UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	SMA Docket No. 03-0001
Southern Minnesota Beet	)	
Sugar Cooperative	)	
	)	
Petitioner	)	

Decision

In this decision, I deny the Petition of Southern Minnesota Beet Sugar Cooperative ("SMBSC" or "Petitioner") to overturn the decision of the Executive Vice-President of the Commodity Credit Corporation (CCC). I find that the actions of the CCC were totally in accord with the express language of the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 (Act)(7 U.S.C. §1359ii). I thus find that SMBSC is not entitled to an increase of 1.25 percent in their allocation for either opening a new sugar beet processing factory or for sustaining substantial quality losses on stored sugar beets during the 1999 crop year.

Procedural Background

This proceeding arose with SMBSC's filing of a Petition for Review of several determinations made by the Executive Vice-President of the CCC on January 23, 2003. SMBSC sought review of the October 21, 2002 beet sugar marketing allotment allocations made by the CCC. After reconsideration of two requests for adjustments by

the Petitioner, the CCC rejected both requests. The CCC filed its Answer on February 13, 2003, along with a certified copy of the record upon which the Executive Vice-President based his reconsidered determination, pursuant to the Sugar Marketing Allotment Program Rules of Practice (Rules), Rule 5. The CCC also submitted, with the Answer, a list of parties who would be "affected" by these proceedings.[1]

As per Rule 5(d), the Hearing Clerk served the petition and answer upon each of the identified affected parties. Seven affected parties—American Crystal Sugar Company, Imperial Sugars Corporation, Michigan Sugar Company, Minn-Dak Farmers Cooperative, Monitor Sugar Company, Western Sugar Cooperative, and Amalgamated Sugar Company--elected to intervene.

Since this was a case of first impression on this subject, then presiding Administrative Law Judge Jill Clifton[2] ordered the submission of briefs concerning how the hearing should be conducted. Both the CCC and Intervenors contended that there should be no oral hearing at all, and that my review should be solely based on the administrative record, with no need for additional testimony or submissions of further documentary evidence. Petitioners, on the other hand, contended that the statute required a *de novo* hearing. While the absence of contested material facts would not have left me any reason to conduct an oral hearing, I concluded that a hearing would be appropriate to allow Petitioner to present facts concerning its positions as to whether it had "opened a new factory" and whether it had "sustained substantial quality losses on stored sugar beets" in

[1] As discussed in more detail, infra, beet sugar allotments are a "zero-sum" situation, in that any increase in allotment to any beet sugar processor means a corresponding reduction in allotments of all other processors.
[2] The case was subsequently assigned to me on July 31, 2003.

crop year1999 as contemplated by the Act. I restricted the hearing to the development of these facts only, and announced that I would not hear testimony on legislative intent and other non-factual issues.

I held a hearing in Washington, D.C. on November 10, 12 and 13, 2003.

Statutory and Regulatory Background

The federal government has 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, 7 U.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 the 1998 to 2000 crop years. At issue here are the provisions allowing for adjustments to these weighted averages. The Act provides for four basic types of adjustments:

CHAPTER 35 - AGRICULTURAL ADJUSTMENT ACT OF 1938

1359dd. Allocation of marketing allotments.

(D) Adjustments

(i) In general

The Secretary shall adjust the weighted average quantity of

beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years under subparagraph (C) if the Secretary determines that the processor -

(I) during the 1996 through 2000 crop years, opened a sugar beet processing factory;

(II) during the 1998 through 2000 crop years, closed a sugar beet processing factory;

(III) during the 1998 through 2000 crop years, constructed a molasses desugarization facility; or

(IV) during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored during any such crop year.

(ii) Quantity

The quantity of beet sugar produced by a beet sugar processor under subparagraph (C) shall be -

(I) in the case of a processor that opened a sugar beet processing factory, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is opened by the processor;

(II) in the case of a processor that closed a sugar beet

processing factory, decreased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is closed by the processor;

(III) in the case of a processor that constructed a molasses desugarization facility, increased by 0.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each molasses desugarization facility that is constructed by the processor; and

(IV) in the case of a processor that suffered substantial quality losses on stored sugar beets, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph).

7 U.S.C. §1359dd(b)(2)(D).

The CCC was directed to promulgate regulations implementing the statute under a very restrictive time frame. These regulations are not at issue here. Neither the statute nor the

regulations define what is meant by "opened" or "closed" with respect to a beet sugar facility, nor is there any specific guidance in the statute or regulations on the implementation of the "substantial quality losses" provision.

Nor is there much in the way of legislative history. While I base my decision primarily on the unambiguous language of the statute, I also discuss below, in the alternative, the snippet of legislative history, in the form of a statement by Senator Conrad, which appears to be the sole discussion on the record by Congress respecting the beet sugar allocation adjustment provisions. Senator Conrad, who cosponsored this provision, stated:

The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the law.

. . .

That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.

I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000 with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

107th Cong., 148 Cong. Rec. 10, p. S514 (Feb. 8, 2002).

The Facts

Petitioner is a beet sugar processing cooperative that was formed in 1972. It currently consists of 585 farmer/shareholders in Minnesota. The cooperative is located in Renville,

Minnesota and currently employs approximately 275 year-round and 450 seasonal workers. Tr. I, 319-320.[3]

In 1999, Petitioner borrowed approximately $100,000,000 and engaged in extensive renovations of its beet sugar processing facilities. Tr. I, 193-195. At the hearing, SMBSC detailed the scope and magnitude of the construction project, which it termed Vision 2000. Tr. I, 32-86, CX 1, 5, 8, 9, 10, 12-22, 25, 41.[4] SMBSC states that substantial portions of the old facility were demolished, and that in effect, the extensive nature of renovations is equivalent to the opening of a new facility, as referred to in the Act. As a result of all this construction, SMBSC states that its design capacity for processing sugar beets into sugar is more than double the capacity of the factory as it previously existed on the same site. See, SMBSC Reply Brief at 22.

SMBSC undoubtedly significantly modernized and increased the capacity of its Renville facility. Likewise, there was considerable testimony that many of the other intervenor beet sugar entities also undertook significant and highly costly—though not as costly over as short a period as Petitioner—modifications and improvements to their processing plants. Thus, Kevin Price of American Crystal—the largest beet sugar processor--testified to two major expansions totaling over $130,000,000 during the period from 1996-2000. Tr. II, 32-46. Inder Mathur, President of Western Sugar Corporation testified to a $22.5 million expansion project. Tr. II, 120-123. Victor Krabbenhoft, the Chairman of the Board of Minn-Dak, testified to a $93,000,000 expansion. Tr. II, 170-1, 179.

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[3] Tr. I refers to the transcript for the first day of the hearing, and Tr. II and Tr. III refer to the transcripts for the second and third days of the hearing.
[4] Petitioner's exhibits are designated by CX, Intervenors by IX, and CCC's by GX.

The process of extracting sugar from the sugar beet is complicated, time-consuming and expensive. It presents difficult material handling problems in a harsh climate. It is complicated by a perishable raw material that is delivered in the fall of the year (usually after a frost to enhance sugar content) to begin what is called the "beet slicing campaign." The raw as-received sugar beets degrade if not processed by the time the springtime warm weather arrives. Once the sugar beets are converted to a intermediate product of thick, syrupy liquid ("thick juice" or "in-process sugar"), the time constraints on further processing are less intense, other than to finish the process before the next year's crop of sugar beets start arriving again. The beet end of the factory is normally shut down for lack of raw product between slicing campaigns. The sugar end of the overall process consists of a year-round concentration and crystallization process. With the aid of intermediate product storage tanks, processing of the thick juice may proceed at a slower daily rate than operations at the beet end part of the factory.

Shortly after regulations were issued implementing the 2002 Act, the CCC sent out a survey to all sugar beet processors. This Beet Processor Allotment Production History Adjustment Survey (Certified Administrative Record of the Commodity Credit Corporation (CR) 004-005) contained four questions concerning the four adjustments that were available under the Act. While Petitioner did state that it had suffered a loss more than 20% above normal on stored sugar beets during the 1999 and 2000 crop years, it answered "No" to the question

> 1. Did your company start processing sugar beets at a new processing facility in the period, October 1, 1996, through September 30, 2001?

Petitioner testified that they did not realize that this was an official survey, since it was not on a printed form or on letterhead, and that they simply made a mistake in filling out this form. John Richmond, the President and CEO of Petitioner testified that the fact that the survey's wording did not exactly track the regulations made them "unsure of what to do." Tr. I at135.

Mr. Richmond also testified that the sugar beet processing portion of the factory was rebuilt in essentially one off-season, between March and September of 1999. By reconstructing a plant " . . . so that it was now two or three times bigger than it was before, I believe means that we reopened the plant and we constructed a new plant simultaneously." Id. at 140. "[W]hat we did was demolish the beet end of a factory, and rebuild that factory and add another factory at the same time. We did not permanently terminate the operation at that factory. We essentially rebuilt that factory and right with it, built another factory at the same time." Id. at 142. Shortly after this statement that Petitioner essentially had two factories on the same site where it previously had one, apparently as a result of the degree of expansion in processing capability, Mr. Richmond engaged in this short colloquy with government counsel:

MR. KAHN: And you have never had more than one factory, have you, on that site?

MR. RICHMOND: There has only ever been one sugar factory.

Id. at 143.

Petitioner also introduced evidence, for comparison purposes, of the reopening of a facility that had been idle for two decades in Moses Lake, Washington. Tr. I, 95-99.

This Pacific Northwest, or PNW, facility did receive an adjustment for opening a sugar factory. While there was some testimony indicating that portions of the infrastructure from the factory that had sat idle for twenty years still existed in a usable condition, other testimony showed that a significant portion of the facility's equipment had been cannibalized, Tr. II at 236-7.

There was no dispute that the CCC had found that Petitioner had incurred a quality loss on stored sugar beets in crop year 2000 that entitled them to a favorable 1.25% adjustment in their allotment. At the hearing, there was a good deal of evidence presented as to whether Petitioner was entitled to a second such adjustment for substantial losses on stored sugar beets allegedly suffered during crop year 1999. Petitioner testified that it suffered substantial quality losses on stored sugar beets because of a major boiler failure, which resulted in the work at the factory slowing down. The boiler failure, combined with abnormally warm weather, caused the quality of the beets, and the resulting output of sugar, to significantly deteriorate. Tr. I at 144-5. There was considerable testimony as to whether losses that were triggered by an equipment failure even qualified as "substantial quality losses" under the statute. The term has not been defined by the CCC either through regulation or other guidance.

Mr. Richmond testified that the "straight house" recovery method was an appropriate approach to determining the relative performance of beet sugar factories, and that a 20 percent loss in sugar production calculated according to this method was an appropriate measure of substantiality. E.g., Tr. I at 117-8. He further testified that in order to establish a baseline to determine the extent of the loss, it was appropriate to use a

standard of recovering a minimum of 75 percent of the sugar in the harvested sugar beets. He stated that, applying this methodology, the recovery average for 1999 was well below the ten-year average recovery percentage.

Intervenors strongly contested Petitioner's methodology and results. They argued that the 75 percent standard for evaluating straight house recovery was inappropriate and unsubstantiated, and testified that if it was the appropriate standard, then a number of other companies would have been similarly entitled to an allocation adjustment. Tr. II at 22-26, 124, 157, 204, 237, IX 29. They also contended that the statutory term "quality losses" was not meant to cover every type of loss that could occur in the processing of sugar beets, and that equipment problems such as boiler failure constitute a "non-quality" loss not intended to be covered by the statutory adjustment of allocation.

All parties acknowledge, as they must, that the beet sugar allotment program is a "zero-sum" game—that is, any increase in one processor's allotment results in a decrease in the amount of the allotments of the other beet sugar processors. Every year the Secretary estimates the amount of sugar that will be consumed in the United States, along with projected domestic production and imports, and establishes an overall allotment quantity, which is allocated according to a statutory formula between sugar derived from sugar beets and sugar derived from sugar cane. Thus, the total amount of sugar to be processed by the beet sugar industry is a fixed amount, subject to some periodic interim adjustments. Thus, an allotment increase of 1.25% for one processor would result in a reduction of a total of 1.25% in the cumulative allocations of the other processors, resulting in zero net gain or loss to all the processors combined.

DISCUSSION

I. Petitioner is Not Entitled to an Adjustment for Opening a Sugar Beet Processing Factory

I affirm the Commodity Credit Corporation's denial of Petitioner's request for an adjustment of 1.25% in their sugar beet allocation for opening a sugar beet processing factory. I find that the language in the Act is clear and unambiguous that substantial expansions, modifications and/or modernizations of a factory are not equivalent to the opening of a factory. Further, the legislative history supports the interpretation of the statute made by the CCC. And to the extent there is any ambiguity as to the meaning of "opened" I find that the CCC's interpretation is both reasonable and entitled to deference. I also find that the CCC's actions in granting Pacific Northwest an adjustment for opening a factory in Moses Lake, Washington are not inconsistent with their actions regarding Petitioner in this matter.

In its Request for Reconsideration of Allocation of Sugar Marketing Allotments by the Executive Vice President of CCC, dated October 9, 2002, SMSBC states:

> "Beginning in crop year 1998, SMSBC substantially re-built and expanded it processing facility, resulting in what is essentially a new sugar beet processing factory on the same site and partially using existing buildings. Nearly every major unit operation in the facility was replaced or substantially modified."

(C.R. 010) SMSBC then refers to this re-building and/or expansion as an "essentially new factory." Id. In the Brief of SMSBC Concerning Suggested Procedural Matters, Petitioner states that it:

> "reconstructed and reconfigured its Renville, Minnesota sugar beet processing factory thus creating a new sugar beet processing factory on the same site. The new factory increased production capacity and enhanced efficiency and productivity thereby driving down the costs of production."

Brief of SMSBC Concerning Suggested Procedural Matters, p. 4. Petitioner is thus essentially arguing that by significantly improving efficiency and expanding its capacity, it has "opened" a new factory.

Congress obviously could have chosen to reward a beet sugar processor for expanding significantly in size. By limiting the 1.25% allocation increase to companies that "opened" a factory, however, Congress did not make the choice urged by Petitioner. That choice being made, it is not the role of the CCC nor the undersigned to second guess Congress. That Congress chose a different course after earlier passing the Freedom to Farm Act, and that Petitioner might have made business decisions in reliance on the earlier Act does not give the CCC any ground to implement the current Act in a manner contrary to its express terms. Moreover, the record indicates that farm bills have a limited life and that those regulated by these bills have learned to expect periodic changes of greater or lesser significance. As I read it, the statute simply does not make any provision for adjusting a beet sugar processor's allotment simply because it has increased its processing capacity, even if the increase was substantial. Indeed, granting allocation

adjustments for increasing capacity would, based on the evidence presented by several of the intervenors, potentially result in a number of adjustments in allocation, which would all have to come out of the same total allotment. And imposing a rule that arguably doubling capacity is the equivalent of opening a factory, while any lesser number would not get such an allocation would likely be viewed as arbitrary, particularly given the clear meaning of "opened" in this context. Congress was certainly familiar with the potential for a processing facility to expand, and they appear to have decided to limit the granting of the 1.25 % increase in allotment to processors who "opened" a factory rather than include those who expanded a presently existing one.

Alternatively, Petitioner has contended that it effectively demolished its old factory—although the company never ceased operating other than in the normal off-season for this industry—and built **two** new factories in its place. Tr. I at 139, 162. On the other hand, Petitioner seems to recognize, as Mr. Richmond testified, that there really is just one beet sugar processing factory in Renville, albeit a significantly larger and probably more efficient one than the pre-expansion factory. The legal argument that Petitioner effectively demolished its old factory and opened two new ones on the same location is less than compelling. Petitioner argues in its Post-Hearing Brief that "The entire beet end of the facility was demolished and reconstructed . . . " (p. 17) and that the beet end of a facility is the "factory." Id., at 21. Yet Petitioner also goes on to argue in its Reply Brief that it should not suffer the downward adjustment of 1.25% that the statute mandates for a beet sugar processor who has "closed" a sugar beet processing factory. Yet if a factory is demolished, it is a difficult to conceive of it not being closed. In fact, Petitioner's approach would logically mandate that the CCC deem a factory "closed" if it reduced

capacity by 50%, since that would appear to be the converse of accepting the argument that the doubling of capacity is “opening” an additional factory. And contending that the “beet end” and the “sugar end” are two different factories, and that therefore there are now two factories where there once was one seems little more than a bootstrap approach to arguing that allegedly doubling the potential capacity to process sugar beets is the same as opening a new factory.

I also find it significant, but not controlling, that in response to a survey conducted by the CCC, Petitioner indicated that it had not opened a new beet sugar processing facility during the time period that would trigger the increased allotment. Although Petitioner through testimony and argument indicates that this was a mistake, and that the form was confusing because it did not track the language of the statute and that it did not appear to be an official survey, it is apparent that at the time of the survey Petitioner considered its extensive renovation of its facility just that, and not the opening of a new facility.

Even if I were to find that the statutory language was ambiguous, which I do not, the legislative history would be of no help to Petitioner. Senator Conrad pointed out that the 2002 Act was designed to create “ . . . a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry.” The amorphous standard suggested by Petitioner which would require the CCC to determine that “opening” a facility includes expanding a facility’s capacity more than an unspecified amount (and suggests that a facility must be found to have “closed” if capacity has diminished by a likewise unspecified amount) provides neither certainty nor

predictability and does not seem to comport with the objectives mentioned by Senator Conrad.

Petitioner also contends that "[a] conservative and common sense reading" (Opening Brief, p. 23) of Senator Conrad's statement that the Secretary of Agriculture had the authority to make adjustments to allotments " . . . if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets" means that a processor who increases processing capacity through improved technology is entitled to an adjustment to its allocation. However, reading Senator Conrad's statement in conjunction with the four bases for allowing allocation adjustments provided in the Act, it is evident that the phrase concerning "increased processing capacity through improved technology to extract more sugar from beets" refers not to an increase in beet slicing capacity or a modernization of technology but rather to the allotment increase for molasses desugarization. Looking at Senator Conrad's comments in context, it is apparent he is making a reference to each of the four types of adjustments—opening a facility, closing a facility, disaster-related losses and construction of a molasses desugarization facility. Further, the phrase in question refers to technologies to "extract more sugar from beets." Increasing the capacity of a factory, as Petitioner did with the Renville facility, does not increase the amount of sugar they can extract from beets, but primarily allows them to process more beets. Thus, Senator Conrad's statement, which basically constitutes the legislative history for these provisions, does not support Petitioner's position.

I find that even if the language concerning whether a factory was "opened" was subject to multiple interpretations and the legislative history was not dispositive, the CCC would be entitled to some deference in its interpretation of these provisions. While the Act provides for a hearing as to whether the provisions on the adjusting of allotments have been correctly applied, it could not have intended to have the administrative law judge interpret the statute as if the CCC had never acted. While the hearing in this type of case may be *de novo* with respect to adducing material facts that are at issue, the judge is not supposed to substitute his expertise for the CCC, which is charged with administering the Act, including the promulgation of regulations. While I will not go so far as to say that I must give the CCC the full deference accorded in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), because that holding specifically seems to apply to federal judicial review of final agency actions while this matter is obviously still before the USDA, I find that some deference must be given to the Executive Vice-President of CCC's Initial Determination of Petitioner's appeal [Reconsidered on December 12, 2000] as the interpretation given the statute by the officers or agency charged with its administration." (*Udall v. Tallman*, 380 U.S. 1, 16 (1965). This is the

" . . . contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408. . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

Udall, 380 U.S. at 17. Here, the CCC's interpretation of the "opened" provision is reasonable and consistent with the Act, and would be entitled to deference had I needed to reach that issue.

Finally, the CCC's handling of the Pacific Northwest allocation is not inconsistent with the Act and with their handling of Petitioner's allocation. The Renville facility was never closed during the period of its expansion, other than during the normal off-season for the beet end of the facility. The Moses Lake facility for which Pacific Northwest was awarded an allocation for "opening" a sugar beet processing facility had been closed for a full twenty years. That it was a closed facility for twenty years is manifest—most of the old equipment had been removed from the site. There had been no sugar beet processing at that location from 1978 until Pacific Northwest opened a processing facility at the same site in 1998. Tr. I at 95-98. The two situations are simply not analogous.

2. **Petitioner is Not Entitled to a Second Adjustment for Substantial Quality Losses on Stored Sugar Beets**

I affirm the CCC's denial of a 1.25% adjustment for quality losses on stored sugar beets for the 1999 crop year. I find that the clear, unambiguous language of the Act only allows a single quality loss adjustment for sugar beets during the three crop years (1998-2000) that are used to calculate the base allotment, and that the CCC had already allowed such an adjustment for the 2000 crop year. Further, the legislative history offers no help to Petitioner's interpretation. To the extent that there is any ambiguity in the statute, the interpretation of the CCC is reasonable and would be entitled to deference.

Section 359d(b)(2)(D)(i)(IV) of the Act provides for an adjustment if the Secretary determines that the processor, "during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored **during any such crop year**." (Emphasis

added.) (7 U.S.C. § 1359dd(b)(2)(D)(i)(IV).) Petitioner contends that it is entitled to a second adjustment for the 1999 crop year, in addition to the quality loss adjustment that it received for the 2000 crop year, while CCC contended that it was immaterial and irrelevant whether SMSBC suffered a second substantial quality loss in the 1999 crop year. The CCC and Intervenors contend that in order to properly apply the statutory provision, CCC never had to decide the issue of whether SMSBC had suffered substantial loss in the 1999 crop year since the substantial quality loss during the 2000 crop year was a sufficient basis for CCC to make the single adjustment permitted under the statute.

The CCC interpretation is in accord with the clear and unambiguous language of the Act. There are four different adjustments allowed under the Act, and three of them—for opening or closing a factory, and for constructing a molasses desugarization facility, apply to **each** opening, closing, or construction. In contrast, the adjustment for substantial quality losses on sugar beets stored during any such crop year from 1998 to 2000 does not specify that the adjustment applies to each such loss. The rules of statutory construction require the presumption that Congress' word choices are intentional, and that where Congress uses one word—each—in describing three of the adjustments, while not using that word to apply to the fourth adjustment, then it must have had a purpose in so doing. Where Congress includes particular language in one section of a statute, but omits it in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Bates v. United States, 522 U.S. 23, 25 (1997). Where Congress provided that an adjustment be made for each opening, closing or construction in subparagraphs (D)(ii)(I), (II), and (III) and chose

a different approach to (D)(ii)(IV), the only proper conclusion is that Congress did not want the same standard to apply.

Once again, even if I found that I needed to look to the legislative history, I see nothing that would support Petitioner's interpretation. The legislative history does not address whether Congress intended there to be one, two or three adjustments based on sustaining quality losses. While all parties agree that the purpose of the Act's adjustment provisions were "to provide a predictable, transparent, and equitable formula," Senator Conrad's statements shed no light, one way or the other, as to how this particular adjustment is to be applied. Thus, if I needed to look to the legislative history, I would next determine whether the CCC's position was reasonable, under the deference standard that I discussed above.

The CCC's position that a processor would only be entitled to a single adjustment for quality losses, even it could show quality losses for more than one of the covered crop years, is reasonable and would be entitled to deference. Since I have already held that this interpretation is the proper reading of the clear terms of the statute, and the only one that gives meaning to each of the terms used by Congress in the adjustment provisions, there is little more to say on the matter.

A considerable portion of the hearing was devoted to testimony and exhibits as to what Congress meant by "substantial quality losses on stored sugar beets." Because I affirm the CCC's determination that the Act only allows for one quality loss adjustment, and because the CCC has already awarded Petitioner such an adjustment for the 2000 crop year, I do not find it necessary to make any determination as to whether Petitioner

showed that it has suffered such losses during the 1999 crop year, and what standards would apply to make such a determination. Whether the loss must be directly related to the beets themselves, or whether such a loss can be the result of equipment failure, whether the straight house method is the appropriate method to determine the extent of losses, etc., are not for me to initially determine. If the Act made provision for more than one quality loss adjustment, I would have to remand the matter to the CCC for an initial determination as to what standards would apply in making such a determination.

3. **Petitioner's Due Process, Regulatory Taking and Significant Impact Claims Provide No Basis for Overturning the CCC's Decision**

Petitioner has alleged (Opening Brief, pp. 13-14) that its due process rights were violated by the CCC's lack of a "thorough and proper investigation" of Petitioner's request that the CCC reconsider its initial allotment allocation decision; that denying it the requested allocation adjustments would amount to a regulatory taking; and that the impact of a denial of the requested allocations would be significant and discriminatory.

An administrative law judge's jurisdiction to rule on constitutional claims is limited. We clearly cannot declare an Act of Congress unconstitutional, nor can we invalidate an Agency regulation. "[G]enerally an administrative tribunal has no authority to declare unconstitutional a statute that it administers." In re Jerry Goetz , 61 Agric. Dec. 282, 287 (2002). However, we are charged with assuring that parties receive due process in their hearings.

Petitioner has received ample due process. The principal due process contention raised by Petitioner appears to be that on reconsideration, the Executive Vice President of the CCC did not conduct a hearing. Aside from the lack of requirement in the Act or the regulations that a reconsideration request entitles Petitioner to a hearing before the CCC, the fact is that Petitioner received an in-person hearing before me and had a full opportunity to adduce the facts that would support its claim for additional allotments.

Petitioner's regulatory taking and unfair impact arguments are essentially disagreements with Congress' legislative decisions in crafting the Act. Since I have sustained the CCC's interpretations as totally consistent with the statute, and since I have no authority to alter or overrule the statutory scheme authorized by Congress, I find no basis for reversing the determination of the CCC.

Findings and Conclusions

1. Petitioner, during the years 1996-2000, engaged in a significant modernization and expansion of the beet sugar processing facility in Renville, Minnesota.

2. Petitioner's significant modernization and expansion did not constitute opening a new beet sugar processing factory.

3. Petitioner was not entitled to a 1.25% increase in its allocation for opening a sugar beet processing factory.

4. Petitioner received a 1.25% increase in its allocation as a result of suffering substantial quality losses on stored sugar beets during the 2000 crop year.

5. Under the Act, no processor is entitled to more than one adjustment for substantial quality losses on stored sugar beets during the 1998 through 2000 crop years.

6. Petitioner was not entitled to a 1.25% increase in its allocation for suffering substantial quality losses on stored beets during the 1999 crop year.

7. Petitioner was not denied due process during the course of these proceedings.

Conclusion and Order

The determinations made by the Executive Vice-President of the CCC on January 23, 2003 denying Petitioner's request for additional allotments under the Act are sustained. The Petition for Review is DENIED.

This decision shall become final 25 days after service on the Executive Vice-President of the CCC, unless a party or an intervenor files an appeal petition to the Judicial Officer pursuant to Rule 11.

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 21st day of July 2004

Marc R. Hillson

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MARC R. HILLSON
Chief Administrative Law Judge