

withheld by an administrative agency” (such as a rulemaking or denial of a permit) as contemplated by Local Rule 83.6. R-CALF instead claims that USDA engaged in an ongoing course of conduct throughout a two-year period (from the fall of 2017 through at least the fall of 2019) that violated the requirements of FACA, a law designed to ensure transparency and balance in the conduct of federal advisory committees. *See* FACA §§ 2, 10. Courts throughout the nation require the Government to file formal responsive pleadings to such claims and, as appropriate, to respond to discovery. *See, e.g., Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004); *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221 (10th Cir. 2004). R-CALF is unaware of a single reported decision in which a federal court limited a FACA lawsuit to review of an administrative record that was cobbled together by the Government after a lawsuit was filed.

Even a cursory review of the “Administrative Record” produced by USDA confirms that Local Rule 83.6 does not apply here. The Agency’s Administrative Record consists of a handful of documents (many of them duplicates) identified as having been considered by USDA “in connection with” the Cattle Traceability Working Group (CTWG) and the Producers Traceability Council (PTC), the two advisory committees at issue. *See* Dkt. No. 29. None of those documents reference FACA and do not explain USDA’s ostensible decision to avoid FACA’s requirements.

On March 23, 2020, R-CALF submitted a Freedom of Information Act (FOIA) request to USDA for documents related to the CTWG. *See* Affidavit of Kara Rollins, Exhibit 1. USDA finally produced its “first partial release” of 200 pages of documents on July 24, 2020. Importantly, those documents produced by USDA in response to the FOIA request were not included in the Administrative Record—despite relating to USDA’s communication with the CTWG. USDA recently notified the Court that its Administrative Record is incomplete and will be supplemented. While the documents provided pursuant to FOIA clearly should have been included in the Administrative Record, they are still silent on the issue regarding USDA’s compliance with FACA.

ARGUMENT

Under the Administrative Procedure Act (APA), a federal agency's actions are arbitrary and capricious if, as here, it fails to “examine[] ‘the relevant data’ and articulate[] ‘a satisfactory explanation’ for [its] decision, ‘including a rational connection between the facts found and the choice made.’” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). R-CALF has challenged the USDA's actions in forming and working with two separate advisory committees without following FACA. The only plausible interpretation of the documents supplied by USDA to date is that it never formally addressed whether the two committees were subject to FACA—and thus never made a decision on that issue one way or the other. Because USDA allegedly failed to make a specific determination as to whether FACA applied, R-CALF cannot be limited to reviewing the few documents that USDA pulled together in a so-called Administrative Record. The USDA, in other words, cannot argue that R-CALF is prohibited from conducting the discovery necessary to show that USDA violated FACA when it convened and worked with the CTWG and PTC advisory committees to develop the RFID requirements.

R-CALF suspects that USDA will claim that it neither “established” nor “utilized” the two advisory committees at issue and that FACA is inapplicable. Many of the documents produced by USDA, however, refute that claim outright, including several documents that confirm that Agency officials played a prominent role in “establishing” the CTWG. Starting in the fall of 2017, for example, USDA officials announced that they were strongly considering adopting an electronic identification (EID) system for cattle, and that an industry-led task force was needed to assist USDA in developing a “comprehensive plan” for such transition:

The United States must move toward an EID system for cattle with a target implementation date of January 1, 2023. A comprehensive plan is necessary to address the multitude of very complex issues related to the implementation of a

fully integrated electronic system. *A specialized industry-lead [sic] task force with government participation* should develop the plan, with a focus on several key objectives.... (Emphasis added).

Administrative Record (“AR”) 000124 (USDA, *Animal Disease Traceability, Summary of Program Reviews and Preliminary “Next Step” Recommendations* (Nov. 2017) at 18 (Exhibit 2).

USDA then provided a detailed account of the “complex” issues the committee would be expected to address. *Ibid.* Many of USDA’s stated objectives and plans for the “industry-lead [sic] task force” related to RFID requirements ended up in the 2019 Factsheet that was the subject of R-CALF’s underlying lawsuit against USDA. It was thus through this USDA-authored document that the Agency not only described the establishment of the “industry-lead [sic] task force,” but gave such “task force” (a/k/a the CTWG advisory committee) its marching orders.

USDA also outlined the task force at the “Traceability Forum,” a September 2017 event in Denver sponsored by the Agency and attended by many of its officials. During this Forum USDA convened and facilitated a meeting to establish the industry-led task force, which came to be known as the CTWG. According to a February 23, 2018 email from USDA’s Aaron Scott (AR000002, Exhibit 3) the CTWG “was formed as an outcome of the NIAA/USAHA forum [in Denver] that we co-hosted.” Importantly, the Administrative Record prepared by USDA contains no mention of the organizational meeting “facilitated” by USDA. R-CALF seeks discovery to determine the nature of USDA’s meeting role and its establishment of the CTWG within the meaning of FACA.

Discovery is also necessary to establish the extent to which USDA “utilized” the CTWG. The Administrative Record demonstrates constant communication between USDA officials and leaders of the CTWG, as the latter developed the “comprehensive plan” sought by USDA for imposing EID requirements. At a presentation to the National Institute of Animal Agriculture (NIAA), USDA’s Dr. Jack Shere deemed the relationship between USDA and the CTWG to be sufficiently close to feel comfortable describing for listeners the CTWG’s “purpose”:

The purpose of the CTWG is to work collaboratively across the various segments of the cattle industry to enhance the traceability of animals for purposes of protecting animal health and market access. The CTWG works to create consensus among stakeholders on key components of traceability so there is an equitable sharing of costs, benefits, and responsibilities across all industry segments. The overarching goal of the CTWG is to enhance cattle identification and traceability to a level that serves the needs of producers, marketers, exporters, and animal health officials.

AR 000175, Speech to NIAA (April 11, 2018) (Exhibit 4). The CTWG regularly shared its meeting minutes with USDA, including its approved policy recommendations. *See, e.g.*, AR000224-000225, July 25, 2018 email from NIAA's Katie Ambrose to USDA's Aaron Scott, forwarding minutes of CTWG's June 29, 2018 meeting. (Exhibit 5). Because so much of the communication between the CTWG and USDA officials occurred by telephone, however, R-CALF requires discovery to determine the full extent to which USDA "utilized" the CTWG in developing its EID policy within the meaning of FACA. The documents supplied by USDA as part of its Administrative Record are silent on that subject.

Importantly, it was in April 2019, soon after the CTWG transmitted recommendations to USDA, that USDA issued its infamous "Fact Sheet" (later withdrawn after R-CALF filed suit showing it was issued in violation of federal law) mandating a cattle industry switch to EID by January 2023. *See* Exhibit 6. This timeline alone shows that CTWG's work and USDA's 2019 RFID mandate are related, and R-CALF must be entitled to do the discovery necessary to establish that this relationship violated FACA.

R-CALF also requires discovery to determine USDA's role in establishing and utilizing the PTC. While USDA's Administrative Record is silent regarding its role in establishing the PTC it was undoubtedly extensive, given: (1) documents demonstrating communication between USDA and leaders of the CTWG in March 2019 when those leaders were considering forming a new committee (to exclude CTWG members whom they deemed insufficiently committed to EID);

(2) the PTC’s self-description: “The newly formed Producers Traceability Council has evolved and was established independently of the Cattle Traceability Working Group (CTWG)” (AR 000313, PTC Press Release, “The Producers Traceability Council Reaches Consensus on Key Elements to Increase Cattle Traceability in the U.S.,” May 15, 2019 (Exhibit 7)); and (3) USDA’s Dr. Sarah Tomlinson’s service as a member of the PTC at its inception. *Id.* at AR 000314. Although later versions of the press release downgraded Tomlinson to “Government Liaison,” and still later to service in an “advisory capacity only,” she remained at all times at least a “non-voting member” of the PTC. AR 000330, May 16, 2019 email, “Corrections to Producer Traceability Council News Release.” (Exhibit 8). Discovery will permit R-CALF to learn the full extent of USDA’s involvement in the decision to establish the PTC as a replacement for the CTWG.

The Administrative Record is also silent regarding USDA’s utilization of the PTC. Indeed, it includes no documents that mention the PTC after September 2019—so it is impossible to determine whether the PTC was disbanded or whether it has continued to operate. Considering USDA’s ongoing effort to impose RFID requirements (discussed below) it is more than reasonable to suspect that PTC and the Agency continue to collaborate on how best to go about doing so.

USDA’s documents show that the Record is far from complete, having been sanitized of the conversations between USDA and individual committee members (and among USDA officials) regarding establishment of the CTWG and PTC and how the Agency used them. At the very least, R-CALF must be allowed to send interrogatories and depose the USDA employees who worked with the advisory committees to learn about those conversations and their interaction.

I. R-CALF HAS A RIGHT TO A RESPONSIVE PLEADING AND TO CONDUCT DISCOVERY

Congress adopted FACA in 1972, in large part to control the activities of committees providing advice to federal agencies and to ensure public awareness of those activities. *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 446 (1989). FACA imposes numerous procedural

requirements on federal advisory committees, *see, e.g.*, FACA §§ 9(c), 10(a), 10(b), 10(c), and 11, and mandates that their membership be “fairly balanced in terms of the points of view represented.” FACA § 5(b)(2). An “advisory committee” subject to FACA includes any committee “established” or “utilized” by a federal agency “in the interest of obtaining advice or recommendations,” unless all members are officers or employees of the United States. FACA § 3(2).

The two primary issues in this case are whether USDA’s interactions with the CTWG and PTC over a two-year period violated FACA and, if so, whether R-CALF is entitled to its requested relief. This case thus does not seek “Review of Action of Administrative Agencies” within the purview, purpose and meaning of Rule 83.6. This case is instead a challenge to USDA’s efforts to circumvent and ignore its FACA obligations and an effort to ensure that the Agency is prevented from relying upon or using any of the work product that was developed by those unlawful advisory committees. This issue is especially important now as USDA is yet again moving forward with its RFID plan. On July 6, 2020, and under the auspices of the President’s Executive Order 13892 (entitled “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication”), USDA issued a “Notice and Request for Comment” seeking input on its proposal to require that all eartags be RFID compliant. *See* 85 Fed.Reg. 40184 (Exhibit 9). USDA, in other words, intends to implement the 2019 Factsheet (allegedly withdrawn in October 2019) by use of another mechanism. Those RFID efforts are reliant upon the information, data, and input from those two advisory committees whose lawfulness R-CALF is challenging here. Because *all of the work* of those advisory committees is “the fruit of the poisonous tree” in “FACA world,” USDA’s actions are unlawful. *See Alabama-Tombigbee Rivers Coal. v. Dep’t of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994) (“to allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act.”).

R-CALF’s Amended Complaint states that the CTWG and the PTC, are “advisory

committees” subject to FACA, and USDA failed to comply with FACA in its dealing with those committees over at least two years. R-CALF seeks, among other relief, an injunction prohibiting USDA from relying on any of the information or recommendations supplied by these unlawfully constituted committees. R-CALF is entitled to an answer to the Amended Complaint and to conduct discovery on the formation and workings of the CTWG and PTC, and their interaction with USDA, to show that USDA’s actions were arbitrary and capricious under the APA.

USDA has not filed an answer or otherwise responded to the Amended Complaint. It has instead produced a small number of documents (99 in total, 368 pages, with substantial duplication) that it claims constitute an “Administrative Record.” We anticipate that USDA will assert that R-CALF’s challenge to its actions throughout an entire two-year period should be decided based solely on the documents it has selected. That assertion is demonstrably incorrect for many reasons, including the fact that it is not possible to discern what sort of determination USDA made regarding FACA compliance when *none* of the documents produced by USDA so much as mention the Act, including why it would or would not apply to the CTWG or the PTC.

Local Rule 83.6 governs “[r]eview of *an action* taken or withheld by an administrative agency.” Rule 83.6(a)(1) (emphasis added). R-CALF is not seeking review of any single “action taken or withheld” by USDA. Rather, the Amended Complaint lists eight separate claims based on USDA misconduct that spanned a period of more than two years. The only way to resolve those claims is to require USDA to proceed in the manner required by Rule 12 of the Federal Rules of Civil Procedure: it must file a responsive pleading followed by discovery.

The procedure R-CALF is requesting is how *every reported FACA decision* of which R-CALF is aware has proceeded. *See, e.g., Cheney*, 542 U.S. 367 (2004); *Colorado Environmental Coalition*, 353 F.3d 1221 (10th Cir. 2004). Courts routinely recognize that discovery is permissible in FACA cases, particularly when there are factual disputes regarding the federal government’s

claims that a committee is not an “advisory committee” subject to the Act. *See, e.g., Assoc. of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915-16 (D.C. Cir. 1993) (“further proceedings, including expedited discovery, are necessary before the district court can confidently decide whether the working group is a FACA committee”). A determination of the extent of discovery required is premature because USDA has so far refused to state whether it believes that the CTWG and the PTC are FACA advisory committees and if not, why not. USDA’s Administrative Record does not address and thus provides no assistance in resolving that question.

By filing an administrative record (albeit one of limited usefulness) rather than a motion to dismiss, USDA concedes that R-CALF’s challenge to its two-year course of dealings with the two committees is subject to judicial review. R-CALF is entitled to an explanation from USDA about such course of dealings. The USDA’s “Administrative Record” does not begin to provide that explanation as those documents do not discuss FACA. Under these circumstances, nothing in Local Rule 83.6 overrides USDA’s duty under Fed. R. Civ. P. 12(a) to file a responsive pleading.

II. ALTERNATIVELY, IF THIS CASE PROCEEDS ON THE ADMINISTRATIVE RECORD, R-CALF IS ENTITLED TO DISCOVERY SO THAT THE CASE IS DECIDED ON THE “WHOLE RECORD”

Alternatively, if the Court determines that the case should proceed under Local Rule 83.6, R-CALF must be permitted to engage in discovery for the purpose of supplementing what is clearly an inadequate and incomplete administrative record. The APA does not permit the federal government to limit evidence considered by a district court to only those documents that a government agency has unilaterally decided to produce. Rather, the APA provides that courts reviewing agency action must consider “the whole record” to determine whether that action is lawful. *See* 5 U.S.C. § 706; *see also Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). If the “action” at issue here is USDA’s conclusion that FACA did not apply to the advisory committees, then the Administrative Record is entirely inadequate—it is totally silent as to how

the agency came to that conclusion concerning FACA. Considering that USDA's own "Administrative Record" does not address that question, it stands to reason that R-CALF must be allowed to conduct the discovery necessary to find out how USDA made that decision.

In summary, as alternative relief only, R-CALF requests "Supplementation of the Record" under Local Rule 83.6(b)(3), to determine the extent to which USDA "established" or "utilized" the CTWG and the PTC. USDA is not entitled to determine unilaterally the "Administrative Record" in this case, especially considering the nature of what it has produced. It is therefore obvious that, even if this were a case in which R-CALF challenged a USDA decision to undertake a single "administrative action" (which it is not), this Court's review of that challenge must be based on "the whole record." 5 U.S.C. § 706. The "whole" record in this case includes all actions taken by USDA to establish or utilize the two committees, regardless whether those actions are memorialized in written documents. Supplementation of the record will require USDA to respond to interrogatories designed to fill gaps in the documents produced to date by USDA, as well as to allow R-CALF to take the depositions of at least three USDA employees, including Sarah M. Tomlinson, Aaron E. Scott, and Jack A. Shere (and perhaps others).

CONCLUSION

R-CALF requests that the Court order USDA to answer or otherwise respond to the amended complaint no later than 30 days after the Court's order. The case should be permitted to proceed like all other civil litigation to which Local Rule 83.6 is inapplicable. Alternatively, if the Court determines that Rule 83.6 applies to this case, R-CALF requests that it be permitted to engage in discovery, outlined above, necessary to supplement the inadequate Administrative Record submitted by USDA. R-CALF requests that it be permitted to submit interrogatories to USDA, to be followed by depositions of at least the three USDA employees identified herein: Sarah Tomlinson, Aaron Scott, and Jack A. Shere.

Dated this 17th day of August 2020.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on August 17, 2020, a copy of this Memorandum in Support of Plaintiffs' Motion for Responsive Pleading or, Alternatively, to Permit Discovery was filed with the Court's CM/ECF system, which will send notice of electronic filing to the counsel of record.

/s/ Harriet M. Hageman

Harriet M. Hageman