



ANIMAL LAW

Lewis & Clark Law School

Thank you for 25 years.



Volume 25 Issue 1

2018



ANIMAL LAW

VOLUME 25

2018

EDITORIAL BOARD

Editors in Chief

Frances Chrzan
Adrienne Craig

Managing Editor

Anna Fugate

Managing Editor

Emma Therrein

Form & Style Editor

James Carlson

Form & Style Editor

Karen Martens

Submissions Editor

Sam Pope

Submissions Editor

Madison Steffey

Business Editor

Rebecca Richman

Symposium Editor

Caitlin Skurky

ASSOCIATE EDITORS

Ashlyn Whitbeck	Sam Pope Caitlin Skurky	Rebecca Richman
-----------------	----------------------------	-----------------

MEMBERS

Cristina Kladis Brittany Rowe	Sara Feld Andrew Linden	Jules Dellinger
----------------------------------	----------------------------	-----------------

NATIONAL ADVISORS

Scott A. Heiser	Jonathan R. Lovvorn	Steven M. Wise
Rebecca J. Huss	Nancy V. Perry	David Wolfson
Matthew Liebman	David B. Rosengard	Tara C. Zuardo

LEWIS & CLARK LAW SCHOOL ADVISORS

Michael C. Blumm	Daniel J. Rohlf
Pamela D. Frasch	Janice Weis
Katherine M. Hessler	Chris Wold

ANIMAL LAW REVIEW WOULD LIKE TO THANK:

Animal Legal Defense Fund Lewis & Clark Law School	Baahaus Animal Rescue Group Julian Gorelli
Laura Martin Daina Bray Karen Kurawaski The Gabriel Foundation Patricia Valusek Fanny Ko	Jo Ann Roberts Sallie Russell Jane E. Robertson Penny Ellison Paul & Pat Miller Colleen Mebus

ARTICLES

ANIMALS IN TRANSPORT LANGUISH AS TWENTY-EIGHT HOUR LAW GOES OFF THE RAILS

Animal Welfare Institute Farm Animal Program*

This Article seeks to identify how the U.S. Twenty-Eight Hour Law, requiring feeding, water, and rest for specific animals being transported after twenty-eight hours of travel, is not being adequately enforced by United States Department of Agriculture (USDA) or United States Department of Transportation (DOT). In this Article, AWI first establishes the legal background of the Twenty-Eight Hour Law and subsequent regulations implemented by the USDA and DOT. Next, AWI discusses the recent history of the law's implementation, or lack thereof, by these Departments and enforcement protocol of the Investigative and Enforcement Services for the Animal and Plant Health Inspection Service (APHIS). The Article then establishes how the current implementation of the Twenty-Eight Hour Law by this agency fails to monitor a large quantity of animal shipments and is insufficient in prosecuting or detecting violation of the law. The Article concludes that the USDA has statutory authority to implement the law and suggests numerous mechanisms for improving the implementation of the Twenty-Eight Hour Law.

I. EXECUTIVE SUMMARY	2
II. LEGAL BACKGROUND	3
A. <i>The Twenty-Eight Hour Law</i>	3
B. <i>Regulations under the Twenty-Eight Hour Law</i>	4
III. MONITORING AND ENFORCEMENT OF THE TWENTY-EIGHT HOUR LAW	5

* © Michelle Pawliger, former farm animal policy associate at the Animal Welfare Institute (AWI), is the Article's primary author. Michelle completed her J.D. at Lewis & Clark Law School in 2013, where she focused on animal advocacy projects. The Article was co-authored by Dena Jones, director of the AWI farm animal program, who has a M.S. from Arizona State University and a M.S. in Animals and Public Policy from Tufts University School of Veterinary Medicine. Research and editorial assistance for the article was provided by Erin Thompson, AWI staff attorney; Adrienne Craig, AWI legal intern; and Dave Tilford, AWI writer/editor.

A.	<i>The FSIS Reporting System for Potential Violations of the Twenty-Eight Hour Law</i>	9
B.	<i>VS Import and Export Protocols</i>	9
C.	<i>Summary of IES Investigations</i>	12
IV.	THE CURRENT REGULATORY FRAMEWORK IS INSUFFICIENT TO PROPERLY ENFORCE THE TWENTY-EIGHT HOUR LAW	15
A.	<i>Large Numbers of Animal Shipments are not Monitored for Violations of the Twenty-Eight Hour Law</i>	16
B.	<i>Monitoring Techniques Are Insufficient to Detect Twenty-Eight Hour Law Violations</i>	18
1.	<i>Food Safety and Inspection Services Directive 6900.2</i> .	18
2.	<i>VS Import and Export Protocols</i>	19
C.	<i>APHIS Applies its Enforcement Authority Inconsistently</i> .	21
D.	<i>APHIS Investigatory and Evidentiary Tools are Indiscriminate</i>	24
V.	THE USDA HAS THE AUTHORITY AND RESPONSIBILITY TO BETTER ENFORCE THE TWENTY-EIGHT HOUR LAW	26
VI.	POSSIBLE MECHANISMS FOR ENFORCING THE TWENTY-EIGHT HOUR LAW	27
VII.	CONCLUSION	28

I. EXECUTIVE SUMMARY

This report presents the findings of an extensive review of the federal government's enforcement of the Twenty-Eight Hour Law. This law requires transporters that carry certain farm animals interstate to unload, feed, water, and rest the animals after twenty-eight consecutive hours in transit.¹ The Animal Welfare Institute (AWI) submitted multiple Freedom of Information Act (FOIA) requests to three federal departments over a nine-year period to analyze enforcement of the law. The report describes the current framework of the Twenty-Eight Hour Law, pinpoints problems with the law and its enforcement, and outlines the (underused) authority of the United States Department of Agriculture (USDA) and the Department of Transportation (DOT) to enforce the law.

From the records received, AWI concluded that the law is rarely enforced, due to an inadequate monitoring system and muddled enforcement authority. Specific findings include: Of the three government entities associated with the Twenty-Eight Hour Law, two—the Department of Justice (DOJ) and the DOT—have not promulgated

¹ The Twenty-Eight Hour Law, 49 U.S.C. § 80502 (2018). The Twenty-Eight Hour Law covers the transportation of cows, sheep, pigs, goats, and equines. In 1996, Congress amended the Humane Methods of Slaughter Act, giving the USDA further authority to regulate the transportation of equines to slaughter. Unlike the Twenty-Eight Hour Law, these regulations discuss floor space per animal and ways to prevent injuries, including separating aggressive animals and stallions. *See* 9 C.F.R. § 88.6 (2018) (noting that the USDA Secretary has the authority to assess civil penalties up to \$5,000 per violation under these regulations.).

specific regulations to assist with enforcement of the law. Neither the DOJ nor the DOT could provide AWI with any records related to the law, even though the law is codified within DOT statutes, and DOJ regulations assign actions related to the law to its Criminal Division.

The USDA, on the other hand, has taken some responsibility for enforcing the law. Its “Statement of Policy under the Twenty-Eight Hour Law” has been codified into federal regulations. However, the Statement has not been amended since its codification in 1963, when rail cars were still the main form of transporting farm animals. In 2003, the USDA authored a memo explaining that the Statement also applies to animals shipped on trucks.

Records received from the USDA via FOIA show only five USDA enforcement inquiries into possible violations of the law over a nine-year period. AWI located another investigation through online research, bringing the total number of USDA investigations to six. In three of these cases, the USDA found sufficient evidence for a violation of the law. However, none of these were reported to the DOJ for prosecution.

FOIA records suggest that the USDA has not submitted violations to the DOJ because (1) there is a lack of proper guidance for USDA personnel in understanding their role in the law’s enforcement, and (2) drivers are not required to provide documentation of the duration, mileage, or stops made on their trips.

Millions of animals are transported interstate each year, and virtually none of these shipments are monitored for violations of the Twenty-Eight Hour Law. Animal agriculture industry data suggest that shipping animals without rest for longer than twenty-eight hours is not an uncommon practice. This article does not address the government’s enforcement of the federal regulations on the transport of horses to slaughter. Possible approaches to enforcing the law are offered at the report’s conclusion.

II. LEGAL BACKGROUND

A. *The Twenty-Eight Hour Law*

Congress enacted the Twenty-Eight Hour Law in 1873, repealed and replaced it in 1906, and repealed and re-enacted it in amended form in 1994.² In its current form, the law states that a carrier transporting animals interstate “may not confine animals in a vehicle or vessel for more than twenty-eight consecutive hours without unloading the animals for feeding, water, and rest.”³ If transport will exceed twenty-eight consecutive hours, animals must be unloaded in a humane manner, put into pens equipped with feed and water, and al-

² Vivian Chu, *Brief Summaries of Federal Animal Protection Statutes*, CONG. RES. SERV., 27 (Feb. 1, 2010), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/94-731.pdf> [<http://perma.cc/C92X-FD39>] (accessed Sept. 11, 2018).

³ 49 U.S.C. § 80502(a) (2017).

lowed to rest for at least five consecutive hours before transport is resumed.⁴

There are four exceptions to the law: (1) sheep may be confined for an additional eight hours when the twenty-eight hour period ends at night; (2) animals may be confined for more than twenty-eight hours when there is an accident or unavoidable circumstances; (3) animals may be confined for thirty-six consecutive hours when the owner or custodian requests in writing (separate from a bill of lading) that the period be extended; and (4) if animals have the opportunity to rest, water, and eat and have space in the carrier, they do not need to be unloaded.⁵

The carrier or owner of a truck that knowingly and willfully violates the law is responsible for a civil penalty of at least \$100 but not more than \$500 for each offense.⁶ According to the law, the Attorney General shall bring a civil action to collect the penalty when notified of a violation.⁷ Traditionally, the USDA has reported violations to the DOJ.⁸ However, the law is found in the U.S. Code dedicated to transportation, which means that the USDA may not be the only executive department responsible for informing the Attorney General when a carrier has violated the law.⁹

B. Regulations under the Twenty-Eight Hour Law

As suggested above, there are at least three government entities associated with the Twenty-Eight Hour Law: the DOJ, the USDA, and the DOT. Neither the DOJ nor the DOT have promulgated specific regulations to help enforce the law. The DOJ regulations only state that the Assistant Attorney General, Criminal Division, is assigned to supervising actions related to the law.¹⁰

In 1963, APHIS codified its Statement of Policy into federal regulations, demonstrating its authority over enforcement of the law.¹¹ The language indicates the amount of food, water, and rest that should be given to animals transported on rail carriers.¹² Animals are to have “sustaining rations” of feed, an “ample supply of potable water,” and enough space so that all animals can lie down simultaneously.¹³ Addi-

⁴ *Id.* § 80502(b).

⁵ *Id.* § 80502(a), (c).

⁶ *Id.* § 80502(d); see Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015) (amending the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) and giving authority to the head of each agency responsible for the law in question to adjust civil penalties for inflation). At this time, the Twenty-Eight Hour Law penalty has not been adjusted for inflation.

⁷ 49 U.S.C. § 80502(d).

⁸ Letter from Kevin Shea, Acting Administrator, APHIS, to Cathy Liss, President, AWI (Apr. 7, 2009) (on file with AWI).

⁹ 49 U.S.C. § 80505.

¹⁰ 28 C.F.R. § 0.55 (2018).

¹¹ 9 C.F.R. § 89.1 (2018).

¹² *Id.* §§ 89.1–2.

¹³ *Id.* §§ 89.1, .4, .5.

tionally, the policy states that animals unloaded for feed and water and then put back in the transport container for rest are to be given not less than two hours in the pens; if unloaded for feed only, animals are to have not less than one hour in the pens.¹⁴

The Statement of Policy has not been amended since its codification in 1963.¹⁵ At that time, railroads had already lost the bulk of their freight in animals to the truck.¹⁶ In 2003, after rail cars had become nearly obsolete for the transport of animals, APHIS wrote an intra-agency memo explaining that the Statement of Policy also applies to animals shipped on trucks.¹⁷ In 2005, animal advocates petitioned APHIS to publicly recognize that the Twenty-Eight Hour Law applies to trucks used for the interstate transport of animals.¹⁸ The agency responded to the petition with a letter stating that “the plain meaning of the statutory term ‘vehicle’ in the Twenty-Eight Hour Law includes ‘trucks’ which operate as express carriers or common carriers.”¹⁹ However, the department has not updated its Statement of Policy to align with current animal transport practices.²⁰

III. MONITORING AND ENFORCEMENT OF THE TWENTY-EIGHT HOUR LAW

Rail carriers were still a common form of interstate shipments of animals from the time Congress enacted the Twenty-Eight Hour Law in 1873 until the 1960s.²¹ Stock cars, which carried animals, decreased from 80,000 in use in 1922 to 31,000 in 1960.²² In 1919, rail carriers shipped approximately 35 million tons of animals and animal products, but by 1960 this number had decreased to 9.5 million.²³ The number continued to decrease, as multi-unit, long-haul trucks became more popular.²⁴

¹⁴ *Id.* § 89.3. In its current form, the Statement of Policy may not comply with the Twenty-Eight Hour Law. The Twenty-Eight Hour Law states that animals should be unloaded for not less than five hours unless they have food, water, space, *and* an opportunity to rest in the vehicle.

¹⁵ *Id.*

¹⁶ JOHN F. STOVER, *AMERICAN RAILROADS* 195 (2d ed. 1997).

¹⁷ Letter from Kevin Shea, Acting Administrator, APHIS, to Tom Garrett, Consultant for Rural Affairs, AWI (Oct. 2, 2009) (on file with AWI).

¹⁸ Humane Soc’y of the U.S. (HSUS) et al., *Petition for Rulemaking* (Oct. 4, 2005) <http://cok.net/wp-content/uploads/2013/02/Twenty-Eight-Hour-Law-Petition-2005.pdf> [<https://perma.cc/Q9P5-79EH>] (accessed Sept. 11, 2018).

¹⁹ Letter from W. Ron DeHaven, Administrator, to Peter A. Brandt, Esq., The Humane Soc’y of the U.S. (Sep. 22, 2006) (on file with Peter Brandt).

²⁰ See, e.g., K.S. Schwartzkopf-Genswein et al., *Road Transport of Cattle, Swine and Poultry in North America and its impact on animal welfare, carcass and meat quality*, 92 *MEAT SCI.* 27 (2012) (presenting a review on the considerable amount of scientific research that has been done regarding the impact of transport on the welfare of animals).

²¹ STOVER, *supra* note 16, at 195.

²² *Id.* at 195–96.

²³ *Id.*

²⁴ *Id.* at 195.

During the period when rail carriers transported a majority of live animals, the USDA enforced the Twenty-Eight Hour Law.²⁵ The USDA tasked its Bureau of Animal Industry (BAI), a former USDA agency, with regulating the interstate movement of animals.²⁶ From 1906 to 1917, the BAI reported approximately 9,000 violations of the Twenty-Eight Hour Law for prosecution, which resulted in \$426,818 in penalties over the eleven-year period.²⁷

As the number of animals shipped on railroads decreased, so did the number of Twenty-Eight Hour Law cases.²⁸ Cases involving rail carriers still appear in the records, however, throughout the first half of the 20th century. For example, in 1941, a railroad appealed a 1937 decision against it to the First Circuit Court of Appeals.²⁹ Also, in 1938, a case against a rail carrier reached the U.S. Supreme Court, which weighed in on the definition of “willfully” under the law.³⁰

A thorough search of Westlaw records suggests that the DOJ did not bring any cases for violations of the Twenty-Eight Hour Law—on railroads or trucks—during the second half of the 20th century. There were reports of violations, but these, too, continued to drop. For instance, there were 400 reported violations in 1967.³¹ In 1976, there were fewer than 100.³² This is due in part to the fact that the USDA did not affirm that the law applied to trucks until 2003. (In 1930, 1946, and 1971, American Humane attempted unsuccessfully to get federal legislation passed stating that transport of animals via trucks was covered under the law.)³³ Even though the USDA now accepts that the law applies to trucks, FOIA requests to the DOJ, USDA, and DOT help illustrate that enforcement of the Twenty-Eight Hour Law has not improved in the 21st century. AWI submitted FOIA requests to three divisions within the DOJ—Environmental and Natural Resources, Justice Management, and Civil—asking for all records related to the

²⁵ ANIMAL AND PLANT HEALTH INSPECTION SERV., USDA, *First Federal Law to Prevent Cruelty to Animals*, in ANIMALS AND THEIR LEGAL RIGHTS 48, 50 (Animal Welfare Institute ed., 4th ed. 1990).

²⁶ *History of APHIS*, USDA (Aug. 3, 2015), https://www.aphis.usda.gov/aphis/banner/aboutaphis/SA_APHIS_History [<https://perma.cc/87WE-RVM9>] (accessed Sept. 11, 2018). Today’s APHIS Veterinary Services (VS) has similar tasks to those the Bureau of Animal Industry had in the first half of 20th Century.

²⁷ HARRY GODING & A. JOSEPH RAUB, USDA, BULLETIN NO. 589, THE 28-HOUR LAW REGULATING THE INTERSTATE TRANSPORTATION OF LIVE STOCK: ITS PURPOSE, REQUIREMENTS, AND ENFORCEMENT 17 (1918), https://www.nal.usda.gov/sites/default/files/28hour1918_0.pdf [<https://perma.cc/P9JB-WNWG>] (accessed Sept. 11, 2018).

²⁸ ANIMALS AND THEIR LEGAL RIGHTS, *supra* note 25.

²⁹ *Boston & M.R.R. v. U.S.*, 117 F.2d 428, 429 (1st Cir. 1941).

³⁰ *U.S. v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 240 (1938).

³¹ ANIMALS AND THEIR LEGAL RIGHTS, *supra* note 25.

³² *Id.*

³³ Our Heritage, HUMANE HEARTLAND, <http://www.humaneheartland.org/about-us/heritage> [<https://perma.cc/WD42-S48P>] (accessed Sept. 11, 2018).

Twenty-Eight Hour Law from 2006 to 2009. The three divisions could not locate any records from within this time period.³⁴

Furthermore, AWI has obtained no evidence to suggest that the DOT has played any role in the enforcement of the Twenty-Eight Hour Law, even though the law is codified within Title 49 of the U.S. Code, which is dedicated to transportation.³⁵ In calendar year 2017, the Federal Motor Carrier Safety Administration (FMCSA) conducted 3.3 million roadside inspections for commercial driver violations.³⁶ That year, the agency cited nearly 1 million violations, falling under 190 separate driver violation codes.³⁷

On July 15, 2016, AWI submitted two FOIA requests to the DOT—one to the Office of Inspector General (OIG) and the other to the FMCSA—requesting records from 2006 to 2016.³⁸ The DOT OIG’s response to the request stated that the department had no records on file related to the Twenty-Eight Hour Law.³⁹ The FMCSA acknowledged the FOIA request, but stated that its significant backlog of FOIA requests would delay a response for several months.⁴⁰ In October 2017, the FMCSA informed AWI that it had no records responsive to the FOIA request.⁴¹

The USDA, on the other hand, has taken some responsibility for enforcing the law as it applies to trucks. AWI submitted FOIA requests to APHIS in 2009, 2011, 2014, and 2018 to determine the USDA’s role in enforcement of the law. AWI did not receive its first set of records

³⁴ Letter from Pauline H. Milius, Chief, U.S. Dep’t of Justice, Env’tl. & Nat. Res. Div., Law & Policy Section, to Deborah D. Press, Assoc., Animal Welfare Inst., Farm Animal Program (Dec. 15, 2009) (on file with author); Letter from Paula A. Scholz, Assistant Director, U.S. Dep’t of Justice, Justice Mgmt. Div., Conference and Contract Section Facilities and Admin. Services Staff, to Deborah D. Press, Assoc., Animal Welfare Inst., Farm Animal Program (Jan. 6, 2010) (on file with author); Letter from James M. Kovakas, Attorney in Charge, U.S. Dep’t of Justice Civil Div., to Deborah D. Press, Assoc., Animal Welfare Inst., Farm Animal Program (Jan. 22, 2018) (on file with author).

³⁵ 49 U.S.C. § 80502.

³⁶ *Roadside Inspections, Driver Violations*, FED. MOTOR CARRIER SAFETY ADMIN. DEP’T OF TRANSP., <https://ai.fmcsa.dot.gov/SafetyProgram/spViolation.aspx?rpt=RDDV> [<https://perma.cc/ZGY7-LA6L>] (accessed Sept. 11, 2018).

³⁷ *Id.*

³⁸ Letter from Michelle Pawliger, Farm Animal Policy Assoc., Animal Welfare Inst., to Gordon Johnson, Dep’t of Transp., Office of Inspector Gen. (July 15, 2016) (on file with author); Letter from Michelle Pawliger, Farm Animal Policy Assoc., Animal Welfare Inst., to Tiffanie C. Coleman, Dep’t of Transp., Fed. Motor Carrier Safety Admin. (July 15, 2018) (on file with author).

³⁹ Letter from Gordon Johnson, DOT OIG FOIA/Privacy Act Officer, U.S. Dep’t of Transp., to Michelle Pawliger, Farm Animal Policy Assoc., Animal Welfare Inst. (Aug. 2, 2016) (on file with author).

⁴⁰ Letter from Kevin Lynch, Acting FOIA Officer, Fed. Motor Carrier Safety Admin., Mgmt. Info. & Directives Div., to Michelle Pawliger, Farm Animal Policy Assoc., Animal Welfare Inst. (July 22, 2016) (on file with author).

⁴¹ Letter from Stanza M. Ludgood, FOIA Officer, Fed. Motor Carrier Safety Admin., U.S. Dep’t Transp., to Michelle Pawliger, Farm Animal Policy Assoc., Animal Welfare Inst. (June 30, 2017) (on file with author).

from APHIS until 2015. The records show five APHIS Investigative and Enforcement Services (IES) inquiries (discussed in detail below) into possible violations of the law over a nine-year period.⁴² Through online research, AWI found another IES investigation, bringing the total number of investigations to six within the nine-year period.⁴³ In three of the six instances, IES found sufficient evidence for a violation of the law. However, IES did not report any of the violations to the DOJ for prosecution.⁴⁴

IES investigations have been initiated as a result of two USDA procedures. APHIS Veterinary Services (VS) and the USDA Food Safety and Inspection Service (FSIS) each have protocols for detecting violations of the Twenty-Eight Hour Law.⁴⁵ Both agencies report potential violations of the law to EIS for further investigation.⁴⁶ According to AWI's analysis of USDA, DOJ, and DOT involvement, these VS and FSIS procedures are the only official mechanisms by which the federal government currently identifies violations of the Twenty-Eight Hour Law. The records suggest that the only other means of prompting IES to initiate an investigation has been if it is reported that a large number of animals died during transport, and/or there is public outcry.⁴⁷ The following subsections will review the FSIS and VS procedures.

⁴² See *infra* Section IV.B.2 (discussing possible violations of the Twenty-Eight Hour Law over a nine-year period).

⁴³ Letter from Dena Jones et al., Program Manager, World Soc'y for the Protection of Animals, to John R. Clifford, Deputy Admin., USDA, APHIS (Dec. 21, 2007) (on file with the author); Investigative and Enforcement Services of APHIS, USDA, CA-08470-VS *Investigative Report* (Apr. 10, 2009) (response to World Soc'y for the Protection of Animals Complaint) (on file with author). The APHIS FOIA office did not provide this case (CA-08470-VS) to AWI even though it fell within the parameters of AWI's requests. AWI knew of this case because individuals in the organization took part in requesting an IES investigation. After discussing this with the APHIS FOIA office, APHIS reviewed the records again and did not find any other cases that would fit within AWI's request.

⁴⁴ See *infra* Section IV.D., (discussing how the IES has not reported truck drivers for violations of the Twenty-Eight Hour Law).

⁴⁵ FOOD SAFETY INSPECTION SERV., USDA, FSIS DIRECTIVE 6900.2 REVISION 2, HUMANE HANDLING AND SLAUGHTER OF LIVESTOCK 6 (2011), <http://www.fsis.usda.gov/wps/wcm/connect/2375f4d5-0e24-4213-902d-d94ee4ed9394/6900.2.pdf?MOD=AJPERES> [<https://perma.cc/ZE9H-L83J>] (accessed Sept. 11, 2018); see NAT'L CTR. FOR IMPORT AND EXPORT, VETERINARY SERV., ANIMAL AND PLANT HEALTH INSPECTION SERV., USDA, PROTOCOL FOR THE IMPORTATION OF CATTLE OR BISON FROM CAN. 4-5 (2007), https://www.aphis.usda.gov/import_export/downloads/pro_imp_cattle-bison_can.pdf [<https://perma.cc/X3HG-JAZQ>] (accessed Sept. 11, 2018) (explaining that bovine entering the United States from Canada are visually examined to assure the accuracy of the health certificate).

⁴⁶ FSIS NOTICE 06-10, HUMAN HANDLING AT ALL ENTRANCES AND THE TWENTY-EIGHT HOUR LAW 2 (USDA 2010), <http://www.aamp.com/documents/Notice06-10.pdf> [<https://perma.cc/87AD-77DR>] (accessed Sept. 11, 2018). Evidence of VS reporting directly to EIS can be found in FOIA documents, see *e.g.*, Memorandum from USDA, APHIS, EIS on WI-10009-VS Investigative Report to William Reinburg (Jan. 31, 2011).

⁴⁷ See *e.g.*, Kevin Garcia, *More Than 130 Pigs Found Dead Near Airport*, THE BROWNSVILLE HERALD (June 30, 2006), https://www.brownsvilleherald.com/news/local/more-than-pigs-found-dead-near-airport/article_92c2164e-fd9b-50a2-a999-59162246fa

A. *The FSIS Reporting System for Potential Violations of the Twenty-Eight Hour Law*

In 2010, the FSIS, which maintains personnel at all federally inspected slaughter establishments in the country, issued a notice to its slaughter establishment personnel informing them of the Twenty-Eight Hour Law, and advising inspectors to contact APHIS if they suspect a violation of the law.⁴⁸ The FSIS incorporated this notice into Directive 6900.2, Humane Handling and Slaughter of Livestock.⁴⁹ The Directive states that if animals arrive at a slaughter establishment looking exhausted or dehydrated, then FSIS personnel are to ask the establishment manager if the truck driver stopped in compliance with the Twenty-Eight Hour Law.⁵⁰ If the manager or truck driver is uncooperative, or the FSIS personnel believe the animals' exhaustion or dehydration is due to transport in excess of twenty-eight hours, the FSIS personnel are to contact APHIS.⁵¹ This directive has led to only two IES investigations of potential violations of the law since 2010.⁵² In both instances, IES determined no violation occurred.⁵³

B. *VS Import and Export Protocols*

Animals are frequently shipped in trucks into and out of the United States from Canada and Mexico.⁵⁴ Import and export protocol for these shipments depend upon the species, destination, and utility of the animal (i.e., animals to be used for breeding or animals for immediate slaughter).⁵⁵ Generally, import and export protocols do not address the Twenty-Eight Hour Law,⁵⁶ and shipments of animals are not monitored for compliance with the law.

62.html [https://perma.cc/HYY7-LRG9] (accessed Sept. 11, 2018). (describing TX-06284-VS case that involved the deaths of 152 pigs).

⁴⁸ FOOD SAFETY INSPECTION SERV., USDA, FSIS NOTICE 06-10, HUMANE HANDLING AT ALL ENTRANCES AND THE TWENTY-EIGHT HOUR LAW 2 (2010).

⁴⁹ FSIS DIRECTIVE 6900.2 REVISION 2, *supra* note 45, at 2, 6.

⁵⁰ *Id.* at 6.

⁵¹ *Id.*

⁵² *See infra* Section IV.A. (discussing how in WI-10009-VS, similar protocols were likely used, but the incident took place before the FSIS published its notice and directive).

⁵³ *See infra* Section IV.A. (discussing that while two possible violations were found, the IES did not find any actual violation).

⁵⁴ Karyn Boswell, *The Sad Truth About the Treatment of Animals on Slaughter Trucks – and One Pig Who Escaped*, ONE GREEN PLANET (Mar 9, 2017) <https://www.onegreenplanet.org/animalsandnature/treatment-of-animals-on-slaughter-trucks-and-one-pig-who-escaped/> [https://perma.cc/3N9D-SY9P] (accessed Sept. 11, 2018).

⁵⁵ *See generally*, *Importing Livestock / Livestock Animal Products*, U.S. CUSTOMS AND BORDER PROT. INFO CENTER, https://help.cbp.gov/app/answers/detail/a_id/13/~/importing-livestock-%2f-livestock-animal-products-%28horses%2C-cattle%2C-sheep%2C [https://perma.cc/PMS6-4QHP] (accessed Sept. 11, 2018) (outlining the permit requirements for importing livestock and livestock animal products).

⁵⁶ *See, e.g.*, NAT'L IMPORT EXPORT SERV., USDA, PROTOCOL FOR THE IMPORTATION OF CATTLE OR BISON FROM CANADA TO THE UNITED STATES (June 2018) [hereinafter PROTO-

While VS does not have a Twenty-Eight Hour Law protocol in place for shipments of pigs and ruminants other than cattle, the sub-agency does often require seals for international truck shipments.⁵⁷ This provides USDA personnel with direct evidence to determine if the animals were unloaded, as a seal needs to be broken for unloading to occur. When exported from the U.S. to Mexico, shipments of breeding sheep and goats are sealed, and the seal number recorded on a health certificate.⁵⁸ The health certificate also requires that the shipper provide the place of origin and the point of embarkation.⁵⁹ The certificate does not require detailed information on the route, rest stops, or even the exact date the trip is to commence.⁶⁰ Additionally, shipments of pigs bound for slaughter, and sheep and goats bound for slaughter or feed yards, are sealed when imported from Canada to the U.S.⁶¹ However, VS protocol instructs drivers to go directly to the slaughter establishment or other final destination within the U.S.⁶² They do not make an exception for the Twenty-Eight Hour Law.⁶³

For cattle, transport containers are sealed when animals are transported from Canada to the U.S., from the U.S. to Mexico, and when they are brought into the U.S. from Canada as a thoroughfare to

COL FOR THE IMPORTATION OF CATTLE OR BISON FROM CANADA TO THE US], <https://www.aphis.usda.gov/regulations/vs/iregs/animals/downloads/ca-protocol-imp-cattle-bison.pdf> [https://perma.cc/AP9N-5S24] (accessed Sept. 11, 2018) (explaining that cattle from Canada must go directly to their final destination within the U.S.); *see also*, NAT'L CTR. FOR IMPORT AND EXPORT, USDA, PROTOCOL FOR THE IMPORTATION OF SWINE FROM CANADA (June 2017) [hereinafter PROTOCOL FOR THE IMPORTATION OF SWINE FROM CANADA], https://www.aphis.usda.gov/regulations/vs/iregs/animals/downloads/import_canadaswine_intous_update_June_2017.pdf [https://perma.cc/YV56-AAJ6] (accessed Sept. 11, 2018) (explaining that pigs imported into the U.S. from Canada for slaughter must go directly to the slaughter establishment).

⁵⁷ While this is true, VS documents state that Canadian shippers may not ship sheep or goats through the U.S. to Mexico. Therefore, instructions for seals and health certificates are not provided on VS import and export webpages for these ruminants. NAT'L CTR. FOR IMPORT AND EXPORT, USDA, PROTOCOL FOR THE IMPORTATION OF SHEEP AND GOATS FOR FEEDING FROM CANADA (Nov. 2007) [hereinafter PROTOCOL FOR THE IMPORTATION OF SHEEP AND GOATS FOR FEEDING FROM CANADA], https://www.aphis.usda.gov/import_export/downloads/sheep_goats_feeding.pdf [https://perma.cc/53MA-G2A8] (accessed Sept. 11, 2018).

⁵⁸ NAT'L CTR. FOR IMPORT AND EXPORT, USDA VETERINARY HEALTH CERTIFICATE FOR EXPORT OF SHEEP AND GOATS FOR BREEDING FROM THE UNITED STATES OF AMERICA TO MEXICO, https://www.aphis.usda.gov/regulations/vs/iregs/animals/downloads/mx_ov_caprine_breeding_hc_9-26_16.pdf [https://perma.cc/9GL3-GL6L] (accessed Sept. 11, 2018).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ PROTOCOL FOR THE IMPORTATION OF SWINE FROM CANADA, *supra* note 56.; PROTOCOL FOR THE IMPORTATION OF SHEEP AND GOATS FOR FEEDING FROM CANADA, *supra* note 57.

⁶² PROTOCOL FOR THE IMPORTATION OF SWINE FROM CANADA, *supra* note 56.; PROTOCOL FOR THE IMPORTATION OF SHEEP AND GOATS FOR FEEDING FROM CANADA, *supra* note 57.

⁶³ PROTOCOL FOR THE IMPORTATION OF SHEEP AND GOATS FOR FEEDING FROM CANADA, *supra* note 57.

Mexico.⁶⁴ For shipments from Canada and the U.S. to Mexico, the seals are not to be broken until the animals arrive at the border, unless the driver is required to stop under the Twenty-Eight Hour Law.⁶⁵ Drivers who stop must do so at a USDA-approved station.⁶⁶ At the station, a USDA-accredited veterinarian will break the seals to unload the animals.⁶⁷ When it is time to reload the animals onto trucks, the veterinarian will reseal the truck with new seal numbers.⁶⁸

Currently, there are five pre-approved “feed, water, and rest” (FWR) stations in the U.S.⁶⁹ When a driver stops at an approved station, in compliance with the Twenty-Eight Hour Law, they must have an addendum for rest stops completed with the information for the seal that the accredited veterinarian broke.⁷⁰ This addendum is to be given to VS-authorized personnel upon arrival at the border.⁷¹ For shipments of cattle from Canada to Mexico, shippers are also required to obtain an “Import or in Transit Permit.” The permit must include the truck’s route, number of drivers, and estimated travel time.⁷²

Additionally, as with the protocol for certain pigs, sheep, and goats, drivers transporting cattle into the U.S. from Canada must go directly to an APHIS-approved slaughter establishment or other final destination within the U.S.⁷³ Again, VS does not make an exception for the Twenty-Eight Hour Law.

⁶⁴ See *Export by Country: Mexico*, ANIMAL AND PLANT INSPECTION SERV., USDA, https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/export/international-standard-setting-activities-oie/sa_by_country/sa_m/ct_animal_mexico [https://perma.cc/DK98-JAGX] (accessed Sept. 11, 2018) (explaining that seals are required for cattle transported from the U.S. to Mexico for breeding and similarly for slaughter.); see also NAT’L CTR. FOR IMPORT AND EXPORT, USDA, Questions and Answers Regarding Bovines in Transit from Canada to Mexico [hereinafter QUESTIONS AND ANSWERS], https://www.aphis.usda.gov/import_export/downloads/q_a_transit_ca_mx.pdf [https://perma.cc/T7MS-SX79] (accessed Sept. 11, 2018).

⁶⁵ NAT’L CTR. FOR IMPORT AND EXPORT, USDA, GUIDELINES TO EXPORT BREEDING CATTLE FROM THE US AND CANADA TO MEXICO, (Apr. 2008), https://www.aphis.usda.gov/regulations/vs/iregs/animals/downloads/mx_bred_ca.pdf [https://perma.cc/CY2N-A2Z5] (accessed Sept. 11, 2018).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Feed, Water, and Rest Stations*, Animal and Plant Inspection Serv., USDA. (June 12, 2018), https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-and-animal-product-import-information/ct_feed_water_rest_stations [https://perma.cc/W9AG-M7ZK] (accessed Sept. 11, 2018).

⁷⁰ GUIDELINES TO EXPORT BREEDING CATTLE FROM THE US AND CANADA TO MEXICO, *supra* note 65.

⁷¹ NAT’L CTR. FOR IMPORT AND EXPORT, USDA, PROTOCOL TO TRANSIT BOVINES FROM CANADA TO MEXICO (Mar. 2008), https://www.aphis.usda.gov/import_export/downloads/cn_us_mx_transit_bovines.pdf [https://perma.cc/57MZ-2ZZ9] (accessed Sept. 11, 2018).

⁷² *Id.*

⁷³ PROTOCOL FOR THE IMPORTATION OF CATTLE OR BISON FROM CANADA TO THE UNITED STATES, *supra* note 56. The requirements for cattle shipped into the U.S. from Canada for purposes other than slaughter are unclear as to whether shipments need to be sealed. In a letter to importers, APHIS does not mention that shipments containing these animals must be sealed. See Letter from Michael David, Acting Dir., Animals,

C. Summary of IES Investigations

TX-06284-VS: In June 2006, several companies shipped 2,644 pigs owned by Pig Improvement Company from Greenville and Somerset, Ohio, to Queretaro, Mexico, with a stop in Brownsville, Texas, before crossing the border.⁷⁴ In Texas, USDA personnel discovered 152 dead animals on the trucks.⁷⁵ An investigation ensued and showed crowded conditions, which prohibited most of the animals from accessing water.⁷⁶ Some trucks did not provide water at all, and ten of eleven trucks did not feed the animals.⁷⁷ The investigator concluded that several of the companies violated the law.⁷⁸ However, according to a letter sent from IES to the USDA's Office of General Counsel, IES did not believe it had the authority to enforce the Twenty-Eight Hour Law and asked that the violations be submitted to the Department of Transportation.⁷⁹ According to the FOIA records, IES never reported the case to the DOT.

CA-08470-VS: In December 2007, animal advocacy organizations requested an investigation into Pacific Livestock Company for potential violations of the Twenty-Eight Hour Law.⁸⁰ The organizations alleged that the company shipped animals from Alberta, Canada, to Vacaville, California, in journeys lasting longer than twenty-eight hours without providing feed, water, or rest to the animals and submitted video evidence to substantiate allegations.⁸¹ Additionally, the organizations alleged that Pacific unloaded animals from their trailers directly into transport containers, where they spent hours before being shipped to Oakland, California, and then across the ocean to Hawaii.⁸² IES commenced an investigation into the incident. IES interviewed a Pacific employee who stated that shipments from Canada had not come into Vacaville for approximately two years.⁸³ Additionally, inter-

Organisms and Vectors, and Select Agents, Nat'l Ctr. for Import and Export, to Importers, Brokers, and Other Interested Parties, https://www.aphis.usda.gov/import_export/downloads/bse_letter.pdf [<https://perma.cc/J7T7-LMNV>] (accessed Sept. 11, 2018) (discussing specific importation requirements for various animals imported from Canada to the United States).

⁷⁴ Investigative and Enforcement Services of APHIS, USDA, *TX-06284-VS Investigative Report* (Dec. 14, 2006) (Freedom of Information Act response to AWI request) (on file with author).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Letter from Dena Jones et al., Program Manager, World Soc'y for the Protection of Animals, to John R. Clifford, Deputy Administrator, USDA, APHIS (Dec. 21, 2007) (on file with the author as part of CA-08470-VS).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Investigative and Enforcement Services of APHIS, USDA, *CA-08470-VS Investigative Report 4* (Apr. 10, 2009) (Response to World Soc'y for the Protection of Animals Complaint) (on file with author).

viewees stated that pigs were unloaded from trailers into pens, where they had time to eat, drink, and rest before being put into shipment containers.⁸⁴ After these interviews IES concluded that there was insufficient evidence of a Twenty-Eight Hour Law violation.⁸⁵

WI-10009-VS: In November 2009, cattle loaded in Canada and shipped into the U.S. were left on a truck for longer than twenty-eight hours.⁸⁶ FOIA records provided little detail for this case, but according to the records, a Canadian company exported animals into the U.S. for immediate slaughter at a Wisconsin slaughter facility.⁸⁷ A veterinarian (presumably at the slaughterhouse) requested an IES investigation for the potential violation of the Twenty-Eight Hour Law.⁸⁸ IES determined that a violation occurred, but closed the investigation because it could not find a U.S. entity for Loerzel Farm Transport, the Canadian shipping company.⁸⁹

CA-10421-VS: In 2010, a transport company shipped thirty-three cattle from Fordyce, Nebraska, to a slaughter establishment in Pico Rivera, California.⁹⁰ According to on-site FSIS personnel, the animals looked dehydrated and lethargic upon arrival.⁹¹ When questioned at the establishment, the truck driver responsible for the cattle stated that he did not unload and rest the animals before arriving at the establishment.⁹² FSIS personnel contacted APHIS, which then initiated an investigation into the matter.⁹³ The transport company told APHIS that all drivers using this route are told to stop at a livestock market in Utah and unload the animals.⁹⁴ However, the market does not keep a record of who stops and unloads animals.⁹⁵ During the investigation, IES was unable to locate the driver of the truck for an interview.⁹⁶ Therefore, IES found insufficient evidence for further action and closed the case.⁹⁷

IL-11039-VS: In February 2011, a truck driver transported 134 pigs from South Dakota to a slaughter establishment in Marengo, Illi-

⁸⁴ *Id.*

⁸⁵ *Id.* at 5.

⁸⁶ Veterinary Services of APHIS, USDA, *WI-10009-VS Report of Animals, Poultry or Eggs Offered for Importation*, (Nov. 8, 2009) (Freedom of Information Act Response to AWI request) (on file with author).

⁸⁷ *Id.*

⁸⁸ Memorandum from USDA, APHIS, EIS on WI-10009-VS Investigative Report to William Reinburg (Jan. 31, 2011) (on file with author).

⁸⁹ *Id.*

⁹⁰ Investigative and Enforcement Services of APHIS, USDA, *CA-10421-VS Investigative Report*, 4 (Dec. 14, 2010) (Freedom of Information Act Response to AWI request) (on file with author).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 6.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

nois.⁹⁸ A supervisory public health veterinarian (SPHV) for the FSIS observed three “dead on arrival” sows, three crippled sows, and one condemned sow during the unloading.⁹⁹ Additionally, some of the sows appeared thirsty and there was no indication that the animals received water or food during transport.¹⁰⁰ The truck driver stated that a majority of the animals were not unloaded until they got to the Illinois slaughter establishment, which took about thirty-five hours.¹⁰¹ However, documentation suggested that the trip was less than twenty-eight hours.¹⁰² The SPHV reported this information to the FSIS Chicago District Office, and the office forwarded this information to APHIS.¹⁰³ An investigation by IES concluded that the agency could not definitively show that the driver violated the Twenty-Eight Hour Law.¹⁰⁴

NM-11032-VS: In May 2011, two trucking companies shipped seventy-eight cows from New Holland, Pennsylvania, to Santa Teresa, New Mexico, en route to Mexico.¹⁰⁵ Before departing New Holland, APHIS personnel sealed the trucks, as is required for cattle being shipped to Mexico.¹⁰⁶ Upon arrival in Santa Teresa, APHIS personnel discovered that the seals had not been cut.¹⁰⁷ The journey from New Holland to Santa Teresa took approximately thirty-two to forty hours (2,000 miles) for the first truck, and thirty-eight to forty hours for the second truck (2,100 miles).¹⁰⁸ Upon arrival, the seals were intact, and an APHIS veterinarian requested that IES investigate any violations of the Twenty-Eight Hour Law.¹⁰⁹ The drivers admitted to knowing about the law, but stated that they did not have a good place to feed, water, and rest the animals along the route.¹¹⁰ After the investigation, which clearly showed that the trip violated the law, IES gave both

⁹⁸ Investigative and Enforcement Services of APHIS, USDA, *IL-11039-VS Investigative Report*, (May 19, 2011) (Freedom of Information Act Response to AWI request Apr. 24, 2014) (on file with author).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Investigative and Enforcement Services of APHIS, USDA, *NM-110032-VS Investigative Report*, (May 18, 2012) (Freedom of Information Act Response to AWI request Apr. 24, 2014) (on file with author).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* One trucking company stated that there is not a good system in place for complying with the Twenty-Eight Hour Law because they must seal the trucks and would need to rest in a place where the trucks could be resealed. The current protocol is to have an addendum for rest stops when transporting cattle from the U.S. to Mexico. The owner’s statement indicates that this process is not used and that the Twenty-Eight Hour Law is not enforced, or that trucking companies are not aware of the process. *See id.* (detailing conversations between investigator and owner of cattle).

companies an official warning.¹¹¹ In the warning, IES threatened the companies with civil penalties of up to \$650 for each violation.¹¹² The agency did this even though, in email communication, APHIS personnel stated that they do not have civil penalty authority.¹¹³

IV. THE CURRENT REGULATORY FRAMEWORK IS INSUFFICIENT TO PROPERLY ENFORCE THE TWENTY-EIGHT HOUR LAW

The Twenty-Eight Hour Law is one of only two federal laws with the express purpose of creating a more humane agriculture system.¹¹⁴ While the law does not provide specifications for several animal welfare indicators such as space per animal, bedding, and fitness to travel, it does require basic care of animals.¹¹⁵ The law also aims to add a layer of safety to the food supply by ensuring healthy animals arrive at slaughter establishments, livestock markets, and other industry facilities.¹¹⁶ Therefore, it is important that the industry comply with the law and that the government vigorously enforce it.

The protocols in place to help enforce the law are inadequate. The following analysis will focus on four main problems with the current framework: (1) large numbers of animal shipments are not monitored; (2) monitoring techniques are insufficient to detect violations of the law; (3) enforcement is applied inconsistently; and (4) APHIS' investigatory and evidentiary tools are indiscriminate.

¹¹¹ Official Warning Letter from Robert J. Huttenlocker, Director, Investigative and Enforcement Services, to Thad Beck Trucking (Oct. 26, 2012) (on file with AWI as part of FOIA request fulfillment).

¹¹² *Id.* The official warning stated that the agency generally pursues penalties for Twenty-Eight Hour Law violations. FOIA records did not indicate that APHIS had pursued penalties for other violations of the law, but if the agency did, it would have gone beyond its authority, as it is up to DOJ to prosecute violations of the law. 49 U.S.C. § 80502.

¹¹³ E-mail from Sarah King, APHIS, to Dr. Paul Sciglibaglio, Area Veterinarian in Charge, New Mexico and Arizona APHIS Veterinary Services (Oct. 23, 2012 09:46 AM) (on file with AWI as part of FOIA request fulfillment).

¹¹⁴ See generally *Animal Cruelty: Factory Farms*, ASPCA, <https://www.aspc.org/animal-cruelty/farm-animal-welfare> [<https://perma.cc/U96X-AV7E>] (accessed Sept. 11, 2018) (summarizing the two federal laws in place to protect farm animals, the Twenty-Eight Hour Law and the Humane Methods of Slaughter Act).

¹¹⁵ 49 U.S.C § 80502 (requiring only food, water, and rest for livestock).

¹¹⁶ See HARRY GODING & A. JOSEPH RAUB, USDA, BULLETIN NO. 589, THE 28-HOUR LAW REGULATING THE INTERSTATE TRANSPORTATION OF LIVE STOCK: ITS PURPOSE, REQUIREMENTS, AND ENFORCEMENT 2 (1918), https://www.nal.usda.gov/sites/default/files/28hour1918_0.pdf [<https://perma.cc/T9PV-HRES>] (accessed Sept. 11, 2018) (stating that the Twenty-Eight Hour Law was enacted primarily for humane reasons, but also that it protects the public interest).

A. *Large Numbers of Animal Shipments are Not Monitored for Violations of the Twenty-Eight Hour Law*

The current Twenty-Eight Hour Law enforcement strategy only applies to animals being transported interstate to slaughter and animals transported across the border.¹¹⁷ However, millions of animals are shipped interstate each year for purposes other than slaughter. Calves are shipped between states to feeding or breeding facilities, and pigs are moved from farrowing to grow-out facilities.¹¹⁸ Farm animals are also frequently shipped across state lines to auctions and markets. Not a single shipment of animals to these places is currently monitored for violations of the Twenty-Eight Hour Law.¹¹⁹ In 2005, the number of pigs and cattle shipped interstate accounted for 26% and 40%, respectively, of these animals sold in the U.S. that year.¹²⁰ *In-shipments* include animals transported for feeding or breeding purposes but exclude animals brought in for immediate slaughter.¹²¹ In 2017, 55 million pigs and 21 million cattle traveled interstate for feeding and breeding purposes.¹²² This represents approximately 32% of all pigs and 40% of all cattle sold in the U.S. that year.¹²³

In response to a national survey of health-related practices in the pork industry in 2012, 68% of pig raising sites said that they had at least one shipment of pigs leave the site during the previous six months to an out-of-state destination.¹²⁴ Sixty-five percent of all sites indicated that they sent at least one shipment of pigs to slaughter

¹¹⁷ See *supra* Sections III.A, III.B. (suggesting that Twenty-Eight Hour Law violation inquiries are only initiated as a result of APHIS inspection officers at slaughterhouses or APHIS personnel at the border).

¹¹⁸ See DENNIS A. SHIELDS & KENNETH H. MATHEWS, JR., ECONOMIC RESEARCH SERVICE, USDA, INTERSTATE LIVESTOCK MOVEMENTS 4 (June 2003) (detailing the movement of livestock throughout the United States).

¹¹⁹ See *supra* Sections III.A, III.B (discussing how the Twenty-Eight Hour Law is limited to regulating the interstate transportation of animals to slaughter or across the border).

¹²⁰ See USDA, MEAT ANIMALS PRODUCTION, DISPOSITION, AND INCOME 2005 SUMMARY 6, 14–15 (Apr. 2006), <http://usda.mannlib.cornell.edu/usda/nass/MeatAnimPr//2000s/2006/MeatAnimPr-04-27-2006.pdf> [<https://perma.cc/DFZ4-9PH5>] (accessed Sept. 11, 2018) (reporting 33,416,200 pig inshipments with 129,056,000 pig marketings, and 20,841,200 cattle inshipments with 52,716,300 cattle marketings).

¹²¹ *Id.* at 27.

¹²² USDA, ISSN: 0748-0318, MEAT ANIMALS PRODUCTION, DISPOSITION, AND INCOME 2017 SUMMARY 8, 14 (Apr. 2018), <http://usda.mannlib.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-26-2018.pdf> [<https://perma.cc/EJ7F-RND3>] (accessed Sept. 11, 2018).

¹²³ See *id.* at 8, 14–15 (reporting 171,422,100 pig inshipments, and 52,097,600 cattle inshipments).

¹²⁴ See USDA, APHIS, SWINE 2012 PART II: REFERENCE OF SWINE HEALTH AND HEALTH MANAGEMENT IN THE UNITED STATES, 2012, 82 (Feb. 2016), https://www.aphis.usda.gov/animal_health/swine/downloads/swine2012/Swine2012_dr_PartII.pdf [<https://perma.cc/MRE2-6ZUY>] (accessed Sept. 11, 2018) (reporting 54.1% destined for slaughter as market hogs, 11.2% destined for slaughter plants as culled pigs, and 2.7% destined for breeding herds at other sites).

across state lines.¹²⁵ According to APHIS, which conducted the survey, production sites of all sizes sent pigs interstate, but the largest operations were most likely to do so.¹²⁶

Of course, not all animals shipped between state lines travel for more than twenty-eight hours. While the number of animals being shipped over twenty-eight hours is unknown, it is likely a common practice. AWI conducted an analysis of a 2003 Economic Research Service (ERS) report on the interstate movement of livestock. AWI's analysis concluded that approximately 11% of farm animals transported for feeding and breeding purposes are shipped more than twenty-eight hours, which amounted to 7.7 million animals in 2015.¹²⁷ The actual figure is likely much higher since the ERS research did not include the millions of animals shipped to slaughter establishments or across the border each year.¹²⁸

Trade association guidelines also suggest that shipping animals without rest for longer than twenty-eight hours is likely a common practice, and one that is not monitored. The American Sheep Industry Association's *Sheep Care Guidelines* state that "rest stops should be given if long hauls of forty-eight hours or more are expected."¹²⁹ The guide does not mention the Twenty-Eight Hour Law, or the fact that in most circumstances, transporting animals for forty-eight hours would violate the law.¹³⁰ The *Master Cattle Transporter Guide*, part of the National Beef Quality Assurance program, does not discuss the Twenty-Eight Hour Law. In fact, the guide reminds transporters to "keep stops as short as possible in extreme heat or cold conditions," but does not mention the legal requirements of the Twenty-Eight Hour Law.¹³¹

While the Beef Quality Assurance Program does not mention the Twenty-Eight Hour Law, the National Beef Quality Audit, which is

¹²⁵ *See id.* (adding the pigs destined for slaughter at market with those destined for slaughter at plants).

¹²⁶ *See id.* (showing 66.1% of small production sites, 63% of medium production sites, and 68% of large production sites sending pigs interstate).

¹²⁷ ANIMAL WELFARE INST., ESTIMATING THE NUMBER OF FARM ANIMALS TRANSPORTED LONG DISTANCES IN THE UNITED STATES 4 (2011). AWI noted several limitations to its approximation—most of which suggest a higher percentage of animals transported more than twenty-eight hours. *Id.* *See* USDA, ISSN: 0748-0318, MEAT ANIMALS PRODUCTION, DISPOSITION, AND INCOME 2015 SUMMARY, 8, 14 (Apr. 2016), <http://usda.mannlib.cornell.edu/usda/nass/MeatAnimPr//2010s/2016/MeatAnimPr-04-28-2016.pdf> [<https://perma.cc/8JWN-RXFB>] (accessed Sept. 11, 2018) (reporting 70,277,700 total inshipments of cattle and pigs in 2015).

¹²⁸ ANIMAL WELFARE INST., *supra* note 127.

¹²⁹ WILLIAM P. SHULAW, SHEEP CARE GUIDE 7 (Am. Indus. Sheep Ass'n eds., 2005 ed.), http://d1cqrq366w3ike.cloudfront.net/http/DOCUMENT/SheepUSA/Sheep_Care_Guide_2006.pdf [<https://perma.cc/43PR-MWY8>] (accessed Sept. 11, 2018).

¹³⁰ *See generally id.* (making no mention of long haul rides beyond the recommended rest stops after forty-eight hours).

¹³¹ NATIONAL BEEF QUALITY ASSURANCE GUIDE FOR CATTLE TRANSPORTERS, MASTER CATTLE TRANSPORTER GUIDE 13, http://www.bqa.org/Media/BQA/Docs/master_cattle_transporter_guide-digital.pdf [<https://perma.cc/KVT2-GWAN>] (accessed Sept. 11, 2018).

conducted approximately every five years, evaluates the condition of animals arriving at beef slaughter plants. The 2016 audit sampled 10% of trucks within one day's production at eighteen slaughter plants.¹³² While the average transit duration for cows and bulls across all loads surveyed was 6.7 hours, with 283 miles traveled, the longest trip observed was 39.5 hours with 1413 miles traveled.¹³³ This shows that the length of transport for at least some animals far exceeds twenty-eight hours.¹³⁴

*B. Monitoring Techniques Are Insufficient to Detect
Twenty-Eight Hour Law Violations*

1. Food Safety and Inspection Services Directive 6900.2

As discussed above, FSIS Directive 6900.2 explains how personnel at slaughter establishments should monitor for violations of the Twenty-Eight Hour Law.¹³⁵ The directive explains that FSIS personnel are only to inquire about violations of the law if animals appear dehydrated or exhausted upon arrival at the slaughter establishment.¹³⁶ This subjective system has been in place for over six years, and the FSIS only detected two (CA-10421-VS and IL-11039-VS) possible violations of the law in that time.¹³⁷ (Note: It is likely that the veterinarian who reported WI-10009-VS to IES followed similar protocol to Directive 6900.2. However, the directive was not issued until a year after the veterinarian's investigation request, and therefore WI-10009-VS has not been included in the cases brought as a result of the directive.)

The potential violations in CA-10421-VS and IL-11039-VS were only discovered because a veterinarian in a supervisory position saw the animals when the truck driver unloaded them.¹³⁸ FSIS personnel

¹³² CATTLEMEN'S BEEF BD. & NATIONAL CATTLEMEN'S BEEF ASS'N, 2016 NATIONAL BEEF QUALITY AUDIT: MARKET COW AND BULL EXECUTIVE SUMMARY 3, 6 (2017), https://www.bqa.org/Media/BQA/Docs/nbqa-exec-summary_cowbull_final.pdf [<https://perma.cc/9P4G-42SD>] (accessed Sept. 11, 2018).

¹³³ *Id.* at 6.

¹³⁴ *See id.* (showing that at least some animals traveled 39.5 hours).

¹³⁵ USDA, FSIS Directive 6900.2, *supra* note 45, at 6 (explaining that if truck drivers refuse to provide information about whether animals who traveled more than twenty-eight hours were given rest, food, and water, the inspection protocol personnel should seek an APHIS investigation).

¹³⁶ FSIS Directive 6900.2, *supra* note 45.

¹³⁷ *See* USDA, FSIS NOTICE 06-10, HUMAN HANDLING AT ALL ENTRANCES AND THE TWENTY-EIGHT HOUR LAW 2 (2010), <http://www.aamp.com/documents/Notice06-10.pdf> [<https://perma.cc/K4A5-5WL2>] (accessed Sept. 11, 2018) (noting the requirements of the Twenty-Eight Hour Law in 2010); Email from Karen Kraubner-Lucas, Pacific Area Manager, USDA, APHIS, to Gary L. Brickler, Area Veterinarian, (Dec. 22, 2010) (from Freedom of Information Act Response to AWI request) (on file with author) (investigating Zomer Brothers, Inc.); APHIS, USDA, *IL-11039-VS* Investigative Report (2011) (Freedom of Information Act Response to AWI request) (on file with AWI) (investigating Pork King Packing, Inc.).

¹³⁸ E-mail from Karen Kraubner-Lucas, *supra* note 137; IL-11039-VS, *supra* note 98.

are not required to inspect animals when they arrive at the slaughter establishment unless they are performing Humane Activities Tracking System (HATS) verifications, which generally occur once per shift at slaughter establishments.¹³⁹ There is no minimum amount of time inspection program personnel must spend on each HATS activity, and therefore it is possible that FSIS personnel spend mere minutes inspecting the condition of animals as they are offloaded from trucks.¹⁴⁰

Additionally, while ante-mortem inspection is required for all animals to be slaughtered, FSIS personnel usually perform these duties after the animals have been off-loaded and put into pens.¹⁴¹ Once animals are placed into these pens, the law requires that they be given water immediately, and food if kept more than twenty-four hours, thus making it harder to determine if violations of the Twenty-Eight Hour Law have occurred.¹⁴²

AWI also has evidence that not all potential Twenty-Eight Hour Law violations flagged by FSIS personnel are investigated. In July 2013 an FSIS inspector at a slaughter establishment in Tennessee generated a Memorandum of Interview reporting a possible violation.¹⁴³ He observed that two truckloads of Canadian hogs had been unloaded, with one of the trucks holding twelve dead animals (another four hogs died that night).¹⁴⁴ The inspector reported that the driver had traveled more than twenty-eight hours since entering the United States from Canada and had not watered the animals during that time.¹⁴⁵ This incident was not covered by the FOIA records received by AWI.

2. *VS Import and Export Protocols*

Compliance with the Twenty-Eight Hour Law is particularly important for the health and welfare of animals shipped internationally. These animals are not shipped in large numbers; for example, in 2015,

¹³⁹ See USDA, FSIS COMPLIANCE GUIDE FOR A SYSTEMATIC APPROACH TO THE HUMANE HANDLING OF LIVESTOCK 6 (2013), <http://www.fsis.usda.gov/wps/wcm/connect/da6cb63d-5818-4999-84f1-72e6dabb9501/Comp-Guide-Systematic-Approach-Humane-Handling-Livestock.pdf?MOD=AJPERES> [https://perma.cc/AZS4-5GMT] (accessed Sept. 11, 2018) (explaining that the FSIS records the time spent performing nine verification activities in the HATS. These activities cover humane handling and slaughter regulations under the Humane Methods of Slaughter Act).

¹⁴⁰ See generally FSIS Directive 6900.2, *supra* note 45 (describing the requirements of FSIS in verifying and enforcing the humane handling of livestock for slaughter).

¹⁴¹ See USDA, FSIS DIRECTIVE 6100.1, REV. 2, ANTE-MORTEM LIVESTOCK INSPECTION 1 (2014), <https://www.fsis.usda.gov/wps/wcm/connect/2b2e7adc-961e-4b1d-b593-7dc5a0263504/6100.1.pdf?MOD=AJPERES> [https://perma.cc/8XPT-8W3R] (accessed Sept. 11, 2018) (stating that the Federal Meat Inspection Act requires FSIS personnel to inspect all livestock before they are slaughtered).

¹⁴² Handling of Livestock, 9 C.F.R. § 313.2 (2018).

¹⁴³ Memorandum of Interview for Humane Handling Tasks, 04C02 (2013) (Freedom of Information Act Response to AWI request 2014) (on file with AWI).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

the U.S. sent 44,000 pigs, sheep, lambs, and goats to Mexico.¹⁴⁶ However, the animals are likely confined in containers for long periods of time and are therefore at a higher risk for a variety of stressors, which can lead to increased susceptibility to disease and improper handling.¹⁴⁷

Import and export protocols for pigs and ruminants other than cattle are minimal. Often the protocol requires that shipments of these animals are sealed, but VS gives no indication that it monitors them for compliance with the Twenty-Eight Hour Law.¹⁴⁸ Worse, for animals imported into the U.S. from Canada, VS procedures tell drivers to take animals directly to their destination, ignoring the Twenty-Eight Hour Law altogether.¹⁴⁹ In other words, according to VS import and export documents, the only time the agency requires drivers to comply with the Twenty-Eight Hour Law is when they are shipping certain animals to Mexico.¹⁵⁰ Because instructions are not in place to monitor for violations of the law for these shipments, and may in fact require noncompliance with the law, it is likely that violations go unmonitored even when enough information is provided through health certificates and seal numbers to determine if a driver violated the law.

On the other hand, import and export procedures provide instruction for how to comply with the Twenty-Eight Hour Law when cattle are shipped to Mexico.¹⁵¹ Fortunately, when APHIS investigations of cattle shipments are conducted at border export facilities, they can definitively prove violations of the Twenty-Eight Hour Law. Current seal and rest stop addendum procedures provide APHIS with enough evidence to demonstrate when a driver has not stopped in compliance with the Twenty-Eight Hour Law. APHIS can do this because animals

¹⁴⁶ *Standard Query*, FOREIGN AGRICULTURAL SERVICE, <https://apps.fas.usda.gov/gats/ExpressQuery1.aspx> (Search Product Type: “exports”, Product Group: “Sheep, lambs, & goats” and “swine”, and Partner: “Mexico”) [<https://perma.cc/AJC5-KMVM>] (accessed Sept. 11, 2018). This number can vary greatly. More than twice that amount was shipped in 2009. In 2010, there was nearly a 30% decrease. The total number of animals shipped from Canada through the U.S. to Mexico is not available. However, U.S. to Mexico summary reports provide numbers for dairy cattle and pigs shipped from Canada to Mexico—3,300 and 12,800, respectively, in 2015. See *US to Mexico Livestock Export Summary* (Dec. 24, 2015), CATTLE.COM, https://www.cattle.com/markets/archive.aspx?code=AL_LS635&date=2015-12-24 [<https://perma.cc/WLH6-BSAP>] (accessed Sept. 11, 2018) (summarizing the number of livestock exported from the United States to Mexico).

¹⁴⁷ See X. Manteca, *Physiology and Disease, in* LONG DISTANCE TRANSPORT AND WELFARE OF FARM ANIMALS 69, (Michael C. Appleby et al. eds., 2008) (describing the stressors that animals are exposed to during transportation).

¹⁴⁸ See VETERINARY SERVS., QUESTIONS AND ANSWERS: USDA’S FINALIZED IMPORT CERTIFICATION REGULATIONS FOR LIVE BOVINE ANIMALS AND BOVINE PRODUCTS (Nov. 2007), https://www.aphis.usda.gov/import_export/downloads/q_a_can_cattle_imp.pdf [<https://perma.cc/N87V-EB3U>] (accessed Sept. 11, 2018); see PROTOCOL FOR THE IMPORTATION OF SWINE FROM CANADA, *supra* note 56 (explaining that swine are moved in sealed conveyances).

¹⁴⁹ PROTOCOL FOR THE IMPORTATION OF SWINE FROM CANADA, *supra* note 56.

¹⁵⁰ QUESTIONS AND ANSWERS, *supra* note 64.

¹⁵¹ *Id.*

are only able to leave a sealed container if the seal is broken. If APHIS can show that a driver spent more than twenty-eight hours en route, the seal shows whether the driver unloaded the animals. In NM-11032-VS, APHIS was able to prove that a driver violated the law because the driver entered the export facility with the same seal on the container from when the trip commenced.¹⁵²

Unfortunately, instances like these are rare, and depend entirely upon on-site personnel at export facilities taking an interest in a specific shipment of animals. In 2009, AWI submitted a FOIA request to APHIS asking for records related to all shipments of bovines transported from Canada to Mexico for a two-year period. APHIS sent records for 116 shipments.¹⁵³ After estimating the mileage of the routes provided, AWI found that 92% of shipments took over twenty-eight hours to reach their destination once they entered the U.S.¹⁵⁴ Yet, the records were void of rest stop addendums. As with these shipments, records indicate that the driver in NM-11032-VS did not have a rest stop addendum, but APHIS only commenced an investigation when an on-site veterinarian requested one after he witnessed dead animals on the truck.¹⁵⁵

In the last nine years there have only been two cases (TX-06284-VS and NM-11032-VS) in which on-site officials have taken an interest in a particular shipment.¹⁵⁶ In one of these cases over 150 animals died during transport or immediately thereafter.¹⁵⁷ Violations of the law may go unnoticed because drivers are often allowed to unload cattle at export facilities without being required to disclose hour or mileage information to APHIS. Thus, the only time a potential violation of the law is investigated is when someone questions the drivers' routes.

C. APHIS Applies its Enforcement Authority Inconsistently

In the few cases, revealed through FOIA records, where APHIS has detected violations of the Twenty-Eight Hour Law, it has applied its authority inconsistently and has not followed its obligation under the law. In a letter to AWI, APHIS stated that its primary obligation under the Twenty-Eight Hour Law is to report violations to the DOJ.¹⁵⁸ Even though the agency has uncovered violations of the law occurring on trucks, it has not reported a single case to the DOJ.¹⁵⁹ In

¹⁵² Investigative and Enforcement Services of APHIS, USDA, *NM-11032-VS Investigative Report*, (Oct. 26, 2012) (Freedom of Information Act Response to AWI request) (on file with author).

¹⁵³ APHIS, USDA, RECORDS OF CANADA TO MEXICO BOVINE SHIPMENTS (2009) (Freedom of Information Act Response to AWI request) (on file with author).

¹⁵⁴ *Id.*

¹⁵⁵ *NM-11032-VS*, *supra* note 152.

¹⁵⁶ *TX-06284-VS*, *supra* note 74; *NM-11032-VS*, *supra* note 152.

¹⁵⁷ *TX-06284-VS*, *supra* note 74.

¹⁵⁸ Letter from Kevin Shea, *supra* note 8.

¹⁵⁹ Letter from Pauline H. Milius, *supra* note 34.

fact, in each of the three cases where APHIS found a violation of the law, it came to a different conclusion regarding its authority.

In one case (TX-06284-VS), APHIS suggested reporting the violation to the DOT because that is all its authority allowed it to do.¹⁶⁰ In another case (NM-11032-VS), IES provided the violator with an “official warning.”¹⁶¹ The warning stated that APHIS may “pursue civil action including penalties up to \$650 for each violation described in the official warning.” The warning continues, “[a]lthough we generally pursue penalties for this type of violation(s), we have decided not to pursue penalties in this instance so long as you comply, in the future, with laws APHIS enforces.”¹⁶²

In the final case (WI-10009-VS) where APHIS found a violation of the law, agency personnel stated that they did not have the authority to bring any action against the company because of its status as a foreign entity.¹⁶³ From the limited facts recovered regarding WI-10009-VS, it seems that APHIS should have submitted the violation to the DOJ, which then would have decided whether to bring the case against a foreign entity.

An APHIS email communication about WI-10009-VS states:

It appears that there is nothing we can do in this case, which is unfortunate. It is likely that the majority of 28-hour violations we will see will involve Canadian exporters, so we effectively have an animal welfare regulation that we will not be able to enforce in the majority of our cases. If that's true, then we are likely, over time, to have repeat offenders because they are effectively exempt from meeting our regulations due to the fact that they are a foreign entity.¹⁶⁴

However, FOIA records show that APHIS acted differently in a 2006 case where Steve's Livestock Transport, a Canadian company, violated the Twenty-Eight Hour Law.¹⁶⁵ Records show that the company received a letter of information (an informal warning letter) for violating the Twenty-Eight Hour Law.¹⁶⁶ In both of the cases where the violator was a foreign entity, APHIS should have reported the cases to the DOJ. Foreign entities must comply with U.S. transport

¹⁶⁰ *TX-06284-VS*, *supra* note 74. Based on FOIA records, it is unclear if APHIS sent the case to the DOT—the records only show APHIS' intention to submit the case to the DOT. The DOT could not locate any records associated with this case when AWI requested this information through FOIA.

¹⁶¹ *NM-11032-VS*, *supra* note 152.

¹⁶² *Id.* The Twenty-Eight Hour Law violation is the only violation discussed in the letter of warning. It is possible, and perhaps likely, that the agency's insinuation that it frequently pursues penalties for violations of the law pertains to horses and violations of 9 C.F.R. Part 88 (2001).

¹⁶³ E-mail from Michael Dutcher, DVM, Area Veterinarian in Charge, USDA, APHIS, to William D. Reinburg, Area Manager, Investigative and Enforcement Services, USDA, APHIS (Mar. 16, 2011, 4:58 PM) (on file with author).

¹⁶⁴ *Id.*

¹⁶⁵ *TX-06284-VS*, *supra* note 74.

¹⁶⁶ FOIA records did not provide details of this case (TX-04252-VS). It is only referenced in the records as a past violation of the law.

laws when transporting goods and animals within the U.S.¹⁶⁷ According to the Department of Homeland Security and the FMSCA, foreign entities must comply with driver's log, alcohol, hours of service, identification, and inspection requirements.¹⁶⁸ The departments do not refer to the Twenty-Eight Hour Law specifically, but this is likely due to the lack of familiarity with the law, and should not be taken as an assertion that foreign companies may ignore the law altogether. Here, IES expressly stated that it found a violation, so it should have reported it to the DOJ.¹⁶⁹

If APHIS did submit these cases to the DOJ, it is likely that a court would find it has jurisdiction over a foreign entity in these circumstances. Canadian defendants are brought before U.S. courts often, as there is significant cross-border travel and economic ties between the U.S. and Canada.¹⁷⁰ In order for a court to move forward with a civil case it must, *inter alia*, determine if it has jurisdiction over the defendant.¹⁷¹ A court may have specific or general personal jurisdiction over the defendant. In order for a court to have specific jurisdiction over a defendant, the plaintiff must show that there is a link between the defendant's conduct in the state and the lawsuit at hand.¹⁷² Additionally, the plaintiff must show that the suit would not violate due process,¹⁷³ meaning in this case that it is reasonable for the court to have jurisdiction over the defendant, and that "fair play and substantial justice" are not offended by this exercise of authority.¹⁷⁴

In a Twenty-Eight Hour Law case, the DOJ could show that the defendant used the interstate highway within the forum state and is therefore subjecting itself to the transportation laws within the U.S.,

¹⁶⁷ See U.S. DEP'T OF TRANSP., BORDER CROSSING GUIDE FOR COMMERCIAL TRUCK DRIVERS, http://www.truckingsafety.org/portals/0/guidebooks/border_crossing_guide.pdf [<https://perma.cc/T7UL-Y558>] (accessed Sept. 11, 2018) (explaining that Canadian drivers must abide by hours of service, alcohol restrictions, identification, and inspection laws).

¹⁶⁸ U.S. DEP'T OF HOMELAND, GUIDELINES FOR COMPLIANCE OF COMMERCIAL MOTOR VEHICLES AND CMV DRIVERS ENGAGED IN CROSS-BORDER TRAFFIC (May 2012), <https://www.dhs.gov/xlibrary/assets/policy/dhs-cross-border-trucking-guidelines.pdf> [<https://perma.cc/ZC6M-VP2U>] (accessed Sept. 11, 2018).

¹⁶⁹ *TX-06284-VS*, *supra* note 74.

¹⁷⁰ Matthew Johnson, *One More Brick in the Wall: The Impact of Personal Jurisdiction of Ex Juris Defendants on the Relationship Between the United States and Canada*, 4 PENN ST. J.L. & INT'L AFF. 522 (2015).

¹⁷¹ *Personal Jurisdiction*, LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/personal_jurisdiction [<https://perma.cc/M445-Q5NZ>] (accessed Sept. 11, 2018).

¹⁷² See *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 919 (2011) (asserting that specific jurisdiction depends on the activity being litigated having occurred in the forum state).

¹⁷³ *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

¹⁷⁴ See Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise from or Relate to" Requirement. . . What Does it Mean?*, 50 WASH. & LEE L. REV. 1265, 1267 (1993) (discussing the *International Shoe Co.* holding that replaced the presence standard with a minimum contacts standard for personal jurisdiction that also provides due process) (accessed Sept. 2, 2018).

including the Twenty-Eight Hour Law. Regarding due process, the DOJ could argue that it is reasonable for a company that transports animals in the U.S. to know one of the only laws that specifically pertains to the transport of animals within the U.S., and that those driving on U.S. roads are subject to U.S. transportation laws.

FOIA records show that APHIS is uncertain as to how it should handle the Twenty-Eight Hour Law overall. Emails discovered through FOIA demonstrate that APHIS personnel are uncertain about their authority under the law.¹⁷⁵ When the FSIS amended Directive 6900.2 with information about the Twenty-Eight Hour Law, APHIS showed it was unaware of how to handle such cases. One area veterinarian in charge stated that the agency needed guidance on the issue. Referring to the law, the e-mail states, “[d]oes this only pertain to slaughter facilities? What about livestock markets? What about dealer facilities? The historic interpretation of this [law] say[s] [it] only pertains to railroad cars, so the vehicle really doesn’t matter now?”¹⁷⁶ FOIA records do not indicate any response to this inquiry. This e-mail came about six years after the USDA’s intra-agency memo explaining that the Twenty-Eight Hour Law regulations apply to trucks.¹⁷⁷ Another area veterinarian in charge e-mailed colleagues in APHIS VS stating that he believed the Twenty-Eight Hour Law was the responsibility of APHIS’s Animal Care division.¹⁷⁸

D. APHIS Investigatory and Evidentiary Tools are Indiscriminate

In three cases—TX-06284-VS, WI-10009-VS, and NM-11032-VS—IES relied on various types of evidence to conclude that a violation had occurred. In TX-06284-VS, the driver’s log, the trucks themselves, and a police report were used.¹⁷⁹ According to the IES investigator, the driver’s log demonstrated that in several shipments, the driver did not stop to provide animals with food or water.¹⁸⁰ FOIA records did not provide all driver logs for the incident, but at least one clearly shows that a shipment of pigs traveled over 3,200 kilometers without stopping to unload and rest the animals.¹⁸¹ An affidavit from a port veterinarian, Dr. Garcia, explained that the trailers used to ship the animals

¹⁷⁵ APHIS employees did not write these emails recently, but because the law has been so inconsistently enforced and few cases have been brought to their attention, it is likely that confusion is still persistent within the agency.

¹⁷⁶ E-mail from Terry L. Taylor, Area Veterinarian in Charge, USDA, APHIS, VS, to Ulysses J. Lane, Assoc. Reg’l Dir., Veterinary Serv., USDA, APHIS (Oct. 27, 2009, 9:55 AM) (on file with author).

¹⁷⁷ *See id.* (noting the dates of these correspondences); Letter from Kevin Shea, *supra* note 8.

¹⁷⁸ E-mail from Michael Dutcher, Area Veterinarian in Charge, USDA, APHIS, VS, to Wis. APHIS VS (Nov. 05, 2009, 3:28 PM) (on file with author).

¹⁷⁹ TX-06284-VS, *supra* note 74.

¹⁸⁰ *Id.*

¹⁸¹ *See* FUNKS LIVESTOCK TRANSP. LTD., DRIVER’S DAILY LOG, (Jun. 26–29, 2006) (on file with author as part of TX-06284-VS investigation file) (adding the kilometers from each day totals 3,219 km).

were not equipped to water the animals during transport.¹⁸² The police report stated that a USDA animal health technician viewed the trucks in question and found them to be overcrowded and, therefore, even if there was water for animals they would not all have been able to access it.¹⁸³

The FOIA records for WI-10009-VS did not indicate the documentation that IES used to conclude that a violation occurred. Records did contain the exhibit list used in the investigation, which included shipping records, a “bill of lading,” a “Non-Domestic Livestock Receiving Verification Log,” and a VS certificate titled “Export of Cattle or Bison for Immediate Slaughter to the United States of America.”¹⁸⁴

In NM-11032-VS, the investigator concluded that a violation occurred because the shipment container’s seal was not broken, the truck driver confessed that he did not stop, an addendum for rest stops did not accompany the shipment, and records indicated which day the animals left their point of departure.¹⁸⁵ APHIS personnel told IES that the seal was not broken and that there was not a rest stop addendum.¹⁸⁶ The IES investigator spoke with the driver during the investigation. According to the investigation report, the driver said that, “he is familiar with . . . the Twenty-Eight Hour Law but that he did not stop during the trip for rest, feed[,] or water for the cattle because there are no rest stop facilities along the way for this.”¹⁸⁷ Finally, an APHIS accredited veterinarian signed a “Certificate of Cleaning and Disinfecting” on May 23, 2011, and sealed the trailer on the same day.¹⁸⁸

The lack of standardized documentation for animal transport makes it difficult for APHIS to collect evidence and determine in a timely manner whether the Twenty-Eight Hour Law has been violated. For instance, it took APHIS ten months to finish its investigation into CA-10421-VS—despite the fact that the truck driver who transported the animals admitted at the outset to violating the Twenty-Eight Hour Law.¹⁸⁹ During the investigation, APHIS conducted interviews, solicited and reviewed affidavits, and traveled to the offices of those involved. Yet, after all this, APHIS was forced to

¹⁸² *TX-06284-VS*, *supra* note 74.

¹⁸³ *Id.* The investigation only discussed the violation of the feed and water requirements under the Twenty-Eight Hour Law regulations. It did not mention the unloading animals to rest requirement under the law. This is particularly troubling because the investigation showed that the animals were overcrowded, and therefore the exemption to the Twenty-Eight Hour Law would not have applied.

¹⁸⁴ Memorandum from Investigative and Enft Servs., APHIS USDA to William Reinburg, Area Manager, Investigative and Enft Servs. (Jan. 31, 2011) (on file with author).

¹⁸⁵ *NM-110032-VS*, *supra* note 105.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* However, there is an official USDA feed, water, and rest station in Adair, Oklahoma, and according to Google Maps this would have provided the driver a place to stop without adding more than an hour in driving time to the trip.

¹⁸⁸ *Id.*

¹⁸⁹ *CA-10421-VS*, *supra* note 90.

make the determination that there was insufficient evidence of a violation because there was no proper documentation of the driver's actions during the trip.¹⁹⁰

In other instances, APHIS put time and resources into its investigations, yet the evidence needed to prove that a violation occurred did not exist or was immaterial. In WI-10009-VS, it took APHIS approximately two years to conduct an investigation into a possible violation of the law.¹⁹¹ It concluded that a violation occurred, but that Canadian companies are exempt from complying with the law and therefore nothing could be done.¹⁹² Even when violations are clear, as in NM-11032-VS, it takes APHIS years to finish the investigation. IL-110390-VS was the shortest case; after looking at driver logs, FSIS took three months to conclude that no violation had occurred.¹⁹³

V. THE USDA HAS THE AUTHORITY AND RESPONSIBILITY TO BETTER ENFORCE THE TWENTY-EIGHT HOUR LAW

While the previous section demonstrates how enforcement of the Twenty-Eight Hour Law has failed, it also illuminates ways to improve compliance with the law. There are two main reasons why the USDA has not submitted violations of the law to the DOJ. First, there is a lack of proper guidance for APHIS personnel in understanding their role in the Twenty-Eight Hour Law. Second, in most instances there is not specific documentation that a driver is required to provide to APHIS that reviews the mileage, hours, and stops made on their trip.¹⁹⁴ The USDA has the authority under the Twenty-Eight Hour Law to provide clarity on these two points and more as initial steps to better enforcement of the law.

When Congress replaced the Twenty-Eight Hour Law in 1906, it specified that the USDA has certain enforcement powers under the law. The law stated that the USDA would report violations of the law to the Attorney General.¹⁹⁵ When Congress repealed and reenacted the law in 1994, it did so "without substantive changes," and therefore the agency is still charged with reporting violations of the law to the DOJ.¹⁹⁶ Congressional reports also demonstrate that Congress intended for the USDA to have enforcement power over the law, given that it implemented the law at the USDA's request.¹⁹⁷

The USDA has clearly demonstrated it has authority to enforce the Twenty-Eight Hour Law. While it has not always done so to the

¹⁹⁰ E-mail from Karen Kraubner-Lucas, *supra* note 137.

¹⁹¹ Memorandum from Investigative and Enft Servs., *supra* note 184.

¹⁹² E-mail from Michael Dutcher, *supra* note 163.

¹⁹³ *IL-11039-VS*, *supra* note 98.

¹⁹⁴ Note that in *IL-11039-VS*, the driver's log helped determine that a violation did not occur, and this case took the least amount of time for APHIS to conclude. *Id.*

¹⁹⁵ Twenty-Eight Hour Law, ch. 3594, §4, 34 Stat. 607 (1906).

¹⁹⁶ Chu, *supra* note 2 (citing H. R. REP. NO. 103-180, at 1 (1994)).

¹⁹⁷ See HSUS, *supra* note 18 (citing 59 CONG. REC. S3769, Special Session (1906) (statement of Senator Warren (R-WY))).

best of its abilities, the department has enforced the law since its enactment. As discussed above, the Bureau of Animal Industry originally enforced the law against rail carriers. APHIS wrote regulations to enforce the law in 1963, when transport by rail was still common, and it eventually applied the law to trucks in 2003.¹⁹⁸ Throughout, IES has investigated possible violations of the law, although this currently occurs very infrequently, and no evidence can be located showing APHIS has ever referred a case involving truck transport for prosecution.

VI. POSSIBLE MECHANISMS FOR ENFORCING THE TWENTY-EIGHT HOUR LAW

There is little to no enforcement of the Twenty-Eight Hour Law, because no enforcement mechanism has existed since trucks replaced trains as the primary mode of farm animal transport in the United States. Although FSIS and APHIS each have protocols in place for detecting violations, these have not resulted in any prosecutions under the law. Legislation can be introduced in Congress to create an enforcement mechanism; however, it is highly unlikely that such a bill could pass in the near future.

Any short-term solution should require no new legislation and very limited or no rulemaking. The solution should take advantage of a current enforcement process employed by the USDA and/or the DOT, and inspection personnel should perform the procedure routinely (unlike the FSIS protocol, which depends on slaughterhouse inspectors taking the initiative to notify APHIS when they observe animals who appear to have endured a lengthy transport). A few possible approaches meet these criteria:

1. The number of hours in transit could be included on an existing or new form that accompanies animals to federally-inspected slaughter establishments. The form could be collected or reviewed by USDA personnel at the slaughter plant. This would cover animals transported to slaughter but not those transported for breeding or feeding purposes.
2. Electronic logging devices and paper logs, which record truck-driving hours, offer a potential mechanism for the DOT and/or the USDA to track compliance with the Twenty-Eight Hour Law. This could be accomplished by having USDA personnel at slaughter establishments review driving logs when they conduct routine inspections related to truck unloading. This approach would cover animals transported for slaughter but not for other purposes.
3. The DOT could monitor compliance with the Twenty-Eight Hour Law by including enforcement as part of roadside inspections conducted by the Motor Carrier Safety Assistance Program (MCSAP). MCSAP inspectors already monitor com-

¹⁹⁸ Letter from Kevin Shea, *supra* note 8.

pliance with numerous FMCSA regulations and hazardous material regulations. However, the Twenty-Eight Hour Law regulations are found within USDA regulations, and it is unclear whether MCSAP inspectors have enforcement jurisdiction. If such enforcement is possible, this approach would cover the transport of farm animals for all purposes.

VII. CONCLUSION

Initially, when animals were transported long distances primarily on rail carriers, the USDA helped enforce the Twenty-Eight Hour Law. Once the animal transport system modernized, the department lost sight of its role under the law. This has led to insufficient enforcement of long-distance animal transport. The USDA has the authority to properly enforce the law, and the agency has an obligation to work with the Department of Transport to identify a mechanism that ends its constructive nullification of one of the very few laws Congress has passed to protect animal health and welfare.