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April 19, 2023

APHIS–2021–0020, Regulatory Analysis
and Development, PPD, APHIS, Station
3A–03.8, 4700 River Road, Unit 118,
Riverdale, MD 20737–1238.

Sent via regulations.gov

Re: R-CALF USA's Comments in Docket No. APHIS–2021–0020: Use of Electronic Identification Eartags as Official Identification in Cattle and Bison.

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 Animal and Plant Health Inspection Service (APHIS) regarding the above captioned proposed rule *Use of Electronic Identification Eartags as Official Identification in Cattle and Bison*, available at 88 Fed. Reg., 3,320-30 (Jan. 19, 2023).

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.

For the reasons set forth below, R-CALF USA urges APHIS to withdraw its proposed rule that generally requires the exclusive use of electronic identification (EID) eartags in adult cattle shipped interstate.

A. The Proposed Rule Is Not Designed to Improve Animal Disease Traceability

The proposed rule contemplates the use of EID eartags on approximately 11% of the nation's cattle herd and APHIS's only basis for asserting that such a low percentage of cattle is nevertheless sufficient to appreciably improve animal disease traceability is the Agency's belief that "the proposed rule will help State and Federal veterinarians trace potentially infected and exposed animals more rapidly and accurately;"[1] that it "will lead to more accurate traceability and record retention;"[2] and its contention "that increases in the use of electronic identification devices can further improve the speed at which an animal can be traced."[3] The Agency, however, provides no analysis or evidence supporting its beliefs and contention, rendering them baseless.

[1] Regulatory Impact Analysis & Initial Regulatory Flexibility Analysis (RIA), APHIS, Nov. 9, 2022, at 1.
[2] *Id*., at 4.
[3] *Id*., at 7.

a. The proposed rule does not correct identified traceback deficiencies.

The Agency attributes the remarkable reductions in disease traceability timeframes achieved after implementation of the 2013 regulations not to EID eartags, but rather, "to the transition from paper to electronic records and sustained educational outreach by staff in APHIS Veterinary Services."[4]

The Agency laments that while disease investigations involving tracebacks with electronic records take only minutes to hours, searching paper records for a visual eartag number can take days to weeks or longer.[5] Indeed, the Agency's current definition of the interstate certificate of veterinary inspection (ICVI) contains requirements pertaining only to paper ICVIs, suggesting that electronic ICVIs are not widely used. It would therefore be expected that APHIS could continue making reductions in disease traceback timeframes by exclusively focusing its resources on transitioning ICVIs and other pertinent paperwork to electronic format and by conducting additional training and outreach, without the need for imposing additional costs on U.S. cattle producers pursuant to the proposed requirement that they purchase and use EID eartags on their cattle. Surprisingly, the proposed does not prescribe such commonsense improvements.

The proposed rule, in fact, takes no measures to ensure that the serious problems identified with tracebacks using paper records will be alleviated. APHIS describes the occurrence of these serious problems as 1) when numbers from non-EID tags were transcribed inaccurately, 2) when movement records were not readily available, or 3) when information was only retrievable from labor-intensive paper filing systems.[6] But the only one of these three problems that could potentially be alleviated by an EID eartag requirement – that of incorrectly transcribing eartag numbers – is not addressed at all as the Agency instead is promoting its proposed rule based on the fact that the EID eartags must also be visually readable, with no attendant requirement that they be read electronically.

More specifically, the problems the Agency identifies with non-EID eartags involve errors associated with visually reading, transcribing, or entering the eartag number in a database. The Agency laments that when non-EID eartags are used the animal must be restrained, the eartag must often be cleaned before the number can accurately be read and then the numbers must be recorded on paper or manually entered in a database.[7] But all these perceived deficiencies are both promoted and memorialized in the proposed rule because, as the Agency explains, "for EID tags, the numbers may be read visually, similarly to the non-EID tags;"[8] "the official RFID tags are easily read visually and therefore could be used as they are currently using non-EID tags without the added expense of purchasing reading equipment;"[9] and, "[b]ecause all EID tags are readable visually, however, no modifications are necessary to facilities or equipment currently in use."[10]

It is undeniable that the proposed rule does not require any action to rectify the problems APHIS identifies in achieving faster and more accurate tracebacks because the Agency does not require the electronic reading of any of the 11 million or so eartags it wants to force upon American cattle farmers and ranchers. This deficiency is fatal: the Agency cannot legitimately quantify any expected

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[4] *Id*., at 7.
[5] *See* 88 Fed. Reg., at 3,321.
[6] *See id*., at 3,322.
[7] *See id*., at 3,321.
[8] *Id*., at 3,321
[9] *Id*., at 3,322.
[10] *Id*., at 3,323.

improvements in disease traceback with the use of expensive EID eartags when the EID component of the tag is not required to be used at any time by anyone.

b. <u>The Government States that a High Percentage of Premises and Cattle Must Be Traced to Accomplish the Goal of Rapid and Effective Animal Disease Traceback.</u>

APHIS contemplates that 11% of the U.S. cattle herd would be officially identified with an EID eartag pursuant to the proposed rule. The department is silent on the number of premises expected to be registered. Given the low percentage of EID-tagged cattle, it is reasonable to assume that the number of premises registered under the proposed rule would likewise represent only a low percentage. However, as discussed below, the expected low percentages of both participating cattle and registered premises are far too low to enable APHIS to accomplish the goal of rapid and effective animal disease traceback.

A July 2007 Government Accountability Report (GAO) reported that the majority of its panel of animal identification experts determined that "81 percent to 100 percent of producers, livestock markets, and slaughter facilities would need to register their premises to achieve the program's goal of rapid and effective traceback."[11] The report further reveals that 97% of the majority of its experts determined that at least 70% of the nation's cattle herd must be identified to achieve rapid animal disease traceback.[12]

Former Deputy Administrator for Veterinary Services, Dr. John Clifford, testified before Congress that:

> In order for NAIS [National Animal Identification System] to be successful, we need a minimum critical mass of producers on board, which we estimate would be 70 percent of the animals in a specific species/sector that could be identified and traceable to their premises of origin. While 70 percent would provide some measure of traceability, I must emphasize that we really need to achieve higher participation rates, perhaps as high as 90 percent, to ensure the benefits of the system.[13]

The USDA was even more explicit in explaining why a 70% level of cattle participation was needed, and how the 70% minimum threshold was scientifically established in its comprehensive business plan for animal disease traceability:

> In order to achieve critical mass, USDA estimates that 70 percent of the animals in a specific species/sector need to be identified and traceable to their premises of origin. This 70 percent level was derived by:
>
> - Reviewing epidemiological reports from the past 5 years involving a variety of animal diseases and species;
> - Reviewing published scientific literature regarding animal disease traceability;

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[11] USDA Needs to Resolve Several Key Implementation Issues to Achieve Rapid and Effective Disease Traceback, Government Accountability Office (GAO), GAO-07-592, July 2007, at 15, available at https://www.gao.gov/products/gao-07-592.
[12] *See id.* at 52.
[13] Congressional Testimony of Dr. John Clifford, Deputy Administrator for Veterinary Services, APHIS, May 5, 2009, at 13, available at 5_5_09_Clifford_Dep_Admin_for_Vet_Services_APHIS_National_Animal_ID.pdf (usda.gov).

- Using a land-grant-university-developed animal disease traceability computer model;
- Assessing USDA National Agricultural Statistics Service (NASS) data involving all reported species and industries relative to animal numbers and operations;
- Reviewing best available participation data in present animal disease control and eradication programs; and
- Projecting a practical and achievable level needed to facilitate animal disease traceability among all species/sectors/livestock industries as the next logical step.[14]

The proposed rule contains not a scintilla of scientific evidence or analysis explaining how an animal disease traceability program, which the USDA has consistently stated would require the participation of 70% of the nation's cattle herd to be effective, would be improved in any way by the imposition of a mandatory EID requirement on only 11% of the nation's cattle herd. Indeed, the proposed rule's assertion that appreciable improvements would nevertheless be achieved even with such a small population of participating cattle stands in direct contradiction to the Agency's well documented scientific evidence and analysis. And, as discussed above, this omission of scientific evidence and analysis is further aggravated by the fact that the proposed rule does not attempt to digitalize the other paper documents essential to improving traceback investigations. This omission renders the proposed rule arbitrary and capricious.

B. The Proposed Rule Would Impose an Untenable Financial Burden on Independent Cattle Producers

Each year the USDA reports regional and national production costs and returns for the nation's cow/calf producers, on a per cow basis. For the Northern Great Plains region – a region commonly referred to as cattle country – the USDA calculated that in 2021 cattle producers lost $70.38 per cow when only operating costs were considered, and they lost $837.88 per cow when the total costs of operating their ranches was considered.[15] The average returns per cow in that region for the past five years (2017-21) based only on operating costs was a loss of $0.68 per cow per year, and when total costs are included, an average annual loss of $703.36 per cow was incurred. These data reveal that cattle producers in the Northern Great Plains were unable to recover even their costs of production from the marketplace and, hence, were unable to pay basic household costs such as for food, clothing, and electricity from their cattle operation proceeds.

On a national basis, the USDA calculates for 2021 a paltry $28.69 return per cow based only on operating costs, but an alarming $866.45 loss per cow when total costs are considered.[16]

Earlier this year University of Nebraska-Lincoln released representative cattle operation budgets, including for Nebraska cattle ranches with cow herd sizes of 50 head and 600 head. The budgets

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[14] A Business Plan To Advance Animal Disease Traceability, Draft, Dec. 12, 2007, at 11-12, available at file:///C:/Users/14066/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/1MMG1V6T/NAIS_Business_Plan.pdf.
[15] Commodity Costs and Returns, USDA Economic Research Service (ERS), Recent Costs and Returns, available at https://www.ers.usda.gov/data-products/commodity-costs-and-returns/.
[16] *Id*.

revealed that the 50- head operation in southeast Nebraska lost $171.39 per calf raised,[17] while the 600- head unit in central Nebraska lost $296.56 per calf raised.[18]

The foregoing data reflecting the dismal financial condition of the U.S. cattle industry is substantiated by the USDA's reporting of farm business average net cash income. The Agency reports that in 2021 the average annual net cash income for cattle and calf operations was only $18,200, which is the lowest income level since at least 2010. [19] The USDA's 2022 projection is only slightly higher at $23,600. And despite being the largest segment of American agriculture (generating nearly $73 billion in cash receipts in 2021),[20] the average annual net cash income for cattle and calf operations is far lower than any other specified agricultural commodity reported by the USDA (except for the nondescript category of "Other livestock").[21]

Under the proposed rule, U.S. cattle producers would be saddled with the initial cost of purchasing $29.3 million in EID eartags annually. The Agency estimates the per head cost of the EID eartags would range from $2.00 to $3.65 per head depending on the type of technology used. The Agency further estimates that cattle producers with smaller herds would bear the highest costs while those with a herd size of 5,000 head or more would incur a lesser per head cost. In fact, the proposed rule discriminates against cattle operations with smaller herd sizes by forcing them to pay between $1.33 and $1.45 more per EID tag than would be incurred by the very largest of cattle operations running 5,000 or more head (comparing costs of a 20-head herd to a 5,000-head herd).

The USDA can neither rationalize nor justify forcing cattle producers to add the high costs of EID eartags to their cost of production when the contemporary marketplace, as discussed above for many cattle producers, provides no opportunity to recover even their preexisting costs of production. Given the dire financial circumstances faced by untold numbers of U.S. cattle producers caused by the industry's prolonged lack of profitability, the proposed rule would be expected to accelerate the ongoing exodus of U.S. cattle ranchers, thus fostering further industry consolidation and concentration.

C. The Proposed Rule Poses a Likely Threat to National Security, Violates the President's Directives to Strengthen Domestic Food Supply Chains, and Creates a New Oligopoly.

a. The Proposed Rule Threatens National Security.

On January 30, 2023, R-CALF USA wrote the Secretary of Agriculture asking for the origin information for the chips used by all the official manufacturers of EID eartags approved by USDA

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[17] Breeding Herd Cash Budget, Cow Herd System Budget, Representative Economic Budget for Southeast Nebraska - 50 Head Cow Herd, Updated 10/22, available at https://cap.unl.edu/budgets/2022/50-Cow-Herd-Southeast-Neb-story-budget-1022.pdf.
[18] Breeding Herd Cash Budget, Cow Herd System Budget, 600 Head Cow Herd – Central Nebraska Representative Budget Updated September 2021, at 11, available at https://cap.unl.edu/budgets/600-cow-herd-budget-Central-NE-092921.pdf.
[19] *See* Farm business average net cash income, Economic Research Service (ERS) U.S. Department of Agriculture (USDA) available at Farm business average net cash income (usda.gov).
[20] *See* U.S. Department of Agriculture (USDA) Economic Research Service (ERS), Cash Receipts by Commodity, available at https://data.ers.usda.gov/reports.aspx?ID=17845.
[21] *See* Farm business average net cash income, Economic Research Service (ERS) U.S. Department of Agriculture (USDA) available at Farm business average net cash income (usda.gov).

and listed in the *Official Animal Identification Number (AIN) Devices with the '840' Prefix*.[22] The Secretary refused to respond to our request and R-CALF USA's follow-up call to the office number the Secretary included in his non-reply was not returned, hence likewise non-responsive. Consequently, and despite our best efforts, we are relegated to submitting these comments without even the basic facts for which to address the potential national security concerns embodied in the proposed rule. That said, we will lay down our argument presuming the anecdotal information we have received regarding the origin of the electronic chips used by all the manufacturers the USDA has approved, and from which U.S. cattle producers will be forced to source their mandatory EID eartags.

The information we are relegated to rely on because of the Secretary's non-response to our request – anecdotal information – indicates that all the chips used by all the officially approved EID eartag manufacturers are manufactured in China and the manufacture(s) of those chips are under the control of the Communist Party of China (CPC). Our sources further inform us that at least one of the handful of official eartag manufacturers (AllFlex) is already experiencing a shortage of chips and/or EID eartags with chips.

The risk to the United States' national security became crystal clear when the U.S. military shot down a Chinese surveillance balloon after it had surveilled cattle production areas and other food production areas from Montana to South Carolina. What detailed food production data the Chinese captured is unknown but could include the locations of facilities where cattle are aggregated, the number of grazing cattle and where their populations are most dense, and the transportation routes where cattle are trucked to market, to feedlots, or to packing plants. The capture of such information by an adversary like China increases the vulnerability of the United States live cattle supply chain to sabotage.

Given the advances in nano and other surveillance-related technology, it is unknown but possible that the EID eartag chips manufactured under the control of the CPC are capable of receiving and sending digitized information regarding the scope, nature and location of critical cattle supply chain components. And even if they are not so capable, our political and economic adversary – China – would be well positioned to disrupt some or all cattle commerce simply by refusing to provide chips (or running short of the requisite number of chips as appears the case with at least Allflex). The unavailability of chips, should the proposed rule be finalized, would render interstate cattle commerce in the United States unlawful as cattle producers would be unable to meet the rules EID requirements.

On even a more basic level, it is fundamentally un-American for the federal government to force U.S. cattle producers to purchase EID eartags containing chips manufactured by a United States' adversary and to subsequently force U.S. cattle producers to affix those foreign chips to their United States cattle, all for the privilege of raising and selling cattle in the United States, or otherwise participating in the U.S. cattle industry.

b. <u>The Proposed Rule Violates the President's Directives to Strengthen Domestic Food Supply Chains.</u>

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[22] *See* Official Animal Identification Number (AIN) Devices with the '840' Prefix, USDA-APHIS, available at https://www.aphis.usda.gov/traceability/downloads/ADT_device_ain.pdf.

If R-CALF USA's concern is correct and USDAs' intention is to compel U.S. cattle producers to purchase EID eartags manufactured in whole or in part in China or any other foreign country, then APHIS' proposed rule is at least violative of the spirit of, if not in direct contravention to, President Biden's January 25, 2021 Executive Order 14005 entitled *Ensuring the Future Is Made in All of America by All of America's Workers*, and his February 24, 2021 Executive Order 14017 entitled *America's Supply Chains*. Together, these orders direct administrative agencies to begin supporting United States manufacturers, workers, and domestic supply chains.

The purpose of these two directives is to reduce the United States' reliance on foreign inputs in critical U.S. supply chains, including for food, thus increasing the United States' self-sufficiency in producing the food produced by those supply chains. The proposed rule, however, flies in the face of this national objective by artificially creating a regulatory dependency on a critical input to the live cattle supply chain for the production of beef. It would make the privilege of ranching in the United States contingent upon the availability of foreign EID eartags and chips, and in many instances would render it impossible for a rancher to comply with the regulatory requirement if the rancher could not first acquire the requisite chips and eartags from a foreign country.

c. <u>The Proposed Rule Creates a New Oligopoly Upon Which U.S. Ranchers Are Forced to Rely.</u>

The proposed rule intends to create a new oligopoly upon which U.S. cattle producers must rely if they wish to ranch in the United States. Only a handful – approximately eight – manufacturers of official EID eartags are approved by APHIS and the Agency provides no analysis suggesting there would be more, or that those already approved will not themselves consolidate through mergers and acquisitions, a process that would make U.S. ranchers susceptible to price gouging, favoritism, retaliation, and other nefarious conduct.

Because the proposed rule likely threatens our national security, forces U.S. ranchers to concede their patriotism, creates a dependency on foreign manufacturers that could disrupt our domestic beef supply chain, and creates a new oligopoly upon which the domestic supply chain must rely, the proposed rule should be immediately withdrawn.

D. The Proposed Rule Constitutes an Insurance Policy Scheme for Multinational Beef Packers with the Annual Premium Paid Exclusively by Independent Cattle Producers.

The proposed rule makes clear that the driving force behind it is to protect the multinational beef packers export market access should the United States encounter a disease outbreak. In fact, APHIS states, without evidence, that one of the most significant benefits of the proposed rule is quicker regionalization and compartmentalization of a disease outbreak, which APHIS asserts will minimize trade impacts.[23] In its economic analysis, the Agency touts the proposed rule for how it will "protect[] our international trade markets."[24]

However, the entire cost of the proposed rule is imposed not on beef exporters (i.e., multinational beef packers) that directly benefit from exports; but rather, on independent U.S. cattle producers

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[23] *See* 88 Fed. Reg., at 3,326.
[24] Regulatory Impact Analysis & Initial Regulatory Flexibility Analysis (RIA), APHIS, Nov. 9, 2022, at 22.

without providing any analysis of the value of the export market to them. In fact, the Agency makes claims that trade restrictions can cause an oversupply of domestic beef intended for export that would reduce domestic prices and lower cattle producers' profits.[25] In its sole support of this claim, the Agency cites trade restrictions imposed following the 2003 BSE outbreak, which it claims caused a "$3.2 billion to $4.7 billion ($4.9 to $7.1 billion in inflation adjusted terms) in losses to the U.S. **beef industry"** (emphasis added).[26]

While the APHIS claims the beef industry suffered losses (i.e., the multinational beef packers whose exports were restricted), it cites to no evidence demonstrating that independent cattle producers, who will be saddled with the entire cost of the proposed rule, were harmed by the BSE-related trade restrictions. Indeed, it could not because cattle prices and producer profits increased significantly following the 2003 restrictions.

For example, USDA data shows cash receipts from the sale of cattle and calves increased from $45.3 billion in 2003 to $47.4 billion in 2004, to $49.3 billion in 2005, representing a $4 billion increase in cash receipts from 2003 to 2005.[27] It is not by accident that the increased cash receipts paid to cattle producers falls mid-range in the estimated loss for beef packers. And the reason is obvious – the beef packers had to pay more for domestic cattle when the BSE-related trade restrictions were in place.

USDA data also show that returns to cow/calf producers increased during the same period, increasing from a paltry $18.70 per cow in 2003 to $86.00 per cow in 2004, and $108.71 per cow in 2005.[28] Of course, fed cattle prices also increased during the same period, with the 5-area steer price increasing from $83.83 per cwt in 2003 to $84.79 per cwt in 2004, to $88.02 per cwt in 2005.[29]

The USDA has long supported the misguided notion that the cattle industry and the beef industry have identical economic and financial interests when in fact there is often an inverse relationship between profits at the cattle producer stage and the profits received by packers, which has been noticeably pronounced since 2015 during and after which the relationship between cattle prices and beef prices was severed.

The principal reasons the USDA errors in assuming cattle prices and cattle producer profitability is directly tied to export volume is because United States cattle producers underproduce for the domestic market. In 2022, e.g., total U.S. beef production from domestic cattle was only about 26 billion pounds while domestic beef consumption was about 28 billion pounds, reflecting an underproduction of over 2 billion pounds.[30] And, at about 12.5%, exports in 2022 comprised but a

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[25] *Id*., 19.
[26] *See id.*
[27] *See* Cash receipts by selected commodity, 1910-2023F, Nominal (current dollars), USDA-ERS, available at https://data.ers.usda.gov/reports.aspx?ID=17832.
[28] Commodity Costs and Returns, USDA Economic Research Service (ERS), Historical Costs and Returns, available at https://www.ers.usda.gov/data-products/commodity-costs-and-returns/.
[29] Choice Beef Values and Spreads and the all-fresh retail value, USDA-ERS, available at https://www.ers.usda.gov/data-products/meat-price-spreads/.
[30] *See* How Much U.S. Meat Comes From Foreign Sources?, Amber Waves, USDA-ERS, Sept. 20, 2012, (Stating approximately 8.1% of U.S. beef production is derived from imported cattle), available at https://www.ers.usda.gov/amber-waves/2012/september/how-much-us-meat/#:~:text=Nearly%20all%20hogs%20imported%20into%20the%20United%20States,U.S.%20beef%20production%20over%20the%20last%2013%20years; *see also* Beef: Supply and disappearance (carcass weight, million pounds) and per capita disappearance (pounds), USDA-ERS, available at

small percentage of total beef production (includes domestic beef and beef from imported cattle).[31] Consequently, the impact of exports on domestic cattle producers is relatively small…far too small to justify the proposed rule's costly EID mandate.[32] Clear evidence of the export market's small if any impact on domestic cattle prices is that year-to-year beef exports between 2017 and 2018 increased by nearly 11% while year-to-year cattle prices during the same period fell nearly 4%, and cattle prices continued falling for another two years.[33]

The USDA's assertion that independent cattle producers (i.e., cow/calf producers and feeders) would be beneficiaries of the proposed EID program that they would be forced to exclusively fund to purportedly protect international trade markets is belied by the above-mentioned historical evidence. Instead, that historical evidence shows that the beef industry (i.e., multinational beef packers) are the intended beneficiaries of the proposed rule. As such, the proposed rule constitutes an insurance policy scheme for multinational beef packers with the annual premium to be paid exclusively by independent cattle producers. Another way to look at this is that the proposed rule shifts the costs of maintaining export markets considered lucrative to multinational beef packers to independent U.S. cattle producers, the vast majority of which are not involved in the export market.

E. The Proposed Rule Violates the Tenth Amendment to the U.S. Constitution.

Implementation of the proposed rule would violate the Tenth Amendment to the United States Constitution. The State of Wyoming and the State of South Dakota, for example, have both codified into state law a wide range of identification options that work well for the independent cattle producers in those states.[34]

F. The USDA Has Neither Statutory Nor Constitutional Authority to Mandate EID Eartags.

The proposed rule cites to no legal authority to force independent U.S. cattle producers to affix EID eartags to their cattle. Indeed, the USDA has no such statutory or constitutional authority to do so.

a. <u>The EID Mandate Under the Proposed Rule Is Not Authorized by Statute.</u>

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https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ers.usda.gov%2Fwebdocs%2FDataFiles%2F104360%2FMeatSDRecent.xlsx%3Fv%3D4061&wdOrigin=BROWSELINK.

[31] *See* Beef: Supply and disappearance (carcass weight, million pounds) and per capita disappearance (pounds), USDA-ERS, available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ers.usda.gov%2Fwebdocs%2FDataFiles%2F104360%2FMeatSDRecent.xlsx%3Fv%3D4061&wdOrigin=BROWSELINK.

[32] It is important to note the exception: a relatively small group of cattle producers who produce under a certified export program and who already are using EID eartags. These producers are likely to lose some or all of the premiums they now receive should the proposed rule be finalized as exporters would have little incentive to continue paying a premium for EID tagged cattle when the government eventually mandates that all cattle be EID identified.

[33] *See* Beef: Supply and disappearance (carcass weight, million pounds) and per capita disappearance (pounds), USDA-ERS, available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ers.usda.gov%2Fwebdocs%2FDataFiles%2F104360%2FMeatSDRecent.xlsx%3Fv%3D4061&wdOrigin=BROWSELINK, *see also*, Choice Beef Values and Spreads and the all-fresh retail value, USDA-ERS, available at https://www.ers.usda.gov/data-products/meat-price-spreads/.

[34] Wyo. Stat. 11-19-117 and S. Dak. Stat. 40-3-27.

While the proposed rule cites no legal authority for a regulatory action to mandate EID eartags on U.S. cattle, the USDA previously referred to authority purportedly conferred under the Animal Health Protection Act (AHPA, 7 U.S.C. 8301 et seq.) when it finalized its 2013 rule, *Traceability for Livestock Moving Interstate.*[35] The Agency specifically asserted authority "to prevent the introduction into the United States and the dissemination within the United States of any pest or disease of livestock," as well as to "establish requirements for the interstate movement of livestock to prevent the dissemination of diseases of livestock within the United States."[36]

Those assertions have been taken completely out of context. Under 7 U.S.C. 8308 the USDA is authorized to "carry out operations and measures to detect, control, or eradicate any pest or disease of livestock (including the drawing of blood and diagnostic testing of animals), including animals at a slaughterhouse, stockyard, or other point of concentration."

The statutory examples of "operations and measures" are of overt action by USDA, such as drawing of blood and diagnostic testing, all directly intended to "detect, control, or eradicate" pests or diseases. Proper statutory construction doctrines require the general terms "operations and measures" to be construed in light of the specific terms "drawing of blood and diagnostic testing."

The language does not confer broad authority to mandate overt action by producers in the form of purchasing and affixing EID eartags to their cattle. The proposed EID mandate does not directly and actively "detect, control, or eradicate" pests or diseases nor is it an operation or measure such as "drawing of blood and diagnostic testing."

Nor does 7 U.S.C. 8305 – Interstate Movement, confer broad authority to mandate overt action by producers in the form of purchasing and affixing EID eartags to their cattle. The proposed EID mandate cannot be countenanced under the limited authority conferred by the statute to "prohibit or restrict":

> (1) the movement in interstate commerce of any animal, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock; and
>
> (2) the use of any means of conveyance or facility in connection with the movement in interstate commerce of any animal or article if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock.

Indeed, the imposition of a mandate upon independent cattle producers to both purchase and affix EID eartags cannot be construed as either a prohibition or restriction in interstate commerce as it is an overt encumbrance upon independent cattle producers for the mere privilege of moving their cattle interstate.

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[35] 78 Fed. Reg, at 2,040.
[36] *Id*.

Any fair reading of the Act does not permit the previous 2013 assertion of authority by APHIS to require cattle producers to purchase and affix EID eartags to their cattle, and certainly does not permit such a requirement under the proposed rule wherein the Agency has failed to cite to any legal authority whatsoever in support of its mandate.

b. <u>The EID Mandate Under the Proposed Rule Is Not Authorized by the Constitution.</u>

Any assertion of broad authority to mandate EID eartags likewise cannot be countenanced under the United States Constitution. The powers of Congress are not implied, plenary, and inherent, but rather express, limited and enumerated.

USDA's assertion that Congress has delegated and granted it broad powers which are implied, plenary and inherent flies in the face of the clear intent of Article 1, Section 8, of the U.S. Constitution.

USDA is an administrative Agency under the Executive branch of the federal government and enjoys no powers beyond those expressly granted it by Congress, acting in turn under the express, limited, and enumerated powers granted under Article 1, Section 8.

Congress has not mandated an electronic animal identification scheme and as an administrative Agency, USDA cannot legislate such a scheme by regulatory fiat.

Or perhaps the Agency believes, though it does not state, that the Commerce Clause of the U.S. Constitution somehow grants it powers of regulatory fiat to mandate EID eartags for cattle moving in interstate commerce, notwithstanding that Congress has not implemented such a program.

The purpose of the Commerce Clause was not one of conferring broad regulatory authority upon Congress over items moving interstate but rather that America should be a national common market without individual states imposing and assessing duties on commerce between states. Any argument that the Commerce Clause gives USDA regulatory authority to require cattle to be EID eartagged in order to cross state lines is not supported by the clear intent of that Clause. Such a broad interpretation of the Commerce Clause emasculates the strict limitations placed on Congress by Article I, Section 8.

G. The Proposed Rule Likely Violates the Fourth and Fifth Amendments to the U.S. Constitution.

As evidenced by the financial premiums certain cattle producers presently receive for using EID eartags on their cattle when participating in value-added programs, the origin and ownership information correlated to the numbering system contained in and on mandatory EID eartag constitutes a separate value that is added to the market value of the animal if it did not contain such origin and ownership information.[37] By virtue of the proposed rule's mandate that cattle producers affix EID eartags to their cattle, which eartags are correlated to the cattle producer's value-added information, the proposed rule violates the Fourth Amendment to the U.S. Constitution by unconstitutionally seizing the cattle producers value-added information without compensation.

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[37] *See*, e.g., *supra*, fn 32.

The value-added information associated with the mandatory EID eartags further constitutes the private property of the owner of the cattle. Because the proposed rule claims the value-added information is for public use (i.e., to protect international trade), the mandatory nature of the proposed rule likely constitutes a taking in violation of the Fifth Amendment to the U.S. Constitution.

H. The Proposed Rule Violates Cattle Producers' Expectations of Privacy Conferred by the U.S. Constitution.

The proposed rule expressly includes the term "premises," inferring that the term has a specific meaning replete with certain criteria that must be met, including the registration of a premises by cattle producers who purchase mandatory EID eartags. But the term remains ominously undefined in the proposed rule. In previous USDA documents, the Agency makes clear that a premises is different than simply the "street address, city, State, and ZIP code where the tags are distributed" as the premises, instead, is the location "where the animals that are being tagged reside."[38]

As a result of the proposed rule's omission of any of the information that cattle producers would be required to provide in order to comply with the mandatory EID mandate, it is unknown as to what happens to the private information that would be collected under the proposed rule. Who will be allowed access to it? And how, if at all, can confidentiality be assured?

R-CALF USA is concerned that disclosure of such private and confidential information could subject cattle producers to liability should the animal bearing their EID eartag contract a disease or otherwise cause harm after the animal is sold to some downstream entity in the domestic live cattle supply chain. In addition, disclosure of such information could subject cattle producers to discrimination or retaliation.

The proposed rules omission of any discussion regarding the scope and nature of private and confidential information cattle producers would be required to provide to comply with the proposed mandate is fatal and reason enough for the Agency to immediately withdraw the proposed rule.

I. The Proposed Rule Will Render Certain Cattle Producers Less Competitive than Other Cattle Producers.

The mandatory EID proposal will render cattle producers who must ship cattle across state lines for feeding or other purposes less competitive than cattle producers in states where all downstream markets are readily available. This is because those in states with adequate downstream markets will enjoy lower production costs than those subject to the costly EID mandate.

J. The Proposed Rule Is a Self-Serving, Bureaucratic, Big Government Solution In Search of a Nonexistent Problem.

Mandatory EID is not needed. The U.S. has successfully prevented the spread of diseases using current animal identification devices including containing the 1929 foot and mouth disease (FMD)

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[38] Animal Disease Traceability, General Standards (Draft), USDA, April 15, 2019, at 12, available at https://www.aphis.usda.gov/traceability/downloads/ADT_standards.pdf.

outbreak in California, the 2003 mad cow disease case identified an a cow imported from Canada in Mabton, Washington, brucellosis outbreaks in the Greater Yellowstone Area, and bovine tuberculosis outbreaks in Michigan. And, USDA continues to knowingly allow the importation of cattle with a high-risk of bovine tuberculosis from Mexico – a practice USDA would not continue doing if it did not already believe it had the capacity and capability of controlling disease spread in the United States.

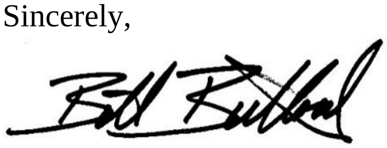
The USDA should focus its resources on preventing the introduction of foreign animal diseases at our U.S. borders. USDA reports show the U.S. continually introduces bovine tuberculosis (TB) from imported Mexican cattle. For example, despite having full and complete knowledge of a 2006 report by USDA's Office of Inspector General (OIG) that states 75 percent of bovine TB cases detected in U.S. slaughtering plants originated in Mexico;[39] and, despite the OIG's other findings that, "These infected animals were identified in 12 different States" and "animals of Mexican origin spent up to 14 months at U.S. farms before going to slaughter, with each case potentially spreading the disease;"[40] and, despite the USDA's own report that states "From 2001 through February 2009, 236 out of 329 slaughter cases [of TB] were traced to Mexico," which means nearly 72 percent of all TB cases detected at slaughter were caused by the USDA's inadequate import restrictions for Mexican cattle imports;[41] and, despite APHIS' own finding that states, "Each year 1-2 infected animals per 100,000 animals imported from Mexico are identified [as bovine TB-infected] through slaughter detection or epidemiologic investigations."[42]

U.S. cattle producers should not be shouldered with the burden of containing other country's diseases that the USDA knowingly allows into the United States as would occur if the proposed rule were to be implemented as a final rule.

K. Conclusion.

For the foregoing reasons, R-CALF USA urges the USDA to immediately withdraw the proposed rule.

Sincerely,



Bill Bullard, CEO

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[39]*See* Audit Report: Animal and Plant Health Inspection Service's Control Over the Bovine Tuberculosis Eradication Program, USDA, Office of Inspector General, Report No. 50601-0009-Ch, September 2006, at 19-20, available at https://www.usda.gov/sites/default/files/50601-09-CH.pdf.
[40] *Id*., at iii.
[41] Assessment of Pathways for the Introduction and Spread of Mycobacterium bovis in the United States, 2009, USDA-APHIS, March 2011, at 62, available at https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1170&context=zoonoticspub.
[42] *Id*., at 1.