

**Lane  
Alton  
Horst** LLC  
Attorneys at Law

TWO MIRANOVA PLACE  
SUITE 500  
COLUMBUS, OH 43215

TELE: 614-228-6885  
FAX: 614-228-0146  
[www.lanealton.com](http://www.lanealton.com)

COLLIS GUNDY LANE (1904-1987)  
THEODORE L. HORST (1908-2000)

JACK R. ALTON (RETIRED)  
MARY BARLEY-McBRIDE  
BELINDA S. BARNES  
JOSHUA R. BILLS  
MARY ELLEN CORNA\*  
DAVID G. COX  
SCOTT A. FENTON  
MELISSA M. FERGUSON  
JENIFER A. FRENCH

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CHAD K. HEMMINGER  
EDWARD G. HUBBARD  
JEFFREY W. HUTSON  
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THEODORE M. MUNSELL  
RAY S. PANTLE  
CHRISTOPHER R. PETTIT  
GREGORY D. RANKIN  
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JAMES K. REUSS

KIM M. SCHELLHAAS  
DOUGLAS J. SCHOCKMAN  
CLAUDIA L. SPRIGGS  
THOMAS E. SWITZER  
MONICA L. WALLER  
STEPHEN B. YURIK

COUNSEL TO THE FIRM  
JAMES W. LEWIS

\*Certified Specialist in  
Labor & Employment Law

May 14, 2008

Secretary Ed Schafer  
U.S. Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, DC 20250

Director Don Koivisto  
Michigan Department of Agriculture  
P.O. Box 30017  
Lansing, Michigan 48909

Re: Notice of Intent to Sue  
National Animal Identification System

Gentlemen:

On behalf of the Farm to Consumer Legal Defense Fund ("FTCLDF") and all of its consumer and producer members, the purpose of this letter is to inform you of the legal deficiencies associated with the development and implementation of the National Animal Identification System ("NAIS") and to provide you with notice of intent to sue in the event that the responsible agencies fail to cure these deficiencies.

## I. INTRODUCTION

NAIS was developed by the United States Department of Agriculture ("USDA"), and is being implemented through its Animal and Plant Health Inspection Service ("APHIS") and various state agencies, including but not limited to the Michigan Department of Agriculture ("MDA"). NAIS alleges to be a comprehensive program of animal tracking whose alleged goals are to 1) assign and register in a nationally coordinated database a unique premises identification number ("PIN") for every farm with a livestock or poultry animal ("premises"); 2) assign and register in a nationally coordinated database every animal on said premises a unique animal identification number ("AIN") or group identification number ("GIN"); and 3) track and trace the movements of all such animals.

The FTCLDF is a nation-wide non-profit organization dedicated to protecting and promoting sustainable, environmentally sound farming practices and direct farm-to-consumer transactions, which the FTCLDF believes further the common good and general welfare of all Americans. The FTCLDF protects the right of farmers to directly provide and for consumers to directly obtain unprocessed and processed farm foods. Toward this end, the FTCLDF provides advocacy, education and legal services for

farmers against any local, state, and federal government interference with the legal transfer of products produced and processed on the farm.

The FTCLDF is strongly opposed to the NAIS program. Many FTCLDF members are or will be suffering harm from implementation of NAIS at the federal and state levels. NAIS is having and will have significant economic and environmental impacts on constituent members. Small, sustainable, environmentally friendly farming operations, and the consumers who interact with those farms, are being and will be significantly harmed by the added economic and regulatory burdens imposed by NAIS. NAIS also violates the Constitutional and statutory rights of FTCLDF members and interferes with the legal, fundamental and natural right of farmers to provide food directly to consumers or persons affiliated with those farms.

USDA and MDA have ignored the substantive and procedural rights of FTCLDF members in the course of developing and implementing NAIS, including how it is being implemented in Michigan. Therefore, on behalf of its members, the FTCLDF requests that the USDA and MDA suspend all ongoing funding, development and implementation of NAIS, including in Michigan, pending compliance with all applicable law and allow citizens to be exempt from participation in NAIS where appropriate.

## **II. FACTUAL BACKGROUND**

On November 11, 2004, USDA adopted an interim rule<sup>1</sup> that officially recognized a numbering system for animals as a “key element of the national animal identification system that is being implemented by the U.S. Department of Agriculture, at present on a voluntary basis.”<sup>2</sup> The alleged purpose of the rule was to “facilitate the development and implementation of the NAIS.”<sup>3</sup> Ironically, USDA claimed that NAIS is necessary to control disease in animals due to the ongoing success of existing animal disease control programs:

“[A]s diseases such as tuberculosis, brucellosis, and pseudorabies are eradicated from the United States, fewer animals are required to be officially identified under the regulations. As a result, our ability to trace diseased animals back to their herds of origin and to trace other potentially exposed animals forward is being compromised.”<sup>4</sup>

USDA failed to explain why NAIS was necessary to control animal disease in light of its admission that ongoing animal disease control programs had already proven effective to control and eliminate animal disease problems.

In the interim rule, USDA recognized the massive scope of NAIS, acknowledging the presence of over one million cattle producers and 95 million beef and dairy cattle in the United States, not including hogs, sheep, poultry and other domestic animals, which would “need to be identified if the NAIS were to be fully implemented.”<sup>5</sup> However, at no

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<sup>1</sup> 69 Federal Register 64,644-64,651.

<sup>2</sup> 69 Federal Register 64,644.

<sup>3</sup> *Id.* at 64,645.

<sup>4</sup> *Id.* at 64,644.

<sup>5</sup> 69 Federal Register at 64,647.

time prior to adopting the 2004 interim rule did USDA prepare an Environmental Assessment (“EA”), Environmental Impact Statement (“EIS”), or other similar document.

In addition, although USDA concluded that “[t]his interim rule has potential implications for small entities in the United States, both in terms of any costs they might incur to satisfy NAIS program requirements and in terms of the benefits associated with the program’s establishment,” it further stated that “[l]ittle information is available at this time about costs that may be incurred by producers.”<sup>6</sup> Notwithstanding this admission that NAIS would have cost impacts, USDA refused to evaluate any such impacts based on the assumption that “participation in the NAIS is voluntary,” and that “[p]roducers can opt not to participate in the NAIS if they anticipate that the costs they will incur will exceed the benefits they receive from participation.”<sup>7</sup> Going further, USDA stated that since “use of this numbering system is voluntary, no costs are imposed on participants and it is unlikely for this interim rule to have any adverse impact on small businesses.”<sup>8</sup> Thus, USDA failed to evaluate the economic impacts NAIS would have on small farmers because USDA officially stated that the program was “voluntary” and impliedly assumed that small farmers would choose not to participate.

On May 6, 2005, USDA announced in the Federal Register that it had issued three documents, two of which were identified as a “Draft Strategic Plan” and a “Draft Program Standards.”<sup>9</sup> These two documents set out USDA’s three-step plan for NAIS and, notwithstanding the interim rule, stated that the program would become mandatory after an initial voluntary period.

In April 2006, the USDA issued a “Strategies for Implementation of NAIS,” which stated that NAIS was voluntary at the federal level, but also that USDA’s goal was 100% participation within three years.<sup>10</sup> In November 2006, USDA issued yet another document, this time a “User Guide” which again stated that NAIS was voluntary at the federal level but was quiet on numerical goals for participation.<sup>11</sup> However, a concurrently issued announcement of funding for state implementation of NAIS still called for States to implement the program on the original timeline.<sup>12</sup>

On July 18, 2007, USDA adopted, with minor changes, the interim rule as a final rule.<sup>13</sup> Although USDA’s final rule continued to recognize the potential for significant economic impacts of NAIS, USDA did not provide any new or additional analysis regarding the potential economic impacts of compliance on small farmers or others.<sup>14</sup>

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<sup>6</sup> Id.

<sup>7</sup> Id.; see also Id. at 64,648 (“As use of this numbering system is voluntary, no costs are imposed on participants and it is unlikely for this interim rule to have any adverse impact on small businesses.”).

<sup>8</sup> Id. at 64,648.

<sup>9</sup> 70 Federal Register 23,961-23,936 (May 6, 2005). A copy of the Draft Strategic Plan is attached hereto as Exhibit A and a copy of the Draft Program Standards is attached hereto as Exhibit B.

<sup>10</sup> USDA-APHIS, Strategies for the Implementation of NAIS (Apr. 2006) at p.3, attached hereto as Exhibit C.

<sup>11</sup> USDA-APHIS, National Animal Identification System (NAIS): A User Guide and Additional Information Resources (Nov. 2006), attached hereto as Exhibit D. The USDA issued a revised User Guide in December 2007, attached hereto as Exhibit E.

<sup>12</sup> USDA-APHIS, Initial Announcement, Cooperative Agreements for Implementation of the National Animal Identification System (Nov. 22, 2006), attached hereto as Exhibit F.

<sup>13</sup> 72 Federal Register 39,301-39,307.

<sup>14</sup> Id. at 39,304.

On December 19, 2007, USDA made available for public review and comment a “Draft Business Plan to Advance Animal Disease Traceability, Through the Harmonization of State, Federal and Industry Programs and Convergence with the National Animal Identification System” (“Business Plan”).<sup>15</sup> The purpose of the Business Plan was to provide detailed “strategies and actions” to implement NAIS which “requires a comprehensive animal-disease traceability infrastructure.”<sup>16</sup> Although the Business Plan claims that “[p]articipation in NAIS is voluntary at the federal level,”<sup>17</sup> it also candidly details a number of final agency actions which USDA/APHIS have taken, is currently taking, or will soon take to implement NAIS.

For example, the actions mentioned by the 2007 Business Plans include the following:

“USDA will . . . implement immediate short term strategies, as outlined in this business plan.”<sup>18</sup>

“Beginning with fiscal year 2008, this draft business plan will uniquely serve as a blueprint for the development of work plans associated with NAIS implementation cooperative agreement funding.”<sup>19</sup>

“Each State, Tribe or Territory will be required to evaluate, describe, and identify animal disease traceability within their State, Tribe or Territory.”<sup>20</sup>

“USDA will take steps to standardize data elements in existing programs. . . .”<sup>21</sup>

The 2007 Business Plan, therefore, constitutes USDA’s nation-wide plan to standardize, guide and direct USDA’s/APHIS’ implementation of NAIS not only through direct federal action but also through indirect federal action in the form of cooperative agreements with and funding of State agencies. However, USDA did not promulgate the Business Plan or the substantive agency actions described therein as a final rule.

USDA/APHIS has been taking concrete actions to implement NAIS for several years now. For example, USDA has been providing conditional funding and technical support to States that implement the program.<sup>22</sup> Another strategy has been to make NAIS mandatory through existing, mandatory animal disease control programs, as has been done with the Michigan Department of Agriculture’s (MDA) bovine tuberculosis (“TB”) program.

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<sup>15</sup> 72 Federal Register 71,871-71,873. A copy of the Business Plan is attached hereto as Exhibit G.

<sup>16</sup> *Id.* at 71,872.

<sup>17</sup> Business Plan, Preface at i.

<sup>18</sup> Business Plan at 11.

<sup>19</sup> Business Plan at 36.

<sup>20</sup> Business Plan at 36.

<sup>21</sup> Business Plan at 2.

<sup>22</sup> See, e.g., USDA-APHIS, Initial Announcement, Cooperative Agreements for Implementation of the National Animal Identification System (Nov. 22, 2006), see Exhibit F.

The difficulty in addressing TB in Michigan is explained in a March 26, 2002 Memorandum of Understanding (“MOU”) between MDA and APHIS:

Tuberculosis was confirmed in wild, free-ranging white-tailed deer in the northeast Lower Peninsula of Michigan in 1994. The discovery of a wildlife reservoir in northeastern lower Michigan poses a unique and difficult impediment in the effort to eradicate bovine TB. Scientists, biologists, epidemiologists, and veterinarians who have studied this problem believe that the most logical theory is that the supplemental feeding of free-ranging deer serves to congregate deer, therefore, contributing to the spread of TB. Since 1998, supplemental feeding was banned and baiting (the practice of hunting deer by attracting them with feed) was limited to reduce the spread of TB between deer and eventually eliminate this disease from the wildlife.<sup>23</sup>

Therefore, according to State and federal experts, one of the primary causes of TB in Michigan is wildlife and the primary solution is to modify the management of said wildlife. The State of Michigan has since taken action to modify the management of wildlife in order to reduce or eliminate the transmission of TB among wildlife and to domestic livestock.<sup>24</sup> However, and as explained below, USDA/APHIS is using the State of Michigan to implement NAIS in that State under the guise of eradicating TB, a disease which is not being caused by animals on farms, but rather, is being caused by wildlife in the State as well as by imported animals.

Federal law allows USDA/APHIS to regulate the interstate movement of animals with TB.<sup>25</sup> USDA classifies states or portions of States into one of several zones, including 1) modified accredited (TB prevalent in less than 0.1 percent of herds); 2) modified accredited advanced (TB prevalent in less than 0.01 percent of herds; and 3) accredited free (no TB for five years prior).<sup>26</sup> For a State to retain its zone status the State must, among other requirements, “enter into a memorandum of understanding with APHIS in which the state agrees to adhere to any conditions for zone recognition particular to that request.”<sup>27</sup> USDA places restrictions on the movement of livestock from various zones and States that fail to comply with federal requirements can be heavily restricted or otherwise penalized by the USDA.<sup>28</sup> Not surprisingly, some of these “conditions for zone recognition” require compliance with NAIS program requirements.

On March 26, 2002, USDA/APHIS entered into an MOU<sup>29</sup> with MDA establishing two TB zones in Michigan, modified accredited and modified accredited advanced. Pursuant to the 2002 MOU, USDA required MDA to manage wildlife so as to reduce or eliminate the transmission of TB, and to:

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<sup>23</sup> 2002 MOU at 1.

<sup>24</sup> Id. at 1-2.

<sup>25</sup> Animal Health Protection Act, 7 USC 8301-8321, 8306; 9 C.F.R. Part 77.

<sup>26</sup> 9 C.F.R. § 77.5.

<sup>27</sup> 9 C.F.R. § 77.4(a)(3).

<sup>28</sup> 9 C.F.R. §§ 77.7-77.20.

<sup>29</sup> Pursuant to 9 C.F.R. § 77.4(a)(3).

“[D]evelop, implement, and enforce scientifically-based movement restrictions and requirements including official bovine TB test requirements, prior movement permits, official intra-state health certificates to accompany movement of animals, and official identification of animals for movement between or within a Disease-Free Zone, Surveillance Zone, and an Infected Zone [zone areas within the modified accredited zone], or any combination of those zones.”<sup>30</sup>

USDA specifically required MDA to mandate “official identification” on “all domestic livestock that move from any premises” within these zones, including movement within disease-free areas.<sup>31</sup> USDA also required MDA to “establish an inspection presence at the livestock auction markets throughout the State,” and verify “that all cattle and goats presented for sale meet bovine TB testing and official identification requirements.”<sup>32</sup> However, the 2002 MOU did not specifically authorize, let alone mention or require, implementation of NAIS or its identification or tracking requirements.

On October 7, 2004, MDA requested that USDA reclassify Michigan’s Upper Peninsula as a TB accredited free zone, based on the fact that TB had not been diagnosed in any domestic or wild animal in the region since at least 1979. On October 6, 2005, USDA published an interim rule establishing Michigan’s Upper Peninsula as a TB accredited free zone.<sup>33</sup> Also, in November 2004 MDA issued a letter to all cattle producers that recognized non-electronic ear tags and “tattoos” as official forms of identification.<sup>34</sup>

On July 26, 2005, MDA entered into a new MOU with USDA/APHIS. Unlike the previous MOUs, however, the 2005 MOU now required MDA to begin implementing NAIS’ electronic tagging program even though only eight months earlier in November 2004 MDA had sent a letter to all cattle producers stating that non-electronic ear tags and tattoos were official forms of identification. Specifically, the 2005 MOU required MDA to mandate “electronic identification and a movement permit for any cattle moved from premises in the Modified Accredited Zone,” while APHIS would provide “support for acquisition and development for electronic identification, hardware and software in accordance with the National Animal Identification System (NAIS) and USDA regulations . . . .”<sup>35</sup> The transition from NAIS being a “voluntary” program to a mandatory program was well on its way.

Following the 2005 MOU, MDA took substantial steps in 2006 toward implementation of NAIS. That year, MDA registered nearly 45,000 premises, pursuant to NAIS specifications.<sup>36</sup> MDA also used existing MDA data regarding farms to create a PIN database and collected additional information during “surveillance efforts,”

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<sup>30</sup> 2002 MOU at 5-6.

<sup>31</sup> 2002 MOU at 7-9.

<sup>32</sup> 2002 MOU at 11.

<sup>33</sup> 70 Federal Register 58,291-58,293; 9 C.F.R. § 77.7(b)(1).

<sup>34</sup> November 1, 2004 letter from Michael S. Vander Klok, DVM, TB Program Coordinator, Animal Industry Division, MDA, to all Michigan cattle producers, attached hereto as Exhibit H.

<sup>35</sup> 2005 MOU at 2, 4.

<sup>36</sup> 2007 Grant Proposal at 2.

apparently without the knowledge or permission of the affected farmers.<sup>37</sup> MDA registered premises with not only cattle and bison, but also with sheep, swine, and poultry as well.<sup>38</sup> MDA's alleged goal was to focus on cattle, due to the TB situation, but then to "expand to the other species groups"<sup>39</sup> with no identified risk of TB.

On July 28, 2006, MDA requested a grant of \$179,000 from the USDA to implement NAIS, primarily to 1) register premises into the NAIS database; 2) convince the public that NAIS is good idea; and 3) implement the electronic identification required by NAIS and mandated by USDA in its 2005 MOU.<sup>40</sup> The grant was approved by USDA's plan administrator on May 8, 2007<sup>41</sup> with the stipulation that "funds may only be used for the implementation and administration of premises registration in accordance with the NAIS, and support of outreach efforts pertaining to all activities that promote the NAIS implementation plan for full participation by 2009." Consequently, the 2007 grant was clearly intended to implement NAIS in Michigan and to make its requirements mandatory by 2009.

In November 2006, MDA issued a second letter to all Michigan cattle producers informing them of MDA's impending mandatory implementation of NAIS as of March 1, 2007.<sup>42</sup> MDA acknowledged that its existing TB program had made significant progress in eradicating TB in Michigan but nevertheless also imposed new substantive requirements implementing NAIS, including the requirement that all identification had to be electronic. At this point, the TB eradication program in Michigan had been expanded to include NAIS measures, statewide, regardless of the presence of TB.

Specifically, MDA required all cattle in the state of Michigan, in all TB zones, *including the TB free zone*, to be identified and tagged with an electronic RFID identification ear tag issued by MDA, linked to a specific PIN registration, prior to any movement from that premises. MDA also required that any vehicle transporting livestock must stop at any posted inspection point and produce documentation proving compliance with all livestock moving requirements. MDA did not promulgate these regulatory requirements as a formal rule or regulation, it did not seek any public comment, it did not evaluate any alternatives or impacts and it did not otherwise comply with any procedural requirements. Instead, MDA simply issued a letter signed by its Director.

With the November 2006 letter, MDA proposed to implement the first two phases of USDA's three-prong NAIS program with respect to cattle in that 1) all premises must be registered and issued a PIN; and 2) all cattle on said premises must be issued an AIN and tagged with an electronic RFID ear tag.<sup>43</sup> In the November 2006 letter, MDA stated that "As these changes . . . are implemented, the [USDA] . . . has indicated that it would consider reinstating TB Free Status for the current MAAZ [modified accredited

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<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id. at 2-7.

<sup>41</sup> The Cooperative Agreement for the grant was signed by the USDA/APHIS on June 29, 2007.

<sup>42</sup> November 2006 letter from Steven L. Halstead, D.V.M., State Veterinarian and Division Director, Animal Industry Division, MDA, to all Michigan cattle producers, attached hereto as Exhibit I.

<sup>43</sup> The only apparent exception being cattle which never leave a premises are not required to be tagged.

advanced zone] area of lower Michigan,” even though implementation of NAIS is not required by any federal or state statute or regulation. In other words, USDA was holding hostage Michigan’s attempt to have its areas declared TB free unless MDA agreed to implement NAIS on a mandatory basis for all cattle.

In 2007, USDA continued to place significant regulatory pressure on MDA to implement NAIS. In March 2007, USDA issued to Michigan a Bovine TB Program Review report, whereby USDA alleged 79 deficiencies by MDA in implementing its TB program and concomitant NAIS requirements. Because of these deficiencies, USDA threatened to place even greater regulatory restrictions on MDA if certain actions were not carried out. For example, USDA was critical of MDA for not enforcing mandatory statewide electronic tagging for all cattle producers, including those who were opposed on the basis of their sincere religious beliefs. As USDA stated in its 2007 Executive Summary:

"[T]he State is making allowances for owners who do not want to identify their animals while on their premises . . . [T]his allowance has been made for Amish producers in particular, who claim they cannot use electronic identification on their property due to religious beliefs[.]"<sup>44</sup>

According to USDA, this allowance for Amish farmers "presents concerns with respect to traceability." Therefore, USDA required MDA to "present documentation which demonstrates how traceability is ensured . . . ."

After receiving the 2007 Program Review report, State officials freely admitted the pressure they were receiving from USDA to implement NAIS. For instance, Michigan State Veterinarian Steve Halstead stated:

"USDA would prefer that we have a system like Mexico's, where to move between states, cattle haulers are stopped at gates by armed guards. Our program has a lot of components in place for tracking animals, and they are effective. But nothing is as secure as a guy at a gate with a gun. . . . The handwriting in the [2007 Executive Summary] is black and white, and there is no option for failure. We will fix the things in the report, and it will happen in full partnership with the USDA."<sup>45</sup>

On June 22, 2007, MDA entered into an MOU with USDA/APHIS regarding the continuation of TB zone status in Michigan. In addition to the NAIS electronic tagging requirement stipulated by the 2005 MOU, the 2007 MOU now mandated two additional provisions that appear to be part of the third phase of NAIS. Specifically, MDA was required to 1) have the “ability to retrieve information concerning animal movements within 48 hours,” and 2) “implement and enforce a uniform, state wide certificate system to track all interstate or interzone cattle and bison movements from farm of origin to final destination.”<sup>46</sup> Thus, the 2007 MOU effectively requires MDA to implement the primary provisions of NAIS with respect to interstate and interzone movements of cattle.

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<sup>44</sup> Program Review report at 11.

<sup>45</sup> Paul W. Jackson, TB-status delayed after state fails USDA review, Michigan Farm News (June 15, 2007), attached hereto as Exhibit J.

<sup>46</sup> 2007 MOU at 2.



Not only has Michigan gone way beyond the bounds of scientifically based TB eradication in cattle, but by its terms the requirements have been broadened to cover all livestock. Specifically, the MOU also requires MDA to “[u]tilize State authority to randomly intercept and inspect vehicles that are transporting livestock on public roads within Michigan for compliance with State and Federal split state status requirements and this MOU.” The Animal Health Protection Act expressly states that USDA does not have authority to stop and inspect vehicles transporting livestock without a warrant or probable cause to believe that the vehicle is carrying an animal which may be regulated or under quarantine. 7 U.S.C. § 8307(b). This constitutes a possible violation of the Animal Health Protection Act and the Fourth and Fifth Amendments to the United States Constitution which protect against unreasonable searches and seizure and the taking of private property without just compensation.

### **III. VIOLATIONS OF APPLICABLE LAW**

As described below, USDA/APHIS’ and MDA’s implementation of the NAIS program violates applicable procedural and substantive law.

#### **A. Procedural Violations**

Governmental agencies must comply with applicable procedural requirements prior to implementing significant agency actions. As a general rule, agencies must allow for and consider public input; they must evaluate the environmental and economic impacts of their proposed actions; and they must consider alternatives to their proposed actions. Agencies must allow the public a meaningful opportunity to be informed of, comment upon, and have influence over the governmental decisions which impact their lives and livelihoods. USDA and MDA have largely ignored these procedures and have abandoned these principles in the process of implementing NAIS.

#### **1. Rulemaking Requirements**

The Federal Administrative Procedures Act (“APA”) mandates that proposed agency rules be published in draft and final form in the Federal Register, giving the public the opportunity for notice and comment.<sup>47</sup> A “rule” is defined, in part, as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy . . . .”<sup>48</sup>

USDA’s NAIS program is clearly a rule. It is a program that involves the nationwide registration and tracking of each and every premises and animal in the country; it includes a “Business Plan” that articulates national policy and its implementation; and it is being implemented right now by USDA/APHIS, either through mandatory MOUs or under existing federal disease control regulations, and by funding NAIS via conditional grants and cooperative agreements, or offering regulatory incentives to State agencies in exchange for implementation of NAIS. Indeed, USDA tacitly recognized that NAIS is subject to the APA’s rulemaking requirements when it promulgated its 2004 interim and

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<sup>47</sup> 5 U.S.C. § 553.

<sup>48</sup> 5 U.S.C. § 551.

2007 final rules allowing the “voluntary” use of PINs and AINs and published those actions in the Federal Register.

Despite these actions, USDA has never published nor promulgated rules regarding many of the key elements of either NAIS itself or its NAIS policy as a whole. Although USDA claims that NAIS is “voluntary at the federal level” this is false, given the way USDA is imposing NAIS provisions on various states via MOUs promulgated through existing federal animal disease control requirements. But even if NAIS were truly voluntary it would not absolve USDA from APA rulemaking requirements prior to prescribing and implementing a policy of general future applicability.<sup>49</sup> USDA’s failure to comply with formal rulemaking procedures prior to implementing NAIS violates APA Section 553.

Michigan’s Administrative Procedures Act (“MAPA”) is similar to the APA, requiring MDA to undergo formal rulemaking procedures for any “agency regulation, statement, standard, policy, ruling or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency . . . .”<sup>50</sup> In addition, Michigan’s Animal Industry Act requires MDA to promulgate rules for the implementation and enforcement of that Act.<sup>51</sup> Despite these mandates, MDA has issued and enforced a number of mandatory policies for the express purpose of implementing NAIS without ever complying with MAPA’s rulemaking requirements.

For example, MDA’s November 2006 letter to cattle producers, which the MDA began enforcing in 2007, required all cattle premises in the State to be registered and issued a PIN, all cattle on said premises to be issued an AIN and tagged with an electronic RFID ear tag, and all cattle to be subject to tracking if moved from one zone to another. Moreover, MDA freely admitted that USDA had offered it regulatory benefits for implementing key NAIS provisions. Although MDA’s mandates for cattle producers clearly constitute a uniform, mandatory regulation and policy of general applicability, MDA failed to comply with any of MAPA’s requirements for formal rulemaking prior to implementing these policies.

Thus, USDA and MDA have simply decided to develop and implement NAIS without first complying with procedural mandates. As such, USDA and MDA are in violation of applicable law.

## **2. NEPA**

The National Environmental Policy Act (“NEPA”) requires all federal agencies to prepare an environmental impact statement (“EIS”) for every major federal action which significantly affects the quality of the human environment.<sup>52</sup> The purpose of an EIS is to provide a “full and fair discussion” of significant potential environmental impacts of the

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<sup>49</sup> 5 U.S.C. §§ 551, 553.

<sup>50</sup> MCL § 24.207.

<sup>51</sup> MCL § 287.745.

<sup>52</sup> 42 U.S.C. §4332(c)(I)-(v); 40 C.F.R. §1508.11.

proposed action in order to facilitate informed decision making<sup>53</sup> and the EIS must describe (a) the environmental impact of the proposed action; (b) any adverse environmental effects which cannot be avoided if the proposed action is implemented; (c) alternatives to the proposed action; (d) the relationship between local short term uses and the maintenance of long term productivity; and (e) any irreversible and irretrievable commitment of resources should the proposed action be implemented.<sup>54</sup>

A NEPA analysis must include all information which is relevant and essential to a reasoned choice among alternatives, including the “no action” alternative.<sup>55</sup> Federal agencies are required to fully and strictly comply with NEPA’s procedures or run the risk of creating an injury-in-fact.<sup>56</sup> In addition, federal agencies must cooperate with state and local agencies and the NEPA document must discuss any inconsistency between a proposed action and any approved State or local plan and laws.<sup>57</sup>

If an agency refuses to conduct an EIS it must instead prepare an environmental assessment (“EA”) and issue a finding of no significant impact (“FONSI”) which explains why the proposed action is not a major federal action that will significantly affect the environment.<sup>58</sup> Therefore, unless a proposed agency action is categorically excluded from NEPA compliance, agencies must always, at a minimum, prepare an EA to be followed by either an EIS or a FONSI.<sup>59</sup> Consequently, before any major federal action can be taken, the environmental impacts must be analyzed, considered and evaluated.

NAIS affects the environment in several ways and should have been subjected to an EIS. For example, a key component of NAIS is electronic tagging and tracking of animals through microchips that are either implanted directly into the animal or used in external ear tags.<sup>60</sup> Although some animals may not require electronic tags, the only forms of identification currently approved by USDA for NAIS at this time are electronic. With approximately 35 million cattle slaughtered each year (and unknown numbers of horses, goats, sheep, llamas, alpacas, deer, elk, and bison that die or are slaughtered each year), NAIS will result in tens of millions of microchips that will need to be (1) manufactured and (2) disposed of each year in accordance with applicable law.

Production and disposal of these chips will likely be regulated under the Solid Waste Disposal Act. Moreover, if these chips or other electronic devices contain any hazardous substances such as lead, cadmium, mercury or other hazardous substances typically found in such production, they would be regulated under the Resource Conservation and Recovery Act or possibly even CERCLA. Manufacturing microchips is a resource-intensive process, while their disposal in such large quantities poses

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<sup>53</sup> See Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service, 75 F.3d 1429, 1434 (10th Cir.1996); Vermont Yankee Nuclear Power Corp. v. N.R.D.C. Inc., 435 U.S. 519, 558 (1978); 40 C.F.R. §1502.1.

<sup>54</sup> 42 U.S.C. § 4332 (c)(I)-(v).

<sup>55</sup> Robertson v. Methow Valley Citizens, 490 U.S. 332 (1989); 40 C.F.R. §1502.14.

<sup>56</sup> Id.

<sup>57</sup> 40 C.F.R. § 1506.2.

<sup>58</sup> 40 C.F.R. §§ 1501.4, 1508.4, 1508.9, 1508.13.

<sup>59</sup> Id.

<sup>60</sup> NAIS Program Standards and Technical Reference 2.0 (October 2007) at 13.

significant hazardous waste concerns.<sup>61</sup> However, this impact, i.e., production and disposal of electronic components, was not evaluated, considered, or analyzed in any way.

Another way in which NAIS will impact the environment is how it will drive small operations (which benefit the environment) out of business yet reward large operations (which burden the environment) by allowing them to proliferate. Specifically, NAIS creates incentives for confined animal feeding operations (CAFO's) but not for pasture-based farms. Therefore, compliance with NAIS will be easier for large operations but more difficult for small operations. Because of this disparate treatment under NAIS, additional adverse environmental impacts will accrue as environmentally friendly operations (smaller operations) go out of business while environmentally unfriendly operations (larger operations) proliferate.

For example, USDA's documents state that group identification numbers can be used for animals that "typically move through the production chain as a group of animals of the same species" and also notes that "[t]his practice is most common in the poultry and pork industries."<sup>62</sup> More accurately, it is the practice in the large swine and poultry CAFO industries, not the small operations. Small, pasture-based operations generally do not manage their animals in such artificial, isolated groups, and will therefore be faced with having to individually tag and track each animal, a cost that USDA again failed to evaluate. Thus, small operations will eventually go out of business because of NAIS while large operations will flourish under NAIS and this will have environmental implications, as described below.

Small farms have been shown to have environmental benefits while large operations have been shown to create environmental detriments. Small farms that raise livestock on pasture, often in an integrated crop management system, have been documented to provide the following benefits:

1. Reducing greenhouse gases by (1) reducing the production of methane from cattle through rotational grazing and extending the useful productive life of ruminants;<sup>63</sup> and (2) storing carbon from the atmosphere in grazed pastures;<sup>64</sup>

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<sup>61</sup> See Eric Williams, Environmental Implications of Microchips, UN Chronicle, Online Edition, <http://www.un.org/Pubs/chronicle/2003/issue4/0403p48.asp>; IT and the Environment, <http://www.it-environment.org/>; eCycling, U.S. Environmental Protection Agency, <http://www.epa.gov/ecycling/>; Winter Casey, Radio-frequency tracking tags pose recycling challenge, National Journal's Technology Daily (Aug. 7, 2006) (quoting an EPA official discussing an intra-government US RFID Council). B. O'Banion, Can RFID Tags Become an Environmental Problem (Aug. 9, 2005), <http://www.industryweek.com/ReadArticle.aspx?ArticleID=10608>.

<sup>62</sup> See User Guide (Dec. 2007) at p.24.

<sup>63</sup> DeRamus, H. A., T. C. Clement, D. D. Giampola, and P. C. Dickison. "Methane Emissions of Beef Cattle on Forages: Efficiency of Grazing Management Systems." J Environ Qual 32, no. 1 (2003): 269-77; Garnsworthy, P.C., The environmental impact of fertility in dairy cows: a modeling approach to predict methane and ammonia emissions, Animal Feed Science & Technology, 2004. 112: 211-223.

<sup>64</sup> Soil Organic Carbon in fields of switch grass and row crops as well as woodlots and pastures across the Chariton Valley, Iowa." Final Report. Lee Burras and Julie McLaughlin, Iowa State University, January 25, 2002.

2. Improving air quality through reduced production of ammonia;<sup>65</sup>
3. Improving water quality;<sup>66</sup>
4. Reducing erosion and improving soil conditions through the establishment of permanent pastures instead of raising row crops to provide grain for CAFOs;<sup>67</sup>
5. Increasing native plants and expanding important ecosystems such as wetlands;<sup>68</sup>
6. Reducing chemical usage directly, through reducing or eliminating the use of antibiotics, hormones, and other chemicals fed to the animals, such as the feeding of arsenic to poultry in CAFOs;<sup>69</sup> and
7. Indirect reductions in chemical usage through integrated pest management.<sup>70</sup>

In contrast, the CAFOs that NAIS favors create significant environmental harms:

1. The large amounts of conventionally-raised grain needed to feed the confined animals contributes to soil degradation and pollution of aquatic ecosystems;<sup>71</sup>
2. Contamination of groundwater from manure pits and lagoons;<sup>72</sup>
3. Surface water pollution;<sup>73</sup>

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<sup>65</sup> Anderson, N., R. Strader, and C. Davidson. 2003. Airborne reduced nitrogen: Ammonia from emissions from agriculture and other sources. *Environment International* 29:277-286.

<sup>66</sup> Boody, G., B. Vondracek, D. Andow, M. Krinke, J. Westra, J. Zimmerman, and P. Welle. 2005. Multifunctional agriculture in the United States. *Bioscience* 55(1): 27-38.

<sup>67</sup> Managed Grazing as an Alternative Manure Management Strategy," Jay Dorsey, Jodi Dansingburg, Richard Ness, USDA-ARS, Land Stewardship Project; Ontario Ministry of Agriculture and Food, Robert P. Stone and Neil Moore, Fact Sheet 95-089.

<sup>68</sup> Duncan, P. and Jarman, P. J. 1993. Conservation of biodiversity in managed rangelands, with special emphasis on the ecological effects of large grazing ungulates, domestic and wild. In: Baker, M. J. (ed.) *Grasslands for Our World*, pp. 776-783. SIR Publishing, Wellington, New Zealand. Results of a grazing experiment presented at the Society for Range Management – 2001 Annual Conference in Kailua-Kona, Hawaii.

<sup>69</sup> Environmental Fate and Transport of Arsenical Feed Amendments for Animal Agriculture. Cherie V. Miller, U.S. Geological Society.

<sup>70</sup> J.N. Guerrero et al. *J. of Animal Science* Vol 80, Supplement 2, p. 126. "Grazing lambs control insects in alfalfa."

<sup>71</sup> Tilman, D., K.G. Cassman, P.A. Matson, R. Naylor, and S. Polasky. 2002. Agricultural sustainability and intensive production practices. *Nature* 418:671-677.

<sup>72</sup> Volland, C., J. Zupancic, and J. Chappelle. 2003. Cost of remediation of nitrogen-contaminated soils under CAFO compounds. *Journal of Hazardous Substance research* 4:1-18; Huffman, R.L, and P.W. Westerman. 1995. Estimated seepage losses from established swine waste lagoons in the lower coastal plain of North Carolina. *Transactions of the American Society of Agricultural Engineers* 38:449-453.

<sup>73</sup> Mallin, M.A., J.M. Burkholder, M.R. McIver, G.C. Shank, H.B. Glasgow, Jr., B.W. Touchette, and J. Springer. 1997. Comparative effects of poultry and swine waste lagoon spills on the quality of receiving stream waters. *Journal of Environmental Quality* 26:1622-1631; Mallin, M.A. and L.B. Cahoon. 2003.

4. Air pollution;<sup>74</sup>
5. Potentially life-threatening contamination of water and food;<sup>75</sup> and
6. Non-therapeutic use of antibiotics that may increase the risk of resistant bacterial strains jumping species.<sup>76</sup>

None of these environmental impacts were considered or evaluated by USDA/APHIS.

Many of the FTCLDF's farmer members are dedicated to developing and implementing sustainable, environmentally friendly farming practices.<sup>77</sup> The restoration of soil ecology is emphasized, soil and water conservation techniques are practiced, and crop rotation and fallowing are utilized. The production of meat, dairy and eggs is often grass-based and relatively unconfined, as opposed to large, commercial animal feeding operations which rely upon inefficient feeding of grain to herbivores and the use of heavy antibiotic and chemical inputs to maintain the health of animals. In addition, the use of chemical fertilizers, pesticides, and herbicides by FTCLDF farmer members is minimized. Due to these production practices, fewer fossil fuel inputs are needed, both to farm and to process and deliver the final product to consumers, and additional carbon is incorporated into the soil, all of which in turn reduce total carbon emissions which may help reduce global warming. In short, the farming techniques associated with the local food movement have many positive environmental impacts which are not found within industrialized agricultural techniques, which rely on large machinery, intensive tillage, and massive inputs of fossil fuels and chemicals. USDA did not analyze the impact that NAIS will have on any of these practices.

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Industrialized animal production: A major source of nutrient and microbial pollution to aquatic ecosystems. *Population and Environment* 24(5): 369-385. Mallin, M.A. and C.A. Corbett. 2006. Multiple hurricanes and different coastal systems: How hurricane attributes determine the extent of environmental impacts. *Estuaries and Coasts* 29:1046-1061. Rabalais NN, Wiseman WJ, RE Turner, BK Sen Gupta, and Q. Dortch (1996). Nutrient changes in the Mississippi River and system responses on the adjacent continental shelf. *Estuaries* 19:386-407.

<sup>74</sup> Anderson, N., R. Strader, and C. Davidson. 2003. Airborne reduced nitrogen: Ammonia emissions from agriculture and other sources. *Environment International* 29:277-286. Merchant JA, AL Naleway, ER Svendsen, KM Kelly, LF Burmeister, AM Stronquist, CD Taylor, PS Thorne, SJ Reynolds, WT Sanderson, and EA Chrischilles (2005). Asthma and farm exposures in a cohort of rural Iowa children. *Environ Health Perspect* 13:350-6. Mirabellia MC, S Wing, SW Marshall, and TC Wilcosky (2006a). Race, poverty, and potential exposure of middle-school students to air emissions from confined swine feeding operations. *Environ Health Perspect* 114:591-6. Mirabellia, MC, S Wing, SW Marshall, and TC Wilcosky (2006b). Asthma symptoms among adolescents who attend public schools that are located near confined swine feeding operations. *Pediatrics* 118:366-75 Sigurdarson ST and JN Kline (2006). School proximity to concentrated animal feeding operations and prevalence of asthma in students. *Chest* 129:1486-91. Schiffman SS, EA Miller, MS Suggs, and BG Graham (1995). The effect of environmental odors emanating from commercial swine operations on the mood of nearby residents. *Brain Res Bull* 37:369-75. Schiffmann SS, CE Studwell, LR Landerman, K Berman, and JS Sundy (2005). Symptomatic effects of exposure to diluted air sampled from a swine confinement atmosphere on healthy human subjects. *Environ Health Perspect* 113:567-576.

<sup>75</sup> CDC (2006). Update on Multi-state outbreak of *E. Coli* O157:H7 infections from fresh spinach, October 6, 2006.

<sup>76</sup> WHO (2000) Report on Infectious Diseases.

<sup>77</sup> See generally [www.eatwild.com](http://www.eatwild.com); [www.localharvest.com](http://www.localharvest.com); [www.organicconsumers.org](http://www.organicconsumers.org); [www.holisticmanagement.org](http://www.holisticmanagement.org); [www.americangrassfed.org](http://www.americangrassfed.org); [www.slowfoodusa.org](http://www.slowfoodusa.org). See also Declarations of Robert Keyworth and Joe Golimbieski, attached hereto as Exhibits K and L.

Small and sustainable farms also provide cultural, health and culinary benefits. For example, agrarian-based communities are an integral part of the fabric of American custom and culture and FTCLDF members, both farmers and consumers, help preserve and protect that culture. These FTCLDF farmers preserve and protect Americans' agricultural heritage and techniques, they maintain and protect heirloom varieties of plants and animals constituting a valuable genetic resource which may help to protect America's food supply in the event of a disease outbreak, and they also provide a national security benefit founded in a diverse system in the event of a terrorist attack or natural disaster that interrupts the distant transportation of centrally-produced food across the country. Again, USDA did not analyze the impact that NAIS will have on any of these benefits that small scale farming provides the local economy.

There are also many health benefits provided by small farms. Substantial scientific evidence demonstrates that grass-fed meats, eggs, and dairy products provide health benefits that outweigh similar products from animals fed grain in CAFOs.<sup>78</sup> Consumers also choose locally produced foods for what many believe to be the superior culinary value of fresh, locally grown or raised foods. The FTCLDF is dedicated to preserving and protecting the right of all Americans to make informed choices regarding their health and well being and the food they eat, and to do so in a manner that is free from burdensome governmental intrusion.

NAIS will also impact the environment by impinging on animal health. Animal health is inextricably intertwined with animal management and the environment.<sup>79</sup> Sustainable, pasture-based farms provide many environmental benefits.<sup>80</sup> "Properly maintained perennial pasture builds soil, protects water quality by reducing nutrient runoff and leaching, and captures carbon dioxide – the heat-trapping gas most responsible for global warming – at higher rates than grain crops," such as the grain

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<sup>78</sup> Rule, D. C., K. S. Broughton, S. M. Shellito, and G. Maiorano. "Comparison of Muscle Fatty Acid Profiles and Cholesterol Concentrations of Bison, Beef Cattle, Elk, and Chicken." *J Anim Sci* 80, no. 5 (2002): 1202-11; . "Effects of time on feed on beef nutrient composition." *J Anim Sci* 71(8): 2079-88; Lopez-Bote, C. J., R.Sanz Arias, A.I. Rey, A. Castano, B. Isabel, J. Thos (1998). "Effect of free-range feeding on omega-3 fatty acids and alpha-tocopherol content and oxidative stability of eggs." *Animal Feed Science and Technology* 72: 33-40; Dolecek, T. A. and G. Grandits (1991). "Dietary Polyunsaturated Fatty Acids and Mortality in the Multiple Risk Factor Intervention Trial (MRFIT)." *World Rev Nutr Diet* 66: 205-16; Dhiman, T. R., G. R. Anand, et al. (1999). "Conjugated linoleic acid content of milk from cows fed different diets." *J Dairy Sci* 82(10): 2146-56; Ip, C, J.A. Scimeca, et al. (1994) "Conjugated linoleic acid. A powerful anti-carcinogen from animal fat sources." p. 1053. *Cancer* 74(3 suppl):1050-4; Aro, A., S. Mannisto, I. Salminen, M. L. Ovaskainen, V. Kataja, and M. Uusitupa. "Inverse Association between Dietary and Serum Conjugated Linoleic Acid and Risk of Breast Cancer in Postmenopausal Women." *Nutr Cancer* 38, no. 2 (2000): 151-7; Smith, G.C. "Dietary supplementation of vitamin E to cattle to improve shelf life and case life of beef for domestic and international markets." Colorado State University, Fort Collins, Colorado 80523-1171.

<sup>79</sup> See Declaration of Dr. Glen Dupree, attached hereto as Exhibit M.

<sup>80</sup> As opposed to confined animal feeding operations which rely upon environmentally destructive commercial grain production, extremely high concentrations of animals in limited space, waste disposal practices which often cause environmental impacts, and heavy antibiotic and other chemical inputs to maintain the health of animals under such adverse conditions. See Doug Gurian Sherman, CAFOs Uncovered, The Untold Costs of Confined Animal Feeding Operations, Union of Concerned Scientists (April 2008), attached hereto as Exhibit N. See also Ho, M.W and L.L. Ching, Mitigating Climate Change through Organic Agriculture and Localized Food Systems, Institute of Science in Society (Mar. 2008), <http://www.i-sis.org.uk/mitigatingClimateChange.php>.

crops used to feed animals in confinement.<sup>81</sup> Moreover, implanted microchips have been known to cause tumors in mammals, an impact which USDA has never recognized or evaluated.<sup>82</sup> In addition, USDA's policy of depopulating animals in response to a range of diseases creates potentially massive environmental impacts for any disease control program.<sup>83</sup> However, none of these impacts were evaluated by USDA/APHIS.

In addition to its failures regarding environmental impacts, USDA has also failed to take a hard look at the enormous economic impacts of NAIS. NEPA regulations interpret "environmental" impacts as including economic and social impacts which are interrelated to the impacts which are purely environmental in nature.<sup>84</sup> NAIS has had and will continue to have substantial economic impacts interrelated with its environmental impacts, which to date have not been evaluated or even identified by USDA. As just one example, increasing the economic burden on small farmers could lead to the consolidation of these farms in large industrial agriculture facilities, or even their development for residential or commercial use, creating significant land use impacts. These impacts were not evaluated, let alone recognized, by USDA.

The impacts of NAIS are highly controversial and the FTCLDF and many others have raised substantial questions about whether NAIS will have a significant effect on the natural and human environment. In such cases, USDA is required to prepare an EIS.<sup>85</sup> Yet USDA has failed to produce so much as an EA and FONSI, or attempted to

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<sup>81</sup> See Doug Gurian Sherman, CAFOs Uncovered, The Untold Costs of Confined Animal Feeding Operations, Union of Concerned Scientists (April 2008), p.25, Citing: Boody, G., B. Vondracek, D. Andow, M. Krinke, J. Westra, J. Zimmerman, and P. Welle. 2005. Multifunctional agriculture in the United States. *Bioscience* 55(1): 27-38; Russell, M.P., M.H. Entz, and A.J. Franzluebbers. 2007. Reconsidering integrated crop-livestock systems in North America. *Agronomy Journal* 99:325-334.

<sup>82</sup> See Katherine Albrecht, Microchip-Induced Tumors in Laboratory Rodents and Dogs: A Review of the Literature, 1990-2006, attached hereto as Exhibit O. See also Declaration of Dr. Melvin Massey, attached hereto as Exhibit P.

<sup>83</sup> For example, the Institute for Homeland Security conducted a simulation in 2002 entitled "Crimson Sky," which modeled what would happen if Foot and Mouth Disease was used in a terrorist attack. Participants included Senator Pat Roberts, the Governor of North Dakota, the Lt. Governor of Nebraska, the Secretary of Agriculture and many senior members of the Interagency Deputies Committee including the Deputy FEMA Director and Deputy EPA Administrator. (September 2002) Among other results, the simulation predicted that so many animals would be depopulated that the government would have to dig a 25-mile long ditch in Kansas to dispose of the carcasses. See <http://www.tihls.org/executiveeed.htm>. The alternative to burial, which would have impacts on groundwater, would be to burn the carcasses, with the resulting impact on air quality. A Texas simulation in 2000 showed hypothetical losses of 20,000 head of cattle in addition to a goat herd, in the space of just 3 days. See News Release, Texas Animal Health Commission, (Nov. 21, 2000), [http://www.tahc.state.tx.us/news/pr/2000/2000Nov\\_Tripartite\\_wrap.pdf](http://www.tahc.state.tx.us/news/pr/2000/2000Nov_Tripartite_wrap.pdf). As with the Crimson Sky exercise, the animals would have to be buried or burned, both carrying significant environmental consequences.

<sup>84</sup> 40 C.F.R. § 1508.14.

<sup>85</sup> A federal action is likely to be deemed significant, requiring preparation of an EIS, if "the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). A "controversial" action is one where there is a substantial dispute regarding the impacts of the action. See Public Citizen v. Dep't of Transp., 316 F.3d 1002, 1027 (9th Cir. 2003)(rev'd on other grounds, 531 U.S. 752 (2004)); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)("Thus, to prevail on a claim that [a federal agency] . . . violated its statutory duty to prepare an EIS, a 'plaintiff need not show that significant effects will in fact occur' It is enough for the plaintiff to raise 'substantial questions whether a project may have a significant effect' on the environment.").



invoke a categorical exclusion, absolving itself from the responsibility to produce an EIS. USDA must comply with these nondiscretionary procedural mandates prior to implementation of NAIS and its substantive components.<sup>86</sup> USDA's failure to do so will result in litigation.

### **3. RFA and Other Procedural Violations**

The Regulatory Flexibility Act ("RFA")<sup>87</sup> requires all federal agencies to analyze their proposed rules for any significant impact on a substantial number of small entities, including businesses, organizations (including non-profit organizations, such as the FTCLDF), and local governments. These impacts must be evaluated prior to implementation of the rule and if such impacts may occur, the agency is required to seek less burdensome alternatives.

All proposed rules must include an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities.<sup>88</sup> The analysis must describe the number of entities impacted, the extent of such impacts, and a description of any alternatives which would accomplish the same regulatory goal, but which would minimize impacts.<sup>89</sup> If the proposed rule may have significant impacts on a substantial number of small entities the agency "shall assure that small entities have been given the opportunity to participate in rulemaking" through notification and opportunity to comment and the agency must also solicit input from the chief counsel for advocacy of the Small Business Administration.<sup>90</sup>

The agency must also publish a final regulatory flexibility analysis concurrent with the final rule that must be more detailed and comprehensive than the initial analysis. For example, the final analysis must include:

"a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected."<sup>91</sup>

Therefore, RFA creates a number of procedural obligations which agencies must comply with that are designed to help ensure that the special concerns of small entities are addressed and considered.<sup>92</sup>

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86 See Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971) (holding that NEPA compliance is not discretionary).

87 5 U.S.C. §§ 601-612.

88 Id. at § 603.

89 Id.

90 Id. at § 609.

91 Id. at § 604(a)(5).

92 See Little Lobster Co. Inc. v. Evans, 352 F.3d 462, 470 (1st Cir. 2003).

In this case, USDA has failed to comply with RFA in the course of promulgating and implementing NAIS. USDA rationalized its noncompliance with RFA in the course of promulgating its 2004 interim and 2007 final rules<sup>93</sup> by concluding that since the rules did not make NAIS mandatory there would be no significant impact on a substantial number of small entities.<sup>94</sup> However, USDA's attempted compliance is deficient for two reasons.

First, RFA requires USDA to evaluate *all* potential impacts from its proposed and final rules, regardless of whether any such rule is obligatory.<sup>95</sup> USDA clearly intended for its interim and final rules to be used to implement NAIS at both the state and federal level and thus was required to evaluate the reasonably foreseeable impacts to small entities. Indeed, USDA has entered into cooperative agreements with and grants to States to implement NAIS. Since implementation of NAIS in this manner causes impacts to small entities then USDA must evaluate those impacts under RFA. RFA itself recognizes this scenario, including within its definition of a "rule" subject to RFA "any rule of general applicability governing Federal grants to State and local governments . . . ." <sup>96</sup>

Second, as noted above and despite USDA's claim to the contrary, USDA's implementation of NAIS is now being made mandatory. For example, existing animal disease control regulations require state compliance with various USDA mandates. A case in point is the State of Michigan, which is required to comply with the terms and conditions of NAIS through its MOUs with USDA for the eradication of TB because USDA has made the various components of NAIS mandatory terms and conditions of Michigan's MOUs. Indeed, cattle producers in Michigan currently do not have the option of refusing to participate in NAIS, even though the logic used by USDA in its RFA analysis was that participation was "voluntary." USDA must, therefore, comply with the RFA's procedural mandates.

Other mandatory implementations, which weave NAIS into existing regulatory fabric and programs, have occurred in the States of Wisconsin and Indiana where premises registration has been made mandatory. Further, farmers in drought-stricken North Carolina and Tennessee have been required to register their premises in order to obtain hay relief. State fairs in Colorado currently are, and state fairs in Illinois previously were, impacted by policies requiring participants to register their premises under NAIS. All of these states, just like Michigan (which is furthest along in NAIS implementation), are operating under cooperative agreements with USDA where the effectively mandatory implementation of NAIS is impacting small farms and livestock-related businesses, yet no RFA analysis was ever conducted.

USDA admits that participation in NAIS may result in significant costs to producers:

"This interim rule has potential implications for small entities in the United States, both in terms of any costs they might incur to satisfy NAIS program

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93 Allowing for the use of PINs and AINs.

94 69 Federal Register 64,647-64,678; 72 Federal Register 39,304.

95 5 U.S.C. §§ 603-604.

96 5 U.S.C. § 601(2).

requirements and in terms of the benefits associated with the program's establishment . . . ."<sup>97</sup>

As noted above, implementation of NAIS has had and will continue to have significant impacts on FTCLDF's producer members, impacts which may be severe enough to put them out of business. NAIS implementation is also likely to affect a wide range of livestock-related and rural businesses. The FTCLDF, as a small non-profit organization, and many of its affected producer members, as small businesses, qualify as small entities under RFA. As such, USDA must evaluate the impacts which implementation of NAIS will have on the FTCLDF and its producer members prior to implementing NAIS. However, USDA has and continues to violate the mandatory procedural requirements of the RFA.

## **B. Substantive Violations**

The federal Administrative Procedure Act ("APA") guides judicial review of agency actions. Upon reviewing an agency action, a court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or that are taken "without observance of procedure required by law."<sup>98</sup> "The duty of a court reviewing agency action under the 'arbitrary and capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made."<sup>99</sup>

In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a "clear error of judgment."<sup>100</sup> Agency actions will be set aside if the agency "entirely failed to consider an important aspect of the problem" or if the decision "runs counter to the evidence before the agency."<sup>101</sup> Furthermore, any such agency action must be supported by "substantial evidence."<sup>102</sup> Thus, an agency must have taken a "hard look" at the issues, articulated and considered all the relevant data, and then have engaged in genuine, "reasoned decision-making."<sup>103</sup>

USDA/APHIS is implementing NAIS through existing, mandatory animal disease control programs and in other ways by providing conditional funding and technical support to States that implement the program. One strategy has been to incorporate NAIS into existing animal disease control programs, as has been done with MDA's bovine tuberculosis ("TB") program. USDA's claimed legal authority to take action to control TB comes from the Animal Health Protection Act<sup>104</sup> ("AHPA") and USDA regulations.<sup>105</sup> MDA alleges similar authority from the Animal Industry Act.<sup>106</sup> However,

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<sup>97</sup> 69 Federal Register 64,647.

<sup>98</sup> 5 U.S.C. § 706(2)(A, D).

<sup>99</sup> Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560, 1574 (10th Cir. 1994).

<sup>100</sup> Id.

<sup>101</sup> Id., quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983).

<sup>102</sup> Olenhouse at 1575; 5 U.S.C. § 706(2)(E).

<sup>103</sup> Greater Boston Television Corp., et al. v. Federal Communications Commission, 444 F.2d 841, 851 (D.C. Cir. 1970).

<sup>104</sup> 7 U.S.C. §§ 8301-8321.

<sup>105</sup> 9 C.F.R. §§ 77.1-77.41.

while USDA and MDA may have legal authority to implement a program to eradicate bovine TB in the State of Michigan, that authority is limited and the agencies must implement these statutes and regulations in a rational manner consistent with the plain language of the AHPA. USDA and MDA's implementation of NAIS through the existing TB program fails this test.

The AHPA authorizes USDA to regulate diseased animals which move in interstate commerce.<sup>107</sup> However, nothing in the Act specifically permits USDA to regulate intra-state movements of animals or to implement a mandatory, nation-wide program such as NAIS with respect to the intrastate movement of animals or within areas where USDA has no probable cause to believe that animals may be diseased or subject to quarantine.<sup>108</sup> USDA's promulgation and implementation of NAIS, therefore, is arbitrary, capricious, an abuse of discretion and not in accordance with applicable law.

In addition, the purpose of AHPA is to control and eradicate animal disease. NAIS, however, does not do this.<sup>109</sup> Indeed, Bovine TB at the turn of the century caused more losses in cattle in the United States than all other diseases combined.<sup>110</sup> Now, the disease is "close to being eradicated in the United States."<sup>111</sup> The near eradication of TB from the United States was accomplished with a simple program of testing cattle and destroying those animals which tested positive.<sup>112</sup> NAIS cannot improve upon this program. How can the placement of an electronic ear tag on a beef cow or dairy cow eradicate TB?

If pockets of TB still exist today in this country, there is no rational basis for USDA to require universal, in perpetuity, premises registration, tagging, and tracking and tracing of all animals in the United States when animal diseases of concern are not similarly widespread. In the case of TB, most states are certified as disease free. Within Michigan, the entire Upper Peninsula as well as a majority of counties within the rest of the State are TB free. There is no rational basis, therefore, for requiring NAIS in these areas to control TB nor is there any rational basis for a universal nation-wide

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106 MCL §§ 287.701-287.747.

107 Cf. 7 U.S.C. § 8306(a) ("The secretary may hold, seize, quarantine, treat, destroy, dispose of, or take other remedial action with respect to . . . any animal . . . [that] is moving or has been moved in interstate commerce . . ."); see also 7 U.S.C. § 8307(b)(3) (Allowing the USDA to stop and inspect persons conveying animals in intrastate commerce only in portions of the state which are under quarantined and with probable cause.).

108 While the Animal Health Protection Act may provide authority for USDA to take some actions to address TB, it does not authorize the NAIS. USDA claims that the AHPA provides authority for NAIS, Draft Plan at 9, yet that statute addresses only import and export of animals, interstate travel, quarantines areas, and related programs. Animal Health Protection Act, 7 U.S.C. §§ 8301-8320 (Supp. 2005). The statute contains no provisions that mention registration of every livestock owner's farm or a nationwide or intrastate animal identification and tracking program, nor are there any provisions that would provide authority for such a program. Although multiple bills have been introduced since USDA began implementation of NAIS to give USDA the statutory authority to do so, none have been adopted. HR 3787, HR 3822, HR 3961, S 2070 & S 2008, 108th Congress (2004-05), HR 1254, HR 1256 & HR 3170, 109th Congress (2005-06).

109 See Declaration of Dr. Melvin Massey, Exhibit P.

110 70 Federal Register 58,291.

111 <http://www.michigan.gov/emergingdiseases/0,1607,7-186-25804-74719--,00.html>.

112 See Alan L. Olmstead and Paul W. Rhode, An Impossible Undertaking: The Eradication of Bovine Tuberculosis in the United States, THE JOURNAL OF ECONOMIC HISTORY, Vol. 64, No. 3 (September 2004).

NAIS program when most areas of the country are not suffering from any serious animal disease problems.

In addition, NAIS is not rationally related to the nature of the TB problem in Michigan. For example, bovine TB takes months to years for an infection to become established, for tests to recognize the disease, for the animal to become sick, and for the animal to become infectious. Moreover, the main cause of TB in Michigan is a persistent reservoir of infection in wildlife. Given these facts, there is no scientific basis for the assumption that the 48-hour tracing of domestic animals to their point of origin would hold any benefit for controlling the disease, above and beyond what existing testing requirements and wildlife management strategies can achieve.

Nor does NAIS distinguish among various categories of risk related to the spread of TB. For instance, the rate of TB infection is higher within confined animal feeding operations than it is within free-range grazing operations.<sup>113</sup> Likewise, and apparently due to a link between the amount of free iron in the soil and the prevalence of TB, it has been discovered that the liming of soil, which in turn reduces acid and the amount of free iron, has in Michigan resulted in a ten fold reduction in TB infection. Such nutritional and environmentally based controls have not been considered in any analysis. Based on such evidence, it is apparent that the risk of TB may be much lower for cattle operations which free range and graze on grass growing in healthy, low acid, low free iron soils.<sup>114</sup> Thus, science does not support the use of NAIS as an instrument to curtail the spread of disease.

Moreover, and in addition to the lack of scientific support, USDA has based NAIS on entirely unsupported assumptions about its feasibility and workability. Microchips are subject to multiple problems that make their effectiveness in a tracking system highly questionable. Microchips can be cloned or infected with computer viruses.<sup>115</sup> The specific type of microchip designated by USDA for NAIS is reprogrammable making it useless against purposeful wrongdoing.<sup>116</sup> USDA's own pilot projects have shown that a large percentage of affected individuals do not own computers or have internet access, making this technology-dependent program impossible unless those individuals are forced to stop owning animals, or forced to purchase, learn to use, and devote their

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<sup>113</sup> Olmstead and Rhode at 5.

<sup>114</sup> USDA/MDA have given no attention to the link between health or nutrition of animals and TB. For example, some animals exhibit presumptive evidence of TB yet they are actually healthy and do not show manifestation of the disease. By automatically destroying such "presumptive TB" animals, the USDA/MDA are eliminating from the gene pool exactly those animals whose resistance to the disease is most likely to cause them and their progeny to survive. This is but one more example of how the USDA/MDA assume without evidence that NAIS will benefit disease control without first taking a hard look at alternatives.

<sup>115</sup> See Annalee Newitz, *The RFID hacking underground*, Wired, [www.wired.com/wired/archive/14.05/rfid\\_pr.html](http://www.wired.com/wired/archive/14.05/rfid_pr.html). (discussing how to clone a microchip by passing a small device over it); John Markoff, *Study says chips in ID Tags are vulnerable to viruses*, New York Times (Mar. 15, 2006). In a university study in the Netherlands, a group of scientists showed that it was possible to create a self-replicating RFID virus. Rieback, M.R., B. Crispo and A. Tanenbaum, *Is your cat infected with a computer virus?*, Vrije Universiteit Amsterdam, Computer Systems Group. (Discussing how RFID tags can be infected with a computer virus that would then be picked up by the reader and potentially passed on to other microchips by the reader).

<sup>116</sup> See Letter from B. Masin to J. McGeary (May 31, 2006), attached hereto as Exhibit Q.

valuable time to computers.<sup>117</sup> And experience in Australia with a similar program for cattle has proven that the databases are subject to extremely high error rates making them essentially useless in cases of true emergencies.<sup>118</sup> These and many other problems with the design and feasibility of NAIS have been documented over the last several years.<sup>119</sup>

For the reasons stated herein, MDA has likewise failed to comport with applicable law and to provide a rational basis for its decision to implement NAIS as part of its existing TB program.<sup>120</sup> In addition, MDA's implementation of NAIS goes beyond any authority given it by Michigan's Animal Industry Act. The Act does not require any particular type of "official identification"<sup>121</sup> yet MDA has imposed a single type of official identification, an electronic ear tag, via administrative fiat, namely, the Director's November 2006 letter. The Act does not require official identification of swine or poultry<sup>122</sup> yet MDA has used federal money to implement NAIS for swine and poultry operations as well as for cattle and sheep. The Act does not require premises registration, does not require 48-hour traceability, and most importantly does not require MDA to help establish and participate in any nation-wide animal identification system, or otherwise take actions which are unrelated to animal disease control.<sup>123</sup> Yet this is exactly what MDA is doing through its MOUs with USDA.

Implementation of NAIS is arbitrary, capricious, an abuse of discretion, and not in accordance with applicable law. The agencies failed to examine the relevant data and articulate a rational connection between the facts and the decisions made; failed to consider important aspects of the disease control problem; failed to support NAIS with substantial evidence; and failed to take a hard look at the evidence or engage in reasoned decision making prior to implementation of NAIS. Implementation of NAIS is substantively illegal and should be immediately terminated.

### **C. Violations of Religious Freedom**

The United States Constitution prohibits the government from establishing a particular religion or prohibiting the free exercise thereof.<sup>124</sup> As such, the United States Congress has passed the Religious Freedom Restoration Act ("RFRA").<sup>125</sup> RFRA prohibits USDA from substantially burdening a person's sincerely held exercise of religion unless: 1) there is a compelling governmental interest; and 2) the burden is the least restrictive means of furthering that interest. The Michigan Constitution applies

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<sup>117</sup> USDA-APHIS, The National Animal Identification System (NAIS): Pilot Projects/ Field Trials Summary (May 2007), attached hereto as Exhibit R.

<sup>118</sup> Australian Beef Association. Response to NSW Agriculture, Regulatory Impact Statement and Draft Regulation on NLIS, attached hereto as Exhibit S.

<sup>119</sup> See, e.g., Farm and Ranch Freedom Alliance, Analysis of the National Animal Identification System (July 15, 2006), attached hereto as Exhibit T.

<sup>120</sup> The MAPA's rules for judicial review of agency action are similar to those for the APA, stating that "the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is . . . in excess of statutory authority . . . arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion." MCL § 24.306.

<sup>121</sup> MCL § 287.706.

<sup>122</sup> MCL § 287.711b.

<sup>123</sup> MCL §§ 287.701-287.746.

<sup>124</sup> U.S. CONST. Amend. I.

<sup>125</sup> 42 U.S.C. § 2000bb.

essentially the same test, prohibiting State agencies from burdening a person's sincerely held exercise of religion absent a compelling State interest justifying the burden and only when the burden constitutes the least obtrusive form available to the State.<sup>126</sup>

In implementing NAIS, USDA and MDA are placing a substantial burden upon the sincerely held religious beliefs of many of FTCLDF's members. Some farmer members have a deeply held religious belief that the use of certain types of technology, such as electronic ear tags or RFID chips, violates their faith. In forcing these individuals to use such technologies against their religious beliefs or else forego their livelihoods and way of life, USDA and MDA are placing a substantial burden on the free exercise of their faith.

Likewise, other farmer members are opposed to a universal NAIS program on the basis that it violates certain prohibitions found within the Bible's Book of Revelation.<sup>127</sup> These individuals sincerely and strongly believe that God prohibits their participation in any sort of governmental regulatory system which imposes on them a "mark of the beast," meaning a system whereby individuals must obtain some sort of individualistic "mark" or identifying "number" without which that individual cannot participate in commerce, i.e. "buy and sell." They believe that NAIS qualifies by virtue of the fact that the goal of NAIS is a universal governmental system which numbers and marks each and every agricultural animal within the United States, and a failure to participate would effectively prohibit their participation in commerce with respect to their current livelihood.

USDA and MDA have failed to consider the sincerely held religious beliefs of these individuals prior to making NAIS effectively mandatory, in violation of RFRA and the Michigan Constitution. First, USDA and MDA have failed to demonstrate a compelling governmental interest in a mandatory (or non-mandatory) NAIS program. As explained above, NAIS has little to no rational relationship with legitimate animal disease control programs particularly with respect to States and portions of States which have no existing disease control problems. Absent compelling evidence that a universal, mandatory NAIS is really necessary to control animal disease, USDA and MDA cannot place a substantial burden on the free exercise of these individuals' faith.

Second, even assuming that a compelling interest exists for implementation of NAIS, USDA and MDA still have a duty to find the least restrictive means of implementing the program. For example, the effectiveness of NAIS in tracing animal disease would not be substantially harmed by allowing persons who claim a legitimate religious burden to opt out of NAIS. This is particularly true for those individuals who live in areas with no existing disease problems. Likewise, USDA and MDA could allow participants to use forms of technology which do not offend their religious sensibilities, or by allowing individuals to take measures (such as voluntarily testing their animals) which have proven effective to control disease instead of participating in NAIS but which are less burdensome on their faith. These are all reasonable measures which might

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<sup>126</sup> McCready v. Hoffius, 459 Mich. 131 (1998).

<sup>127</sup> See Declaration of Reverend Rosanne Wyant, attached hereto as Exhibit U.

satisfy the government's compelling interest, if any, while substantially reducing or eliminating the corresponding burden on faith.

Accordingly, NAIS also violates religious freedoms.

#### **IV. DEMANDS**

Based on the foregoing, FTCLDF respectfully requests that USDA and MDA take the following actions:

1. Immediately suspend development, funding and implementation of NAIS, including implementation via existing animal disease control programs, pending compliance with applicable procedural mandates, including but not limited to procedures required by the APA, NEPA, RFA and RFRA.
2. Fully and fairly examine the need for any sort of NAIS program to supplement existing animal disease control mechanisms, in light of applicable scientific data.
3. Take a hard look at all alternatives to NAIS.
4. Do not exceed statutory authority in the subsequent implementation of NAIS or NAIS-type program.
5. Following compliance with all procedural and substantive requirements, allow participation in any subsequent NAIS program to be in fact voluntary, with no penalties for nonparticipation, no government incentives for participation, and effective procedure for citizens to withdraw.
6. If not completely voluntary, allow individuals and States to decline NAIS participation where there is little to no rational relationship between animal disease control and participation in NAIS, where there is no probable cause to believe that animal disease is present, or where participation in the NAIS offends the sincerely held religious beliefs of the individual.
7. Notify the FTCLDF of all developments, policy statements, responses to this letter, or any other agency actions involving NAIS.
8. Should the USDA/APHIS respond to this letter, please provide all documents, memoranda, or other information, in any form whatsoever, which the USDA/APHIS used, relied upon, or cited to in said response, or to justify its position regarding any of the foregoing allegations or statements, without limitation. This request is made Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on behalf of the FTCLDF and its members. This information should not be subject to the Freedom of Information Act exemptions, and access to the requested documents should be granted within twenty (20) working days from the date of issuance of said response. The FTCLDF also requests that if you determine that some of the information requested is exempt from FOIA,



that this information be identified by a Vaughn index, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, I request that the FTCLDF be provided with all non-exempt portions that can reasonably be segregated. If there is any problem in providing this information, please let me know so that further arrangements can be made. Your response should be directed to FTCLDF to my attention at my firm's address.

We are asking for a response to this letter within 30 days of its receipt. If no response is received by that date we will consider taking appropriate action.

Looking forward to hearing from you soon, I remain,

Respectfully,

LANE, ALTON & HORST, LLC

David G. Cox

FTCLDF Board  
FTCF Board  
Bruce Knight, USDA/APHIS