

**BEFORE THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

**Farm-to-Consumer
Legal Defense Fund
8116 Arlington Blvd, Suite 263
Falls Church, VA 22042**

Plaintiff

**Robert Alexander
15497 Church Road
Coral, Michigan 49322**

Plaintiff

**Joe Golimbieski
2366 South M76
Standish, Michigan 48658**

Plaintiff

**Robert Keyworth
8702 Arendt Road
Yale, Michigan 48097**

Plaintiff

**Glen Mast
5625 W. Fremont Road
Blanchard, Michigan 49310**

Plaintiff

**Andrew Schneider
15689 Pratt Road
Westphalia, Michigan 48894**

Plaintiff

**Reverend Roseanne Wyant
5493 Chapman Road
Remus, Michigan 49340**

Case No.

Judge

Case: 1:08-cv-01546
Assigned To : Collyer, Rosemary M.
Assign. Date : 9/8/2008
Description: Admn. Agency Review

National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C.S. 4321 *et seq.*; the Regulatory Flexibility Act (“RFA”), 5 U.S.C. 601 *et. seq.*, the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 2000bb, *et seq.*; the Michigan Administrative Procedure Act, MCL 24.201 *et seq.*; the Michigan Animal Industry Act, MCL 287,701 *et seq.*; Article 1, Section 4 of the Michigan Constitution; and regulations adopted thereunder.

2. Plaintiffs seek to enjoin the implementation and enforcement of the National Animal Identification System (“NAIS”) currently being implemented by the United States Department of Agriculture (“USDA”) through its Animal and Plant Health Inspection Service (“APHIS”) and by the Michigan Department of Agriculture (“MDA”).

3. A preliminary injunction is necessary at the appropriate time because Plaintiffs will suffer irreparable, actual harm if enforcement of NAIS is not enjoined due to its several violations of state and federal laws. Specifically, the individual Plaintiffs have either already decided that complying with NAIS is too costly and thus will have to quit farming altogether or that the NAIS program violates their religious freedoms and beliefs.

4. 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 furthers the common good and general welfare of all Americans. The FTCLDF defends and 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.

5. The FTCLDF and its members are 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.

The Parties

6. Plaintiff Fund is a non-profit organization organized under the laws of the State of Ohio. The Fund's principal place of business is located at 8116 Arlington Blvd, Suite 263, Falls Church, VA 22042.

7. As of August 28, 2008, the Fund consisted of 1,384 members, 84 of whom are residents and taxpayers of the State of Michigan.

8. Plaintiff Robert Alexander is a member of the Fund, is a member of the Old Order Amish Church, believes that God and the Bible authorize him with dominion over all animals on the planet and prohibit him from taking the "mark," and resides at 15497 Church Road, Coral, Michigan 49322.

9. Plaintiff Joe Golimbieski is a member of the Fund, believes that God and the Bible authorize him with dominion over all animals on the planet and prohibit him from taking the “mark,” and resides at 2366 South M76, Standish, Michigan 48658.

10. Plaintiff Robert Keyworth is a member of the Fund, a Pentecostal minister, believes that God and the Bible authorize him with dominion over all animals on the planet and prohibit him from taking the “mark,” and resides at 8702 Arendt Road, Yale, Michigan 48097.

11. Plaintiff Glen Mast is a member of the Fund, is a member of the Old Order Amish Church, believes that God and the Bible authorize him with dominion over all animals on the planet and prohibit him from taking the “mark,” and resides at 5625 W. Fremont Road, Blanchard, Michigan 49310.

12. Plaintiff Andrew Schneider is a member of the Fund and resides at 15689 Pratt Road, Westphalia, Michigan 48894.

13. Plaintiff Roseanne Wyant is a member of the Fund, is an ordained Reverend of the Christian faith, believes that God and the Bible authorize her with dominion over all animals on the planet and prohibit her from taking the “mark,” and resides at 5493 Chapman Road, Remus, Michigan 49340.

14. The Plaintiffs identified in paragraphs 7 through 13 are collectively referred to as “individual Plaintiffs.”

15. Plaintiffs Alexander, Golimbieski, Keyworth, Mast, Schneider and Wyant are all farmers engaged in agricultural activities and raise some form of livestock.

16. Defendant Ed Schafer is the current Secretary of the United States Department of Agriculture (“USDA”), an agency of the United States. As Secretary, Mr.

Schafer is responsible for the direction and supervision of all operations and activities of the USDA. USDA has at least one office located in Michigan. Defendant Schafer is being named a party in his official capacity as Secretary of USDA.

17. Defendant Don Koivisto is the current Director of the Michigan Department of Agriculture (“MDA”). As Director, Mr. Koivisto is responsible for the direction and supervision of all operations and activities of the MDA. Defendant Koivisto is being named a party in his official capacity as Director of MDA.

Jurisdiction and Venue

18. This Court has jurisdiction pursuant to 28 U.S.C.S. 1331 because this case addresses a federal question, 28 U.S.C.S. 1346(a)(2) because an agency of the United States is a party, and 28 U.S.C.S. 1367 because the case also alleges claims brought under State law.

19. Venue lies with this Court under 28 U.S.C.S. 1391(b)(2) and (e)(2) because this action involves a federal question and an agency of the United States which is located in the District of Columbia.

20. As a general rule, a citizen may not sue a state in federal court. U.S. Const. Amend. XI. However, state officials may be sued in federal court to enjoin ongoing and future violations of federal statutory and constitutional law. *Ex Parte Young*, 209 U.S. 123 (1908). A state may also waive its sovereign immunity by consenting to be sued in federal court. *College Sav. Band v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 522 U.S. 666 (1999); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). A state's waiver of immunity may be inferred by the state's conduct. *Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984). A state

may consent to suit in federal court by virtue of the state's participation in federal programs or by receipt of federal funding. *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002); *MCI Telecommunications Corp. v. Public Service Comm. of Utah*, 216 F.3d 929 (10th Cir. 2000). In this case, jurisdiction over Defendant Koivisto and the MDA is proper to enjoin prospective and ongoing violations of federal constitutional and statutory law in that the State of Michigan has waived its immunity under the Eleventh Amendment when it participated in and implemented the federally funded NAIS program.

21. On May 14, 2008, Plaintiff Fund sent a 25-page "Notice of Intent to Sue" letter to both Defendants that outlined Plaintiff's legal issues and concerns with NAIS and attached numerous documents in support of Plaintiff's position in order to make a record. In its letter, Plaintiff Fund requested a response from Defendants within 30 days but as of the date of the filing of this complaint the Fund has not received any response from Defendants to this letter.

22. On June 19, 2008, Plaintiff Fund sent a supplemental letter to both Defendants, attaching more documents in support of its position and requested a response on or before June 30, 2008. As of the date of this filing Plaintiff Fund has not received any response from Defendant USDA to this letter.

23. On July 14, 2008, Plaintiff Fund sent a second supplemental letter to both Defendants, attaching more documents in support of its position. As of the date of this filing Plaintiff Fund has not received any response from Defendants to this letter.

Standing

24. Plaintiffs will be damaged and will suffer an injury in fact by the conduct engaged in by Defendants as described in this Complaint.

25. Plaintiffs' injury in fact will be caused by Defendants' conduct described in this Complaint.

26. Plaintiffs' injury in fact will be redressed by a favorable ruling on the claims presented in this Complaint.

27. The Fund Plaintiff has standing because several of its members, including but not limited to the individual Plaintiffs, have standing to sue in their own right. The interests at stake in this suit, namely the halting of an intrusive, overly burdensome, and environmentally harmful program that interferes with farmers' ability to raise food and consumers' ability to obtain such foods, are germane to the Fund's purpose and mission. With the exception of the religious freedom claims, which are asserted by the individual Plaintiffs, none of the claims asserted nor the relief requested require the participation of individual members.

Background of the National Animal Identification System ("NAIS")

28. NAIS was developed by USDA and is being implemented through its Animal and Plant Health Inspection Service ("APHIS") and various state agencies, including but not limited to MDA.

29. NAIS alleges to be a comprehensive program of animal tracking whose alleged goal is to prevent, minimize or reduce disease in animals. NAIS allegedly accomplishes this goal by: 1) assigning and registering in a nationally coordinated database a unique premises identification number ("PIN") for every farm with a livestock

or poultry animal (“premises”); 2) assigning and registering in a nationally coordinated database every animal on said premises a unique animal identification number (“AIN”) or group identification number (“GIN”); and 3) tracking and tracing the movements of all such identified animals.

30. USDA and MDA have ignored the substantive and procedural rights of FTCLDF and its members and the individual Plaintiffs in the course of developing and implementing NAIS, including how it is being implemented in Michigan.

31. On November 8, 2004, USDA adopted an interim rule (the “2004 interim rule” or “interim rule”) that 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.” The alleged purpose of the rule was to “facilitate the development and implementation of the NAIS.”

32. In the interim rule, USDA claimed that NAIS was 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.”

33. USDA failed to explain in the interim rule 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.

34. 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.”

35. USDA concluded in the 2004 interim rule that it “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.”

36. However, USDA further stated in the 2004 interim rule that “[l]ittle information is available at this time about costs that may be incurred by producers.”

37. Notwithstanding this admission that NAIS would have unknown 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.” Emphasis added.

38. USDA stated in the interim rule 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.”

39. 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.

40. At no time prior to adopting the 2004 interim rule did USDA prepare an Environmental Assessment ("EA"), an Environmental Impact Statement ("EIS"), any other similar environmental document, or conduct any analysis of the financial impact the interim rule would have on small businesses.

41. On July 18, 2007, USDA adopted, with minor changes, the 2004 interim rule as a final rule.

42. At no time prior to adopting the 2007 final rule did USDA prepare an Environmental Assessment ("EA"), an Environmental Impact Statement ("EIS"), any other similar environmental document, or conduct any analysis of the financial impact the final rule would have on small businesses.

43. On May 6, 2005, USDA announced in the Federal Register that it had issued three documents, one of which was identified as a "Draft Strategic Plan" ("Draft Plan") and another as a "Draft Program Standards" ("Draft Standards").

44. Notwithstanding its statements in the 2004 interim rule that (1) "[l]ittle information is available at this time about costs that may be incurred by producers;" (2) "[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;" and (3) "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;" USDA stated that the Draft Plan and Draft Standards would set out its three-step plan for NAIS and that the program would become mandatory after an initial voluntary period.

45. At no time prior to adopting the 2005 Draft Plan or the Draft Standards did USDA prepare an Environmental Assessment ("EA"), an Environmental Impact

Statement (“EIS”), any other similar environmental document, or conduct any analysis of the financial impact these documents would have on small businesses.

46. In April 2006, USDA issued a “Strategies for Implementation of NAIS,” which alleged that NAIS was voluntary at the federal level but that USDA’s goal was 100% participation within three years, or by 2009.

47. At no time prior to adopting the 2006 Strategies for Implementation of NAIS did USDA prepare an Environmental Assessment (“EA”), an Environmental Impact Statement (“EIS”), any other similar environmental document, or conduct any analysis of the financial impact these documents would have on small businesses.

48. In November 2006, USDA issued a NAIS “User Guide” which again stated that NAIS was voluntary at the federal level but was quiet on numerical goals for participation. However, a concurrently issued announcement of funding for state implementation of NAIS still called for States to implement the program on the original timeline.

49. At no time prior to adopting the 2006 NAIS User’s Guide did USDA prepare an Environmental Assessment (“EA”), an Environmental Impact Statement (“EIS”), any other similar environmental document, or conduct any analysis of the financial impact these documents would have on small businesses.

50. 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”).

51. The purpose of the 2007 Business Plan was to provide detailed “strategies and actions” to implement NAIS which “requires a comprehensive animal-disease traceability infrastructure.” Although the Business Plan claims that “[p]articipation in NAIS is voluntary at the federal level,” it also admittedly details a number of final agency actions which USDA/APHIS have taken, is currently taking, or will soon take to implement NAIS.

52. For example, some actions mentioned by the 2007 Business Plan that USDA/APHIS would be taking include the following: (a) “USDA will . . . implement immediate short term strategies, as outlined in this business plan;” (b) “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;” (c) “Each State, Tribe or Territory will be required to evaluate, describe, and identify animal disease traceability within their State, Tribe or Territory” and (d) “USDA will take steps to standardize data elements in existing programs. . . .”

53. 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 various State agencies.

54. At no time prior to adopting the 2007 Business Plan did USDA prepare an Environmental Assessment (“EA”), an Environmental Impact Statement (“EIS”), any other similar environmental document, or conduct any analysis of the financial impact the Business Plan would have on small businesses.

USDA Coerces MDA to Implement NAIS at the State Level under the Guise of TB Eradication

55. USDA/APHIS has been taking concrete actions to implement NAIS for several years now, including but not limited to the provision of conditional funding and technical support to States that implement NAIS, and by making NAIS mandatory through existing, mandatory animal disease control programs, as has been done with MDA's bovine tuberculosis ("TB") program.

56. For example, in a March 26, 2002 Memorandum of Understanding (the "2002 MOU") between MDA and APHIS, the MOU stated: "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*." Emphasis added.

57. According to "scientists, biologists, epidemiologists, and veterinarians who have studied this problem," therefore, the primary cause of TB in Michigan is wildlife, not domesticated animals like cattle or cows or poultry. Since the primary solution to eradicate TB in Michigan is to modify the management of said wildlife the State of Michigan has taken action to modify the management of wildlife in order to reduce or eliminate the transmission of TB from wildlife to domestic livestock.

58. However, USDA/APHIS is using the State of Michigan as a puppet to implement NAIS in Michigan 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 Michigan as well as being caused by animals imported in Michigan.

59. Federal law allows USDA/APHIS to regulate the *interstate movement* of animals with TB. Under applicable law, USDA classifies states or portions of States into one of several zones, including 1) modified accredited (TB prevalent in less than 0.1% of herds); 2) modified accredited advanced (TB prevalent in less than 0.01% of herds; and 3) accredited free (no TB for five years prior).

60. 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." 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. Not surprisingly, some of these "conditions for zone recognition" are now beginning to require compliance with NAIS program requirements.

61. The 2002 MOU established two TB zones in Michigan, one a modified accredited zone and the other a modified accredited advanced zone.

62. Pursuant to the 2002 MOU, USDA required MDA to "manage wildlife" so as to: "[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.” In other words, the movement and tracking of all domesticated animals was now required in order to “manage wildlife.”

63. Specifically, the 2002 MOU required MDA to mandate “official identification” on “all domestic livestock that move from any premises” within these zones, including movement within disease-free areas. The 2002 MOU also required MDA to mandate and “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.”

64. At no time prior to entering into the 2002 MOU did USDA or MDA prepare an Environmental Assessment (“EA”), an Environmental Impact Statement (“EIS”), any other similar environmental document, or conduct any analysis of the financial impact the 2002 MOU would have on small businesses.

65. MDA’s entering into and execution of the 2002 MOU constitutes a waiver of Michigan’s sovereign immunity.

66. On October 7, 2004, MDA requested that USDA reclassify Michigan’s Upper Peninsula as a TB accredited free zone because TB had not been diagnosed in any domestic or wild animal in the region since at least 1979, over 25 years. (See paragraph 72).

67. In November 2004 MDA issued a letter (the “2004 letter”) to all cattle producers which stated that non-electronic ear tags and “tattoos” would be recognized as official forms of “identification.”

68. At no time prior to issuing the 2004 letter did USDA or MDA prepare an Environmental Assessment ("EA"), an Environmental Impact Statement ("EIS"), any other similar environmental document, or conduct any analysis of the financial impact the 2004 letter would have on small businesses.

69. On July 26, 2005, MDA entered into another MOU with USDA/APHIS (the "2005 MOU"). Unlike the previous 2002 MOU, 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 recognized as official forms of identification.

70. 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" The transition from NAIS being a "voluntary" program to a mandatory program in Michigan was well on its way.

71. At no time prior to entering into the 2005 MOU did USDA prepare an Environmental Assessment ("EA"), an Environmental Impact Statement ("EIS"), any other similar environmental document, or conduct any analysis of the financial impact the 2005 MOU would have on small businesses.

72. MDA's entering into and execution of the 2005 MOU constitutes a waiver of Michigan's sovereign immunity.

73. On October 6, 2005, and after finding that MDA had complied with all of the NAIS requirements in the 2005 MOU, USDA published an interim rule establishing Michigan's Upper Peninsula as a TB accredited free zone.

74. Following the 2005 MOU, MDA took substantial steps in 2006 toward implementation of NAIS.

75. In 2006, MDA registered nearly 45,000 premises pursuant to NAIS specifications. MDA also used existing MDA data regarding farms to create a PIN database and collected additional information during "surveillance efforts," apparently without the knowledge or permission of the affected farmers.

76. In 2006, MDA registered premises not only with cattle and bison, but also with sheep, swine and poultry as well. MDA's alleged goal was to focus on cattle, due to the TB situation, but then to "expand to the other species groups" with no identified risk of TB.

77. At no time prior to conducting the 2006 registrations did USDA or MDA prepare an Environmental Assessment ("EA"), an Environmental Impact Statement ("EIS"), any other similar environmental document, or conduct any analysis of the financial impact the registrations would have on small businesses.

78. On July 28, 2006, MDA requested a grant of \$179,000 from the USDA (the "2006 grant") to implement NAIS, primarily to 1) register premises and forward that information into the NAIS database; 2) convince the public that NAIS is a good idea; and 3) implement the electronic identification required by NAIS and mandated by USDA in the 2005 MOU.

79. The 2006 grant was approved by USDA on May 8, 2007 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 2006 grant that was approved in 2007 was clearly intended to implement NAIS in Michigan and to make its requirements mandatory by 2009.

80. At no time prior to submitting the 2006 grant did USDA or MDA prepare an Environmental Assessment (“EA”), an Environmental Impact Statement (“EIS”), any other similar environmental document, or conduct any analysis of the financial impact the 2006 grant would have on small businesses.

81. MDA's submission and USDA's ultimate approval of the 2006 grant application constitutes a waiver of Michigan's sovereign immunity.

82. In November 2006, MDA issued a second letter to all Michigan cattle producers informing them that MDA would begin mandatory implementation of NAIS as of March 1, 2007.

83. In the November 2006 letter, 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 or absence of TB.

84. 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.

85. The November 2006 letter also stated that MDA's "TB surveillance program," which mandates that any vehicle transporting livestock (even within the state) must stop at any posted inspection point and produce documentation proving compliance with all livestock moving requirements, would "continue for one more year."

86. 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.

87. 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 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 in exchange for MDA's agreement to implement NAIS on a mandatory basis for all cattle.

88. At no time prior to its issuance of the November 2006 letter did USDA or MDA prepare an Environmental Assessment ("EA"), an Environmental Impact Statement ("EIS"), any other similar environmental document, or conduct any analysis of the financial impact the November 2006 letter would have on small businesses.

89. In both its November 2004 and November 2006 letters, 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 two letters signed by its Director.

90. On February 9, 2007, MDA issued an “order” (“the February 2007 Order”) that required, in part, “all cattle must be identified with official RFID electronic identification eartags prior to movement from a premises within Michigan, unless exempted by the director.”

91. MDA did not promulgate the February 2007 Order 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 the February 2007 Order.

92. In 2007, MDA applied for federal funds from USDA in order to implement NAIS in the State of Michigan.

93. In its final “Federal Grant Proposal 2006/2007 National Animal Identification System” (“2007 Grant Proposal”) that was executed on May 8, 2007, MDA indicated it needed federal funding to support Michigan’s “movement certification program for any cattle of any age moving from one zone in Michigan to another zone in Michigan.”

94. In the 2007 Grant Proposal, MDA stated that “all animals being moved must be tagged;” that livestock producers “will be issued a plastic premises registration