

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	FSA Docket No. 04-0001
NICHOLAS W. EIGSTI,)	
)	
Petitioner)	Dismissal Without Prejudice

[1] Nicholas W. Eigsti (“Petitioner Eigsti”) filed a petition on March 26, 2004, under the Federal Seed Act, 7 U.S.C. §§ 1551-1611, Sec. 201.34(d)(3), with the Hearing Clerk, United States Department of Agriculture (“USDA”). In the normal course, the Hearing Clerk docketed the case as (Federal Seed Act) FSA Docket No. 04-0001.

[2] The case has been assigned to me for consideration and decision.

Administrative proceedings under the Federal Seed Act are governed by the “Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes.” 7 C.F.R. § 1.130 et seq. See, especially 7 C.F.R. § 1.131, regarding the Federal Seed Act. As explained below, I find that the petition should be dismissed without prejudice, and a copy forwarded by the Hearing Clerk to the Agricultural Marketing Service, USDA.

[3] The petition, entitled “Complaint and Petition for Review,” identifies as respondents Syngenta Seeds, Inc.; Novartis Seeds, Inc. (Predecessor in

Interest); and American Sun Melon (Predecessor in Interest). Petitioner Eigsti alleges violation(s) of the Federal Seed Act by respondents.

[4] The Federal Seed Act contemplates the Secretary of Agriculture being the moving party. See 7 U.S.C. § 1599. “Upon receipt of the information and supporting evidence, **the Administrator** (emphasis added) shall cause such investigation to be made as, in the opinion of the Administrator, is justified by the facts.” 7 C.F.R. § 1.133(a)(3).

[5] Persons, such as Petitioner Eigsti, who submit information alleging violations of the Federal Seed Act, “shall not be a party to any proceeding which may be instituted as a result [of the information] and such person shall have no legal status in the proceeding, except as a subpoenaed witness, or as a deponent . . .” 7 C.F.R. § 1.133(a)(4).

[6] Attachment A to the petition is a response prepared by the Chief, Seed Regulatory and Testing Branch, Livestock and Seed Program, Agriculture Marketing Service, USDA. The response is to Petitioner Eigsti’s “complaint alleging that the parentage of the seedless watermelon variety ‘Tri-X-313’ (or Tri-X Brand ‘313’) has been changed since the introduction of the variety and that seed currently being shipped under that variety name is mislabeled under the Federal Seed Act.” Petitioner Eigsti’s cover letter states, “**there is further information,**” as

contained in the petition.

[7] Petitioner Eigsti has no administrative remedy for the violation(s) of the Federal

Seed Act he alleges, except in accordance with 7 C.F.R. § 1.133. He submits his petition under 7 C.F.R. § 1.133. He presumes that it is appropriately submitted to the Hearing Clerk. I find to the contrary, that his petition would be appropriately submitted to the Administrator of the agency administering the statute involved, that is, the Agricultural Marketing Service. Accordingly, for lack of subject matter jurisdiction, I hereby **dismiss without prejudice** Petitioner Eigsti's "Complaint and Petition for Review."

[8] This Dismissal shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon Petitioner Nicholas W. Eigsti, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Dismissal shall be served by the Hearing Clerk upon Petitioner Eigsti, and, **together with a copy of the Complaint and Petition for Review** with its 2-page cover letter and all its attachments, upon **(1) the Chief, Seed Regulatory and**

**Testing Branch, Livestock and Seed Program, Agriculture Marketing
Service,
USDA, and (2) the Office of the General Counsel, Marketing Division, Attn:
Robert
A. Ertman.**

Done at Washington, D.C.
this 14th day of May 2004

Jill S. Clifton
Administrative Law Judge

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

**SUBTITLE A—OFFICE OF THE
SECRETARY OF AGRICULTURE**

**PART 1—ADMINISTRATIVE
REGULATIONS**

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 1081, South Building
Washington, D.C. 20250-9200
202-720-4443
Fax: 202-720-9776

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**SUBPART H—RULES OF PRACTICE GOVERNING FORMAL
ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY
UNDER**

VARIOUS STATUTES

....

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument.

Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003] 7 C.F.R. § 1.145.