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ATTORNEYS FOR PETITIONERS/PLAINTIFFS

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,)

No. 19-CV-205-F

Petitioners/Plaintiffs,)

vs.)

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.)

PLAINTIFFS' AMENDED COMPLAINT FOR VIOLATION OF
THE FEDERAL ADVISORY COMMITTEE ACT

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (“R-CALF USA”); Tracy and Donna Hunt, d/b/a The MW Cattle Company, LLC (“Hunt”); and Kenny and Roxy Fox (“Fox”), by and through their attorneys, Harriet M. Hageman and the New Civil Liberties Alliance, hereby file this Amended Complaint against the named Respondents/Defendants seeking Declaratory Judgment and Injunctive Relief for their violation of the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1-16, as well as to recover those attorneys’ fees and costs incurred in bringing this action.

INTRODUCTION AND BACKGROUND

1. On January 9, 2013 the Animal and Plant Health Inspection Service (APHIS), a division of the United States Department of Agriculture (USDA) (collectively, “the Agencies”), published the regulation entitled “Traceability of Livestock Moving Interstate,” 78 Fed. Reg. 2040 (*see* ECF 1-1), with an effective date of March 11, 2013 (referred to below as the “2013 Final Rule”).
2. The 2013 Final Rule (set forth in the newly created 9 C.F.R. Part 86) established requirements for the official identification and documentation necessary for the interstate movement of certain types of livestock.
3. In April 2019 the Agencies issued a two-page “Factsheet” (*see* ECF 1-1) entitled “Advanced Animal Disease Traceability: A Plan to Achieve Electronic Identification of Cattle and Bison” (referred to below as the “2019 Factsheet”). The 2019 Factsheet is attached as Exhibit A.
4. The 2019 Factsheet was not adopted or issued pursuant to a formal notice-and-comment rulemaking procedure under the Administrative Procedure Act (“APA”) and was not published in the *Federal Register*. It instead resulted from the work and collaboration between the

Defendants and one or more of the advisory committees that are the subject of this Amended Complaint.

5. The 2019 Factsheet was intended as a “substantive” or “legislative” rule that was designed to impose legally binding obligations on livestock producers.
6. The 2019 Factsheet unlawfully mandated the use of “radio frequency identification” (“RFID”) eartags and technology for certain categories of livestock, and quickly phased out the use of other types of animal identification, including those methods specifically approved by the 2013 Final Rule (branding, official non-RFID eartags, tattoos, group/lot identification numbers, and backtags).
7. According to the 2019 Factsheet, “[b]eginning January 1, 2023, animals that move interstate and fall into specific categories will need official, individual RFID ear tags.” The Defendants, however, had no legal authority to mandate such RFID use.
8. The 2019 Factsheet stated that “[a] premises identification number (PIN) is required to purchase official ID tags[.]” (*id.*), a requirement that was rejected in the 2013 Final Rule.
9. Defendants intended for the 2019 Factsheet requirements to repeal and replace critically important aspects of the 2013 Final Rule, including the approved livestock identification methods, the types of livestock covered, and requirements related to the registration of premises where livestock are raised or fed.
10. On October 4, 2019 the above-named Plaintiffs filed their “Petition for Review of Agency Action and Complaint for Declaratory Judgment and Injunctive Relief” (Petition for Review) (ECF 1) challenging the 2019 Factsheet.

11. The Petition for Review requested an Order from this Court declaring that the Defendants' actions in issuing the 2019 Factsheet violate the 2013 Final Rule (9 C.F.R. Part 86); the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*; the Congressional Review Act ("CRA"), 5 U.S.C. §§ 801-808; the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. (1972); and the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601 *et seq.* (1980).
12. The Petition for Review sought an injunction barring Defendants from implementing, imposing, or otherwise requiring compliance with the 2019 Factsheet.
13. On October 25, 2019, three weeks after Plaintiffs filed their lawsuit, APHIS posted a statement on its website announcing that it had removed the April 2019 Factsheet from its website, claiming that "it is no longer representative of current agency policy." Attached as Exhibit B.
14. The statement posted on the APHIS website is not branded in any way, having no official USDA or APHIS letterhead, logo, or other markings identifying where it came from.
15. The statement posted on APHIS's website does not contain a date, identify an author, and is ambiguous.
16. Upon information and belief, Defendants have not otherwise sought to inform the industry that producers who seek to move or sell their livestock across state lines are not required to use RFID eartags for identification purposes.
17. To the contrary, published in the February and March, 2020 issues of the Nebraska Cattleman, one of the largest cattle industry trade magazines in that state, USDA partnered with the Nebraska Department of Agriculture to publish an almost identical version of the 2019 Factsheet to inform livestock producers that they were required to convert to RFID eartags.

18. The Defendants have claimed that by their action in posting the statement to the APHIS website that they have withdrawn the 2019 Factsheet effective as of October 25, 2019. Such claim does not comport with the Agencies' internal policies and ongoing efforts to require livestock producers to use official RFID eartags in order to be able to move their cattle and bison across state lines.
19. The Defendants intend to pursue and impose RFID eartag requirements on the livestock industry in the future.
20. Defendant Kevin Shea has in fact specifically stated as such under oath, explaining that "While the need to advance a robust joint Federal-State-Industry ADT capability *remains an important USDA-APHIS and State Animal Health Official objective*, we will take time to reconsider the path forward." ECF 11-1 at 4. (Emphasis added).
21. On January 15, 2020 Respondents filed a motion to dismiss the Petition for Review (ECF 11) arguing that because they had withdrawn the 2019 Factsheet the case was moot.
22. This Court entered its Order Dismissing Case for Lack of Jurisdiction on February 13, 2020 (ECF 21), having concluded that Defendants had successfully mooted this lawsuit by withdrawing the 2019 Factsheet in October of last year.
23. The Court did not address Petitioners FACA claim in the February 13, 2020 Order.
24. In response to Petitioners' Rule 60(a) Motion addressing the FACA claim the Court stated that "there is no dispute among the parties that the Court neglected to address Petitioners' FACA Claim in its Order Dismissing Case dated February 13, 2020." ECF 26 at 2-3.
25. The Court granted Petitioners leave to file an amended complaint associated with the FACA claim and the related relief requested.

26. Regardless of whether Respondents have withdrawn the 2019 Factsheet, Petitioners' FACA claim remains justiciable and is ripe for review.

NATURE OF THE ACTION

27. Petitioners/Plaintiffs file this Amended Complaint pursuant to the FACA to bring transparency and fair balance to a matter of great public importance: the operation of the advisory committees that USDA and APHIS established and utilized following adoption of the 2013 Final Rule to provide advice and recommendations, and to otherwise develop policy, regarding how to pursue mandatory electronic animal identification and traceability of livestock.

28. In 2017, Defendant APHIS arranged for the establishment of one or more advisory committees—the “Cattle Traceability Working Group” (CTWG) as well as several subcommittees thereof—to assist APHIS in developing plans to amend the existing 2013 Final Rule (found in 9 C.F.R. Part 86) governing the identification and traceability of livestock. The CTWG's members consisted of private citizens, with USDA officials regularly participating in meetings.

29. In May 2019, soon after the April 2019 Factsheet was issued, the CTWG disbanded. In its place, APHIS arranged for the establishment of a new advisory committee, the “Producers Traceability Council” (PTC), to provide similar advice and recommendations to APHIS. A senior USDA official is a member of the PTC and has attended one or more of its meetings.

30. The CTWG, its subcommittees, and the PTC (collectively, “the Committees”) are FACA “advisory committees” within the meaning of 5 U.S.C. app. § 3(2) and are thus subject to and must comply with all of the FACA requirements.

31. Among the FACA requirements are the following: the federal government must file a charter

that defines each committee's objectives, duties, and other information before it first meets; announcements of meetings must be published in advance in the *Federal Register*; all committee meetings must be open to the public, and detailed minutes of each meeting must be published; all documents made available to or prepared for or by the advisory committee must be made public; and the membership of the committee must be fairly balanced in terms of the points of view represented. *See* 5 U.S.C. app. 2 §§ 5(b), 9(c), 10(a)-(c).

32. The Agencies took none of the steps identified above with respect to the Committees. Defendants have violated FACA by convening meetings of the Committees without first filing a charter and by failing to abide by FACA's public access and disclosure requirements.
33. The CTWG was fairly balanced in terms of the points of view represented, having a membership that included producers, packers, veterinarians, and others. Upon discovering that the fairly balanced CTWG was not producing the recommendations the Agencies desired—mandatory RFID use—Defendants acquiesced to the dissolution of the CTWG and replaced it with a committee (the PTC) that did not then and does not now satisfy FACA's fair-balance requirement.
34. The PTC excludes cattle producers who are opposed to new animal-traceability measures being considered by USDA, most specifically the idea of mandating RFID-only eartag requirements.
35. This lawsuit seeks to hold the government to its obligations under FACA, provide the transparency the law requires, disclose to the public the documents to which the public is entitled (so that the public can better understand the decision-making process being used by Defendants as they go forward with plans to amend existing rules governing the identification and traceability of livestock), and enjoin Defendants from relying upon any of the Committees'

materials, reports and recommendations.

JURISDICTION AND VENUE

36. The Court has jurisdiction under 28 U.S.C. § 1331 (federal question).
37. The Court may award declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706.
38. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (e).

THE PARTIES AND STANDING

Plaintiffs

39. Plaintiff R-CALF USA was formally organized in 1999 as a public benefit corporation pursuant to the Montana Nonprofit Corporation Act, Montana Statutes §§ 35-2-113 *et seq.* R-CALF USA is the country's largest producer-only membership organization representing cattle producers on domestic and international trade and marketing issues. The purpose of R-CALF USA is to address and protect the market interests of cattle producers in the United States, primarily focusing upon the threats posed to the domestic live cattle industry by unfair and illegal trade practices and imports, and other economic factors (including regulatory burdens that increase production costs). R-CALF USA addresses both national and international issues that affect profitability of domestic cattle producers.
40. R-CALF USA represents the educational, economic, business, and social interests of over 280 cattle producers within the State of Wyoming, and over 5,300 livestock producers around the United States. Its members are located in 43 States. R-CALF USA's membership is made up of a broad spectrum of cattle producers, including but not limited to cow-calf producers, cattle backgrounders, and feeders.

41. R-CALF USA was an active participant in federal administrative proceedings that led to adoption of the 2013 Final Rule that currently governs the traceability of livestock moving interstate. R-CALF has continued to monitor, participate in, and work with Defendants in relation to issues associated with the identification and traceability of livestock.
42. R-CALF USA and its members have informational interests in materials reviewed or produced by FACA advisory committees that have addressed or are addressing whether to revise the 2013 Final Rule, and if so, how they will do so.
43. R-CALF USA and its members have protectable property interests in ensuring that Defendants do not revise the 2013 Final Rule based on information or recommendations supplied by a FACA advisory committee that has not operated in compliance with FACA requirements. The interests at stake in this lawsuit are germane to R-CALF USA's purpose as described above.
44. Plaintiffs Tracy and Donna Hunt are cow-calf operators in northeastern Wyoming near Newcastle. They do business as The MW Cattle Company, LLC, which is organized under the laws of Wyoming. Ms. Hunt is a third-generation rancher, with her grandfather first purchasing land in this area in 1926.
45. The Hunts are members of R-CALF USA and the Wyoming Stock Growers Association. They run livestock in both Wyoming and South Dakota and move their cattle across the state line in the spring/summer and in the fall of each year.
46. The 2013 Final Rule states that cattle producers need not use "radio frequency identification" (RFID) eartags for their livestock.
47. It is not operationally or economically feasible for the Hunts to use RFID eartags, given the nature of the terrain, the size of the pastures, the manner in which the livestock are managed

and moved, and the lack of available corrals.

48. In compliance with the 2013 Final Rule, the Hunts have relied exclusively on branding, as well as metal tags and tattoos, to satisfy federal identification and traceability requirements for the interstate movement of their cattle.
49. The Hunts have informational interests in materials reviewed or produced by FACA advisory committees that have addressed or are addressing whether to revise the 2013 Final Rule, and if so, how they will do so.
50. The Hunts have protectable property interests in ensuring that Defendants do not revise the 2013 Final Rule based on information or recommendations supplied by a FACA advisory committee that has not operated in compliance with FACA requirements.
51. The Hunts have an interest in ensuring that any FACA advisory committees that consider changes to the 2013 Final Rule with respect to RFID eartags comply fully with FACA's requirements, and that they are fully informed about the operation of those committees.
52. Plaintiffs Kenny and Roxy Fox are third-generation ranchers. They have owned and operated a cow-calf ranching enterprise near Belvidere, South Dakota since 1988. Mr. Fox is also chairman of R-CALF USA's Animal Identification Committee and past president of the South Dakota Stockgrowers Association.
53. The Foxes use brands to identify and trace their cattle and have been doing so since they began ranching (and as their fathers and grandfathers did before them). They also vaccinate their replacement heifers for brucellosis, at which time the heifers are identified with a tattoo and a permanent metal eartag. These procedures comply fully with the 2013 Final Rule.
54. Requiring RFID eartags would be cost-prohibitive for the Foxes' ranching operations.

55. The Foxes have informational interests in materials reviewed or produced by FACA advisory committees that have addressed or are addressing whether to revise the 2013 Final Rule, and if so, how they will do so.
56. The Foxes have protectable property interests in ensuring that Defendants do not revise the 2013 Final Rule based on information or recommendations supplied by a FACA advisory committee that has not operated in compliance with FACA requirements.
57. The Foxes have an interest in ensuring that any FACA advisory committees that consider changes to the 2013 Final Rule with respect to RFID eartags comply fully with FACA's requirements, and that they are fully informed about the operation of those committees.
58. Kenny Fox became a member of the CTWG in 2017, where he was a vocal critic of proposals to require RFID eartags. He was not permitted to participate in all meetings held or correspondence between other CTWG members and APHIS for advice and recommendations on RFID-related issues. He is not a member of the PTC, the successor to the CTWG, which continues to offer advice and recommendations on RFID-related issues.
59. Mandatory use of RFID eartags will impose substantial costs on livestock producers, including the Plaintiffs, with such costs being associated with retrofitting infrastructure (barns, corrals, etc.), investing in the RFID technology, and the handling of livestock.
60. Mandatory use of RFID eartags will force producers, including the Plaintiffs, to dramatically change how they manage their livestock and operate their farms and ranches. The costs of the administration associated with RFID use may well exceed the cost of the eartags themselves.
61. Mandatory use of RFID eartags raises numerous privacy and constitutional concerns, including for the Plaintiffs, with questions such as how the data will be transmitted, stored, used, and

disseminated remaining unanswered.

62. RFID eartags have not been shown to provide any more benefit to actual livestock producers, including the Plaintiffs, than the current assortment of animal identification techniques approved in the 2013 Final Rule.
63. The primary beneficiaries of mandatory RFID regulations are the eartag manufacturers and the four large beef packers, and both of those industries are well represented on the advisory committees at issue here.
64. The Defendants have repeatedly touted and continue to tout the benefits of using RFID eartags for the identification and traceability of livestock in the United States. Their decisions and policies in that regard were informed, in whole or in part, by the advisory committees that are the subject of this Amended Complaint.
65. Many of the members of those advisory committees, including representatives of eartag manufacturing companies and the packers, have a financial interest in requiring the livestock producers, including the Plaintiffs, to purchase and use RFID eartags.
66. Eartag manufacturing companies and the packers have a vested interest in advising the Defendants to impose mandatory RFID requirements on livestock producers, including the Plaintiffs.
67. Eartag manufacturing companies and the packers, by their participation on the advisory committees at issue here, have had an unfair influence on Defendants, while the livestock producers, including Plaintiffs, have been excluded from participating.
68. The Plaintiffs have a substantial interest in obtaining all of the information exchanged, reviewed, discussed, drafted, evaluated, and disseminated by the Agencies as they developed

the 2019 Factsheet and made their decision to impose mandatory RFID requirements on the livestock industry. This interest remains regardless of whether the Defendants later withdrew the 2019 Factsheet.

69. The Plaintiffs have a substantial interest in challenging Defendants' violation of FACA regardless of whether Defendants later withdrew the 2019 Factsheet.

Defendants

70. Defendant USDA is an executive branch agency of the United States of America.

71. Defendant Sonny Perdue is the Secretary of Agriculture. He has a statutory duty to comply with FACA, the APA, and the agency's own regulations. He is sued in his official capacity only.

72. Defendant APHIS is a subagency of the USDA and is subject to the direction and control of Defendant Perdue in his official capacity as Secretary.

73. Defendant Kevin Shea is the Administrator of APHIS. He has a statutory duty to comply with FACA, the APA, and the agency's own regulations. He is sued in his official capacity only.

FACTUAL BACKGROUND

Statutory and Regulatory Framework

74. Congress passed FACA, 5 U.S.C. app. 2 §§ 1-16, in 1972 to address whether and to what extent advisory committees should be maintained to advise Executive Branch officers and agencies. 5 U.S.C. app. 2 § 2(a).

75. Congress's enactment of FACA was driven by its concerns over executive reliance on secretive committees through which non-governmental actors could wield governmental power behind closed doors and outside the public's view.

76. In passing this “sunshine” statute, Congress explicitly recognized the risk that “interest groups may use their membership on such bodies to promote their private concerns,” pointing to past committees that excluded representatives from many groups of stakeholders. H.R. Rep. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 2491, 3496.

77. To guard against the danger that committees would be captured by one small group of stakeholders, Congress prescribed rules for advisory committees “to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals.” *National Anti-Hunger Coalition v. Executive Office of the President’s Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir. 1983).

78. FACA defines an “advisory committee” as:

[A]ny committee, board commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof ... which is

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

5 U.S.C. § 3(2).

79. FACA excludes from its coverage committees consisting solely of government employees. *Id.*

In addition, certain other committees are excluded from FACA’s reach by limited statutory exemptions, none of which apply here.

80. FACA requires both that an advisory committee be formally established and that its activities be public. The “requirement of openness is a strong safeguard of the public interest.” H.R. Rep. No. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3500.
81. To promote transparency, an advisory committee is not permitted to “meet or take any action” until it files a charter with “the head of the agency to whom any advisory committee reports.” 5 U.S.C. app. 2 § 9(c). The charter must contain, *inter alia*, “the committee’s objectives and the scope of its activity,” “the period of time necessary for the committee to carry out its purposes,” “the agency or official to whom the committee reports,” “the estimated number and frequency of committee meetings,” and “a description of the duties for which the committee is responsible.” *Id.*
82. In addition to publicizing an advisory committee’s creation and purpose, FACA demands transparency in the structure, procedures, and meetings of advisory committees. A “committee meeting” includes “any gathering of advisory committee members (whether in person or through electronic means) held with the approval of an agency for the purpose of deliberating on the substantive matters upon which the advisory committee provides advice or recommendations.” 41 C.F.R. § 102-3.25.
83. Under FACA, an “officer or employee of the Federal Government” must be designated to “chair or attend each meeting of each advisory committee.” 5 U.S.C. app. 2 § 10(e). No meeting shall be held in the absence of the Designated Federal Officer (DFO). *Id.* The DFO of an advisory committee is required to, *inter alia*, “[a]pprove or call the meeting of the advisory committee,” “[a]ttend the meetings,” “[a]djourn any meeting when he or she determines it to be in the public interest,” and “[c]hair the meeting when so directed.” 41

C.F.R. § 102-3.120.

84. FACA's meeting requirements are designed to guarantee transparency by facilitating open access to the public.
85. "Each advisory committee meeting shall be open to the public," 5 U.S.C. app. 2 § 10(a)(1), and shall be held "at a reasonable time and in a manner or place reasonably accessible to the public." 41 C.F.R. § 102-3.140(a). An advisory committee must provide "timely notice" of its meetings in the *Federal Register*, 5 U.S.C. app. 2 § 10(a)(2), "at least 15 calendar days in advance." 41 C.F.R. § 102-3.150. To close any part of an advisory committee meeting from the public, the DFO must justify the closure, obtain advance approval pursuant to specific procedures, and make the determination of closure available to the public. 41 C.F.R. § 102.3-155.
86. These notice requirements are not a mere formality; they exist to ensure the representation of all stakeholders as well as the general public.
87. "Interested persons" must be permitted to "attend, appear before, or file statements with [the] committee, subject to such reasonable rules or regulations as the [General Services Administration] Administrator may prescribe." 5 U.S.C. app. 2 § 10(a)(3).
88. FACA mandates that "[d]etailed minutes of each meeting of each advisory committee shall be kept," including a "record of the persons present, and a complete and accurate description of matters discussed and conclusions reached." *Id.* § 10(c).

89. FACA further requires that “the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying.” *Id.* § 10(b).
90. Section 10(b)’s disclosure requirement “serves to prevent the surreptitious use of advisory committees to further the interests of any special interest group.” H.R. Rep. No. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3500.
91. It is contrary to federal law for advisory committees to work in secret or to impact government action based on consultations that are shielded from the public and from some of an advisory committee’s own members. *Cummock v. Gore*, 180 F.3d 282, 291 (D.C. Cir. 1999).
92. Advisory committee are affirmatively obligated to provide access to the Section 10(b) materials, *even in the absence of a particular request.* *Id.* at 289.
93. To ensure that advisory committees provide advice representing a broad cross-section of interested parties, FACA requires membership of advisory committees “to be fairly balanced in terms of the points of view represented.” 5 U.S.C. app. 2 § 5(b)(2). Courts are entitled to enforce the fair-balance requirement, and individuals with standing to raise fair-balance issues include those excluded from advisory committee membership in violation of the requirement. *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221 (10th Cir. 2004).

2013 Final Rule and Its Aftermath

94. The 2013 Final Rule governs the identification and traceability of certain types of livestock.
95. The stated purpose of the 2013 Final Rule is “to improve our ability to trace livestock in the event that disease is found”; “to prevent, control, and eradicate disease”; and “to establish minimum national official identification and documentation requirements for traceability of

livestock movement interstate.” *See* 78 Fed. Reg. 2040 (Jan. 9, 2013). The Plaintiffs are primarily concerned with the 2013 Final Rule as it relates to the identification and interstate movement and sale of cattle.

96. The 2013 Final Rule establishes acceptable methods for identifying livestock. The rule supports use of “low-cost technology” for cattle identification by allowing for the use of metal eartags. *APHIS Factsheet, Questions and Answers* (Dec. 2012) (ECF 1, ECF 1-1 at 3) (“to encourage its use, USDA plans to provide these eartags at no cost to producers to the extent funds are available.”).

97. The 2013 Final Rule prohibits States and Tribes from requiring the use of RFID technology. *Id.*

98. Following adoption of the 2013 Final Rule, APHIS undertook an Animal Disease Traceability Program review.

99. In 2017, a State-Federal Animal Disease Traceability Working Group recommended that the cattle industry should increase reliance on RFID technology and that RFID should become mandatory for all cattle by January 1, 2023.

100. The State-Federal Working Group presented its preliminary recommendations at a September 2017 “Traceability Forum” in Denver, Colorado, an event sponsored by USDA and attended by its representatives. During a break-out session “facilitated” by USDA officials, they called on cattle-industry participants to form a task force to review the State-Federal Working Group’s mandatory-RFID proposal and to provide APHIS with reports and recommendations on how best to carry out that proposal. Participants at the break-out session agreed, and the result was creation of the CTWG in the fall of 2017.

101. Later USDA publications confirm that USDA provided the impetus, direction and

instruction for establishing the CTWG.

102. The recommendations of the State-Federal Working Group were published in an April 2018 USDA report entitled, “Animal Disease Traceability - Summary of Program Review and Proposed Directions from State-Federal Working Group.” Attached as Exhibit C. *This USDA report acknowledged that “there continues to be some stakeholders that are not supportive of [electronic identification (EID)] for livestock in general.”* *Id.* at 17. The report nonetheless identified the need for an industry-led advisory group to address technical issues that would have to be resolved in order to move toward mandatory RFID by January 2023:

Proposal. The United States must move toward an EID system for cattle with target implementation date of January 1, 2023. A comprehensive plan is necessary to address the multitude of very complex issues related to the implementation of a fully integrated electronic system. *A specialized industry-lead [sic] task force with government participation should develop the plan....*

Id. (Emphasis added).

103. USDA’s need for an industry-led advisory group was also endorsed by Gregory Ibach, Under Secretary of Agriculture for Marketing and Regulatory Programs, in his keynote address at the National Institute for Animal Agriculture’s annual conference in April 2018 in Denver. Ibach stated:

The USDA envisions several actions in the facilitation of steps toward national disease traceability. The first [USDA action] is to exit the mechanical and technology discussions and turn those over to industry. Industry is better able to develop their preferred technology with input and support from the USDA.

Keynote Address attached as Exhibit D.

104. Pursuant to this policy, USDA had previously facilitated the creation of the CTWG and its various subcommittees and directed them to provide USDA with recommendations regarding implementation of an RFID mandate.

105. In April 2019, APHIS issued the 2019 “Factsheet” which stated that, “Beginning January

1, 2023, animals that move interstate and fall into specific categories will need official, individual RFID ear tags.”

106. The 2019 Factsheet listed the livestock categories included within this new requirement, including all beef cattle that are sexually intact and 18 months or older; all female dairy cattle; all male dairy cattle born after March 11, 2013; and bison.

107. Plaintiffs filed their initial Petition for Review (ECF 1) in this Court in October 2019, challenging the new USDA policy as announced in the Factsheet for the reason that it violated, *inter alia*, the 2013 Final Rule, the APA and the FACA. In response to the lawsuit, APHIS announced that it had “removed the Factsheet from its Web site, as it is no longer representative of current agency policy.”

108. APHIS’s announcement nonetheless emphasized that its “goals to enhance Animal Disease Traceability (ADT) have not changed.” APHIS indicated that it is developing a new proposal and, before adopting it in final form, will provide an “opportunity for all stakeholders to comment.”

109. APHIS has continued to express its support for mandatory use of RFID devices in the cattle industry.

110. Many cattle producers, including Plaintiffs Tracy and Donna Hunt, Plaintiffs Kenny and Roxy Fox, and other members of Plaintiff R-CALF USA, oppose mandatory use of RFID eartags.

111. Such RFID eartags are operationally and economically unfeasible for the Hunts and the Foxes and for many of R-CALF USA’s members.

112. When the CTWG was formed in 2017, cattle producers who opposed the RFID mandate were fairly represented on the committee. One such member was Plaintiff Kenny Fox.

113. Some members of the livestock industry, particularly those not directly involved in cattle production and those who have a financial interest in expansion of RFID technology, *e.g.*, eartag manufacturers, support mandatory RFID. Those members were also fairly represented on the CTWG.
114. Because of the balance of the CTWG membership, deliberations of the CTWG were largely deadlocked during 2017-2019. Supporters of mandatory RFID took the position that the CTWG should develop recommendations for APHIS on how best to implement the recommendations of the State-Federal Working Group. Opponents focused deliberations on whether the CTWG should support any such recommendations at all.
115. As a result of the deadlock, several pro-RFID members of the CTWG announced in late March 2019 (shortly before Defendants issued the 2019 Factsheet) that they would cease participating in the CTWG unless the CTWG could “develop consensus” on going forward with mandatory RFID. They reiterated that announcement at an April 8, 2019 meeting of the CTWG in Des Moines, Iowa.
116. USDA/APHIS officials participated in the Des Moines, Iowa meeting.
117. No such consensus developed among the members of the CTWG. As a result, the pro-RFID members withdrew from the CTWG at the beginning of June 2019, and the CTWG ceased to exist.
118. Pro-RFID members of the CTWG then announced formation of a new advisory committee, the PTC, which would work with APHIS to develop the methods for implementing the State-Federal Working Group’s recommendations to force RFID tags’ use.
119. The Pro-RFID members stated that membership in the PTC would be open only to those “producers that will be interested in helping advance ADT.”

120. On information and belief, pro-RFID members of the CTWG consulted privately with USDA/APHIS officials before announcing plans to abandon the CTWG and form a new committee whose members would be limited to those individuals, businesses and groups committed to advancing the goals set forth in APHIS's April 2019 Factsheet.
121. Members of the CTWG who opposed mandatory RFID, including Plaintiff Kenny Fox, were excluded from those conversations between the pro-RFID members and the Agencies.
122. The PTC was created for the purpose of blocking anyone who was opposed to mandatory RFID use from participating.
123. The PTC began meeting in June 2019. Its members include Dr. Sarah Tomlinson, a senior employee in APHIS's Veterinary Services branch.
124. A July 2, 2019 press release stated that the PTC "is an independent offshoot of the [CTWG]" and "was established to provide guidance on key issues relating to advancement of the Animal Disease Traceability (ADT) requirements." *See* Exhibit E.
125. For example, at its June 2019 meeting, the PTC examined privacy concerns that may arise when industry participants share animal disease traceability data with the federal Animal Health Event Repository (AHER). *Id.* After hearing presentations from APHIS's Tomlinson and Rich Baca (a senior IT official at USDA), the PTC adopted "preliminary recommendations" on privacy concerns, including that third-party management systems which house data for livestock producers should be required to share certain of that data with AHER. *Id.*
126. The PTC does not publicize its meetings.
127. On information and belief, the PTC continues to meet and continues to provide reports and recommendations to USDA/ APHIS "on key issues relating to advancement" of ADT.

Operation of the CTWG and the PTC

128. The PTC and CTWG and their subcommittees are “advisory committees” within the meaning of FACA. 5 U.S.C. app. 2, § 3(2).
129. The PTC’s membership consists almost entirely of non-governmental individuals, as was true of the CTWG and its subcommittees while they still existed. As noted above, APHIS and USDA established and utilize the CTWG and the PTC to provide advice and recommendations to the federal government on animal identification and traceability issues.
130. Because the Committees qualify as “advisory committees,” Defendants were and are required to comply with all procedural requirements imposed by FACA.
131. Defendants have not complied with any of the FACA requirements.
132. Defendants have not: (i) filed a charter for the Committees; (ii) designated a federal employee to serve as DFO for the Committees for the purpose of approving and attending all meetings; (iii) provided timely notice of meetings in the *Federal Register*; (iv) opened the meetings to the general public or allowed interested persons to attend, appear, or file statements; (v) kept detailed minutes of each meeting, including a record of persons present and a complete and accurate description of matters discussed and conclusions reached; and (vi) made all “records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agendas, or other documents which were made available to or prepared for or by each advisory committee” available for public inspection and copying.
133. The Committees have provided advice and recommendations to USDA and APHIS on animal disease traceability issues.
134. On March 23, 2020, counsel for Plaintiffs wrote to APHIS, requesting production of the

documents covered by FACA. A copy of the letter is attached as Exhibit F. No documents have been produced in response to that request. However, no such request is necessary to trigger Defendants' FACA obligations; they are required to make all FACA documents available for public inspection whether or not a document request has been submitted.

135. In establishing and utilizing the PTC, Defendants have failed to comply with FACA's requirement that advisory committees be "fairly balanced in terms of the points of view represented." 5 U.S.C. app. 2 § 5(b)(2).

136. The primary reason for abolishing the CTWG and replacing it with the PTC was to eliminate the fair balance that had existed on the CTWG.

137. Membership in the PTC was limited to individuals who supported the State-Federal ADT Working Group's recommendation to impose mandatory RFID by 2023.

138. A large percentage of cattle producers, including Plaintiff Kenny Fox, oppose mandatory RFID and thus were automatically excluded from consideration for membership on the PTC. The PTC membership includes few, if any, individuals who derive a significant portion of their livelihoods from cattle production.

CLAIM I

Violation of the Federal Advisory Committee Act § 9(c)

139. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 138 of this Amended Complaint.

140. No charter has been filed for the PTC, for the CTWG, or for their subcommittees.

141. FACA and its implementing regulations prohibit any action by the Committees until after charters have been filed. 5 U.S.C. app. 2 § 9(c) ("No advisory committee shall meet or take any action until an advisory committee charter has been filed."); 41 C.F.R. § 102-3.70.

142. Any activities undertaken by the Committees therefore violated FACA and its implementing regulations.

143. The Court's intervention is necessary to enforce FACA'S charter requirement.

144. Absent declaratory and injunctive relief, Plaintiffs will suffer irreparable harm from Defendants' continuing violation of FACA.

CLAIM II

Violations of the Federal Advisory Committee Act § 10(a)

145. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 144 of this Amended Complaint.

146. The Committees have held meetings without ever publishing notice of such meetings in the *Federal Register*.

147. The Committees' holding of meetings without providing public notice violated FACA and its implementing regulations.

148. The Court's intervention is necessary to enforce FACA's public notice requirements.

149. Absent declaratory and injunctive relief, Plaintiffs will suffer irreparable harm from Defendants' continuing violation of FACA.

CLAIM III

Violations of the Federal Advisory Committee Act § 10(a)

150. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 149 of this Amended Complaint.

151. The Committees have held meetings without ever publishing notice of such meetings in the *Federal Register*.

152. The meetings of the Committees have not been open to the public so that interested parties

could attend, nor has any determination of closure been provided to the public.

153. The Committees' holding of meetings without providing public access violated FACA and its implementing regulations.

154. The Court's intervention is necessary to enforce FACA's public-access requirements.

155. Absent declaratory and injunctive relief, Plaintiffs will suffer irreparable harm from Defendants' continuing violation of FACA.

CLAIM IV

Violation of Federal Advisory Committee Act § 10(b)

156. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 155 of this Amended Complaint.

157. Defendants have failed to keep detailed minutes of each meeting, including a record of persons present and a complete and accurate description of matters discussed and conclusions reached.

158. The Court's intervention is necessary to enforce FACA's record-keeping and public-disclosure requirements.

159. Absent declaratory and injunctive relief, Plaintiffs will suffer irreparable harm from Defendants' continuing violation of FACA.

CLAIM V

Violation of Federal Advisory Committee Act § 10(b)

160. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 159 of this Amended Complaint.

161. Defendants have failed to make available to the public for inspection and copying the "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agendas, or

other documents which were made available to or prepared for or by” the Committees (including records of contacts between Defendants and individual members of the Committees with respect to Committee matters), as required by FACA. This failure has continued despite Plaintiffs’ March 23, 2020 letter explicitly requesting production of such materials.

162. The Court’s intervention is necessary to enforce FACA’s public-disclosure requirements.

163. Absent declaratory and injunctive relief, Plaintiffs will suffer irreparable harm from Defendants’ continuing violation of FACA.

CLAIM VI

Violation of Federal Advisory Committee Act § 10(e)

164. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 163 of this Amended Complaint.

165. Defendants have failed to designate a federal employee to serve as the DFO for the Committees, and to ensure that the DFO approves and attends all meetings of the Committees.

166. The Court’s intervention is necessary to enforce FACA’s federal-employee designation requirements.

167. Absent declaratory and injunctive relief, Plaintiffs will suffer irreparable harm from Defendants’ continuing violation of FACA.

CLAIM VII

Violation of Federal Advisory Committee Act § 5(b)

168. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 167 of this Amended Complaint.

169. Defendants have failed to comply with FACA’s fair-balance requirements with respect to the composition of the PTC. In particular, Defendants have excluded from membership on the

PTC representation for the many cattle producers who oppose adoption of mandatory RFID rules.

170. The Court's intervention is necessary to enforce FACA's fair-balance requirements.

171. Absent declaratory and injunctive relief, Plaintiffs will suffer irreparable harm from Defendants' continuing violation of FACA.

CLAIM VIII

Violation of the Administrative Procedure Act

172. Plaintiffs repeat and incorporate by reference the allegations of Paragraphs 1 through 171 of this Amended Complaint.

173. Defendants have violated the APA by: (i) failing to file required charters; (ii) failing to designate a federal employee to serve as DFO for the Committees, and to ensure that the DFO approves and attends all meetings of the Committees; (iii) failing to provide public notice of meetings of the Committees in the *Federal Register*; (iv) failing to provide public access to such meetings; (v) failing to make Committee records available for public inspection, even after an explicit request for access; (v); (vi) failing to keep detailed minutes of each meeting, including a record of persons present and a complete and accurate description of matters discussed and conclusions reached; and (vii) failing to ensure that membership of the PTC is fairly balanced in terms of the points of view represented. Therefore, under the APA, Defendants have unlawfully withheld or unreasonably delayed agency action, 5 U.S.C. § 706(1), and acted contrary to law. 5 U.S.C. § 706(2)(A).

174. These failures to comply with FACA's requirements constitute arbitrary and capricious agency action in violation of the APA.

175. These failures to comply with FACA's requirements constitute "final agency action for

which there is no other adequate remedy in a court,” and therefore are “subject to judicial review.” 5 U.S.C. § 704; *see id.* § 702.

176. The Court’s intervention is necessary to enforce the APA.

177. Absent declaratory and injunctive relief, Plaintiffs will suffer irreparable harm from Defendants’ continuing violation of the APA.

178. Defendants’ failure to comply with FACA’s statutory requirements prevented and continues to prevent public notice and access to the activities of the Committees.

179. The Defendants’ failure to comply with FACA’s fair-balance requirements prevented and continues to prevent the PTC from operating in a statutorily approved manner, and it prevented and continues to prevent Plaintiff Kenny Fox (or any other like-minded cattle producers) from attending and/or serving on the PTC.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully pray that this Court award the following relief:

A. A declaration that the PTC and the CTWG (including all of their subcommittees) were and are subject to FACA and all its requirements.

B. A declaration that Defendants violated FACA and/or the APA by failing to file charters for the Committees.

C. A declaration that Defendants violated FACA and/or the APA by failing to provide public notice and access to Committee meetings.

D. A declaration that Defendants violated FACA and/or the APA by failing to provide public access to the Committees’ records.

E. A declaration that Defendants violated FACA and/or the APA by failing to keep detailed minutes, including a record of persons present and a complete and accurate description of the

matters discussed and conclusions reached.

F. A declaration that Defendants violated FACA and/or the APA by failing to designate a federal employee to serve as the Designated Federal Officer for each of the Committees, and to ensure that the DFO approved and attended all meetings of the Committees.

G. A declaration that Defendants violated FACA and/or the APA by failing to comply with FACA's fair-balance requirements with respect to the composition of the Producers Traceability Council.

H. An order that Defendants make available for public inspection and copying all records of the Committees.

I. An order requiring the Producers Traceability Council to comply with all applicable FACA requirements, including but not limited to the charter, public notice and access, keeping detailed minutes, disclosure, DFO, and fair-balance requirements.

J. An order enjoining and restraining Defendants, while addressing RFID issues and/or other animal identification and disease traceability issues, from considering or making use of any of the materials generated by or recommendations made by the Committees at a time when the Committees were not in compliance with all FACA requirements.

K. Such other relief as the Court deems just and proper, including an award of attorneys' fees and costs.

Dated this 6th day of April 2020

Attorneys for Petitioners/Plaintiffs

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on April 6, 2020, a copy of this PETITIONERS AMENDED COMPLAINT FOR VIOLATION OF THE FEDERAL ADVISORY COMMITTEE ACT was filed with the Court's CM/ECF system, which will send notice of electronic filing to counsel of record.

/s/ Harriet M. Hageman
Harriet M. Hageman