UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	SMA Docket No. 04-0003
	)	
Amalgamated Sugar Company, L.L.C.	)	
	)	
Petitioner	)	
	)	**DECISION**

Petitioner, Amalgamated Sugar Company ("Amalgamated"), is a sugar beet processor appealing a decision by the Commodity Credit Corporation ("CCC") that allowed a competitor, American Crystal Sugar Company ("American Crystal") to acquire all of the sugar beet marketing allocation formerly held by a different processor, Pacific Northwest Sugar Company ("Pacific Northwest", "PNW" or "PNSC"). Allocations for the marketing of beet sugar among beet sugar processors are applicable each crop year that allotments are in effect under the Agricultural Adjustment Act of 1938, as amended by the Farm Security and Rural Investment Act of 2002 (7 U.S.C.§§1359 aa-kk) ("Act" for the Act as amended and "2002 Farm Bill" for the 2002 amendatory provisions). The initial decision granting the transfer was made by CCC on September 16, 2003. In response to Petitioner's request for reconsideration, the CCC's Executive Vice President on November 14, 2003, issued a Reconsidered Determination denying the requested overturn of the decision. Petitioner's appeal from the Reconsidered Determination was filed pursuant to 7U.S.C.§1359 ii and the Rules of Practice issued under 7C.F.R.§1435.320 (b)[1]. The Act and the Rules of Practice provide for a hearing on the appeal by an Administrative Law Judge in accordance with 5 U.S.C.§§554 and 556 ("the Administrative Procedure Act", or

[1] The Rules of Practice are attached as Addendum I.

"the APA"), and for intervention in the proceeding by affected persons. My decision as the assigned Administrative Law Judge, is based on the certified copy of the Administrative Record ("A.R.") upon which the Executive Vice President based his Reconsidered Determination, matters that have been officially noted, the transcribed testimony and exhibits received at the hearing and proposed findings of fact, conclusions, orders and briefs by the parties.[2] All proposed findings and conclusions were considered and are incorporated as part of this decision or, if not incorporated, rejected as not in accord with the material issues of fact, law or discretion presented on the record. This decision upon becoming effective, reverses the Reconsidered Determination by the Executive Vice President for the reasons set forth in the following findings, conclusions and discussion, and directs that the marketing allocation be distributed in future crop years to all beet sugar processors on a pro rata basis.

The Parties and the Issues

Petitioner, Amalgamated, has been joined in this appeal by two supporting Intervenors, Southern Minnesota Beet Sugar Cooperative L.L.C. ("SMBSC") and Wyoming Sugar Company ("Wyoming"). American Crystal has intervened in support of CCC. The Executive Vice President stated in his Reconsidered Determination that is the subject of this appeal, "...after careful reconsideration, I cannot find justification to overturn CCC's decision". (A.R. at 3). He based the decision on his interpretation of subparagraphs (E) and (F) of section 359d(b)(2) of the Act (7U.S.C.§1359dd(b)(2)(E) and(F) that read:

> (E) PERMANENT TERMINATION OF OPERATIONS OF A PROCESSOR– If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in

[2] See the Rules of Practice, Addendum I, particularly, Rule 1(b), Rule 2(a)(b)(c)(d)(e) and (g), Rule 5(a), Rule 6, Rule 9 and Rule 10.

> conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall –
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> (i) eliminate the allocation of the processor provided under this section; and
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> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.
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> (F) SALE OF ALL ASSETS OF A PROCESSOR TO ANOTHER PROCESSOR – If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E).

The Reconsidered Determination stated (A.R. at 3):

> CCC determined that PNW was certainly not dissolved nor liquidated in a bankruptcy proceeding, but instead permanently terminated <u>in conjunction</u> with the sale of its assets. The act of permanent termination was simultaneous with the sale of its assets. The act of permanent termination was simultaneous with the act of closing the deal on the sale of PNW's assets. The former event did not precede the latter. If CCC had determined PNW was permanently terminated for reasons <u>other than in conjunction</u> with the sale of its assets, paragraph E would have dictated the outcome. While the statute does not define what it means to be 'permanently terminated', PNW was still recognized by CCC as a processor at the time of the sale, September 8, 2003.

As the beneficiary of CCC's decision, American Crystal has intervened to protect itself from losing the transferred Pacific Northwest marketing allocation. Petitioner and its two supporting Iintervenors seek the overturn of the CCC decision as beet sugar processors who shall share in the distribution of the marketing allocation under subparagraph E that controls when subparagraph F does not.

<u>The Appeal Proceedings</u>

Amalgamated filed its Petition on December 4, 2003. CCC filed an Answer, a Motion to Dismiss, and a Certified Copy of the Administrative Record on December 23, 2003. American Crystal filed a Notice of Intervention, Answer and Motion to Dismiss on January 14, 2204. Amalgamated filed a brief opposing the Motions to Dismiss on January 20, 2004. Both SMBSC and Wyoming filed Notices of Intervention on January 20, 2004. On March 2, 2004, Judge Jill S. Clifton who was then assigned to this case, held a telephone conference and set a schedule for the parties to follow in respect to a Motion for Summary Judgment American Crystal indicated it would file. On March 25, 2004, American Crystal filed a Memorandum in support of its Motion to Dismiss the Petition or in the Alternative for Summary Judgment. Also filed at that time, was an affidavit attesting to facts by American Crystal's Counsel, Steven Z. Kaplan. SMBSC filed its response to the Motions on May 3, 2004. American Crystal filed a reply to SMBSC's response on May 21, 2004. This proceeding was reassigned to me, and on June 23, 2004, I issued an Order denying the Motions to Dismiss and the Motion for Summary Judgment.[3] On August 10, 2004, I conducted a teleconference with the parties scheduling dates for identifying witnesses and exhibits, holding an oral hearing and the filing of pre-hearing briefs.

Pre-hearing briefs were filed and the oral hearing was held on September 21-23 and on October 4 and 5, 2004 in Washington, DC. An amended certified copy of the Administrative Record respecting the Executive Vice President's Reconsidered Determination was filed and made part of the record at the outset of the hearing. Post-hearing briefing was completed on November 24, 2004. References to the transcript of the oral hearing are shown as "Tr." plus the day of the hearing and the page of that day's transcript, e.g., "Tr. Sept. 21 at 25". Exhibits of Amalgamated and SMBSC are cited as "AMAL–SM -_____)". American Crystal's Exhibits are cited as "ASCS - ___". CCC's Administrative Record is cited as "A.R. _____." and CCC's amended Administrative Record is cited as A.R. add ____."

Findings of Fact

1. The Columbia River Sugar Company (CRSC) was formed as a cooperative in 1991, to

[3] Copy of my Order is attached as Addendum 2.

build and operate a sugar beet processing factory in Moses Lake, Washington. Sugar beets had been previously grown in the Columbia River Basin but the processing plant located these had gone out of business and was inoperable.

2. CRSC formed the Pacific Northwest Sugar Company in partnership with the Holly Sugar Company (Holly Sugar) to construct the factory, which took place in 1996 through the summer of 1998. (AMAL-SM 58 at 8).

3. In 1998, sugar beet processing was started at the Moses Lake factory under the direction of Holly Sugar whose personnel had experience gained from operating other factories. The Moses Lake operations did not go well. Equipment and system breakdowns caused frequent factory shutdowns for repairs and changes to the system. Approximately half of the sugar that went into its silos was unmarketable. The factory had a rate of recovery of sugar from the beets it processed of only 25% and two-thirds of the sugar beets delivered to the plant were not processed but instead rotted (AMAL-SM 58 at 8).

4. In 1999, Holly Sugar pulled out of the partnership conveying its interest in Pacific Northwest to CRSC. That year, Pacific Northwest operating the factory without assistance from Holly Sugar, hired a number of experienced employees to operate the factory. Plant equipment was improved through the investment of several million dollars.

The sugar recovery rate for the 1999 - 2000 processing season, increased from 25% to 65%. However, to be profitable, a sugar processing plant requires a recovery rate in excess of 80% with 90% being the optimum target (Tr. Sept. 22 at 52- 67; Tr. Oct 5 at 6-10).

5. In the 2000-2001 processing season Pacific Northwest made additional improvements to

its plant's operations and claimed to have again increased its sugar recovery to 82%. However, to reach 82%, the plant's chief operating officer had directed that residual molasses be recycled through its equipment; a practice that cost more in energy costs than the value of the additional sugar obtained (Tr. Oct. 5 at 10-11).

6. Operating a sugar beet processing plant is very expensive requiring large sums of capital. In 1999, Pacific Northwest owed $159-160 million to its principal lender and various creditors (AMAL-SM-58 at 8). In August of 1999, with strong congressional support, Pacific Northwest obtained a loan guarantee from the U.S. Department of Agriculture's Rural Development Business Guarantee loan project that enable it to borrow $20 million to upgrade equipment, pay vendors and provide working capital. In December 2002, the U.S. Department of Agriculture, Office of the Inspector General Western Region, issued an audit report that reviewed the circumstances of the loan guarantee (AMAL-SM-58). The Department had guaranteed 70 percent or $14 million of the loan. In the spring of 2000, Pacific Northwest defaulted on the loan and the Rural Development was left with an unpaid balance of $12.1 million after the proceeds from liquidation were applied to the loan. When the $20 million guaranteed loan was made, Pacific Northwest pledged as collateral the land, plant and equipment of the company that was initially valued at $162 million. The lender discounted the appraised value to a range of $40 million to $70 million in recognition of the limited opportunities to dispose of company assets and the lack of a production history (AMAL-SM-58 at 9). The lender also obtained a liquidation appraisal that disclosed that the collateral pledged by Pacific Northwest had a scrap value of $2 million and a forced liquidation value of $10 million. The Inspector General's Audit Report concluded:

> "By the spring of 2000, the Company's second attempt to establish the viability of the processing plant had failed. The failure was attributable to the borrower's poor financial condition and its inability to maintain sufficient resources to survive equipment failure and added production costs. The plant closed and the lender was force to liquidate the company's assets. In May 2001, the collateral was sold for $2.1 million. After the company paid liquidation costs, $1.9 million was applied against the guaranteed loan amount, leaving Rural Development obligated to pay the lender $12.1 million (AMAL-SM-58 at 9).

7. In August/September 2000, at the suggestion of Cobank which was Pacific Northwest's principal lender, Pacific Northwest retained Emmer Associates, Inc., an agricultural financing and debt restructuring firm to work on its debt problems (Tr. Sept. 22 at 46-47). The Chief Executive Officer of Emmer Associates, Allan Lambrecht, personally worked on finding solutions for Pacific Northwest. In his opinion, Pacific Northwest had three principal needs: (1) the restructuring of its onerous debt; (2) a viable plant; and (3) a favorable price for the sugar the plant would produce (Tr. Sept. 22 at 61-62). At that time, the autumn of 2000, Pacific Northwest owed $159-160 million to four lenders with Cobank being the principal lender (Tr. Sept. 22 at 65-66). Efforts to restructure the debt did not go fast enough to maintain sugar beet planting commitments with growers and in March of 2001, Pacific Northwest released its growers from planting commitments. This decision was also based on the fact that the California energy crisis of 2000 – 2001 affected the Pacific Northwest and power companies paid both growers and the plant not to use power (Tr. Sept. 22 at 73). There was also a drought that year and since most of the sugar beets would have been grown on irrigated land, payments for water were avoided by not planting a sugar beet crop (Tr. Sept. 22 at 74-75). In June of 2001, a restructuring arrangement was completed under which the plant was sold to a third party, Central Leasing, for $2.1 million. Pacific Northwest then leased the plant for the 2001-2002

processing season with a purchase option to buy back the plant in the 12-month period following June 2001 for the $2.1 million (Tr. Sept. 22 at 75-76). The lease payment was set at the rate of interest Central Leasing was paying for having borrowed the $2.1 million it paid for the plant. (Tr. Sept. 22 at 80). Under the arrangement, the lenders allowed the plant to be sold free and clear of debts and liens by releasing their security so that title was transferred unencumbered to Central Leasing (Tr. Sept. 22 at 78). The $2.1 million was paid to Cobank and the lenders who were owed some $159-160 million (Tr. Sept 22 at 79). By these means the old debt no longer needed to be serviced but new capital was needed for the plant to operate (Tr. Sept. 22 at 85-86). Everyone understood, in June 2001, that the old debt of $159-160 million less the $2.1 million paid against it would not be paid (Tr. Sept.22 at 87). The debt would be carried on Pacific Northwest's balance sheet as unsecured debt but no payments on it would be made (Tr. Sept. 22 at 87). A principal problem in securing new capital for the plant to operate after June 2001, was that two very substantial agricultural lenders had been taken down, dramatically, wherein they released their collateral and lost $160 million that they agreed they would not be able to recover. Normal commercial agricultural channels for borrowing money were therefore no longer available (Tr. Sept. 22 at 88).

8. On behalf of Pacific Northwest, Mr. Lambrecht attempted to secure capital for it to continue as a sugar beet processor from a variety of sources subsequent to the June 2001 arrangement with creditors and the sale and leaseback of the plant. Pacific Northwest and Mr. Lambrecht met or communicated with Global Ventures, General Mills, Cargill, American Federal Securities, Aegon Insurance Company, Oxbow Financial, Selby Financial, British Sugar, American Crystal, Michigan Sugar, Minn Daks, Southern

Minnesota, and Amalgamated Sugar in an effort to find funding and, if possible, a partner to operate the Moses Lake plant (Tr. Sept. 22 at 90-106). None of these potential sources of capital resulted in necessary capital being obtained prior to the March 2002 deadline for obtaining sugar beet growing commitments for the 2002-2003 processing season (Tr. Sept. 22 at 108-109).

9. Sugar beet processing operations at the Moses Lake plant ceased in February 2001 and never resumed (Tr. Oct 5 at 11). No sugar beet crop was planted by CRSC growers in 2002 or 2003 (Tr. Sept. 21 at 188).

10. On July 23, 2001, Pacific Northwest was administratively dissolved by the Secretary of State of the State of Washington for failure to file an annual license renewal application as required by Washington State law (ASCS-70). Pacific Northwest was not reinstated until September 8, 2003 when it filed necessary documents (ASCS-71).

11. After Pacific Northwest announced it would not have beets planted for the 2001 crop year, it laid off employees at the Moses Lake plant and reduced its workforce to less than 40 people (Tr. Oct. 5 at 12). The plant when fully operational on October 19, 2000, had employed 290 people (AMAL-SM-22 at 3).

12. In December 2001, Pacific Northwest forfeited 91 million pounds of sugar to the CCC and the sugar was then sold on the market to Amalgamated and another bidder. When Amalgamated finally obtained access to the plant site in April 2002 to take the sugar, there were no people working there. Indemnity agreements and arrangements for cutting open the expensive tanks where the sugar was stored were made exclusively with Central Leasing with no participation by Pacific Northwest (Tr. Oct. 5 at 42-58). Central Leasing

accepted a monetary payment in lieu of actual repairs to the tanks and the tanks were not repaired (Tr. Oct. 5 at 59-60).

13. At the end of March 2002, Pacific Northwest's lease arrangement for the Moses Lake plant ended after having failed to pay the agreed rent, and the lease was not renewed (Tr. Sept. 22 at 115).

14. In May of 2002, the 2002 Farm Bill was signed and Pacific Northwest subsequently received a sugar beet marketing allocation of 2.7% of the future allotments under the Act, on the basis of its production record for 1998, 1999 and 2000.

15. In July of 2002, a daylong meeting was held in Spokane, Washington at the law offices of Pacific Northwest's attorneys that included Mr. Lambrecht, representatives of Central Leasing, all five of Pacific Northwest's Board of Directors, a Cargill representative who attended by telephone and a representative for Oxbow Capital and Selby Financial (Tr. Sept.22 at 119-121). Pacific Northwest's Board of Directors made it clear "they were really done spending money, and would pay no further bills from financial consultants or attorneys (Tr. Sept. 22 at 123). In fact, Mr. Lambrecht had not been paid by Pacific Northwest since January 2002 (Tr. Sept 20 at 123).

16. It was decided at the July 2002 meeting that a new entity, Washington Sugar Company, LLC ("Washington Sugar") would replace Pacific Northwest so that Pacific Northwest would not incur any more debts or obligations in respect to any activity to revive sugar beet processing operations at the Moses Lake plant (Tr. Sept. 22 at 125). Washington Sugar was a different company in terms of its ownership base from Pacific Northwest. The only owner of Washington Sugar was Scott Lybbert who was but one of the five

directors of Pacific Northwest that was a wholly owned subsidiary of CRSC (Tr. Sept. 22 at 129). CRSC had no interest in Washington Sugar (Tr. Sept. 22 at 130).

17. A year after its June 2001 purchase of the Moses Lake plant, Central Leasing's leaseback/purchase option agreement with Pacific Northwest ended, and Central Leasing started to dispose of the plant's equipment and sought other ways to recover its investment. In July 2002, it leased two beet pilers to Amalgamated and in December 2002, Amalgamated brought the pilers from Central Leasing for $215,000 (Tr. Oct. 5 at 63; AMAL-SM-57). On June 10, 2003, Central Leasing sold the three remaining pilers of the Moses Lake plant to Amalgamated for $700,000 (Tr. Oct. 5 at 63; AMAL-SM-59). To avoid frost damage to beets during the short harvest opportunity window in Moses Lake, beet pilers are required for beets to be received, cleaned and piled for long-term storage so the factory can operate for a longer period of time (Tr. Oct. 5 at 64-65). On April 16, 2004, Central Leasing sold to Crab Creek Sugar Company centrifuges, conveyors, filters, pumps and other sugar beet processing equipment identified in a Bill of Sale of that date (ASCS-94). By early 2002, the computer system that allowed the Moses Lake plant to be operated as an automated factory was no longer available. (Tr. Oct. 5 at 14-16).

18. In July 2002, Pacific Northwest lost its short-term lease on the Moses Lake facility for failure to pay rent and no longer had a purchase option for the plant in place (Tr. Sept. 23 at 6). Pacific Northwest owned no sugar beet processing equipment and had been unable to attract any new financing. At that point, the Board of Directors of Pacific Northwest informed their lawyers and consultants that they "were really done spending money" and that "they were not ready to stand on the line and incur any more debt or obligations for

the people pursuing" further efforts to revive the Moses Lake plant (Tr. Sept. 22 at 122 and 125).

19. The former vice-president of Pacific Northwest and a CRSC member, Scott Lybbert, formed a new company, Washington Sugar, to pursue the revival of sugar beet processing at the Moses Lake plant. On December 3, 2002, the CRSC Board passed a resolution to transfer its marketing allocation to Washington Sugar and in support of Washington Sugar's efforts to reopen the Moses Lake plant (ASCS - 66 at 2). The resolution made it clear that Pacific Northwest had permanently terminated its operations at the Moses Lake plant:

> CRSC is the sole member of Pacific Northwest Sugar Company, LLC ("PNSC"); and…CRSC has no desire, interest or ability to move forward and operate PNSC processing facility (A.R. add at 95)

20. On September 24, 2002, Scott Lybbert, as President of Washington Sugar Company, wrote to CCC asking that Pacific Northwest's beet sugar marketing allocation be transferred to Washington Sugar (A.R. add at 2). On October 3, 2002, he wrote a second letter making the same request (A.R. add at 3).

21. On October 11, 2002, CCC advised Mr. Lybert, pursuant to 7C.F.R.§1435.308(d) that covers purchasing processors who are new entrants, CCC would transfer Pacific Northwest's allocation to Washington Sugar Company "upon receipt of a copy of the bill of sale showing that virtually all of the assets or Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company (A.R. add at 4).

22. At approximately the same time, Amalgamated, by its President, Ralph Burton, also asked CCC about acquiring Pacific Northwest's allocation. Amalgamated was told that it would be entitled to the allocation "(i)f Amalgamated purchased virtually all of the assets

of Pacific Northwest Washington, including the factory" (A.R. add at 6, Tr. Oct. 4 at 134-137).

23. CCC redistributed virtually all of Pacific Norwest's marketing allocation to other processors in crop year 2002. Although CCC provided Pacific Northwest with an initial marketing allocation for crop year 2002, CCC was legally empowered to redistribute any allocation that wasn't being used. On October 1, 2002, when CCC announced initial allocations under the provisions of the 2002 Farm Bill, it immediately and simultaneously redistributed 87% (97,639 of 112,639 short tons) of Pacific Northwest's allocation to other processors (AMAL-SM-78). During the remainder of that same crop year, CCC subsequently redistributed an additional 24,023 short tons – nearly all the rest of Pacific Northwest's initial allocation, as well as any additional allocation that Pacific Northwest might have received because of increases in the beet sugar total allotment – to other sugar beet processors. As of September 25, 2003, Pacific Northwest's remaining balance was only 381 short tons or .008% of the overall beet sugar allotment (Tr. Oct 4 at 149-154; AMAL-SM-78).

24. Even though Pacific Northwest never used any of its sugar beet marketing allocation, it sought to have the allocation increased for crop year 2003. A hearing on the application was held on June 16, 2003, at which CCC's Executive Vice President presided. CCC was informed at the hearing through the testimony of various witnesses that Pacific Northwest had apparently terminated operations and was unlikely to operate in the future. Ralph Burton, President and CEO of Amalgamated, testified (AMAL-SM-61 at 2; Tri. Oct. 4 at 146-147):

> "…a crop has not been grown and the factory has not processed sugar beets for at least two years…."

Perry Meuleman, President of the Idaho Sugarbeet Growers Association, testified (AMAL-SM-61 at 3):

> It is my understanding that Pacific Northwest has not planted sugar beets for at least two years – and 2004 is suspect. They do not control the factory assets. In fact, the owner of the factory assets has recently agreed to sell three of their beet pilers to the Amalgamated Sugar Company. Pilers are a critical component of a successful beet operation...

James Horvath, President and CEO of American Crystal testified (AMAL-SM-61 at 5):

> Pacific Northwest has not processed sugarbeets of the 2001 and 2002 crops, and it is our understanding that no sugar beets have been planted for the 2003 crop. Therefore, it is a real question as to whether it will be able to continue in operation in 2003…

The Sugarbeet Processors group, which included virtually every sugar beet processor other than Pacific Northwest, submitted virtually identical testimony (AMAL-SM-61 at 7). Finally, the Sugar Beet Growers group informed the CCC that based on Pacific Northwest's unsuccessful history, that fact that it was saddled with old mismatched equipment, its failure to process sugar beets during the 2001 and 2002 crop years, and that all but a minimal amount of PNSC's allocation had to be reallocated to other processors (AMAL-SM-61-at 23-24).

> …there has to be a real question in any reasonable person's mind as to whether this company can ever rise from the ashes to become an operational processor again….

25. The all day meeting held in Spokane, Washington in July 2002 marked the end of any meaningful involvement by Pacific Northwest with the sugar beet processing plant it had sold to Central Leasing. From that point on, all arrangements, deals and overtures respecting the beet sugar marketing allocation CCC had conferred upon Pacific

Northwest were undertaken by Scott Lybbert for his company Washington Sugar, with some assistance from Central Leasing. Neither entity had ever been recognized by CCC as having any independent right or entitlement to the allocation. Although various industry members were interested in acquiring the allocation, they appear to have been either misled or kept in the dark about the status of those who would sell it. There were also different objectives being pursued by Lybbert/Washington Sugar and Central Leasing. When Joseph Talley, Vice-President of Finance and Chief Financial Officer of American Crystal met with Scott Lybert, and Allan Lambrecht on January 30, 2003, Mr. Talley prepared notes on their conversation (Tr. Sept. 21 at 170; ASCS-26). Mr. Talley's notes and his confirming testimony show that he was advised that Washington Sugar was 100 per cent owned by Scott Lybbert and that others was an agreement with USDA that Washington Sugar had the rights to whatever marketing allocation Pacific Northwest had (Tr. Sept. 21 at 219-220, ASCS-26 at 4). There were stumbling blocks to reviving operations at the Moses Lake plant that Mr. Talley duly noted. Growers were still owed $8 million and their lawsuit against USDA (CCC Sugar) and Pacific Northwest was on appeal. USDA had hinted that if no crop was planted by May, the 15,000 tons of 2003 allocation would go away, and for the future it seemed like Pacific Northwest's allocation would go away permanently (Tr. Sept 32 at 220, ASCS-26 at 4). As for participation by Central Leasing:

> "Pacific Rim Ethanol is working with Central Leasing to convert the plant to an ethanol facility. Central Leasing would contribute the plant assets as equity to the ethanol company. Project would process barley and wheat into ethanol, and also to vital wheat gluten.
> ... Central Leasing does not appear to be willing to part with the plant today. Scott L. doesn't know how long this idea will live on.

> … Does Central Leasing understand that if the marketing allocation goes away the plant has no value as a sugar processing plant? (ASCS-26 at 4-5)

Mr. Talley's notes and testimony also disclosed that Central Leasing offered to lease the plant to Washington Sugar but it would not include the assets that Pacific Rim might want (boilers, gas system, etc…value of $10 million) (Tr. Sept. 21 at 220-2, ASCS-26 at 5).

26. Central Leasing brought Pacific Northwest's plant and equipment but never sought to acquire the allocation and was unwilling to directly use the plant for sugar processing. Scott Lybbert was a former director of Pacific Northwest who was interested in reviving the plant's operations through his company, Washington Sugar, but CCC so conditioned the transfer of the allocation to Washington Sugar that he was unable to go forward. There then came a time when Mr. Lybbert and Central Leasing decided to recoup financial losses. Both would share in the payment American Crystal was offering for a successful transfer of the allocation to cover American Crystal's processing operations at plants located outside the State of Washington and not at Moses Lake.

27. American Crystal's proposal was described in a July 3, 2003, fax by Joseph Talley of American Crystal to Barbara Fesco, a CCC sugar program official (A.R.add at 89-90):

> "First, our understanding is that Pacific Northwest Sugar Company (PSNC) currently holds an allocation to sell sugar. The allocation was initially established as a result of the Farm Security and Rural Investment Act of 2002 (Farm Bill). Since that time Pacific Northwest Sugar Company's allocation has not been permanently transferred from them nor terminated, but it has been reassigned (with such reassignment being valid only through the current fiscal year).
>
> American Crystal Sugar Company (ACSC) is currently contemplating a transaction, which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). <u>Since PNSC has already transferred</u>

> <u>ownership of its former processing facility to another party (Central Leasing LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets</u>. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). <u>The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC to ACSC.</u>
>
> ACSC does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction (emphasis added).

28. On July 30, 2003, American Crystal's President James J. Horvath, and Scott Lybbert for Washington Sugar; sent CCC a fax that formally notified CCC of American Crystal's intent to "acquire ownership or control of the assets (including the rights to the production history and marketing allocations) associated with the Moses Lake Washington sugar beet process factory." They requested, "USDA's preliminary approval of these transactions as they related to the transfer of marketing allocation currently held by the Pacific Northwest Sugar Company, LLC to ACSC." CCC was again told that American Crystal had no intention of ever operating the Moses Lake facility (A.R. add at 92-93)

29. CCC replied on August 28, 2003 (A.R. add at 234-235):

> We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing <u>some</u> of the sugar marking equipment used by Pacific Northwest (Emphasis added).

In contrast to previous responses to Washington Sugar and Amalgamated that CCC would require the purchase of virtually all of Pacific Northwest's assets, including the factory, American Crystal was advised that the transfer of Pacific Northwest's allocations would be effectuated upon receipt of documentation showing "that American Crystal has purchased <u>some</u> equipment (including the diffuser and the molasses desugaring equipment) from Central Leasing that Pacific Northwest used to make sugar" (emphasis added). (AMAL-SM-67; A.R. add at 234-235).

30. The letter from CCC of August 28, 2003 (A.R. add at 234-235), advised Mr. Lybbert of Washington Sugar and Mr. Horvath of American Crystal, that CCC would transfer Pacific Northwest's marketing allocation to American Crystal if provided with documentation showing:

- …all of the assets of Pacific Northwest have been purchased by American Crystal, that American Crystal has secured the rights to make sugar at the Pacific Northwest/Central Leasing facility, and that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment from Central Leasing that Pacific Northwest used to make sugar.
- Certification from Pacific Northwest that it has not marketed any sugar under its 2002 – crop sugar marketing allocation, if American Crystal wishes CCC to transfer the Pacific Northwest's 2002 – croup allocation to American Crystal.
- American Crystal and Pacific Northwest must each agree in writing to waive their respective rights, if any, to bring an action against the Secretary of Agriculture, USDA and any agency thereof including CCC, and any official of the Department, in the event USDA is required by a Court to reverse the transfer of the allocation to American Crystal as a result of legal action by a third party challenging the original transfer from Pacific Northwest to American Crystal.
- American Crystal must agree in writing to drop Pacific Northwest's appeal of CCC's adverse decision regarding its request for an increased allocation because Pacific Northwest suffered a quality loss on stored beets and built a desugaring facility.

31. On September 8, 2003, American Crystal advised CCC that through its wholly-owned subsidiary, Crab Creek Sugar Company, it acquired that day, "…ownership or control of all of the assets (including the rights to the production history and the marketing allocations) associated with the production of sugar at the Moses Lake, Washington sugarbeet processing factory…" (AMAL-SM-70 at 1). The letter went on to positively address the requirements for the transfer CCC specified in its August 28th letter"(A.R.

add at 243-244). A bill of Sale was attached (A.R. add at 245-247). However, an "Appendix A" referred to in the Bill of Sale from Central Leasing was not part of the materials produced in evidence and there is nothing indicating that the diffuser and molasses desugaring equipment was actually acquired by American Crystal (A.R. add at 248-249, ASCS 67 at 64-65).

32. On September 16, 2003, CCC, wrote to Scott Lybbert as Vice-President Finance and Marketing, Pacific Northwest Sugar Company, to inform that effective immediately, it was transferring Pacific Northwest's marketing allocation to American Crystal (A.R. add at 250).

33. American paid $6.8 million to acquire Pacific Northwest's marketing allocation. The following payments were made from an escrow account (ASCS 67 at 31-36, Tr. Sept. 21 at 137-139):

Central Leasing	$2,125,000.00
Scott Lybbert	$ 300,000.00
Pacific Northwest	$3,025,000.00

The $300,000.00 paid from the escrow account to Scott Lybbert was designed to be an initial payment on a "non-complete" agreement with the balance to be paid him over a so-called "earn out" period of time, for $1.65 million total going to him (Tr. Sept. 21 at 138-139).

34. After acquiring the allocation, American Crystal realized it could not fully use all of it (Tr. Sept. 21 at 155-156). American Crystal contacted other beet sugar processors and leased them portions of American Crystal's allocation for undisclosed sums (Tr. Sept. 21 at 159-166; ASCS 85-94). The other processors who leased portions of American Crystal's marketing allocation were Michigan Sugar and Minn-Dak and because of

confidentiality agreements American Crystal has with each of them, I did not compel American Crystal to reveal the amounts it has received under the lease arrangements (Tr. Oct. 5 at 121-124).

35. On July 1, 2004, CCC added a regulatory provision dealing with permanently terminated sugar processors operations (7C.F.R.§1435.308(b)):

> ...CCC will permanently eliminate the processor's remaining allocation and distribute it to all the other processors on a pro-rata basis when the processor:
>
> (1) Has been dissolved,
> (2) Has been liquidated in a bankruptcy proceeding, or
> (3) Has permanently terminated operations by:
> (i) Not processing sugarcane or sugar beets for 2 consecutive years, or
> (ii) Notifying CCC that processor has permanently terminated operations.

Conclusions of Law

1. The Act has conferred subject matter jurisdiction upon Administrative Law Judges to hear and decide appeals of this kind.

2. Petitioner has stated a legally cognizable claim.

3. The doctrine of judicial estoppel is unwarranted and inappropriate in this case.

4. The Reconsidered Determination by the Executive Vice President of the Commodity Credit Corporation that implemented the permanent transfer of Pacific Northwest's marketing allocation exclusively to American Crystal instead of distributing it pro-rata to all beet sugar processors, is unsupported by the evidence of record and is inconsistent with the Act's requirements.

Discussion

The first three conclusions deal with procedural issues that are discussed in the Order of June 23, 2004, attached as Addendum 2. The discussion that follows is concerned with the merits of the appeal that is the subject of the fourth conclusion.

Chief Judge Marc R. Hillson recently reviewed the history underlying the 2002 Farm Bill:

> The federal government regulated sugar beets, along with other commodities, for many years. The degree of regulation has varied widely over time, based on a variety of circumstances. Thus, in 1996, Congress enacted the Agricultural Marketing Transition Act, P.L. 104-127, also known as the "Freedom to Farm Act"; which removed the previous sugar marketing allotments that had limited the sale of beet sugar, and other commodities. Then, in 2002, Congress largely reversed itself by passing the Farm Security and Rural Investment Act, 7U.S.C.§ 1359 et seq. This Act required the Secretary to once again establish allotments for the processing of beet sugar, based on the average weighted quantity of beet sugar produced by a given processor during 1998 to 2000 crop years …. *In re: Southern Minnesota Beet Sugar Cooperative*, SMA Docket No. 03-0001, slip opinion, July 21, 2004, at 3.

The Act as amended in 2002, requires the Secretary of Agriculture to estimate the amount of sugar to be consumed in the United States each crop year from 2002 through 2007, and after estimating the amount of permissible imports and desirable carryover stocks of sugar, to establish allotments for the crop year that divides the marketable balance between domestic processors of sugar beets and sugarcane (7U.S.C.§1359bb). Sugar beet processors receive allocations of their crop year allotment based on their production histories during the 1998 to 2000 crop years (7U.S.C.§1359(dd (b)(2)). Any increase in a given processor's allocation requires an offsetting decrease in the allocations of other processors so that the overall allotment remains unchanged for what industry members call "a zero sum game."

The pertinent legislative history of the 2002 amendatory provisions that restored beet sugar allotments, consists of short, introductory remarks by their cosponsor, Senator Conrad of North Dakota (AMAL-SM-83; Vol.148, No. 10 of the Congressional Record, Feb. 8, 2002 at S 513-S 514). Senator Conrad stated that the provisions reflected producers' efforts to forge a consensus on a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. After reviewing the methodology for establishing future allotments, Senator Conrad stated that:

> ...the formula allows for adjustments in the reallocation of beet sugar allotments to account for such industry events as the permanent termination of operations by a processor, the sale of a processor's assets to another processor, the entry of a new processor, and so on.
>
> Taken together, these provisions offer the predictability, fairness, and transparency we all agree is much needed in the sugar beet industry.

These stated intentions that reallocations be event driven and that actions by the Secretary should be predictable, fair and transparent were not adequately met by CCC's actions in this case. Moreover, CCC's actions conflict with the plain and straightforward language of the Act.

CCC, acting for the Secretary, is to transfer the allocation of allotment held by a sugar beet processor to another processor when the buying processor has either bought the selling processor itself or "all of the assets of the processor."

Other than when such a sale has taken place, the allocation of a processor whose operations have permanently terminated is to be eliminated by CCC and an equivalent allocation is to be made to the other beet sugar processors on pro rata basis *See* 7 U.S.C.§1359dd (b)(2)(E) and (F).

When a processor requests the transfer of another processor's allocation of allotments, CCC is required to make three determinations before granting the transfer request.

1. Both parties to the transfer must be processors.

Unquestionably, American Crystal is a sugar beet processor. But Pacific Northwest did not fit the regulatory definition at the time of the transfer request. The following definition was published on August 26, 2002 (67 FR 54928; 7 C.F.R.§1435.2):

> Sugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.
>
> Earlier, 7C.F.R.§1435.2 states:
>
> The definitions, set forth in this section are applicable for all purposes of program administration.

Despite this admonition of the regulation, a failing processor needs time to wind down operations before selling its company or all of its assets. Strict application of the definition in those circumstances would thwart the Act's objective that CCC is to transfer the marketing allocation of a processor that may be failing but has not as yet been dissolved, liquidated in bankruptcy, or has not otherwise permanently terminated its operations. This conflict between an objective of the Act and an implementing regulation requires an exception to the regulation to allow the transfer of a marketing allocation held by a failing but not totally failed, processor as the Act intends. Therefore, even though Pacific Northwest no longer had either a viable processing facility or a supply of current beets, it still was entitled to be treated as a "processor" for the purposes of administering subparagraph (F) of section 359d(b)(2) of the Act.

2. **<u>The seller of the allocation has not been dissolved, liquidated in a bankruptcy proceeding, or otherwise has not permanently terminated operations (other</u>**

<u>than in conjunction with a sale or other disposition of the processor or the assets of the processor).</u>

CCC and American Crystal both argue that Pacific Northwest had not permanently terminated operations before selling its allocation to American Crystal.

American Crystal urges that even though Pacific Northwest previously sold its plant and equipment to Central Leasing, had lost the lease and its option to buy back the plant for failure to pay rent, and had not contracted for a supply of sugar beets for three years, it still had not permanently terminated operations at the time of sale. American Crystal asserts three bases for its argument. First, it argues that the attempts by other industry members to acquire the allocation indicates the industry did not believe a transfer was foreclosed because Pacific Northwest ‘s operation had permanently terminated. Second, a temporary shut-down of operations is not the same thing as a permanent termination and nothing about Pacific Northwest's conduct was consistent with a company that had given up (American Crystal's brief, at 23). Third, it joins with CCC in arguing that a determination of whether a permanent termination of operations has taken place is a wholly discretionary matter left to CCC's judgment.

The fact that others sought the transfer of Pacific Northwest's marketing allocation is of no legal consequence. They made incorrect assumptions based on misleading and incomplete information (*See* Finding of Fact 24).

The argument that the plant's shut-down was only temporary and Pacific Northwest had not given up hope is completely refuted by the evidence of record. Hope was definitely gone. American Crystal's own witness, Allan Lambrecht, testified that Pacific Northwest's Board of Directors in a July 2 "summit meeting," instructed all in attendance that "they were really done spending money" and would incur no financial obligations to revive sugar beet processing at the Moses Lake plant (*See* Findings of Fact 15 and 16).

The record evidence makes it abundantly clear that at the time American Crystal undertook to buy the marketing allocation, Pacific Northwest had long ceased to have the ability to process sugar beets. Its factory and equipment had been sold more than two years earlier to Central Leasing. Although when it sold the plant and equipment, it obtained a lease with a purchase option, Pacific Northwest failed to pay the agreed rent and any right to process sugar beets at the plant ended in March 2002. Sugar beet processing operations ceased in Febraury 2001 and never resumed. No sugar beet crop was planted for processing by Pacific Northwest in 2001, 2002, or 2003. On July 23, 2001, the State of Washington administratively dissolved Pacific Northwest for failure to file its requisite annual license renewal application. At the day-long "summit meeting", held in July 2002, the Directors of Pacific Northwest told their lawyers their financial advisors and everyone else in attendance, they would no longer pay anyone for advice and assistance on how to revive the plant's operations. In no uncertain terms, the Board of Directors told everyone that Pacific Northwest would never again attempt to operate the plant to process sugarbeets (Tr. Sept 22, at 119-132).

American Crystal's third and final argument, and CCC's only one, is that even in light of these facts, a beet sugar processor cannot be said to have permanently terminated its operations until CCC says so. However, the Act requires CCC to make the determination when the facts are such that there has been a permanent termination of operations other than in conjunction with a sale of the processor or all of the processor's assets. Senator Conrad's statement of Feb 8, 2002, explained that the reallocation of all allotments are to be based on industry events. When such events occur, action by CCC is mandated by the plain language of the Act and CCC's discretion in making reallocations is circumscribed.

On July 1, 2004, subsequent to granting this transfer, CCC amended its regulations to add a provision respecting permanent termination of operations 7C.F.R.§1435.308(b) was amended to read (69 Fed. Reg. 39811, 39813 (July 1, 2004)):

> ... CCC will permanently eliminate the processor's remaining allocation and distribute it to all other processors on a pro-rate basis when the processor:
> (1) Has been dissolved,
> (2) Has been liquidated in a bankruptcy proceeding, or
> (3) Has permanently terminated operations by:
> (i) Not processing sugarcane or sugarbeets for 2 consecutive years, or
> (ii) Notify CCC that processor has permanently terminated operations.

But even if this regulation had been in effect, the parties do not agree on the meaning of "2 consecutive years". American Crystal and CCC argue that the regulation means two consecutive crop years and Pacific Northwest cannot be said to have ceased operations for that long in that the 2002-2003 crop year didn't end on September 30, 2003. Conversely, Petitioner argues that since "crop year" was not the term used in this provision while it was plainly stated elsewhere in the Act and the regulations, the word "year" should be given its ordinary meaning denoting a twelve-month time period. Under this interpretation, because Pacific Northwest ceased operations in February of 2001, two consecutive years had indeed passed by the time the transfer was approved on September 16, 2003. I agree with Petitioner that the specific use of "crop year" in other sections of the sugar regulations as well as within subsection 1435.308 itself while not used in subsection 1435.308(b)(i), is subject to the rule of construction that the disparity is intentional and purposeful. *See Barnhardt v. Sigmon Coal, Co., Inc., et al*, 534 U.S.C. 438, 452 (2002); and R*ussello v. U.S.*, 464 U.S.16, 23 (1983). Petitioner next urges that we look to the new regulation for guidance. My problem with this approach is that the new regulation fails to clarify why two years of inactivity results in a presumption that a termination of operations is permanent. The amended regulation was issued as a final rule without notice and comment. It may well be that CCC issued the regulation for purposes of administrative convenience rather than as a reflection of industry practices. But there really is no need to apply the regulation retroactively.

Pacific Northwest's decision to stay completely shut down and no longer be a processor seeking to reopen, was clearly established by the pronouncement of its Board of Directors at the 'summit meeting" in July 2002.

The evidence of record in the proceeding clearly demonstrates that Pacific Northwest permanently terminated operations prior to and not due to selling its rights to its marketing allocation.

3. <u>There must be a sale of a processor of beet sugar or all of the assets of the processor</u>.

The Act is very specific. There must be a sale of the processor, or all of the assets of the processor for its allocation to be transferred.

Pacific Northwest itself was not sold. The assets that it still owned at the time of the sale, consisted of its right to the allocation and what a spokesman for American Crystal described to CCC as "immaterial assets". These immaterial assets were "goodwill", production rights, production history and books and records listing growers and customers. Without a plant, equipment or sugar beets, Pacific Northwest's production rights had become inoperative. The production history that had been used to obtain Pacific Northwest's marketing allocation had no further value. No purchasing processor needed a list of growers who hadn't planted sugar beets for over three years. Nor was there any real value in learning who had once bought sugar from Pacific Northwest. The obvious concern of a processor acquiring additional marketing allocation is the ability to meet its own customer demands and not how it might increase them.

American Crystal points out in its brief (American Crystal brief at 16) that it also bought equipment from Central Leasing to meet conditions imposed by CCC for approving the transfer. Inasmuch as the equipment was once owned by Pacific Northwest, American Crystal seems to suggest that this secondhand acquisition helped it meet the Act's requirement that a qualifying sale include "all of the assets of the processor". However, CCC in its brief (CCC brief at 11), clarifies that it required American Crystal to acquire these other assets because of its concern that if others acquired control of them they might in the future request allocation as a new entrant or because they had acquired and reopened the factory for sugar beet production. Such a claim for allocation could be made under 7 U.S.C.§1359dd(b)(2)(H), and CCC feared there could be a double counting of Pacific Northwest's former allocation.

In sum, the only assets American Crystal bought that were still owned by Pacific Northwest were its rights to the marketing allocation and what its spokesman aptly described to CCC as "some other generally immaterial assets".

The Act does not treat a marketing allocation as an asset that a processor can simply buy and sell. CCC can change a processor's allocation if it sells a factory or if a new sugar beet processor enters into the industry, reopens a factory, or acquires an operating factory with a production history. *See* 7 U.S.C.§§1359dd(b)(2)(G), (H) and (I). Allocations can be changed during a crop year (AMAL-SM-78). CCC is empowered by the Act to transfer or temporarily reassign part of a processor's allocation when there is a shortfall in the processor's production that another processor can make up 7 U.S.C.§1359 ee. A sugar beet processor's allocation is further subject to the requirement that allocations "be shared among producers served by the processors in a fair and equitable manner" 7 U.S.C.§1359 ff. When a sugar beet processor closes a factory, the growers who were delivering beets to the closed factory can elect to deliver their crops to another processor and request CCC to transfer allocation commensurate with the growers' production history to their new processor 7 U.S.C.§1435.308(a). The Secretary of Agriculture is not required to compensate a processor who loses allocation in any of these circumstances or first seek the processor's permission. A marketing allocation is not, therefore, an asset that can be transferred without the concurrence of USDA. For there to be a "sale of all assets", more than the marketing allocation itself needs to be conveyed.

CCC apparently recognized this fact when prior applications to transfer Pacific Northwest's allocation were received from others. Scott Lybbert, the sole owner of Washington Sugar, the would-be successor to Pacific Northwest, sought to obtain it and was advised he would have to provide a "…bill of sale showing that virtually all of the assets of Pacific Northwest including the factory, have been acquired by the Washington Sugar Company" (Finding of Fact 20 and A.R. add at 4). CCC explains that as a new entrant the requirements for Washington Sugar were different. But they were also set differently for petitioner, Amalgamated, an established processor, when it too was advised that the transfer would only be authorized "…if Amalgamated purchases virtually all of the assets of PNW including the factory… (Finding of Fact 21; A.R. add at 6; Tr. Oct.4 at 134-137). These communications took place in the fall of 2002. What transpired in the year that followed that altered CCC's interpretation of the controlling provisions is unexplained.

In any event, CCC did impose different requirements for its approval of the allocation's transfer to American Crystal.

The fact that it imposed any conditions at all for its approval of the transfer is inconsistent with the argument that the language of the Act left it no choice but to give its approval.

Both CCC and American Crystal assert that subparagraph (F) required the allocation's transfer just because it had not been previously distributed to other sugar beet processors under subparagraph (E). If subparagraph (F) is read this simplistically, things of no real worth, such as pencils and paper clips could be the only assets sold with a marketing allocation, and CCC would have to approve the transfer. This would be an absurd result. CCC must evaluate the transfer and place such conditions on its approval as may be needed to effectuate the objectives of the Act. CCC did find it necessary to condition its approval of the transfer.

Inasmuch as the plant and processing equipment was owned by Central Leasing and not by Pacific Northwest, "...CCC wanted to insure that if it transferred the Pacific Northwest allocation to American Crystal, another entity would not come along and, on the basis of other assets relating to the beet sugar processing operation of Pacific Northwest, apply for an allocation" (CCC's brief, at 11). CCC did so by requiring American Crystal to acquire equipment no longer owned by Pacific Northwest. CCC, therefore, did condition its approval even though it now argues that subparagraph (F) left it without discretion to withhold approval.

The Reconsidered Determination by the Executive Vice President of CCC, that is the subject of this appeal, also recognized that for a transfer to be approved under subparagraph (F) the sale of the processor's assets must be the cause of the processor's permanent termination of operations. For an act to be the proximate cause of a consequence, as is so often stated in Tort law, the consequence would not have occurred <u>but for</u> the act.

Here, it cannot be said <u>but for</u> the sale of the assets still owned by Pacific Northwest when its allocation was transferred to American Crystal, Pacific Northwest would still have been able to process sugar beets. "Good will", production history, inoperative production rights, and books and record of past dealings would not have been enough. Pacific Northwest needed ownership or control of a factory and equipment to once again process sugar beets into sugar. It sold or lost those assets long before this transaction. The permanent termination of its operations was not proximately caused by its sale of these immaterial assets and they were not sufficient to meet the statutory requirements for a transfer to be approved.

Additional Comments, Findings and Conclusions

The language of the Act, as supported by underlying legislative history, places restrictions on the sale of sugar beet marketing allocations by one processor to another.

CCC is to transfer the allocations of allotments by a processor of beet sugar to another processor when the buying processor has either bought the selling processor itself or "all of the assets of the processor".

Other than when such a sale has taken place, the allocation of a processor whose operations have permanently terminated is to be eliminated by CCC, and a pro rata distribution of an equivalent allocation is to be made by CCC to the other beet sugar processors.
See 7 U.S.C.§1359dd(b)(2)(E) and (F.

The record in this case makes it abundantly clear that when the sale to American Crystal took place, Pacific Northwest was no longer able to ever again process beets into sugar. It had neither the physical assets or the will. Actually, under the laws of the State of Washington it was dissolved as an entity although it was later reactivated for the sole purpose of signing the transfer papers.

Setting aside for a moment its sale of its plant and the subsequent loss of its lease and the fact it had no sugar beets under contract for processing, the Board of Directors of Pacific

Northwest made it clear that it would never again attempt to operate the plant to process sugar beets (Tr Sept 22, at 119-132).

That was a signal event. Despite the fact that others may still have had hopes to restart operations, Pacific Northwest did not. Central Leasing, the plant's owner, was actively attempting to convert the plant for ethanol production (Tr. Sept. 22, at 133) and sold off equipment needed to operate it for sugar beet processing (Tr. Oct 5, at 63-65).

One man, Scott Lybbert, a director of Pacific Northwest, did want to resume operations at the plant, but for his own company, Washington Sugar, and not for Pacific Northwest. To do so, Washington Sugar had to obtain needed financing, the use of the plant and Pacific Northwest's marketing allocation. It was unable to obtain any of them. Its overtures to CCC seeking the transfer of the marketing allocation were thwarted by CCC's requirement that Washington Sugar had to first acquire the factory. By then, Central Leasing had other potential uses for the plant and Washington Sugar could not meet this requirement. The financing source Mr. Lybbert had turned to for needed capital to start the plant, was American Crystal. But American Crystal, upon investigation of the situation at Moses Lake decided that financing the revival of beet sugar processing operation at the plant would be a bad investment. Instead, American Crystal, as was the case with many other industry members, coveted Pacific Northwest's marketing allocation to support processing operations at plants outside of Washington State. When the deal with American Crystal was made, two parties besides Pacific Northwest asserted claims to the sale proceeds. Central Leasing owned the Moses Lake plant and any remaining equipment that it had not by then sold to others. The equipment may still have included the diffuser and molasses desugaring equipment that CCC required American Crystal to acquire as a condition for its approval. But they were not listed on the Bill of Sale.

Scott Lybbert, the alter ego and sole owner of Washington Sugar, also claimed a share of the proceeds. He had the energy and drive to put the deal through, but owned none of the assets to be conveyed. He never acquired the marketing allocation, the use of the plant, or the needed capital to reopen it.

Pacific Northwest the essential "processor of beet sugar" owned what American Crystal's spokesman described to CCC as "immaterial assets." Its possession of rights to a marketing allocation existed only because CCC had failed to take action under 7 U.S.C.§1359dd(b)(2)(E), to eliminate it even though Pacific Northwest had by then permanently terminated operations. I have been unable to discern any essential purpose of the Act that was served by CCC's approval of the transfer. The approval was not given to assure that local growers would still have a processing outlet for their sugar beets. It was not given in order that a new processor would have entry to this industry that largely forecloses newcomers under government regulations. It was given to increase the marketing allocation of American Crystal, that already had the distinction of being the largest holder of sugar beet marketing allocation in America (AMAL-SM-73 at 2).

Moreover, the conditions CCC set for the transfer primarily show concern for administrative convenience. The parties waived rights to bring an action against USDA, CCC, and any Departmental Official in the event a third party successfully challenged the transfer in court; agreed to drop Pacific Northwest's appeal of CCC's earlier adverse decision against it; and furnished settlement documents showing that American Crystal took actions to preclude the need for CCC to entertain any future applications by new entrants or others who might acquire or reopen the factory as a sugar beet processor, by securing the rights to make sugar at the facility and purchasing some equipment (including the diffuser and the molasses desugaring equipment) from Central Leasing that Pacific Northwest has used to make sugar (A.R. at 234-235).

The Act, as amended, intended that CCC take actions responsive to events. CCC through its day-to-day operations, knew that Pacific Northwest had ceased all operations, had sold its plant, and had not had a beet crop planted for processing in 2001, 2002, or 2003. In a public hearing held on June 16, 2003, the Executive Vice President of CCC, whose Reconsidered Determination is the subject of this appeal, was informed by virtually every beet sugar organization in the industry, including American Crystal, that Pacific Northwest had terminated operations and was unlikely to operate in the future (AMAL-SM-61 at 1-27).

Moreover, when American Crystal described the proposed transfer to CCC in July 2003, it stated (A.R. add. At 89-90):

> American Crystal's Sugar Company (ACSC) is currently contemplating a transaction, which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing, LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC, to ACSC.
>
> ASCS does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction.

For CCC to say in light of all this information, as it did in the Reconsidered Determination that Pacific Northwest was "terminated in conjunction with the sale of its assets" is untenable.

Moreover, CCC had duties as a fact finder. The facts before it appear sufficient for it to have declared Pacific Northwest to have permanently terminated operations. At very least, those facts were sufficient to require CCC to resolve gaps in its knowledge by conducting fact finding. By not taking the steps necessary to make the determination, CCC has encouraged what appears to be a sham transaction contrary to objectives of the Act. This omission taken together with inconsistent treatment of applicants who had earlier sought the allocation's transfer, is conduct of the type the APA instructs reviewers to set aside for being "arbitrary, capricious, an abuse of discretion…" (5 U.S.C.§706(2)(A)).

CCC employed inconsistent standards for the transfer of the allocation that it has not fully explained. American Crystal was only required to acquire some of Pacific Northwest's assets. But previously, both Washington Sugar and Amalgamated had been advised they would need to acquire virtually all of Pacific Northwest's assets including the factory.

CCC points out that Washington Sugar would have been a new entrant to the industry and for that reason different rules would apply. But Amalgamated's status was the same as American Crystal's and yet Amalgamated was required to meet a more stringent standard.

CCC also argues that the applicable statutory provisions are ambiguous and deference should be given to its interpretation. It is our policy to give some deference to interpretations by agency officials, who administer a statute's provisions. *See In re: Southern Minnesota Beet Sugar Cooperative, supra*, slip opinion, at 17. But since my function is take the evidence to determine whether CCC's actions were in accord with the law, the deference that may be accorded its actions is necessarily limited. Here, the way the provisions were interpreted and applied was in conflict with the language and objectives of the Act.

For these reasons, the Reconsidered Determination by the Executive Vice President of CCC that is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute, in future crop years, the amount of marketing allocation that was transferred to American Crystal from Pacific Northwest to all beet sugar processors on a pro rata basis in accordance with 7U.S.C.§1359dd(b)(2)(E) of the Act.

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties and each of the Intervenors, and shall become final and effective 25 days after the Hearing Clerk has served the decision upon the Executive Vice President, unless a party or an Intervenor files an appeal petition within 20 days after service of this decision.

Done in Washington, DC
This 7th day of February 2005

____
VICTOR W. PALMER
Administrative Law Judge

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ADDENDUM 1

The Rules of Practice

ADDENDUM 2

Order Denying Motion to Dismiss and
Motion for Summary Judgment

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	SMA Docket No. 04-0003
	)	
Amalgamated Sugar Company, L.L.C	)	
	)	**Order Denying Motions to Dismiss**
Petitioner	)	**and Motion For Summary Judgment**

Background

The parties in this case are, on one side, the Petitioner, Amalgamated Sugar Company, L.L.C. (Amalgamated), and two supporting Intervenors, Southern Minnesota Beet Sugar Cooperative L.L.C. (SMBSC), and Wyoming Sugar Company (Wyoming). On the other side are the Commodity Credit Corporation (CCC) and its supporting Intervenor, American Crystal Sugar Company (American Crystal).

Amalgamated filed a Petition on December 4, 2003, to challenge the action taken by CCC in a decision issued on November 14, 2003, by James R. Little, CCC's Executive Vice President. In the decision, Mr. Little responded to Amalgamated's Request for Reconsideration of CCC's decision of September 16, 2003, transferring the marketing allocation of Pacific Northwest Sugar Company (Pacific Northwest or PNW) to American Crystal. He stated that "after careful reconsideration, I cannot find justification to overturn CCC's decision." He justified his decision as in accordance with section 359d(b)(2)(F) and section 359d(b)(2)(E) of the Farm Security and Rural Investment Act of 2002 (the Act). The two subparagraphs read as follows:

> (F) SALE OF ALL ASSETS OF A PROCESSOR TO ANOTHER PROCESSOR – If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E)

> (E) PERMANENT TERMINATION OF OPERATIONS OF A PROCESSOR- If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall -
>
> (i) eliminate the allocation of the processor provided under this section; and
>
> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

Mr. Little's decision went on to state:

> CCC determined that PNW was certainly not dissolved nor liquidated in a bankruptcy proceeding, but instead permanently terminated in conjunction with the sale of its assets. The act of permanent termination was simultaneous with the act of closing the deal on the sale of PNW's assets. The former event did not precede the latter. If CCC had determined PNW was permanently terminated for reasons other than in conjunction with the sale of its assets, paragraph E would have dictated the outcome. While the statute does not define what it means to be 'permanently terminated', PNW was still recognized by CCC as a processor at the time of the sale, September 8, 2003.

As the beneficiary of CCC's decision, American Crystal has intervened to protect itself from losing the transferred Pacific Northwest marketing allocation. Petitioner and its two supporting Intervenors seek to eventually benefit from the overturn of the CCC decision as beet sugar processors who would share in the distribution of the marketing allocation under subparagraph E which should control if paragraph F does not.

Amalgamated filed its petition initiating this proceeding on December 4, 2003. CCC filed an Answer and a Motion to Dismiss on December 23, 2003. American Crystal filed a Notice of Intervention, Answer and Motion to Dismiss on January 14, 2004. Amalgamated filed a brief opposing the Motion to Dismiss on January 20, 2004. Both SMBSC and Wyoming filed Notices of Intervention on January 20, 2004. On March 2, 2004, Judge Jill S. Clifton who was then assigned to this case, held a telephone conference and set a schedule for the parties to follow in respect to a Motion for Summary Judgment American Crystal indicated it would file. On March 25, 2004, American Crystal filed a Memorandum in Support of its Motion to Dismiss the Petition or in the Alternative for Summary Judgment. Also filed at that time, was an affidavit attesting to facts by American Crystal's Counsel, Steven Z. Kaplan. SMBSC filed its response to the Motions on May 3, 2004. American Crystal filed a reply to SMBSC's response on May 21, 2004.

Upon consideration of these motions and the written arguments of the parties, I am denying the Motions to Dismiss and the Motion for Summary Judgment.

Motions to Dismiss

5. Subject Matter Jurisdiction

CCC and American Crystal assert that I do not have subject matter jurisdiction to hear and decide the petition under section 359i of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. § 359 i). The section states:

> An appeal may be taken to the Secretary from any decision under section 359d establishing allocations of marketing allotments, or under section 359 f, by any person adversely affected by reason of any such decision. (Emphasis supplied)

CCC and American Crystal contend that the words "establishing allocations" limits the appeal process to those decisions under 359 d(b)(2)(A) that "make allocations" of beet sugar each year after allotments are determined, and do not allow appeals of decisions respecting a "transfer" of an allocation under 359d(b)(2)(F).

However, there is nothing in the Act or CCC's regulations that so define "establishing", or in any way restrict appeals from "any decision under section 359 d" to only those under 359d (b)(2)(A).

> The word 'any' is generally used in the sense of 'all' or 'every' and the meaning is most comprehensive. Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 115 (3rd

Cir. 1992).

Moreover, CCC's own regulations specifically direct, at 7 C.F.R. §1435.319 (b), that:

> For issues arising under §§ 359d, 359f (b) and (c), and 359 (i)... a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal... with the Hearing Clerk.

Whereas the regulation expressly limits appeals arising under section 359 f to paragraphs (b) and (c), it places no limitation upon appeals under section 359 d. It is a basic rule of construction that when a limitation is expressed in one part of a statute or regulation, no further limitation will be implied. *See e.g.*, Russello v. United States, 464 U.S. 16, 23 (1983).

Furthermore, the word "establish" that is undefined in both the statute and the implementing regulations, must be given its normal and ordinary meaning. Richards v. United States, 369 U.S. 1, 9 (1962); and Shook v. District of Columbia Financial Responsibility and Management Assistance Authority, 964 F. Supp. 416, 428 (D.D.C. 1997).

Both Webster's Third New International Dictionary (1986) and the Oxford English Dictionary, Second Edition, Vol V, p 404, state that "establish" is a word that is used to denote the legal settlement of rights or privileges.

Webster lists as a meaning of "establish":

"to settle (as an estate) upon someone; secure (as rights) to a group."

So too, the Oxford English Dictionary lists as a principal meaning of "establish":

"to secure or settle (property, privileges, etc.) to or upon persons."

The Oxford English Dictionary (p 404, 2b) explains that this usage was employed and recognized in the English common law.

It stands to reason that the Secretary secures the rights or privileges of marketing certain amounts of sugar by a particular entity vis-a-vis other competing interests whenever she makes or transfers marketing allotments.

One must conclude that in allowing affected parties to file an administrative appeal from "any decision under section 359 d", Congress intended to provide such recourse from any decision that secures or settles the benefits of a marketing allocation upon a particular person or group of persons.

6. Cognizable Claim Under the Act

CCC and American have also moved to dismiss the petition for failure to state a legally cognizable claim.

The Act specifically allows any one affected by an adverse decision respecting a marketing allocation established pursuant to Section 359d, to file an appeal to obtain a hearing by an Administrative Law Judge pursuant to the Administrative Procedure Act. When Mr. Little denied Amalgamated's request for reconsideration of CCC's transfer of Pacific Northwest market allocation to American Crystal, his denial adversely affected Amalgamated in two ways. First, a major competitor had been given added market share. Second, as Mr. Little acknowledged, if he had not granted the transfer of the market allocation under Paragraph F, the allocation would have been available under Paragraph E to Amalgamated and the Intervenor Processors.

A legally cognizable claim under the Act does exist and the Motions to Dismiss alleging the contrary are denied.

7. Judicial Estoppel

CCC and American Crystal further contend that in a prior proceeding in which Pacific Northwest Sugar Company sought to increase its 2003 crop year allocation, Amalgamated asserted facts and circumstances inconsistent with those now set forth in its petition. In the prior proceeding, Amalgamated along with American Crystal and other affected parties, argued against the increase sought, but did not argue that Pacific Northwest's existing allocation should be distributed to other beet sugar processors because Pacific Northwest had permanently terminated its operations. For this reason, CCC and American Crystal contend that Petitioner is now barred, under the doctrine of judicial estoppel, from making this assertion in this proceeding.

A succinct explanation of the use of estoppel doctrines by courts was given by the United States Court of Appeals for the District of Columbia Circuit in Konstantinidis v. Chen, 626 F. 2d 933, 936-940 (1980).

The court first explained that "judicial estoppel" differs from "equitable estoppel". For equitable estoppel to apply, the invoking party must have been an adverse party in the prior proceeding and must have acted in reliance upon his opponent's prior position and would be harmed if his opponent were now to change positions. Judicial estoppel, however, does not require proof of privity, reliance or prejudice. Whereas, equitable estoppel looks to the integrity of the relationship of parties to each other, judicial estoppel focuses on the integrity of the judicial process. Of particular concern is the sanctity of the oath and the placing of a restraint upon reckless and false sworn testimony and even if prior inconsistent statements were not made under oath, the doctrine may be invoked to prevent a party from playing fast and loose with the courts.

Under both estoppel doctrines, there must be a prior judicial acceptance of a factual assertion made by the party who now advances an inconsistent contention. A review of testimony and the filings in the prior proceeding in which Pacific Northwest sought to have its 2003 crop allocation increased, shows that Amalgamated, American Crystal and others referenced facts which are not inconsistent with the Petition's allegations.

The President of Amalgamated, Ralph Burton, testified in respect to Pacific Northwest's operations as of June of 2003, (Ex. H, pages 70-71 attached to Response of Intervenor, SMBSC):

> ...the crop hasn't been grown for 2 years, nothing planted this year. Probably other portions of the farm bill will soon come into play in this regard, and at such time as that operation becomes viable, then I think the new processor portion of the farm bill can come into play.

His concerns about the viability of Pacific Northwest as a sugar processor were shared by others at the hearing. John Richmond, the President of Southern Minnesota Beet Sugar Cooperative testified (Id, pp 74-76):

> ... However, we also believe that the CCC should clarify when an entity is no longer a beet sugar processor that should receive an allocation. The 2002 farm bill says, and I quote, if a processor has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations other than in conjunction with the sale or disposition of the processor or assets of the processor, the allocation is to be eliminated and distributed pro rata to the other processors.
>
> The regulations, however, take a more limited approach, saying under paragraph (a) of this section, where growers can take their crop to other locations, that CCC will eliminate the allocation of a processor who has been dissolved or liquidated in a bankruptcy proceeding, a bit narrower definition, and the allocation distributed to other processors on a pro rata basis.
>
> From the information we have, it would appear that Pacific Northwest has been dissolved within the meaning of the 2002 farm bill, since we understand that the factory have (sic) also been sold, and that no sugar beets have been planted for 3 years.
>
> If that is true, then it does not matter whether Pacific Northwest suffers a substantial quality loss or if it opened a molasses desugarization facility, because it wouldn't have any allocation to be adjusted at all.

In short, there is not only a lack of evidence of prior inconsistent statements by Amalgamated or by any of the Intervenors who support its Petition, but in fact their concerns about Pacific Northwest's viability as a sugar processor were specifically brought to the attention of CCC at the prior hearing. It so happens that CCC used a different reason for denying the application of Pacific Northwest for an increase in its sugar allocation. But this was not because the Petitioner or any of the Intervenors misled CCC. Without evidence of Amalgamated having acted in bad faith, judicial estoppel is inappropriate. Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F. 3d 355, 362 (3rd Cir. 1996)

Additionally as the Konstantinidis decision further elaborated, supra at 938:

> Moreover, judicial estoppel has not been followed by anything approaching a majority of jurisdictions, nor is there a discernible modern trend in that direction.
>
> * * * * * * * * *
>
> Furthermore, we agree with the Tenth Circuit that utilization of the judicial estoppel theory would be out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately. Parkinson v. California Co., 233 F. 2d at 438.

The Konstantinidis Court concluded that (supra at 940):

> Judicial estoppel has yet to make its way into the law of this jurisdiction, and we do not believe that there is any tendency in favor of its adoption. Furthermore, the District of Columbia Court of Appeals would not adopt the doctrine on the facts before us.

On the basis of the facts before me, I do not find that the adoption of this doctrine is warranted or appropriate in this proceeding.

Motion for Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). It will not be granted if "... there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, supra, at 250. As will be demonstrated, the present record does not support such a resolution of this proceeding.

CCC and American Crystal argue that the plain meaning of section 359d(b)(2)(F) required CCC to transfer Pacific Northwest's market allocation to American Crystal because a finding had not yet been made that Pacific Northwest had permanently terminated operations and its market allocation had not been distributed to other sugar beet processors under section 359d(b)(2)(E).

However, before such a result may be said to be required, section 359d(b)(2)(F) specifies that one of two conditions must exist. Either the processor of beet sugar itself must be the subject of the sale to another processor of beet sugar; or the sale must be for "all of the assets of the processor."

American Crystal did not buy Northwest Pacific itself, and the present record does not identify the assets that were treated as still being Pacific Northwest assets at the time CCC transferred its market allocation to American Crystal.

The factory and the processing equipment had been previously sold to others. Pacific Northwest had no outstanding contracts for sugar beet crops and its production supply and processing operations had ended years before. Petitioner and SMBSC state that for these reasons alone, the statutory provision failed to authorize the transfer of market allocation to American Crystal. They contend that for the provision to be applicable, Pacific Northwest must have still been a viable processor selling assets it still owned.

I take it that CCC and American Crystal believe, to the contrary, that it is sufficient under the section for American Crystal to have acquired the assets Pacific Northwest formerly used to function as a sugar beet processor and the fact that they were owned and sold by entities other than Pacific Northwest did not matter. But the decision that is the subject of the Petition for

Review does not elucidate reasoning that supports such an interpretation.

It may be that the market allocation itself was considered by CCC to be a marketable asset of Pacific Northwest which Pacific Northwest could pass to American Crystal because CCC had not yet redistributed the market allocation to others. If so, CCC's basis for such an interpretation needs to be supplied

All that the Executive Vice President's decisional letter of November 14, 2003, tells us is that he denied Amalgamated's request for reconsideration on the basis that Pacific Northwest "was permanently terminated in conjunction with the sale of its assets". But the decision does not specify what assets he considered to still be Pacific Northwest assets and to be the subject of the sale. Also, the decision does not clarify why assets that were acquired secondhand so to speak from others were treated as constituting a sale of Pacific Northwest assets.

There is also a troubling, apparent inconsistency that needs explanation. When Washington Sugar Company previously sought the transfer of Pacific Northwest's market allocation as part of its contemplated acquisition of virtually all of the assets of Pacific Northwest, CCC on October 11, 2002, advised it (Ex D, attached to Affidavit of Steven Z. Kaplan):

> ... Therefore, CCC will transfer Pacific Northwest's 2002 allocation of 15, 000 tons, raw value, to the Washington Sugar Company upon receipt of a copy of the bill of sale showing that virtually all of the assets of Pacific Northwest, <u>including the factory</u>, have been acquired by the Washington Sugar Company ... (emphasis supplied)

Inasmuch as American Crystal did not acquire Pacific Northwest's factory, this requirement was evidently dropped. But why?

American Crystal has also argued that in the event I believe the statutory provisions to be silent or ambiguous with respect to the specific issues before us I should accord <u>Chevron</u>

deference to CCC's interpretation as set forth in Mr. Little's letter. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense, 467 U.S. 837 (1984).

It is customary in USDA adjudicatory proceedings to look for guidance from those officials who administer the day-to-day operations of the various programs entrusted to USDA. *See*, Greenville Packing Co., Inc., 59 Agric. Dec. 194, 226 (2000) and In re: S.S. Farms Linn County, Inc. 50 Agric. Dec. 476, 497 (1991), aff'd, 991 F.2d 803, (9th Cir. 1993) (not to be treated as a precedent under 9th Circuit Rule 36-3). But controlling deference of the sort American Crystal urges should now be given the Executive Vice President's decision would be excessive and would vitiate the very review I am presently conducting on behalf of the Secretary. Chevron deference is only accorded to final action by an agency. That has not yet occurred. Additionally, before an agency interpretation may receive Chevron deference, it must be found to be reasonable and based on a permissible construction of the statute. See Chevron, supra 467 U.S. 843-844.

There must also be a reasoned analysis demonstrating a rational connection between the facts and the decision made. Orengo Caraballo v. Reich, 11 F. 3d 186, 193 (D.C. Cir. 1993).

Without taking further evidence, I am as yet unable to come to that conclusion.

Accordingly, the Motions to Dismiss and the Motion for Summary Judgment are each denied.

____
Date

____
VICTOR W. PALMER
Administrative Law Judge

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