

Fighting for the U.S. Cattle Producer!



R-CALF
USA

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Docket No. APHIS-2007-0096,
Regulatory Analysis and Development
PPD, APHIS, Station 3A-03.8
4700 River Road Unit 118
Riverdale, MD 20737-1238

Sent Via Federal eRulemaking Portal

Re: R-CALF USA Comments in Docket No. APHIS-2007-0096, RIN 0579-AC72, Official Animal Identification Numbering Systems, Proposed Rule

Dear Administrator:

R-CALF USA (Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America) is a national, nonprofit organization dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA represents thousands of U.S. cattle producers on trade and marketing issues. Our members are located across the U.S. and are primarily cow/calf operators, cattle backgrounders, and/or feedlot owners, and there are numerous affiliated organizations and various main-street businesses that are associate members. R-CALF USA appreciates this opportunity to comment on Docket No. APHIS-2007-0096, found at 74 Fed. Reg., 1634-1643 (Proposed Rule).

The stated purpose of the Proposed Rule is to achieve greater standardization and uniformity of official numbering systems and ear tags used in animal disease programs and to enhance animal traceability, pursuant to the U.S. Department of Agriculture Animal and Plant Health Inspection Service's (APHIS') proposed National Animal Identification System (NAIS). *See* 74 Fed. Reg., 1634, col. 1. However, as explained more fully below, the effect of the Proposed Rule would be to make animal traceability for disease programs demonstrably more difficult and less effective and to cunningly mandate NAIS for U.S. livestock producers in direct contravention of APHIS' promise that NAIS would remain voluntary.

I. INTRODUCTION

APHIS has taken extraordinary steps to obfuscate its intentions regarding the Proposed Rule. For example, on December 22, 2008, APHIS issued an official mandate to Veterinary Services Management Team (VSMT) Directors, VS, requiring that "[a]ll locations involved in the administration of VS animal disease program activities conducted by VS personnel will be

identified with a standardized PIN.¹ Emphasis added. However, nowhere in the Proposed Rule does APHIS define the term “standardized PIN.” Instead, the Proposed Rule states that when the removal of the PIN format that uses the State postal abbreviation becomes effective, “the postal-code format would no longer be recognized as official for the identification of locations where livestock or poultry are housed.” 74 Fed. Reg., 1635, col. 2. Apparently, APHIS has already implemented the very change proposed in the Proposed Rule, but it apparently did so without the benefit of providing the public with an opportunity for comment. APHIS should fully explain whether the change to a “standardized PIN” for all locations involved in the administration of VS animal disease programs is already in effect and, if so, why does the Proposed Rule purport to recommend changes to eliminate the postal-code PIN and replace it with a seven-character PIN? *See* 74 Fed. Reg., 1635, col. 2. Has APHIS violated its rulemaking responsibilities under the Administrative Procedure Act by amending its regulations without providing opportunity for public comment?

In addition, the Proposed Rule states that producers have three specific alternative numbering systems they can choose from: AINs, National Uniform Eartagging System, or the premises-based numbering system. The National Eartagging System appears to be the only numbering system that does not expressly require NAIS premises registration and the assignment of a NAIS PIN. However, the Proposed Rule states that official eartags, which must contain one of the numbering systems, “could only be issued, going forward, to registered premises that have PINs” if they are used in animal disease programs. 74 Fed. Reg., 1636, col.1. Therefore, regardless of the numbering system used, APHIS intends to mandate NAIS premises registration for anyone participating in animal disease programs and using official eartags.

It is unclear whether, in practice, producers not participating in an APHIS Veterinary Services animal disease program activity could still use the postal-code identifier under the National Uniform Eartagging System, though it is clear that the postal-code identifier under the premises-based numbering system is disallowed. *See* 74 Fed. Reg., 1638, col. 1.

The Proposed Rule is more straightforward regarding the Animal Identification Number (AIN) by stating the AIN would be considered official only if it begins with the 840 prefix, and stating that only AIN’s containing the 840 prefix can be used on AIN eartags. *See* 74 Fed. Reg., 1635, col. 1. Further, when AIN eartags are used, they too “could only be issued to registered premises that have PINs.” 74 Fed. Reg., 1636, col. 1.

If R-CALF USA’s interpretation of the Proposed Rule is correct, then the following changes are being proposed by APHIS:

1. Premises registration under the NAIS scheme and the use of the new NAIS premises identification number (PIN) is mandatory for all livestock producers that participate in any APHIS Veterinary Services disease program activities that would include, but are not limited to: vaccinations for disease programs, participation in disease surveillance programs, participation in disease investigations, and all livestock markets.

¹ Veterinary Services Memorandum No. 575.19, issued by John R. Clifford, Deputy Administrator, Veterinary Services, regarding Administration of Premises Identification Numbers in Veterinary Services Animal Disease Program Activities, December 22, 2008, at 4.

2. The use of postal-code identifiers on official eartags would be substantially curtailed because their use would be prohibited for producers who elect to use either the premises-based numbering system or the Animal Identification Number (AIN).
3. APHIS, and not the States, would maintain the national, Web-based Animal Identification Number Management System (AINMS) and will keep national records of animals using AIN devices (the term “AIN device” is not defined in the Proposed Rule), as well as all individual animals and premises participating in any APHIS Veterinary Services disease program for which official eartags are issued, and it may be used to maintain records for the tracking of other official identification devices. *See* 74 Fed. Reg., 1636, col. 1; 1642, col. 3.
4. APHIS would preempt any State’s use of time-proven, State- or regional-specific geographical references for accurately identifying locations where livestock are kept with a one-size-fits-all NAIS premises registration scheme when animal disease programs are administered within the State. *See* 74 Fed. Reg., 1638, col. 3.

II. THE PROPOSED RULE WOULD REDUCE TRACEABILITY

A. The Proposed Rule Deceptively Mandates NAIS Participation for Person’s Participating in Animal Disease Programs

The effect of the Proposed Rule would be to force U.S. livestock producers that participate in animal disease programs to also participate in the NAIS. The Proposed Rule explains that in order for APHIS to achieve its objectives, “official eartags used in animal disease programs could only be issued, going forward, to registered premises that have PINs.” 74 Fed. Reg., 1636, col. 1. The process of registering the premises, and the associated assignment of PINs, is the foundational component of the NAIS.² Thus, APHIS is using the highly deceptive tactic of depriving U.S. livestock producers access to animal disease programs unless they first surrender their right to not register their premises under the NAIS. This covert tactic, related to disease programs, is far more egregious than APHIS’ similar, but overt, tactic employed to advance premises registration by making it a prerequisite for producers to obtain 840 devices and eartags.³ The difference, of course, is that the consequence for refusing to participate in the premises registration prerequisite for 840 tags would not likely contribute to disease spread. On the other hand, the consequence of denying participation in animal disease programs for those who oppose the NAIS’ premises registration would likely contribute to fewer producers and fewer livestock participating in animal disease programs – a consequence that would likely contribute to the spread of serious diseases.

² *See, e.g.*, A Business Plan to Advance Animal Disease Traceability, USDA Animal and Plant Health Inspection Service (hereafter “APHIS.”), Version 1.0, September 2008, at 39 (APHIS describes premises registration as “the foundation of NAIS.”).

³ *See*, A Business Plan to Advance Animal Disease Traceability, USDA APHIS, Version 1.0, September 2008, at 46 (APHIS explains that “[w]hile premises registration remains the foundation of NAIS, premises registration can be “folded” into actions to advance animal identification, since premises registration is a prerequisite for producers to obtain 840 devices/tags.”).

B. The Proposed Rule Would Discourage Participation in Federal Animal Disease Programs.

APHIS acknowledges that opposition to mandatory NAIS exists among “some producers, small farmers, and some religious groups.”⁴ It also acknowledges that it is concerned with the rate at which the cattle industry is increasing participation in official animal identification and that achieving its traceability business plan goal for the cattle industry “will be difficult.”⁵ Indeed, APHIS characterizes participation in its national premises registration scheme as “disappointing” and it explains that “[s]ome State legislators have sought to restrict participation in the program.”⁶

APHIS grossly misrepresents the level of opposition to the NAIS premises registration scheme. Already there are four States that have passed legislation to restrict participation in NAIS (not just “[s]ome State legislators” as Dr. Clifford erroneously asserts):

1. Nebraska passed a law that, *inter alia*, provides a formalized procedure for citizens to withdraw their premises registrations should the state establish a NAIS-type animal identification system.⁷
2. Kentucky passed a law to prevent release of its citizens’ confidential information for the purpose of the NAIS.⁸
3. Arizona passed a law to prohibit the state from mandating, or otherwise forcing, participation in the NAIS.⁹
4. Missouri passed a law in 2008 to prohibit the state from mandating or otherwise forcing citizens to comply with a National Animal Identification System’s (NAIS’s) premises registration and to authorize citizens to withdraw from NAIS at any time.¹⁰

In addition to the opposition expressed by these several States, which collectively have exclusive jurisdiction over approximately 14 million, or 15 percent, of the nation’s entire U.S. cattle herd,¹¹ lawsuits have been filed by both groups and individuals against the agency’s NAIS premises registration scheme. Among these lawsuits is the complaint filed by the Farm-to-Consumer Legal Defense Fund and a number of members of the Old Order Amish Church. The

⁴ Testimony of Dr. John Clifford, Deputy Administrator for Veterinary Services, APHIS, before the House Committee on Agriculture’s Subcommittee on Livestock, Dairy, and Poultry Hearing to “Review Animal Identification Systems,” March 11, 2009, at 2.

⁵ *Id.*, at 7, 8.

⁶ *Id.*, at 5.

⁷ Nebraska Revised Statutes, Chapter 54-702.

⁸ Kentucky Revised Statutes, Chapter 257.497(1).

⁹ Arizona Revised Statutes, Title 3-1214.

¹⁰ See Missouri Senate Bill 931, Section 267.168(1), (2).

¹¹ See Cattle, Agricultural Statistics Board, USDA National Agricultural Statistics Service, January 2009, at 2 (of the 94.491 million cattle in the U.S., Arizona controls 1.020 million, Kentucky controls 2.3 million, Missouri controls 4.250 million, and Nebraska controls 6.350 million).

complaint alleges, *inter alia*, that NAIS violates the religious freedoms of members of the Old Order Amish Church.¹² APHIS is improperly silent on how it intends to address the widely known religious objections raised against NAIS and, specifically, how it intends to administer APHIS Veterinary Services disease program activities when, for religious reasons, mandatory NAIS premises registration is not possible. Notwithstanding APHIS' gross understatement regarding the level of opposition among U.S. livestock producers to the NAIS premises registration scheme, evidence shows this opposition is significant.

Given the evidence that suggests large populations of livestock producers that control large populations of livestock are opposed to NAIS participation, it is counterintuitive to expect that requiring any level of participation in NAIS, particularly premises registration, as a prerequisite to participation in animal disease programs, would result in increased participation in such programs. The opposite outcome is more probable, i.e., by requiring official eartags used in animal disease programs to be associated with a premises registration number, fewer producers will participate, and fewer livestock will be enrolled, in animal disease programs. This outcome would jeopardize the United States' ability to continue controlling disease spread.

C. The Proposed Rule Would Significantly Weaken The United States' Ability to Achieve Timely Traceability in the Event of a Disease Outbreak

In any disease outbreak that would necessitate traceback to the herd of origin, animal health officials need immediate information to identify, from within the entire universe of livestock, the subpopulation consisting of animals-of-interest. From within this more manageable subpopulation, animal health officials must then narrow the subpopulation consisting of animals-of-interest down to the affected animals. The preexisting system provides animal health officials with immediate access to the critical information needed to accomplish this objective, both on the animal itself and on the state-managed data base that records the animal. As explained below, the Proposed Rule would reduce access to this critical traceback information, thereby jeopardizing the ability of animal health officials to timely identify a disease suspect's herd of origin.

Under the preexisting system, e.g., the State-Federal Brucellosis Eradication Program, a disease suspect animal would bear a permanent metal eartag and a tattoo – which are official identification devices that contains a postal-code denoting the State where the animal originated, and a unique number that identifies the local veterinarian that affixed the official identification device to the animal. As a result, even if the disease suspect were found in a location removed from Internet access, the attending animal health official could immediately call the State veterinarian from the State where the animal was eartagged and learn the whereabouts of the local veterinarian who applied the tag. This information enables the immediate identification of the subpopulation of animals-of-interest, i.e., the State from which it originated, and it enables an immediate narrowing of the animals-of-interest within the subpopulation to the service area of the local veterinarian that applied the official identification device. This method of using a postal-code system for the immediate identification of an animal's State-of-origin, as well as the local veterinarian licensed by the State, is a time-proven, highly successful disease traceback

¹² See Farm-to-Consumer Legal Defense Fund, et al. v. USDA, et al., U.S. District Court, District of Columbia.

system that does not require access to the Internet in order to initiate a disease traceback investigation.

APHIS' Proposed Rule restricts the use of this critical, visual traceback information by disallowing postal codes on AIN eartags and eartags associated with the premises-based numbering system. As a substitute for time-proven postal codes on eartags, USDA promotes the use of eartags that do not use postal codes, but rather, they employ either a seven-character alphanumeric PIN format or a 15-digit AIN number that begins with the 840 prefix, the latter to denote only the United States of America as the sole, visual location identifier.¹³ As a result of restricting the use of postal codes on official eartags, the Proposed Rule would severely weaken disease traceback capabilities for the following reasons:

1. In numerous remote areas in the United States, where cattle and sheep populations are likely to exist, Internet access may be unavailable for miles, and the time needed to travel to an area where Internet access may be available could take several hours. Therefore, the 840 eartag affixed to animals, which contain no visually identifiable location identifier other than the entire United States of America, would contain useless information as no disease traceback could be initiated without first accessing the APHIS database.
2. Redundancy is a critical security safeguard for any data management system, but the Proposed Rule provides no redundancy should the multi-numbered AIN be improperly entered into the APHIS database due to human error, i.e., inadvertent transposition of numbers, computer malfunction, loss of electricity, the occurrence of a natural disaster that impedes computer access, or any number of probable events that responsible decision makers must anticipate. Instead, the Proposed Rule puts all the proverbial eggs in only one basket with its 840 eartag and the entire traceback system is wholly dependent on access to a fully operational electronic system, which is inarguably susceptible to a host of various temporary, if not permanent, failures.
3. It is counterintuitive to eliminate data-segregation components (i.e., the preexisting segregation based first on the jurisdiction of each of the 50 States vis-à-vis postal codes, and second on the service area of local veterinarians within each State) in a massive database containing perhaps hundreds of millions of records (there are approximately 100 million cattle alone, not to mention the number of other animal species subject to the Proposed Rule) and then expect that records for a single animal or group of animals contained within such a massive database could be readily retrieved. Instead, the restrictions on the use of postal codes and the transition to 840 tags would complicate data retrieval, make APHIS' database unwieldy, and would significantly impede animal disease traceback efforts.

¹³ See Testimony of Dr. John Clifford, Deputy Administrator for Veterinary Services, APHIS, before the House Committee on Agriculture's Subcommittee on Livestock, Dairy, and Poultry Hearing to "Review Animal Identification Systems," March 11, 2009, at 7 (Dr. Clifford explained that USDA's Agricultural Marketing Service (AMS) "has capitalized on the NAIS 840 animal identification eartag as a producer-friendly, practical solution to meet the requirements of country-of-origin labeling.").

III. THE PROPOSED RULE WOULD DISADVANTAGE DOMESTIC LIVESTOCK PRODUCERS

A. The Proposed Rule Would Greatly Simplify International Source Verification for Meatpackers at the Expense of U.S. Livestock Producers

It is nonsensical for APHIS to abandon the natural, jurisdictional boundaries, i.e., State boundaries, that would help make a massive database more manageable and efficient. It is equally nonsensical that APHIS would propose including two separate location identifiers on official animal identification devices to denote the same location – the 840 prefix that denotes the USA and the U.S. shield that also denotes the USA – particularly when the “real estate” on animal identification devices is so valuable. The smaller the animal identification device, the less prone it is to loss or destruction, yet, APHIS proposes to increase the necessary size of such devices in order to provide redundant information that is of minimal value in disease traceback investigations.

It is R-CALF USA’s sincere belief that the actions described above provide definitive proof that APHIS has not issued the Proposed Rule for the purpose of achieving more efficient and effective animal disease traceability. Instead, APHIS’ Proposed Rule is designed to achieve one overriding purpose – to comply with the international recommendations of the World Organization for Animal Health (OIE) that wants the U.S. to *abandon* its disease prevention strategies and rely instead on the *management* of foreign animal diseases within U.S. borders. In further support of this contention, R-CALF USA asks the following questions:

1. Given that the U.S. imports approximately 2.5 million cattle each year from foreign countries, with approximately 1 million of those animals imported for immediate slaughter,¹⁴ the percentage of imported versus domestic cattle in the U.S. cattle inventory is approximately 1.6 percent imported cattle versus 98.4 percent domestic cattle, why then is APHIS promoting redundant, space accumulating information on 98.4 percent of domestic cattle identification devices to identify their U.S. origin when only about 1.6 percent of the cattle would be expected to originate in foreign countries, particularly when those imported cattle are already required to be permanently marked with their respective country-of-origins under APHIS regulations? Clearly, the identification system contemplated in the Proposed Rule that emphasizes U.S. origin rather than State origin is of minimal, if any, value in domestic disease traceback investigations as the great preponderance of cattle are already known to be of U.S. origin. The 840 tags only legitimate value is for international trade purposes, i.e., to comply with the OIE’s international recommendations for trade in live animals. This, R-CALF USA believes, is a wholly inappropriate consideration for the exercise of APHIS’ authority pursuant to the Animal Health Protection Act of 2002 – the statute cited by APHIS as its source of authority to implement NAIS.¹⁵

¹⁴ See Cattle: Annual and Cumulative Year-to-Date U.S. Trade (Head), USDA Economic Research Service, available at <http://www.ers.usda.gov/data/meattrade/> (The largest influx of imported cattle over the past decade occurred in 2002 with imports totaling approximately 2.5 million head, over 1 million of which were imported for slaughter).

¹⁵ See Testimony of Dr. John Clifford, Deputy Administrator for Veterinary Services, APHIS, before the House Committee on Agriculture’s Subcommittee on Livestock, Dairy, and Poultry Hearing to “Review Animal Identification Systems,” March 11, 2009, at 1, 2.

2. Given the emergence of State marketing programs whereby beef from cattle born and raised in a particular state is branded with the name of the State,¹⁶ why would APHIS devise and promote an animal identification numbering scheme that would exclude readily visible information, such as a postal-code to denote the State-of-origin, that would help in the administration and success of such State marketing programs if APHIS' NAIS is truly intended to "benefit livestock industries" (74 Fed. Reg., 1637, col. 3) by improving the "marketability" of the Nation's animals?¹⁷ It is readily apparent that APHIS cares not about improving marketability for domestic producers and desires, instead, to help only multinational meatpackers to secure the visual information they desire to facilitate their exports (i.e., a visual verification of U.S. origin with the 840 eartag. Not only does the 840-prefix AIN accomplish this objective for the multinational meatpackers, but also, it eliminates the need for meatpackers to pay any premiums to U.S. cattle producers for cattle used to produce beef for export. The effect of the Proposed Rule would be that international source verification would be greatly simplified for meatpackers as they would be afforded the USA verification vis-à-vis the visual 840 prefix, but source verification for domestic markets would become considerably more difficult as State-of-origin information could only be ascertained by accessing the NAIS database or other sources.

IV. APHIS PROVIDES NO SUPPORT FOR ITS ASSERTIONS NOR EVIDENCE OF ANY AUTHORITY TO REQUIRE PREMISES REGISTRATION

A. APHIS Provides No Support for Its Assertion that the Proposed Rule Would Enhance Traceability

The Proposed Rule is void of any foundation, analysis, or support for APHIS' blind assertion that the changes in the Proposed Rule would strengthen its ability to respond effectively in the event of a disease outbreak or other animal health event. For example, APHIS fails to explain how mandatory premises registration would improve disease traceability, how the use of 840 eartags would make disease traceback more efficient and effective than preexisting, postal-code eartags, or how preempting States from using State- or region-specific geographic references for identifying locations where livestock are kept would expedite disease traceback. The public deserves to know, and APHIS should fully explain, the full extent of its analysis that would justify making the significant changes proposed in the Proposed Rule to preexisting animal disease programs that have been highly successful in controlling and eradicating animal diseases in the United States.

B. The Proposed Rule Cites No Authority for Mandating NAIS Participation

Although the Proposed Rule intends to compel participation in APHIS' proposed NAIS, even for producers not participating in animal disease programs (e.g., APHIS would require

¹⁶ See, e.g., South Dakota Certified Enrolled Cattle and associated South Dakota Certified beef programs administered by the South Dakota Department of Agriculture, information available at <http://www.sdcec.sd.gov/>.

¹⁷ See A Business Plan to Advance Animal Disease Traceability, USDA APHIS, Version 1.0, September 2008, at 7; see also *id.*, at 26 ("As mentioned previously, there are now numerous government and industry programs in place—both in the United States and abroad—that use animal identification. Animal identification can be used for management purposes, marketing opportunities, and disease control.").

NAIS premises registration for producers who desire to use official 840 eartags for marketing purposes) APHIS cites no specific authority for issuing such a mandate. APHIS should clearly explain the specific authority under which it is requiring the registration of premises, individual animals, and the movement of animals, both pursuant to and outside of APHIS' animal disease programs.

Before proceeding with the Proposed Rule, APHIS should answer the following questions regarding changes it is proposing in the Proposed Rule:

1. What is the specific authority that grants USDA the power to register personal real estate as a premises without prior consent as would occur under the Proposed Rule's mandate that the record of all official eartags issued or distributed to premises in conjunction with a Federal disease program correlate each official eartag number with the premises identification number?
2. Does registration of real property as a premises become a permanent assignment to the affected property?
3. Does registration of real property as a premises constitute a burden or encumbrance on the affected property?
4. Does registration of real property as a premises alter, impair, diminish, divest, or destroy allodial title of land patentees, or heirs or assigns?
5. Does registration of real property as a premises constitute a taking as defined in the 5th Amendment to the U.S. Constitution?
6. Will those affected by premises registration of real property be compensated for any taking, in what amount, by what standard of elevation, and frequency?
7. Where, by an Act of Congress as legislated within the bounds of Article I, Section 8 of the U.S. Constitution, has USDA been given authority to register real property as a premises or otherwise implement the National Animal Identification System?
8. Where in the U.S. Constitution is USDA given authority to register real property as a premises or otherwise implement the National Animal Identification System?
9. Will future land title and use of private real estate be impacted by implementation of the National Animal Identification System, resulting in further Federal regulation or authority?

V. CONCLUSION

R-CALF USA looks forward to APHIS' responses to the numerous questions it has raised regarding the Proposed Rule and it respectfully requests that APHIS withdraw the Proposed Rule in its entirety and proceed, instead, with an Advance Notice of Proposed

Rulemaking to solicit comments from the public regarding how best to enhance disease traceability in the U.S. livestock herd without infringing on the rights and privileges of States and the citizens within each State.

Sincerely,

A handwritten signature in cursive script that reads "R. M. Thornsberry DVM". The signature is written in black ink and is positioned below the word "Sincerely,".

R.M. (Max) Thornsberry, D.V.M.
R-CALF USA President of the Board