

About the National Animal Identification System (NAIS) Part 19: WSDA Seeks Broad Enforcement Power

By Bruno Schmidt

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When you read this article, you may want to keep in mind the following court ruling:

"The rights of the individuals are restricted only to the extent that they have been voluntarily surrendered by the citizenship to the agencies of government."

City of Dallas v Mitchell, 245 S.W. 944 (1922)

This court case has been cited numerous times over the years as it describes in a single sentence the kind of government we are supposed to have: a government that derives its just powers from the consent (a voluntary act!) of the governed. America's founders enshrined this concept in the original Constitution for the United States of America. It is this very document that, even today, lists only 18 distinct and LIMITED powers delegated to the Federal government, and by way of every state's accession to it, it is this very document that limits every state's government as well.

There exist only two prescribed ways for our governments to gain additional power: either by way of a referendum-type process (example: to get the majority of voters to approve a new law), or by voluntarily surrendering an individual right (example: accepting usage restrictions on your property in exchange for getting a government loan). Whatever the outcome, We-the-People have a RIGHT AND DUTY to hold our governments accountable to abide by the foregoing process. Our diligence is especially important when it comes to "regulations", a.k.a. "rules", proclaimed by a government agency. We need to pose questions like: Does the agency have the delegated authority to issue this rule? Is this rule within the limits of enacted laws and the constitution? Did the agency follow the prescribed rule-making process? Does this rule trespass on any individual or collective right(s) retained by the people?

Those very questions came to my mind when I learned a few weeks ago that the Washington State Department of Agriculture (WSDA) had announced in the Washington State Register (WSR) four extensive collections of proposed and amended rules this past January:

- "WSR 07-03-172: Disposal of dead livestock", 8 pages; filing date: Jan. 24, 2007; adoption date: Mar 21, 2007
- "WSR 07-03-123: Animal diseases – Reporting", 12 pages; filing date: Jan. 22, 2007; adoption date: Mar 16, 2007
- "WSR 07-03-173: Animal Importation", 43 pages; filing date: Jan. 24, 2007; adoption date: Mar 21, 2007
- "WSR 07-03-124: Livestock inspection and identification", 37 pages; filing date: Jan. 22, 2007; adoption date: Mar 16, 2007

(Notes: Page counts were derived from website content; the rules' actual page count published in the Washington State Register (WSR) may differ. The original text of these rules can be found on the internet at <http://www1.leg.wa.gov/documents/wsr/2007/07+WSR+Index+A.htm>).

As I began to look into these proposed and amended rules, I found that WSDA's notice of intent to develop these rules was announced in July 2006, but nothing was published by the department until this past January. Moreover, WSDA, using the state's "expedited" rule-making procedure, allows for a 45-day comment period only, and unless objected to by the public by no later than March 15, these proposed and amended rules are scheduled for adoption by March 16 or 21, 2007.

Trying to explain why the WSDA is rushing towards a quick adoption of these rules is not too difficult: taken as a whole, these rules will allow for broadened enforcement of the state's "Animal Health Protection Act", RCW 16.36, as it is about to be amended by the state's Senate Bill 5204 (introduced Jan. 12, 2007), and its companion House Bill 1310 (introduced Jan. 16, 2007). Is it any wonder that SB5204/HB1310 are receiving preferential treatment by their respective committees?

To understand how important the understanding – and scrutiny – of these proposed and amended rules is, here is how such rules "attach" to the surrounding laws:

*“... It is unlawful for any person to:
... 5) Willfully fail to comply with or
to violate any rule or order adopted
by the director under this chapter.”
(RCW 16.36.050)*

Because the foregoing “unlawful” acts relate exclusively to “any rule or order adopted ... under this chapter” we must therefore be vigilant about both, applicable laws (i.e. RCW Chapter 16.36) and implementing rules (i.e. WAC Chapters 16). With that in mind, let us take a brief look at the above proposed and amended rules:

“WSR 07-03-172: Disposal of dead livestock” proposes to add a new chapter, WAC 16-25, consisting of 6 new rules for disposal of dead livestock on your property. While the statutes authorizing these rules exist (RCW 16.36 and RCW 16.68), two main questions remain: (a) under what authority does the department have say-so over what happens on PRIVATE land, and (b) if such lawful authority exists, are the proposed rules reasonable or overreaching?

“WSR 07-03-123: Animal diseases – Reporting” proposes to amend 3 existing sections in WAC 16-70 and primarily affect veterinarians and veterinary labs. Summarily, these rules adopt the list of animal diseases reportable to the “OIE”, a.k.a. the “World Organization of Animal Health”, strike the department’s own list of diseases, broaden the scope and time of reporting, and append a new list of diseases that must be reported immediately. While the statute authorizing these amended rules exists (RCW 16.36), I wonder about the department’s authority to engage in a reporting relationship with an international organization, the “OIE”, attached to the U.N.

“WSR 07-03-173: Animal Importation” proposes sweeping rule changes affecting how livestock is brought into the state and the papers required for documenting these animals’ health and animal ownership. The “Certificate of Veterinary Inspection” (CVI) becomes the department’s primary enforcement instrument, records all pertinent information about an animal and tracks “official methods of identification”, including ownership brands and USDA-approved RFID ear tags (NAIS). Because an in-depth

discussion of these rule changes would be rather lengthy, I suggest that anybody who brings animals into the state, whether occasionally or routinely, study these rules thoroughly. Moreover, I am concerned that these rule changes are sweeping, extremely broad, and by way of implied contracts (i.e. the CVI evidencing ownership of an animal) may confer upon the department additional enforcement powers beyond authorizing statutes.

“WSR 07-03-124: Livestock inspection and identification” also proposes sweeping rule changes that tie into the proposed “Animal Importation” rules, above. While these rules are primarily geared towards the inspection and identification of cattle and horses, the scope could easily be broadened to other animal species. The “Certificate of Permit” (COP) will become the department’s primary enforcement tool to regulate and monitor movements of animals, records an animal’s brand along with other methods of livestock identification, and may collect any other information that the director considers necessary. In combination with the “Certificate of Veterinary Inspection” (CVI) mentioned above and “Self-inspection Certificates” (SIC), WSDA appears to gain complete oversight regarding the ownership of cattle, horses, and their movements into, within and out of the state. One new rule contains the new, sliding “Penalty schedule for notices of infraction”, a veritable menu of civil fines that is about to be authorized by SB5204/HB1310. My reservations are the same as for WSR 07-03-173, above, that these rule changes are sweeping, extremely broad, and by way of implied contracts (COP, SIC, CVI etc.) may confer upon the department additional enforcement powers beyond authorizing statutes.

When read in conjunction with the new bills (SB5204/HB1310) that authorize the above proposed and amended rules, posted and random points of inspection, added requirements for livestock identification and record keeping, the picture of an all-encompassing, all-knowing and all-seeing animal surveillance program emerges. Even if certain animal species are not yet specifically mentioned by these proposed and amended rules, everything will be in place to broaden this program merely with the stroke of a pen.

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