosecutions of importers who mislabeled Vietnamese fish as "catfish," American consumers were unknowingly being exposed to unsafe and mislabeled fish.⁵⁰

42. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, FOOD SAFETY: FEDERAL OVERSIGHT OF SEAFOOD DOES NOT SUFFICIENTLY PROTECT CONSUMERS 5-6 (2001), <http://www.gao.gov/new.items/d01204.pdf>.

43. ANDREW C. VON ESCHENBACH, U.S. FOOD AND DRUG ADMIN., REPORT TO CONGRESS: FOOD AND DRUG ADMINISTRATION AMENDMENTS ACT OF 2007 (PUBLIC LAW 110-85) SECTION 1006 — ENHANCED AQUACULTURE AND SEAFOOD INSPECTION (2008), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/ucm150954.htm>.

44. *Id.*

45. FDA'S TARGETING TOOL, *supra* note 6, at 21-22.

46. *Id.* at 22.

47. VON ESCHENBACH, *supra* note 43.

48. *Id.*

49. *Id.*

50. *E.g.*, Bennett, *supra* note 15.

USDA's FSIS has long had a similar HACCP system in place for meat, poultry, and egg products, but the agency's inspection process is far more robust than FDA's. Approximately 8,000 FSIS inspection personnel conduct on-site inspections of more than 6,000 domestic slaughterhouses and food processors.⁵¹ FSIS inspects all meat, poultry, and processed egg products imported into the United States—more than 3 billion pounds each year—and certifies foreign countries and establishments as being eligible to export food to the United States.⁵² The thoroughness of the FSIS inspection approach, particularly in regards to imported food, makes the agency attractive to anyone who, like most domestic catfish producers, is concerned about FDA's inspection and enforcement record.

III. Initial Congressional Response: Politics, Power, and Labels

Federal legislative action on regional issues like catfish production or ethanol is heavily influenced by the geographic distribution of power in Congress. Interest groups can do well even with the support of only a few well-placed members. Because almost all legislation originates from, or is referred to a congressional committee, members of Congress who serve on the committee with jurisdiction over a particular issue have outsized influence over how that issue is addressed throughout the legislative process.⁵³ A chair, ranking member, or even a senior member of a committee has a much better chance than other members of Congress of ensuring that the member's priorities are considered in development of the legislation.⁵⁴ Members who serve in leadership positions in the House and Senate also have more opportunities to see that their legislative agenda is taken into account.⁵⁵

51. U.S. DEP'T. OF AGRIC., FOOD AND SAFETY INSPECTION SERVICE: PROTECTING PUBLIC HEALTH AND PREVENTING FOODBORNE ILLNESS 7 (2014), <http://www.fsis.usda.gov/wps/wcm/connect/7a35776b-4717-43b5-b0ce-aeec64489fbd/mission-book.pdf>.

52. *Id.*

53. See *About the Senate Committee System*, U. S. SENATE, https://www.senate.gov/general/common/generic/about_committees.htm (last visited 31 Oct. 2017).

54. *Id.*

55. *Id.*

Domestic catfish producers have one well-placed friend in particular to thank for many of the legislative changes ultimately made on their behalf. Senator Thad Cochran, a Republican from Mississippi, is serving his seventh term in the Senate, where he is the third-most senior Senator⁵⁶ and Chairman of the powerful Senate Appropriations Committee (2005-2006, 2015-present⁵⁷). He is also a senior member, former chair (2003-2005), and ranking member (2013-2014) of the Committee on Agriculture, Nutrition, and Forestry (“Senate Ag Committee”), a committee on which he has served continuously since first becoming a Senator in 1979.⁵⁸ Senator Cochran is widely credited with decades of advocacy for domestic catfish producers and using his position to pressure other Senators, who might be otherwise inclined to vote against such measures because of free trade concerns.⁵⁹

In the Senate, jurisdiction over catfish would historically and logically seem to rest in the Committee on Health, Education, Labor, and Pensions, which has oversight responsibilities for the Food and Drug Administration.⁶⁰ The Senate Ag Committee, which has jurisdiction over FSIS, agricultural production, and a myriad of other issues covered by the massive Farm Bill, would be another obvious choice.⁶¹ However, Congress initially addressed the concerns of domestic catfish producers through the appropriations process, by enacting restrictions on fiscal year 2002 funding for FDA, which at the time had regulatory authority over enforcing the correct labeling, for marketing purposes, of all fish, whether domestic or

56. *Id.*

57. *Biography*, OFFICIAL WEBSITE OF SENATOR THAD COCHRAN, <http://www.cochran.senate.gov/public/index.cfm/biography> (last visited Dec. 14, 2017).

58. *Id.*

59. *Id.*

60. See David Rogers, *Catfish swimming into trade debate*, POLITICO (May 18, 2015), <http://www.politico.com/story/2015/05/catfish-trade-debate-118070>; Eric Bradner, *Cochran's last stand in catfish war*, POLITICO (Aug. 16, 2013), <http://www.politico.com/story/2013/08/thad-cochran-catfish-095620>.

61. *Health*, U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, <http://www.help.senate.gov/about/issues/health> (last visited Sept. 24, 2017).

imported.⁶² The funding restriction prohibited FDA from allowing any fish or fish products labeled as “catfish” to enter the United States unless the fish was classified within the family *Ictaluridae*.⁶³ In other words, only catfish native to North America could be legally imported into or sold in the United States under the name “catfish.”

Language in an appropriations bill is generally effective for only one fiscal year.⁶⁴ Congress extended and formalized the labeling requirements in the 2002 Farm Bill, by requiring FDA to consider as “misbranded” any non-*Ictaluridae* fish marketed as catfish.⁶⁵ The use of the term “misbranded” allowed FDA to pursue enforcement actions against violators of the new catfish labeling requirements, although Congress did not provide any additional funding for FDA to carry out these responsibilities.⁶⁶ The joint explanatory statement of the committee of conference stated that the provision “clarifies that the term catfish may not be considered a common or usual name for the fish *Pangasius bocourti*, or any other fish not classified within the family *Ictalariidae* [*sic*],” demonstrating that the legislative intent was to target Vietnamese catfish.⁶⁷ The 2002 Farm Bill also included country-of-origin labeling provisions that required farm-raised fish at retail sale to be labeled with its country of origin.⁶⁸ A United States label for farm-raised fish is only permitted for fish “hatched, raised, harvested, and processed in the United States.”⁶⁹ While domestic catfish producers hailed these

62. *Jurisdiction*, U.S. SENATE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, <http://www.agriculture.senate.gov/about/jurisdiction> (last visited Sept. 24, 2017).

63. Guidance for Industry; Implementation of Section 755 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-76, § 755 (2001) Regarding Common or Usual Names for Catfish; Availability, 67 Fed. Reg. 5604 (Feb. 6, 2002).

64. *Id.*

65. *Id.*

66. Farm Security and Rural Investment Act of 2002, § 10806(a), 21 U.S.C. § 321d(a) (2015).

67. See H.R. Rep. No. 107-424, at 657 (2002) (Conf. Rep.).

68. *Id.*

69. Farm Security and Rural Investment Act of 2002, Publ. L. No. 107-171, § 10816, 116 Stat. 533.

changes, they proved unpopular with free trade advocates, especially those trying to normalize trade with Vietnam.⁷⁰

IV. Antidumping Order: American Catfish Producers Versus Vietnam

The major domestic catfish industry trade association, which had lobbied Congress for the labeling changes,⁷¹ soon expressed disappointment that FDA was not doing more to inspect imported catfish and prosecute violators of the new requirements.⁷² The Catfish Farmers of America continued the fight on its own, hiring investigators to discover and report violations to FDA and lawyers to file an antidumping petition with the United States International Trade Commission.⁷³ The petition, filed in July 2002, alleged that Vietnam was responsible for falling domestic catfish prices due to the imports of frozen fish fillets at less than fair value.⁷⁴ The Commission and the Department of Commerce sided with the producers, issuing an antidumping duty order,⁷⁵ which required U.S. Customs and Border Protection to assess antidumping duties on the relevant Vietnamese frozen fish imports.⁷⁶ After both the five-year review in 2009 and the second review in 2014, the Commission upheld the initial antidumping duty order, determining that revocation of the order “would be likely to lead to continuation or recurrence of material injury” to the domestic catfish industry.⁷⁷

70. Bruce A. Babcock & Chad E. Hard, *Judging the Performance of the 2002 Farm Bill*, 11 IOWA AG. REV 1, 1 (2005).

71. See Bennett, *supra* note 15.

72. *Id.*

73. E.g., *id.*; David Bennett, *Catfish Farmers of America: Anti-dumping petition filed against Vietnam*, DELTA FARM PRESS (Aug. 9, 2002), <http://deltafarmpress.com/catfish-farmers-america-anti-dumping-petition-filed-against-vietnam>.

74. *Id.*

75. Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 47909 (Aug. 12, 2003).

76. *Id.*

77. U.S. INT'L TRADE COMM'N, CERTAIN FROZEN FISH FILLETS FROM VIETNAM, INVESTIGATION NO. 731-TA-1012 (REVIEW) 1 (2009), https://www.usitc.gov/publications/701_731/pub4083.pdf; U.S. INT'L TRADE COMM'N, CERTAIN FROZEN FISH FILLETS FROM VIETNAM, INVESTIGATION NO. 731-TA-1012 (SECOND REVIEW) 1 (2014), https://www.usitc.gov/publications/701_731/pub4498.pdf.

As demonstrated earlier in the charts showing domestic production and catfish market share, the situation for domestic catfish producers temporarily improved during this period. Ultimately, however, the initial congressional action and the antidumping order failed to stop the rise in Vietnamese imports.⁷⁸ Domestic catfish producers pressured state legislatures to enact state catfish labeling laws.⁷⁹ As Congress began consideration of the 2008 Farm Bill, producers lobbied for a new federal legislative fix, one that would represent a fundamental change in how imported catfish is inspected.

V. Congressional Response: Shifting Inspection Responsibility to FSIS

In the 2008 Farm Bill, Congress began shifting responsibility for catfish from FDA to FSIS.⁸⁰ The first change required the Secretary of Agriculture to establish “a voluntary fee based grading program for all fish of the order Siluriformes.”⁸¹ Congress then amended the Federal Meat Inspection Act to include “catfish, as defined by the Secretary,” thus requiring FSIS to conduct catfish inspections and ensure the proper labeling of catfish.⁸² This new responsibility would not take effect until the Secretary of Agriculture issued final regulations, which Congress directed the Secretary to do, in consultation with FDA, not later than 18 months after the date of

78. *US Gets Hooked on Vietnamese Catfish*, GRO INTELLIGENCE (Oct. 14, 2016), <https://gro-intelligence.com/insights/us-vietnam-catfish-production>.

79. *E.g., Summary of State Catfish Country of Origin Laws*, CATFISH FARMERS OF AMERICA, <http://www.catfishfarmersofamerica.com/countryoforiginlabelinglaws/> (last visited Dec. 15, 2017) (noting state catfish labeling laws enacted by Louisiana (effective 2009), Tennessee (2010), Mississippi (2013), Alabama (2015), and Arkansas (2016)); Hanna Raskin, *Catfish Industry Fighting for New Labeling Law in Texas*, DALLAS OBSERVER (Mar. 2, 2011), <http://www.dallasobserver.com/restaurants/catfish-industry-fighting-for-new-labeling-laws-in-texas-7043293>.

80. Dan Flynn, *Agencies Reach Catfish Inspection Agreement Required by Farm Bill*, FOOD SAFETY NEWS (May 14, 2014), <http://www.foodsafetynews.com/2014/05/catfish-agreement-called-for-in-farm-bill-reached-by-agencies/#.WjNHt9-nHIU>.

81. Agricultural Marketing Act of 1946, § 203(n), 7 U.S.C. § 1622(n) (2016).

82. Food, Conservation, and Energy Act of 2008, Publ. L. No. 110-234, § 11016(b), 122 Stat. 2130, amending 21 U.S.C. § 601(w)(2) (2013) (amended by Act Feb. 7, 2014).

enactment of the 2008 Farm Bill (June 18, 2008).⁸³ The joint explanatory statement of the committee of conference stated, “It is the intent of Congress that catfish be subject to continuous inspection and that imported catfish inspection programs be found to be equivalent under USDA regulations before foreign catfish may be imported into the United States.”⁸⁴

While the legislative text anticipated that FSIS would start catfish inspection sometime in 2010,⁸⁵ reality proved much different. Congress frequently imposes deadlines in legislation that agencies are unable or unwilling to meet and in the case of catfish inspection, it seemed that the Obama Administration’s trade goals and fiscal priorities did not align with the new congressional mandate.⁸⁶ The Secretary of Agriculture did not even issue a proposed regulation until early 2011.⁸⁷ In the proposed rule, the Secretary requested public comments on two options for defining “catfish:” the first, that the term include only fish of the family *Ictaluridae* and the second, that the term include all fish of the order *Siluriformes*.⁸⁸ As it turned out, Congress would intervene again long before the Secretary finalized the regulation.

During the debate over the 2014 Farm Bill, which began in 2012, members who wanted to return catfish inspection to FDA, so as to prevent further trade disruptions, scored an initial victory against those who wanted FSIS responsibility.⁸⁹ Senators John Kerry (D-MA) and John McCain (R-AZ) sponsored an

83. *USDA Releases Final Rule Establishing Inspection Program for Siluriformes Fish, Including Catfish*, U.S. DEP’T. OF AGRIC. (Nov. 25, 2015), <https://www.fsis.usda.gov/wps/portal/fsis/newsroom/news-releases-statements-transcripts/news-release-archives-by-year/archive/2015/nr-112515-01>.

84. H.R. REP. NO. 110-627, at 938 (2008) (Conf. Rep.).

85. *Update to CFP on FSIS Activities*, FOODPROTECT, <http://www.foodprotect.org/media/reportdate/8-08%20USDA-FSIS%20Report.pdf> (last visited Dec. 14, 2017).

86. David Bennett, *Obama budget would shutter USDA catfish inspection program*, DELTA FARM PRESS (Apr. 11, 2013), <http://deltafarmpress.com/government/obama-budget-would-shutter-usda-catfish-inspection-program>.

87. *Mandatory Inspection of Catfish and Catfish Products*, 76 Fed. Reg. 10434 (proposed Feb. 24, 2011) (to be codified at 9 C.F.R. pt. 300).

88. *Id.*

89. Dan Flynn, *U.S. Catfish Farmers Emerge As Big Winners in 2014 Farm Bill*, FOOD SAFETY NEWS (Jan. 31, 2014), <http://www.foodsafetynews.com/2014/01/u-s-catfish-farmers-emerge-as-big-winners-in-2014-farm-bill/#.WfYooTteDUo>.

amendment to repeal the FSIS catfish inspection program, returning sole authority to FDA.⁹⁰ The amendment was approved by Senate floor vote, undoubtedly assisted by a recent report of the Government Accountability Office (“GAO”) bluntly entitled “Seafood Safety: Responsibility for Inspecting Catfish Should Not Be Assigned to USDA.”⁹¹

Debate over the Farm Bill continued for nearly two years, however, and in the end, the interests of domestic catfish producers prevailed through the efforts of well-placed allies. Senator Blanche Lincoln (D-AR), chair of the Senate Ag Committee from September 2009 to January 2011, and her successor as chair, Senator Debbie Stabenow (D-MI), both supported Senator Cochran’s catfish position during consideration of the 2014 Farm Bill.⁹² Senator John Boozman (R-Ark), one of the few remaining Southerners on the Senate Ag Committee, also supported the interests of his state’s catfish producers.⁹³ Over in the Committee on Agriculture of the House of Representatives, Chairman Frank Lucas (R-OK3) joined Representatives Collin Peterson (D-MN7, ranking member), Rick Crawford (R-AR1), and Martha Roby (R-AL2) in citing food safety to beat back an effort to repeal the FSIS inspection program.⁹⁴

The final 2014 Farm Bill included several provisions affecting catfish producers. Congress directed the Federal Crop

90. *Senators McCain and Kerry on GAO Report Supporting Elimination of USDA Catfish Office*, MORRIS ANDERSON (June 8, 2012), <http://www.morrisanderson.com/resource-center/entry/SENATORS-McCAIN-AND-KERRY-ON-GAO-REPORT-SUPPORTING-ELIMINATION-OF-USDA-CATF/>.

91. *See generally* U.S. GOV’T ACCOUNTABILITY OFF., *SEAFOOD SAFETY: RESPONSIBILITY FOR INSPECTING CATFISH SHOULD NOT BE ASSIGNED TO USDA* (2012), <http://www.gao.gov/products/GAO-12-411>.

92. Helena Bottemiller, *Lincoln Pushes for USDA Catfish Inspections*, FOOD SAFETY NEWS (May 28, 2010), <http://www.foodsafetynews.com/2010/05/lincoln-again-pushes-for-usda-catfish-inspections/>; *See also* 161 CON. REC. S3015, S3022-24, S3052-53 (daily ed. May 19, 2015) (statement of Sen. Stabenow).

93. *Boozman, Crawford Say Farm Bill Good For Arkansas*, TIMES REC. (Jan. 28, 2014, 5:27 AM, updated 10:33 AM), <http://swtimes.com/news/politics/boozman-crawford-say-farm-bill-good-arkansas>.

94. David Bennett, *House Agriculture Committee debates USDA catfish inspection program*, DELTA FARM PRESS (July 12, 2012), <http://deltafarmpress.com/government/house-agriculture-committee-debates-usda-catfish-inspection-program>.

Insurance Corporation to consider providing margin coverage to catfish producers and authorized emergency disaster assistance for certain producers of farm-raised fish.⁹⁵ Most significantly, however, Congress removed the discretion of the Secretary of Agriculture to define the meaning of “catfish,” stating that the term would mean “all fish of the order Siluriformes.”⁹⁶ When considered in conjunction with the labeling laws already in effect, this meant that a legal double-standard now existed: the broadest possible definition of “catfish” applied in determining which fish were subject to inspection, but the narrowest possible definition applied in determining which fish could be labeled and sold as “catfish.”⁹⁷ Congress directed the Secretary to issue final regulations within 60 days of enactment and to begin carrying out catfish inspection within 1 year, and required the Secretary to execute a memorandum of understanding with FDA to improve interagency communication and ensure that FSIS inspections would not be duplicative with FDA activities.⁹⁸

The joint explanatory statement of the committee of conference explained that the Farm Bill addressed the definition of catfish to speed implementation of FSIS’ inspection program and avoid “arbitrary or unjustifiable distinctions in the level of inspection.”⁹⁹ The conference committee countered points raised in the GAO report and by other opponents, stating that FSIS inspection was necessary to “ensure the safety of the American food supply from food containing dangerous contaminants and banned substances” such as the “inappropriate and unregulated use of chemicals and veterinary drugs in aquaculture in some countries.”¹⁰⁰ The statement even went so far as to say that FSIS inspection was in compliance with the World Trade Organization (“WTO”) and “consistent with the principles of most-favored-nation and national treatment, in that U.S. and

95. See Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649, 702 (2014) [hereinafter Agricultural Act of 2014].

96. *Id.* at 981.

97. *Id.*; see also *Accurate Labeling of Catfish Is the Law*, U.S. CATFISH (May 29, 2014), <http://uscatfish.com/accurate-labeling-catfish-law/>.

98. Agricultural Act of 2014, *supra* note 95, at 981.

99. H.R. Rep. No. 113-333, at 556-557 (2014) (Conf. Rep.).

100. *Id.*

foreign producers, processors, and products would be treated equally.”¹⁰¹ The provision ended with a particularly blunt conclusion: “The Managers are dissatisfied that the implementation process has already exceeded 5 years and see no barrier to FSIS completing this [memorandum of understanding] and fully implementing the underlying inspection mandate within 60 days from the date of enactment of this Act.”¹⁰²

The 2014 Farm Bill became law on February 7, 2014.¹⁰³ On April 30, 2014, FSIS and FDA entered into a memorandum of understanding to “plan for the orderly transition, in phases, from FDA to FSIS of primary regulatory oversight of domestically produced and imported *Siluriformes* fish and fish products.”¹⁰⁴

VI. Trade Advocates’ Unsuccessful Attempts to Block FSIS Inspection

While domestic catfish producers hoped that the 2014 Farm Bill would put to rest any remaining arguments over catfish labeling and FSIS inspection, free trade advocates in Congress made another impassioned attempt to stop the new program in May 2015. The impetus was Senate consideration of a trade promotion authority bill providing authority to negotiate trade agreements, including the Trans-Pacific Partnership (“TPP”) Agreement. Senator John McCain (R-AZ), who has bitterly opposed for years what he calls the “catfish sham”,¹⁰⁵ led the charge, aided by the two senators from New Hampshire.¹⁰⁶

Senator Jeanne Shaheen (D-N.H.) explained her opposition to the USDA Catfish Inspection Program based on

101. *Id.* at 557.

102. *Id.*

103. Agricultural Act of 2014, *supra* note 95, at 649.

104. Memorandum of Understanding between the Food Safety and Inspection Service, U.S. Dep’t of Agric., and the Food and Drug Admin., U.S. Dep’t of Health and Human Services (Apr. 30, 2014) (on file with Food Safety and Inspection Service) <http://www.fsis.usda.gov/wps/wcm/connect/8675a5cb-7bca-4a8f-a563-7788adceb583/MOU-FSIS-FDA-Fish-Products.pdf/MOU-FSIS-FDA-Fish-Products.pdf>.

105. *E.g.*, Senator John McCain, *The fishy deal on catfish*, POLITICO (June 7, 2013, 2:04 PM EDT), <http://www.politico.com/story/2013/06/the-fishy-deal-on-catfish-092415>.

106. *See* 161 CONG. REC. S3009, 3017 (daily ed. May 19, 2015).

the possibility of the WTO-sanctioned trade retaliation against US agricultural exports and the concerns of constituent seafood processors who depend on imported fish and worry that Congress will subject other seafood products to FSIS scrutiny.¹⁰⁷ Senator McCain lambasted the “wasteful, pork barrel, outrageous program” of catfish inspection, which he claimed could jeopardize the TPP and potentially cost American agricultural producers “billions of dollars in lost market access to Asian nations.”¹⁰⁸

According to Senator McCain, the TPP was necessary not only to “promote hundreds of billions of dollars of American exports” but also to strengthen American security interests in the Pacific, whereas the catfish inspection program was intended “to create a trade barrier to protect a small handful of catfish farmers in two or three Southern States” and had already cost USDA \$20 million dollars without a single catfish inspected.¹⁰⁹ He warned that some countries might need as long as 5 to 7 years before being able to satisfy the new FSIS requirements and resume regular catfish exports, which he said highlighted the strong protectionist streak underlying program implementation.¹¹⁰ Senator McCain cited nine separate GAO reports that recommended Congress repeal the FSIS inspection program, as well as editorials in the *Wall Street Journal* and *New York Times* and letters from the Council for Citizens Against Government Waste and the National Restaurant Alliance, among others, condemning the program.¹¹¹ Senator Kelly Ayotte (R-NH) joined the strident floor speeches, stating that the TPP could create more than 8,000 new jobs in New Hampshire, all of which were imperiled if the FSIS catfish inspection program continued as that might result in a trade war and lawsuits against the United States.¹¹²

107. 161 CONG. REC, S3017 (May 19, 2015) (statement of Sen. Shaheen).

108. 161 CONG. REC, S3017 (May 19, 2015) (statement of Sen. McCain).

109. 161 CONG. REC, S3018 (May 19, 2015) (statement of Sen. McCain).

110. *Id.*

111. 161 CONG. REC, S3018-20 (May 19, 2015) (statement of Sen. McCain).

112. 161 CONG. REC, S3021 (May 19, 2015) (statement of Sen. Ayotte).

Senator Roger Wicker (R-MS) defended the program on the basis of food safety, claiming that FDA was inspecting only about 2 percent of all imported catfish, of which “an alarming volume . . . failed to meet consumer safety standards” due to unsanitary foreign aquaculture production.¹¹³ Senator Thad Cochran (R-MS) followed, reiterating that “American consumers could be exposed to dangerous chemicals and unapproved drugs in the imported catfish they eat.”¹¹⁴ Ultimately, Senator McCain’s amendment, which was cosponsored by 12 Democrats and 6 Republicans, was ruled non-germane and denied a vote.¹¹⁵

Throughout the rest of 2015 and into early 2016, Senators McCain, Shaheen, and Ayotte offered repeated amendments to repeal the FSIS inspection program to bills that came before the Senate and each time the amendments failed without receiving votes.¹¹⁶ Congress made its position on the issue even more clear in the omnibus appropriations act that funded the government for fiscal year 2016, which required FSIS to continue implementation of the new inspection program and FDA to continue to enforce the existing labeling requirements.¹¹⁷

Eventually, the Obama Administration eased Vietnamese concerns over the FSIS inspection program by agreeing to provide technical assistance and a transitional period to allow Vietnam to continue exporting fish to the United States while working to meet new FSIS requirements.¹¹⁸ On December 2, 2015, FSIS issued a final rule for carrying out catfish

113. 161 CONG. REC, S3021-22 (May 19, 2015) (statement of Sen. Wicker).

114. 161 CONG. REC, S3022 (May 19, 2015) (statement of Sen. Cochran).

115. *S. Amdt. 1226 to S. Amdt. 1221 to H.R. 1314 — 114th Congress (2015-2016)*. CONGRESS.GOV, <https://www.congress.gov/amendment/114th-congress/senate-amendment/1226/cosponsors> (last visited Dec. 15, 2017); 161 CONG. REC, S3253,33294 (daily ed. May 22, 2015).

116. 161 CONG. REC. S3021 (daily ed. May 19, 2015) (statement of Sen. Ayotte).

117. RENÉE JOHNSON, CONG. RESEARCH SERV., FY2016 APPROPRIATIONS: SAFETY AGENCIES 1-2 (2016), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R44309.pdf>.

118. Helena Bottemiller Evich, *USTR Offer ‘Catfish’ Aid to Vietnam*, POLITICO MORNING AGRICULTURE (Nov. 6, 2015, 10:00 AM EST), <http://www.politico.com/tipsheets/morning-agriculture/2015/11/ustr-offers-catfish-aid-to-vietnam-211136>.

inspections.¹¹⁹ Under the final rule, FSIS inspections of catfish began March 1, 2016.¹²⁰

An 18-month transitional period was included to allow foreign countries to continue exporting catfish to the United States while preparing the documentation necessary to demonstrate to FSIS that their inspection systems were functionally equivalent to that of the United States in regards to program administration, enforcement of water quality and processing standards, inspection regularity, and other factors.¹²¹ FSIS implemented transitional inspection procedures akin to those used for meat slaughter operations, with inspectors present every day during all hours of operation at domestic catfish slaughter and slaughter-processing facilities, and more limited inspection of processing-only plants and reinspection of imported catfish.¹²² FSIS noted that it might later adjust inspection frequency at catfish slaughter and slaughter-processing facilities based on its experiences during the transitional period.

VII. Early FSIS Successes, Legislative Last Gasp, and Congressional Recognition

Less than a month into the new FSIS inspection regime, news media reported that the agency refused entry to two shipments of Vietnamese catfish after the fish tested positive for illegal dyes and antibiotics.¹²³ The US catfish industry and Senator Cochran's office heralded the effectiveness of the new

119. Mandatory Inspection of Fish of the Order Siluriformes and Products Derived From Such Fish, 80 Fed. Reg. 75590 (December 2, 2015).

120. *Id.*

121. *Id.* at 75598.

122. *Id.* at 75606; *FY 2017 Budget Request for Food Safety: Before the Subcomm. on Agriculture, Rural Development, Food and Drug Administration, & Related Agencies of the H. Comm. on Appropriations*, 114 Cong. (Feb. 24, 2016) (statement of Al Almanza, Deputy Under Secretary for Food Safety), <http://docs.house.gov/meetings/AP/AP01/20160224/104499/HHRG-114-AP01-Wstate-AlmanzaA-20160224.pdf>.

123. *E.g.*, Ian Kullgren & Catherine Boudreau, *U.S. inspectors stop contaminated catfish imports from Vietnam*, POLITICO (May 23, 2016), <https://www.cochran.senate.gov/public/index.cfm/2016/5/u-s-inspectors-stop-contaminated-catfish-imports-from-vietnam>; *USDA-FSIS Inspection Halts Dangerous Vietnamese Pangasius Shipment*, THE CATFISH INSTITUTE (May 24, 2016), <http://uscatfish.com/usda-fsis-inspection-halts-dangerous-vietnamese-pangasius-shipment/>.

program.¹²⁴ Not everyone was impressed, however. With President Obama on a state visit to Vietnam, a country that remained deeply concerned by the new inspection procedures, the Senate considered a joint resolution of disapproval to nullify the rule establishing FSIS catfish inspection.¹²⁵ Both Senators from Mississippi spoke passionately against the resolution, with Senator Wicker arguing that the \$1.1 million annual cost of the FSIS inspection program was small considering it protected “Americans against 175,000 cases of cancer . . . [and] 91 million exposures to antimicrobials.”¹²⁶

Senator Shaheen countered that “you are more likely to get hit by lightning than to get sick from imported or domestic catfish” and argued that, since FDA was entrusted with all other forms of seafood, it made little sense to establish a separate inspection program just for catfish, especially one that might cost USDA \$15 million a year to run.¹²⁷ She warned that the FSIS inspection program, a “thinly disguised illegal trade barrier against foreign catfish”, could allow catfish-exporting countries to obtain WTO sanctions against other US agricultural exports.¹²⁸ Senators McCain and Ayotte also rose in support, noting that ten GAO reports had now called the FSIS inspection program wasteful and duplicative.¹²⁹ While the debate seemed like a carbon copy of the one the Senate engaged in almost exactly a year before, this time the result was decidedly different. The Senate passed the joint resolution of disapproval 55-43, a result that Vietnam’s Foreign Ministry said was “highly appreciated.”¹³⁰

In the end, however, the domestic catfish industry was successful in beating back this latest threat to the new inspection regime. Despite support in the House of Representatives for

124. Kullgren & Boudreau, *supra* note 123.

125. See Bill Tomson, *Vietnam takes gripes on USDA catfish inspection to WTO*, AGRIPULSE (Mar. 30, 2016, 1:45 PM), <https://www.agri-pulse.com/articles/6767-vietnam-takes-gripes-on-usda-catfish-inspection-to-wto>; S.J. Res. 28, 114th Cong. (2016).

126. 162 CONG. REC. S3132 (May 25, 2016) (statement of Sen. Wicker).

127. 162 CONG. REC. S3133 (May 25, 2016) (statement of Sen. Shaheen).

128. *Id.*

129. 162 CONG. REC. S3134 (May 25, 2016) (statements of Sen. McCain & Sen. Ayotte).

130. Anh Kiet, *Vietnam highly appreciated the US Senate’s vote to end catfish inspection*, HANOITIMES (June 3, 2016, 16:03), <http://hanoitimes.com.vn/news/vietnam/2016/06/81E0A41B/vietnam-highly-appreciated-the-us-senate-s-vote-to-end-catfishin-spection/>.

disapproving the final rule, a vote was never called and the resolution died with the end of the 114th Congress.¹³¹

Throughout the 2016 congressional drama, FSIS continued to move forward with inspections. In August, the environmental advocacy group Food & Water Watch reported that FSIS had rejected another shipment containing more than 40,000 pounds of Vietnamese catfish testing positive for illegal veterinary drugs.¹³² FSIS scrutinized domestic producers as well, with a Louisiana producer choosing to recall over 21,000 pounds of catfish after routine FSIS sampling revealed levels of dye that potentially rose to the legal standard of adulteration.¹³³

Congress rewarded FSIS in the Consolidated Appropriations Act, 2017, providing a \$17 million increase in funding for the agency over 2016 appropriations.¹³⁴ In the Joint Explanatory Statement, Congress recognized “FSIS’ diligent work in preventing from entering or removing 547,928 pounds (or more than 273 tons) of adulterated or ineligible imported *Siluriformes* product from U.S. commerce since April 15, 2016” and directed the agency to “reinspect all imported *Siluriformes* fish and fish product shipments” in the same manner as FSIS does for imported meat and poultry products.¹³⁵ It seemed that the FSIS inspection program had finally passed its last legislative hurdle.

VIII. FSIS Reduces Slaughter Inspection Frequency as New Regime Begins

131. Bill Tomson, *USDA catfish inspection takes a beating in House hearing*, AGRIPULSE (Dec. 7, 2016, 6:54 PM), <https://www.agri-pulse.com/articles/8092-usda-catfish-inspection-takes-a-beating-in-house-hearing>.

132. Statement of Food & Water Watch Executive Director Wenonah Hauter, *FSIS Catfish Inspection Program Stops Another Unsafe Shipment from Vietnam*, FOOD & WATER WATCH (Aug. 9, 2016), <https://www.foodandwaterwatch.org/news/fsis-catfish-inspection-program-stops-another-unsafe-shipment-vietnam%C2%A0>.

133. *Haring Catfish, Inc. Recalls Siluriformes Fish Products Due To Possible Adulteration*, FOOD AND SAFETY INSPECTION SERV. (July 14, 2016), <https://www.fsis.usda.gov/wps/portal/fsis/topics/recalls-and-public-health-alerts/recall-case-archive/archive/2016/recall-060-2016-release>.

134. Consolidated Appropriations Act, 2017, Publ. L. No. 115-31, 12, 115th Cong.; Consolidated Appropriations Act, 2016, Publ. L. No. 114-113, 13, 114th Cong.

135. 163 CONG. REC. H3331 (May 3, 2017); see Dan Flynn, *Congress hails FSIS for blocking 272 tons of bad foreign catfish*, FOOD SAFETY NEWS (July 5, 2017), <http://www.foodsafetynews.com/2017/07/congress-hails-fsis-for-blocking-272-tons-of-bad-foreign-catfish/>.

Although in the 2008 Farm Bill, Congress stated that its intent was for catfish to be subject to continuous inspection¹³⁶ and, while Congress had praised FSIS' thorough import inspection regime just days before, on May 17, 2017, FSIS issued a notification and request for comments announcing its intent to reduce certain types of inspection coverage.¹³⁷ Under the new plan, FSIS would inspect catfish slaughter and slaughter-processing establishments once per production shift, rather than all hours of operation each day, which had been its standard during the transitional period.¹³⁸ FSIS explained its belief that Congress intended FSIS to inspect catfish establishments under the same standard used for meat and poultry processing establishments, and noted its recent experience inspecting highly automated and streamlined domestic catfish slaughter-processing operations, which resemble meat processing-only operations more than meat slaughter establishments.¹³⁹ FSIS also stated that it would amend its regulatory definition of fish processing to align with FDA's definition, which combines slaughter and processing activities, so as to formally recognize the differences from meat processing.¹⁴⁰

FSIS received and considered eight comments on its proposal to reduce inspection coverage to once per production shift.¹⁴¹ One from the Consumers Union (described as "the policy and mobilization arm of Consumer Reports"), disagreed with the proposal due to its singular focus on FSIS' domestic experience with the 16 official catfish slaughter establishments.¹⁴² The commenter argued that since foreign

136. H.R. Rep. No. 110-627, at 938 (2008) (Conf. Rep.).

137. Changes to the Inspection Coverage in Official Establishments That Slaughter Fish of the Order Siluriformes, 82 Fed. Reg. 22609 (May 17, 2017) (to be codified at 9 C.F.R. 300).

138. *Id.*

139. *Id.* at 22610.

140. *Id.* at 22611.

141. Changes to the Inspection Coverage in Official Establishments That Slaughter Fish of the Order Siluriformes, 82 Fed. Reg. 41501 (Sept. 1, 2017) (to be codified at 9 C.F.R. 300).

142. Letter from Michael Hansen, Ph.D., Senior Scientist of Consumers Union, to U.S. Dep't. of Agric., Food Safety and Inspection Serv. (July 17, 2017) (on file with

countries importing catfish into the United States are required to have inspection regimes equivalent to FSIS' domestic procedures, any reduction in FSIS standards will necessarily reduce overseas inspections, potentially exposing US consumers to Vietnamese imports contaminated with illegal antibiotics or chemicals.¹⁴³ Conversely, a comment from the Ministry of Agriculture and Rural Development of Vietnam said that even the reduced inspection coverage was excessive, given the low risk of human health impacts from fish as compared to meat and the "super-intensive" cultivation of Vietnamese fish.¹⁴⁴

FSIS rejected all expressed concerns, defending its proposed approach as providing "a high level of assurance that the fish products are safe, wholesome, and properly packaged and labeled" and detailing the extensive activities taken to prevent and detect adulteration in imported fish.¹⁴⁵ To require each unit of catfish to be individually inspected would, FSIS asserted, "create enormous costs without significantly increasing the effectiveness of inspection."¹⁴⁶ FSIS' new inspection plan took effect with full implementation of the FSIS catfish inspection regime on September 1, 2017.¹⁴⁷

IX. Future Outlook for FSIS Inspection

The domestic catfish industry, while the source of less than a quarter of the sales of the total US aquaculture industry—

Regulations.Gov), <http://consumersunion.org/wp-content/uploads/2017/07/CU-comments-on-FSIS-catfish-inspection-7-17-17-final.pdf>.

143. *Id.*

144. Letter from Ngo Hong Phong, Deputy Director of National Agro-Forestry and Fisheries Quality Assurance Department of Vietnam, to Jane H. Doherty, International Coordination Executive of the Food Safety and Inspection Serv. of the U.S. Dep't. of Agric. (July 17, 2017) (on file with Ministry of Agriculture and Rural Development of Vietnam), <https://www.regulations.gov/contentStreamer?documentId=FSIS-2017-0003-0012&attachmentNumber=1&contentType=pdf>.

Changes to the Inspection Coverage in Official Establishments That Slaughter Fish of the Order Siluriformes, 82 Fed. Reg. 41502 (Sept. 1, 2017) (to be codified at 9 C.F.R. 300).

146. *Id.*

147. *Id.* at 41501; see *Inspection Program For Siluriformes Fish, Including Catfish*, FOOD SAFETY AND INSPECTION SERV. (Sept. 7, 2017), <https://www.fsis.usda.gov/wps/portal/ffis/topics/inspection/siluriformes>; Dan Flynn, *FSIS adjusts catfish inspection process; transition period ends*, FOOD SAFETY NEWS (Sep. 5, 2017), <http://www.foodsafetynews.com/2017/09/fsis-adjusts-catfish-inspection-process-transition-period-ends/>.

which itself makes up less than one percent of the total market value of agricultural products sold in the United States—has proven remarkably adept at achieving legislative victories against free trade interests that represent a much larger economic impact. These successes are largely due to the longstanding support of a few well-placed members of Congress, who have used their seniority and power to protect this small regional interest. With FSIS finally implementing its catfish inspection program and further Senate action on trade authorities unlikely in the near future, the domestic catfish industry should now be able to celebrate its legislative achievements and focus on meeting the new FSIS requirements. Indeed, early reports suggest that the industry is already seeing increases in the quantity of catfish produced in Alabama, Arkansas, and Mississippi.¹⁴⁸

Whether the new inspection regime will be sufficient in the long term to overcome the other market forces pressuring American catfish production remains to be seen as does whether Vietnam follows through with its WTO complaints over the program. Another challenge may be the Trump Administration, which proposed in its fiscal year 2018 budget to transfer catfish inspection back to FDA “to avoid potentially duplicative efforts and costs.”¹⁴⁹ Of course, the Obama Administration had similar concerns and was unsuccessful in overriding the determined efforts of the domestic catfish industry and its staunch congressional allies.

Perhaps the biggest question is whether other domestic agricultural producers will try to follow the example of the catfish industry and garner congressional support for shifting other inspection regimes from FDA to FSIS. Given the much greater cost of FSIS’ more thorough inspection process, which even under the recently implemented reduced frequency provides far more frequent and comprehensive inspection than

148. Dan Flynn, *USDA offers cramming sessions on ‘wild caught’ catfish regs*, FOOD SAFETY NEWS (Aug. 22, 2017), <http://www.foodsafetynews.com/2017/08/usda-offers-cramming-sessions-on-wild-caught-catfish-regs/>.

149. U.S. DEP’T OF AGRICULTURE, FY 2018 BUDGET SUMMARY 5 (2017), <https://www.usda.gov/sites/default/files/documents/USDA-Budget-Summary-2018.pdf>.

FDA can, such a move could have considerable economic as well as trade implications and would even further muddy the federal regulatory waters around food safety. To overcome those considerations, other agricultural industries would need strong and committed congressional allies willing to leverage their seniority and influence to achieve another improbable success.