



# Animal Welfare Institute

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May 26, 2022

Marie Bucko, Chief of Staff  
Veterinary Services  
Animal and Plant Health Inspection Service  
U.S. Department of Agriculture  
Jamie L. Whitten Building, Room 318-E  
1400 Independence Ave., SW  
Washington, DC 20250

*Submitted via regulations.gov*

**Re: Comment on Docket No. APHIS-2022-0031, *Draft Environmental Assessment, Emergency Response for Highly Pathogenic Avian Influenza Outbreaks in Seven States***

Dear Dr. Bucko:

The Animal Welfare Institute (AWI) submits these comments in response to the Animal and Plant Health Service's (APHIS) Draft Environmental Assessment (DEA) for its Emergency Response for Highly Pathogenic Avian Influenza Outbreaks in Seven States. AWI seeks to inform APHIS that it is proposing a major federal action that will have significant impacts on the human environment without taking the required "hard look" as required by the National Environmental Policy Act (NEPA).

Since its founding in 1951, AWI has been dedicated to alleviating suffering inflicted on animals by people, and continually works to improve conditions for the billions of animals raised and slaughtered each year for food in the United States. Consequently, AWI is very concerned about the impact on the environment of the methods used to control avian influenza. First, AWI asks that the USDA assess the environmental effects of its HPAI response more broadly. After carefully reviewing the DEA, AWI believes even with a limited scope, the effect on the human environment is likely significant and thus warrants preparation of an environmental impact statement (EIS). Second, AWI believes that the department has the authority to curtail the use of certain inhumane depopulation methods, and to encourage the poultry industry to alter its production practices to allow for better control of highly pathogenic animal diseases.

## **Background**

1. The Scale of the 2022 HPAI Outbreak and Depopulation Activities

As of May 26<sup>th</sup>, highly pathogenic avian influenza has been confirmed in 183 commercial and 172 backyard flocks in 35 states, resulting in the depopulation of more than 38 million birds.<sup>1</sup> Depopulation records for Feb-March received from the USDA in response to Freedom of Information Act requests describe the killing of 14.6 million birds in commercial flocks, including turkey meat birds, turkey breeder hens, table egg layers, table egg pullets, and chicken meat birds (broilers).<sup>2</sup>

According to the released records, ventilation shutdown plus (VSD+), alone or combined with other methods, was used in 73 percent of the depopulations completed in Feb-March. Nearly one-third of the depopulations carried out during that time were at facilities housing at least 100,000 birds. Despite using the most inhumane method available, many depopulations did not meet the USDA's goal of 24-48 hours between the time of positive test confirmation to completion of the killing. In fact, eight of 12 depopulations (66.7 percent) involving more than 200,000 birds during Feb-March exceeded 48 hours. These depopulations involved 11.1 million birds, with an average of 1.4 million birds per depopulation. The two largest depopulations of 2.8 million and 5.3 million birds were completed in 16 and 7 days, respectively.

## 2. The Department should Prepare an EA or EIS for its Comprehensive HPAI Response

As a preliminary matter, AWI recognizes that although the scope of the current DEA is constrained, since the initial issuance, HPAI has spread significantly. AWI believes the current DEA and its constrained scope fail to adequately or meaningfully address the effects of the HPAI response. For example, the department asserts that consideration of the appropriateness of depopulation methods or poultry producer's management practices—that inevitably lead to the necessity of depopulation—are beyond the scope of this assessment. DEA at 11. After the HPAI outbreak of 2015 subsided, the department withdrew the EA and FONSI for its 2015 HPAI control plan. The department justified the withdrawal on the grounds that there was not a current outbreak and because after reviewing the EA, APHIS “acknowledge[d] that the documents could benefit from more extensive analysis.”<sup>3</sup>

During the comment period for the 2015 EA, AWI and others warned that the systems of production, including but not limited to the massive size of some commercial operations, would predictably lead to the rapid spread of HPAI and later, because there are too many birds, the inability to use the most humane methods of depopulation. Instead, VSD+, a method theoretically reserved for extraordinary circumstances (and approved by the American Veterinary Medical Association (AVMA) under that condition) is now the only way to depopulate these massive numbers of birds.

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<sup>1</sup> USDA-APHIS, *2022 Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks* (May 18, 2022) <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/avian/avian-influenza/hpai-2022>.

<sup>2</sup> APHIS FOIA Request Nos. 2022-APHIS-02403-F, 2022-APHIS-02981-F.

<sup>3</sup> *Environmental Assessments; Availability, etc.: High Pathogenicity Avian Influenza Control in Commercial Poultry Operations-A National Approach; Withdrawal*, Animal Plant and Health Inspection Service, US Dep't of Agriculture (July 27, 2021) available at <https://www.regulations.gov/document/APHIS-2015-0058-0010>.

The department never reissued a revised EA, and, to AWI's knowledge, has not performed a NEPA analysis for any revised response plan, including the 2017 "HPAI Response Plan: The Red Book." The department made no effort to curtail industry practices that make the spread of HPAI so swift and make an "extraordinary" depopulation method the only available method. If these concerns are "beyond the scope" of this current DEA because the country is in the midst of a predictable return of HPAI, the department needs to issue a new control plan and related EA to address these issues.

## Concerns With the Current DEA

### 1. The USDA Should Prepare an Environmental Impact Statement

USDA's actions amount to a "significant impact" on the human environment necessitating the preparation of an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(c). According to the current NEPA regulations, in determining whether the effects of a proposed action are "significant," agencies "shall analyze the *potentially affected environment* and *degree* of the effects of the action." 40 C.F.R. § 1501.3(a) (emphasis added). In considering the "potentially affected environment," agencies should consider "the affected area (national, regional, or local) and its resources. . ." and in considering the "degree" of the effects, agencies should consider "short-and long-term effects . . . beneficial and adverse effects, effects on public health and safety, [and] effects that would violate Federal, State, Tribal, or local law protecting the environment." *Id.* § 1501.3(b).<sup>4</sup>

Given the action's "potentially affected environment" and the "degree" of effects—which include numerous long-term adverse effects—the action is likely "significant," warranting preparation of an environmental impact statement. The action is likely to cause short- and long-term environmental degradation on a national scale, and it furthermore has the potential to contribute to the spread of avian influenza to other animals and even humans, and to negatively impact the human food supply. Further, the DEA threatens violation of several environmental laws. Given the likelihood of escaped contaminants from depopulation and carcass disposal, effects may cause violation of state and local laws, the Clean Water Act, the Clean Air Act, or species protection laws such as the Endangered Species Act, the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act.

Finally, courts have found that an agency must prepare an EIS if "substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor." *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988) (internal quotations omitted).

In fact, the EA itself states:

If the number of carcasses at any site exceeds 50 tons (100,000 pounds), such an occurrence could potentially surpass a level that may significantly affect the human environment. If carcass biomass numbers exceed the 50-ton threshold and it is determined that potential environmental impacts could be significant, the appropriate level of NEPA documentation and considerations will be reassessed.

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<sup>4</sup> It is worth noting that these amendments have been challenged legally and face potential abrogation.

DEA at 15 (internal citations omitted).

AWI is aware of at least 63 incidents in which the depopulation exceeded 20,000 animals.<sup>5</sup> At approximately 5 lbs/bird, these events exceed the 50-ton threshold in which APHIS itself states the impacts “may significantly affect the human environment.” Further, since these numbers were obtained, the outbreak worsened in intensity in April and continued into May, spreading across the country to nearly 200 farms in 35 states, affecting at least 38 million birds.

Given the fact that the USDA seems poised to continue allowing farms to operate at a massive scale without adequate control methods (discussed *infra*), and that its actions have a substantial impact on whether these outbreaks will continue, it seems that “substantial questions” have been raised that these actions significantly affect the human environment necessitating the preparation of an EIS.

## 2. USDA has the Power to Control the Depopulation Methods Used

The department rejects in-depth consideration of the alternative action that would disallow certain methods of depopulation, reasoning that APHIS has “little control over the method used.” DEA at 27. This is a mischaracterization of the department’s power. The Animal Health Protection Act (AHPA) provides the USDA with broad powers to regulate for the prevention, detection, control, and eradication of diseases that pose a risk to animal health. The AHPA gives the Secretary authority to order the destruction of animals for the purpose of disease prevention and eradication. The Secretary is also granted the power to compensate an owner for the destruction of an animal for those purposes. 7 U.S.C. § 8306. Pursuant to the AHPA and the exceptions contained within,<sup>6</sup> the USDA has promulgated rules to implement this power. 9 C.F.R. pt. 53. In practice, the USDA has interpreted its power in such a way that only producers that comply with certain requirements are eligible for indemnity payments or reimbursement for carcass disposal. For example, to be eligible for indemnity after an HPAI depopulation, the owner, unless exempt, must have a USDA-approved poultry biosecurity plan. 9 C.F.R. § 53.11.

It is current departmental policy that “[t]he use of a particular method will not impact indemnity payments if the method has been identified by the [AVMA] as a preferred method or a method permitted in constrained circumstances.” DEA at 20. With this policy, the department enables producers to choose the depopulation method and be compensated for it. However, the department’s ability to set certain conditions on compensation demonstrates that the department could accomplish an abolition of VSD+ by conditioning the indemnification payments it makes to producers for birds and eggs that must be destroyed during an outbreak on their use of other depopulation methods. At the very least, the department has the power to increase the stringency of the requirements a producer must meet to be indemnified for killing birds via VSD+.

As discussed above, depopulation by VSD+ has significant human health and animal welfare implications and is, unsurprisingly, the most controversial depopulation method. It should be

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<sup>5</sup> USDA-APHIS, *2022 Confirmations of Highly Pathogenic Avian Influenza in Commercial and Backyard Flocks* (May 18, 2022) <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/avian/avian-influenza/hpai-2022>.

<sup>6</sup> For example, the secretary does not need to compensate when an operator has “moved or handled [an animal] in violation of an agreement for the control and eradication of diseases or pests.” 7 U.S.C. § 8306(d)(3)(A).

noted that the World Organisation for Animal Health (OIE) does not recognize VSD in any form in its recommendations for killing animals for disease control purposes.<sup>7</sup> Yet, the department justifies compensating producers for their birds killed by VSD+ on the AVMA’s approval of the method. However, the AVMA—recognizing the serious welfare implications of VSD+—only recommends its use “under constrained circumstances” for poultry and only when it can be performed to meet the 24-to-48-hour depopulation goal. As noted above, records received by AWI via Freedom of Information Act requests indicate that VSD+ is not being used infrequently, but in fact is the method used to kill the largest percentage of birds during the first two months of this year’s outbreak. Further, those same records indicate that VSD+ is not consistently effective in meeting the 24-to-48-hour depopulation goal. Again, AWI asks the USDA to change its policy and discourage the use of VSD+ through its indemnity process.

Thank you for the opportunity to comment on the DEA. Please contact me at [dena@awionline.org](mailto:dena@awionline.org) or 202-446-2146 should you have any questions or wish to request a meeting.

Sincerely,

A handwritten signature in black ink that reads "Dena Jones". The signature is written in a cursive, flowing style.

Director, Farm Animal Program

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<sup>7</sup> Article 7.6.1 of the OIE Terrestrial Code, Killing of Animals for Disease Control Purposes, mandates that “methods used should result in immediate death or immediate loss of consciousness lasting until death; when loss of consciousness is not immediate, induction of unconsciousness should be non-aversive or the least aversive possible and should not cause avoidable anxiety, pain, distress or suffering in animals.”