

Harriet M. Hageman (Wyo. Bar. # 5-2656)
New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: 202-869-5210
Harriet.Hageman@ncla.legal

222 East 21st Street
Cheyenne, Wyoming 82001
Cell Phone: 307-631-3476

ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

RANCHERS CATTLEMEN ACTION LEGAL)	
FUND UNITED STOCKGROWERS)	
OF AMERICA; et al.)	
)	Petitioners/Plaintiffs,
)	
vs.)	
)	
UNITED STATES DEPARTMENT OF)	
AGRICULTURE; et al.)	
)	Respondents/Defendants.

No. 19-CV-205-F

**PLAINTIFFS’ REPLY BRIEF IN SUPPORT OF SECOND SUPPLEMENTAL
MOTION FOR COMPLETION OF RECORD**

As new documents keep trickling out of Defendants’ files, it becomes more and more obvious that Defendants (collectively, “USDA”) “established” both the Cattle Traceability Working Group (CTWG) and the Producers Traceability Council (PTC), as that term is used in FACA. USDA’S’s response? It seeks to deflect attention from its own culpability by blaming Plaintiffs (collectively, “R-CALF”) for failing to bring the documents to the Court’s attention sooner.

That response makes little sense. R-CALF did not become aware of the documents at issue until USDA disclosed them on March 16 and 17, 2021—in response to a FOIA request filed more than a year ago (well before R-CALF filed the Amended Complaint raising its FACA claims). R-CALF filed its motion to add relevant documents to the Administrative Record less than two weeks later. Defendants are the delinquent parties here. They have been in possession of these

documents *throughout this lawsuit*, while continuing to refuse to take the required steps to add them to the record.

USDA also contends that the documents are not relevant to the key issue in this case: whether Defendants either “established” or “utilized” CTWG or PTC within the meaning of FACA. That contention is doubly wrong. First, it is based on USDA’s unjustifiably narrow interpretation of the word “established,” an interpretation expressly rejected by the Supreme Court in *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989). More importantly, a motion regarding the appropriate scope of the record is not the proper vehicle for deciding which party is correct as to the meaning of “established.” Rather, because the proffered documents are highly relevant if R-CALF’s interpretation of “established” is correct, the proper course of action is to insert these documents into the record—thereby granting the district court access to *all* of the facts in connection with the ultimate decision to be rendered on contested legal issues.

I. THE DOCUMENTS SUPPORT R-CALF’S CLAIM THAT USDA “ESTABLISHED” CTWG AT THE SEPTEMBER 2017 STRATEGY FORUM IN DENVER

A key factual dispute in this case is the date on which CTWG was “established.” Defendants contend that CTWG was “established” in November 2017, when CTWG conducted its first telephone conference—a phone call in which no USDA/APHIS employees participated. R-CALF contends, on the other hand, that CTWG was “established” at the September 26-27, 2017 “Strategy Forum on Livestock Traceability” in Denver. The Administrative Record includes a number of documents (including several drafted by APHIS officials) that trace establishment of CTWG to the Strategy Forum—an event funded and co-hosted by APHIS and heavily attended by APHIS officials. R-CALF has cited those documents in its pending merits briefing. Defendants respond that those documents are insufficient to prove exactly what happened at the Strategy Forum.

The documents at issue in this motion—all drafted by APHIS officials—are highly relevant to the “when-was-CTWG-established” issue. Of particular importance is “Document #1 2nd Suppl.,” a September 20, 2017 email written by Neil Hammerschmidt, a senior APHIS official. Hammerschmidt was scheduled to make a three-hour panel presentation (along with two other APHIS officials and two agricultural officials from state governments) at the Strategy Forum the following week. Attached to the email is Hammerschmidt’s “final draft” of the Power Point display that was to accompany the panel presentation. His Power Point is replete with statements urging attendees at the Strategy Forum to create an industry-led task force to “prepare a plan” for requiring RFID eartags on all cattle by 2023—a call to action that precisely describes CTWG. For example, Slide No. 70, which lists “Immediate Priorities,” states that one such priority is “Supporting the immediate establishment” of such a task force.

The other four documents are similar, as are the documents attached to R-CALF’s first Supplemental Motion (ECF 53) (pending). All of them show efforts by both APHIS officials and state agricultural officials working with APHIS as part of the State-Federal Working Group (a group dominated by APHIS) to persuade cattle-industry representatives to agree to be part of Defendants’ proposed industry-led working group. Their campaign was successful: industry representatives at the Strategy Forum agreed to be part of that working group and to help persuade others to join as well. Under any commonly understood definition of the word “established,” the documents comprise evidence indicating that USDA established CTWG and thus should be made part of the Administrative Record.

Of course, government officials have no authority to order private citizens to serve on an advisory committee. When the government agency plays the dominant organizational role in forming one, however, it has clearly “established” such committee as that term is defined; and

evidence regarding Defendants' organizational role is thus highly relevant to the district court's ultimate determination regarding whether they "established" CTWG.

II. USDA'S CHALLENGES TO THE RELEVANCE OF THE PROFFERED DOCUMENTS IS UNPERSUASIVE

Defendants argue that the proffered documents are not relevant to whether they "established" CTWG. They contend that the word "established, as it is used in FACA, has a specific and narrow meaning," and that their efforts to organize CTWG do not meet that definition. Resp. Br. 5. They cite several decisions from District of Columbia federal courts that allegedly support their contention. *Ibid.* Interestingly enough, Defendants have entirely ignored *Public Citizen*, the Supreme Court's leading FACA decision. *Public Citizen* supports R-CALF's contention that FACA's use of the word "established" should be read broadly. Quoting FACA's legislative history, the Supreme Court stated:

the phrase "established or organized" was to be understood in its "*most liberal sense*, so that when an officer brings together a group *by formal or informal means*, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill."

Public Citizen, 491 U.S. at 461 (quoting S. Rep. No. 92-1098, p.8 (1972)) (emphasis added). Later appeals-court decisions have recognized that *Public Citizen* mandates that "established," as used in FACA, should be construed in accord with its ordinary, broad definition. *Micosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076 (11th Cir. 2002).¹ The documents proffered by R-CALF are thus highly relevant because they provide evidence that APHIS "br[ought] together a

¹ One of the decisions relied on by USDA, *VoteVets Action Fund v. Dep't of Veteran Affairs*, ___ F.3d ___, 2021 WL 1180723 (D.C. Cir., March 30, 2021), actually supports R-CALF. The district court had dismissed a FACA claim on the pleadings. Reversing, the appeals court held that the complaint adequately alleged that the government established the advisory committee at issue. Citing *Public Citizen*, the court held that "the government need not take any formal steps to 'establish' a FACA committee" and that "there is no requirement that government officials act with any particular formality to 'establish' an advisory committee as a source of advice." *Id.* at *6. It was enough that the committee "was established at government behest." *Id.* at *7.

group by formal or informal means ... to obtain advice and information.”

Finally, a motion asking the Court to supplement the Administrative Record is not a proper occasion for Defendants to be arguing the merits of its case. The principal legal issue disputed by the parties is the meaning of the word “established” as used in FACA. The parties’ merits briefing, which is being completed this week, addresses that issue at length. USDA argues that FACA assigns a specialized, narrow meaning to the word “established”; R-CALF contends that Congress intended the word “established” to be construed in accordance with its everyday, broad definition. The Court will rule on that issue in due course. It is inappropriate for USDA to seek resolution of that same issue in connection with this administrative-record motion. So long as the documents in question are relevant to the underlying dispute—in the sense that they at least arguably shed some light on whether Defendants did, in fact, “establish” CTWG—they should be added to the Administrative Record. Granting the motion will ensure that the Court will have access to all relevant material. The Court will then decide what weight, if any, to accord to the documents.²

CONCLUSION

Plaintiffs R-CALF, *et al.*, respectfully request that the Court grant their Second Supplemental Motion for Completion of the Record and order that Plaintiffs’ five proffered documents be made part of the record in this case.

² Before filing this motion, R-CALF neglected to consult with counsel for Defendants to determine whether they would consent to the relief sought—an omission for which R-CALF apologizes to the Court. Based on Defendants’ ongoing refusal to agree to supplement the record, R-CALF was confident that they would once again refuse—but we nonetheless should have asked. At the same time R-CALF understood that this Court’s Order on briefing schedule required bringing issues related to the completeness of the record to the Court for resolution. We recognize that the purpose of the consultation rule is to avoid situations in which the court spends time addressing motions that later become moot when the parties resolve their differences. That situation did not arise here; R-CALF was correct in its presumption that Defendants would not consent to the relief requested (completion of the record).

Dated this 20th day of April 2021

Attorneys for Plaintiffs/Petitioners

/s/ Harriet M. Hageman

Harriet M. Hageman (Wyo. Bar #5-2656)

Senior Litigation Counsel

New Civil Liberties Alliance

1225 19th St., NW, Suite 450

Washington, DC 20036

Harriet.Hageman@NCLA.legal

Cell Phone: 307-631-3476

Office Phone: 202-869-5210

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on April 20, 2021, a copy of Plaintiffs' Reply Brief in Support of Second Supplemental Motion for Completion of Record was filed with the Court's CM/ECF system, which will send notice of electronic filing to the counsel of record.

/s/ Harriet M. Hageman

Harriet M. Hageman