UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	[ACPA]
	)	Docket No. **12-0040**
Resolute Forest Products	)	
	)	
Petitioner	)	**Decision and Order**

Appearances:

Elliot J. Feldman, Esq., David B. Rivkin, Jr., Esq., Michael S. Snarr, Esq., and Andrew M. Grossman, Esq., Baker & Hostetler LLP, Washington D.C., for the Petitioner, Resolute Forest Products (formerly "AbitibiBowater, Inc."), an American company; and

Frank Martin, Jr., Esq. and Brian T. Hill, Esq. (and, prior to his retirement, Robert A. Ertman, Esq.), with the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., for the Respondent, the Administrator, Agricultural Marketing Service, United States Department of Agriculture.

Decision Summary

1. The Petition of Resolute Forest Products is DENIED, because the Softwood Lumber Order and its authorizing statute, as-written and as-administered, are in accordance with law. The authorizing statute is The Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. §§ 7411-7425. The Order's full name is Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order. 7 C.F.R. Part 1217. The Order's nickname is "Check-off". The Softwood Lumber Order is a federal regulation; the final rule to implement the program was published in the Federal Register on August 2, 2011. 76 Fed. Reg. 46185 (August 2, 2011). RX 35. 7 C.F.R. Part 1217.

Parties and Pleadings

2. The Petitioner is Resolute Forest Products (formerly "AbitibiBowater, Inc."), an American company, incorporated under the laws of Delaware ("Resolute" or "Petitioner"). Resolute filed the "First Amended Petition To Terminate Or Amend USDA's Softwood Marketing Order Or, In The Alternative, To Exempt Petitioner From USDA's Softwood Marketing Order" on June 22, 2012. The Respondent is the Administrator, Agricultural Marketing Service, United States Department of Agriculture ("AMS" or "Respondent"). AMS filed the "Respondent's Answer To Petitioner's First Amended Petition" on July 3, 2012. For additional procedural history (exhibits, briefs, and witnesses), *see* Appendix A.

The Appointments Clause

3. The Petitioner Resolute asks me to find The Commodity, Promotion, Research, and Information Act of 1996 unconstitutional on its face. Petitioner Resolute argues that, IF the majority voting in a referendum voted to suspend or terminate an order [1] that had been authorized under The Commodity, Promotion, Research, and Information Act of 1996 (*see* 7 U.S.C. § 7421), private parties would impermissibly be making the decision. Under the Appointments Clause of Article II of the Constitution, states the Petitioner Resolute, such a significant decision should be made by one whose authority comes from having been appointed by the President. Petitioner Resolute reasons that since the statute binds the

[1] No such vote has yet occurred regarding the Softwood Lumber Order. If private parties were to decide through a referendum to suspend or terminate the Softwood Lumber Order, and the Secretary of Agriculture were to suspend or terminate the Softwood Lumber Order based on that referendum majority vote, Petitioner Resolute might find the wording of The Commodity, Promotion, Research, and Information Act of 1996 in that regard to be acceptable.

Secretary of Agriculture by the majority decision of the private parties voting in the referendum, the Secretary is deprived of discretion.

4. Petitioner Resolute is correct in stating that, if the Secretary determines that an order or a provision of an order is not favored by persons voting in a referendum conducted under section 7417 (7 U.S.C. § 7417), the Secretary is required to suspend or terminate: "the Secretary shall . . .". 7 U.S.C. § 7421. Does the Secretary's required acquiescence to a referendum majority vote to suspend or terminate an order or a provision of an order constitute an impermissible delegation of authority? I say no, for two reasons. First, the Secretary of Agriculture has (a) the authority to control the referendum process; (b) the discretion to determine whether, indeed, there is a majority decision of the private parties voting in the referendum to suspend or terminate an order or a provision of an order; and (c) the authority to implement the suspension or termination that he, the Secretary, would be required to implement. 7 U.S.C. § 7421. Second, The Commodity, Promotion, Research, and Information Act of 1996 has tightly controlled the entire process, reasonably limiting the Secretary's discretion: it is reasonable that all concerned by a marketing order will experience a predictable outcome if there is a majority decision of the private parties voting in the referendum to suspend or terminate an order or a provision of an order. *See also* AMS Brief filed June 7, 2013, at pp. 12-17.

The Secretary's Discretion in Issuing an Order

5. The Petitioner Resolute asks me to find that the Softwood Lumber Order was not properly developed because, the Petitioner Resolute states, among other things, following

approval in the referendum (7 U.S.C. § 7417), the Secretary of Agriculture failed to use his discretion as directed in 7 U.S.C. § 7413 to decide whether to implement the Softwood Lumber Order.

6. Petitioner Resolute is correct in stating that the Secretary uses his discretion in the issuance of orders under The Commodity, Promotion, Research, and Information Act of 1996 because he must determine whether "a proposed order is consistent with and will effectuate the purpose of this subchapter". 7 U.S.C. § 7413. Where I disagree with Petitioner Resolute, is that if, while developing the proposed order, the Secretary has already evaluated whether the "proposed order is consistent with and will effectuate the purpose of this subchapter", I think the Secretary may, without renewing his evaluation, proceed to implement the proposed order, especially following approval in a referendum, such as did occur with the Softwood Lumber Order. In other words, the Secretary's exercise of discretion came before the referendum; if there were no change of circumstances during the referendum, the Secretary of Agriculture, in his discretion, was free to choose to agree with the majority vote in support of the proposed Softwood Lumber Order. 7 U.S.C. § 7413.

Subpoena Duces Tecum

7. The issues concerning Petitioner Resolute's Subpoena Duces Tecum were decided at the hearing level by the USDA Judicial Officer, an authority higher than the administrative law judge. (I certified the question to the Judicial Officer; *see* Ruling on Certified Question, issued January 22, 2013, ALJX 2). The Subpoena Duces Tecum that I issued, ALJX1, I then quashed, pursuant to the Judicial Officer's ruling. Tr. 12. Petitioner Resolute has preserved

on appeal to the Judicial Officer the issues concerning the Subpoena Duces Tecum. *See* Petitioner Resolute's April Brief, esp. pp. 88-92.

What Constitutes Majority Vote?

8. The Commodity, Promotion, Research, and Information Act of 1996 provides for approval of an order in a referendum. 7 U.S.C. § 7417. If an initial referendum is undertaken, as was done for the Softwood Lumber Order, the referendum is done "among persons to be subject to an assessment" . . . 7 U.S.C. § 7417(a)(1). These persons were engaged during a representative period determined by the Secretary in the production OR handling OR importation of the agricultural commodity. 7 U.S.C. § 7417(a)(1). The Secretary of Agriculture chose the option for the initial referendum that required approval "by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity" (softwood lumber). 7 U.S.C. § 7417(e)(3); 76 Fed. Reg. 46185, 46193 (August 2, 2011); Tr. 637.

9. Does a "majority" of persons as contemplated by the Act mean (a) a majority of persons-to-be-subject-to-an-assessment? or (b) a majority of persons-to-be-subject-to-an-assessment who voted? Does a "majority" of the volume of softwood lumber as contemplated by the Act mean (a) a majority of the-volume-of-softwood-lumber-to-be-subject-to-an-assessment? or (b) a majority of the-volume-of-softwood-lumber-to-be-subject-to-an-assessment that "was voted"?

10. Petitioner Resolute is certain of the Act's meaning regarding what constitutes majority vote. I do not share Petitioner Resolute's certitude, mindful that Sonia Jimenez testified that it would be impossible to know the total softwood lumber volume. Tr. 421. Sonia Jimenez is the Director, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture. Ms. Jimenez was on the witness stand for about 10 hours (about 3 hours the first day; about 6 hours the second day; and about an hour the third day). Ms. Jimenez testified in part as follows. Tr. 420-21.

Judge Clifton: Do the ballots specify -- tell me what the ballots specify. When the ballot comes back, what does it say about volume?
Ms. Jimenez: It has a blank for the voter to write down the volume that they produce and shipped, or imported, for the representative period.

Judge Clifton: Okay. So until you get the ballots, you can't do this calculation.

Ms. Jimenez: Correct.

Judge Clifton: Okay. All right. Mr. Feldman, go ahead.

Mr. Feldman: Do you know what the volume of the agricultural commodity is in this case; the total volume of the commodity?

Ms. Jimenez: No.

Mr. Feldman: Did you ever know?

Ms. Jimenez: It's impossible for us to know the total volume.

Mr. Feldman: So do you know how much of the agricultural commodity, by volume, was exempted?

Ms. Jimenez: No, I do not.

Tr. 420-21.

11. Petitioner Resolute's evaluation is expressed in the following quotation, with footnotes omitted, from Petitioner Resolute's April Brief, pp. 64-65:

> The statute specifies that the "majority of those persons voting for approval" must "represent a majority of the volume of the agricultural commodity." The statute does not provide for the "majority of those persons voting for approval" to "represent a majority of the volume of the agricultural commodity of those voting for approval." The difference in language and consequent meaning is plain and unambiguous, and the agency's non-conforming interpretation is due no deference. [footnote omitted]
>
> USDA never established whether the "majority of those persons voting for approval" also "represent[ed] a majority of the volume of the agricultural commodity." Instead, following the proposal and preference of the proponent group, USDA concluded that the "majority of those persons voting for approval" represented the majority of the commodity of those voting. [footnote omitted] USDA officials admitted at the hearing that they still, nineteen months later, did not know whether the persons voting for approval also represented a majority of the volume of the agricultural commodity as required by the statute. [footnote omitted]
>
> USDA could not lawfully accept the results of the referendum without satisfying the requirements of the statute. Whether the majority of the volume of the agricultural commodity was represented in the vote in favor of

> the check-off was unknown when the referendum was conducted, after the votes were counted, after the Final Rule was published, after the check-off was implemented, after assessments began being collected, and still. Acceptance of the referendum results without knowledge of the volume of the agricultural commodity represented by the vote is contrary to law. Implementation without satisfying the criteria of 7 U.S.C. § 7417(e)(3) is contrary to law.

from Petitioner Resolute's April Brief, pp. 64-65.

12. To the contrary, states AMS: The Softwood Lumber Order was implemented in the referendum vote by the most stringent method that can be used to approve an Order under the Commodity, Promotion, Research, and Information Act of 1996. *See* 7 U.S.C. § 7417(e)(3); 76 Fed. Reg. 46185, 46193 (August 2, 2011); RX 35; 7 C.F.R. Part 1217.

13. The Secretary's interpretation is that a "majority" of persons as contemplated by the Act means a majority of persons-to-be-subject-to-an- assessment who voted; a "majority" of the volume of softwood lumber as contemplated by the Act means a majority of the-volume-of-softwood-lumber-to-be-subject-to-an-assessment that "was voted". The Secretary's interpretation of "majority" as contemplated by the Act is reasonable, in part because there is no other way to determine majority. Using his interpretation, the Secretary reported the referendum results in the Final Rule implementing the Softwood Lumber Order, including in pertinent part the following, paragraph 14.

14. Quoting from the Final Rule in the Federal Register (76 Fed. Reg. 46185, 46190 (August 2, 2011), RX 35, 7 C.F.R. Part 1217: "Entities that domestically ship or import less than 15 million board feet are exempt along with shipments exported outside of the United States. No entity will pay assessments on the first 15 million board feet domestically shipped or imported. The purpose of the program is to strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States. A referendum was held May 23 through June 10, 2011, among eligible domestic manufacturers and importers to determine whether they favor implementation of the program prior to it going into effect. Sixty-seven percent of those voting in the referendum, representing 80 percent of the volume of softwood lumber represented in the referendum, favored implementation of the program." 76 Fed. Reg. 46185, 46190 (August 2, 2011). RX 35. 7 C.F.R. Part 1217.

Choice of the *De Minimis* Volume

15. Petitioner Resolute complains that AMS encouraged the proponent group to use a *de minimis* volume exemption to keep persons from voting against the Softwood Lumber Order. Petitioner Resolute complains that the referendum might have yielded a different result if more persons had voted, especially those persons who were not eligible to vote because their volume was less-than-15-million-board-feet during 2010 (the representative period chosen by the Secretary). Even if I were to assume Petitioner Resolute's arguments to be true, I would find that the Secretary has done nothing contrary to law, nothing arbitrary and capricious.

16. Petitioner Resolute does not accept 2010 as representative, when softwood lumber volumes were extraordinarily low, in part because many persons whose volumes were less-than-15-million-board-feet in 2010 would likely generate higher volumes in subsequent years and would pay assessments, after having been not eligible to vote.

17. Mr. Richard Garneau is the President and CEO of Resolute Forest Products, the Petitioner. Mr. Garneau testified in part as follows. Tr. 696-700.

Mr. Feldman: Could you explain what a board foot is and how much 15 million board feet represent?

Mr. Garneau: Yes. Well, I can get -- it's easy. It's 1 inch in thickness by 1 foot long. It's probably like that. It's almost 1 foot wide. So, by using this as an example you can have pretty good idea of what is a board feet of lumber.

Mr. Feldman: And all the manufacturers and the importers of record, all the manufacturers in the United States producing under 15 million board feet were not permitted to vote in this referendum, is that correct?

Mr. Garneau: It's my understanding, yes.

Mr. Feldman: And in fact you were associated with one company that could not vote, that was under that threshold, right?

Mr. Garneau: Yes.

Mr. Feldman: And a typical house, how many houses could you build with 15 million board feet?

Mr. Garneau: Well, on average, and I think there are stats on this. A 2,400 square foot house needs about fifteen or sixteen thousand board feet. So, with 15 million you can build about 1,000 houses.

Mr. Feldman: About 1,000 houses. So enterprises producing enough wood to build 1,000 houses were exempted.

Mr. Garneau: You're correct.

Mr. Feldman: And therefore could not vote.

Mr. Garneau: You're correct.

Mr. Feldman: The exemption was made the same for domestic manufacturers and for importers, 15 million board feet applied to both. Is that the same thing for both?

Mr. Garneau: No, it's not the same thing. We have the company that just to give you an example and show our voice. So we have a company, we have an equity position in this company. And it is -- this company is an importer of record. But in 2010 because the demand was so depressed they were below the threshold, below the 15 million threshold and could not vote. But the sawmill itself or this entity is -- has the capacity to produce about 17 million, 17 million board feet but was not allowed to vote because in 2010 they were below the 15 million exemption.

Mr. Feldman: Now, this use of 2010. You've been sitting through this hearing so you've heard discussion about the representative period. Could you describe the condition of the industry in the period from 2007 through 2010?

Mr. Garneau: Well, I can give you if I may a clearer picture. I think you have to go to 2005. That was the last year before the implementation of the SLA consumption of the national number in the U.S. was over 60 billion board feet. And by 2010 was about 33 or 34. That's from memory but about at that level. And it went down every year. So in 2007, `08, `09 and `10 was if I remember correctly one of the lowest in terms of consumption.

Mr. Feldman: Lowest in consumption during that period and one of the lowest in consumption over what period of time?

Mr. Garneau: Well, since basically I was born, since the end of the Second World War.

Mr. Feldman: So, the Department shows 2010 to be a representative period. And it is the year which may have been the lowest consumption since the Second World War.

Mr. Garneau: Yes. And I think that based on our own equity ownership in this company it's -- if you go back this company was exporting more than the exemption. So if the period would have ended different this company would not have been declared non-eligible.

Tr. 696-700.

18. The Secretary of Agriculture chose less-than-15-million-board-feet as the *de minimis* volume. *See* 7 U.S.C. § 7415(a) Exemptions. Those persons whose volume during

"the representative period" was regarded as *de minimis* would not vote in the referendum, because they would not, so long as their volume did not increase to a volume above *de minimis*, be subject to an assessment. The voting is done "among persons to be subject to an assessment" . . . 7 U.S.C. § 7417(a)(1).

19. The Secretary of Agriculture made a practical choice when he divided those persons who would be subject to an assessment (volume of 15 million board feet or higher) from those persons who would not be subject to an assessment (volume of less-than-15-million-board-feet). The practical choice was based on a calculation that sufficient assessment income to support an effective softwood lumber order would be generated if a 15 million board foot exemption were used. So the Secretary chose less-than-15-million-board-feet to be the *de minimis* volume. The Secretary extended this same exemption to those persons who would be assessed under the program: the first 15 million board feet would not be assessed.

20. Marketing orders typically include some exemption: often the smallest operators are not required to comply with marketing order requirements. Exemption from paying assessments under the Softwood Marketing Order is based on volume (not value, not weight, not quality). The Act specifies volume. 7 U.S.C. § 7415. [A board foot is a board foot: Petitioner Resolute is not required to pay a higher assessment based on the quality of the lumber it imports, such as black spruce from central Canada from the boreal forest.] The Secretary had the authority to choose the volume of less-than-15-million-board-feet to be the *de minimis* quantity. 7 U.S.C. § 7415(a). The Secretary's choice (based on a projection

that, per entity, that volume of softwood lumber could be exempt from assessment, and there would remain adequate revenue from assessments to operate the order), is reasonable and entirely within the Secretary's discretion. 7 U.S.C. § 7415. Petitioner Resolute would apparently prefer that *de minimis* be very small, or inconsequential, or at least not exclude so many entities from voting. Such a preference is inadequate to challenge the validity of the Secretary's choice.

The Representative Period

21. Petitioner Resolute proved that 2010 was a year in which softwood lumber production was down. *See* paragraphs 16 and 17. Petitioner Resolute proved that using 2010 as the Representative Period kept ballots from being sent to many entities that would probably be assessed in future years (by virtue of increasing volumes). The Secretary chose 2010 because it was recent. [The voting occurred in 2011.] (The one-year Representative Period should not be confused with the three-year period used for calculations required by the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA); *see* paragraph 22.) The choice of a recent year was reasonable and entirely within the Secretary's discretion. 7 U.S.C. § 7417. The Secretary has the authority to determine the representative period. 7 U.S.C. § 7417(a).

Impact on Small Entities

22. The Secretary of Agriculture complied with the requirements of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA), ensuring that small businesses would not be disproportionately burdened by the Softwood Lumber Order. 76 Fed. Reg. 46185, 46189

(August 2, 2011). RX 35. 7 C.F.R. Part 1217. Some small entities [as defined by the Small Business Administration in 13 C.F.R. Part 121], are subject to assessment (as is generally true, in my experience, with marketing orders). But the impact on the small entities [as defined by the Small Business Administration] is less burdensome because neither they nor any other entity pays assessments on the first 15 million board feet shipped or imported. Some small entities have a low enough volume that they will pay no assessments: entities that ship or import less than 15 million board feet are exempt along with shipments exported outside of the United States. Not all entities considered small in accordance with the Small Business Administration in 13 C.F.R. Part 121 need be exempt. The *de minimis* volume need not match what is considered a small entity in accordance with the Small Business Administration.

23. Petitioner Resolute proved a disparity between domestic entities (considered small under the Small Business Administration guidelines if shipping less than 25 million board feet per year), and importer entities. Importers of fewer than 15 million board feet may, in actuality, be large companies. Mr. Garneau testified that a Canadian sawmill, one with which he is familiar, generating 70 million board feet per year (not a small entity) could have an import volume of less than 15 million board feet per year. Tr. 790. (Importers of record, first handlers, subject to assessment, are deemed to be manufacturers through the application of 7 C.F.R. § 1217.14. Thus, 7 C.F.R. § 1217.11 must be read together with 7 C.F.R. § 1217.14. *See* Tr. 909-16.) When Petitioner Resolute ships to the United States, it is the importer of record for almost all of its lumber mills (except for some volume sold through

the wholesalers). Tr. 792. Another disparity arises from the variety of business structuring: if one entity operates 3 sawmills, that entity's volume is the volume of all 3 sawmills combined, which, hypothetically, could keep it from being a small entity. The calculation of whether a small entity is involved would be different if each of those sawmills is operated by a different entity: hypothetically, each of the 3 might be considered a small entity. The comparison of one softwood lumber business to others is neither precise nor exact. The Secretary, to meet his obligation to determine the impact on small entities, need concern himself only with domestic entities; the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (RFA) applies to businesses within the United States. The Secretary uses the tax i.d. number regarding assessments and exemptions. Tr. 1226. The Secretary complied with the Regulatory Flexibility Act (RFA).

Referendum Ballots

24. Resolute proved, through the testimony of Dr. Anna Greenberg, that survey techniques that include follow-up and reminders will probably yield a higher response. Dr. Greenberg's Ph.D. is in political science, and she specialized in political behavior, data analysis and survey research methodology at the University of Chicago. Tr. 799. Dr. Greenberg has extensive work experience using census and survey and voting methodology, and I accepted Dr. Greenberg as an expert witness in census, survey, and voting methodology. Tr. 802. Dr. Greenberg characterizes the referendum as a census. She explained that a census is a kind of survey where you gather information from every single unit, could be a person, could be a company, in the population that you're trying to represent.

Tr. 804. Dr. Greenberg explained that one can look at the response coming back in from ballots sent out, to analyze the characteristics of the ballots returned and the characteristics of those not returned: Is there some group that's systematically not returning their ballots?

Tr. 812-13. Dr. Greenberg testified in part, as follows. Tr. 812-16.

Mr. Feldman: How do you go about making sure that the results are representative?

Dr. Greenberg: Well, when you get the results back, and in the case of a census it's actually pretty easy because you know who you've sent the ballots to. You look at the response coming in and you look at it and say well, I know there are known characteristics of this population. A certain percentage lives in a certain part of Canada or the U.S. Any range of different things you might know about these companies. And then you can see as the ballots are returned where are they coming from. And you can see is there some bias in the return rate and is it systematic. Is there some group that's systematically not returning their ballots.

Mr. Feldman: Is there an expectation in the OMB guidelines at least as to being able to replicate the results?

Dr. Greenberg: Yes. The OMB says that you should disclose enough information about your data collection so that the results can be replicated.

Mr. Feldman: And have results been published or made available here that would enable you to replicate these results?

Dr. Greenberg: No.

Mr. Feldman: What kinds of information are missing?

Dr. Greenberg: Well, very narrowly, just focusing on the 311 you would need to know who those ballots were mailed to. If you -- there is a part -- what they say in the OMB guidelines is there may be some issues around confidentiality or promises of anonymity so you actually could have other information that would help you. So knowing the percentage that returned that were from say the west or the east or the percentage that returned that was from -- were importers or domestic producers. So even if you didn't have the specific names if you knew something about the characteristics of the respondents you wouldn't necessarily be able to replicate it but at least if you were going to go out and make your own list you'd have a sense of what you needed to be doing.

Mr. Feldman: And would it be important to know who returned the ballots?

Dr. Greenberg: Yes.

Mr. Feldman: Why?

Dr. Greenberg: Because you -- well, first if you want to replicate the study you need to know who it was sent to. And it would be helpful to know who returned it so that you can understand the kinds of biases, the non-response bias. If it's systematic you want to make sure that you correct for the non-response bias.

Mr. Feldman: How would you know whether it's systematic?

Dr. Greenberg: You can look for patterns. We usually know a lot about our populations. You know, there's very little new research under the sun. And so you look at the characteristics. And there are certain things that are known. You know from your list how many companies are from -- are importers and how many are domestic producers. So you know when the data come back if they're matching up or not.

Tr. 812-16.

25. AMS does not agree that the referendum was a census. Neither do I. One technique for better response in a census is to extend the time for response (keep the survey open) and then make contact with those who did not respond (go back into the field and gather more data) in order to a more complete overall response. Tr. 806-08. For the referendum, those techniques would have required departure from the announcement of the referendum (published in the Federal Register) and thus could have made the voting results suspect. Proposed rule and referendum order, 76 Fed. Reg. 22757, especially 22757 (April 22, 2011), RX 16. Dr. Greenberg observed that the announcement of the referendum was not short and not at the top and not easy to understand. Tr. 826-30. Dr. Greenberg observed, " . . . it really buries the lead and it buries the fact that there's going to be a referendum to the bottom and you've got to wade through this. And certainly the Federal Register, it would take a long time to understand what was going on from that." Tr. 830. *See* RX 16, Proposed

rule and referendum order, 76 Fed. Reg. 22757, especially 22757 (April 22, 2011). I disagree with Dr. Greenberg. Information published in the Federal Register is difficult, yes, but here the information is clear from the very first column! The dates of the voting period are very easy to see: "**DATES**: The voting period is May 23 through June 10, 2011." Above that, very clearly in about six sentences, at the very beginning of the Federal Register publication, is clearly and concisely stated: what the rule proposes; that it would be financed by an assessment; what the assessment rate would be; who would pay it; and that "(t)he program would be implemented if it is favored by a majority of those voting in the referendum who also represent a majority of the volume of softwood lumber represented in the referendum."

26. The press release, RX 18, also dated April 22, 2011, is clear and sufficiently "urgent".

27. The Secretary was not required to conduct any referendum initially. If no referendum had been conducted initially, a referendum would have been required not later than 3 years after assessments first began. 7 U.S.C. § 7417(b). Assessments first began January 1, 2012. 76 Fed. Reg. 46185, esp. 46185 (August 2, 2011); RX 35. 7 C.F.R. Part 1217. Because the Secretary conducted an initial referendum, a subsequent referendum is required not later than 7 years after assessments first began. 7 U.S.C. § 7417(c). If Petitioner Resolute is not content to wait for 7 years from January 1, 2012, there is the option in 7 U.S.C. § 7417(c): The Secretary shall conduct a subsequent referendum - - (3) at the request of 10 percent or more of the number of persons eligible to vote under subsection (b)(1) of this section.

Self Help

28. The degree to which the Softwood Marketing Order is a "self help" program is debatable and goes to the issue of whether the proponents, including the Blue Ribbon Commission, may have misled those who would later vote in a referendum. In describing orders such as the Softwood Marketing Order, AMS uses the term "self-help"; the following excerpt is from the AMS Brief, filed June 7, 2013, Introduction, at pages 1-2.

"The commodity check-off is a self-help, government speech concept, for strengthening a commodity industry's position in the market place to increase demand for its commodity, and to develop demand in new and existing markets and new uses for a commodity. Commodity promotion programs have a long history dating back as far as 1880, when states enacted laws to enable commodity groups to receive state funds to promote commodities. Because the amount of money from states was modest, commodity programs organized by various commodity groups began as voluntary, thus creating the "free rider" problem where persons who failed to pay assessments reaped the benefits of the program. The programs therefore did not achieve their full potential. As the concept of generic promotion programs evolved, Congress began enacting specific commodity statutes, and in 1996, it enacted a generic statute entitled the Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. 7411-7425.[2] Under this statute any agricultural commodity group can submit a proposed Order to the Secretary, and if the Secretary finds that it is consistent with and will

[2] *See Commodity Advertising and Promotion*, edited by Kinnucan, Thompson, and Chang, 1992 Iowa State University Press, Ames, Iowa 50010; *see also* 7 U.S.C. §§ 7411-7425.

effectuate the purpose of the statute, the Secretary will publish the proposed Order in the *Federal Register* and give due notice and opportunity for public comment on the proposed Order."

AMS Brief, filed June 7, 2013, Introduction, at pages 1-2.

Proponent Groups' Statements Prior to Referendum

29. Promotional materials prepared and distributed prior to the Referendum by the Blue Ribbon Commission, a proponent group, contained statements that are wrong. *See*, for example, PX 10, Tr. 247-56. Even though the ideas and the objectives and the drafting and the projects may arise from private parties in the softwood lumber industry, the U.S. Secretary of Agriculture oversees and tightly controls the Softwood Lumber program and has veto power; and the authority to collect the assessments comes from the U.S. Government because the assessments are taxes, or government-compelled subsidies, or at least a form of government regulation. Compelled support of government - - even those programs of government one does not approve - - is of course perfectly constitutional, as every taxpayer must attest:

> "Compelled support of government"--even those programs of government one does not approve--is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." [*Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000)].

Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559 (2005), cited in *Gerawan Farming, Inc.*, 67 Agric. Dec. 45, 56 (2008), found online at http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/gerawan.pdf

30. The Blue Ribbon Commission and other industry groups would soon learn how controlling the Secretary is required to be. For example, the "reTHINK WOOD" proposed communication was edited by the Secretary (RX 50, p. 189). Edits included striking language comparing construction using wood, to construction using steel, or construction using concrete, because the proposed language could be perceived as disparaging to other commodities. RX 50, p. 189. Ms. Maureen Pello is a Marketing Specialist, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture. Ms. Pello testified in part as follows. Tr. 1117-19.

Mr. Martin: Ms. Pello.

Ms. Pello: Yes.

Mr. Martin: If you look at the same page Judge Clifton asked you to, Page 189 - [RX 50]

Ms. Pello: Yes.

Mr. Martin: - didn't you also make some other changes to that and would you explain for the record why you made those changes?

Ms. Pello: Yes. In the fourth paragraph under Wood is Renewable, there was a sentence that was provided to me that said unlike other products that deplete the earth's resources, wood is the only major building material that grows naturally and is renewable.

And I had suggested taking out language that talked about other products depleting the earth's resources, and also language where you're making a statement that it's absolute that wood is the only building material. Because, you know, sometimes hard absolutes like that are difficult to prove. So, I suggested, you know, staying away from that absolute.

Mr. Martin: And how about the first sentence?
What was your rationale behind that change?

Ms. Pello: Oh, North American Wood Products?

Mr. Martin: "Wood is renewable unlike other products that deplete the earth's resources,"
I see that's stricken.

Ms. Pello: Yes. You know, that could be perceived as disparaging to other commodities. So, I had suggested taking that out and just stating the positive. Wood grows naturally and is renewable.

Mr. Martin: And, Ms. Pello, if you look at the next paragraph entitled "Using Wood Helps Induce [*sic* - - should read Reduce, Tr. 1118] Environmental Impact" --

Ms. Pello: Yes.

Mr. Martin: - I see you also struck out some language in there.
Would you explain for the record so it's clear, why that language was stricken?

Ms. Pello: Yes, that language would have read "Wood products are better for the environment than steel or concrete."
And, again, that could be perceived as being disparaging to their competing industries. So, I suggested taking out that comparison and just stating wood products need less energy across their life cycle. They're responsible for less air and water pollution.

Mr. Martin: And did you make any other changes in this document?

Ms. Pello: Yes. Do you want me to go through them all?

Mr. Martin: No, I don't think it's necessary. I just want the record to be clear that this document contained a number of changes.

Tr. 1117-19.

Industry groups lose some autonomy when regulated by a marketing order; they gain the enforceability of assessments.

Findings of Fact

31. Resolute Forest Products (formerly "AbitibiBowater, Inc.") is an American company, incorporated under the laws of Delaware.

32. When Resolute Forest Products ships softwood lumber to the United States, it is the importer of record for almost all of its lumber mills (except for some volume sold through the wholesalers). Tr. 792. Resolute Forest Products thereby subjects itself to the Softwood Lumber Order.

33. The Softwood Lumber Order and its authorizing statute, as-written and as-administered, are in accordance with law. The authorizing statute is The Commodity, Promotion, Research, and Information Act of 1996, 7 U.S.C. §§ 7411-7425. The Order's full name is Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order. 7 C.F.R. Part 1217.

Conclusion

34. In light of *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Gerawan Farming, Inc.*, 67 Agric. Dec. 45 (2008), found online at http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/gerawan.pdf , Resolute Forest Products' "First Amended Petition To Terminate Or Amend USDA's Softwood Marketing Order Or, In The Alternative, To Exempt Petitioner From USDA's Softwood Marketing Order", filed on June 22, 2012, must be denied.

Order

35. Resolute Forest Products' First Amended Petition is DENIED.

Finality

36. This Decision shall be final and effective 35 days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service. *See* 7 C.F.R. §§ 900.64 and 900.65.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 30th day of April 2014

s/ Jill S. Clifton

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
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APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:

Resolute Forest Products 12-0040

Petitioner **Additional Procedural History**

Exhibits

The following Exhibits were admitted into evidence at the hearing.

PX 1 through PX 28. Tr. 979 (January 31, 2013).

RX 1 through RX 52. Tr. 979 (January 31, 2013).

ALJX 1 through 3. Tr. 12 (January 28, 2013); Tr. 215 (January 29, 2013); and Tr. 621 (January 30, 2013).

Briefs

Petitioner Resolute timely filed its opening brief on April 18, 2013, having delivered "four hard copies by courier to the Hearing Clerk". Inexplicably, very little of that opening brief was present in the Hearing Clerk's record file when I checked a year later: only the cover page, Table of Contents, and Table of Authorities. Petitioner Resolute graciously filed its opening brief again, on April 14, 2014, on the same day that I alerted counsel by email that the brief was missing from the Hearing Clerk record. [I had been working from electronic versions of the opening brief, circulated to me and opposing counsel nearly a year earlier.] I refer to this brief as Petitioner Resolute's April brief.

Respondent AMS timely filed its only brief on June 7, 2013.

Petitioner Resolute timely filed its reply brief on July 12, 2013.

Witnesses

The 4-day Hearing was held January 28-31, 2013, in Washington, District of Columbia. The 1275-page transcript is in 4 volumes. The transcript pages are shown below for testimony of witnesses.

Day 1, January 28 (Mon), 2013, pages 1-208:

Ms. Sonia Jimenez (Tr. 28-186) called by Resolute

[Ms. Jimenez: Director, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture]

Day 2, January 29 (Tues), 2013, pages 209-617:

Ms. Sonia Jimenez (Tr. 212-575) called by Resolute

Day 3, January 30 (Wed), 2013, pages 618-953:

Ms. Sonia Jimenez (Tr. 622-670) called by AMS for cross-examination

Mr. Richard Garneau (Tr. 673-795) called by Resolute

[Mr. Garneau: President and CEO of Resolute Forest Products]

Dr. Anna Greenberg (Tr. 796-905) called by Resolute

[Dr. Greenberg: Senior Vice President, Greenberg, Quinlan, Rosner Research]

Ms. Sonia Jimenez (Tr. 909-918) recalled by Judge Clifton

Day 4, January 31 (Thur), 2013, pages 954-1275:

Ms. Maureen Pello (Tr. 967-1231) called by AMS

[Ms. Pello: Marketing Specialist, Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture]