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Regulatory Analysis and Development, PPD
Animal and Plant Health Inspection Service
Station 3A-03.8
4700 River Road Unit 118
Riverdale, MD 20737-1238

**Re: NCLA Comments Regarding APHIS Notice on “Use of Radio Frequency Identification Tags as Official Identification in Cattle and Bison”
Docket No. APHIS-2020-0022; 85 Fed. Reg. 40185 (July 6, 2020)**

Dear Sir or Madam:

The New Civil Liberties Alliance (NCLA) is pleased to submit these comments in response to the notice (published by the Animal Plant Health Inspection Service in the Federal Register on July 6, 2020) that APHIS is proposing that beginning January 1, 2023, it will “only approve radio frequency identification [RFID] tags as official eartags for use in interstate movement of cattle and bison that are covered under certain regulations.”

NCLA strongly opposes the proposal. The proposal would prohibit continued use of metal eartags, the eartagging method supported by the vast majority of the cattle industry. The industry’s opposition to the proposal is unsurprising—APHIS’s own estimates indicate that a switch to a mandatory RFID eartag regime would cost producers between \$1.2 and \$1.9 billion. NCLA opposes the proposal for the additional reason that it violates federal law. APHIS adopted regulations in 2013 (the “2013 Final Rule”) that authorized use of metal eartags as a means of officially identifying cattle and bison being moved in interstate commerce. So long as the 2013 Final Rule remains in place, APHIS is barred from adopting a proposal that would prohibit use of metal eartags.

Moreover, adoption of the proposal would violate the Administrative Procedure Act (APA), which requires APHIS to engage in formal notice-and-comment rulemaking before adopting substantive rules. The Notice indicates that APHIS does not intend to engage in notice-and-comment rulemaking, yet any effort to prohibit a longstanding identification system employed by large segments of the cattle industry unquestionably qualifies as a substantive rule.

I. Interests of NCLA

The New Civil Liberties Alliance is a nonpartisan, nonprofit civil rights group devoted to defending civil liberties. The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself, such as freedom of speech, due process of law, the right to be tried by an impartial and independent judge, and the right to live under laws made by the nation’s elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of the Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent. This unconstitutional administrative state within the Constitution’s United States is the focus of NCLA’s concern.

APHIS is a subagency of the U.S. Department of Agriculture (USDA). APHIS and USDA are required by the U.S. Constitution to act in accordance with statutes adopted by Congress, as well as in accordance with formal regulations adopted by USDA under the rulemaking authority granted to it by Congress. NCLA is concerned by APHIS’s repeated refusal to abide by those constraints. After APHIS issued a “factsheet” in April 2019 purporting to establish a deadline by which RFID eartags must be affixed on all adult cattle shipped in interstate commerce, NCLA filed a lawsuit challenging that action. NCLA charged that APHIS’s prohibition on metal eartags violated various provisions of the APA and the U.S. Constitution. In response to that lawsuit, APHIS withdrew the “factsheet,” and much of NCLA’s lawsuit was dismissed as moot. APHIS’s July 6, 2020 Notice indicates that APHIS plans to resume its illegal conduct.

II. APHIS Regulation of Animal Identification

Congress has delegated to USDA/APHIS authority to administer statutes governing animal health. *See, e.g.*, 7 U.S.C. § 8301, *et seq.* APHIS adopted regulations governing animal identification (the “2013 Final Rule”) pursuant to that authority; the regulations are codified at 9 C.F.R. Part 86. The 2013 Final Rule provides for assignment of unique identification numbers to animals, to assist with animal disease traceability—that is, knowing

the whereabouts of diseased and at-risk animals, where they have been, and when.

The 2013 Final Rule provides that the following categories of cattle and bison are subject to the identification requirements if they are to be moved in interstate commerce:

- All sexually intact cattle and bison 18 months of age and over;
- All female dairy cattle of any age and all dairy males born after March 11, 2013;
- Cattle and bison of any age used for rodeo or recreational events; and
- Cattle and bison of any age used for shows or exhibitions.

9 C.F.R. § 86.4(b)(1).

One of the forms of permissible identification for cattle and bison is “an official eartag.” 9 C.F.R. § 86.4(a)(1)(i). The regulations define an “official eartag” as “An identification tag approved by APHIS that bears an official identification number for individual animals.” 9 C.F.R. § 87.1. It is undisputed that when the 2013 Final Rule took effect, a metal eartag qualified as “an official eartag.”

III. APHIS’s Proposed Prohibition of Metal Eartags Violates the 2013 Final Rule

APHIS’s July 6, 2020 notice (the “Notice”) states, “APHIS has used visual (metal) tags for animal identification for many decades and has approved both visual and radio frequency identification (RFID) tags for use as official identification devices in cattle and bison since the implementation of the [2013 Final Rule].” 85 Fed. Reg. at 40184. Despite that acknowledgment, APHIS now contends that the regulations adopted in the 2013 Final Rule merely established “*minimum* national official identification and documentation requirements for the traceability of livestock moving interstate” and that those regulations authorize APHIS to adopt more stringent identification requirements. *Ibid* (emphasis added).

That contention is inconsistent with both the text and the context of the 2013 Final Rule. The Final Rule states that cattle and bison satisfy APHIS identification requirements if they are identified by an “official eartag,” 9 C.F.R. § 86.4(a)(1)(i), and there is no question

that a metal tag qualified as an “official eartag” both before and after adoption of the Final Rule in 2013. Nothing in the text of 9 C.F.R. Part 86 indicates that APHIS is authorized to make *post hoc* changes in what qualifies as an “official eartag” without amending those regulations—which, of course, APHIS has not proposed to do. So long as the Final Rule remains in place, APHIS must abide by its endorsement of metal eartags as a permissible means of identifying cattle and bison.

Because APHIS’s proposed ban on metal eartags violates the Final Rule, it is reviewable by federal courts under the APA, which authorizes courts to set aside agency actions found to be “not in accordance with law.” 5 U.S.C. § 706(2)(A). Federal regulations issued through the notice-and-comment process “have the force and effect of law” and thus are as binding as any congressional enactment. *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 96 (2015); *accord, Jake’s Fireworks Inc. v. Acosta*, 893 F.3d 1248, 1262 (10th Cir. 2018). The Supreme Court has long held that a federal agency is just as bound by its own regulations as is any member of the general public. *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) (Secretary of Interior bound by regulations he promulgated “even though without such regulations” he could have taken the challenged action); *Ballard v. Comm’r of Internal Revenue*, 544 U.S. 40, 59 (2005).

The Final Rule contains numerous other indicia that it authorized use of metal eartags as one means by which cattle producers could satisfy the identification requirements. For example, 9 C.F.R. § 86.8 preempts any effort by a state or local government or tribal government to specify a single device or method that must be used to identify an animal shipped in interstate commerce “if multiple devices or methods may be used under this part for a particular species.” One implication of this regulation is that the specified governments may not prohibit use of metal eartags—because metal eartags are one of several identification methods authorized for cattle or bison. Another implication is that *APHIS itself* may not prohibit use of metal eartags so long as the Final Rule is in effect. That implication can be drawn from § 86.8’s use of the present tense: “multiple devices or methods *may be used*.” That phrasing implies that the determination of whether there are multiple acceptable devices or methods is to be determined as of 2013, when the Final Rule was adopted—not at some future time when APHIS has changed its mind about the list of acceptable devices or methods. In other words, the regulations indicate that if APHIS does change its mind, it must first amend the regulations before implementing the change.

Statements made by APHIS officials in the 2013 time frame confirm that they understood the 2013 Final Rule as authorizing use of metal eartags. For example, an official

Factsheet, issued by APHIS in December 2012 for the purpose of explaining the content of what would become the 2013 Final Rule, stated explicitly that it intended the Rule to serve as an endorsement of metal eartags: “The official identification number would have to adhere to one of the following systems, most of which are already in use [including the] National Uniform Eartagging System (NUES) (typically, metal eartags such as silver USDA tag) ...” *Questions and Answers: Animal Disease Traceability Final Rule*, Factsheet, APHIS Veterinary Services, Dec. 2012, at 2. The Factsheet provided additional direct assurances that its proposed rule permitted use of metal eartags, stating, “For cattle, the low-cost NUES (metal eartag) may be used. To encourage its use, USDA plans to provide these eartags at no cost to producers to the extent funds are available.” *Id.* at 3.

APHIS now contends that the 2013 Final Rule merely establishes *minimum* identification requirements and that it remains free to impose stricter requirements (such as by changing the definition of an “official eartag” so as to remove metal eartags from the list of APHIS-approved tags) without the need to amend the Final Rule. But that contention is belied by APHIS’s economic analysis that accompanied the 2013 Final Rule. That analysis estimated the annual cost of complying with the Final Rule at \$3 million, based on an estimated cost of 10 cents per metal eartag for 30 million cattle shipped interstate each year. *Regulatory Impact Analysis & Final Regulatory Flexibility Analysis, Final Rule, APHIS-2009-0091, Traceability for Livestock Moving Interstate*, at 26. That would not have been a plausible estimate of annual compliance costs had APHIS actually believed in 2013 that the Final Rule authorized it to prohibit use of metal eartags and instead require all cattle producers to use the far-more-expensive RFID eartags. Indeed, APHIS’s economic analysis expressly stated that the Final Rule “will encourage use of low-cost technology, such as metal eartags, for identifying livestock.” *Id.* at 20.

APHIS’s interpretation of the 2013 Final Rule is also inconsistent with the “Animal Disease Traceability Standards” released by APHIS in conjunction with the Final Rule. The Standards document explicitly endorses use of low-cost eartags, stating that the Final Rule permits producers to use NUES tags, “commonly referred to as ‘brite’ tags, when authorized by their State or Tribal animal health officials,” and that such use of “brite” tags qualifies their animals for interstate shipment. *Animal Disease Traceability General Standards, APHIS, Version 2.0, December 20, 2012*, at 11-12. Neither the Standards nor the Final Rule includes any suggestion that APHIS’s endorsement of low-cost eartags was not actually part of the Final Rule and that the Final Rule granted APHIS authority to abandon that endorsement at its sole discretion.

IV. APHIS May Not Adopt the Substantive Rule Contemplated by Its Proposal Without First Engaging in Formal Notice-and-Comment Rulemaking

As the Notice acknowledges, cattle producers “for many decades” have been authorized to use metal eartags to comply with animal identification requirements imposed by disease programs. 85 Fed. Reg. at 40184. APHIS now proposes to prohibit reliance on metal eartags and instead to require all producers to use RFID eartags. Because that new requirement qualifies as a “substantive” or “legislative” rule, the APA requires APHIS to engage in notice-and-comment rulemaking before the requirement may be adopted.

With very limited exceptions, the APA’s notice-and-comment requirements apply to all rules proposed by the federal government. 5 U.S.C. § 553(b). One such exception is set out in § 553(b)(A), which states that the requirements do not apply to “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.” In determining the applicability of this interpretive-rule exception, courts often distinguish between “interpretive” rules on the one hand and “legislative” or “substantive” rules on the other hand—with the latter being ineligible for the interpretive-rule exception. *See, e.g., Perez*, 575 U.S. at 96-97.

One important indication that a rule is “substantive” or “legislative” is that it “sets forth important individual rights and duties.” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007). A legislative rule is one that “is promulgated pursuant to a direct delegation of power by Congress and ... changes existing law, policy, or practice.” *Rocky Mountain Helicopters, Inc. v. FAA*, 971 F.2d 544, 546 (10th Cir. 1992). An interpretive rule, on the other hand, “attempts to clarify an existing rule but does not change existing law, policy, or practice.” *Id.* at 546-47.

Applying those definitions, the proposal described in APHIS’s Notice qualifies as a substantive/legislative rule. APHIS proposes to change existing law by prohibiting continued use of metal eartags and requiring that RFID eartags be used in their place. It would impose a burdensome duty on cattle producers that they have never previously borne.

Yet the Notice indicates that APHIS intends to proceed without engaging in the notice-and-comment rulemaking required by the APA. The Notice states:

We will publish a follow-up notice in the Federal Register after reviewing any comments we receive. This notice will respond to any such comments,

announce our decision on official eartags for cattle and bison, and, if necessary, provide a timeline for a transition if there is a change to what is an official eartag.

85 Fed. Reg. at 40185.

APHIS cannot plausibly contend that its Notice qualifies as the requisite formal notice-and-comment rulemaking. Accordingly, the procedure outlined above by APHIS would not satisfy the APA's requirements if APHIS were to adopt a substantive rule by changing the definition of "what is an official eartag."

If APHIS seeks to impose a new regulatory burden on cattle producers, it must first initiate formal notice-and comment procedures by publishing its proposed new regulation in the Federal Register, provide interested parties an opportunity to comment on the proposal, and then—in conjunction with its final new rule—provide a meaningful response to each of the submitted comments.

CONCLUSION

NCLA respectfully requests that APHIS withdraw its Notice published in the July 6, 2020 Federal Register and commit publicly that it will not seek to impose additional eartag requirements on cattle producers without first initiating formal notice-and-comment rulemaking proceedings.

Sincerely,

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