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An Agricultural Law Research Article

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by

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October 2006

www.NationalAgLawCenter.org

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I. Introduction

The farm bill promises to encompass its usual subjects: commodity support, conservation, rural development and trade policy. Yet as in the past, the farm bill has also considered timely hot-button topics that might not otherwise be deemed classic farm bill material. This is because the farm bill is must-pass legislation that engages the agricultural sector and necessarily requires Congress' attention.¹ In other words, this may be the only chance in a span of years for certain agriculturally-related interests to demand Congress' attention. A somewhat nontraditional area that Congress may address in the next Farm Bill is animal identification. The effort to create a national animal identification program received a considerable push in late 2003 after a cow in Washington State was diagnosed with bovine spongiform encephalitis. Since that time, USDA, state animal health officials, and private industry have begun to implement the National Animal Identification System (NAIS). Nevertheless, controversy swirls around a number of the NAIS facets, including confidentiality of the information, the amount and who will bear the costs, and how very small operations are treated under the system. This article looks at these issues after describing the state of the program and examining both current and proposed state and federal legislation affecting the program.

This article looks first at how the NAIS is designed and then at some federal and state laws that affect the NAIS. It then examines federal legislation that has been proposed to amend the NAIS and concludes by highlighting some of the issues that might arise during the farm bill debate.

II. How the NAIS Is Designed

Major Characteristics of NAIS

Goal. As stated by USDA, the major goal of the NAIS is to create a system that is "able to allow tracking of animals from point of origin to processing within 48 hours."²

Three Key Components.

1. *Premises Registration.* In general, facilities that manage or hold animals are required to register for a unique premise ID number with the appropriate state or tribal officials. Secretary Johanns stated in a speech on August 24 that all 50 states are participating in the program and that 300,000 premises are already registered.

¹ See 1990 Farm Bill, Pub. L. No. 101-624, Title XXI (1990) (creating the organic certification program); 2002 Farm Bill, Pub. L. No. 107-171, Title X, Subtitle E (2002) (creating the Animal Health Protection Act). For extensive farm bill resources, including the text of all farm bills since 1933, see the National Agricultural Law Center's U.S. Farm Bills page at <http://www.nationalaglawcenter.org/farmbills>.

² USDA-APHIS, *National Animal Identification System: Interim/Development Phase*, 2 (July 6, 2006).

2. *Animal Identification.* The next phase entails identifying the animals. The NAIS covers bison, cattle, cervids (e.g., deer and elk), goats, horses, camelids (e.g., llamas and alpacas), poultry, sheep and swine.³ Dogs and cats are not included. Depending on whether their animals are generally kept with the same group their entire lives, such as with most poultry and market swine, the animals can be identified as a group as opposed to individually. The cattle industry working group envisions using individual animal identification.⁴

3. *Animal Tracking.* The final phase of the program will have parties recording key pieces of information related to livestock movement to a central recordkeeping system. In particular, the Draft Strategic Plan envisions recording the animal (or group) ID number, the premise ID number, and the date of the event being recorded.

Voluntary versus Mandatory. USDA has recently maintained that participation in the system will be voluntary.⁵ At one time, USDA stated in its Draft Strategic Plan that the system would be voluntary initially and mandatory beginning in 2009.⁶ As discussed below, legislation was recently introduced in Congress prohibiting a mandatory system. It remains to be seen whether the level of participation in a voluntary system will suffice for the system to be effective. Even absent federal or state mandates, it is possible that private industry will essentially require it in the future. For example, a meatpacker might refuse to accept animals that are not in the system.

Federal-State-Private Partnership. The federal government, state governments and private industry all play a crucial role in the system as it is currently designed. The federal government sets the standards, state governments register the premises, and private industry will provide the physical components and store the information.

III. Laws and Regulations

Animal Health Protection Act (AHPA). USDA's Draft Strategic Plan released in April 2005 states: "The Animal Health Protection Act authorizes the Secretary of the USDA to carry out operations and measures to detect, control, or eradicate livestock pests or disease. It also provides ample authority to establish and implement either a mandatory or voluntary system of animal identification."⁷

Restrict Importation. Upon a determination that the restriction of imports of certain animals is necessary to prevent the introduction of disease in the U.S., the Secretary may prohibit such imports.⁸

Interstate Movement. USDA may point to the following section as the authority to make the program mandatory.

³ USDA-APHIS, *The National Animal Identification System: A Guide for Small-Scale or Non-Commercial Producers*, 3 (June 2, 2006).

⁴ John Adams and Gary Wilson, *Cattle Industry Work Group Report*, a powerpoint presentation at the ID INFO Expo held in Kansas City, Mo. in late August of 2006. For a link to this power point and many others addressing different aspects of NAIS, see <http://animalagriculture.org/proceedings/2006IDProceedings.asp>

⁵ USDA-APHIS, *The National Animal Identification System: A Guide for Small-Scale or Non-Commercial Producers*, 3 (June 2, 2006).

⁶ *Id.* at 17 (Apr. 25, 2005).

⁷ *Id.* at 9 (Apr. 25, 2005).

⁸ 7 U.S.C. § 8303.

The Secretary may prohibit or restrict--

- (1) the movement in interstate commerce of any animal, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock; and
- (2) the use of any means of conveyance or facility in connection with the movement in interstate commerce of any animal or article if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock.

Authority to Establish Program. Although the AHPA does not explicitly envision NAIS, some may argue that to prevent the spread of disease, the Secretary can essentially prohibit all movement unless the producers participate in the NAIS. If challenged, the Secretary would need to prove that the restriction was necessary “to prevent the introduction or dissemination” of disease. This might be an easy case if a disease such as Foot and Mouth Disease is already spreading in the country. However, it is a closer case whether the Secretary has the authority to mandate such a program as a prophylactic against essentially any disease that might occur. This legal problem could put the Secretary in a practical catch-22 because if USDA waits to implement the program until a disease such as Foot and Mouth Disease gains a foothold in the country, it might already be too late to curb the injury caused by the disease.

Agency Discretion. Because the AHPA was passed in 2002, there are few reported cases interpreting the Act. One court of appeals case looked at the issue of whether the Secretary had the discretion to resume imports of Canadian cattle after such imports were banned because of BSE.⁹ The court examined USDA’s authority under section 8303, the provision dealing with importation. The district court found that USDA did not provide assurances that the resumption of imports would minimize the risk to human health.¹⁰ Because of this lack of assurance, the district court found that the Secretary acted in an arbitrary and capricious manner and set aside the rule. In so ruling, the district court examined the statistical risk factors and whether USDA adequately responded to comments during the rulemaking.¹¹ One of the main rationale’s of the district court was the Congressional finding stating that it was necessary for the Secretary to “protect the ... health and welfare of the people of the United States.”¹² On appeal, the Ninth Circuit first found that the district court did not provide the appropriate level of discretion to USDA, which the Ninth Circuit provided:¹³

“Regulations are presumed to be valid, and therefore review is deferential to the agency. *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir.2003). All that is required is that the agency have ‘considered the relevant factors and articulated a rational connection between the facts found and the choices made.’ *Id.* Further, ‘[t]he court is not empowered to substitute its judgment for that of the agency.’ *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir.2001). Deference to the informed discretion of the responsible federal agencies is especially

⁹ *Ranchers Cattleman Legal Fund United Stockgrowers of American v. USDA*, 415 F.3d 1078 (9th Cir. 2005).

¹⁰ *Ranchers Cattleman Legal Fund United Stockgrowers of American v. USDA*, 359 F.Supp. 2d 1058 (D. Mont. 2005).

¹¹ *Id.* at 1067-68.

¹² 7 U.S.C. § 8301(5)(B)(iii).

¹³ *Id.* at 1093.

appropriate, where, as here, the agency's decision involves a high level of technical expertise. *Id.*"¹⁴

Statutory Discretion. The Ninth Circuit then went on to point out that the district court inappropriately relied on the Congressional findings to require or prohibit USDA action.¹⁵ Rather, the Secretary was acting under section 8303 that states "the Secretary *may* prohibit or restrict" the importation or entry of any animal into the U.S.," which the court finds indicates a Congressional intent of wide discretion in regulating imports.¹⁶ Because of this wide discretion that a court is supposed to give to the Secretary, the Ninth Circuit reversed the district court's determination that the rule was arbitrary and capricious. As mentioned above, it is likely that if the USDA were challenged on its creation of the AHPA, USDA would rely on its authority to regulate interstate commerce in section 8505.¹⁷ This section includes the same discretionary language that the Ninth Circuit pointed to in *RCALF v. USDA*: "The Secretary may prohibit or restrict ... the movement in interstate commerce of any animal."¹⁸ Given this similarity, it is likely that a court would provide wide deference in a hypothetical challenge to the Secretary's authority to create NAIS.

Penalties. Penalties under the AHPA can be steep. Multiple violators can be sentenced up to ten years imprisonment, while criminal and civil fines can be in the tens of thousands of dollars for individuals.¹⁹

Agricultural Appropriations Bills. In past years, Congress has appropriated about \$33 million to USDA to implement NAIS. The current appropriation legislation continues funding but includes some important restrictions.

House. The House-passed bill continues to provide \$33 million but includes the following restriction:

That none of the funds appropriated under this heading for the National Animal Identification program may be obligated until the Committee on Appropriations of the House of Representatives receives from the Secretary a complete and detailed plan for the National Animal Identification System, including, but not limited to, proposed legislative changes, cost estimates, and means of program evaluation, and such plan is published as an Advanced Notice of Proposed Rulemaking in the Federal Register for comment by interested parties.²⁰

Senate. As of the writing of this paper, the appropriations bill on the Senate side has cleared the committee but has not yet reached the floor. The Committee version of the bill continues the funding at \$33 million and includes language requiring the "Department to include private industry

¹⁴ *Id.*

¹⁵ *Id.* at 1094.

¹⁶ *Id.* (emphasis added).

¹⁷ 7 U.S.C. § 8505.

¹⁸ 7 U.S.C. § 8505.

¹⁹ 7 U.S.C. § 8313.

²⁰ H.R. 5384, Title I (109th Cong. 2006).

components in any national animal identification program.”²¹ Exactly to what degree the private sector should participate in the system is unclear.

Freedom of Information Act (FOIA).

Application and Purpose. The Freedom of Information Act (FOIA)²² applies to records maintained by agencies within the executive branch of the federal government, which includes the United States Department of Agriculture (USDA). The purpose of FOIA is to provide public access to government records. FOIA does not apply to entities neither chartered nor controlled by the federal government. The first issue to consider with FOIA and NAIS is whether it would even apply. Currently, USDA plans to have private entities maintain the records of the NAIS but will require that the records be kept in such a way that if the federal or state animal health officials deem it necessary, the government could access the records at will. It is not clear whether such records would be subject to FOIA, especially if the program eventually becomes mandatory,

Exemptions. FOIA includes a number of exemptions within the law. The exemption most likely to apply to NAIS is the exemption for trade secrets and commercial information.²³ For this exemption to apply, the government would have to show that release of the information would either hurt the government’s ability to gather this necessary information in the future or cause a substantial competitive harm to the person who provided the information.²⁴ Arguably, either of these reasons would apply to NAIS because release of the information would discourage livestock producers from providing the information in the future, or people could use the information to affect the prices of calves or cattle.

Examples of Statutory Exemptions.

1. *Mandatory Price Reporting.* Beyond exemptions included in FOIA, federal law includes other exemptions relating to a particular regulatory scheme. A statutory exemption familiar to the livestock industry is the exemption found in the Livestock Mandatory Price Reporting Act, which states, “no facts or information obtained under [this law] shall be disclosed in accordance with [FOIA].”²⁵ The reasoning, much like one of the concerns with NAIS, is that other market participants could use the mandatory price reporting information to affect the market.

2. *Bioterrorism Act of 2002.* Another example of a statutory exemption can be found in the Bioterrorism Act of 2002. This Act requires members of the food industry (excluding farmers, ranchers, or meatpackers) to register with the Food and Drug Administration.²⁶ Just as the purpose of NAIS is to trace the whereabouts of animals, the purpose of the Bioterrorism Act is to trace the whereabouts of food in case it is intentionally or unintentionally contaminated. Information collected under the Bioterrorism Act is exempt from FOIA.²⁷

²¹ S. Rep. 109-266 (2006).

²² 5 U.S.C. § 552.

²³ 5 U.S.C. § 552(b)(4).

²⁴ *Utah v. U.S. Dept. of Interior*, 256 F.3d 967, 969 (10th Cir. 2001).

²⁵ 7 U.S.C. § 1636(b)(3).

²⁶ 21 U.S.C. § 350d.

²⁷ 21 U.S.C. § 350d(a)(4).

Restriction from Disclosure If Exemption Applies. If a federal agency attempts to disclose information that federal law requires not be disclosed, then a private party can seek to enjoin or stop the agency from such action using the Administrative Procedures Act (APA).²⁸ Under the APA, federal agencies are prohibited from acting contrary to law. Disclosure of information that federal law requires to be confidential would violate the APA.

State Laws. A number of state legislatures have felt compelled to enact policy that enables or restricts state officials from participating in the program. This section looks at two examples.

Kansas. K.S.A. § 47-674.

The Law. The Kansas law authorizes the state livestock commissioner to cooperate with USDA in the implementation of a voluntary NAIS.²⁹ The Kansas Animal Health Department originally drafted a bill seeking a mandatory system that met strong opposition in the House Agricultural Committee.³⁰ The law states that information provided to the state under this program is confidential and exempt from Kansas Open Records Act.³¹ The Kansas Attorney General considered the question of whether the confidentiality provision in the state law would also apply to private entities or the federal government should they maintain the records.³²

Kansas A.G. Opinion. A state Attorney General's opinion concluded that while the state law would require that the state include a contract provision with a private entity to keep the information private, it also stated that the state law could not control the actions of a federal entity. The opinion concluded that if the federal entities "are not acting on behalf of the [Kansas] Department of Animal Health, such entities may lawfully handle the information and resulting records as required and allowed by federal law."³³ In other words, if records collected by the state are handed over to the federal entities, federal law will control whether those records are confidential.

Vermont. Vt. Stat. Ann. tit. 161.056.

The Law. Much like the Kansas law, the Vermont law provides the state livestock commission the authority to develop and implement an animal identification system consistent with the USDA program. The law also provides that information collected under the system is exempt from the state open records law yet allows release of the information to specified individuals such as the animal's owner, the USDA Secretary and the Department of Homeland Security Secretary.³⁴

²⁸ John Doe # 1 v. Veneman, 2004 WL 1737792 (5th Cir., August 4, 2004). In this case, a number of ranchers sought to stop USDA from providing access to information related to a voluntary program to control coyote attacks. The court ruled that because the federal statute implementing the program prohibits USDA from releasing the information gathered for the program, the USDA abused its discretion when it decided to release the information.

²⁹ K.S.A. § 47-674(a).

³⁰ George Teagarden, *Kansas Animal Health Department Legal Authority – Open Records Act*. Included in Proceedings for ID INFO Expo, 2006,

³¹ K.S.A. § 47-674(g) (citing K.S.A. § 45-229).

³² Kansas Op. Atty. Gen, 2005-21 (Sept. 20, 2005).

³³ Kansas Op. Atty. Gen, 2005-21 (Sept. 20, 2005).

³⁴ Vt. Stat. Ann. § 161.056(e).

Implementation. The Vermont Department of Agriculture was in the process of implementing a premise identification system when it learned from USDA that the latter would not be able to guarantee confidentiality of the information.³⁵ After intense pressure from farmers in the state, the agriculture commissioner decided to halt the premise identification process.

Proposed Federal Laws

H.R. 1256 (109th Cong. 2005). This legislation deals exclusively with concerns that the records in the NAIS could be the subject of a Freedom of Information Act request. The legislation does so by simply exempting such information from FOIA. The legislation would allow release of the information only to persons needing “the information for reasons consistent with the public health and public safety purposes of the livestock identification system, as determined by the Secretary.”³⁶ The legislation requires the Secretary to release the information to certain people who request it, in particular the person who owns or controls the livestock, the Attorney General, the Secretary of Homeland Security, a court of competent jurisdiction, and to the government of a foreign country if the Secretary deems it necessary.³⁷

H.R. 1254 (109th Cong. 2005). This legislation includes the FOIA exemption discussed above in H.R. 1256 but also requires that the Secretary establish “an electronic nationwide livestock identification system to require the identification of livestock.”³⁸ The legislation avoids a number of the thornier issues surrounding the program. It does not make clear where the information will be stored (private or government), nor does it actually state that participation in the program will be mandatory. Nevertheless, the legislation authorizes appropriations of \$175 million.

H.R. 3170 (109th Cong. 2005). This legislation creates a livestock identification board composed of representatives of the different livestock sectors, as well as non-voting positions for a representative from USDA and a state animal health official.³⁹ In particular, the proposal covers cattle, swine, sheep, goats, and poultry. The legislation would make participation in the program mandatory by requiring the Secretary to “verify that each animal ... subject to the livestock identification system ... is properly identified upon first entry of the animal into commerce.”⁴⁰ The information would be controlled by the livestock identification board and would be expressly exempt from FOIA.⁴¹ The proposal would allow for limited release if three conditions are met: (a) a disease poses a serious threat, (b) the release of the information is related to actions under the authority of the Board, and (c) the person obtaining the information needs it for “reasons consistent with the public health and public safety purposes of the livestock identification system, as determined by the Secretary.”⁴²

³⁵ *Cooperate in Efforts to Protect Livestock*, BURLINGTON FREE PRESS (Aug. 17, 2006).

³⁶ H.R. 1256, § 1049A(c) (109th Cong. 2005).

³⁷ H.R. 1256, § 1049A(d) (109th Cong. 2005).

³⁸ H.R. 1254, § 10409A(a) (109th Cong. 2005).

³⁹ H.R. 3170, § 3(d) (109th Cong. 2005).

⁴⁰ H.R. 3170, § 5 (109th Cong. 2005).

⁴¹ H.R. 3170, § 7 (109th Cong. 2005).

⁴² H.R. 3170, § 7(c) (109th Cong. 2005).

S. 3862 (109th Cong. 2006); H.R. 6042 (109th Cong. 2006). Identical bills recently introduced in the Senate and House would prohibit USDA from setting up a mandatory system. The bill would also exempt the information gathered under any voluntary system exempt from FOIA.⁴³

IV. Possible Farm Bill Issues

Confidentiality. Probably the most controversial issue, as the current and proposed state and federal laws indicate, is whether the public will be able to access the information. It is very possible that debate may occur around the farm bill to provide federal protection for this information. This confidentiality provision could mirror one of the proposals in the legislation discussed above.

Cost. Costs for NAIS have been difficult to estimate because the exact nature of the program has not been clear. One survey found that costs in the early years would be higher than subsequent years, with one estimation of first-year cost at \$175 million for cattle only.⁴⁴ Another group estimated costs for a multispecies program at \$122 million per year, with the vast majority of that cost for ear tags.⁴⁵ Although there is not a lot of agreement about what the actual cost might be, the real contention is who will have to pay. The next farm bill could provide funds to the three main participants in the program: USDA, state animal health agencies, and private actors. The private actors include livestock producers, auction markets, meatpackers, and the data retention companies. However, it is hard to tell how successful this search for funding might be given that most expect that the next farm bill will be focusing on where to cut spending as opposed to looking for new programs to fund.

Liability. Another concern that many private actors have expressed is the possibility of increased risk of liability caused by NAIS.⁴⁶ One of the major concerns is that if someone falls ill from meat raised by an animal included in the NAIS, the system will allow the injured person to locate the owner of the animal to seek damages. Meat packers, however, will not be required to track the animal through the plant. Rather, the NAIS stops at the packing plant. Although many packers have the capability of at least being able to identify during which shift the animal was slaughtered, the likelihood that the packer would be able to join every seller of a particular shift into a lawsuit is unlikely. At any rate, some producers may feel compelled to urge Congress to include some type of language shielding the producers from liability that otherwise would not have been discovered if it had not been for NAIS.

Private versus Government. Some in the livestock industry feel strongly that the private sector should keep the records and drive the development of the system. Their main argument is that competition in the private sector is the most likely to yield a system that is low-cost. Meanwhile, others feel just as strongly that this system that is based on animal health concerns and that may be mandated in the future should be mostly in the government's hands.⁴⁷ These people fear that information in private

⁴³ Press Release, Sen. Talent Introduced Measure to Prohibit Mandatory Animal Identification (Sept. 7, 2006). At the time of this writing, the language for the bill was not yet available.

⁴⁴ Geoffrey S. Becker, *Animal Identification and Meat Traceability*, Congressional Research Service, 12 (March 7, 2006) (citing Communication to CRS, Mar. 30, 2004).

⁴⁵ Geoffrey S. Becker, *Animal Identification and Meat Traceability*, Congressional Research Service, 12 (March 7, 2006) (citing USAIP, at 45 (Dec. 23, 2003)).

⁴⁶ For a discussion of this topic, see Michael Roberts and Doug O'Brien, *Animal Identification: Liability Exposure and Risk Management*, chapter six in U.S. CATTLE IDENTIFICATION SYSTEMS: RISK MANAGEMENT AND MARKET OPPORTUNITIES (2004).

⁴⁷ Patrick Webb, *Swine Identification Update*, powerpoint presentation at ID INFO Expo 2006 at <http://animalagriculture.org/proceedings/IDINFOEXPO2006/Tuesday/1PreConferenceSeminar/10%20Swine%20Webb.pdf>; *R-CALF USA co-founder speaks at NIAA Animal ID Forum*, NORTH TEXAS E-NEWS (Aug. 26, 2006), at http://www.ntxe-news.com/artman/publish/article_36361.shtml.

hands may be more susceptible to market abuses, whether it is the sale of the information to other market participants or use of the information for market manipulation.

Small Farmer Concerns. This year saw a lot of activity on small farms, especially in the New England area, criticizing the possible effects of NAIS on these smaller enterprises.⁴⁸ In response, USDA released a publication entitled *The National Animal Identification System: A Guide for Small-Scale or Non-Commercial Producers*.⁴⁹ The guide stated that the focus of NAIS is animal health primarily within the commercial system and thus USDA efforts in NAIS will focus on larger producers. The guide addressed the following concerns.

Animals Raised for Personal Consumption. Those who raise animals that leave the farm only for custom slaughter for meat for personal consumption will not have to register the animals.⁵⁰ Nevertheless, the guide does continue to urge all premises to register within the system.

Reportable Events. The guide states that not all animal movements will be animal events; rather only those animal events posing a high risk of spreading disease, such as when the animal is exposed to a number of new animals.⁵¹ The guide provides common examples when reporting will not be required: movement of animals from one pasture to another owned by the farmer, neighborhood trail rides, and participation in local fairs. The last one is mentioned, even though this might be a classic instance of when animals have a chance to commingle and spread disease.

Possible Farm Bill Activity. It is possible that smaller producers may seek some type of blanket exemption for their operations. Nevertheless, animal health officials may object to such exemptions because smaller producers with animals that spend time in the open also pose a risk for the spread of disease.

V. Conclusion

The creation of a National Animal Identification System has aroused much interest and criticism by those involved with the livestock sector. Although there have been legislative proposals in the past few years, nothing has moved Congress to formally shape the direction of the program. The next farm bill may be the time when Congress may become involved in the design and implementation of this far-reaching system.

⁴⁸ See e.g. Jedd Kettler, *Out With a Bang: Premises Registration 'Dead,' But New Proposal Expected*, COUNTY COURIER (Vermont) (Aug. 24, 2006).

⁴⁹ June 2, 2006.

⁵⁰ USDA, *The National Animal Identification System: A Guide for Small-Scale or Non-Commercial Producers*, 4 (June 2, 2006).

⁵¹ *Id.*