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Sent via [regulations.gov](https://www.regulations.gov)

Re: R-CALF USA's Comments in Docket No. APHIS-2020-0022: Use of Radio Frequency Identification Tags as Official Identification in Cattle and Bison, Notice and Request for Comments.

Dear Sir or Madam:

The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) appreciates this opportunity to comment to the U.S. Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) regarding the above captioned Docket No. APHIS-2020-0022 (hereafter "Notice"), available at 85 Fed. Reg., 40,184 - 185 (July 6, 2020).

R-CALF USA is the largest trade association that exclusively represents United States cattle farmers and ranchers within the multi-segmented beef supply chain. Its thousands of members reside in 44 states and include cow-calf operators, cattle backgrounders and stockers, and feedlot owners, as well as sheep producers.

I. INTRODUCTION

R-CALF USA and several cattle ranchers sued APHIS for attempting to circumvent its legal obligations when it published in April 2019 a factsheet setting forth a timeline to require adult cattle shipped interstate be affixed with radio frequency identification (RFID) eartags. Because the RFID eartags can only be obtained if the cattle producer registered his or her premises with a governmental entity to obtain a premises identification number (PIN),¹ the mandate necessarily included the requirement that all cattle producers who ship cattle interstate must first encumber their real property by registering their premises in a government database.² Within a matter of weeks following the filing of the lawsuit, APHIS withdrew its two RFID-related mandates.

Now, through its Notice, APHIS is re-proposing to implement its original, unlawful RFID mandate by again circumventing its legal obligations. For the reasons discussed more fully below, APHIS should withdraw its Notice.

¹ April 2019 Factsheet, APHIS ("A premises identification number (PIN) is required to purchase official ID tags."); *see also* How to Obtain a Premises Identification Number (PIN) or Location Identifier (LID) - State Specific Information, USDA-APHIS ("A PIN or LID is required to purchase official animal identification tags. :) available at <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/traceability/state-pin/>.

² *See, e.g.*, Montana Premises Registration, Montana Department of Livestock, linked via APHIS website in fn. 1, *supra*, available at <https://app.mt.gov/accessgov/liv/Forms/Edit/liv/7d81005d-d094-4f15-aa2a-0eb55b189704/1> (the PIN becomes an encumbrance on real property for perpetuity: "If the property is sold, the Premises ID stays with the property and is associated with the new owner.").

II. R-CALF USA's ANALYSIS OF APHIS' NOTICE

A. The Notice Constitutes a Legislative Rule Under the Administrative Procedure Act and Cannot be Implemented Without a Formal Rulemaking Process.

Under the Administrative Procedure Act (APA) the Notice mandating the exclusive use of RFID eartags after Jan. 1, 2023 carries the force of law and is therefore a legislative rulemaking. It is so characterized because without the Notice APHIS has no underlying legislative authority with which to enforce its proposed RFID mandate when cattle producers choose to continue using official metal eartags and the National Uniform Eartagging System (NUES) after January 1, 2023 when shipping their adult cattle interstate. The Notice is further a legislative rulemaking because it substantively amends the prior legislative rule implemented on January 9, 2013 (2013 Final Rule).³

As an action that carries the force of law, APHIS cannot implement the Notice without first complying with the APA's notice-and-comment rulemaking procedures that require APHIS to provide notice of its proposal (a proposed rule), an opportunity for public comments, and an explanation of the final rule it adopts. APHIS is attempting to short-circuit this lawful process as evidenced by the particular section within the Federal Register where this Notice was published. It was published in the section containing documents "other than rules or proposed rules that are applicable to the public."⁴ Indeed, it was published in the section reserved for interpretive rules that do not have a substantive impact on the public and, instead, include general statements of policy, or rules of agency organization, procedure, or practice.

It cannot be argued that the Notice is not substantive and does not materially alter the rights and legal obligations of America's cattle producers who, under the 2013 Final Rule, are accorded considerable flexibility in deciding which of the various forms of animal identification are best suited to their individual operations when shipping adult cattle interstate.

1. The 2013 Final Rule and Accompanying APHIS Documents expressly grant producers the legal right to use Metal Eartags for shipping adult cattle interstate.

The 2013 Final Rule afforded U.S. cattle producers with flexibility to choose among several identification methods, including metal eartags, when deciding the type of official identification to use when shipping cattle interstate. In fact, APHIS granted express assurance to producers that no other governmental entity could strip that flexibility away from them by stating emphatically: "The regulations [] prohibit a State or Tribe from mandating the use of RFID [], or any other specific technology, for animals moving into their jurisdiction."⁵

Further, the 2013 Final Rule expressly contemplates the ongoing use of metal eartags. When prescribing the replacement of official eartags "(e.g., metal eartag, RFID eartag)" the information about the replacement must be recorded and maintained for 5 years.⁶

³ Traceability for Livestock Moving Interstate, Final Rule, 78 Fed. Reg., 2,040-75, Jan. 9, 2013.

⁴ 85 Fed. Reg., at 40,184.

⁵ 78 Fed. Reg., at 2,062; see also 7 C.F.R. § 86.8 ("State, Tribal, and local laws and regulations may not specify an official identification device or method [], nor may [they] [] impose requirements that would otherwise cause the State or Tribe [] to have to develop a particular kind of traceability system or change its existing system []").

⁶ 85 Fed. Reg., at 3,074.

APHIS' proposed rule, which led to the 2013 Final Rule, made clear to the public that metal eartags and other non-RFID devices would remain approved official identification devices. The proposed rule expressly used the metal tag and accompanying metal-tag numbering system (NUES), as an example of the types of identification devices APHIS approved and will continue to approve as official identification devices. The proposed rule stated:

All States and Tribal jurisdictions would be required to accept all official identification methods proposed for each species. An example for cattle would be an eartag with a national uniform eartagging system (NUES) number. We recognize, however, that different identification methods may exist or evolve in specific parts of the country and that there may be situations where other forms of identification may be effective and preferred by producers. (Emphasis added).⁷

APHIS' entire push to pass the 2013 Final Rule was predicated on providing U.S. cattle producers with numerous choices regarding the types of animal identification devices they select for moving their adult cattle interstate. For example, in an official, December 2012 APHIS Factsheet, issued in the month preceding the agency's publication of the Final Rule and for the express purpose of explaining the 2013 Final Rule, APHIS clarified what the 2013 Final Rule authorized U.S. cattle producers to use for purposes of shipping cattle interstate. Under the heading "Official Identification", the agency stated explicitly: "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)[.]" (Emphasis added).⁸

But the agency went much further to provide U.S. cattle producers with direct, explicit assurance that the use of metal eartags and other non-RFID are authorized in the 2013 Final Rule: The agency stated in its factsheet: "Official identification is defined for each species. 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."⁹ Thus not only has APHIS explicitly granted U.S. cattle producers a legal right to use metal eartags, it also stated its plan to encourage the use of those metal eartags under the 2013 Final Rule.

Even the agency's formal listing of "Official Eartags: Criteria and Options" published about four months after the 2013 Final Rule expressly states that NUES tags "[c]ommonly referred to as "Silver" or "Brite" tags" are official eartags under the 2013 Final Rule.

It is inarguable that the 2013 Final Rule, as explained, interpreted and clarified by APHIS' own publicly disseminated documents, affirmatively grants U.S. cattle producers a legal right to use NUES metal eartags when shipping their adult cattle interstate. APHIS has no authority to strip producers of this legal right until and unless the agency complies with the APA's formal rulemaking requirements for legislative rules.

2. The 2103 Final Rule's Regulatory Impact Analysis is predicated on an economic analysis that relies on the grant of a legal right to Cattle Producers to use metal eartags.

⁷ 76 Fed. Reg., at 50,083.

⁸ Questions and Answers: Animal Disease Traceability Final Rule, Factsheet, APHIS Veterinary Services, December 2012, at 2, available at https://www.aphis.usda.gov/traceability/downloads/rule_movement_general.pdf.

⁹ *Id.*, at 3.

The Regulatory Impact Analysis that APHIS relied on for the 2013 Final Rule expressly states twice, under two separate subheadings, “[i]t will also encourage the use of low-cost technology, such as metal eartags, for identifying livestock.”¹⁰ The estimation of the 2013 Final Rule’s cost was based in large part on the use of metal eartags for 30 million head of adult cattle. APHIS stated:

The cost of a[] [metal] eartag is about 10 cents. An estimated 30 million cattle are shipped interstate per year []. We therefore estimate the total cost of official eartags needed because of the [2013 Final] [R]ule to be \$3.0 million per year. (Reference removed.).¹¹

When describing both the objective and the legal basis for the 2013 Final Rule, APHIS explained that “[t]he rule reflects a flexible yet coordinated approach that will enable States, Tribes, and livestock producers to use means of traceability that work best for them.”¹² To help clarify what APHIS meant by this, it stated “USDA will bear the cost of the eartags and the eartag applicators as resources allow. The 10-cent metal eartags reflect USDA’s intent to rely on low-cost technology.”¹³

Indeed, when APHIS identified elements of the 2013 Final Rule that will further lessen the cost burden on America’s cattle farmers and ranchers, it stated:

A central tenet of the regulatory philosophy that underlies this rule—namely, allowing States, Tribes, and producers to find and use the approaches to traceability that work best for them—will enable entities to seek and employ low-cost means of achieving the rule’s objectives. (Emphasis added).¹⁴

APHIS’ attempt to mandate a single form of identification – RFID eartags – in its latest Notice directly contradicts the agency’s stated objectives for and “central tenet” of the 2013 Final Rule. Moreover, APHIS does not have and did not provide any form of an economic analysis to estimate the cost to America’s cattle farmers and ranchers when, as APHIS estimates, 30 million of their cattle will have to be affixed with a much more costly RFID eartag if they intend to sell their adult cattle across state lines. The only published estimate in the Final Rule for what is presumably a mandatory RFID regime is between \$1.2 and \$1.9 billion – an estimate APHIS does not dispute because its 2013 Final Rule granted a legal right to America’s cattle farmers and ranchers to use much lower-cost technology.¹⁵

3. The 2103 Final Rule’s Accompanying “Animal Disease Traceability Standards” Expressly Authorize Metal Eartags for Official Identification.

APHIS expressly states in the 2013 Final Rule’s accompanying Animal Disease Traceability Standards document that producers are allowed under the agency’s animal disease traceability

¹⁰ Regulatory Impact Analysis & Final Regulatory Flexibility Analysis, Final Rule, APHIS-2009-0091, Traceability for Livestock Moving Interstate, at 20, available at www.regulations.gov and <file:///C:/Users/14066/Downloads/APHIS-2009-0091-1628.pdf>; see also *id.*, at 10 (“[The 2013 Final Rule] would also encourage the use of low-cost technology, such as metal eartags, for identifying livestock.”).

¹¹ *Id.*, at 26.

¹² *Id.*, at 69.

¹³ *Id.*, at 32.

¹⁴ *Id.*, at 43.

¹⁵ See *id.*, at 13; see also 78 Fed. Reg., at 2,058.

framework to use NUES tags, “commonly referred to as “brite” tags, when authorized by their State or Tribal animal health official.”¹⁶ The general standards document clearly states that producers can use such “brite” tags “for official identification,” which qualifies their animals for interstate movement.¹⁷

This further establishes that the 2013 Final Rule grants America’s cattle farmers and ranchers the legal right to use low-cost technology when shipping adult cattle interstate. It also further establishes that APHIS’ attempt in its Notice to deprive cattle producers of this legal right without following lawful APA requirements is unlawful.

4. The 2103 Final Rule’s accompanying “Tribal Summary Impact Statement” is an assurance to Tribes that the current system of official metal eartags is authorized.

APHIS documents its assurance to Native American Tribes that the 2013 Final Rule would not impose additional costs on their producers. In the 2013 Final Rule’s accompanying Tribal Summary Impact Statement, APHIS provides assurance that the current system of official metal tags and brands is “acceptable under the new framework.”¹⁸

In addition to the unlawful nature of the Notice as discussed above, APHIS, through its Notice, is now attempting to renege on the official assurance it made to Native American Tribes that under the 2013 Final Rule, their producers can continue using metal eartags to ship their cattle interstate.

B. APHIS’ Assertion that its Notice Does Not Alter or Change Current Regulations Is Blatantly False.

APHIS asserts in its Notice that its decision to render all non-RFID metal eartags and other heretofore official eartags manufactured after Jan. 1, 2022 ineligible for a designation as an official eartag, and its mandate beginning Jan. 1, 2023 that only RFID tags would be approved for cattle moving interstate neither alters nor changes current regulations is blatantly false.

APHIS fails completely to disclose the other substantive mandate associated with its Notice. The Notice does not even mention “premises identification number (PIN)” or “premises registration.” However, APHIS has acknowledged that a prerequisite for purchasing RFID tags is to obtain a PIN, which requires the registration of a cattle producers’ premises in a government data base, and in at least one instance, the act of registering a premises permanently attaches the PIN to a producers’ real property.¹⁹

This highly intrusive and widely opposed hidden mandate in the Notice is itself a substantive alteration and change to current regulations. Current regulations DO NOT require a producer to register his or her premises as a prerequisite to shipping cattle interstate.²⁰ But, the Notice does.

¹⁶ Animal Disease Traceability General Standards, APHIS, Version 2.0, December 20, 2012, at 11, available at www.regulations.gov and <file:///C:/Users/14066/Downloads/APHIS-2009-0091-1629.pdf>.

¹⁷ See *id.*, at 12.

¹⁸ Tribal Summary Impact Statement, APHIS, at 4, available at www.regulations.gov and <file:///C:/Users/14066/Downloads/APHIS-2009-0091-0474.pdf>.

¹⁹ See, *supra*, fn.1-2.

²⁰ See, *e.g.*, 78 Fed. Reg., at 2,072 (allowing a choice of tagging systems that do not include or require premises registration).

By virtue of the Notice's hidden mandate to obtain a premises registration-required PIN, its effect of rendering metal eartags manufactured after Jan. 1, 2022 obsolete, and its RFID mandate, APHIS is effectively altering/amending several provisions within current regulations. Below are a sample of provisions in current regulations that are likely rendered inapplicable, obsolete, or superfluous by the Notice:

- The definition and application of a group/lot identification numbers.
- The definition and application of a location-based numbering system.
- The definition and application of a location identification (LID) number.
- The definition and application of the National Uniform Eartagging System (NUES).

As discussed here, above in Section A (1-4), and below, current regulations, as substantiated by every document APHIS included in support of its 2013 Final Rule, either directly or indirectly, expressly authorizes America's cattle farmers and ranchers to continually use metal eartags in lieu of RFID tags to ship their cattle interstate. **THE 2013 FINAL RULE IS SUBSTANTIVE FEDERAL LAW THAT MUST BE OBEYED UNTIL THE FINAL RULE IS CHANGED.** The Notice abruptly deprives America's cattle farmers and ranchers of the very legal rights that current regulations, *i.e.*, current Federal law, grant. The regulations grant America's cattle farmers and ranchers the flexibility to choose among lower-cost technologies such as metal eartags, a choice that APHIS itself described as a "central tenet" of the 2013 Final Rule. Unlawfully, the Notice takes this choice away.

C. The Notice Discriminates Against Producers Who Reside in States Without Sufficient Packing Capacity.

Because the Notice imposes whatever costs are associated with using RFID technology,²¹ producers who reside in states with ample slaughter capacity will likely never have to incur those unspecified costs because they likely never need to move their cattle in interstate commerce. However, cattle producers in states like Wyoming and elsewhere that lack adequate packing capacity, and who are likely already economically disadvantaged because of the transportation costs they must incur to ship cattle to another state where capacity is available, will now be encumbered with yet another, though unspecified cost – that of complying with the RFID mandate. This will likely further erode the competitiveness of many U.S. cattle producers. The Notice, therefore, effectively targets and discriminates against producers in states where slaughter capacity is lacking.

In contrast, current regulations limit the cost exposure for cattle producers who must ship cattle interstate to access packing facilities to about \$0.10 per head for the requisite tags, as this is the cost of the metal eartags should APHIS cease providing them for free.²²

D. The Notice May Relegate Some American Cattle Producers Unprofitable and Only a Formal Rulemaking Would Reveal the True Extent of that Probability.

²¹ Note, again, that APHIS makes no effort whatsoever to estimate the costs associated with its Notice.

²² See Regulatory Impact Analysis & Final Regulatory Flexibility Analysis, Final Rule, APHIS-2009-0091, Traceability for Livestock Moving Interstate, at 26, fn. 2, available at www.regulations.gov and <file:///C:/Users/14066/Downloads/APHIS-2009-0091-1628.pdf>.

In a timely Farm Journal Ag Web article titled “Livestock Technology: Low-Cost Producers Always Win,” two important market principles were reinforced: First, “The market ultimately decides which technology we move on[.][.] ‘If it doesn’t work, people won’t buy it.’²³ Second, “Whatever the market rate – whether prices are high, whether prices are low – the person with the lowest cost of production always wins[.][.]” While the universal nature of those two principles could be argued, it remains inarguable that the Notice contradicts the former and ignores the latter.

The Notice dictates the exclusive use of one of the highest-cost identification technologies known today. Absent a study to determine the Notice’s effect on cattle-producer profitability, a formal rulemaking along with an accompanying economic cost-benefit analysis would likely reveal the extent to which the Notice will relegate some of America’s cattle producers unprofitable.

E. APHIS’ Public Promotional Campaign for Its Notice Deploys Inappropriate Sensationalism.

In a recent Beef Magazine article with the subtitle: “Here’s the true story of how USDA actually found the Cow that Stole Christmas and why robust disease traceability is important,” APHIS’ Assistant Director for Animal Disease Traceability, Alex Turner, was interviewed to promote APHIS’ instant Notice.²⁴

The promotional effort inferred that the need for the Notice’s RFID mandate is predicated on APHIS’ inability to quickly identify the origin of the imported Canadian cow that tested positive for Bovine Spongiform Encephalopathy (BSE or mad cow disease) after being slaughtered in Mabton, Washington – the confirmation test was announced December 23, 2003.²⁵

The story was sensational and even the author dubbed it as an “incredible story.”²⁶

Turner was quoted as saying ‘At the time, that trace took roughly four days before [APHIS][.] could prove beyond a shadow of a doubt that the cow was actually a cow from Canada that was slaughtered in Washington state[.]’²⁷

He was further quoted as saying, ‘It actually took a USDA veterinary medical officer going through hides that were collected from that week’s slaughter run and matching it up. Because part of the traceability of that animal was the original owner had a seedstock Holstein operation and he had pictures and registration papers of all his cattle and he had a Polaroid picture of that hide.’²⁸

The sensational story concluded with, “So identifying an animal that cratered the cattle market and essentially shut down beef exports from the U.S. came down to looking at hide after hide after hide and comparing those with a Polaroid picture.”²⁹

²³ Livestock Technology: Low-Cost Producers Always Win, Jennifer Shike, Farm Journal Ag Web, August 25, 2020, available at <https://www.agweb.com/article/livestock-technology-low-cost-producers-always-win>.

²⁴ USDA’s Animal Disease Traceability program moves ahead: Here’s the true story of how USDA actually found the Cow that Stole Christmas and why robust disease traceability is important, Burt Rutherford, Beef Magazine, August 12, 2020, available at <https://www.beefmagazine.com/commentary/usdas-animal-disease-traceability-program-moves-ahead>.

²⁵ See *id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Not only is this sensational promotional effort incredible, it is also contradicted by APHIS' own March 2004 Summary Report: Epidemiological Investigation of Washington State BSE Case (epidemiological report).

The epidemiological report reveals that the BSE-positive cow detected in Mabton, Washington was affixed with a Canadian eartag and that the cow's eartag was listed on a Canadian health certificate that listed 81 additional Canadian eartag numbers.³⁰ While the official Canadian metal eartag was exceptionally strong evidence that the cow was imported from Canada, APHIS, as part of its investigation, confirmed this with DNA testing.

Even the U.S. Centers for Disease Control and Prevention (CDC) refutes Alex Turner's sensational story. In its report, "BSE Cases Identified in the United States," the CDC states, "Trace-back [of the BSE-infected cow slaughtered in Mabton, WA was] based on an ear-tag identification number and subsequent genetic testing confirmed that the BSE-infected cow was imported into the United States from Canada in August 2001."³¹

Thus, the most incredible part of Alex Turner's promotional campaign story was that Turner omitted entirely the fact that the imported Canadian cow detected in Washington state was affixed with a Canadian eartag that led investigators directly to its herd of origin in Calmar, Alberta, Canada.

That APHIS would engage in such a propaganda campaign to deceptively lead the public into believing that conventional traceback protocols, starting with an official eartag (presumably a metal eartag) and leading to an official health certificate, could not and did not occur with the imported Canadian cow detected with BSE in 2003 is deeply troubling at best. That APHIS would then use such a deceptive tactic to promote its Notice reveals the arbitrary and capricious nature of APHIS' effort.

F. APHIS Misapprehends Executive Order 13892 by Construing it as Superseding its Legal Obligations Under the Administrative Procedure Act.

Executive Order 13692 (the "EO") was issued in large part because Federal agencies "have not always complied [] with [the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq.]" and because some agency practices "undermine the APA's goals of promoting accountability and ensuring fairness."³²

Such was the case when APHIS first issued its April 2019 Factsheet that attempted to undermine the APA's goals of promoting accountability and enduring fairness. However, there is nothing in the EO that supersedes the APA's requirement that when taking action that is a legislative rulemaking with the force of law, the agency must comply with the APA's notice-and-comment rulemaking procedures that require APHIS to provide notice of its proposal (a proposed rule), an opportunity for

³⁰ Summary Report: Epidemiological Investigation of Washington State BSE Case, March 2004, available at

https://www.aphis.usda.gov/animal_health/animal_diseases/bse/downloads/WashingtonState_epi_final3-04.pdf.

³¹ BSE Cases Identified in the United States, Centers for Disease Control and Protection, available at <https://www.cdc.gov/prions/bse/case-us.html>.

³² Executive Order 13692, Section 1.

public comments, and an explanation of the final rule it adopts. As more fully discussed above in Section A, APHIS is again attempting to short-circuit this lawful process with its Notice.

In addition, APHIS is also required to comply with the Executive Orders 12866 and 13563 and the Regulatory Flexibility Act, which it has failed to do by failing to conduct any semblance of an economic analysis replete with a cost-benefit analysis. Therefore, and further, the Notice attempts to impose substantive legal burdens on America's cattle farmers and ranchers without even bothering to examine the potential economic effects the Notice will have on small entities.

In short, the EO does not in any way provide APHIS with a path forward for which to alter and amend current regulations, *i.e.*, substantive Federal law, without first complying with the APA to initiate a formal rulemaking process, which is the procedure the agency acknowledges as necessary before it can expand its identification requirements to include feeder cattle.³³

IV. CONCLUSION

For the foregoing reasons, R-CALF USA respectfully urges APHIS to immediately withdraw its Notice regarding Use of Radio Frequency Identification Tags as Official Identification in Cattle and Bison.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Bullard", written in a cursive style.

Bill Bullard, CEO

³³ See, e.g., 78 Fed. Reg., at 2,041.