Harriet M. Hageman (Wyo. Bar. # 5-2656)
New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: 202-869-5210
Harriet.Hageman@ncla.legal

222 East 21st Street
Cheyenne, Wyoming 82001
Cell Phone: 307-631-3476

ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA; *et al.*	)	
Petitioners/Plaintiffs,	)	No. 19-CV-205-F
vs.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE; *et al.*	)	
Respondents/Defendants.	)	

PLAINTIFFS' OPENING BRIEF RELATED TO FACA CLAIM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutory Provisions:

Page(s)

Miscellaneous:

INTRODUCTION

On January 9, 2013 Defendants United States Department of Agriculture, *et al*., (collectively "USDA") published the final rule entitled "Traceability of Livestock Moving Interstate," 78 Fed.Reg. 2040, codified at 9 C.F.R. Part 86, with an effective date of March 11, 2013 (referred to below as the "2013 Final Rule"). *See* ECF 1-1 at 3-39. The 2013 Final Rule established requirements for the official identification and documentation necessary for the interstate movement of certain types of livestock, including cattle (which is the primary focus of Plaintiffs here). The 2013 Final Rule was designed to allow for maximum flexibility for States, Tribes, and producers to find identification solutions that met their local needs, and that encouraged the use of low-cost technology. In keeping with those goals, the 2013 Final Rule approved the use of official eartags (including metal eartags), properly registered brands, group/lot numbers, backtags, tattoos, and other forms of identification, as agreed to by the shipping and receiving states.

In 2017 USDA began moving forward with an effort to nullify the 2013 Final Rule in relation to the types of identification that would be acceptable for the interstate movement of livestock. More specifically, USDA, through its subagency Defendant Animal and Plant Health Inspection Service ("APHIS"), concluded that the livestock industry should phase out the use of metal eartags and other forms of identification, and that radio-frequency identification ("RFID") eartags should become mandatory by January 1, 2023.

Defendants recognized that a smooth transition to mandatory RFID technology would require input from all segments of the livestock industry to assist with a wide variety of practical and logistical issues—such as selecting a uniform technology for RFID devices. Defendants therefore decided that it would be best to establish and utilize an advisory committee (consisting of USDA/APHIS personnel and representatives of the livestock industry) to assist them with that transition effort. They also realized that creating an advisory committee might serve to minimize

widespread opposition to mandatory RFID among livestock producers.

The USDA-established advisory committee, known as the "Cattle Traceability Working Group" ("CTWG"), had a fixed membership and began meeting regularly in late 2017. CTWG morphed into a second USDA advisory committee (the "Producers Traceability Council" or "PTC") in the spring of 2019, a transformation precipitated by APHIS and those pro-RFID committee members who formed the PTC as a means of excluding those who opposed mandatory RFID requirements. At the request of APHIS, CTWG and PTC made a series of recommendations (by means of formal votes by committee members) regarding the implementation of RFID technology.

The Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1-16 ("FACA"), requires advisory committees "established" or "utilized" by a federal agency to comply with a range of procedural mandates, including filing a detailed charter, giving advance notice in the Federal Register of meetings, generally holding open meetings, having an officer or employee of the federal government preside over or attend every meeting, and making records available to the public. *See* 5 U.S.C. app. 2 §§ 5, 9, 10. Congress's stated purposes for adopting FACA included ensuring that "standards and uniform procedures . . . govern the establishment, operation, administration, and duration of advisory committees" and that "the Congress and the public . . . be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees." 5 U.S.C. app. 2 § 2(b).

Plaintiffs Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, *et al.* ("R-CALF"), allege in their Amended Complaint that Defendants violated FACA, both by failing to comply with FACA's procedural requirements, and by failing to ensure that advisory committee membership was "fairly balanced in terms of the point of view represented." 5 U.S.C. app. 2 § 5(b)(2). Defendants have declined to answer or otherwise respond to the Amended Complaint. Regardless, the papers Defendants have filed with the Court to date concede that they did not follow

the procedural steps mandated by FACA. Their defense is that FACA does not apply to their interactions with CTWG and PTC, claiming they neither "established" nor "utilized" those committees within the meaning of FACA. The Defendants' own documents, however, show otherwise. In short, Defendants' defense is based on an incorrect and crabbed interpretation of FACA's coverage. The steps undertaken by Defendants in relation to the CTWG and PTC, as confirmed by the documents they produced in their "Administrative Record," demonstrate as a matter of law that they both "established" and "utilized" the two advisory committees at issue.

STATEMENT OF THE CASE

The 2013 Final Rule governs livestock identification and traceability. The Rule supports use of "low cost technology" by allowing producers to use metal eartags and other types of identification. *APHIS Factsheet, Questions and Answers* (Dec. 2012) at 1 and 3 ("to encourage its use, USDA plans to provide these eartags at no cost to producers to the extent funds are available."). ECF 1-1 at 49, 51. The Rule also prohibits States and Tribes from requiring livestock producers to use RFID technology. 78 Fed. Reg. 2060-2061; 9 C.F.R. 86.8. (ECF 1-1 at 24-25, 39, 51).

In direct contravention of the 2013 Final Rule, Defendants in April 2019 issued a "Factsheet" stating that "[b]eginning January 2023, animals that move interstate and fall into specific categories will need official individual RFID eartags." ECF 27-1 at 2. The "[a]nimals that will require official, individual RFID tags include . . ." certain beef cattle, bison and dairy cattle. *Id*. at 3.

Plaintiffs filed their initial Complaint in this Court in October 2019, alleging that Defendants' new RFID policy pronouncement set forth in the "Factsheet" violated, *inter alia*, the Administrative Procedure Act ("APA") and the 2013 Final Rule. Defendants subsequently withdrew that "Factsheet," followed by the filing of a Motion to Dismiss in this Court, arguing that they had successfully mooted Plaintiffs' claims by withdrawing the "Factsheet." *See* ECF 10 and 11. This Court agreed and

dismissed the Complaint, while later authorizing Plaintiffs to file an amended complaint to re-allege their FACA claims. *See* ECF 21 and 26.

Although they withdrew the "Factsheet," Defendants have not abandoned their efforts to force livestock producers to use RFID technology. In July 2020, for example, Defendants published a non-rulemaking announcement in the Federal Register seeking comments on their proposal to "only approve [RFID] tags as official eartags for use in interstate movement of cattle and bison," beginning in 2023. *See* "Use of Radio Frequency Identification Tags as Official Identification in Cattle and Bison," 85 Fed. Reg. 40,185 (July 6, 2020).

Plaintiffs filed their Amended Complaint in April 2020 (ECF 27), detailing their claims that the CTWG and PTC are federal advisory committees within the meaning of FACA and that Defendants' refusal to comply with FACA's requirements for such committees was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Defendants have declined to answer or otherwise respond to the Amended Complaint, stating in their initial "Status Report" that because Plaintiffs sought APA "review of an action taken or withheld by an administrative agency," the case was governed by Local Rule 83.6—which requires an agency to submit to the Court an administrative record consisting of all material relating to its decision regarding the action/inaction for which review is sought. ECF 28, at 2.

In July 2020, Defendants submitted a small number of documents to the Court, claiming that they constituted the "Administrative Record" for the challenged decision. Plaintiffs and Defendants both concluded that this "Record" was inadequate. None of the documents even mention FACA in relation to CTWG or PTC, and thus provide no explanation or support for Defendants' supposed decision *not to* undertake the required procedural steps when interacting with those committees. Moreover, throughout the past year, attorneys for Plaintiffs have been receiving a steady stream of

documents from FOIA personnel at USDA (most recently in January 2021) in response to a FOIA request submitted before they filed the Amended Complaint, with many of those documents being relevant to APHIS's relationship with the activities of the two advisory committees. Defendants also determined that many of the documents were relevant to the claims before this Court, and eventually supplemented the Administrative Record with a portion (the first tranche) of the FOIA documents uncovered by Plaintiffs. The Court's December 22, 2020 Order added even more documents.

As Plaintiffs have noted before, the APA requires the decision in this case to be based on the "whole record," 5 U.S.C. §706, which cannot be limited to just those documents unilaterally selected by Defendants. *Every* reported discovery-related FACA decision of which Plaintiffs are aware has held that FACA lawsuits are not decided solely on the basis of the government's self-selected documents, but rather that the record also includes discovery material where necessary to complete the record. *See, e.g., Wyoming v. U.S. Dep't of Agriculture*, 201 F. Supp. 2d 1151, 1157 (D. Wyo. 2002) ("without discovery on the FACA issue, the Court will be unable to rule as to whether a FACA violation has occurred"). *Even if* this Court focuses solely on Defendants' "Administrative Record" (as supplemented), Plaintiffs are entitled to judgment in their favor on their APA claim.

SUMMARY OF ARGUMENT

Although Defendants have not answered the Amended Complaint, they disclosed their defense to the FACA claim when responding to Plaintiffs' motion for discovery, asserting that FACA is inapplicable because they neither "established" nor "utilized" either of the two advisory committees at issue. ECF 44 at 9. Importantly, Defendants have never argued that they did in fact comply with FACA's procedural requirements with respect to the two committees. That omission (or concession) is critical, for if FACA does apply to the CTWG and/or the PTC, Defendants violated it.

Defendants' assertion is belied by their own Administrative Record. Taking this one step at

a time, Defendants decided in 2017 that: (1) RFID technology should become mandatory for all cattle by January 1, 2023; (2) they needed to develop a comprehensive plan to address "the multitude of very complex issues related to the implementation of a fully integrated electronic system"; and (3) a "specialized industry-le[d] task force with government participation should develop the plan." Administrative Record (AR) at 124. *See also*, AR 133, 138-142. Defendants' documents also prove the following: (1) they urged the formation of CTWG at the September 2017 meeting in Denver, which was co-sponsored and financed by APHIS; (2) that numerous APHIS employees actively participated in the Denver meeting; (3) that CTWG thereafter had a fixed membership that included APHIS officials, as well as many individuals not employed by the federal government; and (4) that CTWG (and its various subgroups) met regularly and made a series of recommendations to APHIS regarding implementation of RFID technology. AR 228-230, 297-300, 794-796, 798, 803-807, 820-825, 910-913. Defendants' documents also demonstrate that due to internal dissension within CTWG, APHIS and one faction of CTWG members agreed to dissolve CTWG and continue its work under a new name (PTC)—with APHIS officials continuing to serve as members. AR 1018-1021.

Under any commonly understood definition of the word, these facts gleaned from Defendants' Administrative Record demonstrate that they "established" CTWG and PTC under FACA.

Defendants argue that the statutory word "established" should be interpreted "very narrowly," and contrary to its common definition as found in the dictionary. ECF 44 at 9. They claim that in 1989 the U.S. Supreme Court held that "established" must be read narrowly to prevent FACA from sweeping more broadly than Congress intended. *Ibid*. (citing *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989)). That claim is wholly inaccurate. The meaning of "established" was not at issue in *Public Citizen*. At issue was whether the American Bar Association ("ABA") and its Standing Committee on Federal Judiciary were "utilized" by the Justice Department (within the

meaning of FACA) in connection with selection of federal judges; all parties agreed that the federal government had not "established" either the ABA or its Standing Committee. 491 U.S. at 452.

The Supreme Court's discussion of the word "established" in *Public Citizen* also shows that it expected that term to be interpreted broadly and in accordance with its commonly understood definition. *See, e.g.,* 491 U.S. at 459-63. Subsequent federal appellate courts have correctly endorsed the broad interpretation of the word "established." *See, e.g., Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1074-86 (11th Cir. 2002); *Ass'n of Am. Physicians and Surgeons, Inc. v. Clinton* ["*AAPS*"], 997 F.2d 898, 913-14 (D.C. Cir. 1993).

The Administrative Record also confirms that Defendants "utilized" CTWG and PTC within the meaning of FACA. Although *Public Citizen* cautioned against adopting an overly broad interpretation of the word "utilized" (for fear that doing so would unconstitutionally restrict the President's Article II power to nominate federal judges), the Court nonetheless concluded that the phrase "established or utilized" "is more capacious than the word 'established'" standing alone (the phrasing used in the version of FACA adopted by the House of Representatives). 491 U.S. at 461-62. In this case Defendants clearly "utilized" CTWG and PTC by repeatedly soliciting and receiving advice regarding how best to push the livestock industry to implement RFID technology.

Because CTWG and PTC were "advisory committees" as defined by FACA, Defendants violated FACA by failing to comply with any of the procedural requirements imposed on those federal agencies that establish or utilize such committees. Defendants also violated FACA by failing to ensure that the PTC "was fairly balanced in terms of the point of view represented ... by the advisory committee." 5 U.S.C. app. 2 § 5(b)(2). Indeed, the Administrative Record demonstrates that Defendants' sole purpose in establishing PTC was to exclude representation of the many cattle producers who opposed adoption of mandatory RFID technology. The Tenth Circuit has strongly

endorsed the right of aggrieved parties to obtain judicial relief for violations of FACA's "fair balance" requirement. *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221, 1232-34 (10th Cir. 2004).

Plaintiffs do not know whether PTC continues to operate, as Defendants have produced no documents that are dated after the fall of 2019 regarding PTC's activities. Even if PTC has ceased operations, however, Defendants are in possession of all of the work product and technical advice provided by CTWG and PTC. Accordingly, Plaintiffs are entitled to an injunction preventing Defendants from making use of such work product supplied by the two advisory committees that operated in violation of FACA. *Alabama-Tombigbee Rivers Coalition v. Dep't of Interior*, 26 F.3d 1103, 1106-07 (11th Cir. 1994). An injunction would not unduly hamper Defendants' operations as they consider their proposal to require use of RFID technology, and they would remain free to solicit other sources of technological advice. Injunctive relief is also "the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements." *Id.* at 107.

Finally, Plaintiffs are entitled to judgment in their favor regardless of whether the Court determines that the Administrative Record provides a sufficient basis for determining that Defendants "established" and "utilized" the CTWG and PTC within the meaning of FACA. Defendants do not contest that the agency actions/inactions of which R-CALF complains are reviewable under the APA. 5 U.S.C. § 704. Under the APA, a federal agency acts arbitrarily and capriciously if the record indicates that the agency failed to "examine[ ] 'the relevant data' and articulate[ ] 'a satisfactory explanation' for its decision, including a rational connection between the acts found and the choice made." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Veh. Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The documents produced by APHIS include *no* substantive discussion of FACA, let alone an articulation of why APHIS decided that it need not comply with FACA procedural requirements in the course of

its dealings with CTWG and PTC.[1] That fact alone confirms why judgment must be entered in Plaintiffs' favor under the facts of this case.

ARGUMENT

I. THE CATTLE TRACEABILITY WORKING GROUP ("CTWG") AND PRODUCER'S TRACEABILITY COUNCIL ("PTC") WERE "ADVISORY COMMITTEES" SUBJECT TO FACA'S REQUIREMENTS BECAUSE DEFENDANTS "ESTABLISHED" THEM

FACA defines an "advisory committee" as:

> [A]ny committee, board commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof ... which is
>
> > (A) established by statute or reorganization plan, or
> > (B) established or utilized by the President, or
> > (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

5 U.S.C. app. 2 § 3(2). Defendants do not argue that either CTWG or PTC is not a "committee, board commission, council, conference, panel, task force, or other similar group." Nor do they assert that either of the two exceptions listed in § 3(2) apply here. Thus, whether either CTWG or PTC qualifies as an "advisory committee" turns *solely and exclusively* on whether each was either "established" or "utilized" by Defendants "in the interest of obtaining advice or recommendations."

As detailed below, the Administrative Record establishes as a matter of law that Defendants "established" CTWG and PTC for that purpose. Defendants' documents show that they determined that they needed technical advice from individuals working in the livestock industry, to assist with

[1] Defendants were clearly cognizant of FACA's scope and requirements, stating at one point that the State/Federal ADT Working Group was FACA compliant (AR 115), with such group consisting solely of government employees. AR 116.

their plan to implement a mandatory RFID technology system by 2023. To obtain that advice, Defendants made clear in 2017 that they sought to form an industry-led task force with government employee participation. Numerous federal officials participated in the September 2017 meeting in Denver at which, in response to Defendants' request, CTWG was formed, with at least two senior APHIS officials named as members of the committee. AR 927-929. CTWG then operated precisely as Defendants requested, devoting its entire mission and every agenda to RFID-related issues, regularly supplying them with technical advice. When internal dissension within CTWG began to reduce the committee's effectiveness, APHIS officials joined the committee's pro-RFID faction to establish a successor committee (PTC), which carried on as before with APHIS officials continuing to serve as members. AR 1018-1021.

Under any commonly accepted definition of the word "establish," the facts described above suffice to demonstrate that Defendants "established" CTWG and PTC.[2] Those committees came into existence solely because of Defendants' stated policy goals and efforts. Both committees had a formal structure and fixed membership. CTWG and PTC pursued the precise agenda dictated to them by the federal government officials.

Defendants have previously and unpersuasively argued that "established," despite its broad definition, should be interpreted "very narrowly." According to this Court, however, "[i]n all cases requiring statutory construction, the Court must begin with the plain language of the statute because the Court must assume that Congress's intent is expressed correctly in the ordinary meaning of the words it employs." *Am. Wild Horse Preservation Campaign v. Jewell*, 2015 WL 11070090, at *7 (D. Wyo. 2015) (internal citations omitted), *rev'd on other grounds*, 847 F.3d 1174 (10th Cir. 2016).

[2] *See, e.g., Webster's New Collegiate Dictionary*, G & C. Merriam Co. (1981) (to "establish" means "to bring into existence: found" or "to bring about: effect").

"Only the most extraordinary showing of a contrary legislative intent can justify our departure from the plain meaning of the statutory language." *Standiferd v. U.S. Trustee*, 641 F.3d 1209, 1213-14 (10th Cir. 2011).

Defendants rely on *Public Citizen*, the Supreme Court's most comprehensive FACA decision, to support their contention that the Court should read "established" very narrowly. ECF 44 at 9. That reliance is misplaced; the meaning of "established" was not at issue in *Public Citizen* because all parties agreed that the committee at issue had not been "established" by the federal government. 491 U.S. at 452. Indeed, *Public Citizen*'s discussion of the word "established" (as used in FACA), while not part of the Court's holding, indicates that the word should be accorded its normal, broad meaning. For example, the Court noted when discussing FACA's legislative history that the Senate version of what became FACA did not use the word "utilized" but instead focused on the initial creation of the committee in question— using the phrase "established or organized." *Id.* at 461 (citing S. 3529, 92d Cong., 2d Sess. §§ 3(1), (2) (1972)). The Court cited to the Senate Report's explanation that that phrase should be construed broadly:

> Like the House Report, the accompanying Senate Report stated that the phrase "established or organized" was to be understood in its "*most liberal sense*, so that when an officer brings together a group *by formal or informal means*, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill."

Ibid. (citing S.Rep. No. 92-1098, p.8 (1972)) (emphasis added). The Court then stated that the Conference Committee's final version of FACA, which covered committees "established or utilized" by a federal agency, is "more capacious" than the Senate's earlier version, *id.* at 462, and thus the final version cannot be construed as a retreat from the Senate's mandated "liberal" interpretation of "established." *Ibid.* (the bill's "initial focus on advisory committees established by the Federal

Government, in an *expanded sense* of the word 'established,' was retained") (emphasis added).

Appellate courts have subsequently endorsed *Public Citizen*'s expansive interpretation of "established." The Eleventh Circuit sharply contrasted *Public Citizen*'s treatment of the word "established" with its treatment of the word "utilized," noting:

> The [*Public Citizen*] majority avoided [the need to address a serious constitutional question] by construing the term "utilized" in a way contrary to its plain meaning. In contrast, there is no need to run from the plain meaning of "established" in order to escape a serious constitutional question, because there is no serious constitutional question raised by application of FACA's requirements to every advisory committee established by the federal government.

Miccosukee Tribe, 304 F.3d at 1085-86. In discussing *Public Citizen*'s explanation of Congress's decision to add the word "utilized" to FACA, the Eleventh Circuit stated:

> [*Public Citizen*] explained that the phrase "or utilized" was added in conference "simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly . . . 'for' public agencies as well as 'by' such agencies themselves." . . . The phrase applies, the Court said, not to privately organized groups, but to "advisory groups 'established,' on a broad understanding of that word, by the Federal Government."

Id. at 1085 (quoting *Public Citizen*, 491 U.S. at 462-63).

The D.C. Circuit's approach is similar. *See AAPS*, 997 F.2d at 913-15. In defining what constitutes a committee "established" by the federal government, *AAPS* carefully distinguished between government requests for advice from unorganized groups of individuals (not covered by FACA) and requests for advice from groups with a formal structure (covered by FACA):

> [A] group is a FACA advisory committee when it is asked to render advice or recommendations, *as a group* , and not as a collection of individuals. The group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally . . . In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure,

an organized structure, a fixed membership, and a specific purpose.

Id. at 913-14.

The Administrative Record shows that CTWG and PTC comfortably meet the standard set out in *AAPS.* The record is replete with documents from 2017 in which APHIS called for creation of an industry-led task force to provide technical advice regarding implementation of RFID technology,[3] and the minutes of numerous CTWG/PTC meetings included in the Administrative Record attest to the organizations' structure, fixed membership, and specific purpose (providing advice to Defendants on RFID-related issues). *See,* e.g., AR 927 (CTWG members), AR 1018-1021 (PTC members), AR 491 (CTWG purposes), AR 466 (organizational structure), AR 925 (purpose of PTC), AR 005 (organized into five subgroups).

Defendants admit (AR 005) that the CTWG was organized at the September 26-27, 2017 "Strategy Forum on Livestock Traceability," held in Denver, Colorado (hereinafter, the "Forum").[4] Defendants would have this Court believe, despite their repeated calls in advance of the Forum for formation of an industry-led task force to advise APHIS on RFID-related issues, and despite APHIS's major role in the Forum, that CTWG was not "established" by APHIS but rather was independently formed by interested cattle-industry participants. That claim is not only disingenuous, but defies common sense, blinks reality, and is contradicted by the Administrative Record itself.

APHIS co-hosted and partially funded the Forum. AR 005, 410, 736; ECF 47-4 at 3 and 27

---

[3] *See, e.g.*, AR139 (APHIS "[e]ncourage[s] formation of an industry-led task force with input from animal health officials, as needed. The task force would represent a broad spectrum of industry organizations to thoroughly assess alternatives and gather input from industry sectors."); Doc. 47-3 (9/25/17 slide show prepared by APHIS). *See also* ECF 47-4 at 9 ("A group of industry stakeholders needs to be assembled to drive the ADT movement forward."); ECF 47-4 at 25; and AR 173.

[4] *See also* AR 141 (APHIS timeline states that a "working group" was formed at the Forum, and it became known as CTWG in November 2017).

("The 2017 Strategy Forum on Livestock Traceability was funded in part by . . . the USDA. . ."). Four of the ten members of the Forum's "Planning Committee" were senior APHIS officials (Dr. Geiser-Novotny, Mr. Hammerschmidt, Dr. Munger, and Dr. Scott). ECF 47-2. Senior APHIS officials comprised a significant percentage of those attending the Forum. ECF 47-1.The working group established at the forum (CTWG) was the precise sort of committee for which APHIS had been lobbying: a committee consisting primarily of cattle-industry representatives (with some APHIS representation, (*see* AR 927-929 and ECF 47-4 at 25)), whose sole agenda was providing advice to APHIS on RFID-related issues. During an early meeting in which the name of the CTWG was decided, Dr. Burke Healey, Assoc. Deputy Administrator of APHIS, (AR 546) was designated as the CTWG's government "point person." AR 385.

Because APHIS officials apparently did not save their notes regarding Forum activities (at least none have been produced to date), the Administrative Record does not include a particular formation document for the CTWG. Defendants have also objected to allowing Plaintiffs to depose agency officials who attended in order to ascertain their individual involvement. In light of the factors cited above, however, the great weight of the available evidence demonstrates that Defendants did in fact "establish" the CTWG, as that term is commonly understood under FACA. In contrast, Defendants cannot seriously contend—and the Administrative Record does not support—that cattle-industry representatives acted on their own in forming the exact same type of committee, the very purpose of which was to assist APHIS with implementing its mandatory RFID plan. Such an argument would defy not only common sense, but the Administrative Record itself, which establishes that APHIS provided all of the necessary support and guidance to ensure that *this exact committee* was created, provided instructions and guidance regarding its end goals, participated in its ongoing meetings, and received and acted on its advice.

APHIS viewed CTWG as operating under its direct supervision, a fact confirmed by several different documents in the Administrative Record. First is AR 267-269, showing how APHIS substantively revised the CTWG's message to its members. APHIS also substantively edited PTC's news release, which is another example of such control. AR 1061-1063. In addition, in an April 2018 speech to the National Institute of Animal Agriculture, Dr. Jack Shere (APHIS's Deputy Administrator, AR 546), spoke confidently regarding the "purpose" and "goal" of CTWG, something he could not have assumed to know if CTWG did not take its marching orders from APHIS:

> 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 510; *see also* AR 502. By early 2018 Dr. Shere had already been working with the CTWG "over the past couple of months." AR 441.

As for the PTC, it was essentially CTWG with a new name and much the same membership (excluding those individuals who refused to jump on the RFID bandwagon). It was also "established" by Defendants, with the Administrative Record showing that in the spring of 2019 APHIS was intimately involved in the transition from CTWG to PTC. The transition came about because pro-RFID members of CTWG objected to what they viewed as obstructionism by those members (including Plaintiff Kenny Fox) who were opposed to mandatory RFID technology for cattle. In a March 28, 2019 letter, several pro-RFID members threatened to cease participating in CTWG unless the committee could "develop consensus" on going forward with mandatory RFID. AR 892. CTWG members, including Dr. Tony Forshey (the co-facilitator for CTWG and in constant contact with

senior APHIS officials), responded that same day by seeking a meeting with APHIS "to discuss next steps." AR 852. The pro-RFID CTWG members and senior APHIS officials in fact met shortly thereafter (on April 1, 2019) to discuss appropriate "next steps." AR 897-98, 872, 879, 897, 902. It is not surprising that subsequent internal APHIS correspondence shows that APHIS immediately began contemplating a plan to terminate CTWG and replace it with a new committee. For example, one APHIS official asked if there was a proposal to establish a new committee. AR903. Another APHIS official responded, "I don't know what the next group might look like or *how we pull them together* but something we should consider." AR 901 (emphasis added). The first official then suggested that an APHIS official should serve as "the helm" of the new committee. *Id*.

In the following weeks, the CTWG members who had contacted APHIS about the internal dissension took steps to form a new committee (PTC), whose membership would be largely identical to CTWG, except that those opposed to mandatory RFID technology (including Plaintiff Fox) would be excluded. AR 914-16, 927-28. The meeting at which PTC was officially launched was a CTWG meeting attended by two senior APHIS officials, Dr. Aaron Scott and Dr. Sarah Tomlinson, as "Members" of the CTWG. *Id.* Dr. Tomlinson then became a member of PTC and attended most if not all of the subsequent PTC meetings.

There is only one plausible interpretation of the foregoing course of events: APHIS was an indispensable party to the plan to replace CTWG with PTC. The record shows that the CTWG members who took the lead in launching PTC were in regular contact with APHIS officials. AR 852, 914-916, 920, 940, 923-924, 917. Internal APHIS documents demonstrate that APHIS was aware of their plans and spoke of the need for APHIS to "pull them together." AR 901-902. Two APHIS officials attended the meeting at which PTC was officially launched, with one agreeing to serve as a PTC member. It is simply not plausible that members of CTWG would abandon CTWG and seek

to form a new committee whose exclusive agenda (providing advice to APHIS on RFID-related issues) was identical to CTWG's *unless* APHIS gave advance approval during their many conversations. Under those circumstances, Defendants also "established" PTC as a matter of law.

II. CTWG AND PTC WERE "ADVISORY COMMITTEES" SUBJECT TO FACA'S REQUIREMENTS BECAUSE DEFENDANTS "UTILIZED" THEM

Defendants did not simply establish CTWG and PTC and then leave those committees to fend for themselves. They instead worked closely with both committees, dictating their agendas and asking for their advice on a variety of specific issues. Based on that very close relationship, there is no question that APHIS "utilized" CTWG and PTC within the meaning of FACA.

The Supreme Court concluded in *Public Citizen* that Congress intended "utilized" to be read relatively narrowly. It reached that conclusion after applying the constitutional-avoidance doctrine. It feared that ascribing an every-day meaning to "utilized" so as to apply FACA's requirements to federal government consultations with the ABA's Standing Committee on the Federal Judiciary "would present formidable constitutional difficulties" because it might interfere with the President's Article II power to nominate federal judges. 491 U.S. at 466. Also, while conceding that a "straightforward" and "literal reading" of the term "utilized" would compel the conclusion that FACA applied to the Standing Committee, the Court concluded that the term plausibly could (and thus should) be read more narrowly, given that: (1) a straightforward reading would compel "odd results," such as finding that "FACA's restrictions apply if a President consults with his own political party before picking his cabinet," *id.* at 455; and (2) Presidents had been consulting with the Standing Committee for many years before FACA's adoption, yet nothing in FACA's legislative history suggested that Congress intended such consultation to be subject to FACA. *Id.* at 455-65.

Public Citizen nonetheless stressed that Congress's use of the word "utilized" carries

independent significance, and that FACA's use of the terms "established or utilized" was "more capacious" than the word "established" standing alone (the term used in early versions of the FACA legislation). *Id.* at 462. Without assigning a precise definition to "utilized" as used in FACA, the Court suggested that Congress might have added "utilized" "to clarify that FACA applies to advisory committees established by the Federal Government *in a generous sense of that term*" and encompasses committees established either "by *or for*" a federal agency. *Ibid*. (emphasis added).

Because the ABA's Standing Committee was not "established" by the federal government (even under the broadest interpretations of that word), *Public Citizen* held that the government's consultation with that committee was not subject to FACA. *Id.* at 465. In sharp contrast, the evidence cited above demonstrates that CTWG and PTC are encompassed within FACA's definition of committees "established or utilized" by a federal agency—particularly when that term is construed "generous[ly]" to include committees *indirectly* brought into being by the federal government.

While APHIS took numerous steps to disguise its direct involvement in the establishment and operation of CTWG and PTC, *Public Citizen* makes clear that FACA applies to any advisory committee brought into being by a federal agency "in the interest of obtaining advice or recommendations," 5 U.S.C. app. 2 § 3(2), regardless of the means used by the agency to bring about that result.[5] APHIS's overarching and direct supervision over CTWG and PTC reinforces the

[5] One particularly comical effort by APHIS to disguise its involvement in PTC's operations occurred following issuance of a May 15, 2019 PTC "News Release" regarding its May 2019 meeting in Denver. As initially prepared, the News Release listed Dr. Sarah Tomlinson of APHIS as having attended the meeting as a PTC "member." AR 313-14. That listing led to a flurry of emails from APHIS officials (including attorneys in the General Counsel's office) objecting to Tomlinson's listing. *See, e.g.,* AR 318-19. One APHIS attorney suggested eliminating Tomlinson's name altogether. AR 322-23. PTC eventually issued a revised News Release that listed Tomlinson as "Government Liaison" and "a non-voting member." AR 335-36. Katie Ambrose, Executive Director of the Animal Institute for Animal Agriculture and the head of PTC, wrote to Tomlinson on May 16 to abjectly apologize for "my listing you incorrectly" and stating that "I would never, ever want to put you in any position where there are

conclusion that APHIS "utilized" those committees within the meaning of FACA. In addition to regularly attending committee meetings, APHIS conducted at-least-weekly phone conferences with the chairmen of the two committees and each of their subcommittees as well as maintaining regular correspondence with them. Those contacts are memorialized in scores of documents in the Administrative Record. *See, e.g.*, AR 48-49, 52, 63-66, 322-23, 383, 408, 447, 457, 466, 492, 493, 514, 532, 533, 553, 554, 559-562, 715, 748, 752, 785, 794-95, 798, 799, 800, 827, 828, 833, 848-51, 866, 932, 1158. APHIS considered the committees' work sufficiently important that it circulated information it received from them to all APHIS officials working on RFID-related issues. AR 457.

The Administrative Record demonstrates that both APHIS and the two committees considered that it was up to APHIS to set the committees' agendas. *See, e.g.*, AR 383 (APHIS requests that CTWG send it minutes of its meetings, and CTWG does so); AR 446 (APHIS sends a list of APHIS goals to CTWG "to helpfully get them on the same set of tracks we are on"); AR 447 (APHIS schedules a meeting with CTWG so that CTWG can "work in parallel" with APHIS); AR 514 (CTWG requests meeting with APHIS to determine what APHIS "considers to be the *most important* to be sure [CTWG is] tracking on the same page" with APHIS); AR 533 (head of CTWG schedules meeting with APHIS's Deputy Administrator "to be sure we continue to be in alignment with the work of USDA"); AR 715 (APHIS directs CTWG to make RFID performance standards a focal point of its analysis); AR 833 (CTWG leaders conduct pre-meetings with APHIS officials in advance of regularly scheduled CTWG meetings); AR 1044-45, 1061-63 (PTC does not send out press releases until after receiving USDA approval of draft releases). *See also*, ECF 47-6 and 47-7 (additional

---

concerns or questions about your important role in this council from anyone!" AR 333. Ambrose did not specify what those "concerns" might be, but the most plausible inference is that APHIS officials feared that disclosure of Tomlinson's direct participation in PTC activities might increase APHIS's potential FACA exposure.

confirmation regarding how APHIS "utilized" and directed the work of the CTWG).

Throughout 2018-19, CTWG and PTC sent APHIS a regular stream of RFID-related technical advice, approved by formal votes of those committees. *See, e.g.*, AR 864-867 (CTWG); AR 335-36 (PTC). The Administrative Record documents cited above remove any doubt that APHIS "utilized" the committees within the meaning of FACA and directed their activities.

III. DEFENDANTS VIOLATED FACA BY FAILING TO ADHERE TO FACA PROCEDURAL REQUIREMENTS AND FAILING TO ENSURE THAT PTC MEMBERSHIP WAS "FAIRLY BALANCED"

Because CTWG and PTC were "advisory committees" as defined by FACA, Defendants violated FACA by failing to comply with any of the procedural requirements imposed on federal agencies that establish or utilize such committees. Indeed, Defendants do not contend that they complied; they instead seem inclined to rest their defense entirely on their unfounded contention that the two committees were not subject to FACA's requirements because they neither established nor utilized them.

The Administrative Record also demonstrates that Defendants violated FACA by failing to ensure that PTC's membership was "fairly balanced." FACA requires that federal advisory committees be "fairly balanced in terms of the point of view represented." 5 U.S.C. app. 2 § 5(b). Defendants *intentionally* violated that requirement by *intentionally* blocking any cattle producer who objected to mandating RFID from joining the PTC.

The Tenth Circuit has endorsed the right of aggrieved parties to obtain judicial relief for violations of FACA's "fair balance" requirement. *Colorado Environmental Coalition v. Wenker*, 353 F.3d at 1232-34. The appeals court rejected the federal government's contention that FACA fair-balance claims are not justiciable. *Id.* at 1233 ("While the difficulty of determining what constitutes a 'fair balance' may incline courts to be deferential in reviewing the composition of advisory

committees and may defeat a plaintiff's claims in a given case, this cannot be grounds for refusing to enforce the provision altogether."). The court further held that individuals excluded from consideration for appointment to an advisory committee possessed Article III standing—based on denial of their "interest in a fair opportunity to be appointed to" an advisory committee. *Ibid.*

Per *Wenker*, Plaintiff Fox possesses the requisite standing, having served as a member of CTWG. When APHIS replaced the CTWG with the PTC advisory committee on RFID issues, Fox was excluded from membership due solely to his opposition to mandatory RFID requirements.[6] That exclusion suffices to provide Fox with standing to challenge APHIS's violation of § 5(b).

The Administrative Record demonstrates the accuracy of Fox's exclusion claim and the resulting imbalance in PTC membership. As outlined above, conflict between pro-RFID members of CTWG and members who opposed mandatory RFID came to a head in March 2019. Several prominent pro-RFID members threatened to cease participating in CTWG unless the committee as a whole ceased debating whether mandatory RFID should be adopted, and to focus instead on how best to implement such a requirement. AR 892. That letter led to a series of meetings between pro-RFID members and APHIS officials. AR 897-98, 872, 879, 897, 901, 902. As a result of those meetings, CTWG ceased to operate and (with APHIS's support and guidance) was replaced by PTC. The two committees had similar membership; the only real difference between the two was that Fox and other CTWG members opposed to mandatory RFID were excluded from PTC membership.

Mandatory RFID technology is very controversial within the cattle industry. Many cattle producers oppose it for a variety of reasons (cost, on-the-ground feasibility, privacy concerns,

[6] In connection with its November 30, 2020 Motion for Completion of Record, Plaintiffs proffered to the Court Fox's November 30 Declaration, which detailed the facts surrounding his exclusion from PTC. The Court denied Plaintiffs' request that the Declaration be included as part of the administrative record. At the very least, the Declaration is admissible for purposes of demonstrating Fox's Article III standing.

implementation, etc.). Other segments of the industry, including meat packers and RFID eartag manufacturing companies, support APHIS's push for mandatory RFID technology. Under any plausible understanding of FACA's fair-balance requirement, APHIS's failure to ensure that PTC included members representing the views of independent cattle producers who oppose mandatory RFID violated APHIS's obligations under § 5(b).

IV. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF TO PREVENT DEFENDANTS FROM USING THE WORK PRODUCT AND/OR RECOMMENDATIONS OF CTWG AND PTC IN CONNECTION WITH ITS IMPLEMENTATION OF RFID TECHNOLOGY

Plaintiffs do not know whether PTC continues to operate; Defendants have produced no documents dated after the fall of 2019 (when it withdrew the "Factsheet") regarding PTC's activities. But even if PTC has ceased operations, Defendants continue to possess the work product and technical advice supplied to it by CTWG and PTC. Accordingly, Plaintiffs are entitled to relief in the form of an injunction preventing Defendants from making use of such work product and technical advice supplied by the two advisory committees that APHIS operated in violation of FACA.

When a federal agency violates FACA in connection with its efforts to obtain advice from an advisory committee, courts have recognized that an injunction against use of advice received from the committee is an appropriate form of relief. Indeed, as the Eleventh Circuit has recognized, injunctive relief is often "the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements." *Alabama-Tombigbee*, 26 F.3d at 1103. *See W. Organization of Resource Councils v. Bernhardt*, 412 F. Supp. 3d 1227, 1243 (D. Mont. 2019) ("A use injunction is the only way to achieve FACA's purposes of enhancing public accountability and avoiding wasteful expenditures going forward. The agency . . . cannot now rely on recommendations from an advisory committee whose very existence flies in the face of FACA."). In affirming an injunction against the U.S. Fish and Wildlife Service's use of a report prepared by an advisory

committee conducted in violation of FACA, the Eleventh Circuit explained:

> A simple "excuse us" [from a federal agency that violates FACA] cannot be sufficient. It would make FACA meaningless, something Congress certainly did not intend. . . . The court sees no reason to retreat from its conclusion that FACA was designed by Congress to prevent the use of any advisory committee as part of the process of making important federal agency decisions unless that committee is properly constituted and produces its report in compliance with the procedural requirements of FACA, particularly where, as in this case, the procedural shortcomings are significant.

Alabama-Tombigbee, 26 F.3d at 1107 (quoting district court decision with approval).

Defendants are clearly trying to figure out how to require all cattle producers to use RFID eartag technology by January 1, 2023 despite the fact that such a mandate would violate the 2013 Final Rule. Last year, for example, they requested public comment on a proposal to equate "official eartag" with an RFID eartag, thereby magically making such use mandatory, while also prohibiting the use of metal eartags (despite being specifically provided for in the 2013 Final Rule). 85 Fed. Reg. 40,185 (July 6, 2020). That proposal is highly controversial (not least because it does not comply with the APA rulemaking requirements), and many cattle producers oppose it. It is therefore crucial that Defendants follow an open, fair, legal and procedurally correct process as they evaluate mandatory RFID use. Allowing Defendants to proceed on the basis of work product generated and recommendations received from a defective advisory committee would badly taint that entire process.

An injunction would not unduly interfere with Defendants' ability to proceed. They would remain free to solicit other sources of technological advice regarding how to implement an RFID mandate. An injunction is warranted here, however, as the only effective means of ensuring that Defendants comply with FACA, and to send the message that federal courts will not tolerate agencies' resorting to subterfuge to avoid compliance with the statute.

V. THE ADMINISTRATIVE RECORD FAILS TO PROVIDE A "SATISFACTORY EXPLANATION" FOR DEFENDANTS' DECISION TO ACCEPT ADVICE FROM CTWG AND PTC WITHOUT COMPLYING WITH FACA PROCEDURAL REQUIREMENTS

Plaintiffs are entitled to judgment in their favor regardless of whether the Court determines that the Administrative Record provides a sufficient basis to determine that Defendants "established" or "utilized" CTWG and PTC within the meaning of FACA. That Record reveals that Defendants have failed to provide a satisfactory explanation for their actions/inactions in this case—the decision to accept recommendations from CTWG and PTC but not to comply with FACA's requirements.

The theory underlying any federal-court case in which administrative action is to be reviewed on the basis of an administrative record is that the record provides an adequate basis for judging the propriety of the agency's action, thereby obviating any need for discovery. In this case, Defendants' self-selected collection of documents is woefully inadequate. Not one of the relevant documents produced by them even mentions FACA in relation to CTWG or PTC.

In Defendants' telling, the absence of evidence is evidence of absence. That is, the absence of documents related to their decision-making process means that the lawsuit should be dismissed based on an absence of proof. That is not the rule that governs lawsuits filed, as here, under the APA. Plaintiffs have alleged that Defendants' actions with respect to CTWG and PTC were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). To defeat that claim, Defendants have the burden to demonstrate, on the basis of *the record* before the court (*i.e.*, not based on *post hoc* rationalizations by counsel for the government), a satisfactory explanation for their decision. As the Supreme Court has repeatedly explained, review under § 706(2) requires a court to determine "whether [the government decision-maker] examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Commerce v. New York*, 139 S. Ct. at 2569 (quoting

Motor Veh. Mfrs. Assn., 463 U.S. at 43). Because Defendants' Administrative Record includes no such explanation with only one mention of FACA, Plaintiffs are entitled to judgment under § 706(2).

When an APA claimant asserts that the actions/inactions of a federal agency have violated FACA, it is hardly unusual for the agency to have not prepared a contemporaneous, written document explaining its determination that its actions did not trigger FACA procedural requirements. Most officials do not spend their working hours seeking to head off FACA lawsuits by writing memoranda explaining their decisions. It is perhaps for this reason that most federal courts hearing FACA claims permit the plaintiff to engage in discovery, reasoning that the "whole record"[7] of the agency's actions should include material gleaned from depositions and interrogatories. *AAPS*, 997 F.2d at 916; *Wyoming v. USDA*, 201 F. Supp. 2d at 1157; *NRDC v. Curtis*, 189 F.R.D. 4, 10 (D.D.C. 1999); *Food & Water Watch v. Trump*, 357 F. Supp. 3d 1, 5 (D.D.C. 2018). That did not happen here, with Defendants arguing that discovery is impermissible. Defendants must now live with the consequences of that decision. Because the absence of discovery leaves Defendants with a Record that fails to provide any "satisfactory explanation" for their decision to act as they did with respect to CTWG and PTC, Plaintiffs are entitled to judgment in their favor on their claim that Defendants' actions/inactions were arbitrary and capricious in violation of the APA.

CONCLUSION

Plaintiffs respectfully request that the Court enter judgment in their favor on their claims that CTWG and PTC are federal advisory committees covered by FACA, and that Defendants failed to comply with procedures required by FACA for those committees. Plaintiffs further request that the Court enjoin Defendants from making use of any of the work product and recommendations solicited from the committees related to implementation of RFID technology for livestock moving interstate.

[7] 5 U.S.C. § 706 requires APA cases to be decided based on the "whole record."

Dated this 8th day of February 2021.

Attorneys for Petitioners/Plaintiffs

/s/ Harriet M. Hageman
Harriet M. Hageman (Wyo. Bar #5-2656)
Senior Litigation Counsel
New Civil Liberties Alliance
1225 19th St., NW, Suite 450
Washington, DC 20036
Harriet.Hageman@NCLA.legal
Office Phone: 202-869-5210
Cell Phone: 307-631-3476

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on February 8, 2021, a copy of PLAINTIFFS' OPENING BRIEF RELATED TO FACA CLAIM, 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