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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

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LIST OF DECISIONS REPORTED

JULY - DECEMBER 1997

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

GLICKMAN V. WILEMAN BROTHERS & ELLIOTT
No. 95-1184 1044

DEPARTMENTAL DECISIONS

AUVIL FRUIT CO., ET AL.
95 AMA Docket No. F&V 923-1.
Decision and Order as to Hoverhawk, Inc.
and Lyons & Son, Inc 1045

DANIEL STREBIN, ET AL.
AMAA Docket Nos. 95-0002, 96-0003
& 96 AMA Docket No. F&V 946-1.
Decision and Order 1095

CAL-ALMOND, INC., ET AL.
94 AMA Docket Nos. F&V 981-1,
981-3, 981-4, 981-5 & 981-7.
Decision and Order 1158

ANIMAL QUARANTINE AND RELATED LAWS

DEPARTMENTAL DECISIONS

KENNETH WOLFE, ET AL.
A.Q. Docket No. 95-0034.
Decision and Order 1228

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

JULIAN J. TONEY, ET AL.
AWA Docket Nos. 92-0014 & 94-0012.
Decision and Order 1235

FRED HODGINS, ET AL.
AWA Docket No. 95-0022.
Decision and Order 1242

FRED HODGINS, ET AL.
AWA Docket No. 95-0022.
Stay Order 1372

TAMMI LONGHI AND L & H ASSOCIATES.
AWA Docket No. 95-0074.
Decision and Order on ALJ's Ruling on
Order to Show Cause 1373

CLIFFORD BOETTCHER.
AWA Docket No. 96-0031.
Decision and Order 1391

JAMES J. EVERHART.
AWA Docket No. 96-0051.
Decision and Order and Ruling on
Motion to Modify Default Decision 1400

SAMUEL ZIMMERMAN.
AWA Docket No. 96-0021.
Decision and Order 1419

SAMUEL ZIMMERMAN.
AWA Docket No. 96-0021.
Order Denying Petition for
Reconsideration 1458

BEEF PROMOTION and RESEARCH ACT

DEPARTMENTAL DECISIONS

JERRY GOETZ.
BPRA Docket No. 94-0001.
Decision and Order 1470

FRESH CUT FLOWERS and FRESH CUT GREENS PROMOTION and INFORMATION ACT

DEPARTMENTAL DECISIONS

HANDLERS AGAINST PROMOFLOR.
FCFGPIA Docket No. 96-0001.
Decision and Order 1529

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

DEAN BYARD, ET AL.
HPA Docket No. 94-0038.
Decision and Order as to Dean Byard 1543

MUSHROOM PROMOTION, RESEARCH, and CONSUMER INFORMATION ACT

DEPARTMENTAL DECISIONS

DONALD B. MILLS, INC.
MPRCIA Docket No. 95-0001.
Decision and Order 1567

NONPROCUREMENT DEBARMENT AND SUSPENSION

DEPARTMENTAL DECISIONS

DAVID R. MEYER.
DNS Docket No. FCA-97-0001.
Decision and Order 1610

NORTHWEST PINE PRODUCTS, INC., ET AL.
DNS Docket No. FS-97-0002.
Decision and Order 1621

MISCELLANEOUS ORDERS

SEQUOIA ORANGE CO., INC.
90 AMA Docket No. F&V 908-6.
Remand Order 1632

MILKCO, INC., ET AL.
96 AMA Docket No. M 1-1.
Order 1633

DORA HAMPTON.
AWA Docket No. 96-0050.
Modified Order 1634

DAVID M. ZIMMERMAN.
AWA Docket No. 94-0015.
Stay Order 1636

MICHAEL L. KREDOVSKI AND BIO-MEDICAL ASSOC., INC.
AWA Docket No. 95-0035.
Supplemental Order 1637

BALBACH LOGGING, ET AL.
DNS Docket No. FS-97-0001.
Order Dismissing Appeal 1638

MMI INTERNATIONAL CORP., ET AL.
DNS Docket No. CCC-96-0001.
Order Dismissing Appeal Petition 1638

NORMAN THOMAS MASSEY.
FCIA Docket No. 96-0005.
Ruling on Motion for Summary Judgment and Order 1640

LINDSAY FOODS, INC., ET AL.
FMIA Docket No. 96-0003.
Remand Order 1643

CECIL JORDAN, ET AL.
HPA Docket No. 91-0023.
Ruling on Respondent's Motion for Stay 1654

WINSTON T. GROOVER AND MARCELLA SMITH.
HPA Docket No. 95-0004.
Dismissal of Complaint as to Marcella Smith 1658

PIERCE B. TIDWELL, JR.
P.Q. Docket No. 96-0013.
Order of Dismissal and Cancellation of Hearing 1659

E. LOTSPEICH.
P.Q. Docket No. 97-0012.
Order of Dismissal 1659

CAROL ROBINSON.
P.Q. Docket No. 97-0011.
Order Dismissing Complaint 1659

ADELA ANCHANTE DE REYES.
P.Q. Docket No. 98-0003.
Order of Dismissal 1660

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

CUSTOM RAISIN PACKING, INC., ET AL.
AMAA Docket No. 97-0002.
Decision and Order 1661

ANIMAL QUARANTINE AND RELATED LAWS

C. DAILY.
A.Q. Docket No. 96-0009.
Decision and Order 1664

GLORIA SOLIS.
A.Q. Docket No. 97-0001.
Decision and Order 1666

EUGENE T. COCHRAN.
A.Q. Docket No. 97-0005.
Decision and Order 1668

HO PHI NGUYEN.
A.Q. Docket No. 97-0008.
Decision and Order 1669

ANIMAL WELFARE ACT

RON CLAXON.
AWA Docket No. 95-0029.
Decision and Order 1672

FRANCIS CORL.
AWA Docket No. 96-0036.
Decision and Order 1675

FEDERAL CROP INSURANCE ACT

JERRY EDWARDS.
FCIA Docket No. 96-0008.
Decision and Order 1678

GRANT WOODROW BOTHUM, JR.
FCIA Docket No. 97-0003.
Decision and Order 1679

ERVIN JOSEPH SKLOSS.
FCIA Docket No. 96-0004.
Decision and Order 1679

KURTIS F. MEYER.
FCIA Docket No. 97-0001.
Decision and Order 1680

ADRIAN H. MEYER.
FCIA Docket No. 97-0002.
Decision and Order 1681

ALVIN C. RICHARDSON.
FCIA Docket No. 97-0005.
Decision and Order 1682

FEDERAL MEAT INSPECTION ACT and POULTRY PRODUCTS INSPECTION ACT

AMOROSO FOODS, INC.
FMIA Docket No. 96-0011 & PPIA Docket No. 96-0008.
Decision and Order 1684

PLANT QUARANTINE ACT

RIGAUD PIERRE.
P.Q. Docket No. 97-0006 .
Decision and Order 1688

ANA MARIA ROSALES.
P.Q. Docket No. 97-0001.
Decision and Order 1689

SERGIO ARTURO CANELES.
P.Q. Docket No. 95-0040.
Decision and Order 1691

FERMIN RIVERA-TORRES AND MIGUEL PALLENS.
P.Q. Docket No. 97-0002.
Decision and Order as to Miguel Pallens 1693

FERMIN RIVERA-TORRES AND MIGUEL PALLENS
P.Q. Docket No. 97-0002.
Decision and Order as to Fermin Rivera-Torres 1694

THAO MINH NGO.
P.Q. Docket No. 97-0010.
Decision and Order 1696

MANUEL DE JESUS VALDEZ-FLORES.
P.Q. Docket No. 97-0013.
Decision and Order 1698

CONSENT DECISIONS 1700

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

GLICKMAN, SECRETARY OF AGRICULTURE v. WILEMAN BROTHERS & ELLIOTT.
No. 95-1184.
Filed September 12, 1997.

SUPREME COURT OF THE UNITED STATES

The petition of Wileman Bros. & Elliott, et al. for rehearing is denied. The petition of Gerawan Farming, Inc., et al. for rehearing is denied.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: AUVIL FRUIT CO., HOVERHAWK, INC., and LYONS & SON, INC.
95 AMA Docket No. F&V 923-1.
Decision and Order as to Hoverhawk, Inc., and Lyons & Son, Inc., filed August 13, 1997.

Dismissal of petition — Rainier cherries — Minimum size, sugar content, maturity — Handlers only allowed 15(A) petition — Condemnation under Fifth Amendment — Secretary not arbitrary and capricious — Fifth Amendment due process — Beef, apple orders inapposite — No parity price for Rainier cherries — Regulation.

The Judicial Officer affirmed Administrative Law Judge Dorothea A. Baker's [hereinafter ALJ] dismissal of the 15(A) Petition and adopted the ALJ's Initial Decision and Order as the final Decision and Order. Initially, three Petitioners sought to modify the Cherry Order (Part 923--Sweet Cherries Grown in Designated Counties in Washington, 7 C.F.R. pt. 923), insofar as that Order regulates minimum size, sugar content (Brix), and maturity for Rainier cherries. The ALJ dismissed the petition as to Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., because they were not shown to be handlers. Petitioner Auvil's handler status was not challenged by Complainant, but the ALJ dismissed Auvil's Petition on the merits, as follows: (1) that the Rainier Cherry Order did not constitute an inverse condemnation of Petitioner Auvil's property contrary to the Fifth Amendment of the United States Constitution; (2) that the Secretary of Agriculture did not act in an arbitrary and capricious manner by adopting a final rule (59 Fed. Reg. 31,917) amending the Cherry Order; and (3) that the Secretary of Agriculture's actions did not violate Petitioner Auvil's substantive due process rights under the Fifth Amendment of the United States Constitution. Petitioner Auvil did not appeal to the Judicial Officer. Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., appealed the ALJ's decision that they were not handlers and argued the same merits on appeal as Petitioner Auvil had argued before the ALJ. The Judicial Officer agreed with the ALJ on all issues and affirmed the ALJ's Initial Decision and Order. The Judicial Officer agreed that Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., were not handlers, and that the dismissal of the Petition on the very same merits as to the handler Auvil would also apply to Hoverhawk, Inc., and Lyons & Son, Inc., should a reviewing court find them to be handlers. Respondent raised two issues on appeal with which the Judicial Officer agreed: that Petitioners' arguments to establish who is a handler based upon cases arising from marketing orders covering beef and apples are inapposite because those cases are based upon who collects and remits the assessments and not upon whether the handler ships product out of the production area as required by the Cherry Order; and the Secretary is not prohibited, under section 2 of the AMAA (7 U.S.C. § 602), from regulating Rainier cherries for the reason that the market price of Rainier cherries exceeded the parity price in the pertinent period because there is no separate parity price for Rainier cherries prepared by the Secretary apart from all sweet cherries, making such a price comparison impossible.

Sharlene A. Deskins, for Respondent.
Robert L. Parlette, Wenatchee, WA, for Petitioners.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Auvil Fruit Company, Hoverhawk, Inc., and Lyons & Son, Inc. [hereinafter Petitioners], instituted this proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) [hereinafter AMAA]; the federal marketing order regulating the handling of Sweet Cherries Grown in Designated Counties in Washington (7 C.F.R. pt. 923) [hereinafter Cherry Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter Rules of Practice], by filing a § 15 Petition To Modify Cherry Marketing Order No. 923 Dated June 16, 1994; Notice of Appeal; Request for Hearing or in the Alternative for "Continuance Referendum" on May 9, 1995. Petitioners' May 9, 1995, Petition consists of 2 pages numbered "8 -1-" and "8 -5-" and Affidavits of Robert L. Parlette, Grady Auvil, and Hal Lyons. In response to Chief Administrative Law Judge Victor W. Palmer's letter dated June 13, 1995, informing Petitioners that their Petition did not appear to be complete, Petitioners filed a second Petition consisting of 5 pages numbered "8 -1-" through "8 -5-" and Affidavits of Robert L. Parlette, Grady Auvil, and Hal Lyons on June 29, 1995 [hereinafter Petition].

Petitioners allege that they are handlers of Rainier cherries and challenge provisions of the Cherry Order which prohibit the sale and shipment in interstate commerce of Rainier cherries smaller than 11 row* (Petition at 2). Petitioners contend that the provisions of the Cherry Order which prohibit the sale and shipment of Rainier cherries smaller than 11 row: (1) constitute an inverse condemnation of their property; (2) constitute an unequal and discriminatory application of the law; (3) were adopted in an arbitrary and capricious manner; (4) are not based on any objective, scientific standard that is related to quality or edibility of Rainier cherries; and (5) were promulgated to shrink supply, in an attempt to improperly, and in contravention of guidelines of the United States Department of Agriculture, increase the price of Rainier cherries to consumers in interstate markets (Petition at 4).

Petitioners request that the Secretary of Agriculture declare null and void that portion of the Cherry Order which restricts the right of growers and handlers from dealing in, and packing and shipping Rainier cherries from the State of Washington of a size smaller than 11 row, or that the Secretary of Agriculture direct that a

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*The term "row" refers to the diameter of a cherry. Historically, cherries were placed in a box in rows. The more cherries in a row, the smaller the cherry. The fewer cherries in a row the larger the cherry. A 10 ½ row cherry is 1" in diameter, an 11 row cherry is 61/64" in diameter, an 11 ½ row cherry is 57/64" in diameter, and a 12 row cherry is 54/64" in diameter (7 C.F.R. § 923.322(e)).

continuance referendum on the Cherry Order be conducted (Petition at 4-5).

On June 8, 1995, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed an Answer denying the material allegations in the Petition and asserting that the Petition fails to state a claim upon which relief can be granted and that the Cherry Order, as interpreted by Respondent and the Washington Cherry Marketing Committee, is in accordance with law and thus binding on Petitioners.**

On October 10, 1995, Petitioners filed a Hearing Brief, and on November 1 and 2, 1995, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] presided over a hearing in Wenatchee, Washington. Robert L. Parlette, Esquire, of Davis, Arneil, Dorsey, Kight & Parlette, Wenatchee, Washington, represented Petitioners. Sharlene A. Deskins, Esquire, of the Office of the General Counsel, Washington, D.C., represented Respondent.

On December 12, 1995, Petitioners filed Petitioners' Proposed Findings of Fact and Conclusions of Law and Petitioners' Post-Hearing Brief. On December 21, 1995, Petitioners filed Affidavit of Eric Strutzel describing the operation of Petitioner Hoverhawk, Inc. On January 22, 1996, Respondent filed Proposed Findings of Fact and Conclusions of Law, and on February 15, 1996, Petitioners filed Petitioners' Reply Brief.

On February 20, 1996, the ALJ issued an Order for Additional Briefing regarding whether Petitioner Hoverhawk, Inc., and Petitioner Lyons & Son, Inc., are handlers and have standing to institute a proceeding under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). On March 11, 1996, Respondent filed Response to Order for Additional Briefing and Motion to Exclude Petitioner's [sic] Post Hearing Submission [hereinafter Respondent's Response to Order for Additional Briefing], and on March 13, 1996, Petitioners filed Response to Order for Additional Briefing.

On April 19, 1996, the ALJ filed an Initial Decision and Order dismissing the Petition. On May 29, 1996, Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., filed a Notice of Appeal and Petitioners' Motion for Extension of Time*** with the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to

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**Apparently Respondent had access to the Petition filed June 29, 1995, prior to Petitioners' filing, because Respondent's Answer, filed June 8, 1995, addresses the Petition.

***Petitioner Auvil Fruit Company did not appeal.

5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).**** By Informal Order of May 30, 1996, the Judicial Officer granted an extension of time for filing Petitioners' appeal petition to July 31, 1996. On July 30, 1996, Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., filed Petitioners' Appellate Brief. On October 4, 1996, Respondent filed Respondent's Opposition to the Petitioners' Appeal Petition; Respondent's Appeal Petition and Brief in Support Thereof. On October 31, 1996, Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., filed Petitioners' Response to Respondent's Brief, and on November 1, 1996, the proceeding was referred to the Judicial Officer for decision.

Based upon careful consideration of the record in this proceeding, I find that the ALJ is correct in dismissing the Petition. Petitioner Auvil Fruit Company, the sole, undisputed handler among the three Petitioners, did not appeal the ALJ's denial on the merits of the relief sought. The two non-handler Petitioners, Hoverhawk, Inc., and Lyons & Son, Inc., appeal both the ALJ's decision that they lack standing because they are not handlers, and the ALJ's denial on the merits of the relief sought in the Petition. Ordinarily, when a petitioner lacks standing to file a petition in accordance with section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) for the reason that the petitioner is not a handler, there would be no decision on the merits of that non-handler's petition; the petition would just be dismissed. Any discussion of the merits in such a proceeding would be solely hypothetical. However, the ALJ's Initial Decision and Order on the merits for handler Auvil Fruit Company would be equally applicable to the other Petitioners, should a reviewing court find that they are handlers, because they argue the identical points on appeal to the Judicial Officer, as were argued, *sub judice*. Consequently, the ALJ's Initial Decision and Order on the merits of the Petition is modified and incorporated in this Decision and Order for the benefit of a reviewing court.

Therefore, the ALJ's Initial Decision and Order is affirmed and adopted as the final Decision and Order, with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

****The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

. . . .

The AMAA authorizes only handlers subject to marketing orders to [file Petitions to] obtain administrative review. *See* 7 U.S.C. § 608c(15)(A). This fact[or] was [one of several] cited by the Supreme Court [of the United States] in its conclusion that consumers are foreclosed by the [AMAA] from obtaining reviews of marketing orders. *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984).

In reaching this conclusion, the Supreme Court reviewed the statutory scheme and found that it:

> . . . makes equally clear Congress' intention to limit the classes entitled to participate in the development of market orders. The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them. Handlers and producers—but not consumers—are entitled to participate in the adoption and retention of market orders. . . . Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process.

467 U.S. at 346[-47] (citations omitted).

[Respondent's] Response . . . to Order for Additional Briefing alleges . . . that the court erred to rely on evidence not in the record; . . . that "the court relied on evidence not presented at the hearing"; that the court "apparently accepts . . . [the Affidavit of Eric Strutzel] as explaining the operation of Hoverhawk, Inc., to such a degree that the Respondent must respond with this brief"; and that the "court erred by allowing the inclusion of a post-hearing submission," which places Respondent at a distinct and unfair disadvantage [(Respondent's Response to Order for Additional Briefing at 7-8)].

I do not believe that I erred in any of [these] matters. To begin with, the affidavit referred to by [Respondent] as having been sent to the [ALJ] by Petitioners' counsel was, in fact, [received by] the Acting Hearing Clerk on December [21], 1995, for filing with the case, with courtesy copies to [Respondent's counsel, Sharlene A.] Deskins, and the [ALJ]. Secondly, as noted by the [ALJ] in the Order for Additional Briefing, the affidavit "was not admitted into evidence in this case" noting the objections of Respondent, and further:

Whether or not such affidavit is admissible, it adds nothing of material importance to the facts already established at the oral hearing, namely the method of paying the assessments with respect to the cherries.

[Order for Additional Briefing at 5.]

The [ALJ] has not admitted the [Affidavit of Eric] Strutzel into evidence and is not going to do so. It shall remain a part of the record as an offer of proof, which the Judicial Officer may admit or not.[*****]

Third, the record evidence received at the oral hearing, in the presence of [Respondent's] counsel, describes the operations of Hoverhawk, Inc., and Lyons & Son, Inc. Mr. Lyons, the owner and President of Lyons & Son, Inc., described his operations in detail, including the following testimony:

[BY MR. PARLETTE]

Q. And, so, the people who actually pick the cherries also pack them in a box?

[BY MR. LYONS]

A. Yeah. They -- yeah. That's right. And in fact, before the marketing order came, why, they picked Number 1 and Number 2, and we'd go in, and we'd pick them, and they'd pick them in a liner, and then when they'd get the poundage that they needed, they just pick this container -- this liner out and just place it in the field, and then we would take it over and put it on orchard trailers, and then inspect for grade and for size at that time, and weight.

Q. And then you would mark the box with certain gross size?

A. Yeah. . . .

. . . .

[*****Admissibility of the Affidavit of Eric Strutzel is moot, since Respondent's appellate pleadings neither raise it as an issue, nor list it as an exception in Respondent's request for affirmance of the ALJ's Initial Decision and Order.]

[BY MR. PARLETTE]

Q. Where do you market your fruit now?

[BY MR. LYONS]

A. We market our fruit through Holman's, H&H Orchards, and they -- they do the sales aspect of it and the handling of them, and then the inspectors check. The federal inspectors come in there at the plant and does [sic] the inspecting.

. . . .

[BY MS. DESKINS]

Q. Do you pay assessments on Rainier cherries?

[BY MR. LYONS]

A. Oh, yeah. You can't get them inspected unless you do.

Q. Do you pay the assessments to the Washington Cherry Committee?

A. We pay them -- H&H Orchards does the assessing -- not the assessing, but collects the money, and I end up paying it, yeah.

Q. But H&H actually pays the assessment?

A. Right. They do the marketing for my Rainier cherries. That's right.

Tr. 176, 181, 194-95.

Likewise, Mr. Gutzwiler (Tr. 9[3]-116) and Mr. Parlette testified as to Mr. Parlette's operations [Hoverhawk, Inc.] relative to Rainier cherries.

Mr. Parlette's testimony contained the following description of his activities:

[BY MR. PARLETTE]

I market my fruit through the co-op known as Skookum or now Bluebird. My field man is Norm Gutzwiler, who has testified here today, and the gentleman who operated my orchard in 1995-94-93, Shad Snyder, previously testified. Previous to that time, I operated the orchard substantially by myself and contracted out the pruning.

. . . .

[BY MS. DESKINS]

Q. Okay. Have you ever handled cherries? And I mean handle as defined in the marketing order.

[BY MR. PARLETTE]

A. I have field packed cherries, just as Mr. Lyons has done.

Q. Okay. What I mean by handle is -- let me refer you to the CFR. What -- in the interest of time, let me just show you what the definition is. It's 923.13, and just tell me -- that's what I mean by handle.

A. What's your question?

Q. Okay. Do you handle cherries as defined in that regulation?

A. To the extent that my field pack cherries are marketed through Skookum, I am a handler of cherries.

Q. Have you ever paid assessments on --

A. Oh, absolutely. They collect them from me.

Q. So, it's actually Skookum that pays the --

A. Right.

Tr. 229, 250-51 (emphasis added [by the ALJ]).

Moreover, a review of the record . . . reveals how Hoverhawk, Inc., and Lyons

& Son, Inc., believed they were paying the assessments. [Respondent did not challenge Hoverhawk, Inc.'s and Lyons & Son, Inc.'s] status as handlers . . . until a few minutes before the hearing closed [(Tr. 389-94)].

Included among the allegations of the Petition were those that:

> Petitioner Auvil Fruit Company is a handler of Rainier cherries. Petitioner Hoverhawk, Inc., is a sole proprietorship and acts as a handler of Rainier cherries when field packing and selling fruit directly to purchasers. Petitioner Lyons & Son[], Inc., is a handler of Rainier cherries.

[Petition at 2.]

. . . The Answer . . . contained the following:

> 1. The allegations of page[s] 1 and 2 contain descriptions of the [P]etitioners['] operating structure and the sections of the Cherry Marketing Order that the [P]etitioners seek to have reconsidered to which no response is required. However, to the extent that a response is required the [R]espondent is without sufficient knowledge to respond.

[Answer at 1.]

In [Respondent's] Response [to Order for Additional Briefing at 4, 5 n.5, 6 n.7,] Respondent notes that were Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., to be regarded as handlers, they would have been required to file reports, in addition to paying assessments. Respondent does not set forth the [type] or number of reports which would have been filed.[1] However, [the failure to pay assessments or file reports required of handlers] cannot be regarded as determinative by itself inasmuch as the failure to file a report [or pay an assessment] does not necessarily mean that someone is not a handler. . . .

Respondent, in [Respondent's Response to Order for Additional Briefing,] recognizes the need to examine the full spectrum of activities in determining handler status:

> . . .[T]he Order does not define a handler on the basis of who pays the

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[1]The record evidence does not reveal whether Petitioners [Hoverhawk, Inc., and Lyons & Son, Inc.,] filed reports or not, although inference to the contrary can be [deduced] from the testimony of the [Washington Cherry Marketing] Committee's manager[, Lucille McFarland (Tr. 388-98)]. Section 923.60 [of the Cherry Order], 7 C.F.R. § 923.60, . . . requires the filing of reports. Petitioners, for violations thereof, would be subject to an enforcement action pursuant to 7 U.S.C. § 608c(14)(B).

> assessments. A person does not become a handler under the Order by paying assessments. The payment of an assessments [sic] and the filing [of] reports are relevant to the extent that these activities are required of handlers and are often indicative of who is the handler.[7] Thus, the claims that certain costs are passed down by a handler to a grower does not make the grower a handler and is irrelevant to determine who is a handler. [Footnote omitted.]
>
> [7] Under the terms of the Order a handler is still a handler even when a handler does not pay an assessment or file reports. In situations where a handler does not pay assessments or file reports, the handler is subject to enforcement actions pursuant to 7 U.S.C. § 608(c)(14)(A) and (B). The converse of this is not true. In other words, if a person pays an assessments [sic] and files reports this action does not make that person a handler unless the person also conforms with the statutory definition of handler.

[Respondent's Response to Order for Additional Briefing at 6.]

However, because the Department has determined that growers such as Hoverhawk, Inc., and Lyons & Son, Inc., who field pack, and then have another entity palletize the boxes and achieve inspection (but which charges the growers for the assessments) are not handlers, the . . . Petition as to Hoverhawk, Inc., and Lyons & Son, Inc.[, is dismissed]. The Judicial Officer gives [controlling] weight to an agency's own interpretation of its own regulations and, accordingly, his views are followed [in this Decision and Order]. . . . [For instance, in *Mil-Key Farm*:

> At the outset, it is important to note that this case involves the interpretation of Milk Marketing Order No. 124 by the agency which promulgated and administers that Order. "[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 113 S.Ct. 1913, 1919 (1993) (citations omitted).

In re Mil-Key Farm, Inc., 54 Agric. Dec. 26, 52-53 (1995).]

Such views are in accord with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> When a court reviews an agency's construction of the statute which it

administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

[*Chevron, supra,* 467 U.S. at 842-44 (footnotes omitted)].

Chevron's instruction to a court conducting a judicial review of an agency's construction of a statute, which it administers, has logical application to an administrative review by an administrative law judge whose neutrality requires distancing from those who are involved with the program's day-to-day operations. It is the experience and the sense of the legislative purpose those agency administrators possess, that the *Chevron* court singled out for judicial deference; deference that should be given by an administrative law judge when a pertinent interpretation of this kind has been made prior to a petition for administrative review.

Hereinafter the term "Petitioner Auvil" shall refer to Auvil Fruit Company, unless otherwise indicated.

[APPLICABLE PROVISIONS OF THE AMAA]

SUBCHAPTER I—DECLARATION OF CONDITIONS AND POLICY

. . . .

[7 U.S.C.]:

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

. . . .

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608(c)(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

SUBCHAPTER III—COMMODITY BENEFITS

§ 608. Powers of Secretary

(1) Investigations; proclamation of findings

Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value

thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of this chapter,

he shall cause an immediate investigation to be made to determine such facts. . . .

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof . . . .

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits . . . .

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or produce thereof specified in subsection (2) of this section [which includes fruits], he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

. . . .

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all

producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

. . . .

(14) Violation of order; penalty

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which the notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. §§ 602(3), 608(1), 608c(1)-(4), (6)(A)-(F), (14)-(15).

[APPLICABLE PROVISIONS OF THE] RULES OF PRACTICE

7 C.F.R.:

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

(a) The term *act* means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. and Sup. 601);

(b) The term *Department* means the United States Department of Agriculture;

(c) The term *Secretary* means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead;

(d) The terms *administrative law judge* or *judge* means any Administrative Law Judge, appointed pursuant to 5 U.S.C. 3105, and assigned to the proceeding involved;

(e) The term *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in his stead[;]

. . . .

(h) The term *marketing order* means any order or any amendment thereto which may be issued pursuant to section 8c of the act;

(i) The term *handler* means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable;

(j) The term *proceeding* means a proceeding before the Secretary arising under subsection (15)(A) of section 8c of the act;

(k) The term *hearing* means that part of the proceeding which involves the submission of evidence;

(*l*) The term *party* includes the Department;

. . . .

(o) The term *decision* means the judge's initial decision in proceedings subject to 5 U.S.C. 556 and 557, and includes the judge's (1) findings of fact and conclusions with respect to all material issues of fact, law or discretion as well as the reasons or basis thereof, (2) order, and (3) rules on findings, conclusions and orders submitted by the parties;

(p) The term *petition* includes an amended petition.

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition.* Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(b) *Contents of petition.* A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

7 C.F.R. §§ 900.51(a)-(e), (h)-(*l*), (o)-(p), .52(a)-(b).

[APPLICABLE PROVISIONS OF THE]
ADMINISTRATIVE PROCEDURE ACT [footnote 2 omitted]

[5 U.S.C.]:

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For purposes of this subchapter—

. . . .

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule[.]

. . . .

§ 553. Rule making

. . . .

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which

the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. §§ 551(4)-(5), 553(b)-(e).

Findings of Fact

1. In 1993, the marketing conditions for Rainier cherries [were] disorderly. Many buyers had purchased Rainier cherries that were small, immature, sour, and of inconsistent quality. The sale of small, sour Rainier cherries in 1993 hurt the market for larger, sweeter cherries [(RX 3).]

2. Marketing Order 923, which was promulgated by the [Secretary] of Agriculture, originated from the Washington Cherry Marketing Committee. This administrative body is provided for in the [Cherry Order]:

ADMINISTRATIVE BODY

§ 923.20 Establishment and membership.

There is hereby established a Washington Cherry Marketing Committee consisting of fifteen members . . . .

. . . .

§ 923.51 Recommendation for regulation.

(a) Whenever the committee deems it advisable to regulate the handling of any variety or varieties of cherries in the manner provided in § 923.52, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, the committee shall give consideration to current information with respect to the factors affecting the supply and demand for cherries during the period or periods when it is proposed that such regulation should be made effective. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 923.52 Issuance of regulations.

(a) The Secretary shall regulate, in the manner specified in this section, the handling of cherries whenever he finds, from the recommendations and information submitted by the committee, or from other available information, that such regulations will tend to effectuate the declared policy of the act. Such regulations may:

(1) Limit, during any period or periods, the shipment of any particular grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of cherries grown in any district or districts of the production area;

(2) Limit the shipment of cherries by establishing, in terms of grades, sizes, or both, minimum standards of quality and maturity during any period when season average prices are expected to exceed the parity level;

(3) Fix the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging or handling of cherries.

(b) The committee shall be informed immediately of any such regulation issued by the Secretary, and the committee shall promptly give notice thereof to growers and handlers.

[7 C.F.R. §§ 923.20, .51, .52.]

3. A special meeting of the Washington Cherry Marketing Committee was held August 24, 1993, to determine what direction the Committee should take. Among the many subjects covered were those pertaining to Rainier cherries:

RAINIER CHERRIES

Gary Ormiston brought up the subject of Ranier [sic] cherries. He feels it is time to consider a minimum grade for them. Also the problem of green cherries getting into the market.

His suggestion is that we should have a minimum sugar content. If they have the sugar content then they will have size.

Some members felt that handling and packaging them is the real problem. If regulations are put on them, we may never learn how to handle them.

> What we need is more information on the best way to handle them.
>
> The committee agreed they do not want Rainiers included in our state or federal regulations. They can have separate regulations and include whatever they want to regulate.

[RX 1 at 6.]

4. The [Washington Cherry Marketing] Committee then held a special meeting on December 14, 1993, the official minutes of which are part of the record in this case. The notice [of the December 14, 1993, meeting] stated, among other things, the following:

> Also, on the agenda, a discussion of the future of Rainier cherries. We would like to invite any Rainier cherry grower to contact your warehouse or sales agency to voice your opinion whether or not they need to be regulated.

[RX 2 at 5.] Among the concerns of the Committee at this meeting was the introduction into the market of immature sour cherries picked too early. The Committee adopted a motion to regulate the minimum size of Rainier cherries to 10½ row and larger. The minutes of the Committee reveal:

> <u>RAINIER CHERRIES</u>
>
> Several committee members voiced the problem of small immature cherries on the market. These cherries hurt the rest of the good, quality growers.
>
> Some members felt we should regulate size, soluble solids and quality.
>
> It was stated that some warehouses would not take any Rainiers unless they were at least 10 1/4 Row. If they were brought into the warehouse they were automatically diverted to the briner.
>
> Some of the members felt that poor orchard practices are one of the main causes for small cherries. Some orchards use Rainiers as pollenizers and are not pruned as heavily as needed to grow the larger fruit.

> It was proven last season that the smaller, sour cherries hurt the market for the larger, sweeter ones. Consumers would not buy the larger cherries because of the poor quality of the earlier ones they had purchased.
>
> The committee was advised to be very careful in regulating the Rainier variety. Be sure the industry knows what they want and need first. The committee should do their research first and then decide on regulations.
>
> The committee felt that if size was regulated it would pretty much take care of the sugar content.
>
> STEWART made a motion to regulate the minimum size of Rainier variety only to 10 1/2 Row and larger. Seconded by COWIN. Motion carried with one nay vote. The reason behind the nay vote was that we would take about 50% of the cherries off the market or they would go outside the production area to be packed. He was advised that any fruit grown inside the production area must meet the Marketing Order Regulations.

[RX 2 at 10.] The term 10½ row refers to the diameter of the cherries. Historically, cherries are placed in a box, row sized. The more cherries on a row, the smaller the cherry. A 12 row cherry is smaller than a 10 row cherry. That is to say, as the number goes up, the smaller the diameter of the cherry. . . . A 10½ row cherry is 1 inch in diameter and a 11 row cherry is sixty-one/sixty-fourth inch in diameter; and an 11½ row cherry is fifty-seven/sixty-fourth inch in diameter; and a 12 row cherry is fifty-four/sixty-fourth inch in diameter.

5. By communication dated December 23, 1993, the [Washington Cherry Marketing] Committee advised Agricultural Marketing Service, United States Department of Agriculture, through its Portland, Oregon, Regional Office:

> Dear Mr. Olson:
>
> The Washington Cherry Marketing Committee met on December 14, 1993. As a result of that meeting they would like to request a change in the cherry regulations for Rainier cherries.
>
> Section 923.52 authorizes the regulation and Section 923.53 allow[s] modification of the regulation.

The committee voted to recommend that the minimum size for Rainier cherries be 10½ row or larger. The reason for this change is that the larger cherries have the sugar content that is needed for a better tasting cherry. With Rainers [sic], the larger cherries have the sugar content that is needed for a better quality and tasting cherry, where the smaller cherries tend to be immature and sour. Consumers will not buy the larger cherries once they have purchased the earlier, smaller ones.

Some warehouse[s] have set their minimum at 10½ row or larger. Smaller cherries are automatically diverted to the briner.

The committee feels this regulation is necessary to bring a better product to the consumer.

We would like to have this regulation in place by mid-May for the 1994 season.

Enclosed you will find the ten informational points to substantiate this request for a regulation change.

If you need further information, please call.

Sincerely,

WASHINGTON CHERRY MARKETING COMMITTEE
/s/
Lucille McFarland, Manager

Encl

TEN INFORMATIONAL POINTS

1. **Specific section of the order authorizing the rule or regulation.**

   Section 923.52 authorizes the regulation and section 923.53 allows modification of the regulation.

2. **Recommended effective date and reason that date is needed.**

Effective date by mid-May. Rainier harvests begins in June but we need time to notify the industry of the regulations.

3. **Clear definition of the problem.**

Small, sour cherries getting to the market. These cherries ruin the later market for the larger, sweeter cherries.

4. **Conditions that led to the problem.**

Small, sour cherries getting the early market. Consumers will not buy the larger cherries after buying the earlier small fruit.

5. **How recommendation will address or correct the situation.**

By regulating the row size, the cherries will have the sugar content that is needed for this variety. The larger the cherry the sweeter it is.

6. **Whether there are viable alternatives to the recommended action.**

The only viable alternative would be for the Committee to recommend the warehouses set their own row size. Some warehouses have done this with good results.

7. **Expected results of the regulation.**

A larger, sweeter product for the consumer.

8. **Impact of recommendation on small business.**

Most Rainier growers are small business people. The acreage is small compared to the dark sweet cherries. Larger cherries on the market would bring greater returns to the growers.

9. **Vote on the recommendation and a discussion of the reasons for dissenting votes.**

Yea - 13 Nay - 1. Nay voted against the 10½ Row because he felt it would take too much fruit off the market and they would only go out of the production area to be packed. Not true.

10. **Indications that the action is controversial or raises special problems.**

Growers with poor farming practices will naturally have smaller fruit. Some orchards use Rainiers as pollenizers and do not prune as heavily as they should. These are the cherries that are not doing the industry a favor. Most Rainier growers have specific blocks of Rainiers. This regulation has long been mentioned by the Rainier growers as what the industry needs to have a good marketable product for the consumer.

[RX 3 at 1-2.]

6. There was opposition to [Washington Cherry Marketing] Committee's [recommendation], including the submission of various written letters. A typical reply by the Department to various commentators was similar to, or the same, as:

. . . .

Dear Mr. . . .:

This is in response to your letter regarding the Washington Cherry Marketing Committee's (committee) recommendation to limit the size, to 10½ row and larger, of Rainier variety cherries that can be sold on the fresh market.

The Department of Agriculture (Department) has received a number of letters from Washington cherry growers and shippers both in support of, and in opposition to, the committee's recommendation. Given this lack of consensus, we have asked the committee to reconsider the need to regulate Rainier variety cherries, particularly in light of the concerns raised in these letters. (Copies have been supplied to the committee.) The committee has agreed to hold a meeting March 15, 1994, where it will further discuss this issue. We at the Department encourage you to participate in this meeting to express any further concerns you have.

We appreciate your interest regarding this proposal.

Sincerely,

/s/ Anne M. Dec
for Ronald L. Cioffi, Chief
Marketing Order Administration Branch

cc: Gary Olson, OIC, NWMFO

[RX 4 at 13.]

7. The Chairman of the Washington Cherry Marketing Committee[, Mr. Truman Yeager,] was advised by Mr. Cioffi, Chief, Marketing Order Administration Branch, [by letter] dated February 14, 1994:

> As you may be aware, we have received a number of letters from Washington cherry growers and shippers both in support of, and in opposition to, the committee's recommendation. Some of the handlers raised concerns that were not addressed in the information we received from the committee in support of this rulemaking action. We would appreciate the committee responding to the concerns raised in these letters to assist us in making a decision on this matter. (Copies of the letters are enclosed for your information.) This reconsideration should take place in an open committee meeting to allow all interested parties to participate in the discussion of this issue.

[RX 6 at 1.]

8. A special meeting was called and held on March 15, 1994, to reconsider the matter and to include the views of those who were opposed to the [Washington Cherry Marketing] Committee's actions. In addition to hearing statements by growers and handlers, the Committee heard a presentation by Robert A. Brown, an Engineering Consultant from Wenatchee, Washington. Inherent in some of the discussions of the March 15, 1994, special meeting was the fact that a minimum Brix[******] sugar content would be a desirable factor. As a result, the Committee,

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[*******Brix* relates to the Brix scale of the 19th Century Austrian scientist, Adolph F. Brix: "a hydrometer scale for sugar solutions so graduated that its readings at a specified temperature represent percentages by weight of sugar in the solution--called also *Brix.*" Webster's Ninth New Collegiate

on March 15, 1994, proposed recommending the minimum size of 11 row and a composite sample of 17 Brix minimum per grower lot [(RX 6 at 5, 19-20)].

9. The [Washington Cherry Marketing] Committee's recommendation on size and Brix was forwarded to the Agricultural Marketing Service [(RX 7 at 1)]; was published in the Federal Register [as a notice of proposed rule making] on May 19, 1994 (59 Fed. Reg. 26,148) [(RX 7 at 4)]; was adopted by the Department and incorporated in 7 C.F.R. pt. 923, and the final rule was published on June 21, 1994 (59 Fed. Reg. 31,917) [(RX 7 at 13)]. Among other things, the final rule states:

> The general consensus of the Washington cherry industry is that the shipment of poor quality Rainier cherries is disrupting the marketplace and that some minimum quality standards are needed to maintain the Rainier cherry market. However, some disagreement was expressed at the committee meeting as to precisely what those minimum standards should be.
>
> Some questioned, for example, the 10½ row size requirement initially recommended by the committee, saying that this requirement would result in too many cherries being diverted to processors (an outlet exempt from regulation). Others stated that the smaller 11 row cherries have adequate sugar content. Still others opposed any size requirement, believing that other criteria (e.g., maturity levels) are more important than size and that size bears no relationship to those criteria. Additionally, concern was expressed that producers at higher elevations would be more adversely impacted than other producers by a minimum size requirement.
>
> In regards to this last concern, the committee concluded that producers at higher elevations should not be adversely impacted by the 11 row minimum size regulation, since these producers have demonstrated the ability to produce other varieties at acceptable sizes (e.g., Bing cherries). Further, a number of producers who farm at higher elevations attended the meeting, and stated that they would not have a problem meeting the proposed minimum size requirement, and that proper cultural practices (including pruning) would ensure that other producers achieve appropriate sizing.
>
> In an attempt to reach an industry compromise, the committee rescinded its December recommendation to establish a minimum size

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Dictionary 180 (1986).]

requirement for Rainier cherries at 10½ row size. It recommended instead a lower minimum size requirement of 11 row, coupled with a maturity requirement of at least 17 percent soluble solids. This recommendation is considered to be conservative, in that most handlers in the Washington cherry industry pack to higher standards. The committee intends to conduct research during the 1994 and subsequent seasons to determine whether further refinements in Rainier variety cherry standards are needed.

[59 Fed. Reg. at 31,919; RX 7 at 15.] The Department [also] noted [in the final rule making document] that prices for fresh cherries tend to be highest early in the season and that this "price trend serves as an incentive for producers to harvest early, which has resulted in immature, sour Rainier cherries being marketed." [(59 Fed. Reg. at 31,919; RX 7 at 15)]. The Department placed emphasis on the maturity of Rainier cherries being marketed when it adopted the minimum 17 Brix level. In the final rule, Agricultural Marketing Service discussed parity price: "The AMS has calculated an equivalent parity price for Washington sweet cherries of $2,083 per ton, and does not expect that prices received during the 1994 season will exceed parity levels." 59 Fed. Reg. at 31,920 [(RX 7 at 16)].

10. [Section 8c(15)(A) of the AMAA] (7 U.S.C. § 608c(15)(A)) provides that only handlers [subject to an Order] may file a written petition. *See In re M & R Tomato Distribs., Inc.*, 41 Agric. Dec. 33 (1982); *In re Sequoia Orange Co.*, 40 Agric. Dec. 1908 (1981). [Section] 923.41 [of the Cherry Order] provides . . .:

§ 923.41 Assessments.

(a) Each person who first handles cherries shall, with respect to the cherries so handled by him, pay to the committee upon demand such person's pro rata share of the expenses which the Secretary finds will be incurred by the committee during each fiscal period. Each such person's share of such expenses shall be equal to the ratio between the total quantity of cherries handled by him as the first handler thereof during the applicable fiscal period and the total quantity of cherries so handled by all persons during the same fiscal period. . . . (Emphasis added [by the ALJ]).

[7 C.F.R. § 923.41(a).]

Section 923.12 of the [Cherry] Order [states] that "*[h]andler* is synonymous with shipper and means any person (except a common or contract carrier

transporting cherries owned by another person) who handles cherries[" (7 C.F.R. § 923.12)]. Section 923.13 [of the Cherry Order] expands upon what is meant by handle[, as follows]:

> *Handle* and *ship* are synonymous and mean to sell, consign, deliver, or transport cherries or cause the sale, consignment, delivery, or transportation of cherries or in any other way to place cherries, or cause cherries to be placed, in the current of the commerce from any point within the production area to any point outside thereof: *Provided*, That the term "handle" shall not include the transportation within the production area of cherries from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such cherries to such packing facility for such preparation.

[7 C.F.R. § 923.13.]

11. Hoverhawk, Inc., and Lyons & Son, Inc., describe themselves as growers of Rainier cherries (Tr. 175, 181-189, 392). They do not meet the definition of "*handler*" and [are] dismissed as Petitioners.

Conclusions

The [AMAA] authorizes the Secretary of Agriculture to promulgate marketing orders for certain fruits and vegetables. Marketing orders are implemented by committees composed of members of the regulated industry. The committees recommend . . . regulations to the Secretary to effectuate the marketing orders and to govern such matters as fruit size, fruit maturity, and advertising. The Secretary may adopt committees' recommendations through informal rule making. The [costs associated with administering] the marketing orders are funded through assessments imposed on fruit handlers based upon the volume of fruit they ship. The committees are required to submit annual budgets to the Secretary, along with a recommendation as to the rate of assessment for [each] year. The Secretary approves the committees' budget and the assessment to be imposed on handlers for each year in the form of a regulation.

Petitioner Auvil maintains that the criteria [for] size designation were [developed] without determining the scientific relationship between size and sugar content and the further distinction between cherries grown at lower elevations (500 feet to 1500 feet) and those grown at higher elevations (1500 feet to 2500 feet). Moreover, [Petitioner Auvil] asserts . . . that such criteria did not include sugar

content. Petitioner Auvil maintains that size is an unreliable indicator of maturity and flavor.

In addition, Petitioner Auvil maintains [that] the [Washington Cherry Marketing] Committee's recommendation of a minimum size of 11 row and a 17 Brix minimum was without objective basis, and that absolutely no scientific evidence was presented to support size as an indicator of maturity. Further, Petitioner alleges that the Committee did not discuss certain vital matters, such as whether a parity price had been set for Rainier cherries, what such price was, and how its proposal would affect high altitude growers and small family farms. Moreover, [Petitioner Auvil] alleges the Committee's actions were an attempt to [escalate] prices for the benefit of some farmers and to the detriment of other farmers in the higher elevations.

Petitioner Auvil alleges that the [size requirement for Rainier Cherries in the] Cherry Order constitutes an inverse condemnation of private property under the Fifth Amendment of the United States Constitution. [Petitioner Auvil] further alleges that the Department acted arbitrarily and capriciously when it adopted the [final rule published June 21, 1994 (59 Fed. Reg. 31,917), amending the] Cherry Order. In addition, [Petitioner Auvil] alleges the Department violated its substantive due process rights guaranteed by the Fifth Amendment to the United States Constitution.

It is well-settled that the burden of proof in a . . . proceeding [instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A))] rests with the Petitioner, who has the burden of proving that the challenged marketing order provisions or obligations are not in accordance with law. *In re Borden, Inc.*, 46 Agric. Dec. 1315 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990)[, *printed in* 50 Agric. Dec. 1135 (1991)].

The scope of review is set forth in section 10(e) of the Administrative Procedure Act, . . . which provides . . . .:

[§ 706. Scope of review

. . . The reviewing court shall—

. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—]

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in

> accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2).

Petitioner has the burden of proving that the rule making record does not provide the requisite level of support for the Secretary's findings and conclusions. *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972). In the absence of clear evidence to the contrary, administrative regulations are presumed to be based on facts justifying the Secretary's exercise of statutory authority. *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969).

This proceeding does not afford Petitioner a forum to debate questions of policy, desirability, or effectiveness of order provisions. *In re Sunny Hill Farms Dairy Co., supra*. The responsibility for selecting the best means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative expertise. *In re Defiance Milk Products Co.*, 44 Agric Dec. 11 (1985), *aff'd*, 857 F.2d 1065 (6th Cir. 1988).

The fact that Petitioner has the burden of proof in this proceeding and that this is not a proceeding to "second guess" the Secretary's policy judgments is set forth in many decisions, as follows:

> It is well settled that the burden of proof in an 8c(15)(A) review proceeding rests with the petitioner. Petitioner in this proceeding has the burden of proving that the challenged Order provisions and obligations imposed upon it were "not in accordance with law" (7 U.S.C. 608c(15)(A)).

See Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 316-317 (C.A. 3), *certiorari denied*, 394 U.S. 929; *Boonville Farms Cooperative, Inc. v. Freeman*, 358 F.2d 681, 682 (C.A. 2); *United States v. Mills*, 315 F.2d 828, 836, 838 (C.A. 4), *certiorari denied*, 374 U.S. 832, 375 U.S. 819; *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-636 (D.N.J.) *affirmed*, 350 F.2d 978 (C.A. 3), *certiorari denied*, 382 U.S. 979; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), *affirmed*, 157 F.2d 87 (C.A. 8), *certiorari denied*, 329 U.S. 788; *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa.), *affirmed*, 149 F.2d 860, 862-863 (C.A. 3); *In re Clyde Lisonbee*, 31 Agriculture Decisions 952, 961 (1972); *In re Fitchett Brothers, Inc.*, 31 Agriculture Decisions 1552, 1571 (1972).

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. *See In re Independent Milk Producer-Distributors' Assoc.*, 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 Agriculture Decisions 1209, 1220 (1957), *affirmed*, Southern Dist. Miss., January 5, 1959. *See, also, Pacific States Co. v. White*, 296 U.S. 176, 182.

The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. *American Power Co. v. S.E.C.*, 329 U.S. 90, 112; *Secretary of Agriculture v. Central Roig [Ref.] Co.*, 338 U.S. 604, 610-614.

Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. *Benson v. Schofield*, 236 F.2d 719, 722 (C.A.D.C.), *certiorari denied*, 352 U.S. 976; *Reed v. Franke*, 297 F.2d 17, 25-26 (C.A. 4). Mere assertions of illegality are not sufficient to have an order provision or administrative decision declared illegal. *In re College Club Dairy, Inc.*, 15 Agriculture Decisions 367, 373 (1956).

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15. *Accord: [Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953);] Reines v. Woods, 192

F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (C.A. 5); *Woods v. Tate,* 171 F.2d 511, 513 (C.A. 5); *Pasadena Research Laboratories v. United States*, 169 F.2d 375, 381 (C.A. 9), *certiorari denied,* 335 U.S. 853; *Laughlin v. Cummings,* 105 F.2d 71, 73 (C.A.D.C.). Specifically, administrative orders and regulations are presumed to be based on facts justifying the specific exercise of the delegated authority. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 567-568 (a case under the Act involved herein); *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 69; *Pacific States Co. v. White*, 296 U.S. 176, 185-186.

In re Michaels Dairies, Inc., 33 Agric. Dec. 16[6]3, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976).

The "narrow" scope of review under the arbitrary and capricious standard of the Administrative Procedure Act (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overton Park*, as follows:

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted).

The court further stated:

> But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974).

The "narrow" scope of review under 5 U.S.C. § 706(2)(A), i.e., "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law," and the fact that it "forbids the court's substituting its judgment for that of the agency," is explained in *Ethyl Corp. v. EPA*:

> This standard of review is a highly deferential one. It presumes agency action to be valid. Moreover, it forbids the court's substituting its judgment for that of the agency, . . . and requires affirmance if a rational basis exists for the agency's decision.
>
> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors * * *." Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 415, 416, 91 S.Ct. at 823, 824, 28 L.Ed.2d at 152, 153. This is particularly true in highly technical cases such as this one.
>
>> A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

Greater Boston Television Corp. v. FCC, 143 U.S.App.D.C. 383, 392, 444 F.2d 841, 850 (1970), *cert. denied,* 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971).

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed

> by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors. It is settled that we must affirm decisions with which we disagree so long as this test is met.
>
> Thus, after our careful study of the record, we must take a step back from the agency decision. We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality. "Although [our] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 416, 91 S.Ct. at 824, 28 L.Ed.2d at 153. We must affirm unless the agency decision is arbitrary or capricious.

Ethyl Corp. v. EPA, 541 F.2d 1, 34-37 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) (footnotes and citations omitted).

The "narrow" scope of review under the "arbitrary and capricious" standard, under which "a court is not to substitute its judgment for that of the agency," with examples of when a court should reverse an agency, is explained by the Supreme Court as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation,

> we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, at 285; *Citizens to Preserve Overton Park v. Volpe, supra*, at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

In *Schepp's Dairy, Inc.*, it is explained that it is for the Secretary in his rule making capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and that even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary. Specifically, it is stated:

> Section 8c(4) requires not only that order provisions be based upon record evidence, but that they also tend to effectuate the declared policy of the Act. Petitioner's argument ignores the discretionary power conferred upon the Secretary with respect to such finding. As noted earlier, there was extensive testimony at the hearing relating to various approaches and considerations to be taken in determining the appropriate location adjustment. The fact that the Secretary chose one regulatory alternative over another cannot logically give rise to cries of illegality. *Lewes Dairy, supra*, [401 F.2d at 319].
>
> . . . .
>
> While the Secretary's finding as to the effectuation of the policy of the Act must be based on the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal will tend to effectuate the statutory policy even though supported by evidence.
>
> . . . .

> In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely allege that the Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. *Lewes Dairy, Inc., supra*, pages 315-316. The Act gives the Secretary broad discretionary powers to effectuate its purposes. The existence of regulatory alternatives, even those which might be more persuasively reasonable, is not cognizable on review, *Lewes, supra*, pages 317, 319.
>
> This proceeding does not afford petitioner a forum to review questions of policy, desirability, or effectiveness of Order provisions, *In re Sunny Hill Farms Dairy Co.*, 26 A.D. 201, 217[, *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972)]. [Footnote omitted.] It is not sufficient for petitioner to show that the record may contain evidence supporting its positions. On the contrary, petitioner must establish clearly that the record cannot sustain the conclusion reached by the Secretary.

In re Schepp's Dairy, Inc., 35 Agric. Dec. 1477, 1493, 1495, 1497-98 (1976), *aff'd*, No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd*, 628 F.2d 11 (D.C. Cir. 1979).

. . . .

In sum, there is more than sufficient basis in the record evidence to support the [final rule published June 21, 1994 (59 Fed. Reg. 31,917) establishing a minimum size requirement and a minimum maturity requirement for Rainier cherries that can be shipped to fresh market outlets] under the [Cherry] Order. . . . In exercising discretionary power, the Secretary considered various approaches and contentions of those favoring and opposing the [recommended] regulation. [The Secretary's] attention to the matter is reflected in advice to the [Washington Cherry Marketing] Committee to hold an open meeting to reconsider the [Committee's recommended] regulation, which was done. The Secretary's action is supported by record evidence.

Petitioner Auvil has not demonstrated that the actions complained of are arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. In this type of proceeding, Petitioner cannot claim as a basis for changing the regulation that the evidence supports a different result. Rather, Petitioner must show that the rule . . . lacks [a rational basis]. . . . Petitioner has not claimed nor did it attempt to establish that anything was erroneous with respect to the process

[footnote 3 omitted] for issuing the rule relative to Rainier cherries. Instead, Petitioner claims that the [Washington Cherry Marketing] Committee and the Secretary should have arrived at different results.

The rule making record [relating to] the promulgation of 9 C.F.R. § 923.322, as it pertains to Rainier cherries, establishes that [there is a rational basis for] the regulation. There is record evidence [in this proceeding] that at the time there were those who believed that there were disorderly marketing conditions. The [Washington Cherry Marketing] Committee is composed of growers and handlers with a large amount of experience with [many types of cherries, including] Rainier cherries. The minutes of the Committee meetings reflect that those experienced growers discussed and considered various ways of solving the disorderly marketing conditions which were [detrimental to the marketing of] Rainier cherries. The minutes reflect that the Committee at first thought that a size-only requirement would result in quality Rainier cherries being marketed. After several people raised concerns that the change in size should be discussed more, the Agricultural Marketing Service requested that the Committee reconsider [its recommendation]. The Committee then held an additional meeting to discuss a means of correcting the disorderly marketing conditions. As a result [of this additional meeting, the Committee] determined that both a size and sugar content (Brix) requirement would provide a quality product. [Size 11 row was chosen] because most growers could grow fruit at this size. Additionally, the combination of both size and Brix content would assure that buyers and consumers were receiving a quality product. . . . The regulation [of the] size and Brix [of Rainier cherries is] a rational means of [ensuring consumer satisfaction and maintaining markets for Rainier cherries]. Petitioner Auvil does not dispute that Brix is an appropriate basis for establishing quality. Both a size [requirement] and a sugar content [requirement are] rational [methods] of [enhancing the] quality [of] Rainier cherries and Petitioner presented no evidence to establish that the choice was irrational or contrary to law. However, [Petitioner Auvil] argued that there was not proper attention given to . . . other aspects relating to the growing and marketing of Rainier cherries (namely, the relationship of size to maturity, the difference in growing season with respect to the altitude at which the cherries are grown) and that the Committee lacked reliable scientific evidence that Rainier cherries must be 11 row size or greater to protect the Rainier [cherry] market from immature, sour fruit. [Petitioner] also contends that many of the growers at high elevations have a significant portion of their crops reach maturity (17 Brix minimum) yet never reach the 11 row size and that . . . the Department and the Committee [failed] to recognize the unique problems of altitude. The evidence of record does not support

these contentions of Petitioner Auvil.

The [Washington Cherry Marketing] Committee [recommended] the regulation, which was adopted by the Secretary, that would establish quality fruit so that consumers would continue to buy Rainier cherries. Sour, immature fruit, early in the season, was just one of the problems--there was concern that the fruit was small and the Rainier cherries shipped were of inconsistent quality. A minimum size requirement was needed for Rainier cherries that were being shipped and which were of inconsistent quality. The minimum size requirement provided a consistency after the regulation took effect. Petitioner has not shown that the Brix and size regulation were not appropriate means of preventing the marketing of poor quality fruit. [While] a different approach to the problem could have been forthcoming[, the existence of other rational approaches] does not render the actions of the Secretary arbitrary, capricious, or without substantial basis.

Petitioner [raises two] constitutional issues.... [First, Petitioner contends that section 923.322 of the Cherry Order (7 C.F.R. § 923.322) violates its right to equal protection of the laws.

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to the federal government.[4]

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[4]*See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2108 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to the violative of due process; this Court's approach to Fifth Amendment equal

Equal protection requires that persons similarly situated be treated alike. However, virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications.[5] Here, t]he regulation with respect to Rainier cherries does not violate Petitioner's equal protection rights since it impacts all handlers, who may be similarly situated, the same.

Moreover, Petitioner's argument that high altitude creates a special problem for growing cherries lacks merit[, as] all farmers have problems due to weather or features of the land that can affect the yield of the commodity grown. Accordingly, all farmers have different, but also special problems in growing cherries, from floods to [unfavorable winds. . . . As such,] the high altitude grower is no different than other growers; there will always be some problem with the condition of the land that will affect the yields of a crop. Moreover, the cultivation practices that growers use will also affect the size of the fruit on the tree. Where there is a lack of a "solid block" of Rainier cherries, the Rainier cherry trees are pollenizers for the dark sweet cherries (Tr. 171[-72]). The use of a Rainier cherry tree as a pollenizer will reduce the size of the cherries the tree produces (Tr. 107, 159, 309). The vigor of trees and pruning practices are also factors that may affect cherry size

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protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

[5]*See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (stating that the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding that exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause).

(Tr. 304, 310-12, 343).

[Even if I found that the minimum size and maturity requirements in 7 C.F.R. § 923.322 are disadvantageous to certain areas or persons, that finding would not compel the conclusion that 7 C.F.R. § 923.322 denies disadvantaged persons equal protection of the laws. Equal protection does not, as Petitioner asserts, demand that laws and regulations have an equal impact on those subject to the laws and regulations.[6] Therefore, even if I found that section 923.322 of the Cherry Order (7 C.F.R. § 923.322) is disadvantageous to Petitioner because it grows cherries at high altitudes, I would not find that 7 C.F.R. § 923.322 violates Petitioner's right to equal protection of the laws.]

[Second, Petitioner contends that section 923.322 of the Cherry Order effects] an unlawful taking [of its property] in violation of the Fifth Amendment. [The inquiry into whether a taking has occurred is essentially an ad hoc factual inquiry not directed by a set formula. However, the Supreme Court of the United States has identified three factors to be taken into account when determining whether a governmental action has gone beyond regulation and effects a taking: (1) the character of the governmental action; (2) the economic impact of the governmental

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[6]*See Personnel Administrator of Massachusetts v. Fenney*, 442 U.S. 256, 271-72 (1979) (holding that a state veterans preference statute that disadvantages women applicants for state civil service positions does not deprive women of equal protection of the laws—"[m]ost laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."); *Secretary of Agriculture v. Central Roig Ref. Co.*, 338 U.S. 604, 617-19 (1950) (holding that even though sugar quotas may be demonstrably disadvantageous to certain areas or persons, sugar quotas do not violate the due process clause); *Bowles v. Willingham*, 321 U.S. 503, 518 (1944) (holding that even though a member of the regulated class may suffer economic losses not suffered by others and that member's property may lose utility and depreciate in value, such consequences have never been a barrier to the exercise of police power); *Defiance Milk Products Co. v. Lyng*, 857 F.2d 1065, 1067 (6th Cir. 1988) (holding that absolute equality of treatment among handlers and producers is not required in milk marketing orders issued under the AMAA); *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.) (holding that while the enforcement of a milk marketing order under the AMAA may damage a handler or producer, absolute equality is not demanded to sustain the validity of the Order), *cert. denied*, 375 U.S. 819 (1963); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 212-13 (1967) (finding that an amendment to Order No. 62 regulating the handling of milk in the St. Louis, Missouri, market area does not violate the due process clause despite the fact that petitioner was the only handler affected by the amendment), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972); *In re Central Dairy Products Co.*, 12 Agric. Dec. 303, 312 (1953) (stating that even assuming that the regulated petitioner must compete with those who are not regulated, and that the regulation is demonstrably disadvantageous to certain areas or persons, the regulation does not violate the due process clause).

action; and (3) the governmental action's interference with reasonable investment-backed expectations.[7] A taking may more readily be found when the governmental interference with property can be characterized as a physical invasion by government, than when the interference arises from a public program adjusting the benefits and burdens of economic life to promote the common good.[8]]

In this case, the Agricultural Marketing Service regulated the size and sugar content of Rainier cherries in order to eliminate the sale of poor quality fruit. The regulation was a valid exercise of administrative and statutory power and furthered a legitimate governmental objective. *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 [(1939)]; *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

Furthermore, the courts have found that handlers did not have a property right to market a commodity (almonds) free of regulation. [*Cal-Almond, Inc. v. United States*], 30 Fed. Cl. [244,] 247 [(1994)], *aff'd*, [73 F.3d 381] (Fed. Cir. 1995)[, *cert. denied*, 117 S. Ct. 385 (1996)]. As that decision points out, Petitioner's property rights and reasonable expectation of a profit are limited by the existing regulatory scheme. Petitioner knew about the existence of the proposal for the regulation prior to it being published in the Federal Register. There was no unconstitutional taking of property from Petitioner.

All of Petitioner [Auvil's] arguments and contentions have been carefully considered. An evaluation of the record as a whole results in the conclusion that there is substantial record evidence to support the promulgation of [7] C.F.R. § 923.322; that Petitioner Auvil has not met its burden of proof; and that the provisions of the regulation complained of are not violative of Petitioner's constitutional rights.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

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[7]*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-96 (1981); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

[8]*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 n.18 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

It is well-settled that the burden of proof in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with the petitioner.[9] Petitioners, therefore, bear the initial burden of coming forward with evidence sufficient for a prima facie case.[10] Petitioners have failed to carry their burden in this proceeding.

Since Petitioner Auvil did not appeal, the only relevant issue left in this proceeding is whether Petitioners Hoverhawk, Inc., or Lyons & Son, Inc., are handlers. Until and unless Petitioners can establish handler status, none of the

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[9]*United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp 209, 217 (E.D. Mo., 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3d Cir. 1945); *In re Midway Farms, Inc.*, 56 Agric. Dec. ___, slip op. at 12 (Apr. 18, 1997); *In re Garelick Farms, Inc.*, 56 Agric. Dec. ___, slip op. at 3 (Jan. 14, 1997); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Adam L. Liptak*, 24 Agric. Dec. 1176, 1181 (1965).

[10]*See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Inst. v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). *See also Attorney General's Manual on the Administrative Procedure Act* 75 (1947) (stating "[t]here is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); *3 Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (describing that the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

other issues Petitioners raise can be addressed in this proceeding. It is well-settled under the AMAA and the Rules of Practice that only a handler has standing to file a petition under section 8c(15)(A) (7 U.S.C. § 608c(15)(A)).[11]

The Department looks very carefully at a petitioner's status. In fact, a great deal of deference is accorded a petitioner's claim that it is a handler, when the question is a motion to dismiss for want of standing, and allegations of material fact in a petition must be construed in the light most favorable to a petitioner *claiming handler status* when considering a motion to dismiss.[12]

Thus, the ALJ was on solid precedential ground in denying Respondent's Motion to Dismiss, entered at the hearing, and, instead, ordering additional briefing on the issue of the standing of Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., to file a petition under section 8c(15)(A) (7 U.S.C. § 608c(15)(A)) (Tr. 390-93). Moreover, when the ALJ reviewed the additional briefing, the ALJ properly concluded that Petitioners Hoverhawk, Inc., and Lyons & Son, Inc., were not handlers, and had no standing to file a petition under 7 U.S.C. § 608c(15)(A) (Initial Decision and Order at 3-10).

I agree with the ALJ's analysis, findings of fact, conclusions, and order dismissing the Petition for lack of standing. No purpose would be served by restating the ALJ's reasoning, which I hereby affirm.

However, in the event that a reviewing court might disagree with the ALJ's

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[11]*In re Midway Farms, Inc.*, 56 Agric. Dec.___, slip op. at 13-14 (Apr. 18, 1997); *In re Kent Cheese Co., Inc.*, 43 Agric. Dec. 34, 36 (1984); *In re M&R Tomato Distribs., Inc.*, 41 Agric. Dec. 33 (1982); *In re Sequoia Orange Co.*, 40 Agric. Dec. 1908 (1981).

[12]*See In re Midway Farms, Inc.*, 56 Agric. Dec. ___, slip op. at 14 (Apr. 18, 1997); *In re Asakawa Farms, Inc.*, 50 Agric. Dec. 1144, 1149 (1991), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993). *See generally Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991) (stating that for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint); *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (stating that when standing is challenged on the basis of the pleadings, the Court accepts as true all material allegations of the complaint and construes the complaint in favor of the complaining party); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (holding that for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party; at the same time, it is within the trial court's power to allow or require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (holding that for purposes of a motion to dismiss for lack of standing, the material allegations of the complaint are admitted and the complaint is to be liberally construed in favor of the plaintiff).

dismissal of the Petition, and the Judicial Officer's subsequent affirmance of the ALJ's dismissal of the Petition, a review of the merits of Petitioners' appeal reveals that all pertinent issues raised by Petitioners were properly analyzed and properly decided on the merits by the ALJ.

Petitioners' appeal presents the following questions:

> 1. Does the Rainier Cherry Marketing Order Constitute an Inverse Condemnation of Private Property Under the Fifth Amendment to the United States Constitution?
>
> 2. Did Respondent Agricultural Marketing Service, U.S. Department of Agriculture, Act Arbitrarily and Capriciously in Adopting the Rainier Cherry Marketing Order?
>
> 3. Did Respondent Violate Petitioners' Substantive Due Process Rights Guaranteed by the Fifth Amendment to the United States Constitution?
>
> 4. Are Petitioners' Hoverhawk, Inc. and Lyons & Son, Inc., Handlers Under the Rainier Cherry Marketing Order and Therefore Have Standing?

Petitioners' Appellate Brief at 2.

The ALJ set forth the following questions, before properly answering these questions, in the Initial Decision and Order:

> The Petitioner alleges that the Rainier Cherry Marketing Order constitutes an inverse condemnation of private property under the Fifth Amendment of the United States Constitution. It is further alleged that the Department acted arbitrarily and capriciously when it adopted the Rainier Cherry Marketing Order. In addition, it is alleged that the Department violated Petitioner's substantive due process rights guaranteed by the Fifth Amendment to the United States Constitution.

Initial Decision and Order at 30-31.

Obviously, the ALJ's language is almost identical to the first three questions presented in Petitioners' Appellate Brief, which questions the ALJ properly addressed and resolved. The other question (No. 4) concerning Petitioners'

(Hoverhawk, Inc., and Lyons & Son, Inc.) standing was also properly addressed and resolved by the ALJ.

On the other hand, Respondent raises several issues which deserve attention in Respondent's Opposition to the Petitioners' Appeal Petition; Respondent's Appeal Petition and Brief in Support Thereof [hereinafter Respondent's Opposition].

First, Respondent correctly emphasizes that the act of shipping cherries outside of the production area is what distinguishes a handler from a grower, according to the definitions in the Cherry Order, 7 C.F.R. §§ 923.12, .13 (Respondent's Opposition at 7). Therefore, I agree with Respondent that Petitioners' arguments based upon *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989) (Petitioners' Appellate Brief at 28-29), regarding who collects and who remits assessments under the Beef Order, are inapposite. The same reasoning applies to *Old Orchard Brands, Inc. v. Department of Agric.*, 393 N.W.2d 608 (Mich. Ct. App. 1986), *cert. denied*, 480 U.S. 933 (1987), also cited by Petitioners concerning, again, who collects and remits assessments under the Michigan Apple Order. That is, even accepting *arguendo* that these cases hold, as Petitioners contend, that they are responsible for assessments even though they do not collect assessments and remit them to the Washington Cherry Marketing Committee, it does not change the outcome in this proceeding, because the Cherry Order's definition of a handler relates to shipment out of the production area and not who pays or remits assessments.

Respondent also correctly rebuts Petitioners' argument that section 2 of the AMAA (7 U.S.C. § 602) prohibits the Secretary's regulation of the row size of Rainier cherries because the market price for Rainier cherries exceeded the parity price in the pertinent period. The Department does not calculate a separate parity price for Rainier cherries or for any other one variety of sweet cherries, but only calculates a parity price for all sweet cherry varieties. Therefore, Petitioners do not have a valid parity price for Rainier cherries upon which to base this argument. Rather, Petitioners have compared the market price for Rainier cherries against the Secretary's parity price for all varieties of sweet cherries. Respondent correctly points out that the lack of a valid parity price for Rainier cherries refutes the argument.

Finally, I agree with Respondent that the ALJ erred in describing Respondent's motion to dismiss, at the hearing, as a "technical pleading ambush" (Respondent's Opposition at 12-13). Respondent provides several cogent reasons for making the motion at the end of the hearing, rather than earlier, or even before the hearing. The Rules of Practice require that if a motion to dismiss a petition is based on an allegation of fact not appearing on the face of the petition "appropriate affidavits

or documentary evidence substantiating such allegations of fact" (7 C.F.R. § 900.52(c)) must accompany a motion to dismiss. Prior to the hearing, Respondent was unaware of any individuals, who had sufficient knowledge regarding Petitioners, to provide the requisite affidavits. Moreover, the Rules of Practice do not allow discovery, and the only available information upon which Respondent could rely was that neither Petitioners Hoverhawk, Inc., nor Lyons & Son, Inc., paid assessments or filed reports with the Washington Cherry Marketing Committee. As discussed in this Decision and Order, *supra*, pp. 10-12, 54, the failure of a handler either to pay assessments or to file reports does not mean that it is not a handler. Consequently, I agree with Respondent that it would not be reasonable to expect that Respondent could have determined the status of Hoverhawk, Inc., and Lyons & Son, Inc., to be that of growers and not handlers, until that information was presented at the hearing (Respondent's Opposition at 11-13). As a result, I have slightly modified the ALJ's Initial Decision and Order on this point.

Respondent also states that Petitioners did not pay the court reporter for the transcript and that "[t]he Rules of Practice provide that in order to obtain a personal copy of the transcript the court reporter must be paid to provide such a copy. 9 C.F.R. § 900.60(2) [sic]." (Respondent's Opposition at 3.)

I disagree with Respondent's contention that the Rules of Practice require Petitioners to pay the court reporter. As an initial matter, Petitioners are not required by the Rules of Practice to obtain a transcript. Further, while section 900.60(f)(2) of the Rules of Practice (7 C.F.R. § 900.60(f)(2)) states how a personal copy of the transcript may be obtained from the reporter, it does not preclude persons from obtaining a copy of the transcript in any other manner, as follows:

> **§ 900.60 Oral hearings before judge.**
>
> . . . .
>
> (f) *Transcript*. . . .
>
> (2) If a personal copy of the transcript is desired, such copy may be obtained upon written application filed with the reporter, and upon payment of fees at the rate (if any) provided in the contract between the reporter and the Secretary.

7 C.F.R. § 900.60(f)(2).

In any event, the method by which Petitioners obtained a copy of the transcript is not relevant to this proceeding; specifically, in light of the fact that the Rules of

Practice do not require Petitioners to obtain a transcript at all.

For the foregoing reasons, the following Order should be issued.

Order

The relief requested by Petitioners is denied, and the Petition is dismissed with prejudice.

In re: DANIEL STREBIN and WILLIAM STREBIN, d/b/a STREBIN FARMS.
AMAA Docket No. 95-0002.
and
In re: DANIEL STREBIN and WILLIAM STREBIN d/b/a STREBIN FARMS.
AMAA Docket No. 96-0003.
and
In re: STREBIN FARMS, A SOLE PROPRIETORSHIP OF WILLIAM B. STREBIN.
96 AMA Docket No. F&V 946-1.
Decision and Order filed November 26, 1997.

Potatoes — Civil penalties — Preponderance of the evidence — Inspection requirements — Failure to pay inspection fees — Failure to have potatoes inspected — Burden of proof — Sanction policy.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) holding: 1) that Respondents are ordered to comply with the AMAA, the Order, and the Regulations; 2) that in AMAA Docket Nos. 95-0002 and 96-0003 Respondents violated the Order regulating Irish Potatoes Grown in Washington (7 C.F.R. pt. 946) by shipping uninspected potatoes out of the production area; and 3) that Respondents' (Petitioners') Petition filed pursuant to 7 U.S.C. § 608c(15)(A) is dismissed. However, the Judicial Officer increased the $12,425 civil penalty, assessed by the ALJ against Respondents, to $35,500. AMAA marketing orders displace competition in favor of collective action. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2134 (1997). Under 5 U.S.C. § 556(d), the proponent of an order has the burden of proof: in AMAA Docket Nos. 95-0002 and 96-0003 Complainant has the burden of proof; but in 96 AMA Docket No. F&V 946-1 Petitioners have the burden of proof. The standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. Respondents concede the violations, but seek lower or no civil penalties, and relief under 7 U.S.C. § 608c(15)(A). A § 15(A) petitioner must show that the rulemaking record does not support the Secretary's decision. Without clear, contrary evidence, administrative regulations are presumed justified and valid. A § 15(A) proceeding is not a forum for Petitioner to debate policy, offer competing alternatives, or vaguely allege that the Secretary's decision is unsupported in the rulemaking record. Petitioners' due process challenge to the rulemaking record fails because the Secretary fulfilled

the criteria of the AMAA and the APA. Petitioners' argument that USDA must engage in "required rulemaking" to exempt a county in Oregon, because another handler has an exemption, is without merit. Petitioners' allegedly superior equipment located in a non-exempt county does not mandate an exemption for that county. Rulemaking is not a remedy available in a 7 U.S.C. § 608c(15)(A) proceeding. The Judicial Officer cannot order the Secretary to engage in rulemaking. The Order anticipates that the Secretary may act upon the recommendation of the SWPC, or upon the Secretary's own volition. The AMAA authorizes the Secretary to amend the Order, but does not mandate amendment. The Judicial Officer considers flagrant violation of an Order a "weighty factor" in determining civil penalties, a factor to increase but not decrease civil penalties. *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 156 (1992). The ALJ erroneously reduced civil penalties for Respondents' good faith, when Respondents had not in good faith sought exemption or modification. The ALJ erroneously reduced civil penalties because Complainant did not satisfy mandatory *Calabrese* criteria, but these criteria are permissive, not mandatory. Nevertheless, Complainant met all five *Calabrese* criteria: nature and number of violations; damage to the Order; profit from the violations; prior warnings; and any other circumstance shedding light on culpability. Rules of Practice permit a party to await the other party's appeal before filing a cross-appeal raising any relevant issue, without first filing a protective notice of appeal (7 C.F.R. §§ 1.145(b), 900.65(c)). A litigant may not raise an issue for the first time on appeal, and attempting to resurrect a non-appealed trial level issue in a reply to the response to a litigant's appeal is tantamount to a first time raising of the issue on appeal. Respondents' argument that a cease and desist order may not emanate from a 7 U.S.C. § 608c(14)(B) proceeding is irrelevant because Complainant neither requested a cease and desist order in either of the 7 U.S.C. § 608c(14)(B) Complaints nor proposed it in the proposed order; rather, Complainant sought compliance under the Order, 7 C.F.R. § 946.71. The AMAA is remedial legislation which should be liberally construed to achieve the purposes of the Act. Contemporaneous administrative construction of the AMAA is entitled to great weight. The AMAA has no explicit standards for setting civil penalties. Respondents may only be relieved of civil penalties for violation of the Order under 7 U.S.C. § 608c(14)(B) during the pendency of a proceeding filed in good faith and not for delay pursuant to 7 U.S.C. § 608c(15)(A). Civil penalties authorized under the AMAA are designed by Congress to complement the criminal penalties which the United States Attorneys are authorized to seek.

Sharlene A. Deskins, for Complainant.
Brian C. Leighton, Clovis, CA, for Respondents.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

These proceedings were consolidated through agreement of the parties.*

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*On May 6, 1996, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], moved to consolidate AMAA Docket No. 95-0002 and AMAA Docket No. 96-0003, disciplinary proceedings against Daniel Strebin and William Strebin, d/b/a Strebin Farms, and 96 AMA Docket No. F&V 946-1, a proceeding instituted by Strebin Farms, a sole proprietorship of William B. Strebin, under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) [hereinafter AMAA] (Complainant's Motion to Consolidate, May 6, 1996). On May 22, 1996, Administrative Law Judge James W. Hunt [hereinafter ALJ] held a telephone conference in which counsel for the parties agreed,

Complainant instituted the proceeding captioned AMAA Docket No. 95-0002 pursuant to section 8c(14)(B) of the AMAA, 7 U.S.C. § 608c(14)(B), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 22, 1995. The Complaint alleges that Daniel Strebin and William Strebin, doing business as Strebin Farms, willfully violated the marketing order regulating the handling of Irish Potatoes Grown in Washington (7 C.F.R. §§ 946.1-.78) [hereinafter Order] issued under the AMAA (7 U.S.C. §§ 601-674), the Rules and Regulations (7 C.F.R. §§ 946.100-.142), and the Handling Regulation (7 C.F.R. § 946.336 (1993)), on or about March 1, 1993, until at least May 31, 1993, by transporting at least 153 shipments of uninspected potatoes outside of the production area.

Complainant also instituted the proceeding captioned AMAA Docket No. 96-0003 pursuant to section 8c(14)(B) of the AMAA (7 U.S.C. § 608c(14)(B)) and the Rules of Practice (7 C.F.R. §§ 1.130-.151) by filing a Complaint on March 27, 1996, alleging that Daniel Strebin and William Strebin, doing business as Strebin Farms, willfully violated the Order issued under the AMAA (7 U.S.C. §§ 601-674), the Rules and Regulations (7 C.F.R. §§ 946.100-.142), and the Handling Regulation (7 C.F.R. § 946.336 (1995)), on or about January 16, 1995, until at least May 15, 1995, by transporting at least 123,496.1 hundredweight of uninspected potatoes outside of the production area.

Strebin Farms, a sole proprietorship of William B. Strebin, instituted the proceeding captioned 96 AMA Docket No. F&V 946-1 under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) and the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice] by filing a "Petition To Modify The Washington Irish Potato Marketing Order Provisions/Regulations And/Or Petition To Amend Specific Washington Irish Potato Marketing Order Provisions/Regulations, And/Or Petition To Exempt Petitioner From Various

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inter alia, to consolidate all three proceedings for hearing, but that one decision would be issued in the disciplinary proceedings, AMAA Docket Nos. 95-0002 and 96-0003, and a separate decision would be issued in the 7 U.S.C. § 608c(15)(A) proceeding, 96 AMA Docket No. F&V 946-1 (Summary of Telephone Conference, May 23, 1996). This agreement was formalized in the Order Consolidating Cases, May 23, 1996. However, at the hearing, the parties and the ALJ agreed to one Decision and Order for all three proceedings (Tr. 5-6). The Administrator of the Agricultural Marketing Service, United States Department of Agriculture, is Respondent in 96 AMA Docket No. F&V 946-1, but to lessen confusion, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, is designated "Complainant" for all three proceedings.

Provisions Of The Washington Irish Potato Marketing Order And One Or More Obligations Imposed In Connection Therewith That Are Not In Accordance With Law" [hereinafter Petition] on January 30, 1996.

The ALJ presided over a hearing conducted on September 18, 1996, and September 19, 1996, in Portland, Oregon. Sharlene A. Deskins, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Brian C. Leighton, Esq., Law Offices of Brian C. Leighton, Clovis, California, represented Daniel Strebin, William Strebin, and Strebin Farms [hereinafter Respondents or Strebin Farms].

On March 6, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] dismissing the Petition instituted pursuant to 7 U.S.C. § 608c(15)(A); concluding that Respondents had violated the Order; ordering Respondents to comply with the AMAA, the Order, and the Regulations issued pursuant to the AMAA and the Order, particularly that Respondents cease and desist from shipping uninspected potatoes outside the area covered by the Order; and ordering Respondents jointly and severally to pay an inspection fee of $12,425. On March 26, 1997, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).** On May 16, 1997, Complainant filed "Complainant's Opposition to the Respondent's [sic] Appeal Petition; Complainant's Appeal and Brief in Support thereof" [hereinafter Complainant's Appeal]. On June 13, 1997, Respondents filed "Respondents'/Petitioners': (1) Objections to Complainant's Appeal; (2) Response to Complainant's Appeal; and (3) Reply to Complainant's Response to Strebins' Appeal" [hereinafter Respondents' Reply]. The proceeding was referred to the Judicial Officer for decision on June 17, 1997.

Based upon careful consideration of the record in this proceeding, I find that the ALJ was correct in dismissing the Petition and in concluding that Respondents had violated the Order. Therefore, pursuant to the Rules of Practice, 7 C.F.R. §§ 1.145(i) and 900.66, I am adopting the ALJ's Initial Decision and Order as the final Decision and Order in this proceeding, with changes included within brackets and omissions designated by dots. After the ALJ's conclusions, there are additional conclusions by the Judicial Officer, in which I set forth the reasons I am increasing

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**The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

the civil penalty to $35,500, as requested by Complainant.

PERTINENT STATUTES AND REGULATIONS

The pertinent provisions of the AMAA provide as follows:

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608a. Enforcement of chapter

. . . .

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

. . . .

(8) Cumulative remedies

The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in

this chapter or now or hereafter existing at law or in equity.

§ 608c. Orders regulating handling of commodity

. . . .

(11) Regional application

. . . .

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

. . . .

(14) Violation of order; penalty

. . . .

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. §§ 608a(6), (8), 608c(11)(B), (14)(B), (15)(A).

The pertinent provisions of the Rules of Practice provide as follows:

7 C.F.R:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

Subpart H—Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [Footnote omitted]

. . . .

§ 1.145 Appeal to Judicial Officer.

. . . .

(i) *Decision of the judicial officer on appeal. . . .* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX—AGRICULTURAL MARKETING SERVICE

PART 900—GENERAL REGULATIONS

. . . .

SUBPART—RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS

. . . .

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

. . . .

(i) The term *handler* means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable[.]

. . . .

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition.* Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary.

§ 900.66 Consideration of appeal by the Secretary and issuance of final order.

(a) *Consideration of appeal.* . . . If the Secretary decides that no change or modification of the judge's decision is warranted, he may adopt the Judge's decision as the final order of the Secretary, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. §§ 1.145(i), 900.51(i), .52(a), .66(a).

The pertinent provisions of the Order, the Rules and Regulations, and the Handling Regulation, provide as follows:

7 C.F.R.:

PART 946—IRISH POTATOES GROWN IN WASHINGTON

SUBPART—ORDER REGULATING HANDLING

DEFINITIONS

. . . .

§ 946.4 Production areas.

Production area means all territory included within the boundaries of the State of Washington.

§ 946.5 Potatoes.

Potatoes means all varieties of Irish potatoes grown within the State of Washington.

§ 946.6 Handler.

Handler is synonymous with *shipper* and means any person (except a common or contract carrier of potatoes owned by another person) who

handles potatoes or causes potatoes to be handled.

§ 946.7 Handle.

Handle is synonymous with *ship* and means to transport, sell, or in any other way to place potatoes grown in the State of Washington, or cause such potatoes to be placed, in the current of commerce within the production area or between the production area and any point outside thereof, or from any point in the adjoining States of Oregon and Idaho to any other point: *Provided*, That, the definition of "handle" shall not include the transportation of ungraded potatoes within the production area for the purpose of having such potatoes prepared for market, or stored, except that the committee may impose safeguards pursuant to § 946.55 with respect to such potatoes.

. . . .

ADMINISTRATIVE COMMITTEE

. . . .

§ 946.28 Powers.

The committee shall have the following powers:

(a) To administer the provisions of this subpart in accordance with its terms;

(b) To make rules and regulations to effectuate the terms and provisions of this subpart;

(c) To receive, investigate, and report to the Secretary complaints of violation of the provisions of this subpart; and

(d) To recommend to the Secretary amendments to this subpart.

. . . .

REGULATION

§ 946.50 Marketing policy.

(a) Prior to each marketing season, the committee shall consider and prepare a policy statement for the marketing of potatoes. . . .

. . . .

(b) In the event it becomes advisable to deviate from such marketing policy because of changed supply and demand conditions, the committee shall formulate a revised marketing policy statement in accordance with the appropriate considerations in paragraph (a) of this section.

(c) The committee shall submit a report to the Secretary setting forth such marketing policy. . . .

§ 946.51 Recommendation for regulations.

The committee shall recommend to the Secretary regulations, or amendments, modifications, suspension, or termination thereof, whenever it finds that such regulations as provided in § 946.52 are in accordance with the marketing policy established pursuant to § 946.50 and that such regulations will tend to effectuate the declared policy of the act.

§ 946.52 Issuance of regulations.

(a) The Secretary shall limit the shipment of potatoes as set forth in this subpart whenever he finds from the recommendation and information submitted by the committee, or from other available information, that it would tend to effectuate the declared policy of the act[.]

. . . .

(b) The Secretary may amend any regulation issued under this subpart whenever he finds that such amendment would tend to effectuate the declared policy of the act. The Secretary may also terminate or suspend any regulation whenever he finds that such regulation obstructs or no longer

tends to effectuate the declared policy of the act.

(c) The Secretary shall notify the committee of any such regulation issued pursuant to this section and the committee shall give reasonable notice thereof to handlers.

. . . .

INSPECTION AND CERTIFICATION

§ 946.60 Inspection and certification.

(a) During any period in which the Secretary regulates the shipment of potatoes pursuant to the provisions of this subpart, each handler who first ships potatoes shall, prior to making shipment, cause each shipment to be inspected by an authorized representative of the Federal-State inspection service or such other inspection service as the Secretary shall designate. The committee may, with the approval of the Secretary, prescribe rules and regulations modifying the inspection requirements of this section in circumstances under which such requirements would create an undue hardship on growers or shippers: *Provided*, That all such shipments shall comply with all regulations in effect: *And provided further*, That proper safeguards to assure compliance are adopted.

. . . .

MISCELLANEOUS PROVISIONS

. . . .

§ 946.71 Compliance.

Except as provided in this subpart, no handler shall ship potatoes, the shipment of which has been prohibited by the Secretary in accordance with provisions of this subpart, and no handler shall ship potatoes except in conformity to the provisions of this subpart.

. . . .

SUBPART—RULES AND REGULATIONS

. . . .

MODIFICATION OF INSPECTION REQUIREMENTS

§ 946.130 Application.

Any handler whose packing facilities are located in an area where a Washington State Department of Agriculture, Plant Industry Division Office or Federal-State Inspector is not readily available to perform the inspection required by this part may, pursuant to § 946.60(a), apply to the committee for a permit authorizing modification of inspection requirements. Applications shall be made on forms furnished by the committee and shall contain such information as the committee, with approval of the Secretary, may find necessary in making a determination regarding the issuance of such permit.

. . . .

SUBPART—HANDLING REGULATIONS

§ 946.336 Handling regulation.

. . . .

(d) *Special purpose shipments.* The minimum grade, size, cleanness, maturity, and pack requirements set forth in paragraphs (a), (b), and (c) of this section shall not be applicable to shipments of potatoes for any of the following purposes:

(1) Livestock feed;
(2) Charity;
(3) Seed;
(4) Prepeeling;
(5) Canning, freezing, and "other processing" as hereinafter defined;
(6) Grading or storing at any specified location in Morrow or Umatilla Counties in the State of Oregon, in District 5, or in Spokane County in Dis-

trict 1; or

(7) *Export*, except to Alaska and Hawaii and except as provided in (c)(2) of this paragraph.

Shipments of potatoes for the purpose specified in paragraphs (d)(1) through (7) of this section shall be exempt from inspection requirements specified in paragraph (g) of this section except shipments pursuant to paragraph (d)(6) of this section shall comply with inspection requirements of paragraph (e)(2) of this section. Shipments specified in paragraphs (d)(1), (2), (3), and (5) of this section shall be exempt from assessment requirements specified in § 946.41.

(e) *Safeguards*. (1) Handlers desiring to make shipments of potatoes for prepeeling shall:

(i) Notify the committee of intent to ship potatoes by applying on forms furnished by the committee for a certificate applicable to such special purpose shipments;

(ii) Prepare on forms furnished by the committee a special purpose shipment report on each such shipment, a copy of which must also accompany each shipment. The handler shall forward copies of each such special purpose shipment report to the committee office and to the receiver with instructions to the receiver to sign and return a copy to the committee office. Failure of the handler or receiver to report such shipments by promptly signing and returning the applicable special purpose shipment report to the committee office shall be cause for cancellation of such handler's certificate applicable to such special purpose shipments and/or the receiver's eligibility to receive further shipments pursuant to such certificate. Upon cancellation of such certificate, the handler may appeal to the committee for reconsideration; such appeal shall be in writing;

(iii) Before diverting any such special purpose shipment from the receiver of record as previously furnished to the committee by the handler such handler shall submit to the committee a revised special purpose shipment report.

(2) Handlers desiring to ship potatoes for grading or storing to any

specified location in Morrow or Umatilla Counties in the State of Oregon, to District No. 5, or to Spokane County in District No. 1 shall:

(i) Notify the committee of intent to so ship potatoes by applying on forms furnished by the committee for a certificate applicable to such special purpose shipment. Upon receiving such application, the committee shall supply to the handler the appropriate certificate after it has determined that adequate facilities exist to accommodate such shipments and that such potatoes will be used only for authorized purposes;

(ii) If reshipment is for any purpose other than as specified in paragraph (d) of this section, each handler desiring to make reshipment of potatoes which have been graded or stored shall, prior to reshipment, cause each such shipment to be inspected by an authorized representative of the Federal-State Inspection Service. Such shipments must comply with the minimum grade, size, cleanness, maturity, and pack requirements specified in paragraphs (a), (b), and (c) of this section;

(iii) If reshipment is for any of the purposes specified in paragraph (d) of this section, each handler making reshipment of potatoes which have been graded or stored shall do so in accordance with the applicable safeguard requirements specified in paragraph (e) of this section.

(3) Each handler making shipments of potatoes for canning, freezing, or "other processing" pursuant to paragraph (d) of this section shall:

(i) First apply to the committee for and obtain a Certificate of Privilege to make shipments for processing;

(ii) Make shipments only to those firms whose names appear on the committee's list of canners, freezers, or other processors of potato products maintained by the committee, or to persons not on the list provided the handler furnishes the committee, prior to such shipment, evidence that the receiver may reasonably be expected to use the potatoes only for canning, freezing, or other processing;

(iii) Upon request by the committee, furnish reports of each shipment pursuant to the applicable Certificate of Privilege;

(iv) Mail to the office of the committee a copy of the bill of lading for each Certificate of Privilege shipment promptly after the date of shipment unless other arrangements are made;

(v) Bill each shipment directly to the applicable processor.

(4) Each receiver of potatoes for processing pursuant to paragraph (d) of this section shall:

(i) Complete and return an application form for consideration of approval as a canner, freezer, or other processor of potato products;

(ii) Certify to the committee and to the Secretary that potatoes received from the production area for processing will be used for such purpose and will not be placed in fresh market channels;

(iii) Report on shipments received as the committee may require and the Secretary approve.

(5) Each handler desiring to make shipments of potatoes for export shall:

(i) Notify the committee of intent to so ship potatoes by applying on forms furnished by the committee for a certificate applicable to such special purpose shipment. Such information shall include the quantity of potatoes to be shipped and the name and address of the exporter;

(ii) After the certificate is approved and the shipment is made, furnish the committee with a copy of the on-board bill of lading applicable to such shipment unless other arrangements are made;

(iii) Before diverting any such special purpose shipment from the receiver of record as previously furnished to the committee by the handler such handler shall submit to the committee a revised special purpose shipment report.

(f) *Minimum quantity exemption.* Each handler may ship up to, but not to exceed 5 hundredweight of potatoes per day without regard to the

inspection and assessment requirements of this part, but this exception shall not apply to any shipment over 5 hundredweight of potatoes.

(g) *Inspection.* (1) Except when relieved by paragraphs (d) or (f) of this section, no person may handle any potatoes unless a Federal-State Inspection Notesheet or certificate covering them has been issued by an authorized representative of the Federal-State Inspection Service and the document is valid at the time of shipment. Further, any bulk load shipments of potatoes not relieved in paragraphs (d) or (f) of this section must also be accompanied by a Shipping Clearance Report issued by the Federal-State Inspection Service and valid at the time of shipment.

(2) U.S. No. 1 grade or better potatoes in the State of Washington which are resorted or repacked within 72 hours of being inspected and certified are exempt from reinspection.

7 C.F.R. §§ 946.4-.7, .28, .50(a)-(c), .51-.52, .60(a), .71, .130, .336(d)-(g).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS MODIFIED)

. . . . [Footnote 1 omitted.]

The underlying issue in these proceedings is the interpretation and application of the inspection requirements in the Order. . . .

. . . .

Statement of the Case

. . . William Strebin is the sole proprietor of . . . Strebin Farms. Strebin [Farms] has grown Irish potatoes in Oregon since 1959 and has a packing facility in Troutdale, a town in Multnomah County, Oregon. Troutdale is located about 4 miles from the Oregon-Washington state line. Since 1980, Strebin [Farms] has expanded the size of the Troutdale plant as the demand for [its] potatoes increased, added refrigeration, and upgraded equipment for packing, bagging, and inspecting potatoes. In 1992, Strebin [Farms] invested one and [one-]half million dollars in the facility, which included the purchase of an x-ray machine to detect a potato disease called "hollow heart." [Strebin Farms] is one of the few facilities in the Oregon-Washington area to have such a machine. The [facility], considered state-

of-the-art, is managed by William Strebin's son, Daniel. Two other sons are also actively involved in running the business.

About 70 percent of the potatoes processed at the Troutdale [facility] are from Strebin Farms and about 30 percent are from other Oregon potato growers. Strebin [Farms] packages and sells potatoes under [its] name and also sells a No. 1 grade potato called "Cream of the Crop." United States Department of Agriculture [hereinafter USDA] inspectors, as well as Strebin [Farms'] own inspectors, are located at the facility. Under Oregon and Washington Potato Marketing Orders, the potatoes have to be only No. 2 grade to meet quality standards. Strebin [Farms], however, has [its] Troutdale "Cream of the Crop" potatoes inspected and graded for marketing as No. 1 grade.

Strebin [Farms] has another two facilities in the Oregon Counties of Morrow and Umatilla, which also border the Oregon-Washington state line, but which are over 100 miles from Troutdale. The Morrow operation is a storage facility where potatoes are held until they are shipped, in Strebin [Farms'] trucks, to Troutdale for processing. In 1995, [William] Strebin and his sons acquired a packing facility in Umatilla County called South Basin Packing. It is comparable to Troutdale except for having less capacity and not having a "hollow heart" detection machine.

In 1992, Strebin [Farms] expanded [its] potato growing operation into Washington when [it] acquired land near Pasco, Washington. [Strebin Farms] planned to ship the potatoes [(and actually shipped potatoes in 1992 (CX 9))] to [its] storage facility in Morrow County, Oregon, and then to Troutdale where they would be inspected and packaged as No. 1 grade potatoes. Under the . . . Order, all potatoes grown in Washington [are considered in the production area and] must be inspected before being shipped outside the production area covered by the Order.[2] The purpose of an inspection is to insure that the potatoes meet the minimum quality (No. 2 grade) required by the Order. Handlers,[3] such as Strebin [Farms], have to pay for the cost of inspection, including any travel by the

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[2]"During any period in which the Secretary regulates the shipment of potatoes pursuant to the provisions of this subpart, each handler who first ships potatoes shall, prior to making shipment, cause each shipment to be inspected by an authorized representative of the Federal-State inspection service or such other inspection service as the Secretary shall designate." (7 C.F.R. § 946.60(a).) ["*Production area* means all territory included within the boundaries of the State of Washington." (7 C.F.R. § 946.4.)]

[3]"*Handler* is synonymous with *shipper* and means any person (except a common or contract carrier of potatoes owned by another person) who handles potatoes or causes potatoes to be handled." (7 C.F.R. § 946.6.)

inspectors to the point where the potatoes are inspected. [William] Strebin [avers that he] assumed that since his Washington-grown potatoes would be inspected in Troutdale, Oregon, according to standards required by the . . . Order and by the same federal inspection service which inspects under both the Washington and Oregon Orders, which are similar, this [Oregon inspection] would satisfy the Order's inspection requirements . . . without having to incur the expense of having the same potatoes inspected twice.[4] Strebin [Farms] would then forward the inspection certificates and the amount of assessment due on the Washington-grown potatoes to the State of Washington Potato Committee [hereinafter SWPC] which administers the Order. Between March and May 1993, Strebin [Farms] shipped [its] Washington-grown potatoes to Troutdale without having them first inspected in Washington. The potatoes, however, were inspected in Troutdale before being marketed. Strebin [Farms] also paid the [SWPC] the assessments due on the potatoes. In 1995, Strebin [Farms] again shipped Washington-grown potatoes to the Troutdale facility without having them inspected in Washington. These potatoes were inspected at Troutdale and assessments were paid to the [SWPC].

On April 13, 1993, the [SWPC] sent Daniel Strebin, the manager of the Troutdale [facility], a letter formally notifying him that Strebin [Farms] had to have the potatoes inspected in Washington, as required by the Order, before shipping them to Troutdale (CX 9).

Daniel Strebin and the [SWPC] then began a dialogue concerning Strebin [Farms'] request for an "exemption" from the Order's requirements that the potatoes be inspected in Washington. [Daniel] Strebin contended that he should have an exemption from inspection in Washington similar to the one allowed for potatoes shipped to Morrow and Umatilla Counties in Oregon and to one given to a Washington potato grower called Echo Valley Farms. Section 946.336 of the [Handling] Regulation (7 C.F.R. § 946.336) provides that a handler may apply to the [SWPC] for a special purpose certificate allowing [the handler] to ship potatoes to the Oregon counties of Morrow or Umatilla for grading or storing without first having [the potatoes] inspected [(7 C.F.R. § 946.336(d), (e))].

This Morrow-Umatilla exemption from inspection in Washington resulted from a meeting of the [SWPC] in January 1971 to discuss whether to [seek to amend the Order to] allow Washington growers to ship potatoes to Oregon for storage before

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[4]Gary Olson, a USDA official, estimated that the cost to Strebin [Farms] to have an inspection in Washington would be about $35 per 52,000-pound truckload of potatoes. Strebin [Farms] shipped [approximately 6,113,500] pounds of Washington potatoes in 1993 (approximately 117.5 truckloads) and [approximately 12,349,600] pounds in 1995 (approximately 237.5 truckloads) (Tr. 320). The cost of having these potatoes inspected in Washington for these 2 years would therefore be $12,425.

having them inspected [(see Minutes of the SWPC meeting of January 18, 1971, as read into the Minutes of the SWPC Special Winter Meeting of February 23, 1994] (CX 11 [at 5])).

. . . [A few months later, in 1971, the SWPC, *inter alia*, discussed changes in the Order, adopted recommended changes in the Order, agreed upon a date and place for a hearing, and then agreed to request] the Secretary to [hold a hearing to] amend the Order [(see Minutes of SWPC Organizational Meeting of June 16, 1971; CX 22C at 6-8). The notice of the public hearing, setting forth the SWPC's proposed amendments to the Order, together with a request for a hearing submitted by the SWPC as administrative agency established pursuant to the Order, was published in the September 24, 1971, issue of the Federal Register (36 Fed. Reg. 18,956)]. At the hearing on the proposed amendment, witnesses testified on the need for change:

BY MR. ANDARY:

Q. Mr. Bouchey, why is it that the Committee has requested this Marketing Order program be amended?

[BY MR. BOUCHEY:]

A. [Delmar Bouchey, Chairman of the Washington Potato Committee] [brackets added by ALJ]. Well, I suppose there is a number of changes, but I think probably the main reason that we want a change is that we have potatoes growing presently in the Patterson and the Horse Heaven Hills, which are being shipped over onto the Oregon side and, actually, I guess this is in violation, but due to the packing houses over in the Oregon side, it is just much closer for them to ship there than to the Pasco area.

Q. This order has been in effect since 1949, I see, and has it ever been amended?

A. Not to my knowledge, no.

Q. Some of the other changes that you mentioned, are they to bring it up-to-date?

A. That's right.

. . . .

[BY MR. GEISERT:]

. . . [Otto Geisert, member of the Washington Potato Committee] [brackets added by ALJ].

The need to expand the definition of handle has come about, at least in part, by the development of new areas of production. In the past years, potatoes have become an important crop in the Hermiston-Umatilla, Oregon area and in the Patterson-Horse Heaven Hills area of Washington. Packing facilities have recently been built in the Hermiston-Umatilla, Oregon area which is just across the Columbia River from the Patterson-Horse Heaven Hills area of Washington. It is also reported that a processing plant will be built near Hermiston, Oregon. Thus, the haul to that Oregon area is much shorter than they have into the Pasco area. Recently, the Oregon-California potato order was amended in the same manner as is proposed here. This has facilitated the movement of the Hermiston-Umatilla area crop by permitting it to move under appropriate safeguards into the Pasco area for grading and storing. Safeguards for the movement of Washington potatoes to Oregon or Idaho for grading and storing will also be needed.

The definition of handle in the proposed potato order amendment is intended to regulate any shipments moving within the production area and all shipments moving from the production area to any point outside thereof.

[CX 22E at 26-28].

On March 3, 1972, the Secretary of Agriculture, issuing a proposed rule to amend the Order, commented:

The hearing record indicates that the definition of "handle" should include the shipment of ungraded potatoes to the adjoining States of Idaho or Oregon for storage, or preparation for market, or both.

[CX 22F at 2.]

The Secretary then issued the following amendment to the Order on June 1, 1972:

§ 9[4]6.7 Handle.

> "Handle" is synonymous with "ship" and means to transport, sell, or in any other way to place potatoes grown in the State of Washington, or cause such potatoes to be placed, in the current of commerce within the production area or between the production area and any point outside thereof, or from any point in the adjoining States of Oregon and Idaho to any other point[.]

CX 22G.

However, on July 13, 1972, the Secretary, responding to . . . a request by the [SWPC] for "minor revisions" in the Order's shipping requirements, issued "Limitation of Shipments Regulation," which states that "[p]otatoes grown in the production area may be shipped . . . to specified locations in Morrow and Umatilla Counties, Oreg., for grading and storing." [(CX 22H.)] Gary Olson, the Officer-in-Charge for USDA's Northwest Field Office which administers the marketing orders in the area, testified that the Secretary's purpose in allowing potatoes to be shipped only to Oregon locations in Morrow and Umatilla Counties was "just to take advantage of the grading and storing facilities in those . . . adjacent counties to the Washington production area, where it was believed there could be an effective monitoring of compliance and enforcement of compliance." (Tr. 13.) Since 1972, the Order has allowed uninspected shipments of Washington potatoes for [grading or] storage only to the Oregon Counties of Morrow and Umatilla (7 C.F.R. § 946.336).

[On October 15, 1992, Henry C. Michael, Manager of SWPC, wrote Dan Strebin, d/b/a Strebin Farms, a letter stating that on October 14, 1992, Mr. Chuck Backman of the Federal Inspection Service, Salem, Oregon, called SWPC indicating that Dan Strebin had contacted Mr. Backman regarding potatoes grown in Washington and transported to Oregon for the fresh market; that Marketing Order 946 requires all Washington-grown potatoes for the fresh market to be inspected in Washington and meet the minimum fresh grade requirement, "U.S. number 2 or better"; that there is an exception for Washington-grown potatoes transported to Morrow and Umatilla Counties, Oregon, for packing; and that the then current Handling Regulation enclosed with the letter contained the necessary information (CX 8).

On April 13, 1993, Sam Thornton, Assistant Manager of SWPC, wrote Dan Strebin, d/b/a Strebin Farms, stating that the SWPC understood that Strebin Farms' Washington-grown potatoes were being transported to Irrigon, Oregon, in Morrow County, an exempt movement under the Order; that these potatoes, however, were then shipped to Strebin Farms' packing shed in Troutdale, Oregon, without inspection prior to shipment to make U.S. No. 2 grade or better; that Mr. Thornton mistakenly thought Mr. Strebin apparently understood that this constituted a violation when they talked about it on March 30, 1993; that starting "immediately" all such shipments must be inspected to conform to the minimum grade requirements of the Order; and that the violations of the Order to date would be written up and sent to the "N.W. Marketing Order Field office in Portland," but would not be pursued if proper inspection is arranged in Irrigon, Oregon (CX 9).

On April 30, 1993, Officer-in-Charge Gary D. Olson, Northwest Marketing Field Office, Fruit and Vegetable Division, Agricultural Marketing Service [hereinafter AMS], USDA, in Portland, Oregon, sent a letter by registered mail to Mr. Dan Strebin, d/b/a Strebin Farms, informing Mr. Strebin of the requirements for shipment of potatoes to Morrow and Umatilla Counties, Oregon; advising that failure to meet these requirements violates federal law; explaining the civil penalties possibly attaching to such violations; and reminding Mr. Strebin that it was made absolutely clear in an April 16, 1993, phone conversation between Mr. Strebin and Mr. Olson that Strebin Farms' full compliance with these regulations is expected, or prosecution would follow (CX 10).]

In 1993, the [SWPC], in response to Strebin [Farms'] request to extend the Morrow-Umatilla exemption to Oregon's Multnomah County (where Strebin [Farms'] Troutdale [facility] is located), began consideration of the matter. The minutes of [the Special Winter Meeting held February 23, 1994,] reflect an extensive discussion of Strebin [Farms'] request[, with a presentation by Dan Strebin]:

[Strebin Farms

The Chairman briefly outlined Mr. Dan Strebin's current situation and asked Mr. Strebin to present his request to the Committee.

Mr. Strebin explained that he grows potatoes in Washington near Pasco. He grows approximately 350 acres of Norkotahs and stores them at Irrigon, Oregon until February or March and runs them at his plant in

Troutdale, Oregon from March until the end of May.

Currently Mr. Strebin must obtain inspection at the storage to U.S. #2 grade or better prior to shipment to Troutdale. This costs him an additional $9,000. in added inspection fees at his shed to grade these potatoes to a U.S. #1 grade.

Mr. Strebin requested that the Committee consider changing the Handling Regulations (946.336) under (d) Special Purpose Shipments (6) Grading or storing at any specific location in Morrow and Umatilla Counties in the State of Oregon, in District 5, or in Spokane County in District 1; to include Multnomah County in Oregon.]

Comments and Questions:

- How would we monitor this? How many more tons of potatoes would be affected?
- The Oregon shippers book lists six packers in the Multnomah and Washington County areas near Portland, Oregon area.
- Two of the packers in Multnomah County just grow and ship red potatoes during the summer deal.
- Tomy Amsted of Sherwood, Oregon and Kris Mehlenbacher of Pasco, Washington came before this Committee several years ago to request the same thing and we turned it down.
- The concern is in tracking these potatoes. We would have to generate more income to monitor this situation.
- A plan of acreage and production could be submitted each year. This should be adequate to track these potatoes.
- Since 1956 the Washington State Potato Commission (WSPC) has managed the State of Washington Potato Committee (SWPC). When the Hermiston and lower Columbia Basin areas were expanding in the late sixties and early seventies a group of packers requested that the SWPC allow Washington potatoes to be stored and/or graded in Morrow and Umatilla Counties and that the State of Oregon Potato Committee (SOPC) allow potatoes grown in Morrow & Umatilla County, Oregon to be packed in Adams, Benton, Franklin and Walla Walla Counties in Washington. At that time a lot more fresh potatoes went back and forth than do today.

- We would have to monitor six packers in the Portland area and would need an extra person to do it with.
- The intent of the order should be considered.
- Where do we draw the line?
- What does it cost for the SWPC to monitor processed potatoes from Washington that go to Oregon and/or Idaho?
- The SWPC exempts processed potatoes from the Marketing Order.
- Morrow and Umatilla Counties are geographically part of our main production area and it makes sense to allow them the exemption but not for Multnomah County.
- Mr. Strebin is current on all assessments.
- What is the downside of granting this request?
- The ability to monitor for compliance is just not available.
- What varieties does Strebin Farms grow on their Irrigon, Oregon farm? Norkotahs and Yukon Golds.
- Couldn't he pack at his field operation?
- How do we keep potatoes from going to California for rebagging? California doesn't require inspection.
- Strebin Farms would have an inspection certificate for everything they pack and at the end of the season a check could be made to compare production with pack out and inspection reports.
- Mr. Strebin grows on both sides of the river (Oregon and Washington) and could conceivably make up any discrepancies with Oregon potatoes.
- If it was only Strebin we probably could do it, but what happens when others start going into Multnomah County. How would we monitor it?
- If we did not have an exemption for Morrow and Umatilla Counties Mr. Strebin would have to have his potatoes inspected at the field to U.S. #2 or better prior to shipment to his storage in Oregon.

[CX 11 at 3-5.]

. . . [After additional discussion at this February 23, 1994, meeting between SWPC members and Dan Strebin on the issue of the extension of the Morrow-Umatilla exemption to Multnomah County, the "Chairman asked for a motion from the Committee. No motion was made so the Handling Regulations stay[ed] as is." (CX 11 at 6.)

On June 15, 1995, Mr. Dan Strebin, accompanied by counsel, Mr. Jim Perkins,

appeared before the SWPC at its Annual Meeting, which took up the issue of Strebin Farms' proposal, as follows:

Strebin Farms

Chairman Bouchey asked Henry Michael to outline requests to change the exemption for counties in Oregon to date.

1. Early discussions began in the 1970's. These discussions led to a hearing and a vote of the growers in 1971/72 to allow grading and storage within the adjoining states of Oregon & Idaho. Following the referendum vote of growers, the State of Washington Potato Committee recommended to the Secretary that Morrow & Umatilla Counties be specified (due to location) as storage and grading areas outside the State of Washington.

2. Periodically since that time, requests to modify this exemption have occurred.

3. In 1993, Strebin Farms requested at the June Annual Meeting, that Multnomah County in Oregon be added as an exempted county. This request was denied.

4. Strebin Farms asked the SWPC to allow Multnomah County again at the February 1994 Special Meeting. No action was taken.

5. No request was put forth at the February 22, 1995 SWPC Special Meeting.

The Chairman asked Strebin Farms to state their request.

CX 12 at 4.

Mr. Jim Perkins, Strebin Farms' attorney, then gave a detailed presentation, after which Dan Strebin and SWPC members engaged in a question and comment period (CX 12 at 5-18). Thereafter, there occurred a vote upon "[a] motion . . . to leave the exemptions of Morrow and Umatilla Counties the same," which motion failed for lack of nine concurring votes, but SWPC Manager Henry Michael pointed out "that no action on this issue would mean the regulations would stay the

same." (CX 12 at 18.) The SWPC then considered "putting the question of exempted counties in Oregon into a sub-committee for further study." (CX 12 at 18.) Thereafter, a motion to "have the 1995/96 SWPC Chairman select three committee members to serve on this sub-committee" carried 10 votes to none (CX 12 at 19). After "intermission" that same day, Bob Halvorson, Jr., was elected Chairman for 1995-1996 by the just-seated 1995-1996 SWPC members (CX 12 at 20-21). Chairman Halvorson] then appointed a special four-person subcommittee to consider the matter [(CX 12 at 22)]. Strebin [Farms] contends that three of the four were associated with [its] competitor called Basin Gold [(CX 26 at 5)]. The subcommittee on December 18, 1995, unanimously agreed not to extend the exemption to ["any other counties in Oregon."] (CX 25 [at 2].) Its chairman, Allen Floyd, testified on the reasons for the subcommittee's decision:

> [BY MS. DESKINS:]
>
> Q. Tell us about this subcommittee. What -- when you were appointed, what did you do?
>
> [BY MR. FLOYD:]
>
> A. Henry [Michael, manager of the Washington Potato Committee] [brackets added by the ALJ] prepared all the materials since 1971 that had gone on discussing this type of a motion and this type of a request, and, so, each member of the subcommittee received a book with all this past history in it.
>
> I called each sub -- each member on the committee, on the subcommittee, and requested that they thoroughly examine this book and be prepared to discuss it at the meeting in December, that I held for my convenience at Harvest Fresh in the conference room. We have a large conference room.
>
> And at that time, Rich Betts [sic] was asked to set [sic] in, not as a voting member, only as an advisor for some of the ideas that we were going to try to come up with to make this work or not work and the input on what they thought of it, what he thought their committee thought of it.
>
> And we met at Harvest Fresh, and I asked -- the first thing I

asked all the members was if they had read and thoroughly reviewed it all, and they all assured me they had.

Then we had a quite lengthy discussion about it, and I don't remember who called for question on it, we voted, and it was unanimous, and we dispersed.

Some of the things that came up were bringing the line back to the state of Washington because of the problems of policing it. We discussed throwing the marketing order out of the state totally. Our recommendation was to do away with it because of problems.

We discussed opening all of Oregon up because we didn't feel that we could draw an imaginary line, and we didn't consider Strebin Farms individually. That wasn't our job. Our job was to look at whether we should tell the committee to make a change in the marketing order as far as locality.

We felt that we had some options, and we discussed all these options, whether we should do the things that I have said. We didn't feel we could draw a line in the sand, a new line in the sand, out there anywhere and include a county because where do you stop?

If we go to Multnomah, why not Washington? If we go to Multnomah, why not Madras? Why not Klamath Falls? We have many shippers in the state, and there's many shippers in Oregon that go to California. We all know there's no marketing order in California.

That is why we have 2s or better in the state of Washington, because if you have a hollow heart crop in the state of Washington and can get it across that border, California doesn't have a knife, and, so, it goes on the market.

So, we didn't see how we could change it. We couldn't see their request was any different than anything in the past, and all the notes we had in front of us and all the work done by the other committees. So, we didn't feel we had any other recommendation but to go back to the committee and stay the same as we were.

Tr. 268-70.

A special meeting of the [SWPC] was held on February 15, 1996. The minutes reflect that Daniel Strebin actively participated in a discussion of the subcommittee's report. The [SWPC] then voted 12 - 0 to accept the subcommittee's recommendation to "leave the exemption as is." (CX 26 [at 5-9].)[5]

The exemption from inspection that the [SWPC] had given to a potato handler called Echo Valley Farms was, according to Gary Olson, [a] USDA official [responsible for field administration of the Order], a "hardship" waiver which is the situation where a handler can "ship without inspection but would still be required to ship product that meets the minimum requirements established under the order, and the inspection service would from time to time monitor that those minimum quality requirements are being met." (Tr. 44.)

Section 946.130 [of the Rules and Regulations] (7 C.F.R. § 946.130) provides for such a waiver: "Any handler whose packing facilities are located in an area where a Washington State Department of Agriculture, Plant Industry Division Office or Federal-State Inspector is not readily available to perform the inspection required by this part may, pursuant to § 946.60(a), apply to the committee for a permit authorizing modification of inspection requirements."

Henry Michael, the [SWPC] manager . . ., said that Echo Valley [Farms] received a "modification of inspection" because it was a smaller grower with 120 acres compared to between three and four hundred for Strebin [Farms] (Tr. [153-59]). [Further, Echo Valley Farms] is located 80 miles from the nearest inspection service (Tr. 398). The minutes for the February 23, 1994, [Special Winter Meeting of the SWPC] also provide the following reasons for the [SWPC's] approval of an exemption for Echo Valley Farms:

> Echo Valley only grows about 120 acres of potatoes and is located 90 miles north of Spokane. They pack about ten months a year. They pack approximately 20 tons per day four days per week. Almost all their product goes to the Spokane market.
>
> **Comments and questions:**
>
> - The Inspection Service does quality inspections in the market and

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[5]If the SWPC had approved Strebin [Farms'] request for an exemption for Multnomah County, its next step would have been a recommendation to the Secretary who would decide whether to grant the exemption (Tr. 50). . . .

sends these reports to the State of Washington offices.
- No problems to date on billing or quality.
- This is a hardship request due to distance from inspection.

[CX 11 at 3.]

[On at least two occasions, in 1982 and 1987, the SWPC appointed subcommittees to examine proposed exemptions for Washington County, Oregon, which proposed exemptions are very similar to the exemption proposed by Strebin Farms for Multnomah County, as explained in the minutes of the SWPC meetings held in those years, as follows (CX 24 contains the 1982 and 1987 meetings minutes, but page 2 of the 1987 meeting minutes was not put in evidence (Tr. 143-44)):

SUB-COMMITTEE REPORTS

Committee on Allowing Ungraded Potatoes to Move to Washington County, Oregon

Gary Graber was the Chairman of that sub-committee and reported the sub-committee had recommended such shipments not be approved. The recommendation was voted on by full Committee with their recommendation being approved by a vote of 12 to 1.

CX 24 at 2.

Special Committees

Chairman Long outlined the request by Kris Mehlenbacher to add Washington County in Oregon to the list of counties exempt from double inspection.

At the March 10, 1987 meeting, Chairman Long appointed Pat Connors, Lynn Olsen and Bruce LePage to a Special committee to study this question. Chairman Long asked Mr. Mehlenbacher to present his request to the committee before he gave the Special committee's recommendation.

Mr. Mehlenbacher stated that he had been shipping approximately 4

to 10,000 tons of potatoes into Washington County for the last five years. He has had to pay for inspection on his potatoes in Washington to make 2's or better bulk and then has to pay for another inspection in Oregon. This is costing him an added $8,000 per year. Since at this time Umatilla and Morrow Counties in Oregon are exempted from this double inspection he would like the Committee to add Washington County in Oregon to the list of exempt counties.

Chairman Long reported on the recommendation of the Special committee. Their recommendation was to leave the exemptions as they are with Umatilla and Morrow Counties in Oregon the only counties exempted.

Some of the discussion was as follows:

- how do we exempt two counties and not another. How can exemption be for two counties and not all counties in Oregon?

- the Morrow and Umatilla County exemptions are geographic, i.e., they are part of the Columbia Basin. Portland is over 200 miles away—it would be difficult to keep track of any spuds going that far.

- even though he is paying an extra $8,000 per year, it might cost the Committee that much just to try to keep track of these spuds going to Washington County.

Chairman Long asked if the Committee wished to take any action at this time. There being no motion for action, the request was denied.

CX 24 at 4.]

Discussion

Complainant contends that Strebin [Farms] violated the Order on the two occasions [it] shipped potatoes from Washington to Troutdale (Multnomah County) in Oregon without first having [the potatoes] inspected and that [Strebin Farms] should be ordered to pay the costs [it] would have incurred for such inspections

plus a penalty. [Complainant] contends that Strebin [Farms] could avoid [its] two-inspection dilemma by packing and selling [its] potatoes as No. 2 grade after the inspection in Washington instead of having them inspected at Troutdale as a premium No. 1 grade.

Respondent[s] contend that the Order, by giving inspection exemptions for potatoes shipped to Morrow and Umatilla Counties, but not for those shipped to Multnomah County, is arbitrary and capricious and not in accordance with law, and that it was a denial of equal protection and due process for the [SWPC] to give a waiver to Echo Valley Farms, but not to [Respondents]. [They] argue that under section [8c](15)(A) [of the AMAA] (7 U.S.C. § 608(c)(15)(A)) the Order can be modified or an exemption granted to provisions of the Order. Specifically, [Respondents] contend that "the Secretary should be directed to modify the . . . Order to accommodate Multnomah County, Oregon as an acceptable place for first inspection of Washington produced potatoes." [Strebin Farms Post Hearing Opening Brief at 21.]

Respondent[s] present cogent reasons for seeking a modification of the Order to market a No. 1 grade potato without having to incur the added cost of a double inspection. Strebin [Farms] points out that [its] request involves no scheme to avoid paying assessments or to avoid an inspection. Indeed, [it] notes that the inspection of washed potatoes provided by [its] Troutdale facility, including the test for hollow heart disease, is superior to the inspection of uncleaned field-run potatoes in Washington. Inspection of potatoes before they are cleaned, [Respondents] said, can prevent detection of a condition called "green spot." (Tr. 436-3[8].)

Strebin [Farms'] argument for an exemption is further supported by the Secretary's initial amendment to the Order in 1972 when he indicated that an exemption for shipments to any point in Oregon would be appropriate [(CX 22G)].

However, for Strebin [Farms], as the petitioner in a [7 U.S.C. § 60]8c(15)(A) proceeding, to prevail, [it] must do more than show the reasonableness of [its] proposal. [It] also has the burden of showing that the record does not support the position of the Secretary . . .[6] limiting the exemption to Morrow and Umatilla Counties. As in virtually all [7 U.S.C. § 60]8c(15)(A) proceedings, this burden is a formidable if not insurmountable obstacle:

[[6]Respondents' 7 U.S.C. § 608c(15)(A) burden does not extend to the SWPC. I infer that the ALJ inadvertently included the SWPC. Respondents do not have to show that the SWPC's position is not supported in the record, when SWPC's role under the Order is to recommend regulations to the Secretary.]

> In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely allege that the Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. . . . The Act gives the Secretary broad discretionary powers to effectuate its purposes. The existence of regulatory alternatives, even those which might be more persuasively reasonable, is not cognizable on review. . . .
>
> This proceeding does not afford petitioner a forum to review questions of policy, desirability, or effectiveness of Order provisions. . . . It is not sufficient for petitioner to show that the record may contain evidence supporting its positions. On the contrary, petitioner must establish clearly that the record cannot sustain the conclusion reached by the Secretary. (Citations omitted.)

In re Farm Fresh, Inc., 49 Agric. Dec. 23, 86-87 (1990), *aff'd*, CIV-90-688-T (W.D. Okla. June 24, 1991), *printed in* 50 Agric. Dec. 1 (1991), *aff'd*, 968 F.2d 19, 1992 WL 138493 (10th Cir. 1992), *printed in* 51 Agric. Dec. 110 (1992).

The record supports the position of the Secretary and the [SWPC]. Although the Secretary initially indicated in 1972 when [he] amended the Order that all sites in Oregon could be considered for an exemption, he qualified his amendment by finding that the exemption would be limited to sites only in Morrow and Umatilla Counties, Oregon. This action by the Secretary was within his authority. In determining the scope of the area covered by a marketing order, the Secretary is directed to follow the [AMAA's] explicit injunction that "[e]xcept in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy." (7 U.S.C. § 608c(11)(B).)

The record supports the Secretary's determination that an exemption limited to Morrow and Umatilla Counties was the smallest practicable area. Unlike Multnomah County, Umatilla and Morrow Counties, as part of the Columbia Basin production area, are in close proximity to [Washington] potato growers, which, as the record shows, was a reason for the Morrow-Umatilla exemption. Allowing an exemption for more distant sites, such as Multnomah, which is more than 100 miles from the Washington potato production area, would make monitoring of

Washington-grown potatoes more difficult and more expensive and therefore less practicable.

[SWPC] members also expressed a legitimate concern that if an exemption were granted for Multnomah, any handler of Washington-grown potatoes could make the same claim as Strebin [Farms] for an inspection exemption for any county in Oregon. As Allen Floyd put it, "where do you stop?" (Tr. 269.)

Thus, as the decision of the Secretary and the [SWPC] to limit the inspection exemption to Morrow and Umatilla Counties is supported by the record, it is in accordance with law.

As for Strebin [Farms'] argument that [it] was denied due process and equal protection, the record shows that the [SWPC] carefully considered Strebin [Farms'] request. There is no showing that the members of the special subcommittee who were allegedly Strebin [Farms'] competitors engaged in any collusion to deny [Strebin Farms] fair consideration of [its] request. As for Strebin [Farms'] equal protection, the record contains objective reasons for the [SWPC's] determination not to extend the Morrow-Umatilla exemption to Multnomah. The [SWPC's] determination is also consistent with its action[s] in [1982 and] 1987 not to extend the exemption to Washington County, Oregon (CX 24). With respect to "hardship" exemptions, the one given to Echo Valley Farms was in accordance with the specific provision in the Order allowing an exemption when, as in Echo Valley Farms' case, a handler which sells its potatoes in-state, the operation is distant from the inspection service. There is no showing that Strebin [Farms'] Washington operation was such a distance from the inspection service as to constitute a similar hardship. Strebin [Farms] was therefore not denied due process or equal protection of the laws. [The] petition for modification of the Order [shall] be denied.

Strebin [Farms] violated the Order in 1993 and 1995 when [it] shipped 355 truckloads of uninspected potatoes from Washington to Multnomah County, Oregon. [Strebin Farms] shall be ordered to pay [a civil penalty of $35,500]. . . . Complainant has . . . shown that it considered the appropriate criteria in seeking a penalty, *viz.*, the nature and number of violations, the damage, if any, to the Order, Strebin [Farms'] profit from [its] actions, prior warnings, and "any other circumstances shedding light on the degree of culpability involved." *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 154-55 (1992), [*appeal docketed sub nom. Balice v. USDA*, No. CV-F-92-5483-GEB (E.D. Cal. July 21, 1992)]. . . .

Findings of Fact

1. Respondents, William Strebin, Daniel Strebin, and Strebin Farms, also

referred to [in this Decision and Order] jointly as Strebin [Farms], grow potatoes in the State of Washington.

2. Respondents, William Strebin, Daniel Strebin, and Strebin Farms, are handlers subject to the marketing order regulating the handling of Irish Potatoes Grown in Washington (7 C.F.R. pt. 946).

3. The Order requires that Washington-grown potatoes be inspected before being shipped outside the area covered by the Order. Washington-grown potatoes may be shipped only to the Oregon Counties of Morrow and Umatilla without an inspection.

4. Strebin [Farms] operates a potato packing [facility] in Troutdale, Multnomah County, Oregon.

5. In 1993, Strebin [Farms] shipped approximately 6,113,500 pounds of potatoes grown in the State of Washington to Multnomah County, Oregon, without having the potatoes inspected.

6. In 1995, Strebin [Farms] shipped approximately [12,349,600] pounds of potatoes grown in the State of Washington to Multnomah County, Oregon, without having the potatoes inspected.

7. In 1993, Strebin [Farms] requested from the [SWPC] an exemption from inspection for . . . potatoes [shipped from the State of Washington to Multnomah County, Oregon]. The request was denied by the [SWPC] in February 1996.

Conclusion of Law

Respondents, William Strebin, Daniel Strebin, and Strebin Farms, violated the marketing order for the handling of Irish Potatoes Grown in Washington (7 C.F.R. [pt.] 946).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Burden of Proof

Both Complainant and Respondents have burdens of proof in these consolidated proceedings. The Administrative Procedure Act provides with respect to burden of proof that:

§ 556. Hearings; presiding employees; powers and duties; burden of

proof; evidence; record as basis of decision

. . . .

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

5 U.S.C. § 556(d).

The standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative enforcement proceedings conducted under section 8c(14)(B) of the AMAA (7 U.S.C. § 608c(14)(B)) is preponderance of the evidence, and Complainant, as the proponent of an order in the two 7 U.S.C. § 608c(14)(B) enforcement actions in this proceeding, has the burden of proof. However, this burden of proof would not have required Complainant to disprove each of Respondents' assertions or theories of the case, had Respondents appealed the enforcement actions. Nevertheless, I find that Complainant met its burden of proof in the two 7 U.S.C. § 608c(14)(B) actions, *sub judice*. Since Respondents have not appealed these violations found by the ALJ, the only issue on appeal pursuant to 7 U.S.C. § 608c(14)(B) is the size of the sanction.

It is well settled that the burden of proof in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with the petitioner.[7] The

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[7]*United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo., 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3d Cir. 1945); *In re Midway Farms, Inc.*, 56 Agric Dec. 102, 112-13 (1997); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 39 (1997); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th

petitioner (in this proceeding known as Respondents), therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case.[8] Respondents have failed to carry their burden in the proceeding instituted under 7 U.S.C. § 608c(15)(A), for the reasons set forth in this Decision and Order, *infra*, pp. 42-54.

Respondents' Appeal

Respondents aver that the essential facts of these proceedings are not in dispute and that the ALJ was not required to weigh credibility or to resolve other conflicting evidence. Rather, Respondents argue that the Initial Decision and Order focused on the amount of the civil penalty and whether denial of an exemption for Respondents' potatoes to be shipped uninspected out of the Order's production area is arbitrary and capricious, as follows:

> It must be remembered that the essential facts are not in dispute. The ALJ's Decision and Order was not required to weigh creditability [sic] nor determine the results of conflicting evidence.
>
> The focus of the ALJ's Decision and Order was to determine the amount of civil penalty appropriate in this case, and determine whether the Secretary's refusal to allow exemptions for anything other than Morrow and

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Cir. 1987); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Adam L. Liptak*, 24 Agric. Dec. 1176, 1181 (1965).

[8]*See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Inst. v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). *See also Attorney General's Manual on the Administrative Procedure Act* 75 (1947) (stating "[t]here is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); *3 Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (describing that the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

Umatilla Counties in Oregon for the inspection of Washington Potatoes is arbitrary and capricious.

Respondents'/Petitioners' Appeal to the Secretary [hereinafter Respondents' Appeal] at 13. Thus, Respondents are not appealing the ALJ's holding that Respondents violated section 946.336 of the Handling Regulation (7 C.F.R. § 946.336), as alleged in the two 7 U.S.C. § 608c(14)(B) enforcement actions which are the subject of this proceeding, by shipping uninspected potatoes out of the Order's production area. Rather, Respondents only seek a reduction in the ALJ's civil penalty in the two enforcement actions.

Otherwise, Respondents' stated grounds for appeal are that "[t]he ALJ Erred In Refusing To Require USDA To Engage In Informal Rulemaking To Provide The Exemption To The Strebins, Or To Modify The Marketing Order To Allow Washington Grown Potatoes To Be Inspected In Multnomah County, Oregon" (Respondents' Appeal at 13). Respondents allege that, even if the 1971-1972 rulemaking record justified the Secretary's then exemption of only Morrow and Umatilla Counties, Oregon, by 1993 to 1996 the Order with respect to that exemption would have been obsolete;[9] and therefore, the Order is arbitrary and capricious to the extent it exempts only Morrow and Umatilla Counties (Respondents' Appeal at 14).

A petitioner has the burden of proving that the rulemaking record does not provide the requisite level of support for the Secretary's findings and conclusions. *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 213 n.4 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972). In the absence of clear evidence to the contrary, administrative regulations are presumed to be based on facts justifying the Secretary's exercise of statutory authority. *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969).

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[9]I reject the argument that the Order (or, by implication the 1971-1972 rulemaking record) could be arbitrary and capricious on account of it being "obsolete." Respondents have not shown that the term "obsolete" can properly be applied to a marketing order. (It cannot.) But, even if evidence were adduced for this argument, which is not the case, it is refuted by the regulatory requirement in 7 C.F.R. § 946.50 that SWPC annually update its marketing policy and report annually to the Secretary. If by "obsolete" Respondents mean that conditions have changed such that the Order should be modernized, then the SWPC can appropriately seek modernization under the procedures in sections 946.50, 946.51, and 946.52 of the Order (7 C.F.R. §§ 946.50-.52). *See In re Sequoia Orange Co.*, 41 Agric. Dec. 1511, 1522 (1982), *order transferring case*, No. 82-2510 (D.D.C. June 14, 1983), *aff'd*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983), where the Judicial Officer concludes "if circumstances have changed so that the Order no longer produces equitable results, the remedy is through the amendatory or termination process—not through a § 8c(15)(A) proceeding."

This proceeding does not afford Strebin Farms a forum to debate questions of policy, desirability, or effectiveness of order provisions. *In re Sunny Hill Farms Dairy Co., supra*, 26 Agric. Dec. at 217. The responsibility for selecting the best means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative expertise. *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 53 (1985), *aff'd*, 857 F.2d 1065 (6th Cir. 1988).

The ALJ correctly points out that a petitioner in a proceeding instituted under 7 U.S.C. § 608c(15)(A) not only has to show the reasonableness of his or her proposal but has the formidable, if not insurmountable, task of clearly establishing that the record cannot sustain the conclusion reached by the Secretary, which in this case is that the exemption is limited to Morrow and Umatilla Counties (Initial Decision and Order at 13).

Relying upon the *Farm Fresh* decision, the ALJ is correct that for a petitioner to successfully challenge the decision of the Secretary, a petitioner cannot merely show that, on balance, petitioner's position is supported by evidence in the record or vaguely allege that the Secretary's decision is unsupported in the record. *See In re Farm Fresh, Inc., supra*, 49 Agric. Dec. at 86-87. A petitioner has a substantial burden to overcome the strong presumption of the existence of facts supporting the Secretary to whom the AMAA has given broad discretionary powers to effectuate the AMAA's purposes. Regulatory alternatives, even those that may be more persuasively reasonable than those of the Secretary, are not cognizable on review. A proceeding instituted under 7 U.S.C. § 608c(15)(A) does not allow a petitioner a forum to review questions of policy, desirability, or effectiveness of order provisions.

The ALJ methodically details both a rational basis in the rulemaking record upon which the Secretary relied in designating Morrow and Umatilla Counties as the only exempted Oregon counties, and an adherence to procedural and substantive due process as Respondents' requests for an exemption for Multnomah County were considered (Initial Decision and Order at 5-15). I find that the ALJ correctly found that the Secretary fulfilled the requirements of the AMAA and the Administrative Procedure Act.

The ALJ noted that the Morrow-Umatilla County exemption resulted from discussions at the January 1971 SWPC meeting (Initial Decision and Order at 5; CX 11 at 5). At the June 16, 1971, SWPC meeting, the SWPC discussed and adopted recommended changes and agreed to request that the Secretary hold a hearing at a suggested place and date (Initial Decision and Order at 5; CX 22C at 6-8). A notice containing all the necessary information for the hearing was

published in the Federal Register on September 24, 1971, at 36 Fed. Reg. 18,956 (CX 22E at 6; CX 22F at 2). The ALJ included witnesses' testimony from the October 28, 1971, hearing supporting the need for the changes recommended by the SWPC, which are based upon changing production areas and packing facilities in the States of Oregon and Washington (Initial Decision and Order at 5-6; CX 22E at 26-28).

The ALJ correctly included in the Initial Decision and Order a review of the Secretary's actions which resulted in the Morrow-Umatilla Counties exemption: the March 3, 1972, Notice of Recommended Decision and Opportunity to File Written Exceptions With Respect to Proposed Amendment of Marketing Agreement and Order (CX 22F); the June 1, 1972, Order Amending the Order (CX 22G); and the July 13, 1972, Limitation of Shipments Regulation (CX 22H). The ALJ is also correct that the Secretary's decision-making process and final decision, which originally exempted all of Oregon, but ultimately exempted "sites only in Morrow and Umatilla Counties, Oregon . . . was within his authority"; and the ALJ correctly noted that the statutory authority (7 U.S.C. § 608c(11)(B)) for the Secretary's ultimate decision limits the Secretary's order to the smallest practicable area of regional production or regional marketing or both (Initial Decision and Order at 14). The ALJ properly analyzed the record and correctly concluded that the record supports the Secretary's determination that the chosen exemption was the smallest practicable regional area; that a comparison between Multnomah County and the exempted Morrow-Umatilla Counties reveals that the exempted counties are part of the Columbia Basin production area; that the exempted counties are in close proximity to Washington potato growers, which was the reason for their exemption; that more distant sites like Multnomah County, more than 100 miles away, would be less practicable because SWPC monitoring would be more difficult and more expensive; and that SWPC members' concern was legitimate that an exemption for Multnomah County would mean that a handler could claim the same exemption for any other county in Oregon (Initial Decision and Order at 14).

For all of the foregoing reasons, I find that the ALJ did not err by concluding that the decision of the Secretary and the SWPC to limit the inspection exemption to Morrow and Umatilla Counties is supported by the record, and therefore in accordance with law.

In order to successfully challenge an order in a proceeding pursuant to 7 U.S.C. § 608c(15)(A), a petitioner must show that the rulemaking record cannot support the decision of the Secretary. The ALJ correctly found that the rulemaking record supports the Secretary's decision to exempt only Morrow and Umatilla Counties. Since this underlying rulemaking is in accordance with law, Respondents' only

remaining alternatives are to convince the Secretary to act on their request for relief; or, to show that the rejection of Respondents' several requests for relief before the SWPC was unlawful. Faced with this legal reality, Respondents argue that "the Strebins are entitled to a ruling from this Court ordering the Secretary to engage in rulemaking, or ordering the Secretary to provide a modification to allow Washington produced potatoes to be inspected in Multnomah County, or ordering an exemption from the Washington inspection requirements . . . ." (Respondents' Appeal 16.)

I have closely examined Respondents' Appeal for support for these arguments, but find none.

Respondents argue that the ALJ erred by not finding that the Secretary's inaction, in not modifying the Order to allow Respondents the same inspection exemption for Multnomah County as that provided in the Order for Morrow and Umatilla Counties, was arbitrary and capricious; and, that the ALJ erred by not ordering the Secretary to engage in rulemaking to grant Respondents the exemption they seek, even if the SWPC did not recommend it. I infer that Respondents' arguments are based upon unfairness or unequal treatment, but the record shows that Respondents were treated fairly. I find that the ALJ's decision is correct that Strebin Farms was not denied due process or equal protection in Respondents' several failed attempts to convince the SWPC to recommend to the Secretary that Multnomah County be included in the existing exemption, as follows:

> As for Strebin's argument that he was denied due process and equal protection, the record shows that the [SWPC] carefully considered Strebin's request. There is no showing that the members of the special subcommittee who were allegedly Strebin's competitors engaged in any collusion to deny him fair consideration of his request. As for Strebin's equal protection, the record contains objective reasons for the Committee's determination not to extend the Morrow-Umatilla exemption to Multnomah. The Committee's determination is also consistent with its action in 1987 not to extend the exemption to Washington County, Oregon. (CX 24.) With respect to "hardship" exemptions, the one given to Echo Valley Farms was in accordance with the specific provision in the Order allowing an exemption when, as in Echo Valley's case, a handler which sells its potatoes in-state, the operation is distant from the inspection service. There is no showing that Strebin's Washington operation was such a distance from the inspection service as to constitute a similar hardship. Strebin was therefore not denied due process or the equal protection of the laws. His petition for

modification of the Order will be denied.

Initial Decision and Order at 15.

Respondents do not press their equal protection or due process arguments on appeal, and, in any event, I conclude that the ALJ was not in error in finding no merit in Respondents' equal protection and due process arguments. Moreover, the Supreme Court of the United States makes clear that arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in what the Court describes as "collective action," as follows:

> Congress enacted the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.*, in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. § 602(1). Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws. § 608b. Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets. In order "to avoid unreasonable fluctuations in supplies and prices," §§ [sic] 602(4), these orders may include mechanisms that provide a uniform price to all producers in a particular market, that limit the quality and the quantity of the commodity that may be marketed, §§ 608c(6)(A), (7), that determine the grade and size of the commodity, § 608c(6)(A), and that make an orderly disposition of any surplus that might depress market prices, *ibid.* Pursuant to the policy of collective, rather than competitive marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements. §§ 608c(6)(D), (H), (I). The expenses of administering such orders, including specific projects undertaken to serve the economic interests of the cooperating producers, are "paid from funds collected pursuant to the marketing order." §§ 608c(6)(I), 610(b)(2)(ii).
>
> Marketing orders must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity. § 608c(9)(B). The AMAA restricts the marketing orders "to the smallest regional production areas . . . practicable."

§ 608c(11)(b). The orders are implemented by committees composed of producers and handlers of the regulated commodity, appointed by the Secretary, who recommend rules to the Secretary governing marketing matters such as fruit size and maturity levels. 7 CFR §§ 916.23, 916.62, 917.25, 917.30 (1997). The committee also determines the annual rate of assessments to cover the expenses of administration, inspection services, research, and advertising and promotion. §§ 916.31(c), 917.35(f).

Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2134 (1997) (footnote omitted).

Respondents allege that USDA abused its discretion by not engaging in "required rulemaking," which abuse of discretion was based solely upon lack of a recommendation for changes from the SWPC (Respondents' Appeal at 15). In general support of this point, Respondents argue that the epitome of arbitrariness is USDA's refusal to engage in rulemaking to allow Multnomah County the same exemption as Morrow and Umatilla Counties; that even the SWPC exempted from inspections altogether one grower/producer (Echo Valley Farms) to ship self-inspected, minimum-graded product without an inspection service on site; that USDA's arbitrariness is "further epitomized" because the purposes of the AMAA would otherwise be advanced by allowing Respondents to use the very expensive hollow heart defect detection equipment in their Troutdale, Oregon, facility to prevent shipment of potatoes with latent defects not detectable by the required field inspection in Washington; that the Judicial Officer has the authority to order USDA to engage in rulemaking based upon the three cases cited; that the Secretary can, by informal rulemaking, place Multnomah County in the same exempt category as Umatilla and Morrow Counties; and the Secretary's refusal to engage in such rulemaking because the SWPC had not recommended it would be an "abrogation" of the Secretary's oversight rulemaking function to a "committee of competitors" (Respondents' Appeal at 15-16).

There is no merit to these arguments, and they are rejected. It is not an abuse of discretion for USDA not to engage in what Respondents call "required rulemaking," whether there is a recommendation from SWPC for changes in the Order, or no recommendation for changes from SWPC. The Secretary and the SWPC have scrupulously followed the AMAA, the Administrative Procedure Act, and the Order in determining the exempt counties. Respondents have provided no material evidence, support, or authority for this argument. It is not material evidence to argue that Multnomah County must be exempt merely because two other Oregon counties are exempt.

Respondents' argument based on Echo Valley Farms' exemption was correctly analyzed, distinguished from Respondents' situation, and rejected by the ALJ. Further, the ALJ explained that in 1987 an exemption similar to the exemption sought by Respondents was sought for Washington County, Oregon, and the request for a Washington County exemption was rejected by the SWPC for the same reasons as the reasons for rejecting Respondents' requested exemption. Moreover, the ALJ included the minutes of the February 23, 1994, SWPC meeting at which handlers Tomy Amsted and Kris Mehlenbacher are both referenced as having previously requested the same exemption as that sought by Respondents and as having been rejected by the SWPC (Initial Decision and Order at 8; CX 11 at 3-5).

There is no merit to Respondents' argument that USDA is arbitrary for not advancing the purposes of the AMAA by recognizing the superior latent defect detection (hollow heart) equipment available at Respondents' Troutdale, Multnomah County, Oregon, facility, which equipment is not available in the field in Washington. Respondents provide no nexus between this equipment and USDA's statutory responsibilities, and there is none. In fact, Respondents are mistaken that they are somehow prevented by USDA from using their equipment; Respondents are free to use latent defect equipment however they wish. But, Respondents are not free to ship potatoes out of Washington sans inspection to reach the equipment in non-exempt Multnomah County, Oregon, in violation of the Order.

Respondents cite three cases allegedly supporting Respondents' argument that the Judicial Officer has the authority to order USDA to engage in rulemaking. This argument is without merit for a number of reasons. As explained by the ALJ in the Initial Decision and Order, and affirmed in this Decision and Order, to be successful in a proceeding pursuant to 7 U.S.C. § 608c(15)(A), Respondents must show that the rulemaking record does not support the Secretary's decision; and that, therefore, the Secretary's decision is not in accordance with law. Respondents did not meet their burden of proof in this regard; thus, Respondents are not entitled to a remedy. Consequently, the ALJ was correct to dismiss the Petition. But, even if Respondents had met this burden, which they did not do, rulemaking is not a remedy available in a proceeding pursuant to 7 U.S.C. § 608c(15)(A). Moreover, contrary to Respondents' argument, the cases cited do not support Respondents' argument that the Judicial Officer can order the Secretary to engage in rulemaking.

In *Central Citrus*, the Judicial Officer found that the early maturity allotments for navel oranges were unfairly apportioned by the Naval Orange Administrative Committee between District 1 and District 3, that the apportionment was not in

accordance with law; and that, therefore, Petitioner is exempt from any obligation in the pertinent period. *In re Central Citrus Co.*, 34 Agric. Dec. 1428, 1504 (1975). Although Petitioner sought, *inter alia*, amendment of the naval orange order, the Judicial Officer clearly did not order rulemaking, but, rather, states as follows:

> The function of the Judicial Officer in a review proceeding instituted under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 is limited to ascertaining whether a marketing order or any provision thereof or any obligation imposed in connection therewith "is not in accordance with law" (7 U.S.C. 608c(15)(A)).

In re Central Citrus Co., 34 Agric. Dec. 1428, 1467 (1975).

Babcock Dairy is another case where the Judicial Officer found certain parts of an order not in accordance with law, but fashioned a decision which did not include ordering the Secretary to engage in rulemaking. *In re The Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252 (D.C. Cir. 1980). In fact, the Judicial Officer retained jurisdiction in the proceeding to await "whatever corrective action is taken by the Secretary" (*Id.* at 446).

Finally, Respondents assert that the court in *American Dairy of Evansville, Inc.*, directed the Secretary to engage in specific rulemaking relief pending more comprehensive rulemaking by the Secretary. However, the most that can be said here is that the court strongly recommended that the Secretary consider a type of action. But, the court merely held an existing provision invalid until a new provision could be adopted.

I conclude that none of the cases cited by Respondents stand for the proposition that the Judicial Officer may order the Secretary of Agriculture to engage in rulemaking. Moreover, I find that even if the Judicial Officer had such power, which is not the case, the facts of this proceeding would not support requiring a rulemaking proceeding.

Respondents argue that the Secretary's refusal to engage in rulemaking, because SWPC did not recommend it, is an "abrogation" of the Secretary's rulemaking function to a "committee of competitors." This argument is without merit. As explained by the Supreme Court of the United States in *Wileman Bros.*, "[c]ollective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets" (*Wileman Bros.*, *supra*, 117 S. Ct. at 2134). I find that Respondents' arguments describing SWPC members as "competitors" are inapposite, because SWPC members and Respondents are

engaged in what the Supreme Court of the United States characterizes as "collective action." Thus, Respondents' arguments based upon "competition" are rejected.

Respondents allege that the AMAA not only authorizes the Secretary under 7 U.S.C. § 608c(1) to amend marketing orders, but that the AMAA mandates under 7 U.S.C. § 608c(11)(C) that the Secretary "shall, so far as practicable," amend marketing orders to allow for differences in production and marketing of the same commodity produced and marketed in different production and marketing areas (Respondents' Appeal at 14-15). Respondents correctly describe these sections of the AMAA, but these sections of the AMAA do not help Respondents' cause in this proceeding, because these sections' requirements were properly fulfilled by the actions of the Secretary and the SWPC in this case. Also, Respondents state that 7 U.S.C. § 608c(17) of the AMAA "allows an amendment to a Marketing Order when it would effectuate the declared policies of the Act" (Respondents' Appeal at 15). Once again, Respondents' statements are accurate, but this section's requirements were properly fulfilled in this proceeding.

Finally, I reject Respondents' argument that the ALJ erred by concluding that the Secretary was justified in qualifying his original amendment, which allowed all Oregon sites to be considered for exemption, to later limiting the exemption to only those sites in Morrow and Umatilla Counties (Respondents' Appeal at 14). I infer that Respondents' point is that the Secretary's action in changing his mind is not in accordance with law. But, Respondents neither actually make this point nor does Respondents' stated allegation actually contain any supporting evidence. On the other hand, the ALJ discussed how the Secretary's qualification of his original amendment exempting all of Oregon was within the Secretary's authority, and the ALJ properly cited 7 U.S.C. § 608c(11)(B) as the authority for the Secretary's mandate that the Order's application "shall be limited" to the smallest practicable production and marketing areas (Initial Decision and Order at 14).

Respondents appeal, as excessive, the $12,425 in estimated inspection fee costs imposed by the ALJ, and argue that the ALJ imposed this amount for Respondents not having the potatoes inspected in Washington, or in Umatilla or Morrow Counties, Oregon, before the potatoes went to Multnomah County, Oregon; that Respondents did in fact have the potatoes inspected; that Respondents paid for inspections; that the ALJ found that "there was no damage to the Order" and Respondents gained no unfair profit by their actions; that the ALJ did not add additional penalties after finding that Respondents had in good faith sought the inspection exemption in the pertinent time period; that the minimum penalty allowed in this proceeding is $1 per truckload, or $355; and that the facts of this

case, the Respondents' good faith, and the lack of damage to the Order, mean that the minimum penalty should be imposed (Respondents' Appeal at 16).

I disagree with Respondents, for the reasons set forth in this Decision and Order, *infra*, pp. 69-76.

Complainant's Reply and Cross-Appeal

Complainant opposes the Respondents' Appeal, which seeks to reverse the ALJ's decision, and Complainant cross-appeals the amount of the civil penalty imposed by the ALJ (Complainant's Appeal).

Complainant makes two arguments. First, Complainant argues that "[t]he ALJ's dismissal of the Section 15(A) petition must be affirmed since the Petitioner failed to meet his burden of proof." (Complainant's Appeal at 3.) I have carefully examined this part of Complainant's Appeal, and I agree with Complainant. In fact, an examination of my response to Respondents' Appeal reveals that all of Complainant's arguments have been addressed. Therefore, no purpose would be served by restating Complainant's arguments for affirming the ALJ's dismissal of the section 8c(15)(A) Petition.

Second, Complainant argues that "[t]he ALJ erred not to assess the civil penalty requested by the Complainant." (Complainant's Appeal at 8.) Complainant bases this argument on two major points: 1) that the ALJ erroneously agreed to Respondents' "good faith" argument, and 2) that the ALJ misinterpreted the relevant case law in ordering a reduced civil penalty (Complainant's Appeal at 11).

Complainant's first major point opposes Respondents' position that there be no sanction at all, or only a token sanction, because Complainant argues that Respondents did not in "good faith" try to change 7 C.F.R. § 946.336, even though the ALJ found good faith (Complainant's Appeal at 9).

Complainant argues that one of the purposes of a civil penalty is to deter further violations, but neither the reduced penalty Respondents seek, nor the penalty imposed by the ALJ, would have a meaningful deterrent effect on Respondents, who, for example, spent thousands of dollars improving the Multnomah facility (Complainant's Appeal at 9). Complainant argues that Respondents will continue to violate the Order if the $355 civil penalty Respondents seek is imposed because it will be profitable to do so. Complainant argues that agency representative Gary Olson's testimony recommending a $35,500 civil penalty explained that this amount was based, *inter alia*, upon Respondents' repeated violations, number of violations, prior warnings, and the impact that Respondents' open violations of the Order were having on enforcing the terms of the Order throughout the production

area (Complainant's Appeal at 9-10).

Complainant argues that the ALJ overlooked important facts in finding that Respondents acted in "good faith" when Respondents were asking the SWPC to change the Order to accommodate Respondents' violations during the time in which Respondents were violating the Order (Complainant's Appeal at 12). Complainant argues that SWPC Manager Henry Michael (Tr. 133) wrote an October 15, 1992, letter (CX 8) in which the SWPC informed Respondents of the Order's requirements; that AMS also wrote Respondents an April 30, 1993, letter (CX 10) informing Respondents of the Order's requirements; that Respondents, nevertheless, shipped potatoes in violation of the Order in the 1992-93 crop year (Tr. 136); that both the letters and Respondents' refusal to heed the letters' admonishments to adhere to the Order's requirements all occurred *before* Respondents sought to change the Order at the SWPC meeting on February 23, 1994 (CX 11); that in the 1993-94 crop year, Respondents had potatoes inspected according to the Order, but when those potatoes failed inspection they were shipped anyway (CX 7; Tr. 85, 195-97); and that in the 1994-95 crop year, Respondents resumed shipping potatoes without inspection to western Oregon (Complainant's Appeal at 12).

Complainant cites *Calabrese* for the proposition that the Judicial Officer considers a respondent's failure to comply with the requirements of a marketing order to be a "weighty factor" in determining appropriate civil penalties. *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 156 (1992), *appeal docketed sub nom. Balice v. USDA*, No. CV-F-92-5483-GEB (E.D. Cal. July 21, 1992). Complainant argues that the ALJ is in error to reduce the civil penalty recommended by Complainant on account of Respondents' "good faith" attempts to get an inspection exemption, when *Calabrese* makes it clear that flagrant violations of marketing orders should be weighted toward increasing, not decreasing, civil penalties (Complainant's Appeal at 13).

Complainant argues that the ALJ is factually wrong that Respondents sought an "inspection exemption" during the time of the violating shipments; that the Order, in any event, does not provide for "inspection exemptions" of any kind; that the Order does provide for modification of inspections for those handlers whose facilities are so far from inspection sites that the cost of inspection is prohibitively expensive (7 C.F.R. § 946.130); that handlers pay AMS inspectors for inspections based upon the distance the inspector must travel from inspection facilities, which for Echo Valley Farms at 90 miles is very expensive, but Respondents' Washington farm is only 20 miles from the nearest inspection site (CX 23A; Tr. 128, 154-56); that Respondents may have stated at the hearing that they wanted a modification

of inspection, but testified that they never applied for one (Tr. 478); that a "good faith" effort to obtain an exemption under the Order would require an application for modification of inspection; and that, therefore, the ALJ's reduction in the civil penalty on the basis of a "good faith" effort is in error (Complainant's Appeal at 13-14).

Complainant's second major point, in support of its argument that the ALJ was in error for not adopting Complainant's recommended civil penalty, is that the ALJ misinterpreted relevant case law. Complainant argues that, although the AMAA does not provide criteria for assessing a civil penalty, the Judicial Officer has discussed appropriate criteria for determining sanction amounts in several decisions, *e.g.*, *In re Saulsbury Enterprises*, 55 Agric. Dec. 6, 46-50 (1996), *appeal docketed*, No. CV-F-97-5136-REC-SMS (E.D. Cal. Feb. 19, 1997); *In re Onofrio Calabrese*, *supra*, 51 Agric. Dec. at 152-55. Complainant argues that, although the ALJ correctly cites these criteria as set forth in *Calabrese* (Initial Decision and Order at 16), the ALJ mistakenly regards the criteria as mandatory rather than permissive. By requiring Complainant to fulfill all the criteria, rather than just using the criteria as a guide, the ALJ erroneously reduced the requested civil penalty, which should be increased to $35,500 (Complainant's Appeal at 10-11).

Moreover, in addition to Complainant's two major points--that the ALJ erroneously determined Respondents' "good faith," and that the ALJ misinterpreted the case law--Complainant argues that the record reveals that the *Calabrese* criteria actually were properly considered by Complainant in fashioning the civil penalty (Complainant's Appeal at 15). Thus, even assuming that the five *Calabrese* criteria are mandatory (they are actually permissive), the ALJ should not have reduced the civil penalty, Complainant argues, because all five criteria were nonetheless met, as follows.

The first criterion is nature and number of violations. The agency representative, Gary Olson, testified to the number of pounds and the number of truckloads of potatoes Respondents shipped in the 1992-93 and 1994-95 crop years, and AMS based the civil penalty on the number of truckloads of potatoes shipped without inspection (Tr. 320).

The second criterion is damage to the Order caused by Respondents' violations. Mr. Olson testified (Tr. 326) that there were increasing incidents of non-compliance with the Order by people who were aware that Respondents were violating the Order without adverse consequences (Complainant's Appeal at 16).

The third criterion is profit from the violation. Mr. Olson testified that the recommended civil penalty was based on the approximate savings from not having the potatoes inspected as required by the Order (Tr. 320). Moreover, contrary to

the ALJ's conclusion that Respondents did not profit because Respondents paid for two inspections, the record shows (CX 13; Tr. 271, 355) that Strebin Farms shipped potatoes out of the production area with no minimum grade No. 2 inspection, benefitting both from not complying with the Order by not paying for the inspection, and from gaining an economic advantage over other handlers who do comply by paying to have their potatoes inspected prior to shipment.

The fourth criterion is prior warnings. Complainant argues that Mr. Olson testified (Tr. 322) that Respondents continued to violate the Order after "repeated requests" to stop the violations (Complainant's Appeal at 17).

The fifth criterion is consideration of any other factors shedding light on the degree of culpability. Complainant argues that Mr. Olson testified (Tr. 322) that Complainant considered, in setting the civil penalty, that no product was shipped out of grade to consumers (Complainant's Appeal at 17).

Therefore, Complainant argues the record shows that Complainant did consider all the *Calabrese* criteria, that the ALJ was in error to reduce the civil penalty on the basis that these criteria were not considered, and that the civil penalty should be increased to the $35,500 requested by Complainant (Complainant's Appeal at 18).

Respondents' Reply

Respondents object to the filing of Complainant's Cross-Appeal, oppose the merits of the Cross-Appeal, and oppose Complainant's arguments against Strebins' appeal (Respondents' Reply).

Respondents argue that "Complainant's appeal should be dismissed because it was filed out of time" (Respondents' Reply at 1). Essentially, Respondents' argument is that Complainant did not appeal until after the 30 days allowed for appeals under the Rules of Practice, 7 C.F.R. § 900.65(a). Respondents are chronologically correct that Complainant did not actually file an appeal within the referenced 30-day period. However, I granted Complainant's two timely requests for extensions of time to file Complainant's response to Respondents' appeal, which means that Complainant's eventual filing was timely (Informal Order of April 10, 1997; Informal Order of May 2, 1997).

Nevertheless, Respondents argue that since Complainant neither actually filed an appeal within the 30-day period, nor filed a separate request approved by the Judicial Officer for an extension of time for filing an appeal, Complainant's appeal is filed out of time. I reject this argument, for the following reasons.

It is well settled that the Department's Rules of Practice permit a party to wait

to see if the other party appeals before filing a timely response in the nature of a cross-appeal, without first filing a protective notice of appeal. Although the case excerpted below emanates from a different statute under the Secretary's jurisdiction, the procedure generally allowing cross-appeals before the Judicial Officer is equally applicable in cases under the AMAA.[10]

There are a number of good reasons why the Department's Rules of Practice allow cross-appeals, some of which are explained in *Unique Nursery*, as follows:

> The second aspect of the civil penalty warranting discussion is that the ALJ imposed a $5,000 civil penalty, and Complainant did not file a direct appeal. However, after Respondent appealed, Complainant filed an Answer in the nature of a cross-appeal, recommending that a $19,000 civil penalty be imposed. This is permitted by the Department's Rules of Practice, which provide for the filing of "a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised" (7 C.F.R. § 1.145(b)). The Department's Rules of Practice are, in this respect, similar to the Federal Rules of Appellate Procedure, which permit a party to wait until after the other party appeals, before deciding whether to cross-appeal. Specifically, the applicable Federal Rule provides (Rule 4(a)(3), Federal Rules of Appellate Procedure, *reprinted in* 28 U.S.C. app. at 515 (1988)):
>
>> (3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.
>
> However, the Department's Rules of Practice are different from the Federal Rule, just quoted, in that the Department does not require a "notice of appeal" following one appeal, but permits the raising of new issues in the "response" to the appeal (7 C.F.R. § 1.145(b)). As stated in *In re Interstate Meat Packing Co.*, 43 Agric. Dec. 1189, 1191 (1984), *quoting from* 1 Davidson, Agricultural Law (1981), § 3.24, at 212–13:
>
>> A party contemplating an appeal to the judicial officer

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[10]*See In re Onofrio Calabrese, supra*, 51 Agric. Dec. at 145; 7 C.F.R. § 900.65.

> should recognize that the filing of an appeal is not without some risk. At times the complainant is not satisfied with an initial decision but may not regard the matter as sufficiently important to warrant an appeal unless the respondent appeals. If one party appeals, the other party may raise additional issues in its response to the appeal, which, in effect, amounts to a cross-appeal. [Footnote omitted.]

> In addition to determining whether a matter is of sufficient importance to warrant an appeal, Complainant must also consider its backlog of pending cases and its limited personnel. Moreover, an Initial Decision not appealed to the Judicial Officer is not a controlling precedent in any future case. [Footnote omitted.] But if Respondent files an appeal, and Complainant does not file a cross-appeal as to the sanction, the decision by the Judicial Officer in that case will be of controlling precedent in all subsequent cases. Accordingly, if a case reaches the Judicial Officer in any manner, both Complainant and the Judicial Officer must be aware of the precedential nature of the decision, including the sanction.

In re Unique Nursery & Garden Center (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 424-25 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995). *See also In re Floyd Stanley White*, 47 Agric. Dec. 229, 262-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Reeves Produce, Inc.*, 44 Agric. Dec. 1607, 1619 (1985), *aff'd per curiam*, 790 F.2d 163 (D.C. Cir. 1986) (unpublished); *In re Jackie McConnell*, 44 Agric. Dec. 712, 731-32 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1408 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Richard L. Thornton*, 41 Agric. Dec. 870, 900-05 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992).

This issue of the timeliness of filings and cross-appeals is a frequent occurrence in proceedings before the Judicial Officer, and a typical case is one like *Otto Berosini*, where a party would have been out of time for an appeal, but for replying to a filing by the other litigant, as follows:

> Since Respondent's original appeal was filed more than 35 days after service, it would have been dismissed on jurisdictional grounds (7 C.F.R. § 1.142(b)(4); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529,

529-30 (1994)). However, since Complainant obtained an extension of time and filed a timely appeal, Respondent's reply properly incorporated by reference his original appeal, and, therefore, it constituted a timely cross-appeal (7 C.F.R. § 1.145(b); *In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 378 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995)).

In re Otto Berosini, 54 Agric. Dec. 886, 888 n.** (1995). As regards cross-appeals in the case, *sub judice*, 7 C.F.R. § 900.65(c) operates the same as 7 C.F.R. § 1.145(b), in that the responding party may raise any relevant issue on cross-appeal. (*See also* 7 C.F.R. § 900.65(b)(2), which allows the Secretary to determine any additional issues to be argued, irrespective of the status of the pleadings filed by the parties.)

I also reject Respondents' argument that 7 C.F.R. § 900.69(c) operates in conjunction with 7 C.F.R. § 900.65(d) to prevent an extension of time to Complainant after the record has been transmitted to the Secretary (Respondents' Reply at 2). The plain words of that rule state that the Secretary can grant an extension "at any other time if . . . there is good reason for the extension." (7 C.F.R. § 900.69(c).)

Respondents oppose Complainant's Appeal to increase the civil penalty to the amount recommended by Complainant. A close examination of Respondents' Reply, at 3-6, reveals that Respondents reiterate the arguments already examined in this Decision and Order. Respondents assert that the Judicial Officer "invariably" adopts the civil penalty requested by Complainant, and ". . . that to merely adopt the penalty requested by the government would violate the principles of Due Process." (Respondents' Reply at 3.) On the contrary, this consolidated proceeding demonstrates detailed, rational, and reasonable fact-finding and decision making. Respondents have had numerous opportunities to be heard before the SWPC; Respondents have had a full, on-the-record administrative hearing before an administrative law judge; and Respondents are receiving a complete appellate review before the Judicial Officer. In these circumstances, Respondents' complaint of lack of due process is not meritorious. In any event, the Judicial Officer did not "merely adopt" Complainant's recommended civil penalty amount, but rather has very carefully analyzed this entire consolidated proceeding for the proper civil penalty. Respondents' due process argument is groundless, and is rejected.

Further, Respondents reiterate the arguments attacking the Order as obsolete[11] and assert that Respondents are entitled to the relief Respondents seek (Respondents' Reply at 6-9). Respondents' arguments in Respondents' Reply differ in no meaningful way from Respondents' arguments already addressed in this Decision and Order, and are rejected.

Finally, Respondents argue that the ALJ's imposition of a cease and desist order in a proceeding pursuant to 7 U.S.C. § 608c(14)(B) is contrary to law; rather, Respondents argue that a cease and desist order must be obtained by USDA suing in United States District Court pursuant to 7 U.S.C. § 608a(6) (Respondents' Reply at 9). Respondents argued this exact point in Strebin Farms Post Hearing Reply Brief at 15. However, the ALJ did not decide this point in favor of Respondents, and Respondents make no mention of this point in Respondents' Appeal. Moreover, Complainant does not address this issue in Complainant's Appeal.

Therefore, the first time this trial-level issue is raised before the Judicial Officer is in Respondents' Reply. However, a respondent may not resurrect a non-appealed, trial-stage issue before the Judicial Officer by way of a reply to a complainant's response to that respondent's appeal. I find this tactic tantamount to raising a new issue for the first time on appeal. It is well settled that new issues cannot be raised for the first time on appeal to the Judicial Officer.[12] I find that this

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[11]*See* note 9.

[12]*In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Petition for Reconsideration), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642,

argument comes too late, and therefore, it is rejected.

However, even if Respondents' argument was timely, it would still fail. Respondents allege that Complainant seeks a cease and desist order pursuant to 7 U.S.C. § 608c(14)(B), which Respondents argue is contrary to law, because Complainant must instead proceed in United States District Court under 7 U.S.C. § 608a(6) to get a cease and desist order. However, neither does Complainant seek in the Complaints filed in this consolidated proceeding a cease and desist order pursuant to 7 U.S.C. § 608c(14)(B), nor does Complainant make any mention in the record of seeking a cease and desist order pursuant to 7 U.S.C. § 608c(14)(B). On the other hand, both Complaints charge that Respondents violated the AMAA, the Order, the Rules and Regulations, and the Handling Regulation. The Order specifically requires compliance as follows:

> **§ 946.71 Compliance.**
>
> Except as provided in this subpart, no handler shall ship potatoes, the shipment of which has been prohibited by the Secretary in accordance with provisions of this subpart, and no handler shall ship potatoes except in conformity to the provisions of this subpart.

7 C.F.R. § 946.71.

Respondents cite subsection (6) of 7 U.S.C. § 608a as controlling, but this section specifically provides for cumulative remedies, as follows:

> **(8) Cumulative remedies**
>
> The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or hereafter existing at law or in equity.

7 U.S.C. § 608a(8). Consequently, I find that there is no question under the Order but that the Secretary has explicit authority to order compliance with the Order. Complainant did not seek a cease and desist order under 7 U.S.C. § 608c(14)(B), but did request before the ALJ that Respondents be ordered to comply with the Order (Complainant's Findings of Fact Conclusions of Law and Brief in Support Thereof at 27; Complainant's Reply to Strebin Farms Post Hearing Opening Brief

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aff'd, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

at 4 n.1, 8). I find that the ALJ's order to comply was based upon proper authority given the Secretary under 7 C.F.R. § 946.71, which allows the Secretary to order compliance with the terms of the Order. Any confusion between a compliance order under the Order and a "cease and desist order" is correctable by proper wording of the compliance order.

Sanction

Turning to the sanction, the Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey & Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> The administrative recommendation as to the appropriate sanction is entitled to great weight, in view of the experience gained by the administrative officials during their day-to-day supervision of the regulated industry.
>
> . . . .
>
> . . . [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The AMAA is remedial legislation, which should be liberally construed, and the contemporaneous administrative construction of the AMAA is entitled to great weight, as pointed out in *Calabrese*:

> [T]he AMAA is remedial legislation which should be liberally construed to achieve the Act's purpose.[4] . . . [T]he contemporaneous administrative construction of the AMAA is entitled to great weight. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Youakim v. Miller*, 425 U.S. 231, 235 (1976); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 660 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549 (1940). As stated in *Udall v. Tallman* (380 U.S.

1, 16 (1964)):

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[4]*Shapiro v. United States*, 335 U.S. 1, 31 (1948); *Sunshine Anthracite Coal Co. v. Adkins*[,] 310 U.S. 381, 392 (1940); *McDonald v. Thompson*, 305 U.S. 263, 266 (1938); *Piedmont & N. Ry. v. ICC*, 286 U.S. 299, 311-12 (1932); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1336 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966).

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153. See also, *e.g.*, *Gray v. Powell*, 314 U.S. 402; *Universal Battery Co. v. United States*, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408.

In re Onofrio Calabrese, supra, 51 Agric. Dec. at 147-48.

As explained in this Decision and Order, *supra*, p. 59, the *Calabrese* criteria for determining civil penalties in AMAA cases are permissive, not mandatory, as the ALJ had erroneously concluded. Nevertheless, Complainant carefully examined the record and correctly analyzed the evidence in light of the five *Calabrese* criteria: nature and number of violations, damage to the Order caused by the violations, profit from the violations, prior warnings, and consideration of any other factors shedding light on the degree of culpability. I find it very clear that Complainant has fully supported Complainant's suggested civil penalty. Moreover, the Congressional purpose in AMAA cases is important to set forth,

because the AMAA has no explicit standards for setting civil penalties, as was explained in *Calabrese*, as follows:

IV. Factors to Be Considered in Determining the Civil Penalty to Be Assessed for Each Violation.

The AMAA, unlike some other statutes, (e.g., the Packers and Stockyards Act, 7 U.S.C. §§ 193(b), 213(b)), provides no explicit standards to be followed in determining the amount of the civil penalty to be assessed for each violation, except the statutory maximum of $1,000 for each day a violation continues. The legislative history of the Act explains the purpose of the civil penalty provisions, as follows (H. REP. NO. 391(I), 100th Cong., 1st. Sess. 29-30, *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-29-30):

Marketing order penalties

Under current law, any handler who violates a marketing order regulation is subject to a criminal fine of not less than $50 or more than $5,000 for each violation and each day during which the violation occurs. Such violations are referred by the Department of Agriculture to the U.S. Attorneys Office of the Department of Justice for prosecution. Only the U.S. Attorneys Office may enforce this section and take action against violators of marketing orders.

This criminal prosecution procedure, however, is both time-consuming and cumbersome. In addition, the U.S. Attorneys offices handle an enormous number and variety of cases on behalf of all Federal Government agencies. Because the Offices cannot effectively handle the volume of cases that they now receive, many regulatory violations are often not pursued.

In many cases, the U.S. Attorneys Offices have not taken any action against reported marketing order violations. In 1986, for example, out of 52 investigations of alleged violations of fruit, vegetable, and specialty crop marketing orders, only 11 were resolved by the U.S. Attorneys Offices.

> To maintain the integrity of the marketing order program, it is necessary that civil penalties (imposed through administrative procedures) be used as an enforcement tool to respond to regulatory violations in addition to the criminal enforcement procedures currently provided. Furthermore, administrative civil penalties will ensure that regulatory violations of marketing orders will be dealt with in a timely, efficient, and effective manner.
>
> Thus, section 1051 contains a provision that gives the Department of Agriculture the authority to initiate an administrative action to assess a civil penalty of not more than $1000 for each violation against any handler who violates a marketing order. Each day during which a violation continues would be considered a separate violation.
>
> The Secretary would be required to give notice and an opportunity for an agency hearing before assessing a civil penalty. A penalty order would be reviewable in the U.S. district court in any district in which the handler subject to the order is an inhabitant, or has his principal place of business. The bill does not eliminate the authority to seek a criminal fine for a marketing order violation, where appropriate. It simply will authorize the Secretary of Agriculture to seek an administrative civil penalty when circumstances indicate that it would be an effective regulatory enforcement tool.

The importance of compliance by all handlers with Marketing Order programs was explained by the Supreme Court in *Ruzicka, supra,* as follows (329 U.S. at 293):

> The success of the operation of such Congressionally authorized milk control must depend on the efficiency of its administration. Promptness of compliance by those subject to the scheme is the presupposition of Order No. 41. Thus, definite monthly deadlines are fixed by the Order for every step in the program. In large measure, the success of this scheme revolves around a "producers" fund which is solvent and to which all contribute in

> accordance with a formula equitably determined and of uniform applicability. Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements.
>
> Although the Supreme Court was speaking with respect to a Milk Marketing Order, the same reasoning is applicable to the present Marketing Order. Accordingly, civil penalties must be assessed at a level to deter Respondents and others from similar violations in the future.

In re Onofrio Calabrese, supra, 51 Agric. Dec. at 152-54.

This language from *Calabrese* describing the Congressional intent regarding the imposition of civil penalties for violations of marketing orders is particularly appropriate in the instant case in which Respondents decided for economic reasons to violate the Order. The facts supporting this conclusion are set forth in great detail, both in the ALJ's Initial Decision and Order, which I have for the most part adopted as my own, and in my Additional Conclusions of the Judicial Officer.

Respondents are a large, well-established, farm production and marketing enterprise based in Oregon. In 1992, Respondents decided that farmland in Oregon had become too expensive to rent, and bought a nearby 1200-acre farm in Washington. In the 1992-93 crop year, Respondents grew Washington potatoes and shipped them uninspected to Oregon. Although Respondents made inquiries of the Federal Inspection Service and the SWPC about these potato shipments and knew them to be in violation of the Order, Respondents chose to ship uninspected potatoes out of Washington, anyway. Respondents continued to ship Washington potatoes out of Washington without inspection, while requesting an exemption from, or a modification to, the Order.

Respondents have not appealed the ALJ's determination that Respondents committed the violations. Rather, Respondents have appealed for reduced civil penalties, based upon a meritless argument that Respondents proceeded in "good faith," seeking an exemption from, or modification of, the Order, while Respondents were actually violating the Order. The ALJ mistakenly agreed to Respondents' "good faith" argument and erroneously imposed merely a nominal civil penalty, in derogation of that sought by the administrative officials. The AMAA has a mechanism under which a petitioner may be relieved from civil

penalties while that petitioner challenges a marketing order. A petitioner must file a 7 U.S.C. § 608c(15)(A) petition in order to be relieved of civil penalties, and the petitioner is only relieved of civil penalties during the pendency of that 7 U.S.C. § 608c(15)(A) petition, as was explained in *Calabrese*, as follows:

> However, even if various Order provisions were ultimately held to be invalid, that would have no effect on the civil penalties assessed here, all of which relate to violations occurring before Respondents filed their Petition pursuant to 7 U.S.C. § 608c(15)(A). The AMAA expressly provides (7 U.S.C. § 608c(14)(B) (emphasis [in original]):
>
>> (B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order . . . may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that *if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler* in good faith and not for delay, *no civil penalty may be assessed* under this paragraph *for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler* in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. *The validity of such order may not be reviewed in an action to collect such civil penalty.*

Under the statutory language, a handler who believes that a Marketing Order provision is invalid must file an 8c(15)(A) Petition in order to be relieved from the statutory penalty provisions. The exemption from civil penalties begins on "the date on which the handler's petition was filed with the Secretary. . . ." 7 U.S.C. § 608c(14)(B).

The legislative history of the AMAA is consistent with the plain language thereof, *viz.*, that there is an exception from civil penalties only during the pendency of an 8c(15)(A) Petition. The legislative history is quoted and relied on in *United States v. Ruzicka*, 329 U.S. 287, 294 n.3 (1946), as follows:

> [3]"During the period while any such petition is pending before the Secretary and until notice of the Secretary's ruling is given to the petitioner, the penalties imposed by the act for violation of an order cannot be imposed upon the petitioner if the court finds that the petition was filed in good faith and not for delay. The Secretary may, nevertheless, during this period proceed to obtain an injunction against the petitioner pursuant to section 8a(6) of the Agricultural Adjustment Act. . . . It is believed that these provisions establish an equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms." S. REP. NO. 1011, 74th Cong., 1st Sess., p. 14.

Accordingly, even if various provisions of the Order were ultimately held to be invalid, that would be no defense to any of the violations for which civil penalties are assessed in this case, all of which occurred before Respondents filed their 8c(15)(A) Petition.

In re Calabrese, supra, 51 Agric. Dec. at 151-52. The two Complaints seeking civil penalties pursuant to 7 U.S.C. § 608c(14)(B) cover violations occurring in 1993 and 1995, respectively, but Respondents did not file the petition pursuant to 7 U.S.C. § 608c(15)(A) until 1996. Therefore, Respondents may not be relieved of civil penalties under 7 U.S.C. § 608c(15)(A). Moreover, I have concluded that the ALJ's finding of "good faith" is erroneous and that there is therefore no basis for mitigation of the sanction. To the contrary, these are deliberate and serious violations, and were it not for the sanction policy to place great weight on the recommendation of the administrative officials, the civil penalties would have been higher. The following additional passage from *Calabrese*, on the intent of Congress that the civil penalties imposed be a complement to the criminal penalties available to overworked United States Attorneys, is particularly appropriate here:

> It is the intent of Congress that the penalties assessed in this

> proceeding be a complement to the criminal penalties which the United States Attorneys have the authority to seek, but often do not due to their workload demands. In order to be an effective complement (or alternative) to criminal prosecution, the sanctions imposed in these proceedings should be sufficient to remedy the violations committed by the Respondents, and also sufficient to deter such conduct by Respondents and others in the future. An insufficient penalty might be seen by these Respondents or other potential violators as a tolerable cost of doing business, in light of the potential returns available for operating in violation of the Order requirements.

In re Onofrio Calabrese, *supra*, 51 Agric. Dec. at 162.

For the foregoing reasons, I have concluded that the ALJ's Order assessing a civil penalty against Respondents William Strebin, Daniel Strebin, and Strebin Farms should be affirmed, but that the civil penalty should be increased to $35,500, i.e., an additional $23,075, which is comprised of the Complainant-recommended $65 civil penalty per uninspected truckload of potatoes shipped out of Washington ($65 times 355 truckloads) plus the $12,425 in inspection fees assessed by the ALJ ($35 times 355 truckloads).

Order

1. Respondents, William Strebin, Daniel Strebin, and Strebin Farms, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall comply with the AMAA and the Order, and the Rules and Regulations and the Handling Regulation issued under the AMAA and the Order, and in particular, are prohibited from shipping uninspected potatoes outside the area covered by the Order. This paragraph of the Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally ordered to pay a civil penalty of $35,500, which shall be paid by certified check, or money order, made payable to the Treasurer of the United States, and shall be forwarded to, and received by, Ms. Sharlene A. Deskins within 65 days after service of this Order on Respondents at the following address:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel

Room 2014-South Building
1400 Independence Avenue, S.W.
Washington, D.C. 20250-1417

3. The petition in 96 AMA Docket No. F&V 946-1 is dismissed.

In re: CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, INC., and FRAZIER NUT FARMS, INC.
94 AMA Docket No. F&V 981-1.
and
In re: DEL RIO NUT COMPANY and MONTE VISTA FARMING COMPANY.
94 AMA Docket No. F&V 981-3.
and
In re: BAL NUT, INC., CARLSON FARMS, CENTRAL VALLEY GROWER PACKING, HOCKER NUT FARM, JARDINE ORGANIC RANCH, and ROTTEVEEL ORCHARDS.
94 AMA Docket No. F&V 981-4.
and
In re: TREEHOUSE FARMS, INC.
94 AMA Docket No. F&V 981-5.
and
In re: THERON SHAMGOCHIAN, INC., d/b/a MONTE CRISTO PACKING COMPANY, formerly known as MONTE CRISTO PACKING COMPANY AND THERON SHAMGOCHIAN RANCHES, INC., d/b/a MONTE CRISTO PACKING COMPANY, but known always to the Almond Board for the subject crop years as MONTE CRISTO PACKING COMPANY; BEARD'S QUALITY NUT COMPANY, a sole proprietorship; AND AMARETTO ORCHARDS, a California general partnership.
94 AMA Docket No. F&V 981-7.
Decision and Order filed December 24, 1997.

Dismissal of petition — Freedom of speech under First amendment — Almonds — Burden of proof.

The Judicial Officer reversed Judge Palmer's (Chief ALJ) Initial Decision and Order granting Petitions, filed by handlers under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) (AMAA), seeking relief from the requirement that handlers pay

assessments for advertising under the Almond Order (7 C.F.R. pt. 981) based on Petitioners' contention the compelled assessments under the Almond Order violate Petitioners' rights guaranteed under the First Amendment. The burden of proof in a proceeding under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with Petitioners, and Petitioners have not met their burden. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising do not implicate the First Amendment, is dispositive of the First Amendment issue in the proceeding. Petitioners are not prohibited or restrained by the AMAA, the Almond Order, or the Almond Board from communicating any message to any audience; Petitioners are not compelled to speak either by the AMAA or by the Almond Order; and the Almond Board's almond promotional efforts have no political or ideological content and Petitioners are not compelled by the AMAA or the Almond Order to endorse or finance any political or ideological views. Thus, the requirement under the AMAA and the Almond Order that Petitioners fund the promotion of almonds does not implicate Petitioners' rights guaranteed under the First Amendment.

Gregory Cooper, for Respondent.
Brian C. Leighton, Clovis, CA, and James A. Moody, Washington, D.C., for Petitioners Cal-Almond, Inc., Gold Hills Nut Company, Inc., Frazier Nut Farms, Bal Nut, Inc., Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, Rotteveel Orchards, Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company, Beard's Quality Nut Company, and Amaretto Orchards.
Jeffrey A. LeVee, Los Angeles, CA, for Petitioner Treehouse Farms, Inc.
Ronald W. Hillberg, Turlock, CA, for Petitioners Del Rio Nut Company and Monte Vista Farming Company.
Julian B. Heron, Jr., Washington, D.C., for Intervenors.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Cal-Almond, Inc., Gold Hills Nut Company, Inc., and Frazier Nut Farms, Inc., instituted the proceeding captioned 94 AMA Docket No. F&V 981-1 on January 25, 1994; Del Rio Nut Company and Monte Vista Farming Company instituted the proceeding captioned 94 AMA Docket No. F&V 981-3 on February 25, 1994; Treehouse Farms, Inc., instituted the proceeding captioned 94 AMA Docket No. F&V 981-5 on May 24, 1994; Bal Nut, Inc., Carlson Farms,[1] Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, and Rotteveel Orchards instituted the proceeding captioned 94 AMA Docket No. F&V 981-4 on June 15, 1994; and Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company, Beard's Quality Nut Company, and Amaretto Orchards, instituted the

[1]On November 8, 1994, Carlson Farms requested to withdraw its petition, and Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] granted Carlson Farms' request (Summary of Telephone Conference, filed November 10, 1994).

proceeding captioned 94 AMA Docket No. F&V 981-7 on September 20, 1994.[2]

Each proceeding was instituted by a Petition filed pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)) [hereinafter the AMAA]; the marketing order regulating Almonds Grown in California (7 C.F.R. §§ 981.1-.474) [hereinafter the Almond Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. Each Petition alleges that the advertising program conducted under the Almond Order violates each respective Petitioner's right to freedom of speech guaranteed under the First Amendment of the Constitution of the United States, and each Petition seeks relief from the requirement under the Almond Order that handlers pay assessments for advertising. The First Amendment challenge in each Petition is based, in large part, on *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993).[3]

The Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed an Answer to each Petition: (1) stating that the Petition fails to state a claim upon which relief can be granted and the AMAA and the Almond Order, as interpreted by Respondent and the Almond Board of California, were, and are, in accordance with law; and (2) requesting that the relief prayed for in the Petition be denied and the Petition be

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[2]Unless limited by the context in which it is used, the word "Petitioners" in this Decision and Order refers to: Amaretto Orchards, Bal Nut, Inc., Beard's Quality Nut Company, Cal-Almond, Inc., Central Valley Grower Packing, Del Rio Nut Company, Frazier Nut Farms, Inc., Gold Hills Nut Company, Inc., Hocker Nut Farm, Jardine Organic Ranch, Monte Vista Farming Company, Rotteveel Orchards, Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company, and Treehouse Farms, Inc.

[3]On June 27, 1997, the Supreme Court of the United States vacated the judgment of the United States Court of Appeals for the Ninth Circuit in *Cal-Almond Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), and remanded the case for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (Respondent's Memorandum in Support of Motion to the Judicial Office [sic] to Vacate the Findings of Facts, Factual Discussion, Conclusions of Law and Order of the Administrative Law Judge and to Issue an Immediate Decision [hereinafter Respondent's Memorandum in Support of Motion for Immediate Decision], Attachment C.)

dismissed.[4]

Respondent filed three motions to consolidate the proceedings captioned 94 AMA Docket No. F&V 981-1, 94 AMA Docket No. F&V 981-2,[5] 94 AMA Docket No. F&V 981-3, 94 AMA Docket No. F&V 981-4, and 94 AMA Docket No. F&V 981-5 on the ground that all of the Petitions filed in the proceedings raise similar issues regarding the Almond Order.[6] No Petitioner objected to Respondent's motions to consolidate, and the Chief ALJ granted each of Respondent's motions to consolidate.[7] On September 20, 1994, Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 filed a motion requesting consolidation of the proceeding captioned 94 AMA Docket No. F&V 981-7 with the proceeding captioned 94 AMA Docket No. F&V 981-1, 94 AMA Docket No. F&V 981-2,[8] 94 AMA Docket No. F&V 981-3, 94 AMA Docket No. F&V 981-4, and 94 AMA Docket No. F&V 981-5.[9] On September 22, 1994, the Chief ALJ granted the motion for consolidation filed by Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 stating:

> Petitioners in AMA Docket No. F&V 981-7, have requested that their petition be consolidated with the other consolidated petitions in 94 AMA Docket Nos. F&V 981-1, 981-2, 981-3, 981-4 and 981-5.

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[4]See: (1) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-1 on March 15, 1994; (2) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-3 on March 28, 1994; (3) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-5 on June 21, 1994; (4) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-4 on July 14, 1994; and (5) Answer of Respondent, filed in the proceeding captioned 94 AMA Docket No. F&V 981-7 on October 3, 1994.

[5]On November 8, 1994, Dole DF&N, Inc., the only Petitioner in the proceeding captioned 94 AMA Docket No. F&V 981-2, requested to withdraw its Petition, and the Chief ALJ granted Dole DF&N, Inc.'s request (Summary of Telephone Conference, filed November 10, 1994).

[6]See Respondent's: (1) Motion to Consolidate Petitions, filed April 18, 1994; (2) Motion to Consolidate Petitions, filed June 24, 1994; and (3) Motion to Consolidate Petitions, filed July 14, 1994.

[7]See Chief ALJ's: (1) Order of Consolidation, filed May 4, 1994; (2) Order of Consolidation, filed July 12, 1994; and (3) Order of Consolidation, filed August 26, 1994.

[8]See note 5.

[9]See Petitioners' Request for an Order Consolidation, and Order Thereon, filed September 20, 1994.

> Respondent and the other petitioners have advised that there is no objection to the request and the petitions in all the referenced cases are hereby consolidated.

Order of Consolidation, filed September 22, 1994.

The Chief ALJ conducted an oral hearing on November 14, 1994, through November 17, 1994, in Fresno, California, and on December 13, 1994, through December 16, 1994, in Los Angeles, California. Mr. Brian C. Leighton, Esq., of the Law Offices of Brian C. Leighton, Clovis, California, and James A. Moody, Esq., Washington, D.C., represented Amaretto Orchards, Bal Nut, Inc., Beard's Quality Nut Company, Cal-Almond, Inc., Central Valley Grower Packing, Frazier Nut Farms, Gold Hills Nut Company, Inc., Hocker Nut Farm, Jardine Organic Ranch, Rotteveel Orchards, and Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company. Mr. Jeffrey A. LeVee, Esq., of Jones, Day, Reavis & Pogue, Los Angeles, California, represented Treehouse Farms, Inc. Mr. Ronald W. Hillberg, Esq., Turlock, California, represented Del Rio Nut Company and Monte Vista Farming Company. Ms. Tejal Mehta, Esq., and Mr. Gregory Cooper, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent. The evidentiary record consists of a 2,560-page transcript and approximately 300 exhibits. Forty-three witnesses testified.

On January 9, 1995, Blue Diamond Growers, Inc. (a non-profit growers' cooperative that markets almonds regulated under the Almond Order), filed a Motion to Intervene, and on January 27, 1995, Paramount Farms, Inc. (a handler of almonds regulated under the Almond Order), filed a Motion to Intervene. On February 21, 1995, pursuant to section 900.57 of the Rules of Practice (7 C.F.R. § 900.57), the Chief ALJ granted the January 9, 1995, and January 27, 1995, motions to intervene permitting Blue Diamond Growers, Inc., and Paramount Farms, Inc. [hereinafter Intervenors], to file a joint brief.[10]

Petitioners, Intervenors, and Respondent filed post-hearing briefs on March 24, 1995, and reply briefs on May 9, 1995. The Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] on June 15, 1995. The Chief ALJ, relying on *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir.

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[10]See Order Respecting Motions to Intervene by Blue Diamond Growers and Paramount Farms, Inc., filed February 21, 1995.

1993),[11] and applying the test in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), for evaluating the constitutionality of commercial speech regulation,[12] concludes that: (1) Respondent has the burden of proof in these proceedings; (2) Respondent has failed to meet its burden of proving that the Almond Board's advertising and promotional program for crop years 1986-87 through 1994-95 directly advanced the governmental interest of selling more almonds and increasing returns to growers which the United States Department of Agriculture asserted in justification of its regulation of Petitioners' commercial speech; (3) Respondent has failed to meet its burden of proving that the Almond

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[11]See note 3.

[12]The Supreme Court summarized the test for evaluating the constitutionality of commercial speech regulation as follows:

> In commercial speech cases, . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

The United States Court of Appeals for the Ninth Circuit, applying the *Central Hudson* test to the almond marketing program, in *Cal-Almond* states:

> Once again, for the almond marketing program to be constitutional, (a) the asserted government interest behind it must be "substantial," (b) the program must "directly advance" that interest, and (c) the program must not be more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351. USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, [507] U.S. [761], [769], 113 S. Ct. 1792, 1800, 123 L.Ed. 2d 543 (1993).

Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 437 (9th Cir. 1993).

Board's advertising and promotional program for crop years 1986-87 through 1994-95 was no more extensive than necessary to serve the governmental interest of selling more almonds and increasing returns to growers which the United States Department of Agriculture asserted in justification of its regulation of Petitioners' commercial speech; and (4) the Almond Board's advertising and promotional program for crop years 1986-87 through 1994-95 was not in accordance with law because the program violates Petitioners' right to freedom of speech guaranteed by the First Amendment (Initial Decision and Order at 69).

On July 19, 1995, Petitioners appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[13] On August 4, 1995, Respondent filed Respondent's Appeal to the Judicial Officer [hereinafter Respondent's Appeal Petition]. On August 10, 1995, Respondent filed Respondent's Response to Petitioners' Appeal to the Judicial Officer [hereinafter Respondent's Response]; on September 20, 1995, Petitioners filed Petitioners' Joint Response to Respondent's Appeal to the Judicial Officer; and on September 21, 1995, Petitioners filed Petitioners' Response to "Respondent's Proposed Findings of Fact and Conclusions of Law; Appeal of the ALJ's Findings of Fact and Conclusions of Law."

On September 22, 1995, the case was referred to the Judicial Officer for decision, and on May 15, 1996, I issued an Order to Show Cause stating:

> An examination of the Chief ALJ's Decision and Order and the appellate pleadings filed in the consolidated proceeding, *sub judice*, reveals that any decision by the Judicial Officer herein would have to be based upon the same First Amendment/commercial free speech issues that are still being litigated in the consolidated *Wileman* [footnote omitted] and consolidated *Cal-Almond* [footnote omitted] proceedings.
>
> On January 24, 1996, the Solicitor General of the United States, on behalf of the Secretary of Agriculture, filed [a] Petition for a Writ of Certiorari in the Supreme Court of the United States seeking review of the United States Court of Appeals for the Ninth Circuit's judgment in *Wileman*.

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[13]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Moreover, I have been informed that the Department will likely request that the Solicitor General file a petition for a writ of certiorari regarding *Cal-Almond.* Consequently, I am issuing this Order for the parties in the proceeding, *sub judice*, to show cause why I should not forestall my Decision and Order herein, and await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond.*

Therefore, the parties herein shall, within 30 days from the service of this Order to Show Cause, file with the Hearing Clerk any cause showing why I should not await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant case.

On June 12, 1996, Blue Diamond Growers, Inc., filed Response to Order to Show Cause stating that "[w]aiting until the Supreme Court hands down its decision in [*Wileman* and *Cal-Almond*] provides for the most efficient use of judicial resources." On June 14, 1996, Mr. Brian Leighton, on behalf of Petitioners in 94 AMA Docket No. F&V 981-1, 94 AMA Docket No. F&V 981-3, 94 AMA Docket No. F&V 981-4, and 94 AMA Docket No. F&V 981-7, filed Petitioners' Response to Judicial Officer's Order to Show Cause stating, *inter alia*, that the Supreme Court of the United States had not granted review in *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993), that "the Judicial Officer could render his decision based on the controlling case, *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F3d 429 (9th Cir. 1993)," and that "the Judicial Officer should not stay the proceedings pending the outcome of the review [of *Wileman* and *Cal-Almond*] before the Supreme Court[.]" On June 14, 1996, Respondent filed Respondent's Response to Show Cause Order stating that Respondent "agrees that the Judicial Officer should await the outcome of the Supreme Court review of *Wileman* before issuing a Decision and Order herein." On October 4, 1996, I issued Ruling on Order to Show Cause stating that "[n]o cause having been shown, I shall await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant case."

On June 25, 1997, the Supreme Court of the United States issued a decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), holding that the First Amendment rights of persons compelled to fund generic advertising of California nectarines, plums, and peaches, in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt 917), both of which are issued under the AMAA, are not implicated, much less abridged. On June 27,

1997, the Supreme Court granted a petition for a writ of certiorari in *Cal-Almond*, vacated the Ninth Circuit's judgment, and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (Respondent's Memorandum in Support of Motion for Immediate Decision, Attachment C.)

On October 30, 1997, Respondent filed Respondent's Motion to the Judicial Officer to Vacate the Findings of Facts, Factual Discussion, Conclusions of Law, and Order of the Administrative Law Judge and to Issue an Immediate Decision [hereinafter Respondent's Motion for Immediate Decision] contending that:

> There is only one issue in this proceeding: whether the almond marketing order and program is unconstitutional under the free speech and free association provisions of the First Amendment. . . . This is one of the older proceedings of this nature currently pending in the Department, and the [R]espondent certainly believes that justice always should be rendered as fast as can reasonable [sic] be done. Furthermore, this is a case where petitioners are not in full compliance and prompt handling of this matter should aid in resolving this situation.
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> The record herein, however, presents a technical problem with respect to prompt adjudication. . . . A complete review of this record and a reconsideration of all of these points of contention would be a heavy and time-consuming burden on the Judicial Officer. Furthermore, it appears to be unnecessary since the findings, discussion and conclusions of the law judge are no longer relevant.
>
> Under the Supreme Court reasoning in *Wileman* and *Cal-Almond Inc.*, the First Amendment is not even implicated. Further, even if there were any First Amendment issue, it would only ask whether the promotion and advertising of almonds is germane to the [AMAA] and the [Almond] Order and whether the assessments are used for political or ideological activities.
>
> . . .
>
> The Judicial Officer, therefore, should: (1) Vacate the entire Decision

> and Order of the law judge (including the discussion, findings and conclusions therein); (2) Issue findings of fact that petitioners are handlers, that the record contains more evidence of germaneness than the earlier case, and that the record contains no evidence of political or ideological activities; and (3) Issue a Decision and Order dismissing the petitions on the merits.
>
> In the unlikely event some reviewing court should determine more extensive factual findings are necessary, the matter can be remanded to the Judicial Officer with specific directions in accord with 7 U.S.C. [§] 608c(15)(B).

Respondent's Motion for Immediate Decision at 1-3.

On November 26, 1997, Mr. Brian Leighton, on behalf of Petitioners in 94 AMA Docket No. F&V 981-1, 94 AMA Docket No. F&V 981-3, 94 AMA Docket No. F&V 981-4, and 94 AMA Docket No. F&V 981-7 filed Petitioners' Response to "Respondent's Motion to the Judicial Officer to Vacate the Findings of Facts, Factual Discussion, Conclusions of Law and Order of the ALJ and to Issue an Immediate Decision" [hereinafter Petitioners' Response to Respondent's Motion for Immediate Decision].[14] Petitioners contend that Respondent's motion must be denied because there is no authority in the Rules of Practice for Respondent's Motion for Immediate Decision, the Judicial Officer already has pending before him Respondent's appeal, and *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), does not control the instant proceeding (Petitioners' Response to Respondent's Motion for Immediate Decision at 1.) Petitioners further state that:

> In what would make a mockery out of the "exhaustion" requirement, the Respondent advises the Judicial Officer that he must or should simply ignore all of the witnesses testimony, the evidentiary record, the ALJ's extensive findings of fact, the ALJ's factual discussion and just simply rule that there is no First Amendment issue--regardless of the facts. . . . That is

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[14]Mr. Leighton states that "Petitioners in Docket Nos. F&V 981-3 (In Re Del Rio Nut Company, et al) and 981-5 (In Re Treehouse Farms, Inc.) are joining in this Response, and these responding Petitioners have no objection." (Petitioners' Response to Respondent's Motion for Immediate Decision at 1 n.1.) On December 1, 1997, Del Rio Nut Company and Monte Vista Farming Company filed a letter stating that they "join in the response filed by Mr. Brian Leighton" and Treehouse Farms, Inc., filed a letter stating that "Treehouse hereby joins the opposition of Cal-Almond to Respondent's motion to the judicial officer to vacate the findings of fact, etc."

> simply not a remedy [available] to the Respondent nor reasoned decision-making.

Petitioners' Response to Respondent's Motion for Immediate Decision at 8.

As an initial matter, section 900.59(a) of the Rules of Practice (7 C.F.R. § 900.59(a)) does not limit motions that may be filed and requires the Secretary to rule on all motions filed after the record has been transmitted to the Secretary, as follows:

> **§ 900.59 Motions and requests.**
>
> (a) *General.* (1) All motions and requests shall be filed with the hearing clerk, except that those made during the course of an oral hearing may be filed with the judge or may be stated orally and made a part of the transcript.
>
> (2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing clerk to the Secretary of the record as provided in this subpart. The Secretary shall rule upon all motions and requests filed after that time.

7 C.F.R. § 900.59(a).

The Rules of Practice place no limit on motions that may be filed in proceedings conducted in accordance with the Rules of Practice, and section 900.59(a) of the Rules of Practice (7 C.F.R. § 900.59(a)) requires the Secretary to rule on *all* motions filed after the record has been transmitted to the Secretary. As commonly used, the word *all* does not permit an exception or exclusion not specified.[15] Moreover, the context in which the word *all* is used in section

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[15]*See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944) (stating that *all* means all, not substantially all); *William v. United States*, 289 U.S. 553, 572 (1933) (describing the word *all* as a comprehensive word); *McLean v. United States*, 226 U.S. 374, 383 (1912) (stating that *all* excludes the idea of limitation); *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969) (stating that *all* means the whole of that which it defines, not less than its entirety and that the purpose of the word *all* is to underscore that intended breadth is not to be narrowed); *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 464 (S.D. Miss. 1964) (stating that *all* means *the whole, the sum of all the parts, the aggregate* and that *all* is about the most comprehensive and all inclusive word in the English language), *aff'd per curiam*, 358 F.2d 723 (5th Cir. 1966); *Travelers Ins. Co. v. Cimarron Ins. Co.*, 196 F. Supp. 681, 684 (D. Or. 1961) (stating that the word *all* when referring to the amount, quantity, extent, duration, quality, or degree means *the whole of* and that a statute which says *all* excludes nothing); *Fischer & Porter Co. v. Brooks Rotameter Co.*, 86 F. Supp. 502, 503 (E.D. Pa.

900.59(a) of the Rules of Practice (7 C.F.R. § 900.59(a)) provides no basis for reading the word *all* narrowly. Since there is no explicit limitation in the Rules of Practice on the nature of motions that may be filed, and the Secretary must rule on *all* motions filed after the transmittal of the record to the Secretary, I disagree with Petitioners' contention that there is no authority in the Rules of Practice for Respondent's Motion for Immediate Decision, and Respondent's previous filing of an appeal does not affect Respondent's right to file a motion in accordance with section 900.59(a) of the Rules of Practice (7 C.F.R. § 900.59(a)). However, I agree with Petitioners' general contention that I must review the record prior to issuing a Decision and Order. The Administrative Procedure Act provides that an order may not be issued except on consideration of the whole record or those parts of the record cited by a party, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .

1949) (stating that the word *any* implies totality as plainly as does the word *all* and the only difference is that *any* arrives at totality by a series of choices for consideration, whereas *all* arrives at totality in a single leap); *In re Central of Georgia Ry.*, 58 F. Supp. 807, 813 (S.D. Ga. 1945) (stating that a more comprehensive and all-inclusive word than *all* can hardly be found in the English language, there is a totality about the word *all* that few words possess), *rev'd on other grounds and remanded sub nom. Liberty National Bank & Trust Co. v. Bankers Trust*, 150 F.2d 453 (5th Cir. 1945); *United States v. Bachman*, 246 F. 1009, 1011 (E.D. Pa. 1917) (stating that the word intended to embrace every member of a class, where the number of the members of the class exceeds two, is the word *all*); *Beckwith v. Chicago, M. & St. P. Ry.*, 223 F. 858, 860 (W.D. Wash. 1915) (stating that the word *all* is very comprehensive in its meaning); *The Koenigin Luise*, 184 F. 170, 173 (D.N.J. 1910) (describing the word *all* as an inclusive term); *In re Lindsay Foods, Inc.*, 56 Agric. Dec. ___, slip op. 12-13 (Aug. 28, 1997) (Remand Order) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(b)(2) narrowly); *In re Far West Meats*, 55 Agric. Dec. 1045, 1050 (1996) (Clarification of Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly); *In re Far West Meats*, 55 Agric. Dec. 1033, 1037 (1996) (Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1041 (1973) (stating that: the word *all* means as much as possible, every individual component, every, and any whatever; the word *all* signifies the whole of; a more comprehensive word than *all* cannot be found in the English language; a more comprehensive and all-inclusive word than *all* can hardly be found in the English language), *aff'd*, 369 F. Supp. 632 (S.D.N.Y. 1973).

> (d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

I reject Respondent's suggestion (Respondent's Motion for Immediate Decision at 3-4) that a Decision and Order could be issued in this proceeding without consideration of at least those portions of the record cited by the parties. Therefore, based solely on my view that I must review the record prior to issuing an order in this proceeding, Respondent's Motion for Immediate Decision is denied.

After reviewing the record in this proceeding, I find that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of the First Amendment issue in this proceeding, and the appellate filings reveal that the First Amendment issue, Petitioners' request for a refund of assessments, and Respondent's motion to exclude "the entire testimony of petitioner Monte Cristo" are the only remaining issues in this proceeding. Further, I find that much of the evidence; much of Petitioners', Respondents', and Intervenors' filings; and much of the Chief ALJ's Initial Decision and Order have been rendered irrelevant by *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

Based on my finding that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), has rendered much of the Chief ALJ's Initial Decision and Order irrelevant; my disagreement with the Chief ALJ's conclusion that Respondent has the burden of proof in this proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)); my disagreement with the Chief ALJ's conclusion that the Almond Board's advertising and promotional program for crop years 1986-87 through 1994-95 violates the First Amendment of the Constitution of the United States; and my finding that *Wileman Bros.* is dispositive of the First Amendment issue in this proceeding, I have not adopted the Chief ALJ's Initial Decision and Order as the final Decision and Order.

Petitioner Amaretto Orchards' exhibits are designated by the letters "AO"; Petitioner Bal Nut, Inc.'s exhibits are designated by the letters "BN"; Petitioner Beard's Quality Nut Company's exhibits are designated by the letters "BQN"; Petitioner Cal-Almond, Inc.'s exhibits are designated by the letters "CA"; Petitioner Central Valley Grower Packing's exhibits are designated by the letters "CVG"; Petitioner Del Rio Nut Company's exhibits are designated by the letters "DRN"; Petitioner Frazier Nut Farms, Inc.'s exhibits are designated by the letters "FN"; Petitioner Gold Hills Nut Company, Inc.'s exhibits are designated by the letters

"GH"; Petitioner Hocker Nut Farm's exhibits are designated by the letters "HNF"; Petitioner Jardine Organic Ranch's exhibits are designated by the letters "JOR"; Petitioner Monte Cristo Packing Company's exhibits are designated by the letters "MC"; Petitioner Monte Vista Farming Company's exhibits are designated by the letters "DRN"; Petitioner Rotteveel Orchards' exhibits are designated by the letters "RO"; Petitioner Treehouse Farms, Inc.'s exhibits are designated by the letters "TREE"; Petitioners' joint exhibits are designated by the letters "PJ"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The pertinent provision of the Constitution of the United States provides, as follows:

United States Constitution:

Amendment I

Congress shall make no law . . . abridging the freedom of speech.

U.S. Const. amend. I.

The pertinent provisions of the AMAA provide, as follows:

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

. . . .

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds . . . such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds . . . may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with

the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(6)(I), (15)(A).

The pertinent provisions of the Federal Agriculture Improvement and Reform Act of 1996 provide, as follows:

110 Stat.:

TITLE V—AGRICULTURAL PROMOTION

Subtitle A—Commodity Promotion and Evaluation

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.—In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

(1) the marketing promotion provisions under section 8c(6)(I) of the Agricultural Adjustment Act (7 U.S.C. 608c(6)(I), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937[.]

. . . .

(b) FINDINGS.—Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture—

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501(a)(1), (b)(1)-(9), 110 Stat. 888, 1029-31 (1996).

The pertinent provisions of the Rules of Practice provide, as follows:

7 C.F.R:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX—AGRICULTURAL MARKETING SERVICE

PART 900—GENERAL REGULATIONS

. . . .

SUBPART—RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING

ORDERS

. . . .

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

. . . .

(i) The term *handler* means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable[.]

. . . .

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition.* Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary.

7 C.F.R. §§ 900.51(i), .52(a).

The pertinent provisions of the Almond Order (1994) provide, as follows: 7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX—AGRICULTURAL MARKETING SERVICE

. . . .

PART 981—ALMONDS GROWN IN CALIFORNIA

SUBPART—ORDER REGULATING HANDLING

DEFINITIONS

. . . .

§ 981.4 Almonds.

Almonds means (unless otherwise specified) all varieties of almonds (except bitter almonds), either shelled or unshelled, grown in the State of California, and for the purposes of research includes almond shells and hulls.

. . . .

§ 981.12 Grower.

Grower is synonymous with *producer* and means any person engaging, in a proprietary capacity, in the commercial production of almonds.

§ 981.13 Handler.

Handler means any person handling almonds during any crop year, except that such term shall not include either a grower who sells only almonds of his own production at retail at a roadside stand operated by him, or a person receiving almonds from growers and other persons delivering these almonds to a handler.

. . . .

§ 981.19 Crop year.

Crop year means the 12 months from July 1 to the following June 30

inclusive.

. . . .

§ 981.22 Board.

Board means the Almond Board of California which is the administrative agency established by this subpart.

ALMOND BOARD OF CALIFORNIA

. . . .

§ 981.38 Powers.

The Board shall have the following powers:

(a) To administer the provisions of this part in accordance with its terms;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To receive, investigate and report to the Secretary complaints of violations of this part; and

(d) To recommend to the Secretary amendments to this part.

RESEARCH

§ 981.41 Research and development.

(a) *General.* The Board, with the approval of the Secretary, may establish or provide for the establishment of projects involving production research, marketing research and development projects, and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds. The Board may also provide for crediting the pro rata expense assessment obligations of a handler with such portion of his direct expenditure for such marketing promotion including paid advertising as may be authorized. The expenses of such projects shall be paid from funds collected pursuant to § 981.81(a) or credited pursuant to paragraph (c) of

this section.

(b) *Authorization.* If, on the basis of a Control Board recommendation pursuant to § 981.40(e) with respect to projects pursuant to this section, and appertaining rules and regulations established by the Secretary on recommendation of the Board, and other available information, the Secretary concurs that such activities should be permitted, he shall authorize such activities.

(c) *Creditable expenditures.* The Board, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion including paid advertising, that promotes the sale of almonds, almond products or their uses. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising. Such expenditures may include, but are not limited to, money spent for advertising space or time in newspaper, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent: *Provided*, That, with respect to paid advertising, advertising production costs, preparation expenses, travel allowances, and other expenses not directly connected with paid space or time, and costs relating to pre-testing of advertising, test marketing, directory advertising, point of sales materials, premiums, and trade promotion allowances shall not be eligible for credit against a handler's assessment obligation.

(d) *Promotion guidelines.* All marketing promotion activity engaged in by the Board, including paid advertising, shall be subject to the following terms and conditions:

(1) No marketing promotion, including paid advertising shall refer to any private brand, private trademark or private trade name;

(2) No promotion or advertising shall disparage the quality, use, value, or sale of like or any other agricultural commodity or product, and no false or unwarranted claims shall be made in connection with the product;

(3) No promotion or advertising shall be undertaken without reason to believe that returns to producers will be improved by such activity; and

(4) Upon conclusion of each activity, but at least annually, the Board shall summarize and report the results of such activity to its members and to the Secretary.

(e) *Rules and regulations.* Before any project involving marketing promotion, including paid advertising and the crediting of the pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary, after recommendation by the Board, shall prescribe appropriate rules and regulations as are necessary to effectively regulate such activity.

SUBPART—ADMINISTRATIVE RULES AND REGULATIONS

. . . .

§ 981.441 Credit for market promotion activities, including paid advertising.

(a) In order for a handler to receive credit for his/her own promotional activities from his/her pro rata portion of advertising assessment payments, pursuant to § 981.41(c), the Board must determine that such expenditures meet the applicable requirements of this section. Credit will be granted in the form of a payment from the Board, hereinafter termed "Credit-Back." Credit-Back will be granted in an amount not to exceed 50 percent of a handler's proven expenditures for qualified activities.

(b) The portion of the handler assessment for which credit may be received under this section will be billed, and is due and payable, at the same time as the portion of the handler assessment used for the Board's administrative expenses.

(c) The Board shall grant Credit-Back for qualifying activities only to the handler who performed such activities and who filed a claim for Credit-Back in accordance with this section.

(d) Credit-Back shall be granted only for qualified promotional activities which are conducted and completed during the crop year for which Credit-Back is requested.

(e) The following requirements shall apply to Credit-Back for all promotional activities:

(1) Credit-Back granted by the Board shall be that which is appropriate when compared to accepted professional practices and rates for the type of activity conducted. In the case of claims for Credit-Back activities not covered by specific and established criteria, the Board shall grant the claim if it is consistent with practices and rates for similar

activities. To this end, the Board may issue guidelines for qualifying activities from time to time as warranted. For activities in markets other than the United States and Canada, paragraph (e)(5) of this section shall also apply.

(2) The clear and evident purpose of each activity shall be to promote the sale, consumption or use of California almonds, and nothing therein shall detract from this purpose.

(3) No Credit-Back will be given for advertising placed in publications that target the farming or grower trade. No Credit-Back shall be given for any outdoor advertising or sponsorships in the California almond growing counties of Butte, Colusa, Fresno, Glenn, Kern, Madera, Merced, Sacramento, San Joaquin, Stanislaus and Tulare counties, except that, outdoor advertising in these counties which specifically directs consumers to a handler-operated outlet offering direct purchase of almonds will be eligible for Credit-Back.

(4) Credit-Back shall be granted for those qualified activities specified below, except that Credit-Back for travel expenses will not be allowed in any case.

(i) *Paid advertising directed to end users, trade or industrial users.* Credit-Back shall be granted for money spent on paid advertising space or time including, but not limited to, newspapers, magazines, radio, television, transit and outdoor media, and including the standard agency commission costs not to exceed 15 percent of gross.

(ii) *Other market promotion activities.* Credit-Back shall be granted for market promotion other than paid advertising, for the following activities:

(A) Marketing research (except pre-testing and test-marketing of paid advertising);

(B) Trade and consumer product publicity;

(C) Printing costs for promotional material;

(D) Direct mail printing and distribution;

(E) Retail in-store demonstrations;

(F) Point-of-sale materials (not including packaging);

(G) Sales and marketing presentation kits;

(H) Trade fairs and exhibits;

(I) Trade seminars;

(J) 50/50 advertising with retailers;

(K) Couponing (printing, distribution and handling costs only);

(L) Purchase of Board produced promotional materials; and

(M) Sponsorships.

(iii) For any qualified activity involving joint participation by a handler and a manufacturer or seller of a complementary product(s), or a handler selling multiple complementary products, including other nuts, with such activity including the handler's name or brand, or the words "California Almonds", the amount allowed for Credit-Back claim shall reflect that portion of the activity represented by almonds, or the handler's actual payment, whichever is less.

(iv) When products containing almonds are promoted, the amount allowed for Credit-Back claim shall reflect that portion of the product weight represented by almonds, or the handler's actual payment, whichever is less. In addition, the product must display the handler's name or brand, or the words "California Almonds" on the primary, face label.

(5) Credit-Back for promotional activities in a foreign market shall be granted at 50 percent of a handler's unreimbursed expenditures for qualified activities in any foreign market, if the handler is promoting pursuant to a contract with the Foreign Agricultural Service, USDA (FAS) and/or the California Department of Food and Agriculture (CDFA). Such activities must also meet the requirements of paragraphs (e)(1), (2), (3), (4) and (6) of this section. Unless the Board is administering the foreign marketing program, such activities shall not be eligible for Credit-Back unless the handler certifies that he/she was not and will not be reimbursed by either FAS or the CDFA for the amount claimed for Credit-Back, and has on record with the Board all claims for reimbursement made to FAS and/or the CDFA. Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA will not be eligible for Credit-Back.

(6) A handler must file claims with the Board to obtain Credit-Back for promotional expenditures, as follows:

(i) Within 15 days after start of the applicable crop year, a handler must declare to the Board his/her intention to apply for Credit-Back funds, and for what amount of his/her assessment funds he/she intends to seek Credit-Back: Provided, That, with respect to the 1993-94 crop year, handlers must declare their intent no later than October 15, 1993. If a handler's intent is not declared on or before that time, there will be no further consideration of Credit-Back claims from that handler for that entire crop year.

(ii) If a handler has declared his/her intention to apply for Credit-Back

funds, but does not submit any approved activity claims by January 15 of the crop year, he/she will be ineligible to apply for any Credit-Back funds for that entire crop year.

(iii) After a handler has declared to the Board his/her intention to apply for Credit-Back funds, he/she must get pre-approval from the Board in writing for each activity he/she plans to conduct. Once pre-approval is received, the handler can then conduct the activity and, upon completion, submit a claim to the Board.

(iv) All claims submitted to the Board for any qualified activity must include:

(A) Reference to the pre-approval number for the activity assigned by the Board;

(B) A description of the activity and when and where it was conducted;

(C) Copies of all invoices from suppliers or agencies;

(D) Copies of all canceled checks issued by the handler in payment of these invoices; and

(E) An actual sample, picture or other physical evidence of the activity.

(v) Checks from the Board in payment of approved Credit-Back claims will be mailed to handlers on February 15, April 15, June 15, and 30 days after submission of final claims for the crop year pursuant to paragraph (c)(6)(vi) of this section. To receive payment on these dates, handler claims must be submitted, with all required elements, at least one month prior to the payment date. A handler can receive Credit-Back for his/her allowable direct expenditures only up to the amount of that portion of the handler's assessment designated for marketing promotion, including paid advertising.

(vi) A statement of the Credit-Back commitments outstanding as of the close of a crop year must be submitted in full to the Board within 15 days after close of that crop year. Final claims must be submitted within 105 days after the close of that crop year.

(f) *Appeals.* If a determination is made by the Board staff that a particular promotional activity is not eligible for Credit-Back because it does not meet the criteria specified herein, or for any other reason, the affected handler may request the Public Relations and Advertising Committee to review the Board staff's decision. If the affected handler disagrees with the decision of the Public Relations and Advertising Committee, the handler may request that the Board review the Committee

decision. If the handler disagrees with the decision of the Board, the handler, through the Board, may request that the Secretary review the Board's decision. The Secretary maintains the right to review any decisions made by the aforementioned bodies at his/her discretion.

7 C.F.R. §§ 981.4, .12, .13, .19, .22, .38, .41, .441 (1994).

The pertinent provision of the Almond Order (1993) provides, as follows:

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX—AGRICULTURAL MARKETING SERVICE

. . . .

PART 981—ALMONDS GROWN IN CALIFORNIA

. . . .

SUBPART—ADMINISTRATIVE RULES AND REGULATIONS

. . . .

§ 981.441 Crediting for marketing promotion including paid advertising.

(a) In order for a handler to receive credit for his marketing promotion expenditures, including paid advertising, against his pro rata expense assessment obligation pursuant to § 981.41(c), the Board shall determine that such expenditures meet the applicable requirements of this section.

(b) Each paid advertisement must be published, broadcast, or displayed and other marketing promotion activities must be conducted during the crop year for which credit is requested, except that a handler may receive credit up to a maximum of 40 percent of his total creditable advertising and promotion obligation as of the June 30 redetermination report for expenditures made for advertisements published, broadcast, or displayed and other marketing promotion activities conducted no later than December 31 of the subsequent crop year. A handler utilizing this extension shall: (1) File any required documentation with the Board no later than the following January 31, and (2) certify to the Board, at the time of the June 30 redetermination, his planned expenditures during the extension period.

(c) The following requirements shall apply to crediting for paid advertising:

(1) Credit granted by the Board for paid advertising shall be that which is appropriate when compared to the applicable outlet rate published in the domestic or Canadian catalogs of Standard Rate and Data Service or station, publisher, or outdoor rate cards. In the case of claims for credit not covered by any such source, the Board shall grant the claim if it is consistent with rates for comparable outlets. For advertisements in markets other than the United States and Canada, paragraph (c)(4) of this section shall apply.

(2) The clear and evident purpose of each advertisement shall be to promote the sale, consumption, or use of California almonds, and nothing therein shall detract from this purpose.

(3) Credit for paid advertising shall be granted:

(i) For 100 percent of a handler's payment to an advertising medium:

(A) For a generic advertisement of California almonds;

(B) For an advertisement of the handler's brand of almonds;

(C) When either of these advertisements includes reference to a complementary commodity or product;

(D) For a trade media advertisement that displays branded food products containing almonds, or announces a handler's future promotion activities, including joint promotions, and the entire expenditure is borne by the handler;

(E) For in-store supermarket advertisements using fixed position, video media, or light emitting diode (LED) signs, when such payments are made through an advertising firm or company which specializes in the

production of LED advertisements and the placement of those advertisements: (*1*) Fixed position advertisements must include one or more of the following: (*i*) Processed color displays enclosed in plastic frames and mounted on supermarket shopping carts; (*ii*) overhead directories enclosed in frames placed at the end or middle of supermarket aisles; or (*iii*) processed color advertisements enclosed in frames and mounted on a supermarket shelf; (*2*) Video advertisements must be shown on a fixed video monitor running television commercials or infomercials for specific products on a rotating basis; (*3*) LED advertisements must be shown on an in-aisle LED screen running specific product messages on a rotating basis; or

(F) For processed color displays enclosed in frames mounted on fixtures outside and in front of retail food stores when payments are made through an advertising firm.

(ii) For an advertisement resulting from joint participation by a handler and a manufacturer or seller of a complementary commodity or product, and including the brands of both, the credit shall be 50 percent of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iii) For an advertisement resulting from joint participation by a handler and manufacturers or sellers of two complementary commodities or products, and including the brands of all three, the credit shall be one-third of the total allowable payment to the advertising medium, or the handler's payment thereof, whichever is less.

(iv) When almond products, other than almond butter, are advertised, the credit shall be 50 percent of the total allowable payment to the advertising medium or 50 percent of the handler's payment thereof, whichever is less: *Provided*, That (A) the almond product does not contain nuts other than almonds, (B) the almond product contains at least 50 percent raw shelled almonds by weight, and (C) the almond product displays the handler's brand and: *Provided further*, That, if the product is advertised with forms of almonds for which 100 percent credit is allowed, the advertisement shall receive 100 percent credit provided it meets the criteria of paragraph (c)(3)(iv)(A), (B), and (C) of this section. With respect to almond butter advertising, the credit shall be 100 percent of the total allowable payment to the advertising medium or 100 percent of the handler's payment thereof, whichever is less. For the handler to receive credit, the almond butter must meet the specifications contained in § 981.466, and the handler's brand must

be displayed.

(4) Credit for media expenditures in a foreign market shall be granted:

(i) For handlers' unreimbursed media expenditures for advertising in any foreign market pursuant to a contract with the Foreign Agricultural Service, U.S. Department of Agriculture, and/or the California Department of Food and Agriculture, provided the advertisements meet the requirements of paragraphs (c)(2) and (3) of this section and the limitations of paragraphs (c)(5)(i) and (ii) of this section. Such advertising in foreign markets shall not be creditable unless the handler certifies on ABC Form 31 that said handler was not and will not be reimbursed for such advertising by the Foreign Agricultural Service or the California Department of Food and Agriculture and submits to the Board copies of all claims for reimbursement filed with the Foreign Agriculture Service and/or the California Department of Food and Agriculture.

(ii) For a handler's media expenditures for brand advertising in any country where California almonds are sold, credit shall be allowed when claims are substantiated by applicable rate cards. The provisions of this section applicable to domestic advertising shall also apply to the crediting of advertising in these markets.

(5) Credit granted a handler shall be subject to other conditions as follows:

(i) No credit shall be granted to a handler when more than two complementary branded products are included in an advertisement.

(ii) Advertisements which, in addition to promoting California almonds, also mention or promote the sale of noncomplementary commodities or products, or of competing nuts, shall not be eligible for credit.

(iii) Advertisements which direct consumers to one or more named retail outlets, other than handler operated, shall not be eligible for credit.

(6) A handler must file a claim with the Board to obtain credit for an advertising expenditure. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that documentation will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each

final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance as follows:

(i) For published advertisements, submit a copy of the publication invoice, agency invoice, if any, and tear sheet of the advertisement.

(ii) For radio advertisements, submit a copy of the station invoice, a copy of the script, or reference to a copy on file with the Board, and the agency invoice, if any.

(iii) For television advertisements, submit a copy of the station invoice, a copy of the script and tape or story board of the advertisement, or a reference to these in the Board files, and the agency invoice, if any.

(iv) For outdoor advertisements, submit a copy of the company invoice, a photograph of the display or a reference to a photograph in the Board files, and the agency invoice, if any.

(v) For in-store supermarket advertising and for mounted advertising enclosed in frames outside and in front of retail food stores, submit a copy of the company invoice, a copy of the actual advertisement or video tape, a published rate card from a nationally recognized company, and a copy of the agency invoice, if any.

(vi) Each claim shall also include a certification to the Secretary of Agriculture and to the Board that the claim is just and conforms to requirements set forth in § 981.41(c). The Board shall advise the handler promptly of the extent to which such claim has been allowed.

(d) The following requirements shall apply to crediting for marketing promotion other than paid advertising:

(1) Credit for marketing promotion expenditures shall be granted:

(i) For the distribution of sample packages containing one-half ounce or less of almonds to charitable or educational outlets. For the purposes of this section, the term *charitable outlet* means an organization to which a charitable contribution as defined in section 170(c) of the Internal Revenue Code (26 U.S.C. 170(c)) may be made. Such sample packages shall be packed for the Board under its generic label and sold to the distributing handlers at the price paid for them by the Board. Credit shall be based on the price a handler pays the Board for such packages and upon receipt by the Board of acceptable proof of distribution. Such sample packages may or may not be personalized with an individual handler's label. Credit applicable to the distribution of sample packages shall be subject to the following conditions:

(A) A handler may receive credit for 150 percent of the purchase

price of such packages against the creditable assessment obligation incurred on the first 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(B) A handler may receive credit for 100 percent of the purchase price of such packages against the creditable assessment obligation incurred on the second 4,000,000 redetermined kernel weight pounds received by him during a crop year.

(C) No credit shall be granted in excess of the creditable assessment obligation incurred on 8,000,000 redetermined kernel weight pounds received by a handler during a crop year.

(D) No credit shall be granted for sample packages distributed to market segments where almonds are already being sold. Handlers shall obtain approval from the Board prior to distribution to ensure that this condition is met.

(E) No credit shall be applicable to the distribution of sample packages in outlets where they will be used for resale.

(F) Handlers must place written orders for sample packages with the Board no later than February 1 of any crop year except to the extent that handlers use the deferment provision found in paragraph (b) of this section: *Provided*, That for the 1988-89 crop year, handlers must place written orders no later than March 15, 1989. Handlers must place written orders for sample packages with the Board no later than August 15 of any crop year to receive credit for up to 40 percent of their creditable assessment obligations when using the deferment provision pursuant to paragraph (b) of this section.

(G) Handlers must file claims with the Board in order to receive credit for the distribution of sample packages. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of distribution will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proof of performance. This proof shall consist of a signed statement from the organization to which sample packages were distributed, on that organization's letterhead, stating:

(1) The name and address of the handler from whom the packages were received;

(2) The date of receipt;

(3) The volume of packages received;

(4) How such packages will be used; and

(5) A statement that such packages will not be used for resale.

(ii) For promotion materials available from the Board and sold to handlers at the price paid for them by the Board. Credit shall be granted for the amount a handler pays the Board for such materials upon purchase. Such materials may or may not be personalized with the label of an individual handler.

(iii) For costs directly related to mail order promotion subject to the following conditions:

(A) Credit shall only be granted for the following expenditures:

(*1*) For the purchase of mailing lists to conduct mail order promotions.

(*2*) For the cost of envelopes and postage to mail promotional materials.

(B) Credit for mail order promotion shall be limited to a total of $25,000 or 25 percent of a handler's creditable assessment per crop year, whichever is greater.

(C) Handlers must file claims with the Board in order to receive credit for mail order promotion expenditures. Except as provided in paragraph (b) of this section, no credit shall be granted unless a preliminary claim is filed on or before July 15 of the succeeding crop year and a final claim is filed on or before October 15 of the succeeding crop year. Each preliminary claim must be filed on an ABC Form 31 (claim for advertising credit), stating that proof of performance will be submitted as expeditiously as possible, but no later than October 15. If this preliminary claim is not filed on or before July 15, there will be no consideration of the claim under any circumstances. Each final claim must be submitted on ABC Form 31 and accompanied by appropriate proofs of performance such as invoices or postal receipts.

(e) Credit shall be granted for payments made to the Board for use by the Board for generic marketing promotion including paid advertising subject to the following conditions:

(1) A handler may receive credit for 150 percent of a payment made to the Board against the creditable assessment obligation.

(2) When a handler elects to use this method of crediting for all or a portion of such handler's assessment obligation, the handler may use the extension provided for pursuant to paragraph (b) of this section for the handler's deferred advertising and promotion obligation.

(3) Handlers must file claims with the Board on ABC Form 31 in order to receive credit for payments made to the Board. No credit shall be granted unless a claim is filed on or before January 31 of the then current crop year: *Provided*, That for the 1988-89 crop year for claims not previously filed on or before January 31, 1989, a claim or supplementary claim must be filed with the Board on ABC Form 31 on or before March 31, 1989. Payments must be made as follows: One-fourth of total claim on or before January 31; one-fourth on or before March 31; one-fourth on or before May 31; and one-fourth on or before June 30 of the then current crop year: *Provided*, That for the 1988-89 crop year, payments not previously made on or before January 31, 1989, must be made as follows: One-third on or before March 31, 1989; one-third on or before May 31, 1989; and one-third on or before June 30, 1989. If the entire amount of the claim is not paid by June 30, or if a handler fails to meet any payment deadline of this paragraph, credit for payment shall revert to the 100 percent basis.

7 C.F.R. § 981.441 (1993).

I. Findings of Fact

A. The Almond Order and Its Promotion Program

1. The AMAA authorizes the creation of marketing orders to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce. The Secretary promulgated the Almond Order in 1950, pursuant to the AMAA. (15 Fed. Reg. 4272; 15 Fed. Reg. 3623 (1950).)

2. Evidence indicated that if current almond production levels continued, there would be a significant decrease in the price of almonds and high levels of production were predicted to continue. The Almond Order was promulgated to stabilize the almond industry. The goal of the Almond Order is to provide an adjustment of the supply of almonds to the trade demand, and as a result, increase grower returns. (15 Fed. Reg. 3623-24 (1950).)

3. The Almond Order contains provisions for advertising and promotion by

the Almond Board which administers the Almond Order and the regulations which implement the advertising and promotion program. (7 C.F.R. §§ 981.41, .441 (1994).) The Almond Board gives credit against "advertising assessments" to those handlers who engage in specified forms of branded advertising and brand promotion. (7 C.F.R. §§ 981.41, .441 (1994).) The purpose of both the Almond Board's generic advertising and promotion, which is paid for out of those "advertising assessments" actually collected from handlers, and the branded advertising and promotion, which the Almond Board encourages, through the credits, is to achieve the Almond Order's asserted goal. (7 C.F.R. § 981.41 (1994).)

4. There are two distinct Almond Board advertising and promotion programs referenced in this proceeding. The first program, the "creditable advertising" program, was in effect through and including the 1992-93 crop year and was essentially a program of creditable industry advertising with a small Almond Board generic advertising element. (7 C.F.R. §§ 981.41, .441 (1993).) The second program, the "credit-back" program, began with the 1993-94 crop year. The "credit-back" program is a large generic advertising, promotion, and public relations program operated by the Almond Board, with various efforts in both the domestic and export markets. These efforts included a television commercial (Tr. 2081-83), a public relations program (RX 255-256; Tr. 1205-06), an almond promotion program for foreign markets (Tr. 369-71, 2106-09, 2215-17), research on new product development (RX 259; Tr. 1301-02, 1311-12), and consumer and industry research (RX 243; Tr. 1313-23). The credit-back program allows handlers to receive partial credit back for many more forms of branded advertising and brand promotion than were allowed under the creditable program. (7 C.F.R. §§ 981.41, .441 (1994).)

5. The Almond Board seeks through its generic advertising and promotion activities to build demand through the changing of consumer preferences by providing information to manufacturers and end users about the essential features of almonds. (RX 248 at 2, RX 260 at 2.)

6. Increasing the demand for a product involves influencing consumer attitudes so that more of a product can be sold at the given price, the same amount can be sold at a higher price, or more of the product can be sold at a higher price. (RX 250 at 2-3, RX 251 at 2.) Expansion of demand benefits producers as a group because their revenues increase. (RX 248 at 12-13.)

7. The marketing mix available to firms and organizations marketing products and services includes advertising, promotion, publicity, and public relations. (RX 249 at 2; Tr. 817-18.)

8. Advertising is defined as paid broadcasting of a message in the television,

radio, or print media. It can also involve the providing of point-of-purchase materials to retailers. Promotion involves the placing of information oriented messages such as a product's nutritional aspects or suggestions for its preparation, in the various media.

9. Since advertising is an efficient way of reaching a large number of people, organizations that market products that are aimed directly to consumers spend considerable sums on advertising. (RX 251 at 2.)

10. Generic advertising is the cooperative effort among producers of a nearly homogenous product to disseminate information about the underlying general attributes of the product to existing and potential customers for the purpose of strengthening demand for the commodity. (RX 249 at 3-4, RX 260 at 1, RX 264 at 1-3.)

11. Branded advertising is the effort of an individual firm in the product category that emphasizes the particular attributes of its brand as compared to competing bands. (RX 260 at 1, RX 264 at 3.)

12. Brand and generic advertising can be complementary when they have mutually reinforcing effects on consumer choice. (RX 248 at 2, 4, RX 260 at 1.)

13. The *Law of One Price*, which states that, once cost differentials are excluded, every firm in the marketing channel receives the same price, applies to the almond industry. (RX 251 at 7; Tr. 687-88.) Because the *Law of One Price* applies in the almond industry, the benefits of an effective advertising program accrue to everyone who sells the commodity. (RX 251 at 7; Tr. 655, 664.)

14. The rationale for mandatory collection of advertising and promotion assessments is that everyone who benefits from advertising should share equitably in its cost and not be a "free rider." (RX 250 at 2, 6, RX 251 at 3-5, RX 254 at 2, RX 260 at 5; Tr. 983-84.) The mandatory collection of funds to support programs to benefit industries composed of many producers is essential for success of the program. (RX 254 at 2.) Voluntary programs, even when supported financially by an overwhelming majority of an industry, fail because of "free riders" who are able to enjoy the same benefits as those supporting the program. (RX 251 at 4, RX 254 at 2; Tr. 983-84.)

15. The phenomenon of tax shifting results in the incidence of a tax being ultimately shared with other entities in the marketing channel. (Tr. 690.) Tax shifting in a cooperative advertising program results in the greatest incidence of the cost of the program being borne by that side of the market that has the least elastic supply response. In the agriculture industry, producers have the least elastic supply response. (RX 248 at 4; Tr. 331, 690-94, 1538, 2461-67.)

16. All six agricultural economists called by Respondent as expert witnesses,

Dr. Ronald Ward, Dr. Henry Kinnucan, Dr. Richard Sexton, Dr. Jason Christian, Dr. Hoy Carman, and Dr. Olan Forker, are experienced researchers on the impact of advertising on commodities. (RX 248, 250, 251, 252, 254, 260; Tr. 618, 833, 921, 994, 1160, 1446.) Dr. Russell Winer and Dr. Margaret Campbell, professors of marketing, are experts in the area of advertising theory. (RX 249, 264; Tr. 775, 1731.) The agricultural economist called by Petitioners, Professor Michael K. Wohlgenant, is also an experienced researcher. (PJ 2; Tr. 1787.) Professor Scott Davis, who was called by Petitioners, is an expert in the area of marketing and advertising theory as well as economics. (PJ 1; Tr. 1983.)

17. The testimony of the agricultural economists called by Respondent and the empirical results from their studies on various agricultural commodities confirm that cooperative generic advertising and promotion can be a viable tool for building demand and ultimately increasing producer returns. (RX 248, RX 250-251, RX 254, RX 260.)

18. The Almond Board retained the firm of Hallberg, Schierson & Company to determine the effectiveness of the Almond Board's generic advertising program. (Tr. 327.) On January 28, 1991, Hallberg, Schireson & Company submitted *A Report of a Research Study of Domestic Almond Sales and Customers, Advertising and Public Relations Programs to Promote California Almonds* to the Almond Board. (RX 265.) The Hallberg, Schireson & Company report states that the "programs appear correctly targeted and well received", but "there is significant room for improvement by better differentiating almonds from other nuts." The Hallberg, Schireson & Company report concludes that the Almond Board should continue its public relations efforts aimed at institutional purchasers and shift current consumer public relations from a recipe-ingredient focus to consumer-directed messages based on a strong "differentiating positioning." (RX 265; Tr. 2087-88, 2235.)

19. Dr. Christian concluded a study on September 19, 1994, entitled *The Economic Effects of Advertising in the California Almond Industry* in which he found advertising expenditures in the past have had a significant impact on the demand for California almonds. Since creditable branded advertising constituted almost all advertising and Blue Diamond Growers, Inc., advertising constituted a large majority of the branded advertising during this time, Dr. Christian's study uses Blue Diamond advertising expenditures to measure the effectiveness of branded almond advertising. Dr. Christian found that for every dollar spent on Blue Diamond Growers, Inc., advertising, growers benefitted with $5 of increased returns. Advertising has contributed to higher prices received for each year's crop. Branded advertising has had a positive impact not just on the demand for the

branded product, but on the demand faced by the industry as a whole and leads to higher prices for all almonds. (RX 159 at 20-21.)

20. None of Dr. Christian's studies measured the effect of advertising after 1992, and the Almond Board's current advertising and promotional activity was not examined by Dr. Christian. (Tr. 1004.)

21. Petitioners are not prohibited or restrained by the AMAA, the Almond Order, or the Almond Board from advertising or promoting their own brands of almonds or communicating any other message to any audience.

22. The Almond Order provides that Petitioners may advertise their own brand of almonds and receive a credit against their assessments for their branded advertising. Neither the credit-back program nor the creditable program requires handlers to advertise, but rather, both programs give the handler the option to advertise and receive credit for promotional expenditures as provided in the Almond Order. While both the credit-back and creditable programs limit the type of promotion for which a handler may receive credit, neither the credit-back program nor the creditable program prohibits or restricts a handler from promoting or advertising almonds in any other way or from communicating any other message to any audience. (7 C.F.R. §§ 981.41, .441. (1993); 7 C.F.R. §§ 981.41, .441. (1994).)

23. The Almond Promotion Program does not include political or ideological views. Petitioners are not compelled by the AMAA, the Almond Order, or the Almond Board to endorse or finance any political or ideological views.

24. The Almond Board has not identified Petitioners in any of its promotional events, and the Almond Board's promotion program does not compel Petitioners to speak. Petitioners are not compelled by the AMAA, the Almond Order, or the Almond Board to engage in actual or symbolic speech.

25. The record reveals that the generic advertising conducted by the Almond Board in accordance with the Almond Order and the branded advertising conducted in accordance with the Almond Order are germane to the purposes of the Almond Order.

B. The Petitioners

Amaretto Orchards

1. Amaretto Orchards is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Amaretto Orchards' mailing address and principal place of business is [redacted], California [redacted]. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 3.)

3. Amaretto Orchards is a California general partnership which was formed in 1986. The partners in Amaretto Orchards are Bruce L. Beretta, David Beretta, Franco Beretta, Marco Beretta, Sandra Beretta, Norman Gilfenbain, Stuart Gilfenbain, and George Gill. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 3.)

4. The Almond Order's Promotion Plan requires Amaretto Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Amaretto Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Amaretto Orchards for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 27.)[16]

5. Amaretto Orchards became a handler of almonds during the 1986-87 crop year and handles between 1.1 million pounds of almonds and 1.8 million pounds of almonds each crop year. Approximately 70 per centum of Amaretto Orchards' almonds are exported. Amaretto Orchards has no retail brand, but sells brown almonds (almonds that are not manufactured) for use as an ingredient in other products, primarily cereals. (AO 1 ¶ 1; Tr. 1954-56.)

6. From 1986 through the 1992-93 crop year, when the creditable advertising program was in effect, Amaretto Orchards typically purchased ½-ounce packages of snack almonds from the Almond Board to give them to charities so that Amaretto Orchards could receive 150 per centum credit for those purchases pursuant to the Almond Order. (AO 1 ¶ 2.)

7. On a couple of occasions, Amaretto Orchards advertised its almonds pursuant to the Almond Order. However, Amaretto Orchards would not have engaged in this advertising but for the Almond Board's Promotion Program. (AO

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[16]Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 requested refunds of assessments by the Almond Board for advertising and promotion back to the 1980-81 crop year (Petition filed in 94 AMA Docket No. F&V 981-7). However, in their proposed conclusions, Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 only make claim for assessments back to the 1986-87 crop year. (Petitioners' Proposed Findings of Fact and Conclusions of Law at 49-52.) Further, Petitioners in the proceeding captioned 94 AMA Docket No. F&V 981-7 do not appeal the Chief ALJ's Conclusions of Law which only relate to crop years 1986-87 through 1994-95 (Initial Decision and Order at 69.)

1 ¶ 2.)

8. Amaretto Orchards believes that the best way to promote its almonds is by engaging in direct one-on-one salesmanship with buyers and customers; by bringing buyers to its plant and entertaining the buyers while visiting its plant; and by traveling to Italy to promote its almonds. (AO 1 ¶ 3.)

9. If Amaretto Orchards could retain for its own use the money it pays to the Almond Board for the advertising program, Amaretto Orchards would use the money to increase the quality control system at its facility in order to expand the number of potential buyers of its product. (AO 1 ¶ 3.)

Bal Nut, Inc.

1. Bal Nut, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Bal Nut, Inc.'s mailing address is [redacted], Pennsylvania [redacted]. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 1.)

3. Bal Nut, Inc.'s principal place of business is Valley Home, California. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 1.)

4. Bal Nut, Inc., is a corporation which was incorporated in the Commonwealth of Pennsylvania on June 1, 1989. Mr. Vito Balice is the president of Bal Nut, Inc., and Ms. Domicella Balice is the secretary and treasurer of Bal Nut, Inc. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 1.)

5. The Almond Order's Promotion Plan requires Bal Nut, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Bal Nut, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Bal Nut, Inc. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

6. Bal Nut, Inc., handles approximately 150,000 to 300,000 pounds of almonds each year. Approximately 80 per centum of its almonds are exported. (BN 1 ¶ 1; Tr. 263-67.)

7. Mr. Vito Balice believes that the best way to promote Bal Nut, Inc.'s product is to travel to various countries to meet buyers, engage in one-on-one sales

efforts with those buyers, and have follow-up phone calls with those buyers. Bal Nut, Inc., engages in these activities in an effort to assure buyers that Bal Nut, Inc., can supply the product the buyers require. (BN 1 ¶ 1.)

8. Since 1989, Bal Nut, Inc., has generally paid the Almond Board the advertising assessments and not engaged in creditable advertising or credit-back advertising. However, on one occasion, Bal Nut, Inc., did advertise almond butter on radio station WARD in Wilkes-Barre, Pennsylvania, but the advertisement, which cost about $900 to air, only sold one pound of almond butter. (BN 1 ¶ 1; Tr. 272.)

9. If Bal Nut, Inc., was not required to participate in the Almond Board's advertising program, Bal Nut, Inc., would use the money it would save to upgrade its equipment, install a bathroom at its warehouse, and fix a leaking roof. (BN 1 ¶ 2; Tr. 269.)

Beard's Quality Nut Company

1. Beard's Quality Nut Company is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Beard's Quality Nut Company's mailing address and principal place of business is [redacted], California [redacted]. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 2.)

3. Beard's Quality Nut Company is a sole proprietorship which was formed in 1969. Beard's Quality Nut Company is owned by Mr. Rodney Beard. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 2.)

4. The Almond Order's Promotion Plan requires Beard's Quality Nut Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Beard's Quality Nut Company seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Beard's Quality Nut Company for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 27.)[17]

5. Mr. Steven Beard is the manager of the almond division of Beard's Quality

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[17]See note 16.

Nut Company and was the chairman of the public relations and advertising committee for the Almond Board for the 2 years immediately preceding the date on which Mr. Steven Beard executed his November 3, 1994, written declaration, BQN 12. The public relations and advertising committee and the Almond Board consist of growers and handlers both of whom vote on Almond Board and public relation and advertising committee recommendations with respect to Almond Board expenditures for advertising and promotion. (BQN 12 ¶ 1.)

6. From 1986 to the date of Mr. Steven Beard's November 3, 1994, written declaration, BQN 12, Beard's Quality Nut Company spent its creditable advertising assessment dollars and its credit-back dollars to avoid paying that money to the Almond Board. (BQN 12 ¶ 2.)

7. Beard's Quality Nut Company has no store shelf almonds for snacks or baking. All of Beard's Quality Nut Company products are sold as whole brown almonds and are used as ingredients in other products. Beard's Quality Nut Company's almonds are marketed throughout the world, approximately 70 per centum of which are exported and 30 per centum of which are sold in the domestic market. (BQN 12 ¶ 2.)

8. Beard's Quality Nut Company has spent an enormous amount of time and money for which it cannot receive credit either under the creditable advertising rules or the credit-back rules. These expenditures include: (1) the costs associated with personal contact with many customers and direct mailing to those customers; (2) the cost of purchasing new facilities and equipment and improving existing facilities and equipment; (3) the costs associated with improving efficiency; and (4) the costs associated with improving the quality of Beard's Nut Company's product. (BQN 12 ¶ 3.)

9. If Beard's Quality Nut Company was not required to participate in the Almond Board's advertising program, Beard's Quality Nut Company would use the money it would save for trade publication advertisements, personal contact with buyers, promotional materials, quality line extensions at Beard's Quality Nut Company's facility in order to produce a product that would appeal even more to the industrial users and customers, Beard's Quality Nut Company sponsored seminars, and more travel to meet buyers. (BQN 12 ¶ 5.)

10. Beard's Quality Nut Company's credit-back advertising assessment, creditable advertising assessments, and administrative assessments for the 1989-90 crop year through the 1993-94 crop year are set forth in BQN 7-10.

Cal-Almond Inc.

1. Cal-Almond, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Cal-Almond, Inc.'s mailing address and principal place of business is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 1.)

3. Cal-Almond, Inc., is a corporation which was incorporated in the State of California on April 3, 1979. Mr. Cloid Francis Angle is the president of Cal-Almond, Inc., and Mr. Tyler Angle is the secretary and treasurer of Cal-Almond, Inc. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 1; Tr. 2164.)

4. The Almond Order's Promotion Plan requires Cal-Almond, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Cal-Almond, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Cal-Almond, Inc., for the 1987-88 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 26.)

5. Cal-Almond, Inc., sells approximately 65 per centum of the almonds it handles for export and approximately 35 per centum in the domestic market. Most almond handlers ship only brown almonds. Beginning in 1988, Cal-Almond, Inc., extensively increased its product lines to include manufactured almonds that are sliced, diced, and blanched. (CA 3 ¶ 3.)

6. In 1989, Cal-Almond, Inc., manufactured approximately 50 per centum of its almonds into specialty products which include blanched, sliced, diced, and super premium brown almonds. In the 1993-94 crop year, Cal-Almond, Inc., handled approximately 30 million pounds of almonds; approximately 80 per centum of these almonds were manufactured into specialty products. At the time of the hearing in this proceeding, Cal-Almond, Inc., anticipated handling approximately 40 million pounds of almonds during the 1994-95 crop year, approximately 80 per centum of which would be manufactured into specialty products. (CA 3 ¶ 3.)

7. Cal-Almond, Inc.'s manufactured items are used as ingredients in ice creams, cereals, bakery goods, candy bars, and other confectionery items. (CA 3 ¶ 5.)

8. Cal-Almond, Inc., at considerable expense, has so successfully developed the Cal-Almond label that many buyers and brokers, at the urging of an end user, have called Cal-Almond, Inc., requesting the Cal-Almond label because of its

assurance of quality, timeliness of shipment, and competitive price. (CA 3 ¶ 5.)

9. In 1988, Cal-Almond, Inc., expanded its facilities to house newly purchased blanching and cutting units. The cost of the newly purchased equipment was in excess of one million dollars. In addition, Cal-Almond, Inc., incurred the cost of propane tanks to heat the blanching water, plumbing, recycled water systems, and necessary county permits. (CA 3 ¶ 6.)

10. Since 1988, Cal-Almond, Inc., has expanded its roasting trade from pure oil roasting to dry roasting because several of Cal-Almond, Inc.'s buyers in the cereals, bakery, and candy bar trade desired dry roasted almonds; and in 1992, Cal-Almond, Inc., purchased dry roasting equipment for approximately $200,000. (CA 3 ¶ 6.)

11. Cal-Almond, Inc., has spent approximately $500,000 for additional equipment for blanching, slicing, and dicing to supply greater quality assurance and to meet customer specifications. In the summer of 1994, Cal-Almond, Inc., spent approximately $150,000 for the most modern dicing unit, again to meet buyer specifications. (CA 3 ¶ 6.)

12. In 1987 and 1988, Cal-Almond, Inc., spent $350,000 for additional cold storage warehousing so that Cal-Almond, Inc., would have the ability to market almonds throughout the crop year. (CA 3 ¶ 6.)

13. In the summer of 1994, Cal-Almond, Inc., spent one million dollars to improve and expand its shelling line, and at the time of the hearing in this proceeding, an additional warehouse was being built at a cost of $150,000. (CA 3 ¶ 6.)

14. In 1994, Cal-Almond, Inc., also installed a LMC pre-cleaning and cleaning line at a cost of $350,000. The LMC pre-cleaning and cleaning line was installed to meet major domestic and export buyer specifications. (CA 3 ¶ 7.)

15. During tours of Cal-Almond, Inc.'s facilities, visiting buyers, brokers, and customers suggested added safeguards and extra "cleanliness" developments, stating that they would be interested in purchasing more products from Cal-Almond, Inc., if it was able to make the suggested changes. Cal-Almond, Inc., complied with these requests. (CA 3 ¶ 7.)

16. As a result of a buyer request, Cal-Almond, Inc., put in new flooring in one of its buildings for approximately $75,000, and it expanded the floor space of its roasting operation in order to allow the loading and unloading of almonds without exposing the almonds to the elements outside. In order to meet further buyer specifications, Cal-Almond, Inc., added eight electronic sorting machines at a cost of approximately $40,000 per machine to increase the quality of its product. (CA 3 ¶ 7.) Cal-Almond, Inc., has upgraded its computer systems at considerable

expense to accommodate customer shipping and label making. (CA 3 ¶ 8.)

17. Since being employed by Cal-Almond, Inc., in October 1988, Mr. Bill Grant Dryden, the Quality Assurance and Production Manager, has spent approximately 30 per centum of his time with buyers and customers. He has conducted tours of Cal-Almond, Inc.'s facilities for buyers and customers; reviewed buyer specifications for products; and made adjustments for purchasers in order to comply with their specifications. When customers arrive at Cal-Almond, Inc., the company entertains them. The customers are flown in Cal-Almond, Inc.'s airplanes to Yosemite National Park, taken to breakfast, lunch, and dinner, and otherwise fully hosted at Cal-Almond, Inc.'s expense. (CA 3 ¶ 8.)

18. At least once a year, Mr. Dryden and Mr. Tyler Angle travel to Europe and other places in order to meet with customers, buyers, and brokers, and Cal-Almond, Inc., and Mr. Dryden have found that these visits are particularly valuable in promoting the Cal-Almond, Inc., product. (CA 3 ¶ 8.)

19. Mr. Dryden spends considerable time on the telephone with buyers and customers to promote Cal-Almond, Inc.'s product, listen to the concerns of buyers and customers, and provide assurances that Cal-Almond, Inc., can continue to meet buyer specifications. (CA 3 ¶ 8.) There are several Cal-Almond, Inc., employees who are constantly on the telephone with buyers and customers or meeting with buyers and customers to increase almond sales. (CA 3 ¶ 13.) These contacts are extremely important to Cal-Almond, Inc.'s promotion of its almonds. (CA 3 ¶ 8.) Mr. Dryden has worked with customers to develop new products and new manufacturing techniques in order to provide the buyers and customers with even more alternatives for almonds. (CA 3 ¶ 9.)

20. Historically, foreign and domestic buyers of almonds would buy almonds in their brown natural state, and those buyers and customers would blanch, slice, dice, and otherwise manufacture the almonds for resale or use as ingredient products. By virtue of Cal-Almond, Inc.'s quality control efforts and equipment and its salesmanship, Cal-Almond, Inc., now provides manufacturing services, which have increased Cal-Almond, Inc.'s profits. (CA 3 ¶ 9.)

21. Buyers have learned as a result of Cal-Almond, Inc.'s special expertise, quality control, and equipment, that Cal-Almond, Inc., using its own facilities and machinery, can provide those buyers with a better product than the buyers can produce with their own manufacturing equipment. Cal-Almond, Inc., has expended much time and money to convince buyers and customers to utilize Cal-Almond, Inc.'s services, and as a result, Cal-Almond, Inc., has increased the tonnage that it manufactures from approximately 50 per centum of Cal-Almond, Inc.'s sales in 1989 to approximately 80 per centum of Cal-Almond, Inc.'s sales in

1994. (CA 3 ¶ 9.) Cal-Almond, Inc., runs its blanching operation 365 days a year, 24 hours a day, to keep up with the demand for Cal-Almond, Inc.'s blanched products. (Tr. 2171-72.)

22. Cal-Almond, Inc., pays the Almond Board advertising assessments between $400,000 and $600,000 per year. (CA 3 ¶ 12.) For the 1992-93 crop year, Cal-Almond, Inc.'s creditable advertising assessment was $366,431.83. (CA 2.) Cal-Almond Inc.'s credit-back advertising assessment for the 1993-94 crop year was $288,440.30. (CA 1.) None of Cal-Almond, Inc.'s expenditures for equipment, product enhancement, or personal selling to the customers is approved for credit under the advertising provisions of the Almond Order. (CA 3 ¶ 9.)

23. Cal-Almond, Inc., has developed an almond flour, which the Almond Board never advertises. Cal-Almond, Inc., developed its own buyers for almond flour and has developed a sizeable market for almond flour. (Tr. 2169-70.)

24. If the Almond Order's Promotion Program did not exist, Cal-Almond, Inc., would continue to promote its product in the method and manner described in Findings of Fact Nos. 58-74, but would have more money for its own promotion. (CA 3 ¶ 12; Tr. 2184-85.)

25. Mr. Cloid Angle, who at the time of the hearing in this proceeding was 59 years old, has been a grower of almonds all of his life and has been an almond handler for 20 years. (Tr. 2164-66.) Mr. Cloid Angle believes that Cal-Almond, Inc., was able to grow quickly because it kept its growers happy and because of its personal service to its buyers. (Tr. 2167-68.)

Central Valley Grower Packing

1. Central Valley Grower Packing is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (CVG 7 ¶ 1.)

2. Central Valley Grower Packing's mailing address and principal place of business is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 3.)

3. Central Valley Grower Packing is a sole proprietorship, and Mr. Robert W. Christian is the sole owner of Central Valley Grower Packing. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 3; CVG 7 ¶ 1.)

4. The Almond Order's Promotion Plan requires Central Valley Grower Packing to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Board. Central Valley Grower Packing seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Central Valley Grower Packing for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

5. Central Valley Grower Packing has no retail store shelf almonds, but sells its almonds for use as ingredients in other products. (CVG 7 ¶ 2.) More than 90 per centum of Central Valley Grower Packing's almond production during the 1986-87 crop year through the 1992-93 crop year was exported. During the 1986-87 crop year through the 1992-93 crop year, the Almond Board had no export promotional program, only a domestic promotional program. (CVG 7 ¶ 2.)

6. Central Valley Grower Packing has found that the best way to sell its almonds to its foreign buyers is to provide personalized service and meet the buyers' quality requirements. (CVG 7 ¶ 2.)

7. Central Valley Grower Packing paid the advertising assessments to the Almond Board in order to receive the 150 per centum credit. (CVG 7 ¶ 2.) Exhibits CVG 1 through CVG 6 are the Almond Board Assessment Notices to Central Valley Grower Packing showing the number of pounds of almonds handled by Central Valley Grower Packing and the advertising assessments for the 1986-87 crop year through the 1992-93 crop year. (CVG 1-6, 7 ¶ 1.)

8. If Central Valley Grower Packing did not have to pay advertising assessments to the Almond Board for the generic almond promotion program, Central Valley Grower Packing would have used the money to further promote its product in the export market, spent more money on product research and development in an attempt to expand Central Valley Grower Packing's market, and paid growers a higher return. (CVG 7 ¶ 2.)

Del Rio Nut Company

1. Del Rio Nut Company is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (DRN 3 at 2.)

2. Del Rio Nut Company's mailing address is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 1.)

3. Del Rio Nut Company's principal place of business is Livingston,

California. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 1.)

4. Del Rio Nut Company was incorporated on December 3, 1987. Mr. David J. Arakelian is the president and chief executive officer of Del Rio Nut Company and Ms. Diane Arakelian is the secretary of Del Rio Nut Company. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 1; DRN 3 at 2.)

5. The Almond Order's Promotion Plan requires Del Rio Nut Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Del Rio Nut Company seeks to be relieved from any obligation to pay for any promotional or marketing activities undertaken by the Almond Board. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 7.)

6. Del Rio Nut Company has been a handler of almonds since 1987. The principal markets for Del Rio Nut Company's almonds are food manufacturers and export organizations. Del Rio Nut Company has no retail sales. (DRN 3 at 2.)

7. Del Rio Nut Company's creditable advertising assessment for crop years 1987-88 through 1992-93 are stated in DRN 3 at 2-3. For the 1993-94 crop year, Del Rio Nut Company's advertising assessment was $42,168.05. (DRN 3 at 4.)

8. Mr. Arakelian believes that the most useful form of advertising Del Rio Nut Company's product is direct contact with buyers. (DRN at 3.) Mr. Arakelian promotes Del Rio Nut Company's product by informing customers of the positive qualities of the Del Rio Nut Company and its product. Mr. Arakelian personally visits customers and has customers visit the Del Rio Nut Company's facility. On one occasion Mr. Arakelian flew 4,000 miles to visit a company which was involved in importing associated products, but was not at that point buying almonds. (Tr. 201-02.)

Frazier Nut Farms, Inc.

1. Frazier Nut Farms, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Frazier Nut Farms, Inc.'s mailing address and principal place of business is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 3.)

3. Frazier Nut Farms, Inc., is a corporation which was incorporated in the State of California on March 30, 1981. Mr. Jim Frazier, Sr., was, at the time

Frazier Nut Farms, Inc., filed its petition in the proceeding captioned 94 AMA Docket No. F&V 981-1, the president of Frazier Nut Farms, Inc.; Mr. Jim Frazier, Jr., was, at the time Frazier Nut Farms, Inc., filed its petition in the proceeding captioned 94 AMA Docket No. F&V 981-1, the vice president of Frazier Nut Farms, Inc.; and Ms. Heidi Frazier Slacks is the secretary and treasurer of Frazier Nut Farms, Inc. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(C); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 3.) Mr. Jim Frazier, Jr., became the president of Frazier Nut Farms, Inc., sometime between January 25, 1994, and November 4, 1994. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(C); FN 3 ¶ 1.)

4. The Almond Order's Promotion Plan requires Frazier Nut Farms, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Frazier Nut Farms, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Frazier Nut Farms, Inc., for the 1987-88 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 26.)

5. Frazier Nut Farms, Inc., handled 1,290,912 pounds of almonds in the 1992-93 crop year and 870,010 pounds of almonds in the 1993-94 crop year. (FN 1, FN 2.)

6. Frazier Nut Farms, Inc., sells brown almonds and most of its almonds are exported. Frazier Nut Farms, Inc., finds that the best way to promote its product is to meet with buyers, have one-on-one sales meetings with buyers, and make plant improvements. (FN 3 ¶ 2.) Mr. Jim Frazier, Jr., believes that the Frazier name itself generates the interest in Frazier Nut Farms, Inc.'s product. (Tr. 214-15.)

7. Frazier Nut Farms, Inc., is a much larger walnut processor than it is an almond processor, but many of Frazier Nut Farms, Inc.'s buyers buy both walnuts and almonds. Under the Almond Board's 1992-93 creditable advertising program, Frazier Nut Farms, Inc., could not obtain credit for promoting almonds along with "competing nuts," which would include walnuts. (FN 3 ¶ 2.)

8. Under the new credit-back rules, which restrict credits to two-thirds of the amount spent, a handler can receive credit for the promotion of both walnuts and almonds, but the amount of the credit reflects the portion of the product weight represented by almonds. (FN 3 ¶ 2.)

9. If there were no Almond Board advertising assessments, Frazier Nut Farms, Inc., would increase the quality control of its product, expand the types of products that Frazier Nut Farms, Inc., processes, and increase Frazier Nut Farms,

Inc.'s customer base. (FN 3 ¶ 2.)

Gold Hills Nut Company, Inc.

1. Gold Hills Nut Company, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Gold Hills Nut Company, Inc.'s mailing address is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 2.)

3. Gold Hills Nut Company, Inc.'s principal place of business is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 2.)

4. Gold Hills Nut Company, Inc., is a corporation which was incorporated in the State of California on October 21, 1986. Mr. Bill Phipps is the president and chief financial officer of Gold Hills Nut Company, Inc., and Mr. Mike Stiles is the secretary of Gold Hills Nut Company, Inc. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 1(B); Answer filed in 94 AMA Docket No. F&V 981-1 ¶ 2; GH 3 ¶ 1.)

5. The Almond Order's Promotion Plan requires Gold Hills Nut Company, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Gold Hills Nut Company, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Gold Hills Nut Company, Inc., for the 1987-88 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-1 ¶ 26.)

6. Gold Hills Nut Company, Inc., began handling almonds in 1986. (GH 3 ¶ 1.) For the 1992-93 crop year, Gold Hills Nut Company, Inc., handled 5,632,793 pounds of almonds, all of which were sold for export. (GH 1, GH 3 ¶ 3.) For the 1993-94 crop year, Gold Hills Nut Company, Inc., handled 9,997,462 pounds of almonds, all of which were sold for export. (GH 2, GH 3 ¶ 3.)

7. Approximately 20 per centum of the crop handled by Gold Hills Nut Company, Inc., is owned and grown by Mr. Phipps. (GH 3 ¶ 3.)

8. For the 1992-93 crop year, almost all of Gold Hills Nut Company, Inc.'s creditable advertising assessment was spent buying ½-ounce packages of almonds from the Almond Board to be distributed to schools and churches. Gold Hills Nut Company, Inc., bought them in order to receive the credit under the Almond Order

advertising regulations. (GH 3 ¶ 4.)

9. At the time Mr. Phipps executed his November 3, 1994, written declaration, GH 3, Mr. Phipps expected that Gold Hills Nut Company, Inc., would handle approximately 15 million pounds of almonds during the 1994-95 crop year. In 1994, Gold Hills Nut Company, Inc., spent approximately 1½ million dollars on equipment specifically designed to provide high quality manufactured items to compete in the export market with Spanish manufactured products. At the time Mr. Phipps executed his November 3, 1994, written declaration, GH 3, Mr. Phipps expected that Gold Hills Nut Company, Inc., would spend substantial sums of money targeting those buyers who had previously bought Spanish manufactured products. Neither Gold Hills Nut Company, Inc.'s equipment purchases nor Gold Hills Nut Company, Inc.'s expenditures to target buyers may be credited against assessments under the Almond Board's advertising program. (GH 3 ¶ 5.)

10. Over the last 3 years, Gold Hills Nut Company, Inc., has, at its cost, entertained a number of customers who have come to the Gold Hills Nut Company, Inc.'s facility. Gold Hills Nut Company, Inc., entertains these customers as part of its effort to prove to those customers that Gold Hills Nut Company, Inc., can provide the best quality product possible with timely shipments and excellent service. None of these entertainment expenditures may be credited against assessments under the advertising provisions of the Almond Order. (GH 3 ¶ 6.)

11. Gold Hills Nut Company, Inc., not only contacts buyers that already buy almonds, but also has contacted potential customers that have not previously bought almonds. (Tr. 1916-18.)

12. Gold Hills Nut Company, Inc., has slightly discounted its price to buyers overseas who advertise products which are made from Gold Hills Nut Company, Inc.'s almonds. Gold Hills Nut Company, Inc., believes this to be a good investment because the buyer will buy more of Gold Hills Nut Company, Inc.'s product when consumption increases as a result of the buyers' advertising program, but the discount provided by Gold Hills Nut Company, Inc., may not be credited against assessments under the advertising provisions of the Almond Order. (Tr. 1929-31.)

13. The new credit-back program has expanded the ways in which a handler may receive credit for market promotion activities, but Gold Hills Nut Company, Inc., believes the new credit-back regulations to be even more burdensome than the creditable regulations in that a handler can receive only two-thirds credit for its expenditures for qualified promotional activities under the credit-back regulations. (GH 3 ¶ 7.)

14. Gold Hills Nut Company, Inc., believes that it knows best how to market

its product; that the competitive returns that Gold Hills Nut Company, Inc., has paid its growers have not been caused by any Almond Board advertising program; and that if the Almond Board's advertising program did not exist, Gold Hills Nut Company, Inc., could make more money and could pay its growers more money. (GH 3 ¶ 7.)

Hocker Nut Farm

1. Hocker Nut Farm is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (HNF 6 ¶ 1.)

2. Hocker Nut Farm's mailing address and principal place of business is [redacted] California [redacted] Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(D); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 4).

3. Hocker Nut Farm is a California partnership, and the partners are Doyle Hocker and Steve Hocker. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(D); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 4; HNF 6 ¶ 1.)

4. The Almond Order's Promotion Plan requires Hocker Nut Farm to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Hocker Nut Farm seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Hocker Nut Farm for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

5. Hocker Nut Farm has been a handler of almonds from and including the 1986-87 through the 1993-94 crop years. During the period 1986 through 1993, Hocker Nut Farm handled the pounds of almonds listed in paragraph 1 of Mr. Steve Hocker's November 3, 1994, written declaration, HNF 6. (HNF 6 ¶ 1.)

6. Approximately 95 per centum of Hocker Nut Farm's almonds are exported, and Hocker Nut Farm only sells brown almonds, not manufactured almonds. However, Hocker Nut Farm custom manufactures products for other handlers. (HNF 6 ¶ 1.)

7. Hocker Nut Farm has found that the best way to promote its product is salesmanship and one-on-one conversations with its buyers. (HNF 6 ¶ 2.) Hocker Nut Farm sells its almonds through personal contacts and has communicated with manufacturers that do not currently use almonds in an effort to convince them to use almonds in their products. (Tr. 254-55.)

8. During the time the creditable advertising rules were in effect, Hocker Nut

Farm would advertise that its country store sells almonds. Further, Hocker Nut Farm advertised its product in the newspaper and on the radio, but with very limited success. (Tr. 256.) However, once the Almond Board approved receiving 150 per centum credit for early payments of the advertising assessments, Hocker Nut Farm paid the Almond Board directly, virtually every year, in order to receive the 150 per centum credit. (HNF 6 ¶ 2.)

9. If Hocker Nut Farm was not required to participate in the Almond Board's advertising program, Hocker Nut Farm would use the money that it saves to increase the efficiency and improve the quality of Hocker Nut Farm's equipment. (HNF 6 ¶ 2.)

Jardine Organic Ranch

1. Jardine Organic Ranch is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Jardine Organic Ranch's mailing address and principal place of business is [redacted] California. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(E); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5.)

3. Jardine Organic Ranch is a sole proprietorship, and Mr. Duane Jardine is the sole owner of Jardine Organic Ranch. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(E); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5.)

4. The Almond Order's Promotion Plan requires Jardine Organic Ranch to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Jardine Organic Ranch seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Jardine Organic Ranch for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

5. From crop year 1986-87 through the date on which Mr. Duane Jardine executed his November 3, 1994, written declaration, Jardine Organic Ranch has marketed only organically grown almonds, and organically grown almonds account for less than 1 per centum of all of the almonds grown in California. (JOR 1 ¶ 1.)

6. Jardine Organic Ranch handles between 40,000 and 120,000 pounds of almonds per year, and Jardine Organic Ranch is assessed between $1,000 and $3,500 per year by the Almond Board for the generic advertising program. (JOR

1 ¶ 1.)

7. All of Jardine Organic Ranch's buyers insist upon organically grown and processed almonds; and therefore, Jardine Organic Ranch's almonds do not compete with 99 per centum of the almonds grown in California. (JOR 1 ¶ 1.)

8. Jardine Organic Ranch's buyers are willing to pay a premium price for organically grown almonds. The Almond Board's promotional program has never promoted or advertised organically grown almonds, and Jardine Organic Ranch does not want to be associated with any organization that does not promote organically grown products. (JOR 1 ¶ 1.)

9. Jardine Organic Ranch markets its almonds by contacting buyers by telephone and meeting potential buyers at Jardine Organic Ranch's booths at food expositions. Other buyers learn of Jardine Organic Ranch's product through promotional work done by the Farm Verified Organic Program, an organization which is not connected to the Almond Board and which promotes certified organic products. (JOR 1 ¶ 2.) On several occasions, Jardine Organic Ranch has redesigned boxes and packaging using different labeling and sizes to accommodate customers, but Jardine Organic Ranch received no credit under the advertising provisions of the Almond Order for expenses connected with these efforts. (JOR 1 ¶ 2.) On at least two occasions since the 1986-87 crop year, Jardine Organic Ranch has spent money bringing customers to Jardine Organic Ranch's premises, but Jardine Organic Ranch does not receive credit for the cost of funding these visits under the advertising provisions of the Almond Order. (JOR 1 ¶ 2.)

10. Jardine Organic Ranch has received credit for billboard advertising in California and is eligible for credit-back on its participation at food trade shows, but Jardine Organic Ranch is not eligible for credit against assessments under the Almond Order for any of the other methods by which Jardine Organic Ranch promotes its product. (JOR 1 ¶ 3; Tr. 288-89.)

11. Jardine Organic Ranch has been a long-time critic of the generic advertising program under the Almond Order. (JOR 1 ¶ 5.)

Monte Cristo Packing Company

1. Monte Cristo Packing Company is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Monte Cristo Packing Company's mailing address is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 1.)

3. Monte Cristo Packing Company's principal place of business is in Livingston, California. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 1.)

4. Theron Shamgochian, Inc., d/b/a Monte Cristo Packing Company, is a corporation which was incorporated in the State of California on July 25, 1979. Mr. Theron Shamgochian is the president of Monte Cristo Packing Company and Mr. William F. Fleisig is the secretary of Monte Cristo Packing Company. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 1(A); Answer filed in 94 AMA Docket No. F&V 981-7 ¶ 1.)

5. The Almond Order's Promotion Plan requires Monte Cristo Packing Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Monte Cristo Packing Company seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Monte Cristo Packing Company for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-7 ¶ 27.)[18]

6. Monte Cristo Packing Company sells all of its almonds for use as an ingredient in other products. Monte Cristo Packing Company sells a substantial amount of its almonds in Japan, Hong Kong, Korea, Macao, and Mexico. (MC 8 ¶¶ 3, 4.)

7. The Almond Board does not advertise in Mexico, and Monte Cristo Packing Company incurred costs to enter the Mexican market. (MC 8 ¶ 4.) Mr. Shamgochian, his son, and other representatives of Monte Cristo Packing Company frequently travel to Europe, Russia, Japan, and Korea to meet with potential customers. (MC 8 ¶¶ 5, 6.) Monte Cristo Packing Company entertains clients by: (1) hosting a golf tournament in Japan; (2) hosting an annual golf tournament and dinner in the United States for the entire almond industry, which includes growers, packers, brokers, exporters, importers, candy industry representatives, and foreign users; (3) supplying private airplanes, limousines, and automobiles to visiting almond buyers and paying the cost of their stay in California; and (4) providing vacation stays for brokers, importers, and users. (MC 8 ¶¶ 6-8.) Monte Cristo Packing Company has spent over $2 million in the last 10 years on plant improvements so that Monte Cristo Packing Company could be certified by all major domestic candy manufacturers, including M&M Mars, Hershey Chocolates, Sees Candies, Russell Stover, and Banner Candy. (MC 8 ¶ 12.) Monte Cristo

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[18]See note 16.

Packing Company did not receive credit against advertising assessments under the Almond Order for any of the expenses related to entering the Mexican market, travel, entertainment, and capital improvements.

8. If the Almond Order's Promotion Program were discontinued, Monte Cristo Packing Company would continue to promote its product. (MC 8 ¶ 14.)

9. Monte Cristo Packing Company's creditable advertising assessments for the 1986-87 crop year through the 1988-89 crop year and the 1990-91 crop year through the 1992-93 crop year are set forth in MC 1-6. Monte Cristo Packing Company did not handle almonds in the 1989-90 crop year. Monte Cristo Packing Company's credit-back advertising assessment for the 1993-94 crop year is set forth in MC 7.

Monte Vista Farming Company

1. Monte Vista Farming Company is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (DRN 4 at 2.)

2. Monte Vista Farming Company's mailing address is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 2.)

3. Monte Vista Farming Company's principal place of business is Denair, California. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 2.)

4. Monte Vista Farming Company is a sole proprietorship owned by James Crecelius. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 2; DRN 4 at 2.)

5. The Almond Order's Promotion Plan requires Monte Vista Farming Company to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Monte Vista Farming Company seeks to be relieved from any obligation to pay for any promotional or marketing activities undertaken by the Almond Board. (Petition filed in 94 AMA Docket No. F&V 981-3 ¶ 7.)

6. Monte Vista Farming Company has been a handler of California almonds since 1985. The number of pounds of almonds handled by Monte Vista Farming Company during each crop year from crop year 1987-88 through crop year 1992-93 is set forth in DRN 4 at 2-3.

7. Monte Vista Farming Company's almonds are sold to food manufacturers and export organizations and have never been sold in the retail market. (DRN 4 at 2.)

8. Monte Vista Farming Company sells almonds by establishing and

maintaining personal relationships with buyers, maintaining name recognition, and offering almonds for sale at a reasonable price. (DRN 4 at 3; Tr. 185-86.)

9. Monte Vista Farming Company's advertising assessment for the 1993-94 crop year is $65,561.87, which includes $.60 per pound that Mr. Crecelius estimates is the portion of the administrative and research assessment which was used for advertising. (DRN 4 at 4.)

Rotteveel Orchards

1. Rotteveel Orchards is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981). (RO 9 ¶ 1.)

2. Rotteveel Orchards' mailing address is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(F); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5.)

3. Rotteveel Orchards' principal place of business is [redacted] California. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(F); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5.)

4. Rotteveel Orchards is a California partnership, and the partners are Neal Rotteveel and John Rotteveel. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 1(F); Answer filed in 94 AMA Docket No. F&V 981-4 ¶ 5; RO 9 ¶ 9.)

5. The Almond Order's Promotion Plan requires Rotteveel Orchards to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Rotteveel Orchards seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Rotteveel Orchards for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-4 ¶ 29.)

6. Rotteveel Orchards grows and markets almonds and has been an almond handler since 1986. (RO 9 ¶ 1.)

7. Rotteveel Orchards' advertising assessments for the 1987-88 through 1993-94 crop years are set forth in RO 1 through RO 8 and RO 10. Rotteveel Orchards does not have the assessment notice for the 1986-87 crop year. (Rotteveel RO 9 ¶ 1.)

8. Rotteveel Orchards is a small handler of almonds and exports 80 per centum of its almonds, primarily to the Netherlands. (RO 9 ¶ 1.)

9. Rotteveel Orchards promotes its product to buyers by bringing the buyers to Rotteveel Orchards' facilities. Messrs. John and Neal Rotteveel have also

traveled to Europe and Latin America to meet with prospective buyers and established buyers. (RO 9 ¶ 1.) Because the Rotteveels are from the Netherlands, Rotteveel Orchards has a great market there. The buyers from the Netherlands are impressed with the quality of product that Rotteveel Orchards can ship to them and the Rotteveels' ability to directly communicate with them. Providing a quality product, traveling, and communicating directly with buyers costs money, but Rotteveel Orchards receives no credit for these costs under the advertising provisions of the Almond Order. (RO 9 ¶¶ 1, 3.)

10. Generally, Rotteveel Orchards paid advertising assessments directly to the Almond Board in order to earn the 150 per centum credit available under the Almond Order. Occasionally, Rotteveel Orchards advertised its own product to obtain credit pursuant to the advertising provisions in the Almond Order. (RO 9 ¶ 2.) Several years prior to the date on which John Rotteveel executed his November 14, 1994, written declaration, RO 9, Rotteveel Orchards ran a television advertisement promoting its almonds. (RO 9 ¶ 1.)

11. If Rotteveel Orchards did not have to pay Almond Board assessments and did not spend money on creditable or credit-back advertising, Rotteveel Orchards would use the money to increase its market by engaging in more direct contact with existing and prospective customers (RO 9 ¶ 1), increasing its processing lines in order to provide more buyers with the quality and packaging that they require (RO 9 ¶ 1), and purchasing new lines of equipment to provide buyers with specialty almond products. (Tr. 467-68.)

Treehouse Farms, Inc.

1. Treehouse Farms, Inc., is a handler, as defined in section 981.13 of the Almond Order (7 C.F.R. § 981.13 (1994)), subject to regulation under the Almond Order (7 C.F.R. pt. 981).

2. Treehouse Farms, Inc.'s principal place of business is [redacted] California [redacted] (Petition filed in 94 AMA Docket No. F&V 981-5 ¶ 2; Answer filed in 94 AMA Docket No. F&V 981-5 ¶ 2.)

3. Treehouse Farms, Inc., is a corporation duly authorized under the laws of the State of California. (Petition filed in 94 AMA Docket No. F&V 981-5 ¶ 3; Answer filed in 94 AMA Docket No. F&V 981-5 ¶ 3.) Mr. David James Fitzgerald is the president of Treehouse Farms, Inc.; Mr. Richard Atkinson is the secretary of Treehouse Farms, Inc.; and Mr. David Morgan is the treasurer of Treehouse Farms,

Inc. (Petition filed in 94 AMA Docket No. F&V 981-5 ¶ 4; Answer filed in 94 AMA Docket No. F&V 981-5 ¶ 4; Tr. 71.)

4. The Almond Order's Promotion Plan requires Treehouse Farms, Inc., to pay advertising assessments for the generic advertising and promotion of almonds by the Almond Board, which may be avoided by engaging in branded advertising and promotion activities, as specified in the Almond Order. Treehouse Farms, Inc., seeks to have the Almond Order's Promotion Plan and implementing regulations declared unlawful as they applied to Treehouse Farms, Inc., for the 1986-87 crop year and subsequent crop years. (Petition filed in 94 AMA Docket No. F&V 981-5 ¶ 12.)

5. Treehouse Farms, Inc., is a mid-sized almond handler that sells virtually all of its almonds for use as ingredients in other products. Treehouse Farms, Inc., does not sell any retail products. Treehouse Farms, Inc.'s sales are effectuated through almond brokers to manufacturers of products that use almonds as ingredients. (TREE 9 ¶ 2.)

6. Approximately 80 per centum of Treehouse Farms, Inc.'s almonds are sold into the foreign market. Over several years immediately preceding the date on which Mr. Fitzgerald executed his November 3, 1994, written declaration (TREE 9), Treehouse Farms, Inc.'s foreign sales have risen dramatically, whereas its domestic sales have risen only gradually. (TREE 5, TREE 9 ¶ 3.)

7. Treehouse Farms, Inc., opposes the Almond Board's generic advertising program. (TREE 9 ¶ 4.) Mr. Fitzgerald believes that a fair price, efforts to contact customers, visits to potential customers at their facilities, visits by potential customers to Treehouse Farms, Inc.'s facilities, and creation of new and improved products by investing in new and improved technologies and quality control sells almonds for Treehouse Farms, Inc. (TREE 9 ¶ 4, TREE 10 ¶ 2.)

8. Treehouse Farms, Inc., conducts a limited amount of its own advertising for name recognition purposes only. Treehouse Farms, Inc.'s advertisements have appeared in three magazines, *The Clipper*, *The Cracker*, and *Nut Grower*. (TREE 1-4, TREE 9 ¶ 7; Tr. 113.)

9. Treehouse Farms, Inc., has developed a new product that is a slivered almond that is exported to Japan for use in a dried fish product. Treehouse Farms, Inc., spent its own funds to develop this market and Treehouse Farms, Inc.'s effort has resulted in the sale of more almonds. (Tr. 116-17.)

10. Treehouse Farms, Inc., does not consult with the Almond Board or any public relations or advertising committee or with its growers as to how Treehouse Farms, Inc., should market its almonds. (Tr. 125.)

11. The amount of advertising assessment Treehouse Farms, Inc., has paid to

the Almond Board for the 1986-87 crop year and the 1988-89 through the 1993-94 crop years are contained in TREE 6 and TREE 8. (TREE 9 ¶ 8.)

C. Blue Diamond Growers, Inc.

1. Blue Diamond Growers, Inc., is a grower-owned cooperative in the almond industry which at the time of the hearing in this proceeding had approximately 5,000 grower members. (Tr. 298.) Respondent has estimated that Blue Diamond Growers, Inc., represented well over 60 per centum of the industry from 1960 through 1980, and after 1980, represented over 50 per centum of the industry through the 1990-91 crop year. (Tr. 1593.) Blue Diamond Growers, Inc., sells almonds in approximately 96 countries. (Tr. 298.) Domestically, Blue Diamond Growers, Inc., sells almonds to be used as ingredients in other products and sells its own retail line of store shelf snack almonds. (Tr. 298-99.) Approximately 90 per centum of all almonds sold in the domestic retail trade, either as snacks or for home cooking use, are sold by Blue Diamond Growers, Inc. (Tr. 343.) The retail line of almonds, which includes snack almonds, almonds that a consumer would buy for baking purposes, and bulk almonds sold to the produce departments of grocery chains, makes up only 20 to 30 per centum of all almonds sold domestically or 10 to 15 per centum of all almonds sold worldwide. (Tr. 342-43.) Blue Diamond Growers, Inc., controls close to 90 per centum of that retail almond market. (Tr. 343.)

2. Blue Diamond Growers, Inc.'s primary competition for the snack almond trade is from companies not regulated under the marketing order, such as Fishers and Planters. Blue Diamond Growers, Inc.'s primary competition for the cooking almond trade is more likely to be from other handlers regulated under the marketing order. (Tr. 343-44.)

3. The percentage of the domestic sales that go to retail markets has not increased over the last 5 years. A premium price is paid for retail almonds as compared to almonds for use as an ingredient in other products. (Tr. 344.)

4. From the 1980-81 crop year through the 1986-87 crop year, the Almond Board spent between $87,000 and $373,000 per year on generic advertising, promotion, and public relations related to almonds. (PJ 13.) From the 1980-81 crop year through the 1986-87 crop year, Blue Diamond Growers, Inc., spent between $5,100,000 and $11,000,000 per year on creditable advertising. (PJ 10.) During the 1987-88 through the 1990-91 crop years, the total expenditure by the Almond Board for generic advertising, promotion, and public relations ranged between $840,000 and $1,400,000 per year, whereas during the same period, Blue

Diamond Growers, Inc., spent between $8,000,000 and $14,200,000 per year on its branded advertising which was primarily directed to the domestic retail market. (PJ 10.)

5. Mr. Algernon Greenlee is a retail business manager for Blue Diamond Growers, Inc., and for the 6 years immediately prior to the hearing in this proceeding had been Blue Diamond Growers, Inc.'s advertising manager. (Tr. 297.)

6. Blue Diamond Growers, Inc., has advertised almonds on television and radio and in the print media. (Tr. 299.) Blue Diamond Growers, Inc.'s various types of advertising have been effective both for Blue Diamond Growers, Inc., and the almond industry at large. (Tr. 300.)

7. Because the Almond Board's advertisement assessment rate was lowered and Blue Diamond Growers, Inc., decided to use some additional funds for international advertising, Blue Diamond Growers, Inc., has decreased the amount it spends on domestic advertising. Recently, Blue Diamond Growers, Inc., reduced the amount it spends on television advertising and increased the amount it spends on radio and print media advertising. (Tr. 306-07.) In approximately 1990, Blue Diamond Growers, Inc., spent approximately $7 million on television advertising, but at the time of the hearing in this proceeding, Blue Diamond Growers, Inc., was only spending $2 to $3 million per year on television advertising. (Tr. 363-64.)

8. Blue Diamond Growers, Inc., has no research which shows whether its advertisements actually increased consumption of Blue Diamond Growers, Inc.'s almonds. However, since around 1970, per capita yearly consumption of almonds has risen from .38 pounds to as high as .86 pounds in the 1990's, prices for almonds have risen, and public awareness of almonds and Blue Diamond almonds has increased. (Tr. 300, 313-17.) When the advertising assessment rate was 2½ cents per pound, Blue Diamond Growers, Inc., believes that the rate hurt returns to their growers; it did not earn Blue Diamond Growers, Inc., more than the 2½ cents that was spent. However, based on per capita consumption numbers, Blue Diamond Growers, Inc., believes that the almond industry benefitted from the expenditure. (Tr. 339.)

9. Blue Diamond Growers, Inc., will not advertise when it does not realize a favorable return on the dollars spent. (Tr. 319-20, 339, 364.)

10. Blue Diamond Growers, Inc., has a sales force of 11 people in the United States that calls on customers. While not as efficient as advertising, this sales force helps promote the sale of almonds. (Tr. 321-22.)

11. Blue Diamond Growers, Inc., would not support a total generic program run by the Almond Board, but favors a "blended program that encourages the

individual handlers to support their businesses." (Tr. 333.)

12. Blue Diamond Growers, Inc., does not need encouragement from the United States Department of Agriculture to promote its almond products and would continue to engage in branded advertising in the absence of the Almond Order's Promotion Program. (Tr. 334-35, 339.) However, Blue Diamond Growers, Inc., sets its advertising expenditures in accordance with the assessment rate. (Tr. 338, 351.)

13. Blue Diamond Growers, Inc., is concerned that in the absence of the Almond Order's Promotion Plan, it would spend more money on advertising than competing handlers. (Tr. 351.)

II. Discussion

It is well settled that the burden of proof in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with the petitioner.[19] Petitioners have the burden of proving that the challenged provisions of the Almond Order or obligations imposed in connection with the Almond Order are

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[19]*United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo., 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3d Cir. 1945); *In re Daniel Strebin*, 56 Agric. Dec. ___, slip op. at 40-41 (Nov. 26, 1997); *In re Auvil Fruit Co.*, 56 Agric. Dec. ___, slip op. at 35-42 (Aug. 13, 1997); *In re Midway Farms, Inc.*, 56 Agric Dec. 102, 112-13 (1997); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 39 (1997); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Adam L. Liptak*, 24 Agric. Dec. 1176, 1181 (1965).

"not in accordance with law" (7 U.S.C. § 608c(15)(A)). Based upon a careful consideration of the record, I find that Petitioners have not met their burden of proof.

Petitioners contend that the requirement in the Almond Order that Petitioners pay assessments, which are then used to promote almonds, violates Petitioners' right to freedom of speech under the First Amendment of the Constitution of the United States. The Chief ALJ agreed with Petitioners' contention that the Almond Order violates Petitioners' right to freedom of speech under the First Amendment (Initial Decision and Order at 9-18, 69). The Chief ALJ reviewed the Almond Order using the three-part test in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), a test used by the Supreme Court of the United States to determine the constitutional validity of laws which restrict commercial speech. The Court held in *Central Hudson* that "[t]he First Amendment . . . protects commercial speech from unwarranted governmental regulation[,]" *id.* at 561, and if commercial speech is neither misleading nor related to unlawful activity, restrictions on such speech must: (1) implement a substantial governmental interest; (2) directly advance that interest; and (3) be narrowly tailored to achieve the desired objective. *Id.* at 564.

The Chief ALJ, applying the *Central Hudson* test to the Almond Order, found that there was a substantial governmental interest in promoting the consumption of almonds (Initial Decision and Order at 5),[20] but found that the Almond Order failed to directly advance the government's interest of selling more almonds and increasing returns to almond growers (Initial Decision and Order at 9-16, 18, 69) and is more extensive than necessary to advance the government interest of selling more almonds and increasing returns to almond growers (Initial Decision and Order at 16-18, 69). Based on these findings, the Chief ALJ concluded that, under the *Central Hudson* test, the Almond Order violates Petitioners' right to freedom of speech under the First Amendment; and therefore, the Almond Order is not in accordance with law (Initial Decision and Order at 18, 69).

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[20]The Chief ALJ does not directly state that he found that there was a substantial governmental interest in promoting the consumption of almonds. However, the Chief ALJ does state that the United States Court of Appeals for the Ninth Circuit, "the circuit which will eventually review this case[,] has already addressed the constitutional issue that is the sole subject of the petitions" and that the "legal conclusions of the Ninth Circuit on this issue are controlling." (Initial Decision and Order at 3.) Further, the Chief ALJ, citing *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993), states that "USDA was held to have satisfied its . . . burden of proving a substantial government interest in promoting the consumption of almonds: 'We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest.' 14 F.3d at 437." (Initial Decision and Order at 5.)

However, the *Central Hudson* test is not applicable to this proceeding because the *Central Hudson* test is used to determine whether restrictions on commercial speech pass constitutional muster and neither the AMAA nor the Almond Order nor the Almond Board prohibit or restrict commercial speech. The AMAA and the Almond Order do, however, compel Petitioners to fund an almond promotion program.

In *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), decided on June 25, 1997, more than 2 years after the Chief ALJ issued the Initial Decision and Order, the Supreme Court of the United States specifically rejected the use of the *Central Hudson* test to determine the validity under the First Amendment of two marketing orders[21] issued pursuant to the AMAA. Instead, the Supreme Court held in *Wileman Bros.* that provisions of the two AMAA marketing orders compelling handlers of California tree fruit to fund generic advertising programs neither abridge the handlers' First Amendment rights nor implicate the First Amendment.

The Court in *Wileman Bros.* stressed the importance of the statutory context in which the First Amendment issue arises as follows:

> In answering [the] question [whether being compelled to fund advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve] we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment

[21]The two marketing orders at issue in *Wileman Bros.* are: Marketing Order 916, which regulates nectarines grown in California (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), which originally regulated peaches, pears, and plums grown in California. The plum portion of Marketing Order 917 was terminated in 1991 (56 Fed. Reg. 46,368).

issues.

Glickman v. Wileman Bros. & Elliott, Inc., supra, 117 S. Ct. at 2138. The Almond Order, like the California tree fruit orders at issue in *Wileman Bros.*, is a comprehensive regulatory scheme established under the AMAA. The Almond Order contains provisions for volume and quality control and requires handlers to keep records and make periodic reports. Like the California tree fruit orders at issue in *Wileman Bros.*, the Almond Order contains a research, promotion, and generic advertising scheme. Handlers subject to the Almond Order that are compelled to fund the generic advertising do so as a part of a broader collective enterprise in which their freedom to act independently is constrained by the regulatory scheme. Thus, there is no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding; and I, therefore, find that *Wileman Bros.* is dispositive of Petitioners' First Amendment challenge to the Almond Order in this proceeding.[22]

However, the Supreme Court did not limit its holding in *Wileman Bros.* to marketing orders issued under the AMAA. Instead, the Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders do not compel producers to endorse or finance any political or ideological views.

An examination of the Almond Order reveals that the Almond Order has the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra.* First, Petitioners are not prohibited or restrained by the AMAA, the Almond Order, or the Almond Board from promoting or advertising their own almonds or from

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[22]Moreover, on June 27, 1997, the Supreme Court of the United States vacated the judgment of the United States Court of Appeals for the Ninth Circuit in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), and remanded the case for further consideration in light of *Wileman Bros. Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). In *Cal-Almond*, the United States Court of Appeals for the Ninth Circuit held that the generic advertising program under the very same Almond Order that is the subject of this proceeding (7 C.F.R. pt. 981) violated handlers' First Amendments rights. On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (Respondent's Memorandum in Support of Motion for Immediate Decision, Attachment C.)

communicating any other message to any audience. Section 501(b)(4)-(5) of the Federal Agriculture Improvement and Reform Act of 1996 provides that the AMAA was neither designed nor intended to prohibit or restrict, and the Almond Order established pursuant to the AMAA does not prohibit or restrict, any individual advertising or promotion or replace the individual advertising or promotion efforts of producers or processors (110 Stat. 1030). This factor distinguishes the AMAA and the Almond Order from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[23]

While the requirement that Petitioners fund generic advertising may reduce the amount of money available to Petitioners to conduct their own advertising or communicate other messages, this incidental effect of the AMAA and the Almond Order does not amount to a restriction on speech.[24] Further, unlike the California tree fruit orders at issue in *Wileman Bros.*, the Almond Order ameliorates this incidental effect by providing that almond handlers may reduce the Almond Board's advertising assessment by engaging in and receiving credit for their own

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[23]*See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates the First and Fourteenth Amendments).

[24]*See generally Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2138-39 (stating that the First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget and the fact that an economic regulation may indirectly lead to a reduction in an individual advertising budget does not itself amount to a restriction on speech); *In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 33 (Nov. 3, 1997) (stating that even if the requirements of the Beef Promotion and Research Act of 1985 and the Beef Promotion and Research Order do reduce the resources available to the respondent to engage in his own speech, this incidental effect of the Beef Promotion and Research Act of 1985 and the Beef Promotion and Research Order does not amount to a restriction on speech); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 45 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (stating that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the Mushroom Promotion, Research, and Consumer Information Act of 1990 and the Mushroom Promotion, Research, and Consumer Information Order does not amount to a restriction on speech).

promotional activities.[25]

Second, Petitioners are not compelled to speak by either the AMAA or the Almond Order. This fact distinguishes the AMAA and the Almond Order from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[26] While Petitioners are compelled under the AMAA and the Almond Order to fund promotion of almonds, this requirement is not a requirement that Petitioners speak. Petitioners are not publicly identified or publicly associated with the Almond Board's promotion program, and Petitioners are not required to respond to the Almond Board's promotion program.

Third, the Almond Board's almond promotion program has no political or ideological content, and Petitioners are not compelled by the AMAA or the Almond Order to endorse or finance any political or ideological views. Section 501(b)(8) of the Federal Agriculture Improvement and Reform Act specifically provides that the AMAA establishes promotion programs to produce "nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding . . . markets" (110 Stat. 1031). This fact distinguishes the AMAA and the Almond Order from cases in which the Supreme Court has found that required financing of political or

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[25]See the "credit-back" program instituted beginning in the 1993-94 crop year (7 C.F.R. § 981.441 (1994)) and the "creditable" program in place prior to the 1993-94 crop year (7 C.F.R. § 981.441 (1993)). Neither the credit-back program nor the creditable program requires handlers to advertise, but rather both programs give the handler the option to advertise and receive credit for promotional expenditures as provided in the Almond Order. Further, while both the credit-back and creditable programs limit the type of promotion for which a handler may receive credit, neither the credit-back program nor the creditable program prohibits or restricts a handler from promoting or advertising almonds in any other way or from communicating any other message to any audience.

[26]*See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

ideological speech violates the right to freedom of speech.[27]

Further, the record reveals that Petitioners are not concerned with the political or ideological content of the Almond Board's advertisements, but rather view the Almond Board's advertising program as a waste of money and not well suited to the promotion of their respective products. Petitioners believe that, if left to their own devices, they could better promote their respective products. Petitioners' objections to the Almond Board's advertising program do not rest upon political or ideological disagreement with the content of the Almond Board's message, and the mere fact that Petitioners believe that their money is not well spent does not mean that they have a First Amendment complaint.[28]

I find that *Wileman Bros.* is dispositive of the First Amendment issue in this proceeding. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this proceeding are not relevant to Petitioners' First Amendment challenge to the AMAA and the Almond Order. Thus, the requirement under the AMAA and the Almond Order that Petitioners fund the promotion of almonds does not violate Petitioners' rights guaranteed under the First Amendment to the Constitution of the United States, and Petitioners' rights under the First Amendment are not even implicated by the AMAA or the Almond Order.

Just as the Supreme Court found with respect to the California tree fruit orders under review in *Wileman Bros.*, the Almond Order is a species of economic regulation that should enjoy a strong presumption of validity, and the mere fact that Petitioners do not wish to fund generic advertising of their product "is not a sufficient reason for overriding the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial."

Petitioners contend in Petitioners' Appeal Petition to the Judicial Officer from the Administrative Law Judge's Decision Pursuant to 7 C.F.R. § 900.65 [hereinafter

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[27]*See Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

[28]*See Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2138 (1997); *Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984).

Petitioners' Appeal Petition] that they are entitled to a refund of assessments paid as follows:

> Petitioners agree entirely with the decision reached by Chief Administrative Law Judge Palmer that the [Almond] Board's promotion and advertising program from 1986-87 through the 1994-95 crop years were unconstitutional and therefore not in accordance with law. However, Petitioners appeal this decision for the sole reason that the decision does not order a refund of assessments, and never addressed the issue of a refund. . . .
>
> . . . .
>
> Petitioners herein allege that they are entitled to the following relief, based upon Chief Administrative Law Judge Palmer's decision:
>
> A. An order that Petitioners are entitled to a refund from USDA of all their creditable advertising assessments and credit-back advertising assessments imposed by USDA for the crop years 1986-87 through the 1994-95 crop years;
>
> B. An order ordering a refund from USDA of that portion of the administrative assessments used by the Almond Board for the Board's generic promotion and advertising program for the crop years 1986-87 through 1994-95 crop years;
>
> C. That the refund of assessments listed in the two preceding paragraphs are required by the Ninth Circuit Court of Appeals' decisions in *Cal-Almond, Inc., et al v. USDA*, 14 F.3d 429 (9th Cir. 1993), and upon remand, *Cal-Almond, Inc., et al v. USDA*, District Court decision of September 19, 1994; and *Wileman Bros. & Elliott, Inc., et al v. Espy*, 95 Daily Journal D.A.R. 8411;
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> D. In all other respects, [the] Chief Administrative Law Judge's decision should be affirmed.

As an initial matter, Petitioners' reliance on the Ninth Circuit decisions in *Cal-Almond* and *Wileman Bros.* is misplaced; the Supreme Court of the United States

reversed the Ninth Circuit's decision in *Wileman Bros.*[29] and vacated the Ninth Circuit's decision in *Cal-Almond.*[30] Further, the Supreme Court has remanded *Cal-Almond* to the United States Court of Appeals for the Ninth Circuit for further consideration in light of the Supreme Court's decision in *Wileman Bros.* The Ninth Circuit, in turn, has remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim." (Respondent's Memorandum in Support of Motion for Immediate Decision, Attachment C.) Moreover, because I conclude in this Decision and Order that neither the AMAA nor the Almond Order violates Petitioners' rights guaranteed under the First Amendment of the Constitution of the United States, the issue of a refund of assessments is moot.

Respondent states that it "renews its motion to exclude the entire testimony of petitioner Monte Cristo." (Respondent's Proposed Findings of Fact and Conclusions of Law; Appeal of the ALJ's Findings of Fact and Conclusions of Law at 26). Petitioner Monte Cristo Packing Company did not testify during the hearing, and it is difficult to discern what "testimony" Respondent requests be excluded; therefore, Respondent's renewed motion is denied.[31]

III. Conclusions of Law

Neither the AMAA nor the Almond Order violates Petitioners' rights under the First Amendment to the Constitution of the United States.

For the foregoing reasons, the following Order should be issued.

IV. Order

The relief requested by Petitioners is denied and the Petitions are dismissed.

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[29]*Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).

[30]*Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997).

[31]I do note that during the hearing the Chief ALJ denied Respondent's motion to exclude MC 1-22 (Tr. 2434-39). However, I do not speculate as to the nature of Respondent's renewed motion "to exclude the entire testimony of petitioner Monte Cristo." (Respondent's Proposed Findings of Fact and Conclusions of Law; Appeal of the ALJ's Findings of Fact and Conclusions of Law at 26.)

In re: KENNETH WOLFE and CLARK LIVESTOCK AUCTION COMPANY, INC.
A.Q. Docket No. 95-0034.
Decision and Order filed July 15, 1997.

Failure to appear at hearing - Movement interstate of test-eligible cattle out of a class A state without a valid certificate - Civil penalty.

Respondent failed to appear at the hearing, after being duly notified of the time and place, without showing good cause. Such failure to appear constituted a waiver of the right to an oral hearing and an admission of the facts presented at the hearing. Accordingly, Administrative Law Judge Edwin S. Bernstein found that on or about August 17, 1994, Respondents moved interstate from Latexo, Texas to Bossier City, Louisiana, four test-eligible cattle without being accompanied by a certificate as required. Judge Bernstein imposed a civil penalty of $1,000 against each Respondent. In determining the appropriate penalty, Judge Bernstein considered the national importance of the brucellosis eradication program, the detrimental effect of Respondents' actions on the brucellosis eradication program, and Respondents' prior history of noncompliance with the brucellosis regulations.

Sheila H. Novak, for Complainant.
Respondents, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of civil penalties against Respondents, Kenneth Wolfe and Clark Livestock Auction Company, Inc., for a violation of Section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), Sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120), and the regulations promulgated thereunder (9 C.F.R. § 78.1 *et seq.*), in accordance with the Rules of Practice applicable to this proceeding (9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*). This proceeding was instituted by a Complaint filed on July 11, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondents, Kenneth Wolfe and Clark Livestock Auction Company, Inc., filed an Answer on July 28, 1995, denying all material allegations of the Complaint.

On January 28, 1997, an Order was issued scheduling a hearing to begin on June 19, 1997, in Shreveport, Louisiana and directing the parties to exchange witness lists and exhibits by specified dates. Pursuant to a Notice of Hearing dated March 26, 1997, the parties were notified that the hearing in this matter would commence on June 19, 1997, at 9 a.m., local time, at the U.S. Courthouse, Conference Room 2265 (2nd floor), 300 Fannin Street, Shreveport, Louisiana.

I presided over a hearing on June 19, 1997, beginning at 9:30 a.m., local time.

Complainant was represented by Sheila H. Novak, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Respondents, Kenneth Wolfe and Clark Livestock Auction Company, Inc., did not appear at the hearing.

Findings of Fact

1. Kenneth Wolfe is an individual with a mailing address of [redacted] (b) [redacted]

2. Clark Livestock Auction Company, Inc. is a corporation with a mailing address of [redacted] LA [redacted]

3. On or about August 17, 1994, Respondents moved interstate approximately four test-eligible cattle from Latexo, Texas, a Class A state, to Bossier City, Louisiana, in violation of section 78.9 (b)(3)(ii) of the regulations (9 C.F.R. § 78.9 (b)(3)(ii)), because the cattle were not accompanied interstate by a valid certificate, as required.

Applicable Legal Provisions

21 U.S.C. § 122 provides:

> Any person, company, or corporation knowingly violating the provisions of this Act or the order or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment of not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under Chapter 158 of Title 28, United States Code [28 U.S.C. §§ 2341 *et seq.*]. The validity of such order may not be reviewed in an action to collect such civil penalty.

9 C.F.R. § 78.1 provides, in relevant part:

> *Certificate.* An official document, issued by an APHIS representative, state representative, or accredited veterinarian at the point of origin of an interstate movement of animals.

(a) The certificate must show the official eartag number, individual animal register breed association registration tattoo, individual animal registered breed association registration number, or similar individual identification of each animal to be moved; the number of animals covered by the certificate; the purpose for which the animals are to be moved; the points of origin and destination; the consignor; and the consignee.

Moved. Shipped, transported, delivered, or received for movement, or otherwise aided, induced, or caused to be moved.

Test-eligible cattle and bison. For purposes of interstate movement, test-eligible cattle and bison are:

(a) Cattle and bison which are not official vaccinates and which have lost their first pair of temporary incisors (18 months of age or over), except steers and spayed heifers;

(b) Officials calfhood vaccinates 18 months of age or over which are parturient or postparturient;

(c) Official calfhood vaccinates of beef breeds or bison with the first pair of permanent incisors fully erupted (2 years of age or over); and

(d) Official calfhood vaccinates of dairy breeds with partial eruption of the first pair of permanent incisors (20 months of age or over).

9 C.F.R. § 78.9 provides, in relevant part:

. . . Test-eligible cattle which are not brucellosis exposed and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 and as follows:

(b) *Class A States/areas.* Test-eligible cattle which originate in Class A States or areas, are not brucellosis exposed, and are from a herd not known to be affected may be moved interstate from Class A states or areas only as specified below:

(3) *Movement other than in accordance with paragraphs (b)(1) and (2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (b)(1) and (2) of this section only if:

(ii) Such cattle are negative to an official test within 30

days prior to such interstate movement and are accompanied interstate by a certificate which states, in addition to the items specified in § 78.1, the test dates and results of the official test.

9 C.F.R. § 78.41 (b) classifies the following states as Class A:

(b) *Class A*-Alabama, Arkansas, California, Colorado, Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, and Texas.

Conclusions and Discussion

I. On or about August 17, 1994, Respondents, Kenneth Wolfe and Clark Livestock Auction Company, Inc., moved interstate from Latexo, Texas to Bossier City, Louisiana, four test-eligible cattle without being accompanied by a certificate, as required by 9 C.F.R. § 78.9 (b)(3)(ii).

Pursuant to 9 C.F.R. § 1.141, a respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. The failure to appear also constitutes an admission of all the material allegations of fact contained in the Complaint. Therefore, Respondents are deemed to have admitted that on or about August 17, 1994, Respondents moved interstate approximately four test-eligible cattle from Latexo, Texas, a Class A state, to Bossier City, Louisiana, in violation of section 78.9 (b)(3)(ii) of the regulations (9 C.F.R. § 78.9 (b)(3)(ii)) because the cattle were not accompanied interstate by a valid certificate, as required.

Complainant elected to present evidence in the form of oral testimony and documentary evidence. The evidence presented at the hearing establishes that Respondents violated the requirements of 9 C.F.R. § 78.9 (b)(3)(ii) in moving cattle interstate from Texas to Louisiana.

The evidence shows that on August 16, 1994, approximately 253 cattle were tested for brucellosis by Dr. George Beeler at East Texas Livestock in Crockett, Texas (CX-1). Included in this group were four cows, identified by eartag numbers 74 DPQ 3678, 74 DPQ 3680, 74 DPQ 3694, and 74 DQD 8943. The brucellosis test record dated August 16, 1994 (CX-1) indicates that each of these animals was "test-eligible," as that term is defined in the regulations, because all were over two

years of age. These four cows were purchased by a buyer with the code "NW" (CX-2). "NW" purchased these cows for Kenneth Wolfe (CX-2). David Green, a Senior Investigator with the Animal and Plant Health Inspection Service, learned through inquiry at East Texas Livestock that "NW" was the code used by cattle buyer Harry Pragar. An official at East Texas Livestock also indicated that the cows were paid for by a check from the barn in Louisiana. On October 27, 1994, Mr. Green interviewed Mr. Harry Pragar, who admitted that he purchased the four cows in question, that he moved the cows to his farm in Latexo, Texas, and that Kenneth Wolfe sent one of his trucks to pick up the cows on Wednesday, August 17, 1994.

The four cows identified by eartag numbers 74 DPQ 3678, 74 DPQ 3680, 74 DPQ 3694, and 74 DQD 8943 were moved interstate to Clark Livestock Auction Company, Inc., in Bossier City, Louisiana. The four cows were brucellosis tested and sold at Clark Livestock Auction on August 18, 1994 (CX-4). Gary Pettway, a Senior Investigator with the Animal and Plant Health Inspection Service, was present at Clark Livestock Auction when these four cows were being tested for brucellosis. He became suspicious because the four cows had eartag numbers beginning with the number "74," indicating that they originated in Texas. By investigating records filed with the Louisiana Department of Agriculture, Mr. Pettway discovered that the four cows in question were received at Clark Livestock Auction from Pragar Cattle Company in Latexo, Texas (CX-3). Mr. Pettway then asked Investigator David Green to determine whether a health certificate was issued in Texas for the interstate movement of these four cows.

Mr. Green contacted Dr. George Beeler, the veterinarian of record for East Texas Livestock, to determine if he issued a health certificate for the cows identified by eartag numbers 74 DPQ 3678, 74 DPQ 3680, 74 DPQ 3694, and 74 DQD 8943. In a signed affidavit, Dr. Beeler stated that he worked the sale on August 16, 1994, but that he did not "write any health certificates for a Kenneth Wolf (sic) or Harry Pragar to move cattle to Bossier City, Louisiana on or about August 16, 1994" (CX-6). In fact, Dr. Beeler did not write or issue any health certificates for tested cows to go to Louisiana from the August 16, 1994, sale (CX-6).

To further confirm that no health certificate was issued for this movement, Mr. Green contacted Barbara Hallmark, the Permit Coordinator for the Texas Animal Health Commission and requested that she search the records. Health certificates issued for the interstate movement of cattle from Texas are filed with the Texas Animal Health Commission ("TAHC"). In a memorandum dated September 15, 1994, Ms. Hallmark stated that her search of the records revealed that no health certificate was received by the TAHC for a shipment of test-eligible

cattle for Mr. Harry Pragar or Pragar Cattle Company consigned to Clark Livestock Auction, Bossier City, Louisiana on or around August 16, 1994 (CX 7).

II. The assessment of a civil penalty of $1,000 against Respondents, Kenneth Wolfe and Clark Livestock Auction Company, Inc., is appropriate.

The Department requested the assessment of a civil penalty of $1,000.00 against each of Respondents.

Brucellosis is defined as the contagious, infectious, and communicable disease caused by bacteria of the genus *Brucella*. (9 C.F.R. § 78.1) Brucellosis commonly causes abortions in cattle, as well as loss of milk. The Department, along with the individual states, jointly operate a program for the control and eradication of brucellosis in cattle called the Brucellosis Eradication Program. The regulations "are an integral and significant part of the federal and state cooperative effort to control and eradicate brucellosis." *In re Thompson*, 50 Agric. Dec. 392, 395 (1991). Because of the significant economic impact of brucellosis on the cattle industry of the United States, the eradication of brucellosis is of national importance. *In re Petty*, 43 Agric. Dec. 1406, 1409 (1984), *aff'd* No. 3-84-2200-R (N.D. Tex. June 5, 1986).

As David Green testified, the interstate movement of cattle without the required health certificate can significantly undermine the effort to eradicate brucellosis because is impairs the ability to trace cattle.

Evidence at the hearing established that Respondents have a history of noncompliance with the brucellosis regulations. On December 27, 1993, Respondents were issued an official warning for moving a brucellosis suspect animal from Clark Livestock Auction to Mississippi without a permit on or about May 6, 1993 (CX-9). On August 14, 1991, Respondent, Kenneth Wolfe, was issued an official warning for the diversion of six adult cattle moving from Louisiana to Texas in September 1990, in violation of section 78.9 of the regulations (9 C.F.R. § 78.9) (CX-8). In addition, Mr. Pettway testified that Kenneth Wolfe has also received two additional official letters of warning for violations of the brucellosis regulations. Mr. Pettway also testified that the previous history of noncompliance with the brucellosis regulations was a factor in recommending a civil penalty in this case.

Given the national importance of the brucellosis eradication program, the detrimental effect of Respondents' actions on the brucellosis eradication program, Respondents' prior history of noncompliance with the brucellosis regulations, a civil penalty of $1,000 against each Respondent is appropriate.

Order

Each Respondent is assessed a civil penalty of $ 1,000.00. These penalties shall be paid by certified checks or money orders made payable to the "Treasurer of the United States" and shall be forwarded within 30 days from the effective date of this Order to: United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, P.O. Box 55403, Minneapolis, Minnesota 55403. Respondents shall indicate that payment is in reference to A.Q. Docket No. 95-0034.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon Respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final September 5, 1997.-Editor]

ANIMAL WELFARE ACT

In re: JULIAN J. TONEY AND ANITA L. TONEY.
AWA Docket Nos. 92-0014 and 94-0012.
Decision and Order on Remand filed July 11, 1997.

Cease and desist order — Civil penalty — License revocation — Sanction policy.

The Judicial Officer vacated the Order in *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995), and issued an Order permanently revoking Respondents' license, directing Respondents to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act, and assessing Respondents a civil penalty of $175,000. The United States Court of Appeals for the Eighth Circuit upheld the Judicial Officer's decision of *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995), in *Toney v. Glickman*, 101 F.3d 1236 (8th Cir. 1996), except for two violations and remanded the case to the Judicial Officer to recalculate the sanction without considering the two violations which the court found were unsubstantiated. The Administrator of the Animal and Plant Health Inspection Service recommended the reduction of the civil penalty assessed in *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995), from $200,000 to $175,000, and the Judicial Officer found that the reduction of the civil penalty is in accordance with the Act and the Department's sanction policy.

Robert A. Ertman, for Complainant.
Curtis J. Krull, Des Moines, IA, for Respondents.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order on Remand issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter the Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice), by filing Complaints on September 30, 1992, and May 11, 1994. On May 20, 1994, the Complaints were consolidated for hearing.

The Complaints allege that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards by maintaining false and incomplete records with respect to the acquisition source of 1,600 dogs and cats; by providing live random source dogs to research facilities which were accompanied by forged documents; by failing to hold animals for the required period of time after acquisition; by not maintaining individual identity of dogs; and by failing to provide appropriate animal care and facilities as required by the Animal Welfare

Act and the Regulations and Standards.

Respondents timely filed Answers denying all material allegations of the Complaints.

Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) presided over an oral hearing on June 21, 22, and 23, 1994, in Kansas City, Kansas. Robert A. Ertman, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Curtis J. Krull, Esq., Des Moines, Iowa, represented Respondents.

On April 20, 1995, the ALJ issued an Initial Decision and Order permanently revoking Respondents' license, assessing Respondents a civil penalty of $200,000, and directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. The ALJ found that Respondents in willful violation of the Animal Welfare Act and the Regulations and Standards: (1) maintained false and incomplete records with respect to the source and date of acquisition of dogs; (2) acquired random source dogs; (3) sold live random source dogs to research facilities by means of forged documents purporting to be certifications from municipal pounds; (4) failed to hold animals for the required period of time after acquisition; (5) failed to maintain individual identity of dogs; and (6) failed to provide appropriate animal care and facilities.

On May 26, 1995, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On December 5, 1995, the Judicial Officer issued a Decision and Order affirming the ALJ's Initial Decision and Order, *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996). The Judicial Officer's December 5, 1995, Decision and Order imposed the following sanction against Respondents:

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

thereunder, and in particular, shall cease and desist from:

A. Failing to make, keep, and maintain a system of records which fully discloses all required information and presents it in a meaningful and useful form;

B. Failing to hold dogs and cats for the required period;

C. Acquiring animals from prohibited sources or without required certifications and records;

D. Using any altered or otherwise falsified certificate in the acquisition or disposition of any dog or cat;

E. Failing to individually identify dogs and cats as required;

F. Failing to maintain housing facilities for dogs and cats in a structurally sound condition and in good repair;

G. Failing to maintain housing facilities for dogs and cats on a regular basis and to replace surfaces when soiled or worn;

H. Failing to make provisions for the removal and disposal of animal wastes;

I. Failing to provide dogs kept outdoors with adequate shelter; and

J. Failing to keep the premises clean and in good repair and free of accumulations of trash, waste and debris.

2. Respondents are jointly and severally assessed a civil penalty of $200,000, which shall be paid, within 180 days after service of this Order on Respondents, by certified check or money order made payable to the Treasurer of the United States and forwarded to Robert A. Ertman Esq., United States Department of Agriculture, Office of the General Counsel, Marketing Division, 14th and Independence Avenue, S.W., Room 2014,

South Building, Washington, D.C. 20250-1417.

3. Respondents' license is permanently revoked.

The revocation provision shall become effective on the 35th day after service of this Order on Respondents. The cease and desist provisions shall become effective on the day after service of this Order on Respondents.

In re Julian J. Toney, supra, 54 Agric. Dec. at 1022.

Respondents appealed the Judicial Officer's December 5, 1995, Decision and Order, and the United States Court of Appeals for the Eighth Circuit held, *inter alia*:

> We thus uphold the Judicial Officer's Decision except as to the findings that the Toneys falsely received dogs from the Trenton pound and that they falsely claimed to have received dogs from Mr. Hughes. Accordingly, we remand so that the Judicial Officer can recalculate the sanction without considering these violations.

Toney v. Glickman, 101 F.3d 1236, 1242 (8th Cir. 1996).

On May 23, 1997, the case was referred to the Judicial Officer for decision on remand. On May 28, 1997, I issued an Informal Order for Briefs Regarding Sanction requesting that Complainant and Respondents each file a brief limited to the issue of any sanction to be imposed on remand, in light of the court of appeals decision in *Toney v. Glickman, supra.*

Complainant filed Complainant's Brief Upon Remand for Recalculation of Sanctions (hereinafter Complainant's Brief) on June 26, 1997. Respondents filed Respondent's [sic] Brief (hereinafter Respondents' Brief) on July 1, 1997. Neither Complainant nor Respondents recommend modification of the cease and desist or the license revocation provisions of the December 5, 1995, Order in *In re Julian J. Toney, supra*, and the United States Court of Appeals for the Eighth Circuit did not specifically instruct that either the cease and desist provision or the license revocation provision of the December 5, 1995, Decision and Order must be modified on remand. I have thoroughly reviewed the Decision and Order in *In re Julian J. Toney, supra*, and *Toney v. Glickman, supra.* Based upon the hundreds of serious violations of the Animal Welfare Act and the Regulations and Standards that the United States Court of Appeals for the Eighth Circuit found supported by substantial evidence, I find no basis for the modification of either the cease and

desist or the license revocation provisions of the December 5, 1995, Decision and Order in *In re Julian J. Toney, supra.*

However, both Complainant and Respondents recommend the reduction of the $200,000 civil penalty assessed against Respondents in *In re Julian J. Toney, supra*, 54 Agric. Dec. at 1022, and the United States Court of Appeals for the Eighth Circuit has instructed that the case is remanded for a recalculation of the sanction in light of two violations which the court found to be unsubstantiated.

For this recalculation, Respondents request that the Judicial Officer consider: (1) the size of Respondents' business; (2) the gravity of Respondents' violations; (3) the good faith of Respondents; and (4) the history of previous violations (Respondents' Brief at 2). Based upon these considerations, Respondents urge the reduction of the civil penalty assessed against them "by at least $50,000." (Respondents' Brief at 5.)

Section 19(b) of the Animal Welfare Act requires that the Secretary of Agriculture give due consideration to the factors Respondents now suggest that I consider, as follows:

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(b).

However, the Judicial Officer examined each of the factors required to be considered by 7 U.S.C. § 2149(b),[2] and the sanction imposed in the December 5, 1995, Decision and Order is based upon the Judicial Officer's findings with respect to those factors. *In re Julian J. Toney, supra*, 54 Agric. Dec. at 973-74. Moreover, the United States Court of Appeals for the Eighth Circuit has not remanded the case for a recalculation of the sanction based on the factors in 7 U.S.C. § 2149(b) as Respondents suggest. Rather, the court upheld the Judicial Officer's findings regarding the factors in 7 U.S.C. § 2149(b) and remanded the case for the very limited purpose of recalculating the sanction based on the court's finding that two violations are "unsubstantiated." *Toney, supra*, 101 F.3d at 1242. Consequently, there is no basis for receiving additional evidence regarding the size of Respondents' business,[3] or for a reconsideration of the factors set forth in 7 U.S.C. § 2149(b).

Complainant correctly points out that the sanction imposed in *In re Julian J. Toney, supra*, is not based upon either of the two violations that the United States Court of Appeals for the Eighth Circuit found were unsubstantiated (Complainant's Brief at 1).[4] Nevertheless, Complainant recommends the reduction of the civil penalty assessed against Respondents from $200,000 to $175,000 (Complainant's Brief at 2).

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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[2]Specifically, the Judicial Officer determined the following: 1) "the size of [R]espondents' business is relatively large"; 2) "the gravity of most of [Respondents'] violations is extreme"; 3) regarding the good faith of Respondents, the record, as a whole, supports Complainant's allegations as to the numerous violations of the Animal Welfare Act and the Regulations and Standards; these violations have been repeated, flagrant, and willful; and Respondents' disregard of the Animal Welfare Act and the Regulations and Standards thwart the purposes of the Animal Welfare Act and render its objectives a nullity; and 4) regarding history of previous violations, although there are no prior adjudicated violations by Respondents, this proceeding involves two separate complaints which were consolidated for hearing. *In re Julian J. Toney, supra*, 54 Agric. Dec. at 974.

[3]Respondents' Brief at 3, 5.

[4]The Judicial Officer specifically states, even if the material related to the Trenton pound and to Mr. Hughes had been received in evidence, it would not have altered the sanction in the slightest. *In re Julian J. Toney, supra*, 54 Agric. Dec. at 1021.

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In *In re Julian J. Toney, supra*, the Judicial Officer found violations which supported a civil penalty significantly higher than the $200,000 civil penalty assessed against Respondents. Nonetheless, in light of the Department's sanction policy, the Judicial Officer adopted the recommendation of the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Administrator), the administrative official charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act, that Respondents be assessed a civil penalty of $200,000.[5]

Based on *Toney v. Glickman, supra*, the Administrator now recommends the reduction of the civil penalty assessed against Respondents from $200,000 to $175,000 (Complainant's Brief at 2). Moreover, while I find that Respondents' numerous willful and serious violations of the Animal Welfare Act and the Regulations and Standards, which thwarted the purposes of the Animal Welfare Act and rendered its objectives a nullity, would support a civil penalty substantially higher than $175,000, I conclude that the assessment of a civil penalty of $175,000 against Respondents is in accordance with the Animal Welfare Act and the Department's sanction policy.

For the foregoing reasons and those set forth in *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995) and *Toney v. Glickman*, 101 F.3d 1236 (8th Cir. 1996), the Order in *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995) is vacated, and the following Order should be issued.

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act; in particular, Respondents shall cease and desist from:

A. Failing to make, keep, and maintain a system of records which fully discloses all required information and presents it in a meaningful and useful

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[5]*In re Julian J. Toney, supra*, 54 Agric. Dec. at 1015.

form;

B. Failing to hold dogs and cats for the required period;

C. Acquiring animals from prohibited sources or without required certifications and records;

D. Using any altered or otherwise falsified certificate in the acquisition or disposition of any dog or cat;

E. Failing to individually identify dogs and cats as required;

F. Failing to maintain housing facilities for dogs and cats in a structurally sound condition and in good repair;

G. Failing to maintain housing facilities for dogs and cats on a regular basis and to replace surfaces when soiled or worn;

H. Failing to make provisions for the removal and disposal of animal wastes;

I. Failing to provide dogs kept outdoors with adequate shelter; and

J. Failing to keep the premises clean and in good repair and free of accumulations of trash, waste, and debris.

2. Respondents are jointly and severally assessed a civil penalty of $175,000, which shall be paid, within 180 days after service of this Order on Respondents, by certified check or money order made payable to the Treasurer of the United States and forwarded to Robert A. Ertman, Esq., United States Department of Agriculture, Office of the General Counsel, Marketing Division, 1400 Independence Avenue, SW., Room 2014, South Building, Washington, D.C. 20250-1417.

3. Respondents' Animal Welfare Act license is permanently revoked.

The revocation provision in this Order shall become effective on the 35th day after service of this Order on Respondents. The cease and desist provisions in this Order shall become effective on the day after service of this Order on Respondents.

In re: FRED HODGINS, JANICE HODGINS, AND HODGINS KENNEL, INC.
AWA Docket No. 95-0022.
Decision and Order filed July 11, 1997.

Cease and desist order — Civil penalty — License suspension — Recordkeeping violations — Failing to provide appropriate veterinary care and facilities — Selective prosecution — Anticipation of litigation — Vague regulations — Preponderance of the evidence — Substantial evidence — Hearsay evidence — Correction dates — Tape recordings — Adequacy of complaint — Trivial violations — Jencks Act — Brady doctrine — Warrantless searches — Adequate defined — Outdated drugs — Willful — Sanction policy.

The Judicial Officer affirmed Judge Hunt's (ALJ) Initial Decision and Order assessing a civil penalty and directing Respondents to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act. However, the Judicial Officer also suspended Respondents' license for 14 days and reduced the civil penalty assessed from $16,000 to $13,500. Respondents bear the burden of proving that they are the target of selective prosecution but failed to sustain this burden because they did not show membership in a protected group, that others in a similar situation not members of the protected group would not be prosecuted, or that prosecution was initiated with discriminatory intent. The warrantless searches of Respondents' facility were reasonable and fell within the "closely regulated industry" exception to the warrant requirement. The Complaint fully complies with both the Administrative Procedure Act (5 U.S.C. § 554(b)) and the Rules of Practice (7 C.F.R. § 1.135), and the record reveals that Respondents were reasonably apprised of the issues in controversy and not misled by the Complaint. Complainant, as proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. The Judicial Officer found inspection reports introduced by Complainant and Complainant's witnesses' testimony to be substantial evidence of 58 violations alleged in the Complaint. The Federal Rules of Evidence are not applicable to administrative proceedings conducted under the Administrative Procedure Act in accordance with the Rules of Practice, and reliable hearsay is routinely admissible in federal administrative hearings and can be substantial evidence as long as it is reliable, probative, and meets the test of fundamental fairness. The inspection reports were not prepared in anticipation of litigation, and the facts surrounding the preparation of the inspection reports are not similar to the facts surrounding preparation of the documents at issue in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995). The Regulations and Standards issued under the Act are not unconstitutionally vague. The ALJ's denial of Respondents' subpoena to assist in the preparation of their defense was proper because discovery is not available under the Rules of Practice. Jencks Act statements may only be obtained after a witness has testified on direct examination, and the ALJ's denial of Respondents' prehearing motion for Jencks Act statements is proper. Further, *Brady v. Maryland*, 373 U.S. 83 (1963), is inapposite to administrative proceedings under the Act. Sound recordings are generally admissible in these proceedings. However, there was no foundation sufficient to show that Respondents' recordings are trustworthy. Respondents did not preserve their right to appeal the ALJ's ruling limiting their cross-examination of a witness in accordance with 7 C.F.R. § 1.141(h)(2). Respondents' correction of the violations does not operate to eliminate the fact that violations occurred, does not provide a basis for the dismissal of alleged violations, and does not prevent the assessment of a civil penalty for violations. While some of Respondents' violations are trivial, *In re Marlin U. Zartman*, 44 Agric. Dec. 174 (1985), is inapposite because Respondents have committed 58 violations of the Act, some of which are serious. The term *adequate veterinary care* means *sufficient veterinary care* not *barely sufficient veterinary care*. The mere presence of outdated drugs on Respondents' premises does not violate 9 C.F.R.§ 2.40. Theft of an animal is not an element of a violation of 9 C.F.R. § 2.50. Respondents' violations were willful (5 U.S.C. § 558(c)), and Respondents received written notice prior to the date that this proceeding was instituted as provided in 7 C.F.R. § 1.133(b)(2). Evidence regarding a defamation action instituted by Respondent Fred Hodgins against animal rights activists and the influence of animal rights activists on the Department is irrelevant to this proceeding. The Judicial Officer accords great weight to the ALJ's credibility determinations, but the Judicial Officer is not bound by them. Respondents' history of previous violations is relevant to any penalty to be imposed under 7 U.S.C. § 2149(b). The sanction imposed against Respondents is appropriate under the circumstances and is in accordance with the Act and the Department's sanction policy.

Sharlene A. Deskins, for Complainant.
Nancy L. Kahn, Farmington, MI, for Respondents.

Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant), instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter the Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151), by filing a Complaint on March 22, 1995.

The Complaint alleges that Fred Hodgins, Janice Hodgins, and Hodgins Kennel, Inc. (hereinafter Respondents), willfully violated the Animal Welfare Act and the Regulations and Standards. On April 14, 1995, Respondents filed an Answer denying the material allegations in the Complaint. Administrative Law Judge James W. Hunt (hereinafter ALJ) presided over a hearing in Detroit, Michigan, on September 27-October 4 and October 18-19, 1995. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Nancy L. Kahn, Farmington Hills, Michigan, represented Respondents.

On May 31, 1996, the ALJ issued an Initial Decision and Order jointly and severally assessing Mr. Hodgins and Ms. Hodgins, as the *alter egos* of Hodgins Kennel, Inc., a civil penalty of $16,000 and directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On July 29, 1996, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* On August 30, 1996, Complainant filed Complainant's Appeal Petition and Brief in Support Thereof (hereinafter Complainant's Appeal Petition); on September 25, 1996, Respondents filed Respondent's [sic] Reply to Complainant's Brief in Support of Its Appeal Petition (hereinafter Respondents' Reply); on October 11, 1996, Complainant filed Complainant's Response in Opposition to the Respondent's [sic] Appeal Petition and Brief in Support Thereof (hereinafter Complainant's Reply); and on November 21, 1996, Respondents filed

*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Reply to Complainant's Brief in Opposition to Respondents' Appeal Petition. On December 12, 1996, the case was referred to the Judicial Officer for decision.

Respondents' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues are not complex, are controlled by established precedents, and have been fully briefed by the parties, and thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ that Respondents violated the Animal Welfare Act and the Regulations and Standards. Specifically, I agree with the ALJ's conclusions that: (1) Respondents violated section 2.40 of the Regulations (9 C.F.R. § 2.40) as alleged in paragraphs II(A), III(A), IV(A), V(A), VI(A), VII(A), VIII(A), and IX(A) of the Complaint; (2) Respondents violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) as alleged in paragraphs II(B), III(C), and IV(C) of the Complaint; (3) Respondents violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75 of the Regulations (9 C.F.R. § 2.75) as alleged in paragraphs III(B), IV(B), V(B), VI(B), and VII(B) of the Complaint; (4) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) as alleged in paragraphs III(D)(1), IV(D)(1), V(C)(1), VIII(C)(1), and IX(B)(1) of the Complaint; (5) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) as alleged in paragraphs III(D)(3), IV(D)(2), and VIII(C)(4) of the Complaint; (6) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) as alleged in paragraphs III(D)(4), IV(D)(3), and VII(C)(2) of the Complaint; (7) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.2(a) of the Standards (9 C.F.R. § 3.2(a)) as alleged in paragraph III(D)(5) of the Complaint; (8) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.2(b) of the Standards (9 C.F.R. § 3.2(b)) as alleged in paragraphs II(C)(3), IV(D)(4), V(C)(4), VI(C)(3), VIII(C)(5), and IX(B)(5) of the Complaint; (9) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi)) as alleged in paragraph III(D)(6) of the Complaint; (10) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) as alleged in paragraphs II(C)(6) and VIII(C)(7) of the Complaint; (11) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(b)(3) of the Standards (9 C.F.R. § 3.11(b)(3)) as alleged in paragraph IX(B)(8) of the

Complaint; (12) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) as alleged in paragraphs II(C)(7), III(D)(8), IV(D)(7), V(C)(7), VI(C)(6), VII(C)(4), and VIII(C)(8) of the Complaint; (13) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(d) of the Standards (9 C.F.R. § 3.11(d)) as alleged in paragraphs IV(D)(8), VII(C)(6), and VIII(C)(10) of the Complaint; (14) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.15 of the Standards (9 C.F.R. § 3.15) as alleged in paragraph IX(B)(10) of the Complaint; and (15) Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.12 of the Standards (9 C.F.R. § 3.12) as alleged in paragraphs II(C)(8), IV(D)(9), V(C)(8), VI(C)(7), VII(C)(5), VIII(C)(9), and IX(B)(9) of the Complaint (Initial Decision and Order at 59-62).**

Moreover, I find that the ALJ dismissed two violations alleged in the Complaint that Complainant has proven by at least a preponderance of the evidence.*** Specifically, I find that Complainant has carried its burden of proof by a preponderance of the evidence that Respondents violated the Animal Welfare Act

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**The ALJ did not find that Respondents' violations of the Animal Welfare Act and the Regulations and Standards were willful. As discussed in this Decision and Order, *infra* pp. 142-45, I find that all of Respondents' violations were willful.

***The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re David M. Zimmerman*, 56 Agric. Dec. ___, slip op. at 39 (June 6, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 4 n.4 (Jan. 13, 1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

and the Regulations and Standards as alleged in paragraphs II(C)(9) and VIII(B) of the Complaint.

While Complainant has a prima facie case with respect to the violations alleged in paragraphs II(C)(1), II(C)(4), III(D)(2), IV(D)(5), IV(D)(6), V(C)(5), V(C)(6), VI(C)(4), VI(C)(5), VII(C)(3), VIII(C)(2), VIII(C)(6), IX(B)(2) relating to a violation of section 3.1(c)(1)(i) of the Standards (9 C.F.R. § 3.1(c)(1)(i)), IX(B)(4) relating to a violation of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)), IX(B)(6), and IX(B)(7) of the Complaint, the record is not quite strong enough to reverse the ALJ. Further, Complainant does not have a prima facie case regarding the violations alleged in paragraphs II(C)(5), V(C)(2), VI(C)(1), VII(C)(1), IX(B)(2) relating to a violation of section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)), IX(B)(4) relating to a violation of 3.1(e) of the Standards (9 C.F.R. § 3.1(e)), and IX(B)(8) relating to a violation of 3.11(c) of the Standards (9 C.F.R. 3.11(c)). Moreover, I find the ALJ erroneously found that Respondents violated the Regulations and Standards as alleged in paragraphs II(C)(2), III(D)(7), III(D)(9), V(C)(3), VI(C)(2), VIII(C)(3), and IX(B)(3) of the Complaint.

Since I agree with most of the ALJ's findings of fact and conclusions of law and much, but not all, of the ALJ's discussion, I have adopted the ALJ's Initial Decision and Order as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

. . . .

Introduction

Congress enacted the Animal Welfare Act in 1966 to achieve three objectives:

> The purposes of this bill, as amended, are (1) to protect the owners of dogs and cats from theft of such pets, (2) to prevent the use or sale of stolen dogs or cats for purposes of research or experimentation, and (3) to establish humane standards for the treatment of dogs, cats, and certain other animals . . . by animal dealers and medical research facilities.

S. Rep. No. 1281, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635.

Congress gave the Secretary of Agriculture authority "to promulgate humane standards and recordkeeping requirements governing the purchase, handling, or sale of animals, in commerce, by dealers, research facilities, and exhibitors at auction sales and by the operators of such auction sales." 7 U.S.C. § 2142. Pursuant to that authority, the Secretary established [Regulations and] Standards that provide for the proper care of animals held by dealers, research facilities, and exhibitors. *See* 9 C.F.R. §§ 1.1[-3.142]. The [Animal Welfare] Act requires dealers to be licensed by the Secretary (7 U.S.C. § 2134) and [the Regulations] restrict the issuance of licenses to those who have applied in the prescribed form and manner and have shown that their facilities comply with the [Regulations and] Standards promulgated by the Secretary [(9 C.F.R. § 2.1)].

Background

Respondents Fred and Janice Hodgins own, manage, and control Respondent Hodgins Kennel, Inc. (Tr. 44). (Fred and Janice Hodgins are referred to jointly as "the Hodgins" [in this Decision and Order]. . . .) Tammi Longhi, the Hodgins' daughter, has worked for Respondents for over [10] years as [an employee at] the kennel and overseer of the animals (Tr. 1933-34).[1] Hodgins Kennel[, Inc.], which began operations in 1960, has been licensed as a Class B dealer under the Animal Welfare Act since its [enactment] in 1966[2] (Tr. 44-45, 1448-49). When obtaining an annual license, Respondents receive copies of the [Animal Welfare] Act and the Regulations and Standards issued [under the Animal Welfare Act] and agree in writing to comply with them (Tr. 48). As a licensee, Hodgins Kennel, Inc., is subject to periodic inspections by [Animal and Plant Health Inspection Service

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[1]Tammi Longhi is the Respondent in a companion case, *In re Tammi Longhi*, 56 Agric. Dec. ___ (July 11, 1997). The parties in the instant proceeding and *In re Tammi Longhi, supra*, agreed that the record in the two cases could be referred to in each case. Transcript and exhibit references to the Longhi case in this Decision [and Order] will be preceded by "Longhi."

[2]"*Class 'B' licensee* means a person subject to the licensing requirements under [9 C.F.R.] part 2 and meeting the definition of a 'dealer' ([9 C.F.R.] § 1.1), and whose business includes the purchase and/or resale of any animal." (9 C.F.R. § 1.1.) "*Dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes." (9 C.F.R. § 1.1.)

(hereinafter] APHIS) officials.

Hodgins Kennel[, Inc.,] obtains animals (mostly dogs), which have not been adopted and are otherwise to be euthanized, from municipal and county animal shelters (Tr. 1451). After a prescribed waiting period, the kennel sells the animals to research facilities (Tr. 1192[, 1449-50]). The animals usually have unknown histories and typically have been exposed to a variety of pathogens [prior to arrival at Hodgins Kennel, Inc. Many of these dogs] manifest . . . disease symptoms after their arrival at the kennel (Tr. 1308-09). All animals, whether displaying disease symptoms or not, are placed on a treatment conditioning program as outlined in the "veterinary protocol" developed annually by the facility's attending veterinarian[3] (Tr. 53). The veterinary protocol contains vaccination and de-worming schedules, a parasite control regimen, and instructions for administering antibiotics to the animals (Tr. 69-71; RX 1). Despite these precautions, many of the animals still develop upper respiratory diseases, usually "kennel cough," resulting from exposure to diseases prior to being received by [Hodgins] Kennel[, Inc]. The symptoms include coughing, runny nose and eyes, and listlessness. . . . In a facility the size of Hodgins Kennel[, Inc.,] up to 30 animals can display new symptoms or illnesses each day (Tr. 675-76, [1200-]01). Most animals recover as a result of the veterinary protocol program. If not, they are referred to the attending veterinarian for further treatment or [are] euthanized.

After an approximately 6-week treatment and conditioning program, the animals are sold for use in medical research to hospitals and universities throughout the Midwest. The State of Michigan Department of Public Health has an official policy confirming the need for animals in medical research [and urges] municipal and county [governments to facilitate the availability of unclaimed dogs and cats for scientific use (Tr. 1456; RX 35). Generally, when municipal and county governments make unclaimed dogs and cats available for scientific use, they] release the animals to Class B dealers such as Hodgins Kennel[, Inc.,] for later transfer to medical research facilities after a required holding period (Tr. 1456[-57]; RX 35). Animals that are not suitable for treatment or become too ill to participate in the conditioning program are euthanized. Approximately six animals per week are euthanized at Hodgins Kennel, Inc. The decision to euthanize an animal is made solely by Respondents (Tr. 1474-75).

Research facilities, which accept only healthy animals, return unhealthy animals to Respondents and receive either a refund [of the purchase price] or a replacement

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[3]Each year the attending veterinarian provides a detailed veterinary protocol to [the United States Department of Agriculture (hereinafter] USDA) using USDA's format (RX 1).

[with another animal] (Tr. 1192-93, 1452). Mr. Hodgins testified that his animals are rarely rejected by research facilities because of poor health (Tr. 1458-59, 1676). He said it is in Respondents' financial interest to treat illnesses as effectively and quickly as possible. Sick animals are not salable, he said, and costs increase for each day an animal is ill (Tr. 1463-64). Respondents sold 4,795 animals in 1994, [and the gross amount derived from the sale of those animals was] $458,966.65 (CX 3 at 7).

During the time relevant to the Complaint (November 1993-November 1994), Hodgins Kennel[, Inc.,] had two locations: 1) the Lange Road facility, consisting of five buildings and referred to in [APHIS] inspection reports as Site 1; and 2) the Judd Road facility, 4 miles from the Lange Road facility, comprising one large building and referred to in [APHIS] inspection reports as Site 3. The Judd Road facility closed in February 1995 (Tr. [1681]-82). Normally, there are between 225-250 dogs and cats at Hodgins Kennel[, Inc.,] on a given day (Tr. [64-]65). At various times relevant to th[e] Complaint, the kennel also housed a few goats, pigs, sheep, rabbits, and calves.

Respondents have two basic types of cages: elevated cages and pens on the floor. Elevated cages have slatted rubberized or plastic floors designed to allow excreta and urine to drain immediately away from the animal housing area. Respondents state that the daily routine is to clean the inside of the cages and pens, wash down the floor and trough area under the cages, and change the wood shavings used in the pens as bedding (Tr. 1509). The areas underneath and outside the pens are also power-washed every 2 weeks (Tr. 1510). Animals are segregated by sex. Four or five animals are housed in one pen (Tr. 1812).

Dr. Kenneth Johnson, the attending veterinarian at Hodgins Kennel[, Inc.,] from 1971-1995, semi-retired and moved to Colorado in 1995. Dr. Henry Vaupel then became the attending veterinarian (Tr. 1166, 1823). Both veterinarians are experienced practitioners in treating animals. Mr. Hodgins testified that an attending veterinarian is normally at [Hodgins] Kennel[, Inc.,] every week to [conduct] a "walk-through" of the kennel or to authorize a health certificate for an animal that is being shipped out of state (Tr. 51). Similarly, Dr. Johnson estimated that the frequency of his visits to Hodgins Kennel[, Inc.,] was [approximately] one time per week (Tr. 1173). APHIS inspector Joseph Kovach testified that of the 100 facilities that he inspects, one veterinary visit per week is the best frequency rate he has observed (Tr. 309).

The attending veterinarian issues a bi-monthly report listing the animals by federal identification number and including a diagnosis and the medication prescribed for animals receiving treatment (Tr. 1176-81, 1826). In addition to the

bi-monthly report, Respondents maintain an animal health record for each animal that includes information on medications given, vaccinations, worming, and the final sale date and destination of the animal (Tr. 78, 80-83, 1174-75, 1828-29). The animal health records are attached to the cages of the animals and accessible to the attending veterinarian during his rounds (Tr. 1174-75, 1828-29). . . .

APHIS Inspections November 1993-November 1994

The Complaint [alleges that Respondents violated the Animal Welfare Act and the Regulations and Standards during] the period from November 1993 through November 1994. . . . [Prior to the violations alleged in the Complaint, APHIS issued Respondents a warning letter dated January 13, 1992, which states that inspections of Respondents' facility in October 1991 revealed conditions which were not in compliance with the Regulations and Standards (CX 4).] Although APHIS inspectors are to conduct a reinspection within 45 days [after] a [licensee] is cited for any items affecting the health of the animals (Tr. 292), there was no such follow-up to the October 1991 inspections. In the 4-year period prior to 1993, [two] APHIS inspectors,] Dr. Dellar, a doctor of veterinary medicine, who first began inspecting the facility about 1988, and Carl Lalonde, an animal care inspector, who began inspecting the facility in 1991[, inspected Hodgins Kennel, Inc.] Dr. Dellar accompanied Mr. Lalonde on some of his inspections (Tr. 1115-16).

On January 5, 1993, Mr. Lalonde inspected [Hodgins Kennel, Inc]. It was apparently the first inspection since . . . October [of] 1991. Mr. Lalonde found the kennel to be in compliance [with the Animal Welfare Act and the Regulations and Standards] except for allegedly not keeping 18 cats for the required holding period before disposing of them (RX 14). The matter was referred to Dr. [Joseph] Walker, the head of APHIS' Northeast sector in Annapolis, Maryland (Tr. 846-47). Eleven months later, in November 1993, the matter was assigned to Thomas Rippy, a senior APHIS investigator. Mr. Rippy, who provides investigative and witness services for APHIS, has had training at a federal law enforcement center in taking photographs and witness statements for use in litigation. Mr. Rippy testified that Respondents cooperated with him in his investigation and provided the documents he requested. He also said [Respondents] were easy to deal with and friendly. He said he found that the kennel's dogs were being held for the required holding period but that a "couple of cats" had been disposed of before the holding period had expired. Mr. Rippy testified that the matter had been "largely corrected." He then prepared a report for his supervisor. The report included a recommendation, but

Mr. Rippy said that he could not remember what recommendation he had made. In any event, [Mr. Rippy] said he received no "feedback" [regarding] his report [from his supervisor], and the alleged violation of the holding period was not made a part of the Complaint filed in this [proceeding] (Tr. 827-56, 961, 975).

On November 16, 1993, Dr. Dellar and Mr. Kovach . . . conducted an inspection of [Hodgins] Kennel[, Inc.,] the first since Mr. Lalonde's inspection [in January 1993]. Tammi Longhi . . . was present for the inspection. Mr. Hodgins was absent at the time (Longhi Tr. 214). Ms. Longhi, the kennel manager, had participated in prior inspections. Until the November [1993] inspection, Dr. Dellar and the Hodgins were apparently on a first name basis (Longhi Tr. 96). However, Ms. Longhi testified that, starting with the November [1993] inspection, the inspections . . . [became] more stressful because of what she perceived as a change in Dr. Dellar's attitude:

> [BY JUDGE HUNT:]
>
> Q. What do you mean by "attitude"?
>
> [BY MS. LONGHI:]
>
> A. They were not as friendly when they -- when Lisa used to come -- Dr. Dellar used to come in by herself a long time ago. She was always very friendly, but at that inspection she was -- she didn't - she wasn't very talkative --
>
> . . . .
>
> Q. Can you give us some -- how you felt that there was a difference, that --
>
> A. She was just very short, didn't really explain a lot what she was doing. She was just writing everything down and being very -- I guess "short" is the only word I can think of, with any questions we had, and didn't really explain what she was -- why there was pictures and why she was writing so many things out.

Longhi Tr. 357-[5]8.

Dr. Dellar cited approximately 23 alleged violations covering such matters as

housekeeping, veterinary care, recordkeeping, identification, and cleaning [(CX 5)]. The specific findings of the inspectors for this and the other inspections [is] discussed in the following section on alleged violations.

Two months later, on January 18, 1994, Dr. Dellar and Mr. Kovach, together with a third inspector, Dr. Norma Jean Harlan, a doctor of veterinary medicine, conducted an inspection of [Hodgins] Kennel[, Inc.] (Tr. 1121-22). Mr. Kovach, who conducts some inspections by himself, testified that usually two persons inspect large kennels. He said that it is not "normal" to have three inspectors and that this was the only occasion in his experience when there were three. However, he added that they did have "a lot to cover." (Tr. 321, 469.)

Mr. Rippy, the investigator who at the same time was looking into [Hodgins] Kennel, [Inc.'s] holding period, testified that Dr. Dellar contacted him to ask him to accompany her on the inspection (Tr. 971-72). He said he does not ordinarily accompany inspectors, but does so if requested. He said Dr. Dellar asked him to accompany her because of her "unease" with the situation, but he declined because he was involved with his own independent investigation of [Hodgins] Kennel[, Inc.'s] alleged violation of the holding period (Tr. 960-61, 971). Dr. Dellar, however, testified that she had not asked Mr. Rippy to accompany her (Tr. 1108), but that she needed someone like Mr. Rippy to take photographs to document deficiencies she found (Tr. 1109-11). [Dr. Dellar testified that] Dr. Harlan had made the request that someone from "regulatory enforcement" accompany them because Dr. Harlan felt intimidated and needed a third person (Tr. 1108-09). Dr. Harlan, however, had not inspected the facility before, and Mr. Rippy testified that he did not believe that Dr. Harlan was someone who would be easily intimidated (Tr. 947; Longhi Tr. 91). Dr. Harlan, for her part, gave as her reason for being at the inspection that her supervisor, Dr. Miava Binkley, who did not testify, had "indicated that Dr. Dellar needed a second inspector and a second veterinarian with her, and I was required to be there. I was given a date and a time." (Tr. 555.) Dr. Harlan also said that Dr. Dellar had "indicated that Mr. Hodgins had asked for a second opinion, and I assumed that's why I was sent." (Tr. 563.) As noted, Mr. Hodgins was not present at the previous inspection on November 16, 1993. Mr. Kovach also testified that [the] Hodgins cooperated with the inspectors at the January [1994] inspection (Tr. 470, 473).

The day of the inspection, January 18, 1994, turned out to be a record-setting cold day, with the temperature ranging from -16 to -20 degrees below zero (Tr. [387-]88). The inspectors noted in the inspection report approximately 22 alleged violations (CX 7). Mr. Kovach took photographs to document the violations (Tr. 303).

The next inspection was conducted 2 months later, on March 1, 1994, by Drs. Dellar and Harlan (Tr. 570). Dr. Dellar took photographs of alleged violations during this inspection (Tr. [579-]80[; CX 10]). Approximately 18 alleged violations were cited by the veterinarians in the inspection report (CX 9). Dr. Dellar also wrote a memorandum to her supervisor, Dr. Binkley, saying that Ms. Longhi displayed signs of anger at the inspection, spoke in a loud voice, and swore (Longhi CX 50). However, Dr. Dellar testified that Ms. Longhi always calmed down when asked to do so (Longhi Tr. 167). Ms. Hodgins testified that the inspection was a "little bit tense for us because it's our business that's at stake, so naturally we'd be a little upset." (Longhi Tr. 245.) Mr. Hodgins testified that he became frustrated with the inspections and admitted that he criticized the inspectors' findings. He said that an animal rights group in Michigan was trying to put Class B dealers like his kennel out of business and that he was aware that Dr. Dellar had talked to a member of that group (Tr. 1519 . . .). Dr. Dellar and Mr. Rippy both testified that they were aware of efforts by animal rights groups to eliminate Class B dealers (Tr. 930, 1049[-50]). [Mr. Hodgins testified that] Dr. [Joseph] Walker ["alluded to the fact] that there was a lot of pressure[] to eliminate Class B [d]ealers." (Tr. 1636.)[4]

The next inspection was conducted a month later, on April 5, 1994. Mr. Rippy, who had by now completed his investigation of the holding period at [Hodgins] Kennel, [Inc.,] accompanied Drs. Dellar and Harlan and took photographs of the alleged violations. The kennel was cited for approximately 15 alleged violations (CX 13). [Mr. Rippy] testified that [Mr. Hodgins claimed that] having three persons conduct an inspection [was] harassment (Longhi Tr. 36), and . . . that Ms. Longhi reacted to the citations by "showing exasperation, frustration, turning around, stepping away, throwing her hands up and then coming back to stand beside them again, making various comments as to what was being cited, in a very agitated manner. . . ." (Longhi Tr. 21.) Dr. Harlan and Mr. Rippy testified that the Hodgins were "very upset" during the inspection and told them that the stress of the inspections was affecting Ms. Longhi, who was pregnant. Ms. Longhi later had a miscarriage (Tr. 634; Longhi Tr. 74).

A May 10, 1994, inspection was conducted by Drs. Dellar and Harlan. Mr. Rippy accompanied them and took photographs of the alleged deficiencies. The kennel was cited for approximately 10 alleged violations (CX 17).

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[4]Complainant did not present Dr. Walker as a witness. His statements are based on the Hodgins' testimony concerning their telephone conversations with [Dr. Walker]. Although hearsay, I find this testimony reliable and credible.

Another inspection was conducted the following month, on June 23, 1994, by Drs. Dellar and Harlan. Mr. Rippy again accompanied them. The Hodgins and Ms. Longhi became angry with the inspection process and started talking so loudly that Drs. Dellar and Harlan considered terminating the inspection. Mr. Rippy, who said the inspectors felt harassed because of this behavior, intervened and at his request the Hodgins and Ms. Longhi calmed down. The inspection proceeded without further incident (Tr. 736, 739-40, 933-37, 944-48, 960). Approximately 12 alleged violations were found [(CX 20)].

The next inspection was on September 13, 1994. When Mr. Rippy was unavailable, Dr. Dellar requested that Don Castner, another senior [APHIS] investigator, accompany her and Dr. Harlan (Tr. 476-77). Mr. Castner, who said his job is to document violations, was asked by Dr. Dellar to take photographs of the violations she found (Tr. 479). He said that the Hodgins did not impede the investigation in any way (Tr. 513). Approximately 15 alleged violations were noted in the inspection report (CX 24).

The last inspection covered by the Complaint took place on November 22, 1994. It was conducted by Dr. Dellar and Dr. Peter Kirsten. They cited approximately nine alleged violations in the inspection report (CX 26). There is no evidence that the Hodgins or Ms. Longhi interfered with or impeded this inspection.

The record does not indicate exactly when the next inspection took place after the period of inspections covered by the Complaint. . . . In any event, Dr. Dellar's superior, Dr. Ellen Magid, was instructed by her superior, Dr. [Joseph] Walker, the head of APHIS' Northeast Sector, to accompany Dr. Dellar on an inspection to "be sure that what we were doing was true and correct. And also to judge what was happening at the facility." (Tr. 1137.) Mr. Hodgins testified that in March 1995 he talked to Dr. Walker about Dr. Dellar (Tr. 1634-35). Dr. Walker, in turn, discussed with Dr. Magid his concern about a personality conflict between the Hodgins and Dr. Dellar and that there had been other complaints about Dr. Dellar's conduct (Tr. 1143-44). Mr. Hodgins also testified that in October 1994 he had received a call and then a letter from Jeff Quinn at the Tuscola County Animal Control who said that when Dr. Dellar had inspected his records she acted like someone "with a chip on her shoulder." (Tr. 1778[-79]; RX 20.)

Dr. Magid inspected the facility in May 1995 and reported back to Dr. Walker "that Hodgins Kennel was fairly close to coming into compliance at the time that I saw it" (Tr. 1137) and that she "thought that with a little effort that they would be in compliance with our regulations." (Tr. 1141.) Dr. Dellar did not disagree with this assessment (Tr. 1158). Dr. Magid said she observed during the inspection that

Dr. Dellar seemed a "bit nervous," but polite, and that the Hodgins were tense, but calm (Tr. 1159).

Discussion

Respondents contend that the Complaint should be dismissed on the grounds that the inspections constitute warrantless searches, that they were denied due process because they were denied access to certain information and witnesses, and that they were unable to defend themselves because of the vagueness of APHIS' regulations. Respondents also contend that APHIS' inspection reports are inadmissible because they were prepared in anticipation of litigation. . . . Respondents further suggest that it may be more than a coincidence that animal rights groups have allegedly used APHIS' reports and press releases in an effort to force Respondents out of business and that the "sole motive" of the inspectors may therefore not have been to enforce the law and regulations (Respondents' [Post-Trial] Brief at 7).

Warrantless searches are permitted under the Animal Welfare Act. *Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994). Respondents' arguments concerning access to information and witnesses were considered and ruled upon at the hearing. Those rulings are affirmed. . . .

With respect to the motives of APHIS' inspectors, the fact that an inspector may have talked to a member of the public, including members of an animal rights group, or that such groups may have disseminated APHIS-prepared information for their own purpose, is . . . no basis for inferring a bad motive on the inspectors' part. . . . I [do not] find . . . evidence of undue influence on the inspectors or [evidence] that [the inspectors'] objectivity was compromised because of their contact with the public.

The allegations that the inspections were conducted in anticipation of litigation raises the issue of whether APHIS instituted the series of inspections beginning in November 1993 with the intention of filing a Complaint against Respondents.

The record does not show that Respondents had a pattern or practice in over 25 years of APHIS' inspections of failing to comply with the [Animal Welfare Act or the] Regulations [and Standards] that would lead inspectors in November 1993, when they began their series of eight inspections[, which is the subject of this proceeding,] to reasonably anticipate that the inspections would likely culminate in litigation. Respondents had received a warning letter following an inspection in October 1991, but APHIS did not conduct [another inspection of Hodgins Kennel, Inc.,] for over a year. When the next inspection was conducted in January 1993,

no violations, except for a question about the holding period, were found, indicating that the items for which Respondents had been cited in October 1991 had been corrected. There are no other objective reasons in the record suggesting that Respondents in November [1993] or January [1994] would be difficult to deal with or refuse to comply with the [Animal Welfare Act and the] Regulations [and Standards]. Mr. Rippy's experience at the time with Respondents would suggest the contrary. He found Respondents to be friendly and cooperative.

When inspections resumed in November 1993, . . . the attitude of Dr. Dellar, who became the principal inspector, had changed for no apparent reason. She then requested . . . help for her and Mr. Kovach's reinspection in January [1994]. . . . The people involved with the inspections thereafter all give different reasons for their participation in the inspection process. Mr. Rippy, an investigator who does not ordinarily accompany inspectors, said Dr. Dellar, an experienced inspector, asked him to participate because she felt uneasy about the situation. Dr. Dellar, in turn, denied asking Mr. Rippy for assistance, but said that she needed someone like Mr. Rippy to take photographs to document her findings, even though Mr. Kovach had performed the function in January [1994], and, as she demonstrated in March [1994], she was capable of taking such photographs herself. The only difference is that Mr. Rippy (and later Mr. Castner) had been trained to take photographs that could be used as evidence in litigation.

Dr. Harlan, for her part, stated that she was led to believe that the reason she participated in the inspection in January [1994] was because Mr. Hodgins had asked for another inspector. She did not, as Dr. Dellar suggested, say that she requested . . . help because she felt intimidated. Mr. Hodgins, however, was not present during the previous inspection in November [1993,] which would have been the logical time for him to have given some signs that he wanted another inspector present or was going to be troublesome. Mr. Hodgins' frustration and anger with the inspections did increase over time, but it did not become a problem until about March or April [1994]. Mr. Hodgins also obviously had not asked for another inspector at the time because he felt that having three persons at the inspections was harassment and in his written response to the November [1993] inspection, in which he detailed the corrective action the kennel was taking, made no complaint at that time about the inspection or the inspectors and did not request new or additional inspectors (CX 6). . . .

Except for the January and March [1994] inspections, when Mr. Kovach and Dr. Dellar took the photographs, either Mr. Rippy or Mr. Castner accompanied the inspectors at the other inspections to take photographs to document the alleged violations. The photographs were all of the same quality regardless of whether

they were taken by Dr. Dellar, or Messrs. Kovach, Rippy, or Castner.

. . . Mr. Rippy . . . conceded that, with respect to recordkeeping, this was a "test case . . . [t]o determine if what the inspector was doing in the citations was correct or incorrect." (Tr. 914-16.)

[However,] these circumstances [do not] support [Respondents'] argument that Respondents were chosen for "selective enforcement." . . . As discussed [in this Decision and Order, *infra* pp. 71-72,] the inspectors conducted [thorough] inspections and their findings were extensive, but [there is no evidence that Respondents are the target of selective enforcement or selective prosecution or that the inspectors' findings] reflect arbitrariness or bias. . . . [Footnote 5 omitted.] I do not find that the [inspection] reports were arbitrary or lack probative value, although, as noted [in this Decision and Order, *infra* pp. 23-65,] the inspectors' conclusions were sometimes wrong.

Finally, Respondents contend that the Regulations [and Standards] are too vague to be enforceable. The Regulations [and Standards], however, are quite detailed. The difficulty arises, as in this case, in defining certain regulatory terms, such as "adequate veterinary care," "structurally sound housing," or "excessive" rust or excreta, and applying them to the facts of a given situation. . . . [However, I find that the Regulations and Standards apprise Respondents of that conduct which is prohibited and that conduct which is required, and the Regulations and Standards are not so unclear that they encourage arbitrary and discriminatory enforcement. Consequently,] I . . . do not find that APHIS' Regulations [and Standards] . . . are unconstitutionally vague.

Alleged Violations

. . . .

Veterinary Care

Paragraphs II(A), III(A), IV(A), V(A), VI(A), VII(A), VIII(A), and IX(A) of the Complaint allege that Respondents failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care in [willful] violation of section 2.40 of

the Regulations (9 C.F.R. § 2.40).[6]

Respondents allegedly violated section 2.40 [of the Regulations (9 C.F.R. § 2.40) in three] . . . ways: 1) sick animals were not provided with appropriate medical treatment; 2) outdated drugs were found at Respondents' facility; [and] 3) nonveterinary personnel treated and diagnosed animals. . . .

1. **Medical treatment**. APHIS inspectors found that many sick animals were not being treated because no one noticed that the animals were sick or injured. Dr. Dellar, for example, testified that "the overall violation that is cited at Hodgins Kennels [sic] is that there are animals that are not noticed as being abnormal." (Tr.

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[6] **§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).**

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer and exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40.

252.) Similarly, in the inspection report for the November 16, 1993, inspection, APHIS inspectors noted that "[m]any sick animals were not reported nor being treated." (CX 5.)

Respondents were cited often for inadequate veterinary care based on animals that were thin (CX 7, 9, 13, 24, 26). For example, on January 18, 1994, [an] "extremely thin" dog[] with nasal discharge had not been treated, and on March 1, 1994, four "extremely thin" dogs needed "to be isolated, feed intake monitored and supplied with higher caloric density type of feed." (CX 7, 9.) Dr. Dellar testified that "[w]hether the dog comes in thin or whether it is thin at the facility it requires a veterinarian examination to determine why it is thin." (Tr. 1092.) She further said that "thin dogs most commonly were cited because of inadequate veterinary care in that they were group housed with other dogs, [and] their feed intake could not be monitored." (Tr. 1040.) However, Drs. Johnson and Vaupel, the kennel's [attending] veterinarians, both stated that it is not unusual to see thin animals coming from pounds and shelters. They indicated that thin animals do not necessarily require immediate veterinary care. They said the standard veterinary practice is to observe thin animals to see if they are eating and drinking and gaining weight before performing a more extensive medical examination (Tr. 1191-92, 1838-40). Ms. Longhi testified that thin dogs were often taken out of the pen in order to monitor their food intake and to prevent undue competition for food (Tr. 1985). However, the record does not show that thin dogs were promptly segregated while they were being monitored.

On May 10, 1994, inspectors observed a dog that had a bloody discharge that was not detected as being abnormal and noted that "[m]any dogs/cats were found with unnoticed, untreated or inadequately treated conditions." (CX 17 at 2.) . . . .

On November 16, 1993, inspectors noted a cat with "both eyes stuck shut with copious ocular discharge" that was supposed to have been euthanized 5 days earlier and was unresponsive to treatment (CX 5; Tr. 181). In the report for the January 18, 1994, inspection, Mr. Kovach stated that "[m]any, many dogs were noted to be unresponsive and shaking with cold. These dogs need to be supported with additional heat and isolation from healthy dogs." (CX 7.) Similarly, on June 23, 1994, a dog was observed to be unresponsive, dehydrated, weak, coughing and had a "copious nasal discharge which had soiled his front legs." Dr. Dellar indicated in the inspection report that the "dog needs to be separated, given fluids and additional supportive care." (CX 20.)

. . . [M]any dogs brought to [Hodgins] Kennel[, Inc.,] are thin or become sick and develop "kennel cough" with its attendant symptoms. Respondents' veterinary protocol states that kennel cough should be treated with antibiotics for 7 days.

Although some animals will respond to the use of standard antibiotics, this is not always the case. "Supportive care for an animal who is seriously ill far exceeds . . . just antibiotic therapy." (Tr. 670.) For example, on April 5, 1994, a dog that was coughing, shaking, and having difficulty breathing was being treated with tetracycline (CX 13; Tr. 651-52). Dr. Harlan testified that "[a] dog that ill needs further supportive care and other treatment if he's going to recover well or quickly." (Tr. 652.)

Inspectors also cited Respondents for not following their own veterinary protocol because animals remained on antibiotics after the period established by the attending veterinarian. Complainant contends that "[t]he major and most serious violation of their own protocol was continuing animals on antibiotics for more than seven days without consulting their veterinarian[,]" a practice that allegedly can affect the animals' kidneys (Complainant's [Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof] at 43). Respondents, however, state that the veterinary protocol is not inflexible and provides instructions to change the antibiotics or to continue the antibiotics for a longer period of time if necessary (Tr. 1183-84). Moreover, Dr. Johnson testified that during his visits to Hodgins Kennel[, Inc.], "[t]he typical procedure was to review the animals that were on medications, to determine that protocol was being handled the way we had set it up. . . ." (Tr. 1174.) He further explained that a determination of whether or not an animal should be continued on antibiotics or changed or terminated is also made based on Ms. Longhi's description of how the animal is doing (Tr. 1184).

On January 18, 1994, inspectors noted a cat that had been on amoxicillin . . . since December 28, 1993, "with no improvement of the animal nor evidence of follow-up exam by the vet." (CX 7.) Dr. Johnson testified, however, that the course of treatment for kennel cough must be flexible, depending on the responsiveness of the animals (Tr. 1185). He stated that Ms. Tammi Longhi was "very good" at determining what the response of the animals has been (Tr. 1186). Some animals, he said, respond to antibiotics more quickly than others. If a lack of response to the antibiotic is noted, the animal will be switched to a different antibiotic. Where a response to the antibiotic is slow, but definite, an animal might be kept on the same antibiotic for a considerable period of time, occasionally longer than 14 days (Tr. 1185-86, 1850-51). Specifically, Dr. Johnson stated, "[i]t was standard if the animal was improving [after 7 days] to continue with the medication that it was on. If it wasn't improving, then it was standard to switch to a secondary antibiotic." (Tr. 1333.) Some animals are on medication for up to a month. Dr. Vaupel reiterated that if an animal is responding to an antibiotic, . . . it will be kept on medication until the symptoms subside (Tr. 1851). Animals that

do not respond to treatment are euthanized (Tr. 1202). It is Respondents' prerogative to euthanize any animal not responding to treatment after a 5-day holding period (Tr. 1100).

Beginning in early 1994, Respondents asked Dr. Johnson to examine the animals cited by APHIS in the inspection reports. Dr. Johnson did a physical exam on each individual animal, usually within 24 hours of the time that APHIS inspected the animal (Tr. 1204-05). Dr. Johnson testified that most of the observations or claims made by APHIS inspectors were unfounded (Tr. 1252). He stated that "the animals were being treated. They had recently begun symptoms or appeared to recently begin symptoms and were being treated in the logical, adequate protocol that had been set up." (Tr. 1252.) For example, on April 5, 1994, a cat was cited for having a limp and "greatly enlarged lymph nodes." (CX 13; Tr. 1004.) Dr. Johnson examined the cat on the same day as the APHIS inspection. No enlarged lymph nodes were found (CX 15; Tr. 1224-26, 1393). Dr. Johnson testified that jowls on an old cat get quite large. Moreover, although the cat did have a limp, the limp was caused from an old injury that was not active and not a treatable condition (Tr. 1224-26).

Both Dr. Johnson and Dr. Vaupel testified that on any given morning, new symptoms can appear (Tr. 1201, 1845). Dr. Johnson testified that he could not recall having ever walked through the kennel and gotten the impression that symptoms were not being properly observed and dealt with according to protocol (Tr. [1201]-02). Dr. Harlan admitted that based on a single viewing of an animal, APHIS inspectors were not in as good a position as the attending veterinarian to reach a conclusion about whether the animal was improving on a particular course of antibiotic treatment (Tr. 758-59). In addition, Dr. Dellar testified that she examines animals by looking at them, that she does not exam[ine] them [sufficiently to allow her to diagnose the animals, and that it is not the role of the USDA inspectors to make diagnoses] (Tr. 135).

Although APHIS inspectors are to determine whether there is an adequate program of veterinary care (Tr. 135), the program remains under the supervision and control of the attending veterinarian because of the [attending] veterinarian's expertise (*See* 54 Fed. Reg. 10,868 (1989)). APHIS inspectors, however, never checked with the attending veterinarian to determine whether the veterinary care provided at [Hodgins] Kennel[, Inc.,] met or exceeded standard veterinary practices or to discuss the veterinary protocol or the specific animals they identified as needing treatment, even though failure to provide adequate veterinary care was the most serious alleged violation at the kennel (Tr. 1150). Dr. Dellar did not speak with an attending veterinarian until Respondent Fred Hodgins insisted she call

Dr. Johnson (Tr. 141-42, 1485). The inspectors also never followed-up on any of the individual animals that had been cited during the previous inspections to determine if they had received necessary treatment (Tr. 751, 773, 1024).

Respondents contend that rather than requiring them to provide "adequate" veterinary care, as required by the Regulations, APHIS is demanding the "maximum" care: "[t]he assertions of Complainant here in demanding complete medical work-ups for in-coming thin animals, biopsies of all skin lesions, cough syrup, heating pads and the like, clearly do not promote minimum standards but rather maximum possible standards." (Respondents' [Proposed Findings of Fact and Conclusions of Law] at 5.)

2. **Outdated drugs**. Respondents were cited on January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, [and] September 13, 1994, for the presence of outdated drugs (CX 7, 9, 13, 17, 24). USDA policy statements provide that outdated drugs, if used on [regulated] animals, [is] a violation of the standard of adequate veterinary care (RX 33). Ms. Longhi testified that the kennel orders new vaccines and antibiotics on a regular basis and receives deliveries of fresh medication every week (Tr. 1942). She further stated that the outdated drugs cited by APHIS inspectors were found in the back of cabinets that were seldomly used and were immediately discarded when discovered (Tr. 1944-45). Mr. Hodgins and Ms. Longhi both stated that the types of outdated drugs that were found during the inspections were generally not the types of drugs used currently by the kennel (Tr. 1541, 1953).

Dr. Vaupel testified that outdated medicine becomes ineffective but does not become toxic or unsafe (Tr. 1930). Ms. Longhi, who administers the medication, testified that she always checks the date of the prescription before giving it to the animals (Tr. 1943).

3. **Nonveterinary care**. The inspectors expressed concern that the animals were being diagnosed and treated by Ms. Tammi Longhi, a nonveterinarian. On January 18, 1994, they stated in the inspection report that "[a]dequate veterinary care requires more than nonspecific administration of antibacterials (with no identification of underlying causes). This requires a more active role of the veterinarian in the day to day care of sick animals." (CX 7.) Similar comments were made in the inspection report on March 1, 1994 (CX 9). Dr. Dellar testified that the animals were not being seen by Dr. Johnson or Dr. Vaupel because they were being examined and treated by Ms. Longhi and that the attending veterinarian was only seeing dogs to issue health certificates and a few "pointed-out" sick dogs (Tr. 1051-54). Dr. Dellar summarized the situation as follows: "Generally, the problem is that the veterinarians are not seeing the sick dogs. The animals come

in, they become sick. They are examined, diagnosed and prescribed by a nonveterinarian, Ms. Longhi." (Tr. 1067.)

Dr. Johnson, however, testified that Ms. Longhi, an experienced animal handler, was able to provide him with detailed information regarding the condition and responsiveness of the animals at the facility (Tr. 1186-87). He further stated that the veterinary protocol might handle 99 percent of the animals developing symptoms on a daily basis and that a veterinarian therefore does not need to be consulted initially in these circumstances (Tr. 1437). Moreover, he could not recall ever having walked through Hodgins Kennel and receiving the impression that the animals were not being properly treated according to the protocol (Tr. 1201-02).

. . . .

As Respondents testified, it was in their interest to have healthy animals, since sick animals could not be sold and constituted only an additional expense. The record does not show that animals became sick because of [deliberate] mistreatment by Respondents. . . . [Many] of the animals that did become sick obviously recovered under Respondents' treatment program. . . .

Animals as well as humans can become extremely ill despite the best medical attention. The fact that inspectors observed sick, and sometimes very sick, animals at [Hodgins] Kennel[, Inc.,] does not, therefore, necessarily mean that the animals were not being observed by Respondents or were failing to receive adequate [veterinary] care. Moreover, since the inspectors saw each animal briefly on only one occasion, they would not know, unlike Ms. Longhi, an experienced animal handler, whether the symptoms were better or worse than the previous day before judging the efficacy of the prescribed course of treatment. The inspectors conceded as much by saying that they based many of their conclusions on single observations of the animals rather than on a complete medical examination. As a result, some of their conclusions were incorrect, as in the instance of the cat they diagnosed with enlarged lymph nodes whose problem, as it turns out, was that it was just an old cat with large jowls. In other instances, the inspectors were doing no more than second-guessing the [attending] veterinarian concerning the proper antibiotics to use and the medical care to provide. In those circumstances, the opinion of the [attending] veterinarian would carry much greater weight than the opinion of . . . inspectors.

I find that Respondents had an animal care program that adequately covered most -- 99 percent in Dr. Johnson's opinion -- of its animals. However, "adequate" veterinary care also requires, at a minimum, a reasonably prompt examination of animals to detect symptoms that appear so that a course of treatment can be prescribed as soon as possible to minimize the suffering of the animals. There were

occasions when Respondents' veterinary care program . . . did not cover symptoms that persisted or required more prompt referral to an attending veterinarian for treatment. These included a cat with its eyes stuck shut that had not responded to treatment and was supposed to have been euthanized, the failure to promptly segregate thin dogs and place them on proper diets, the failure to promptly segregate sick from healthy animals, and the failure to promptly detect and treat animals with such symptoms as bloody discharges. These were failures to provide adequate veterinary care and constitute violations of section 2.40 of the Regulations (9 C.F.R. § 2.40).

As for the outdated drugs, there is no evidence that any out-of-date medicines were administered or were intended to be administered to the animals. However, the drugs could be used inadvertently. Even though not toxic, they would be ineffective on animals in need of proper medications and thus prolong their illness. [Nevertheless, I do not find that Respondents' mere possession of] outdated medicines . . . violates section 2.40 of the Regulations [(9 C.F.R. § 2.40)].

. . . .

I find, however, that on November 16, 1993, and January 18, March 1, April 5, May 10, June 23, September 13, and November 22, 1994, Respondents did not provide adequate veterinary care in violation of section 2.40 of the Regulations [(9 C.F.R. § 2.40)].

Identification of Animals

Paragraphs II(B), III(C), IV(C), and VIII(B) of the Complaint allege that Respondents failed to individually identify dogs in willful violation of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50).[7]

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[7]**§ 2141. Marking and identification of animals**

> All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe: *Provided,* That only live dogs and cats need be so marked or identified by a research facility.

7 U.S.C. § 2141.

[§ 2.50 Time and method of identification.

Respondents received numerous citations . . . for animals [that were not individually identified] (CX [5], 7[, 9, 24] . . .). However, tags for animals with a low tolerance for collars were placed on the outside of the cage. Tags for [most] animals were available either on the animal or on the door of the cage (Tr. 1203-04, 1955).

At the time of the inspections at issue, [APHIS] policy required that the tags be on the animal and not on the cage. However, this policy has since been changed. The tags for animals with a low tolerance for collars can now be placed on the outside of the cage (Tr. 203-04, 206). Dr. Dellar testified that:

> The situation would be in compliance if: a) all dogs were tagged or tattooed; b) there was one dog in an enclosure and the tag was attached to the outside of the enclosure if the dog was unable to be tagged for a

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. . . .

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

9 C.F.R. § 2.50(b)(1)-(3) (footnote omitted)].

behavioral reason or a veterinary reason; or, c) if there were multiple dogs in the enclosure, only one was untagged and it was because of a fractious behavioral problem or a veterinary problem.

Tr. 206.

Although APHIS' policy has changed so that Respondents' practice is now in compliance, Respondents were not in compliance with APHIS' policy at the time of the inspections, and therefore, violated [section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of] the Regulations (9 C.F.R. § 2.50). *See First National Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 682-83 (5th Cir. 1983); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1062 (1992)[, *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2))].

Recordkeeping

Paragraphs III(B), IV(B), V(B), VI(B), and VII(B) of the Complaint allege that Respondents failed to maintain adequate records concerning the acquisition, disposition, and identification of animals, as required by section 10 of the Animal Welfare Act [(7 U.S.C. § 2140)] and section 2.75(a)(1) of the [Regulations (9 C.F.R. § 2.75(a)(1))].[8]

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[8] **§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers**

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

7 U.S.C. § 2140.

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

The Animal Welfare Act requires animal dealers to make and keep such records of "the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe." 7 U.S.C. § 2140. This recordkeeping documents the ownership history of [animals primarily] to prevent the sale of stolen animals for medical research. *In re Gentle Jungle*, 45 Agric. Dec. 135, 142-43 (1986).

The January 18, 1994, inspection report noted that "[t]he rabbits and the goats had no records." (CX 7.) On March 1, 1994, Respondents were cited for a pig that did not have a record of acquisition (CX 9). At the time of the next inspection, on April 5, 1994, the pig's record had been corrected, but there were five more dogs and one more cat on the records than were counted by the inspectors (CX 13). On May 10 and June 23, 1994, the inspectors found that Respondents' dog records showed one more dog than was actually present at the facility (CX 17, 20).

Respondents' explanation was that animals shipped or euthanized had not yet been "logged out" on the official record book at the time of an inspection (CX [6], 19, 23; Tr. 1955-56). Mr. Hodgins admitted that there was sometimes a time lag between the physical process of euthanizing the animal and logging it on the records (Tr. 1570). Complainant, however, produced no evidence of any animals whose acquisition or disposition was not ultimately explained (Tr. 1955-56). There is also no allegation that Respondents trafficked in stolen animals.

Respondents' lack of adequate recordkeeping appears to stem from a delay in logging animals into the record book, not from an attempt to evade APHIS' regulations. Nevertheless, . . . the failure to maintain the required records[, even for a short period of time,] . . . constitutes a violation of [section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) and (b)(1) of the Regulations (9 C.F.R. § 2.75(a)(1), (b)(1))].

Structural Strength

Paragraphs II(C)(9), III(D)(1), IV(D)(1), V(C)(1), VIII(C)(1), and IX(B)(1) of the Complaint allege that housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering as required by section

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(vii) The number of animals in the shipment.

9 C.F.R. § 2.75(a)(1), (b)(1).

3.1(a) of the Standards (9 C.F.R. § 3.1(a)).[9]

[The November 16, 1993, inspection report states that:

> III #10 Structure and Construction (3.1a) The doorway leading from the addition area into the main Kennel has several broken cement blocks and a door with a poorly patched hole in it. A door leading to the outside has a broken sweep, leaving a 3-4" gap which allows mice to enter the facility. The outside door in building #4 also has a 3-4" gap—and the concrete in building #3 has large cracks which need repair as well. . . .

CX 5 at 2.]

The . . . January 18, 1994, [inspection report states] that "wall panels were lose, [sic] missing, and buckling" and that ceiling panels in the cat building were in need of repair (CX 7). In addition, a door leading into the kennel at the Judd Road facility was coming apart (CX 7). The March 1, 1994, inspection notes that "[t]he main barn ceiling had missing panels" and the roof was leaking in another building (CX 9). Respondents indicated that the two panels were loose because of recent renovations and were not in contact with the animals. They repaired the panels immediately. Respondents stated that the leak in the roof was a recent development resulting from severe weather and requested additional time to "effect a proper repair." (CX 12.) The April 5, 1994, inspection report notes that the ceiling of the main barn at the Lange Road facility was poorly repaired and "leaving exposed insulation and holes." (CX 13.) Respondents repaired the ceiling (CX 15).

Respondents received several citations for bent or broken pen wires. Some cages used by Respondents are constructed from wire, such as cyclone-type fencing. Dr. Vaupel testified that animals housed in groups often become rowdy and regularly cause cage wires to break and bend (Tr. 1864). On September 13, 1994, the inspectors noted that "[b]roken wires and poorly patched wires" were found in . . . dog pens at the Lange Road facility (CX 24). Dr. Dellar testified that

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[9] **§ 3.1 Housing facilities, general.**

> (a) *Structure, construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

9 C.F.R. § 3.1(a).

on November 22, 1994, sharp wires were "poking into an animal enclosure" (Tr. 1028) and a large metal panel in a cat enclosure was found to be rusty and loose (CX 26).

Respondents corrected many of these structural problems at the time of the inspections. Nevertheless, such deficiencies, even though corrected, are still violations of the Standards. . . . *See In re Pet Paradise*, *supra*, 51 Agric. Dec. at 1070 . . .; *In re Otto Berosini*, 54 Agric. Dec. 886, 914-15 (1995).

Paragraphs II(C)(1), III(D)(2), V(C)(5), VI(C)(4), VIII(C)(2), [and] IX(B)(2) of the Complaint allege that the interior surfaces of housing facilities that come in contact with dogs had excessive rust that would prevent the required cleaning and sanitization and would affect the structural strength of the surface [in violation of] section 3.1(c)(1)[(i)] of the Standards [(9 C.F.R. § 3.1(c)(1)(i))].[10]

[During] the November 16, 1993, and January 18, 1994, inspections[, APHIS inspectors] found that animal enclosures were "excessively rusty" and could not be readily sanitized (CX 5, 7). Dr. Dellar testified that if a visible amount of rust could be seen on her finger after rubbing a surface, such rust would be considered excessive and would be a violation (Tr. 188, 287).

However, as stated in [a notice of proposed rulemaking], the Department recognizes that surface rust will result from the daily cleaning requirements imposed by the [Animal Welfare] Act:

> Because we recognize that as long as water is used to clean animal areas, metal parts will rust, we proposed to allow rust on metal surfaces, as long as it does not reduce structural strength or interfere with proper cleaning and sanitization.

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[10]**§ 3.1 Housing facilities, general.**

. . . .

(c) *Surfaces*—(1) *General requirements.* The surfaces of the housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]

9 C.F.R. § 3.1(c)(1)(i).

. . . .

> . . . It was our intent to provide that rust would become unacceptable only when it prevented cleaning and sanitization or affected the structural strength of a surface. To further clarify this intent, we are proposing to prohibit "excessive" rust that causes such problems.

55 Fed. Reg. 33,455 (1990).

Moreover, when addressing a comment submitted [during] the notice and comment period, the Department stated:

> One commenter stated that rusted areas cannot be adequately sanitized, and that rust affects structural strength and creates harmful runoff, and therefore should be prohibited. Based on our experience enforcing the regulations, we have not found superficial rust to be a problem with regard to either structural strength or sanitization. We are therefore making no changes based on this comment.

56 Fed. Reg. 6433 (1991).

With respect to the inspection conducted on November 22, 1994, Dr. Dellar testified that Respondents had "painted over the rust, and it just chips right off. . . . I ran my hand under this bar, and I actually could peel the large chunks of rust off." (Tr. 1026.) However, Dr. Johnson stated that he never saw any rust that would be of a level that would prevent sanitization of any part of the facilities (Tr. 1274). Mr. Hodgins testified that the kennel has an ongoing program to deal with rust. Periodically, the rust is cleaned from the cages and the cages are repainted (Tr. 1490). Based on the foregoing, I do not find that the amount of rust found on the [interior surfaces of housing facilities and surfaces that come in contact with animals] was excessive so as to prevent [required cleaning and] sanitization or to [affect the] structural [strength of the surface]. Accordingly, no violation is found based on rust [as alleged in paragraphs II(C)(1), III(D)(2), V(C)(5), VI(C)(4), VIII(C)(2), and IX(B)(2) of the Complaint].

Maintenance of Surfaces

Paragraphs V(C)(2), VI(C)[(1)], and VII(C)(1) of the Complaint allege that Respondents did not maintain the surfaces of housing facilities on a regular basis,

as required by section 3.1(c)(2) of the Standards (9 C.F.R. § 3.1(c)(2)).[11] No evidence concerning section 3.1(c)(2) of the Standards was contained in the inspection reports which correspond to the alleged violations. Accordingly, paragraphs V(C)(2), VI(C)[(1)], and VII(C)(1) of the Complaint are dismissed.

Paragraphs VIII(C)(3) and IX(B)(3) of the Complaint allege that Respondents did not clean and sanitize surfaces of housing facilities as required by section 3.1(c)(3) of the Standards (9 C.F.R. § 3.1(c)(3)).[12]

The inspect[ors who inspected Hodgins Kennel, Inc.,] on September 13, 1994, found "soiled, empty cages" at the Lange Road facility. The inspectors further noted that "[u]nder the cages the just cleaned concrete still had urates that could be scraped up with a pen," and the gutters contained an accumulation of urates (CX

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[11]**§ 3.1 Housing facilities, general.**

> . . . .
> (c) . . . .
> . . . .
> (2) *Maintenance and replacement of surfaces.* All surfaces must be maintained on a regular basis. Surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

9 C.F.R. § 3.1(c)(2).

[12]**§ 3.1 Housing facilities, general.**

> . . . .
> (c) . . . .
> . . . .
> (3) *Cleaning.* Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in § 3.11(b)(3) for primary enclosures.

9 C.F.R. § 3.1(c)(3).

24). When the facility was inspected on November 22, 1994, it was found that empty cages had been poorly cleaned, that occupied cages were soiled with excrement between the grates and supports, as was the concrete below the cages, and that urates had accumulated in poorly drained gutters (CX 26).

Respondents argue that since most inspections took place at 9 a.m., just as Respondents' cleaning staff was beginning its daily schedule, what the inspectors saw was only a day's accumulation of excrement. Drs. Johnson and Vaupel also testified that they never saw a level of excrement that exceeded that amount (Tr. 1277, 1920-21). Similarly, Mr. Castner, a senior APHIS investigator, [who was present during the September 13, 1994, inspection,] noted that he did not observe an excessive amount of feces in the animal cages at the kennel (Tr. 501).

The [Department's] position[, as explained] in the Federal Register, is as follows:

> We continue to believe that it is necessary to remove excreta and food waste from primary enclosures daily. However, in those areas with which the dogs and cats do not have contact, specifically areas underneath the primary enclosures, we believe that daily cleaning may not be necessary. We are therefore providing in section 3.10(a) of this revised proposal that excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs and cats contained in the primary enclosures, and to reduce disease hazards, insects, pests, and odors. We are also providing in this revised proposal that the pans under primary enclosures with grill-type floors, and the ground areas under raised runs with wire or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards, pests, insects, and odors.

55 Fed. Reg. 33,471[-72] (1990).

According to Respondents, elevated cages and the floors underneath are cleaned daily, as are the floor-level pens. Wood shavings in the pens are also changed daily (Respondents' [Proposed Findings of Fact and Conclusions of Law] at 38-39). . . . Respondents have instituted a program of daily cleaning [and] I [do not] find that [Complainant has proven by a preponderance of the evidence that Respondents violated 9 C.F.R. § 3.1(c)(3) on September 13, 1994, and November 22, 1994, as alleged in paragraphs VIII(C)(3) and IX(B)(3) of the Complaint].

Storage of Food and Bedding

Paragraphs II(C)(2), III(D)(3), IV(D)(2), VIII(C)(4), and IX(B)(4) of the Complaint allege that supplies of food and bedding were not stored in a manner that protects them from spoilage, contamination, and vermin infestation as required by section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)).[13]

Inspectors found open bags of bedding and feed at the inspection on November 16, 1993 (CX 5), bedding stored open and soiled bedding stored next to fresh food and bedding on January 18, 1994 (CX 7), paint stored [with] feed on March 1, 1994 (CX 9), open bedding, food stored on top of the furnace, rabbit feed placed in the dead animal storage room, and feed in the same room with gasoline on September 13, 1994 (CX 24).

Respondents stated that the bags of bedding were open on November 16, [1993,] because they were in the process of changing bedding. The instances where food was found next to paint and gasoline were matters that were corrected immediately (CX 6, 24). Nevertheless, even if these deficiencies were corrected at the time of the inspection, they still constitute violations of the storage [requirements in section 3.1(e)] of the [Standards (9 C.F.R. § 3.1(e))]. As stated in *In re Big Bear Farm, Inc.*, 55 Agric. Dec. [107, 142 (1996)]:

> This Department's policy is that the subsequent correction of a condition not in compliance with the Act or the regulations or standards issued under the Act has no bearing on the fact that a violation has occurred. *In re Pet*

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[13]**§ 3.1 Housing facilities, general.**

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

9 C.F.R. § 3.1(e).

Paradise, Inc., 51 Agric. Dec. 1047 (1992), *aff'd sub nom. Wilson v. USDA*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)). Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Regulations in 9 C.F.R. Part 2 and the Standards in 9 C.F.R. Part 3. (9 C.F.R. § 2.100(a).) This duty exists regardless of a "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation . . . does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.

[While I find that Complainant has proven violations of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) as alleged in paragraphs III(D)(3), IV(D)(2), and VIII(C)(4) of the Complaint, Complainant has not introduced sufficient evidence to prove that Respondents violated section 3.1(e) of the Standards on November 16, 1993, and November 22, 1994. Accordingly, paragraph II(C)(2) and paragraph IX(B)(4), as it relates to a violation of section 3.1(e) of the Standards, are dismissed.]

Drainage and Waste Disposal

Paragraphs III([D])(4), IV(D)(3), V(C)(3), VI(C)(2), and VII(C)(2) of the Complaint allege that Respondents did not provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease as required by section 3.1(f) of the Standards [(9 C.F.R. § 3.1(f))].[14]

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[14]**§ 3.1 Indoor housing facilities, general.**

. . . .

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage

On January 18, 1994, inspectors found large puddles of standing water in the aisles of the Lange Road facility due "to melting snow off the equipment." In addition, numerous piles of soiled bedding were found in the aisles, and standing water and feces were found in the drainage troughs [during] this inspection (CX 7).

On March 1, April 5, and May 10, 1994, the inspectors noted standing water, urine, and fecal debris in the drainage troughs at the Lange Road facility (CX 9, 13, 17). On June 23, 1994, standing water was found pooled in a walkway at the Lange Road facility (CX 20). Dr. Dellar testified that there was a "large pool of water that was so high it was actually flowing into one of the dog enclosures and getting the bedding wet." (Tr. 1010.)

Mr. Hodgins testified that the problems identified on January 18, 1994, were due to employees not working a full day because of the temperatures, which were as low as 19 degrees below zero (Tr. 1540). Mr. Hodgins stated:

> [T]here was no place to go with [the used bedding]. We cleaned the pens and left it in there because of the extreme cold temperatures. And the manure spreader could not be dumped because it was froze, so we were in a situation where we couldn't get rid of it. So until that manure spreader got thawed out and we dumped it the next day, then it would have been removed. But the pens were cleaned, the feces were in the middle of the floor in small piles.

Tr. 1540.

As for the drainage trough, Respondents contend that such troughs exist for the purpose of catching urine and feces "so that it is taken away from the area in which the animals are kept and the animals stay clean and dry." Respondents also point out that the inspections usually took place at 9 a.m., at which time the daily cleaning of the troughs had not been completed (CX 12, 15, 19).

Respondents violated section 3.1(f) of the Standards [(9 C.F.R. § 3.1(f))]. . . .

> systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. . . . Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times.

9 C.F.R. § 3.1(f).

The Standards contain no exception for a failure to comply because of extreme weather conditions or because the inspection occurs early in the work day. [A failure to comply with the Standards constitutes] a violation [of the Standards], regardless [of] the reason [for] the [failure to comply] and even though [the violation is] promptly corrected. *In re Big Bear Farm, Inc., supra.* [However, as discussed in this Decision and Order, *infra* pp. 120-21, Complainant has not proven the violations alleged in paragraphs V(C)(3) and VI(C)(2) by a preponderance of the evidence, and paragraphs V(C)(3) and VI(C)(2) of the Complaint are dismissed.]

Temperature

Paragraph III(D)(5) of the Complaint alleges that Respondents failed to sufficiently heat indoor housing facilities for dogs and cats to protect the animals from temperature extremes and provide for their health and well-being as required by section 3.2(a) of the Standards (9 C.F.R. § 3.2(a)).[15]

The temperature on January 18, 1994, when the inspectors were at Respondents' facility, ranged between -16 degrees and -20 degrees below zero (Tr. 388). Schools in the area were closed that day, and local businesses encountered extraordinary difficulties trying to keep equipment working. The inspectors found that the temperature in the Lange Road kennel was 41 degrees, and the temperature in the Judd Road kennel was 44 degrees (Tr. 565-66; CX 7). Dr. Dellar testified that Respondent Fred Hodgins turned up the thermostat in the barn during the inspection, thereby "indicating that it wasn't set as high as it should have been, and that it could be turned up and the building could be heated more adequately." (Tr. 998.) Mr. Hodgins testified that the first reading taken by Dr. Dellar was

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[15]**§ 3.2 Indoor housing facilities.**

> (a) *Heating, cooling, and temperature.* Indoor housing facilities for dogs and cats must be sufficiently heated and cooled when necessary to protect the dogs and cats from temperature extremes and to provide for their health and well-being. When dogs or cats are present, the ambient temperature in the facility must not fall below 50 °F (10 °C) for dogs and cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress or discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs and cats, except as approved by the attending veterinarian.

9 C.F.R. § 3.2(a).

within the regulatory limit, but that she took repeated readings, including putting the thermometer at floor level, where an unacceptable temperature was received (Tr. 1516-17).

Since [indoor housing facilities for dogs and cats were] not at the required temperature level (50° F), regardless of the record-breaking cold, Respondents were not in compliance with section 3.2(a) of the Standards on January 18, 1994. Accordingly, I find that Respondents violated section 3.2(a) of the Standards on January 18, 1994[, as alleged in paragraph III(D)(5) of the Complaint].

Ventilation

Paragraphs II(C)(3), IV(D)(4), V(C)(4), VI(C)(3), VIII(C)(5), and IX(B)(5) of the Complaint allege that indoor housing facilities for dogs were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation as required by section 3.2(b) of the Standards (9 C.F.R. § 3.2(b)).[16]

Inspectors detected strong ammonia odors during six of their inspections of the facility (November 16, 1993, and March 1, April 5, May 10, September 13, and November 22, 1994) (CX 5, 9, 12, 13, 15, 17, 19, 24, 26). Inspectors remarked that increased cleaning, ventilation, or decreased animal population could reduce such odors (CX 24, 26).

Respondents stated that ventilation fans run constantly. Dr. Vaupel testified that although 250 on-site animals inevitably create a considerable amount of odor, he has never noticed an excessive odor at the kennel (Tr. 1856). Dr. Dellar, on the other hand, stated that the odor in the kennel burned her eyes and throat (Tr. 210-

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[16]**§ 3.2 Indoor housing facilities.**

. . . .

(b) *Ventilation.* Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85 °F (29.5 °C) or higher. The relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices.

9 C.F.R. § 3.2(b).

11). Dr. Harlan, likewise, testified that her eyes watered because of the ammonia level (Tr. 539).

[Indoor housing facilities] with ammonia [levels that cause an inspector's eyes to water are not sufficiently ventilated to provide for the "health"] and "well-being" [of animals present in the facilities] as required by [section 3.2(b) of] the Standards [(9 C.F.R. § 3.2(b)). Accordingly, Respondents violated section 3.2(b) of the Standards on November 16, 1993, and March 1, April 5, May 10, September 13, and November 22, 1994, as alleged in paragraphs II(C)(3), IV(D)(4), V(C)(4), VI(C)(3), VIII(C)(5), and IX(B)(5) of the Complaint].

Interior Surfaces

Paragraphs II(C)(4), IV(D)(5), VIII(C)(6), and IX(B)[(6)] . . . of the Complaint allege that the floors and walls of indoor housing facilities and other surfaces in contact with the animals were not impervious to moisture and that the ceilings were not impervious to moisture or replaceable as required by section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)).[17] [Paragraph IX(B)(2) of the Complaint alleges that Respondents violated section 3.2(d) of the Standards but does not allege facts which, if true, would constitute a violation of section 3.2(d) of the Standards. Accordingly, paragraph IX(B)(2) of the Complaint, as it relates to 9 C.F.R. § 3.2(d), is dismissed.]

The inspectors on November 16, 1993, found that many floors at the Lange Road facility needed to be resealed (CX 5). They further noted that the metal grating on the walls of the Judd Road facility had begun to peel, "leaving areas of unsealed material which cannot be readily sanitized." (CX 5.) Similarly, on March 1, 1994, they reported that the floors in the main barn of the Lange Road facility needed to be resealed (CX 9). On September 13, 1994, and November 22, 1994, similar problems were indicated concerning the condition of the floors at the Lange Road facility (CX 24, 26).

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[17]**§ 3.2 Indoor housing facilities.**

. . . .

(d) *Interior surfaces.* The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels).

9 C.F.R. § 3.2(d).

Dr. Dellar testified that she employed a "beading up" test in determining whether floors needed to be resealed by placing water on the floor and watching for "beading." If the height of the water bead lessens after a minute or two, she said, the floor needs to be resealed (Tr. 212-14). However, Thompson's Water Seal, a manufacturer of resealing products, stated in a letter that beading up is not an appropriate indicator of the effectiveness of a sealer. The company said that floors treated with water seal will bead-up only for approximately 3 months but that the water seal continues effective for approximately 1 year. It further stated that a sealant should not be applied more than once a year because a more frequent application creates a sticky residue (RX 21).

[Section 1.1 of the Regulations defines the term "impervious surface," as follows:

§ 1.1 Definitions.

. . . .

Impervious surface means a surface that does not permit the absorption of fluids. Such surfaces are those that can be thoroughly and repeatedly cleaned and disinfected, will not retain odors, and from which fluids bead up and run off or can be removed without their being absorbed into the surface material.

9 C.F.R. § 1.1.

Thus, the "beading-up" test is not the only method by which to determine whether a surface meets the definition of an "impervious surface" under the Regulations and Standards.]

. . . .

Mr. Hodgins testified that the kennel purchased and applied 50 gallons of floor sealant during the time of the Complaint and that inspectors had [cited Respondents for an unsealed floor that had been] sealed just 8 days [prior to the citation] (Tr. 1497-98). I find no violations of section 3.2(d) of the Standards [(9 C.F.R. § 3.2(d))].

Space Requirements

Paragraph III(D)(6) of the Complaint alleges that the construction of the primary enclosures for dogs did not provide sufficient space for each animal as

required by section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi)).[18] On January 18, 1994, APHIS conducted an inspection of Respondents' Lange Road facility and noted that too many dogs were housed together in one pen to provide sufficient space for each animal (CX 7). I find that Respondents violated section 3.6(a)(2)(xi) of the Standards [(9 C.F.R. § 3.6(a)(2)(xi)) as alleged in paragraph III(D)(6) of the Complaint].

Adequate Resting Surfaces

Paragraph II(C)(5) of the Complaint alleges that primary enclosures for cats did not contain adequate resting surfaces as required by section 3.6(b)(4) of the Standards (9 C.F.R. § 3.6(b)(4)).[19] On November 16, 1993, APHIS conducted an

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[18]**§ 3.6 Primary enclosures.**

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

. . . .

(2) Primary enclosures must be constructed and maintained so that they:

. . . .

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

9 C.F.R. § 3.6(a)(2)(xi).

[19]**§ 3.6 Primary enclosures.**

Primary enclosures for dogs and cats must meet the following minimum requirements:

. . . .

(b) *Additional requirements for cats.*

. . . .

(4) *Resting surfaces.* Each primary enclosure housing cats must contain a resting surface or surfaces that, in the aggregate, are large enough to hold all of the occupants of the primary enclosure at the same time comfortably. The resting surfaces must be elevated, impervious to moisture, and be able to be easily cleaned and sanitized, or easily replaced when soiled or worn. Low resting surfaces that do not allow the space under them to be comfortably occupied by the animal will be counted as part of the floor space.

inspection of Respondents' facility and noted that "[several] cats were being held in transport cages" that did not have resting surfaces (CX 5). Respondents stated that the cats had been placed in the transport cages temporarily and were to be moved into primary cages (CX 6). As the transport cages were not primary enclosures, Respondents did not violate section 3.6(b)(4) of the Standards [(9 C.F.R. § 3.6(b)(4)) as alleged in paragraph II(C)(5) of the Complaint]. *Cf. In re Otto Berosini, supra*, 54 Agric. Dec. at 918.

Housekeeping and Cleaning

Paragraphs II(C)(6), III(D)(7), IV(D)(6), V(C)(6), VI(C)(5), VII(C)(3), VIII(C)(7), and IX(B)(7) of the Complaint allege that primary enclosures for dogs were not kept clean as required by section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)).[20]

APHIS conducted an inspection of Respondents' facility on November 16, 1993, and found that "urine scale had built up on the floor under the dog enclosures" at the Judd Road facility (CX 5). Urine scale is residue from evaporated animal urine (Tr. 197). Dr. Dellar testified that the presence of urine scale indicates inadequate cleaning procedures (Tr. 199-200). On January 18, 1994, inspectors . . . noted a build up of urine and water and feces in the gutters . . . at the Judd Road facility (CX 7). On September 13, 1994, inspectors reported [urate] scale [on the floor] beneath the pens and hair and other debris stuck to the

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9 C.F.R. § 3.6(b)(4).

[20] **§ 3.11 Cleaning, sanitization, housekeeping, and pest control.**

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with wire or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards[,] pests, insects and odors.

9 C.F.R. § 3.11(a).

bottom of cages (CX 24). . . . [I find that Respondents violated section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) as alleged in paragraphs II(C)(6) and VIII(C)(7) of the Complaint, but that Complainant has not proven by a preponderance of the evidence that Respondents violated section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) as alleged in paragraphs III(D)(7), IV(D)(6), V(C)(6), VI(C)(5), VII(C)(3), and IX(B)(7) of the Complaint].

Paragraph IX(B)(8) of the Complaint alleges that Respondents' premises were not kept clean to protect the animals from injury and facilitate the required husbandry practices in violation of section 3.11(b)(3) of the Standards (9 C.F.R. § 3.11(b)(3)).[21]

The inspectors found on November 22, 1994, that the cages were poorly cleaned (CX 26). Dr. Dellar testified that Respondents were "only cleaning the surface, the top [of the cages] underneath they were leaving the feces and the urate mineral deposits and the hair." (Tr. 1029.) Mr. Hodgins testified that the pens are cleaned completely every day, that fresh bedding is provided for the animals (Tr. 1509), and that the areas outside and underneath of the pens are sanitized every 2 weeks (Tr. 1509-10).

I find that, although Respondents have a regular cleaning program, they did not provide the cleaning of all surfaces required by the Standards and that they therefore violated section 3.11(b)(3) of the Standards [(9 C.F.R. § 3.11(b)(3)) as alleged in paragraph IX(B)(8) of the Complaint].

Paragraphs II(C)(7), III(D)(8), IV(D)(7), V(C)(7), VI(C)(6), VII(C)(4), VIII(C)(8), and IX(B)(4) of the Complaint allege that Respondents' premises,

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21 **§ 3.11 Cleaning, sanitization, housekeeping, and pest control.**

. . . .

(b) *Sanitization of primary enclosures and food and water receptacles. . . .*

. . . .

(3) Hard surfaces of primary enclosures and food and water receptacles must be sanitized using one of the following methods:

(i) Live steam under pressure;

(ii) Washing with hot water (at least 180 °F (82.2 °C)) and soap or detergent, as with a mechanical cage washer; or

(iii) Washing all soiled surfaces with appropriate detergent solutions and disinfectants, or by using a combination detergent/disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surfaces to remove organic material, so as to remove all organic material and mineral buildup, and to provide sanitization followed by a clean water rinse.

9 C.F.R. § 3.11(b)(3).

including buildings, were not kept in a clean order to protect the animals from injury and facilitate the required husbandry practices as required by section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).[22]

The inspectors, on November 16, 1993, found that certain walls at the Lange Road facility "were splattered with debris and appeared moldy," the floor needed sweeping, tools and bottles needed to be removed, and "[d]ead flies, shingles, vents, and gasoline cans need to be cleared away." (CX 5.) Similar problems with housekeeping were found at the Judd Road facility (CX 5). Respondents stated that the appearance of "splashed" walls was due to the recent installation of wallboard that had not yet been scrubbed and that the storage room in which many items were found is separated from the animal housing area by a door (CX 6). On January 18, 1994, the inspectors noted cobwebs and rodent feces at the Judd Road facility and stated that "walls and ceiling areas still need more cleaning." (CX 7.) Similarly, on March 1, April 5, May 10, and June 23, 1994, wall surfaces, window sills, ventilation ducts, ceilings, and fixtures at the Lange Road facility were soiled with dust, debris, and cobwebs (CX 9, 13, 17, 20). In addition, on May 10, 1994, APHIS inspectors further noted that "[t]he barrel used to euthanize the animals had a strong odor and was soiled, and rusting." (CX 17.) Dr. Harlan testified that:

> Anything that comes in contact with the animals is required to be maintained in good condition, well repaired, no rusting surfaces, to allow for cleaning and disinfection. This includes everything associated with any medical treatment up to and including euthanasia.

Tr. 708.

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[22] **§ 3.11 Cleaning, sanitization, housekeeping, and pest control.**

. . . .

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

9 C.F.R. § 3.11(c).

On September 13, 1994, inspectors noted, with respect to the Lange Road facility, that "[t]he entire facility was in need of a more frequent cleaning," citing dust, cobwebs, fecal accumulation, dead flies, and flaking light fixtures as examples of uncleanliness (CX 24).

. . . .

. . . On the basis of the inspectors' findings, I find . . . that Respondents violated section 3.11(c) of the Standards [(9 C.F.R. § 3.11(c))] on November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, and September 13, 1994. [The November 22, 1994, inspection report does not support a finding that Respondents violated section 3.11(c) of the Standards on November 22, 1994. Accordingly, paragraph IX(B)(4) of the Complaint, as it relates to a violation of 9 C.F.R. § 3.11(c), is dismissed.]

Pest Control

Paragraphs III(D)(9), IV(D)(8), VII(C)(6), and VIII(C)(10) of the Complaint allege that Respondents did not maintain an effective program for the control of pests as required by section 3.11(d) of the Standards (9 C.F.R. § 3.11(d)).[23]

[During] the January 18, 1994, inspection, [inspectors] found rodent feces at the Lange Road facility (CX 7). Similarly, on March 1, 1994, APHIS inspectors noted rodent feces and nesting material at the Lange Road facility (CX 9). [The] June 23, 1994, . . . inspection report states that numerous mosquitos were present and rodent feces was found at the Judd Road facility, and on September 13, 1994, numerous flies were found at the Lange Road facility (CX 20, 24).

Inspectors acknowledged that Respondents had a pest control program in the form of traps and bait. On one occasion, when an inspector's claim that she saw rodent droppings was challenged, she conceded that the materials were flecks of dirt next to the furnace (Tr. 1568).

The Standards do not require the complete elimination of pests, which is

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[23] **§ 3.11 Cleaning, sanitization, housekeeping, and pest control.**

. . . .

(d) *Pest control.* An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

9 C.F.R. § 3.11(d).

probably impossible to achieve, but an "effective program" of control. . . . Although Respondents had a pest control program, [I find that] it . . . was not [an] effective [program and] that Respondents violated section 3.11(d) of the Standards [(9 C.F.R. § 3.11(d))] on [March 1, June 23, and September 13, 1994, as alleged in paragraphs IV(D)(8), VII(C)(6), and VIII(C)(10) of the Complaint].

Primary Conveyance

Paragraph IX(B)(10) of the Complaint alleges that the interior of a van used to transport dogs was not kept clean in violation of section 3.15 of the Standards (9 C.F.R. § 3.15).[24]

APHIS inspectors conducted an inspection of Respondents' facility on November 22, 1994, and found trash "along with potentially toxic substances like brake fluid and oil" in a van used to transport animals (CX 26). Respondents promptly cleaned the van. . . . [Accordingly, I find that Respondents violated] section 3.[1]5 of the Standards [(9 C.F.R. § 3.15) on November 22, 1994, as alleged in paragraph IX(B)(10) of the Complaint].

Employees

Paragraphs II(C)(8), IV(D)(9), V(C)(8), VI(C)(7), VII(C)(5), VIII(C)(9), and IX(B)(9) of the Complaint allege that Respondents did not have enough employees to carry out the required level of husbandry practices and care as required by section 3.12 of the Standards (9 C.F.R. § 3.12).[25]

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[24] **§ 3.15 Primary conveyances (motor vehicle, rail, air, and marine).**

. . . .

(g) The interior of the animal cargo space must be kept clean.

9 C.F.R. § 3.15(g).

[25] **§ 3.12 Employees.**

Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise others. The employer must be certain that the supervisor and other employees can

The inspection report for November 16, 1993, states:

> Most of the items cited on this report are a reflection of inadequate man hours spent at this facility. This facility must have enough employees to carry out the required level of husbandry. Several times the statement was made to the inspectors that they were short handed at this facility.

CX 5.

Respondents, however, explained that the kennel was temporarily short-handed because some of the employees had gone hunting at the opening of the hunting season [and Mr. Hodgins was gone because he was attending the annual AALAS convention] (CX 6). The inspectors, however, found that there was also an insufficient number of employees on March 1, April 5, May 10, June 23, September 13, and November 22, 1994 (CX 9, 13, 17, 20, 24, 26).

Respondents counter that employees who start work at 7:30 a.m. have had insufficient time to provide the animals with medical treatment, feeding, and cleaning by the time the inspectors arrive at 9 a.m. . . . Mr. Hodgins testified that employees arrive at the kennel between 7 and 8 a.m. and that the cleaning of the facility and the medication of the animals begins at that time and lasts until well into the afternoon (Tr. 1550). Therefore, since most of the inspections were conducted in the early morning, the inspectors did not see the facility after it had been cleaned thoroughly and completely.

Respondents' argument appears reasonable. However, the Standards [require that each person subject to the Regulations must] . . . have enough employees at all times to [carry out the level of husbandry practices and care required by the Standards] . . . regardless of the time of an inspection. By not having enough employees to maintain the required level [of husbandry and care] at all times, Respondents violated section 3.12 of the Standards [(9 C.F.R. § 3.12)].

Finally, in many instances, Respondents corrected housekeeping and other deficiencies as soon as noted by an inspector or by the time listed on the inspection report. However, . . . despite these commendable efforts, they do not preclude a violation from being found.

. . . .

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perform to these standards.

9 C.F.R. § 3.12.

Findings of Fact

1. Respondents Fred Hodgins and Janice Hodgins are individuals whose mailing address is [redacted] Michigan [redacted].

2. Respondents [Fred Hodgins and Janice Hodgins] are owners and shareholders of Respondent Hodgins Kennel, Inc., a Michigan corporation operating from the same address.

3. At all times material herein, Respondents were licensed and operating as dealers as defined in the Animal Welfare Act and the Regulations.

4. On November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, September 13, 1994, and November 22, 1994, Respondents failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and to provide veterinary care to animals in need of such care.

5. On November 16, 1993, January 18, 1994, March 1, 1994, [and September 13, 1994,] Respondents failed to individually identify dogs. . . .

6. On January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, and June 23, 1994, Respondents failed to maintain complete records showing the acquisition, disposition, and identification of animals.

7. On [November 16, 1993,] January 18, 1994, March 1, 1994, April 5, 1994, September 13, 1994, and November 22, 1994, housing facilities for dogs were not structurally sound and not maintained in good repair, so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering.

8. . . . .

9. On . . . January 18, 1994, March 1, 1994, and September 13, 1994, food and bedding were not stored in a manner that protects them from spoilage, contamination, and vermin infestation.

10. On January 18, 1994, March 1, 1994, . . . and June 23, 1994, Respondents did not provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes in a manner that minimizes contamination and disease.

11. On January 18, 1994, Respondents failed to sufficiently heat indoor housing facilities for dogs and cats to protect the animals from temperature extremes and provide for their health and well-being.

12. On November 16, 1993, March 1, 1994, April 5, 1994, May 10, 1994, September 13, 1994, and November 22, 1994, indoor housing facilities for dogs

were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation.

13. On January 18, 1994, Respondents failed to provide sufficient space for each animal in primary enclosures for dogs.

14. On November 16, 1993, . . . and September 13, 1994, [areas underneath] primary enclosures for dogs were not kept clean.

15. On November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, [and] September 13, 1994, . . . Respondents' premises, including buildings, were not kept in a clean order to protect the animals from injury and facilitate the required husbandry practices.

16. On . . . March 1, 1994, June 23, 1994, and September 13, 1994, Respondents did not maintain an effective program for the control of pests.

17. On November 22, 1994, the interior of a van used by Respondents to transport [animals] was not kept clean.

18. On November 16, 1993, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, September 13, 1994, and November 22, 1994, Respondents did not have enough employees to carry out the required level of husbandry practices and care.

[19. On November 22, 1994, Respondents did not sanitize the hard surfaces of primary enclosures.]

Conclusions of Law

1. On November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, September 13, 1994, and November 22, 1994, Respondents [willfully] violated section 2.40 of the Regulations, 9 C.F.R. § 2.40, by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failing to provide veterinary care to animals in need of such care.

2. On November 16, 1993, January 18, 1994, March 1, 1994, [and September 13, 1994,] Respondents [willfully] violated section 11 of the [Animal Welfare] Act, 7 U.S.C. § 2141, and section 2.50 of the Regulations, 9 C.F.R. § 2.50, by failing to individually identify dogs. . . .

3. On January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, and June 23, 1994, Respondents [willfully] violated section 10 of the [Animal Welfare] Act, 7 U.S.C. § 2140, and section 2.75 . . . of the Regulations, 9 C.F.R. § 2.75 . . ., by failing to maintain complete records showing the acquisition, disposition, and

identification of animals.

4. On [November 16, 1993,] January 18, 1994, March 1, 1994, April 5, 1994, September 13, 1994, and November 22, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.1(a) of the Standards, 9 C.F.R. § 3.1(a), by failing to maintain housing facilities for dogs in good repair, so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering.

5. . . . .

6. On . . . January 18, 1994, March 1, 1994, and September 13, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.1(e) of the Standards, 9 C.F.R. § 3.1(e), by failing to store supplies of food and bedding in a manner that protects them from spoilage, contamination, and vermin infestation.

7. On January 18, 1994, March 1, 1994, . . . and June 23, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.1(f) of the Standards, 9 C.F.R. § 3.1(f), by failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes in a manner that minimizes contamination and disease.

8. On January 18, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.2(a) of the Standards, 9 C.F.R. § 3.2(a), by failing to sufficiently heat indoor housing facilities for dogs and cats to protect the animals from temperature extremes and provide for their health and well-being.

9. On November 16, 1993, March 1, 1994, April 5, 1994, May 10, 1994, September 13, 1994, and November 22, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.2(b) of the Standards, 9 C.F.R. § 3.2(b), by failing to sufficiently [ventilate] indoor housing facilities for dogs to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation.

10. On January 18, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.6(a)(2)(xi) of the Standards, 9 C.F.R. § 3.6(a)(2)(xi), by failing to construct primary enclosures for dogs, so as to provide sufficient space for each animal.

11. On November 16, 1993, . . . and September 13, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.11(a) of the Standards, 9 C.F.R. § 3.11(a), by failing to keep [areas underneath] primary enclosures for dogs clean.

12. On November 22, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.11(b)(3) of the Standards, 9 C.F.R. § 3.11(b)(3), by failing to [sanitize hard surfaces of primary enclosures].

13. On November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, and September 13, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.11(c) of the Standards, 9 C.F.R. § 3.11(c), by failing to keep [their] premises, including buildings, clean and in good repair to protect the animals from injury, and to facilitate the required husbandry practices.

14. On . . . March 1, 1994, June 23, 1994, and September 13, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.11(d) of the Standards, 9 C.F.R. § 3.11(d), by failing to maintain an effective program for pest control.

15. On November 22, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.15 of the Standards, 9 C.F.R. § 3.15, by failing to keep clean the interior of a van used to transport [animals].

16. On November 16, 1993, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, September 13, 1994, and November 22, 1994, Respondents [willfully] violated section 2.100(a) of the Regulations, 9 C.F.R. § 2.100(a), and section 3.12 of the Standards, [9] C.F.R. § 3.12, by failing to have enough employees to carry out the required level of husbandry practices and care.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise 28 issues in Respondents' Appeal Petition. First, Respondents contend that they are the target of selective prosecution in violation of their due process and equal protection rights (Respondents' Appeal Petition at 2-5, 11-13, 21-22).

Respondents bear the burden of proving that they are the target of selective prosecution. In order to prove their selective prosecution claim, Respondents must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied*, 117 S. Ct. 296 (1996). Respondents have not shown that they are members of a protected group; that others in a similar situation, not members of the protected group, would not be prosecuted; or that the instant proceeding was initiated with discriminatory intent.

Second, Respondents contend that the ALJ erred in concluding that the eight

inspections of Respondents' facility, which are the subject of this proceeding, were proper warrantless searches (Respondents' Appeal Petition at 14-16).

I disagree with Respondents and find no error in the ALJ's conclusion that the warrantless inspections of Respondents' facility were proper. The Fourth Amendment's prohibition against unreasonable searches and seizures applies to administrative inspections of private commercial property. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978). However, a warrantless search of commercial property does not *per se* violate the Fourth Amendment.

The Supreme Court of the United States has long held that, in closely regulated industries governmental interest in regulating the particular industry may be so strong and the privacy interests of business owners so attenuated, warrantless inspection of the commercial premises may be reasonable. *New York v. Burger*, 482 U.S. 691 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

In *Burger*, the United States Supreme Court employed a four-part test in reaching its holding that a New York statute authorizing warrantless searches of junkyards fell within the "closely regulated industry" exception to the warrant requirement. First, it must be determined whether governmental regulation of the industry in question is pervasive. The Court held that governmental regulation is "pervasive" if the regulatory presence is so comprehensive and defined that the business owner cannot help but be aware that his or her commercial property will be subject to periodic inspections undertaken for specific purposes. Second, there must be a substantial governmental interest in the regulatory scheme. Third, the warrantless inspections must be necessary to further the regulatory scheme. Finally, the inspection program must provide a constitutionally adequate substitute for a warrant, *viz.*, it must advise the owner of the premises that the search is being conducted pursuant to law and within a properly defined scope and it must limit the discretion of the inspecting officers. *New York v. Burger, supra*, 482 U.S. at 700-05.

The United States Court of Appeals for the Seventh Circuit specifically addressed the issue of warrantless inspections conducted under the Animal Welfare Act and held that application of the *Burger* test to the facts of the case demonstrates that on balance a search conducted by APHIS pursuant to the Animal Welfare Act fits within the exception to the warrant requirement for "closely regulated" industries. *Lesser v. Espy*, 34 F.3d 1301, 1306 (7th Cir. 1994).

I find nothing in the record that causes the inspections of Respondents' premises to fall outside the "closely regulated industry" exception to the warrant

requirement.

Third, Respondents contend that the inspection reports (CX 5, 7, 9, 13, 17, 20, 24, 26) do not constitute substantial evidence of the violations alleged in the Complaint, do not fall within the hearsay exception in section 803 of the Federal Rules of Evidence for documents kept by the government in the normal course of business, and are inadmissible because they were prepared in anticipation of litigation (Respondents' Appeal Petition at 17-18).

I disagree with Respondents. The inspection reports (CX 5, 7, 9, 13, 17, 20, 24, 26) constitute substantial evidence of the violations alleged in the Complaint. The Administrative Procedure Act provides, with respect to substantial evidence, that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence.*

5 U.S.C. § 556(d) (emphasis added).

"Substantial evidence" denotes quantity,[26] and it is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[27] Each of the inspection reports (CX 5, 7, 9, 13, 17, 20, 24, 26) was completed during the inspection of Respondents' facility and each reflects the

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[26]*Steadman v. SEC*, 450 U.S. 91, 98 (1981); *Wall Street West, Inc. v. SEC*, 718 F.2d 973, 974 (10th Cir. 1983); *Baumler v. State Farm Mutual Automobile Ins. Co.*, 493 F.2d 130, 134 n.8 (9th Cir. 1974).

[27]*Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Diaz v. Shalala*, 59 F.3d 307, 314 (2d Cir. 1995); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995); *United States Dep't of Agric. v. Kelly*, 38 F.3d 999, 1002-03 (8th Cir. 1994); *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (per curiam); *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 924 (3d Cir. 1994); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 144 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1104 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991).

observations by experienced APHIS inspectors of the conditions at Respondents' facility directly relating to Respondents' compliance with and violations of the Animal Welfare Act and the Regulations and Standards.

Based upon the description of their employment status (Tr. Dellar 99-100; Kovach 289-90; Castner 475-76; Harlan 518-19; Rippy 827-28), I infer that the inspectors who completed the inspection reports were salaried USDA employees and that their salary, benefits, and continued employment by USDA were not dependent upon the findings during their inspections of Respondents' facility. The inspectors had no reason to record their findings in other than an impartial fashion, and I find nothing in the record that indicates that the inspection reports are inaccurate or false. The pictures taken by the inspectors, which were introduced into evidence, support many of the findings that the inspectors included in their inspection reports. Further, while characterizing many of the violations as trivial, Respondents admit many of the violations reflected on the inspection reports. Under these circumstances, I find that the inspection reports are highly relevant and constitute evidence that a reasonable mind would accept as adequate to support a conclusion; thus, these reports constitute substantial evidence of the violations alleged in the Complaint.

Further, Respondents' reliance on the Federal Rules of Evidence is misplaced. The Federal Rules of Evidence are not applicable to administrative proceedings conducted under the Administrative Procedure Act in accordance with the Rules of Practice.[28] The Administrative Procedure Act provides:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

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[28]*In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1339 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), decision on remand, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 407 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1182, 1196 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1060, 1079 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994).

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides:

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence.* (1) *In general.*

. . . .

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

The inspection reports (CX 5, 7, 9, 13, 17, 20, 24, 26) are admissible under the Administrative Procedure Act and the Rules of Practice. Reliable hearsay is routinely admissible in federal administrative hearings and can be substantial evidence as long as it is reliable, probative, and meets the test of fundamental fairness.[29] Moreover, responsible hearsay has long been admitted in the Department's administrative proceedings.[30]

Even if the Federal Rules of Evidence applied to this proceeding, Complainant's

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[29]*See, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1414 (6th Cir. 1995); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.), *cert. denied*, 116 S.Ct. 88 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981).

[30]*In re David M. Zimmerman*, 56 Agric. Dec. ___, slip op. at 52 (June 6, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 6 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 871 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 822-23 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

exhibits would be admissible under the following hearsay exceptions contained in Rule 803:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(5) Recorded Recollection. — A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . . .

(8) Public records and reports. — Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers

> and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

28 U.S.C. app. at 776-77 (1988).

The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial, even though he or she may be available. Such is inarguably the case here. The APHIS inspectors have no vested interest in the outcome of this proceeding. The inspectors merely recorded, contemporaneously and impartially, their observations of conditions at Respondents' facility in the performance of their duties under the Animal Welfare Act. Further, with the exception of Dr. Kirsten, the APHIS inspectors who completed the inspection reports were available for and subject to cross-examination.

In light of the inherent trustworthiness of the inspection reports, the hearsay rule (which is not applicable to this proceeding) affords no grounds for their exclusion.

Moreover, I do not agree with Respondents' contention that the inspection reports (CX 5, 7, 9, 13, 17, 20, 24, 26) were prepared in anticipation of litigation, and I do not find, as Respondents contend, that the issue is controlled by *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision). The documents that the *Young* court found were prepared in anticipation of litigation were affidavits of two veterinary medical officers and a USDA Summary of Alleged Violations form completed after an inspection conducted in accordance with the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) (hereinafter the Horse Protection Act). The *Young* court found that the Veterinary Medical Officers' testimony in the case revealed that as a general practice Veterinary Medical Officers prepare USDA Summary of Alleged Violations forms and affidavits only when administrative proceedings are anticipated. The court found even more important the fact that the Veterinary Medical Officers admitted that they only included observations indicating a violation of the Horse Protection Act. Further, the court found relevant the fact that the Veterinary Medical Officers also indicated that they were given instructions regarding how to prepare the documents by USDA attorneys so that the documents would support a USDA complaint under the Horse Protection Act. The *Young* court concluded, based on

these factors, that, although the authors of the affidavits and the Summary of Alleged Violations forms may have been objective in forming their opinion, the documents themselves admittedly recorded a biased account of the results of the inspection and that their probative value is limited. *Young*, 53 F.3d at 730-31.

Dealers licensed under the Animal Welfare Act are regularly inspected. Unlike the documents that were at issue in *Young*, Animal Welfare Act inspection reports (APHIS Form 7008, Animal Care Inspection Report) are prepared after each inspection whether violations of the Animal Welfare Act and the Regulations and Standards are found or not found. Each inspection report indicates conditions at the inspected facility that comply with the Animal Welfare Act and the Regulations and Standards, as well as those conditions that are found to violate the Animal Welfare Act and the Regulations and Standards. Moreover, a correction date is noted on inspection reports for each aspect of a facility that violates the Animal Welfare Act and the Regulations and Standards, and, if a previous violation is found on a subsequent inspection to have been corrected, the correction is noted on that subsequent inspection report. Neither the method by which facilities subject to the Animal Welfare Act are chosen to be inspected nor the manner in which the inspection reports are completed support a conclusion that the inspection reports are prepared in anticipation of litigation (CX 5, 7, 9, 13, 17, 20, 24, 26).

Finally, unlike *Young*, there is nothing in this record to indicate that the inspectors received any instructions from USDA attorneys regarding how to prepare their inspection reports so that they would support a Complaint instituted under the Animal Welfare Act against Respondents. There is no basis for finding that the facts surrounding preparation of the inspection reports after inspection of Respondents' facility (CX 5, 7, 9, 13, 17, 20, 24, 26) are similar to the facts surrounding the preparation of the affidavits and Summary of Alleged Violations form at issue in *Young*.

Fourth, Respondents assert that the Regulations and Standards are unconstitutionally vague. Respondents contend that they were not given notice of the standard of conduct to which they were held accountable and that the Regulations and Standards invite arbitrary, discriminatory, and overzealous enforcement by inspectors (Respondents' Appeal Petition at 19-22).

I disagree with Respondents. A regulation is unconstitutionally vague if it is so unclear that ordinary people cannot understand what conduct is prohibited or required or if it is so unclear that it encourages arbitrary and discriminatory

enforcement.[31] Respondents have not cited any specific Regulation or Standard which they believe is unconstitutionally vague. However, I have reviewed each of the Regulations and Standards which Respondents are alleged to have violated (Complaint) and have not found any which are unconstitutionally vague. In fact, I agree with the ALJ's characterization of the Regulations and Standards as "quite detailed" (Initial Decision and Order at 17). The ALJ also noted, and I agree, that "[t]he difficulty arises . . . in defining certain regulatory terms, such as `adequate veterinary care,' `structurally sound housing,' or `excessive' rust or excreta, and applying them to the facts of a given situation." *Id.* However, regulations are not unconstitutionally vague merely because they are ambiguous or difficulty is found in determining whether marginal cases fall within their language.[32]

Moreover, the record reveals that inspectors found that Respondents were in compliance with most of the Regulations and Standards during each inspection. Further, Respondents often corrected the violations noted on an inspection report during the inspection or shortly after each inspection. Respondents' compliance with most of the Regulations and Standards during each inspection and Respondents' ability to correct the conditions at their facility, which were not in compliance with the Regulations and Standards, indicates to me that the Regulations and Standards fairly apprise Respondents of the conduct that is prohibited and the conduct that is required.

In addition, Respondents contend that the ALJ "based his finding of violations on the subjective interpretations of . . . [APHIS] inspectors . . . (Opinion, p. 17) which are unsupported by the published regulations and policies of Complainant." (Respondents' Appeal Petition at 19.)

The Initial Decision and Order reveals that the ALJ weighed the evidence introduced at the hearing, considered Respondents' and Complainant's filings, acted as a fact finder, and determined whether Respondents violated the Animal Welfare Act and the Regulations and Standards. The APHIS inspectors merely provided evidence. Their findings are subject to the same scrutiny as any other evidence. Accepting that the opinions of the inspectors are subjective to a degree, that subjectivity is no more than that inherently present whenever expert opinion is used

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[31]*Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996); *Georgia Pacific Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004-05 (11th Cir. 1994); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992); *The Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

[32]*The Great American Houseboat Co. v. United States*, 780 F.2d 741, 747 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

for evidentiary purposes in adjudicative proceedings.

Fifth, Respondents contend that the denial of their request to subpoena Dr. Joseph Walker was an abuse of discretion and served to deny Respondents an opportunity to prepare a defense or even receive notice of the details of the case against them (Respondents' Appeal Petition at 23). I agree with the ALJ's August 31, 1995, denial of Respondents' request for issuance of a subpoena for Dr. Walker (Order Rescheduling Hearing and Order Denying Request for Subpoenas). Discovery is not available under the Rules of Practice.[33]

Moreover, the "defenses" which Respondents allege that Dr. Walker would be "instrumental in allowing Respondents to prepare" (Respondents' Appeal Petition at 23-24) are neither defenses to Respondents' violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint nor relevant to this proceeding.

Sixth, Respondents contend that the denial of Respondents' Motion for Production of Documents dated June 30, 1995, denied them due process and violated the Jencks Act and *Brady v. Maryland*, 373 U.S. 83 (1963) (Respondents' Appeal Petition at 24-25).

I agree with the ALJ's August 4, 1995, denial of Respondents' June 30, 1995, Motion for Production of Documents (Order Denying Respondents' Motions for Production of Documents, More Definite Statement, and Deposition). Respondents' motion is a discovery motion and discovery is not available under the Rules of Practice.[34]

Further, *Brady v. Maryland, supra*, is a criminal case involving the suppression of evidence where the defendants were found guilty of crimes for which they had been sentenced to death. The *Brady* court held that the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith

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[33]*In re Simone Fruit Co.*, 53 Agric. Dec. 537 (1994) (Ruling on Certified Question); *In re A.P. Holt* (Decision as to Richard Polch & Merrie Polch), 52 Agric. Dec. 233, 242 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Lincoln Meat Co.*, 48 Agric. Dec. 166 (1989); *In re SEMA, Inc.*, 49 Agric. Dec. 176, 186-87 (1990); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 616 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Beef Nebraska, Inc.*, 44 Agric. Dec. 2786, 2834 (1985), *aff'd*, 807 F.2d 712 (8th Cir. 1986); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 143-45 (1984); *In re Miguel A. Machado* (Decision as to Respondent Cozzi) (Remand Order), 42 Agric. Dec. 820, 832-33 (1983), *final decision*, 42 Agric. Dec. 1454 (1983), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

[34]See note 33.

of the prosecution. *Brady*, 373 U.S. at 87. However, the Judicial Officer has previously held that in view of the great dissimilarities between criminal cases and administrative proceedings under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) (hereinafter the Packers and Stockyards Act), there is no justification for applying the *Brady* doctrine to Packers and Stockyards Act administrative proceedings.[35] For the same reason, as fully articulated in *In re Miguel A. Machado, supra*, 42 Agric. Dec. at 857-62, I find *Brady* inapposite to administrative proceedings under the Animal Welfare Act.

Finally, Respondents are not entitled to any documents in accordance with the Jencks Act prior to the hearing. Both the Jencks Act and the Rules of Practice clearly provide that Jencks Act statements may only be obtained after a witness has testified on direct examination. Section 1.141(h)(1)(iii) of the Rules of Practice provides:

> **§ 1.141 Procedure for hearing.**
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> . . . .
>
> (h) *Evidence.* (1) *In general.*
>
> . . . .
>
> (iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

7 C.F.R. § 1.141(h)(1)(iii).

Subsections (b) and (e) of the Jencks Act provide:

> **§ 3500. Demands for production of statements and reports of witnesses**

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[35]*In re ITT Continental Baking Co.*, 44 Agric. Dec. 748, 796 (1985) (Packers and Stockyards investigation reports are not available under *Brady*); *In re Miguel A. Machado* (Decision as to Respondent Cozzi) (Remand Order), 42 Agric. Dec. 820, 857-62 (1983) (*Brady* is not applicable to administrative proceedings under the Packers and Stockyards Act), *final decision*, 42 Agric. Dec. 1454 (1983), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

. . . .

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(b), (e). Therefore, I find that the ALJ's denial of Respondents' pre-hearing motion for Jencks Act statements was proper.

Further, the record reveals that when Respondents made motions for statements covered by the Jencks Act after the direct testimony of witnesses from whom Respondents sought statements, the ALJ ordered production of those statements, and Respondents obtained any existing statements, as follows:

MS. KAHN: Well, quite a while back in this proceedings we asked for any witness' statements of witnesses that were going to be called by the Complainant.

JUDGE HUNT: Uh-huh.

MS. KAHN: And those were ordered to be produced at the time of the witnesses testimony.

JUDGE HUNT: Right.

MS. KAHN: Now I take it that there are none at this point, but I wanted to remind the Court, and Ms. Deskins, that that is an outstanding order.

JUDGE HUNT: Well, why don't you just ask for it at the time the witness testifies?

MS. DESKINS: Your Honor, it's not an outstanding order. You had mentioned that -- it's not an "outstanding order". You had mentioned that witness statements are to be produced. As I recall, you had said that at the time they testify they can request it.

JUDGE HUNT: Yes. At the time they can request it.

MS. DESKINS: And I've been here. I have not heard Ms. Kahn request witness statements.

MS. KAHN: Your Honor, I did understand that to be a standing order.

JUDGE HUNT: Well, that's the Jenks [sic] Ruling that at the time of the cross-examination the opposing Counsel has the right to request any statement by the witness -- that the witness may have made.

MS. KAHN: Well, let's inquire at this point, because I understood that to be a standing order. Are there any?

MS. DESKINS: Well I'm sorry you misunderstood it, Ms. Kahn.

JUDGE HUNT: All right. Okay. But in any event --

MS. KAHN: Are there witness statements with respect to witnesses that have testified?

MS. DESKINS: Which witnesses?

MS. KAHN: Well, let's start with Ms. Dellar. Are there witness statements from Ms. Dellar?

MS. DESKINS: I can check my file. I think there may be one from her; I can check and find out. But this is the first time I've heard the request.

JUDGE HUNT: Well I'm not going to recall them. You should have made your request at the time they testified, and so I'm not going to recall them for that purpose. But, of course, she'll be back. I mean, Dr. Dellar will come back anyways.

MS. DESKINS: She's going to be recalled.

MS. KAHN: That's right. And how about Mr. Kovach?

MS. DESKINS: I don't think there is any, but your Honor, I have to check the file. I don't think there is any, but I will check.

MS. KAHN: Could we have, just in the interest of streamlining things, could we just have Ms. Deskins check her file, let us know what witnesses have witness statements?

JUDGE HUNT: Well, you can do that.

MS. DESKINS: You can do that after they testify.

JUDGE HUNT: You don't have to do that right now; at the time.

MS. DESKINS: After they testify you could ask and I will produce what they have.

MS. KAHN: Okay. Can we --

JUDGE HUNT: Well, just to save time, you might want to check your witness list just to see if you have it so you don't have to go through it at that time.

MS. KAHN: Can I get confirmation now that we can have Mr. Kovach's statement? Even if we can't recall him, I'd like to get a copy of his statement, if there is one.

MS. DESKINS: Well my response to that is no, because you didn't do it at the time he was on the stand.

JUDGE HUNT: Well, I said --

MS. DESKINS: But I don't think there is any.

JUDGE HUNT: All right, but I'm going to rule on it. I'll allow her to have the statement, if there is one, of Mr. Kovach, even though he's not present for cross-examination. So if you have it, you can produce it.

MS. DESKINS: I'll check. I don't think there is one.

JUDGE HUNT: Well I don't know. If you have it, then produce it by tomorrow.

MS. KAHN: Is there one for Dr. Harlan?

MS. DESKINS: I think there might be another one for Dr. Harlan, but since she hasn't testified I would object to --

JUDGE HUNT: She hasn't testified yet. Make your request at the time of cross-examination.

MS. KAHN: Thank you.

JUDGE HUNT: If you have any and they're available, it

would save time if you could produce it at the time the request is made since you know there is going to be a request made.

. . . .

MS. KAHN: The next matter is witness statements. We had asked yesterday for any witness statements that may have been taken with respect to witnesses who are in the middle of testifying or who have testified.

MS. DESKINS: Well, I believe that the rules of practice cover that, but you're supposed to ask me that at the end of witness statements. But Judge Hunt did rule, however, that Mr. Kovach, that I was to produce them. I checked; there is no witness statements for him.

I would have to object to counsel making some sort of standing order. I think that the Rules of Practice cover the procedure that needs to be followed, and Ms. Kahn has been told on two occasions now what it is.

JUDGE HUNT: You have to specifically request after each witness testifies to request a copy of his statement.

MS. KAHN: Your Honor, we do have an unusual situation here --

JUDGE HUNT: I know.

MS. KAHN: -- in that they're testifying as --

JUDGE HUNT: You can request -- if you're referring to Dr. Harlan, you can request that now. Since we're having an unordinary way of examining and cross-examining.

MS. KAHN: I would like any statements, then, for Dr. Dellar or Dr. Harlan.

MS. DESKINS: Well, Your Honor, again, I have to refer to

the Rules of Practice. Since she's asking for Dr. Harlan, I think that's appropriate at this point, but for Dr. Dellar, she's supposed to ask while she was on the stand. I have to insist upon that procedure because that's what's covered in the Rules of Practice.

JUDGE HUNT: Well, for the same reasons I ordered you to give Mr. Kovach's statement to Ms. Kahn, I'll ask you also to give -- if Dr. Dellar had a statement, that you give that to Ms. Kahn.

MS. DESKINS: Well, can we do it -- Dr. Dellar will probably be recalled. Can we request that she make at the end of Dr. Dellar's testimony?

JUDGE HUNT: She is going to be recalled?

MS. DESKINS: I anticipate her being on the stand again, and I think that'd be the appropriate time to make the request. I have an objection to the procedure where Ms. Kahn just waits to whenever she feels she's ready and then asks for it. If she waits to -- as prescribed in the Rules of Practice, the procedure can be followed. The Court has told her this on two occasions.

JUDGE HUNT: Well, I've asked you now to give her a copy of Mr. Kovach's statement to her.

MS. DESKINS: Right. There isn't any.

JUDGE HUNT: There isn't? There's none there. And if you have one of Dr. Harlan, if you'd give that to her.

MS. DESKINS: She already has those.

JUDGE HUNT: She already has that, so that remains Dr. Dellar.

I will wait -- Dr. Dellar is going to be recalled. I'll wait until that time to ask you to present that document to -- her statement to Ms. Kahn.

MS. DESKINS: Okay. And, also, Your Honor, I would request that for all future witnesses that Ms. Kahn make her request at the time the witness testifies rather than waiting. There's no reason at this point for this to go on. The Rules cover it.

JUDGE HUNT: Well, I'll take that up on each occasion.

MS. KAHN: Okay, Your Honor, I would like to remind the Court I did make this motion in writing in advance, and I thought we had an understanding with respect to it, but I apologize if I was mistaken about that.

MS. Deskins indicated I already had the statement for Ms. (sic) Harlan. If I do, I don't know it.

MS. DESKINS: Why don't we go through this.

MS. Kahn, you were sent a set of exhibits that were numbered CX 50 through CX 60; is that correct? We'll wait while you check.

JUDGE HUNT: Do you have an extra copy of Dr. Harlan's statement with you?

MS. DESKINS: I can pull it out. It's in a set of exhibits that I believe Ms. Kahn already has.

MS. KAHN: If you've give it to me --

JUDGE HUNT: Well, she may have, but if you give it to her or if you've got an extra copy, you can give it to her now.

MS. DESKINS: Okay. Let me check. I will --

MS. KAHN: If it has an exhibit number, just tell me what it is.

MS. DESKINS: Well, I'm trying to find out -- I'm trying to

find out if you have, in fact, received it. Do you have a copy of that?

MS. KAHN: I have a list here of Exhibits 50 through 60.

MS. DESKINS: And were exhibits attached to that list?

MS. KAHN: Yes, but I see nothing that says Statement of Dr. Harlan.

MS. DESKINS: Okay. If you look on there, it's CX 51; do you see that?

MS. KAHN: Yes.

MS. DESKINS: It has on there "Affidavit of Dr. Harlan"; correct?

MS. KAHN: Yes.

MS. DESKINS: Did you receive a copy of that?

JUDGE HUNT: We're taking a lot of time. Can't we just speed this up? Just look at that; just refer -- say it's such and such a document and then just check to see. It's attached to what? CX what?

MS. DESKINS: It's listed as CX 51. There's also one listed as DX 54.

JUDGE HUNT: All right. Would you look to see if you have that?

MS. KAHN: Is that the only thing that constitutes a statement by Dr. Harlan, 51 and 54?

MS. DESKINS: Those are the only statements we have on this case.

JUDGE HUNT: All right. Do you have that, do you have

that, Ms. Kahn?

MS. KAHN: These, yes, were given to us as exhibits in the Longhi case.

JUDGE HUNT: Then that's the statement. All right, then.

MS. KAHN: So there's nothing -- there's nothing else?

MS. DESKINS: Ms. Kahn, I've answered the question.

JUDGE HUNT: She just said that. There's other statements, so let's proceed. Let's move on.

. . . .

MS. KAHN: As I indicated I do have a preliminary matter to take up.

At the close on Friday Mr. Rippy indicated that he had signed two statements, and then two statements -- two affidavits were handed to me but upon examining them I see that only one of them was from Dr. Rippy -- Mr. Rippy, and the other one was from Dr. Dellar. So the first inquiry that I have is whether we could get Mr. Rippy's second affidavit or statement if there is one.

MS. DESKINS: I thought we had handed you two of them, but I think we can look right now and see -- which one didn't you get? What's the date of the one you have?

MS. KAHN: The one that I have is June the 23rd, 1994.

MS. DESKINS: Here's one April 7th, 1994.

MS. KAHN: Okay. And then the next question that I have is whether the complainant contends that all of the Jenks [sic] Act material with respect to Mr. Rippy has been turned over at this time?

MS. DESKINS: As far as I know all the statements -- we had two statements and you've been given those.

MS. KAHN: Okay. Thank you, Your Honor. The question that I would like to raise at this time is that we believe there may be more reports or notes of Mr. Rippy, and we think that those should be turned over in connection with the Jenks [sic] Act requirements in Brady v. Maryland as well. Mr. Rippy initiated contact with the veterinarians involved here, and if there are notes or reports or something like that in connection with his work as an investigator in this matter, we believe that those should be turned over in connection with the Jenks [sic] Act.

There are cases that indicate that individual notes and reports of government agents who testify for the government should be turned over in this fashion. If the Court would like I can give you some excerpts from some of those cases.

JUDGE HUNT: Are there any notes?

MS. DESKINS: I think there may be some. I'd have to check. I think there may be some notes on conversations we had with Dr. Johnson. I think there may be some notes of that. I can check and --

JUDGE HUNT: Would you please?

MS. DESKINS: -- and see if we can get a copy of it. Your Honor, just a moment, we might have it here.

MS. KAHN: The same would be true for reports, and that would be true whether the report says report at the top or whether it's in the form of a letter reporting his activities in connection with the investigation.

MS. DESKINS: It's an interview log. What I found is we have an interview log from the interview of Dr. Johnson. We can turn this over. I don't think it's covered by the Jenks [sic] --

JUDGE HUNT: Do you have any other notes?

MS. DESKINS: Well, I think -- I mean, it's an investigative style. I'd have to look through it. There may be other things that he took notes on, and I can check through it and see what we can come up with. I don't know that there's -- I don't know that there's statements from him, but he did take affidavits from people such as Dr. --

JUDGE HUNT: It would just be his statements at this stage.

MS. DESKINS: Well, I gave over his statements where he swore out -- I mean, if you're asking for notes that's going to cover a lot of other material.

MS. KAHN: Your Honor, we do contend that, quite clearly, notes are covered in particular. If he did some sort of a report even in the form of a letter where he's the investigator and he says I've looked at this --

JUDGE HUNT: Well, why don't you call him out and see -- ask him what notes he prepared.

MS. KAHN: Fine, Your Honor.

Tr. 513-17, 625-30, 874-77.

Seventh, Respondents contend that the ALJ erred when he excluded tape recorded party admissions (RX 51-53) which are admissible under the Federal Rules of Evidence (Respondents' Appeal Petition at 26).

As an initial matter, Respondents' reliance on the Federal Rules of Evidence is misplaced. The Federal Rules of Evidence are not applicable to administrative proceedings conducted under the Administrative Procedure Act in accordance with the Rules of Practice.[36] Section 1.141(h)(1)(iv) of the Rules of Practice provides that evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable (7 C.F.R. § 1.141(h)(1)(iv)).

The ALJ did not allow the admission of RX 51-53 because the tape recordings were not originals and they could be modified (Tr. 1735-36). Sound recordings are generally admissible in these proceedings. However, there must be some foundation for the recording sufficient to show that the recording is accurate,

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[36]See note 28.

authentic, and generally trustworthy. There has been no showing here. In fact, Respondents' counsel states that RX 51 and 52 are merely excerpts of statements made during the inspection of Respondents' facility and excerpts of telephone conversations, and it is clear from listening to the tapes that Respondents' counsel did modify the tape recordings.

Eighth, Respondents contend that it was error for the ALJ to refuse to allow Respondents' counsel to cross-examine Dr. Dellar regarding her level of experience as a practicing veterinarian.

I agree with Respondents. The record reveals that the ALJ would not allow Respondents' counsel to pose a question to Dr. Dellar regrading her veterinary practice, as follows:

> MS. KAHN: I am finished with this inspection report. I would like to ask a few background questions relating to what Ms. Deskins asked in terms of work experience at this point.
>
> JUDGE HUNT: Well, ask the questions and we'll decide.
>
> BY MS. KAHN:
>
> Q. Okay. You indicated that you graduated from Michigan State University and you went into veterinary practice. Could you describe that veterinary practice?
>
> JUDGE HUNT: I'm going to overrule that. She's a veterinarian. I think she's sufficiently established that she's a veterinarian, so I'm not going to go into any more background. That's it.
>
> MS. KAHN: Those are all the question I have for right now.

Tr. 268-69.

However, sections 1.141(h)(2) and 1.145(c) of the Rules of Practice provide:

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence*. . . .

. . . .

(2) *Objections*. (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the Judge, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge.

(ii) Only objections made before the Judge may subsequently be relied upon in the proceeding.

. . . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. . . . As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal.

7 C.F.R. §§ 1.141(h)(2), .145(a).

Respondents did not object to the ALJ's ruling limiting their cross-examination of Dr. Dellar and have not preserved their right to appeal the ALJ's ruling.

If I had found that Respondents' counsel objected to the ALJ's ruling, I would have found that the question posed by Respondents' counsel regarding Dr. Dellar's previous experience marginally relevant to this proceeding and found the ALJ's ruling in error. However, the ALJ's refusal to allow a question posed to Dr. Dellar regarding her veterinary practice is far from prejudicial error and certainly is not a basis for remanding this proceeding to the ALJ to allow Respondents to pose questions to Dr. Dellar regarding the nature of her veterinary practice before being employed by APHIS.

Respondents state that "[t]his issue may be moot provided that the Judicial Officer agrees" that the investigating veterinarians admitted that they did not examine any of the animals sufficient to form a diagnosis (Respondents' Appeal Petition at 27), and I infer, based on Respondents' Appeal Petition, that Respondents' counsel posed the question at issue to Dr. Dellar to determine the extent of Dr. Dellar's experience diagnosing animals. However, on direct examination, Dr. Dellar testified that, when she inspects a facility licensed under the Animal Welfare Act, her examination of the animals is not sufficient to allow her to diagnose the animals and that it is not the role of USDA inspectors to diagnose animals (Tr. 135).

Even if I were to find that Dr. Dellar never had a veterinary practice, that

finding would not change the outcome of this proceeding.

Ninth, Respondents assert that they corrected the violations cited in the inspection reports and that many of these corrections were made immediately after the violation was noted by an APHIS inspector (Respondents' Appeal Petition at 29). Respondents contend that it is USDA policy that, when a violation is corrected, either immediately or by the time of the next inspection of a facility, the corrected violation would not constitute a basis for filing a Complaint or the assessment of a civil penalty (Respondents' Appeal Petition at 31-33).

I agree with Respondents that the record reveals that Respondents eventually corrected the violations identified by APHIS inspectors and corrected some of the violations identified during an inspection before the inspection was completed. Nonetheless, each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Regulations and Standards (9 C.F.R. § 2.100(a)). This duty exists regardless of a "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation: (1) does not operate to prevent the Department from alleging the violation in a Complaint; (2) does not operate to eliminate the fact that a violation occurred; (3) does not provide a basis for the dismissal of the alleged violation; and (4) does not prevent the assessment of a civil penalty for the violation.[37]

Tenth, Respondents contend that many of the violations alleged in the Complaint are "frivolous in nature" and should be dismissed (Respondents' Appeal Petition at 33-36). Respondents, citing *In re Marlin U. Zartman*, 44 Agric. Dec. 174 (1985), state that:

> The Judicial Officer has indicated that violations that are of a "trivial nature, not posing any serious threat to the well-being of the animals," can justify the dismissal of a complaint because the alleged violations do not warrant a sanction.

Respondents' Appeal Petition at 35.

However, in *Zartman*, the Judicial Officer dismissed the complaint because

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[37]*In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 6 (Apr. 16, 1997) (Order Denying Petition for Reconsideration); *In re John Walker*, 56 Agric. Dec. ___, slip op. at 21 (Mar. 21, 1997); *In re Mary Meyers*, 56 Agric. Dec. ___, slip op. at 31 (Mar. 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

there were only three trivial violations of the Regulations and Standards alleged in the complaint, the Judicial Officer found that none of the violations posed a serious threat to the well-being of the animals, the respondent had a long, unblemished record of compliance with federal and state requirements applicable to his animal auction, and there was nothing in the record to indicate the need for any type of disciplinary order based on the trivial violations, which were the subject of that proceeding. *In re Marlin U. Zartman, supra*, 44 Agric. Dec. at 185-86. In the instant proceeding, Respondents have committed 58 violations of the Animal Welfare Act and the Regulations and Standards, some of which are serious and pose a threat to the well-being of the Respondents' animals. Therefore, *Zartman* is inapposite and provides no basis for dismissal of the Complaint or any of the violations alleged in the Complaint.

The Animal Welfare Act does, however, require the Secretary of Agriculture to give due consideration to the appropriateness of the penalty with respect to, *inter alia*, the gravity of the violations (7 U.S.C. § 2149(b)), and the sanction imposed in this Decision and Order reflects the gravity of Respondents' violations of the Animal Welfare Act and the Regulations and Standards.

Eleventh, Respondents contend that the evidence is not sufficient to find that they violated section 2.40 of the Regulations (9 C.F.R. § 2.40) (Respondents' Appeal Petition at 37-72).

Respondents contend that all that is required under section 13 of the Animal Welfare Act (7 U.S.C. § 2143) and section 2.40 of the Regulations (9 C.F.R. § 2.40) is that they provide animals with "barely satisfactory" or "acceptable but not remarkable" care and that they are alleged to have violated section 2.40 of the Regulations based upon a failure to provide the animals with "maximum" care (Respondents' Appeal Petition at 41).

Section 13(a)(1) and (a)(2) of the Animal Welfare Act provides:

§ 2143. Standards and certification process for humane handling, care, treatment, and transportation of animals

(a) Promulgation of standards, rules, regulations, and orders; requirements; research facilities; State authority

(1) The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.

(2) The standards described in paragraph (1) shall include

minimum requirements—

(A) for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, *adequate veterinary care*, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals; and

(B) for exercise of dogs, as determined by an attending veterinarian in accordance with general standards promulgated by the Secretary, and for a physical environment adequate to promote the psychological well-being of primates.

7 U.S.C. § 2143(a)(1), (a)(2) (emphasis added).

Section 2.40 of the Regulations provides:

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide *adequate veterinary care* to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of *adequate veterinary care* and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of *adequate veterinary care* that include:

(1) The availability of appropriate facilities, personnel,

equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40 (emphasis added).

Neither the Animal Welfare Act nor the Regulations and Standards define the word "adequate." However, section 1.1 of the Regulations (9 C.F.R. § 1.1) provides that words that are not defined for the purposes of 9 C.F.R. subchapter A shall have the meaning attributed to them in general usage as reflected by definitions in a standard usage dictionary. The Tenth Edition of Merriam Webster's Collegiate Dictionary defines *adequate*, as follows:

> **1:** sufficient for a specific requirement <[adequate] taxation of goods>; *also*: barely sufficient or satisfactory <her first performance was merely [adequate]> **2:** lawfully and reasonably sufficient.

Merriam Webster's Collegiate Dictionary 14 (10th ed. 1997).

While the meaning of the word *adequate* varies depending on the context in which it is used, courts have found the common and ordinary meaning of the word *adequate* includes *sufficient* and *reasonable*,[38] and I find that, as used in section

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[38]*See Atlantic Coast Line R.R. Co. v. Wharton*, 207 U.S. 328, 335 (1907) (finding the term *adequate or reasonable facilities* is not in its nature capable of exact definition; "[i]t is a relative expression and has to be considered as calling for such facilities as might be fairly demanded"); *Eubanks v. FDIC*, 977 F.2d 166, 169 n.2 (5th Cir. 1992) (stating that a determination as to *adequacy of a disclosure statement* necessarily depends upon the facts and circumstances of each case); *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 490-91 (3d Cir. 1991) (defining *adequate warnings* as those a reasonably prudent person

2.40(a) of the Regulations (9 C.F.R. § 2.40(a)), the term *adequate veterinary care* means *sufficient veterinary care* (to comply with section 2.40 of the Regulations (9 C.F.R. § 2.40)). Section 2.40(b) of the Regulations (9 C.F.R. § 2.40(b)) lists five conditions that each dealer must meet in order to have a program of adequate veterinary care, including "[t]he use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries[.]"

The record reveals that Respondents did have a program of veterinary care, but

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in the same or similar circumstances would have provided with respect to the danger and that communicate adequate information on the dangers and safe use of the product); *United States v. Studley*, 907 F.2d 254, 259 (1st Cir. 1990) (defining *adequate treatment services* as "services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards"); *Texas Extrusion Corp. v. Lockheed Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988) (holding that the determination of what is *adequate information* is "subjective and made on a case by case basis"); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (defining *adequate health care services* as "services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards"); *Rehler v. Beech Aircraft Corp.*, 777 F.2d 1072, 1077 (5th Cir. 1985) (defining *adequate airplane manufacture warnings* as those sufficient to convey the nature and extent of the dangers); *Northwestern Elec. Co. v. FPC*, 134 F.2d 740, 743 (9th Cir. 1943), *aff'd*, 321 U.S. 119 (1944) (holding the word "satisfactory" in a statute requiring satisfactory proof means *adequate* which in turn means substantial); *In re Stuart*, 114 F.2d 825, 830 (D.C. Cir. 1940) (construing *adequate parental care* as used in the Juvenile Court Act (Act of June 1, 1938, 52 Stat. 596, c.309) as "such care as is necessary to accomplish the purpose of the Act"); *Jeha v. Arabian Am. Oil Co.*, 751 F. Supp. 122, 125 (S.D. Tex. 1990), *aff'd*, 936 F.2d 569 (5th Cir. 1991) (discussing *forum non conveniens* and the adequacy of the available forum--stating *adequate* is the equivalent of reasonable); *United States v. School Dist. of Omaha*, 367 F. Supp. 198, 200 (D. Neb. 1973) (describing representation as *adequate* if the representative does not fail in the fulfillment of his duty); *Peterson v. United States*, 41 F.R.D. 131, 133 (D. Minn. 1966) (describing representation as adequate if the representative does not fail in the fulfillment of his duty); *Comm'rs of Sinking Fund of Louisville v. Anderson*, 20 F. Supp. 217, 220 (W.D. Ky. 1937) (defining sufficient as meaning adequate); *Chasse v. Banas*, 399 A.2d 608, 611 (N.H. 1979) (defining *adequate and humane treatment* as treatment "consistent with accepted medical standards"); *First Nat'l Bank of Kansas City v. University of Kansas City*, 245 S.W.2d 124, 130 (Mo. 1952) (defining sufficient as adequate); *Nissen v. Miller*, 105 P.2d 324, 326 (N.M. 1940) (defining sufficient as adequate, enough, equal to the end proposed, and that which may be necessary to accomplish an object, and embracing "no more than that which furnishes a plentitude, which when done, suffices to accomplish the purposes intended in the light of present conditions and viewed through eyes of practical and cautious men"); *Britain v. Industrial Comm. of Ohio*, 115 N.E. 110, 111 (Ohio 1917) (defining sufficient as "adequate, enough and as much as may be necessary"); *Sheets v. Thomann*, 336 S.W.2d 701, 712 (Mo. Ct. App. 1960) (stating *adequately* means "equal to or sufficient for some specific requirement and fully sufficient legally such as is lawfully and reasonably sufficient"); *People v. Kiser*, 245 P.2d 1125, 1126 (Cal. Ct. App. 1952) (defining *adequate* as "able, fully competent, and fully sufficient"); *Vandermade v. Appert*, 5 A.2d 868, 871 (N.J. Super. Ct. Ch. Div. 1939) (holding *adequate* means legally sufficient, fully equal to requirements or occasions, and commensurate); and *Louisville Trust Co. v. Comm'rs of Sinking Fund of Louisville*, 84 S.W.2d 30, 34 (Ky. 1935) (defining sufficient as *adequate*).

that the program was not a program of adequate veterinary care and did not meet all five of the conditions listed in section 2.40(b) of the Regulations (9 C.F.R. § 2.40(b)) on November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, September 13, 1994, and November 22, 1994. Inspectors found a number of animals on each inspection that were sick or injured and either untreated or not adequately treated (CX 5, 7, 9, 13, 17, 20, 24, 26). I agree with the ALJ's conclusion that Complainant has proven by a preponderance of the evidence that Respondents failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of such care (Initial Decision and Order at 59).

In addition, the record reveals that on November 16, 1993, Respondents did not have a written program of veterinary care for all species of animals in violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)) (CX 5, CX 6 at 4).

Respondents contend that the ALJ erred when he "concluded that simply the presence of outdated medicines in [Respondents'] buildings violated the standard for adequate veterinary care and [s]ection 2.4[0] of the [R]egulations." (Respondents' Appeal Petition at 71.)

I agree with Respondents. Section 2.40 of the Regulations (9 C.F.R. § 2.40) does not specifically prohibit the presence of outdated drugs in a licensee's facility. Further, the May 31, 1990, memorandum from Joan M. Arnoldi to REAC Sector Supervisors, Animal Care Specialists, and REAC Staffs, which appears to be the latest APHIS policy statement interpreting section 2.40 of the Regulations (9 C.F.R. § 2.40) as it relates to outdated drugs, specifically allows the presence of outdated drugs in a licensee's facility, as follows:

> All outdated drugs found in any licensed or registered facility are to be identified and brought to the attention of the responsible officials and/or the attending veterinarian. *Such drugs should either be properly disposed of or placed in a separate, outdated drug cabinet.* The use of outdated drugs is not considered to be an acceptable veterinary practice and does not provide adequate veterinary care under the Animal Welfare Act.

CX 30 (emphasis added). Moreover, the use of the word *should* in the memorandum indicates that licensees are not required to choose between disposal of outdated drugs and maintenance of outdated drugs in a separate outdated drug cabinet, but rather, are exhorted to either dispose of outdated drugs or maintain

them in a separate cabinet.[39] Therefore, none of Respondents' violations of section 2.40 of the Regulations (9 C.F.R. § 2.40) is based upon the presence of outdated drugs at Respondents' facility.

Respondents contend that Complainant's failure to provide a more definite statement regarding the alleged violations of section 2.40 of the Regulations (9 C.F.R. § 2.40) deprived Respondents of due process (Respondents' Appeal Petition at 49-52).

The Administrative Procedure Act provides:

§ 554. Adjudications

. . . .

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

5 U.S.C. § 554(b).

Section 1.135 of the Rules of Practice provides:

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[39]While the meaning of the word *should* varies widely depending on the context in which it is used, the word *should* is generally employed in a directory rather than a mandatory sense. *In re Ann M. Veneman*, 56 Agric. Dec. ___, slip op. at 62 (May 6, 1997). See *New England Tank Industries of New Hampshire, Inc. v. United States*, 861 F.2d 685, 694 (Fed. Cir. 1988) (*will not* and *will* are mandatory terms; terms such as *should* are merely directory); *Doe v. Hampton*, 566 F.2d 265, 280-81 (D.C. Cir. 1977) (the term *should be* is generally directory; the terms *shall* and *must* are mandatory); *Clariton Sportsmen's Club v. Pennsylvania Turnpike Comm'n*, 882 F. Supp. 455, 476 (W.D. Pa. 1995) (a Council on Environmental Quality regulation, providing that an agency may wish to analyze actions in a single impact statement and *should* do so when the best way to adequately assess impacts of the actions or reasonable alternatives to such actions is to treat them in a single impact statement, is merely permissive); *Harris County Hosp. Dist. v. Shalala*, 863 F. Supp. 404, 410 (S.D. Tex. 1994) (*should* is mandatory only when used as the past tense of *shall*; otherwise *should* is precatory); *United States v. Strickrath*, 242 F. 151, 153 (S.D. Ohio 1917) (the word *ought* is a stronger word than its frequently used synonym *should*; *should* may imply an obligation of propriety or expediency, or a moral obligation; *ought* denotes an obligation of duty); *Bio-Medical Applications of Lewiston, Inc. v. United States*, 17 Cl. Ct. 84, 90 (Cl. Ct. 1989) (section 2728 of the Health Care Financing Administration's State Operating Manual, which provides when notices of deficiencies *should* be sent, is clearly precatory).

§ 1.135 Contents of complaint.

A complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought.

7 C.F.R. § 1.135.

Paragraphs II(A), III(A), IV(A), V(A), VI(A), VII(A), VIII(A), and IX(A) of the Complaint allege that on November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, September 13, 1994, and November 22, 1994, respectively, APHIS inspected Respondents' facility and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

It is well settled that the formalities of court pleading are not applicable in administrative proceedings.[40] Additionally, due process is satisfied when the litigant is reasonably apprised of the issues in controversy. It is only necessary that the Complainant in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled.[41] The Complaint fully

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[40] *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. Int'l Bros. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

[41] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951),

complies with both the Administrative Procedure Act (5 U.S.C. § 554(b)) and the Rules of Practice (7 C.F.R. § 1.135). Further, the record reveals that Respondents were reasonably apprised of the issues in controversy and were not in any way misled by the Complaint.

Moreover, each of the APHIS inspection forms, completed after the inspections of Respondents' facility on November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, September 13, 1994, and November 22, 1994, identifies with great specificity the conditions at Respondents' facility which inspectors found to be in violation of 9 C.F.R. § 2.40, and Respondents were provided with a copy of the inspection report upon completion of each inspection.

Twelfth, Respondents contend that the alleged violations of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) for failure to individually identify dogs should be dismissed because, *inter alia*, all of Respondents' dogs were identified, albeit not in the manner required by the Regulations at the time of the inspections of Respondents' facility. Respondents further note that because of a change in the manner in which APHIS interprets section 2.50 of the Regulations, Respondents would have been in compliance with 7 U.S.C. § 2141 and 9 C.F.R. § 2.50 had the inspections of their facility been conducted on the date of the hearing (Respondents' Appeal Petition at 73-75).

Dr. Dellar testified that APHIS had changed its policy between the time Respondents were cited by inspectors for failure to individually identify their dogs and the time of the hearing and that, as of the date of the hearing, Respondents' method of identifying their dogs would have been in compliance with APHIS' interpretation of section 2.50 of the Regulations (9 C.F.R. § 2.50) (Tr. 206). I

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cert. denied sub nom. International Typographical Union v. NLRB, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 37 n.9 (Jan. 13, 1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 132 (1996); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1097-98 (1994); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53 (b)(2)); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233-32 (1987); *In re H & J Brokerage*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1434 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

agree with the ALJ that although APHIS' policy has changed so that Respondents' method of identifying animals at the time of the inspections is now in compliance with the Animal Welfare Act and the Regulations, Respondents were not in compliance with the section 2.50 of the Regulations at the time of the November 16, 1993, January 18, 1994, March 1, 1994, and September 13, 1994, inspections and, therefore, violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) on November 16, 1993, January 18, 1994, March 1, 1994, and September 13, 1994, as alleged in paragraphs II(B), III(C), IV(C), and VIII(B) of the Complaint. However, under these circumstances, I find that no sanction, except the issuance of a cease and desist order, is warranted for Respondents' violations of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50). Therefore, these violations form no part of the basis for either the civil penalty assessed against Respondents or the suspension of Respondents' Animal Welfare Act license in this Decision and Order.

Thirteenth, Respondents contend that the alleged violations for failure to maintain complete records showing the acquisition, disposition, and identification of animals as alleged in paragraphs III(B), IV(B), V(B), VI(B), and VII(B) of the Complaint, should be dismissed because Respondents' records were "overwhelmingly accurate," inspections were unannounced, Respondents' inaccurate records indicated that there were more animals in Respondents' facility than were actually in their facility, and despite the inaccuracies in their records, Respondents were able to account for the acquisition and disposition of all of their animals (Respondents' Appeal Petition at 75-76).

None of Respondents' assertions provides a basis upon which to dismiss the recordkeeping violations alleged in paragraphs III(B), IV(B), V(B), VI(B), and VII(B) of the Complaint. Respondents are required by section 2.75 of the Regulations (9 C.F.R. § 2.75) to keep and maintain records or forms which fully and correctly disclose the information about each animal. Respondents failed to keep and maintain accurate records and even if I found, as Respondents assert, that Respondents' records were "overwhelmingly accurate," that Respondents were able to account for the acquisition and disposition of all their animals, that Respondents' records indicated that there were more animals on their premises than were actually on Respondents' premises, and that the inspections which revealed the inaccuracies were unannounced, those findings would not constitute a basis for dismissing paragraphs III(B), IV(B), V(B), VI(B), and VII(B) of the Complaint.

Fourteenth, Respondents contend that a number of the allegations regarding Respondents' failure to have structurally sound housing facilities maintained in

good repair are not supported by the evidence (Respondents' Appeal Petition at 78-83).

Respondents contend that paragraph III(D)(1) of the Complaint should be dismissed because the citation was for a new wall that was being constructed during the January 18, 1994, inspection of Respondents' facility. However, the fact that the wall for which Respondents were cited during the January 18, 1994, inspection was being constructed at the time of the inspection does not constitute a basis for the dismissal of paragraph III(D)(1) of the Complaint. Housing facilities must be structurally sound and maintained in good repair at all times so as to protect animals from injury, contain the animals securely, and restrict other animals from entering. If new construction or repairs will cause a housing facility to be structurally unsound during the construction or the repair, the housing facility is not in compliance with 9 C.F.R. §§ 2.100(a) and 3.1(a). The evidence establishes that on January 18, 1994, the wall in question was not structurally sound (CX 7, 8R) so as to protect the animals in the facility from injury.

Respondents contend that bent or broken cyclone fence wires should not constitute a basis for any violation because, due to the rowdy actions of some of Respondents' animals, the violations occur on a regular basis; Respondents have a maintenance program for the repair of bent or broken fence wires; and all bent or broken fence wires noted during the inspection of Respondents' facility were repaired immediately after they were noted by an inspector (Respondents' Appeal Petition at 79-80).

I disagree with Respondents. Bent or broken cyclone fence wires in housing facilities for dogs and cats can cause serious injury to the animals, and the regularity with which fence wires become bent or broken in Respondents' animal housing facilities is not a defense to Respondents' violation of 9 C.F.R. §§ 2.100(a) and 3.1(a). Further, Respondents are required to be in compliance with the Regulations and Standards at all times (9 C.F.R. § 2.100(a)). Respondents' regular program of repair of fence wires and immediate correction of broken or bent wires after they were noted by an inspector is not a basis for the dismissal either of paragraph VIII(C)(1) of the Complaint, which is based entirely upon evidence of bent and broken wires in Respondents' housing facilities, or of paragraph IX(B)(1) of the Complaint, which is based, in part, upon evidence of bent and broken wires in Respondents' housing facilities.

Respondents assert that they were specifically given time by APHIS to repair a leaking roof that was discovered during the March 1, 1994, inspection of their facility (CX 9); and that on September 13, 1994, during the first inspection after the agreed upon repair date, APHIS inspectors found that the roof had been repaired

(CX 24). Respondents contend that, based upon this repair of their roof, paragraph IV(D)(1) of the Complaint should be dismissed (Respondents' Appeal Petition at 81). However, the subsequent correction of a condition not in compliance with the Animal Welfare Act or the Regulations and Standards has no bearing on the fact that a violation has occurred.[42] Further, the violation alleged in paragraph IV(D)(1) of the Complaint is also based on the fact that the main barn ceiling had missing panels at the door (CX 9).

Respondents further contend that:

> The balance of the items . . . under the category of [s]tructural [s]trength all appear to involve repairs that were requested by Complainant and made promptly by Respondents . . . . Such items . . . do not support a finding of a violation based on structural strength.

Respondents' Appeal Petition at 82.

The evidence clearly supports a finding that Respondents violated the structural strength requirements in 9 C.F.R. §§ 2.100(a) and 3.1(a) as alleged in paragraphs II(C)(9), III(D)(1), IV(D)(1), V(C)(1), VIII(C)(1), and IX(B)(1) of the Complaint. Subsequent correction of a condition not in compliance with the Animal Welfare Act or the Regulations and Standards has no bearing on the fact that a violation has occurred and is not a basis for dismissal of the structural strength violations.[43]

Fifteenth, Respondents contend that the "record is absolutely clear that Respondents exceeded the cleaning requirements set forth in the regulations and thus the violations relating to the maintenance of surfaces should be dismissed." (Respondents' Appeal Petition at 90.) While I do not agree with Respondents' characterization of the evidence in the record, I do find that Complainant has not proven by a preponderance of the evidence that on September 13, 1994, and November 22, 1994, surfaces of Respondents' housing facilities were not cleaned and sanitized as required in section 3.1(c)(3) of the Standards (9 C.F.R. § 3.1(c)(3)). I therefore dismiss paragraphs VIII(C)(3) and IX(B)(3) of the Complaint.

Sixteenth, Respondents contend that paragraphs II(C)(2), III(D)(3), IV(D)(2), VIII(C)(4), and IX(B)(4) of the Complaint, which allege that supplies of food and bedding were not stored in a manner that protects them from spoilage,

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[42]See note 37.

[43]See note 37.

contamination, and vermin infestation as required by 9 C.F.R. §§ 2.100(a) and 3.1(e), should be dismissed (Respondents' Appeal Petition at 91-95).

While Complainant has a prima facie case with respect to the violations of 9 C.F.R. §§ 2.100(a) and 3.1(e) alleged in paragraphs II(C)(2), III(D)(3), IV(D)(2), and VIII(C)(4) of the Complaint, I find that Complainant has not proven the violation alleged in paragraph II(C)(2) of the Complaint by a preponderance of the evidence. Further, I find that Complainant does not have a prima facie case with respect to the violation of 9 C.F.R. §§ 2.100(a) and 3.1(e) alleged in paragraph IX(B)(4) of the Complaint. Accordingly, paragraph II(C)(2) and paragraph IX(B)(4) relating to a violation of 9 C.F.R. §§ 2.100(a) and 3.1(e) are dismissed.

Respondents assert that there is no basis upon which to find that Respondents violated 9 C.F.R. §§ 2.100(a) and 3.1(e) on January 18, 1994, as alleged in paragraph III(D)(3), because the violation is based upon "the presence of one wheelbarrow full of soiled bedding" which was temporarily placed next to "bedding and food materials [that] were completely wrapped and properly stored on pallets" and "soiled bedding [that] remained in the hallway areas after the pens had been cleaned and the employees had gone home." (Respondents' Appeal Petition at 92-94 (emphasis in original).) Respondents assert that the soiled bedding was not removed from the facility because of the extreme weather conditions (Respondents' Appeal Petition at 92-94).

The January 18, 1994, inspection report (CX 7) establishes that the violation alleged in paragraph III(D)(3) is not solely based upon the factors referenced in Respondents' Appeal Petition. The inspection report states:

> IV #13 FOOD AND BEDDING STORAGE (3.1) (3.50)(e) - Food was found on the floor. Bedding was stored open. Soiled bedding was found stored next to fresh food and bedding. A gallon of antifreeze was found directly in front of a dog pen.

CX 7.

Further, I do not find that the extremely cold weather that Respondents experienced on January 18, 1994, is a basis for dismissing paragraph III(D)(3) of the Complaint.

Respondents contend that paragraph IV(D)(2) of the Complaint, which alleges that toxic substances were stored in food storage and preparation areas in violation of 9 C.F.R. §§ 2.100(a) and 3.1(e), should be dismissed because:

> The Judge's Opinion also makes reference to paint stored next to feed

on March 1, 1994. (Opinion, p. 38). In this situation, a jug of antifreeze was sitting in the "truck drive through" area of the main kennel because it was in use, in preparation for having a properly maintained truck on the road that day. (See CX 12, p. 2, Section IV). Since this antifreeze was in the process of being used and was simply in the large, open "truck drive through" area of the building, there was no support for any violation based in this citation (Transcript, F. Hodgins, p. 1549).

Respondents' Appeal Petition at 94-95.

The March 1, 1994, inspection report (CX 9), prepared by Drs. Dellar and Harlan, does not support Respondents' version of the facts. The March 1, 1994, inspection report, relating to Respondents' Judd Road facility, states:

> III Noncompliant items newly identified on 3/1/94
>
> 13 Storage 3.1(e) Toxic chemicals paint etc. stored with feed corrected immediately.
>
> Note: all feed & medical supplies and bedding must be stored away from cleaning chemicals, paints etc. to prevent contamination.

CX 9.

Further, the March 1, 1994, inspection report, relating to Respondents' Lange Road facility, states:

> IV #13 Storage (3.1e) Animal food and medications were found being stored alongside toxic chemicals. These items need to be stored so as to prevent contamination. Correct: 03-08-94

CX 9.

Respondents did send a letter to Dr. R. L. Crawford, USDA, APHIS, dated March 8, 1994, in which they state that they disagreed with Drs. Dellar's and Harlan's March 1, 1994, findings regarding storage of animal feed and medication at the Lange Road facility (CX 12 at 2). Respondents' March 8, 1994, letter does not address the March 1, 1994, violation of 9 C.F.R. §§ 2.100(a) and 3.1(e) found at the Judd Road facility. Therefore, even if I found (which I do not) that Respondents' March 8, 1994, letter rebutted the evidence introduced by Complainant regarding the violation of the storage of animal feed at the Lange

Road facility, it would not constitute a basis for the dismissal of the violation of 9 C.F.R. §§ 2.100(a) and 3.1(e) as alleged in paragraph IV(D)(2). I agree with the ALJ that Complainant proved the violation of 9 C.F.R. §§ 2.100(a) and 3.1(e) as alleged in paragraph IV(D)(2) of the Complaint by a preponderance of the evidence, and I find no basis for dismissing paragraph IV(D)(2) of the Complaint.

Respondents assert that there is no basis upon which to find that Respondents violated 9 C.F.R. §§ 2.100(a) and 3.1(e) on September 13, 1994, as alleged in paragraph VIII(C)(4), because:

> The open barrel of bedding was being used because the buildings were being cleaned at the time the nine a.m. inspection commenced.
>
> A bag of dog biscuits (dog treats, not dog food) belonging to an employee that had been brought to the kennel that day had temporarily been placed on top of the furnace. The inspection report itself even specifies that the food involved was dog biscuits rather than the kennels' normal animal feed. (CX 24, item 13).
>
> A closed barrel of rabbit food was located in a storage room that did contain a freezer for housing dead animal carcasses. However, the rabbit feed barrel was completely closed and, most important, there were no rabbits whatsoever, at this facility at the time of that inspection. (Transcript, pp. 799-800).
>
> Contrary to the Court's Opinion at page 38, there does not appear to be any citation of food stored with gasoline in Complainant[']s inspection. (Report CX 24) For the reasons listed above, the record does not support any violations based on the subject citations.

Respondents' Appeal Petition at 95.

I disagree with Respondents' contention that the September 13, 1994, inspection report (CX 24) does not include a citation for storing food with gasoline. The September 13, 1994, inspection report, relating to the Judd Road facility, states:

> III Noncompliant items newly identified on 9/13/94

13 - Storage of feed 3.1(e) - Palleted feed stored in the same area as gasoline in a can
gasoline was removed immediately.

CX 24.

Therefore, based on CX 24 alone, there is substantial evidence that Respondents violated 9 C.F.R. §§ 2.100(a) and 3.1(e) on September 13, 1994, as alleged in paragraph VIII(C)(4) of the Complaint, which Respondents did not rebut. I find that the ALJ was not in error when he determined that "feed [was] found in the same room with gasoline on September 13, 1994." (Initial Decision and Order at 38.)

Seventeenth, Respondents contend that paragraph III(D)(4) of the Complaint, which alleges that Respondents did not make provisions for the regular and frequent collection, removal, and disposal of animal and food wastes, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease risks in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), should be dismissed (Respondents' Appeal Petition at 96-97). Respondents admit that there was water on the drive through floor of the main kennel, but state that there was no violation of 9 C.F.R. § 3.1(f) because "[r]egulation[] 3.1(f) states only that standing puddles of water 'in animal enclosures' must be drained or mopped up so that the animals stay dry" and "there is nothing on this record to suggest that there were animals in any proximity to the water on the drive floor of the kennel." (Respondents' Appeal Petition at 97.)

I disagree with Respondents' assertion that section 3.1(f) of the Standards states only that standing puddles of water in animal enclosures must be drained or mopped up so the animals stay dry. Section 3.1(f) also requires that "[h]ousing facility operators must provide for regular and frequent collection, removal, and disposal of . . . water, . . . in a manner that minimizes contamination and disease risks." Respondents' failure to provide for the regular and frequent collection, removal, and disposal of water in the main kennel constitutes a violation of 9 C.F.R. §§ 2.100(a) and 3.1(f).

Moreover, the January 18, 1994, inspection report reveals that the water in the main kennel was not the sole basis for the allegation in paragraph III(D)(4) that Respondents violated 9 C.F.R. §§ 2.100(a) and 3.1(f), as follows:

#14 Drainage and Waste Disposal (3.1)(f) - There were (Bldg #1) large puddles of standing water in the aisles do [sic] to melting snow off the

equipment. There were numerous piles of soiled bedding in the aisles as well. Standing water and feces were found in the drainage troughs in Bldg #3.

CX 7.

Respondents also contend that paragraphs IV(D)(3), V(C)(3), and VI(C)(2) of the Complaint, which allege that on March 1, 1994, April 5, 1994, and May 10, 1994, respectively, Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), should be dismissed, because they are based upon water, urine, and fecal debris in drainage troughs (Respondents' Appeal Petition at 97-98). Respondents contend that "the drainage troughs underneath the elevated cages are designed to contain excreta and urine in between their daily cleanings" and "individual inspectors do not have the discretion to demand that trough areas underneath the cages remain clean at all times. . . ." (Respondents' Appeal Petition at 98 (emphasis in original).)

I agree with Respondents that drainage troughs are designed to collect animal wastes and that they do not remain clean at all times. Further, section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) does not require that housing facilities must be free of animal waste and water at all times. However, 9 C.F.R. § 3.1(f) does require that Respondents provide for "regular and frequent collection, removal, and disposal of animal . . . wastes . . . [and] water[.]" The March 1, 1994, inspection report states:

> #14 Drainage (3.1f). Standing water and fecal debris/urates were built up in the drainage troughs - especially in building #4.

CX 9.

I infer from the description of water, fecal debris, and urates as "built up" that Respondents did not provide for regular and frequent collection, removal, and disposal of animal wastes and water on March 1, 1994, in violation of 9 C.F.R. §§ 2.100(a) and 3.1(f). The April 5, 1994, and May 10, 1994, inspection reports state that animal wastes and water were found in drainage troughs (CX 13 and 17), but neither inspection report provides a sufficient basis upon which to find that Respondents failed to provide for the regular and frequent collection, removal, and disposal of animal wastes and water on April 5, 1994, and May 10, 1994, in violation of 9 C.F.R. §§ 2.100(a) and 3.1(f). While Complainant introduced pictures of the material found in Respondents' drainage troughs on April 5, 1994, and May 10, 1994 (CX 14 and 18), I did not find the pictures sufficiently clear to

determine the regularity or frequency of Respondents' collection, removal, and disposal of animal wastes and water on April 5, 1994, and May 10, 1994. Therefore, I find that, while Complainant introduced some evidence that Respondents violated 9 C.F.R. §§ 2.100(a) and 3.1(f) on April 5, 1994, and May 10, 1994, Complainant has not proven these violations by a preponderance of the evidence. Paragraphs V(C)(3) and VI(C)(2) of the Complaint are dismissed.

Eighteenth, Respondents contend that paragraph III(D)(5) of the Complaint, which alleges that on January 18, 1994, Respondents did not sufficiently heat indoor housing facilities for dogs and cats in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.2(a) of the Standards (9 C.F.R. § 3.2(a)), should be dismissed (Respondents' Appeal Petition at 99-100).

Section 3.2(a) of the Standards (9 C.F.R. § 3.2(a)) provides that when dogs or cats are present, the ambient temperature in the facility must not fall below 50° F for dogs or cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress or discomfort, and for sick, aged, young, or infirm dogs and cats, except as approved by the attending veterinarian.

The January 18, 1994, inspection report states that the temperature in one of the buildings at Respondents' Lange Road facility was 41° F and the temperature at the Judd Road facility was 44° F at approximately 5:00 p.m. (CX 7).

Respondents contend that the temperature at cage level was 50° F. Even if I found Respondents' contention to be true, it would not constitute a basis for dismissing paragraph III(D)(5) of the Complaint because section 3.2(a) of the Standards (9 C.F.R. § 3.2(a)) requires that the ambient temperature in the facility must not fall below 50° F.

Respondents further contend, with respect to the temperature at the Lange Road facility, that:

> . . . Complainant's own inspectors conceded that the allegedly sick animals and puppies were not in the same section of the building where the temperature readings were taken and may have been in a different building altogether, Transcript, p. 412, 413. Even though there were several different buildings at Site # 1, Complainant's inspector couldn't recall the temperature reading being taken in more than one area. (Transcript, pp. 412-413).

Respondents' Appeal Petition at 99.

The portion of the transcript characterized by Respondents as a concession, reads as follows:

BY MS. KAHN:

Q. Do you have any specific recollection that the temperature was taken anywhere but the main barn?

JUDGE HUNT: Now the "main barn", which is this; Site 1 or Site 3 when you say "main barn"?

MS. KAHN: Site 1.

JUDGE HUNT: Site 1 is the main barn, okay. How far apart are these, incidently? Sites one and sites three?

[BY MR. KOVACH:]

THE WITNESS: Four miles.

JUDGE HUNT: Four miles, oh. All right. Four miles difference. Lange Road and Judd Road, those are four miles apart?

MS. KAHN: That's right.

JUDGE HUNT: And so Lange Road is Site 1, the barn?

MS. KAHN: Yes.

JUDGE HUNT: Okay.

BY MS. KAHN:

Q. Okay. There was a question pending, I believe it was whether you have any recollection at all that the temperature was taken anywhere but the main barn at Site 1?

A. I don't have any recollection of that; no.

Q. How many buildings are there for animals at Site 1; do you recall?

A. I don't know.

Q. Several?

A. I believe there is.

Q. Okay. And they all have separate heating systems?

A. I don't know that, either.

Tr. 412-13.

I do not find that Mr. Kovach's testimony is a concession by all, or, for that matter, any, of the inspectors that sick animals and puppies were not in Respondents' building at the Lange Road site found to be 41° F on January 18, 1994. Further, even if there were no sick animals or puppies in the building in question, it would not constitute a basis for dismissing paragraph III(D)(5) of the Complaint because Respondents' contention in no way addresses the temperature at the Judd Road facility and section 3.2(a) of the Standards applies not only to facilities in which puppies and sick animals are present, but it also applies to facilities in which are present dogs and cats that are not acclimated to lower temperatures, breeds that cannot tolerate lower temperatures without stress or discomfort, and aged, young, or infirm dogs and cats, except as approved by the attending veterinarian. Moreover, the January 18, 1994, inspection report, relating to the Lange Road facility, states:

> #15 Temperature and Ventilation (3.2)(a)(b) — The temperature in this bldg. was 41 °F. The temperature must not fall below 50 °F for non-acclimated short haired, sick, aged, young or infirm dogs.

CX 7.

While the inspection report does not explicitly state that the Lange Road building found to be 41° F contained dogs or cats not acclimated to lower temperatures, breeds that cannot tolerate lower temperatures without stress or discomfort, or sick, aged, young, or infirm dogs and cats, I infer, based on the reference to "non-acclimated short haired, sick, aged, young or infirm dogs" in the inspection report, that dogs that met this description were in the building when it was found to be 41° F.

Respondents further contend that consideration should be given to the fact that

extremely cold temperatures prevailing at the time made it difficult to heat the buildings on January 18, 1994, and that, despite numerous previous inspections, Respondents have only been cited once for failing to sufficiently heat indoor housing facilities for dogs and cats (Respondents' Appeal Petition at 100). While I have taken both of these factors into account with respect to the sanction I am imposing on Respondents, neither of these factors serves as a basis for dismissing paragraph III(D)(5) of the Complaint.

Nineteenth, Respondents contend that the evidence does not support a conclusion that Respondents failed to sufficiently ventilate their indoor housing facilities for dogs in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.2(b) of the Standards (9 C.F.R. § 3.2(b)) as alleged in paragraphs II(C)(3), IV(D)(4), V(C)(4), VI(C)(3), VIII(C)(5), and IX(B)(5) of the Complaint (Respondents' Appeal Petition at 101-02).

I disagree with Respondents. The record contains substantial and reliable evidence of each of Respondents' violations of 9 C.F.R. §§ 2.100(a) and 3.2(b) alleged in the Complaint. The November 16, 1993, inspection report describes the Judd Road facility as follows:

> #15 Ventilation (3.2b) A strong odor was noted upon entering Rooms #1 and #2. Increased ventilation and increased cleaning may help this problem. Correct By: 11-23-93.

CX 5. Further, the November 16, 1993, inspection report describes the odors in building number 4 at the Lange Road facility as follows:

> #15 Ventilation (3.2b) Very strong odors were noted in Building #4. Strong odors can be decreased by increasing ventilation, or cleaning frequency. Correct by: 11-17-93.

CX 5.

In a letter dated November 18, 1993, to Dr. Crawford, Respondents stated that they did not notice the strong odor. "However, we will run the fans for a longer period of time each day. Corrected on November 17, 1993." (CX 6.)

Inspectors found a "strong odor" in building number 4 at the Lange Road facility on March 1, 1994 (CX 9); a "very strong odor" in building number 4 at the Lange Road facility on April 5, 1994, and May 10, 1994 (CX 13, 17); and "strong odor" in the annex part of the main building at the Lange Road facility on September 13, 1994 (CX 24). Respondents sent letters to APHIS shortly after

the March 1, 1994, April 5, 1994, and May 10, 1994, inspections of their facility, stating that the buildings in which odors were found have adequate ventilation and that they are equipped with fans that are on all day long, but that the buildings had not been cleaned prior to the inspections (CX 12, 15, 19).

The November 22, 1994, inspection report describes building number 4 at the Lange Road facility as follows:

> #15 Ventilation (3.2b) Ventilation/strong odors were noted to be still a problem in building 4. Adequate ventilation must be maintained in all dog areas. This may be accomplished by increasing ventilation, increasing cleaning efforts or decreasing the dog population.

CX 26.

Dr. Dellar testified that she does not cite a facility for just odor and that the ventilation at a facility must be seriously deficient before the facility is cited for a violation of 9 C.F.R. §§ 2.100(a) and 3.2(b), as follows:

> [BY MS. KAHN:]
>
> Q. Is there a way to measure odor of the type you regulate?
>
> [BY DR. DELLAR:]
>
> A. Well --
>
> Q. With an instrument, is what I'm saying.
>
> MS. DESKINS: Your Honor, can she be allowed to answer the first question? She said is there a way that she's able to measure odor.
>
> JUDGE HUNT: Well, she was just elaborating on her question. Okay.
>
> BY MS. KAHN:
>
> Q. Go ahead.
>
> A. What question am I supposed to answer?

Q. Is there a way to measure odor, of the type that you were citing as a violation?

A. Yes. When I walk into a facility and my eyes burn and the back of my throat starts to hurt, it is cited for ventilation problems. Dog facilities normally have an odor, they are never cited for just a dog odor. It's only until I am uncomfortable and then I have to assume that the animals housed therein are also uncomfortable. That's when the facility would be cited.

Tr. 210-11.

Similarly, Dr. Harlan testified that, during the January 18, 1994, inspection, Respondents' indoor housing facilities for dogs and cats were not sufficiently ventilated, as follows[44]:

[MS. DESKINS:]

Q. Okay. Anything else that you remember?

. . . .

[BY DR. HARLAN:]

A. Yes, ma'am.

Q. Okay. Please proceed.

A. Okay. And as I say, under ventilation, I do clearly remember that at least two of the buildings that we walked into, and it cites here buildings four and three, that the ammonia level was extreme. And as I recall, when I walked in my eyes began to water immediately.

Q. Well isn't it typical to have some sort of odor in an animal facility?

---

[44]Respondents were cited by APHIS inspectors for not properly ventilating an indoor housing facility for dogs and cats on January 18, 1994 (CX 7), but the Complaint does not allege that Respondents violated 9 C.F.R. §§ 2.100(a) and 3.2(b) on January 18, 1994.

A. I expect a certain amount of odor, but when the ammonia level reaches a point that my eyes begin to water, if I'm uncomfortable, I realize that the animals are equally uncomfortable.

Tr. 523.

Respondents contend that Dr. Dellar's and Dr. Harlan's testimony is fabricated (Respondents' Appeal Petition at 102). I find Drs. Dellar and Harlan to be credible witnesses. Further, their testimony is consistent with the November 16, 1993, March 1, 1994, April 5, 1994, May 10, 1994, September 13, 1994, and November 22, 1994, inspection reports (CX 5, 9, 13, 17, 24, 26), and Dr. Dellar and Dr. Harlan or both Drs. Dellar and Harlan were accompanied by other APHIS employees on every inspection in which a violation of 9 C.F.R. §§ 2.100(a) and 3.2(b) was cited, except the March 1, 1994, inspection.

Respondents have introduced evidence that the buildings, which were cited as not sufficiently ventilated, had equipment to ventilate the buildings. Further, Dr. Vaupel testified that generally the ventilation at Respondents' facility is sufficient, as follows:

[BY MS. KAHN:]

Q. What about the ventilation at the facilities? Have you ever seen -- well, let me ask you this: Have you ever had any kind of a burning sensation in your nose or throat as you walked into the kennel?

[BY DR. VAUPEL:]

A. No.

Q. How does the odor at Hodgins Kennel stack up with the odor at other kennels that you -- that you visit in the course of your work?

A. I would say with the number of dogs, it stacks up very, very well. There are a lot of dogs there and the odor is, I would say, minimal.

Q. Do you see ventilation fans at Hodgins Kennels?

A. Yes.

Q. Are they run?

A. Yes.

Q. Is there anything about odor or the atmosphere that you have ever observed at Hodgins that could affect the health of the animals?

A. No -- adversely affect. Let me put it that way.

Tr. 1856-57.

Moreover, Mr. Hodgins testified that he has not received any complaints from any others about the odor at his facility, as follows:

[BY MS. KAHN:]

Q. Do you get visitors at the kennel from time to time?

[BY MR. HODGINS:]

A. Yes, I do.

Q. Do your customers come out and make sure that everything looks good?

A. Yes, I do -- they do.

Q. Do any of them complain that odor is excessive?

A. No one has ever complained about the odor.

Q. Do you get other visitors, suppliers, things like that at the kennel?

A. Yes.

Q. Any of them ever complain that they thought the odor was excessive?

A. No.

Q. Anybody complain that their throat burned or their eyes burned?

A. No.

Tr. 1514.

While Respondents have introduced evidence that their buildings were generally sufficiently ventilated, Complainant has proven by a preponderance of the evidence that on November 16, 1993, March 1, 1994, April 5, 1994, May 10, 1994, September 13, 1994, and November 22, 1994, the buildings cited for insufficient ventilation were not sufficiently ventilated. Respondents' November 18, 1993, letter to Dr. Crawford indicates that Respondents did not run the ventilation fans for an appropriate period of time (CX 6). Respondents' letters, following the March 1, 1994, April 5, 1994, and May 10, 1994, inspections, indicate that the odor was elevated in the morning prior to Respondents' cleaning of the buildings in question (CX 12, 15, and 19), and section 3.2(b) of the Standards (9 C.F.R. § 3.2(b)) specifically states that indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present.

Twentieth, Respondents agree that they violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi)) as alleged in paragraph III(D)(6) of the Complaint, but state that the violation "should not form the basis of a legal complaint" because it is trivial (Respondents' Appeal Petition at 103).

Paragraph III(D)(6) of the Complaint alleges that on January 18, 1994, Respondents failed to maintain primary enclosures so that they provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner. The evidence reveals that one primary enclosure in which Respondents housed nine dogs was 114" by 108" for a total of 12,312 square inches (CX 7). In order to comply with section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi)), the size of the primary enclosure in question should have been a minimum of 13,603.89 square inches and was thus 1,291.89 square inches too small (CX 7; Tr. 362).

I agree with Respondents that they violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi)) as alleged in paragraph III(D)(6) of the Complaint, but I disagree

with Respondents' contention that a primary enclosure, which is almost 9.5% smaller than required by the Standards, is a trivial violation of the space requirements. Even if I found that Respondents' violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi)) is trivial, as discussed in this Decision and Order, *supra* pp. 99-100, that finding would not constitute a basis for dismissing paragraph III(D)(6) of the Complaint.

Twenty-first, Respondents contend that Complainant has not proven by a preponderance of the evidence that Respondents failed to keep primary enclosures for dogs clean in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) (Respondents' Appeal Petition at 104-07).

The ALJ concluded that Respondents violated 9 C.F.R. §§ 2.100(a) and 3.11(a) on November 16, 1993, January 18, 1994, and September 13, 1994, as alleged in paragraphs II(C)(6), III(D)(7), and VIII(C)(7) (Initial Decision and Order at 58, 61), and I agree with the ALJ's conclusion regarding the November 16, 1993, and September 13, 1994, violations of 9 C.F.R. §§ 2.100(a) and 3.11(a).

The November 16, 1993, inspection report states:

> #36 Cleaning (3.11a) Urine scale had built up on the floor under the dog enclosures. This needs to be removed on a more frequent basis to avoid an accumulation and to reduce odors. Correct by: 11-23-93.

CX 5.

The January 18, 1994, inspection report states:

> IV #36 Cleaning (3.11a) - Still noted at this facility is a build up of urine and water and feces in the gutters. More cleaning to reduce odors is needed.

CX 7. It is not clear from the January 18, 1994, inspection report that the gutters referenced in the report were under primary enclosures, and the photograph taken of the alleged violation does not reveal that the gutters in question were under a primary enclosure (CX 8). Therefore, even though Complainant has introduced prima facie evidence that Respondents violated 9 C.F.R. §§ 2.100(a) and 3.11(a) on January 18, 1994, I am dismissing paragraph III(D)(7) of the Complaint.

The September 13, 1994, inspection report states:

> 36 Cleaning & Sanitation 3.11(a) Build up of urate scale on the floors beneath the pens in this facility - There is hair and other debris stuck to the bottoms of cages after cleaning is completed. This needs removal. Correct by: 9/15/94

CX 24.

Respondents contend that the Regulations do not require that the areas underneath the cages be cleaned once a day (Respondents' Appeal Petition at 104). I agree with Respondents that the daily cleaning requirement in 9 C.F.R. § 3.11(a) is not applicable to the areas under primary enclosures. However, the evidence does not reveal that Respondents were cited for failing to clean under the primary enclosures daily, and there is no allegation in paragraph II(C)(6) or paragraph VIII(C)(7) that Respondents failed to clean under primary enclosures daily.

Respondents further contend that:

> Section 3[.]11 prohibits only an "excessive accumulation of feces and food waste" underneath the primary closures "to prevent soiling of the dogs or cats contained in the primary enclosures and to reduce the disease hazards, insects, pests, and odors."

Respondents' Appeal Petition at 104.

I disagree with Respondents' contention that section 3.11(a) of the Standards only prohibits an "excessive accumulation of feces and food waste." Section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) requires the removal of *all types of excreta* and food waste from under primary enclosures as often as necessary: (1) to prevent an excessive accumulation of feces and food waste; (2) to prevent soiling of the dogs or cats contained in the primary enclosures; and (3) to reduce disease hazards, insects, pests, and odors. Therefore, the accumulation of urate scale under a primary enclosure can constitute a violation of 9 C.F.R. § 3.11(a).

Further still, Respondents contend that Complainant has not met its burden of proof with respect to violations of 9 C.F.R. §§ 2.100(a) and 3.11(a) because the inspectors did not test the material found under the primary enclosures to determine whether it was urate scale, as follows:

> The treating veterinarians testified that they did not see any urine scale build-up in the kennel. (Transcript, Johnson, pp. 1283-4; Vaupel, p. 1912). The veterinarians did testify that the mineral content of the water in the rural area in which the kennel is located was extremely high and that that

> could explain the discoloration of the floor from years of repeated washing. Id. Complainant's witnesses, who have the burden of proof here, confirmed that they did not test any of the scale build up to determine whether it was salts from evaporated urine or mineral deposits (Transcript, p. 201). Without any testing or samples, Complainant has not met its burden of proving the presence of urine scale (even if that were considered a violation of the regulations) as opposed to the simple presence of mineral deposits which necessarily occur from years of daily washing with water containing a high mineral content.

Respondents' Appeal Petition at 106.

I disagree with Respondents' contention that a test was necessary to prove that the material under the primary enclosures was urate scale. Dr. Dellar, who inspected Respondents' facility on November 16, 1993, and September 13, 1994, testified as to her ability to identify urate scale as follows:

> [BY MS. KAHN:]
>
> Q. The area underneath the cages is cleaned out with water once a day; is that right?
>
> [BY DR. DELLAR:]
>
> A. I don't know.
>
> Q. Okay. But, there are provisions to clean off the excrement and urine in the -- from the concrete underneath those cages once a day; is that right?
>
> A. That is the requirement.
>
> Q. Okay. And the water that is used can also have mineral deposits in it; can it not?
>
> A. I suppose.
>
> Q. So, when they hose down with water every day, the water evaporates once the cleaning is done as well; is that right?

A. They're supposed to squeegee to remove excess water in a rapid manner. It's not supposed to evaporate, no.

Q. Is that true in areas where the animal is not located at the time of cleaning?

A. That's my understanding.

Q. Did you do anything with this -- so this stuff that you're seeing that you're calling urine scale is sort of like a mineral stain on the concrete that's underneath the cage where the animal is; right?

A. Yes.

Q. Did you do anything with that to confirm that it was urine scale as opposed to mineral deposit from the water?

A. Scraped it up and I smelled it, and it smelled of ammonia.

Q. Did you note that anywhere on your Report?

A. I noted that it was urine scale.

Q. Do you scrape up urine scale every time you call it urine scale on these reports?

A. I have on several occasions. I can't say I do it every single time, no.

Q. And you don't recall if you did it this particular day; right?

A. Correct.

Q. Okay. Is there anything about urine scale that can hurt an animal?

A. Well, it's an indication that the cleaning procedures are not being followed. It's causing an odor problem, as they were cited for

ventilation. And it is a disease hazard in that if the cleaning -- if the cleaning is not sufficient enough to get rid of the mineral deposits, it's not sufficient enough to get rid of the bacteria and viruses that are present as well.

Q. Can you tell me what section of the Regulations you cited this urine scale under, that prohibits urine scale, that allows you to call it a violation of the Act?

A. It's cited under 3.11(a). And the correct citation would be 3.11(a)(iii).

Q. Okay. Which says:

"Washing all soiled surfaces with appropriate detergent solutions and disinfectants or by using a combination detergent disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surface to remove organic material so as to remove all organic material and mineral build up and to provide sanitation followed by a clean water rinse."?

A. Correct.

Q. Okay. So, if that surface is being washed with a detergent solution and a disinfectant product, are you stating that that's insufficient if it doesn't remove a mineral build up?

A. The Regulations state that, I'm not saying that. That is what the Regulations say.

Q. Is it possible to test urine scale to confirm that that's what it is, other than scratching it with your finger?

A. Not by myself, no.

Q. Okay. Have you ever taken any of this mineral deposit or urine scale out and had it tested at a lab or anything like that?

A. It's unnecessary. I've inspected several kennels throughout my career with the United States Department of Agriculture and I'm fully capable of identifying urine scale when I see it.

Tr. 198-201.

Complainant has proven by a preponderance of the evidence that on November 16, 1993, and September 13, 1994, excreta was not removed from under primary enclosures, as required by 9 C.F.R. §§ 2.100(a) and 3.11(a).

Twenty-second, Respondents contend that violations of housekeeping requirements in section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) as alleged in paragraphs II(C)(7), III(D)(8), IV(D)(7), V(C)(7), VI(C)(6), VII(C)(4), VIII(C)(8), and IX(B)(4) of the Complaint, should be dismissed (Respondents' Appeal Petition at 108-11). Respondents characterize these violations as trivial and contend that each violation is based upon the inspectors' finding a few cobwebs, dust on the floor, or a splattered wall. A review of the relevant inspection reports reveals major housekeeping violations on November 16, 1993, January 18, 1994, March 1, 1994, April 5, 1994, May 10, 1994, June 23, 1994, and September 13, 1994 (CX 5, 7, 9, 13, 17, 20, 24), and I agree with the ALJ that Respondents violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) as alleged in paragraphs II(C)(7), III(D)(8), IV(D)(7), V(C)(7), VI(C)(6), VII(C)(4), and VIII(C)(8) of the Complaint.[45] Further, as discussed in this Decision and Order, *supra* pp. 99-100, even if I found that the violations were trivial (which I do not), that finding would not be a basis for dismissing paragraphs II(C)(7), III(D)(8), IV(D)(7), V(C)(7), VI(C)(6), VII(C)(4), and VIII(C)(8) of the Complaint.

Twenty-third, Respondents contend that paragraphs III(D)(9), IV(D)(8), VII(C)(6), and VIII(C)(10) of the Complaint, which allege that Respondents did not maintain an effective program for the control of pests as required by section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(d) of the Standards (9 C.F.R. § 3.11(d)), should be dismissed (Respondents' Appeal Petition at 112-15).

There is evidence that Respondents had a program for the control of pests. However, I agree with the ALJ that the March 1, 1994, June 23, 1994, and

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[45]The inspection report applicable to the November 22, 1994, inspection does not support a finding that Respondents violated section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) on November 22, 1994. Accordingly, paragraph IX(B)(4) of the Complaint, as it relates to a violation of 9 C.F.R. § 3.11(c), is dismissed.

September 10, 1994, inspection reports each establish that Respondents' program of pest control was not an "effective program" as required by section 3.11(d) of the Standards (9 C.F.R. § 3.11(d)).

Respondents did introduce credible evidence that, on one occasion, Dr. Harlan may have mistaken flecks of dirt for rodent feces in "building 4" (Tr. 1568). The only inspection report that cites Respondents for a violation of 9 C.F.R. §§ 2.100(a) and 3.11(d) based solely upon a finding of rodent feces in building 4 is the January 18, 1994, inspection report. Therefore, despite the evidence introduced by Complainant with respect to the Respondents' violation of 9 C.F.R. §§ 2.100(a) and 3.11(d) on January 18, 1994, I am dismissing paragraph III(D)(9) of the Complaint which alleges that on January 18, 1994, Respondents did not establish and maintain an effective program for the control of pests, so as to promote the health and well-being of their animals and reduce contamination by pests in animal areas.

Twenty-fourth, Respondents contend that paragraph IX(B)(10) of the Complaint, which alleges that Respondents failed to keep the interior of a van used to transport dogs clean in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.15 of the Standards (9 C.F.R. § 3.15), is not supported by the evidence (Respondents' Appeal Petition at 116-17). Specifically, Respondents contend that the evidence does not support a finding that they violated section 3.15(h) of the Standards which provides:

> **§ 3.15 Primary conveyances (motor vehicle, rail, air, and marine).**
>
> . . . .
>
> (h) Live dogs and cats may not be transported with any material, substance (e.g., dry ice) or device in a manner that may reasonably be expected to harm the dogs and cats or cause inhumane conditions.

9 C.F.R. § 3.15(h).

I agree with Respondents that the evidence is not sufficient to prove that Respondents violated 9 C.F.R. § 3.15(h). However, section 3.15(g) of the Standards provides:

> **§ 3.15 Primary conveyances (motor vehicle, rail, air, and marine).**
>
> . . . .

(g) The interior of the animal cargo space must be kept clean.

9 C.F.R. § 3.15(g).

The November 22, 1994, inspection report states:

> # 41 Primary Conveyance (3.15 a g h) A van used to transport animals (license # VX0015) contained papers and plastic trash - along with potentially toxic substances like brake fluid and oil. These things must be removed from the animal areas. Correct By: 11-23-94.

CX 26.

Based on this evidence, I agree with the ALJ that on November 22, 1994, Respondents violated 9 C.F.R. §§ 2.100(a) and 3.15 as alleged in paragraph IX(B)(10) of the Complaint.

Twenty-fifth, Respondents contend that paragraphs II(C)(8), IV(D)(9), V(C)(8), VI(C)(7), VII(C)(5), VIII(C)(9), and IX(B)(9) of the Complaint, which allege that Respondents did not have enough employees to carry out the required level of husbandry practices and care as required by section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.12 of the Standards (9 C.F.R. § 3.12), should be dismissed (Respondents' Appeal Petition at 118-20).

Respondents contend that the violations for lack of sufficient employees is "essentially derivative," *viz.*, Respondents were cited for having too few employees to carry out the level of husbandry practices and care required by 9 C.F.R. pt. 3, subpart A, because of the level of husbandry practices and care which the inspectors found at Respondents' facility rather than the actual number of Respondents' employees. Respondents further contend that because there were no significant animal husbandry violations, Respondents did not violate section 3.12 of the Standards (9 C.F.R. § 3.12) by having too few employees.

The record does support Respondents' contention that the citations for not having sufficient employees was based upon Respondents' numerous husbandry and care violations, as follows:

> [BY JUDGE HUNT:]
>
> Q. Okay. Another matter you refer to the facility being shorthanded on manpower. Do you recall in numbers what numbers -- people they had working for them or how many they should have had working for them?

[BY DR. DELLAR:]

A. No. This citation is based on two things: One, the Regulations state that they have to have enough people to maintain the facility in compliance. Because the facility is not in compliance they don't have enough people. Whether they have 40 people or 80 people, if it's not in compliance they don't have enough.

The second one is -- oh, I lost my train of thought.

Oh, the second one is that constantly when asked, why isn't this done, why aren't you cleaning, why aren't doing this, the reply I would get back from Tami Longhi was, we just don't have enough people. We can't afford to hire all these people. If we could afford it we would have all these people. So it was her constant answer back, that we don't have enough people to do what you want us to do.

Q. So you made a quantative [sic] judgement on how many people they had or didn't have, it's based on what you were told that they were shorthanded?

A. Correct.

Q. When you have a conference with them do you give them advice on what they can do to come into compliance, like painting the cages, do you tell them how many people they should have to -- what they would need to come into compliance?

A. At the very beginning I did. At the very beginning I offered to set up appointments so that I wouldn't have to be doing an inspection. I would come in, talk to them, answer all their questions. But as these inspections have progressed the situation has -- they've become more and more hostile.

Tr. 273-74.

However, the record does not support Respondents' contention that there were no significant husbandry and care violations on the dates that Respondents were found to have insufficient employees to carry out the husbandry practices and care

required by 9 C.F.R. pt. 3, subpart A. Therefore, I reject Respondents' basis for dismissing paragraphs II(C)(8), IV(D)(9), V(C)(8), VI(C)(7), VII(C)(5), VIII(C)(9), and IX(B)(9), and I agree with the ALJ that Complainant has proven the violations of 9 C.F.R. §§ 2.100(a) and 3.12 alleged in the Complaint by a preponderance of the evidence.

Twenty-sixth, Respondents contend that the institution of this proceeding was not in accordance with USDA's procedural requirements and that no penalty can be imposed against Respondents because they did not receive a warning letter prior to the institution of this proceeding, as follows:

> The Administrative Law Judge acknowledged that USDA regulations require a relevant warning letter to be given prior to proceeding on a complaint of this type. (Opinion, p. 56). The Administrative Law Judge confirmed that there was no such relevant warning letter here. Id. Accordingly, the imposition of fines and penalties based on violations imposed without the requisite warning letter is a violation of the Department's own procedural requirements and additionally, a violation of Respondent's [sic] rights to due process of law.

Respondents' Appeal Petition at 121.

I disagree with Respondents. Section 1.133(b) of the Rules of Practice provides:

> **§ 1.133 Institution of proceedings.**
>
> . . . .
>
> (b) *Filing of complaint.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or of any regulation, standard, instruction or order issued pursuant thereto, whether based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.
>
> (2) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to

> the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

7 C.F.R. § 1.133(b).

The written notice referenced in 7 C.F.R. § 1.133(b)(2) is not required in this proceeding because Respondents' violations of the Animal Welfare Act and the Regulations and Standards were willful. An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[46]

Respondents' facility was inspected eight times over the course of 1 year and on each occasion violations were found. Although Respondents corrected some of the violations either immediately or by the time of the next subsequent inspection, many of the same violations were repeated.

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[46]*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 108-09 (Jan. 13, 1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138-39 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973). ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.") *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'") (The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, many of Respondents' violations would still be found willful.)

Respondents were fully aware of the Regulations and Standards. The Animal Welfare Act is published in the statutes at large and the United States Code, and Respondents are presumed to know the law. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925). The Regulations and Standards are published in the *Federal Register*, thereby constructively notifying Respondents of the Regulations and Standards, *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 17, 19 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976), and Respondents received the Regulations and Standards approximately once a year (Answer ¶ I(C)).

Moreover, after each inspection, Respondents were provided with a copy of the inspection report which identified each violation observed by APHIS inspectors. Despite constructive and actual knowledge of the Regulations and Standards and full disclosure of the observations made by APHIS inspectors during each inspection, Respondents repeatedly violated the Animal Welfare Act and the Regulations and Standards. I find under these circumstances that Respondents' violations were not only willful, but also that Respondents received written notice prior to the date that this proceeding was instituted as provided in section 1.133(b)(2) of the Rules of Practice (7 C.F.R. § 1.133(b)(2)).

Twenty-seventh, Respondents contend that:

> The Administrative Law Judge permitted Complainant to admit into evidence numerous photographs which contained self-serving hearsay statements on the reverse side. (See Transcript, pp. 824 through 825).
>
> In many instances it was confirmed on the record that the individual taking the photographs was not the same individual who wrote the hearsay statements on the reverse side of the photograph. (Transcript, p[p]. 824-825, 1013). It cannot be disputed that the photographs themselves were taken for purposes of evidence to be used at a proceeding against Respondents and therefore are not governmental records kept in the ordinary course of business. There is no exception to the hearsay rule which would permit the admission of such photographic captions or comments. They cannot simply be disregarded by the Court because they were used by witnesses in testifying at trial as a prompt to explain what Complainant's position was with respect to various matters.

> Respondent[]s objected to the admission into evidence of such rank hearsay. (Transcript, 824-825, 1013). Accordingly, it was error to admit such photographs into evidence.

Respondents' Appeal Petition at 122.

I disagree with Respondents' contention that the ALJ erred by admitting photographs into evidence. Neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence. The Administrative Procedure Act provides, with respect to the admission of evidence, that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence.* (1) *In general.* . . .
>
> . . . .
>
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in

proceedings conducted under the Administrative Procedure Act.[47] Moreover, responsible hearsay has long been admitted in the Department's administrative proceedings.[48]

The record reveals that Respondents requested that the captions on the back of photographs identified as CX 25 be excised, but did not object to the admission of the photographs themselves (Tr. 825). The photographs in question were taken by Mr. Castner during the September 13, 1994, inspection of Respondents' facility. Dr. Dellar, who took part in the September 13, 1994, inspection of Respondents' facility, testified that the handwriting on the back of the photographs identified as CX 25 is hers, as follows:

[BY MS. DESKINS:]

Q. All right. Now, on the back of the photographs, is that your handwriting on the back?

[BY DR. DELLAR:]

A. Yes, it is.

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[47]*See, e.g., Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (even though inadmissible under the rules of evidence applicable to court procedure, hearsay is admissible under the Administrative Procedure Act); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (it is well established that hearsay evidence is admissible in administrative proceedings).

[48]*In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 5-6 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re John T. Gray* (Decision as to Glen Edward Cole) 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

Q. Did you confer with Mr. Castner before you wrote out the descriptions on the back?

A. No.

Q. Okay. Do you recall when you wrote out those descriptions?

A. Yes.

Q. When was that?

A. Right after I had the film developed.

Q. And when did you have the film developed?

A. Mr. Castner handed me back my camera and the rolls of film that had been exposed. I then took it to a 1-hour photo lab. I don't recall if it was the day of the inspection - and it probably was not - but it was within that work week. After the photos were developed I then immediately sat down, filled out the backs, and mailed them in. That's how I routinely do it.

Tr. 1013.

I find that, under these circumstances, the hearsay statements on the back of the photographs identified as CX 25 are responsible hearsay. Further, Dr. Dellar, the individual who wrote the statements on the back of the photographs, was available for and subject to extensive cross-examination by Respondents' counsel. The ALJ did not err when he admitted the statements on the back of CX 25 into evidence.

Twenty-eighth, Respondents contend that the ALJ erred when he refused to admit evidence regarding the influence of certain animal rights activists, as follows:

> Respondent's [sic] made an offer of proof with respect to Fred Hodgins testimony to the effect that officials within the Department of Agriculture had admitted the influence of certain animal rights activists. (Transcript, p. 1790-1, See also RX51-Tape recording of party admission of Joseph Walker regarding same). Documents were also offered confirming support by those same activists for REAC's budget in front of Congress during the time period involved in this investigation RX54.

Similarly, other documents and testimony were offered to confirm that the same animal rights activists that were supporting increases in REAC's budget were simultaneously demanding the elimination of Class B dealers. (Transcript, p. 1790-1792).

. . . The Administrative Law Judge himself indicated that there was insufficient evidence to attribute any inappropriate motive to Complainants [sic]. (Opinion, p. 13). Nonetheless, the Judge refused to admit the evidence when offered. This was error.

Respondents' Appeal Petition at 123.

The record reveals that the ALJ excluded testimony regarding a defamation action instituted by Mr. Hodgins against animal rights activists, statements by Dr. Walker concerning pressure on the Department to eliminate Class B dealers and the influence of an individual identified as Christine Stevens, and Ms. Stevens' submission to a subcommittee in the House of Representatives requesting $28,000,000 for the Department, as follows:

BY MS. KAHN:

Q. Mr. Hodgins, have you ever sued any animal rights activists for defamation?

MS. DESKINS: Your Honor, I'm going to object. What's -- what is the relevancy of that for this particular case?

JUDGE HUNT: That question -- I'll sustain the objection to that one, yes, on suing someone else.

MS. KAHN: Well, the tie in, Your Honor, relates --

JUDGE HUNT: Well, if you want to know why he did it, you can ask that --

MS. KAHN: No, no, no. That's not my point. I think that this relates to the amount of pressure that the department may be experiencing to --

MS. DESKINS: Your Honor --

MS. KAHN: -- eliminate Hodgins Kennel.

MS. DESKINS: Your Honor, this defamation suit was 10 years ago. What would the relevancy of that be on this particular case?

JUDGE HUNT: Good point. Why is it relevant now?

MS. KAHN: Your Honor, it's --

JUDGE HUNT: Is it 10 years --

MS. KAHN: How -- how --

JUDGE HUNT: -- ago the suit took place?

MS. KAHN: -- can I --

JUDGE HUNT: I'll let you make --

MS. KAHN: It's taken them 10 years to get --

JUDGE HUNT: Okay. I'm going to sustain the objection.

MS. KAHN: -- the government.

JUDGE HUNT: You can make your offer of proof about this suit, Ms. Deskin.

MS. KAHN: I'll keep it brief.

JUDGE HUNT: You can make a statement of -- offer of proof.

MS. KAHN: Okay. If allowed to testify, Mr. Hodgins would have testified that he had sued animal rights activists for defamation and that he had won those suits. He won a substantial amount of money and

that a major national animal rights organization paid for part of one of those verdicts and that since that time, he has experienced additional pressure from animal rights organizers to eliminate Class B dealers and he has evidence that those pressures were placed directly on -- in the regulating -- toward the regulating agencies.

JUDGE HUNT: All right, your offer of proof is part of the record, then.

BY MS. KAHN:

Q. You have testified about Dr. Walker's statements regarding the pressure to eliminate Class B dealers. Would you tell us what, if anything, he said about Christine Stevens?

MS. DESKINS: Your Honor, I'm going to object to this again, on relevancy.

JUDGE HUNT: Yes. Who is Christine Steven?

MS. KAHN: Well, that's the answer where -- we're about to get, Your Honor.

JUDGE HUNT: Well, why don't you tell me?

MS. KAHN: Okay.

JUDGE HUNT: What's he going to say?

MS. KAHN: He has to say that she has tremendous influence and the next proposed exhibit is her request for twenty-eight million dollars for this department during --

JUDGE HUNT: Who is she?

MS. KAHN: She's an animal rights activist in Washington, and she requested $28 million for this department --

JUDGE HUNT: Make your -- make an offer of proof on that.

MS. KAHN: Okay. If allowed to testify, Mr. Hodgins would state that Dr. Walker confirmed that Christine Stevens has tremendous influence in the department. He would testify that Christine Stevens is publically committed to the elimination of Class B dealers and he would testify that during the time period of these inspections, Christine Stevens went to Congress and requested $28 million in funding for this department. And we have an exhibit that we would like to put in as part of that offer of proof. One moment. I would like to mark this as Exhibit 54 and if the --

JUDGE HUNT: RX-54?

MS. KAHN: -- Court will give me one moment, I will locate the extra copies here. Okay, shall we have the -- Mr. Hodgins identify this document or just mark it as part of the offer of proof?

JUDGE HUNT: Well, you can just say -- you can tell us what that --

MS. KAHN: Exhibit 54 is a submittal from Christine Stevens to the House Appropriation Sub-Committee requesting some $28 million for the REAC Department. It's dated April 12, 1994, which is in the middle of the inspection period with which --

JUDGE HUNT: Okay. I'll --

MS. KAHN: -- this Court is dealing.

JUDGE HUNT: All right, 54 will remain part of your offer of proof.

Tr. 1788-92.

I agree with the ALJ's exclusion of testimony regarding Mr. Hodgins' defamation suit against animal rights activists, the pressure by animal rights activists to eliminate Class B dealers, and Ms. Stevens' influence in the Department and attempts to secure funding for the Department. I find all of this testimony to be irrelevant to whether Respondents violated the Animal Welfare Act and the

Regulations and Standards as alleged in the Complaint. Moreover, I find that the ALJ properly excluded RX 54 (April 12, 1994, Society for Animal Protective Legislation statement submitted to the House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies) as irrelevant.

Complainant raises 12 issues in Complainant's Appeal Petition. First, Complainant contends that the ALJ erred when he did not find a violation of section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)) (Complainant's Appeal Petition at 2). I disagree with Complainant.

Paragraphs II(C)(4), IV(D)(5), VIII(C)(6), and IX(B)(6) of the Complaint allege that the floors and walls of indoor housing facilities and other surfaces in contact with the animals were not impervious to moisture and that the ceilings were not impervious to moisture or replaceable, as required by section 3.2(d) of the Standards (9 C.F.R. § 3.2(d)). Paragraph IX(B)(2) of the Complaint alleges that Respondents violated section 3.2(d) of the Standards but does not allege facts which, if true, would constitute a violation of section 3.2(d) of the Standards. Accordingly, paragraph IX(B)(2) of the Complaint, as it relates to 9 C.F.R. § 3.2(d), is dismissed.

Further, as discussed in this Decision and Order, *supra* pp. 53-55, I agree with the ALJ that Respondents rebutted Complainant's evidence regarding the violations of 9 C.F.R. § 3.2(d) alleged in paragraphs II(C)(4), IV(D)(5), VIII(C)(6), and IX(B)(6) of the Complaint.

Second, Complainant contends that the ALJ erred when he did not find a violation of section 3.1(c)(1) of the Standards (9 C.F.R. § 3.1(c)(1)) (Complainant's Appeal Petition at 2). I disagree with Complainant.

Paragraphs II(C)(1), III(D)(2), V(C)(5), VI(C)(4), VIII(C)(2), and IX(B)(2) of the Complaint allege that the interior surfaces of housing facilities that come in contact with dogs had excessive rust that would prevent the required cleaning and sanitization and would affect the structural strength of the surface in violation of section 3.1(c)(1)(i) of the Standards (9 C.F.R. § 3.1(c)(1)(i)). The ALJ found that the amount of rust found on the interior surfaces of housing facilities and surfaces that come in contact with animals was not so excessive as to prevent required cleaning and sanitization or to affect the structural strength of the surface. While Complainant has a prima facie case with respect to the violations of section 3.1(c)(1)(i) of the Standards, the record is not strong enough to reverse the ALJ.

Third, Complainant contends that the ALJ's determination that "'up to thirty animals developed signs of illness each day but only six animals on average had to be killed each week'" is not supported by the evidence (Complainant's Appeal

Petition at 3). I agree and have not made that determination in this Decision and Order.

Fourth, Complainant contends that "[t]he ALJ's conclusion that 'the care provided by [Ms.] Longhi did not violate the Regulations' is not supported by the evidence. See Decision, p. 28." (Complainant's Appeal Petition at 6.) The ALJ states:

> With respect to Tammi Longhi providing improper veterinary care, the record shows that she followed an APHIS-reviewed protocol prescribed by a treating veterinarian and that she consulted the treating veterinarian on matters outside the protocol.... Accordingly, the care provided by Longhi did not violate the Regulations.

Initial Decision and Order at 28. I do not find it relevant to address Ms. Longhi's activities with respect to veterinary care and have not adopted this determination by the ALJ. It is sufficient to find, as the ALJ did, that Complainant has proven by a preponderance of the evidence that Respondents did not comply with section 2.40 of the Regulations (9 C.F.R. § 2.40) as alleged in the Complaint. The identity of the particular Respondent or employee or agent of Respondents that may have caused the violation is not dispositive of the issue of Respondents' violations of section 2.40 of the Regulations (9 C.F.R. § 2.40).

Fifth, Complainant contends that:

> The ALJ's analysis of [s]ection 2.40 in regards to record keeping requirements is based on an erroneous premise. The ALJ relied on the opinion of one APHIS investigator, Thomas Rippy, that an issue in this case was record keeping. However, the necessity of a record keeping requirement under [s]ection 2.40 is not an issue in this case. The only reason that veterinarian records are significant, in any respect, is because they are a means for the Respondents to establish compliance with [s]ection 2.40. An animal being ill or injured is not necessarily a violation of [s]ection 2.40. If an inspector is shown evidence, such as veterinarian records, that detail that a sick animal is receiving appropriate treatment for its condition then no violation of the veterinary care standard exists.

Complainant's Appeal Petition at 12-13 (footnote omitted).

Although the Animal Welfare Act and the Regulations require dealers to keep certain records, recordkeeping is not an element of veterinary care required under

section 2.40 of the Regulations (9 C.F.R. § 2.40). However, I do not find that the ALJ erred. The ALJ specifically states that recordkeeping requirements are not applicable to veterinary care requirements (Initial Decision and Order at 26).

Sixth, Complainant contends that the Initial Decision and Order "gives the misleading impression that Dr. Johnson visits Hodgins Kennel on a weekly basis to examine animals which in turn implies that . . . Respondents[] had the best frequency to be expected of veterinarian visits." (Complainant's Appeal Petition at 14.)

I disagree with Complainant. The ALJ did not state that Dr. Johnson visits the Hodgins Kennel on a weekly basis to examine animals. Further, the ALJ's statements, regarding the frequency of Dr. Johnson's visits to Respondents' facility and the testimony given by Mr. Kovach concerning the veterinary visits to the facilities that he inspects, are fully supported in the record.

Seventh, Complainant contends that:

> The ALJ's conclusion that there was no selective prosecution should be affirmed but the reasoning that the ALJ followed to reach that conclusion must be vacated because it is contrary to pertinent case law and also gives the misleading impression that APHIS' enforcement of the regulations was part of a campaign against Class B dealers.

Complainant's Appeal Petition at 15.

I disagree with the ALJ's findings that the circumstances in this case offer strong support for the argument that Respondents were chosen for selective enforcement and that they reflect a new policy by APHIS of taking a tougher approach toward Class B dealers (Initial Decision and Order at 16).

One of the grounds cited by the ALJ as supporting the claim of a special enforcement campaign against Respondents was the frequency of inspections. Respondents' facility was inspected eight times during the period November 16, 1993, through November 22, 1994, or approximately every 46 days. However, repeated inspections are not unusual,[49] and the frequency of the inspection of

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[49]*In re David M. Zimmerman*, 56 Agric. Dec. ___ (June 6, 1997) (Respondent's facility was inspected 10 times during the period August 3, 1994, through October 31, 1995); *In re Patrick D. Hoctor*, 56 Agric. Dec. ___ (May 30, 1997) (Respondent's facility was inspected six times during the period January 11, 1990 through May 21, 1992); *In re John Walker*, 56 Agric. Dec. ___ (Mar. 21, 1997) (Respondent's facility was inspected three times during the period August 3, 1994, through August 14, 1995); *In re Mary Meyers*, 56 Agric. Dec. ___ (Mar. 13, 1997) (Respondent's facility was inspected four times during the period September 12, 1994, through October 4, 1995); *In re Dora*

Respondents' facility does not indicate that Respondents were the target of selective enforcement.

Further, I find no basis in this record for the ALJ's determination that the inspections of Respondents' facility "were likely intended to reflect to the industry a new policy by APHIS of taking a tougher approach towards Class B dealers." (Initial Decision and Order at 16.)

Eighth, Complainant contends that:

> The ALJ made a clear error of fact in concluding that the testimony of APHIS personnel was not reliable because they each gave different reasons for going to inspect Respondents' facilities.
>
> . . . .
>
> The evidence just does not support that there were unknown or unstated motivations for having two APHIS veterinarians and an investigator inspect the Respondents' facilities. The ALJ's speculation that the inspections were part of some campaign of heighten[ed] enforcement of the Act against Class B Dealers is factually erroneous. The Respondents' facility was repeatedly out of compliance of many of the regulations and standards, including [s]ection 2.40 which is very serious. . . . The reasons for having three people at the facility were known and reasonable and were not part of a special enforcement campaign against either the Respondents or Class B dealers. The ALJ's reasoning if left unchanged would give the misleading appearance that something more happened in this case than the routine enforcement of the Act, regulations and standards.

Complainant's Appeal Petition at 17, 20-21.

I do not find that the ALJ found that the testimony of APHIS representatives was generally unreliable. The ALJ's determination regarding their reliability appears to be limited to the reasons for their role in the inspection of Respondents' facility. Normally, the Judicial Officer accords great weight to the ALJ's credibility determinations, but the Judicial Officer is not bound by them and may make

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Hampton, 56 Agric. Dec. ___ (Jan. 15, 1997) (Respondent's facility was inspected five times during the period August 2, 1994, through November 7, 1995); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___ (Jan. 13, 1997) (Respondent's facility was inspected nine times during the period September 19, 1991, through February 1, 1994), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997).

separate determinations of witnesses' credibility. The standard of court review is whether there is substantial evidence to support the Judicial Officer's contrary decision. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[50]

While I agree with the ALJ that the APHIS inspectors gave conflicting testimony regarding the reasons for their participation in the inspections of Respondents' facility, I do not agree with the ALJ that their testimony regarding this subject is "not very reliable." Rather, each inspector had his or her own views as to the reasons for his or her participation in the inspections of Respondents' facility.

Ninth, Complainant contends that:

> Some of the legal conclusions reached by the ALJ in the Decision

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[50]*See also In re Volpe Vito, Inc.*, 56 Agric. Dec. ___ slip op. at 95 (Jan. 13, 1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiner's finding on credibility); *3 Kenneth C. Davis, Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

> must be vacated because they are based on evidence that the ALJ found inadmissible during the hearing. An example of this[] is the ALJ's reliance on the Respondents' testimony taken from tapes that the ALJ found inadmissible. See TR. I [1736]. The Respondents as part of this case attempted to utilize several secret tape recordings that they made of APHIS employees including Dr. Joseph Walker, a sector supervisor for APHIS. The court ruled that all of the tapes that the Respondents attempted to admit were inadmissible because they could be altered. TR. I 1630:14-15. The court further ruled that testimony should be limited to the conversations that the Respondents[] remembered and not based upon their listening to and reading transcripts of tape recordings. TR. II 257, 264, 434 [F. Hodgins "Yes its on the tape."]
>
> Yet, the court in the Decision relies on the testimony about the content of the tapes. See Decision, p. 10 footnote 4. Many of the ALJ's conclusions that relate to the various theories that APHIS had some campaign against Class B dealers are derived from the testimony of Fred Hodgins about his conversations with Dr. Walker. Decision, p. 12. Mr. Hodgins testimony was not reliable.

Complainant's Appeal Petition at 21-22 (footnote omitted).

The ALJ found Mr. Hodgins' testimony regarding his conversations with Dr. Walker reliable (Initial Decision and Order at 10 n.4). Normally, the Judicial Officer accords great weight to the ALJ's credibility determinations, and I find no basis in the record to overturn the ALJ's credibility determinations regarding Mr. Hodgins' testimony on his conversations with Dr. Walker.

Moreover, I do not find that the ALJ based any of his conclusions on the content of tapes which the ALJ excluded from evidence, or that the ALJ drew any adverse inference from Complainant's failure to call Dr. Joseph Walker as a witness.

Tenth, Complainant contends that:

> . . . [T]he ALJ's finding that [s]ection 2.50 [of the Regulations] was violated was supported by the evidence but his reasoning that evidence of dog thefts is an element of the violation is inconsistent with Departmental precedent. The ALJ based his analysis of the violation of [s]ection 2.50 on whether or not the Complainant showed evidence that dogs were stolen.

Complainant's Appeal Petition at 23.

I agree with Complainant that theft of an animal is not an element of a violation of section 2.50 of the Regulations (9 C.F.R. § 2.50). However, I do not agree with Complainant that the ALJ found evidence of dog thefts to be an element of a violation of section 2.50 of the Regulations. The ALJ found that Respondents violated section 2.50 of the Regulations (9 C.F.R. § 2.50) (Initial Decision and Order at 29-30, 57, 59) and correctly stated that there is no evidence that Respondents stole any animals, as follows:

> Complainant, however, produced no evidence of any animals whose acquisition or disposition was not ultimately explained. (Tr. 1955-56.) There is also no allegation that [R]espondents trafficked in stolen animals.

Initial Decision and Order at 32.

Eleventh, Complainant contends that:

> The ALJ erred to place any relevancy on the compliance history of the Respondents that extended for a period of twenty-five years. The complaint covered the time period from November 16, 1993 through November 22, 1994. Evidence of the Respondents' compliance within the time period of the complaint is relevant to determine sanctions. Even evidence in the recent past that relates to compliance with the regulations is relevant in the determination of sanctions. However, the entire compliance history of the Respondents that extends over a twenty-five year period is too remote from the time period of the complaint to have any relevancy. The ALJ's inference that lack of evidence on the compliance record then means that the Respondents[] were in compliance over the past twenty-five years is an impermissible inference that must be vacated.
>
> The Complainant notes, however, that record evidence was presented on the compliance history of the Respondents in the last five years which is relevant because it is less remote from the time period in the complaint. The Respondents received a warning notice in 1991. Decision, p. 14. Other record evidence of Respondents' conduct in the last five years showed non-compliance. See CX-36 (OFFER OF PROOF). This more recent evidence of the Respondents' conduct shows non-compliance with the regulations.

Complainant's Appeal Petition at 27-28.

Section 19(b) of the Animal Welfare Act provides that "[t]he Secretary [of Agriculture] shall give due consideration to the appropriateness of the penalty with respect to . . . the history of previous violations." (7 U.S.C. § 2149(b).)

I agree with Complainant that the ALJ cannot infer from this record that Respondents complied with the Animal Welfare Act and the Regulations and Standards for 25 years. However, Respondents' history of previous violations is relevant to any penalty to be imposed on Respondents under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)). The record reveals that Dr. Valencia D. Colleton, Northeast Sector Supervisor, REAC-Animal Care, APHIS, sent Mr. Hodgins a letter on January 13, 1992, stating that inspections of Respondents' facility in October 1991 revealed conditions which were not in compliance with the Regulations and Standards and that each non-compliant condition "constitutes a[n] *alleged* violation of the Animal Welfare Act and/or accompanying regulations." (CX 4 at 2 (emphasis added).) Complainant introduced no evidence that, prior to the Initial Decision and Order in this proceeding, Respondents have ever been found after an adjudication to have violated the Animal Welfare Act or the Regulations or Standards.

Twelfth, Complainant contends that the sanction imposed by the ALJ should be increased from the assessment of a $16,000 civil penalty and a cease and desist order (Initial Decision and Order at 62-64) to the assessment of a $45,000 civil penalty and a 30-day suspension of Respondents' license under the Animal Welfare Act (Complainant's Appeal Petition at 29).

Sanction

As to the appropriate sanction, the Animal Welfare Act provides:

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such

violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a), (b).

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondents sold 4,795 animals in 1994, and the gross amount derived from the sale of those animals was $458,966.65 (CX 3 at 7). During the time relevant to the Complaint (November 16, 1993 - November 22, 1994), Hodgins Kennel, Inc., had two locations: 1) the Lange Road facility, consisting of five buildings; and 2) the Judd Road facility, four miles from the Lange Road facility, comprising one large building. Normally, there are between 225-250 dogs and cats at Hodgins

Kennel, Inc., on a given day (Tr. 64-65). At various times relevant to the Complaint, the kennel also housed a few goats, pigs, sheep, rabbits, and calves. I find, based on this evidence, that Respondents operate a large facility.

There is no evidence that Respondents deliberately harmed their animals. However, Respondents repeatedly and willfully violated the Animal Welfare Act and the Regulations and Standards. Many of the violations are serious.

Complainant could have sought $2,500 for each violation.[51] In light of the amount that Complainant could have requested and the number of violations and serious nature of many of the violations, the requested sanction of a civil penalty of $45,000, and 30-day suspension of Respondents' Animal Welfare Act license, is not inappropriate.

However, considering the statutory criteria, the Department's sanction policy, Respondents' record regarding correction of violations, the number of alleged violations not proven by a preponderance of the evidence, and Complainant's recommendation regarding the sanction, I believe a civil penalty of $13,500 and a 14-day suspension of Respondents' Animal Welfare Act license to be reasonable and appropriate. Also, Respondents should be ordered to cease and desist from further violations of the Animal Welfare Act and the Regulations and Standards.

Finally, an individual who is not a party to this proceeding and who did not file a motion to intervene filed an undated letter on November 13, 1996. This letter is not a part of the record of this proceeding and forms no part of the basis for this Decision and Order.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondents Fred Hodgins and Janice Hodgins, as the *alter egos* of Respondent Hodgins Kennel, Inc., are jointly and severally assessed a civil penalty of $13,500. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 120 days after service of this Order on Respondents to:

---

[51]I found that Complainant proved its case by a preponderance of the evidence with respect to 58 violations alleged in the Complaint. As explained in this Decision and Order, *supra* pp. 109-10, no sanction, except the issuance of a cease and desist order, is warranted under the circumstances for Respondents' four violations of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50). Complainant could have sought and had assessed a maximum civil penalty of $2,500 for each of 54 violations, for a total civil penalty of $135,000.

Sharlene A. Deskins
Office of the General Counsel
Room 2014 South Building
U.S. Department of Agriculture
Washington, DC 20250-1417

The certified check or money order should indicate that payment is in reference to AWA Docket No. 95-0022.

2. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

(a) Failing to provide adequate veterinary care to animals in need of such care;

(b) Failing to individually identify dogs;

(c) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required;

(d) Failing to maintain for dogs housing facilities that are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(e) Failing to store supplies of food and bedding in a manner that protects them from spoilage, contamination, and vermin infestation;

(f) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, and other fluids and wastes, in a manner that minimizes contamination and disease;

(g) Failing to sufficiently heat indoor housing facilities for dogs and cats to protect the animals from temperature extremes and provide for their health and well-being;

(h) Failing to sufficiently ventilate indoor housing facilities for dogs to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation;

(i) Failing to construct primary enclosures for dogs so as to provide sufficient space for each animal;

(j) Failing to keep primary enclosures for dogs clean;

(k) Failing to keep their premises, including buildings, clean and in good repair to protect the animals from injury and facilitate the required husbandry practices;

(*l*) Failing to maintain an effective program for pest control;

(m) Failing to keep clean the interior of a van used to transport animals;

(n) Failing to have enough employees to carry out the required level of husbandry practices and care; and

(o) Failing to sanitize the hard surfaces of primary enclosures.

The cease and desist provisions shall become effective on the day after service of this Order on Respondents.

3. Respondents' Animal Welfare Act license is suspended for a period of 14 days and continuing thereafter until Respondents demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the Animal Welfare Act, the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondents demonstrate to the Animal and Plant Health Inspection Service that they have satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondents' Animal Welfare Act license after the expiration of the 14-day license suspension period. The Animal Welfare Act license suspension provisions in this Order shall become effective on the 30th day after service of this Order on Respondents.

In re: FRED HODGINS, JANICE HODGINS, AND HODGINS KENNEL, INC.
AWA Docket No. 95-0022.
Stay Order filed August 11, 1997.

Sharlene A. Deskins, for Complainant.
Nancy L. Kahn, Farmington, MI, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On July 11, 1997, the Judicial Officer issued a Decision and Order concluding that Fred Hodgins, Janice Hodgins, and Hodgins Kennel, Inc. [hereinafter Respondents], willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]. *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 68-71 (July 11, 1997).

The Decision and Order assesses Respondents Fred Hodgins and Janice

Hodgins, as the *alter egos* of Hodgins Kennel, Inc., jointly and severally, a civil penalty of $13,500, to be paid within 120 days after service of the Decision and Order on Respondents, and suspends Respondents' Animal Welfare Act license for 14 days, effective on the 30th day after service of the Decision and Order on Respondents. *In re Fred Hodgins, supra*, slip op. at 165-68.

On August 7, 1997, Respondents filed a Petition for Stay of Penalty Pending Appeal in which Respondents state that they are in the process of filing a petition for judicial review of the Judicial Officer's July 11, 1997, Decision and Order with the United States Court of Appeals for the Sixth Circuit and request a stay pending the outcome of proceedings for judicial review. On August 8, 1997, the case was referred to the Judicial Officer for a ruling on Respondents' Petition for Stay of Penalty Pending Appeal. On August 11, 1997, Sharlene A. Deskins, attorney for Complainant in this proceeding, informed the Office of the Judicial Officer by telephone that Complainant does not oppose Respondents' Petition for Stay of Penalty Pending Appeal.

Respondents' Petition for Stay of Penalty Pending Appeal is granted. The Order issued in this proceeding on July 11, 1997, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: TAMMI LONGHI and L & H ASSOCIATES.
AWA Docket No. 95-0074.
Decision and Order on ALJ's Ruling on Order to Show Cause filed July 11, 1997.

License application — Abuse — Harassment — Licensed person — Complaint.

The Judicial Officer affirmed the Ruling on Order to Show Cause by Administrative Law Judge James W. Hunt (ALJ) denying Respondent L & H Associates' application for a license. Complainant failed to prove by a preponderance of the evidence verbal abuse or harassment of APHIS officials in violation of 9 C.F.R. § 2.4. Granting a license to L & H Associates, a partnership, would result in a person having two licenses, in violation of 9 C.F.R. § 2.1(c), because one of the partners in L & H Associates is an owner of and a principal in a corporation already holding a license. APHIS' interpretation of its regulations regarding persons eligible for a license must be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulations, provided that the interpretation does not violate the Constitution or a federal statute. Paragraph II(C) of the Order to Show Cause could have been more specific with respect to the matters of fact asserted. However, the formalities of court pleading are not applicable in administrative proceedings and due process is satisfied because

Respondents were reasonably apprised of the issues in controversy and were not misled.

Sharlene A. Deskins, for Complainant.
Nancy L. Kahn, Farmington Hills, MI, for Respondents.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

L & H Associates applied for a license under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act), and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) (hereinafter the Regulations) on May 24, 1995. The Animal and Plant Health Inspection Service (hereinafter APHIS), United States Department of Agriculture (hereinafter USDA), denied L & H Associates' application for a license, and on July 12, 1995, in accordance with section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)), Tammi Longhi, one of the partners in L & H Associates, and L & H Associates (hereinafter Respondents) requested a hearing for the purpose of showing why the application for a license should not be denied.

The Administrator of APHIS, USDA (hereinafter Complainant), instituted this administrative licensing proceeding under the Animal Welfare Act, the Regulations, and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), on July 31, 1995, by filing an Order to Show Cause why the May 24, 1995, license application should not be denied.

On August 21, 1995, Respondents filed a Response to Order to Show Cause stating that there is no valid reason for the denial of the May 24, 1995, application for a license under the Animal Welfare Act (Response to Order to Show Cause at 1). Administrative Law Judge James W. Hunt (hereinafter ALJ) presided over a hearing in Detroit, Michigan, on October 18-19 and November 28, 1995. Sharlene A. Deskins, Esq., Office of the General Counsel, USDA, represented Complainant. Nancy L. Kahn, Esq., Farmington Hills, Michigan, represented Respondents.

Respondents and Complainant filed briefs on January 17, 1996, and January 25, 1996, respectively, which contain proposed findings of fact and proposed conclusions of law, and in Complainant's brief, a proposed order.

On June 3, 1996, the ALJ issued an Initial Decision and Order in which he ruled that Respondents had failed to show cause under section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)) why the license application should not be denied, and the ALJ affirmed Complainant's denial of Respondents' license application (Initial Decision and Order at 9).

On July 31, 1996, Respondents appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated

authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* On September 6, 1996, Complainant filed Complainant's Appeal Petition and Brief in Support Thereof (hereinafter Complainant's Appeal Petition). On October 4, 1996, Respondents filed Respondent's [sic] Brief in Opposition to Complainant's Appeal Petition, and Complainant filed Complainant's Opposition to the Respondent's [sic] Appeal Petition and Brief in Support Thereof. On October 9, 1996, the case was referred to the Judicial Officer for decision.

Respondents' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed by the parties, and thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ that Respondents failed to show cause why the license application should not be denied. The ALJ's ruling on the Order to Show Cause in the ALJ's Initial Decision and Order is affirmed and adopted as the final Decision and Order, with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions. As used in this Decision and Order, Tr. refers to the transcript of the proceeding, CX refers to Complainant's exhibits, and RX refers to Respondents' exhibits.

Applicable Statutory Provisions and Regulations

5 U.S.C.:

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

. . . .

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested

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*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.

5 U.S.C. § 558(c).

7 U.S.C.:

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title[.]

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

§ 2153. Fees and authorization of appropriations

The Secretary shall charge, assess, and cause to be collected reasonable fees for licenses issued.

7 U.S.C. §§ 2133, 2134, 2153.

9 C.F.R.:

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section.

. . . .

Class "A" licensee (breeder) means a person subject to the licensing requirements under part 2 and meeting the definition of a "dealer" (§ 1.1), and whose business involving animals consists only of animals that are bred and raised on the premises in a closed or stable colony and those animals acquired for the sole purpose of maintaining or enhancing the breeding colony.

Class "B" licensee means a person subject to the licensing requirements under part 2 and meeting the definition of a "dealer" (§ 1.1), and whose business includes the purchase and/or resale of any animal. This term includes brokers, and operators of an auction sale, as such individuals negotiate or arrange for the purchase, sale, or transport of animals in commerce. Such individuals do not usually take actual physical possession or control of the animals, and do not usually hold animals in any facilities. A class "B" licensee may also exhibit animals as a minor part of the business.

. . . .

Person means any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted

from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the APHIS, REAC Sector Supervisor in the State in which that person operates or intends to operate. . . . The applicant shall file the completed application form with the APHIS, REAC Sector Supervisor.

. . . .

(c) No person shall have more than one license.

(d) A license will be issued to any applicant, except as provided in §§ 2.10 and 2.11, when the applicant:

(1) Has met the requirements of this section and of §§ 2.2 and 2.3; and

(2) Has paid the application fee of $10 and the annual license fee indicated in § 2.6 to the APHIS, REAC Sector Supervisor and the payment has cleared normal banking procedures.

§ 2.4 Non-interference with APHIS officials.

A licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.

§ 2.11 Denial of initial license application.

. . . .

(b) An applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied. The license denial shall remain in effect until the final legal decision has been rendered. Should the license denial be upheld, the applicant may again apply for a license 1 year from the date of the final order denying the application.

9 C.F.R. §§ 1.1, 2.1(a)(1), (c), (d) .4, .11(b).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

. . . .

Facts

Respondent Tammi Longhi is the daughter of Fred and Janice Hodgins. Mr. and Mrs. Hodgins own and operate Hodgins Kennel, Inc., an APHIS-licensed Class B dealer under the Animal Welfare Act. Tammi Longhi has worked for her parents for 10 years [at Hodgins Kennel, Inc.] Fred Hodgins, Janice Hodgins, and Hodgins Kennel, Inc., [are] Respondents in a companion case ([*In re Fred Hodgins*, 56 Agric. Dec. ___ (July 11, 1997)]). The parties [in *In re Fred Hodgins, supra*, and the parties in the instant proceeding] agreed that the record for both cases could be referred to in each case. Accordingly, the findings of fact [in the Decision and Order in *In re Fred Hodgins, supra*,] are . . . incorporated by reference in this Decision [and Order].

Until February 1995, the Hodgins Kennel[, Inc.,] operation encompassed two locations, one called the Lange Road facility and the other the Judd Road facility. The [Lange Road facility and the Judd Road facility] are about 4 miles from each other. Tammi Longhi and her husband live near the Judd Road [facility].

In June 1994, Tammi Longhi applied to APHIS for an Animal Welfare Act license to operate a kennel at the Judd Road facility (CX 56). Her parents had agreed to allow her to use part of the facility to breed animals. [Mr. Joseph E. Kovach, an APHIS inspector, conducted a pre-license inspection of the Judd Road facility on July 19, 1994.] The application was denied because the [Judd Road] facility was already being operated under the Hodgins Kennel, Inc., license (Tr. 250[, 301-02; CX 57 at 2). Mr. Kovach's inspection report, signed by, *inter alia*, Dr. Ellen J. Magid, Area Supervisor, Northeast Sector, Regulatory Enforcement and Animal Care, APHIS, specifically states the reasons for the denial of the license application, as follows:

* This is the first pre-license inspection:

The applicant Tami [sic] L. Longhi has submitted an application for a "class B" dealers license for a facility that is within an already licensed facility. A room located at 9530 Judd Road is part of Hodgins Kennel license # 34-B-002. (site # 3)

III NC - item(s) identified this inspection;

#11 Condition and Site 3.1(b)

As required per this section housing facilities other than those maintained by research facilities and federal research facilities must be physically separated from any other business.

* Note: the applicant is an employee of Hodgins Kennel and wants her own license within another licensed facility. Storage, pest control etc. would not be considered separate from one another.

* The applicant may re-apply for a class "B" dealers license under a new and separate facility.

* No covered activities permitted until USDA license is obtained.

* Next pre-license inspection will be at the owners request when the non-compliant item has been corrected, i.e. separate facility.

CX 57 at 2.]

In February 1995, Fred and Janice Hodgins discontinued using the Judd Road [facility] as part of the operation [of Hodgins Kennel, Inc.,] and advised APHIS of this change (Tr. 302-04). . . . Tammi Longhi and Janice Hodgins formed a 50-50 partnership doing business as L & H Associates, and [on February 21, 1995, Tammi Longhi] filed a new application for a license for L & H Associates to operate [as a Class A dealer] at the Judd Road location. The [facility] was to be run by Tammi Longhi and her husband (CX 58; Tr. 236, 304-07, 362, 404). The license was denied because Janice [Hodgins'] name was on the application.

Following the suggestion of Dr. [Joseph] Walker, [Sector Supervisor,] Northeast Sector, [Regulatory Enforcement and Animal Care, APHIS, Tammi Longhi deleted Janice Hodgins'] name from the license application and [on March 15, 1995,] resubmitted [the application for a license for L & H Associates to APHIS' Northeast Sector office (CX 59)]. The application was again rejected on the grounds that APHIS considered the Judd Road location to be part of the Hodgins' Lange Road kennel ([RX 62]; Tr. 248-51, 262-64).

On May 24, 1995, Tammi Longhi again applied for a license [for L & H Associates as a Class A licensee, and the application] was . . . denied (RX 67-69). Tammi Longhi and L & H Associates then requested a hearing, and on July 31, 1995, [an] Order to Show Cause was filed alleging that Respondents were denied

a license "pursuant to sections 2.1(c) and 2.4 of the regulations (9 C.F.R. §§ 2.1(c) and 2.4)." [(Order to Show Cause ¶ I(D).)] The Order [to Show Cause] further alleges that Respondents are not eligible for a license because Tammi Longhi participated in violations of the Animal Welfare Act and, "in particular," harassed and was verbally abusive to APHIS personnel in the performance of their duties during the March 1 and April 5, 1994, [inspections of Hodgins Kennel, Inc.,] and Janice Hodgins harassed APHIS personnel [in the performance of their duties during the] April 5, 1994[, inspection of Hodgins Kennel, Inc.] The Complaint [filed in *In re Fred Hodgins, supra*, which alleges that Fred Hodgins, Janice Hodgins, and Hodgins Kennel, Inc., violated the Animal Welfare Act, the Regulations, and the Standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) (hereinafter the Standards) during eight inspections of Hodgins Kennel, Inc., including the March 1 and April 5, 1994, inspections, does] not allege [that anyone harassed or abused] APHIS personnel [during any of the eight inspections of Hodgins Kennel, Inc.] . . . .

. . . .

Robert Hogan, an investigation specialist with APHIS' Regulatory Enforcement Staff, testified that APHIS regarded Janice Hodgins as a licensed "person" by virtue of being a part owner of and principal in Hodgins Kennel[, Inc.] . . . . Therefore, since Janice Hodgins . . . already [has an Animal Welfare Act] license, . . . the application [for a license for L & H Associates] was denied because of her partnership in L & H [Associates] (Tr. 445-50).

Respondents challenge APHIS' one-person one-license policy on the ground that it does not actually follow this policy. In support of this contention, they presented evidence that APHIS has issued separate licenses to two animal dealers that have similar names (Tr. 284-88). However, the evidence is insufficient to show that, despite the similar names, the two facilities are in fact operated by the same person. Mr. Hogan said that if APHIS discovers two licensed facilities being operated by the same person, APHIS will revoke one of the licenses (Tr. 442-44).

This interpretation by APHIS of its Regulations concerning the "persons" eligible for a license is entitled to deference. . . . Therefore, APHIS could deny [the May 24, 1995,] license application [for L & H Associates] because Janice Hodgins [is a person who has a license due to her being an owner of and principal in a licensed facility, Hodgins Kennel, Inc., and is] a partner in [the entity applying for a license,] L & H Associates. APHIS' denial [of the May 24, 1995, license application is] therefore affirmed.

Complainant further contends that the denial should also be based on Tammi Longhi's alleged violations of the Animal Welfare Act and her alleged [verbal]

abuse and harassment of APHIS [personnel] on March 1 and April 5, 1994, and Janice Hodgins' alleged harassment [of APHIS personnel] on April 5[, 1994]. Mr. Hogan also intimated that an additional reason for the license denial was an unarticulated "feeling and belief" by APHIS officials that Tammi Longhi ["is a part of"] Hodgins Kennel[, Inc.,] and that this "entered into the situation." (Tr. 445-47.)

No evidence was presented that Tammi Longhi was more than an employee of Hodgins Kennel[, Inc.] She was also not named as a respondent in the disciplinary proceeding involving the violations of the Animal Welfare Act[, the Regulations, and the Standards] at Hodgins Kennel[, Inc. (*In re Fred Hodgins, supra*). APHIS officials' feeling and belief that Tammi Longhi is a part of Hodgins Kennel, Inc.,] . . . are therefore insufficient grounds for denying [L & H Associates'] license [application].

As for the alleged harassment and [verbal] abuse of [APHIS personnel], the circumstances surrounding Tammi Longhi's and Janice Hodgins' behavior during the inspections [of Hodgins Kennel, Inc.,] are set forth in [*In re Fred Hodgins, supra*]. Specifically, the incidents on March 1 and April 5[, 1994,] are [described] in the following [statements] by the two inspectors involved, Dr. Lisa Dellar and Dr. Norma Jean Harlan.

Dr[s]. Dellar [and Harlan], in [a memorandum to their supervisor, Dr. Miava Binkley], state:

> During our inspection on 3/1/94 at Hodgins Kennels [sic], Ms. Hodgin's [sic] daughter, Tammy [sic] became very angry. She was swearing and verbally abusive. Her father finally took her aside and we heard him tell her to calm down.
>
> Following this her behavior improved. She completed the rest of the inspection, limiting herself to sarcastic remarks.

CX 50.

Dr. Dellar testified that . . . she had no specific memories of the incident and that she could not recall what swear words Tammi Longhi had used (Tr. 157, 174).

Dr. Harlan [states] in her affidavit that:

> On 4/5/94 I inspected the facilities of Fred Hodgins (34-B-002) with Dr. Lisa Dellar VMO and Tom Rippy Sr. Investigator for Michigan.
>
> During this inspection Mr. Hodgins, his wife and daughter

continuously harassed us.

The harassment included such things as following us with video cameras — comments such as "I hope this doesn't cause Tammy [sic] (their daughter) to lose her baby." — This was said by Mrs. Hodgins directly to Dr. Dellar.

The Hodgins took exception to every statement made. They disputed every item on the inspection report and in general were extremely dificult [sic] to deal with. Mr. Hodgins on several occasions raised his voice to us and remained very argumentative throughout the inspection.

CX 51.

Thomas Rippy, an [APHIS] investigator, testified that Tammi Longhi was "agitated" at the April 5[, 1994,] inspection, spoke in a loud voice, and made comments about almost everything the inspectors wrote down. He said she used expletives and that her comments were "inappropriate." However, he said he could not remember any of the specific things she said [and did not personally feel harassed or intimidated by Tammi Longhi or Janice Hodgins] (Tr. 21-23[, 27, 59]). Dr. Dellar said she considered swearing to be harassment, but when asked if she regarded "yelling" to be harassment, responded "there are times when you have to yell. In a kennel situation you've got a hundred and fifty dogs barking so certainly -- yelling, no." (Tr. 175.) She also said that on those occasions when she asked Tammi Longhi not to yell at her, Tammi Longhi always complied (Tr. 167).

Complainant contends in its brief that Respondents' license application should also be denied because of Tammi Longhi's behavior [during] the June 23, 1994, inspection [of Hodgins Kennel, Inc.] Complainant's Order to Show Cause specifically cites the alleged [verbal] abuse and harassment at only the March 1 and April 5, 1994, inspections as being violations of section 2.4 [of the Regulations (9 C.F.R. § 2.4)] and grounds for denying the license application. [However, on the last day of the 3-day hearing, Complainant was permitted to amend the Order to Show Cause to include an allegation that Tammi Longhi verbally abused and harassed APHIS personnel during the June 23, 1994, inspection of Hodgins Kennel, Inc. (Tr. 277)]. . . . [Footnote 1 omitted.]

[Dr. Dellar states in her affidavit concerning the June 23, 1994, inspection that during the inspection, Tammi Longhi had escalated her criticism of the inspection team, but that Tammi Longhi calmed down when Dr. Dellar asked Mr. Hodgins to calm down. Further, Dr. Dellar states that during the June 23, 1994, exit interview,

Tammi Longhi disagreed with the reported findings and "grew more and more loud until Tom Rippy asked Mr. Hodgins to again stop yelling." (CX 53.) Dr. Harlan's affidavit confirms Dr. Dellar's description of Tammi Longhi's behavior during the June 23, 1994, inspection (CX 54).]

. . . [T]he use of a video camera is not objectionable. After all, [the individuals who followed APHIS inspectors with video cameras] were apparently only doing what the inspectors were doing -- taking pictures of the alleged violations. Further, it is not objectionable that Janice Hodgins expressed her opinion that the stress of the inspections was affecting her daughter's pregnancy. Finally, the fact that [Janice Hodgins and Tammi Longhi] exercised their right to comment on the inspectors' findings, or dispute them, or even argue about them, is not *per se* interference, abuse, or harassment. . . .

[While Complainant introduced prima facie evidence to prove that Tammi Longhi verbally abused and harassed APHIS personnel on March 1, April 5, and June 23, 1994, and that Janice Hodgins harassed APHIS personnel on April 5, 1994, Respondents introduced extensive rebuttal evidence (Tr. 214-16, 228-30, 240-43, 259-61, 273-75, 322-23, 331-34, 363-67, 392-93, 424-30). Based on my review of the record, I find that] Complainant failed to prove by a preponderance of the evidence that [Janice Hodgins harassed APHIS personnel during the inspection of Hodgins Kennel, Inc., on April 5, 1994, or that Tammi Longhi verbally abused and harassed APHIS personnel during inspections of Hodgins Kennel, Inc., on March 1, April 5, and June 23, 1994, in] violation of section 2.4 of the Regulations (9 C.F.R. § 2.4).

Findings of Fact

1. Fred Hodgins and Janice Hodgins are individuals who own and manage Hodgins Kennel, Inc. Hodgins Kennel, Inc., is licensed under the Animal Welfare Act as a Class B animal dealer.

2. . . . .

3. [No person may have more than one Animal Welfare Act license at the same time.]

4. Janice Hodgins is regarded under APHIS policy to be a person having a[n Animal Welfare Act] license . . . because [she is an owner of and a principal in] Hodgins Kennel, Inc.[, a Class B licensee].

5. Respondent Tammi Longhi is . . . an employee of Hodgins Kennel, Inc.

6. On May 24, 1995, [L & H Associates] applied for a Class A license. . . .

7. L & H Associates is a partnership comprised of Tammi Longhi and Janice

Hodgins.

8. [APHIS] denied [L & H Associates'] license application because Janice Hodgins [is] a partner in L & H Associates.

9. Tammi Longhi did not [verbally] abuse or harass APHIS officials on March 1, . . . April 5, [or June 23,] 1994.

10. Janice Hodgins did not . . . harass APHIS officials on April 5, 1994.

Conclusion of Law

Respondent . . . L & H Associates [is] not eligible to receive a license under section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) because [Janice Hodgins,] one of the partners in L & H Associates, . . . already has an Animal Welfare Act license through her [interest in] Hodgins Kennel, Inc.[, a Class B licensee.]

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant's Order to Show Cause is based upon section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) which prohibits a person from holding more than one license and section 2.4 of the Regulations (9 C.F.R. § 2.4) which prohibits a licensee or an applicant for an initial license from verbally abusing or harassing any APHIS official in the course of carrying out his or her duties.

I agree with the ALJ that Complainant has not proven by a preponderance of the evidence that Janice Hodgins harassed APHIS personnel during the inspection of Hodgins Kennel, Inc., on April 5, 1994, or that Tammi Longhi verbally abused and harassed APHIS personnel during inspections of Hodgins Kennel, Inc., on March 1, 1994, and April 5, 1994. Further, while I find that the Order to Show Cause was amended to include an allegation that Tammi Longhi verbally abused and harassed APHIS personnel during the June 23, 1994, inspection of Hodgins Kennel, Inc. (Tr. 277), I do not find that Complainant has proven by a preponderance of the evidence that Tammi Longhi verbally abused and harassed APHIS personnel on June 23, 1994. Moreover, Complainant suggests that the Judicial Officer rely solely upon section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) in affirming the ALJ's ruling on the Order to Show Cause, as follows:

> . . . Complainant notes that the ALJ after determining on the basis of 2.1(c) that the Respondent [sic] was not entitled to an additional license did not have to reach the merits of the harassment of APHIS personnel. Thus,

> the Judicial Officer in reviewing this could affirm the denial of license to the Respondent [sic] without reviewing the merits of the violations of Section 2.4, since sufficient grounds exist for the denial that are not based on the harassment violations.

Complainant's Appeal Petition at 3-4.

Consequently, the only issue remaining is the denial of L & H Associates' application for a license based upon section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)). Therefore, only those aspects of the appellate pleadings addressing the denial of L & H Associates' license application, because Janice Hodgins already holds a license, need be addressed.

Respondents raise two issues regarding the denial of the May 24, 1995, application for a license based upon section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)). First, Respondents contend, as follows, that granting the application for a license for L & H Associates would not result in one person having more than one Animal Welfare Act license:

> Regulation 2.1(c) states that "no person shall have more than one license." "Person" is specifically defined in Section 1.1 of the Regulations as meaning "any individual, partnership, firm, joint stock company, corporation, association, trust, estate or other legal entities".
>
> The record is clear that the Hodgins Kennel license (a copy of which is attached at CX 2) is carried under the name of Hodgins Kennel, Inc. Hodgins Kennel, Inc. is a distinct legal entity recognized by the State of Michigan (see Exhibit CX 1 - Articles of Incorporation of Hodgins Kennel, Inc.).
>
> The Longhi application, which was at issue in the subject Complaint was submitted under the name of L & H Associates (Exhibit RX 60, RX 61, RX 62, p. 2, RX-67). L & H Associates is a legal entity recognized in the State of Michigan through its registration in Livingston County, Michigan (Transcript, p. 304). The fact that Hodgins Kennels' license is in the name of a Michigan partnership, demonstrates that the granting of a license to Ms. Longhi or L & H Associates would not constitute the granting of a second license to one "person" within the meaning of Section 1.1.
>
> Complainant's own regulation specifies that "person" means an

> individual, partnership or corporation. There is absolutely no basis for an argument that Hodgins Kennel, Inc. is the same legal entity as Janice Hodgins, her daughter Tammi Longhi, or the recognized Michigan partnership of L & H Associates.

Brief in Support of Respondents' Appeal Petition at 7.

I disagree with Respondents' interpretation of section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)). Respondents' interpretation would allow an individual to own and control multiple legal entities licensed under the Animal Welfare Act, thus rendering section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) a nullity.

APHIS denied L & H Associates' application for a license because Janice Hodgins is the owner of and a principal in Hodgins Kennel, Inc. (a Class B licensee), and a partner in L & H Associates. As such, Janice Hodgins is an *alter ego* of both Hodgins Kennel, Inc., and L & H Associates; therefore, if Hodgins Kennel, Inc., and L & H Associates each held a license under the Animal Welfare Act, Janice Hodgins would hold two Animal Welfare Act licenses in violation of section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)).

It is well settled that an agency's interpretation of its own regulations must be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulations, provided that the interpretation does not violate the Constitution or a federal statute.[2] APHIS' interpretation of its regulations concerning the "persons" eligible for a license is not plainly erroneous or inconsistent with the regulations and does not violate the Constitution or a federal statute and will, therefore, be given controlling weight.

Second, Respondents contend that the Complaint "is not really sufficient to provide a clear indication" that the application for a license was denied based upon section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) (Brief in Support of Respondents' Appeal Petition at 8).

The Order to Show Cause states "[t]he issuance of a license to respondents would violate 9 C.F.R. § 2.1(c)." (Order to Show Cause ¶ II(C).)

The Administrative Procedure Act provides:

§ 554. Adjudications

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[2]*Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

. . . .

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

5 U.S.C. § 554(b).

Sections 1.132 and 1.135 of the Rules of Practice provide:

§ 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

. . . .

Complaint means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.

§ 1.135 Contents of complaint.

The complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought.

7 C.F.R. §§ 1.132, .135.

I agree with the ALJ that paragraph II(C) of the Order to Show Cause could have been more specific with respect to the matters of fact asserted (Tr. 121-25). However, it is well settled that the formalities of court pleading are not applicable in administrative proceedings.[3] Additionally, due process is satisfied when the

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[3]*Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. Int'l Broth. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984);

litigant is reasonably apprised of the issues in controversy. It is only necessary that the Complainant in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled.[4] The Complaint complies with both the Administrative Procedure Act (5 U.S.C. § 554(b)) and the Rules of Practice (7 C.F.R. § 1.135). Further, Respondents' initial filing in this proceeding, Respondents' Response to Order to Show Cause, reveals that Respondents were not in any way misled by paragraph II(C) of the Order to Show Cause and were fully apprised of the issues in controversy.[5]

Consolidated Gas Supply Corp. v. FERC, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

[4]*NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 37 n.9 (Jan. 13, 1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 132 (1996); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1097-98 (1994); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53 (b)(2)); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233-32 (1987); *In re H & J Brokerage*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1434 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

[5]Respondents' response to paragraph II(C) of the Order to Show Cause states:

> The issuance of a license to Respondents would not violate 9 C.F.R. § 2.1(c). Hodgins Kennel, Inc. has a license. L & H Associates is requesting a license. These are not the same "person" within the meaning of the definitions

Therefore, I find that Janice Hodgins is a *person*, as defined by the Regulations (9 C.F.R. § 1.1), who has a license as an owner of and a principal in Hodgins Kennel, Inc., a Class B licensee. The ALJ was correct to affirm Complainant's denial of L & H Associates' application for an Animal Welfare Act license because Janice Hodgins is a partner in L & H Associates and granting a license to L & H Associates would result in Janice Hodgins having two Animal Welfare Act licenses which is prohibited by section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)).[6]

For the foregoing reasons, the following Order should be issued.

Order

The ALJ's Initial Decision and Order, which affirmed Complainant's denial of L & H Associates' license application, is affirmed.

This Order shall become effective 30 days after service of this Order upon Respondents.

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set forth in 9 C.F.R. § 1.1 as follows:

> "Person means any individual, partnership, firm, joint stock company, corporation, association, trust, estate or other legal entity."

> Hodgins Kennel, Inc. is a legal entity. L & H Associates is [a] separate legal entity and, therefore, a separate person within the meaning of the regulations.

Response to Order to Show Cause ¶ II(C).

[6]This Decision and Order upholds the denial of an application for a license for L & H Associates based upon my finding that Janice Hodgins already has a license due to her interest in Hodgins Kennel, Inc., and cannot, in accordance with section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)), hold an additional license at the same time. In accordance with section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)), L & H Associates may not again apply for a license within 1 year from the date of this Decision and Order denying L & H Associates' application for a license. The record does not reveal that Respondent Tammi Longhi has a license or is an owner of and a principal in any entity that has an Animal Welfare Act license. Therefore, granting a license application filed by Respondent Tammi Longhi individually or in association with non-licensed persons is not prohibited by section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)). Moreover, since I find that the applicant in this proceeding is L & H Associates, Respondent Tammi Longhi is not prohibited by section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)) from applying for a license within 1 year from the date of this Decision and Order.

In re: CLIFFORD BOETTCHER.
AWA Docket No. 96-0031.
Decision and Order filed June 24, 1997.

Record keeping requirements - Veterinary care - Structural requirements - Storage of food and bedding - Temperature requirements - Waste removal - Space requirements - Sanitization of food and water receptacles - Cleanliness of primary enclosures - Cleanliness and condition of premises - Program of pest and insect control - Sanction policy - Cease and desist order - Civil penalty - License disqualification.

Administrative Law Judge James W. Hunt found that Respondent wilfully violated the Animal Welfare Act and the regulations and standards issued pursuant thereto by: failing to maintain complete records; failing to maintain programs of disease control and prevention and adequate veterinary care; failing to maintain housing facilities in good repair; failing to store food and bedding in a manner that protects them from spoilage, contamination, and vermin infestation; failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes and bedding; failing to sufficiently heat housing facilities; failing to provide housing facilities with sufficient space for the animals to move in a comfortable manner; failing to sanitize food and water receptacles; failing to keep primary enclosures clean; failing to maintain an effective program for insect and pest control; and failing to keep premises clean and free of weeds and bushes. Judge Hunt imposed a $3,500 civil penalty, a cease and desist order, and disqualified Respondent from being licensed for a period of two years. In determining the penalty, Judge Hunt noted that Complainant failed to show that violations were widespread; or that Respondent had been continuously noncompliant since 1991.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("Act"), by a Complaint filed March 26, 1996, by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), alleging that Respondent wilfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A hearing was held on February 12, 1997, in Sioux Falls, South Dakota. James D. Holt, Office of the General Counsel, USDA, represented Complainant. Respondent represented himself.

Statement of the Case

Respondent, Clifford Boettcher, owned and operated Clifmar Kennels in Clark, South Dakota. He marketed dogs to pet shops and private individuals. The record

does not show that he acquired or sold dogs outside the State of South Dakota. Respondent had been in "the dog business" for about 10 years. In 1993, Respondent applied to have his dealer's license changed from a Class "A" to a Class "B." He was granted the license change following an inspection by Don Borchert, an APHIS Animal Care Inspector. In his report of the inspection, Borchert noted that the kennel was owned and operated at the time by Respondent and his wife, Patricia.

On November 16, 1993, Borchert conducted a routine inspection of the facility. He found that Respondent was failing to comply with APHIS' regulations and its standards for the care of animals as follows: Respondent's records needed to be updated to show the number and identification of animals at the facility (Borchert's report stated that there were 127 animals at the kennel at the time of the inspection); a beagle with insect bites needed to be dipped, a matted dog needed to be groomed, and a puppy with a prolapse needed immediate attention (the report states that the puppy was treated by a veterinarian that same date); nails were exposed in one pen, cage wire was torn in another, and a heat bulb was exposed in a third; some feed and bedding were not placed in containers with lids; accumulated feces and wet bedding had not been removed from enclosures[1]; chewed wood needed to be sealed against moisture and insulation in a puppy enclosure needed to be covered; "all sheltered facilities" were to be kept at 50 degrees and, specifically, puppies had to have heat of at least 50 degrees and that short-haired dogs were not to be kept outdoors; clean, dry bedding was to be provided when temperatures fell below 50 degrees; shelters had to have wind/snow brakes and animals provided with adequate space; chewed water and feed receptacles were to be repaired for purposes of sanitization; ice was to be removed from water receptacles; accumulated hair on cages was to be removed; materials were to be stored neatly to avoid clutter; and rodent signs showed a need for an effective plan of rodent control. (CX-1.) Although Borchert sometimes identified the enclosure by number where he identified the non-compliant items, his reports usually did not give the enclosure number. His reports also often did not indicate whether problems were isolated incidents or widespread. (CX-1, CX-2, CX-3.)

On June 21, 1994, Borchert conducted another routine inspection of Respondent's kennel. He found that Respondent had provided veterinary and other care for the dog with the prolapse and the dogs in need of a dip and grooming. However, Borchert found that in other areas Respondent was not in compliance:

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[1]The record does not indicate the number of enclosures at the facility. Borchert's report, however, does refer to various enclosures by their number with the highest number mentioned being thirty-seven.

broken wire was found in two enclosures, roof holes in another, and exposed nails, a broken door with jagged edges, torn tin, and chewed wood in others; soiled bedding, excessive hair, and cobwebs had not been removed from some enclosures; feed and bedding had not been placed in containers with lids; excessive accumulations of feces had not been removed; wood had not been sealed and rotted wood had not been replaced; the west side of a "small building" lacked adequate shade; enclosures lacked wind/snow brakes; feed receptacles were not protected from the elements and algae was found in receptacles; some food had been poured on the floor rather than in a receptacle; tall weed and grass had not been removed from around enclosures; there was a lack of effective rodent control; some weaned puppies and "several" adult dogs had not been identified; and records on dog identification and sales were incomplete. (CX-2.)

Borchert's next inspection was conducted on August 1, 1994. He again found that many of the non-compliant items he identified at the two previous inspections continued to occur: holes in shelters; rotted wood; torn or sharp edges; protruding nails; cluttered supplies; excessive accumulations of feces; soiled bedding; food receptacles not protected from the elements; chewed receptacles in need of repair or replacement; excessive algae in water receptacles; tall weeds and grass; lack of effective rodent control; and inadequate record keeping. He also found unclean food containers and that a dead dog had not been removed. (CX-3.)

Complainant also presented as an exhibit a form prepared by Borchert in 1994 for purposes of demonstrating that Respondent had been non-compliant since 1991. (CX-6.) It contains what purports to be a brief summary of alleged violations found at Respondent's facility between 1991 and 1994. However, the actual inspection reports prepared at the time of the inspections were not offered into evidence.

Respondent testified that he had tried to comply with APHIS regulations, but "[w]hen you're raising dogs, dogs are destructive. They tear things up so it's one of them deals where you're constantly cleaning, constantly repairing, constantly upgrading. There was a lot of instances where Don [Borchert] would come and I would be in the middle of cleaning or in the middle of building more pens or rebuilding. . ." He said that APHIS "kept increasing the rules on what was acceptable and what was not acceptable and I always tried to stay one jump ahead by going with coated wire, expanded steel, glass board, all this stuff." But that "all these things take time and the dogs have to pay for them as they go because it's not something you just run out and spend $1 million on." He said that at the time of the inspections he was going through a divorce and a bankruptcy proceeding and that he has not been in the commercial dog business since his license expired in 1994. (Tr. 85-94.)

As for his alleged non-compliance, Respondent said that he could not have been in the business without operating a clean facility and keeping his dogs in good shape; that he had veterinarians on call 24 hours a day to provide medical care for the animals; that he treated wood with Thompson's Water Seal so that even chewed wood remained impervious to water; that he provided food to dogs twice a day only in the amount they needed so that there was no feed in the receptacles at other times to be affected by the weather; that his dogs, as required by the regulations, were acclimated to the temperatures; that the problem with the grass was due to unseasonable rains over the last four years; and that photographs taken by APHIS officials show that the enclosures had wind brakes and that conditions at the facility were not "as bad as they sound in writing." (Tr. 84.)

The photographs (14) referred to by Respondent were taken by Larry Neustal, an APHIS investigator, at the August 1994 inspection. (RX-1.) They show three holes in the wire, one with a patch. They purport to show sharp edges, but which are difficult to discern in the photographs. An unremarkable picture of a dog feeding is shown in another picture; another shows a crack in the leg of an enclosure which represents a broken support leg; others show enclosures with a rat or mouse hole, chewed wood, and accumulated feces; and one shows grass around the enclosures (which are elevated away from direct contact with the grass or weeds). A cart containing debris or waste is shown in another photograph. The remaining pictures are of dogs and enclosures. As far as one can tell, the enclosures in these photographs appear relatively clean of feces and the dogs appear groomed and alert.

As for his alleged failure to be in compliance since 1991, Respondent points out that if he had not been in compliance as complainant contends he would not have received a license: "My facilities where this occurred in approximately June of 1990 and every year thereafter went through basically a prelicense inspection in order to renew my license each year which means that it had to pass in order to have a license again the next year." (Tr. 85.)

Statement of the Law

Section 2.75(a)(1) of the Rules and Regulations (9 C.F.R. § 2140) requires that each dealer keep and maintain records or forms which fully and correctly disclose the information concerning each dog, and any offspring, purchased or otherwise acquired, owned, held, or otherwise in the dealer's possession or under his control and information concerning the identity of the person from whom animals are acquired or to whom they are sold.

Section 2.40 (9 C.F.R. § 2.40) requires each dealer to have an attending

veterinarian to provide adequate veterinary care to its animals.

Section 2.100(a) (9 C.F.R. § 2.100(a)) requires that each dealer comply in all respects with the regulations and standards established for the humane handling, care, treatment, housing, and transportation of animals.

Section 3.1(a) (9 C.F.R. § 3.1(a)) requires that:

> Housing facilities for dogs . . . must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

Section 3.1(e) requires that:

> Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. [A]ll food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tight fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. . . .

Section 3.1(f) (9 C.F.R. § 3.1(f)) requires that:

> Housing facility operators must provide for regular and frequent collection removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. . . . Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

Section 3.2(a) (9 C.F.R. § 3.2(a)) requires that:

> Indoor housing facilities for dogs . . . must be sufficiently heated and cooled when necessary to protect the dogs . . . from temperature extremes and to provide for their health and well-being. When dogs . . . are present, the

> ambient temperature in the facility must not fall below 50 F (10 C) for dogs . . . not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperature without stress or discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs . . ., except as approved by the attending veterinarian. Dry bedding, solid resting boards, or other methods of conserving body heat must be provided when the temperatures are below 50 F (10 C). . . .

Section 3.2(d) (9 C.F.R. § 3.2(d)) requires that floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, be impervious to moisture.

Section 3.4(a)(l)(ii) (9 C.F.R. § 3.4(a)(l)(ii)) prohibits, without the express approval of an attending veterinarian, the use of outdoor facilities to keep breeds of dogs that cannot tolerate the prevalent temperatures of the area without stress or discomfort (such as short-haired breeds in cold climates).

Section 3.4(b) (9 C.F.R. § 3.4(b)) requires that:

> Food receptacles must be used for dogs . . ., must be readily accessible to all dogs . . . , and must be located so as to minimize contamination by excreta and pests, and be protected from rain and snow. Feeding pans must either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized. . . .

Section 3.10 (9 C.F.R. § 3.10)) states that, if potable water is not continually available to the dogs, it must be offered to the dogs in water receptacles kept clean and sanitary as often as necessary to ensure their health and well-being, but not less than twice daily for at least one hour each time, unless restricted by the attending veterinarian.

Section 3.11(a) (9 C.F.R. § 3.11(c)) requires that:

> Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required [by the regulations], and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the

animals.

Section 3.11(d) (9 C.F.R. § 3.11(c)) requires the establishment and maintenance of an effective program for the control of insects and pests.

Discussion

In some instances Borchert's findings are not supported by the regulations. For instance, he found that all shelters had to maintain at least a 50 degree temperature. However, section 3.2(a) (9 C.F.R. §3.2(a)) does not require this minimum temperature for all animals, but only for those which are unacclimated, or those breeds unable to tolerate cold weather, or the "sick, aged, young, or infirm. . ." Respondent also challenged Borchert's findings concerning untreated wood, the wind/snow brakes, and feed receptacles being affected by the weather. However, Borchert's other findings are for the most part undisputed and are supported by his credible testimony. I accordingly find that Complainant has shown by a preponderance of the evidence that, as detailed in the Findings of Fact, Respondent violated the following regulations and standards: 9 C.F.R. §§ 2.75(a)(1), 2.40, 2.100(a), 3.1(a), (e),(f), 3.2(a)(1)(ii), (b), 3.6(a)(2)(xi), 3.9(b), 3.10, and 3.11(a), (c)(d).

Sanction

It is the Secretary's policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose." *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991). The Act also provides that "[t]he Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." 7 U.S.C. § 2149(b).

Respondent's violation relating most directly to the Act's purpose of providing animals with humane care and treatment was the puppy in need of immediate veterinary care. Respondent did promptly provide care for this animal. There were, however, other repeated violations relating to providing animals with comfort, disease control, and safety, such as providing clean and dry bedding, removing accumulated feces, and correcting structural defects. Still, while these

violations were repeated, the inspector, Borchert, did not indicate whether they were confined to a few shelters or extended to all 37 enclosures. As an inspector it was incumbent on him to not only cite the items of non-compliance but also to indicate the extent to which they constituted a problem (i.e., number of dogs or number of enclosures affected). This is critical in determining whether these items of non-compliance were isolated or widespread as they relate directly to the gravity of the violations and thus to the penalty to impose.

As for Respondent's alleged past violations in 1991, the evidence presented is tenuous at best, since Complainant's best evidence to support its position would have been either Borchert's testimony on the nature of the violations or at least the reports he prepared at the time. Complainant, however, offered neither and, as Respondent points out, Borchert and APHIS granted him a license despite their contention that he was non-compliant. I infer in these circumstances that the grant of a license indicates that the extent of Respondent's alleged non-compliance in 1991 was not significant.

Considering all the circumstances, I find that a penalty of $3,500 is appropriate and that he is disqualified for two years from becoming licensed.

Findings of Fact

1. Clifford Boettcher is an individual whose address is [redacted] (b) (6) [redacted]

2. Respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

3. When Respondent became licensed and annually thereafter, he received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. On November 16, 1993, and June 21, 1994, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals.

5. On November 16, 1993, Respondent failed to maintain programs of disease control and prevention, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care.

6. On November 16, 1993, June 21, 1994, and August 1, 1994, Respondent's housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury.

7. On November 16, 1993, June 21, 1994, and August 1, 1994, Respondent's supplies of food and bedding were not stored in a manner that protects them from

spoilage, contamination, and vermin infestation.

8. On November 16, 1993, June 21, 1994, and August 1, 1994, Respondent had not made provisions for the regular and frequent collection, removal, and disposal of animal and food wastes and bedding, in a manner that minimizes contamination and disease risks.

9. On November 16, 1993, Respondent's indoor housing facilities for puppies and short-haired dogs were not sufficiently heated to protect the animals from temperature extremes and to provide for their health and well-being.

10. On November 16, 1993, one of Respondent's primary enclosures for dogs was not constructed so that it provided sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

11. On November 16, 1993, June 21, 1994, and August 1, 1994, Respondent's food receptacles for dogs were not kept sanitized.

12. On November 16, 1993, June 21, 1994, and August 1, 1994, Respondent's primary enclosures for dogs were not kept clean.

13. On November 16, 1993, June 21, 1994, and August 1, 1994, Respondent did not have or maintain an effective program for the control of pests so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

14. On June 21, 1994, and August 1, 1994, Respondent did not keep the premises, including buildings and surrounding grounds, clean and free of weeds and bushes.

15. On June 21, 1994, and August 1, 1994, Respondent's watering receptacles for dogs were not kept clean and sanitized.

Conclusion of Law

1. The Secretary has jurisdiction in this matter. *Lloyd A. Good, Jr.*, 49 Agric. Dec. 156, 165 (1990).

2. The Respondent wilfully violated the Act (7 U.S.C. § 2140, 2143) and the regulations (9 C.F.R. §§ 2.75(a)(l), 2.40, 2.100(a), 3.1(a), (e), (f), 3.2(a), (d), 3.4(a)(l)(ii), (b), 3.6(a)(2)xi), 3.9(b), 3.10, 3.11(a), (c), (d)) and standards issued under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of $3,500. Respondent shall send a certified check or money order payable to "Treasurer of the United States," to USDA, APHIS Field Servicing Office, Accounting Section, P.O. Box 3334, Minneapolis, MN 55403, within 30 days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

3. Respondent is disqualified for a period of two years from becoming licensed under the Act and regulations.

This Decision and Order will become final and effective without further proceedings 35 days after the date of service upon Respondent as provided by section 1.142 of the Rules of Practice, 7 C.F.R. § 1.142, unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final August 8, 1997.-Editor]

In re: JAMES J. EVERHART.
AWA Docket No. 96-0051.
Decision and Order and Ruling on Motion to Modify Default Decision filed October 2, 1997.

Default — Failure to file timely answer — Disability not a mitigating factor — Inability to pay not a mitigating factor — License disqualification — Cease and desist order.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Dorothea A. Baker (ALJ) but granted Complainant's motion, joined by Respondent, to modify the ALJ's Order in the Default Decision. The Judicial Officer assessed a civil penalty of $3,000 against Respondent but suspended the assessment of the civil penalty provided that Respondent does not violate the Animal Welfare Act (Act) or the Regulations and Standards issued under the Act for 10 years; permanently disqualified Respondent from obtaining a license under the Act; and directed Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default

§§ 3.1-.142) [hereinafter the Standards]; (3) assessed a civil penalty of $3,000 against Respondent; and (4) disqualified Respondent from becoming licensed under the Animal Welfare Act and the Regulations for a period of one year (Default Decision at 2-3).

On July 28, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] Complainant filed Complainant's Opposition to Respondent's Appeal of the Default Decision and Complainant's Motion to Modify the Order Issued Therein [hereinafter Complainant's Response and Motion to Modify] on August 8, 1997, and on September 25, 1997, the case was referred to the Judicial Officer for decision and ruling on Complainant's motion.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order; except that I have granted the motion to modify the ALJ's Order in the Default Decision. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusion.

Applicable Statutory Provisions and Regulations

7 U.S.C.:

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2132. Definitions

When used in this chapter—

. . . .

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

provisions of the Rules of Practice does not deny Respondent due process. Neither Respondent's inability to pay the civil penalty assessed nor Respondent's disability is a basis for setting aside or modifying the Default Decision.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on May 8, 1996.

The Complaint alleges that: (1) in April or May 1994, James J. Everhart [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare Act and the Regulations without having obtained a license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl. ¶ II(A)); (2) in April or May 1994, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of one nonhuman primate, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) (Compl. ¶ II(B)); and (3) in April or May 1994, Respondent transported, in commerce, one nonhuman primate without it being accompanied by a health certificate executed and issued by a licensed veterinarian, in willful violation of section 2.78(a) of the Regulations (9 C.F.R. § 2.78(a)) (Compl. ¶ II(C)).

Respondent was served with the Complaint on September 5, 1996. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on March 5, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondent violated the Animal Welfare Act and the Regulations as alleged in the Complaint; (2) issued a cease and desist order directing that Respondent cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards issued under the Animal Welfare Act (9 C.F.R.

(b) The term "Secretary" means the Secretary of Agriculture of the United States or his representative who shall be an employee of the United States Department of Agriculture[.]

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

. . . .

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.]

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation[.]

7 U.S.C. §§ 2132(b), (f), 2133, 2134, 2140, 2149(b).

9 C.F.R.:

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year[.]

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale . . . must have a valid license.

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information

concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

§ 2.78 Health certification and identification.

(a) No dealer, exhibitor, operator of an auction sale, broker, or department, agency, or instrumentality of the United States or of any State or local government shall deliver to any intermediate handler or carrier for transportation, in commerce, or shall transport in commerce any dog, cat, or nonhuman primate unless the dog, cat, or nonhuman primate is accompanied by a health certificate executed and issued by a licensed veterinarian. The health certificate shall state that:

(1) The licensed veterinarian inspected the dog, cat, or nonhuman primate on a specified date which shall not be more than 10 days prior to the delivery of the dog, cat, or nonhuman primate for transportation; and

(2) when so inspected, the dog, cat, or nonhuman primate appeared to the licensed veterinarian to be free of any infectious disease or physical abnormality which would endanger the animal(s) or other animals or endanger public health.

9 C.F.R. §§ 1.1, 2.1(a)(1), .75(b)(1), .78(a)

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

Respondent . . . has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted as set forth [in this Decision and Order] by Respondent's failure to file an answer, are adopted and set forth [in this Decision and Order] as Findings of Fact and Conclusions of Law.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact and Conclusions of Law

1. James J. Everhart . . . is an individual whose address is [redacted] (b) (6) [redacted]

2. Respondent, at all times material herein, was operating as a dealer as defined in the [Animal Welfare] Act and the Regulations.

3. Respondent willfully violated section 4 of the [Animal Welfare] Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) by operating as a dealer as defined in the [Animal Welfare] Act and the Regulations without having obtained a license. Respondent negotiated the sale of, transported, and sold, in commerce, one nonhuman primate for use as a pet or for exhibition.

4. In April or May 1994, Respondent transported, in commerce, one nonhuman primate without it being accompanied by a health certificate executed and issued by a licensed veterinarian, in willful violation of section 2.78(a) of the Regulations (9 C.F.R. § 2.78(a)).

5. In April or May 1994, Respondent [failed to maintain complete records showing the acquisition, disposition, and identification of one nonhuman primate,] in willful violation of section [10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1))].

Conclusion

1. The Secretary has jurisdiction in this matter.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

In Respondent's letter dated July 22, 1997, and filed July 28, 1997 [hereinafter Respondent's Appeal Petition], Respondent denies that he violated the Animal Welfare Act and the Regulations as alleged in the Complaint and states that he is not "liable for" the $3,000 civil penalty assessed against him in the Default Decision (Respondent's Appeal Petition). Respondent's denial of the material allegations of the Complaint comes too late.

On September 5, 1996, Respondent was personally served at his residence with a copy of the Complaint and a copy of the Rules of Practice.[2]

Section 1.147(c)(3)(i) of the Rules of Practice provides:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (c) *Service on party other than the Secretary*
>
> . . . .
>
> (3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:
>
> . . . .
>
> (i) Delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]

7 C.F.R. § 1.147(c)(3)(i).

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

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[2]An affidavit of Harry G. Dawson, dated October 11, 1996, filed on October 17, 1996, states:

> I, (*name of affiant*) Harry G. Dawson, being duly sworn on oath make the following statement:
>
> On September 5, 1996, pursuant to [s]ection 1.147(c)(3)(i) of the Uniform Rules of Practice (7 CFR 1.130, etc), I personally served a copy of the Complaint and Rules of Practice in AWA Docket No. 96-51 on James J. Everhart by attaching the copies to Mr. Everhart's front door of his residence located at 401 South Park, Springfield, Illinois 62704.

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

The Complaint served on Respondent on September 5, 1996, states:

The respondent shall file an answer with the Hearing Clerk, United States

> Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Complaint at 2.

The Complaint clearly informs Respondent of the consequences of failure to file a timely answer. Respondent's Answer was due no later than September 25, 1996. Respondent's first filing in this proceeding was filed on May 19, 1997, more than 8 months after the Complaint was served on Respondent and more than 7 months after Respondent's Answer was due. Moreover, Respondent's May 19, 1997, filing does not address the allegations in the Complaint.[3] Further, Respondent made two additional filings in May and June 1997, neither of which address the allegations in the Complaint.[4] Section 1.136(b) of the Rules of Practice provides:

> **§ 1.136 Answer.**
>
> . . . .
>
> (b) *Contents.* The answer shall:
>
> (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

7 C.F.R. § 1.136(b).

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[3]On May 19, 1997, Respondent filed two copies of a Motion to Amend which he had filed in *In re Jimmy J. Everhart*, Case No. 97-70771 (Bankr. C.D. Ill. filed May 14, 1997).

[4]On May 20, 1997, Respondent filed a copy of a Notice of Amendment which had been filed in *In re Jimmy J. Everhart*, Case No. 97-70771 (Bankr. C.D. Ill. filed May 14, 1997), and on June 18, 1997, Respondent filed a copy of a Notice of Objection Date which had been filed in *In re Jimmy J. Everhart*, Case No. 97-70771 (Bankr. C.D. Ill. filed May 29, 1997) and two copies of Discharge of Debtor which had been filed in *In re Jimmy J. Everhart*, Case No. 97-70771 (Bankr. C.D. Ill. filed June 11, 1997).

It is well settled that the formalities of court pleadings are not applicable in administrative proceedings.[5] However, Respondent's May 19, 1997, May 20, 1997, and June 18, 1997, filings address matters extraneous to the Complaint. Respondent's May and June 1997 filings do not: (1) admit, deny, or explain the allegations of the Complaint and set forth any defense relevant to the instant proceeding; (2) admit all the facts alleged in the Complaint; or (3) state that Respondent admits the jurisdictional allegations of the Complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure. Therefore, I do not find that Respondent's May and June 1997 filings constitute an answer as described in section 1.136 of the Rules of Practice (7 C.F.R. § 1.136); thus, Respondent's May and June 1997 filings provide no basis for setting aside the Default Decision.

Respondent's Appeal Petition, filed July 28, 1997, is the first document filed in this proceeding that addresses the allegations in the Complaint. Respondent's Appeal Petition was filed more than 10 months after Respondent's answer was due. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint (7 C.F.R. § 1.136(a), (c)) and a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On December 19, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Proposed Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision] based upon Respondent's failure to file an Answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a).

On January 24, 1997, in accordance with section 1.147(c)(3)(i) of the Rules of Practice (7 C.F.R. § 1.147(c)(3)(i)), Respondent was personally served at his residence with a copy of the Motion for Proposed Default Decision and a copy of the Proposed Default Decision.[6]

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[5]*Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. Int'l Bros. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

[6]An affidavit of Harry G. Dawson, dated January 24, 1997, filed on February 11, 1997, states:

> I, (*name of affiant*) Harry G. Dawson, being duly sworn on oath make the following statement: . . . .

Respondent failed to file objections to Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and on March 5, 1997, the ALJ filed the Default Decision.

Respondent denies the allegations in the Complaint and states that he is not "liable for" the $3,000 civil penalty assessed against him in the Default Decision (Respondent's Appeal Petition). Respondent's denial of the material allegations of the Complaint comes too late. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[7] Respondent has shown no basis for setting aside the Default Decision and allowing

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On Friday, January 24, 1997, at approximately 9:30 am, I went to the residence address of James J. Everhart at [redacted] (b) (6) [redacted] to deliver copies of the Complainant's Motion for Adoption of Proposed Decision and Order together with Proposed Decision and Order Upon Admission of Fact by Reason of Default for personal service. AWA Docket No 96-0051. HGD

No one responded at the James J. Everhart residence.

Therefore, according to my instructions for personal service, I taped the copies to Mr. Everhart's front door. I then took photographs of the taped information, which I had enclosed in an envelop [sic]. Also present in the photographs was the identical Chevrolet Blazer, Illinois license plate E 3737 (which is licensed to James J. Everhart).

The photographs which I took were processed on this date and also submitted to Regulatory Enforcement staff are included with this sworn statement.

I have read this statement, and it is true & correct to the best of my knowledge.

[7]*See generally In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside a default decision because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (setting aside a default decision because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (vacating a default decision and remanding the case to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

Respondent to file an Answer.[8]

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[8]*See generally In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. ___ (Aug. 8, 1997) (holding that the default decision was proper where respondent's answer was over 2 years late); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. ___ (Aug. 1, 1997) (holding the default decision proper where respondents' December 13, 1996, filing, even if found to be an answer, was filed 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. ___ (Aug. 1, 1997) (holding the default decision proper where respondents' December 13, 1996, filing, even if found to be an answer, was filed 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. ___ (Mar. 21, 1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. ___ (Mar. 13, 1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. ___ (Jan. 15, 1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. ___ (Aug. 15, 1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal docketed*, No. 96-7124 (11th Cir. Nov. 8, 1996); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed and finding respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*,

The Rules of Practice, a copy of which was served on Respondent on September 5, 1996, with a copy of the Complaint, clearly provides that an Answer

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46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed and finding respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed and finding it irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed and finding Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed and finding Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper where a timely answer was not filed and finding irrelevant respondent's inability to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

must be filed within 20 days after the service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed May 19, 1997, more than 8 months after Respondent was served with the Complaint and more than 7 months after Respondent's Answer was due. Moreover, Respondent's Appeal Petition, filed July 28, 1997, more than 10 months after Respondent's Answer was due, is Respondent's first and only filing which addresses the allegations in the Complaint and which could be construed to be an Answer to the Complaint.

The requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

The courts have recognized that administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.[9] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent

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[9]*See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940) (stating that administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties); *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977) (stating that administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (holding that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties and that regulatory agencies have discretion to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (stating that administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed); *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953) (stating that administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties), *cert. denied*, 347 U.S. 1016 (1954).

waived his right to a hearing by failing to file a timely Answer (7 C.F.R. §§ 1.139, .141(a)). Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)).

Respondent requests that "the Department of Agriculture . . . waive the three thousand dollars and also suspend, indefinitely, [his Animal Welfare Act license]." (Respondent's Appeal Petition.) In support of this request, Respondent states that:

> To pay the three thousand dollars, that I am not liable for, would cause a great hardship on myself. I am disabled and live on a fixed income, with no assets or available money to pay such a great amount.

Respondent's Appeal Petition.

Respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act. Section 19(b) of the Animal Welfare Act specifically provides the factors to be considered when determining the amount of a civil penalty and ability to pay is not one of the statutory factors to be considered.[10] While the Judicial Officer did give consideration to ability to pay in one case,[11] the Judicial Officer subsequently held that consideration of ability to pay in that case was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future.[12] Therefore, while I

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[10]Section 19(b) of the Animal Welfare Act provides with respect to the assessment of a civil penalty that:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(b).

[11]*In re Gus White III*, 49 Agric. Dec. 123, 152 (1990).

[12]*See In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating that ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating that ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating that the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2));

sympathize with Respondent's current financial circumstances, Respondent's financial condition forms no basis for setting aside or modifying the Default Decision.

Moreover, Respondent's disability is not a mitigating factor and forms no basis for setting aside or modifying the Default Decision.[13]

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). There is no basis for allowing Respondent to present matters by way of defense at this time.

On August 8, 1997, Complainant filed Complainant's Response and Motion to Modify in which Complainant requests the modification of the Order in the Default Decision and states that Respondent joins in the motion to modify the Order in the Default Decision as follows:

> Complainant also requests that the order contained in the default decision issued March 5, 1997, be modified as proposed herein. The Respondent has been contacted by Complainant's attorney and does not object to the Complainant's proposed order. The Respondent has stated that he joins the Complainant's motion to modify the order issued on March 5, 1997.
>
> . . . .
>
> Complainant requests that the Judicial Officer's Order issued in this matter on March 5, 1997, be modified as follows:

In re Jerome A. Johnson, 51 Agric. Dec. 209, 216 (1992) (stating that the holding in *In re Gus White III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

[13]*Cf. In re Dora Hampton*, 56 Agric. Dec. ___, slip op. at 22 (Jan. 15, 1997) (stating that age cannot be considered either as a defense to respondent's violations of the Animal Welfare Act, the Regulations, and the Standards, or as a mitigating factor); *In re Volpe Vito Inc.*, 56 Agric. Dec. ___, slip op. 112-13 (Jan. 13, 1997) (stating that failing health is not a defense to violations of the Animal Welfare Act, the Regulations, and the Standards, and is not considered as a mitigating factor).

Order

1. Respondent is assessed a civil penalty of $3,000, which is hereby suspended provided that the respondent does not violate the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act for a period of ten years from the effective date of this order.

2. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act.

3. Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act and Regulations issued under the Animal Welfare Act.

Complainant's Response and Motion to Modify at 1, 4 (footnote omitted).

Complainant's Response and Motion to Modify was served on Respondent by certified mail on August 29, 1997, and Respondent did not file a response. Complainant's motion to modify the Order in the Default Decision issued in this proceeding on March 5, 1997, which I find that Respondent has joined, is granted.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent is assessed a civil penalty of $3,000, which is hereby suspended, provided that Respondent does not violate the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act, for a period of 10 years from the effective date of this Order. Respondent shall not be required to pay the $3,000 civil penalty if Respondent does not violate the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act within 10 years from the effective date of this Order.

2. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal

Welfare Act, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act.

3. Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act.

4. This Order shall become effective upon service of this Order on Respondent.

In re: SAMUEL ZIMMERMAN.
AWA Docket No. 96-0021.
Decision and Order filed November 6, 1997.

Cease and desist order — Civil penalty — License suspension — Dogs — Recordkeeping violations — Veterinary care — Primary enclosures — Food storage — Refusal to allow inspection — Jurisdiction — Commerce — Preponderance of the evidence — Willful — Sanction policy.

Robert A. Ertman, for Complainant.
Eugene R. Campbell, York, PA, for Respondents.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 22, 1996.

The Complaint alleges that: (1) on October 5, 1994, November 15, 1994, and January 31, 1995, Samuel Zimmerman [hereinafter Respondent] failed to maintain complete records showing the acquisition, disposition, and identification of animals in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) (Compl. ¶¶ II(A), III(A), V(A)); (2) on October 5, 1994, Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, and on October 5,

1994, November 15, 1994, and January 31, 1995, Respondent failed to provide veterinary care to animals in need of care in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40) (Compl. ¶¶ II(B), III(B), V(B)); (3) on October 5, 1994, Respondent failed to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) (Compl. ¶ II(C)(1)); (4) on October 5, 1994, Respondent failed to provide primary enclosures for dogs that were structurally sound and maintain primary enclosures for dogs in good repair so as to protect the animals from injury and have no sharp points or edges that could injure the animals in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) and (a)(2)(i)-(ii) of the Standards (9 C.F.R. § 3.6(a)(1), (a)(2)(i)-(ii)) (Compl. ¶ II(C)(2)); (5) on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to remove excreta from primary enclosures daily in order to prevent soiling of the animals and to reduce disease hazards, insects, pests, and odors in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) (Compl. ¶¶ II(C)(3), III(D)(1), V(D)(1)); (6) on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to keep premises where the housing facilities were located clean and in good repair to protect the animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) (Compl. ¶¶ II(C)(4), III(D)(2), V(D)(2)); (7) on November 15, 1994, and January 31, 1995, Respondent failed to individually identify dogs in willful violation of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) (Compl. ¶¶ III(C), V(C)); (8) on November 15, 1994, and January 31, 1995, Respondent failed to provide primary enclosures for dogs that were structurally sound and maintain primary enclosures for dogs in good repair so as to protect the animals from injury in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) (Compl. ¶¶ III(D)(3), V(D)(3)); (9) on November 15, 1994, Respondent failed to make provisions for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes in a manner that minimizes contamination and disease risks in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) (Compl. ¶ III(D)(4)); and (10) on January 23, 1995, Respondent denied the Animal and Plant Health Inspection

Service entry to inspect his facility in willful violation of section 11 of the Animal Welfare Act (7 U.S.C. § 2141)* and section 2.126 of the Regulations (9 C.F.R. § 2.126) (Compl. IV(A)).

On April 10, 1996, Respondent filed an Answer denying the material allegations in the Complaint. Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing in Lancaster, Pennsylvania, on January 29, 1997. Denise Y. Hansberry, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant.** Respondent appeared pro se.***

On March 14, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Brief in Support Thereof [hereinafter Complainant's Brief]. On April 3, 1997, Respondent filed a letter addressing testimony given at the hearing and transcribed on pages 14, 22, 35, 43, and 67 of the transcript. On May 29, 1997, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondent violated the Regulations and Standards (Initial Decision and Order at 11); (2) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards (Initial Decision and Order at 11); and (3) assessed Respondent a civil penalty of $500 (Initial Decision and Order at 12).

On June 30, 1997, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557

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*Section 11 of the Animal Welfare Act (7 U.S.C. § 2141) requires the marking and identification of certain animals. Based on the facts alleged in paragraph IV(A) of the Complaint and the provision of the Regulations cited in paragraph IV(A) of the Complaint, it appears that Complainant cited the incorrect section of the Animal Welfare Act in paragraph IV(A) of the Complaint.

**On March 18, 1997, Frank Martin, Jr., Esq., entered an appearance on behalf of Complainant, replacing Denise Y. Hansberry, Esq. (Notice of Appearance filed Mar. 18, 1997). On June 18, 1997, Robert A. Ertman, Esq., entered an appearance on behalf of Complainant, replacing Frank Martin, Jr. (Notice of Appearance filed June 18, 1997).

***On July 21, 1997, Eugene R. Campbell, Esq., entered an appearance on behalf of Respondent (July 17, 1997, Letter from Eugene R. Campbell, Esq., to USDA - Hearing Clerk).

(7 C.F.R. § 2.35).**** On July 21, 1997, Respondent filed Response to Appeal Petition; on August 18, 1997, Complainant filed Complainant's Memorandum in Support of Appeal Petition; on September 9, 1997, Respondent filed Respondent's Memorandum in Opposition to Appeal Petition; and on September 10, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's conclusions that: (1) on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals in violation of section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) as alleged in paragraphs II(A), III(A), and V(A) of the Complaint; (2) on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to keep primary enclosures in good repair in violation of section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) as alleged in paragraphs II(C)(2), III(D)(3), and V(D)(3) of the Complaint; (3) on October 5, 1994, and November 15, 1994, Respondent failed to remove excreta from primary enclosures on a daily basis in violation of section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) as alleged in paragraphs II(C)(3) and III(D)(1) of the Complaint; (4) on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to provide adequate veterinary care for animals in need of such care in violation of section 2.40 of the Regulations (9 C.F.R. § 2.40) as alleged in paragraphs II(B), III(B), and V(B) of the Complaint; (5) on October 5, 1994, Respondent failed to store food in a manner to allow proper cleaning and to prevent infestation in violation of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) as alleged in paragraph II(C)(1) of the Complaint; (6) on November 15, 1994, Respondent failed to provide for the adequate drainage of water in violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) as alleged in paragraph III(D)(4) of the Complaint; (7) on January 23, 1995, Respondent failed to allow Animal and Plant Health Inspection Service officials to inspect his facility in violation of section 2.126 of the Regulations (9 C.F.R. § 2.126) as alleged in paragraph IV(A) of the Complaint; and (8) on January 31, 1995, Respondent failed to keep premises where housing facilities were located clean and in good repair to protect animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin in violation of section 3.11(c) of the

****The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Standards (9 C.F.R. § 3.11(c)) as alleged in paragraph V(D)(2) of the Complaint.

I disagree with the ALJ's finding that on November 15, 1994, Respondent failed to store food in a manner to allow proper cleaning and to prevent infestation because these facts were not alleged in the Complaint, and the evidence does not support a finding that on November 15, 1994, Respondent failed to store food in a manner to allow proper cleaning and to prevent infestation. Moreover, I disagree with the sanction imposed by the ALJ against Respondent.

Since I agree with most of the ALJ's findings of fact and conclusions of law and much, but not all, of the ALJ's discussion, I have adopted the ALJ's Initial Decision and Order as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law.

Complainant's exhibits are designated by the letters "CX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2132. Definitions

When used in this chapter—

. . . .

(c) The term "commerce" means trade, traffic, transportation, or other commerce—

(1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of

Columbia;

(2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

. . . .

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2141. Marking and identification of animals

All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe: *Provided*, That only live dogs and cats need be so marked or identified by

a research facility.

. . . .

§ 2146. Administration and enforcement by the Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

. . . .

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey

cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2132(c), (f), 2140, 2141, 2146(a), 2149(a)-(b).

9 C.F.R.:

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Commerce means trade, traffic, transportation, or other commerce:

(1) Between a place in a State and any place outside of such State, including any foreign country, or between points within the same State but through any place outside thereof, or within any territory, possession, or the

District of Columbia; or

(2) Which affects the commerce described in this part.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending

veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

SUBPART E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

(a) A class "A" dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

(2) Live puppies or kittens, less than 16 weeks of age, shall be

identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

. . . .

(d) Unweaned puppies or kittens need not be individually

identified as required by paragraphs (a) and (b) of this section while they are maintained as a litter with their dam in the same primary enclosure, provided the dam has been individually identified.

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer. . . . The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial

carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations, and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and the animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located

far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

. . . .

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

(2) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the dogs and cats; [and]

(ii) Protect the dogs and cats from injury[.]

. . . .

§ 3.11 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed,

wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with wire or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards[,] pests, insects and odors.

. . . .

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pest and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

9 C.F.R. §§ 1.1; 2.40(a), (b), .50(a), (b)(1)-(3), .75(a)(1), .100(a), .126; 3.1(e), (f), .6(a)(1), (a)(2)(i)-(ii), .11(a), (c). (Footnotes omitted.)

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Statement of the Case

. . . .

Respondent . . . is licensed by the Animal and Plant Health Inspection Service [hereinafter APHIS], United States Department of Agriculture, as an animal dealer under the Animal Welfare Act [(CX 7, 7A; Tr. 13)]. His facility is located in Ephrata, Pennsylvania [(CX 3-7A; Tr. 13)]. . . . Respondent, who is also a farmer, has been licensed as a dealer since about 1991 [(Tr. 13, 98)]. The number of animals under his care ranges from about 95 to 143 [(Tr. 15)]. He grosses from $15,000 to $2[5],000 a year from the sale of the animals [(CX 7, 7A)]. The record does not show where the animals are sold. Robert G. Markmann, an APHIS animal care inspector, has inspected Respondent's facility since 1991 [(Tr. 9, 13)].

On October 5, 1994, Mr. Markmann conducted a routine inspection of Respondent's facility to determine his compliance with [the] Regulations and . . . Standards . . . [(CX 3; Tr. 15-16)]. In his report [Mr. Markmann] stated that Respondent had corrected the noncompliant [conditions] that Mr. Markmann had identified at his last inspection of [Respondent's] facility on January 25, 1994 [(CX 3 at 2)]. At the October [5, 1994,] inspection, Mr. Markmann identified the following [conditions] as not complying with [the] Standards relating to housekeeping, food storage, enclosures, record keeping, cleaning, and veterinary care: Food was not stored away from the wall so as to allow for cleaning and some food was spilled on the floor [(CX 3 at 2; Tr. 19)]; one dog enclosure had a 4½-inch by 4½-inch hole on its floor and a hole of an unspecified dimension on the top, but the report did not indicate whether there were any sharp points that would constitute a danger to the animals [(CX 3 at 2; Tr. 19-20)]; excreta were not being cleaned on a daily basis from the cages [(CX 3 at 2; Tr. 20)]; "supplies, boxes, etc." were stored on top of . . . enclosure[s (CX 3 at 3; Tr. 21-22)]; puppies that were still with their mother, but which "should have been weaned a long time ago," [(Tr. 61)] were not identified [(CX 3 at 3; Tr. 22)]; the records for "some" of the adult dogs were not [complete] . . . [(CX 3 at 3; Tr. 22-23)]; and appropriate medical treatment was not being provided to a Cairn Terrier which had a "greenish discharge in both eyes" [(CX 3 at 3; Tr. 23-24)].

Mr. Markmann conducted a follow-up inspection on November 15, 1994. He found that the holes in the cage had not been repaired [(CX 4 at 2; Tr. 28-29)]; that the cages still contained an excessive accumulation of excreta and that they needed to be sanitized at least once every two weeks [(CX 4 at 2; Tr. 29-30)]; that supplies and materials had not been removed from the tops of enclosures [(CX 4 at 3; Tr. 30)]; that some of the dogs were not properly identified [(CX 4 at 3; Tr. 30-31)] and that records were not adequately maintained [(CX 4 at 3; Tr. 30-31)]; that the Cairn Terrier with the eye discharge had not received veterinary care and that another dog with matted hair needed to be groomed [(CX 4 at 3; Tr. 32-33)]. He also found that water . . . was [not adequately drained from] in front of the enclosures [(CX 4 at 2; Tr. 28)].

Mr. Markmann asked his supervisor, Mary Geib, a doctor of veterinary medicine, to accompany him on his reinspection on December 20, 1994 [(Tr. 33-34)]. However, they did not conduct the inspection because Respondent was not home [(Tr. 34)]. They then proceeded about 9:30 a.m. to a facility operated by Respondent's brother, Ervin, to conduct an inspection [(Tr. 70, 76)]. Ervin, however, was leaving as they arrived [(Tr. 70, 76-77)]. Mr. Markmann and Dr. Geib told Ervin that they would return later, but did not return that day [(Tr. 77)].

On January 23, 1995, Mr. Markmann and Dr. Geib returned to Respondent's facility at about 9:15 a.m. to conduct an inspection [(Tr. 36)]. They arrived just as Respondent was preparing to leave in his buggy to help work on his father-in-law's house. Mr. Markmann and Dr. Geib asked Respondent to delay his departure until after they conducted their inspection. Respondent declined. He said he had made a commitment to help his father-in-law that day and that "suddenly you were asking me to drop all my commitments. This wouldn't be a problem if I hadn't known that inspections take up to a half a day." (Tr. [99-]100.) Respondent told them to make an appointment. They replied that they had the right to make unannounced inspections and suggested that Respondent's wife accompany them on their inspection. Respondent told them that she could not accompany them because she had to care for her small children. Respondent also made some comment about seeing them "in court." Mr. Markmann and Dr. Geib then [completed an inspection report which cites] Respondent for refusing [to allow APHIS officials to conduct] an inspection [(CX 5; Tr. 34-39, 91, 126)].

After reflecting on the matter, Respondent "realized I am not one to go to court. I wanted to work with my inspector." (Tr. 100.) Respondent then called Mr. Markmann the next day and, when he was unable to reach Mr. Markmann, left a message on his answering machine, giving the dates he would be available for an inspection [(CX 6 at 2; Tr. 39, 41)]. Mr. Markmann and Dr. Geib conducted an inspection a week later on January 31[, 1995 (Tr. 39)]. They found that many of the noncompliant [conditions] identified at the previous inspections had been corrected, including the problem with the daily cleaning of excreta, and that Respondent's housekeeping had improved [(CX 6 at 2)]. They also found that a holding pen door would not stay closed [(CX 6 at 2; Tr. 42)]; that a shelter box had protruding nails, a condition which Respondent corrected during the inspection [(CX 6 at 2; Tr. 42)]; that supplies were still being stored above the pens [(CX 6 at 2-3; Tr. 43)]; that some piles of empty feed bags were in the animal area [(CX 6 at 2; Tr. 43)]; that two litters of large puppies were still being housed with their mother without being identified . . . [(CX 6 at 3; Tr. 43-44)]; that some records were not complete and that the records did not accurately reflect the number of dogs at the facility [(CX 6 at 3; Tr. 44)]; that there were no medical records on the Cairn Terrier, which had been euthanized [(CX 6 at 3; Tr. 44)]; that one [Yorkie female] had untrimmed toe nails [(CX 6 at 3; Tr. 45)]; and that medicine bottles were dusty, with one bottle not being stored at the required temperature [(CX 6 at 3; Tr. 45)].

Mr. Markmann testified that, of the noncompliant [conditions] he found during this 4-month inspection period (October 1994 through January 1995), two of the

[conditions], failure to provide adequate veterinary care and excreta build-up, constitute "serious" violations: that is, [conditions] that directly affected the health and [well-being] of the animals [(Tr. 21, 23-24, 29-30, 32-33, 82-85)]. He said the other identified noncompliant [conditions], while not serious, were nevertheless "significant" in that they constitute violations of the Regulations and Standards [(Tr. 19, 21-23, 28-29, 42-43, 82-85)].

Discussion

I. Jurisdiction

Complainant states in Complainant's Brief that Respondent admitted in his Answer and at the hearing that [the Secretary] has jurisdiction in this proceeding [(Complainant's Brief at 12)]. . . . [T]he record contains no such admission. [However,] the Animal Welfare Act provides that "animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof . . ." (7 U.S.C. § 2131)[, and the record clearly establishes that Respondent has animals and engages in activities that are regulated under the Animal Welfare Act]. . . .

. . . [Footnote 1 omitted.] Accordingly, I find that . . . the Secretary has jurisdiction over Respondent's facility.

II. Noncompliance

Mr. Markmann testified that [on October 5, 1994,] Respondent's food storage did not comply with section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)). The storage did not, as required, allow for adequate cleaning and the spilled food could attract pests. I find that [Respondent's manner of storing food on October 5, 1994,] constitutes a violation [of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e))].

Mr. Markmann's finding that [on October 5, 1994, and November 15, 1994,] Respondent did not clean excreta from the enclosures on a daily basis as required by the [section 3.11(a) of the] Standards (9 C.F.R. § 3.11(a)) is likewise affirmed. . . . [However, there is no basis for finding that on January 31, 1995, Respondent did not remove excreta from primary enclosures daily as alleged in paragraph V(D)(1) of the Complaint. Therefore, paragraph V(D)(1) of the Complaint is dismissed.]

The holes in the cage [found during the October 5, 1994, and November 15, 1994, inspections of Respondent's premises] did not comply with the requirement

that enclosures be kept in good repair (9 C.F.R. § 3.6(a)(1)). The [two shelter boxes found during the January 31, 1995, inspection to have] protruding nails [did not comply with] section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) and constitute a violation of the Standards] even though promptly corrected by Respondent. *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047 (1992)[, *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2))].

The failures to provide adequate veterinary care for the Cairn Terrier[, which was found during the October 5, 1994, and November 15, 1994, inspections] with the eye discharge, are violations of 9 C.F.R. § 2.40. [Further, Respondent's failure to groom the black scottie, which was found during the November 15, 1994, inspection, and Respondent's failure to trim the nails of a Yorkie female, which was found during the January 31, 1995, inspection, constitute failures to provide adequate veterinary care in violation of 9 C.F.R. § 2.40.]

The [evidence also establishes that on November 15, 1994, Respondent failed to provided an adequate drainage system in violation of section 3.1(f) of the Standards] (9 C.F.R. § 3.1(f)), [and] water leak[ing from automatic waterers was not rapidly removed from housing facilities].

Mr. Markmann found [on November 15, 1994, and January 31, 1995,] that the failure to identify puppies did not comply with the requirement that animals be separately identified ([7 U.S.C. § 2141;] 9 C.F.R. § 2.50(a)(1)). However, section 2.50(d) [of the Regulations (9 C.F.R. § 2.50(d))] provides that unweaned puppies do not have to be individually identified "while they are maintained as a litter with their dam in the same primary enclosure. . . ." Mr. Markmann conceded that . . . the puppies were maintained with their mother, but argued that they were big enough to have been weaned and "should have been weaned a long time ago." (Tr. 61.) I find that Complainant has failed to show that these puppies, regardless of their size, were in fact weaned. The puppies therefore did not have to be individually identified[, and paragraphs III(C) and V(C) of the Complaint are dismissed].

As for Respondent's failure to maintain complete records . . ., Mr. Markmann testified that the APHIS form that he found that Respondent did not maintain . . . [was not required to be used] until [at least] April 1995, . . . after the period of inspections involved in this proceeding (Tr. 122-23). . . . Nevertheless, as Mr. Markmann contended, [section 2.75(a)(1) of the] Regulations [(9 C.F.R. § 2.75(a)(1))] did contain record keeping requirements at the time of Mr. Markmann's inspections, and Respondent was required to comply with them even though [there was no requirement at the time of the inspections material to this

proceeding that Respondent keep information on a particular APHIS form]. Respondent's failure[s, on October 5, 1994, November 15, 1994, and January 31, 1995,] to maintain complete records [are] violation[s] of [section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations] (9 C.F.R. § 2.75(a)(1)).

[On October 5, 1994, and November 15, 1994,] Mr. Markmann found that supplies [and materials] stored on top of . . . enclosure[s to be in] violation of [section 3.11(c) of the Standards] (9 C.F.R. § 3.11(c)). This Standard, however, prohibits [accumulations] on the premises only of "trash, junk, waste products, and discarded matter." As the stored [supplies and] material w[ere] not shown to constitute any of these prohibited matters, Respondent was not in violation of section 3.11(c) [of the Standards (9 C.F.R. § 3.11(c)) on October 5, 1994, and November 15, 1994, and paragraphs II(C)(4) and III(D)(2) of the Complaint are dismissed. However, Mr. Markmann found that Respondent did leave, *inter alia*, empty feed bags in animal areas on January 31, 1995, and I find that Respondent's housekeeping did not comply with section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) on January 31, 1995.]

Mr. Markmann cited Respondent for refusing an inspection on January 23, 1995. . . . [Section 2.126 of the Regulations (9 C.F.R. § 2.126)] provides that dealers shall, during business hours, allow APHIS officials to conduct inspections, and provides for no exceptions. Thus, a refusal for any reason to allow an APHIS official to conduct an inspection constitutes a violation. Although some agencies cannot conduct unannounced, warrantless searches, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), [section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) specifically provides that the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to 7 U.S.C. § 2140 of any dealer subject to 7 U.S.C. § 2142, and] it is the Secretary's position that [unannounced, warrantless] searches are permitted under the Animal Welfare Act. *In re Craig Lesser*, 52 Agric. Dec. 155, 168 (1993)[, *aff'd*, 34 F.3d 1301 (7th Cir. 1994)].

. . . Respondent's [January 23, 1995,] refusal to allow an inspection was a violation of the requirement that he permit . . . unannounced inspection[s] of his facility at any time during business hours that an [APHIS] inspector selects.

III. Sanction

It is the Secretary's policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the

regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose." *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991)[, *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3)].

[Four] of Respondent's violations, [the October 5, 1994, and November 15, 1994, failures to provide adequate veterinary care] and failure[s] to [remove excreta from primary] enclosures every day . . . directly [affected the health and well-being] of animals, which is [one of] the principal remedial purpose[s] of the Animal Welfare Act. The remaining violations, while significant, were not considered serious. As for the dog[s] in need of veterinary care, [they] constituted [approximately] one percent of the animals at Respondent's facility, and the inspector's January 31, 1995, report indicates that the excreta cleaning problem had been corrected. Respondent's refusal to allow an inspection was also a serious matter even though occurring only on one occasion. However, Respondent apparently acted in the heat of the moment because of a previous commitment and not in defiance of the law since, on reflection, he promptly called the [APHIS] inspector to arrange for an inspection. . . .

Considering all the circumstances, I find appropriate [the issuance of an order: (1) directing Respondent to cease and desist from violation of the Animal Welfare Act and the Regulations and Standards; (2) suspending Respondent's license under the Animal Welfare Act for 40 days; and (3) assessing Respondent a civil] penalty of $[7,]500.

Findings of Fact

1. Respondent, Samuel Zimmerman, is an individual whose address is [redacted] (b) (6) [redacted] [(CX 3-7A)].

2. Respondent was licensed and operating as a dealer as defined in the Animal Welfare Act and the Regulations at all times material [to this proceeding (CX 7, 7A; Tr. 13)].

3. On October 5[, 1994,] November 15, 1994, and January 31, 1995, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals [(CX 3 at 3, CX 4 at 3, CX 6 at 3; Tr. 22-23, 31-32, 44)].

[4. On October 5, 1994, November 15, 1994, and January 31, 1995, Respondent] failed to keep primary enclosures in good repair [(CX 3 at 2, CX 4 at

2, CX 6 at 2; Tr. 19-20, 28-29, 42)].

[5]. On October 5[, 1994,] and November 15, 1994, Respondent failed to remove excreta from primary enclosures on a daily basis [(CX 3 at 2, CX 4 at 2; Tr. 20, 29-30)].

[6. On October 5, 1994, November 15, 1994, and January 31, 1995, Respondent] failed to provide adequate veterinary care for . . . animal[s] in need of such care [(CX 3 at 3, CX 4 at 3, CX 6 at 3; Tr. 23-24, 32-33, 45)].

[7. On October 5, 1994, Respondent] failed to store food in a manner to allow proper cleaning and to prevent infestation [(CX 3 at 2; Tr. 19)].

[8.] On November 15, 1994, Respondent failed to provide for the adequate drainage of water from a housing facility [(CX 4 at 2; Tr. 28)].

[9]. On January 23, 1995, Respondent failed to allow APHIS officials to inspect his facility [(CX 5; Tr. 34-39)].

[10. On January 31, 1995, Respondent failed to keep premises where housing facilities were located clean and in good repair to protect animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin (CX 6 at 2; Tr. 43).]

. . . .

Conclusions of Law

[1. On October 5, 1994, Respondent willfully violated:

a. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

b. section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to an animal in need of care;

c. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) by failing to store supplies of food in a manner so as to protect them from spoilage, contamination, and vermin infestation;

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) by failing to ensure that primary enclosures for dogs were structurally sound and maintained in good repair; and

e. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) by failing to remove excreta

from primary enclosures on a daily basis in order to prevent soiling of dogs and to reduce disease hazards, insects, pests, and odors.

2. On November 15, 1994, Respondent willfully violated:

a. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

b. section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care;

c. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) by failing to remove excreta from primary enclosures on a daily basis in order to prevent soiling of dogs and to reduce disease hazards, insects, pests, and odors;

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) by failing to ensure that primary enclosures for dogs were structurally sound and maintained in good repair; and

e. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) by failing to provide for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes in a manner that minimizes contamination and disease risks.

3. On January 23, 1995, Respondent willfully violated section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126 of the Regulations (9 C.F.R. § 2.126) by refusing to allow Animal and Plant Health Inspection Service officials to inspect his premises during business hours.

4. On January 31, 1995, Respondent willfully violated:

a. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

b. section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to an animal in need of care;

c. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) by failing to keep premises where housing facilities were located clean and in good repair to protect animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin; and

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and

section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) by failing to ensure that primary enclosures for dogs were structurally sound and maintained in good repair.]

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises five issues in Complainant's Appeal Petition.
First, Complainant contends that:

> Although the Administrative Law Judge correctly found that the Secretary has jurisdiction (p. 6), he also found that the "respondent is engaged in purely intrastate activities." This finding and the related discussion (p. 5) are in error and are likely to cause confusion.

Complainant's Appeal Petition at 1.
Section 1(b) of the Animal Welfare Act provides:

> **§ 2131. Congressional statement of policy**
>
> The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—
>
> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
> (2) to assure the humane treatment of animals during transportation in commerce; and
> (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.
>
> The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and

> treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

7 U.S.C. § 2131.

Congress has declared that the entire class of activities described in the Animal Welfare Act is in interstate or foreign commerce, substantially affects interstate or foreign commerce, or substantially affects the free flow of interstate or foreign commerce. Respondent's activities as a dealer fall within the activities described in the Animal Welfare Act, and Respondent repeatedly made application for and was granted an Animal Welfare Act license (CX 7, 7A). Further, Respondent concedes that the ALJ "appropriately . . . found that the Secretary has jurisdiction by virtue of the Animal Welfare Act." (Respondent's Memorandum in Opposition to Appeal Petition at 1.)

The ALJ's determination that "[R]espondent is engaged in purely intrastate activities" (Initial Decision and Order at 5) is irrelevant because the ALJ also found that Respondent's activities substantially affect commerce and that the Secretary has jurisdiction over Respondent's facility (Initial Decision and Order at 5-6). I have, therefore, modified the Initial Decision and Order to eliminate confusion that Complainant contends is likely to be caused by the ALJ's discussion of the nature of Respondent's activities as they relate to commerce and intrastate activities.

Complainant also states that the ALJ's "erroneous view that jurisdiction was 'marginal' may have let [sic] to an erroneous view of the sanctions appropriate in this case." (Complainant's Memorandum in Support of Appeal Petition at 2.) I find nothing in the Initial Decision and Order or in any other part of the record to indicate that the sanction imposed by the ALJ was in any way related to the ALJ's discussion regarding jurisdiction.

Second, Complainant contends that:

> Although the ALJ correctly found that the respondent failed to keep required records (p. 7), he also found that they may not have been previously enforced. This is in error and likely to cause confusion.

Complainant's Appeal Petition at 1.

Further, Complainant states that "[C]omplainant regrets having contributed to the confusion on this issue. An [APHIS] investigator[, Mr. Markmann,] erred when he testified that the use of a certain APHIS recordkeeping form became mandatory in April 1995 and that 'we didn't actually start enforcing that law until

October 1st '95. . . .' (TR 122)." (Complainant's Memorandum in Support of Appeal Petition at 3.)

While Mr. Markmann's testimony on the issue of recordkeeping requirements is not the mirror of clarity, I find that Mr. Markmann's testimony supports a finding that the recordkeeping requirements in section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) were in effect and enforced at all times material to this proceeding as follows:

[BY MS. HANSBERRY:]

Q. Okay, there was also testimony about the recordkeeping requirements with Form 7005.

Are you familiar with that form?

[BY MR. MARKMANN:]

A. Yes.

Q. What is that?

A. 7005 is a record of dogs and cats on hand. That became mandatory, that particular form became mandatory with a rule change that went into effect in April of '95. We actually didn't start enforcing that law until October 1st of '95.

Q. Okay.

A. Prior to that period you had to still -- you were still required to keep that information. You didn't have to use the USDA form. The record requirement, the 2.75 record requirement has been there for years.

Q. Okay.

A. I have been inspecting for 11 years. It's always been there.

Q. So under 2.75, licensees have always been required to keep the same kinds of information?

A. They have been required to keep the name and address of who they get the animal from. It's listed in 2.75.

Q. It's all in the reg?

A. Yes.

Q. Okay.

A. The only part of that regulation, if you have a copy of the regulations in front of you, the only part that has changed in the last year or so is where it says 2.75, It's (a)(2).

In the current regulations once they change the book, they will rewrite that. But under (a)(2), it says, "Records of dogs on hand," the book still mentions the old form, "the BS Form 18-5 and record of disposition of dogs and cats, BS Form 18-6," those records are now called 7005 and 7006, "are forms which may be used by dealers and exhibiters [sic] to maintain this information required by the paragraphs of this section.

The way the law reads now is they must keep those forms.

Q. That USDA Form 7005 and 7006?

A. Yes.

Q. But it does not require any information which is different than that which was formerly required?

A. Exactly.

Tr. 122-24.

I agree with the ALJ's conclusion that on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals in violation of section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) as alleged in paragraphs II(A), III(A), and V(A) of the Complaint. Based on Mr. Markmann's testimony, I have modified the Initial Decision and Order to eliminate confusion that Complainant

contends is likely to be caused by the ALJ's reference to the date on which the "law" was enforced.

Third, Complainant contends that:

> Although the ALJ correctly found that the respondent refused to allow an inspection (pp. 8-9), the discussion contains the erroneous statement that "it is within an inspector's discretion not to cite a party for a refusal to allow an inspection" (p. 8), which is likely to cause confusion.

Complainant's Appeal Petition at 1.

I infer that the ALJ was prompted to state that APHIS inspectors have discretion not to cite a party for a refusal to allow an APHIS official to inspect facilities based upon the ALJ's perception that Mr. Markmann did not cite another dealer, Respondent's brother, Ervin, for conduct that the ALJ believes was similar to Respondent's January 23, 1995, refusal to allow inspection. However, the record establishes that Mr. Markmann did not cite Respondent's brother for refusing to allow inspection, because Mr. Markmann did not find that Respondent's brother refused to allow APHIS officials to inspect, as follows:

> [BY MR. ZIMMERMAN:]
>
> Q. Did you do this -- didn't -- did you go to, Ervin, my brother's place, after you left my place?
>
> [BY MR. MARKMANN:]
>
> A. Which date?
>
> Q. I ain't quite sure which day no more. Same day, same day that you were at my place when I wasn't home.
>
> A. I'm not sure what date you are referring to.
>
> Q. I wasn't home. Then you went from my place to Ervin's place; isn't this correct?
>
> A. I think you might be referring to a December 20, 1994, inspection that you were home. We went there in the morning. You were

not home. We went back in the afternoon and you were not home. And we filled out that type a [sic] report at that time.

Q. Did you fill out an attended [sic] report at my brother's place?

A. He was home, and he was leaving, I believe, when we got there, shortly -- it was around 9:30. He had a driver there, and he was delivering, I think he had bundles of tobacco stalks, and he said he would be back in about an hour or two. Dr. Geib and I said we will try to get back, but we went on to do another inspection. And after doing that inspection, we went back to your facility to try to see you since you had some "D" items.

Q. Did you cite him for this refusal?

A. I don't believe he was because we didn't get back. He said he would be back in an hour or two, and we didn't get back that day because we had other commitments.

Tr. 70-71.

On the other hand, Mr. Markmann described Respondent's conduct when he, Mr. Markmann, and Dr. Geib arrived to inspect Respondent's facility on January 23, 1995, as a refusal to allow inspection as follows:

BY MS. HANSBERRY:

Q. Can you just describe what happened when you and Dr. Geib attempted to inspect and were refused inspection on January 23, 1995?

[BY MR. MARKMANN:]

A. When Dr. Geib and I arrived at approximately 9:15 a.m., Samuel Zimmerman was present, and said that he was going to his father-in-law['']s. He had no time for us. And the second page [of CX 5] explains the narrative that we had before we filled out the report; the exchange that Mr. Zimmerman and we had.

And I mention on page 2 that "On January 23rd of '95, at

9:15 a.m., Samuel S. Zimmerman, License No. 23A076, refused to allow APHIS officials to conduct a reinspection of his facilities, animals and records. This is in violation of Section 2.126. When Dr. Mary Geib and myself, Robert Markmann, arrived on the premise, Samuel Zimmerman was getting ready to leave. We requested to [sic] a reinspection and Mr. Zimmerman said he had no time, and we could settle the matter in court. Dr. Geib told Mr. Zimmerman that we were trying to work with him, and asked whether there was any particular days or times he would be available. Mr. Zimmerman responded that we needed to make an appointment. He claimed he was very busy. He said that he would be away this week working at his father-in-law's house. He also said that he would be busy working on is [sic] father's new house and his brother's calf barn.

"We informed Samuel Zimmerman that inspections were unannounced. We mentioned that we previously attempted to do a reinspection. Samuel Zimmerman was aware of our previously attempted inspection. We asked Mr. Zimmerman if he could delay his departure so that we could conduct an inspection. Mr. Zimmerman said no. We also asked if Mrs. Zimmerman could accompany us on the inspection since she was remaining at home. Again Mr. Zimmerman said no.

"Mr. Zimmerman was informed that we would have to write up this report as a refusal to allow inspection. Again, Samuel Zimmerman mentioned that the matter could be settled in court."

And he left so we didn't have him sign the report.

Q. Okay. So this was a refusal to allow inspection under Regulation 2.126?

A. Yes.

Tr. 36-38.

The record establishes that there were material differences between Respondent's brother's conduct on December 20, 1994, and Respondent's conduct on January 23, 1995. The record also establishes that Mr. Markmann believes that Respondent's conduct on January 23, 1995, constitutes a refusal to allow inspection and that Respondent's brother's conduct on December 20, 1994, does not constitute

a refusal to allow inspection.

Mr. Markmann exercised discretion. However, the discretion exercised by Mr. Markmann was not that of deciding to cite only one of two persons who Mr. Markmann viewed as having refused to allow inspection, but rather, that of determining whether particular conduct constitutes a refusal to allow inspection. Since there is no evidence on this record to indicate that Mr. Markmann used discretion "not to cite a party for a refusal to allow an inspection," I have modified the Initial Decision and Order by eliminating the ALJ's reference to "an inspector's discretion not to cite a party for a refusal to allow an inspection[.]"

Fourth, Complainant contends that:

> The ALJ erred in not considering testimony that the respondent had been "'noncompliant' for two years" on the grounds that the "period involved in this proceeding relates to only four months" (p. 8). Although prior noncompliance was not charged in the complaint, the history is relevant to the context of the violations and appropriate sanctions.

Complainant's Appeal Petition at 1-2.

I disagree with Complainant's contention that the ALJ did not consider testimony that Respondent had been noncompliant for 2 years. The ALJ, citing Mr. Markmann's testimony (Tr. 14), specifically states that "Markmann also complained that respondent had been 'noncompliant' for two years." (Initial Decision and Order at 8.)

The ALJ found, and I agree, that the record does not support Mr. Markmann's assertion (Initial Decision and Order at 8). Mr. Markmann testified as follows:

> [BY MS. HANSBERRY:]
>
> Q. And how would you described [sic] [Respondent's] attitude towards complying with the standards and the regulations?
>
> [BY MR. MARKMANN:]
>
> A. I'd say he's noncompliant for the last couple of years. He's been noncompliant for the last two years.

Tr. 14.

As an initial matter, I note that neither the Animal Welfare Act nor the

Regulations and Standards specifically addresses "attitude towards complying with the [S]tandards and [R]egulations." Further, Mr. Markmann testified on January 29, 1997. Therefore, Mr. Markmann characterized Respondent as "noncompliant" during the period January 29, 1995, through January 29, 1997. The Complaint was filed on February 22, 1996, and the only violations that Respondent is alleged to have committed between the time Respondent is alleged to have begun being "noncompliant" and the time of the filing of the Complaint are those which are alleged to have occurred on January 31, 1995 (Compl. ¶ V).

The Animal Care Inspection Report prepared and signed by Mr. Markmann and signed by Dr. Geib after their January 31, 1995, inspection of Respondent's premises states that Respondent had corrected some of the conditions found to be in violation of the Animal Welfare Act and the Regulations and Standards during the previous inspection and corrected one of the newly discovered violations during the January 31, 1995, inspection (CX 6 at 2). Moreover, there is nothing in this record, other than Mr. Markmann's assertion, to support a finding that Respondent was "noncompliant" after January 31, 1995.

Fifth, Complainant contends that:

> The ALJ erred in appraising the seriousness of the violations and in rejecting the sanctions recommended by the complainant.

Complainant's Appeal Petition at 2.

I agree with Complainant that the sanction imposed by the ALJ against Respondent, a cease and desist order and a $500 civil penalty, is not appropriate under the circumstances in this case.

As to the appropriate sanction, section 19 of the Animal Welfare Act provides:

> **§ 2149. Violations by licensees**
>
> **(a) Temporary license suspension; notice and hearing; revocation**
>
> If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such

violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a), (b).

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The number of animals under Respondent's care ranges from about 95 to 143 (Tr. 15), and Respondent grosses from $15,000 to $25,000 a year from the sale of the animals (CX 7, 7A). The annual licensing fee regulations (9 C.F.R. § 2.6) classify dealers by the gross amount received from the sale of animals. Applying this regulatory scheme to Respondent's business, I find that Respondent has a medium-size business.

I find that Respondent violated the Animal Welfare Act and the Regulations and Standards 15 times during the period October 5, 1994, through January 31, 1995. Four of Respondent's violations, Respondent's failures to provide adequate veterinary care, and failures to remove excreta from primary enclosures on October 5, 1994, and November 15, 1994, constitute "serious" violations in that they directly affected the health and well-being of Respondent's animals (Tr. 21, 23-24, 29-30, 32-33, 82-85). Moreover, Respondent's refusal to allow APHIS officials to inspect his facility is a serious violation in that the refusal to allow inspection prevents APHIS from ensuring that the requirements of the Animal Welfare Act and the Regulations and Standards are being met. Respondent's 10 other violations, while not "serious," are "significant" in that they constitute violations of the Regulations and Standards which could have affected the health and well-being of animals under certain circumstances (Tr. 19, 21-23, 28-29, 42-43, 82-85).

Respondent has been a licensed dealer since 1991 and was a licensed dealer at all times pertinent to this proceeding (Tr. 13, 98). Respondent was fully aware of the Animal Welfare Act and the Regulations and Standards. The Animal Welfare Act is published in the statutes at large and the United States Code, and Respondent is presumed to know the law.[2] The Regulations and Standards are published in the *Federal Register*, thereby constructively notifying Respondent of the Regulations and Standards.[3] Further, Respondent received copies of the Regulations and Standards annually and agreed in writing to comply with them (CX 7, 7A). Moreover, Respondent accompanied the APHIS inspector during the October 5, 1994, November 15, 1994, and January 31, 1995, inspections of his premises, and the APHIS inspector discussed the violations cited on each report with Respondent (Tr. 14, 18-19, 27, 42) and provided a copy of each inspection report to Respondent (CX 3, 4, 6). Further still, during the January 23, 1995, attempt to inspect Respondent's facility, Respondent was informed that, if he persisted in his refusal to allow inspection, he would be cited in the APHIS inspector's report for a refusal to allow inspection (Tr. 36-38). Despite Respondent's actual and constructive knowledge of the Animal Welfare Act and the Regulations and Standards, he

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[2]*See generally Atkins v. Parker*, 472 U.S. 115, 130 (1985); *Wilber Nat'l Bank of Oneonta v. United States*, 294 U.S. 120, 124 (1935); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Town of South Ottawa v. Perkins*, 94 U.S. 260, 269 (1876); *Upton v. Tribilcock*, 91 U.S. 45, 50-51 (1875).

[3]*FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976).

continued to violate the Animal Welfare Act and the Regulations and Standards.

There is no evidence that Respondent deliberately harmed his animals. However, Respondent repeatedly and willfully violated the Animal Welfare Act and the Regulations and Standards.[4] Proof of Respondent's willful violations of the Animal Welfare Act and the Regulations and Standards is not necessary for the revocation or suspension of Respondent's Animal Welfare Act license because Respondent received notice by APHIS in writing of the facts or conduct that may warrant suspension or revocation of his license, and Respondent had an opportunity to achieve compliance with the requirements of the Animal Welfare Act and the

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[4]An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 143-44 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, many of Respondent's violations would still be found willful.

Regulations and Standards (CX 3, 4, 6).[5] Nevertheless Respondent's willfulness is relevant to the gravity of Respondent's violations.

Complainant could have sought a maximum civil penalty of $2,500 for each violation.[6] In light of the amount that Complainant could have requested, the number of violations, the number of repeated violations, and the serious nature of five of the violations, the sanction recommended by Complainant is appropriate.

However, I find that Complainant did not prove by a preponderance of the evidence[7] 5 of the 20 violations which Complainant alleged in the Complaint. I

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[5]The Administrative Procedure Act provides, with respect to license revocation and suspension, as follows:

> **§ 558 Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**
>
> . . . .
>
> (c) . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of the agency proceedings therefor, the licensee has been given—
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

[6]I find that Complainant proved its case by a preponderance of the evidence with respect to 15 violations alleged in the Complaint. Complainant could have sought to have assessed a maximum civil penalty of $2,500 for each of these 15 violations, for a total civil penalty of $37,500.

[7]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re Fred Hodgins*, 56 Agric. Dec.___, slip op. at 5 n.*** (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric.

find that Respondent corrected a number of the cited violations either during the inspection in which the violations were cited or prior to the next inspection.[8] With respect to Respondent's refusal to allow inspection, I agree with the ALJ that Respondent apparently acted in the heat of the moment because of a previous commitment and not in defiance of the law since, on reflection, he promptly called the inspector to arrange for an inspection.

Therefore, I am assessing Respondent a civil penalty of $7,500 and suspending Respondent's Animal Welfare Act license for a period of 40 days. Finally, I believe that Respondent should be ordered to cease and desist from further violations of the Animal Welfare Act and the Regulations and Standards.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent, Samuel Zimmerman, is assessed a civil penalty of $7,500. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Robert A. Ertman
United States Department of Agriculture
Office of the General Counsel
Marketing Division

Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

[8]Corrections are to be encouraged and may be taken into account when determining the sanction to be imposed. *In re Fred Hodgins*, 56 Agric. Dec.___, slip op. at 99 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Petition for Reconsideration); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

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1400 Independence Avenue, S.W.
Washington, DC 20250-1413

Respondent's payment of the civil penalty shall be forwarded to and received by Mr. Ertman within 70 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0021.

2. Respondent, Samuel Zimmerman, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and, in particular, shall cease and desist from:

(a) failing to maintain complete records showing the acquisition, disposition, and identification of animals;

(b) failing to provide veterinary care to animals in need of care;

(c) failing to store supplies of food in a manner so as to protect them from spoilage, contamination, and vermin infestation;

(d) failing to provide primary enclosures for dogs that are structurally sound and maintain primary enclosures for dogs in good repair so as to protect the animals from injury;

(e) failing to remove excreta from primary enclosures daily in order to prevent soiling of the animals and to reduce disease hazards, insects, pests, and odors;

(f) failing to keep premises where the housing facilities are located clean and in good repair to protect animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin;

(g) failing to make provisions for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes in a manner that minimizes contamination and disease risks; and

(h) failing to allow Animal and Plant Health Inspection Service officials entry to inspect his facility.

The cease and desist provisions shall become effective on the day after service of this Order on Respondent.

3. Respondent's Animal Welfare Act license is suspended for a period of 40 days and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Animal

Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 40-day license suspension period.

The Animal Welfare Act license suspension provisions in this Order shall become effective on the 70th day after service of this Order on Respondent.

In re: SAMUEL ZIMMERMAN.
AWA Docket No. 96-0021.
Order Denying Petition for Reconsideration filed December 22, 1997.

Cease and desist order — Civil penalty — License suspension — Sanction policy.

The Judicial Officer denied Respondent's Petition for Reconsideration. The $7,500 civil penalty assessed against Respondent and the 40-day suspension of Respondent's Animal Welfare Act license in *In re Samuel Zimmerman*, 56 Agric. Dec. ___ (Nov. 6, 1997), is appropriate under the circumstances in this case and is consistent with the Animal Welfare Act, the Department's sanction policy, and sanctions imposed in other cases for violations of the Animal Welfare Act and the Regulations and Standards. With respect to the sanction imposed against Respondent, consideration was given to each of the factors required to be considered under section 19 of the Animal Welfare Act (7 U.S.C. § 2149), the recommendation of an administrative official charged with responsibility for achieving the congressional purpose of the Animal Welfare Act, and all relevant circumstances, including evidence of Respondent's correction of violations and the circumstances surrounding Respondent's failure to allow Animal and Plant Health Inspection Service officials entry to inspect his facility, and the lack of evidence that Respondent deliberately harmed his animals.

Robert A. Ertman, for Complainant.
Eugene R. Campbell, York, PA, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7

C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 22, 1996.

The Complaint alleges that: (1) on October 5, 1994, November 15, 1994, and January 31, 1995, Samuel Zimmerman [hereinafter Respondent] failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) (Compl. ¶¶ II(A), III(A), V(A)); (2) on October 5, 1994, Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, and on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40) (Compl. ¶¶ II(B), III(B), V(B)); (3) on October 5, 1994, Respondent failed to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) (Compl. ¶ II(C)(1)); (4) on October 5, 1994, Respondent failed to provide for dogs primary enclosures that were structurally sound and maintain for dogs primary enclosures in good repair so as to protect the animals from injury, and have no sharp points or edges that could injure the animals, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) and (a)(2)(i)-(ii) of the Standards (9 C.F.R. § 3.6(a)(1), (a)(2)(i)-(ii)) (Compl. ¶ II(C)(2)); (5) on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to remove excreta from primary enclosures daily in order to prevent soiling of the animals and to reduce disease hazards, insects, pests, and odors, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) (Compl. ¶¶ II(C)(3), III(D)(1), V(D)(1)); (6) on October 5, 1994, November 15, 1994, and January 31, 1995, Respondent failed to keep premises where the housing facilities were located clean and in good repair to protect the animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) (Compl. ¶¶ II(C)(4), III(D)(2), V(D)(2)); (7) on November 15, 1994, and January 31, 1995, Respondent failed to individually identify dogs, in willful violation of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) (Compl. ¶¶ III(C), V(C)); (8) on November 15, 1994, and January 31, 1995,

Respondent failed to provide for dogs primary enclosures that were structurally sound and maintain for dogs primary enclosures in good repair so as to protect the animals from injury, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) (Compl. ¶¶ III(D)(3), V(D)(3)); (9) on November 15, 1994, Respondent failed to make provisions for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes in a manner that minimizes contamination and disease risks, in willful violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) (Compl. ¶ III(D)(4)); and (10) on January 23, 1995, Respondent denied the Animal and Plant Health Inspection Service entry to inspect his facility, in willful violation of section 11 of the Animal Welfare Act (7 U.S.C. § 2141)[1] and section 2.126 of the Regulations (9 C.F.R. § 2.126) (Compl. IV(A)).

On April 10, 1996, Respondent filed an Answer denying the material allegations in the Complaint. Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing in Lancaster, Pennsylvania, on January 29, 1997. Denise Y. Hansberry, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant.[2] Respondent appeared pro se.[3]

On March 14, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Brief in Support Thereof [hereinafter Complainant's Brief]. On April 3, 1997, Respondent filed a letter addressing testimony given at the hearing and transcribed on pages 14, 22, 35, 43, and 67 of the transcript. On May 29, 1997, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondent violated the

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[1]Section 11 of the Animal Welfare Act (7 U.S.C. § 2141) requires the marking and identification of certain animals. Based on the facts alleged in paragraph IV(A) of the Complaint and the provision of the Regulations cited in paragraph IV(A) of the Complaint, it appears that 7 U.S.C. § 2141 is incorrect, and that the correct citation in paragraph IV(A) should have been 7 U.S.C. § 2146. However, I find Complainant's erroneous citation of 7 U.S.C. § 2141 to be a harmless typographical error.

[2]On March 18, 1997, Frank Martin, Jr., Esq., entered an appearance on behalf of Complainant, replacing Denise Y. Hansberry, Esq. (Notice of Appearance, filed March 18, 1997). On June 18, 1997, Robert A. Ertman, Esq., entered an appearance on behalf of Complainant, replacing Frank Martin, Jr. (Notice of Appearance, filed June 18, 1997).

[3]On July 21, 1997, Eugene R. Campbell, Esq., entered an appearance on behalf of Respondent (July 17, 1997, Letter from Eugene R. Campbell, Esq., to USDA - Hearing Clerk).

Regulations and Standards (Initial Decision and Order at 11); (2) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards (Initial Decision and Order at 11); and (3) assessed Respondent a civil penalty of $500 (Initial Decision and Order at 12).

On June 30, 1997, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[4] On July 21, 1997, Respondent filed Response to Appeal Petition; on August 18, 1997, Complainant filed Complainant's Memorandum in Support of Appeal Petition; on September 9, 1997, Respondent filed Respondent's Memorandum in Opposition to Appeal Petition; and on September 10, 1997, the case was referred to the Judicial Officer for decision.

On November 6, 1997, I issued a Decision and Order in which I concluded that: (1) on October 5, 1994, Respondent willfully violated: (a) section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals, (b) section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to an animal in need of care, (c) section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) by failing to store supplies of food in a manner so as to protect them from spoilage, contamination, and vermin infestation, (d) section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) by failing to ensure that primary enclosures for dogs were structurally sound and maintained in good repair, and (e) section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) by failing to remove excreta from primary enclosures on a daily basis in order to prevent soiling of dogs and to reduce disease hazards, insects, pests, and odors; (2) on November 15, 1994, Respondent willfully violated: (a) section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals, (b) section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care, (c) section 2.100(a) of the Regulations

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[4]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

(9 C.F.R. § 2.100(a)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) by failing to remove excreta from primary enclosures on a daily basis in order to prevent soiling of dogs and to reduce disease hazards, insects, pests, and odors, (d) section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) by failing to ensure that primary enclosures for dogs were structurally sound and maintained in good repair, and (e) section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) by failing to provide for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes in a manner that minimizes contamination and disease risks; (3) on January 23, 1995, Respondent willfully violated section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126 of the Regulations (9 C.F.R. § 2.126) by refusing to allow Animal and Plant Health Inspection Service officials to inspect his premises during business hours; and (4) on January 31, 1995, Respondent willfully violated: (a) section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals, (b) section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to an animal in need of care, (c) section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) by failing to keep premises where housing facilities were located clean and in good repair to protect animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin, and (d) section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1)) by failing to ensure that primary enclosures for dogs were structurally sound and maintained in good repair. *In re Samuel Zimmerman*, 56 Agric. Dec. ___, slip op. at 28-30 (Nov. 6, 1997). Based on these conclusions, I assessed a civil penalty of $7,500 against Respondent, ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and suspended Respondent's Animal Welfare Act license for a period of 40 days. *In re Samuel Zimmerman, supra*, slip op. at 47-49.

On November 17, 1997, Respondent filed a Petition for Reconsideration. Complainant filed no response to Respondent's Petition for Reconsideration. On December 15, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondent contends in his Petition for Reconsideration that the $7,500 civil penalty assessed against Respondent and the 40-day suspension of Respondent's Animal Welfare Act license are excessive, as follows:

1. The Judicial Officer erred in raising the penalty to a $7,500.00 and 40-day suspension. Such penalty is excessive for the offenses that were found by him to be validly charged.

2. The Judicial Officer correctly found that Respondent's "attitude" should not be a factor in determining the charges against him. The Judicial Officer was also correct that Respondent had corrected a number of cited violations either during the inspection or prior to the next inspection. He also correctly found that there was no proof he had harmed his animals. He also correctly found that the refusal to inspect was in the heat of the moment and not in defiance of the law. Under these circumstances, Respondent contends the penalty was excessive.

I disagree with Respondent's contention that the $7,500 civil penalty assessed against Respondent and the 40-day suspension of Respondent's Animal Welfare Act license are excessive, and the reasons for the $7,500 civil penalty assessed against Respondent and the 40-day suspension of Respondent's Animal Welfare Act license are fully articulated in the November 6, 1997, Decision and Order. *In re Samuel Zimmerman*, 56 Agric. Dec. ___ (Nov. 6, 1997).

Respondent states in his Petition for Reconsideration that I "correctly found that Respondent's `attitude' should not be a factor in determining the charges against him." I do not state in the November 6, 1997, Decision and Order that "Respondent's `attitude' should not be a factor in determining the charges against him," but I do note that "neither the Animal Welfare Act nor the Regulations and Standards specifically addresses `attitude towards complying with the [S]tandards and [R]egulations.'" *In re Samuel Zimmerman, supra*, slip op. at 39. In any event, I gave no consideration to Complainant's "noncompliant attitude" evidence either in determining the violations committed or in imposing the sanction.

Respondent correctly states in Respondent's Petition for Reconsideration that I found that Respondent corrected a number of cited violations either during the inspection or prior to the next inspection. However, while corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, a correction of a condition not in compliance with the Animal Welfare Act or the Regulations and Standards has no bearing on the fact that a violation

occurred.[5] Each dealer, exhibitor, or operator of an auction sale must always be in compliance in all respects with the Regulations and Standards (9 C.F.R. § 2.100(a)), and this duty exists regardless of a correction date suggested by an Animal and Plant Health Inspection Service inspector who notes the existence of a violation.

Respondent also states in his Petition for Reconsideration that I found that there was no proof Respondent harmed his animals. I disagree with Respondent. I found that "[t]here is no evidence that Respondent *deliberately* harmed his animals." *In re Samuel Zimmerman, supra*, slip op. at 43 (emphasis added). Further, in regard to the effect and potential effect of Respondent's violations on the health and well-being of Respondent's animals, I found that:

> . . . Four of Respondent's violations, Respondent's failures to provide adequate veterinary care, and failures to remove excreta from primary enclosures on October 5, 1994, and November 15, 1994, constitute "serious" violations in that they directly affected the health and well-being of Respondent's animals (Tr. 21, 23-24, 29-30, 32-33, 82-85). . . . Respondent's 10 other violations, while not "serious," are "significant" in that they constitute violations of the Regulations and Standards which could have affected the health and well-being of animals under certain circumstances (Tr. 19, 21-23, 28-29, 42-43, 82-85).

In re Samuel Zimmerman, supra, slip op. at 41-42.

Finally, Respondent correctly states that with respect to Respondent's refusal to allow inspection, I found that "Respondent apparently acted in the heat of the moment because of a previous commitment and not in defiance of the law." *In re Samuel Zimmerman, supra*, slip op. at 46-47.

Section 19 of the Animal Welfare Act provides:

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

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[5]*In re Fred Hodgins*, 56 Agric. Dec.___, slip op. at 98-99 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Petition for Reconsideration); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a)-(b).

Respondent could have been assessed a maximum civil penalty of $2,500 for each of Respondent's 15 violations, for a total of $37,500. Moreover, Respondent's license under the Animal Welfare Act could be revoked for a single willful violation of the Animal Welfare Act or the Regulations and Standards.

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of

the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, an administrative official charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act, recommended a civil penalty of $10,750 and a 60-day suspension of Respondent's Animal Welfare Act license (Complainant's Brief at 30-33; Complainant's Memorandum in Support of Appeal Petition at 4-5).

I considered each of the factors required to be considered under section 19 of the Animal Welfare Act (7 U.S.C. § 2149), the recommendation of the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, and all relevant circumstances, including evidence of Respondent's correction of violations and the circumstances surrounding Respondent's failure to allow Animal and Plant Health Inspection Service officials entry to inspect his facility and the lack of evidence that Respondent deliberately harmed his animals. *In re Samuel Zimmerman, supra*, slip op, at 40-47.

The sanction imposed in the November 6, 1997, Decision and Order is appropriate under the circumstances in this case and is consistent with the Animal Welfare Act, the Department's sanction policy, and sanctions imposed in other cases for violations of the Animal Welfare Act and the Regulations and Standards.[6]

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[6]*See, e.g., In re James J. Everhart*, 56 Agric. Dec. ___ (Oct. 2, 1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. ___ (July 21, 1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards) (Modified Order); *In re Fred Hodgins*, 56 Agric. Dec. ___ (July 11, 1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. ___ (July 11, 1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Lifting Stay Order and Decision and Order); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. 322

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 6, 1997, *In re Samuel Zimmerman, supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[7] Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on November 6, 1997. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed November 6, 1997, is reinstated, with allowance for time passed.

For the foregoing reasons, the following Order should be issued.

Order

(1997) (imposing a $26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.)(Table), *cert. denied*, 476 U.S. 1108 (1986).

[7]*In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Petition for Reconsideration); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Petition for Reconsideration); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Petition for Reconsideration); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Petition for Reconsideration); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Petition for Reconsideration); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Petition for Reconsideration).

1. Respondent, Samuel Zimmerman, is assessed a civil penalty of $7,500. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Robert A. Ertman
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2014 South Building
1400 Independence Avenue, S.W.
Washington, DC 20250-1413

Respondent's payment of the civil penalty shall be forwarded to and received by Mr. Ertman within 70 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0021.

2. Respondent, Samuel Zimmerman, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and, in particular, shall cease and desist from:

(a) failing to maintain complete records showing the acquisition, disposition, and identification of animals;

(b) failing to provide veterinary care to animals in need of care;

(c) failing to store supplies of food in a manner so as to protect them from spoilage, contamination, and vermin infestation;

(d) failing to provide for dogs primary enclosures that are structurally sound and maintain for dogs primary enclosures in good repair so as to protect the animals from injury;

(e) failing to remove excreta from primary enclosures daily in order to prevent soiling of the animals and to reduce disease hazards, insects, pests, and odors;

(f) failing to keep premises where the housing facilities are located clean and in good repair to protect animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin;

(g) failing to make provisions for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes in a manner that

minimizes contamination and disease risks; and

(h) failing to allow Animal and Plant Health Inspection Service officials entry to inspect his facility.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

3. Respondent's Animal Welfare Act license is suspended for a period of 40 days and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 40-day license suspension period.

The Animal Welfare Act license suspension provisions in this Order shall become effective on the 70th day after service of this Order on Respondent.

BEEF PROMOTION and RESEARCH ACT

In re: JERRY GOETZ, d/b/a JERRY GOETZ AND SONS.
BPRA Docket No. 94-0001.
Decision and Order filed November 3, 1997.

Beef order - Collecting person - Civil penalty - Assessments - Failure to submit reports — Late payment charge - First amendment right to free speech — Taxation — Equal protection — Interstate commerce.

The Judicial Officer affirmed Judge Hunt's (ALJ) decision that Respondent violated the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101.-.217) (Beef Promotion Order) and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) (Beef Promotion Regulations) by failing to remit assessments due to a qualified State beef council. In addition, the Judicial Officer found that Respondent violated the Beef Promotion Order and the Beef Promotion Regulations by failing to transmit reports of assessments to the Kansas Beef Council. The Judicial Officer held that the Beef Promotion and Research Act of 1985 (Beef Promotion Act), the Beef Promotion Order, and the Beef Promotion Regulations do not violate Respondent's First Amendment right to freedom of speech and do not violate Respondent's right to equal protection of the laws. The Beef Promotion Act is a valid regulation of interstate commerce and the assessments required to be collected and remitted under the Beef Promotion Act are not taxes, but rather, mere incidents of the regulation of commerce. Late payment charges under the Beef Promotion Order are not designed to penalize those who fail to remit assessments when due, but rather, are designed to reimburse the entity to which the assessments are not timely remitted for the time value of the assessments. Neither the Beef Promotion Act, the Beef Promotion Order, nor the Beef Promotion Regulations limits the time within which an action to collect unremitted assessments and late payment charges, assess civil penalties, or issue a cease and desist order may be instituted. The Judicial Officer ordered Respondent to pay assessments of $21,423 which Respondent failed to remit in accordance with the Beef Promotion Order and Beef Promotion Regulations and late payment charges of $45,154 to the Kansas Beef Council, ordered Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations, and assessed Respondent a civil penalty of $69,244.51 in accordance with section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)).

Sharlene A. Deskins, for Complainant.
David R. Klaassen and Clarence L. King, Jr., Marquette, KS, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-

.151) [hereinafter the Rules of Practice] by filing a Complaint on October 29, 1993.

The Complaint alleges that Jerry Goetz, d/b/a Jerry Goetz and Sons [hereinafter Respondent]: (1) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required reports (Compl. ¶ II(A)); (2) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit necessary information in required reports (Compl. ¶ II(B)); and (3) willfully violated section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312) by failing to remit the assessments due for the purchase and sale of cattle (Compl. ¶ III(A)-(L)). Complainant requests the issuance of an order or orders as authorized under the Beef Promotion Act, including an order requiring Respondent to cease and desist from violating the Beef Promotion Order and Beef Promotion Regulations and assessing civil penalties against Respondent in accordance with section 9 of the Beef Promotion Act (7 U.S.C. § 2908) (Compl. at 4-5).

On December 10, 1993, Respondent filed an Answer denying the material allegations of the Complaint and contending that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void, and unenforceable (Answer ¶¶ 2-4). Respondent requests denial of the relief requested in the Complaint and a determination and declaration that the Beef Promotion Act is unconstitutional, void, and unenforceable; and the Beef Promotion Order and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void, and unenforceable (Answer at 1-2).

On August 2, 1994, Respondent filed an action in the United States District Court for the District of Kansas seeking a temporary restraining order to prevent a hearing from being held in this proceeding. The court issued an order requiring an audit by the accounting firm of Wendling, Noe, Nelson & Johnson of Topeka, Kansas, of Respondent's books and records pertaining to his raising, buying, selling, and trading of cattle and Respondent's collection of monies, if any, under the Beef Promotion Act and enjoined the instant proceeding pending the completion of the audit of Respondent's books and records (Complainant's Findings of Fact Conclusions of Law and Brief in Support Thereof [hereinafter Complainant's Findings of Fact], Exhibit A). On August 4, 1994, Respondent filed a Complaint in United States District Court for the District of Kansas challenging the constitutionality of the Beef Promotion Act. The court stayed the instant

proceeding pending a decision regarding Respondent's constitutional challenges to the Beef Promotion Act. The audit was completed on November 23, 1994 (CX 18 at 5), and the court issued a decision on February 28, 1996, in which the court rejected each of Respondent's constitutional challenges to the Beef Promotion Act and set aside prior orders which enjoined and stayed this proceeding. *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996).

On September 25 and 26, 1996, Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing in Wichita, Kansas. Sharlene A. Deskins, Esq., represented Complainant. David R. Klaassen, Esq., of Marquette, Kansas, and Clarence L. King, Jr., Esq., of the law firm of Hampton, Royce, Engleman & Nelson, represented Respondent.

On January 8, 1997, Complainant filed Complainant's Findings of Fact. On January 13 and 16, 1997, Respondent filed Respondent's Brief. On February 26, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondent failed to collect assessments and remit assessments to a State Cattlemen's Beef Promotion and Research Board for 22,118 cattle during the period October 1, 1986, through June 30, 1994, in violation of section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections 1260.311 and .312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312) (Initial Decision and Order at 13-14); (2) ordered Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations (Initial Decision and Order at 14); (3) assessed a civil penalty of $46,624 against Respondent (Initial Decision and Order at 14); and (4) ordered Respondent to pay past-due assessments and penalties to the Kansas Beef Council in the amount of $68,742 (Initial Decision and Order at 14).

On April 7, 1997, Respondent filed an appeal to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557.* On June 6, 1997, Complainant filed Complainant's Opposition to the "Petition Appealing Decision and Order of Administrative Law Judge James W. Hunt Dated February 26, 1997, to the Judicial Officer, Combined With Supporting Brief"; Complainant's Appeal and Brief in Support Thereof [hereinafter Complainant's

*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Appeal Petition], and on August 18, 1997, Respondent filed Respondent's Response and Opposition to Complainant's Opposition and Appeal Combined With Supporting Brief [hereinafter Respondent's Opposition to Complainant's Appeal Petition]. On August 18, 1997, the case was referred to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which, in accordance with section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused because the issues have been fully briefed by Complainant and Respondent and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, except that: (1) I find erroneous the ALJ's determination that section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) is a method for determining the civil penalty to be assessed; thus, I assess a civil penalty in an amount different than that assessed by the ALJ; (2) I conclude that Respondent failed to transmit 93 reports of assessments to the Kansas Beef Council in willful violation of the Beef Promotion Order and the Beef Promotion Regulations; and (3) I find that Respondent failed to remit assessments for 21,423 head of cattle in willful violation of the Beef Promotion Order and the Beef Promotion Regulations; thus, I order Respondent to pay the Kansas Beef Council assessments and late payment charges in amounts different than those ordered to be paid by the ALJ. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law.

Complainant's exhibits are designated by the letters "CX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

APPLICABLE STATUTES AND REGULATIONS

7 U.S.C.:

CHAPTER 62—BEEF RESEARCH AND INFORMATION

§ 2901. Congressional findings and declaration of policy

(a) Congress finds that—

. . . .

(2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;

. . . .

(4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation[.]

. . . .

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this chapter shall be construed to limit the right of individual producers to raise cattle.

§ 2902. Definitions

For purposes of this chapter—

. . . .

(3) the term "Board" means the Cattlemen's Beef Promotion and Research Board established under section 2904(1) of this title;

. . . .

(14) the term "qualified State beef council" means a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State;

. . . .

(16) the term "Secretary" means the Secretary of Agriculture[.]

§ 2904. Required terms in orders

. . . .

(8)(A) The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

§ 2908. Enforcement

(a) Restraining order; civil penalty

If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may—

(1) issue an order to restrain or prevent a person from violating an order; and

(2) assess a civil penalty of not more than $5,000 for violation of such order.

7 U.S.C. §§ 2901(a)(2), (4), (b), 2902(3), (14), (16), 2904(8)(A), 2908(a).

110 Stat.:

TITLE V—AGRICULTURAL PROMOTION

Subtitle A—Commodity Promotion and Evaluation

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.—In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

. . . .

(5) Public Law 94-294 (7 U.S.C. § 2901 et seq.)[.]

. . . .

(b) FINDINGS.—Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or

expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture—

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional

purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501(a)(5), (b)(1)-(9), 110 Stat. 888, 1029-31 (1996).

7 C.F.R.:

PART 1260—BEEF PROMOTION AND RESEARCH

SUBPART A—Beef Promotion and Research Order

DEFINITIONS

. . . .

§ 1260.102 Secretary.

"Secretary" means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in the Secretary's stead.

§ 1260.103 Board.

"Board" means the Cattlemen's Beef Promotion and Research Board established pursuant to the Act and this subpart.

. . . .

§ 1260.106 Collecting person.

"Collecting person" means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

. . . .

§ 1260.115 Qualified State beef council.

"Qualified State beef council" means a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the Board pursuant to this subpart as the beef promotion entity in such State.

. . . .

§ 1260.128 Act.

"Act" means the Beef Promotion and Research Act of 1985, Title XVI, Subtitle A of the Food Security Act of 1985, Pub. L. 99-198 and any amendments thereto.

. . . .

ASSESSMENTS

§ 1260.172 Assessments.

(a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar ($1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

. . . .

REPORTS, BOOKS AND RECORDS

§ 1260.201 Reports.

Each importer, person marketing cattle, beef or beef products of that

person's own production directly to consumers, and each collecting person making payment to producers and responsible for the collection of the assessment under § 1260.172 shall report to the Board periodically information required by regulations prescribed by the Board and approved by the Secretary. Such information may include but is not limited to the following:

(a) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates of such transaction;

(b) The number of cattle imported; or the equivalent thereof of beef or beef products;

(c) The amount of assessment remitted;

(d) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and,

(e) The date any assessment was paid.

. . . .

SUBPART B—Rules and Regulations

. . . .

§ 1260.311 Collecting persons for purposes of collection of assessments.

Collecting persons for purposes of collecting and remitting the $1.00 per head assessment shall be:

(a) Except as provided in paragraph (b) and (c) of this section, each person making payment to a producer for cattle purchased in the United States shall collect from the producer an assessment at the rate of $1.00 per head of cattle purchased and shall be responsible for remitting assessments to the qualified State beef council or the Cattlemen's Board as provided in § 1260.312. The collecting person shall collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. The person paying the producer shall give the producer a receipt indicating payment of the assessment.

. . . .

(c) In the States listed below there exists a requirement that cattle be brand inspected by State authorized inspectors prior to sale. In addition, when cattle are sold in the sales transactions listed below in those States, these State authorized inspectors are authorized to, and shall, collect assessments due as a result of the sale of cattle. In those transactions in which inspectors are responsible for collecting assessments, the person paying the producer shall not be responsible for the collection and remittance of such assessments. The following chart identifies the party responsible for collecting and remitting assessments in these States:

. . . .

[Nebraska Country Sales (country sales include any sale which is not conducted at an auction or livestock market and which is not a sale to a slaughter/packer, feedlot, or an order buyer or dealer) - The brand inspector has responsibility to collect; however, when there has not been a physical brand inspection, the person paying the producer shall be the collecting person and has the responsibility to collect and remit assessments due.]

. . . .

§ 1260.312 Remittance to the Cattlemen's Board or Qualified State Beef Council.

Each person responsible for the collection and remittance of assessments shall transmit assessments and a report of assessments to the qualified State beef council of the State in which such person resides or if there is no qualified State beef council in such State, then to the Cattlemen's Board as follows:

(a) *Reports*. Each collecting person shall make reports on forms made available or approved by the Cattlemen's Board. Each collecting person shall prepare a separate report for each reporting period. Each report shall be mailed to the qualified State beef council of the State in which the collecting person resides, or its designee, or if there exists no qualified State beef council in such State, to the Cattlemen's Board. Each report shall contain the following information:

(1) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates

of such transactions;

(2) The amount of assessment remitted;

(3) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and

(4) The date any assessment was paid.

(b) *Reporting periods*. Each calendar month shall be a reporting period and the period shall end at the close of business on the last business day of the month.

(c) *Remittances*. The remitting person shall remit all assessments to the qualified State beef council or its designee, or, if there is no qualified State beef council, to the Cattlemen's Board at P.O. Box 27-275; Kansas City, Missouri 64180-0001, with the report required in paragraph (a) of this section not later than the 15th day of the following month. All remittances sent to a qualified State beef council or the Cattlemen's Board by the remitting persons shall be by check or money order payable to the order of the qualified State beef council or the Cattlemen's Board. All remittances shall be received subject to collection and payment at par.

. . . .

§ 1260.314 Certification of non-producer status for certain transactions.

(a) The assessment levied on each head of cattle sold shall not apply to cattle owned by a person:

(1) If the person certifies that the person's only share in the proceeds of a sale of cattle, beef, or beef products is a sales commission, handling fee or other service fee; or

(2) If the person:

(i) Certifies that the person acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party[;]

(ii) Establishes that such cattle were resold not later than 10 days from the date on which the person acquired ownership; and

(iii) Certifies that the assessment levied upon the person from whom the person purchased the cattle, if an assessment was due, has been collected and has been remitted, or will be remitted in a timely fashion.

. . . .

§ 1260.315 Qualified State Beef Councils.

The following State beef promotion entities have been certified by the Board as qualified State beef councils:

. . . .

Kansas Beef Council

. . . .

Nebraska Beef Industry Development Board

7 C.F.R. §§ 1260.102, .103, .106, .115, .128, .172(a)(1), .201, .311(a), (c), .312, .314(a), .315.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER AS MODIFIED

. . . . [Footnote 1 omitted.]

Statement of the Case

Respondent . . . has been in the cattle buying business in Kansas since 1949 [(Tr. 259)]. He does some farming and does his cattle buying and selling as the owner and operator of Jerry Goetz and Sons (Tr. 260). He visits a different sale barn each day, where he buys and sells cattle. He keeps some cattle at his feedlot, but often promptly resells the cattle he buys. "We buy some cattle for the feedlot. We swap a lot of cattle that I buy at one sale barn and move them to the next barn. That is basically what I do." [(Tr. 260.)] Respondent buys up to 200 cattle a day (Tr. 260-64).

The Complaint alleges that Respondent failed to remit assessments required by the Beef Promotion Order for cattle he purchased [and sold from] 1986 [through] October 29, 1993, the date . . . the Complaint [was filed].

The [collection of assessment provisions of the] Beef Promotion Order, promulgated pursuant to the Beef Promotion Act, became effective October 1, 1986. The Beef Promotion Order requires that $1.00 be assessed for each head of cattle [purchased]. The money is used to promote beef and beef products. The

Beef Promotion Order requires that the assessment be collected by the "collecting person" in the transaction [(7 C.F.R. § 1260.172(a)(1)). The Beef Promotion Order] defines "collecting person" as the person "making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment" (7 C.F.R. § 1260.106). The collected money is to be remitted by the collecting person to [a qualified] State . . . beef [council] (in this instance, to the Kansas Beef Council for cattle purchased in Kansas). The assessment, deducted from the money the purchaser pays to the seller, is commonly referred to as a "checkoff."

Complainant alleges that Respondent failed to remit assessments as the "collecting person" in [transactions involving] over 24,000 cattle . . . .

Respondent's alleged failure to remit assessments was first brought to his attention in June 1987 in a letter to him from the Kansas Beef Council (CX 12). The letter states:

June 1, 1987

Jerry Goetz & Sons
[redacted]

Dear Mr. Goetz:

The Kansas Beef Council has been informed by producers selling cattle to you that you have collected from them a $1.00 per head assessment on cattle sold to you. The Kansas Beef Council has not received remittance of those dollars from you.

This is to remind you of that as of October 1, 1986 you are required by the Beef Promotion and Research Act to collect from producers and remit to the Kansas Beef Council $1.00 per head on all cattle purchased. Failure to do so may result in a civil penalty.

If you have any questions or require further information regarding this program, please contact Ms. Renee Wassenberg at [redacted]

Sincerely,

/s/
Renee Wassenberg
Manager

In February and June 1992 the Kansas Beef Council again sent Respondent letters concerning his alleged failure to comply with the Beef Promotion Order (CX 13, 14).

On August [19], 1994, as a result of legal action [instituted by Respondent to stay this proceeding, the United States District Court for the District of Kansas] ordered that [the accounting firm of Wendling, Noe, Nelson & Johnson of Topeka, Kansas, conduct] an audit . . . of Respondent's [books and] records to determine his compliance with the Beef Promotion Order [(Complainant's Findings of Fact, Exhibit A)]. Darrell D. Loyd, a certified public accountant [and partner in the accounting firm of Wendling, Noe, Nelson & Johnson,] conducted the audit which he completed on November 23, 1994, and which is entitled "[Kansas Beef Council] Compliance Report [for Jerome (Jerry) Goetz October 1, 1986 Through June 30, 1994]" [hereinafter Compliance Report] (CX 18). Mr. Loyd examined Respondent's purchase invoices, sale invoices, canceled checks, deposit slips, and non-producer status forms to determine the head count for cattle that Respondent purchased and for which he should have collected and remitted assessments. Mr. Loyd estimated the number of cattle involved in the transactions from October 1, 1986, to December 31, 1989, a period for which Respondent no longer had records, by using the average sales for the period January 1, 1990, to June 30, 1994, a period for which Respondent had records ([CX 18 at 2;] Tr. 162-63). Mr. Loyd estimated in the Compliance Report that Respondent had failed to remit assessments in transactions involving 24,672 head of cattle between October 1, 1986, and June 30, 1994. Mr. Loyd determined that Respondent owes $24,672 in assessments and a [late payment charge] of $51,847.48 (CX 18 at 4, 8). Complainant seeks an order requiring Respondent to pay these [unremitted assessments and accrued late payment charges, totaling $76,519.48, to the Kansas Beef Council] and to pay a [civil] penalty of $80,000 [to the Treasurer of the United States (Complainant's Findings of Fact at 17-18)].

Discussion

Respondent contends that the Beef Promotion Act and Beef Promotion Order [are] unconstitutional and that, if he is required to pay assessments, he should not have to pay on the 1,170 head of cattle that the auditor agreed at the hearing were

not subject to an assessment, that the records showing that he collected but failed to remit assessments for other transactions are erroneous, that some sales were exempt from assessments, and that Complainant is precluded from going back farther than 1990 to make claims for alleged unremitted assessments.

. . . .

At the hearing, the auditor, Darrell Loyd, testified that on further review of the records, including those that he had not reviewed during his audit, approximately 1,170 head of cattle involved in transactions between January 1, 1990, and June 30, 1994, that he included in his audit as being subject to assessment could be excluded from the total number of cattle for which Respondent should have remitted assessments (Tr. 343). Complainant argues that the 1,170 [cattle] should still be included in the count because some of the records on which Mr. Loyd based his determination were presented to him for the first time at the hearing and that Respondent had therefore failed to comply with the [United States district] court's order to submit all the records to the auditor. Respondent's wife, Alice Goetz, who keeps records for Respondent, testified that the documents reviewed by the auditor were prepared on the dates indicated and that no substantive changes had been made to them (Tr. 313). The auditor did not question the authenticity of these documents and said that they may have been presented to him during the audit but that he had not matched them up before the hearing (Tr. 343). I find that the documents, whether submitted in compliance with the [United States district] court order or not, are authentic and relevant and that assessments do not have to be remitted on 1,170 head of cattle. Assessments also do not have to be remitted for the 30.5 head of cattle that the auditor estimated that Respondent had purchased from an "F. Chapman" on 1/12/91 (CX 18 at 10). [Mrs. Goetz] testified that the check memo for this purchase, which she signed, shows that the purchase was for 7,699.45 bushels of corn rather than for cattle (RX 35; Tr. 286-87). Likewise, the check to ["F.] Chapman["] on 3/26/94 (RX 166), rather than being payment for what the auditor estimated was 174.1 head of cattle (CX 18 at 15), was instead payment for corn.

A check reflecting a transaction between Respondent and "J. Hartman" on 5/20/91 (RX 58) is too vague to support the auditor's conclusion that it reflects a purchase of an estimated 7.3 head of cattle (CX 18 at 10). Another check, for a transaction with an "M. Bechman" on 12/14/93 (RX 154), states that it was for "machine hire" rather than for the purchase of what the auditor estimated was 9.6 head of cattle (CX 18 at 14). Two checks payable to "D. Goetz" on 12/14/93 (RX 153, 155) appear to reflect, as Respondent contends, an overpayment for cattle, rather than, as the auditor found (CX 18 at 14), an estimated purchase, respectively,

of 21.1 and 21.7 head of cattle.

Respondent contends, in regard to his purchase of 228 head of cattle from Scott Clements in Nebraska on 2/22/92, that, contrary to the auditor's determination, he did not collect an assessment from Mr. Clements for these cattle and that he was also not the collecting person for the transaction because it occurred in Nebraska. Mr. Clements, however, testified that . . . Respondent's truck driver [deducted] $1.00 a head [from the purchase price of the] cattle . . . and [that he, Mr. Clements,] was told that Respondent "would take care of the checkoff." (Tr. 11, 28-30.) Respondent first denied collecting an assessment from Mr. Clements (Tr. 271), but then equivocated as follows:

BY MS. DESKINS:

Q. Okay. Are you saying that when this [sic] cattle was purchased from Mr. Clements, no checkoff money was deducted?

[BY MR. GOETZ:]

A. I don't know. It wasn't my responsibility.

Tr. 283.

I find Respondent's denial to be too equivocal to be credible, but that Mr. Clements' testimony was credible that Respondent through his agent collected an assessment on the 228 head of cattle he bought from Mr. Clements. . . . [However,] section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) provides that, in Nebraska, a brand inspector instead of the purchaser shall be the collecting person if there has been a [physical] brand inspection. Otherwise, the "person paying the producer" is the collecting person. [As discussed in this Decision and Order, *infra*, pp. 51-58, the evidence establishes that a brand inspector was present during the February 22, 1992, transaction between Respondent and Mr. Clements, and I infer, based on Mr. Clements' testimony, that there was a physical brand inspection. Therefore, in accordance with section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)), the brand inspector was the collecting person for this transaction.]

Respondent further contends that many of Respondent's cattle transactions were "private treaty sales" which are sales between producers. In these transactions, Respondent argues, both the seller and the buyer are liable for the collection and

remittance of the assessment and that Complainant, by attempting to collect assessments from Respondent, may be trying to collect twice for the same transactions since Complainant has not proven that the cattle sellers have not paid the assessments. Complainant, however, has shown that Respondent was the "collecting person" as defined by section 1260.106 of the [Beef Promotion Order (7 C.F.R. § 1260.106)] since Respondent was "the person making payment to a producer" in these transactions. As the collecting person, Respondent was responsible under the Beef Promotion Order for collecting and remitting the assessment regardless of whether the transactions were private treaty sales. Complainant has therefore established its *prima facie* case that Respondent either collected or should have collected assessments involving transactions in which he was the collecting person and that he did not remit such assessments. [Once Complainant has established its *prima facie* case], it is Respondent's burden to rebut Complainant's case by showing that [Respondent] was not responsible for the assessments in these . . . private treaty sales [based upon the payment of the assessments] . . . by the sellers. Respondent has not done so.

[Section 1260.314(a)(2)(ii) of the Beef Promotion] Regulations [(7 C.F.R. § 1260.314(a)(2)(ii))] provides that assessments do not have to be collected if the person buying the cattle establishes that the cattle were resold not later than 10 days from the date on which [the person acquired ownership]. Respondent contends that the auditor erred in finding that Respondent had held cattle more than 10 days before selling them and that this error was caused by Mrs. Goetz' record keeping. The auditor had determined sale dates by relying on the sale invoices prepared by Mrs. Goetz. Her practice, she said, was to write on the invoices the date she prepared them rather than the actual date the cattle were resold. She testified that she was sometimes over a week late in preparing the invoices (Tr. 364-65). Respondent contends that, because of Mrs. Goetz' delay in preparing the invoices, many cattle were resold within the 10-day period even though the invoices show a later date. He maintains that the feedlot records for the cattle also indicate that resales occurred earlier than the dates appearing on the invoices. [Respondent] cites as an example 66 cattle that he bought at Norton Livestock [Auction, Inc.,] on January 7, 1993, and then sold to "D. Goetz." (RX 117; Tr. 371-72.) The invoice date for the sale to D. Goetz [is] January 2[0], 1993, but Respondent contends that the cattle were resold before January 2[0, 1993]. A feedlot computer printout for February 1993 shows that, as of the date of the printout, D. Goetz owned the cattle and that they had been "on feed" for 49 days at the feedlot (RX 119, 120, 126; Tr. 371-73).

Respondent argues that the feedlot record shows that title to the cattle was

transferred to D. Goetz "[w]hen they hit the lot" which would have been sometime around January [10, 1993] (Tr. 375[-76]). Mrs. Goetz also testified that the feedlot record reflects cattle ownership and that Respondent usually resold cattle within a week after buying them, sometimes the next day (Tr. 389-90). However, this was not [Respondent's] invariable practice. He referred to the cattle he resells soon after buying them as "swap" cattle, but he testified that he also keeps some cattle for 30 or more days after buying them (Tr. 260, 264-65). Mr. Loyd, the auditor, testified that he relied on Respondent's sale invoices rather than the feedlot records to determine resale dates because he found that the feedlot records contained conflicting information and that it is the practice of auditors to rely on sale invoices to determine when title to cattle changes (Tr. 422). Mrs. Goetz also testified that she did not prepare the feedlot records, that she was not actually familiar with them, and that she could not reconcile the differences appearing on these records (Tr. 396-98). Respondent, moreover, did not offer the testimony of the person or persons who prepared the feedlot records to explain the information on them or how . . . the actual dates that cattle were bought or sold [can be determined from the feedlot records]. The feedlot record for the cattle sold to D. Goetz shows that the cattle had been at the feedlot for 49 days (RX 126), thus indicating that they had been there since about January 10[, 1993]. However, this does not necessarily show that the [cattle] were actually owned by D. Goetz since th[e date that the cattle had been in the feedlot] and the feedlot record does not otherwise provide a sale date.

Mrs. Goetz' testimony that she sometimes inadvertently used an incorrect sale date on some invoices is credible, but, even so, she did not testify that all sale invoices had a wrong sale date or that the January 2[0, 1993,] date for the sale to D. Goetz was incorrect. While one might infer, in the absence of other evidence, that January 10[, 1993,] was the date that Respondent sold the cattle to D. Goetz, this inference fails in the face of the much stronger direct evidence presented by Respondent's sales invoice showing that the cattle were sold on January 2[0], 1993. I find that the sale dates appearing on Respondent's sale invoices, relied on by the auditor in determining that cattle were resold more than 10 days after their purchase, were the presumptive sale dates in the absence of evidence showing, in specific instances, that such dates were incorrect. Respondent has therefore failed to establish that, except for the following transactions, he resold cattle within 10 days of purchasing them.

As to an estimated 106 head of cattle that the auditor found had been held by Respondent more than 10 days before selling them at Syracuse Sale [Company] on 12/16/91 (CX 18 at 18), Respondent has established that these cattle were resold

within the 10-day period. The resale date the auditor determined as 12/16/91 was based on a deposit slip dated Monday, 12/16/91 (RX 69). However, Mrs. Goetz testified that sales at Syracuse [Sale Company] take place on Friday and that the deposit slip therefore reflects the sale of cattle on the Friday before she made the deposit, which means the sale would have been on Friday, 12/13/91 (Tr. 351-55). She said that these cattle sold at Syracuse [Sale Company] included those that Respondent had bought at Hays Livestock [Market Center, Inc.,] on 12/4/91, at Oakley Livestock [Commission Co., Inc.,] on 12/7/91, and at Wakeeney Livestock [Commission Company] on 12/10/91 (RX 66, 67, 68). She testified that this could be determined by the abbreviations that Respondent wrote on the purchase invoices at the time he bought them to direct where the cattle were to be sent. The purchase invoices for these cattle indicate with an "S" or a "Syr" the cattle that were destined for the Syracuse Sale [Company] (Tr. 357-58). Thus, [Respondent established that] the 106 head of cattle were [resold] at Syracuse [Sale Company] on 12/13/91, [not later than 10 days from the date on which Respondent acquired ownership of the cattle].

Respondent contends that assessments also are not due for those "swapping" transactions set forth on page 29 of the Compliance Report (CX 18 at 29), because, as the auditor conceded at the hearing (Tr. 424), the cattle were resold within 10 days [from the date on which Respondent acquired ownership of the cattle]. The auditor, however, determined that Respondent should have remitted assessments for these cattle because, regardless of whether these cattle were resold within the 10-day period, the records for these transactions ("Certification of Non-Producer Status" forms), show that Respondent had collected assessments on the cattle. The forms, signed by Respondent, certify that "I collected $1.00 per head." (CX 2-4, 7, 9.)

Bryce Schumann, the Coordinator of Industry Relations for the Kansas Beef Council, oversees the collection of the assessments in Kansas. He testified that all money collected as assessments on cattle transactions are to be remitted to the [Kansas Beef] Council:

BY MS. DESKINS:

Q. Is it the general practice when someone collects assessments that they are going to submit to the Qualified State Beef Board or the Beef Board itself?

[BY MR. SCHUMANN:]

A. It is their [sic] responsibility of the collecting person to forward that to the Kansas Beef Council, yes, it is.

Q. Has Mr. Goetz ever submitted any assessments to the Kansas Beef Council?

A. No, he has not.

Tr. 138.

Respondent argues that he did not collect these assessments despite his signed statements. He claims he signed only blank forms at sale barns and that his certification on the non-producer status forms that he collected the assessments is therefore an error . . . [and Mr. Loyd testified that Respondent sold the 174 cattle listed on page 29 of the Compliance Report (CX 18 at 29) not later than 10 days from the date on which Respondent acquired ownership of the cattle. I find, based on Respondent's and Mr. Loyd's testimony that Respondent has established that he resold these 174 head of cattle not later than 10 days from the date on which he acquired ownership of the cattle. Therefore, Respondent is not required under the Beef Order and Beef Regulations to pay assessments for the 174 head of cattle listed on page 29 of the Compliance Report (CX 18 at 29).]

Finally, Respondent contends that Complainant is precluded from going back more than 3 years to require him to pay assessments. Respondent's argument is based on [the Collection - Compliance Reference] Guide [prepared by the compliance manager for the Cattlemen's Beef Promotion and Research Board] in 1993 which provides that [collecting] persons subject to the Beef Promotion Order [must maintain records and documentation pertaining to the checkoff for at least] 3 years [following each transaction] (RX 169[at 5; Tr. 241-42]). The guide, however, is not a rule or regulation binding on Complainant's enforcement proceedings. Neither [the Beef Promotion Act,] the Beef Promotion Order, nor the Beef Promotion Regulations provides for any . . . limitation [on the time within which an action may be instituted to collect unremitted assessments and late payment charges, assess civil penalties, and issue a cease and desist order]. Complainant may therefore seek [to collect unremitted assessments and late payment charges] from the effective date of the Beef Promotion Order to June 30, 1994[, and seek a cease and desist order and the assessment of a civil penalty based on violations from the effective date of the Beef Promotion Order to June 30,

1994].[2]

Thus, for the period January 1, 1990, through June 30, 1994, Respondent owes $12,[441] for the 12,[441] head of cattle for which he failed to remit assessments. The [late payment charge] due, using an average per head of cattle based on the [late payment charge] determined by the auditor, is $11,[553].

The number of cattle for the period October 1, 1986, through December 31, 1989, for which Respondent should have remitted assessments is [8,982] (based on the average number of monthly cattle transactions occurring [from] January 1, 1990[, through June 30, 1994]). Respondent thus owes $[8,982] for these transactions. The [late payment charge] due on these cattle is $3[3],6[01].

In summary, the total unremitted assessments for the periods October 1, 1986, through December 31, 1989, and January 1, 1990, through June 30, 1994, is $2[1,423] and the total [late payment charges] is $4[5,15]4. The total amount owed by Respondent [to the Kansas Beef Council] is $6[6,577].

. . . .

Findings of Fact

1. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, [resides in Park, Kansas, and] is engaged in the business of buying and selling cattle in Kansas and other states.

2. Respondent is subject to the Beef Promotion and Research Act [of 1985 (7 U.S.C §§ 2901-2911)] and the [Beef Promotion and Research] Order [(7 C.F.R. §§ 1260.101-.217)] and the [Rules and] Regulations [(7 C.F.R. §§ 1260.301-.316)] promulgated pursuant to the [Beef Promotion and Research] Act [of 1985].

3. For the period from October 1, 1986, through June 30, 1994, Respondent was the collecting person as defined by the [Beef Promotion and Research] Order [(7 C.F.R. §§ 1260.101-.217)] and the [Rules and] Regulations [(7 C.F.R. §§ 1260.301-.316)] in transactions involving 2[1,423] head of cattle.

4. As the collecting person, Respondent was responsible for collecting $1.00 for each head of cattle he purchased in these transactions and responsible for remitting the assessments to a [qualified] State . . . beef [council]. . . .

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[2]Paragraph III(L) of the Complaint [alleges that Respondent failed to remit assessments during the period 1986 through the date the Complaint was filed, October 29, 1993.] . . . No motion to amend the Complaint [to include allegations that Respondent failed to remit assessments during the period October 30, 1993, through June 30, 1994, was filed]. However, Respondent did not object at the hearing to litigation of transactions occurring after October 1993 and did not raise the issue in [Respondent's] Brief.

5. Respondent did not remit assessments to a [qualified] State . . . beef [council] . . . as the collecting person for transactions occurring [from] October 1, 1986[, through] June 30, 1994, involving 2[1,423] head of cattle.

[6. Respondent did not pay any late payment charges for assessments that Respondent failed to remit when due.]

[7. As the person responsible for collection and remittance of assessments, Respondent was responsible for transmitting a report of assessments to the Kansas Beef Council each month during the period October 1, 1986, through June 30, 1994.]

[8. Respondent did not transmit any report of assessments to the Kansas Beef Council during the period October 1, 1986, through June 30, 1994.]

Conclusions of Law

[1.] Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, [willfully] violated section 1260.172 [of the Beef Promotion and Research Order] and [sections] 1260.311 and 1260.312 of the [Rules and] Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to collect and remit assessments to a [qualified] State . . . beef [council] . . . [for 21,423 head of cattle during] the period . . . October 1, 1986, through June 30, 1994.

[2. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, willfully violated section 1260.175 of the Beef Promotion and Research Order (7 C.F.R. § 1260.175) by failing to pay late payment charges for assessments that Respondent failed to remit to a qualified State beef council, when due, during the period October 1, 1986, through June 30, 1994.]

[3. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, willfully violated section 1260.201 of the Beef Promotion and Research Order and section 1260.312 of the Rules and Regulations (7 C.F.R. §§ 1260.201, .312) by failing to transmit monthly reports of assessments to the Kansas Beef Council during the period October 1, 1986, through June 30, 1994.]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises seven issues in Respondent's Petition Appealing Decision and Order of Administrative Law Judge James W. Hunt Dated February 26, 1997, to the Judicial Officer, Combined With Supporting Brief [hereinafter Respondent's Appeal Petition].

I. Respondent's Constitutional Issues

A. Introduction

First, Respondent requests that I:

(a) Declare the Act, the Order, and all of the rules and regulations issued or adopted under either of the foregoing, to be unconstitutional and order that these administrative proceedings be dismissed for lack of jurisdiction; or, in the alternative,

(b) Order that the enforceability of any decisions made in these administrative proceedings is made specifically subject to the constitutionality of the Act, the Order, and all of the rules and regulations issued or adopted thereunder, as determined in the pending federal court case filed by the Respondent asserting such constitutional challenge, or any appeal taken therefrom; and,

(c) Reverse all adverse findings, holdings or orders of the ALJ which affect this Appeal Request # 1.

Respondent's Appeal Petition at 5.

Respondent raises four issues regarding the constitutionality of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations in his appellate filings. I disagree with Respondent's contention that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional.

B. First Amendment

First, Respondent argues that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional based on *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995) and *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993) (Respondent's Appeal Petition at 2-5). In *Wileman Bros.* and *Cal-Almond*, the United States Court of Appeals for the Ninth Circuit held that forced assessments to pay for generic advertising under marketing orders promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 [hereinafter AMAA] violate the First Amendment rights of those who

were required to pay assessments. However, the Supreme Court of the United States reversed the Ninth Circuit's *Wileman* decision and held that compelled funding of generic advertising does not implicate the First Amendment. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).[3] Specifically, the Supreme Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders do not compel producers to endorse or finance any political or ideological views.

An examination of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations reveals that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations have the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra.* First, Respondent is not prohibited or restrained by the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations from promoting or advertising his products or from communicating any other message to any audience. Section 501(b)(4)-(5) of the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that neither the Beef Promotion Act nor the Beef Promotion Order prohibits or restricts any individual advertising or promotion or replaces the individual advertising or promotion efforts of producers or processors (110 Stat. 1030). This factor distinguishes the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[4]

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[3]Further, the Supreme Court of the United States vacated the judgment of the United States Court of Appeals for the Ninth Circuit in *Cal-Almond Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995) and remanded the case for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997).

[4]*See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates

Further, Respondent is alleged in this proceeding to have failed to collect assessments from producers and remit those assessments to a qualified State beef council. The requirement that Respondent collect assessments from others and remit those assessments to a qualified State beef council does not reduce resources available to Respondent to conduct his own advertising or communicate other messages. Even if the requirements of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations did reduce resources available to Respondent to engage in his own speech, this incidental effect would not amount to a restriction on speech.[5]

Second, Respondent is not compelled to speak by the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations. This fact distinguishes the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[6] While Respondent is compelled under the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations to collect and remit assessments used to fund

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the First and Fourteenth Amendments).

[5]*See generally Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2138-39 (stating that the First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget and the fact that an economic regulation may indirectly lead to a reduction in an individual advertising budget does not itself amount to a restriction on speech); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 45 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (stating that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the Mushroom Promotion, Research, and Consumer Information Act of 1990 and the Mushroom Promotion, Research, and Consumer Information Order does not amount to a restriction on speech).

[6]*See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

promotion of beef and beef products, this requirement is not a requirement that Respondent speak. Respondent is not publicly identified or publicly associated with the beef promotion program, and Respondent is not required to respond to the beef promotion program.

Third, the beef promotion program has no political or ideological content, and Respondent is not compelled by the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations to endorse or finance any political or ideological views. Respondent, however, contends that the beef promotion program is not ideologically neutral (Respondent's Opposition to Complainant's Appeal Petition at 8) because it expresses a "doctrine, opinion or way of thinking" that the consumption of beef is healthy and "not all agree with that opinion" (Respondent's Brief, Appendix # 2 at 44). However, the United States Court of Appeals for the Third Circuit has directly addressed this issue and characterizes the beef promotion program as ideologically neutral as follows:

> 2. *Ideological Neutrality*
>
> The purpose underlying the Beef Promotion Act is ideologically neutral. The federal government seeks to bolster the image of beef solely to increase its sales; it harbors no intent to "prescribe orthodoxy" or "communicate an official view," *see e.g., Wooley v. Maynard*, 430 U.S. at 716-17, 97 S. Ct. at 1436-37 (state required that license plates bear state motto to "promote appreciation of history, individualism, and state pride"); *West Virginia Bd. of Education v. Barnette*, 319 U.S. at 624-25, 63 S. Ct. at 1179 (compulsory flag salute sought to engender "national unity").

United States v. Frame, 885 F.2d 1119, 1135 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

Further, the United States District Court for the District of Kansas, relying on *Frame,* specifically rejected Respondent's characterization of the beef promotion program as ideological and held that the beef promotion program is ideologically neutral. *Goetz v. Glickman, supra*, 920 F. Supp. at 1183.

Moreover, section 501(b)(8) of the Federal Agriculture Improvement and Reform Act specifically provides that the Beef Promotion Act establishes a promotion program to produce "nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding . . . markets" (110 Stat. 1031).

If Respondent's view of ideological expression were to be adopted, almost all

speech in which a product or person is characterized would constitute ideological expression. However, I find nothing in the record that remotely indicates that the beef promotion program has any ideological content. The beef promotion program "harbors no intent to prescribe orthodoxy" nor does the program "communicate an official view," and I specifically reject Respondent's contention that the statement that "the consumption of beef is healthy" is ideological expression.[7]

The absence of political or ideological content in the beef promotion program distinguishes the program from cases in which the Supreme Court has found that required financing of political or ideological speech violates the right to freedom of speech.[8]

I find that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the First Amendment issue raised by Respondent in Respondent's appellate filings. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this proceeding are not relevant to Respondent's First Amendment challenge to the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations. Moreover, prior to the United States Supreme Court's *Wileman* decision, First Amendment challenges to the beef promotion program have been rejected by United States Court of Appeals for the Third Circuit, *United States v. Frame, supra*, 885 F.2d at 1135, and the United States District Court for the District of Kansas, *Goetz v. Glickman, supra*, 920 F. Supp. at 1183.

Thus, the requirement under the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations that Respondent collect and remit assessments for the promotion of beef and beef products does not violate Respondent's rights to freedom of association and speech under the First

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[7]See generally, *In re Donald B. Mills*, 56 Agric. Dec. ___, slip op. at 46 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (holding that the mushroom promotion program (a promotion program similar in nature, purpose, and content to the beef promotion program) has no political or ideological content).

[8]*See Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

Amendment to the Constitution of the United States, and Respondent's rights under the First Amendment are not even implicated by the Beef Promotion Act, the Beef Promotion Order, or the Beef Promotion Regulations.

C. Taxation

Second, Respondent contends that "[t]he Beef Promotion Act is a direct tax which is unconstitutional because it is not apportioned as required by the United States Constitution" and "it does not have a public purpose." (Respondent's Opposition to Complainant's Appeal Petition at 8.)

Article I, section 8, clause 1, of the Constitution of the United States provides:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States[.]

Congress' power to tax under this provision of the Constitution of the United States is limited, as Respondent contends, in two ways: (1) the revenue must be collected for public purposes; and (2) all duties, imposts, and excises must be uniform throughout the United States.[9] However, the imposition of assessments or fees under a regulatory scheme does not constitute a tax within the meaning of the Constitution of the United States, unless the real purpose and effect of the statute and the regulations is to raise revenues for the general support of the government.[10] The test to be applied to determine whether a regulatory scheme is a tax is to examine the purposes of the statute as a whole and if, based on the examination, the primary purpose of the regulatory scheme is to raise revenue and regulation is merely incidental, then the imposition is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that revenue is incidentally obtained does not make the imposition a tax,

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[9]*South Carolina v. United States*, 199 U.S. 437, 450 (1905).

[10]*Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 595-96 (1884); *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1314 (D.C. Cir. 1988); *Brock v. Washington Metro. Area Transit Auth.*, 796 F.2d 481, 488 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *Cities Service Co. v. Federal Energy Admin.*, 529 F.2d 1016, 1029 (Temp. Emer. Ct. App. 1 75), *cert. denied*, 426 U.S. 947 (1976); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943); *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996).

but rather an imposition for the purpose of effectuating the congressional statute.[11] Courts have found a wide variety of government imposed fees, assessments, and charges are not taxes in the constitutional sense, but rather, mere incidents of the regulation of commerce.[12]

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[11]*Cities Service Co. v. Federal Energy Admin.*, 529 F.2d 1016, 1029 (Temp. Emer. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976); *Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943); *Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996); *Mulroy v. Block*, 569 F. Supp. 256, 261 (N.D.N.Y. 1983) (mem. decision), *aff'd per curiam*, 736 F.2d 56 (2d Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

[12]*See, e.g., Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 595 (1884) (holding that a $.50 duty imposed on ship owners for each immigrant passenger which is paid to the United States Treasury and deposited into a separate fund used to defray the expense of regulating immigration and for the care and relief of immigrants is not a tax subject to the limitations in article I, section 8, clause 1, of the United States Constitution, but a mere incident of the regulation of commerce); *Brock v. Washington Metro. Area Transit Auth.*, 796 F.2d 481, 488-89 (D.C. Cir. 1986) (holding that the requirement that the Washington Metropolitan Area Transit Authority contribute to a special fund established under the Longshore and Harbor Workers' Compensation Act, which is used for the payment of several kinds of workers' compensation payments, is the imposition of a fee, rather than a tax, because the primary purpose of the statute is regulation, not the raising of revenue for the general support of the government), *cert. denied*, 481 U.S. 1013 (1987); *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (holding that a $.50 per hundredweight deduction on the proceeds of milk sold in commerce which is required, in accordance with the Agricultural Act of 1949, as amended, to be remitted to the Commodity Credit Corporation, a federal corporate entity within the United States Department of Agriculture, and which is imposed to decrease the oversupply of milk and offset a portion of the cost of the milk price support program, is not a tax), *cert. denied*, 465 U.S. 1080 (1984); *Moon v. Freeman*, 379 F.2d 382, 391-92 (9th Cir. 1967) (holding that the requirement under the Agricultural Act of 1964 that wheat exporters purchase export certificates, which requirement is designed to raise farmer income, avoid budgetary increases, and meet responsibilities under international wheat agreements, is an exercise of the commerce power and not legislation designed to raise revenue); *Morrison Milling Co. v. Freeman*, 365 F.2d 525, 529 n.3 (D.C. Cir. 1966) (stating that a requirement that wheat processors purchase certificates in order to process wheat is not a tax because the purpose of the statute under which the certificates are required to be purchased is to regulate the price of wheat and the proceeds from the purchases are used to guarantee wheat growers minimum prices for wheat; the federal power relied on is the commerce power and the revenue raised is for a regulatory purpose and not to contribute to the general funds of the United States Treasury), *cert. denied*, 385 U.S. 1024 (1967); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957) (holding that the imposition of penalties under the Agricultural Adjustment Act of 1938 for marketing wheat in excess of farm marketing quotas, designed to avoid problems of deficits and surpluses, is an imposition under the commerce clause and not an exercise of the Congress' taxing power); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943) (holding that the imposition under the Agricultural Adjustment Act of 1938 of a sanction for cultivation and sale of cotton in excess of marketing quotas is not the levying of a tax under the government's taxing power, but a method adopted by the Congress for the purpose of regulating the production of cotton affecting interstate commerce); *Goetz v.*

The Beef Promotion Act does not raise revenue for the government. Regulation to strengthen the beef industry's position in the market place and to maintain and expand markets and uses for beef and beef products are the primary purposes of the Beef Promotion Act. The mere fact that the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations require Respondent to collect assessments and remit those assessments to a qualified State beef council which is required to use the assessments to carry out the purposes of the Beef Promotion Act does not render the regulatory scheme a tax.[13]

D. Interstate Commerce

Third, Respondent contends that "[t]he Beef Promotion Act is not a valid regulation of interstate commerce under the Commerce Clause because it does not have a public purpose." (Respondent's Opposition to Complainant's Appeal Petition at 8.) The determination of what constitutes a public interest initially belongs to Congress. The Beef Promotion Act contains specific findings and a declaration by Congress that the Beef Promotion Act is in the public interest (7 U.S.C. § 2901(a)(2), (4), (b)). Further, the two courts that have addressed the issue concluded that "Congress had, at the very least, a 'reasonable' basis for concluding that [the Beef Promotion Act] was in the public interest[,]" *United States v. Frame, supra*, 885 F.2d at 1139, and that "[t]he court will not second-guess the Congress' determination that stimulation of the beef industry is in the public interest." *Goetz v. Glickman, supra*, 920 F. Supp. at 1182.

Moreover, section 501(b)(1) of the Federal Agriculture Improvement and Reform Act of 1996 describes the Beef Promotion Act as "in the national public interest and vital to the welfare of the agricultural economy of the United States" and section 501(b)(8) of the Federal Agriculture Improvement and Reform Act of 1996 specifically states that the Beef Promotion Act is designed to "further specific

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Glickman, 920 F. Supp. 1173, 1181 (1996) (holding that the Beef Promotion Act does not raise revenue for the government and the mere fact that money changes hands in the pursuit of the object of the Beef Promotion Act (promotion of the beef industry) does not render the regulatory scheme under the Beef Promotion Act a tax), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996); *Mandel v. Block*, 573 F. Supp. 1522, 1528-29 (S.D.N.Y. 1983) (same as *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983)); *Mulroy v. Block*, 569 F. Supp. 256, 261 (N.D.N.Y. 1983) (mem. decision) (same as *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983)), *aff'd per curiam*, 736 F.2d 56 (2d Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

[13]*Goetz v. Glickman*, 920 F. Supp. 1173, 1181 (1996), *appeal docketed*, No. 96-3120 (10th Cir. Mar. 27, 1996).

national governmental goals, as established by Congress" and "further the governmental policy and objective of maintaining and expanding . . . markets" (110 Stat. 1030-31).

I find no basis for Respondent's contention that the Beef Promotion Act does not have a public purpose.

Respondent also contends that "the Beef Promotion Act is not valid regulation of interstate commerce under the Commerce Clause because it is not regulatory" . . . [and] "there is no activity being regulated by the Beef Promotion Act." (Respondent's Opposition to Complainant's Appeal Petition at 8-9.) Again, the issues of whether the Beef Promotion Act is regulatory and whether the Beef Promotion Act regulates an activity were addressed in *Goetz* and *Frame* and both courts held that the Beef Promotion Act is a valid regulation of interstate commerce. The court in *Goetz* states:

> Plaintiff [Respondent in this proceeding] argues that Congress was intending to regulate advertising in the [Beef Promotion] Act. Plaintiff ignores the language of the statute, which provided that the purpose of the [Beef Promotion] Act was to strengthen the beef industry, not to regulate the advertising industry. The objectives contained in the [Beef Promotion] Act are valid. The stimulation of trade in a particular industry is a proper regulatory activity. It was a legitimate goal for Congress to seek to strengthen the beef industry.
>
> Plaintiff ignores reality by taking the position that the production of beef does not substantially affect interstate commerce. Plaintiff ignores the fact that beef and beef products move in interstate commerce. It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause. Congress had a rational basis for finding that the beef industry substantially affects interstate commerce.
>
> This court rejects the plaintiff's argument that the commerce power is limited to restricting or prohibiting activity. As the Third Circuit noted in *United States v. Frame*, 885 F.2d at 1126, "it is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce." The Beef Promotion Act regulates interstate commerce in beef through the imposition of a monetary assessment. The collected assessments are spent on beef promotion and advertising.

Advertising stimulates consumer demand for the product being promoted. *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343, 106 S. Ct. 2968, 2977-78, 92 L.Ed.2d 266 (1986). The promotion of beef represents a valid exercise of Congress' broad power to stimulate commerce. *United States v. Frame*, 885 F.2d at 1125.

The *Frame* decision also rejected the argument that the [Beef Promotion] Act was not a "regulatory" program. The Third Circuit found that Congress established the Act to "strengthen and expand" the nation's beef markets. *Id.* The court noted Congress has in the past regulated commerce by influencing the supply side of agricultural markets (through quotas, loans and subsidies) as well as the demand side (through direct government purchases). In passing the Beef Promotion Act, Congress chose to promote and stimulate the demand side of the market indirectly, by influencing consumer attitudes towards beef. *Id.* at 1126. As noted in *Frame*, the legal definition of "regulate," rather than a more restrictive definition from a standard dictionary of the English language, should be applied in this context. *Id.* at 1126 n.5.

In *Frame*, the court likewise considered an argument that the [Beef Promotion] Act is unconstitutional because no "activity" is being regulated. In *Frame*, the defendant argued that Congress' failure to specify the particular activity being regulated was fatal. The court stated, "we decline to invalidate an otherwise lawful exercise of the commerce power on the basis Congress has not specified whether it is regulating the `activity' of `consumer beef purchases,' `interstate beef sales,' or `national beef markets.' Each activity is regulated, and is validly regulated by Congress." *Id.* at 1127.

Goetz v. Glickman, supra, 920 F.2d at 1179-80.

Respondent further contends that "[t]he Beef Promotion Act is not valid regulation of interstate commerce under the Commerce Clause because there is not a rational connection between the regulatory means selected and the asserted ends of the Beef Promotion Act." (Respondent's Opposition to Complainant's Appeal Petition at 9.)

Congress states that the purposes of the Beef Promotion Act are to strengthen the beef industry and to maintain and expand markets and uses for beef and beef products (7 U.S.C. § 2901(b)). The means chosen by Congress to strengthen the

beef industry and maintain and expand markets and uses for beef and beef products is a regulatory scheme to stimulate demand for beef and beef products through promotion, advertising, research, and consumer and industry information. These endeavors are rationally connected to the purposes of the Beef Promotion Act. *United States v. Frame, supra*, 885 F.2d at 1127; *Goetz v. Glickman, supra*, 920 F. Supp at 1180.

E. Equal Protection

Fourth, Respondent contends that "[t]he Beef Promotion Act is unconstitutional because it violates [Respondent's] [r]ight to [e]qual [p]rotection under the Fifth Amendment of the United States Constitution." (Respondent's Opposition to Complainant's Appeal Petition at 9.) Specifically, Respondent contends that the Beef Promotion Act violates his right to equal protection of the laws "[b]ecause assessments under the Beef Promotion Act are only taken from or collected by producers, importers and collecting persons, and are not taken from or collected by other persons in the industry such as packers, processors, transporters, grocers, truckers, etc." (Respondent's Brief, Appendix # 2 at 40).

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to the federal government.[14]

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[14]*See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2108 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that

Equal protection requires that persons similarly situated be treated alike. However, virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications.[15] The general rule is that legislation is presumed to be valid and will be sustained if the statute's classification scheme is rationally related to a legitimate governmental interest, unless the statute creates a suspect classification or impinges upon a constitutionally protected right.[16]

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while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

[15]*See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (stating that the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding that exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating that the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

[16]*Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997); *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996); *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Dallas v. Stanglin*, 490 U.S. 19, 23 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 81 (1988);

Equal protection analysis requires a two-part inquiry: 1) whether the challenged legislation has a legitimate governmental purpose; and 2) whether the challenged classification is rationally related to that legitimate governmental purpose. Rational-basis scrutiny is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). All that is needed to uphold the classification scheme is to find that there are "plausible,"[17] "arguable,"[18] or "conceivable"[19] reasons which may have been the basis for the distinction.

Congress declared that the purposes of the Beef Promotion Act are to strengthen the beef industry's position in the marketplace and to maintain and expand existing markets and uses for beef and beef products. 7 U.S.C. § 2901(b). The Supreme Court of the United States has recognized the legitimate governmental interest in creating other mandatory marketing order programs for "advancing the interests of producers" and to "raise producer prices," *Block v.*

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam).

[17]*FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (holding that where there is a plausible reason for a legislative classification, the equal protection inquiry is at an end); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (stating that in general, the equal protection clause is satisfied so long as there is a plausible policy reason for the classification); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 116, 179 (1980) (holding that where there is a plausible reason for a legislative classification, the equal protection inquiry is at an end).

[18]*Vance v. Bradley*, 440 U.S. 93, 112 (1979) (holding that the admission that the facts in support of a legislative classification are arguable immunizes the legislative classification from an equal protection attack); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) (stating that a legislative classification is not arbitrary if any state of facts reasonably can be conceived that would sustain the classification and it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength).

[19]*Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993) (stating that a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (stating that in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification); *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (holding that those challenging legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker).

Community Nutrition Inst., 467 U.S. 340, 342 (1984), and has described a statutory scheme providing for generic advertising intended to stimulate consumer demand for an agricultural product as "legitimate." *Glickman v. Wileman Bros. & Elliott, Inc., supra,* 117 S. Ct. at 2141.

Moreover, I have previously held that the government's purposes, as declared in the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112), an Act the purposes of which are similar to the purposes of the Beef Promotion Act,[20] are legitimate. *In re Donald B. Mills, Inc., supra,* slip op. at 52-53.

Therefore, I find that government's purposes, as declared in the Beef Promotion Act (7 U.S.C. § 2901(b)), are legitimate.

The second step in equal protection analysis is determining whether the exemptions from the payment and collection of assessments under the Beef Promotion Act are rationally related to the legitimate governmental purposes of strengthening the beef industry's position in the marketplace and maintaining and expanding existing markets and uses for beef and beef products. The courts in *Frame* and *Goetz* each addressed this issue and found that there were several rational bases for Congress' decision: an assessment on the initial sale of cattle is

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[20]Section 1 of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, sets forth the purposes of the Act as follows:

> **§ 6101. Findings and declaration of policy**
>
> . . . .
>
> **(b) Policy**
>
> It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and
>
> (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b).

easier to administer; ranchers would be the most benefitted by the Beef Promotion Act; ranchers could pass on the cost to others; and Congress may have wanted to grant cattle producers the maximum influence in shaping the program and imposed on them the corresponding financial burdens. *United States v. Frame, supra*, 885 F.2d at 1137-38; *Goetz v. Glickman, supra*, 920 F. Supp. at 1183. Accordingly, both the *Frame* court and the *Goetz* court rejected the equal protection challenges to the Beef Promotion Act, and Respondent has not raised any issue with respect to his equal protection challenge to the Beef Promotion Act in this proceeding that would warrant a different result.

II. Statute of Limitations

Second, Respondent requests that I:

(a) Declare that the Compliance Guide in effect establishes a three-year statute of limitations with regard to any claims for assessments and penalties thereon being made in these administrative proceedings by the Complainant against the Respondent; and,

(b) Order that any and all claims for assessments and penalties thereon being made in these administrative proceedings by the Complainant against the Respondent with regard to transactions which occurred prior to October 29, 1990 are barred; and,

(c) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request # 2.

Respondent's Appeal Petition at 10.

I disagree with Respondent's contention that the Collection - Compliance Reference Guide establishes a 3-year statute of limitations. The Collection - Compliance Reference Guide, prepared and distributed by the Cattlemen's Beef Promotion and Research Board to assist qualified State beef councils to understand the Beef Promotion Order and Beef Promotion Regulations and the collection process (Tr. 240), provides variously that the collecting person must "[m]aintain records and documentation pertaining to the checkoff for at least three years following each transaction[,]" "[c]ollecting persons and producers must maintain records pertinent to the checkoff for at least three years[,]" and "all parties involved in [a] transaction [in which one party has non-producer status] should retain a copy

of the [non-producer status form] for three years" (RX 169 at 5, 6, 11). However, none of these provisions in the Collection - Compliance Reference Guide establishes a statute of limitations on claims to collect assessments and late payment charges that have not been timely remitted by the collecting person or on proceedings instituted under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Further, neither the Beef Promotion Act, the Beef Promotion Order, nor the Beef Promotion Regulations establishes a statute of limitations with regard to claims for assessments and late payment charges that have not been remitted by a collecting person in accordance with the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations or proceedings for the assessment of a civil penalty instituted under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Moreover, I agree with the ALJ that the Collection - Compliance Reference Guide is not a rule or regulation binding on Complainant's enforcement proceedings (Initial Decision and Order at 11).

III. Clements' Cattle

Third, Respondent requests that I:

(a) Declare that the Respondent is not the collecting person with regard to the Clements' cattle sale; and,

(b) Order that the Respondent is not responsible for the collection or payment of any assessment or penalty with regard to the Clements' cattle sale nor is he responsible for any reporting related thereto under the Act, the Order and any rules and regulations thereunder; and,

(c) Reverse all adverse findings, holdings and orders of the ALJ which affect his Appeal request # 3.

Respondent's Appeal Petition at 14.

I agree with Respondent that he was not the collecting person with respect to 228 head of cattle which he purchased from Mr. Clements in Nebraska on February 22, 1992. The ALJ found that Respondent, through his agent, collected an assessment on 228 head of cattle which Respondent bought from Mr. Clements on February 22, 1992, and failed to remit the assessment collected to a qualified State beef council (Initial Decision and Order at 5-6). The ALJ found Mr. Clements' testimony regarding this sale credible and Respondent's testimony regarding the

collection of an assessment from Mr. Clements "too equivocal to be credible" (Initial Decision and Order at 6). While Mr. Clements did not remember certain aspects of the sale, he consistently testified that Respondent deducted $228 from the purchase price of the 228 head of cattle to pay the assessment (Tr. 11-31). Further, while Respondent first denied collecting an assessment for the February 22, 1992, transaction with Mr. Clements (Tr. 271), I agree with the ALJ's assessment that Respondent later equivocated (Tr. 283). While the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witness credibility, normally the Judicial Officer accords great weight to an administrative law judge's credibility determinations because of the administrative law judge's ability to see and hear the witnesses.[21] I find nothing on this record that is sufficient to reverse the ALJ's credibility determinations.

Further, Respondent contends that his position that he did not deduct any assessment from the price he paid Mr. Clements is supported by Mrs. Goetz' testimony (Respondent's Appeal Petition at 12). However, I do not find Mrs. Goetz' testimony supportive of Respondent's position. Instead, I find that Mrs. Goetz' testimony indicates that she does not know whether Respondent deducted the assessment from the amount he paid to Mr. Clements for the 228 head of cattle which Respondent purchased on February 22, 1992, as follows:

> BY MR. KLAASSEN:
>
> Q. Okay, Alice, one of the first things I want to ask you just before we get going through those items is just kind of quickly in the blue book would you open it to RX-83? Would you identify what that is for me, please?
>
> [BY MRS. GOETZ:]
>
> A. It is a check, No. 1824 to Scott Clements.
>
> Q. Dated 2/22/92?
>
> A. 2/22/92.

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[21] *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 158 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997).

Q. And it's for how much?

A. $121,923.32.

Q. All right. And how -- And then there's a little memo down there as to what it's for. What is it?

A. 228 steers.

Q. Is there anything on this check that shows that there was anything like a check off withheld?

A. No, there isn't.

Q. Do you know of any records at all that would say there was a check off withheld?

A. No, I don't.

Q. Are you aware if Jerry withheld any check off at all on this?

A. No, I'm not aware of anything.

Q. Okay. Okay, do you know whether Jerry ever took possession of these cattle and brought them into the feed lot?

A. I don't know.

Tr. 347-48.

Finally, Respondent contends that there was a brand inspector present during the February 22, 1992, transaction and therefore, pursuant to 7 C.F.R. § 1260.311(c), Respondent was not the collecting person. Mr. Clements did testify that a brand inspector was present during the transaction, but that the brand inspector did not collect the assessment as follows:

BY JUDGE HUNT:

Q. Mr. Clements, just for my own information on this -- this

Complainant's Exhibit 1 -- the line that Mr. Klaassen referred to, the total number of cattle sold that is on there, the statement says, "Both the seller and the buyer have the responsibility to have the $1.00 per head assessment collected and remitted to the qualified state beef council. This form is designed for the seller to use in private treaty sales."

What is that $1.00 a head assessment that has to be collected and remitted?

[BY MR. CLEMENTS:]

A. What is it?

Q. Yes? Is that the cattle sold?

A. Yes.

Q. All the cattle you sell you have to remit -- the seller has to remit $1.00 a head and --

A. This is issued by -- in Nebraska this is issued by a brand inspector.

Q. Um-hmm.

A. Okay. And at that time -- they have changed things around several different times -- at that time the brands inspector would fill this out -- I mean, he put his little number over here, in this deal --

Q. Um-hmm.

A. -- which is the brand inspection number. He would give that to me and say -- and take his copy off and --

Q. At the time of the sale?

A. Yeah, at the time of the sale and say there, I've seen that you've sent in your dollar or do something with it.

Q. Was a brand inspector present at the time of this transaction?

A. Yes, that is what this brand inspection number is down there.

Q. But was a brand inspector present at the time of the transaction?

A. When we filled out all this?

Q. Yes? The brand inspector filled this out?

A. He put the number down there in the corner -- his writing here.

Q. Oh. But did he fill out the form?

A. No, that is my handwriting for the rest of the form. He gave -- he filled --

Q. Does he have any responsibility for collecting and remitting the money?

A. Well, I don't know what their rules are right now. It has bounced back and forth.

Q. Well, at that -- at the time of this, 1992?

A. No.

Q. He didn't?

A. He just had these forms. He had these forms and this is a little duplicated -- if you know what they look like --

Q. I am not familiar with them.

A. It is a little duplicated form. It is about three or four deals.

Q. Um-hmm. And he writes his little brand number here, takes off his copy. He sends that in with his brand ins --

Q. Okay. So it is between you and the seller to see that the $1.00 is sent in -- $1.00 a head is sent in? Now why weren't you responsible for this $1.00 a head assessment?

A. Because it was held from my check. $228 were deducted from the amount of purchase of the cattle.

Q. Okay. Did Mr. Goetz tell you this that $228 was --

A. I am 99 per cent positive that it was on my purchase sheet. We filled out the little purchase sheet --

Q. But you don't have that so what do you remem -- what do you remember, Mr. Clements?

A. I remember that it --

Q. Did he say that he was taking out the $228?

A. Yes.

Q. He told you that?

A. Yeah, and that's how come I put down a feedlot collected because I didn't have any -- any --

Q. Okay. So --

A. -- I mean, I wasn't responsible after that point.

Q. At that -- up to that point, you would have been responsible?

A. Yes, yes. It is up to the producer -- and I was the producer -- to send it in.

Q. Okay. Okay. Well, when you -- when -- I guess it is negotiated -- arranged between you and the buyer as to how much you are going to receive for your cattle, is that correct?

A. Yes.

Q. Okay. And then it is so much per head or per pound, is that how --

A. Per pound.

Q. So regardless of the price of the cattle, it is always $1.00 a head --

A. That is correct.

Q. --that is assessed? Okay.

A. That is whatever they have come up with -- whoever --

Q. Right. As far as you know?

A. And every time this critter is sold another $1.00 is taxed on.

Q. And so your understanding is that then either you or the buyer has to pay the $1.00 a head and --

A. Yes.

Q. Yes?

A. Yes.

Q. Okay. And Mr. Goetz -- did Mr. Goetz tell you that this $228 that he was deducting was being -- was going to be remitted to the Beef Council?

A. He didn't say that, no.

Q. Do you remember what he did say?

A. Just that they would pay -- they would take care of the checkoff.

Q. Okay. And that is what you called the --

A. Yes.

Q. -- the collection --

A. These four checkoffs. Yes.

Tr. 25-30.

I find, based on Mr. Clements' testimony, that a brand inspector was present at the sale, and I infer from Mr. Clements' testimony that a physical brand inspection was conducted. In accordance with section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)), the brand inspector was responsible for the collection of the assessment due as a result of the sale in Nebraska. Respondent was not responsible for collecting the assessment for the 228 head of cattle he purchased from Mr. Clements on February 22, 1992. Therefore, even though I find that Respondent's agent collected $228 from Mr. Clements and Respondent failed to remit the $228 to a qualified State beef council, I agree with Respondent that he was not the collecting person with respect to the February 22, 1992, purchase of 228 cattle from Mr. Clements and is not liable to a qualified State beef council or the Board for this assessment because section 1260.311(c) of the Beef Promotion Regulations (7 C.F.R. § 1260.311(c)) specifically provides that the brand inspector has the responsibility to collect under these circumstances.

IV. Sales at Sale Barns

Fourth, Respondent requests that I:

(a) Declare that all Certification of Non-Producer Status forms signed by the Respondent which were produced as exhibits by the Complainant in this administrative case and on which the boxes indicating "I collected $1.00 per head" were checked are in error if the person to whom such cattle were sold by the Respondent was a sale barn; and,

(b) Declare that all cattle sales included in CX-18 which were sales of cattle by the Respondent at and through any sale barns were sales which occurred within ten (10) days from the date on which the Respondent acquired ownership of such cattle; and,

(c) Order that the Respondent is not responsible for the collection or payment of any assessments or penalties thereon with regard to any cattle sales covered by CX-18 where such cattle sales by the Respondent were at and through any sale barns; and,

(d) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request #4.

Respondent's Appeal Petition at 17-18.

I disagree with Respondent's contention that evidence establishing that Respondent sold cattle to a sale barn also establishes that Certification of Non-Producer Status forms on which Respondent certified that he collected an assessment of $1.00 per head are in error and establishes that Respondent resold the cattle in question not later than 10 days from the date on which Respondent acquired ownership. I cannot infer, merely based on a finding that Respondent sold cattle to a sale barn, that the documents completed by Respondent contained erroneous certifications or that the cattle which were sold to the sale barn were acquired by Respondent not later than 10 days from the date on which Respondent acquired ownership of the cattle. However, as discussed in this Decision and Order, *supra*, pp. 25-26, I find, based on Respondent's testimony and Mr. Loyd's testimony, that Respondent established that he sold 174 cattle listed on page 29 of the Compliance Report (CX 18 at 29) not later than 10 days from the date on which Respondent acquired ownership of the cattle. Therefore, Respondent is not required under the Beef Order and Beef Regulations to pay assessments for the 174 head of cattle listed on page 29 of the Compliance Report (CX 18 at 29) which Respondent sold to Oakley Livestock Commission Co., Inc.

V. Private Treaty Sales

Fifth, Respondent requests that I:

(a) Declare that as part of the Complainant's case against the Respondent with regard to all private treaty sales covered in CX-18 in which no

designated collecting person was involved, the Complainant must prove that the seller has not paid or remitted any assessment which is required under the Act to the appropriate qualified State beef council for the Respondent to be found to be the collecting person in such transactions; and,

(b) Declare that with regard to all of the private treaty sales listed in CX-18 on pages 9 through and including page 15, (excluding the sale evidenced by CX-1 which is dealt with elsewhere in this petition and CX-19), the Complainant has failed to prove that the seller in such transactions has not paid or remitted such assessment to the appropriate qualified State beef council; and,

(c) Order that the Complainant has failed to show that the Respondent is responsible for the collection or payment of any assessments or penalties thereon with regard to any of the private treaty sales listed in CX-18 on pages 9 through and including page 15, (excluding the sales evidenced by CX-1 which is dealt with elsewhere in this petition and CX-19); and,

(d) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request #5.

Respondent's Appeal Petition at 20-21.

I agree with the ALJ that Respondent was the collecting person as defined in section 1260.106 of the Beef Promotion Order (7 C.F.R. § 1260.106) in these private treaty sales since Respondent was the person making payment to a producer in these private treaty sales (Initial Decision and Order at 7). Complainant has therefore established its *prima facie* case that Respondent either collected or should have collected assessments involving transactions in which he was the collecting person and that he did not remit such assessments to a qualified State beef council. Respondent could rebut Complainant's case by showing that Respondent was not responsible for the assessments in these private treaty sales by showing that the assessments had been paid by the producer-sellers. Respondent did not do so, and I agree with the ALJ that Complainant established by a preponderance of the evidence that Respondent was the collecting person with respect to these private treaty sales and failed to remit assessments to the appropriate qualified State beef council, as required by the Beef Promotion Order and Beef Promotion Regulations.

VI. Cattle in Section III of Respondent's Brief

Sixth, Respondent requests that I:

(a) Declare that all cattle sales identified in section III of the *Respondent's Brief* were sales which occurred within ten (10) days from the date on which the Respondent acquired ownership of such cattle; and,

(b) Order that the Respondent is not responsible for the collection or payment of any assessments or penalties thereon with regard to any cattle sales identified in section III of the *Respondent's Brief*; and,

(c) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request #6.

Respondent's Appeal Petition at 22.

Respondent identifies 258 head of cattle in section III of Respondent's Brief which Respondent contends were sold no later than 10 days from the date upon which Respondent acquired ownership of the cattle. I have carefully examined the exhibits referenced in section III of Respondent's Brief which Respondent contends supports his position that he sold these 258 cattle within 10 days from the date that he acquired ownership of the cattle. However, I do not find Respondent's evidence strong enough to reverse the ALJ. As the ALJ stated, the sales invoices prepared by Respondent regarding these 258 cattle clearly establish that Respondent did not sell these cattle within 10 days from the date he acquired them, and Respondent has failed to establish that his own invoices indicate the incorrect dates on which Respondent sold the cattle in question (Initial Decision and Order at 9).

VII. Civil Penalty

Seventh, Respondent requests that I:

(a) Declare that no penalty under 7 U.S.C. § 2908 should be imposed; and,

(b) Order that the Complainant's request that a penalty under 7 U.S.C. § 2908 be imposed against the Respondent is denied; and,

(c) Reverse all adverse findings, holdings and orders of the ALJ which affect this Appeal Request #7.

Respondent's Appeal Petition at 24.

I disagree with Respondent's position that no civil penalty should be imposed in accordance with section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)).

The ALJ determined that section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) provides "the method for determining the penalty as a late-payment charge for failure to pay assessments" (Initial Decision and Order at 13). Further, the ALJ states that the Beef Promotion Order contains no other penalty provision than section 1260.175, and Complainant's Compliance Report (CX 18 at 6-8) used section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) to calculate the civil penalty (Initial Decision and Order at 13). The ALJ concluded that, "[t]herefore, no additional penalty will be imposed." (Initial Decision and Order at 13.) Despite this analysis of section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175), the ALJ ordered Respondent to pay the Kansas Beef Council "unremitted assessments" of $22,118 and "penalties" of $46,624 (Initial Decision and Order at 12, 14) and assessed Respondent a civil penalty of $46,624 to be paid to the Treasurer of the United States (Initial Decision and Order at 14). Respondent appears to agree with the ALJ's analysis of the import of section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175), but contends that, in order to be consistent with this analysis, the ALJ should not have assessed a civil penalty to be paid to the Treasurer of the United States in addition to the "penalty" to be paid to the Kansas Beef Council (Respondent's Appeal Petition at 22-24).

I disagree with the ALJ's determination that section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) is a method for determining a penalty under the Beef Promotion Act. Section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) does not in any way limit or relate to the civil penalty that may be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)). Instead, section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) contains provisions for the imposition of late-payment charges for assessments that have not been remitted when due to the Board or a State qualified beef council. Late payment charges imposed in accordance with section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) are not designed to penalize those who fail to remit assessments when due, but rather, are designed to reimburse the entity to which assessments are not timely remitted for the time value of the assessments.

On the other hand, a civil penalty assessed in accordance with section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)) is a sanction which is designed to

deter those who violate any order issued under the Beef Promotion Act. Civil penalties imposed under section 9(a) of the Beef Promotion Act are not in any way related to assessments and late payment charges a respondent may owe the Board or a qualified State beef council under the Beef Promotion Order.

Further, assessment of a civil penalty under section 9(a) of the Beef Promotion Act is not dependent on the Beef Promotion Order or the Beef Promotion Regulations containing a civil penalty provision, as the ALJ suggests. There is no requirement in the Administrative Procedure Act, or elsewhere, that the regulations advise the public of the fact that a violation of the regulations may subject the violator to a civil penalty. Congress informed the public of that fact when it enacted the Beef Promotion Act which specifically provides for the assessment of a civil penalty of not more than $5,000 for violation of the Beef Promotion Order (7 U.S.C. § 2908(a)). When Congress has provided by statute for a civil penalty for certain conduct (violation of the Beef Promotion Order), there is no duty that the Beef Promotion Order or the Beef Promotion Regulations also inform the public of the consequences of violation of the Beef Promotion Order.[22]

Finally, I disagree with the ALJ's finding that the Compliance Report (CX 18 at 6-8) "used" section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) "to calculate the penalty." (Initial Decision and Order at 13.) Instead, while the Compliance Report unfortunately uses the word "penalty," the figures that appear on pages 6-8 of the Compliance Report under the column entitled "Penalty" are late payment charges calculated by the auditor in accordance with section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) and not civil penalties Complainant recommends be assessed in accordance with section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)).

Therefore, I disagree with Respondent's contention that no civil penalty should be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)), and I find the ALJ's determination that section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) provides the method for determining the penalty to be in error.

VIII. Failure to Transmit Reports

Complainant raises two issues in Complainant's Appeal Petition.

First, Complainant contends that the ALJ's failure to conclude that Respondent failed to file reports required by the Beef Promotion Order was in error

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[22]*See In re David Harris*, 50 Agric. Dec. 683, 688-89 (1991) (Ruling on Certified Question).

(Complainant's Appeal Petition at 3, 13).

I agree with Complainant. Each person responsible for collection and remittance of assessments is required each month to transmit a report of assessments to the qualified State beef council of the state in which the person resides (7 C.F.R. §§ 1260.201, .312). Respondent resides in Park, Kansas (Answer ¶ 1), and the qualified State beef council to which Respondent is required to transmit reports is the Kansas Beef Council (7 C.F.R. § 1260.315). Mr. Schumann, the coordinator of industry relations for the Kansas Beef Council, testified with respect to Respondent's failure to transmit reports required under the Beef Promotion Order and the Beef Promotion Regulations as follows:

> BY MS. DESKINS:
>
> Q. Is it the general practice when someone collects assessment that they are going to submit to the Qualified State Beef Board or the Beef Board itself?
>
> [BY MR. SCHUMANN]
>
> A. It is their responsibility of the collecting person to forward that to the Kansas Beef Council, yes, it is.
>
> Q. Has Mr. Goetz ever submitted any assessments to the Kansas Beef Council?
>
> A. No, he has not.
>
> Q. Has he ever submitted any reports?
>
> A. He has not.

Tr. 138.

Complainant proved by a preponderance of the evidence that Respondent did not transmit reports to the Kansas Beef Council as required by section 1260.201 of the Beef Promotion Order and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.201, .312). Therefore, I conclude that Respondent willfully violated sections 1260.201 of the Beef Promotion Order and section 1260.312 of the Beef Promotion Regulations once each month during the period October 1,

1986, through June 30, 1994, or on 93 occasions.

IX. Amount of Civil Penalty

Second, Complainant contends that the ALJ misinterpreted the language of the Beef Promotion Act and the Beef Promotion Order in determining the amount of the civil penalty and that the civil penalty assessed by the ALJ should be increased (Complainant's Appeal Petition at 3).

I agree with Complainant's contention that the ALJ misinterpreted the language of the Beef Promotion Act and the Beef Promotion Order in determining the amount of the civil penalty, and I have addressed the ALJ's error in this Decision and Order, *supra*, pp. 62-65.

Turning to the amount of the civil penalty, the Beef Promotion Act provides for a maximum of $5,000 for violation of the Beef Promotion Order, but does not provide any criteria for determining the amount of the civil penalty. Complainant recommended a civil penalty of $80,000. Mr. Barry L. Carpenter, Director of the Livestock and Feed Division, Agricultural Marketing Service, United States Department of Agriculture (Tr. 32-33), testified as to the basis for Complainant's sanction recommendation as follows:

BY MS. DESKINS:

Q. Can you tell us what sanctions the Agricultural Marketing Service wants in this case?

[BY MR. CARPENTER:]

A. There's a number of them. First of all, we would like to see an order requiring full, complete compliance with the Act and the order. There needs to be full payment of the liabilities and penalties associated with the audit that was performed. There needs to be payment of all accrued penalties from the date of that audit, payment of the liabilities and penalties associated with any additional check offs due since the date of that audit and a civilian penalty of $80,000.00.

Q. Mr. Carpenter, can you tell us why you want these sanctions? Let me rephrase. Can you tell us why the agency wants these sanctions?

> A. These sanctions are essential for several reasons. First of all, this program's been in existence since 1986 and Mr. Goetz has failed to remit any assessments during that period of time. These monies were collected from other producers and never remitted. The program has done a number of things for the meat industry and, as such, Mr. Goetz has benefitted from those -- from those impacts on the marketplace without making the proper contribution and -- and remitting the money that he collected or monies that he was responsible for paying himself. The entire beef industry and the whole philosophy behind this legislation is that all producers are obligated to contributed [sic] because it's for the gain and benefit of the entire industry and, if one segment fails to do that, it deteriorates the whole process, it leaves negative feelings in the minds of the producers who are doing their fair share and, when one entity is allowed not to do that, it detracts from the whole program and it causes unrest amongst other producers.
>
> As far as the overall check off program, it is essential to make sure that other contributors do not feel like they can totally disregard a federal law.

Tr. 435-36.

In determining the amount of the civil penalty to be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)), it is appropriate to consider the nature of Respondent's violations, the number of Respondent's violations, the damage or potential damage to the regulatory program from Respondent's violations, prior warnings or other instructions given to Respondent, and any other circumstances shedding light on the degree of Respondent's culpability.

Respondent has not inadvertently violated the Beef Promotion Order and the Beef Promotion Regulations. Respondent has been in the cattle buying business since 1949 and buys up to 200 head of cattle every day (Tr. 259, 260-64). Respondent was fully aware of the Beef Promotion Order and the Beef Promotion Regulations. The Beef Promotion Act is published in the statutes at large and the United States Code, and Respondent is presumed to know the law.[23] The Beef Promotion Order and the Beef Promotion Regulations are published in the *Federal Register*, thereby constructively notifying Respondent of the Beef Promotion Order

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[23]*See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

and the Beef Promotion Regulations,[24] and Respondent was warned on three occasions of the requirement that he collect assessments and remit those assessments to a qualified State beef council (CX 12-14). The first of these warnings is dated June 1, 1987. Notwithstanding the repeated warnings, Respondent violated the Beef Promotion Order and the Beef Promotion Regulations 21,516 times and continued to violate the Beef Promotion Order and the Beef Promotion Regulations during the period October 1, 1986, through June 30, 1994. Under these circumstances, I find that Respondent's violations were not inadvertent, but were willful.[25]

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[24]*FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 17, 19 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976).

[25]An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Fred Hodgins*, 56 Agric. Dec. ___, slip op. at 143-144 (July 11, 1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *appeal docketed*, No. 97-3414 (3d Cir. Aug. 4, 1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925, (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56, (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138-39 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 297-98 (1975). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to

Further, Respondent's violations are extremely serious because they completely undermine the ability to conduct a beef promotion program. If sufficient numbers of collecting persons were to violate the Beef Promotion Order and the Beef Promotion Regulations in the manner in which Respondent has violated the Beef Promotion Order and Beef Promotion Regulations, the assessments remitted to the Board and qualified State beef councils would not be sufficient for the operation of the beef promotion program. Moreover, the evidence establishes that, on a number of occasions, Respondent collected assessments from producers and retained those assessments for his own use rather than remitting the assessments to a qualified State beef council, as required by the Beef Promotion Order and Beef Promotion Regulations.

Complainant could have sought the maximum of $5,000 for each violation.[26] Instead, it appears that Complainant seeks a civil penalty of $3.2182798 for each violation which Complainant alleges Respondent committed.[27] In light of the number of Respondent's violations, the willful nature of Respondent's violations, and the serious nature of Respondent's violations, I am perplexed by the small amount of the civil penalty recommended by Complainant for each alleged violation. However, I infer that Complainant believes that this small civil penalty

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characterize `conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

[26]I found that Complainant proved its case by a preponderance of the evidence with respect to 21,516 violations (21,423 violations of the requirement that Respondent remit assessments to a qualified State beef council and 93 violations of the requirement that Respondent transmit reports of assessments to a qualified State beef council) of the Beef Promotion Order and the Beef Promotion Regulations. Complainant could have sought and had assessed a maximum civil penalty of $5,000 for each of these violations, for a total civil penalty of $107,580,000.

[27]Complainant alleges that Respondent violated the requirement that Respondent remit assessments to a qualified State beef council 24,672 times, violated the requirement that Respondent transmit reports of assessments to a qualified State beef council 93 times, and violated the requirement that Respondent submit necessary information in required reports 93 times, for a total of 24,858 alleged violations.

will deter Respondent from future violations of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations. The Department's sanction policy requires that I give appropriate weight to the sanction recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the statute in question,[28] and despite the facts of this case, which would appear to warrant a significantly higher civil penalty, I am reluctant to assess a civil penalty larger than that recommended by Complainant. Therefore, applying Complainant's recommendation of $3.2182798 per violation to the number of violations which I find that Complainant proved by a preponderance of the evidence, I am assessing a civil penalty of $69,244.51 against Respondent.

For the foregoing reasons, the following order should be issued.

Order

1. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C §§ 2901-2911), the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217), and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) and, in particular, shall cease and desist from:

(a) failing to remit all assessments when due;
(b) failing to remit late payment charges; and
(c) failing to transmit reports in a timely manner.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, is assessed a civil penalty of $69,244.51 which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2014 - South Building

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[28] *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

1400 Independence Avenue, S.W.
Washington, D.C. 20250-1413.

Respondent's payment of the civil penalty shall be forwarded to and received by Ms. Deskins within 70 days after service of this Order on Respondent.

3. Respondent, Jerry Goetz, d/b/a Jerry Goetz and Sons, shall pay past-due assessments and late payment charges of $66,577 which shall be paid by certified check or money order, made payable to the Kansas Beef Council, and forwarded to:

Kansas Beef Council
P.O. Box 4567
Topeka, Kansas 66604-0567.

Respondent's payment of the past-due assessments and late payment charges shall be forwarded to and received by the Kansas Beef Council within 70 days after service of this Order on Respondent.

FRESH CUT FLOWERS and FRESH CUT GREENS PROMOTION and INFORMATION ACT

In re: HANDLERS AGAINST PROMOFLOR.
FCFGPIA Docket No. 96-0001.
Decision and Order filed September 8, 1997.

Flowers and greens — Appeal — Dismissal — Petition for reconsideration.

The Judicial Officer affirmed Chief Administrative Law Judge Palmer's Dismissal of Petition. Handlers Against Promoflor, an unincorporated association, is not a person subject to the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order and has no standing to file a petition under section 8(a) of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. § 6807(a)). The Second Amendment to Petition which deleted Handlers Against Promoflor as Petitioner and listed others as Petitioners did not cure the jurisdictional defect in the Petition because much of the Petition, even as amended by the First Amendment to Petition and Second Amendment to Petition, references Handlers Against Promoflor. Further, Petitioners' piecemeal amendments to the original Petition resulted in a confused and muddled record. A Third Amended Petition filed by Petitioners and others after the Chief ALJ dismissed the proceeding in its entirety was properly returned to second group of petitioners and the Chief ALJ's act of returning the Third Amended Petition is not an *order* or a *decision* as those terms are defined in the Rules of Practice (7 C.F.R. § 1200.51(f), (*l*)). Therefore, no petition for reconsideration of the Chief ALJ's act of returning the Third Amended Petition may be filed under the Rules of Practice (7 C.F.R. § 900.68(a)(3)).

Colleen A. Carroll for Respondent.
James A. Moody, Washington, D.C., for Petitioner.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Handlers Against Promoflor, an unincorporated association [hereinafter HAP], instituted this proceeding under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814) [hereinafter the FCFGPIA]; the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order (7 C.F.R. §§ 1208.1-.85) [hereinafter the Fresh Cut Flowers and Greens Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter Rules of Practice], by filing a Petition on September 3, 1996.

The Petition alleges, *inter alia*, that: (1) the FCFGPIA and the Fresh Cut Flowers and Greens Order violate the right of HAP's members to freedom of speech and association guaranteed by the First Amendment of the Constitution of the United States (Pet. ¶¶ 25-26); (2) the FCFGPIA and the Fresh Cut Flowers and

Greens Order violate the right of HAP's members to equal protection of the laws and due process of law guaranteed by the Fifth Amendment of the Constitution of the United States (Pet. ¶¶ 27-30); and (3) assessments under the Fresh Cut Flowers and Greens Order are improper and unjust (Pet. ¶ 31). HAP seeks, *inter alia*: (1) an order declaring that the FCFGPIA and the Fresh Cut Flowers and Greens Order violate the right of HAP's members to free speech, free association, due process of law, and equal protection of the laws guaranteed by the First and Fifth Amendments of the Constitution of the United States (Pet. ¶¶ 33-34); (2) an order modifying the Fresh Cut Flowers and Greens Order and exempting HAP's members from the payment of assessments under the Fresh Cut Flowers and Greens Order (Pet. ¶ 35); and (3) a refund of all assessments (Pet. ¶ 38).

On October 9, 1996, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a Motion to Dismiss Petition of Handlers Against Promoflor and a Memorandum in Support of Motion to Dismiss Petition of Handlers Against Promoflor [hereinafter Respondent's Memorandum] stating, *inter alia*, that HAP's Petition should be dismissed because: (1) the Petition does not comply with the requirements of section 1200.52(b)(1) of the Rules of Practice (7 C.F.R. § 1200.52(b)(1)) in that it does not contain the names and addresses of HAP's officers and the respective positions held by them (Respondent's Mem. at 2-3); (2) the Petition does not disclose the parties who claim to be affected by the FCFGPIA and the Fresh Cut Flowers and Greens Order (Respondent's Mem. at 3); and (3) the Petition does not comply with the requirements of section 1200.52(b)(6) of the Rules of Practice (7 C.F.R. § 1200.52(b)(6)) in that it does not contain an affidavit by an officer of HAP having knowledge of the facts stated in the Petition, verifying the Petition, and stating that it is filed in good faith and not for the purposes of delay (Respondent's Mem. at 3-4).

On October 31, 1996, HAP filed three documents. First, HAP filed Opposition to AMS's Motion to Dismiss on the Grounds of Form stating that the Petition was not deficient as to form because Petitioner "did not have `officers.'" Second, HAP filed First Amendment to Petition, which adds paragraph 2a to the Petition. Paragraph 2a of the First Amendment to Petition sets forth the names and addresses of HAP's three-person "Executive Committee." Third, HAP filed a Verification of Petition which states as follows:

> I am the General Counsel of Handlers Against Promoflor, the Petitioner in this matters [sic]. The facts set forth in the Petition and the claims for relief are true and correct to the best of my knowledge following

thorough research, investigation, and legal analysis. The Petition, including the request for interim relief, is filed in good faith and not for the purpose of delay. I declare under penalty of perjury that the above statements are true and correct.

/s/
James A. Moody
General Counsel
Handlers Against Promoflor

On December 9, 1996, HAP filed Proposal Regarding Identification of HAP Members stating that:

> The parties discussed the identification of HAP members at the telephone status conference on November 26[, 1996]. HAP proposed that a sheet for each handler be filed with the Hearing Clerk. This had the advantage of avoiding multiple petitions, repeated consolidations, and wasteful paperwork, since most of the factual and legal issues are shared in common by individual HAP members. . . . [Respondent] reserved its right to object to the proposed disclosure arrangement. . . .
>
> It may be necessary to file one or a few disclosure statements in "John Doe" form because of mounting threats and competitive pressure in the industry. HAP is willing to disclose the identity of any such handler to USDA subject to a confidentiality agreement that this identity not be further disclosed to the industry, Promoflor, or the general public. If such protection becomes necessary, HAP will file a declaration explaining the particularized need for such protection.

On December 16, 1996, Respondent filed Respondent's Reply to Petitioner's Proposal Regarding Identification of HAP Members stating that "although [Petitioner's Proposal Regarding Identification of HAP Members] allows for the provision of some relevant information by HAP members, more information will be needed in order to protect the interests of the parties and fully comply with the Rules of Practice" (Respondent's Reply to Petitioner's Proposal Regarding Identification of HAP Members at 3-4) and objecting to HAP's proposal to identify a few of HAP's members in "John Doe" form (Respondent's Reply to Petitioner's Proposal Regarding Identification of HAP Members at 5).

On December 23, 1996, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] filed Summary of Teleconference and Ruling on Motion to Dismiss, stating as follows:

> I determined that to avoid later confusion, it is essential that each petitioning "qualified handler" be fully identified and the date each becomes a party to this proceeding also be specified. On the other hand, it is desirable to avoid the confusion that is caused by the filing of multiple petitions or the expansion of a case caption to show additional petitioners. For that reason, I suggested that Mr. Moody[, HAP's counsel,] propose a method to keep the present case caption, yet individually document each handler who is a party to the proceeding and the date that the handler became a petitioner.
>
> The "Proposal Regarding Identification of HAP Members" that Mr. Moody has filed is not acceptable for the reasons set forth in Respondent's Reply to Petitioner's Proposal[.]
>
> Both the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 and the governing Rules of Practice limit the filing of petitions challenging the implementing Order to "a person subject to . . . (the) Order." 7 U.S.C. § 6807(a)(1); 7 C.F.R. § 1200.52(a).
>
> The Order subjects to regulation and requires the payment of assessments by all persons who meets its definition of a "qualified handler." 7 C.F.R. §§ 1208.16, 1208.50.
>
> Accordingly, it is essential that each person who claims to be an aggrieved "qualified handler" be specified as a petitioner.
>
> For these reasons, we will retain the present case caption, but each person who wishes to participate shall be required to state his, her or its correct name, address and principal place of business and sign an affidavit verifying the petition and that it has been filed in good faith and not for purposes of delay.
>
> These requirements are set forth in 7 C.F.R. § 1200.52, which specifies the additional information that is needed from those petitioners

who are corporations or unincorporated associations. See 7 C.F.R. § 1200.52(b)(1).

On February 5, 1997, HAP filed a letter dated January 31, 1997, addressed to the Chief ALJ requesting approval of an attached disclosure form entitled *Disclosure Statement of HAP Member*. On April 15, 1997, Respondent filed Complainant's [sic] Second Motion to Dismiss Petition stating that the Chief ALJ wrote to HAP's counsel on February 10, 1997, approving HAP's disclosure form, but that "[m]ore than two months have passed since the disclosure form was approved by Judge Palmer" and that HAP had failed to identify any of its members and had failed to file any disclosure form.

On May 6, 1997, HAP filed Opposition to USDA's Second Motion to Dismiss to which HAP attached 12 completed disclosure statements. HAP's Opposition to USDA's Second Motion to Dismiss states:

> Attached hereto are the verifications signed by members of HAP recently sued by USDA:
>
> Everflora, Inc., No. FCFCGPIA 97-1.
> Ferris Brothers, Inc., No. FCFCGPIA 97-2.
> Suburban Wholesale Florists, Inc., No. FCFCGPIA 97-3.
> Dutch Flower Line, Inc., No. FCFGPIA 97-4.
> Frank W. Manker Wholesale Grower, Inc., No. FCFCGPIA 97-5.
> Quality Wholesale Flrist, Inc., No. FCFCGPIA 97-6.
> Henry C. Alders, Inc., No. FCFCGPIA 97-7.
> Harry M. Vlachos, Inc., No. FCFCGPIA 97-8.
> Mueller Brothers, Inc., No. FCFCGPIA 97-9.
> U.S. Evergreen, Inc., No. FCFGPIA 97-10.
> George Rallis, Inc., No. FCFGPIA 97-11.
>
> Motions to consolidate these cases with this petition have been filed in each of these cases.

On May 9, 1997, Respondent filed Complainant's [sic] Supplemental Memorandum to Second Motion to Dismiss Petition in which Respondent, citing *In re Ann M. Veneman*, 56 Agric. Dec. ___ (May 6, 1997), contends that HAP lacks standing to file a petition under the section 8(a) of the FCFGPIA (7 U.S.C. § 6807(a)) because HAP is not a *person subject to* the Fresh Cut Flowers and

Greens Order.[1]

On May 13, 1997, HAP filed a letter addressed to the Chief ALJ stating, "I have filed today a second amendment to the petition that lists the individual companies, and deleted HAP from the caption" (Letter dated May 13, 1997, from James A. Moody to Chief ALJ at 1). The Second Amendment to Petition, filed May 13, 1997, deletes "Handlers Against Promoflor" as Petitioner and lists Petitioners as: "Harry M. Vlachos, Company, Inc., Everflora, Inc., Ferris Brothers, Inc., Suburban Wholesale Florists, Inc., Dutch Flower Line, Inc., Frank W. Manker Wholesale Grower, Inc., Quality Wholesale Flrist, Inc., Henry C. Alders, Inc., Mueller Brothers, Inc., U.S. Evergreen, Inc., George Rallis, Inc.," [hereinafter Petitioners]. Petitioners' Second Amendment to Petition states as follows:

> This second amendment pursuant to 7 C.F.R. § 900.52(c)(3), is made necessary by the decision of Chief Administrative Law Judge Victor Palmer that Handlers Against Promoflor cannot be a petitioner under the Department's rules, even though its members are considered by USDA to be handlers, because HAP itself is not a handler. Accordingly, this amendment changes the caption of this case to Harry M. Vlachos Company, et al., and lists the petitioners set forth above. Their verifications, containing the information set forth io [sic] § 1200.52(b), have been previously filed with the Hearing Clerk. Chief ALJ Palmer indicated that new petitioners can be added by amendment. The following paragraph is

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[1]Section 8(a)(1) of the FCFGPIA only authorizes *a person subject to an order* to file a petition, as follows:

> **§ 6807. Petition and review**
>
> **(a) Petition and hearing**
>
> **(1) Petition**
>
> A person subject to an order may file with the Secretary a petition—
>
> (A) stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law; and
>
> (B) requesting modification of the order or an exemption from the order.

7 U.S.C. § 6807(a)(1).

added to the Petition:

> 2b. The individual Petitioners are members of HAP and are considered by USDA to be qualified handlers within the meaning of the [FCFGPIA] and [Fresh Cut Flowers and Greens] Order.

Second Amendment to Petition at 1.

On May 14, 1997, the Chief ALJ filed Dismissal of Petition, Cancellation of Hearing and Summary of Prehearing Conference [hereinafter Dismissal of Petition] dismissing HAP's Petition as follows:

> Subsequent to the filing of [R]espondent's Motion to Dismiss the petition by "Handlers Against Promoflor," the Judicial Officer decided *In re[] Ann M. Veneman*, [56 Agric. Dec. ___ (May 6, 1997)]. The Judicial Officer's findings in that case have application here and require the dismissal of this petition. As was the case for two of the petitioners in *Veneman*, . . . [HAP] is not a person subject to the provisions of the [Fresh Cut Flowers and Greens] Order the [P]etition seeks to challenge, and therefore does not have requisite standing. My decision to dismiss the [P]etition was made in the course of a prehearing conference held on May 12, 1997, that was attended by James A. Moody, attorney for [HAP], and Colleen A. Carroll, attorney for [R]espondent.

Dismissal of Petition at 1.

The Chief ALJ also dismissed Petitioners' Second Amendment to Petition as follows:

> During the [May 12, 1997, prehearing] conference we discussed paper-flow problems that are caused when multiple handlers file separate petitions to assert a common challenge to the constitutionality of a governing statute. To avoid them, I indicated that multiple handlers may be combined into a single petition, provided each handler is specifically identified as required by 7 C.F.R. § 1200.52(b), and each signs individual affidavits. Other handlers who may subsequently wish to join that petition would need to file motions with affidavits requesting their inclusion by amendment of the petition. Hopefully, this procedure shall avoid the confusion, paper-flow burdens, and misfiling of documents that can ensue when many, separate petitions are filed.

. . . .

On May 13, 1997, the day following the conference, Mr. Moody filed a Second Amendment to Petition to change the caption in this case to substitute as the named petitioners, those handlers who have already provided affidavits attesting to the accuracy of the "Handlers Against Promoflor" petition. Mr. Moody in an accompanying letter suggested that this amendment would implement my decisions at the conference. Upon consideration of his letter and the proposed Second Amendment, I do not find this procedure acceptable. The "Handlers Against Promoflor" petition was phrased in terms of a group not subject to the Promotion Order's requirements; whereas, under controlling authority it is necessary that petitions be by "persons subject to the . . . Order who pay assessments, file reports, and maintain books and records." *Veneman*, slip op. at 54. The present petition does not meet that criterion, and piecemeal amendments are causing a confusing and muddled record. Better to start afresh, particularly in light of the fact that action on a future, acceptable petition shall necessarily be withheld awaiting the Supreme Court's decision in the case now before it for review of the constitutionality of governmentally, mandated generic advertising.

The present petition is accordingly dismissed in its entirety and the scheduled hearing is cancelled.

Dismissal of Petition at 1-3.

Mr. Moody attempted to file a document entitled Third Amended Petition in this proceeding, and on June 3, 1997, the Chief ALJ returned the Third Amended Petition to Mr. Moody accompanied by the following letter:[2]

Mr. James A Moody, Esquire

[2]There is no document entitled *Third Amended Petition* in the record. However, I infer from the Chief ALJ's letter dated June 3, 1997, that Mr. Moody attempted to file a document entitled *Third Amended Petition* in this proceeding.

Dear Mr. Moody:

You misunderstood my ruling of May 14, 1997. The case was dismissed in its entirety. There is nothing left for amendment.

To proceed further, you will need to file a new petition accompanied by affidavits of each named petitioner verifying the petition as required by 7 C.F.R. § 1200.52(b).

The "Third Amended Petition" you tendered for filing is herewith returned.

On June 16, 1997, Petitioners appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[3] Simultaneously, Petitioners and Major Wholesale Florist, Inc., Everflora-Miami, Inc., Holland Flower Express, Inc., East Coast Floral, Inc., S.F. Brannan Street Wholesale Florist, Inc., G. Page Wholesale Flowers, Aard De Boer, Inc., Connecticut Floral Supplies, Inc., Kester Wholesale Floral Company, Kiamos & Tooker, Inc., Mazzoni Farms, Inc., McCallum Sauber Florists, Inc., Pacific Floral Services, Inc., Paul's Wholesale Florist Co., Inc., Allan Stanley Greenhouses, Inc., Westflora, Inc., Sequoia Floral International, Inc., Stonehurst Flower Company, Inc., and Handlers Against Promoflor [hereinafter Second Group of Petitioners] filed Request for Reconsideration of Dismissal of Third Amended Petition requesting that the Chief ALJ reconsider his "June 3, 1997[,] decision dismissing the Third Amended Petition and returning copies to [Second Group of Petitioners'] counsel" (Request for Recons. of Dismissal of Third Amended Pet. at 1).

On June 19, 1997, the Chief ALJ filed a Certification of Reconsideration Request to the Judicial Officer stating that:

Inasmuch as the Request for Reconsideration of the Third Amended Petition raises questions pertaining to the requisites for a petition, which are

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[3]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

akin to those raised in the appeal of the Second Amended Petition, the Request for Reconsideration of the Third Amended Petition is hereby certified to the Judicial Officer.

On July 3, 1997, Respondent filed Respondent's Answer to Request for Reconsideration of Dismissal of Third Amended Petition and Respondent's Response to Notice of Appeal of Dismissal of Second Amendment to Petition. On July 7, 1997, the case was referred to the Judicial Officer for decision.

Petitioners' Notice of Appeal of Dismissal of Second Amendment to Petition filed on June 16, 1997, states in its entirety:

> Petitioners hereby appeal to the Secretary Chief ALJ Palmer's May 14 dismissal of their Second Amended Petition. Although proceedings in these cases [sic] were stayed pending the Supreme Court's decision in *Wileman v. Glickman*, No. 95-1184, which will likely provide guidance on the constitutionality of the "speech tax" challenged in these cases [sic], Petitioners hereby request an expedited briefing schedule on the issue of whether Petitioners (an organization of handlers and individual handlers and putative handlers) have standing to litigate this petition.

Section 900.65(a) of the Rules of Practice provides:

> **§ 900.65 Appeals to Secretary; Transmittal of record.**
>
> (a) *Filing of appeal.* Any party who disagrees with a judge's decision or any part thereof, may appeal the decision to the Secretary by transmitting an appeal petition to the hearing clerk within 30 days after service of said decision upon said party. Each issue set forth in the appeal, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations and authorities being relied upon in support thereof. The appeal petition shall be served on the other party to the proceeding by the hearing clerk.

7 C.F.R. § 900.65(a).

Petitioners were served with the Dismissal of Petition on May 16, 1997, and filed their Notice of Appeal of Dismissal of Second Amendment to Petition within the time for filing an appeal. However, Petitioners' Notice of Appeal of Dismissal

of Second Amendment to Petition does not meet the requirements of section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)). Specifically, Petitioners fail to identify any issue in their appeal, fail to set forth any argument in support of their appeal, and fail to cite any authority in support of their appeal.

Since Petitioners have raised no issue in their Notice of Appeal of Dismissal of Second Amendment to Petition, Petitioners' Notice of Appeal of Dismissal of Second Amendment to Petition is dismissed.

Further, I am in complete agreement with the Chief ALJ's dismissal of Petitioners' Second Amendment to Petition. Much of the Petition as amended by the First Amendment to Petition and Second Amendment to Petition references HAP, which is not subject to the Fresh Cut Flowers and Greens Order and does not have standing to file a petition in accordance with section 8(a) of the FCFGPIA (7 U.S.C. § 6807(a)). Further, Petitioners' "piecemeal amendments" to HAP's original Petition "are causing a confused and muddled record" (Dismissal of Pet. at 2).

Moreover, Petitioners' are not prejudiced by this Decision and Order and those Petitioners who are "persons subject to" the Fresh Cut Flowers and Greens Order are free to file a petition in accordance with section 8(a) of the FCFGPIA (7 U.S.C. § 6807(a)).[4]

As for the Request for Reconsideration of Dismissal of Third Amended Petition filed by the Second Group of Petitioners, I find no document entitled *Third Amended Petition* in this record. However, I infer from the record that the Second Group of Petitioners did attempt to file a document entitled *Third Amended Petition.*

The Second Group of Petitioners requests "reconsideration, under 7 C.F.R. § 90.68(a)(3) [sic], of Chief ALJ Palmer's June 3, 1997[,] decision dismissing the Third Amended Petition" (Request for Recons. of Dismissal of Third Amended Pet. at 1).

Section 1200.51(*l*) of the Rules of Practice defines *decision* as follows:

§ 1200.51 Definitions.

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[4]It appears, however, that most, if not all, of the issues raised by Petitioners in this proceeding are, or will be, moot. In accordance with section 7(d)(1) of the FCFGPIA (7 U.S.C. § 6806(d)(1)), the requirement to pay assessments under the Fresh Cut Flowers and Greens Order was terminated effective July 29, 1997 (62 Fed. Reg. 40,257). Further, on July 29, 1997, the Agricultural Marketing Service announced that, in accordance with section 7(d)(2) of the FCFGPIA (7 U.S.C. § 6806(d)(2)), it will publish an order in the *Federal Register* terminating the remaining requirements and provisions of the Fresh Cut Flowers and Greens Order (62 Fed. Reg. 40,256).

As used in this subpart, the terms as defined in the acts shall apply with equal force and effect. In addition, unless the context otherwise requires:

. . . .

(*l*) *Decision* means the judge's initial decision and includes the judge's:

(1) Findings of fact and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof;

(2) Order; and

(3) Rulings on findings, conclusions and orders submitted by the parties[.]

7 C.F.R. § 1200.51(*l*).

The Chief ALJ's act of returning the Second Group of Petitioners' Third Amended Petition is not a *decision* as Second Group of Petitioners contend. Moreover, section 900.68(a)(3) of the Rules of Practice (7 C.F.R. § 900.68(a)(3)) provides that a petition to reconsider a final order may be filed within 15 days after the date of service of such order. Section 1200.51(f) of the Rules of Practice defines *order* as follows:

§ 1200.51 Definitions.

As used in this subpart, the terms as defined in the acts shall apply with equal force and effect. In addition, unless the context otherwise requires:

. . . .

(f) *Order* means any order or any amendment thereto which may be issued pursuant to the [FCFGPIA]. The term *order* shall include plans issued under the Acts listed in paragraph (a) of this section.

7 C.F.R. § 1200.51(f).

The Chief ALJ's act of returning Second Group of Petitioners' Third Amended Petition is not an *order* as defined in section 1200.51(f) of the Rules of Practice (7 C.F.R. § 1200.51(f)), and no petition to reconsider the Chief ALJ's act of returning

the Third Amended Petition may be filed.

Second Group of Petitioners contend that they are allowed by 7 C.F.R. §§ 900.52(c)(2) and .52b to amend their pleadings (Request for Recons. of Dismissal of Third Amended Pet. at 2).

Section 900.52(c)(2) of the Rules of Practice provides that:

> **§ 900.52 Institution of proceeding.**
>
> . . . .
>
> (c) *Motion to dismiss petition*—. . . .
>
> (2) *Decision by Administrative Law Judge.* The Judge, after due consideration, shall render a decision upon the motion [to dismiss] stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided,* That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, *on the ground that it does not substantially comply in form and content with the [FCFGPIA] or with [7 C.F.R. § 1200.52(b)],* the petitioner shall be permitted to file an amended petition.

7 C.F.R. § 900.52(c)(2) (emphasis added).

The Chief ALJ's Dismissal of Petition reveals that the Second Amendment to Petition was dismissed based, at least in part, on jurisdictional grounds not *on the ground that the Second Amendment to Petition does not substantially comply in form and content with the [FCFGPIA] or with 7 C.F.R. § 1200.52(b).* Therefore, section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)) provides no basis for Second Group of Petitioners' contention that their Third Amended Petition must be allowed.

Section 900.52b of the Rules of Practice provides:

> **§ 900.52b Amended pleadings.**
>
> At any time before the close of the hearing the petition or answer may be amended, but the hearing shall, at the request of the adverse party, be

> adjourned or recessed for such reasonable time as the judge may determine to be necessary to protect the interests of the parties. *Amendments subsequent to the first amendment* or subsequent to the filing of an answer *may be made only with leave of the judge or with written consent of the adverse party.*

7 C.F.R. § 900.52b (emphasis added).

The First Amendment to Petition was filed October 31, 1996. While the record does not contain a document entitled *Third Amended Petition*, the record does reveal that Second Group of Petitioners attempted to file a document entitled *Third Amended Petition* sometime between the date of the issuance of Dismissal of Petition, May 14, 1997, and date of the Chief ALJ's letter returning Third Amended Petition, June 3, 1997, *viz.*, subsequent to the First Amendment to Petition. Further, the record establishes that Second Group of Petitioners did not have leave of the Chief ALJ to amend the Petition (Chief ALJ's letter dated June 3, 1997, to Mr. Moody), and I find nothing in the record which indicates that Second Group of Petitioners had the written consent of Respondent to amend the Petition. Therefore, section 900.52b of the Rules of Practice (7 C.F.R. § 900.52b) provides no basis for Second Group of Petitioners' contention that their Third Amended Petition n.ust be allowed.

The Third Amended Petition was not filed in this proceeding; consequently, the Second Group of Petitioners has not requested relief in this proceeding and the Third Amended Petition constitutes a nullity for the purposes of this proceeding. Therefore, neither the Third Amended Petition which the Second Group of Petitioners attempted to file nor the relief which the Second Group of Petitioners may have requested in the Third Amended Petition forms any part of the Order in this Decision and Order.

For the foregoing reasons, the following Order should be issued.

Order

The relief requested by HAP and Petitioners is denied and the Petition is dismissed.

HORSE PROTECTION ACT

In re: DEAN BYARD, LARUE MCWATERS, and ANN MCWATERS.
HPA Docket No. 94-0038.
Decision and Order as to Dean Byard filed August 8, 1997.

Default — Admissions — Rules of civil procedure — Estoppel — Civil penalty — Disqualification — Failure to file timely answer.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of $2,000 against Respondent Byard and disqualifying Respondent Byard for 1 year because he entered a horse for showing or exhibiting while the horse was sore. Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. Application of the default provisions of the Rules of Practice does not deny Respondent due process. Respondent's decision to proceed *pro se* does not operate as an excuse for Respondent's failure to file an answer in this proceeding. The record reveals no basis for Respondent's impression that the case was settled. The Federal Rules of Civil Procedure do not apply to the Department's adjudicatory proceedings. There is no factual basis for estoppel. The Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that Complainant prove that a respondent's failure to file a timely answer has prejudiced Complainant's ability to present its case.

Colleen A. Carroll, for Complainant.
Carthel L. Smith, Jr., Lexington, TN, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service [hereinafter Complainant] instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on April 11, 1994.

The Complaint alleges that on September 2, 1992, Dean Byard [hereinafter Respondent] entered, for the purpose of showing or exhibiting, a horse known as "Whittin' Generator," as Entry No. 454, in Class No. 89A, at the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II(A)).

Respondent was served with the Complaint on April 21, 1995. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on May 22, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law

Judge James W. Hunt [hereinafter ALJ] issued a Decision and Order as to Dean Byard [hereinafter Default Decision] in which the ALJ: (1) found that Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), as alleged in the Complaint; (2) assessed a civil penalty of $2,000 against Respondent; and (3) disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or otherwise, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction (Default Dec. at 3).

On June 26, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On July 8, 1997, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order [hereinafter Complainant's Response], and on July 9, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

Applicable Statutory Provisions

15 U.S.C.:

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has

[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. . . .

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. §§ 1821(3), 1824(2), 1825(b)(1), (c).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

Copies of the Complaint and the Rules of Practice . . . were served on Respondent . . . by the Hearing Clerk by certified mail on April 21, 1995. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation.

Respondent . . . failed to file an answer addressing the allegations contained in the Complaint within the time prescribed in the Rules of Practice. Complainant

states that Respondent indicated that he desired to settle the case against him by entering into a Consent Decision and Order. Complainant further states that although counsel for Complainant has had numerous oral and written communications with Respondent in an effort to finalize a settlement agreement between the parties, Respondent has failed to sign the Consent Decision and Order, which counsel for Complainant has provided to him, and has continued to fail to file an answer to the Complaint. Complainant states that there are no ongoing settlement negotiations and no outstanding settlement offer.

On April 18, 1997, Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and [a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]] because of Respondent's failure to file a timely answer. On May 12, 1997, . . . Respondent filed Objections to the Proposed Decision on the ground that Respondent had proceeded without an attorney and that he would be unduly prejudiced by a default decision. However, a default decision may be taken against a respondent who fails to file a timely answer, even if the respondent lacks counsel. . . . Complainant's Motion for Default Decision is therefore granted. As the material facts alleged in the Complaint are deemed admitted by Respondent's failure to file an answer, they are hereby adopted and set forth in this Decision and Order as to Dean Byard as Findings of Fact.

. . . .

Findings of Fact

1. Respondent, Dean Byard, is an individual whose last two mailing addresses are [redacted] (b) (6) [redacted] (b) (6) [redacted]

2. At all material times herein, Respondent, Dean Byard, was the trainer of the horse known as "Whittin' Generator" and entered this horse as Entry No. 454, [in] Class No. 89A, on September 2, 1992, at the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee.

3. On September 2, 1992, Respondent, Dean Byard, in violation of section 5(2)(B) of the [Horse Protection] Act (15 U.S.C. § 1824(2)(B)), entered for the purpose of showing or exhibiting the horse known as "Whittin' Generator," as Entry No. 454, in Class No. 89A, at the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee, while the horse was sore.

Conclusions [of Law]

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact [in this Decision and Order as to Dean Byard], Respondent has violated section 5(2)(B) of the [Horse Protection] Act (15 U.S.C. § 1824(2)(B)).

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises six issues and requests that I vacate the Default Decision (Pet. for Appeal). However, I find no a basis for vacating the Default Decision.

First, Respondent contends that the history of this proceeding reveals he was denied due process. I disagree with Respondent. The history of this proceeding, briefly described in this Decision and Order as to Dean Byard, *infra*, pp. 7-19, reveals that the proceeding was conducted in accordance with the Rules of Practice and that Respondent has been provided with due process.

On April 11, 1994, the Office of the Hearing Clerk [hereinafter Hearing Clerk] sent a letter dated April 11, 1994, and one copy of the Complaint and the Rules of Practice to Respondent at his last known address, [redacted] (b) (6) [redacted] by certified mail. The envelope containing the April 11, 1994, mailing, to Respondent from the Hearing Clerk, was returned to the Hearing Clerk, marked by the postal service "MOVED, LEFT NO ADDRESS." The postal service provided a new address for Respondent, and on December 7, 1994, the Hearing Clerk mailed a copy of the Complaint, the Rules of Practice, and the April 11, 1994, letter to Respondent at the address provided by the postal service.[2] Again, the envelope containing the December 7, 1994, mailing, to Respondent from the Hearing Clerk, was returned to the Hearing Clerk marked by the postal service "MOVED, LEFT NO ADDRESS."

On April 13, 1995, the Hearing Clerk mailed a copy of the Complaint, the Rules of Practice, and the April 11, 1994, letter from the Hearing Clerk, to Respondent at "c/o Ann Branch, [redacted] (b) (6) [redacted] FL," by certified mail. Respondent signed the return receipt attached to the April 13, 1995, mailing, which states that the April 13, 1995, mailing was delivered to Respondent on April 21, 1995.

Section 1.147(c)(1) of the Rules of Practice provides:

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[2]December 7, 1994, Memorandum to the File from Pamela M. Favors, Hearing Clerk's Office.

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that,* if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

In addition, sections 1.136, 1.139, and 1.141 of the Rules of Practice, which were in the April 13, 1995, mailing served on Respondent, clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on April 21, 1995, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 2.

Likewise, the letter from the Hearing Clerk accompanying the Complaint and the Rules of Practice provides:

Enclosed is a copy of a Complaint, which has been filed with this office

under the Horse Protection Act, 1921 [sic], as amended.

Also enclosed is a copy of the rules of practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have **20 days from the receipt of this letter to file with the Hearing Clerk an original and five copies of your written and signed answer to the complaint**. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appear on the last page of the complaint.

Letter dated April 11, 1994, from Pamela M. Favors, Legal Technician, to Mr. Dean Byard (emphasis in original).

Respondent's Answer was due May 11, 1995. On June 13, 1995, the Hearing Clerk sent a letter dated June 13, 1995, to Respondent at c/o Ann Branch, [redacted] (b) (6) [redacted] informing Respondent that his answer to the Complaint had not been received within the allotted time. The envelope containing the June 13, 1995, letter, to Respondent from the Hearing Clerk, was returned to the Hearing Clerk by the postal service marked "Returned to Sender."

Complainant asserts that between April 1994 and June 1995, Respondent and Complainant engaged in settlement negotiations during which negotiations Complainant's counsel sent Respondent four different proposed consent decisions, which Respondent never signed and returned for entry by the ALJ. On September 11, 1995, Respondent sent Complainant's counsel a written counter-offer to the proposed consent decisions. Complainant accepted Respondent's counter-offer, and Complainant's counsel sent a letter to Respondent confirming acceptance of Respondent's counter-offer and a new, fifth proposed consent decision, which reflects Respondent's counter-offer. Complainant asserts that Respondent never signed and returned the fifth proposed consent decision for entry by the ALJ (Complainant's Resp. at 1-2).

In a letter dated January 4, 1996, Complainant's counsel informed Respondent that, unless Respondent signed the proposed consent decision or filed an answer, Complainant would file a motion for a default decision, as follows:

> I recently sent you a draft Consent Decision and Order which reflected the terms of a settlement agreement we had discussed in the above captioned matter. To date, I have not received a signed copy of that Consent Decision from you. If you still wish to settle this case, you need to mail the signed Consent Decision to me immediately. If you no longer wish to settle this matter through a Consent Decision, we will have to have a hearing. However, to date you have not filed an answer to the complaint that was served on you in this case. Therefore, I am writing to let you know that unless you file an answer to the complaint within fifteen days of the date of this letter, I will be filing a motion for default against you. If a default decision is entered against you, you will lose your right to have a hearing in this case.

Complainant's Resp. at Exhibit A.

Respondent did not respond to Complainant's counsel's January 4, 1996, letter (Complainant's Resp. at 2), and on March 20, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Decision and Order

as to Dean Byard and a Proposed Decision and Order as to Dean Byard, which were sent to Respondent by certified mail by the Hearing Clerk on March 20, 1996. Complainant's March 20, 1996, filings were accompanied by a letter from the Hearing Clerk, which states:

CERTIFIED RECEIPT REQUESTED March 20, 1996

Mr. Dean Byard
c/o Ann Branch
(b) (6)

Dear Mr. Byard:

Subject: In re: Dean Byard, LaRue McWaters and Ann McWaters, Respondents
HPA Docket No. 94-38

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order as to Dean Byard, together with a copy of the Proposed Decision, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,
/s/
JOYCE A. DAWSON
Hearing Clerk

The envelope containing the March 20, 1996, mailing to Respondent from the Hearing Clerk was returned to the Hearing Clerk marked by the postal service "Returned To Sender Attempted Not Known." On April 4, 1996, the Hearing Clerk sent Complainant's Motion for Adoption of Proposed Decision and Order as to Dean Byard, Complainant's Proposed Decision and Order as to Dean Byard, and the March 20, 1996, letter, from the Hearing Clerk to Respondent, by ordinary mail

in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)).[3] The postal service returned the April 4, 1996, mailing to the Hearing Clerk marked "Returned To Sender Attempted Not Known."

Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order as to Dean Byard, and on May 1, 1996, the Hearing Clerk sent Respondent a letter informing him that objections had not been filed within the allotted time and that the file was being referred to the ALJ for consideration and decision.[4]

On May 6, 1996, the ALJ granted Complainant's Motion for Adoption of Proposed Decision and Order as to Dean Byard and issued a Decision and Order as to Dean Byard in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), in which the ALJ: (1) found that Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), as alleged in the Complaint; (2) assessed a civil penalty of $2,000 against Respondent; and (3) disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or otherwise, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction (Decision and Order as to Dean Byard at 3).

On May 7, 1996, the Hearing Clerk sent Respondent the Decision and Order as to Dean Byard and a letter informing Respondent of his right to appeal the Decision and Order to the Judicial Officer addressed as follows:

> Mr. Dean Byard
> c/o Ann Branch
> [redacted] (b) (6) [redacted]

An individual named Ann Branch wrote a letter to the United States Department of Agriculture, which was filed in this proceeding on June 21, 1996, stating:

> This is to advise that Dean Byard's address is not c/o Ann Branch, [redacted] This is the 2nd letter I [redacted] address but his parent's [sic] address is Mr. & Mrs. L.E. Byard, [redacted] (b) (6) [redacted]

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[3]April 4, 1996, Memorandum to the File from Joyce A. Dawson, Hearing Clerk.

[4]May 1, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Mr. Dean Byard.

(b) (6) [redacted]

Respondent did not appeal the May 6, 1996, Decision and Order as to Dean Byard within the time for filing an appeal in accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), and on July 16, 1996, the May 6, 1996, Decision and Order as to Dean Byard became final.[5]

On July 30, 1996, Respondent filed a letter stating that he had not received any correspondence from the Department since November 21, 1995, and indicating that his address is "(b) (6) [redacted]." On August 15, 1996, Complainant filed a Motion to Vacate Judgement and Reopen Case Against Dean Byard, and on August 19, 1996, the ALJ issued an order vacating the May 6, 1996, Decision and Order as to Dean Byard and reopening the proceeding on the ground that the Decision and Order as to Dean Byard had not been properly served on Respondent (Order Vacating Decision and Reopening Case).

On August 28, 1996, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order as to Dean Byard and a Proposed Decision and Order as to Dean Byard, which were sent to Respondent by certified mail by the Hearing Clerk on August 28, 1996. Complainant's August 28, 1996, filings were accompanied by a letter from the Hearing Clerk, which states:

August 28, 1996

Mr. Dean Byard
[redacted]
(b) (6)

Dear Mr. Byard:

Subject: In re: Dean Byard, LaRue McWaters and Ann McWaters, Respondents — HPA Docket No. 94-0038

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order as to Dean Byard, together with a copy of the Proposed Decision, which have been filed with this office in the above-captioned

[5]July 17, 1996, Notice of Effective Date of Decision and Order as to Dean Byard issued by Joyce A. Dawson, Hearing Clerk.

proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the date of receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,
/s/
JOYCE A. DAWSON
Hearing Clerk

The return receipt accompanying the August 28, 1996, mailing is signed by "Mrs. L.E. Byard," and the return receipt indicates that it was delivered on September 4, 1996.

On September 17, 1996, Respondent filed a letter dated September 16, 1996, addressed to Complainant's counsel, which states:

> In response to your letter dated Nov 21, 1995, (enclosed). I am in agreement to accept this offer of an eight month disqualification and a $250.00 fine beginning October 1, 1996.
>
> If you do not wish to accept this, I want to request a new hearing as soon as possible. I regret the delay in responding, but have discussed this response with my attorney & he advised me I have this right of choice to a hearing.
>
> I would appreciate hearing from you at your earliest convenience.

Respondent's September 17, 1996, filing did not contain any objections to Complainant's Motion for Adoption of Proposed Decision and Order as to Dean Byard or Complainant's Proposed Decision and Order as to Dean Byard. However, on September 19, 1996, Complainant's counsel sent Respondent another proposed consent decision (Complainant's Resp. at 3).

On October 10, 1996, the ALJ issued an order denying Complainant's Motion for Adoption of Proposed Decision and Order as to Dean Byard on the ground that Respondent had not had an opportunity to respond to Complainant's latest offer to agree to the entry of a Consent Decision (Order Denying Motion for Default Dec.).

On October 24, 1996, Complainant's counsel wrote to Respondent, as follows:

> I am in receipt of your letter dated September 16, 1996, requesting to settle this case. I have enclosed yet another Consent Decision and Order for your signature. According to the terms of this Consent, you will agree to an eight month disqualification and a civil penalty of $250.00. The disqualification will begin on January 1, 1997. . . .
>
> . . . .
>
> If I do not hear from you within two weeks of the date of this letter, I will assume that you no longer wish to settle this case and you can consider my settlement offer withdrawn.

Complainant's Resp. at Exhibit B.[6]

On March 26, 1997, the ALJ requested that Complainant's counsel file a report on the status of the case (Request for Status Report). On April 14, 1997, Complainant filed a Status Report which states:

> On October 10, 1996, complainant's motion for a default decision and order was denied on the grounds that complainant had made a settlement offer to respondent Byard that was still outstanding. On October 24, 1996, the complainant sent a letter to the respondent enclosing a consent decision containing the settlement terms, and informing the respondent that if the respondent did not respond within two weeks, the offer would be withdrawn. The complainant sent the letter to the respondent's two last-known addresses: [redacted] (b) (6) [redacted] and [redacted] The respondent has not responded at all. The settlement offer has expired, and the complainant has not engaged in any further negotiations with respondent Byard.
>
> Because respondent Byard has never filed an answer to the complaint, the complainant expects to file a motion seeking the issuance of a default decision and order by April 18, 1997.

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[6]Complainant asserts that Complainant's counsel sent the October 24, 1996, letter to Respondent's two last known addresses, "[redacted]" and "[redacted] (b (6) [redacted]" (Complainant's Resp. at 3 n.1 and Exhibit B).

On April 18, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On May 12, 1997, Respondent filed Objections to the Proposed Decision in which Respondent contends that: (1) he did not have benefit of counsel until "last week;" (2) he was under the impression that settlement "negotiations would toll or suspend the need to retain counsel and/or file formal pleadings;" and (3) a default judgment would unduly prejudice him and would not prejudice the government.

The ALJ did not find any of these objections meritorious and entered the Default Decision on May 22, 1997.

Respondent's contention that the history of this proceeding reveals that he was denied due process is without merit. The fundamental elements of due process are notice and an opportunity to be heard.[7] The record reveals that Respondent was apprised of the issues in controversy, was not in any way misled by the Complaint, was fully informed of the consequences of the failure file a timely answer in this proceeding, and was provided with multiple opportunities to be heard.

Despite being fully informed that the failure to file a timely answer is deemed an admission of the allegations of the Complaint and that a default decision could be entered against him, Respondent has failed to file any answer. Respondent's answer is now over 2 years late, and I do not find any basis on this record for vacating the default decision and allowing Respondent to file an answer at this time.

Second, Respondent contends that he "did not have legal Counsel until May 2, 1997, and that he did not file an Answer or responsive pleading within the designated time." (Pet. for Appeal at 2.) On April 21, 1995, Respondent was served with a copy of the Rules of Practice and a letter from the Hearing Clerk, each of which clearly state that Respondent may proceed *pro se* or by attorney of record. Respondent chose to proceed *pro se* until May 1997, when he retained Mr. Carthel L. Smith, Jr., who entered an appearance on behalf of Respondent.[8]

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[7]*See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *Lankford v. Idaho*, 500 U.S. 110, 126 (1991); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

[8]While the record establishes that Respondent chose to proceed *pro se* until May 1997, it does appear that Respondent was advised by counsel in this proceeding prior to an appearance on Respondent's behalf by Mr. Carthel L. Smith, Jr. Respondent states in a letter dated September 16, 1996, and filed September 17, 1996, "I regret the delay in responding, but have discussed this response with my attorney & he advised me I have this right of choice to a hearing."

Moreover, the Complaint, the Rules of Practice, and the Hearing Clerk's letter served on Respondent on April 21, 1995, each expressly state that a failure to file a timely answer in this proceeding is deemed an admission of the allegations in the Complaint and could result in the entry of a default decision against Respondent.

I find nothing in this record to indicate that Respondent was misled regarding the time for filing an answer or the consequences of the failure to file a timely answer, and Respondent's decision to proceed *pro se* prior to May 1997 does not operate as an excuse for Respondent's failure to file an answer in this proceeding.

Third, Respondent contends that "he has not intentionally failed to take action in this matter" and that "he was under the impression that the case was settled[.]" (Pet. for Appeal at 4.) The record clearly establishes that Respondent failed to file an answer. The fact that Respondent's failure to file an answer was not intentional is irrelevant and not a basis for vacating the Default Decision. Further, the record does not reveal how Respondent could have reasonably been under the "impression that the case was settled." The record clearly establishes that the case was not settled. Moreover, the primary reason that the case was not settled was Respondent's failure to sign and return for entry by the ALJ any one of the six proposed consent decisions sent to Respondent by Complainant's counsel.

Fourth, Respondent contends "that under the standard Rules of Civil Procedure, notices of any attempt to obtain default judgments are required." (Pet. for Appeal at 5).

As an initial matter, Respondent's reference to "the standard Rules of Civil Procedure" is unclear. However, no rules of civil procedure govern this proceeding.[9] Instead, the Rules of Practice govern this proceeding, and section

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[9]*See generally Mister Discount Stockbrokers, Inc. v. SEC*, 768 F. 2d 875, 878 (7th Cir. 1985) (holding the Federal Rules of Civil Procedure do not apply to administrative hearings); *In re Far West Meats*, 55 Agric. Dec. 1045, 1056 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to the Department's proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to the Department's proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure are not applicable to the Department's disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before the Department of Agriculture); *In re Ron Morrow*, 53 Agric. Dec. 144, 154 (1994) (stating the Federal Rules of Civil Procedure are not applicable to disciplinary proceedings conducted under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159), pursuant to the Rules of Practice), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995).

1.139 of the Rules of Practice (7 C.F.R. § 1.139) specifically provides the procedure to be followed if a respondent fails to file an answer. This procedure requires service of a proposed default decision and the motion for adoption of a proposed default decision on a respondent and provides that a respondent may file objections to the proposed default decision.

The record reveals full compliance with the procedures in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) in this proceeding. Respondent was served with Complainant's Proposed Default Decision and Complainant's Motion for Default Decision in April 1997 and Respondent filed Objections to the Proposed Decision on May 12, 1997. The Default Decision issued by the ALJ reveals that he fully considered Respondent's Objections to the Proposed Decision, but the ALJ did not find any of the objections meritorious and properly entered the Default Decision.

Fifth, Respondent asserts that "Complainant should be estopped from seeking a penalty in excess of the agreement of the parties which was eight (8) months and $250.00 fine." (Pet. for Appeal at 5.)

As an initial matter, the record does not reveal that Complainant and Respondent entered any agreement. Instead, the record clearly establishes that the parties did not agree to the entry of a consent decision and that there is no longer any offer by Complainant to agree to the entry of a consent decision (Complainant's Resp. at 3 and Exhibit B; Status Report).

The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.[10] One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his position for the worse.[11] Complainant did nothing to lead Respondent to believe that negotiations to enter into a consent decision altered the requirement that Respondent file an answer within 20 days after being served with the Complaint. This record does not support a finding that Complainant's conduct caused Respondent to fail to file a timely answer, and I find no conduct on the part of Complainant or Complainant's counsel upon which Respondent could have

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[10]*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

[11]*Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, 965 F.2d 413, 418 (7th Cir. 1992).

reasonably relied for his failure to file an answer in this proceeding.

Further, even if Respondent had acted to his detriment based on Complainant's conduct, it is well settled that the government may not be estopped on the same terms as any other litigant.[12] It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.[13] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[14] as it was doing in this case, and estoppel is only available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.[15] Respondent bears a heavy burden when asserting estoppel against the government and he has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Sixth, Respondent contends that "Complainant has never alleged that Respondent's failure to file a timely answer has resulted in a prejudice to [Complainant's] . . . presentation of [its] case" (Pet. for Appeal at 5) and that Complainant's failure to allege or prove prejudice to its ability to prove its case constitutes a basis for setting aside the Default Decision (Pet. for Appeal at 2).

I disagree with Respondent's contention that Complainant must allege or prove prejudice to Complainant's ability to present its case before an administrative law

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[12]*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

[13]*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

[14]*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 416 (1991); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[15]*City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 418, *citing Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

judge may issue a default decision. The Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that Complainant prove that a respondent's failure to file a timely answer has prejudiced Complainant's ability to present its case.

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[16] Respondent has shown no basis for setting aside the Default Decision and allowing Respondent to file an answer.[17]

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[16]*See generally In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. 1121 (1996) (setting aside a default decision because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (setting aside a default decision because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (vacating a default decision and remanding the case to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[17]*See generally In re John Walker*, 56 Agric. Dec. ___ (Mar. 21, 1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. ___ (Mar. 13, 1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. ___ (Jan. 15, 1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. ___ (Aug. 15, 1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal docketed*, No. 96-7124 (11th Cir. Nov. 8, 1996); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until

March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer

The Rules of Practice clearly provide that an answer must be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's answer is now over 2 years late. This proceeding does not present a situation in which a technical procedural obstacle has denied Respondent of his due process rights; to the contrary, the present situation is one in which the Respondent was fully afforded due process, but Respondent's own indifference to this proceeding and his due process rights are the reasons for the issuance of a default decision.

Further, the requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJs frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year. As such, the courts have recognized that administrative agencies "should be `free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[18] If Respondent was permitted to contest

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was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[18]*See Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (stating that the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (stating that administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

some of the allegations of fact after failing to file a timely answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution.[19]

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent Dean Byard is assessed a civil penalty of $2,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States and forwarded within 60 days after service of this Order to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2014-South Building
Washington, D.C. 20250-1417

Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 94-0038.

2. Respondent Dean Byard is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, and until Respondent Dean Byard has paid the civil penalty assessed in this Order. When Respondent Dean Byard demonstrates to the Animal and Plant Health Inspection Service that he has been disqualified for 1 year as provided in this Order and paid the civil penalty assessed in this Order, a supplemental order will be issued in this proceeding upon motion of Complainant, terminating the disqualification of Respondent Dean Byard imposed by this Order.

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[19]*See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

The disqualification provision of this Order shall become effective on the 30th day after service of this Order on Respondent Dean Byard.

MUSHROOM PROMOTION, RESEARCH, and CONSUMER INFORMATION ACT

In re: DONALD B. MILLS, INC., A CALIFORNIA CORPORATION, d/b/a DBM MUSHROOMS.
MPRCIA Docket No. 95-0001.
Decision and Order filed August 27, 1997.

Dismissal of petition — Freedom of speech under First amendment — Equal protection under Fifth amendment — Mushrooms — Burden of proof.

The Judicial Officer reversed Judge Bernstein's (ALJ) Initial Decision and Order granting a Petition, filed by a mushroom producer under the Mushroom Promotion, Research, and Consumer Information Act (7 U.S.C. §§ 6101-6112) (MPRCIA), seeking a declaration that the MPRCIA and the Mushroom Order (7 C.F.R. pt. 1209) violate Petitioner's First Amendment rights to freedom of association and speech and the MPRCIA violates Petitioner's Fifth Amendment right to equal protection of the laws. The burden of proof in a proceeding under 7 U.S.C. § 6106(a) rests with Petitioner, and Petitioner has not met its burden. The decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), in which the Court held that marketing orders which compel handlers of California tree fruit to fund generic advertising does not implicate the First Amendment, is dispositive of the First Amendment issue in the proceeding. Petitioner is not prohibited or restrained by the MPRCIA, the Mushroom Order, or the Mushroom Council from communicating any message to any audience; Petitioner is not compelled to speak either by the MPRCIA or by the Mushroom Order; the Mushroom Council's mushroom promotional efforts have no political or ideological content; and Petitioner is not compelled by the MPRCIA or the Mushroom Order to endorse or finance any political or ideological views. Thus, the requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not implicate Petitioner's rights to freedom of association and speech. Petitioner contends that the MPRCIA violates its right to equal protection of the laws under the Fifth Amendment because the MPRCIA exempts from assessments producers who produce: 1) 500,000 pounds of mushrooms or less per year; 2) process mushrooms; or 3) export mushrooms. Equal protection requires that persons similarly situated be treated alike. However, virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications. The general rule is that legislation is presumed to be valid and will be sustained if the statute's classification scheme is rationally related to a legitimate government interest, unless the statute creates a suspect clarification that impinges upon a constitutionally protected right. Since all three challenged classifications are rationally related to the legitimate government purposes of strengthening the mushroom industry's position in the marketplace, maintaining and expanding existing markets and uses for mushrooms, and developing new markets and uses for mushrooms, the MPRCIA complies with the equal protection component of the Fifth Amendment.

Brian C. Leighton, Clovis, CA, for Petitioner.
Gregory Cooper, for Respondent
Richard T. Rossier, Washington, D.C., for Intervenor.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

I. Introduction

Donald B. Mills, Inc., a California corporation, d/b/a DBM Mushrooms [hereinafter Petitioner], instituted this proceeding on March 14, 1995, under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the MPRCIA]; the Mushroom Promotion, Research, and Consumer Information Order (7 C.F.R. §§ 1209.1-.280) [hereinafter the Mushroom Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter Rules of Practice], by filing a Petition pursuant to 7 U.S.C. § 6106.

The Petition alleges, *inter alia*, that: (1) the referendum adopting the Mushroom Order was not conducted in accordance with law (Pet. ¶¶ 8, 17)[1]; (2) the MPRCIA and the Mushroom Order violate Petitioner's right to freedom of association and freedom of speech under the First Amendment of the Constitution of the United States (Pet. ¶¶ 14-15); and (3) the MPRCIA violates Petitioner's right to equal protection of the laws under the Fifth Amendment of the Constitution of the United States (Pet. ¶ 16). Petitioner seeks: (1) an exemption from the Mushroom Order, or in the alternative, a modification of the Mushroom Order (Pet. ¶ 19); (2) a refund of assessments paid by Petitioner in accordance with the MPRCIA and the Mushroom Order (Pet. ¶ 19); (3) a declaration that the Mushroom Order violates Petitioner's rights to due process of law and equal protection of the laws (Pet. ¶ 20); (4) a declaration that the referendum adopting the Mushroom Order was not conducted in accordance with law (Pet. ¶¶ 21-22)[2]; and (5) attorney's fees and costs (Pet. ¶ 23).

On April 14, 1995, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed an Answer stating: (1) the referendum adopting the Mushroom Order was conducted in accordance with law (Answer ¶ 8)[3]; (2) the Petition fails to state a claim upon which

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[1]In late July or early August 1995, Petitioner withdrew all allegations in the Petition concerning the lawfulness of the referendum adopting the Mushroom Order (Respondent's Response to Petitioner's Withdrawal of Allegations; Tr. 6-7). Thus, Petitioner's challenge to the referendum adopting the Mushroom Order is moot and is not addressed in this Decision and Order.

[2]See note 1.

[3]See note 1.

relief can be granted (Answer at 3); and (3) the MPRCIA and the Mushroom Order are constitutional and otherwise fully in accordance with law (Answer at 3).

On August 15-17, 1995, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] conducted an oral hearing in San Francisco, California. Mr. Brian C. Leighton, Esq., of the Law Offices of Brian C. Leighton, Clovis, California, represented Petitioner. Mr. Gregory Cooper, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On October 20, 1995, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law and Petitioner's Post Hearing Brief, and Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Order and Respondent's Brief in Support of Proposed Findings of Fact, Conclusions of Law, and Order. On November 22, 1995, Petitioner filed Petitioner's Response to Respondent's Proposed Findings of Fact, Conclusions of Law and Order and Petitioner's Post-Hearing Reply Brief, and Respondent filed Respondent's Response to Petitioner's Proposed Findings of Fact and Conclusions of Law and Respondent's Reply Brief.

On April 26, 1996, the ALJ issued an Initial Decision and Order concluding that "[t]he Mushroom Promotion Program violates the First Amendment of the United States Constitution" and "[t]he Mushroom Promotion Program does not violate the Equal Protection requirements of the Fifth Amendment of the Constitution." (Initial Decision and Order at 22.)

On May 22, 1996, Respondent filed Respondent's Motion for Reconsideration; on June 3, 1996, Petitioner filed Petitioner's Response to Respondent's Motion for Reconsideration; and on June 4, 1996, the American Mushroom Institute [hereinafter Intervenor] filed Motion of American Mushroom Institute to Intervene in Support of Respondent's May 22 Motion to Reconsider [hereinafter Motion to Intervene in Support of Respondent].

On June 12, 1996, the ALJ filed Decision on Respondent's Motion for Reconsideration granting Intervenor's Motion to Intervene in Support of Respondent (Decision on Respondent's Motion for Recons. at 2) and affirming the Initial Decision and Order (Decision on Respondent's Motion for Recons. at 10).

On May 30, 1996, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R.

§ 2.35).[4]

On July 2, 1996, Intervenor filed Motion by American Mushroom Institute to Judicial Officer (1) For leave to Intervene for Purpose of Filing a Brief on Appeal from April 26 Initial Decision and June 12 Reconsideration Decision and in Opposition to Petitioner's May 30 Appeal and (2) For an Extension of Time to File Said Opposition [hereinafter Motion to Intervene and for Extension of Time]. On July 8, 1996, the Judicial Officer granted Intervenor's Motion to Intervene and for Extension of Time permitting Intervenor to intervene for purposes of:

> (1) filing a brief on appeal addressing (a) any issue raised by the ALJ's Decision filed April 26, 1996, (b) any issue raised by Petitioner's Appeal To The Judicial Officer From The ALJ's Decision Pursuant To 7 C.F.R. § 900.65 filed May 30, 1996, and (c) any issue raised by the ALJ's Decision on Respondent's Motion for Reconsideration filed June 12, 1996; and (2) participating in any oral argument that may be held on appeal before the Judicial Officer pursuant to 7 C.F.R. § 900.65(b).

Ruling on Motion to Intervene and for Extension of Time at 3.

On July 5, 1996, Respondent filed Respondent's Response to Petitioner's Appeal to the Judicial Officer, and on July 12, 1996, Intervenor filed Intervenor American Mushroom Institute's Appeal from April 26, 1996 and June 12, 1996 Decisions of the ALJ and Intervenor's Response to Petitioner's May 30 Appeal [hereinafter Intervenor's Appeal Petition]. On July 16, 1996, Respondent filed Respondent's Appeal to the Judicial Officer Regarding the Findings of Fact, Conclusions of Law, and Order and Respondent's Appeal Petition to the Judicial Officer. On July 31, 1996, Petitioner filed Petitioner's Reply to Respondent's Response to Petitioner's Appeal to the Judicial Officer, and on August 5, 1996, Petitioner filed Petitioner's Response to USDA's and AMI's Appeal Petition to the Judicial Officer.

On August 7, 1996, the case was referred to the Judicial Officer for decision. On March 19, 1997, I issued an Order to Show Cause stating:

> An examination of Administrative Law Judge Edwin S. Bernstein's Initial Decision and Order and the appellate pleadings filed in this

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[4]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

proceeding, *sub judice*, reveals that any decision by the Judicial Officer herein would have to address the First Amendment/commercial free speech issues that are still being litigated in . . . [*Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S. Ct. 1875 (1996) and *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429; 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879).]

Consequently, I am issuing this Order for the parties and intervenor in this proceeding to show cause why I should not forestall my Decision and Order herein, and await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond.*

Therefore, the parties and intervenor herein shall, within 20 days from the service of this Order to Show Cause, file with the Hearing Clerk any cause showing why I should not await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant case.

Neither Petitioner nor Intervenor filed a response to the Order to Show Cause. Respondent filed Respondent's Reply to Show Cause Order stating that Respondent had no objection to the delay of the proceeding "pending the judicial review in *Glickman v. Wileman* and *United States v. Cal-Almond, Inc.*" (Respondent's Reply to Show Cause Order). On May 22, 1997, I issued Ruling on Order to Show Cause stating that "[n]o cause having been shown, I shall await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant proceeding." (Ruling on Order to Show Cause at 3.)

On June 25, 1997, the Supreme Court of the United States issued a decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997) holding that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt 917), both of which are issued under the Agricultural Marketing Agreement Act of 1937 [hereinafter AMAA], does not abridge the freedom of speech within the meaning of the First Amendment. On June 27, 1997, the Court granted the petition for a writ of certiorari in *Cal-Almond*, vacated the judgment, and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct.

2501 (1997).

On July 1, 1997, Respondent filed Respondent's Motion for Immediate Decision by the Judicial Officer in which Respondent contends that the decision in *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the "only . . . remaining issue in this proceeding: whether the mushroom order and program is unconstitutional under the First Amendment" and requests that I issue a Decision and Order without further briefing. On July 3, 1997, Petitioner filed Petitioner's Response to Respondent's Motion for Immediate Decision by the Judicial Officer stating that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is not completely determinative of the First Amendment issue in this proceeding and that "while Petitioner does not object to the Judicial Officer now ruling on the issues presented in this appeal," the Judicial Officer should only issue a Decision and Order with a "clear understanding of the huge distinctions between the Marketing Order at issue in *Wileman*" and the Mushroom Order at issue in the instant proceeding (Petitioner's Response to Respondent's Motion for Immediate Decision by the Judicial Officer at 3-4).

I agree with Respondent that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the First Amendment issue in this proceeding. Further, the appellate pleadings reveal that the First Amendment issue is the only remaining issue in this proceeding.

Petitioner states in Petitioner's Appeal to the Judicial Officer from the ALJ's Decision Pursuant to 7 C.F.R. § 900.65 [hereinafter Petitioner's Appeal Petition] that "Petitioner appeals Judge Bernstein's decision for the sole reason that the decision did not order a refund of assessments, and never addressed the issue of a refund of assessments." (Petitioner's Appeal Pet. at 1.) However, because I conclude in this Decision and Order that neither the MPRCIA nor the Mushroom Order violates Petitioner's rights to freedom of association and freedom of speech under the First Amendment of the Constitution of the United States or Petitioner's right to equal protection of the laws under the Fifth Amendment of the Constitution of the United States, the issue of a refund of assessments is moot.

Intervenor states in Intervenor's Appeal Petition that there are four issues on appeal (Intervenor's Appeal Pet. at 1-2). The first two issues identified by Intervenor concern the First Amendment (Intervenor's Appeal Pet. at 1). In addition, the Intervenor identifies the issuance of a stay pending the decision of the Supreme Court of the United States in *Glickman v. Wileman Bros. & Elliott, Inc.*, as an issue (Intervenor's Appeal Pet. at 1-2). This issue was rendered moot by the May 22, 1997, Ruling on Order to Show Cause in which this proceeding was stayed pending the "outcome of proceedings for judicial review of *Wileman* and *Cal-Almond*"

(Ruling on Order to Show Cause at 3). Moreover, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997) and *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997), moot this issue. Finally, Intervenor states that the ALJ's failure to order a refund of assessments is an issue (Intervenor's Appeal Pet. at 2). Again, because I conclude in this Decision and Order that neither the MPRCIA nor the Mushroom Order violates Petitioner's rights to freedom of association and freedom of speech under the First Amendment of the Constitution of the United States or Petitioner's right to equal protection of the laws under the Fifth Amendment of the Constitution of the United States, the issue of a refund of assessments is moot.

Respondent's Appeal Petition to the Judicial Officer appeals only the ALJ's conclusion regarding the First Amendment of the Constitution of the United States. Moreover, Respondent asserts that the "only . . . remaining issue in this proceeding [is] whether the mushroom order and program is unconstitutional under the First Amendment." (Respondent's Motion for Immediate Decision by the Judicial Officer at 1 (footnote omitted).)

Petitioner, Respondent, and Intervenor have fully briefed the First Amendment issue in this proceeding, and I find that *Glickman v. Wileman Bros. & Elliott Inc., supra*, is dispositive of the First Amendment issue in this proceeding. Therefore further briefing by Petitioner, Respondent, and Intervenor before I issue a Decision and Order is not necessary. Moreover, Intervenor's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 900.65(b)), is refused because the issue in this proceeding has already been thoroughly briefed by Petitioner, Respondent, and Intervenor. Further, should Petitioner, Respondent, or Intervenor believe that my Decision and Order is in error, section 900.68(a)(3) of the Rules of Practice (7 C.F.R. § 900.68(a)(3)) provides for the filing of a petition for reconsideration.

Petitioner in this proceeding instituted under the MPRCIA (7 U.S.C. § 6106(a)) has the burden of proving that the challenged provisions of the Mushroom Order are not in accordance with law. Based upon a careful consideration of the record, I find that Petitioner has not met its burden of proof. I agree with many of the ALJ's findings of fact and the ALJ's conclusion that the Mushroom Promotion Program does not violate the equal protection requirements of the Fifth Amendment of the Constitution of the United States. Nonetheless, based on my disagreement with the ALJ's conclusion that the Mushroom Promotion Program violates the First Amendment of the Constitution of the United States, I have not adopted the ALJ's Initial Decision and Order.

As used in this Decision and Order, "Tr." refers to the transcript of the hearing

and "RX" refers to Respondent's exhibits.

II. Applicable Statutory and Regulatory Provisions

7 U.S.C.:

CHAPTER 90—MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION

. . . .

§ 6101. Findings and declaration of policy

(a) Findings

Congress finds that—

(1) mushrooms are an important food that is a valuable part of the human diet;

(2) the production of mushrooms plays a significant role in the Nation's economy in that mushrooms are produced by hundreds of mushroom producers, distributed through thousands of wholesale and retail outlets, and consumed by millions of people throughout the United States and foreign countries;

(3) mushroom production benefits the environment by efficiently using agricultural byproducts;

(4) mushrooms must be high quality, readily available, handled properly, and marketed efficiently to ensure that the benefits of this important product are available to the people of the United States;

(5) the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation;

(6) the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markets for mushrooms; and

(7) mushrooms move in interstate and foreign commerce, and mushrooms that do not move in such channels of commerce directly burden or affect interstate commerce in mushrooms.

(b) Policy

It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—

(1) strengthen the mushroom industry's position in the marketplace;

(2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

(c) Construction

Nothing in this chapter may be construed to provide for the control of production or otherwise limit the right of individual producers to produce mushrooms.

§ 6102. Definitions

As used in this chapter—

. . . .

(2) Consumer information

The term "consumer information" means information and programs that will assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of mushrooms.

. . . .

(5) First handler

The term "first handler" means any person, as described in an order issued under this chapter, who receives or otherwise acquires mushrooms from a producer and prepares for marketing or markets such mushrooms, or who prepares for marketing or markets mushrooms of that person's own production.

(6) Importer

The term "importer" means any person who imports, on average, over 500,000 pounds of mushrooms annually from outside the United States.

(7) Industry information

The term "industry information" means information and programs that are designed to lead to the development of new markets and marketing strategies, increased efficiency, and activities to enhance the image of the mushroom industry.

(8) Marketing

The term "marketing" means the sale or other disposition of mushrooms in any channel of commerce.

(9) Mushrooms

The term "mushrooms" means all varieties of cultivated mushrooms grown within the United States for the fresh market, or imported into the United States for the fresh market, that are marketed, except that such term shall not include mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed, as may be determined by the Secretary.

. . . .

(11) Producer

The term "producer" means any person engaged in the production of mushrooms who owns or shares the ownership and risk of loss of such mushrooms and who produces, on average, over 500,000 pounds of mushrooms per year.

(12) Promotion

The term "promotion" means any action determined by the Secretary to enhance the image or desirability of mushrooms, including paid advertising.

(13) Research

The term "research" means any type of study to advance the image, desirability, marketability, production, product development, quality, or nutritional value of mushrooms.

. . . .

§ *6103. Issuance of orders*

(a) In general

To effectuate the declared policy of section 6101(b) of this title, the Secretary, subject to the procedures provided in subsection (b) of this section, shall issue orders under this chapter applicable to producers, importers, and first handlers of mushrooms. Any such order shall be national in scope. Not more than one order shall be in effect under this chapter at any one time.

(b) Procedures

(1) Issuance of an order

The Secretary may propose the issuance of an order under this chapter, or an association of mushroom producers or any other person

that will be affected by this chapter may request the issuance of, and submit a proposal for, such an order.

(2) Publication of order

Not later than 60 days after the receipt of a request and proposal by an interested person for an order, or when the Secretary determines to propose an order, the Secretary shall publish the proposed order and give due notice and opportunity for public comment on the proposed order.

(3) Issuance of order

After notice and opportunity for public comment are given, as provided in paragraph (2), the Secretary shall issue the order, taking into consideration the comments received and including in the order provisions necessary to ensure that the order is in conformity with the requirements of this chapter. Such order shall be issued and, if approved by producers and importers of mushrooms as provided in section 6105(a) of this title, shall become effective not later than 180 days following publication of the proposed order.

. . . .

§ 6104. Required terms in orders

(a) In general

Each order issued under this chapter shall contain the terms and conditions prescribed in this section.

(b) Mushroom Council

(1) Establishment and membership of Council

(A) Establishment

The order shall provide for the establishment of, and

selection of members to, a Mushroom Council that shall consist of at least 4 members and not more than 9 members.

. . . .

(c) Powers and duties of Council

The order shall define the powers and duties of the Council, which shall include the following powers and duties—

(1) to administer the order in accordance with its terms and provisions;

. . . .

(4) to propose, receive, evaluate, approve and submit to the Secretary for approval under subsection (d) of this section budgets, plans, and projects of mushroom promotion, research, consumer information, and industry information, as well as to contract and enter into agreements with appropriate persons to implement such plans or projects;

. . . .

(6) to receive, investigate, and report to the Secretary complaints of violations of the order. . . .

. . . .

(g) Assessments

(1) Collection and payment

(A) In general

The order shall provide that each first handler of mushrooms for the domestic fresh market produced in the United States shall collect, in the manner prescribed by the

order, assessments from producers and remit the assessments to the Council.

(B) Importers

The order also shall provide that each importer of mushrooms for the domestic fresh market shall pay assessments to the Council in the manner prescribed by the order.

(C) Direct marketing

Any person marketing mushrooms of that person's own production directly to consumers shall remit the assessments on such mushrooms directly to the Council in the manner prescribed in the order.

(2) Rate of assessment

The rate of assessment shall be determined and announced by the Council and may be changed by the Council at any time. The order shall provide that the rate of assessment—

(A) for the first year of the order, may not exceed one-quarter cent per pound of mushrooms;

(B) for the second year of the order, may not exceed one-third cent per pound of mushrooms;

(C) for the third year of the order, may not exceed one-half cent per pound of mushrooms; and

(D) for the following years of the order, may not exceed one cent per pound of mushrooms.

. . . .

(4) Limitation on collection

No assessment may be collected on mushrooms that a first handler certifies will be exported as mushrooms.

. . . .

§ 6106. Petition and review

(a) Petition

(1) In general

A person subject to an order issued under this chapter may file with the Secretary a petition—

(A) stating that the order, any provision of the order, or any obligation imposed in connection with the order, is not in accordance with law; and

(B) requesting a modification of the order or an exemption from the order.

(2) Hearings

The petitioner shall be given the opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary.

(3) Ruling

After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

7 U.S.C. §§ 6101, 6102(2), (5)-(9), (11)-(13), 6103(a), (b), 6104(a), (b)(1)(A), (c)(1), (c)(4), (c)(6), (g)(1), (g)(2), (g)(4), 6106(a).

7 C.F.R.:

PART 1209—MUSHROOM PROMOTION, RESEARCH, AND CONSUMER INFORMATION ORDER

Subpart A—Mushroom Promotion, Research, and Consumer Information Order

DEFINITIONS

. . . .

§ 1209.3 Consumer information.

Consumer information means information and programs that will assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of mushrooms.

. . . .

§ 1209.6 First handler.

First handler means any person who receives or otherwise acquires mushrooms from a producer and prepares for marketing or markets such mushrooms, or who prepares for marketing or markets mushrooms of that person's own production.

. . . .

§ 1209.8 Importer.

Importer means any person who imports, on average, over 500,000 pounds of mushrooms annually from outside the United States.

§ 1209.9 Industry information.

Industry information means information and programs that will lead to the development of new markets and marketing strategies, increased efficiency, and activities to enhance the image of the mushroom industry.

§ 1209.10 Marketing.

(a) *Marketing* means the sale or other disposition of mushrooms in any channel of commerce.

(b) *To market* means to sell or otherwise dispose of mushrooms in any channel of commerce.

§ 1209.11 Mushrooms.

Mushrooms means all varieties of cultivated mushrooms grown within the United States and marketed for the fresh market, or imported into the United States and marketed for the fresh market, except such term shall not include mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed in such a manner as the Council, with the approval of the Secretary, may determine.

. . . .

§ 1209.15 Producer.

Producer means any person engaged in the production of mushrooms who owns or shares the ownership and risk of loss of such mushrooms and who produces, on average, over 500,000 pounds of mushrooms per year.

. . . .

§ 1209.17 Promotion.

Promotion means any action determined by the Secretary to enhance the image or desirability of mushrooms, including paid advertising.

. . . .

§ 1209.19 Research.

Research means any type of study to advance the image, desirability, safety, marketability, production, product development, quality, or nutritional value of mushrooms.

. . . .

EXPENSES AND ASSESSMENTS

. . . .

§ 1209.51 Assessments.

(a) Any first handler initially purchasing, or otherwise placing into the current of commerce, mushrooms produced in the United States shall, in the manner as prescribed by the Council and approved by the Secretary, collect an assessment based upon the number of pounds of mushrooms marketed in the United States for the account of the producer, and remit the assessment to the Council.

(b) The rate of assessment effective during any fiscal year shall be the rate specified in the budget for such fiscal year approved by the Secretary, except that:

(1) The rate of assessment during the first year this subpart is in effect shall be one-quarter of one cent per pound of mushrooms marketed, or the equivalent thereof.

(2) The rate of assessment during the second year this subpart is in effect shall not exceed one-third of one cent per pound of mushrooms marketed, or the equivalent thereof.

(3) The rate of assessment during the third year this subpart is in effect shall not exceed one-half of one cent per pound of mushrooms marketed, or the equivalent thereof.

(4) The rate of assessment during each of the fourth and following years this subpart is in effect shall not exceed one cent per pound of mushrooms marketed, or the equivalent thereof.

(5) The Council may change the rate of assessment for a fiscal year at any time with the approval of the Secretary as necessary to reflect changed circumstances, except that any such changed rate may not exceed the level of assessment specified in paragraphs (b)(1), (2), (3), or (4), whichever is applicable.

(c) Any person marketing mushrooms of that person's own production to consumers in the United States, either directly or through retail or wholesale outlets, shall be considered a first handler and shall remit to the Council an assessment on such mushrooms at the rate per-pound then in effect, and in such form and manner prescribed by the Council.

(d) Only one assessment shall be paid on each unit of mushrooms marketed.

(e)(1) Each importer of mushrooms shall pay an assessment to the Council on mushrooms imported for marketing in the United States, through the U.S. Customs Service or in such other manner as may be established by rules and regulations approved by the Secretary.

(2) The per-pound assessment rate for imported mushrooms shall be

the same as the rate provided for mushrooms produced in the United States.

(3) The import assessment shall be uniformly applied to imported mushrooms that are identified by the number, 0709.51.0000, in the Harmonized Tariff Schedule of the United States or any other number used to identify fresh mushrooms.

(4) The assessments due on imported mushrooms shall be paid when the mushrooms are entered or withdrawn for consumption in the United States, or at such other time as may be established by rules and regulations prescribed by the Council and approved by the Secretary and under such procedures as are provided in such rules and regulations.

(5) Only one assessment shall be paid on each unit of mushrooms imported.

(f) The collection of assessments under this section shall commence on all mushrooms marketed in or imported into the United States on or after the date established by the Secretary, and shall continue until terminated by the Secretary. If the Council is not constituted on the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments on behalf of the Council and may hold such assessments until the Council is constituted, then remit such assessments to the Council.

(g)(1) Each person responsible for remitting assessments under paragraphs (a), (c), or (e) shall remit the amounts due from assessments to the Council on a monthly basis no later than the fifteenth day of the month following the month in which the mushrooms were marketed, in such manner as prescribed by the Council.

. . . .

§ 1209.52 Exemption from assessment.

(a) Persons that produce or import, on average, 500,000 pounds or less of mushrooms annually shall be exempted from assessment.

(b) To claim such exemption, such persons shall apply to the Council, in the form and manner prescribed in the rules and regulations.

(c) Mushrooms produced in the United States that are exported are exempt from assessment and are subject to such safeguards as prescribed in rules and regulations to prevent improper use of this exemption.

(d) Domestic and imported mushrooms used for processing are exempt from assessment and are subject to such safeguards as prescribed in rules and

regulations to prevent improper use of this exemption.

7 C.F.R. §§ 1209.3, .6, .8-.11, .15, .17, .19, .51(a)-(g)(1), .52.

III. Findings of Fact

1. Petitioner is a California corporation doing business as DBM Mushrooms (Pet. ¶ 1).

2. Petitioner's office address is [redacted] California [redacted] (Pet. ¶ 2).

3. Petitioner grows mushrooms on a ranch located at [redacted] California [redacted] (Pet. ¶ 2).

4. Petitioner was incorporated in the State of California on October 2, 1972 (Pet. ¶ 3).

5. Mr. Donald B. Mills is the president of Petitioner; Ms. Evelyn Mills is the secretary of Petitioner; Mr. Donald B. Mills, Jr., is the vice-president of Petitioner; and Mr. Greg H. Mills is the treasurer of Petitioner (Pet. ¶ 4).

6. Petitioner grows approximately 3 million pounds of mushrooms per year, with approximately 75% of the mushrooms going to the fresh market (Tr. 729-30).

7. Petitioner markets fresh mushrooms in Oakland, South San Francisco, and San Francisco, California (Tr. 727).

8. Petitioner is a "producer" of mushrooms as defined by the MPRCIA (7 U.S.C. § 6102(11)) and section 1209.15 of the Mushroom Order (7 C.F.R. § 1209.15) (Pet. ¶¶ 2, 5-6, 11).

9. Petitioner is a "first handler" of mushrooms as defined by the MPRCIA (7 U.S.C. § 6102(5)) and section 1209.6 of the Mushroom Order (7 C.F.R. § 1209.6) (Pet. ¶¶ 5-6, 11).

10. Respondent is the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (Answer at 1).

11. At all times material to this proceeding, Respondent was authorized to exercise the functions of the Secretary of Agriculture under the MPRCIA (7 C.F.R. § 2.79(a)(8)(xlvii)) (1996).

12. Intervenor is a national, non-profit trade association and its membership includes more than 100 commercial-sized mushroom farms in the United States representing over 90% of domestic mushroom production (Decision on Respondent's Motion for Recons. at 2).

13. Intervenor has a substantial interest in the outcome of this proceeding (Decision on Respondent's Motion for Recons. at 2).

14. In 1966, 75% of mushrooms produced in the United States were sold for processing and 25% of the mushrooms produced in the United States were sold in the fresh market. By 1993, 69% of the mushrooms produced in the United States were sold in the fresh market and only 31% of the mushrooms produced in the United States were sold for processing (RX 69 at 15).

15. Between 1966 and 1993, the number of pounds of mushrooms sold in the fresh market increased from 41,951,000 pounds to over 520,000,000 pounds (RX 69 at 15). In 1992-1993, the total value of mushrooms produced in the United States and sold in the fresh market was $537,922,000 (RX 69 at 12, 20). Less than 1% of the mushrooms sold in the United States in the fresh mushroom market is from imports (RX 24 at 1).

16. Between 1966 and 1993, the number of pounds of mushrooms sold for processing only increased from 122,964,000 pounds to 234,172,000 pounds (RX 69 at 15). Most of the United States canned mushroom market has been lost to foreign growers (RX 6 at 98, RX 10 at 17, RX 12 at 43, 83, 89; Tr. 424).

17. The value of fresh mushrooms exported from the United States peaked in 1990, totalling approximately $22 million (RX 43 at 29). Most foreign fresh mushroom markets are supplied by local producers who have ample, low-cost supplies of fresh mushrooms available for sale. Many European and Asian consumers favor varieties of mushrooms not grown in significant quantities by United States producers. United States mushroom producers may have difficulty expanding sales in mushroom markets outside North America (RX 43 at 29-31).

18. In 1993-1994, there were approximately 355 mushroom producers who produced approximately 529 million pounds of mushrooms for the fresh market (RX 69 at 9, 15, 20).

19. Mushrooms are produced commercially in many states (RX 69 at 20 n.5). However, 43% of United States mushroom production comes from Pennsylvania and 17% of United States mushroom production comes from California (Tr. 328-29).

20. Per capita consumption of fresh mushrooms in the United States is far below the per capita consumption of fresh mushrooms in Canada and most western European countries (RX 43 at 7, 9). The rate of increase in per capita mushroom consumption in the United States fell between the early 1970's and 1990, and in 1990, per capita consumption of mushrooms in the United States began to decline and continued to decrease through the early 1990's (RX 43 at 1a, 7-8; Tr. 167).

21. The price per pound for fresh mushrooms did not rise during the period 1987-1993, while, during that same period, the price for vegetables generally rose rapidly (RX 43 at 11-12; Tr. 170).

22. The sale of mushrooms in the fresh market is more profitable than the sale of mushrooms for processing (Tr. 628, 770). In 1966-1967, the producer received an average price of $0.465 per pound for mushrooms purchased for the fresh market and an average price of $0.313 per pound for mushrooms purchased for processing (RX 69 at 16). In 1993-1994, the producer received an average price of $1.03 per pound for mushrooms purchased for the fresh market and an average price of $0.662 per pound for mushrooms purchased for processing (RX 69 at 16).

23. Fresh mushrooms have significant uses in salads, on pasta, and with other vegetables (RX 47 at 7). Mushrooms "make meals more elegant," "add a nice finishing touch," and "make a meal look better on the plate" (RX 47 at 8). These uses for fresh mushrooms present an opportunity to increase sales of fresh mushrooms (RX 47 at 13-14).

24. Enhancing demand for a commodity involves increasing consumer preference for a commodity (Tr. 21-22). Consumer preferences, which "translate into a demand schedule," are influenced by income, demographics, regional differences, and promotion programs (Tr. 22). Once a demand curve is established for a commodity, the amount of the commodity sold depends on the price of the commodity (Tr. 22). If a promotion program is effective and increases demand for a commodity so that more of the commodity can be sold at a given price, the same amount of the commodity can be sold at a higher price, or more of the commodity can be sold at a higher price, total revenue to the industry increases (RX 83; Tr. 25-28).

25. Generic promotion is a cooperative effort by sellers of a relatively homogeneous commodity to disseminate information about a commodity to increase demand for the commodity (Tr. 16-17, 19). Many agricultural commodities are relatively homogeneous (Tr. 21). Effective generic promotion of a commodity increases consumer preference for the commodity (Tr. 21-22). The purpose of generic promotion is to increase overall demand for a commodity (Tr. 19).

26. Branded advertising is an individual effort designed to increase the demand for the individual's brand or increase the individual's share of the market for the commodity (Tr. 17-18). Branded advertising may have the effect of increasing total demand for a commodity, but, unlike generic promotion, that is not the primary purpose of branded advertising (Tr. 19).

27. While mushroom producers and handlers may compete with one another for the mushroom market, they are also in competition with producers and handlers of other agricultural commodities and food items for the entire food market (Tr. 536, 543-44).

28. Voluntary generic mushroom promotion programs have not been effective

(Tr. 419-21, 542-44). Voluntary promotion programs allow individuals who do not choose to pay for the promotion program to reap the benefits of a generic promotion program that results in increasing demand for a relatively homogeneous commodity (Tr. 49-50, 110-11).

29. The Mushroom Order became effective on January 8, 1993 (RX 24), and the Mushroom Council was first seated on June 24, 1993 (RX 60 at 1).

30. The Mushroom Council sends a newsletter to mushroom producers and handlers and others who have requested copies of the newsletter approximately every 3 months to keep recipients of the newsletter informed of the Mushroom Council's activities (RX 61; Tr. 268).

31. On June 24, 1993, the Mushroom Council developed a budget for the period August 1, 1993, through December 31, 1994 (RX 60 at 2).

32. On August 1, 1993, the Mushroom Council began collecting assessments from mushroom producers and importers to fund a generic mushroom promotion program (Tr. 200).

33. Mushroom producers and importers of mushrooms are assessed at the rate of $0.0025 per pound of mushrooms in accordance with the MPRCIA and the Mushroom Order (7 U.S.C. § 6104(g)(2); 7 C.F.R. § 1209.51). First handlers initially purchasing, or otherwise placing into the current of commerce, mushrooms produced in the United States, must collect assessments at the rate of $0.0025 per pound for mushrooms marketed in the United States for the account of the producer and remit the assessments collected to the Mushroom Council. Persons marketing mushrooms of that person's own production to consumers in the United States are considered first handlers and must remit to the Mushroom Council an assessment of $0.0025 per pound for mushrooms. Importers of mushrooms must remit to the Mushroom Council an assessment of $0.0025 per pound for mushrooms marketed in the United States (7 U.S.C. § 6104(g); 7 C.F.R. § 1209.51; RX 38 at 1, RX 40 at 1; Tr. 284-85).

34. First handlers and producers marketing mushrooms of that person's own production must submit assessment reports and checks to the Mushroom Council monthly (RX 31; Tr. 257).

35. Only producers who market on average over 500,000 pounds of fresh mushrooms per year and importers who import on average over 500,000 pounds of fresh mushrooms annually into the United States are subject to assessments (7 U.S.C. § 6102(6), (11)). One hundred fifty-two mushroom producers in the United States are subject to assessments as they each, on average, annually market over 500,000 pounds of fresh mushrooms (Tr. 252, 329). In 1995, the Mushroom Council collected assessments from these 152 producers for approximately 515

million to 518 million pounds of mushrooms (Tr. 252).

36. Fifty-nine fresh mushroom producers have filed exemptions with the Mushroom Council claiming that they market 500,000 pounds or less of fresh mushrooms annually for the domestic market and are therefore exempt from assessments (Tr. 252, 329).

37. No assessment is collected on mushrooms produced in the United States that are exported and no assessment is collected on mushrooms used for processing (7 U.S.C. §§ 6102(9), 6104(g)(4); 7 C.F.R. §§ 1209.11, .52; Tr. 130, 319, 330-31).

38. In October 1993, the Mushroom Council hired Mr. Wade A. Whitfield as president and chief executive officer (Tr. 194-95). At the time that he was hired by the Mushroom Council, Mr. Whitfield had approximately 30 years of experience in agricultural commodity advertising and promotion programs (Tr. 195-200).

39. In late 1993, the Mushroom Council hired M. Cubed, an economic consulting firm, to examine the state of the mushroom industry, the factors influencing the demand for mushrooms, and potential mushroom marketing objectives (RX 60 at 22; Tr. 164-66, 175-76).

40. In March 1994, M. Cubed prepared a report for the Mushroom Council based on existing statistics, surveys, and industry and user interviews (RX 43; Tr. 167, 170-71).

41. Studies reveal that: (1) there are significant information gaps in the retail sector concerning the proper handling, presentation, and care for mushrooms at the store; (2) consumers are not particularly knowledgeable about proper mushroom selection, storage, and preparation; and (3) consumers generally want more recipes in which mushrooms are an ingredient (RX 43 at 2, 22-23, RX 45-47; Tr. 172-73, 364-69).

42. The Mushroom Council interviewed two consulting firms for the development of a strategic plan (Tr. 210-11). Nuffer, Smith, Tucker, Inc., submitted a proposal (RX 44) to the Mushroom Council in March 1994, and on the basis of the proposal, the Mushroom Council hired Nuffer, Smith, Tucker, Inc., to assist the Mushroom Council with the development of a strategic plan (Tr. 211). After numerous discussions and meetings with the Mushroom Council and individuals from the mushroom industry, Nuffer, Smith, Tucker, Inc., developed a draft strategic plan, which was adopted by the Mushroom Council on June 15-16, 1994 (RX 45; Tr. 213-15, 219). The strategic plan is reviewed each time the Mushroom Council meets and is revised as the Mushroom Council believes necessary (Tr. 218).

43. The strategic plan states the mission, values, vision, key result areas, and objectives of the Mushroom Council, and identifies individuals responsible for obtaining results and achieving objectives and the time within which results are to

be obtained and objectives are to be achieved (RX 45; Tr. 216).

44. The Mushroom Council hired The Data Group, Inc., a professional marketing research organization, to conduct studies to identify consumers of mushrooms, mushroom use patterns, and consumer attitudes toward mushrooms, and to provide information necessary to build a mushroom promotion program (Tr. 220). The project included a qualitative study of 12 focus groups and a quantitative study using a statistically-reliable telephone survey (RX 46, 47; Tr. 220, 363-66).

45. The consumer studies prepared by The Data Group, Inc., state that consumers are willing to buy more fresh mushrooms (RX 46, 47; Tr. 364-65, 371-73).

46. The Mushroom Council began a public relations program in February 1994, entitled *Let Your Love Mushroom* (RX 41; Tr. 202-03). The public relations program used Valentines Day as a vehicle to promote mushrooms as a food that adds romance and gourmet appeal throughout the year. Romance expert and best-selling author Greg Godek was the spokesperson for the public relations program. Mr. Godek conducted a 15-city electronic media tour (RX 41; Tr. 203-06). The public relations program included the production and distribution of articles about mushrooms, pictures of mushrooms, recipes which include mushrooms as one of the ingredients, and an "aphrodisiac basket" containing mushrooms (RX 71; Tr. 203, 206-09). The promotion program resulted in 41 television and 57 radio interviews with the Mushroom Council's spokesperson; 148 audio news releases regarding mushrooms; 560 newspapers publishing stories concerning mushrooms and mushroom brochure offers; and 30 magazine editors receiving a mushroom gift delivery (RX 42; Tr. 206-07). The total cost of the public relations program begun in February 1994 was $138,000 (Tr. 308).

47. In August 1994, the Mushroom Council hired Ms. Robyn Wilk as public relations director (Tr. 449). Ms. Wilk has a Bachelor of Arts degree in home economics with an emphasis in food, nutrition, public relations, and advertising (Tr. 447). At the time of the hearing in this proceeding, Ms. Wilk had 20 years of experience in agricultural commodity advertising and promotion programs (Tr. 447-49).

48. The Mushroom Council hired a consulting firm to prepare a buyer's guide for National Mushroom Month in 1994 (Tr. 225). Approximately 16,000 copies of the buyer's guide, which provides information concerning the varieties and characteristics of mushrooms and the proper handling, preparation, and storage of mushrooms, were distributed (RX 74, items 1, 2; Tr. 224-26, 312-14).

49. The Mushroom Council ran trade advertisements during National Mushroom Month in September 1994 (RX 74, item 6; Tr. 227, 499) and prepared

a "color page," entitled *The Mystique of Mushrooms*, for use in newspapers. The "color page" includes photographs of mushrooms, facts about mushrooms, and recipes which include mushrooms as one of the ingredients (RX 74, item 3; Tr. 227). The color page, which could be reprinted in newspapers, cost the Mushroom Council $26,000 to produce, but was published in more than 160 newspapers in the United States for free (RX 74, items 4, 5; Tr. 498). If the Mushroom Council had paid for the publication of the color page, the cost of publication just in the *Houston Chronicle* would have been over $52,000 (Tr. 498). The Mushroom Council received an award for *The Mystique of Mushrooms* as it was found to be one of the 20 best promotional pages of its type in 1994 (Tr. 525-26).

50. The Mushroom Council's staff and consultants hired by the Mushroom Council developed a marketing plan for 1995, which was approved by the Mushroom Council on December 9, 1994, and subsequently approved by the United States Department of Agriculture (RX 58; Tr. 228-29). The plan provides for a total budget of $2,082,657 and an assessment in accordance with the MPRCIA and the Mushroom Order at a rate $0.0025 per pound of mushrooms (RX 58 at 3). Planned expenditures for 1995 are categorized in the marketing plan as follows: (1) $710,000 for consumer publicity and education; (2) $185,000 for food service promotion; (3) $450,000 for retail merchandising and promotion; (4) $12,500 for research; (5) $12,500 for sponsorships; (6) $13,000 for conventions and conferences; (7) $10,000 for crisis management; and (8) $464,657 for council administration (RX 58 at 4-5). The 1995 marketing plan also includes a $225,000 reserve (RX 58 at 3).

51. In 1995, the Mushroom Council developed a retail merchandising kit, entitled *Blueprint for Profit*, with a shelf layout schematic, care and handling cards for consumers, and a color chart for produce clerks showing varieties of, uses for, flavors in, and handling requirements for mushrooms (RX 72 at 5, 6; Tr. 231-32, 236-39). The Mushroom Council announced the retail merchandising kit in three produce trade publications, *The Packer Produce News*, *Produce Merchandising*, and *Produce Business* (RX 72 at 2-4; Tr. 243). The Mushroom Council mailed the *Blueprint for Profit* to every mushroom producer in the United States that was on their list of mushroom producers and advised producers that they could order additional kits (Tr. 240). In addition, the Mushroom Council mailed copies of the *Blueprint for Profit* directly to retailers and provided order forms in the kit so that retailers could obtain additional copies of the kit (Tr. 242). Almost 70 store groups ordered copies of the *Blueprint for Profit*, and the number of copies ordered is sufficient for use in over 15,000 supermarkets or approximately one-half of the major supermarkets in the United States (Tr. 242-43). At the request of a major

retailer with 1,000 supermarkets in the eastern part of the United States, the Mushroom Council developed and distributed a small chart, which includes information on varieties of mushrooms, for use in the mushroom section of the stores by consumers (Tr. 244-45).

52. At the time of the hearing in this proceeding, the Mushroom Council was testing an in-store radio promotion program with two major retailers and had scheduled a training program for produce clerks to inform them on "how to use mushrooms and how to . . . keep them fresh" (Tr. 246).

53. In January 1995, the Mushroom Council contracted with U.S. Marketing Services to provide the Mushroom Council with sales data from a representative group of supermarket chains to be used for a newsletter (RX 49; Tr. 232-33). In March 1995, the Mushroom Council contracted with John Donaghue to prepare a newsletter using the sales data gathered by U.S. Marketing Services (RX 49, 50; Tr. 233). The newsletter, entitled *Retailers Mushroom Marketscope*, was first issued in June 1995, is issued quarterly, and is mailed to supermarket executives (RX 50 at 3, RX 72 item 1; Tr. 234-36). The newsletter is designed to help retailers improve mushroom sales and margins and the objectives are to increase retailers' awareness of the Mushroom Council, to motivate retailers to improve mushroom merchandising in their stores, to position the Mushroom Council as an authoritative source of marketing information (RX 50), and to constantly remind retailers of the importance of mushrooms to their businesses (Tr. 234).

54. At the time of the hearing in this proceeding, the Mushroom Council had nearly completed a Comprehensive Education Program for elementary school children (Tr. 452). The objective of the project is to increase awareness of and understanding about mushrooms among young children (RX 58 at 6) and to influence eating patterns (Tr. 453-54).

55. In 1995, the Mushroom Council prepared a consumer information leaflet which contains photographs of mushrooms, mushroom recipes, and information about varieties of mushrooms and fresh mushroom storage, handling, and purchase (RX 58 at 7; Tr. 454-55). The Mushroom Council produced approximately 50,000 copies of the consumer information leaflet and copies of the leaflet are distributed at conferences and conventions and mailed to consumers on request (Tr. 455).

56. At the time of the hearing in this proceeding, the Mushroom Council had just completed and mailed the first edition of a quarterly retail consumer advisor's newsletter (Tr. 455-56). Retail consumer advisors are employees of supermarkets whose function it is to communicate with customers. The newsletter is designed to present information about fresh mushrooms, including recipes, serving suggestions, nutrition facts, and handling, to retail consumer advisors and assist retail consumer

advisors with the promotion of fresh mushrooms (RX 58 at 7; Tr. 455).

57. The Mushroom Council identified as one of its projects for 1995 the production of a stock of photographs of mushrooms for use in trade publications, consumers publications, recipe brochures, cookbooks, newspapers, magazines, trade shows, and meetings (RX 58 at 6; Tr. 454).

58. Most of the Mushroom Council's consumer publicity and education programs are developed and implemented by a public relations agency hired by the Mushroom Council (RX 58). The Mushroom Council conducted a thorough search for a public relations agency, including a review of approximately 75 applicants for the job (Tr. 222). The public relations agency selected by the Mushroom Council is Lewis & Neale, Inc., New York, New York, a food-only public relations agency with extensive experience in public relations and with a good relationship with magazine editors (Tr. 223, 457). Lewis & Neale, Inc., has particular expertise in developing recipes, color photography, nutritional information and programs, and cookbooks (Tr. 457-58). Lewis & Neale, Inc., has a test kitchen on its premises and home economists and dieticians on its staff (Tr. 458).

59. The Mushroom Council's public relations director, Ms. Robyn Wilk, supervises Lewis & Neale, Inc.'s, public relations work for the Mushroom Council (Tr. 456).

60. The Mushroom Council's public relations effort, as distinct from paid advertising, is an attempt to obtain publicity for mushrooms in various media outlets without charge (Tr. 223-24, 459-60, 508). The Mushroom Council's experience is that free publicity for mushrooms may be obtained if the Mushroom Council is viewed by the media as a reliable and conscientious organization that produces high quality materials which convey accurate information (Tr. 460).

61. In 1995, Lewis & Neale, Inc., prepared editorial press releases concerning mushrooms, which it sent to thousands of newspapers in the United States (RX 76-78, 80; Tr. 500-06).

62. Lewis & Neale, Inc., created two color pages with photographs of mushrooms, recipes which include mushrooms as one of the ingredients, and information about mushrooms. These color pages were published in a special food edition of *Woman's Day*, a magazine with a circulation of more than 1,000,000 (RX 81; Tr. 506-07). The Mushroom Council paid a $2,000 fee to obtain this coverage in *Woman's Day* (Tr. 507).

63. The Mushroom Council attempts to obtain exposure for fresh mushrooms through the electronic media (Tr. 466-67). Art Ginsburg, a chef who appears on national television and has a audience of more than 10,000,000, cooperated with the Mushroom Council on two occasions in 1995 (Tr. 466-67). Lewis & Neale, Inc.,

produced two cooking videos distributed to over 150 television stations in the United States (RX 58 at 14).

64. Other public relations programs conducted or scheduled by the Mushroom Council include: (1) a 12-page recipe booklet, which was prepared by Lewis & Neale, Inc., and printed in April 1995, containing approximately 16 recipes, each of which include mushrooms as one of the ingredients (Tr. 460-61); (2) a dinner held in May 1995 by the Mushroom Council for more than 50 food editors employed by magazines such as *Woman's Day, Bon Appetite, Gourmet,* and *Ladies Home Journal* and designed to introduce food editors to the Mushroom Council (RX 58 at 11; Tr. 461-62); (3) two mushroom farm tours for food editors scheduled for the fall of 1995 which are designed to give food editors an opportunity to visit mushroom farms, to talk to mushroom producers, and to see how mushrooms are grown (RX 58 at 15; Tr. 467-68); (4) a booth at the International Association of Cooking Professionals meeting held in San Antonio, Texas, in April 1995, at which the Mushroom Council distributed its press kit and its cookbook and cooked a mushroom dish, which was distributed to attendees (RX 58 at 16; Tr. 468-70); (5) a mushroom recipe contest on the internet, entitled *Cyberspace Mushroom Lovers Challenge*, which also includes information about varieties of mushrooms and handling mushrooms (RX 58 at 17, RX 79; Tr. 470-71, 504); and (6) a soup and stew food page, which the Mushroom Council produced in conjunction with the California Carrot Advisory Board, the Washington Potato Commission, and the National Onion Association, for newspapers and magazines (RX 53; Tr. 474-76).

65. The food service industry is a multi-billion-dollar-a-year industry which includes food service at restaurants, hotels, schools, and hospitals (Tr. 472). The Mushroom Council's research indicates that approximately 30% of the fresh mushrooms sold in the United States is used by the food service industry (Tr. 472). The Mushroom Council contracted with James M. Degen & Co., Inc., a marketing research and consulting firm specializing in the food service industry, to conduct an internal assessment of the experiences of mushroom producers with the food service industry, identify marketing opportunities, and recommend strategic alternatives and future market research requirements for the Mushroom Council's consideration (RX 56; Tr. 481-82). The report, entitled *An Internal Assessment of the U.S. Fresh Mushroom Industry's Foodservice Situation--1995*, was completed on April 25, 1995 (RX 56). The Mushroom Council contracted with James M. Degen & Co., Inc., to prepare a written and oral presentation of a 3-year strategic marketing plan and a first-year action plan to guide the development and implementation of the Mushroom Council's food service program (RX 57; Tr. 472-74). At the time of the hearing in this proceeding, the research regarding the potential for marketing fresh

mushrooms to the food service industry had just been completed (Tr. 472-73).

66. Agricultural economists use econometrics, focus groups, consumer surveys, panel data, and consumer diaries to determine whether an advertising or promotion program is increasing demand for the advertised or promoted commodity (Tr. 28-30). Econometrics enable the agricultural economist to definitively determine whether a statistically significant shift in demand for a commodity has occurred (Tr. 30). Advertising and public relations firms typically use tracking studies and gross rating points to evaluate the effectiveness of an advertising or promotion program (Tr. 30-31).

67. The evaluation of the effectiveness of an advertising or promotion program is expensive (Tr. 186, 332, 376). Given the expense of measuring the effectiveness of each promotional event and the size of the Mushroom Council's budget, the measurement of the Mushroom Council's entire program on a yearly or multi-yearly basis is more reasonable than the evaluation of each individual promotional event (Tr. 376-78).

68. At the time of the hearing in this proceeding, the effectiveness of the Mushroom Council's promotion program could not be evaluated using econometrics because the program had not been implemented for a sufficient period of time (Tr. 32-33). At the time of the hearing in this proceeding, the Mushroom Council had not conducted an evaluation of the mushroom promotion program, but had conducted informal surveys of retailers and persons in the food service industry and found that retailers and persons in the food service industry had a positive reaction to the Mushroom Council's 1994 promotional events (Tr. 269-70).

69. Analysis of other generic promotion programs reveals that most generic promotion programs have enhanced the demand for the commodity promoted (Tr. 33) and for each $1 spent on generic promotion programs, returns to the industries whose commodities have been promoted have averaged between $4 and $5 (Tr. 33-34). However, many of the generic promotion programs that have been evaluated spend large amounts on national advertising (which the Mushroom Council does not do) and most of the rate of return for these generic promotion programs is attributable to national media advertising (Tr. 62-70, 75-77). Nonetheless, analysis reveals that rates of return in generic promotion programs with national media advertising are enhanced by promotion programs similar to those conducted by the Mushroom Council (Tr. 76-77).

70. Mushrooms meet many of the criteria of commodities that have benefitted from generic commodity promotion (Tr. 51-55). These criteria include: (1) relative homogeneity of the commodity and relatively little brand preference by consumers (RX 47 at 39; Tr. 52, 372); (2) the commodity is identifiable at the time of purchase

by the consumer (Tr. 52); (3) a need for consumer knowledge about the commodity (RX 43 at 2, 22-23, RX 45-47; Tr. 53, 172-73, 364-69); (4) barriers to entry into production of the commodity (Tr. 55, 578-81, 704); (5) availability of the commodity and an adequate delivery system (RX 43 at 10, 11; Tr. 53-54); and (6) a lack of a producer monopoly, duopoly, or oligopoly (Tr. 54, 252, 265).

71. The Mushroom Council uses promotional techniques that are an effective means of promoting mushrooms (Tr. 271-73) and are practiced in the other commodity promotion programs that have been effective (Tr. 272, 527).

72. At the time of the hearing in this proceeding, Mr. Whitfield, the president and chief executive officer of the Mushroom Council, concluded that it was too early to evaluate the Mushroom Council's 1995 promotional campaign, but Mr. Whitfield intended to propose an evaluation plan to the Mushroom Council at its next meeting (Tr. 269-70, 332).

73. Petitioner is not prohibited or restrained by the MPRCIA, the Mushroom Order, or the Mushroom Council from advertising or promoting its own brand of mushrooms or communicating any other message to any audience.

74. The Mushroom Council's mushroom promotion program has not included political or ideological views. Petitioner is not compelled by the MPRCIA, the Mushroom Order, or the Mushroom Council to endorse or finance any political or ideological views.

75. The Mushroom Council has not identified Petitioner in any of its mushroom promotional events, and the Mushroom Council's promotion program does not compel Petitioner to speak. Petitioner is not compelled by the MPRCIA, the Mushroom Order, or the Mushroom Council to engage in actual or symbolic speech.

IV. Discussion

A. Introduction

Petitioner in this proceeding, instituted under the MPRCIA (7 U.S.C. § 6106(a)), has the burden of proving that the challenged provisions of the Mushroom Order are not in accordance with law. Petitioner alleges that: (1) the referendum adopting the Mushroom Order was not conducted in accordance with law (Pet. ¶¶ 8, 17); (2) the MPRCIA and the Mushroom Order violate Petitioner's right to freedom of association and freedom of speech under the First Amendment of the Constitution of the United States (Pet. ¶¶ 14-15); and (3) the MPRCIA violates Petitioner's right to equal protection of the laws under the Fifth Amendment of the Constitution of the

United States (Pet. ¶ 16).

In late July or early August 1995, Petitioner withdrew all allegations in the Petition concerning the lawfulness of the referendum adopting the Mushroom Order (Respondent's Response to Petitioner's Withdrawal of Allegations; Tr. 6-7). Thus, the Discussion in this Decision and Order, *infra*, pp. 41-56, only addresses Petitioner's two constitutional challenges to the MPRCIA and the Mushroom Order.

B. First Amendment

Petitioner contends that the requirement in the MPRCIA and the Mushroom Order that Petitioner pay assessments, which are then used to promote mushrooms, violates Petitioner's rights to freedom of association and freedom of speech under the First Amendment of the Constitution of the United States (Pet. ¶¶ 14-15).

The ALJ agreed with Petitioner's contention that the MPRCIA and the Mushroom Order violate Petitioner's right to freedom of speech under the First Amendment (Initial Decision and Order at 9, 15, 22). The ALJ reviewed the MPRCIA and the Mushroom Order using the three-part test, which the Supreme Court of the United States used in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), to determine the constitutional validity of laws which restrict commercial speech. The Court held in *Central Hudson* that "[t]he First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted government regulation[,]" *id.* at 561, and if commercial speech is neither misleading nor related to unlawful activity, restrictions on such speech must: (1) implement a substantial governmental interest; (2) directly advance that interest; and (3) be narrowly tailored to achieve the desired objective. *Id.* at 564.

The ALJ, applying the *Central Hudson* test to the MPRCIA and the Mushroom Order, found that there was a substantial governmental interest in promoting and expanding the mushroom industry (Initial Decision and Order at 10), but found that the Mushroom Council's program has not directly advanced the government's interest (Initial Decision and Order at 13) and is not narrowly tailored to achieve the desired objective (Initial Decision and Order at 15). Based on these findings, the ALJ concluded that, under the *Central Hudson* test, the mushroom program violates Petitioner's right to freedom of speech under the First Amendment (Initial Decision and Order at 15).

However, the *Central Hudson* test is not applicable to this proceeding because the *Central Hudson* test is used to determine whether restrictions on commercial speech pass constitutional muster and neither the MPRCIA nor the Mushroom Order

nor the Mushroom Council prohibit or restrict commercial speech. The MPRCIA and the Mushroom Order do, however, compel Petitioner to fund a mushroom promotion program.

In a case decided after the ALJ issued the Initial Decision and Order, the Supreme Court of the United States specifically rejected the use of the *Central Hudson* test to determine the validity under the First Amendment of two marketing orders which compel handlers of California tree fruit to fund a generic advertising program and held that compelled funding of generic advertising does not implicate the First Amendment. *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997).[5]

As Petitioner correctly notes (Petitioner's Response to Respondent's Motion for Immediate Decision by the Judicial Officer at 1), the Court in *Wileman Bros.* stressed the importance of the statutory context in which the First Amendment issue arises. However, the Court did not limit its holding to marketing orders issued under the AMAA. Instead, the Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders do not compel producers to endorse or finance any political or ideological views.

An examination of the MPRCIA and the Mushroom Order reveals that the MPRCIA and the Mushroom Order have the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra.* First, Petitioner is not prohibited or restrained by the MPRCIA, the Mushroom Order, or the Mushroom Council from promoting or advertising its brand of mushrooms[6] or from communicating any other message to

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[5]The two marketing orders at issue in *Wileman Bros.* are: Marketing Order 916, which regulates nectarines grown in California (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), which originally regulated peaches, pears, and plums grown in California. The plum portion of Marketing Order 917 was terminated in 1991 (56 Fed. Reg. 46,368). Marketing Order 916 and Marketing Order 917 are issued under the AMAA.

[6]The Federal Agriculture Improvement and Reform Act of 1996 [hereinafter FAIR Act] specifically provides that neither the MPRCIA nor the Mushroom Order prohibits or restricts any individual advertising or promotion, as follows:

any audience. This factor distinguishes the MPRCIA and the Mushroom Order from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[7]

TITLE V—AGRICULTURAL PROMOTION

Subtitle A—Commodity Promotion and Evaluation

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.—In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

. . . .

(10) subtitle B of title XIX of Public Law 101-624 (7 U.S.C. § 6101 et seq.)[.]

. . . .

(b) FINDINGS.—Congress finds the following:

. . . .

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

FAIR Act, Pub. L. No. 104-127, § 501(a)(10), (b)(4)-(5), 110 Stat. 1029-30 (1996).

[7]*See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v.*

While the requirement that Petitioner fund generic advertising may reduce the amount of money available to Petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA and the Mushroom Order does not amount to a restriction on speech.[8]

Second, Petitioner is not compelled to speak by either the MPRCIA or the Mushroom Order. This fact distinguishes the MPRCIA and the Mushroom Order from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[9] While Petitioner is compelled under the MPRCIA and the Mushroom Order to fund promotion of mushrooms, this requirement is not a requirement that Petitioner speak. Petitioner is not publicly identified or publicly associated with the Mushroom Council's promotion program, and Petitioner is not required to respond to the Mushroom Council's promotion program.

Third, the Mushroom Council's mushroom promotion program has no political or ideological content, and Petitioner is not compelled by the MPRCIA or the Mushroom Order to endorse or finance any political or ideological views.[10] This

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Public Serv. Comm'n, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates the First and Fourteenth Amendments).

[8]*See generally Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2138-39.

[9]*See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

[10]The FAIR Act specifically provides that the MPRCIA establishes a promotion program to produce nonideological communication, as follows:

fact distinguishes the MPRCIA and the Mushroom Order from cases in which the Supreme Court has found that required financing of political or ideological speech

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TITLE V—AGRICULTURAL PROMOTION

SUBTITLE A—COMMODITY PROMOTION AND EVALUATION

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.— In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

. . . .

(10) subtitle B of title XIX of Public Law 101-624 (7 U.S.C. § 6101 et seq.)[.]

. . . .

(b) FINDINGS.—Congress finds the following:

. . . .

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture—

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for covered commodities.

FAIR Act, Pub. L. No. 104-127, § 501(a)(10), (b)(8), 110 Stat. 1029-31 (1996).

violates the right to freedom of speech.[11]

I find that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the First Amendment issue in this proceeding. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this proceeding are not relevant to Petitioner's First Amendment challenge to the MPRCIA and the Mushroom Order. Thus, the requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's rights to freedom of association and speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

C. Equal Protection

1. Introduction

Petitioner contends that the MPRCIA violates its right to equal protection of the laws guaranteed under the Fifth Amendment of the Constitution of the United States (Pet. ¶ 16). Specifically, the Petitioner argues that the MPRCIA violates its right to equal protection of the laws by generally exempting producers who: (1) produce 500,000 pounds of mushrooms or less per year; (2) process mushrooms; or (3) export mushrooms (Pet. ¶ 16).

The ALJ concluded that "[t]he Mushroom Promotion Program does not violate the Equal Protection requirements of the Fifth Amendment of the Constitution." (Initial Decision and Order at 22.) Neither Petitioner nor Respondent appealed the ALJ's Initial Decision and Order as it relates to Petitioner's equal protection challenge. Moreover, Intervenor's Appeal Petition does not reveal any disagreement on the part of Intervenor with the ALJ's conclusion that the mushroom promotion program does not violate the equal protection component of the Fifth Amendment

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[11]*See Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

of the Constitution of the United States. I agree with the ALJ's analysis of Petitioner's equal protection challenge to the MPRCIA and consequently have adopted much of the ALJ's discussion regarding Petitioner's equal protection challenge in this Decision and Order, *infra*, pp. 52-56.

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to the federal government.[12]

Equal protection requires that persons similarly situated be treated alike. However, virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications.[13] The general rule is that legislation is

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[12]*See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2108 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

[13]*See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (stating that the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966)

presumed to be valid and will be sustained if the statute's classification scheme is rationally related to a legitimate governmental interest, unless the statute creates a suspect clarification that impinges upon a constitutionally protected right.[14]

Equal protection analysis requires a two-part inquiry: 1) whether the challenged legislation has a legitimate governmental purpose; and 2) whether the challenged classification is rationally related to that legitimate governmental purpose. Rational-basis scrutiny is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). All that is needed to uphold the classification scheme is to find that there are "plausible,"[15]

(stating that the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding that exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating that the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

[14]*Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997); *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996); *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Dallas v. Stanglin*, 490 U.S. 19, 23 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 81 (1988); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam).

[15]*FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (holding that where there is a plausible reason for a legislative classification, the equal protection inquiry is at an end); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (stating that in general, the equal protection clause is satisfied so long as there is a plausible policy reason for the classification); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 116, 179 (1980) (holding that where there is a plausible reason for a legislative classification,

"arguable,"[16] or "conceivable"[17] reasons which may have been the basis for the distinction.

2. Legitimate Governmental Purpose

Congress declared that the purpose of the MPRCIA is to strengthen the mushroom industry's position in the marketplace, maintain and expand existing markets and uses for mushrooms, and develop new markets and uses for mushrooms. 7 U.S.C. § 6101(b). I agree with Respondent that the "primary purpose of this legislation is to create an efficient mandatory cooperative information and promotion program to maintain and expand the domestic fresh mushroom market for the financial benefit of producers and the industry." (Respondent's Brief in Support of Proposed Findings of Fact, Conclusions of Law, and Order at 10.) The Supreme Court of the United States has recognized the legitimate governmental interest in creating other mandatory marketing order programs for "advancing the interests of producers" and to "raise producer prices," *Block v. Community Nutrition Inst.*, 467 U.S. 340, 342 (1984), and has described a statutory scheme providing for generic advertising intended to stimulate consumer demand for an agricultural product as "legitimate." *Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2141. I, therefore, find that the government's purpose as declared in the MPRCIA (7 U.S.C. § 6101(b)) is legitimate.

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the equal protection inquiry is at an end).

[16] *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (holding that the admission that the facts in support of a legislative classification are arguable immunizes the legislative classification from an equal protection attack); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916) (a legislative classification is not arbitrary if any state of facts reasonably can be conceived that would sustain the classification and it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength).

[17] *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993) (stating that a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (stating that in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification); *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (holding that those challenging legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker).

3. Rational Relationship

The second step in equal protection analysis is determining whether the exemptions from the payment of assessments under the MPRCIA are rationally related to the legitimate governmental purpose of strengthening the mushroom industry's position in the marketplace, maintaining and expanding existing markets and uses for mushrooms, and developing new markets and uses for mushrooms. Three categories of mushrooms or producers are excluded from assessments. First, assessments under the MPRCIA only apply to mushrooms ". . . grown within the United States for the fresh market, or imported into the United States for the fresh market, that are marketed. . . ." 7 U.S.C. § 6102(9). Thus, the MPRCIA specifically excludes ". . . mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed, as may be determined by the Secretary." 7 U.S.C. § 6102(9). Second, assessments under the MPRCIA only apply to producers and importers who produce or import ". . . on average, over 500,000 pounds of mushrooms" annually for the fresh market. 7 U.S.C. §§ 6102(6) and (11). Third, the assessments under the MPRCIA do not apply to "mushrooms that a first handler certifies will be exported as mushrooms." 7 U.S.C. § 6104(g)(4).

a. Exclusion of Mushrooms for Processing

Mushroom producers receive an average price of $1.03 per pound for mushrooms sold in the fresh market, but only an average price of $0.662 per pound for mushrooms sold for processing (RX 69 at 16). In 1993, 69% of the mushrooms produced in the United States were sold in the fresh market and only 31% of the mushrooms produced in the United States were used for processing (RX 69 at 15). Since the fresh market for mushrooms is more lucrative than the market for mushrooms for processing, it is conceivable that Congress could rationally conclude that only mushrooms marketed in the fresh market should be subject to assessments because those who market fresh mushrooms would receive the majority of the benefit from increased mushroom consumption and sales.

b. Exclusion of Mushrooms for Export

In 1992-1993, mushrooms produced in the United States and sold in the fresh market were valued at $537,922,000 (RX 69 at 12). The value of fresh mushrooms exported from the United States peaked in 1990, totalling only $22 million (RX 43 at 29). Thus, the value of exports of fresh mushrooms constitutes approximately 4%

of the total value of United States mushrooms marketed in the fresh market. Therefore, it is rational that Congress would choose to focus on the domestic market, thereby avoiding the administrative expense of worldwide marketing and distribution of promotional materials by the Mushroom Council.

c. Exclusion of Producers of 500,000 Pounds or Less

In 1993-1994, there were approximately 355 producers who produced approximately 529 million pounds of mushrooms for the fresh market (RX 69 at 9, 15). In 1995, the Mushroom Council collected assessments from 152 producers for approximately 515 million to 518 million pounds of fresh mushrooms (Tr. 252). Therefore, there are approximately 203 producers who produce a total of 11 million to 14 million pounds of mushrooms annually for the fresh market who are not assessed.

Currently, the Mushroom Council receives monthly reports and assessment checks from 152 producers, processes them, and keeps records for each producer (Tr. 257). If the Mushroom Council successfully identified and collected assessments from the 203 excluded producers, the Mushroom Council would receive an additional $35,000 per year, based upon the computation of 14,000,000 pounds of mushrooms times $0.0025 per pound. Congress could have rationally concluded that the administrative cost associated with the identification of and collection of assessments from these small producers was not justified.

Since all three challenged classifications are rationally related to the legitimate governmental purposes of strengthening the mushroom industry's position in the marketplace, maintaining and expanding existing markets and uses for mushrooms, and developing new markets and uses for mushrooms, the MPRCIA fully complies with the equal protection component of the Fifth Amendment.

V. Conclusions of Law

Neither the MPRCIA nor the Mushroom Order violates Petitioner's right under the Fifth Amendment to the Constitution of the United States to equal protection of the laws. Neither the MPRCIA nor the Mushroom Order violates Petitioner's rights under the First Amendment to the Constitution of the United States to freedom of association and speech.

For the foregoing reasons, the following Order should be issued.

VI. Order

The relief requested by Petitioner is denied and the Petition is dismissed.

NONPROCUREMENT DEBARMENT and SUSPENSION

In re: DAVID R. MEYER.
DNS Docket No. FCA-97-0001.
Decision and Order filed July 29, 1997.

Nonprocurement debarment - Bid rigging - Mitigating factors - Compliance program - Passage of time - Successful performance of contracts - Acceptance of responsibility - Cooperation with authorities - Arbitrary, capricious and an abuse of discretion - Punishment - Present responsibility - Decision of debarring official vacated.

Chief Administrative Law Judge Victor W. Palmer vacated the decision of the debarring official which had imposed a three year period of debarment on Respondent. Judge Palmer rejected Respondent's contention that the decision to debar was not issued within the applicable time limits, finding that the debarring official had issued extensions in a timely manner. Judge Palmer, however, also found that the debarring official failed to properly consider mitigating factors presented by Respondent, and imposed the debarment for purposes of punishment contrary to the regulations. Accordingly, the decision to debar was vacated as arbitrary, capricious and an abuse of discretion.

William E. Ludwig, Debarring Official.
Rachel H. Bishop, for Food and Consumer Service.
Gerald H. Werfel, Alexandria, VA, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515, the regulations which implement a governmentwide system for nonprocurement debarment and suspension (Regulations).[1] The objective of the regulations is stated at 7 C.F.R. § 3017.115(a) and (b):

> (a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order 12549 and [the] regulations, [is an] appropriate means to implement this policy.

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[1]The Regulations implement Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

(b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

Pursuant to 7 C.F.R. § 3017.515, debarment decisions may be appealed to the Office of Administrative Law Judges. The administrative law judge may vacate the debarment if the implementing decision is not in accordance with law; not based on the applicable standard of evidence; or is arbitrary, capricious and an abuse of discretion. Decisions of the administrative law judge must be based solely on the administrative record which must demonstrate the evidentiary basis of the decision.

Respondent appealed the May 21, 1997 decision of the Debarring Official William E. Ludwig, Administrator, Food and Consumer Service (FCS), United States Department of Agriculture (USDA), which debarred Respondent from participation in federal government programs for a period of three years.

FCS instituted these debarment proceedings on June 1, 1994, by issuing a Notice of Proposed Debarment, which informed Respondent that:

> This action is based on the imputation of H. Meyer Dairy Company's (Meyer) criminal conduct as reflected by its conviction for bidrigging on December 11, 1993, in the Covington Division of the U.S. District Court for the Eastern District of Kentucky. Meyer pleaded guilty to participating in a conspiracy to suppress and eliminate competition by rigging bids for the award and performance of contracts to supply dairy products to certain public schools in northern Kentucky and southwestern Ohio beginning at least as early as 1984 and continuing at least through the 1988-89 school year.

(A.R. 10). The letter further advised that debarment was authorized under 7 C.F.R. § 3017.305(a)(2), which allows for debarment based on: "Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;" and 7 C.F.R. § 3017.325(b)(2) which allows for imputation of criminal conduct to officers and shareholders. (A.R. 10).

The debarment proceedings were stayed by the Debarring Official while Respondent assisted the U.S. Attorney's Office prepare a case against one of Respondent's competitors. After completion of the trial Respondent submitted written information in opposition to the proposed debarment on June 28, 1995. On June 29, 1995, Respondent presented information and argument in person, during a meeting with FCS. The Debarring Official extended the period of time in which to issue a decision fifteen times, and ultimately issued a final decision to debar on

May 21, 1997.

Respondent filed a timely appeal on May 28, 1997. I issued a ruling respecting procedural requirements on May 30, 1997. Pursuant to that ruling FCS filed a Response in Opposition to the Appeal Petition, along with a copy of the Administrative Record on June 12, 1997. Respondent filed a Reply in Support of Appeal Petition on June 23, 1997.

References to the record of the administrative proceeding below are cited as "A.R." followed by the number of the document.

Findings

Respondent, David Meyer, is the president and sole shareholder of H. Meyer Dairy Company, Inc. (hereinafter Meyer Dairy), a Kentucky corporation with its principal place of business in Ohio. Meyer Dairy manufactures, sells and distributes fluid milk and juice products. Its customers include grocery and convenience stores, hospitals, public schools in Ohio, Kentucky and Indiana, as well as agencies of the federal government. Meyer Dairy has 160 employees, and annual sales of approximately $60 million. Fourteen percent of its sales are to public schools. (A.R. 29 at 3).

Meyer Dairy became involved in a bid rigging scheme in Ohio in 1977, prior to Respondent's assumption of the presidency and complete ownership in 1983. The price fixing continued in Ohio and Kentucky until the 1988/89 school year, at which point Respondent determined that his business would benefit from increased competition. (A.R. 31 at 10).

In 1990 the Justice Department began to investigate bid rigging in Ohio and Kentucky; and began to subpoena information from Meyer Dairy in 1991. (A.R. 31 at 11). In 1990 Kentucky filed charges against Meyer Dairy and its competitor Trout Dairy. In 1992 Ohio began investigating the bid rigging activities as well. Respondent cooperated with all of the investigations, providing all of the information that was requested, and in 1993 decided to come forward and admit the existence of the conspiracy. (A.R. 31 at 11-12).

On August 5, 1993, Meyer Dairy entered into a settlement agreement with the Commonwealth of Kentucky, whereby the Attorney General agreed not to prosecute Meyer Dairy in exchange for its complete cooperation with the Commonwealth and Federal investigations. (A.R. 29 at app. 4). Pursuant to the agreement a Consent Decree was filed on August 11, 1993, which enjoined Meyer Dairy from engaging in anticompetitive activities; and ordered Meyer Dairy to submit a certification with every bid, swearing under oath that the bid was not made in collusion with any other

distributor. (A.R. 2). In addition, Meyer Diary paid Kentucky $250,000 in restitution.

On August 13, 1993, Meyer Dairy entered into a Plea Agreement with the United States, under which Meyer Dairy agreed to plead guilty to one count of violating section 1 of the Sherman Act, and pay a fine of $750,000. In addition, Meyer Dairy agreed to provide complete cooperation with federal investigations and agreed to negotiate settlement agreements with Ohio and Kentucky. (A.R. 3). Based on the Agreement, a judgment was entered against Meyer Dairy in the United States District Court for the Eastern District of Kentucky on December 10, 1993. (A.R. 8).

On August 23, 1993, Meyer Dairy entered into a Settlement Agreement with the State of Ohio, whereby Meyer Dairy agreed to pay $4 million in restitution and fully cooperate with future investigations. In exchange, the State agreed to take no further action against Meyer Dairy. (A.R. 4). Pursuant to the Agreement, a Consent Decree was entered which enjoined Meyer Dairy from engaging in anticompetitive activities and ordered certification of future bids. (A.R. 6).

In December 1993, Meyer Dairy developed an Antitrust Compliance Program which includes an Antitrust Compliance Guide which was distributed to all dairy employees that have any contact with Meyer Dairy customers or competitors. These employees are each required to read the Guide and undergo training with respect to the antitrust requirements. (A.R. 29 at 12 and app. 7; A.R. 31 at 19). I n September 1994, Meyer Dairy adopted a written Ethics Code of Conduct which was provided to all employees. (A.R. 29 at 9, app. 6). Each employee was required to read the Code and participate in training sessions with Timothy Meyer, the Ethics Compliance Officer. Every eight months employees are required to complete a questionnaire which tests their understanding of the Code. (A.R. 31 at 16-18). An ethics hotline was set up and complaint forms developed for employees to report suspected violations. Reports may be made anonymously. (A.R. 29 at 16). In order to implement the Ethics Compliance Program, Ethics Compliance Procedures were drafted and an Ethics Committee was created in September 1994. David Meyer, David Amrine and Timothy Meyer were named to serve on the Committee; and Timothy Meyer was designated as the Ethics Compliance Officer. (A.R. 29 at 13-14 and app. 8 & 9). In addition, an Outside Bid Audit Committee was established to review all bids before they are submitted. Sitting on the Committee are a retired judge of the Ohio State Court of Appeals, a government contracts attorney, and a certified public accountant. (A.R. 29 at 17-18 and app. 14). All bids undergo an extensive review by the Committee and all bids must be certified before they can be submitted. (A.R. 29 at 20 and A.R. 31 at 25-28).

On June 1, 1994, FCS notified Respondent of its intent to debar him, based on

Meyer Dairy's conviction on federal charges of bid rigging. (A.R. 10). Respondent and the Department of Justice each requested that the debarment proceedings be postponed, to enable Respondent to devote sufficient time to its assistance with the federal prosecution of Trauth Dairy. (A.R. 15, 19, 23, 24). The Debarring Official granted the request and stayed the proceedings pending completion of the trial. (A.R. 21, 25).

On June 28, 1995, Respondent submitted written information and argument opposing the proposed debarment. On June 29, 1995, a meeting with representatives of FCS was held during which oral information and argument was presented by Respondent, as well as Tim Meyer, Meyer Dairy's Ethics Officer, and Judge George H. Palmer, representing the Outside Bid Audit Committee for Meyer Dairy. Respondent presented several mitigating factors for consideration by the Debarring Official, including: the length of time that has passed since the activities in question, the successful performance of contracts since debarment proceedings were initiated, acceptance of responsibility, cooperation with state and federal investigations, restitution, and the establishment of a comprehensive ethics compliance program.

In addition, on July 21, 1995, a letter was submitted for the record by Anne Porter, an attorney with the Antitrust Division at the Department of Justice, urging the agency to consider the "extensive and valuable cooperation" on the part of Respondent and Meyer Dairy, without which the government would not have had sufficient evidence to prosecute the other two dairies involved in the bid rigging scheme. (A.R. 27).

On August 14, 1995, October 4, 1995, November 16, 1995, December 12, 1995, February 9, 1996, March 22, 1996, May 8, 1996, June 21, 1996, August 9, 1996, September 24, 1996, November 13, 1996, December 24, 1996, February 26, 1997, March 21, 1997, and May 12, 1997, the Debarring Official extended the period for making a final debarment decision for "good cause" based on the "need to consider each of the many factors in this case as contained in the documents included in the Administrative Record." (A.R. 32-46). On May 21, 1997, the Debarring Official issued a final decision to debar Respondent for a period of three years. On May 28, 1997, Respondent filed the instant appeal.

Conclusion

The Debarring Official's decision to debar Respondent for a period of three years was arbitrary and capricious and an abuse of discretion. The Debarring Official failed to properly consider mitigating factors and imposed the debarment

for purposes of punishment, contrary to the regulations.

Discussion

Respondent appeals the final decision of the Debarring Official on two grounds. First, Respondent maintains that the debarment is not in accordance with the law because the decision was not issued within the time limits prescribed by the regulations. Second, Respondent asserts that the decision was arbitrary and capricious, and an abuse of discretion because the Debarring Official failed to take into account all of the mitigating factors and properly consider whether Respondent is presently responsible. (Appeal).

A. The decision to debar was issued within the applicable time limits.

The regulations provide that: "The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends the period for good cause." 7 C.F.R. § 3017.314(a). Respondent argues that the debarment should be vacated as not in accordance with the law because the Debarring Official did not extend his time in which to issue a decision until forty-six days after Respondent presented information and argument on June 29, 1995.

With respect to procedural requirements the regulations merely provide that debarment actions shall be processed as informally as practical consistent with principles of fundamental fairness. 7 C.F.R. § 3017.310. No provision is made with respect to the computation of time. The typical procedure for computing time in judicial proceedings requires that if the last day falls on a weekend or holiday, the time period runs until the end of the next business day. *See, e.g.* Fed. R. Civ. P. 6(a); Fed. R. Crim. P. 45(a); Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary § 1.147(h) (7 C.F.R. § 1.147(h)).

The forty-fifth day after June 29, 1995, was a Sunday. Therefore, it was not improper for the Debarring Official to issue the extension on the following Monday.

Respondent also asserts that the second extension of time was issued beyond the deadline. In the first notice of extension, issued on August 14, 1995, the Debarring Official stated that he was extending the time in which to issue a decision for forty-five days. He miscalculated the date, however, and stated in the same notice that the decision would be issued no later than October 5, 1995. The next extension was issued on October 4, 1995, more than forty-five days after the previous notice. The

regulations do not require that extensions be granted in forty-five day intervals. Therefore, it was not improper to issue an extension until October 5, 1995. The next extension was issued by the stated deadline. Although there was an inconsistency as to the number of days within which it would be issued, such a mistake does not merit reversal of a debarment.

Although, FCS addresses the two year delay on the part of the Debarring Official, Respondent does not challenge the reasonableness of the fifteen extensions. Therefore, it is not necessary to address that issue.

B. The decision to debar was arbitrary and capricious, and an abuse of discretion.

Respondent's involvement in Meyer Dairy's illegal activities provides cause for debarment under 7 C.F.R. §§ 3017.305(a)(2) and 3017.325(b)(2). The existence of cause, however, does not require that debarment be imposed. The debarring official must consider the seriousness of the person's acts, as well as any mitigating factors. 7 C.F.R. § 3017.300. Furthermore, debarment shall only be used to protect the interests of the government and shall not be used for purposes of punishment. 7 C.F.R. § 3017.115(b).

The ultimate inquiry must be whether a contractor is "presently responsible." *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989); *Silverman v. United States Dep't of Defense*, 817 F. Supp. 846, 848-49 (S.D. Cal. 1993). Factors to be considered by the debarring official include the seriousness of the offense, the length of time that has passed since the offense, and the contractor's conduct in the interim, restitution, and the contractor's character before and after the offense. *Silverman, supra,* at 849; *Roemer v. Hoffmann*, 419 F. Supp. 130, 132 (D.D.C. 1976). The Debarring Official concentrated his attention in this case on the "seriousness of the offense," and gave scant consideration to the other factors he must consider.

The Debarring Official failed to consider the amount of time which has passed since the bid rigging ended; the successful completion of contracts since then; or the $5 million dollars in restitution and fines Respondent has paid.

FCS argues that it was not necessary to consider the amount of time that has passed because the passage of time, without more cannot invalidate the Debarring Official's decision. (Response in Opposition to the Appeal at 17). There is more in this case, however, including successful performance on contracts, implementation of compliance programs, restitution, and cooperation with the government. In any case, the Debarring Official must give consideration to a mitigating factor before determining that it is outweighed by other factors.

FCS also argues that the passage of time does not merit reversal of the decision

because the government did not purposefully delay the debarment. This argument relies on a misconception as to the purpose of the regulations. The relevance of time passing has nothing to do with government misconduct or prejudice to the Respondent. It is relevant to the issue of whether Respondent is presently responsible. The Debarring Official failed to consider the passage of time; and, consequently, failed to explain why, after the passage of eight years, Respondent is still not responsible enough to perform government contracts.

The passage of time is particularly relevant in conjunction with the successful completion of government contracts, which the Debarring Official also failed to consider. Here FCS argues that failing to impose a suspension--and consequently continuing to awards contracts--does not prevent the imposition of a debarment. While this is true, FCS once again misunderstands the relevance of the inquiry. Respondent's successful completion of contracts for the past eight years is indicative of his current trustworthiness and should have been considered by the Debarring Official.

The Debarring Official also failed to consider the fact that Respondent made restitution to Kentucky and Ohio. FCS asserts that because the Debarring Official mentioned the restitution in his recitation of the facts, he considered it as a mitigating factor and determined that it was outweighed by other factors. There is no basis for this conclusion. The Debarring Official must articulate the reasons for his decision. Mere reference to a fact is not sufficient to show that proper consideration was given to its mitigating nature.

Respondent's present responsibility--as evidenced by his cooperation with state and federal investigations, his acceptance of responsibility, and the implementation of a compliance program--was not adequately considered by the Debarring Official.

Respondent's cooperation with the government was denied any operative weight because of the seriousness of the offense, indicating that the debarment was issued for punitive purposes rather than for protection of public interest. In considering this factor, the Debarring Official stated:

> Your full cooperation with the U.S. Department of Justice's investigation and prosecution of co-conspirators is a factor in making a final determination in your case. Your commitment to assisting the U.S. Department of Justice in its investigation and your encouragement to other company employees to do the same is certainly of great value and deserves serious consideration in making a final determination. However, while your cooperation with the investigations and prosecution is a positive element it does not exculpate the wrong doing.

> Clearly, you received the full benefit of your cooperation in the forum it was offered. . . .
>
> While your cooperation appropriately influenced the plea agreement terms reached with the U.S. Department of Justice, it does not alleviate the effect your activities had on FCS programs. Criminal activity of such gravity and longstanding cannot be erased by later cooperation with prosecutors whose investigations effected your withdrawal from the conspiracy.

(Notice of Debarment at 2-3). While the seriousness of Respondent's offenses is an appropriate consideration, the Debarring Official fails to address how Respondent's cooperation affects his present responsibility. Respondent need not "erase" past misconduct, rather he must show that such misconduct is unlikely to occur again. Furthermore, it is not appropriate to issue a debarment based on the effect an activity had on the agency in the past. The purpose of debarment is to protect the government from future impropriety, not to punish past misconduct. With respect to Respondent's acceptance of responsibility and implementation of compliance programs the Debarring Official stated:

> Your seemingly sincere remorse and your acceptance of responsibility for the bid rigging activity and the establishment of the compliance program at Meyer Dairy are definite factors in your favor. Your attitude shows a desire to recognize misconduct in the past and prevent any such activity in the future. Two issues seem to outweigh those factors, however. First, although you have accepted responsibility for the misconduct of Meyer Dairy and the role you played in it and have acted to implement preventative measures for the company for the future, you still hold the most powerful position in the company. As the final decision-maker and most senior officer in your company, you set an example for other employees. Even with the compliance program in place, your continued service indicates to other employees that such misconduct, as evidenced by your public admission, will not negatively affect one's standing with Meyer Dairy. Allowing you to continue to participate in Federal nonprocurement programs in view of the gravity of your misconduct, would further insinuate that such misconduct will be ignored.

(Notice of Debarment at 3-4).

The Debarring Official's emphasis on the impressions of other employees is misplaced. It is Respondent's trustworthiness that is at issue. While Respondent's

responsible position at Meyer Dairy is relevant to whether he is in a position to engage in anticompetitive activities, the tone of the above paragraph indicates a greater concern for the responsibility of Meyer Dairy and its employees than that of Respondent. While bid rigging is a serious offense and should not be tolerated, making an example of Respondent is not an appropriate use of the debarment regulations. *See Sellers v. Kemp*, 749 F. Supp. 1001 (W.D. Mo. 1990).

Respondent has implemented extensive programs to ensure that Meyer Dairy operates in accordance with the law. The Debarring Official afforded minimal scrutiny to these measures. A proper inquiry would have questioned whether these programs are effective and sufficient to protect the public interest. There is no indication that this inquiry was ever made. Instead, the Debarring Official summarily concluded that the measures taken by Respondent were outweighed by other factors, and imposed the maximum period of debarment.

Respondent has made every effort to show that he poses no threat to government interests. By debarring Respondent for the maximum period despite these efforts, without explaining why measures taken are insufficient to indicate trustworthiness, the Debarring Official seems to be imposing an automatic penalty based on the seriousness of the offense. The seriousness of the offense is only one factor to be considered, however; and the regulations require that Respondent be given an opportunity to prove himself responsible despite his prior acts.

In *Robinson v. Cheney*, the court held that:

> "[T]he contractor can meet the test of present responsibility by demonstrating that it has taken steps to ensure that the wrongful act will not recur. . . . Affording the contractor this opportunity to overcome a blemished past assures that the agency will impose debarment only in order to protect the Government's proprietary interest and not for the purpose of punishment."

Robinson, supra, at 160.

In *Roemer v. Hoffmann*, the court noted the serious consequences of debarments and reasoned that:

> The decision-maker must take great care, then, to be certain that his decision is a correct one. In this case, the decision-maker . . . has simply inferred from the nature of the particular offense that it is not presently a good risk for the government to do business with Roemer, and that it is not likely to be a good risk for three more years at least. And certainly, Roemer's offense was of sufficient gravity to give a decision-maker pause to question Roemer's present and likely

> future responsibility in dealing with the government.
>
> But the plaintiff has suggested a number of factors which appear to diminish the force of that conviction as an indication of Roemer's present responsibility.
>
> . . .
>
> It is clear from the memorandum that [the decision-maker] wrote at about the time he issued the order debarring Roemer that he was aware of at least the most important of these factors. But what is less clear is why [the decision-maker] attributed little or no importance to them, and what is was about the offense which necessitates, despite these factors, a debarment of three years.

Roemer, supra at 131-32.

In assessing an agency action under the arbitrary and capricious standard, it is necessary to determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983). The Debarring Official failed to consider all of the relevant factors; and he failed to give adequate consideration and articulate a rational reason for rejecting those factors he did address. This creates the impression that the debarment was imposed for punitive purposes, contrary to purposes of the regulations. Accordingly, the decision shall be vacated as arbitrary and capricious, and an abuse of discretion.

Order

The decision of the Debarring Official is hereby vacated.

This Order shall take effect immediately. This decision is final and not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final July 29, 1997.-Editor]

In re: NORTHWEST PINE PRODUCTS INC., THOMAS HICKS and BARBARA HICKS.
DNS Docket No. FS-97-0002.
Decision and Order filed November 21, 1997.

Nonprocurement debarment - Forest Service - Debarment of timber purchasers - Authority to debar - Arbitrary, capricious and an abuse of discretion - Decision not issued in accordance with law - Decision of debarring official vacated.

Chief Administrative Law Judge Victor W. Palmer vacated the decision of the debarring official which had debarred Respondents for a period of two years. As an initial matter, Judge Palmer found that although there are separate regulations for the debarment of timber purchasers, debarment under the governmentwide regulations was permissible. He also found that Respondents Barbara and Thomas Hicks were properly included in the debarment proceedings, as affiliates of Northwest Pine Products. The decision to debar, however, was not issued in accordance with law because it was issued by a person lacking authority to debar. Authority to debar may not be delegated below the agency head. Judge Palmer also found that the decision was arbitrary and capricious and an abuse of discretion, because the administrative record lacked sufficient evidence to support a finding that a cause for the debarment existed.

Robert Lewis, Jr., Debarring Official.
Lori Polin Jones, for Forest Service.
John B. Crowell, Jr., Portland, OR, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515 which governs appeals of debarment and suspension actions under 7 C.F.R. § 3017.100-.515, the regulations that implement a governmentwide system for nonprocurement debarment and suspension (regulations).[1] The objective of the regulations is stated at 7 C.F.R. §§ 3017.115(a) and (b):

> (a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order

[1]The Regulations implement Executive Order No. 12549, 51 Fed. Reg. 6370 (1986), which requires to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provided that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

> 12549 and these regulations, [is an] appropriate means to implement this policy.
>
> (b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

Pursuant to 7 C.F.R. § 3017.515, debarment decisions may be appealed to the Office of Administrative Law Judges. The administrative law judge may vacate the debarment if the implementing decision is not in accordance with law; not based on the applicable standard of evidence; or is arbitrary, capricious and an abuse of discretion. Decisions of the administrative law judge must be based solely on the administrative record which must demonstrate the evidentiary basis of the decision.

Transactions relating to conservation programs are generally excepted from coverage under 7 C.F.R., Part 3017, the governmentwide nonprocurement debarment and suspension regulations as implemented by USDA.[2] Debarment proceedings relating to contracts for sales of timber are instead governed by 36 C.F.R., Part 223–Suspension and Debarment of Timber Purchasers. Section 3017.115(d), however, provides that:

> In any case in which an administrative exclusion is considered under an authority other than this part, USDA will initiate, where appropriate, a debarment or suspension action under this part for the protection of the entire Federal Government.

Accordingly, debarment of Respondents under the governmentwide regulations is permissible.

On July 3, 1997, Mike Dombeck, Chief of the Forest Service, issued notices of proposed debarment to Respondents, pursuant to § 3017.312. The notices informed Respondents that the proposed debarment was based on two violation notices issued

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[2]When USDA adopted the common rule for governmentwide nonprocurement debarment and suspension, it initially limited the coverage of the rule to domestic assistance transactions. Subsequently the rule was amended to remove this limitation; however, a number of specific exceptions to coverage were added, including transactions under conservation programs. While excepting these transactions from the common rule, USDA retained the right to initiate debarment under existing regulations. 60 Fed. Reg. 49,519 (Sept. 26, 1995). However, USDA also provided that if an administrative exclusion was considered under a regulation other than the common rule, debarment proceedings would be initiated under the common rule, if appropriate to protect the entire Government. *Id.*; *see also* 7 C.F.R. § 3017.200.

to Northwest Pine Products, Inc. on April 19, 1995, charging it with violations of 36 C.F.R. §§ 261.6(a) and 261.6(e); the violation of the terms of one or more public agreements or transactions, so serious as to affect the integrity of a government program; and Northwest Pine Products' history of failure to perform or unsatisfactory performance with respect to timber sale contracts. Thomas Hicks and Barbara Hicks were further informed that their debarments were based on their affiliation with Northwest Pine Products. (A.R. E1-E4).

Respondents received the notices on July 9, 1997, and responded with information and argument in opposition on July 23, 1997. The materials submitted were added to the administrative record, and on September 4, 1997, a final decision to debar Respondents for a period of two years was issued. The Chief of the Forest Service did not issue the final debarment. Instead, Robert Lewis, Jr., Deputy Chief for Research and Development, was substituted as the Debarring Official.

Respondents filed this appeal on September 30, 1997. On October 3, 1997, I issued a ruling with respect to the procedural requirements governing this proceeding. Pursuant to that ruling the Forest Service filed a copy of the administrative record and a response in opposition to Respondents' appeal on October 14, 1997; and Respondents filed a reply to that response on November 18, 1997. References to the administrative record are cited herein as "A.R." followed by the letter and number of the document.

Conclusion

Upon consideration of the administrative record and the arguments of the parties, I have concluded that the decision to debar Respondents is not in accordance with law because it was issued by a person without authority to debar, and is arbitrary and capricious and an abuse of discretion because the administrative record lacks sufficient evidence to support a finding that cause for debarment exists. Accordingly, the decision to debar Respondents from participation in government programs for a period of two years is vacated.

Factual Background

Respondents Thomas Hicks and Barbara Hicks are the owners of Northwest Pine Products, as well as its president and corporate secretary, respectively. (A.R. E5, E6). Northwest Pine Products is a whole-log chipping operation located in Bend, Oregon. During the last decade it has entered into more than thirty timber sales contracts with the Forest Service. The Forest Service had concerns about Northwest

Pine Products' performance on multiple occasions, but never felt there was sufficient cause for debarment until the most recent contract, the Bitter Salvage Timber Sale. (A.R. A3 at 2). Based on incidents which occurred during the Bitter sale, and two previous contracts, the Sweat LP Salvage Timber Sale and the Unkas Fiber Salvage Timber Sale, the Forest Service determined it was appropriate to initiate debarment proceedings.

The Debarring Official determined that debarment for a period of two years was appropriate to protect the public interest, citing the following causes:

1. Northwest Pine Products, Inc. was issued a Notice of Violation on April 19, 1995, for violation of 36 C.F.R. § 261(a) on the Sweat LP Salvage Sale (contract no. 069826) described in the notice as cutting any tree or other forest product except as authorized by timber sale contract.

2. Northwest Pine Products, Inc., was issued a Notice of Violation on April 19, 1995, for violation of 36 C.F.R. 261.6(e) on the Sweat LP Salvage Sale (contract no. 069826) described in the notice as load, remove or haul timber product acquired under contract not identified as required by same contract.

3. Northwest Pine Products, Inc. has a history of failure to perform or of unsatisfactory performance on the Bitter Salvage Sale (contract no. 069990) timber sale contract on the Deschutes National Forest including their:

   a. cutting of undesignated leave trees on the Bitter Salvage timber sale which resulted in the contract being terminated (C9.3 - Breach) and,

   b. repeated breach actions taken against them on April 29, 1994, February 14, 1994, March 2, 1993, and February 26, 1993, for noncompliance with contract terms on the Bitter Salvage timber sale.

4. Northwest Pine products, Inc. has a history of failure to perform or of unsatisfactory performance on the Unakas [sic] Fiber Salvage Sale (contract no. 069867) on the Deschutes National Forest including repeated breach action taken against them on November 15, 1993, October 1, 1993, June 16, 1993, and November 13, 1993, for non-compliance with contract terms which resulted in termination of the contract. (C9.3 - Breach) (7 C.F.R. 3017.305(a)(1), (b)(1), and (2)).

(A.R. E5 at 2).

Thomas Hicks and Barbara Hicks were included in the debarment because the Debarring Official determined that they were affiliates of Northwest Pine Products, Inc., based on interlocking management or ownership, identity of interests among concerns and common address. (A.R. E5 at 2).

Discussion

Respondents appeal the debarment on three grounds. First, Respondents maintain that an improper standard of evidence was applied in debarring Thomas Hicks and Barbara Hicks as affiliates of Northwest Pine Products, Inc. Second, Respondents contend that the decision was not issued in accordance with the law because it was issued by a person lacking authority to debar. Finally, Respondents argue that the decision is arbitrary and capricious because the administrative record lacks sufficient evidence to support a finding that cause for debarment existed.

A. The Debarring Official properly included Thomas Hicks and Barbara Hicks in the debarment as affiliates of Northwest Pine Products.

Respondents admit that Thomas and Barbara Hicks are affiliates of Northwest Pine Products, as defined by § 3017.105.[3] (A.R. E6 at 2). Section 3017.325(a)(2) provides that:

> The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 3017.311 through 3017.314).

Thomas and Barbara Hicks each received noticed of the proposed debarment and were given the opportunity to respond.

Respondents maintain that affiliates cannot be debarred without proof of individual wrongdoing. In so arguing, Respondents improperly rely on the more stringent standard set in § 3017.325(b)(2) for imputing conduct to persons associated

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[3]Persons are "affiliates" for purposes of the regulations if, "directly or indirectly, either one controls or has the power to control the other." 7 C.F.R. § 3017.105. As the owners and the president and corporate secretary of Northwest Pine Products, Thomas Hicks and Barbara Hicks possess the requisite control to be considered affiliates of the company.

with the participant.[4] In *Kisser v. Kemp*, the court explained the distinction between the "affiliate" and "imputation" sections:

> Under the "affiliate" section of the regulations, all that the agency need prove is that an individual was an affiliate, namely that there existed the requisite "control" relationship between the individual and the suspended company. No actual proof of wrongdoing on the part of the individual is required . . . . In contrast, to have proceeded under the "imputation" section, HUD would have actually had to prove, first, that DRG's conduct was itself improper and deserving of suspension, and second, that the individuals suspended "participated in, knew of, or had reason to know of" DRG's wrongful conduct.

Kisser v. Kemp, 786 F. Supp. 38, 40-41 (D.D.C. 1992) *rev'd on other grounds*, 14 F.3d 615 (D.C. Cir. 1994), *see also* 53 Fed. Reg. 19,169 (May 26, 1988).

Accordingly, the Debarring Official did not err by including Thomas and Barbara Hicks in the debarment action, without any proof of actual wrongdoing on their part.

B. <u>The Debarring Official's decision was not issued in accordance with the law</u>.

The regulations define debarring official as follows:

> *Debarring official.* An official authorized to impose debarment. The debarring official is either:
> (1) The agency head, or
> (2) An official designated by the agency head.
> (i) In USDA, the authority to act as a debarring official is not delegated below the agency head level.

7 C.F.R. § 3017.105. In the context of the Forest Service, therefore, the authority to act as a debarring official is vested in the Chief, and cannot be delegated to officials below the Chief.

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[4]Section 3017.325(b)(2) provides that: "The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct."

The signature on the notice of proposed debarment indicated that the debarring official was Mike Dombeck, Chief of the Forest Service. Some time prior to the issuance of the final decision to debar, however, the duty of debarring official was transferred to Robert Lewis, Jr., Deputy Chief for Research and Development, Forest Service. Mr. Lewis was designated to be the acting Associate Chief for the month of September 1997, which is when the decision was issued. (A.R. E1). Nevertheless, Mr. Lewis lacked authority to debar as either Deputy Chief or Associate Chief, since both positions are below the Chief.

The Forest Service asserts that Mr. Lewis had authority to impose debarment despite holding a position below the agency head level. It asserts that on September 4, 1997, Mr. Lewis "essentially was the agency head" because the Chief was busy with other duties that day. Specifically, the Forest Service maintains that:

> The Associate Chief of the Forest Service, has all the powers and authorities to act as the Chief of the Forest Service, specifically in the absence of the Chief. AR, Section E, Tab [1] (Forest Service Manual § 1235.11 & .2). *See also* the photocopy of the Chief's calendar indicating he was in various meetings throughout the day (inside and outside the office) and therefore relied on the Acting Associate Chief, Robert Lewis, Jr. to also act as the Chief and carry out the daily operations of the agency.

Debarring Official's Response in Opposition to Appeal at 3, n. 4.

This argument fails for two reasons. First, the Forest Service Manual does not supersede the regulations.[5] Second, the two provisions that the Forest Service cited from the Manual provide as follows:

> 1235.11 - Acting Chief Authority. Except as provided at FSM 1230.4, when the Chief and Associate Chief are absent or unavailable, an Acting Chief has full authority to act for the Chief on any matter specifically reserved to the Chief, *unless* the Chief or Associate Chief directs otherwise in writing, or *the Chief is prohibited by law, order, or regulation from delegating a specific authority* (FSM 5404); in this latter case, the matter would be elevated to the Assistant Secretary.

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[5]*See, e.g. Guernsey Memorial Hospital v. Secretary of HHS*, 996 F.2d 830 (6th Cir. 1993); *Fiorentino v. United States*, 607 F.2d 963 (Ct. Cl. 1979).

> 1235.2 - Associate Chief. The Associate Chief of the Forest Service is delegated authority to perform all duties and to exercise all functions vested in the Chief (FSM 1233), unless the incumbent Chief specifically reserves the authority to take a particular action or make a certain decision or *unless the Chief is prohibited by law, order, or regulation from redelegating an authority* (FSM 5404).

(A.R. at E1) (emphasis added). The regulations prohibit the Chief from delegating the authority to debar below the agency head level. Accordingly, the Manual supports the conclusion that Mr. Lewis lacked authority to debar.[6]

The Forest Service further argues that 7 C.F.R. § 3017.105 intended to allow delegation commensurate with that provided for under 36 C.F.R. § 223.133, which defines debarring official with respect to the suspension and debarment of timber purchasers as: "Chief of the Forest Service or the Deputy Chief, National Forest System, or the Associate Deputy Chief, Resources Divisions, National Forest System." There is, however, nothing in the language of § 3017.105 or in the rulemaking record to indicate that the intent was as the Forest Service suggests. The common rule was intentionally structured in a way which allowed agencies to individually specify which officials could be designated by the agency head to impose debarments. 53 Fed. Reg. 19,163. USDA specifically chose to disallow any delegation below the agency head level. Furthermore, Mr. Lewis does not hold any of the positions enumerated in § 223.133, making the point of the Forest Service's argument unclear.

C. The Debarring Official's decision was arbitrary, capricious and an abuse of discretion.

In assessing an agency action under the arbitrary and capricious standard it is necessary to determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983). The Debarring Official's decision lacks this needed articulation.

This debarment was precipitated by the Regional Forester's claim that Respondents cut more than 200 trees on approximately 12 acres, without authorization. Respondents deny that this occurred, and submitted evidence to the

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[6]Furthermore, the reference to § 1235.11 is irrelevant since Mr. Lewis was not designated to be Acting Chief.

Debarring Official which casts doubt upon the accuracy of the Regional Forester's claims.

The contract provided for twenty foot spacing between marked trees, and the biggest and tallest trees, preferably ponderosa pine, were to be left standing. The least desirable trees to leave were lodgepole. Trees which were supposed to remain uncut were marked with green paint, and were approved by the Forest Service. Respondents videotaped a portion of the area investigated by the Forest Service. The video shows a number of stumps in the investigated area which had been painted red. (A.R. E10). Presumably these are the stumps that investigators identified as being cut without authorization.

The contract did not provide for trees to be marked at the stump; and the video shows that uncut trees were, in fact, marked with green paint well above the point at which trees would be cut. This fact immediately calls into question the manner in which investigators determined that any of the cut trees had been marked. Many of the stumps which the Forest Service had painted red did have specks of green paint on them. It is possible that investigators used those specks to identify marked trees. There were, however, trails of paint splatter left on the ground in the areas around marked trees. Many of the red stumps were in close proximity to marked trees and, therefore, simply may have been in the path of the splatter. (A.R. E10).

The close proximity of marked trees also raises questions about the Forest Service's claims. The contract provided for 20-foot spacing between uncut leave trees, yet the video shows stumps painted red within feet, and in at least one instance, inches of marked trees. (A.R. E10).

In addition, a number of the red stumps belonged to trees which would not likely have been designated to remain uncut, because they were not the size or species that were supposed to be left. There were even some red stumps which had supported trees that were dead. (A.R. E10).

Respondents also point out that 20 trees per acre is such a substantial number that unauthorized cutting of that magnitude would have been immediately visible to the sale administrator, harvest inspector, and the Forest Service representative, as well as several van loads of people from the regional office who visited the site, none of whom apparently noticed a problem. (A.R. E6). Indeed, the areas shown in the video did not have the appearance of being overly stripped of trees.

The Debarring Official acknowledged receipt of Respondents' evidence, and stated that it would be included in the administrative record. However, he neither addressed any of the issues raised, nor articulated a rational reason for rejecting the evidence.

The administrative record does not contain affidavits from the investigating

officers, or any information regarding the investigation which resulted in the finding of unauthorized cutting and the cancellation of the Bitter Salvage Sale contract. Although the evidence presented by Respondents may not conclusively prove that unauthorized cutting did not occur, the burden of proof is on the Forest Service to prove by a preponderance of the evidence that cause for debarment exists. 7 C.F.R. § 3017.314(c). The administrative record is devoid of any evidence to indicate that the trees were designated to remain standing and, therefore, it cannot be said that the burden of proof was met. Consequently, the Debarring Official's inclusion of the incident as a cause for debarment was arbitrary and capricious, and an abuse of discretion.

The Debarring Official's inclusion of an unproven cause, furthermore, does not constitute harmless error. Although the unauthorized cutting of trees on the Bitter sale was not the only cause for debarment cited by the Debarring Official, it was the most serious.[7] In addition, it was the incident that precipitated the debarment action. The Forest Service had previously concluded that breaches on the Unkas and Sweat sales were not serious enough to warrant debarment; and the minor breaches which had previously occurred on the Bitter sale had been remedied to the Forest Service's satisfaction. (A.R. A3, C5, C8, C12, D2).

It is, therefore, not clear that the Debarring Official would have found debarment appropriate had he properly excluded the unauthorized cutting as a cause. As such, the decision was arbitrary and capricious, and an abuse of discretion.

For the foregoing reasons the following Order is issued.

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[7]The other causes were as follows:

> Two violation notices issued on April 19, 1995 on the Sweat sale, for the issuance of 4 forest product removal permits by a log driver who was not designated in writing to issue permits; transporting logs without the date and time on the portion of the product removal permit that was left at the scaling station; and improperly removing 2 ponderosa pine trees which had been blown down. (A.R. B1).
>
> Four breach actions on the Bitter sale, between February 26, 1993 and April 19, 1994, for negligently removing19 trees which were outside of the sale subdivision boundary; interference with law enforcement personnel; and failure to properly complete 5 product removal permits. (A.R. C7, C9, C19, C20).
>
> Four breach actions taken on Unkas sale between June 16, 1993 and November 15, 1993, for improper validation of 6 load tickets; failure of a chip truck to stop at a scaling location; hauling 5 loads of chips for which a scaler or product monitor did not pull the scaler's copy of the product removal permit; and hauling 3 loads of timber after operations had been suspended. (A.R. D9, D12, D6).

Order

The decision of the debarring official is hereby vacated.

This Order shall take effect immediately. This decision is final and not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served on the parties.

[This Decision and Order became final November 21, 1997.-Editor]

MISCELLANEOUS ORDERS

In re: SEQUOIA ORANGE CO., INC.
90 AMA Docket No. F&V 908-6.
Remand Order filed January 3, 1992.

Remand order — Postmark controlling if mailed.

The Judicial Officer remanded the proceeding to Chief Judge Palmer to determine whether Petitioner's appeal was delivered by the United States Postal Service or, rather, was hand delivered. Under the Rules of Practice, Petitioner's appeal is deemed filed when postmarked, if delivered by the United States Postal Service, but if hand delivered, it is deemed filed when received by the Hearing Clerk. The Pitney Bowes, Inc., postage meter stamp on the envelope was timely, but the Hearing Clerk's filing date, 22 days later, was not timely.

M. Bradley Flynn, for Respondent.
James A. Moody, Washington, D.C., for Petitioner.
Order issued by Donald A. Campbell, Judicial Officer.

On August 26, 1991, an Initial Decision and Order was filed in this proceeding by Chief Administrative Law Judge Victor W. Palmer (ALJ) dismissing the Petition filed by Petitioner, which challenged regulations issued under Marketing Order 908 during the years 1979 to 1982, inclusive. The Initial Decision and Order was received by Petitioner's attorney on August 30, 1991, and a Notice of Effective Date of Decision and Order was filed by the Hearing Clerk on October 10, 1991, stating that since the case had not been appealed within the allotted time, the Initial Decision and Order "became final and effective on October 5, 1991."

On October 22, 1991, Petitioner's appeal was stamped as received by the Hearing Clerk. However, the appeal is dated September 29, 1991, and the envelope, stamped by the Hearing Clerk as received on October 22, 1991, has a Pitney Bowes, Inc., meter stamp dated September 30, 1991, showing U.S. postage of 98 cents. (Presumably, the private individual stamping the document can stamp it to show any desired date.) There is no postal department cancellation mark on the meter stamp.

Under the Department's Rules of Practice (7 C.F.R. § 900.69(d) (1991)), a document such as an appeal "shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk." As I interpret this rule of practice, if a document is mailed, the filing date is the date of the postmark, but if it is hand delivered, or sent through the Department's internal mail system, it is filed when it is received by the Hearing Clerk. Since the Judicial Officer has no jurisdiction to hear this appeal if it was not delivered by the United States Postal Service but, rather, was hand delivered by someone, it is necessary for a

determination to be made as to whether Petitioner's appeal was hand delivered or whether it was deposited with the United States Postal Service on September 30, 1991, and delivered by the United States Postal Service to the Department.

Order

This proceeding is remanded to the ALJ for the purpose of conducting a hearing to determine the circumstances with respect to the filing of Petitioner's appeal. This hearing should be expedited, insofar as practicable, so that if anyone has a specific memory as to this particular document, that memory will not fade due to the lapse of time. Whatever jurisdiction the Judicial Officer presently has will be retained by the Judicial Officer pending the ALJ's determination as to the circumstances of the filing of the appeal. Particularly, the ALJ should determine whether the appeal came through the U.S. Postal Service or whether it was hand delivered by someone not connected with the U.S. Postal Service. Whether the ALJ permits briefs to be filed is a matter for the ALJ's discretion. After the ALJ has made his findings and/or conclusions, the Judicial Officer will determine whether briefs will be permitted as to this issue.

In re: MILKCO, INC., and HUNTER FARMS, a DIVISION of HARRIS TEETER, INC.
96 AMA Docket No. M 1-1.
Order filed July 15, 1997.

Charles M. English, Washington, D.C., for Petitioner.
Gregory Cooper, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Based on the stipulation of the parties and for good cause, the petition herein is dismissed without prejudice, except that the petitioners agree not to file any action or proceeding to recover monies paid under the Settlement Agreement.

In re: DORA HAMPTON, d/b/a HAMPTON KENNELS.
AWA Docket No. 96-0050.
Modified Order filed July 21, 1997.

Civil penalty — Disqualification — Cease and desist — Modification of order.

The Judicial Officer modified the Order issued in *In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997). The Order in *In re Dora Hampton, supra*, is modified as set forth in a Proposed Order filed by Complainant and agreed to by Respondent.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service [hereinafter Complainant] instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on May 8, 1996.

The Complaint alleges that Dora Hampton, d/b/a Hampton Kennels [hereinafter Respondent], willfully violated the Regulations and Standards on August 2, 1994, January 31, 1995, August 15, 1995, September 26, 1995, and November 7, 1995.

Respondent was served with the Complaint on May 14, 1996. Respondent failed to answer the Complaint within 20 days as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on October 9, 1996, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the Chief ALJ: (1) found that Respondent violated the Regulations and Standards as alleged in the Complaint; (2) issued a cease and desist order directing that Respondent cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed a civil penalty of $10,000 against Respondent; and (4) suspended Respondent's license under the Animal Welfare Act for 60 days and continuing thereafter until Respondent demonstrates that she is in full compliance with the Animal Welfare Act and the Regulations and Standards and pays the assessed civil penalty (Default Decision at 5).

On October 16, 1996, Respondent appealed to the Judicial Officer to whom the

Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On December 3, 1996, Complainant filed Complainant's Opposition to Motion by Respondent Dora Hampton to Set Aside Default. On January 6, 1997, the case was referred to the Judicial Officer for decision.

On January 15, 1997, the Judicial Officer filed a Decision and Order in which Respondent was found to have violated the Regulations and Standards. *In re Dora Hampton*, 56 Agric. Dec. ___, slip op. at 10-13 (Jan. 15, 1997). Moreover, Respondent's Animal Welfare Act license was suspended for 60 days, Respondent was assessed a civil penalty of $10,000, and Respondent was ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. *In re Dora Hampton, supra*, slip op. at 23-25.

On July 7, 1997, Respondent filed two motions for modification of the civil penalty assessed in the Order issued in *In re Dora Hampton, supra*. On July 17, 1997, Complainant filed a Motion to Modify Order and Proposed Order. Complainant states "[R]espondent has been contacted by [C]omplainant's attorney and [Respondent] does not object to the [C]omplainant's proposed order." (Complainant's Motion to Modify Order at 1.) On July 17, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's and Complainant's motions.

Respondent's July 7, 1997, motions, as supplemented by Respondent's agreement to the Proposed Order filed by Complainant on July 17, 1997, are granted. Complainant's July 17, 1997, Motion to Modify Order, which I find Respondent has joined, is granted. The Order in the Decision and Order issued in this proceeding on January 15, 1997, *In re Dora Hampton, supra*, is modified as set forth in the Proposed Order filed by Complainant on July 17, 1997, and agreed to by Respondent, as follows:

Order

1. Respondent is assessed a civil penalty of $10,000 which is suspended provided that Respondent does not violate the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act for a period of 10

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490-91 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

years from the effective date of this Order.

2. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

a. Failing to provide housing facilities for dogs that are structurally sound and maintained in good repair so as to protect dogs from injury, contain dogs securely, and restrict other animals from entering;

b. Failing to clean and sanitize surfaces of housing facilities for dogs;

c. Failing to construct primary enclosures for dogs so that they provide sufficient space for dogs;

d. Failing to keep the premises, including buildings and surrounding grounds, in good repair, clean, and free of trash, junk, waste, and discarded matter;

e. Failing to control weeds, grasses, and bushes in order to protect dogs from injury and facilitate the required husbandry practices;

f. Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks;

g. Failing to remove excreta from primary enclosures daily to prevent soiling of dogs and to reduce disease hazards, insects, pests, and odors; and

h. Failing to provide building surfaces in contact with the animals in outdoor housing facilities for dogs that are impervious to moisture.

3. Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act.

In re: DAVID M. ZIMMERMAN.
AWA Docket No. 94-0015.
Stay Order filed August 8, 1997.

Frank Martin, Jr., for Complainant.
David A. Fitzsimons & Elizabeth J. Goldstein, Harrisburg, PA, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On June 6, 1997, the Judicial Officer issued a Decision and Order concluding that David M. Zimmerman [hereinafter Respondent] willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare

Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]. *In re David M. Zimmerman*, 56 Agric. Dec. ___, slip op. at 24-35 (June 6, 1997). Respondent was served with the Decision and Order on June 11, 1997.

The Decision and Order assesses Respondent a civil penalty of $51,250, to be paid within 60 days after service of the Decision and Order on Respondent, viz., August 10, 1997, and suspends Respondent's Animal Welfare Act license for 60 days, effective on the 30th day after service of the Decision and Order on Respondent, viz., July 11, 1997. *In re David M. Zimmerman, supra*, slip op. at 61-62.

On August 7, 1997, Respondent filed an Application For Stay Pending Review in which Respondent states that he has contemporaneously filed a petition for review of the Judicial Officer's June 6, 1997, Decision and Order with the United States Court of Appeals for the Third Circuit and requests a stay pending the outcome of proceedings for judicial review. On August 8, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's Application For Stay Pending Review. On August 8, 1997, Frank Martin, Jr., attorney for Complainant in this proceeding, informed the Judicial Officer by telephone that Complainant does not oppose Respondent's Application For Stay Pending Review.

Respondent's Application For Stay Pending Review is granted. The Order issued in this proceeding on June 6, 1997, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: MICHAEL L. KREDOVSKI AND BIO-MEDICAL ASSOCIATES, INC.
AWA Docket No. 95-0035.
Supplemental Order filed December 24, 1997.

Sharlene A. Deskins, for Complainant.
Ronald T. Derenzo, Pottsville, PA, for Respondents.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, respondents' license as a dealer under the Animal Welfare Act, as amended, will be suspended from December 28, 1997, to January 3, 1998.

This order shall be effective upon issuance.

In re: BALBACH LOGGING, DANNY WILLIAM BALBACH, and PAIGE PAMELA BALBACH.
DNS Docket No. FS-97-0001.
Order Dismissing Appeal filed August 4, 1997.

Lori Polin Jones, for FS.
Richard C. Boardman, Boise, ID, for Respondent.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Counsel for Respondents and the Debarring Official filed a Joint Stipulation for Dismissal on July 31, 1997. The appeal petition filed on April 15, 1997, is hereby dismissed.

In re: MMI INTERNATIONAL CORPORATION, MILK MAID, INC., and HARJIT SINGH.
DNS Docket No. CCC-96-0001.
Order Dismissing Appeal Petition filed August 11, 1997.

Maureen T. LaPiana, for FAS.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

On July 25, 1997, the Debarring Official, August Schumacher, Jr., Administrator of the Foreign Agricultural Service (FAS), filed a motion to dismiss Respondents' appeal on the basis that the Office of Administrative Law Judges does not have jurisdiction to consider the appeal, as it was not filed within the time period required by 7 C.F.R. § 3017.515. Respondents filed a response to the motion to dismiss on August 5, 1997.

The Debarring Official notified Respondents of his final decision to debar by a letter dated June 16, 1997. The letter was sent certified mail, return receipt requested. The signature and date on the return receipt indicate that the letter was received by Margaret Singh[1] on June 18, 1997. The letter advised Respondents that:

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[1]Margaret Singh is the current owner of Respondent MMI International, and is the wife of Respondent Harjit Singh.

> You may appeal this decision to the Office of Administrative Law Judges (OALJ) pursuant to 7 C.F.R. § 3017.515. The appeal must be in writing and filed with the Hearing Clerk, OALJ, United States Department of Agriculture, Washington, D.C. *within 30 days of your receipt of this letter.*

Motion to Dismiss Appeal, Attachment 1 at 3 (emphasis added).

On June 15, 1997, Respondents filed a request for extension of time in which to file an appeal on the basis that Respondent Harjit Singh was incarcerated at the time the notice was issued, and had been unable to obtain counsel. I denied the request for additional time based on a lack of jurisdiction under the regulations. The Order reiterated that an appeal must be filed within 30 days of the date Respondents received the Notice of Debarment.

Respondents appealed the debarment by a letter dated July 18, 1997. The letter was faxed to the Hearing Clerk on Saturday, July 19, 1997, and was actually received and stamped by the Hearing Clerk the following Monday, July 21, 1997--33 days after the Notice of Debarment was received.

The regulations require that appeals of decisions to debar must be filed with the Hearing Clerk within 30 days of receiving the decision. 7 C.F.R. § 3017.515(a). *In re: Leon Howard*, 53 Agric. Dec. 1400 (1994), held that appeals of debarment actions not received within 30 days must be dismissed as untimely. Furthermore, debarment decisions which are not issued within 45 days are vacated as not in accordance with the law. *In re: Robert M. Miller*, 53 Agric. Dec. 1411 (1994); *In re: Maple Hill Farms, Inc.*, 53 Agric. Dec. 1415 (1994); *In re: Young's Food Stores, Inc.*, 53 Agric. Dec. 1403 (1994); *In re: Jerry Reeves, East Arkansas Insurance*, 54 Agric Dec. 374 (1995); *In re: Newell Vance Williams*, 54 Agric. Dec. 1087 (1995); *In re: Lewis Eugene McCravy, Jr.*, 55 Agric. Dec. 254 (1996). All of the above cases stressed that time is of the essence in debarment proceedings and that time lines must be enforced against all parties with equal consistency.

Respondents do not deny that the Appeal was not filed within 30 days. Instead, they claim that it was their understanding based on conversations with the Office of the Hearing Clerk and OALJ staff, that when computing the time for filing, Saturdays and Sundays are counted, but federal holidays are excluded. Accordingly, Respondents claim that the July 4 holiday added an extra day to their filing time.

The regulations only state that the appeal shall be filed within 30 days. There is no provision regarding computation of time. The Office of the Hearing Clerk, however, advised Respondents of the usual method of calculating a deadline, which requires that all days be counted unless the final day of the time period falls on a Saturday, Sunday, or Federal Holiday, in which case the period is extended to the end of the next business day.

This advice may have caused Respondents genuine confusion as to the proper method of calculating the filing deadline; however, the fact that the Appeal was backdated to July 18--the correct filing deadline--suggests that Respondents were aware of the proper deadline and simply missed it. In any case, Respondents had official notice that the appeal must be filed no later than 30 days after receipt of the Notice of Debarment. Despite this, the appeal was not filed until 33 days after the decision was received.

Although it may appear harsh to dismiss a petition for being only three days late, allowing an exception in one case would require exceptions to be granted in every case. Time is of the essence in debarment proceedings. To avoid inequities and timely process debarment proceedings, time limitations must be strictly construed. Accordingly, the Debarring Official's motion must be granted, and the petition dismissed.

Order

Respondents petition appealing the June 16, 1997 decision of the Debarring Official is hereby dismissed.

Copies of this Order shall be served on the parties.

In re: NORMAN THOMAS MASSEY.
FCIA Docket No. 96-0005.
Ruling on Motion for Summary Judgment and Order filed June 2, 1997.

No genuine issue of material fact - Collateral estoppel - Conviction - Willful and intentional submission of false information to FCIC - Disqualification.

Chief Administrative Law Judge Victor W. Palmer granted the motion for summary judgment on the grounds that Respondent was collaterally estopped from relitigating the issue of whether he willfully and intentionally submitted false information to FCIC, and therefore, there remained no genuine issue of material fact to be decided.

Kimberly E. Arrigo, for Complainant.
Leah R. Cooper, Princeton, KY, for Respondent.
Ruling on Motion for Summary Judgment and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is a proceeding under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501 *et seq.*) (hereinafter referred to as the Act) and the regulations promulgated thereunder, governing the administration of the Federal Crop Insurance

Program (7 C.F.R. Part 400, hereinafter referred to as the regulations). The Manager of the Federal Crop Insurance Corporation (FCIC) filed a Complaint on May 3, 1996, pursuant to 7 U.S.C. § 1506(n) which provides that:

> If a person willfully and intentionally provides any false or inaccurate information to the Corporation, or to any insurer with respect to an insurance plan or policy under this chapter; the Corporation may, after notice and an opportunity for a hearing on the record-
>
> (A) impose a civil fine of not to exceed $10,000 on the person; and
> (B) disqualify the person from purchasing catastrophic risk protection or receiving noninsured assistance for a period of not to exceed 2 years, or from receiving any other benefit under this chapter for a period of not to exceed 10 years.

The Complaint alleges that Respondent submitted a disaster claim to FCIC which falsely showed a zero yield for his soybean crops on farm serial number 1159; and that Respondent claimed that soybeans sold from farm serial number 1159 were from farm serial number 2400.

Respondent filed an Answer and Request for Oral Hearing on June 7, 1996, beyond the time allowed. The agency did not take any further action until April 17, 1997, when it filed a Motion for Summary Judgment based on Respondent's conviction on an analogous criminal charge. Respondent was served with the Motion but failed to respond.

Section 1.143 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary authorizes the Judge to entertain any motion other than a motion to dismiss on the pleadings. Motions for summary judgment are appropriate when--based on the pleadings, affidavits, and other forms of evidence relevant to the merits--there is no genuine issue of material fact to be decided, and the movant is entitled to judgment as a matter of law.

Complainant submitted with its Motion for Summary Judgment: a copy of a sworn statement made by Respondent; a Grand Jury Indictment from the Western District of Kentucky; and a Judgment from the Western District of Kentucky. Complainant maintains that summary judgment is proper because the doctrine of collateral estoppel precludes Respondent from relitigating the issue of whether he willfully and intentionally submitted false information to FCIC, thereby leaving no issue of material fact to be decided.

Collateral estoppel precludes the relitigation of an issue if: 1) the issue is

identical in both proceedings; 2) resolution of the issue was essential to the prior judgment; 3) the party was adequately represented in the prior proceeding; and 4) the issue was fully litigated in the prior proceeding. *See Mintzmyer v. Dep't of the Interior*, 84 F.3d 419, 423 (Fed. Cir. 1996); *Ramsey v. United States Immigration and Naturalization Serv.*, 14 F.3d 206, 210 (4th Cir. 1994); *Blohm v. Comm'r of Internal Revenue*, 994 F.2d 1542, 1553 (11th Cir. 1993); *Delta Rocky Mountain Petroleum, Inc.*, 726 F. Supp. 278, 282 (D. Colo. 1989).

Respondent was indicted in the Western District of Kentucky on two counts. The first count alleged that:

> Norman Thomas Massey . . . knowingly made and caused to be made a materially false statement and report to the Federal Crop Insurance Corporation (FCIC) for the purpose of influencing the action of the FCIC and its agent, American Agrisurance Company, upon an application for crop insurance benefits: namely, the defendants prepared and submitted to American Agrisurance a Production Worksheet which claimed that Massey's farm, designated Farm Serial Number 1159, had experienced a total loss of the 1993 soybean crop, and the defendants certified that information to be true and complete, when in fact, as the defendants then well knew, that information was false.

(Motion for Summary Judgment, Appendix). The second count alleged that Respondent made a false statement to the Commodity Credit Corporation. Respondent was found guilty on both counts.

The requirements for collateral estoppel are met. The issue of whether Respondent willfully and intentionally provided false information to FCIC was necessarily determined in the criminal trial in the Western District of Kentucky. Respondent was a party in the criminal proceeding; and the issue was fully litigated with the judgment final.

Respondent is, therefore, estopped from claiming that he did not willfully and intentionally submit false statements to FCIC. As such there are no questions of material fact to be decided at a hearing. Accordingly, Complainant's Motion for Summary Judgment is granted and the following Order is Issued.

Order

It is found that Respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to an insurer

with respect to an insurance plan or policy under the Act.

Pursuant to section 506 of the Act (7 U.S.C. § 1506), Respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years, or from receiving any other benefit under the Act for a period of ten years. The period of disqualification shall be effective 335 days after this decision is served on the Respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the Respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

In re: LINDSAY FOODS, INC., and GARY C. LINDSAY, PRESIDENT, LINDSAY FOODS, INC.
FMIA Docket No. 96-0003.
Remand Order filed August 28, 1997.

Motion to dismiss — Motion concerning complaint — Rules of practice binding — Remand order.

The Judicial Officer vacated Chief Administrative Law Judge Palmer's (Chief ALJ) Dismissal of Case for Lack of Jurisdiction and remanded the case for further procedure in accordance with the Rules of Practice. Respondents' Motion for Summary Judgment and Dismissal is a motion to dismiss on the pleadings which, in accordance with 7 C.F.R. § 1.143(b)(1), cannot be entertained. In addition, Respondents' Motion for Summary Judgment and Dismissal is a motion concerning the complaint which, in accordance with 7 C.F.R. § 1.143(b)(2), may not be made after the time allowed for filing an answer. Respondents' answer was due in mid-January 1996, and Respondents' Motion for Summary Judgment and Dismissal was filed on March 4, 1997.

Jane H. Settle and Howard D. Levine, for Complainant.
Robert G. Hibbert, Washington, D.C., for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Food Safety and Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601-695) [hereinafter the FMIA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Proceedings Under the Federal Meat Inspection Act

(9 C.F.R. §§ 335.1-.40) [hereinafter the Rules of Practice], by filing a Complaint on December 8, 1995.

The Complaint alleges, *inter alia*, that: (1) Respondent Lindsay Foods, Inc., is a corporation which operates a meat processing establishment and is a recipient of meat inspection services under Title I of the FMIA (Compl. ¶ I(a)); (2) Respondent Gary C. Lindsay is an individual responsibly connected to Respondent Lindsay Foods, Inc. (Compl. ¶ I(b)); (3) on or about April 3, 1995, Respondent Gary C. Lindsay was convicted in the Criminal Division of the Circuit Court for Milwaukee County in the State of Wisconsin of 12 violations of Wis. Stat. § 97.10(1) for selling misbranded ground beef products (Compl. ¶ II); and (4) Lindsay Foods, Inc., and Gary C. Lindsay [hereinafter Respondents] are unfit to engage in any business requiring inspection service under Title I of the FMIA, within the meaning of section 401 of the FMIA (21 U.S.C. § 671) (Compl. ¶ III). Complainant requests the issuance of an order withdrawing inspection service under Title I of the FMIA from Respondents for a period of 5 years (Compl. at 3).

On December 22, 1995, Respondents filed an Answer: (1) admitting that Respondent Lindsay Foods, Inc., is a corporation which operates a meat processing establishment and is a recipient of meat inspection services under Title I of the FMIA (Answer ¶ I); (2) admitting that Respondent Gary C. Lindsay is an individual responsibly connected to Respondent Lindsay Foods, Inc. (Answer ¶ I); (3) admitting that on or about April 3, 1995, Respondent Gary C. Lindsay was convicted in the Criminal Division of the Circuit Court for Milwaukee County in the State of Wisconsin of 12 violations of Wis. Stat. § 97.10(1) for selling misbranded ground beef products, but reserving "the right to further describe the circumstances and the events which led to the plea and finding by the Milwaukee County Circuit Court" (Answer II); (4) denying that Respondents are unfit to engage in any business requiring inspection service under Title I of the FMIA, within the meaning of section 401 of the FMIA (21 U.S.C. § 671) (Answer ¶ III); and (5) stating that Respondents "are responsible perveyors [sic] of wholesome, unadulterated meat products and are entitled to continued service under Title I of the FMIA" (Answer ¶ III).

On March 4, 1997, Respondents filed a Motion for Summary Judgment and Dismissal stating that:

> Respondent[s] hereby move[] for Summary Judgment and Dismissal in the above-captioned proceeding. As discussed in further detail below, the Complaint and Answer having been filed, this matter can be fully resolved as a matter of law without the need for an Administrative Hearing. More

> specifically, Complainant has failed to satisfy the jurisdictional requirement specified in [s]ection 401 of the Federal Meat Inspection Act (21 U.S.C. 671) in that it has failed to allege the existence of a criminal conviction which would provide the necessary pretext for such a proceeding. Accordingly, the matter should be immediately dismissed.

Motion for Summary Judgment and Dismissal at 1.

On March 6, 1997, Complainant filed Complainant's Preliminary Response to Respondents' Motion for Summary Judgment and Dismissal (footnote omitted) [hereinafter Complainant's Response] in which Complainant contends that Respondents' Motion for Summary Judgment and Dismissal should be denied because: (1) Respondents' Motion for Summary Judgment and Dismissal is a motion to dismiss on the pleading which, in accordance with section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), may not be entertained; and (2) Respondents' Motion for Summary Judgment and Dismissal is a motion concerning the Complaint that was filed after Respondents' Answer was due and in accordance with section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)), may not be made after the time allowed for filing an answer.

On March 7, 1997, Respondents filed Respondent's [sic] Reply to Complainant's Response stating that:

> Respondents' [March 4, 1997, m]otion seeks [s]ummary [j]udgment. . . . Motions to [d]ismiss on the [p]leading as contemplated by the Rules of Practice encompass [m]otions seeking a substantive resolution of a proceeding based upon technical or other procedural defects in the pleadings themselves. . . . In the instant case, Respondent does not allege any technical defects in the pleadings. To the contrary, it [sic] argues that, taking the pleadings as a given, the issue now can and should be resolved as a matter of law. Complainant's efforts to relabel it do nothing to change the essential character of this Summary Judgment Motion.
>
> . . . .
>
> Complainant's suggestions regarding timeliness are also without merit. . . . Complainant [sic] is not alleging formal or technical problems with the complaint of the sort contemplated by 7 C.F.R. 1.143(b)(2). Again, the issue is not a technical defect but a broader matter of substantive law.

Respondent's [sic] Reply to Complainant's Response at 1-2.

On March 13, 1997, Complainant filed Complainant's Comments Regarding Respondent's Reply to Complainant's Response, and on March 21, 1997, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] filed Dismissal of Case for Lack of Jurisdiction. The Chief ALJ held that:

> Respondents' challenge to the Department's jurisdiction in this case must be considered. Good jurisprudence does not permit its consideration to be precluded by the fact that it was raised late in the proceedings and subsequent to the filing of Respondents' answer.
>
> Federal courts have long recognized that jurisdictional challenges may be raised at any time. . . .
>
> . . . .
>
> Obviously, it would be entirely inappropriate for a federal administrative agency to retain jurisdiction in circumstances where a federal court would not, just because the jurisdictional question was raised in a motion filed later than the agency's rules of practice otherwise permit. *See* 7 C.F.R. § 1.143(b)(2). Nor is it proper to treat the motion merely as a motion to dismiss on the pleadings which may not be entertained under the rules of practice. *See* 7 C.F.R. § 1.143(b)(1).
>
> . . . .
>
> The jurisdictional question raised by Respondents is whether the imposition of an order requiring payment of a forfeiture constitutes a *conviction* within the meaning of the [FMIA]. If it does not, then this forum is without jurisdiction to withdraw federal inspection from Respondents. To nonetheless go to hearing would be a waste of governmental resources and would place an unconscionable burden upon the Respondents. There is established Departmental precedent for rendering a decision without a hearing when officially noticed court documents show there is not any material issue of fact needing resolution in the case. *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627-628 (1989); and *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375,

1379 (1995).

Dismissal of Case for Lack of Jurisdiction at 3-4.

Moreover, the Chief ALJ concluded that:

> Obviously, the imposition of the civil forfeiture upon Gary C. Lindsay, the President of Lindsay Foods, Inc., cannot under the laws of the State of Wisconsin, be interpreted as amounting to his conviction for a crime. Therefore, neither he nor the corporate Respondent come within the subject matter jurisdiction of 21 U.S.C. § 671 which authorizes this proceeding for withdrawal of federal inspection against a business because it or someone responsibly connected with it "has been *convicted* in any Federal or State court . . . ."
>
> Accordingly, Respondents' Motion for Summary Judgment and Dismissal is hereby granted, and a judgment of dismissal is entered subject to Complainant's right of appeal as set forth in the Rules of Practice.

Dismissal of Case for Lack of Jurisdiction at 6-7.

On May 23, 1997, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On June 9, 1997, Respondents filed Respondents' Reply to Complainant's Appeal, and on June 20, 1997, Complainant filed Complainant's Response to Respondents' Reply to Complainant's Appeal. On June 23, 1997, the case was referred to the Judicial Officer for decision, and on June 27, 1997, Respondents filed Respondents' Supplemental Reply.

Based upon a careful consideration of the record in this proceeding, the Dismissal of the Case for Lack of Jurisdiction is vacated and the proceeding is remanded to the Chief ALJ for further procedure in accordance with the Rules of Practice. This Remand Order is based solely on my conclusions that Respondents' Motion for Summary Judgment and Dismissal is a motion to dismiss on the pleading, that Respondents' Motion for Summary Judgment and Dismissal is a

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

motion concerning the Complaint which was not filed within the time allowed for filing an answer, and that the Chief ALJ committed procedural error by granting Respondents' Motion for Summary Judgment and Dismissal.[2]

Section 1.143(b) of the Rules of Practice provides:

> **§ 1.143 Motions and requests.**
>
> . . . .
>
> (b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.
>
> (2) All motions and request [sic] concerning the complaint must be made within the time allowed for filing an answer.

7 C.F.R. § 1.143(b).

Respondents' Motion for Summary Judgment and Dismissal by its very terms is a motion to dismiss on the pleadings. Specifically, Respondents seek dismissal of the proceeding based on the Complaint, as follows:

> Complainant has failed to satisfy the jurisdictional requirement specified in [s]ection 401 of the Federal Meat Inspection Act (21 U.S.C. 671) *in that it has failed to allege* the existence of a criminal conviction which would provide the necessary pretext for such a proceeding. Accordingly, *the matter should be immediately dismissed.*

Motion for Summary Judgment and Dismissal at 1 (emphasis added).

Respondents contend however that "[m]otions to dismiss on the [p]leading as contemplated by the Rules of Practice encompass [m]otions seeking substantive resolution of a proceeding based on technical or other procedural defects in the pleadings themselves." (Respondent's [sic] Reply to Complainant's Response at 1.) Respondents appear to base their contention on section 1.137(a) of the Rules of Practice which provides that the parties may amend their pleadings, as follows:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**

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[2]I reach no conclusion in this Remand Order regarding the merits of Complainant's case, the merits of Respondents' rebuttal, or the Chief ALJ's conclusions regarding the merits of this proceeding.

(a) *Amendment.* At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137(a).

Respondents argue that since the parties may amend their pleadings under the Rules of Practice, "the proper remedy for . . . procedural defects is correction of the pleadings, not dismissal of the action." (Respondent's [sic] Reply to Complainant's Response at 1-2 (footnote omitted).)

While I find nothing to support Respondents' contention that the ability of the parties to amend pleadings in accordance with section 1.137(a) of the Rules of Practice is connected to the prohibition in section 1.143(b)(1) of the Rules of Practice on entertaining motions to dismiss on the pleadings, I note that section 1.137(a) of the Rules of Practice does not place any limits on the nature of the amendments that parties may make to their pleadings. In accordance with section 1.137(a) of the Rules of Practice (7 C.F.R. § 1.137(a)), a complainant may amend a complaint to correct substantive defects as well as technical or procedural defects, and may even amend a complaint to add additional allegations[3] or conform the complaint to the proof.[4] Moreover, the Judicial Officer has long held that administrative law judges should liberally grant motions to amend complaints.[5]

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[3]*See In re John T. Gray*, 55 Agric. Dec. 853, 855-57 (1996) (stating the administrative law judge's denial of complainant's motion to amend the complaint to add an allegation was in error); *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 142-43 (1992) (affirming the administrative law judge's ruling allowing complainant to amend the complaint during the hearing to add allegations), *appeal docketed sub nom. Balice v. USDA*, No. CV-F-92-5483-GEB (E.D. Cal. July 21, 1992).

[4]*See In re John T. Gray*, 55 Agric. Dec. 853, 855-57 (1996) (stating the administrative law judge's denial of complainant's motion during the hearing to amend the complaint to conform to the evidence was in error); *In re Gary R. Edwards*, 52 Agric. Dec. 1365, 1366 (1993) (Remand Order) (holding that it was error for the administrative law judge to deny complainant's motion to amend the complaint to conform to the proof which complainant offered during the hearing); *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1903 (1984) (stating that a motion to conform pleadings to the evidence is appropriate even though the rules of practice do not expressly provide for such a motion).

[5]*See In re Durward W. Starr*, 53 Agric. Dec. 461, 466 n.2 (1994) (stating that administrative law judges should liberally grant motions to amend complaints, with a continuance granted, if necessary, to enable respondents to prepare an adequate defense), *aff'd in part and rev'd in part*, No.5:94cv118 (D. Vt. July 20, 1995). (Court affirmed revocation order in less than all grounds found by the Judicial

Therefore, even if I found the connection between the ability of the parties to amend their pleadings and the prohibition on entertaining motions to dismiss on the pleadings suggested by Respondents, I would not find, as Respondents argue, that the prohibition on entertaining motions to dismiss on the pleadings only relates to motions to dismiss based on technical or procedural defects in pleadings. Rather, using Respondents' logic, the prohibition on entertaining motions to dismiss would relate to any amendment to a pleading that a party could make in accordance with section 1.137(a) of the Rules of Practice (7 C.F.R. § 1.137(a)), which amendments include the addition of allegations which give the Secretary subject matter jurisdiction and allegations which state a claim upon which relief could be granted.

The Rules of Practice do not define the term "motion to dismiss on the pleading." However, I find no basis for holding that the prohibition on entertaining motions to dismiss on the pleadings in section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) only relates to motions which seek substantive resolution of a proceeding based on technical or other procedural defects in the pleadings. Respondents' Motion for Summary Judgment and Dismissal clearly seeks dismissal of this proceeding and the basis for Respondents' motion is the purported failure of Complainant to allege facts in its pleading which give the Secretary jurisdiction to withdraw inspection services under Title I of the FMIA from Respondents.

Section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) prohibits administrative law judges and the judicial officer from entertaining a motion to dismiss on the pleading.[6] I find nothing in section 1.143(b)(1) of the Rules of

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Officer), *appeal withdrawn*, No. 95-_____ (2d Cir. Jan. 4, 1996); *In re Dr. Dane O. Petty*, 43 Agric. Dec. 1406, 1436 n.30 (1984) (stating that administrative law judges should liberally grant motions to amend complaints, with a continuance granted, if necessary, to enable respondents to prepare an adequate defense), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).

[6]*See In re Far West Meats*, 55 Agric. Dec. 1045, 1049 (Clarification of Ruling on Certified Questions) (stating that 7 C.F.R. § 1.143(b)(1) prohibits an administrative law judge from entertaining a motion to dismiss on the pleading); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414 (1991) (Remand Order) (holding that the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (stating that the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and that under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading). *See generally In re Don Van Liere*, 34 Agric. Dec. 1641 (1975) (Order of Dismissal) (stating that the purpose of 9 C.F.R. § 202.10(b), which provides that, in proceedings under the Packers and Stockyards Act, 1921, as amended and supplemented, any motion will be entertained "except a motion to dismiss on the pleadings," is to prevent a respondent from filing a motion to dismiss on the

Practice (7 C.F.R. § 1.143(b)(1)) which permits an administrative law judge or the judicial officer to entertain a motion to dismiss even in those circumstances in which the motion is supported by sound argument that the pleading in question fails to allege facts necessary for jurisdiction over the subject matter or fails to state a claim upon which relief can be granted.

I also find that Respondents' Motion for Summary Judgment and Dismissal cannot be considered because by its terms it is a motion concerning the Complaint and the motion was not filed within the time allowed for filing the answer.

A copy of the Complaint and a copy of the Rules of Practice were sent by certified mail to Respondents on December 8, 1995, and Respondents were served with a copy of the Complaint and the Rules of Practice in December 1995 (Return Receipts PO40135936 and PO40135937). Section 1.136(a) of the Rules of Practice provides:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding.

7 C.F.R. § 1.136(a).

Thus, Respondents' answer and any motion concerning the Complaint were due no later than mid-January 1996. Respondents did not file the Motion for Summary Judgment and Dismissal concerning the allegations in the Complaint until March 4, 1997, more than one year after such a motion was due.[7]

Respondents assert that:

> Again, the issue is not a technical defect but a broader matter of substantive law. Regardless of the passage of any particular amount of time, the Complainant cannot assert jurisdiction for the Secretary which Congress has not given him and force Respondent [sic] into a [s]ection 401 proceeding

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pleadings).

[7]Respondents' present counsel, Mr. Robert G. Hibbert, McDermott, Will & Emery, Washington, D.C, who entered an appearance on February 18, 1997, filed the Motion for Summary Judgment and Dismissal 14 days after he entered his appearance. However, Mr. Hibbert's diligence does not provide Respondents, who were represented by counsel prior to Mr. Hibbert's appearance, with an excuse for their failure to file a motion concerning the Complaint within the time allowed for filing an answer.

absent the requisite criminal conviction.

Respondent's [sic] Reply to Complainant's Response at 2.

Section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)) requires that "*[a]ll* motions and request[s] concerning the complaint must be filed within the time allowed for filing an answer." As commonly used, the word *all* does not permit an exception or exclusion not specified.[8] Moreover, the context in which the word *all* is used in section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)) provides no basis for reading the word *all* narrowly[9], and I find nothing in section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)) which permits

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[8]*See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944) (stating that *all* means all, not substantially all); *William v. United States*, 289 U.S. 553, 572 (1933) (describing the word *all* as a comprehensive word); *McLean v. United States*, 226 U.S. 374, 383 (1912) (stating that *all* excludes the idea of limitation); *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969) (stating that *all* means the whole of that which it defines, not less than its entirety and that the purpose of the word *all* is to underscore that intended breadth is not to be narrowed); *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 464 (S.D. Miss. 1964) (stating that *all* means *the whole, the sum of all the parts, the aggregate* and that *all* is about the most comprehensive and all inclusive word in the English language), *aff'd per curiam*, 358 F.2d 723 (5th Cir. 1966); *Travelers Ins. Co. v. Cimarron Ins. Co.*, 196 F. Supp. 681, 684 (D. Or. 1961) (stating that the word *all* when referring to the amount, quantity, extent, duration, quality, or degree means *the whole of* and that a statute which says *all* excludes nothing); *Fischer & Porter Co. v. Brooks Rotameter Co.*, 86 F. Supp 502, 503 (E.D. Pa. 1949) (stating that the word *any* implies totality as plainly as does the word *all* and the only difference is that *any* arrives at totality by a series of choices for consideration, whereas *all* arrives at totality in a single leap); *In re Central of Georgia Ry.*, 58 F. Supp. 807, 813 (S.D. Ga. 1945) (stating that a more comprehensive and all-inclusive word than *all* can hardly be found in the English language, there is a totality about the word *all* that few words possess), *rev'd on other grounds and remanded sub nom. Liberty National Bank & Trust Co. v. Bankers Trust*, 150 F.2d 453 (5th Cir. 1945); *United States v. Bachman*, 246 F. 1009, 1011 (E.D. Pa. 1917) (stating that the word intended to embrace every member of a class, where the number of the members of the class exceeds two, is the word *all*); *Beckwith v. Chicago, M. & St. P. Ry.*, 223 F. 858, 860 (W.D. Wash. 1915) (stating that the word *all* is very comprehensive in its meaning); *The Koenigin Luise*, 184 F. 170, 173 (D.N.J. 1910) (describing the word *all* as an inclusive term); *In re Far West Meats*, 55 Agric. Dec. 1045, 1050 (1996) (Clarification of Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly); *In re Far West Meats*, 55 Agric. Dec. 1033, 1037 (1996) (Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly).

[9]*But see In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1896 (1984) (stating that 7 C.F.R. § 1.143(b)(2) must be construed as relating to motions filed by respondents, not to motions filed by complainants).

Respondents to file a motion concerning the Complaint after the time allowed for filing an answer, even in those circumstances in which the motion is supported by sound argument that the pleading in question fails to allege facts necessary for jurisdiction over the subject matter or fails to state a claim upon which relief can be granted.

I agree with Respondents that the inability of an administrative law judge to entertain a motion to dismiss on the pleading could force a party to incur expenses that the party would not have incurred had the administrative law judge been authorized under the Rules of Practice to entertain a motion to dismiss on the pleading (Respondent's [sic] Reply to Complainant's Response). Moreover, I agree with the Chief ALJ that there may be occasions when the inability of an administrative law judge to dismiss a proceeding may result in a waste of government resources and place an unwarranted burden on a respondent (Dismissal of Case for Lack of Jurisdiction at 4). Nonetheless, the judicial officer and the administrative law judges are bound by the Rules of Practice.[10]

For the foregoing reasons, the following Order should be issued.

Order

The Dismissal of Case for Lack of Jurisdiction issued in this proceeding on March 21, 1997, is vacated and the proceeding is remanded to the Chief ALJ for

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[10]*See In re Stimson Lumber Co.*, 56 Agric. Dec. ___, slip op. at 12-13 (Mar. 18, 1997) (stating that while generally administrative law judges and the judicial officer are bound by the Rules of Practice, they may modify rules of practice to comply with statutory requirements such as the deadline for agency approval or disapproval of sourcing area applications set forth in 16 U.S.C. § 620b(c)(3)); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Questions) (stating that the judicial officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414 (1991) (Remand Order) (stating that the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (stating that the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and that under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading). *See generally In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (Order Denying Appeals) (stating that the Judicial Officer has no authority to depart from the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders).

further procedure in accordance with the Rules of Practice.[11]

In re: CECIL JORDAN, SHERYL CRAWFORD, and RONALD R. SMITH.
HPA Docket No. 91-0023.
Ruling on Respondent's Motion for Stay filed July 17, 1997.

Donald Tracy, for Complainant.
David N. Patterson, Willoughby, OH, for Respondent
Ruling issued by William G. Jenson, Judicial Officer.

On November 19, 1993, the Judicial Officer issued a Decision and Order holding that Sheryl Crawford (hereinafter Respondent) had violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); assessing Respondent a $2,000 civil penalty; and disqualifying Respondent from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction for a period of 1 year. *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 116 S. Ct. 88 (1995). Respondent was served with the Decision and Order on November 24, 1993 (Return Receipt). The Decision and Order requires payment of the assessed civil penalty within 30 days after service of the Decision and Order on Respondent and imposes the disqualification period beginning on the 30th day after service of the Decision and Order on Respondent, viz., December 24, 1993. Respondent appealed the November 19, 1993, Decision and Order, and on February 16, 1994, Respondent filed Respondent's Motion for Stay of Sanctions Pending Appeal, which the Judicial Officer granted on February 28, 1994. *In re Cecil Jordan*, 53 Agric. Dec. 536 (1994) (Stay Order).

The agency decision was affirmed, *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), and on May 1, 1995, Respondent filed Respondent's

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[11]While the Rules of Practice do not permit resolution of this proceeding pursuant to a motion to dismiss on the pleadings, Complainant's and Respondents' filings reveal that there are few, if any, material facts at issue. The parties may substantially reduce the length of any necessary hearing by stipulating to some of the material facts or may eliminate the need for any hearing by stipulating to all of the material facts and agreeing to brief the issue of the jurisdiction of the Secretary of Agriculture under section 401 of the FMIA (21 U.S.C. § 671) and any other issue ordered to be briefed by the Chief ALJ.

Motion to Initiate Sanctions. On May 11, 1995, prior to a ruling on Respondent's Motion to Initiate Sanctions, Respondent filed Respondent's Motion to Withdraw Respondent's Motion to Initiate Sanctions and Respondent's Motion to Stay Order of Judicial Officer. On June 6, 1995, the Judicial Officer granted Respondent's Motion to Withdraw Respondent's Motion to Initiate Sanctions and Respondent's Motion for Stay Order of Judicial Officer pending the outcome of Respondent's then-contemplated petition for a writ of certiorari. *In re Cecil Jordan*, 54 Agric. Dec. 449 (1995) (Order to Stay Execution).

On October 2, 1995, the Supreme Court of the United States denied Respondent's petition for a writ of certiorari. *Crawford v. United States Dep't of Agric.*, 116 S. Ct. 88 (1995). Subsequently, Complainant filed a Motion to Lift Stay as to Sheryl Crawford, which was granted by the Judicial Officer on February 23, 1996. *In re Cecil Jordan*, 55 Agric. Dec. 332 (1996). Pursuant to the February 23, 1996, Order Lifting Stay, Respondent was to pay the assessed civil penalty within 30 days after service of the Order Lifting Stay on Respondent, and the disqualification provisions were to become effective on the 30th day after service of the Order Lifting Stay on Respondent.

On March 25, 1996, Respondent filed Respondent's Motion to Stay Order of Judicial Officer, pending the disposition of Respondent's Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. On March 28, 1996, prior to the 30th day after service on Respondent of the Order Lifting Stay, a Temporary Stay Order was issued which provided Complainant with an opportunity to respond to Respondent's Motion to Stay Order of Judicial Officer. *In re Cecil Jordan*, 55 Agric. Dec. 333 (1996) (Temporary Stay Order).

Complainant filed Complainant's Opposition to Respondent's Motion to Stay the Judicial Officer's Order on April 11, 1996. On May 8, 1996, a Stay Order, which provides that the "Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction," was issued. *In re Cecil Jordan*, 55 Agric. Dec. 334 (Stay Order).

On May 7, 1996, Respondent filed a Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. The Supreme Court denied Respondent's motion on June 24, 1996. *Crawford v. United States Dep't of Agric.*, 116 S. Ct. 2574 (1996). On April 21, 1997, Complainant filed a Motion to Judicial Officer to Lift Stay; on May 12, 1997, Respondent filed Respondent's Response to Motion to Judicial Officer to Lift Stay; and on May 19, 1997, I issued an Order Lifting Stay Order, which states:

> Respondent does not oppose Complainant's Motion to Judicial Officer

> to Lift Stay, but asserts that she has served the entire 1-year disqualification period (Respondent's Response [to Motion to Judicial Officer to Lift Stay]).
>
> The Decision and Order filed November 19, 1993, disqualifying Respondent became "effective on the 30th day after service of [the] Order on Respondent," *In re Cecil Crawford, supra*, 52 Agric. Dec. at 1242, *viz.*, December 24, 1993. The November 19, 1993, Order was stayed effective February 28, 1994, and Respondent was disqualified during the period December 24, 1993, through February 27, 1994. At no other time was the disqualification provision in November 19, 1993, Decision and Order in effect. Therefore, Respondent's request that she be considered to have been disqualified during the period December 24, 1993, through February 27, 1994, is granted, and Respondent's request that she be considered to have been disqualified during the periods February 28, 1994, to March 16, 1994; March 31, 1995, to June 6, 1995; and October 31, 1995, to May 31, 1996, is denied.

In re Cecil Jordan, 56 Agric. Dec. ___, slip op. at 3-4 (May 19, 1997) (Order Lifting Stay Order).

On May 29, 1997, Respondent filed Respondent's Motion for Reconsideration of Order Lifting Stay Order reiterating the arguments which she made in Respondent's Response to Motion to Judicial Officer to Lift Stay, and on June 11, 1997, Complainant filed Complainant's Opposition to "Respondent's Motion for Reconsideration of Order Lifting Stay Order." On June 13, 1997, I issued an Order on Reconsideration of Order Lifting Stay Order which provides:

> A good faith belief that a stay order has been lifted does not in fact cause a stay order to be lifted. Instead, action must be taken to lift a stay order. *In re Jackie McConnell*, 56 Agric. Dec. ___, slip op. at 3 (Mar. 11, 1996) (Ruling on Respondent's Motion to Correct Order Lifting Stay). The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice), which are applicable to this proceeding, provide that "[a]ny motion will be entertained other than a motion to dismiss on the pleading." (7 C.F.R. § 1.143(b)(1).) Respondent was fully aware of her right to file a motion to lift a stay and begin her disqualification period under the Rules of Practice, as evidenced by Respondent's Motion to Initiate Sanctions filed May 1, 1995.

> I find no basis upon which to disturb the Order Lifting Stay Order issued May 19, 1997, and Respondent's Motion for Reconsideration of Order Lifting Stay Order is therefore denied.

In re Cecil Jordan, 56 Agric. Dec. ___, slip op. at 4-5 (June 13, 1997) (Order on Reconsideration of Order Lifting Stay Order).

On July 15, 1997, Respondent filed Respondent's Motion for Stay requesting that I stay the May 19, 1997, Order Lifting Stay, *In re Cecil Jordan, supra* (May 19, 1997) (Order Lifting Stay Order), and the June 13, 1997, Order on Reconsideration of Order Lifting Stay, *In re Cecil Jordan, supra* (June 13, 1997) (Order on Reconsideration of Order Lifting Stay Order), pending judicial review under the Administrative Procedure Act. Respondent states:

> Respondent desires to seek review of the Judicial Officer's decision in the United States [d]istrict [c]ourt on the basis that the Judicial Officer's decisions regarding the calculation of time served by Respondent in regards to the disqualification period were arbitrary and capricious. There are numerous events which point to the fact that Respondent believed in good faith that she was under suspension during the various periods of time outlined above.

Respondent's Motion for Stay at 2.

On July 15, 1997, Complainant filed Complainant's Response to Respondent's July 15, Motion for Stay, and on July 16, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's Motion for Stay filed July 15, 1997.

The Administrative Procedure Act provides:

> **§ 705. Relief pending review**
>
> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.

Respondent has exhausted avenues for judicial review of this administrative proceeding. *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 116 S. Ct. 88 (1995). I have fully considered and addressed Respondent's belief that she was disqualified during the pendency of judicial review of the administrative proceeding. *In re Cecil Jordan, supra* (May 19, 1997) (Order Lifting Stay Order); *In re Cecil Jordan, supra* (June 13, 1997) (Order on Reconsideration of Order Lifting Stay Order). Under these circumstances, I do not find that justice requires that I disturb the Order Lifting Stay issued May 19, 1997, based upon Respondent's "desire to seek judicial review" of *In re Cecil Jordan, supra* (May 19, 1997) (Order Lifting Stay Order), and *In re Cecil Jordan, supra* (June 13, 1997) (Order on Reconsideration of Order Lifting Stay Order).

For the foregoing reasons, Respondent's July 15, 1997, Motion for Stay is denied.

In re: WINSTON T. GROOVER and MARCELLA SMITH.
HPA Docket No. 95-0004.
Dismissal of Complaint as to Marcella Smith filed November 18, 1997.

Robert Ertman, for Complainant.
Respondent, Pro se.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Complainant's Motion therefor, filed October 20, 1997, the Complaint filed herein is dismissed as to Respondent Marcella Smith.

The Caption of the case henceforth shall be "Winston T. Groover, Respondent."

Copies hereof shall be served upon the parties.

In re: PIERCE B. TIDWELL, JR. d/b/a TIDWELL NURSERIES.
P.Q. Docket No. 96-0013.
Order of Dismissal and Cancellation of Hearing filed August 7, 1997.

Scott Safian, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's August 4, 1997, motion to dismiss is granted. The Complaint filed herein on December 21, 1995, is dismissed without prejudice.

The hearing scheduled for August 12, 1997, in Atlanta, Georgia, is canceled.

In re: E. LOTSPEICH.
P.Q. Docket No. 97-0012.
Order of Dismissal filed August 20, 1997.

Howard Levine, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer Chief Administrative Law Judge.

FOR GOOD CAUSE SHOWN and at the request of the Complainant this case is DISMISSED.

In re: CAROL ROBINSON.
P.Q. Docket No. 97-0011.
Order Dismissing Complaint filed August 28, 1997.

James D. Holt, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint filed herein on April 23, 1997, be dismissed.

In re: ADELA ANCHANTE de REYES.
P.Q. Docket No. 98-0003.
Order of Dismissal filed December 12, 1997.

Susan C. Golabek, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer Chief Administrative Law Judge.

For Good Cause Shown and upon the Motion of the Complainant, this case is hereby dismissed.

MISCELLANEOUS ORDERS

In re: SEQUOIA ORANGE CO., INC.
90 AMA Docket No. F&V 908-6.
Remand Order filed January 3, 1992.

Remand order — Postmark controlling if mailed.

The Judicial Officer remanded the proceeding to Chief Judge Palmer to determine whether Petitioner's appeal was delivered by the United States Postal Service or, rather, was hand delivered. Under the Rules of Practice, Petitioner's appeal is deemed filed when postmarked, if delivered by the United States Postal Service, but if hand delivered, it is deemed filed when received by the Hearing Clerk. The Pitney Bowes, Inc., postage meter stamp on the envelope was timely, but the Hearing Clerk's filing date, 22 days later, was not timely.

M. Bradley Flynn, for Respondent.
James A. Moody, Washington, D.C., for Petitioner.
Order issued by Donald A. Campbell, Judicial Officer.

On August 26, 1991, an Initial Decision and Order was filed in this proceeding by Chief Administrative Law Judge Victor W. Palmer (ALJ) dismissing the Petition filed by Petitioner, which challenged regulations issued under Marketing Order 908 during the years 1979 to 1982, inclusive. The Initial Decision and Order was received by Petitioner's attorney on August 30, 1991, and a Notice of Effective Date of Decision and Order was filed by the Hearing Clerk on October 10, 1991, stating that since the case had not been appealed within the allotted time, the Initial Decision and Order "became final and effective on October 5, 1991."

On October 22, 1991, Petitioner's appeal was stamped as received by the Hearing Clerk. However, the appeal is dated September 29, 1991, and the envelope, stamped by the Hearing Clerk as received on October 22, 1991, has a Pitney Bowes, Inc., meter stamp dated September 30, 1991, showing U.S. postage of 98 cents. (Presumably, the private individual stamping the document can stamp it to show any desired date.) There is no postal department cancellation mark on the meter stamp.

Under the Department's Rules of Practice (7 C.F.R. § 900.69(d) (1991)), a document such as an appeal "shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk." As I interpret this rule of practice, if a document is mailed, the filing date is the date of the postmark, but if it is hand delivered, or sent through the Department's internal mail system, it is filed when it is received by the Hearing Clerk. Since the Judicial Officer has no jurisdiction to hear this appeal if it was not delivered by the United States Postal Service but, rather, was hand delivered by someone, it is necessary for a

determination to be made as to whether Petitioner's appeal was hand delivered or whether it was deposited with the United States Postal Service on September 30, 1991, and delivered by the United States Postal Service to the Department.

Order

This proceeding is remanded to the ALJ for the purpose of conducting a hearing to determine the circumstances with respect to the filing of Petitioner's appeal. This hearing should be expedited, insofar as practicable, so that if anyone has a specific memory as to this particular document, that memory will not fade due to the lapse of time. Whatever jurisdiction the Judicial Officer presently has will be retained by the Judicial Officer pending the ALJ's determination as to the circumstances of the filing of the appeal. Particularly, the ALJ should determine whether the appeal came through the U.S. Postal Service or whether it was hand delivered by someone not connected with the U.S. Postal Service. Whether the ALJ permits briefs to be filed is a matter for the ALJ's discretion. After the ALJ has made his findings and/or conclusions, the Judicial Officer will determine whether briefs will be permitted as to this issue.

In re: MILKCO, INC., and HUNTER FARMS, a DIVISION of HARRIS TEETER, INC.
96 AMA Docket No. M 1-1.
Order filed July 15, 1997.

Charles M. English, Washington, D.C., for Petitioner.
Gregory Cooper, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Based on the stipulation of the parties and for good cause, the petition herein is dismissed without prejudice, except that the petitioners agree not to file any action or proceeding to recover monies paid under the Settlement Agreement.

In re: DORA HAMPTON, d/b/a HAMPTON KENNELS.
AWA Docket No. 96-0050.
Modified Order filed July 21, 1997.

Civil penalty — Disqualification — Cease and desist — Modification of order.

The Judicial Officer modified the Order issued in *In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997). The Order in *In re Dora Hampton, supra*, is modified as set forth in a Proposed Order filed by Complainant and agreed to by Respondent.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service [hereinafter Complainant] instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on May 8, 1996.

The Complaint alleges that Dora Hampton, d/b/a Hampton Kennels [hereinafter Respondent], willfully violated the Regulations and Standards on August 2, 1994, January 31, 1995, August 15, 1995, September 26, 1995, and November 7, 1995.

Respondent was served with the Complaint on May 14, 1996. Respondent failed to answer the Complaint within 20 days as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on October 9, 1996, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the Chief ALJ: (1) found that Respondent violated the Regulations and Standards as alleged in the Complaint; (2) issued a cease and desist order directing that Respondent cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed a civil penalty of $10,000 against Respondent; and (4) suspended Respondent's license under the Animal Welfare Act for 60 days and continuing thereafter until Respondent demonstrates that she is in full compliance with the Animal Welfare Act and the Regulations and Standards and pays the assessed civil penalty (Default Decision at 5).

On October 16, 1996, Respondent appealed to the Judicial Officer to whom the

Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On December 3, 1996, Complainant filed Complainant's Opposition to Motion by Respondent Dora Hampton to Set Aside Default. On January 6, 1997, the case was referred to the Judicial Officer for decision.

On January 15, 1997, the Judicial Officer filed a Decision and Order in which Respondent was found to have violated the Regulations and Standards. *In re Dora Hampton*, 56 Agric. Dec. ___, slip op. at 10-13 (Jan. 15, 1997). Moreover, Respondent's Animal Welfare Act license was suspended for 60 days, Respondent was assessed a civil penalty of $10,000, and Respondent was ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. *In re Dora Hampton, supra*, slip op. at 23-25.

On July 7, 1997, Respondent filed two motions for modification of the civil penalty assessed in the Order issued in *In re Dora Hampton, supra*. On July 17, 1997, Complainant filed a Motion to Modify Order and Proposed Order. Complainant states "[R]espondent has been contacted by [C]omplainant's attorney and [Respondent] does not object to the [C]omplainant's proposed order." (Complainant's Motion to Modify Order at 1.) On July 17, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's and Complainant's motions.

Respondent's July 7, 1997, motions, as supplemented by Respondent's agreement to the Proposed Order filed by Complainant on July 17, 1997, are granted. Complainant's July 17, 1997, Motion to Modify Order, which I find Respondent has joined, is granted. The Order in the Decision and Order issued in this proceeding on January 15, 1997, *In re Dora Hampton, supra*, is modified as set forth in the Proposed Order filed by Complainant on July 17, 1997, and agreed to by Respondent, as follows:

Order

1. Respondent is assessed a civil penalty of $10,000 which is suspended provided that Respondent does not violate the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act for a period of 10

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490-91 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

years from the effective date of this Order.

2. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

a. Failing to provide housing facilities for dogs that are structurally sound and maintained in good repair so as to protect dogs from injury, contain dogs securely, and restrict other animals from entering;

b. Failing to clean and sanitize surfaces of housing facilities for dogs;

c. Failing to construct primary enclosures for dogs so that they provide sufficient space for dogs;

d. Failing to keep the premises, including buildings and surrounding grounds, in good repair, clean, and free of trash, junk, waste, and discarded matter;

e. Failing to control weeds, grasses, and bushes in order to protect dogs from injury and facilitate the required husbandry practices;

f. Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks;

g. Failing to remove excreta from primary enclosures daily to prevent soiling of dogs and to reduce disease hazards, insects, pests, and odors; and

h. Failing to provide building surfaces in contact with the animals in outdoor housing facilities for dogs that are impervious to moisture.

3. Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act.

In re: DAVID M. ZIMMERMAN.
AWA Docket No. 94-0015.
Stay Order filed August 8, 1997.

Frank Martin, Jr., for Complainant.
David A. Fitzsimons & Elizabeth J. Goldstein, Harrisburg, PA, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On June 6, 1997, the Judicial Officer issued a Decision and Order concluding that David M. Zimmerman [hereinafter Respondent] willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare

Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]. *In re David M. Zimmerman*, 56 Agric. Dec. ___, slip op. at 24-35 (June 6, 1997). Respondent was served with the Decision and Order on June 11, 1997.

The Decision and Order assesses Respondent a civil penalty of $51,250, to be paid within 60 days after service of the Decision and Order on Respondent, viz., August 10, 1997, and suspends Respondent's Animal Welfare Act license for 60 days, effective on the 30th day after service of the Decision and Order on Respondent, viz., July 11, 1997. *In re David M. Zimmerman, supra*, slip op. at 61-62.

On August 7, 1997, Respondent filed an Application For Stay Pending Review in which Respondent states that he has contemporaneously filed a petition for review of the Judicial Officer's June 6, 1997, Decision and Order with the United States Court of Appeals for the Third Circuit and requests a stay pending the outcome of proceedings for judicial review. On August 8, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's Application For Stay Pending Review. On August 8, 1997, Frank Martin, Jr., attorney for Complainant in this proceeding, informed the Judicial Officer by telephone that Complainant does not oppose Respondent's Application For Stay Pending Review.

Respondent's Application For Stay Pending Review is granted. The Order issued in this proceeding on June 6, 1997, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: MICHAEL L. KREDOVSKI AND BIO-MEDICAL ASSOCIATES, INC.
AWA Docket No. 95-0035.
Supplemental Order filed December 24, 1997.

Sharlene A. Deskins, for Complainant.
Ronald T. Derenzo, Pottsville, PA, for Respondents.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, respondents' license as a dealer under the Animal Welfare Act, as amended, will be suspended from December 28, 1997, to January 3, 1998.

This order shall be effective upon issuance.

In re: BALBACH LOGGING, DANNY WILLIAM BALBACH, and PAIGE PAMELA BALBACH.
DNS Docket No. FS-97-0001.
Order Dismissing Appeal filed August 4, 1997.

Lori Polin Jones, for FS.
Richard C. Boardman, Boise, ID, for Respondent.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Counsel for Respondents and the Debarring Official filed a Joint Stipulation for Dismissal on July 31, 1997. The appeal petition filed on April 15, 1997, is hereby dismissed.

In re: MMI INTERNATIONAL CORPORATION, MILK MAID, INC., and HARJIT SINGH.
DNS Docket No. CCC-96-0001.
Order Dismissing Appeal Petition filed August 11, 1997.

Maureen T. LaPiana, for FAS.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

On July 25, 1997, the Debarring Official, August Schumacher, Jr., Administrator of the Foreign Agricultural Service (FAS), filed a motion to dismiss Respondents' appeal on the basis that the Office of Administrative Law Judges does not have jurisdiction to consider the appeal, as it was not filed within the time period required by 7 C.F.R. § 3017.515. Respondents filed a response to the motion to dismiss on August 5, 1997.

The Debarring Official notified Respondents of his final decision to debar by a letter dated June 16, 1997. The letter was sent certified mail, return receipt requested. The signature and date on the return receipt indicate that the letter was received by Margaret Singh[1] on June 18, 1997. The letter advised Respondents that:

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[1]Margaret Singh is the current owner of Respondent MMI International, and is the wife of Respondent Harjit Singh.

> You may appeal this decision to the Office of Administrative Law Judges (OALJ) pursuant to 7 C.F.R. § 3017.515. The appeal must be in writing and filed with the Hearing Clerk, OALJ, United States Department of Agriculture, Washington, D.C. *within 30 days of your receipt of this letter.*

Motion to Dismiss Appeal, Attachment 1 at 3 (emphasis added).

On June 15, 1997, Respondents filed a request for extension of time in which to file an appeal on the basis that Respondent Harjit Singh was incarcerated at the time the notice was issued, and had been unable to obtain counsel. I denied the request for additional time based on a lack of jurisdiction under the regulations. The Order reiterated that an appeal must be filed within 30 days of the date Respondents received the Notice of Debarment.

Respondents appealed the debarment by a letter dated July 18, 1997. The letter was faxed to the Hearing Clerk on Saturday, July 19, 1997, and was actually received and stamped by the Hearing Clerk the following Monday, July 21, 1997--33 days after the Notice of Debarment was received.

The regulations require that appeals of decisions to debar must be filed with the Hearing Clerk within 30 days of receiving the decision. 7 C.F.R. § 3017.515(a). *In re: Leon Howard*, 53 Agric. Dec. 1400 (1994), held that appeals of debarment actions not received within 30 days must be dismissed as untimely. Furthermore, debarment decisions which are not issued within 45 days are vacated as not in accordance with the law. *In re: Robert M. Miller*, 53 Agric. Dec. 1411 (1994); *In re: Maple Hill Farms, Inc.*, 53 Agric. Dec. 1415 (1994); *In re: Young's Food Stores, Inc.*, 53 Agric. Dec. 1403 (1994); *In re: Jerry Reeves, East Arkansas Insurance*, 54 Agric Dec. 374 (1995); *In re: Newell Vance Williams*, 54 Agric. Dec. 1087 (1995); *In re: Lewis Eugene McCravy, Jr.*, 55 Agric. Dec. 254 (1996). All of the above cases stressed that time is of the essence in debarment proceedings and that time lines must be enforced against all parties with equal consistency.

Respondents do not deny that the Appeal was not filed within 30 days. Instead, they claim that it was their understanding based on conversations with the Office of the Hearing Clerk and OALJ staff, that when computing the time for filing, Saturdays and Sundays are counted, but federal holidays are excluded. Accordingly, Respondents claim that the July 4 holiday added an extra day to their filing time.

The regulations only state that the appeal shall be filed within 30 days. There is no provision regarding computation of time. The Office of the Hearing Clerk, however, advised Respondents of the usual method of calculating a deadline, which requires that all days be counted unless the final day of the time period falls on a Saturday, Sunday, or Federal Holiday, in which case the period is extended to the end of the next business day.

This advice may have caused Respondents genuine confusion as to the proper method of calculating the filing deadline; however, the fact that the Appeal was backdated to July 18--the correct filing deadline--suggests that Respondents were aware of the proper deadline and simply missed it. In any case, Respondents had official notice that the appeal must be filed no later than 30 days after receipt of the Notice of Debarment. Despite this, the appeal was not filed until 33 days after the decision was received.

Although it may appear harsh to dismiss a petition for being only three days late, allowing an exception in one case would require exceptions to be granted in every case. Time is of the essence in debarment proceedings. To avoid inequities and timely process debarment proceedings, time limitations must be strictly construed. Accordingly, the Debarring Official's motion must be granted, and the petition dismissed.

Order

Respondents petition appealing the June 16, 1997 decision of the Debarring Official is hereby dismissed.

Copies of this Order shall be served on the parties.

In re: NORMAN THOMAS MASSEY.
FCIA Docket No. 96-0005.
Ruling on Motion for Summary Judgment and Order filed June 2, 1997.

No genuine issue of material fact - Collateral estoppel - Conviction - Willful and intentional submission of false information to FCIC - Disqualification.

Chief Administrative Law Judge Victor W. Palmer granted the motion for summary judgment on the grounds that Respondent was collaterally estopped from relitigating the issue of whether he willfully and intentionally submitted false information to FCIC, and therefore, there remained no genuine issue of material fact to be decided.

Kimberly E. Arrigo, for Complainant.
Leah R. Cooper, Princeton, KY, for Respondent.
Ruling on Motion for Summary Judgment and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is a proceeding under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501 *et seq.*) (hereinafter referred to as the Act) and the regulations promulgated thereunder, governing the administration of the Federal Crop Insurance

Program (7 C.F.R. Part 400, hereinafter referred to as the regulations). The Manager of the Federal Crop Insurance Corporation (FCIC) filed a Complaint on May 3, 1996, pursuant to 7 U.S.C. § 1506(n) which provides that:

> If a person willfully and intentionally provides any false or inaccurate information to the Corporation, or to any insurer with respect to an insurance plan or policy under this chapter; the Corporation may, after notice and an opportunity for a hearing on the record-
>
> (A) impose a civil fine of not to exceed $10,000 on the person; and
> (B) disqualify the person from purchasing catastrophic risk protection or receiving noninsured assistance for a period of not to exceed 2 years, or from receiving any other benefit under this chapter for a period of not to exceed 10 years.

The Complaint alleges that Respondent submitted a disaster claim to FCIC which falsely showed a zero yield for his soybean crops on farm serial number 1159; and that Respondent claimed that soybeans sold from farm serial number 1159 were from farm serial number 2400.

Respondent filed an Answer and Request for Oral Hearing on June 7, 1996, beyond the time allowed. The agency did not take any further action until April 17, 1997, when it filed a Motion for Summary Judgment based on Respondent's conviction on an analogous criminal charge. Respondent was served with the Motion but failed to respond.

Section 1.143 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary authorizes the Judge to entertain any motion other than a motion to dismiss on the pleadings. Motions for summary judgment are appropriate when--based on the pleadings, affidavits, and other forms of evidence relevant to the merits--there is no genuine issue of material fact to be decided, and the movant is entitled to judgment as a matter of law.

Complainant submitted with its Motion for Summary Judgment: a copy of a sworn statement made by Respondent; a Grand Jury Indictment from the Western District of Kentucky; and a Judgment from the Western District of Kentucky. Complainant maintains that summary judgment is proper because the doctrine of collateral estoppel precludes Respondent from relitigating the issue of whether he willfully and intentionally submitted false information to FCIC, thereby leaving no issue of material fact to be decided.

Collateral estoppel precludes the relitigation of an issue if: 1) the issue is

identical in both proceedings; 2) resolution of the issue was essential to the prior judgment; 3) the party was adequately represented in the prior proceeding; and 4) the issue was fully litigated in the prior proceeding. *See Mintzmyer v. Dep't of the Interior*, 84 F.3d 419, 423 (Fed. Cir. 1996); *Ramsey v. United States Immigration and Naturalization Serv.*, 14 F.3d 206, 210 (4th Cir. 1994); *Blohm v. Comm'r of Internal Revenue*, 994 F.2d 1542, 1553 (11th Cir. 1993); *Delta Rocky Mountain Petroleum, Inc.*, 726 F. Supp. 278, 282 (D. Colo. 1989).

Respondent was indicted in the Western District of Kentucky on two counts. The first count alleged that:

> Norman Thomas Massey . . . knowingly made and caused to be made a materially false statement and report to the Federal Crop Insurance Corporation (FCIC) for the purpose of influencing the action of the FCIC and its agent, American Agrisurance Company, upon an application for crop insurance benefits: namely, the defendants prepared and submitted to American Agrisurance a Production Worksheet which claimed that Massey's farm, designated Farm Serial Number 1159, had experienced a total loss of the 1993 soybean crop, and the defendants certified that information to be true and complete, when in fact, as the defendants then well knew, that information was false.

(Motion for Summary Judgment, Appendix). The second count alleged that Respondent made a false statement to the Commodity Credit Corporation. Respondent was found guilty on both counts.

The requirements for collateral estoppel are met. The issue of whether Respondent willfully and intentionally provided false information to FCIC was necessarily determined in the criminal trial in the Western District of Kentucky. Respondent was a party in the criminal proceeding; and the issue was fully litigated with the judgment final.

Respondent is, therefore, estopped from claiming that he did not willfully and intentionally submit false statements to FCIC. As such there are no questions of material fact to be decided at a hearing. Accordingly, Complainant's Motion for Summary Judgment is granted and the following Order is Issued.

Order

It is found that Respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to an insurer

with respect to an insurance plan or policy under the Act.

Pursuant to section 506 of the Act (7 U.S.C. § 1506), Respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years, or from receiving any other benefit under the Act for a period of ten years. The period of disqualification shall be effective 335 days after this decision is served on the Respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the Respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

In re: LINDSAY FOODS, INC., and GARY C. LINDSAY, PRESIDENT, LINDSAY FOODS, INC.
FMIA Docket No. 96-0003.
Remand Order filed August 28, 1997.

Motion to dismiss — Motion concerning complaint — Rules of practice binding — Remand order.

The Judicial Officer vacated Chief Administrative Law Judge Palmer's (Chief ALJ) Dismissal of Case for Lack of Jurisdiction and remanded the case for further procedure in accordance with the Rules of Practice. Respondents' Motion for Summary Judgment and Dismissal is a motion to dismiss on the pleadings which, in accordance with 7 C.F.R. § 1.143(b)(1), cannot be entertained. In addition, Respondents' Motion for Summary Judgment and Dismissal is a motion concerning the complaint which, in accordance with 7 C.F.R. § 1.143(b)(2), may not be made after the time allowed for filing an answer. Respondents' answer was due in mid-January 1996, and Respondents' Motion for Summary Judgment and Dismissal was filed on March 4, 1997.

Jane H. Settle and Howard D. Levine, for Complainant.
Robert G. Hibbert, Washington, D.C., for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Food Safety and Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601-695) [hereinafter the FMIA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Proceedings Under the Federal Meat Inspection Act

(9 C.F.R. §§ 335.1-.40) [hereinafter the Rules of Practice], by filing a Complaint on December 8, 1995.

The Complaint alleges, *inter alia*, that: (1) Respondent Lindsay Foods, Inc., is a corporation which operates a meat processing establishment and is a recipient of meat inspection services under Title I of the FMIA (Compl. ¶ I(a)); (2) Respondent Gary C. Lindsay is an individual responsibly connected to Respondent Lindsay Foods, Inc. (Compl. ¶ I(b)); (3) on or about April 3, 1995, Respondent Gary C. Lindsay was convicted in the Criminal Division of the Circuit Court for Milwaukee County in the State of Wisconsin of 12 violations of Wis. Stat. § 97.10(1) for selling misbranded ground beef products (Compl. ¶ II); and (4) Lindsay Foods, Inc., and Gary C. Lindsay [hereinafter Respondents] are unfit to engage in any business requiring inspection service under Title I of the FMIA, within the meaning of section 401 of the FMIA (21 U.S.C. § 671) (Compl. ¶ III). Complainant requests the issuance of an order withdrawing inspection service under Title I of the FMIA from Respondents for a period of 5 years (Compl. at 3).

On December 22, 1995, Respondents filed an Answer: (1) admitting that Respondent Lindsay Foods, Inc., is a corporation which operates a meat processing establishment and is a recipient of meat inspection services under Title I of the FMIA (Answer ¶ I); (2) admitting that Respondent Gary C. Lindsay is an individual responsibly connected to Respondent Lindsay Foods, Inc. (Answer ¶ I); (3) admitting that on or about April 3, 1995, Respondent Gary C. Lindsay was convicted in the Criminal Division of the Circuit Court for Milwaukee County in the State of Wisconsin of 12 violations of Wis. Stat. § 97.10(1) for selling misbranded ground beef products, but reserving "the right to further describe the circumstances and the events which led to the plea and finding by the Milwaukee County Circuit Court" (Answer II); (4) denying that Respondents are unfit to engage in any business requiring inspection service under Title I of the FMIA, within the meaning of section 401 of the FMIA (21 U.S.C. § 671) (Answer ¶ III); and (5) stating that Respondents "are responsible perveyors [sic] of wholesome, unadulterated meat products and are entitled to continued service under Title I of the FMIA" (Answer ¶ III).

On March 4, 1997, Respondents filed a Motion for Summary Judgment and Dismissal stating that:

> Respondent[s] hereby move[] for Summary Judgment and Dismissal in the above-captioned proceeding. As discussed in further detail below, the Complaint and Answer having been filed, this matter can be fully resolved as a matter of law without the need for an Administrative Hearing. More

> specifically, Complainant has failed to satisfy the jurisdictional requirement specified in [s]ection 401 of the Federal Meat Inspection Act (21 U.S.C. 671) in that it has failed to allege the existence of a criminal conviction which would provide the necessary pretext for such a proceeding. Accordingly, the matter should be immediately dismissed.

Motion for Summary Judgment and Dismissal at 1.

On March 6, 1997, Complainant filed Complainant's Preliminary Response to Respondents' Motion for Summary Judgment and Dismissal (footnote omitted) [hereinafter Complainant's Response] in which Complainant contends that Respondents' Motion for Summary Judgment and Dismissal should be denied because: (1) Respondents' Motion for Summary Judgment and Dismissal is a motion to dismiss on the pleading which, in accordance with section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), may not be entertained; and (2) Respondents' Motion for Summary Judgment and Dismissal is a motion concerning the Complaint that was filed after Respondents' Answer was due and in accordance with section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)), may not be made after the time allowed for filing an answer.

On March 7, 1997, Respondents filed Respondent's [sic] Reply to Complainant's Response stating that:

> Respondents' [March 4, 1997, m]otion seeks [s]ummary [j]udgment. . . . Motions to [d]ismiss on the [p]leading as contemplated by the Rules of Practice encompass [m]otions seeking a substantive resolution of a proceeding based upon technical or other procedural defects in the pleadings themselves. . . . In the instant case, Respondent does not allege any technical defects in the pleadings. To the contrary, it [sic] argues that, taking the pleadings as a given, the issue now can and should be resolved as a matter of law. Complainant's efforts to relabel it do nothing to change the essential character of this Summary Judgment Motion.
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> . . . .
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> Complainant's suggestions regarding timeliness are also without merit. . . . Complainant [sic] is not alleging formal or technical problems with the complaint of the sort contemplated by 7 C.F.R. 1.143(b)(2). Again, the issue is not a technical defect but a broader matter of substantive law.

Respondent's [sic] Reply to Complainant's Response at 1-2.

On March 13, 1997, Complainant filed Complainant's Comments Regarding Respondent's Reply to Complainant's Response, and on March 21, 1997, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] filed Dismissal of Case for Lack of Jurisdiction. The Chief ALJ held that:

> Respondents' challenge to the Department's jurisdiction in this case must be considered. Good jurisprudence does not permit its consideration to be precluded by the fact that it was raised late in the proceedings and subsequent to the filing of Respondents' answer.
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> Federal courts have long recognized that jurisdictional challenges may be raised at any time. . . .
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> . . . .
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> Obviously, it would be entirely inappropriate for a federal administrative agency to retain jurisdiction in circumstances where a federal court would not, just because the jurisdictional question was raised in a motion filed later than the agency's rules of practice otherwise permit. *See* 7 C.F.R. § 1.143(b)(2). Nor is it proper to treat the motion merely as a motion to dismiss on the pleadings which may not be entertained under the rules of practice. *See* 7 C.F.R. § 1.143(b)(1).
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> . . . .
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> The jurisdictional question raised by Respondents is whether the imposition of an order requiring payment of a forfeiture constitutes a *conviction* within the meaning of the [FMIA]. If it does not, then this forum is without jurisdiction to withdraw federal inspection from Respondents. To nonetheless go to hearing would be a waste of governmental resources and would place an unconscionable burden upon the Respondents. There is established Departmental precedent for rendering a decision without a hearing when officially noticed court documents show there is not any material issue of fact needing resolution in the case. *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627-628 (1989); and *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375,

1379 (1995).

Dismissal of Case for Lack of Jurisdiction at 3-4.

Moreover, the Chief ALJ concluded that:

> Obviously, the imposition of the civil forfeiture upon Gary C. Lindsay, the President of Lindsay Foods, Inc., cannot under the laws of the State of Wisconsin, be interpreted as amounting to his conviction for a crime. Therefore, neither he nor the corporate Respondent come within the subject matter jurisdiction of 21 U.S.C. § 671 which authorizes this proceeding for withdrawal of federal inspection against a business because it or someone responsibly connected with it "has been *convicted* in any Federal or State court . . . ."
>
> Accordingly, Respondents' Motion for Summary Judgment and Dismissal is hereby granted, and a judgment of dismissal is entered subject to Complainant's right of appeal as set forth in the Rules of Practice.

Dismissal of Case for Lack of Jurisdiction at 6-7.

On May 23, 1997, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On June 9, 1997, Respondents filed Respondents' Reply to Complainant's Appeal, and on June 20, 1997, Complainant filed Complainant's Response to Respondents' Reply to Complainant's Appeal. On June 23, 1997, the case was referred to the Judicial Officer for decision, and on June 27, 1997, Respondents filed Respondents' Supplemental Reply.

Based upon a careful consideration of the record in this proceeding, the Dismissal of the Case for Lack of Jurisdiction is vacated and the proceeding is remanded to the Chief ALJ for further procedure in accordance with the Rules of Practice. This Remand Order is based solely on my conclusions that Respondents' Motion for Summary Judgment and Dismissal is a motion to dismiss on the pleading, that Respondents' Motion for Summary Judgment and Dismissal is a

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

motion concerning the Complaint which was not filed within the time allowed for filing an answer, and that the Chief ALJ committed procedural error by granting Respondents' Motion for Summary Judgment and Dismissal.[2]

Section 1.143(b) of the Rules of Practice provides:

> **§ 1.143 Motions and requests.**
>
> . . . .
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> (b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.
>
> (2) All motions and request [sic] concerning the complaint must be made within the time allowed for filing an answer.

7 C.F.R. § 1.143(b).

Respondents' Motion for Summary Judgment and Dismissal by its very terms is a motion to dismiss on the pleadings. Specifically, Respondents seek dismissal of the proceeding based on the Complaint, as follows:

> Complainant has failed to satisfy the jurisdictional requirement specified in [s]ection 401 of the Federal Meat Inspection Act (21 U.S.C. 671) *in that it has failed to allege* the existence of a criminal conviction which would provide the necessary pretext for such a proceeding. Accordingly, *the matter should be immediately dismissed.*

Motion for Summary Judgment and Dismissal at 1 (emphasis added).

Respondents contend however that "[m]otions to dismiss on the [p]leading as contemplated by the Rules of Practice encompass [m]otions seeking substantive resolution of a proceeding based on technical or other procedural defects in the pleadings themselves." (Respondent's [sic] Reply to Complainant's Response at 1.) Respondents appear to base their contention on section 1.137(a) of the Rules of Practice which provides that the parties may amend their pleadings, as follows:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**

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[2]I reach no conclusion in this Remand Order regarding the merits of Complainant's case, the merits of Respondents' rebuttal, or the Chief ALJ's conclusions regarding the merits of this proceeding.

(a) *Amendment.* At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137(a).

Respondents argue that since the parties may amend their pleadings under the Rules of Practice, "the proper remedy for . . . procedural defects is correction of the pleadings, not dismissal of the action." (Respondent's [sic] Reply to Complainant's Response at 1-2 (footnote omitted).)

While I find nothing to support Respondents' contention that the ability of the parties to amend pleadings in accordance with section 1.137(a) of the Rules of Practice is connected to the prohibition in section 1.143(b)(1) of the Rules of Practice on entertaining motions to dismiss on the pleadings, I note that section 1.137(a) of the Rules of Practice does not place any limits on the nature of the amendments that parties may make to their pleadings. In accordance with section 1.137(a) of the Rules of Practice (7 C.F.R. § 1.137(a)), a complainant may amend a complaint to correct substantive defects as well as technical or procedural defects, and may even amend a complaint to add additional allegations[3] or conform the complaint to the proof.[4] Moreover, the Judicial Officer has long held that administrative law judges should liberally grant motions to amend complaints.[5]

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[3]*See In re John T. Gray*, 55 Agric. Dec. 853, 855-57 (1996) (stating the administrative law judge's denial of complainant's motion to amend the complaint to add an allegation was in error); *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 142-43 (1992) (affirming the administrative law judge's ruling allowing complainant to amend the complaint during the hearing to add allegations), *appeal docketed sub nom. Balice v. USDA*, No. CV-F-92-5483-GEB (E.D. Cal. July 21, 1992).

[4]*See In re John T. Gray*, 55 Agric. Dec. 853, 855-57 (1996) (stating the administrative law judge's denial of complainant's motion during the hearing to amend the complaint to conform to the evidence was in error); *In re Gary R. Edwards*, 52 Agric. Dec. 1365, 1366 (1993) (Remand Order) (holding that it was error for the administrative law judge to deny complainant's motion to amend the complaint to conform to the proof which complainant offered during the hearing); *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1903 (1984) (stating that a motion to conform pleadings to the evidence is appropriate even though the rules of practice do not expressly provide for such a motion).

[5]*See In re Durward W. Starr*, 53 Agric. Dec. 461, 466 n.2 (1994) (stating that administrative law judges should liberally grant motions to amend complaints, with a continuance granted, if necessary, to enable respondents to prepare an adequate defense), *aff'd in part and rev'd in part*, No.5:94cv118 (D. Vt. July 20, 1995). (Court affirmed revocation order in less than all grounds found by the Judicial

Therefore, even if I found the connection between the ability of the parties to amend their pleadings and the prohibition on entertaining motions to dismiss on the pleadings suggested by Respondents, I would not find, as Respondents argue, that the prohibition on entertaining motions to dismiss on the pleadings only relates to motions to dismiss based on technical or procedural defects in pleadings. Rather, using Respondents' logic, the prohibition on entertaining motions to dismiss would relate to any amendment to a pleading that a party could make in accordance with section 1.137(a) of the Rules of Practice (7 C.F.R. § 1.137(a)), which amendments include the addition of allegations which give the Secretary subject matter jurisdiction and allegations which state a claim upon which relief could be granted.

The Rules of Practice do not define the term "motion to dismiss on the pleading." However, I find no basis for holding that the prohibition on entertaining motions to dismiss on the pleadings in section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) only relates to motions which seek substantive resolution of a proceeding based on technical or other procedural defects in the pleadings. Respondents' Motion for Summary Judgment and Dismissal clearly seeks dismissal of this proceeding and the basis for Respondents' motion is the purported failure of Complainant to allege facts in its pleading which give the Secretary jurisdiction to withdraw inspection services under Title I of the FMIA from Respondents.

Section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) prohibits administrative law judges and the judicial officer from entertaining a motion to dismiss on the pleading.[6] I find nothing in section 1.143(b)(1) of the Rules of

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Officer), *appeal withdrawn*, No. 95-_____ (2d Cir. Jan. 4, 1996); *In re Dr. Dane O. Petty*, 43 Agric. Dec. 1406, 1436 n.30 (1984) (stating that administrative law judges should liberally grant motions to amend complaints, with a continuance granted, if necessary, to enable respondents to prepare an adequate defense), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).

[6]*See In re Far West Meats*, 55 Agric. Dec. 1045, 1049 (Clarification of Ruling on Certified Questions) (stating that 7 C.F.R. § 1.143(b)(1) prohibits an administrative law judge from entertaining a motion to dismiss on the pleading); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414 (1991) (Remand Order) (holding that the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (stating that the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and that under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading). *See generally In re Don Van Liere*, 34 Agric. Dec. 1641 (1975) (Order of Dismissal) (stating that the purpose of 9 C.F.R. § 202.10(b), which provides that, in proceedings under the Packers and Stockyards Act, 1921, as amended and supplemented, any motion will be entertained "except a motion to dismiss on the pleadings," is to prevent a respondent from filing a motion to dismiss on the

Practice (7 C.F.R. § 1.143(b)(1)) which permits an administrative law judge or the judicial officer to entertain a motion to dismiss even in those circumstances in which the motion is supported by sound argument that the pleading in question fails to allege facts necessary for jurisdiction over the subject matter or fails to state a claim upon which relief can be granted.

I also find that Respondents' Motion for Summary Judgment and Dismissal cannot be considered because by its terms it is a motion concerning the Complaint and the motion was not filed within the time allowed for filing the answer.

A copy of the Complaint and a copy of the Rules of Practice were sent by certified mail to Respondents on December 8, 1995, and Respondents were served with a copy of the Complaint and the Rules of Practice in December 1995 (Return Receipts PO40135936 and PO40135937). Section 1.136(a) of the Rules of Practice provides:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding.

7 C.F.R. § 1.136(a).

Thus, Respondents' answer and any motion concerning the Complaint were due no later than mid-January 1996. Respondents did not file the Motion for Summary Judgment and Dismissal concerning the allegations in the Complaint until March 4, 1997, more than one year after such a motion was due.[7]

Respondents assert that:

> Again, the issue is not a technical defect but a broader matter of substantive law. Regardless of the passage of any particular amount of time, the Complainant cannot assert jurisdiction for the Secretary which Congress has not given him and force Respondent [sic] into a [s]ection 401 proceeding

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pleadings).

[7]Respondents' present counsel, Mr. Robert G. Hibbert, McDermott, Will & Emery, Washington, D.C, who entered an appearance on February 18, 1997, filed the Motion for Summary Judgment and Dismissal 14 days after he entered his appearance. However, Mr. Hibbert's diligence does not provide Respondents, who were represented by counsel prior to Mr. Hibbert's appearance, with an excuse for their failure to file a motion concerning the Complaint within the time allowed for filing an answer.

absent the requisite criminal conviction.

Respondent's [sic] Reply to Complainant's Response at 2.

Section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)) requires that "*[a]ll* motions and request[s] concerning the complaint must be filed within the time allowed for filing an answer." As commonly used, the word *all* does not permit an exception or exclusion not specified.[8] Moreover, the context in which the word *all* is used in section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)) provides no basis for reading the word *all* narrowly[9], and I find nothing in section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)) which permits

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[8]*See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944) (stating that *all* means all, not substantially all); *William v. United States*, 289 U.S. 553, 572 (1933) (describing the word *all* as a comprehensive word); *McLean v. United States*, 226 U.S. 374, 383 (1912) (stating that *all* excludes the idea of limitation); *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969) (stating that *all* means the whole of that which it defines, not less than its entirety and that the purpose of the word *all* is to underscore that intended breadth is not to be narrowed); *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 464 (S.D. Miss. 1964) (stating that *all* means *the whole, the sum of all the parts, the aggregate* and that *all* is about the most comprehensive and all inclusive word in the English language), *aff'd per curiam*, 358 F.2d 723 (5th Cir. 1966); *Travelers Ins. Co. v. Cimarron Ins. Co.*, 196 F. Supp. 681, 684 (D. Or. 1961) (stating that the word *all* when referring to the amount, quantity, extent, duration, quality, or degree means *the whole of* and that a statute which says *all* excludes nothing); *Fischer & Porter Co. v. Brooks Rotameter Co.*, 86 F. Supp 502, 503 (E.D. Pa. 1949) (stating that the word *any* implies totality as plainly as does the word *all* and the only difference is that *any* arrives at totality by a series of choices for consideration, whereas *all* arrives at totality in a single leap); *In re Central of Georgia Ry.*, 58 F. Supp. 807, 813 (S.D. Ga. 1945) (stating that a more comprehensive and all-inclusive word than *all* can hardly be found in the English language, there is a totality about the word *all* that few words possess), *rev'd on other grounds and remanded sub nom. Liberty National Bank & Trust Co. v. Bankers Trust*, 150 F.2d 453 (5th Cir. 1945); *United States v. Bachman*, 246 F. 1009, 1011 (E.D. Pa. 1917) (stating that the word intended to embrace every member of a class, where the number of the members of the class exceeds two, is the word *all*); *Beckwith v. Chicago, M. & St. P. Ry.*, 223 F. 858, 860 (W.D. Wash. 1915) (stating that the word *all* is very comprehensive in its meaning); *The Koenigin Luise*, 184 F. 170, 173 (D.N.J. 1910) (describing the word *all* as an inclusive term); *In re Far West Meats*, 55 Agric. Dec. 1045, 1050 (1996) (Clarification of Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly); *In re Far West Meats*, 55 Agric. Dec. 1033, 1037 (1996) (Ruling on Certified Questions) (stating that, as commonly used, the word *all* does not permit an exception or exclusion not specified, and that there is no basis for reading the word *all* as used in 7 C.F.R. § 1.143(a) narrowly).

[9]*But see In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1896 (1984) (stating that 7 C.F.R. § 1.143(b)(2) must be construed as relating to motions filed by respondents, not to motions filed by complainants).

Respondents to file a motion concerning the Complaint after the time allowed for filing an answer, even in those circumstances in which the motion is supported by sound argument that the pleading in question fails to allege facts necessary for jurisdiction over the subject matter or fails to state a claim upon which relief can be granted.

I agree with Respondents that the inability of an administrative law judge to entertain a motion to dismiss on the pleading could force a party to incur expenses that the party would not have incurred had the administrative law judge been authorized under the Rules of Practice to entertain a motion to dismiss on the pleading (Respondent's [sic] Reply to Complainant's Response). Moreover, I agree with the Chief ALJ that there may be occasions when the inability of an administrative law judge to dismiss a proceeding may result in a waste of government resources and place an unwarranted burden on a respondent (Dismissal of Case for Lack of Jurisdiction at 4). Nonetheless, the judicial officer and the administrative law judges are bound by the Rules of Practice.[10]

For the foregoing reasons, the following Order should be issued.

Order

The Dismissal of Case for Lack of Jurisdiction issued in this proceeding on March 21, 1997, is vacated and the proceeding is remanded to the Chief ALJ for

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[10]*See In re Stimson Lumber Co.*, 56 Agric. Dec. ___, slip op. at 12-13 (Mar. 18, 1997) (stating that while generally administrative law judges and the judicial officer are bound by the Rules of Practice, they may modify rules of practice to comply with statutory requirements such as the deadline for agency approval or disapproval of sourcing area applications set forth in 16 U.S.C. § 620b(c)(3)); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Questions) (stating that the judicial officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414 (1991) (Remand Order) (stating that the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (stating that the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and that under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading). *See generally In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (Order Denying Appeals) (stating that the Judicial Officer has no authority to depart from the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders).

further procedure in accordance with the Rules of Practice.[11]

In re: CECIL JORDAN, SHERYL CRAWFORD, and RONALD R. SMITH.
HPA Docket No. 91-0023.
Ruling on Respondent's Motion for Stay filed July 17, 1997.

Donald Tracy, for Complainant.
David N. Patterson, Willoughby, OH, for Respondent
Ruling issued by William G. Jenson, Judicial Officer.

On November 19, 1993, the Judicial Officer issued a Decision and Order holding that Sheryl Crawford (hereinafter Respondent) had violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); assessing Respondent a $2,000 civil penalty; and disqualifying Respondent from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction for a period of 1 year. *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 116 S. Ct. 88 (1995). Respondent was served with the Decision and Order on November 24, 1993 (Return Receipt). The Decision and Order requires payment of the assessed civil penalty within 30 days after service of the Decision and Order on Respondent and imposes the disqualification period beginning on the 30th day after service of the Decision and Order on Respondent, viz., December 24, 1993. Respondent appealed the November 19, 1993, Decision and Order, and on February 16, 1994, Respondent filed Respondent's Motion for Stay of Sanctions Pending Appeal, which the Judicial Officer granted on February 28, 1994. *In re Cecil Jordan*, 53 Agric. Dec. 536 (1994) (Stay Order).

The agency decision was affirmed, *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), and on May 1, 1995, Respondent filed Respondent's

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[11]While the Rules of Practice do not permit resolution of this proceeding pursuant to a motion to dismiss on the pleadings, Complainant's and Respondents' filings reveal that there are few, if any, material facts at issue. The parties may substantially reduce the length of any necessary hearing by stipulating to some of the material facts or may eliminate the need for any hearing by stipulating to all of the material facts and agreeing to brief the issue of the jurisdiction of the Secretary of Agriculture under section 401 of the FMIA (21 U.S.C. § 671) and any other issue ordered to be briefed by the Chief ALJ.

Motion to Initiate Sanctions. On May 11, 1995, prior to a ruling on Respondent's Motion to Initiate Sanctions, Respondent filed Respondent's Motion to Withdraw Respondent's Motion to Initiate Sanctions and Respondent's Motion to Stay Order of Judicial Officer. On June 6, 1995, the Judicial Officer granted Respondent's Motion to Withdraw Respondent's Motion to Initiate Sanctions and Respondent's Motion for Stay Order of Judicial Officer pending the outcome of Respondent's then-contemplated petition for a writ of certiorari. *In re Cecil Jordan*, 54 Agric. Dec. 449 (1995) (Order to Stay Execution).

On October 2, 1995, the Supreme Court of the United States denied Respondent's petition for a writ of certiorari. *Crawford v. United States Dep't of Agric.*, 116 S. Ct. 88 (1995). Subsequently, Complainant filed a Motion to Lift Stay as to Sheryl Crawford, which was granted by the Judicial Officer on February 23, 1996. *In re Cecil Jordan*, 55 Agric. Dec. 332 (1996). Pursuant to the February 23, 1996, Order Lifting Stay, Respondent was to pay the assessed civil penalty within 30 days after service of the Order Lifting Stay on Respondent, and the disqualification provisions were to become effective on the 30th day after service of the Order Lifting Stay on Respondent.

On March 25, 1996, Respondent filed Respondent's Motion to Stay Order of Judicial Officer, pending the disposition of Respondent's Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. On March 28, 1996, prior to the 30th day after service on Respondent of the Order Lifting Stay, a Temporary Stay Order was issued which provided Complainant with an opportunity to respond to Respondent's Motion to Stay Order of Judicial Officer. *In re Cecil Jordan*, 55 Agric. Dec. 333 (1996) (Temporary Stay Order).

Complainant filed Complainant's Opposition to Respondent's Motion to Stay the Judicial Officer's Order on April 11, 1996. On May 8, 1996, a Stay Order, which provides that the "Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction," was issued. *In re Cecil Jordan*, 55 Agric. Dec. 334 (Stay Order).

On May 7, 1996, Respondent filed a Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. The Supreme Court denied Respondent's motion on June 24, 1996. *Crawford v. United States Dep't of Agric.*, 116 S. Ct. 2574 (1996). On April 21, 1997, Complainant filed a Motion to Judicial Officer to Lift Stay; on May 12, 1997, Respondent filed Respondent's Response to Motion to Judicial Officer to Lift Stay; and on May 19, 1997, I issued an Order Lifting Stay Order, which states:

> Respondent does not oppose Complainant's Motion to Judicial Officer

> to Lift Stay, but asserts that she has served the entire 1-year disqualification period (Respondent's Response [to Motion to Judicial Officer to Lift Stay]).
>
> The Decision and Order filed November 19, 1993, disqualifying Respondent became "effective on the 30th day after service of [the] Order on Respondent," *In re Cecil Crawford, supra*, 52 Agric. Dec. at 1242, *viz.*, December 24, 1993. The November 19, 1993, Order was stayed effective February 28, 1994, and Respondent was disqualified during the period December 24, 1993, through February 27, 1994. At no other time was the disqualification provision in November 19, 1993, Decision and Order in effect. Therefore, Respondent's request that she be considered to have been disqualified during the period December 24, 1993, through February 27, 1994, is granted, and Respondent's request that she be considered to have been disqualified during the periods February 28, 1994, to March 16, 1994; March 31, 1995, to June 6, 1995; and October 31, 1995, to May 31, 1996, is denied.

In re Cecil Jordan, 56 Agric. Dec. ___, slip op. at 3-4 (May 19, 1997) (Order Lifting Stay Order).

On May 29, 1997, Respondent filed Respondent's Motion for Reconsideration of Order Lifting Stay Order reiterating the arguments which she made in Respondent's Response to Motion to Judicial Officer to Lift Stay, and on June 11, 1997, Complainant filed Complainant's Opposition to "Respondent's Motion for Reconsideration of Order Lifting Stay Order." On June 13, 1997, I issued an Order on Reconsideration of Order Lifting Stay Order which provides:

> A good faith belief that a stay order has been lifted does not in fact cause a stay order to be lifted. Instead, action must be taken to lift a stay order. *In re Jackie McConnell*, 56 Agric. Dec. ___, slip op. at 3 (Mar. 11, 1996) (Ruling on Respondent's Motion to Correct Order Lifting Stay). The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice), which are applicable to this proceeding, provide that "[a]ny motion will be entertained other than a motion to dismiss on the pleading." (7 C.F.R. § 1.143(b)(1).) Respondent was fully aware of her right to file a motion to lift a stay and begin her disqualification period under the Rules of Practice, as evidenced by Respondent's Motion to Initiate Sanctions filed May 1, 1995.

> I find no basis upon which to disturb the Order Lifting Stay Order issued May 19, 1997, and Respondent's Motion for Reconsideration of Order Lifting Stay Order is therefore denied.

In re Cecil Jordan, 56 Agric. Dec. ___, slip op. at 4-5 (June 13, 1997) (Order on Reconsideration of Order Lifting Stay Order).

On July 15, 1997, Respondent filed Respondent's Motion for Stay requesting that I stay the May 19, 1997, Order Lifting Stay, *In re Cecil Jordan, supra* (May 19, 1997) (Order Lifting Stay Order), and the June 13, 1997, Order on Reconsideration of Order Lifting Stay, *In re Cecil Jordan, supra* (June 13, 1997) (Order on Reconsideration of Order Lifting Stay Order), pending judicial review under the Administrative Procedure Act. Respondent states:

> Respondent desires to seek review of the Judicial Officer's decision in the United States [d]istrict [c]ourt on the basis that the Judicial Officer's decisions regarding the calculation of time served by Respondent in regards to the disqualification period were arbitrary and capricious. There are numerous events which point to the fact that Respondent believed in good faith that she was under suspension during the various periods of time outlined above.

Respondent's Motion for Stay at 2.

On July 15, 1997, Complainant filed Complainant's Response to Respondent's July 15, Motion for Stay, and on July 16, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's Motion for Stay filed July 15, 1997.

The Administrative Procedure Act provides:

> **§ 705. Relief pending review**
>
> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.

Respondent has exhausted avenues for judicial review of this administrative proceeding. *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 116 S. Ct. 88 (1995). I have fully considered and addressed Respondent's belief that she was disqualified during the pendency of judicial review of the administrative proceeding. *In re Cecil Jordan, supra* (May 19, 1997) (Order Lifting Stay Order); *In re Cecil Jordan, supra* (June 13, 1997) (Order on Reconsideration of Order Lifting Stay Order). Under these circumstances, I do not find that justice requires that I disturb the Order Lifting Stay issued May 19, 1997, based upon Respondent's "desire to seek judicial review" of *In re Cecil Jordan, supra* (May 19, 1997) (Order Lifting Stay Order), and *In re Cecil Jordan, supra* (June 13, 1997) (Order on Reconsideration of Order Lifting Stay Order).

For the foregoing reasons, Respondent's July 15, 1997, Motion for Stay is denied.

In re: WINSTON T. GROOVER and MARCELLA SMITH.
HPA Docket No. 95-0004.
Dismissal of Complaint as to Marcella Smith filed November 18, 1997.

Robert Ertman, for Complainant.
Respondent, Pro se.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Complainant's Motion therefor, filed October 20, 1997, the Complaint filed herein is dismissed as to Respondent Marcella Smith.

The Caption of the case henceforth shall be "Winston T. Groover, Respondent."

Copies hereof shall be served upon the parties.

In re: PIERCE B. TIDWELL, JR. d/b/a TIDWELL NURSERIES.
P.Q. Docket No. 96-0013.
Order of Dismissal and Cancellation of Hearing filed August 7, 1997.

Scott Safian, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's August 4, 1997, motion to dismiss is granted. The Complaint filed herein on December 21, 1995, is dismissed without prejudice.

The hearing scheduled for August 12, 1997, in Atlanta, Georgia, is canceled.

In re: E. LOTSPEICH.
P.Q. Docket No. 97-0012.
Order of Dismissal filed August 20, 1997.

Howard Levine, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer Chief Administrative Law Judge.

FOR GOOD CAUSE SHOWN and at the request of the Complainant this case is DISMISSED.

In re: CAROL ROBINSON.
P.Q. Docket No. 97-0011.
Order Dismissing Complaint filed August 28, 1997.

James D. Holt, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint filed herein on April 23, 1997, be dismissed.

In re: ADELA ANCHANTE de REYES.
P.Q. Docket No. 98-0003.
Order of Dismissal filed December 12, 1997.

Susan C. Golabek, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer Chief Administrative Law Judge.

For Good Cause Shown and upon the Motion of the Complainant, this case is hereby dismissed.

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: CUSTOM RAISIN PACKING, INC., a NEVADA CORPORATION aka CUSTOM RAISIN PACKING CO., and CUSTOM INC., and JOHN C. BOWERSOX, an individual.
AMAA Docket No. 97-0002.
Decision and Order filed May 15, 1997.

Failure to file an answer - Failure to hold raisins in reserve - Failure to deliver raisins to the RAC - Failure to file accurate and timely reports to RAC - Shipment of raisins without inspection - Failure to pay assessments - Civil Penalty - Cease and Desist Order.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (the "Act"), the Marketing Order for Raisins Produced from Grapes Grown in California, 7 C.F.R. §§ 989.1-989.95 (the "Order"), and the Rules and Regulations issued pursuant to the Act, 7 C.F.R. §§ 989.102-989.801 (the "Regulations"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondents Custom Raisin Packing, Inc., a Nevada corporation (also known as Custom Raisin Packing Co. and Custom, Inc.), and John C. Bowersox, an individual, willfully violated the Order, and the Regulations.

The Hearing Clerk served on the respondents, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondents were informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondents sought, and were granted an extension of time within which to file their answer. The respondents have failed to file an answer within the time prescribed in the Rules of Practice, or at all, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Custom Raisin Packing, Inc., aka Custom Raisin Packing Co. and Custom, Inc., ("Custom Raisin"), is a Nevada corporation whose mailing address is [redacted] California [redacted].

2. Respondent John C. Bowersox ("Bowersox") is an individual whose mailing address is [redacted] (b) (6) [redacted] Respondent Bowersox is the president, secretary, treasurer, and sole shareholder of respondent Custom Raisin. At all times mentioned herein, respondents Custom Raisin and Bowersox were engaged in business as handlers of raisins produced from grapes grown in California, and were subject to the Act, Order, and Regulations.

3. Respondents failed to hold 41,596 pounds of standard raisins in reserve for the 1994-1995 crop year, and failed to hold 78,277 pounds of standard raisins in reserve for the 1995-1996 crop year.

4. Respondents failed to deliver 41,596 pounds of standard raisins to the Raisin Administrative Committee (the "RAC"), for the 1994-1995 crop year, and failed to deliver 78,277 pounds of standard raisins to the RAC for the 1995-1996 crop year.

5. Respondents failed to file with the RAC timely reports of standard raisin acquisition (Form RAC-1), on at least 21 occasions in crop year 1994-1995.

6. Respondents failed to file with the RAC accurate and timely reports of standard raisin acquisition (Form RAC-1), on at least 19 occasions in crop year 1995-1996.

7. Respondents failed to file with the RAC reports of the acquisition of dipped seedless raisins, golden raisins, and other seedless raisins (Form RAC-1), for crop year 1995-1996.

8. On twelve occasions, respondents failed to file with the RAC timely reports of the disposition of free tonnage raisins (Form RAC-20), for crop year 1994-1995.

9. On two occasions, respondents failed to file with the RAC timely reports of the disposition of free tonnage raisins (Form RAC-20), for crop year 1995-1996.

10. On at least two occasions, respondents failed to file with the RAC reports of the acquisition of raisins produced outside California (Form RAC-500), for crop year 1995-1996.

11. Respondents failed to file with the RAC a record of the status of reserve pool raisins (Form RAC-7), for crop years 1994-1995 and 1995-1996.

12. Respondents failed to file with the RAC monthly reports of the disposition of off-grade raisins, other failing raisins and raisin residual material (Form RAC-32) for crop years 1994-1995 and 1995-1996.

13. Respondents failed to file with the RAC reports of the inventory of free

tonnage standard raisins (Form RAC-50) for crop years 1994-1995 and 1995-1996.

14. Respondents failed to file with the RAC reports of the inventory of off-grade raisins on hand (Form RAC-51) for crop years 1994-1995 and 1995-1996.

15. On or about May 7, 9, 23, 24, and 30, 1996, respondents shipped natural condition raisins, without having them inspected.

16. Respondents failed to pay to the RAC assessments for crop years 1994-1995 and 1995-1996, in the amount of $1,814.36 (for crop year 1994-1995) and $1,512.47 (for crop year 1995-1996).

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 989.59(a), 989.66, 989.67, 989.73, 989.80 of the Order (7 C.F.R. §§ 989.59(a), 989.66, 989.67, 989.73, 989.80), and sections 989.159, 989.166 and 989.173 of the Regulations (7 C.F.R. §§ 989.159, 989.166, 989.173).

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondents are assessed a civil penalty of $98,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

2. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, from paying to the Raisin Administrative Committee $1,814.36 and $1,512.47 in past due assessments, plus interest, for crop years 1994-1995, and 1995-1996 respectively.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final July 15, 1997.-Editor]

ANIMAL QUARANTINE AND RELATED LAWS

In re: C. DAILY.
A.Q. Docket No. 96-0009.
Decision and Order filed May 16, 1997.

Failure to file an answer - Importation of ham, liverwurst, bacon and salami from Germany into the United States without a certificate- Civil penalty.

Jane H. Settle, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty, as authorized by section 3 of the Act of February 2, 1903, as amended (21 U.S.C.§ 122), for a violation of the regulations governing the importation of meat products from Germany (9 C.F.R. § 94 et seq.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.*, and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111) and regulations promulgated thereunder (9 C.F.R. § 94 *et seq.*), by a complaint filed on February 22, 1996, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about June 22, 1995, respondent imported approximately two hams, two liverwursts, one package of bacon, and two salamis from Germany into the United States in violation of 9 C.F.R. § 94.11, because such products were not accompanied by a certificate, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. C. Daily is a person whose mailing address is [redacted] (b) (6)

[redacted]

2. On or about June 22, 1995, respondent imported approximately two hams, two liverwursts, one package of bacon, and two salamis from Germany into the United States in violation of 9 C.F.R. § 94.11, because such products were not accompanied by a certificate, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act of February 2, 1903, as amended, and the regulations issued under that Act (9 C.F.R. § 94 *et seq.*). Therefore, the following Order issued.

Order

The respondent is hereby assessed a civil penalty of three hundred seventy-five dollars ($375.00).[1] This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 96-09.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final July 2, 1997.-Editor]

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[1]The respondent has failed to file answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re: Bobo* 49 Agric. Dec. 849 (1990).

In re: GLORIA SOLIS.
A.Q. Docket No. 97-0001.
Decision and Order filed July 29, 1997.

Failure to file an answer - Importation of horses from Mexico into the U.S. - Failure to enter the U.S. at a designated border port- Failure to submit to inspection at a port of entry - Failure to accompany horses with a veterinary certificate - Failure to quarantine horses - Civil penalty.

Susan Golabek, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of horses into the United States (9 C.F.R., Subpart C), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a complaint filed on November 8, 1996, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about February 1, 1995, respondent moved approximately three horses from Anahuac, Coahila, Mexico to Rio Bravo, Texas, in violation of the Act and the following regulations: (1) 9 C.F.R. §§ 92.303(a) and 92.303(c), because the horses were not entered into the United States at a designated land border port; (2) 9 C.F.R. § 92.306, because the horses were not inspected at a port of entry, as required; (3) 9 C.F.R. § 92.314, because the horses were not accompanied by a certificate of a salaried veterinary officer of the national government of the country of origin or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico; and (4) 9 C.F.R. § 92.324, because the horses were not quarantined, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Gloria Solis, respondent herein, is an individual with a mailing address of

[redacted] (b) (6) [redacted]

2. On or about February 1, 1995, respondent moved approximately three horses from Anahuac, Coahila, Mexico to Rio Bravo, Texas, in violation of the Act and the regulations specified below:

A. The horses were not entered into the United States at a designated land border port (9 C.F.R. §§ 92.303(a) and 92.303(c));

B. The horses were not inspected at a port of entry, as required (9 C.F.R. § 92.306);

C. The horses were not accompanied by a certificate of a salaried veterinary officer of the national government of the country of origin or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico (9 C.F.R. § 92.314); and

D. The horses were not quarantined, as required (9 C.F.R. § 92.324).

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 9 C.F.R. §§ 92.303(a), 92.303(c), 92.306, 92.314, and 92.324. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two thousand dollars ($2,000). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 97-01.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this

proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final October 13, 1997.-Editor]

In re: EUGENE T. COCHRAN.
A.Q. Docket No. 97-0005.
Decision and Order filed July 29, 1997.

Failure to file an answer - Movement interstate of one Equine Infectious Anemia reactor mule - Civil penalty.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement interstate of one Equine Infectious Anemia reactor mule (9 C.F.R. § 75.4 *et seq.)*, hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act) and the regulations promulgated thereunder, by a complaint filed on January 2, 1997, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Eugene T. Cochran is an individual whose mailing address is [redacted] (b) (6)

2. On or about November 4, 1995, respondent moved interstate one Equine Infectious Anemia reactor mule from Roanoke, Alabama, in violation of § 75.4(b) of the regulations (9 C.F.R. § 75.4(b), because the animal, which was moving under

permit to slaughter, was diverted to a farm in Washington, Georgia.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 75.4 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 97-0005.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final October 13, 1997.-Editor]

In re: HO PHI NGUYEN.
A.Q. Docket No. 97-0008.
Decision and Order filed September 26, 1997.

Failure to file an answer - Importation of dried beef jerky and cured pork sausages from Thailand or Vietnam without required certificate - Civil penalty.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation into the United States of ruminants, swine or the fresh, chilled, or frozen meat of any swine originating in any country where rinderpest or foot-and-mouth disease exists (9 C.F.R. § 94 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*, and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on March 25, 1997, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about May 3, 1996, the respondent imported into the United States, approximately two (2) pounds of dried beef jerky and two (2) pounds of cured pork sausages from Vietnam or Thailand, in violation of 9 C.F.R. § 94.4 (a)(4) because the meat products were not accompanied by a certificate issued by an official of the national government of the country of origin, as required. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136 (a). Section 1.136 (c) of the Rules of Practice (7 C.F.R. § 1.136 (c)) provides that the failure to file an answer within the time provided under § 1.136 (a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Ho Phi Nguyen is an individual whose mailing address is [redacted] (b) (6) [redacted]

2. On or about May 3, 1996, the respondent imported into the United States, approximately two (2) pounds of dried beef jerky and two (2) pounds of cured pork sausages from Vietnam or Thailand, in violation of 9 C.F.R. § 94.4 (a)(4) because the meat products were not accompanied by a certificate issued by an official of the national government of the country of origin, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 9 C.F.R. § 94.4. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred seventy five dollars ($ 375.00).[1] This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to :

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 55403
Minneapolis, Minnesota 55403.

Respondent shall indicate that payment is in reference to A.Q. Docket No. 97-008.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final November 18, 1997.-Editor]

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[1]Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re: Ricky Bobo*, 49 Agric. Dec. 849 (1990).

ANIMAL WELFARE ACT

In re: RON CLAXON, d/b/a TRI-STATE BIOMEDICAL.
AWA Docket No. 95-0029.
Decision and Order filed May 13, 1997.

Admission of material allegations - Failure to individually identify dogs - Failure to maintain complete records - Failure to maintain programs of disease control and prevention, enthanasia, and adequate veterinary care - Failure to maintain premises in good repair and clean and free of clutter and trash - Failure to maintain an effective program of pest control - Failure to maintain an exercise program - Failure to provide food and water - Failure to remove excreta - cease and desist order - Civil penalty - Disqualification.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative proceeding for an order requiring the Respondent to cease and desist from violating the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(Act); the assessment of civil penalties in accordance with section 19 of the Act (7 U.S.C. § 2149); and the disqualification of Respondent to become licensed under the Act.

This proceeding was instituted by a complaint filed against the Respondent on April 11, 1995, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. On April 29, 1997, the Honorable Dorothea A. Baker, Administrative Law Judge, set the hearing by personal attendance on May 13, 1997, at the Administrative Law Judges' Hearing Room, Room 1079, United States Department of Agriculture, South Building, 1400 Independence Avenue, S.W., Washington, D.C. 20250.

The hearing was called to order on May 13, 1997. Having been duly notified of the time and place of the hearing, Respondent failed, without good cause, to appear at the hearing. Pursuant to section 1.141(e) of the rules of practice (7 C.F.R. § 1.141(e)), a respondent who, after being duly notified, fails to appear at the hearing without good cause, is deemed to have waived the right to an oral hearing in the proceeding. Section 1.141(e) further provides that such failure by a respondent also constitutes an admission of all the material allegations of fact contained in the complaint. By Respondent's failure to appear at the hearing, Respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and

set forth herein as the Findings of Fact, and this Decision is issued pursuant to sections 1.139 and 1.141(e) of the rules of practice applicable to this proceeding. (7 C.F.R. §§ 1.139, 1.141(e)).

Finding of Fact

1. Ron Claxon, doing business as Tri-State Biomedical, is an individual whose address is [redacted] (b) (6)

2. The Respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

3. When the Respondent became licensed and annually thereafter, he received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. On June 17, 1993, Respondent failed to individually identify dogs.

5. On June 17, 1993, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals.

6. On June 17, 1993, Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care.

7. On June 17, 1993, the Respondent failed to develop, document, and follow an appropriate plan approved by the attending veterinarian to provide dogs with the opportunity to exercise.

8. On June 17, 1993, Respondent's premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury, facilitate the required husbandry practices.

9. On June 17, 1993, Respondent did not have and maintain an effective program for the control of pests so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

10. On January 12 and 13, 1993, Respondent failed to feed dogs at least once each day.

11. On January 12 and 13, Respondent failed to offer dogs water at least twice each day.

12. On January 12 and 13, Respondent failed to removed excreta and food waste from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors.

Conclusion

By reason of the facts contained in the Findings of Fact above, the Respondent has violated the Act and the regulations (7 U.S.C. §§ 2140, 2141, 9 C.F.R. §§ 2.40, 2.50, 2.75(a)(1), 2.100(a), 3.8, 3.9(a), 3.10, 3.11 (a)(c)(d)).

Therefore, the following Order is issued.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder.

2. Respondent is assessed a civil penalty of $6,000.

a. Respondent shall pay $600 by certified check or money order made payable to the Treasurer of the United States within 90 days of service of this Order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

b. Payment of remaining $5,400 of the civil penalty is hereby suspended as long as Respondent complies with the Animal Welfare Act and the regulations promulgated thereunder.

3. The Respondent is disqualified for a period of ten years from becoming licensed under the Act and regulations.

The disqualification provisions of this order shall be effective thirty (30) days after the date of service of this order on Respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145). The cease and desist provisions shall become effective on the day after service of this Order on Respondent.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. §

1.145).

[This Decision and Order became final July 1, 1997.-Editor]

In re: FRANCIS CORL.
AWA Docket No. 96-0036.
Decision and Order filed June 27, 1997.

Failure to file an answer - Failure to handle animal so as to minimize risk of harm to animal and public - Cease and desist order - License disqualification - Civil penalty.

Robert Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations issued under the Act.

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the respondent by certified mail. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. Francis Corl, hereinafter referred to as respondent, is an individual whose address is [redacted] (b) (6)

2. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations. The respondent's license expired

on February 8, 1995.

3. When the respondent became licensed and annually thereafter, he received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. On or about June 13, 1993 the respondent failed to handle a dangerous animal (a black bear) so that there was a minimal risk of harm to the animal and to the public, in willful violation of section 2.131(b)(1) of the regulations (9 C.F.R. § 2.131(b)(1)), by allowing an intoxicated person to have physical contact with the bear while it was being unloaded from a transport enclosure, resulting in an attack by the bear.

5. On or about September 25, 1993 the respondent failed to handle a dangerous animal (a black bear) so that there was a minimal risk of harm to the animal and to the public, in willful violation of section 2.131(b)(1) of the regulations (9 C.F.R. § 2.131(b)(1)), by handling the bear while intoxicated and allowing intoxicated persons to have physical contact with the bear while it was outside its enclosure, resulting in an attack by the bear.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder.

2. Respondent is disqualified from becoming licensed under the act and regulations for ten years.

3. Respondent is assessed a civil penalty of $5,000, which is suspended provided that the respondent does not violate the Act, the regulations and standards issued thereunder, or this order, by operating as an exhibitor or dealer without being licensed.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This decision and order became final September 8, 1997.-Editor]

FEDERAL CROP INSURANCE ACT

In re: JERRY EDWARDS.
FCIA Docket No. 96-0008.
Decision and Order filed June 2, 1997.

Failure to file an answer - Willfully and intentionally providing false or inaccurate information to FCIC or to the insurer - Disqualification.

Kimberly Arrigo, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of the respondent, Jerry Edwards, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision

[This Decision and Order became final July 11, 1997.-Editor]

In re: GRANT WOODROW BOTHUM, JR.
FCIA Docket No. 97-0003.
Decision and Order filed June 2, 1997.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to FCIC or to the insurer - Disqualification.

Kimberly Arrigo, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of the respondent, Grant Woodrow Bothum, Jr., to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final July 11, 1997.-Editor]

In re: ERVIN JOSEPH SKLOSS.
FCIA Docket No. 96-0004.
Decision and Order filed on June 2, 1997.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to FCIC or to the insurer - Disqualification.

Kimberly Arrigo, Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of the respondent, Ervin Joseph Skloss, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respond has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant of § 1.145.

If period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision

[This Decision and Order became final July 16, 1997.-Editor]

In re: KURTIS F. MEYER.
FCIA Docket No. 97-0001.
Decision and Order filed September 12, 1997.

Admission of material allegations - Willfully and intentionally providing false and inaccurate information to FCIC or to an insurer - Disqualification.

Janice Bullard, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, by waiving the

right to a hearing, and filing a non-contesting answer, the respondent, Kurtis F. Meyer, has admitted the allegations contained in the Complaint. Because the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act (7 U.S.C. section 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. section 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year, and remain in effect for the entire period specified in this decision.

[This Decision and Order became final October 27, 1997.-Editor]

In re: ADRIAN H. MEYER.
FCIA Docket No. 97-0002.
Decision and Order filed September 12, 1997.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to the FCIC or an insurer - Disqualification.

Janice Bullard, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of the respondent, Adrian H. Meyer, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Because the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the

Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act (7 U.S.C. section 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. section 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year, and remain in effect for the entire period specified in this decision.

[This Decision and Order became final October 31, 1997.-Editor]

In re: ALVIN C. RICHARDSON.
FCIA Docket No. 97-0005.
Decision and Order filed September 24, 1997.

Failure to file an answer - Willfully and intentionally providing false and inaccurate information to FCIC or to the insurer - Disqualification.

Janice Bullard, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of the respondent, Alvin C. Richardson, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Because the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act (7 U.S.C. section 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. section 1506), respondent, and any entity in which he retains substantial beneficial interest

after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year, and remain in effect for the entire period specified in this decision.

[This Decision and Order became final November 3, 1997.-Editor]

FEDERAL MEAT INSPECTION ACT and POULTRY PRODUCT INSPECTION ACT

In re: AMOROSO FOODS, INC.
FMIA Docket No. 96-0011.
PPIA Docket No. 96-0008.
Decision and Order issued June 16, 1997.

Admission of material allegations - Failure to maintain the required level of sanitation - Failure to correct deficiencies - withdrawal of inpsection services.

Sheila Hogan Novak, for Complainant.
Joseph M. Toddy, Philadelphia, PA, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the indefinite withdrawal of federal meat and poultry inspection services pursuant to Sections 7 and 18 of the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*) (PPIA) and Title I of the Federal Meat Inspection Act (21 U.S.C. § 1.130 *et seq.*) (FMIA), based on Respondent's failure to eliminate insanitary conditions at its meat and poultry processing establishment, in accordance with the Rules of Practice, 7 C.F.R. § 1.130 *et seq.*, and 9 C.F.R. §§ 335.13, 381.230, 381.234.

This proceeding was instituted by a Complaint filed on September 11, 1996, by the Administrator of the Food Safety Inspection Service (FSIS), United States Department of Agriculture. The Complaint alleged that Respondent failed to take the necessary actions to eliminate insanitary conditions identified by FSIS on or about July 23, 1996, July 25, 1996, August 6, 1996, and August 13, 1996. Inspection services were withdrawn upon service of the Complaint on Respondent.

Respondent filed a timely Answer which denied all material allegations of the Complaint. However, on May 16, 1997, Respondent telefaxed a letter that stated, "This confirms that my client will be withdrawing its opposition to the USDA Complaint in this matter. Also, my client will not execute the consent order proposed by the USDA. Please contact me should you have any questions regarding the above."

On May 29, 1997, Complainant filed a Motion for Adoption of Proposed Decision and Order. On June 5, 1997, I issued an Order to Show Cause directing Respondent to show cause within five days of its receipt of the Order why Complainant's motion should not be granted. Respondent's attorney received a copy of the order on June 9, 1997. Respondent has failed to respond to the Order to Show Cause.

According to the material allegations in the Complaint and adopted order, I issue

the following findings, conclusions and Order.

Findings of Fact

1. Amoroso Foods, Inc. is now, and at all times material was, a corporation organized and existing under the laws of Pennsylvania which operates a meat and poultry processing establishment (Establishment 8761/P-8761) at [redacted] Pennsylvania.

2. At all times material, Respondent was the recipient of federal meat and poultry inspection services under the PPIA and Title I of the FMIA.

3. Between May 29, 1995 and May 28, 1996, Respondent was notified through written Process Deficiency Reports issued by officials of FSIS, USDA, that at least 55 sanitation deficiencies existed at its meat and poultry processing establishment.

4. Between May 29, 1996 and July 18, 1996, Respondent was notified through written Process Deficiency Reports issued by officials of FSIS, that at least 22 sanitation deficiencies existed at its meat and poultry processing establishment.

5. On July 23, 1996, July 25, 1996, August 6, 1996, and August 31, 1996, Respondent was notified through letters from FSIS that several reviews revealed a continued failure to maintain the required level of sanitation at its establishment. Respondent was notified on July 19, 1996, that inspection services were being refused because the premises, facilities, or equipment, or the operation thereof, failed to meet the requirements of section 7(a) of the PPIA, and regulations promulgated thereunder, and because the insanitary conditions of the establishment were such that any meat or meat food products prepared therein would be rendered adulterated within the meaning of section 1(m) of the FMIA.

6. FSIS specifically identified the following 11 sanitation deficiencies:

a. Baking oven showed extensive buildup of product residue;

b. Tray racks, some with flaking paint, were used for exposed products;

c. Ceiling in the chipping/grinding area was loose, cracked and had exposed openings with product residue;

d. All refrigerated units throughout the establishment were rusty and in poor repair;

e. Deep fryers showed product residue, flaking paint, extensive buildup in filters, and overall poor sanitation;

f. Mixer in the spice room showed rough welding and spice residue;

g. Product storage lugs contained product residue;

h. Overhead ceiling and structure (back cooler) showed flaking paint and plaster;

i. No letter of guarantee for garlic from China;

j. Rodent droppings found in dry storage area, basement, and second floor storage area;

k. Ceiling in processing room was leaking water directly over meat grinder.

7. FSIS stated in its August 13, 1997 letter that, unless satisfactory corrections of the described deficiencies were made within 15 calendar days from the receipt of the letter, a formal Complaint to withdraw inspection service would be initiated pursuant to sections 7 and 18(b) of the PPIA and sections 8 and 104 of the FMIA, and the applicable rules and regulations promulgated thereunder, 9 C.F.R. § 305.5, 335.13, 381.29, 381.230, 381.234, and 7 C.F.R. § 1.130 *et seq*. This letter was served on Respondent on August 14, 1996.

8. On August 20, 1996, the establishment was reviewed to determine whether satisfactory corrective actions were taken to eliminate the insanitary conditions specified above. The review revealed that the following 5 sanitation deficiencies had not been satisfactorily corrected:

a. Refrigerated units throughout the establishment were rusty and in poor repair;

b. Deep fryers showed product residue, flaking paint, extensive buildup in filters, and overall poor sanitation;

c. Product storage lugs contained product residue;

d. Rodent droppings and insects were found;

e. Ceiling in processing room.

9. On August 30, 1996, FSIS officials were refused entry into Respondent's

establishment for the purpose of verifying whether Respondent had corrected the specified sanitation deficiencies.

Conclusion

Respondent has failed to eliminate insanitary conditions at Amoroso Foods, Inc. (Establishment 8761/P-8761) in violation of section 8 of the FMIA and section 7 of the PPIA and regulations promulgated thereunder.

Order

Inspection services under the PPIA and Title I of the FMIA are indefinitely withdrawn from Respondent, its successors, affiliates or assigns.

This order shall be final and effective 35 days after service of this Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final July 28, 1997.-Editor]

PLANT QUARANTINE ACT

In re: RIGAUD PIERRE.
P.Q. Docket No. 97-0006.
Decision and Order filed June 2, 1997.

Failure to file an answer - Importation of potatoes from Haiti into the United States without a permit - Civil penalty.

Howard Levine, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), and the regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.)*.

This proceeding was instituted by a complaint filed against Rigaud Pierre, respondent, on January 23, 1997, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Rigaud M. Pierre, hereinafter referred to as the respondent, is an individual with a mailing address of [redacted] (b) (6) [redacted]

2. On or about March 27, 1996, the respondent violated sections 319.56-3(a) and 321.4(a) of the regulations by importing seventeen (17) potatoes from Haiti into the United States without a permit.

Conclusion

By reason of the facts contained in paragraphs one and two above, Rigaud Pierre, respondent, has violated 7 C.F.R. § 319.56-3(a) and 321.4(a).

Therefore, the following order is issued.

Order

Rigaud Pierre is hereby assessed a civil penalty of one thousand dollars ($1000). This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final July 15, 1997.-Editor]

In re: ANA MARIA ROSALES.
P.Q. Docket No. 97-0001.
Decision and Order filed May 30, 1997.

Failure to file an answer - Importation of mangoes into the United States from Mexico without a permit - Civil penalty.

Howard Levine, Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), and the regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.).*

This proceeding was instituted by a complaint filed against Ana Maria Rosales, respondent, on October 29, 1996, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Ana Maria Rosales, hereinafter referred to as the respondent, is an individual with a mailing address of [redacted] (b) (6) [redacted]

2. On or about January 6, 1996, the respondent violated section 319.56-3(a) of the regulations by importing ten (10) fresh mangos from Mexico into the United States without a permit.

Conclusion

By reason of the facts contained in paragraphs one and two above, Ana Maria Rosales, respondent, has violated 7 C.F.R. § 319.56-3(a).

Therefore, the following order is issued.

Order

Ana Maria Rosales, respondent, is hereby assessed a civil penalty of one thousand dollars ($1000). This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final August 6, 1997.-Editor]

In re: SERGIO ARTURO CANELES.
P.Q. Docket No. 95-0040.
Decision and Order filed July 2, 1997.

Failure to file an answer - Importation of mangoes from Guatemala into the United States without a permit - Civil penalty..

Jeffrey Kirmsse, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into the United States (7 C.F.R. 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the rules of practice set forth in 7 C.F.R. 1.130 et seq., and 380.1 *et seq.*).

This proceeding was instituted by a complaint, filed on June 6, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about November 30, 1994, the respondent imported mangoes from Guatemala into the United States in violation of 7 C.F.R. 319.56-2(e), because the respondent did not obtain a permit for the mangoes, as required.

The complaint was served upon the respondent by certified mail on June 7, 1995. The respondent failed to file an answer which denied or otherwise responded to the allegations in the complaint. In accordance with section 1.136(c) of the rules of practice (7 C.F.R. 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for the purpose of this proceeding, an admission of said allegation.

In view of the aforementioned facts, the respondent is deemed to have admitted the material allegations in the complaint and, therefore, has waived his right to a

hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139). This Default Decision and Order, therefore, is issued, pursuant to section 1.136 and 1.139 of the rules of practice (7 C.F.R. 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent is deemed to have admitted, are adopted and set forth herein as the Findings of Fact.

Findings of Fact

1. Sergio Arturo Canales, hereinafter referred to as the respondent, is an individual whose mailing address is [redacted] (b) (6) [redacted]

2. On or about November 30, 1994, the respondent imported mangoes from Guatemala into the United States in violation of 7 C.F.R. 319.56-2(e), because the respondent did not obtain a permit for the mangoes, as required.

Conclusion

By reason of the facts in the Findings of Fact set forth above, the respondent has violated the Act and section 319.56-2(e) of the regulations (7 C.F.R. 319.56-2(e)). Therefore, the following Order is issued:

Order

The respondent, Sergio Arturo Canales, is hereby assessed a civil penalty of seven hundred and fifty dollars ($750.00), which shall be made payable to the "TREASURER OF THE UNITED STATES" by a certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, MN 55403

within thirty (30) days from the effective date of this Order. The respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-40.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon

the respondent, unless there is an appeal to the Judicial Officer, pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. 1.145).

[This Decision and Order became final August 10, 1997.-Editor]

In re: FERMIN RIVERA-TORRES and MIGUEL PALLENS.
P.Q. Docket No. 97-0002.
Decision and Order as to Miguel Pallens filed July 2, 1997.

Failure to file an answer - Movement of untreated mangoes from Puerto Rico to Boston and Philadelphia - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj)(Acts), and regulations promulgated thereunder (7 C.F.R. § 318.58 *et seq.)*(regulations).

This proceeding was instituted by a complaint filed against the respondents on October 29, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent Pallens has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent Pallens' failure to answer, respondent Pallens has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Finding of Fact

1. Miguel Pallens is an individual with a mailing address of [redacted] (b) (6) [redacted]

2. On April 10, 1995, respondent Pallens moved untreated mangoes from Puerto Rico to Boston, Massachusetts.

3. On April 10, 1995, respondent Pallens moved untreated mangoes from

Puerto Rico to Philadelphia, Pennsylvania.

Conclusion

By reason of the facts contained in the Findings of Fact above, respondent Pallens has violated the Act and the regulations (7 C.F.R. § 318.58-2(b)).

Therefore, the following Order is issued.

Order

Miguel Pallens is hereby assessed a civil penalty of two thousand dollars ($2,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final September 10, 1997.-Editor]

In re: FERMIN RIVERA-TORRES and MIGUEL PALLENS.
P.Q. Docket No. 97-0002.
Decision and Order as to Fermin Rivera-Torres filed July 2, 1997.

Failure to file an answer - Movement of untreated mangoes from Puerto Rico to Philadelphia and Boston - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj)(Acts), and regulations promulgated thereunder (7 C.F.R. § 318.58 *et seq.*)(regulations).

This proceeding was instituted by a complaint filed against the respondents on October 29, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent Rivera-Torres has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent Rivera-Torres' failure to answer, respondent Rivera-Torres has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Finding of Fact

1. Fermin Rivera-Torres is an individual with a mailing address of [redacted] (b) (6) [redacted]

2. On April 10, 1995, respondent Rivera-Torres moved untreated mangoes from Puerto Rico to Boston, Massachusetts.

3. On April 10, 1995, respondent Rivera-Torres moved untreated mangoes from Puerto Rico to Philadelphia, Pennsylvania, in violation of the Acts and the regulations.

Conclusion

By reason of the facts contained in the Findings of Fact above, respondent Rivera-Torres has violated the Act and the regulations (7 C.F.R. § 318.58-2(b)).

Therefore, the following Order is issued.

Order

Fermin Rivera-Torres is hereby assessed a civil penalty of two thousand dollars

($2,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final September 10, 1997.-Editor]

In re: THAO MINH NGO.
P.Q. Docket No. 97-0010.
Decision and Order filed July 29, 1997.

Failure to file an answer - Importation of dried beef from Vietnam into the United States without the required certificate - Civil penalty.

Howard Levine, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and the regulations promulgated thereunder (9 C.F.R. § 94 *et seq.*).

This proceeding was instituted by a complaint filed against Thao Minh Ngo, respondent, on March 6, 1997, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the

allegations of the complaint.

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Thao Minh Ngo is an individual with a mailing address of [redacted] (b) (6) [redacted]

2. On or about June 26, 1996, the respondent violated 9 C.F.R. § 94.4(a)(4) by importing four (4) pounds of dried beef from Vietnam into the United States without the required certificate.

Conclusion

By reason of the facts contained in paragraphs one and two above, Thao Minh Ngo, respondent, has violated 9 C.F.R. § 94.4(a)(4).

Therefore, the following order is issued.

Order

Thao Minh Ngo is hereby assessed a civil penalty of one thousand dollars ($1000). This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final September 10, 1997.-Editor]

In re: MANUEL de JESUS VALDEZ-FLORES.
P.Q. Docket No. 97-0013.
Decision and Order filed September 12, 1997.

Failure to file an answer - Importation of mangoes and guavas from Mexico into the U.S. without a permit - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fresh mangoes and guavas from Mexico to the United States (7 C.F.R. § 319.56-3 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on May 6, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about June 26, 1996, at Los Angeles, California, respondent imported three fresh mangoes and two fresh guavas from Mexico into the United States without a permit, in violation of section 319.56-3 of the regulations (7 C.F.R. § 319.56-3).

The respondent signed for receipt of the filed Complaint on May 10, 1997. However, respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and has not filed an answer as of the date of the filing of the motion for this Order. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegation in the Complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Manuel de Jesus Valdez-Flores, herein referred to as the respondent, is an individual whose mailing address is [redacted] (b) (6) [redacted]

2. On or about June 26, 1996, at Los Angeles, California, respondent imported

three fresh mangoes and two fresh guavas from Mexico into the United States without a permit, in violation of section 319.56-3 of the regulations (7 C.F.R. § 319.56-3).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56-3 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Manuel de Jesus Valdez-Flores, is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 97-0013.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final October 24, 1997.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

ANIMAL QUARANTINE and RELATED LAWS

Carl L. Churchill, Jr. A.Q. Docket No. 95-0008. 7/25/97.

Ana M. Valencia. A.Q. Docket No. 97-0004. 7/29/97.

ANIMAL WELFARE ACT

John Strong. AWA Docket No. 97-0024. 7/1/97

Burnie G. Pauley. AWA Docket No. 97-0019 . 7/21/97.

Kellie S. Stephens and Teay's River Valley Ranch, Inc. AWA Docket No. 96-0016. 7/22/97

Lewis Barre and Pat Barre, d/b/a Meadowbrook Farm. AWA Docket No. 96-0060. 7/23/97.

Water Wheel Exotics, Inc. and James E. Stephens. AWA Docket No. 96-0006. 8/4/97.

Mona Hill, d/b/a Mona Hill Kennels. AWA Docket No. 95-0056. 8/8/97.

Robert T. Fieber and Dotti Martin, d/b/a Ligertown Game Farm, Inc. AWA Docket No. 97-0009. 8/8/97.

John Biggs and Carol Biggs, d/b/a Scotch Pine Exotic Game Exhibit. AWA Docket No. 96-0061. 9/22/97.

Jeanne Milewski, d/b/a American Wildlife Rescue. AWA Docket No. 95-0059. 10/7/97.

Hope Yvonne Colvin, d/b/a Rocking C Kritter Korral. AWA Docket No. 97-0043. 10/10/97.

Hawaiian Airlines. AWA Docket No. 97-0029. 10/17/97.

Hayet A. Kassar-Creek and CAMM Research Institute, Inc. AWA Docket No. 96-0076. 10/23/97.

Chris Loncarich and Melissa Loncarich, d/b/a Bookcliff Animal Park. AWA Docket No. 97-0023. 10/28/97.

Michael L. Kredovski and Bio-Medical Associates, Inc. AWA Docket No. 95-0035. 10/28/97.

Jean Davenport. AWA Docket No. 96-0035. 11/7/97.

Tropicana Living Things, Inc., and Joseph Hereau. AWA Docket No. 97-0044. 11/28/97.

Northeast Nebraska Zoo, also d/b/a Northeast Nebraska Zoological Society, Inc. AWA Docket No. 95-0081. 12/1/97.

Lions, Tigers and Teddy Bears-Oh My! and Thomas R. Lease. AWA Docket No. 97-0033. 12/1/97.

Village Wholesale, Inc. and Francis Englert, Jr. AWA Docket No. 97-0031. 12/3/97.

Harold Kafka, Deborah Kafka, and Scotch Plains Zoo, Inc. AWA Docket No. 97-0025. 12/5/97.

Bethan and I.B. (Trey) Chapman III, d/b/a Alamo Tiger Ranch. AWA Docket No. 97-0035. 12/23/97.

BEEF PROMOTION and RESEARCH ACT

Lonnie Ritter. BPRA Docket No. 95-0001. 8/26/97.

EGG RESEARCH and CONSUMER INFORMATION ACT

Wilmot Family Farm, Inc. ERCIA Docket No. 96-0002. 12/11/97.

FEDERAL CROP INSURANCE ACT

Robert W. Ullyott. FCIA Docket No. 95-0023. 7/18/97.

Anthony William Skloss. FCIA Docket No. 96-0003. 8/13/97.

FEDERAL MEAT INSPECTION ACT

Lone Star Beef Processors, LLC and Thomas Michael Evans. FMIA Docket No. 97-0006. 9/12/97.

Tommy E. Rickel and TER, Inc., d/b/a St. Joseph Quality Meats, a/k/a Tom's Wholesale Meat Co., a/k/a St. Joseph Prime Meat Co. FMIA 97-0005. 9/12/97.

Murry L. Thompson d/b/a Thompson Meat Company. FMIA Docket No. 96-0010. 10/6/97.

Lindsay Foods, Inc. and Gary C. Lindsay, President, Lindsay Foods, Inc. FMIA Docket No. 96-0003. 12/3/97.

HORSE PROTECTION ACT

Judith Burgess and Ernest Upton. HPA Docket No. 95-0003. 8/21/97.

Lincoln Eugene Webb. HPA Docket No. 97-0005. 9/12/97.

Dale Rowland. HPA Docket No. 94-0042. 10/17/97.

Carl Edwards & Sons Stables, a general partnership, Carl Edwards & Sons Stables, Inc., a Georgia corporation, Gary R. Edwards, Larry E. Edwards, Etta Edwards, Paige Edwards and Robin Edwards. HPA Docket No. 95-0003. 10/23/97.

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PLANT QUARANTINE ACT

Satoshi Yamada. P.Q. Docket No. 97-0008. 8/6/97.

Windy Hill Foliage, Inc. P.Q. Docket No. 96-0027. 9/2/97.

Hensley, Inc. P.Q. Docket No. 96-0027. 9/11/97.

American Airlines. P.Q. Docket No. 97-0016. 9/17/97.

Normans Truck Brokerage, Inc. P.Q. Docket No. 96-0027. 9/17/97.

ATI Enterprises, Ltd. P.Q. Docket No. 96-0027. 9/26/97.

Midwest Transportation, Inc. P.Q. Docket No. 96-0027. 9/26/97.

Keith Wright Trucking. P.Q. Docket No. 96-0027. 9/30/97.

Zweber Trucking. P.Q. Docket No. 96-0027. 9/30/97.

Bork Tree Farms, Inc. P.Q. Docket No. 96-0027. 10/2/97.

Zeitner & Sons, Inc. P.Q. Docket No. 96-0027. 10/2/97.

LaFave Recycling. P.Q. Docket No. 96-0027. 10/2/97.

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Lone Star Beef Processors, LLC and Thomas Michael Evans. PPIA Docket No. 97-0006. 9/12/97.

Tommy E. Rickel and TER, Inc., d/b/a St. Joseph Quality Meats, a/k/a Tom's Wholesale Meat Co., a/k/a St. Joseph Prime Meat Co. PPIA Docket No. 97-0005. 9/12/97.

VETERINARY ACCREDITATION

Randy D. Risley, D.V.M. V.A. Docket No. 97-0001. 7/16/97.