

L. ROBERT MURRAY  
Acting United States Attorney  
NICHOLAS VASSALLO (WY Bar No. 5-2443)  
Assistant United States Attorney  
P.O. Box 668  
Cheyenne, WY 82003  
Telephone: 307-772-2124  
[nick.vassallo@usdoj.gov](mailto:nick.vassallo@usdoj.gov)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING**

RANCHERS CATTLEMEN ACTION  
LEGAL FUND UNITED  
STOCKGROWERS OF AMERICA;  
TRACY and DONNA HUNT, d/b/a THE MW  
CATTLE COMPANY, LLC; and KENNY  
and ROXY FOX,

Petitioners/Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
AGRICULTURE; ANIMAL AND PLANT  
HEALTH INSPECTION SERVICE;  
SONNY PERDUE, in his official  
Capacity as the Secretary of Agriculture;  
And KEVIN SHEA, in his official  
capacity as Administrator of the Animal  
and Plant Health Inspection Service,

Respondents/Defendants.

No. 19-cv-205-F

**RESPONSE TO PETITIONERS' "SUPPLEMENTAL MOTION FOR  
COMPLETION OF RECORD"**

Respondents, by counsel, respectfully submit this Response to Petitioners'  
"Supplemental Motion for Completion of Record."

Petitioners filed this action on October 4, 2019. ECF 1. On February 13, 2020, this Court dismissed the action for lack of jurisdiction based on mootness. ECF 21. Petitioners sought relief, under Fed. R. Civ. P. 60(a), from the dismissal of their claim under the Federal Advisory Committee Act (FACA). ECF 22. This Court granted that request and allowed Petitioners to file an amended complaint on their FACA claim. ECF 26.

In their original pleading (the one this Court dismissed), Petitioners had alleged that Respondents' activities relating to the State-Federal Animal Disease Traceability Working Group ("ADT Working Group") violated FACA. In their motion to dismiss Petitioners' original pleading, Respondents pointed out that Petitioners had not pled sufficient facts to establish that the ADT Working Group was a FACA Advisory Committee. In their Amended Complaint, Petitioners abandoned their FACA claims relating to the ADT Working Group. They do not allege that the ADT Working Group was a FACA Advisory Committee. Instead, they allege that two *other* groups are FACA Advisory Committees. Those two groups are the Cattle Traceability Working Group (CTWG) and the Producers' Traceability Council (PTC). See ECF No. 27 at 23 (para. 129).

When APHIS prepared the AR and Supplemental AR in this case, it limited the scope of the record to documents reflecting the agency's activities regarding the CTWG and the PTC, as they are the only groups Petitioners allege to be FACA Advisory Committees.<sup>1</sup> The AR reflects that the CTWG was formed at an "inaugural conference

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<sup>1</sup> In the certifications of the AR and Supplemental AR, Dr. Aaron Scott certified that the record contained "all of the available documents and materials directly or indirectly

call” on November 20, 2017. *See* AR 383, 385, 388. APHIS officials did not select the participants in that formative telephonic meeting, nor did APHIS officials attend the meeting or participate in generating the “Draft CTWG Purpose, Goals and Objectives” which came out of the meeting. *See* AR 1, 383, 388. The earliest document relating to the actual formation of the CTWG appears to be an email dated November 13, 2017.<sup>2</sup> AR 369. Temporally, that is where the AR begins, because that is the time frame when the CTWG came into existence.

Petitioners now insist that the AR must be supplemented with three internal APHIS emails (with attachments) from June 2017, almost five months before CTWG was formed.<sup>3</sup> The subject emails include notes from a meeting of the ADT Working Group. The notes include a discussion that “one idea that has been put forward is putting together a state-federal task force” (also referred to in the documents as an “industry and State/Federal Task

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considered by Veterinary Services in connection with the Cattle Traceability Working Group and Producers Traceability Council.” ECF Nos. 29.1, 39.1.

<sup>2</sup> The November 13, 2017 email is from Katie Ambrose, the Chief Operating Officer of the National Institute for Animal Agriculture, to Neil Hammerschmidt, an APHIS official. Ms. Ambrose had received a call from an individual who wanted to be included on the November 20, 2017 “inaugural conference call.” Ms. Ambrose informed Mr. Hammerschmidt that she wanted to “visit with” him to “find out more about” the individual.

<sup>3</sup> Petitioners obtained the emails in response to a FOIA request. The scope of the FOIA request is significantly broader than the limited issues presented by this action, as it includes records of “any working groups that have addressed Animal Disease Traceability issues in the cattle industry.” APHIS is providing documents responsive to that request on a rolling basis, and the response is not yet complete.

Force”). ECF No. 52-1 at 3. The emails also discuss a survey to be distributed to the members of the ADT Working Group regarding the possible formation of such a task force.

In preparing the AR and Supplemental AR, Respondents did not attempt to capture and include every document in which there might have been a discussion about an “idea” relating to a possible future task force. Petitioners argue that the subject documents are relevant to the issue of whether Respondents “established” the CTWG. But as discussed in Respondents’ previous filings, an agency does not “establish” an advisory committee unless it “directly forms” the committee by actually selecting its members. *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 736 F.Supp. 2d 24, 32-33 (D.D.C. 2010) (citing *Byrd v. United States Environmental Protection Agency*, 174 F.3d 239 (D.C.Cir.1999)); *VoteVets Action Fund v. United States Department of Veterans Affairs*, 414 F. Supp. 3d 61, 68-71 (D.D.C. 2019). It does not matter whether an agency “effectively created” the group by “conceiving of the need for it.” *Byrd* at 246.

Discussions among APHIS officials and other members of the ADT Working Group about the possible formation of an unnamed task force are not germane to the issue of whether Respondents in fact “established” the CTWG or the PTC. The documents which are the subject of Petitioners’ motion go beyond the appropriate scope of the record. The record should be (and was) limited to the agency’s activities and interactions with regard to two real, concrete entities, the CTWG and the PTC. This includes the agency’s activities (if there were any) relating to the actual formation of those entities. The documents

Petitioners now propose for inclusion in the record do not fit into that category, and Petitioners' motion should accordingly be denied.<sup>4</sup>

Respectfully submitted this 26<sup>th</sup> day of February, 2021.

L. ROBERT MURRAY  
Acting United States Attorney

By: /s/ Nicholas Vassallo  
NICHOLAS VASSALLO  
Assistant United States Attorney

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<sup>4</sup> Further, Respondents submit that if the scope of the record is deemed to include all documents relating to discussions about the possible creation of an unnamed future task force, rather than the actual formation of the CTWG and the PTC, there are likely additional documents that would fit into that category which were not included in the AR and Supplemental AR. The identification of those additional documents and their incorporation into the record, and any additional motions or supplemental briefing that might follow, would unnecessarily cause further delay and disruption to these proceedings.

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that on February 26, 2021, a copy of this Response to Petitioners' Supplemental Motion for Completion of Record Response to Petitioners' "Motion for Completion of Record or for Consideration of Extra-Record Evidence." was filed with the Court's CM/ECF system, which will send a notice of electronic filing to counsel of record.

*/s/ Elizabeth Kilmer*  
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ELIZABETH KILMER  
United States Attorney's Office