

Opinion No. 2007-152

July 23, 2007

The Honorable James Norton
State Representative
3132 Bolin Hill Road
Harrison, AR 72766-7602

Dear Representative Norton:

I am writing in response to your request for my opinion on an issue arising from the following reported facts:

The USDA [United States Department of Agriculture] and ALPC [Arkansas Livestock and Poultry Commission] verbally state the NAIS [National Animal Identification System] program is strictly voluntary. However, the Work Plan signed during December, 2006 by Mr. Phil Wyrick, the ALPC Executive Director, states that it will transition to mandatory. In this Contract, the USDA gave the ALPC funds, which they accepted, to carry out this program from voluntary to mandatory.

You have attached to your request (1) a copy of correspondence, stamped Nov. 29, 2006, from USDA Undersecretary for Marketing and Regulatory Programs Bruce I. Knight to Arkansas Agriculture Department Secretary Richard Bell; and (2) an approved "Work Plan," dated December 14, 2006 and signed by ALPC Executive Director Phil Wyrick, which sets forth the ALPC's proposals to "promote the NAIS implementation plan for achieving full participation by 2009."

Against this backdrop, you have posed a question I will paraphrase as follows:

Are provisions of the National Animal Identification System (NAIS) program, contracted between the United States Department of Agriculture (USDA) and Arkansas Livestock and Poultry Commission (ALPC), transitioning from voluntary to mandatory in January 2009?

RESPONSE

In my opinion, the two documents you have provided me do not appear to amount to a contractual obligation on the part of the state to commit to mandatory NAIS registration by agricultural producers by some point in 2009. I lack the resources or the authority to opine whether the state has in some other manner, contractual or otherwise, committed itself to mandatory participation in the NAIS program.

NAIS is a program of animal identification developed in 2004 in the immediate aftermath of the discovery of mad-cow disease in an American cow. The program is generally designed to check disease outbreaks in livestock and poultry. *See generally* Jackson W. Adams, *Cow 54, Where Are You? Producer Liability and the National Animal Identification System*, 23 J. Contemp. Health & Pol'y 106 (Fall 2006). The program comprises three components: premises identification, animal identification and animal tracing. <http://animalid.aphis.usda.gov/nais/premises-id/index.shtml> (last visited June 13, 2007). Adams summarizes as follows the steps required to achieve the goal of identifying within 48 hours every animal that has had contact with an infected animal:

First, every location holding livestock animals, hatcheries, farms, and feedlots among others, is assigned a premises identification number. Once the locations are identified, a method must be implemented to uniquely identify each animal at every location. The final step, tracing animal movement from premise to premise, is vital to the functioning of the entire system. . . . The initial plan was created with cooperation and input from both state agencies and industry groups with the hope of keeping the system voluntary. . . . By maintaining a voluntary system, the USDA is . . . hoping that industries, not governments, will bear some of the costs of implementation. Despite the federal government's predictions about

industry enthusiasm and voluntary participation,^[1] the USDA remains prepared to make parts of the program mandatory. Absent federal rulemaking, states are encouraged to take action. As of this writing, the NAIS is not yet fully operational.

As reflected in the correspondence attached to your request, the USDA frequently stresses that producer participation in the program is voluntary. *See, e.g.*, <http://animalid.aphis.usda.gov/nais/premises-id/index.shtml> (last visited June 13, 2007); <http://animalid.aphis.usda.gov/nais/about/content/wp-c-index.shtml> (last visited June 13, 2007); <http://animalid.aphis.usda.gov/nais/about/top-reasons.shtml> (last visited June 13, 2007). In a table last modified on June 11, 2007, the USDA reports that of 37,614 estimated eligible premises in Arkansas, 7,463 are registered with NAIS. *Id.* Although the USDA correspondence attached to your request suggests that some states have made NAIS participation mandatory, the table of state participation posted on the USDA website indicates that only Wisconsin has full participation -- a report that may in itself be misleading in that the table reports 112.4% participation in Wisconsin. *Id.* Nothing in the pertinent federal legislation, 7 U.S.C. 8301 through 8320 (West Supp. 2007), suggests that participation in NAIS is mandatory or is anticipated to become mandatory. Likewise, no provision of the Arkansas Code mandates that agricultural premises be registered with NAIS, and my inquiries suggest that ALPC has no intention to seek to make participation mandatory. As noted above, however, the USDA correspondence attached to your request represents that some states have mandatory programs, and the Work Plan attached to your request at one point suggests that participation in Arkansas may at some future point become mandatory. With respect to the possibility that the federal government may at some point mandate NAIS registration, the USDA has announced the following:

USDA has indicated that at the outset, the NAIS will be a voluntary system. Incremental implementation of the plan as development continues will allow for potential problems within the system to be identified and the plan modified to address those problems.

¹ The unlikelihood of this predicted enthusiasm is illustrated at the state-wide level by Interim Study Proposal 2007-040, currently under review as House Bill 1761, captioned "The Freedom to Farm Act," which purports to exempt any producer from registering its premises or animals. Proposals for a national identification system for cattle have been unsuccessfully presented for decades, invariably opposed by the Cattlemen's Beef Association. *See* Jason R. Odeshoo, *Note: No Brainer? The USDA's Regulatory Response to the Discovery of "Mad Cow" Disease in the United States*, 16 *Stan. L. & Pol'y Rev.* 277, 313 (2005).

Ultimately there needs to be full compliance for the system to work as effectively as it should. Once the USAIP/NAIS^[2] has been finalized, considered workable and accepted by industry, it is likely that industry and market forces will drive the process towards full participation. At that time, USDA will work with industry and state partners to achieve full participation with the USAIP/NAIS.

<http://usaip/info/faqprint.htm> (last visited June 13, 2007). This forecast suggests that either the federal government by legislation or regulation or, alternatively, market forces that will foreclose the sale of unregistered animals will eventually mandate registration with NAIS. However, this conclusion leaves unresolved your particular question, which is whether the particular documents attached to your request commit the state to mandatory participation in NAIS by 2009.

The correspondence you have provided does not appear to be contractual in nature. It declares that the "USDA strongly believes that the best approach to NAIS is a voluntary system" and focuses on "new informational materials and messages we've developed to promote voluntary premises identification." The correspondence further declares: "Since NAIS is a voluntary program at the Federal level and in most States, it's important that we address concerns that might cause producers not to participate." The correspondence refers to existing "state NAIS coordinators," suggesting that Arkansas was already participating in NAIS prior to the ALPC's submission to the USDA of the Work Plan. Finally, the correspondence states: "We're making it very clear that, at the Federal level, NAIS is voluntary, although of course some States have made it mandatory and we support that choice." Nowhere in Mr. Knight's letter is there any suggestion that the USDA is interested in negotiating an arrangement under which the participation of Arkansas agricultural producers would be mandatory.

The Work Plan you have provided appears to be an approved application for funding submitted by the ALPC to the USDA. Although it may be contractual in nature, it is merely stamped "approved" and bears no signature of any USDA official. Immediately above the signature of Plan Administrator Phil Wyrick, the Work Plan declares: "These funds may only be used for the implementation and administration of premises registration in accordance with the NAIS and support of outreach efforts pertaining to all activities that promote the NAIS

² The "USAIP" is an acronym for the U.S. Animal Identification Plan.

implementation plan for achieving full participation by 2009." The Work Plan at one point declares:

Concentration will be on registering more premises to meet benchmarks for progress with the immediate goal of 60% premises registered by December 31, 2007 and create positive momentum for obtaining 100% premises registered by January, 2009. . . . Our current voluntary premises registration and horse chipping and tracking campaign will remain in place as producers are more favorable to this approach.

The only reference in the Work Plan to mandatory producer participation in NAIS is the following:

In order to train our livestock inspection personnel to be agents for producers when individual animal ID becomes mandatory, we will continue to use our personnel to work with equine owners in inserting chips in horses for preparedness purposes and create a tracking record for all movements to ready Arkansas to transition when individual animal ID becomes mandatory.

Neither of the documents you have submitted contains any unequivocal declaration that Arkansas producers' participation in NAIS will become mandatory at some point in 2009. The Work Plan appears to anticipate that NAIS participation will at some point become mandatory but does not contain any pledge that this will be the case. The USDA correspondence merely acknowledges that NAIS participation is mandatory in some states but describes a "voluntary system" as the "best approach."

Given the dearth of material I have been supplied regarding the state's participation in the NAIS program, I am simply unable definitively to opine whether the state has committed itself contractually to compel NAIS participation by producers at some point in 2009. I can do no more than opine that the documents you have provided in and of themselves do not appear to reflect any such commitment.

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Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

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