AGRICULTURE DECISIONS

Volume 57

July - December 1998
Part One (General)
Pages 841 - 1352

UNITED STATES DEPARTMENT OF AGRICULTURE

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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LIST OF DECISIONS REPORTED

JULY - DECEMBER 1998

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

VITO BALICE V. USDA.
CV F 92-5483-AWI 841

KREIDER DAIRY FARMS, INC. V. USDA.
NO. 98-0518 857

ANIMAL WELFARE ACT

COURT DECISIONS

C.C. BAIRD, D.B.A. MARTIN CREEK KENNEL V. USDA.
NO. 98-3296 869

SAMUEL ZIMMERMAN V. USDA.
NO. 98-3100 869

BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

JERRY GOETZ D/B/A JERRY GOETZ AND SONS V. USDA.
NO. 96-3120 875

NATIONAL DAIRY PROMOTION AND RESEARCH BOARD

COURT DECISIONS

GALLO CATTLE COMPANY V. USDA.
CIV. NO. S-98-1619 EJG/JFM 890

GALLO CATTLE COMPANY V. USDA.
NO. 97-15198 895

ANIMAL QUARANTINE AND RELATED LAWS

DEPARTMENTAL DECISIONS

GARLAND E. SAMUEL.
A.Q. Docket No. 98-0002.
Decision and Order 905

JERRY LYNN STOKES, D/B/A TAYLOR CATTLE.
A.Q. Docket No. 98-0007.
Decision and Order 914

CONRAD PAYNE.
A.Q. Docket No. 98-0004.
Decision and Order 921

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

JACK D. STOWERS, D/B/A SUGAR CREEK KENNELS.
AWA Docket No. 97-0022.
Decision and Order 944

KARL MITCHELL D/B/A ALL ACTING ANIMALS.
AWA Docket No. 97-0028.
Decision and Order 972

CHERYL A. ZIEMANN.
AWA Docket No. 98-0007.
Decision and Order 976

RICHARD LAWSON, STANLEY CURTIS, AND JOHN M. CURTIS,
D/B/A NOAH'S ARK ZOO.
AWA Docket No. 96-0047.
Decision and Order 980

DAVID M. ZIMMERMAN.
AWA Docket No. 98-0005.
Decision and Order 1038

JUDIE HANSEN.
AWA Docket No. 96-0048.
Decision and Order 1072

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISION

RONALD L. WIECZOREK AND DEANNA WIECZOREK.
EAJA-FSA Docket No. 99-0001.
Decision and Order 1149

FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF ACT

DEPARTMENTAL DECISION

KINZUA RESOURCES, LLC.
FSSAA Docket No. 98-0001.
Decision and Order 1165

FRESH CUT FLOWERS AND FRESH CUT GREENS PROMOTION AND INFORMATION ACT

DEPARTMENTAL DECISIONS

EVERFLORA, INC.
FCFGPIA Docket No. 97-0001.
Decision and Order 1183

FERRIS BROTHERS, INC.
FCFGPIA Docket No. 97-0002.
Decision and Order 1189

SUBURBAN WHOLESALE FLORISTS, INC.
FCFGPIA Docket No. 97-0003.
Decision and Order 1195

DUTCH FLOWER LINE, INC.
FCFGPIA Docket No. 97-0004.
Decision and Order 1201

FRANK W. MANKER WHOLESALE GROWER, INC.
FCFGPIA Docket No. 97-0005.
Decision and Order 1207

QUALITY WHOLESALE FLORIST, INC.
FCFGPIA Docket No. 97-0006.
Decision and Order 1213

HENRY C. ALDERS WHOLESALE FLORIST, INC.
FCFGPIA Docket No. 97-0007.
Decision and Order 1219

HARRY VLACHOS, INC.
FCFGPIA Docket No. 97-0008.
Decision and Order 1225

MUELLER BROTHERS, INC.
FCFGPIA Docket No. 97-0009.
Decision and Order 1231

U.S. EVERGREEENS, INC.
FCFGPIA Docket No. 97-0010.
Decision and Order 1237

GEORGE RALLIS, INC.
FCFGPIA Docket No. 97-0011.
Decision and Order 1243

MAJOR WHOLESALE FLORIST, INC.
FCFGPIA Docket No. 97-0012.
Decision and Order 1249

EVERFLORA MIAMI, INC.
FCFGPIA Docket No. 97-0013.
Decision and Order 1255

HOLLAND FLOWER EXPRESS, INC.
FCFGPIA Docket No. 97-0014.
Decision and Order 1261

MISCELLANEOUS ORDERS

STEW LEONARD'S.
98 AMA Docket No. M 1-1.
Order Denying Interlocutory Appeals 1268

AGRI-MARK, INC.
98 AMA Docket No. M 1-2.
Dismissal of Petition 1274

NEW ENGLAND DAIRIES, INC.
98 AMA Docket No. M 1-3.
Dismissal of Petition 1274

PAT KNIGHT.
A.Q. Docket No. 98-0010.
Order Dismissing Complaint 1275

PETER A. LANG, D/B/A SAFARI WEST.
AWA Docket No. 96-0002.
Stay Order 1275

SOUTH CALHOUN FARM, INC.
AWA Docket No. 95-0042.
Order Dismissing Complaint 1276

STEVEN M. SAMEK AND TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Ruling Denying Steven M. Samek's Motion for
Assistance With Appeal 1276

MARILYN SHEPHERD.
AWA Docket No. 96-0084.
Order Denying Petition for Reconsideration 1280

C.C. BAIRD, D/B/A MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Order Denying in Part and Granting in Part Petition
for Reconsideration 1284

C.C. BAIRD, D/B/A MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Stay Order 1301

C.C. BAIRD, D/B/A MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Order Lifting Stay and Modified Order 1302

SEVERIN PETERSON AND SHARON PETERSON.
EAJA-FSA Docket No. 99-0002.
Order Denying Late Appeal 1304

EVERFLORA, INC., ET AL.
FCFGPIA Docket No. 97-0001 ET AL.
Ruling Denying Respondents' Motion for Extension of Time 1314

OTTO WAGNER, JR.
FCIA Docket No. 98-0005.
Order Dismissing Disqualification Proceeding 1319

ROBERT SKLOSS, D/B/A ROBERT A. SKLOSS AND B&A FARMS.
FCIA Docket No. 98-0012.
Order Dismissing Disqualification Proceeding 1319

RAYMOND J. FULLER.
FCIA Docket No. 97-0008.
Order 1319

JAMES L. AULT.
FCIA Docket No. 98-0014.
Order of Dismissal 1320

HAWAIIAN MACADAMIA PLANTATION, INC.
P.Q. Docket No. 98-0011.
Complaint Dismissal 1320

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

BEN MORA, D/B/A MORA FARMS.
AMAA Docket No. 98-0002.
Decision and Order 1321

ANIMAL WELFARE ACT

PEGGY LEE MILLER.
AWA Docket No. 96-0033.
Decision and Order 1323

MARIANO V. RUGGERI, CYNTHIA V. RUGGERI, AND
CRANE LABORATORIES.
AWA Docket No. 98-0009.
Decision and Order 1325

CHARLES CATHEY, D/B/A T-BO'S LOUNGE.
AWA Docket No. 98-0006.
Decision and Order 1329

STEVEN M. SAMEK AND TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Decision and Order 1331

BEEF PROMOTION AND RESEARCH ACT

GERALD MURNION.
BPRA Docket No. 98-0001.
Decision and Order 1335

FEDERAL CROP INSURANCE ACT

EDWARD E. SHOOK.
FCIA Docket No. 98-0009.
Decision and Order 1337

RICHARD WAYNE HARP.
FCIA Docket No. 97-0016.
Decision and Order 1338

ROBERT L. "BILLY" BURKS.
FCIA Docket No. 98-0006.
Decision and Order 1338

DONALD B. ALDERMAN.
FCIA Docket No. 98-0008.
Decision and Order 1339

HENRY KRUP.
FCIA Docket No. 98-0011.
Decision and Order 1340

EDWARD LEROY BREHM.
FCIA Docket No. 98-0003.
Decision and Order 1341

JIMMY HALL "PETE" BURKS.
FCIA Docket No. 98-0007.
Decision and Order 1341

CHARLES WILKERSON, D/B/A WILKERSON & WILKERSON.
FCIA Docket No. 98-0013.
Decision and Order 1342

PLANT QUARANTINE ACT

FRANCISCO IVITZ ABAN.
P.Q. Docket No. 98-0010.
Decision and Order 1344

FRANK SHORTER (FRANK STREETER), D.B.A. KAPOHA PALMS,
RARE PALMS & CYCADS.
P.Q. Docket No. 98-0009.
Decision and Order 1345

SUNDER KISHINGHAND GANGLANI.
P.Q. Docket No. 98-0012.
Decision and Order 1347

Consent Decisions 1350

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

VITO BALICE v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CV F 92-5483-AWI.
Filed July 14, 1998.

Marketing order — Almonds — Civil penalty — Eighth amendment — Due process.

The Circuit Court granted the United States Department of Agriculture's cross-motion for summary judgment, holding the Judicial Officer's (JO) assessment of a $225,000 civil penalty against plaintiff for violations of the Almond Marketing Order (7 C.F.R. pt. 981) was not arbitrary and capricious. The Court found the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which requires agency programs or policies to reduce or to waive civil penalties for violations by small entities, was not applicable because SBREFA does not appear to apply to adjudication and SBREFA was enacted after the JO assessed the civil penalty. The Court concluded that the assessment of a civil penalty, after notice and an opportunity to be heard, did not violate plaintiff's right to due process and that the amount of the civil penalty was not in violation of the Eighth Amendment to the United States Constitution, as excessive.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Docs. 19, 22]

This is an action by Vito Balice ("Balice") seeking review of the imposition of a $225,000 civil penalty imposed by the United States Department of Agriculture ("the USDA") against him. Balice was fined for violating certain regulations contained within the California Almond Marketing Order ("the Marketing Order"). 7 C.F.R. § 981 et seq. Both Balice and the USDA now move for summary judgment of Balice's action for judicial review. The court has jurisdiction to review this administrative action by the Secretary of Agriculture. 7 U.S.C. § 608c(14)(B).

PROCEDURAL HISTORY

In 1990 the administrator of the United States Department of Agriculture's Agricultural Marketing Service filed an administrative complaint alleging that

Balice, an agent of the O.R.C. Company, as well as Onofrio Calabrese and Rocco Calabrese, violated certain provisions of the Marketing Order. In response Balice filed an answer, and also an administrative petition challenging the lawfulness of the regulations. In 1991 a hearing as to the administrative complaint was held before an administrative law judge, who ruled that Balice had violated certain provisions of the Almond Marketing Order, and thereafter fined Balice $216,000.[1] Balice was fined $62,000 for violating a "reserve" requirement, $74,500 for violating record keeping provisions, $1,000 for failing to file certain reports either at all or on time, and $78,500 for violating "inedible disposition" regulations. The administrative law judge also heard Balice's petition, denied any relief to Balice based on the petition challenging the regulations, and dismissed the petition.

Balice then filed administrative appeals, both as to the imposition of the fine and as to the dismissal of Balice's petition. As to Balice's appeal relating to the imposition of the fine, the USDA filed a cross-appeal seeking to increase the fine to $582,000.

On January 31, 1992 the Judicial Officer upheld the ALJ's dismissal of Balice's petition challenging the lawfulness of the regulations. Balice then sought judicial review of that decision by filing a complaint, which is pending before another judge of this court. *Balice v. United States Dep't of Agriculture*, CV F 92-5108 OWW. After the USDA answered that complaint, the parties entered into a stipulation approved by the Magistrate Judge on May 12, 1992 staying the action due to the pendency of appeals before the Ninth Circuit that may address the same, or similar, legal issues.[2]

On June 25, 1992 the Judicial Officer issued a second order, generally affirming the ALJ's decision as to the administrative complaint, but revising the fine against Balice. The Judicial Officer affirmed the ALJ's findings and conclusions regarding the four types of violations, and added certain findings. The Judicial Officer then fined Balice $124,000 for the "reserve" regulation violation, $74,500 fine for record keeping violations, $2,000 for the failure to timely file reports, and $25,000 for the "inedible disposition" regulation violations. Thus the total fine against Balice was $225,500. Because the Calabreses did not appeal the $216,000 fine

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[1]The $216,000 fine was assessed jointly and severally against Balice, Onofrio Calabrese and Rocco Calabrese. The Calabreses, Balice's uncles who live in Italy, did not challenge the ALJ's decision, and are not a party to this action for judicial review.

[2]The stay of that action remains in effect, neither party having moved for relief from the stay to resolve that separate action, and neither party having filed a motion to consolidate or relate that action to this action.

against them, the Judicial Officer determined that $216,000 of the $225,500 fine against Balice would be jointly and severally imposed against all three individuals, while the balance of $9,500 would be imposed as against Balice only.

Balice filed this second action to challenge the findings and conclusions of the Judicial Officer. This action was originally assigned to the Hon. Garland E. Burrell, Jr. On October 30, 1992 the Magistrate Judge approved a stipulation between the parties to say this action due to certain appeals before the Ninth Circuit that reportedly might address some of the legal issues presented in Balice's complaint. Having heard nothing from the parties from that point, on December 4, 1996 Judge Burrell issued an Order directing the parties to show cause as to why this action should not be dismissed. Balice responded that the Ninth Circuit appeals had not addressed many of the issues in his complaint, and he proposed that the court set a briefing schedule for cross-motions for summary judgment.

On March 5, 1997 Judge Burrell set a schedule for the filing of cross-motions for summary judgment, thus lifting the stay of this action by implication.

On July 15, 1997 Balice filed his motion for summary judgment. The USDA filed its cross-motion for summary judgment on September 24, 1997. On October 16, 1997 the USDA filed the administrative record.

On December 15, 1997 this action was reassigned to the Hon. Anthony W. Ishii. On April 15, 1998 this court issued an order vacating the previously set hearing date for the summary judgment motions, which was to have been April 20, 1998, and directed the parties to cure certain deficiencies in the administrative record. On May 18, 1998 the USDA filed certain additions and corrections to the administrative record, thus curing the record deficiencies. On June 5, 1998 the court issued an order stating that it was taking the pending motions for summary judgment under submission.

LEGAL STANDARD

Summary judgment shall be granted when the undisputed facts entitle the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment motions are particularly appropriate where, as here, the court's review is of an administrative record. *Adams v. United States*, 318 F.2d 861, 865 (9th Cir. 1963).

A district court reviewing the action of an administrative agency shall "hold unlawful and set aside agency action, findings, and conclusions" which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "unsupported by substantial evidence." 5 U.S.C. §§ 706(2)(A), (B), (E).

In determining whether an agency decision is arbitrary, capricious, or an abuse of discretion, the standard of review is narrow, and the district court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In applying this standard of review, the court determines whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Resources Ltd. v. Robertson*, 35 F.3d 1301, 1304 (9th Cir. 1993).

"Substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Western Truck Manpower, Inc. v. United States Dep't of Labor*, 12 F.3d 151, 153 (9th Cir. 1993) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

The court must also grant "a high degree of deference to an agency's interpretation of the statutory provisions and regulations it is charged with administering." *Natural Resources Defense Council v. United States Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (citation omitted).

DISCUSSION

In this action Balice seeks judicial review of the Secretary of Agriculture's decision that Balice violated four aspects of the California Almond Marketing Order.

The California almond handling industry is regulated by the Almond Marketing Order, 7 C.F.R. § 981 (the "Order"). The Order was established in 1950 by USDA pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c (the "Act"). The purpose of the Act is to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce" as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. §§ 602(1), 602(4) (1988). The Act authorizes the Secretary of Agriculture (the "Secretary") to issue, following notice and an opportunity for hearing, marketing orders that will "tend to effectuate the declared policy of [the Act]" with respect to the particular commodity. 7 U.S.C. § 608c(4) (1988). The Order is administered by the [California Almond] Board, which has the power to "make rules and regulations to effectuate the terms and provisions" of the Order. 7 C.F.R. § 981.38 (1993). The Board has ten members, all of whom are industry representatives appointed by the Secretary. The Board engages in a variety of activities, including research and development, marketing, quality control, and volume regulation.

Cal-Almond, Inc. v. United States Dep't of Agriculture, 14 F.3d 429, 433 (9th Cir. 1993).

Under 7 U.S.C. § 608c(14)(B) the Secretary of the USDA can assess against a handler or an agent of a handler a civil penalty of up to $1,000 per day for each violation of a marketing order. Each day that a violation continues is deemed to be a separate day for which a penalty of up to $1,000 can be assessed.

The administrative order at issue imposes a fine against Balice of $225,000, and includes findings that Balice violated certain regulations within the Marketing Order. Balice contests certain aspects of each of the four violations, and also challenges the fine as a whole as being excessive.

I. The Reserve Requirement Violation

The Judicial Officer fined Balice $124,000 for violating the "reserve" requirement of the Marketing Order, fining him $1,000 per day for 124 days of violation.

The Ninth Circuit has explained the nature of the reserve requirement as follows:

> The reserve requirement is the mechanism the Board uses to regulate the volume of almonds entering the market, pursuant to the Act's goals of protecting almond prices and maintaining an orderly flow of almonds to market. 7 U.S.C. § 608c(6)(A) (1988). Every year, the Board recommends to the Secretary what percentage of the total almond crop should be "salable" and what percentage should be held in "reserve" by handlers. 7 C.F.R. § 981.49 (1993). Handlers may only sell the salable percentage of almonds they receive; they must withhold from marketing an amount equal to the reserve percentage. 7 C.F.R. § 981.50 (1993). The Secretary designates the final percentage based on the Board's recommendation and "any other available information." 7 C.F.R. § 981.47 (1993).

Cal-Almond, Inc., 14 F.3d at 443.

For the crop year 1987-88, the reserve requirement was 18%, meaning that Balice was required to withhold from both domestic and export markets 18% of the merchantable almonds he obtained from growers in that crop year. 52 Fed. Reg. 39,900 (1987). On August 1, 1988 handlers were allowed to "release" their entire reserve into edible markets after the Secretary of Agriculture determined that the market could sustain such an influx. 53 Fed. Reg. 28,630 (1988).

The Judicial Officer found that Balice, as an agent for the O.R.C. Company,

violated 7 C.F.R. §§ 981.46,[3] 981.50,[4] and 981.52[5] on March 22, 1988 and from March 31, 1988 through July 31, 1988, for a total of 124 days. The Judicial Officer further found that Balice fully understood the reserve requirement but deliberately violated the regulation.

In his motion for summary judgment Balice does not specifically contend that these findings are unsupported by substantial evidence.[6] Balice instead contends that the amount of the fine was excessive and was arbitrary and capricious, because (1) he shipped the reserve to Italy at the bequest of his uncles because the uncles believed that they needed the reserve in Italy to comply with an Italian currency rule, (2) the Secretary failed to show that the almonds not held in reserve were actually placed in the stream of commerce, and (3) the Judicial Officer did not consider other mitigating circumstances, namely that O.R.C.'s reserve requirement was small given that O.R.C. itself was a small handler of California almonds. Because Balice does not expressly challenge the sufficiency of the evidence as to the finding that he violated the reserve requirement, the court interprets Balice's arguments as being offered to lower the amount of the fine, rather than to contest the fact that he was found in violation of the reserve regulation.

Balice's first argument is that his uncles ordered him to ship some portion of the reserve to Italy, which is perhaps characterized as a duress defense, in that the uncles asserted to Balice that they needed the almonds in Italy in order to comply with an Italian currency rule. The Judicial Officer found that Balice and uncles knew well in advance of the deadlines imposed by the Italian law in question that they were subject to both sets of laws, and did nothing to prepare for the perceived conflict. Further the Judicial Officer adopted the reasoning of the ALJ that the Italian currency law and the United States' almond reserve requirements were not in conflict in the first place, and this court finds no error in such a legal conclusion.

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[3]"When a reserve percentage has been fixed for any crop year, . . . no handler shall handle almonds except on condition that he comply with the requirements in respect to withholding reserve almonds."

[4]When "reserve percentages are in effect for a crop year, each handler shall withhold from handling a quantity of almonds having a kernel weight equal to the reserve percentage of the kernel weight of all almonds such handler receives for his own account during the crop year."

[5]"Each handler shall, at all times, hold in his possession or under his control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligations."

[6]To the extent that Balice may be implicitly challenging the quantum of evidence offered to sustain the findings, the court finds that the Judicial Officer's findings are supported by substantial evidence as set forth and identified in the Judicial Officer's opinion at pp. 7-11, 33-34, 38, and 42.

Based on the above the Judicial Officer's decision not to consider this defense to be an appropriate mitigating factor calling for a lower fine was not a capricious and arbitrary decision.

As to whether the Judicial Officer did or did not find that Balice actually caused harm to his competitors by placing the almonds not held in reserve in the stream of commerce, the record is not clear. However, the findings that Balice willfully and deliberately violated the reserve requirement and that O.R.C. did not have on hand a sufficient reserve on hand for 124 days would seem to give rise to a reasonable inference that the almonds had been placed into the stream of commerce in some manner or another. If in fact no such finding was implicitly made by the Judicial Officer, the court nevertheless finds that the Judicial Officer's decision not to lower the daily fine on the basis that the USDA did not prove that Balice caused actual harm to a competitor was not an arbitrary and capricious decision.

The court also finds that, contrary to Balice's interpretation of the administrative record, the Judicial Officer did consider the asserted mitigating factor that Balice was a small handler. The Judicial Officer expressly stated that, as to the administrative complaint as a whole, he would consider any "circumstances shedding light on the degree of culpability involved." Judicial officer's Decision and Order, p. 32. After reviewing the Judicial Officer's opinion, this court cannot conclude that the Judicial Officer failed to consider any evidence of additional circumstances offered by Balice. As to the point that Balice was a small handler, applied to the reserve requirement violation, the Judicial Officer noted that, based on the reserve amount that Balice was required to hold and on the then-prevailing market rate for edible almonds, Balice stood to gain close to a quarter to a million dollars in profit by releasing the reserve before the release date. From Balice's perspective he may have been a small handler as compared to larger operators, but the profit available to him from selling the reserve almonds before the release date was not small. Also as noted by the Judicial Officer if all "small" handlers ignored the reserve requirements the integrity of the reserve program would quickly erode.

Additionally the Judicial Officer reported that imposition of the fines against Balice and his uncles were the first fines to be imposed for handlers of California almonds under the then-new section 608c(14)(B),[7] and that the first fine should set the standard. Congress passed section 608c(14)(B) to provide for a civil penalty alternative to the previously available criminal penalties for violation of the reserve requirement. The Judicial Officer believed that it was congressional intent to create

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[7] 7 U.S.C. § 608c(14)(B) became law on December 22, 1987. Public Law No. 100-203, tit. I, § 1501, 101 Stat. 1330 (1987).

the alternative civil penalties because federal prosecutors rarely invoked the available criminal statute due to workload restrictions. The Judicial Officer concluded that, to be an effective alternative to criminal prosecution, the first civil fine cases should be sufficient to deter similar conduct by Balice and all other handlers in the future.

In any action in which a violation of the Marketing Order is found, the Judicial Officer has the discretion granted by 7 U.S.C. § 608c(14)(B) to issue a daily fine in some amount below $1,000. After reviewing the record, and based on the above, this court cannot conclude that the Judicial Officer's decision to fine Balice for the statutory maximum due to the violations of the reserve requirement was arbitrary and capricious.

II. The Recordkeeping Requirement Violations

The Judicial Officer fined Balice $74,500 for violating certain recordkeeping regulations of the Marketing Order, fining him $250 per day for 289 days of violation.

7 C.F.R. § 981.70 of the Marketing Order requires handlers to keep records to "clearly show the details of his receipts of almonds, withholdings, sales, shipments, inventories, reserve disposition, advertising and promotion activities, and other pertinent information with respect to his operations pursuant to" the Marketing Order. That regulation also requires that handlers retain such records for two years after the end of the crop year to which they are applicable.

The Judicial Officer adopted the finding of the ALJ that Balice violated the recordkeeping requirement on May 18, 1988. The ALJ found that on May 18, 1988 a Board auditor, Charles Charlton, visited Balice to audit O.R.C., but Balice could not provide records of grower receipts, withholdings, sales, shipments, inspections and inventories.

The Judicial Officer further adopted the finding of the ALJ that Balice violated the recordkeeping requirements from March 13, 1989 to January 5, 1990. The ALJ found that on March 13, 1989 a compliance officer with the USDA, Stephen Pollard, requested from Balice certain records for the 1987-88 crop year, but that Balice could not produce them, and admitted that certain of the records had never been created or maintained. Further the ALJ found that Balice sent some of the records to Italy after Pollard originally informed him that O.R.C. was being audited, thus indicating that Balice had control over the records but chose not to provide them to Pollard in an attempt to frustrate the USDA's investigation. The records were not produced at any time after March 13, 1989. The ALJ found that violation continued up to the point that the USDA filed the complaint, which was

January 5, 1990.

The Judicial Officer further found that Balice fully understood the recordkeeping requirement but nevertheless violated the regulation.

Balice does not expressly contend that the above findings are unsupported by substantial evidence.[8] Balice instead contends that the amount of the fine was excessive and was arbitrary and capricious, because (1) he provided some of the records, and those he did not provide he shipped to Italy upon the advice of his tax accountant, and later could not retrieve them because he became estranged from his uncles, (2) the USDA never asked Balice's uncles in Italy to produce records that they had in Italy, even though the USDA compliance officer suggested that course of action to his superiors, (3) fining Balice up to the date that the USDA filed its complaint was unfair because, had the USDA filed the complaint earlier the fine would have been lower. Because Balice does not expressly challenge the sufficiency of the evidence as to the findings that he violated the recordkeeping requirements, the court interprets Balice's arguments as being offered to lower the amount of the fine, rather than to contest the fact that he was found in violation of the recordkeeping regulations.

Initially the court notes that the Judicial Officer rejected the USDA's position, as set forth in its cross-appeal from the ALJ's opinion, that Balice be fined $1000 per day for each of the 289 days. Instead the Judicial Officer, after considering mitigating circumstance evidence offered by Balice, imposed a fine as to the recordkeeping violations of $250 per day rather than $1000 per day as allowed by 7 U.S.C. § 608c(14)(B). The Judicial Officer, contrary to Balice's contentions, did consider and accept Balice's arguments as to certain mitigating factors, including the fact that the records were of less import to the USDA after the end of the crop year. Because the Judicial Officer did accept certain of the mitigating evidence offered by Balice, the court does not find that the Judicial Officer acted capriciously in not imposing a daily fine in some amount below $250.

Further the court notes that the fact that Balice sent certain of the forms to Italy, whether at the behest of his accountant or not, is not a proper mitigating factor at all. Nothing prohibited Balice from maintaining a copy of whatever forms were needed in Italy before Balice caused them to be sent abroad. It was unreasonable for Balice, considering that he had actual knowledge that the USDA sought the

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[8]To the extent that Balice may be implicitly challenging the quantum of evidence offered to sustain the findings, the court finds that the Judicial Officer's findings are supported by substantial evidence, specifically the testimony of Peggy Leong and Stephen Pollard before the ALJ, and by USDA's Exhibits 74, 76, and 77, and by the evidence set forth in the Judicial Officer's opinion at pp. 33-34.

records for the purposes of conducting a lawful audit before he sent them to Italy, not to have kept a copy of the records that he sent to Italy. Likewise, whether or not the USDA attempted to attain records held abroad does not diminish the fact that Balice, who had control over them as evidenced by his sending them to Italy, failed to provide them to the USDA as requested.

III. The Report Filing Violations

The Judicial Officer fined Balice $2,000 for two violations of report filing violations.

7 C.F.R. § 981.74 provides that "every handier shall furnish to the Board in such manner and at such times as it prescribes . . . such other information as will enable the Board to perform its duties and exercise its powers." 7 C.F.R. § 981.472(a) provides that "each handler shall report to the Board on ABC Form 1 the total adjusted kernel weight of almonds, by varieties, received by it for its own account within any of the . . . reporting periods. Each report shall be filed with the Board within five (5) business days after the close of the applicable [ten] reporting period[s]."

The Judicial Officer noted that, at the hearing before the ALJ, Balice conceded that he did not file one of the ten Form 1 reports at any time, and that he filed another of the Form 1 reports more than five weeks late. Thus, substantial evidence supports the finding that Balice failed to comply with the report filing requirements as to two of the required Form 1 reports during the 1987-88 crop year.

Balice contends that fining him the maximum $1000 for each of the two violations is excessive and arbitrary on the ground that Balice was cooperating with the Board and sought help from the Board in filing the reports. Balice however, did not offer evidence that he sought help from the Board in relation to the two reports in question, but rather that on various occasions he spoke with Board personnel about the report filing obligations in general.

The Judicial Officer concluded that the maximum fine was appropriate because the complete failure to file a report, and the failure to file another report on a timely basis (here more than one month late) were serious violations in that the information provided on the reports are verified against other reports and are used by the Board for such purposes as calculating assessments, projecting industry volume, recommending to the Secretary whether changes as to the reserve requirement are advisable, and recommending to the Secretary future reserve percentages. The Judicial Officer further indicated that the USDA, in its complaint, did not itself seek the maximum fine given that the failure to file the two reports

in compliance with the Marketing Order regulations were continuing violations, and thus Balice could have been fined much higher amounts.

Based on the above the court cannot conclude that the $2000 fine for the failure to file one report at all, and the filing of another report more than one mouth late, was a capricious and arbitrary act by the Judicial Officer.

IV. The Inedible Disposition Requirement Violation

The Judicial Officer assessed a $25,000 penalty against Balice for not disposing of his entire inedible disposition by the due date, fining him $1000 a day for 25 days of violation.

An "inedible kernel" are pieces of an almond "with any defect scored as serious damage, or damage due to mold, gum, shrivel or brown spot, . . . or which has embedded dirt or other foreign material not easily removed by washing." 7 C.F.R. § 981.408.

The Marketing Order provides that "each handler shall cause to be determined . . . the percent of inedible kernels received by him. . . . The quantity of inedible kernels in each variety in excess of two percent of the kernel weight received, shall constitute a weight obligation to be accumulated in the course of processing and shall be delivered to the Board, or Board accepted crushers, feed manufacturers, or feeders." 7 C.F.R. § 981.42(a). 7 C.F.R. § 981.442 sets forth the manner of determining the disposition requirement, and the manner of disposing of inedible kernels. *See* 7 C.F.R. § 981.442(a). According to 7 C.F.R. § 981.442(a)(4) "the weight of inedible kernels in excess of 0 percent of kernel weight reported to the Board of any variety received by a handler shall constitute that handler's disposition obligation." Section 981.442(a)(5) explains in more detail the mechanics as to how the disposition requirement is physically met, and states that the "disposition obligation shall be satisfied when the almond meat content of the material delivered to accepted users equals the disposition obligation, but no later than July 31, succeeding the crop year in which the obligation was incurred." The July 31 deadline was extended for the 1987-88 crop year to August 31, 1988 "to satisfy the 18 percent of their disposition obligation which corresponds to the 18 percent reserve almonds released to salable almonds." 53 Fed. Reg. 29,222, 29,223 (1988).

The Judicial Officer adopted the finding of the ALJ that Balice handled a total of 571,726 pounds during the 1987-88 crop year, that his inedible disposition obligation was 10,291 pounds, and that he properly disposed of 7,695 pounds of inedible kernels on August 24, 1988, leaving 2,596 pounds not disposed. The Judicial Officer further found that Balice had been instructed by Board representatives several months prior to the August 31 deadline of his need to

comply with the inedible disposition requirement. The court concludes that these findings are supported by substantial evidence as set forth and identified in the Judicial Officer's opinion at pp. 17, 33, 52.

Since 2,596 pounds were not disposed of as of the August 31, 1988 deadline, Balice violated the inedible disposition requirement as of September 1, 1988. The failure to so dispose was apparently never cured, or at a minimum the evidence establishes that it was not cured as of the date that the USDA filed its complaint, January 5, 1990, and hence the Judicial Officer correctly determined that Balice did not comply with the requirement for at least 491 days.

Balice raises the following additional arguments: (1) the inedible obligation is not really crucial, (2) this type of violation is not properly viewed as a "continuing" violation because after the August 31 deadline passed without compliance Balice could no longer comply with the regulation, and (3) because the obligation remaining after the deadline was very small, it was arbitrary and capricious to impose a penalty over $1000 in totality for this violation.

Balice has not clearly identified the nature of his contention that the inedible disposition requirement is not crucial. To the extent that he may be claiming that a violation of that requirement should not subject one to the maximum $1000 violation, Congress has granted the Judicial Officer that discretion by the enactment of 7 U.S.C. § 608c(14)(B). To the extent that Balice may be claiming that the regulation itself is substantively unfair, the court is not convinced that the issue was properly raised either in the administrative forum or before this court; however the regulation has a rational basis, namely that "requiring handlers to meet [the inedible disposition] requirement should ensure that each handler's outgoing shipments of almonds are relatively free of almonds with serious damage, and the number of kernels with minor damage should be minimal." 41 Fed. R. 22,075, 22,078 (1976) (USDA's explanation, in part, for need for 7 C.F.R. § 981.42). If an economic regulation furthers a legitimate public goal and is reasonably directed to meet that goal, the regulation does not deprive those so regulated of substantive due process rights. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (economic regulations are not substantively unfair unless the regulation "manifests a patently arbitrary classification, utterly lacking in rational justification").

Balice also contends that the failure to meet the entire inedible disposition requirement by August 31, 1988 cannot be a "continuing" violation in that it is physically impossible to comply with the regulation after the deadline. However Balice cites no authority and does not point to any regulation to support his contention that the Board, and by extension the USDA, lacks the authority to apply an inedible disposition occurring after the deadline to the crop year in which the disposition had been due. Lacking any reasonable construction to the contrary, the

court will defer to the Judicial Officer's interpretation of the Marketing Order -- that the Marketing Order does not contain any regulation excusing a violation of the inedible disposition requirement once the deadline passes, and does not contain a regulation that would prohibit a handler from complying with the 1987-88 crop year disposition requirement after the deadline.

Finally Balice maintains that the total amount of the fine was too high because he complied with most of his inedible disposition requirement. The Judicial Officer determined that Balice violated the requirement for at least 491 days, but decided to apply a $1,000 fine to 25 days rather than to the entire violation period. The court finds that the Judicial Officer's decision to limit the number of days to which a fine would apply was sufficient to account for Balice's partial compliance with the disposition requirement.

V. The Additional $9,500 Fine

Balice claims that the Judicial Officer "for no apparent reason" increased the fine originally set by the ALJ by an additional $9,500. This contention is unsupported by the record. The Judicial Officer provided a lengthy analysis of each of the four violations in question, and made various changes, additions, and subtractions to the fines. When the four separate fines were totaled, the total imposed by the Judicial Officer exceeded that of the ALJ by $9,500. However given that the Judicial Officer explained the bases for each of the four fines, the court does not accept Balice's depiction of the increased fine as being "for no apparent reason."

Balice also states that the increased fine was imposed because the Judicial Officer sought to penalize Balice for seeking redress from the ALJ's decision. The court also rejects this characterization. The Judicial Officer had before it both Balice's appeal seeking to vacate or lower the original $216,000 fine, and also the USDA's cross-appeal seeking to increase the fine to $582,000. The mere fact that the Judicial Officer ruled against Balice does not evidence any prejudice or bad motive.

Balice finally argues that having his fine increased by the Judicial Officer violated his right to due process in an undisclosed manner. Given that he had full notice of the USDA's cross-appeal, this contention is frivolous.

VI. Attacks On Fine As A Whole

In addition to challenging the specific fines relative to the four violations, plus the challenge to the increased fine imposed by the Judicial Officer, Balice also

maintains that the $225,000 fine in totality is excessive under a number of legal theories.

A. Small Business Regulatory Enforcement Fairness Act Claim To Fine As A Whole

On March 29, 1996 Congress enacted the Small Business Regulatory Enforcement Fairness Act of 1996 ("the SBREFA"). Section 223(a) of that Act states that administrative agencies "regulating the activities of small entities shall establish a policy or program within 1 year of enactment of this section [Mar. 29, 1996] to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities."

Balice contends that neither the ALJ nor the Judicial Officer considered his ability to pay the fine in question. He therefore asks this court to wave or substantially reduce the penalty pursuant to the SBREFA.

The court finds that the SBREFA is inapplicable to this action. The SBREFA does not contain any indication that its substantive provisions were directed at administrative agencies acting in their adjudicative capacity. Instead it appears that Congress intended that agencies comply with the SBREFA when engaging in rule-making. *See Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1417 (M.D. Fla. 1998) (the SBREFA "requires an agency in the process of rule-making to the effect of the agency's proposed regulation on small enterprises and to prescribe pertinent mitigating measures"). Further even if the SBREFA could be interpreted as requiring an administrative law judge or a judicial officer with the USDA to consider a small entity's ability to pay a fine as part of the hearing process, the statute was enacted over four years after the Judicial Officer assessed the fine in question. Balice presents no legal argument as to why the SBREFA has retroactive effect, and the court declines to so hold.

B. Eighth Amendment Claim To Fine As A Whole

Balice maintains that the $225,000 fine violates the Eighth Amendment in that

the penalty is excessive compared to the conduct.[9] Assuming without deciding that the civil penalty in question could be characterized as "punishment,"[10] the fine is not excessive in the constitutional sense given the relationship between the profit available to Balice due to his violations of the Marketing Order and the actual fine imposed. Looking solely at the reserve regulation violation the Judicial Officer explained that placing the reserve on the market before the reserve release date would have resulted in a profit to Balice of somewhere in the vicinity of $241,196 to $246,677. Judicial Officer's Decision and Order, p. 42.

C. Due Process Claims To Fine As A Whole

Balice also states that the fine, as a whole, violates his due process rights. The court concludes that imposition of the fine did not violate Balice's procedural due process rights in that he had full notice of the USDA's intent to impose a fine well over $225,000, and exercised his opportunity to be heard in opposition to the complaint before the ALJ and the Judicial Officer.

Neither can it be said that imposition of the fine violated Balice's substantive due process rights. To show that a government action, which would include imposition of a civil fine, violates substantive due process, the plaintiff would need to show that the challenged action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Congress has declared that the institution and implementation of marketing orders, in part, is necessary "in the interests of producers and consumers [for] an orderly flow of the supply of [an agricultural product] to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). Fining a handler who violates a marketing order by not maintaining the required reserve, not

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[9]The USDA asserts that Balice did not specifically argue before the Judicial Officer that the ALJ's $216,000 fine violated the Eighth Amendment, and that therefore he cannot argue before this court that the Judicial Officer's fine, even though it was higher, violated the Eighth Amendment. The court is not convincing by this logic as Balice could not know in advance of the Judicial Officer's decision what amount, if any, the Judicial Officer would impose. In any event a review of Balice's Appeal Petition to the Judicial Officer establishes that Balice expressly challenged the fines imposed by the ALJ relative to the reserve regulation violation and the inedible disposition regulation violation as constituting cruel and unusual punishment.

[10]*Austin v. United States*, 509 U.S. 602, 621 (1993) suggests that, unless a civil monetary penalty solely serves remedial purposes, it may be considered punishment and thus subject to scrutiny under the Excessive Fines Clause.

maintaining proper records to verify handling activity, not filing timely reports with the overseeing Board, and not meeting inedible disposition requirements is a government action that is rationally related to public health and general welfare interests.

D. Administrative Procedure Act Based Claims To Fine As A Whole

Balice contends that the Judicial Officer acted in a arbitrary and capricious manner within the meaning of the Administrative Procedure Act, as well as abused the discretion granted him by that Act, by failing to consider Balice's offered mitigating circumstance evidence. The court, having reviewed the record below, that the Judicial Officer did consider the evidence and argument posed by Balice, but simply did not accept it to the extent suggested by Balice.

CONCLUSION

The court, having reviewed the parties' cross-motions for summary judgment and the administrative record, finds that the Judicial Officer's decision was not arbitrary and capricious. The decision is based on substantial evidence, and the particular fines imposed as to each of the four violations found to have occurred were within the scope of the discretion granted to the Judicial Officer by 7 U.S.C. § 608c(14)(B).

The Judicial Officer's Decision and Order filed June 25, 1992 is affirmed.

ORDER

For the reasons stated in the above Memorandum Opinion, IT IS HEREBY ORDERED that

1. Balice's motion for summary judgment is DENIED;
2. the USDA's motion for summary judgment is GRANTED; and
3. the Clerk of the Court is to close the case.

KREIDER DAIRY FARMS, INC. v. DAN GLICKMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.
Civil No. 98-0518.
Filed August 10, 1998.

(Cite as 1998 WL 481926 (E.D. Pa.)).

Jurisdiction of court — Postmark — Appeal petition.

The District Court held that petitioner's Amended Complaint, in which it first appealed the Judicial Officer's Order Denying Late Appeal and Order Denying Petition for Reconsideration, was not filed within 20 days of the Judicial Officer's Orders, as required by 7 U.S.C. § 608c(15)(B). Nonetheless, the Court found that it had jurisdiction to review the Judicial Officer's Orders because the Amended Complaint relates back to the filing date of the timely Complaint, which makes explicit reference to the Judicial Officer's Orders. Moreover, the Court held that the Judicial Officer's determination, that the word "postmarked" in 7 C.F.R. § 900.69(d) does not include a Federal Express label, is not in accordance with law. The Court vacated the Judicial Officer's Order Denying Late Appeal and Order Denying Petition for Reconsideration, remanded the case to the Judicial Officer, and ordered the Judicial Officer to treat petitioner's appeal petition as timely and to rule on the merits of the appeal petition.

United States District Court
Eastern District of Pennsylvania

MEMORANDUM

Cahn, C.J.

This case is back before the court following a remand. Currently pending is the Secretary's motion to dismiss Kreider's Amended Complaint. For the reasons that follow, the court will deny the motion. The court will also vacate the Judicial Officer's ("JO") January 12, 1998, and February 20, 1998, decisions (respectively, the "January 12 decision" and the "February 20 decision") and remand this case to the Secretary for a decision on the merits of Kreider's appeal of the Administrative Law Judge's ("ALJ") August 12, 1997, decision (the "August 12 decision").

I. BACKGROUND

The background of this case prior to the remand is set forth in *Kreider Dairy Farms, Inc. v. Glickman*, No. CIV. A. 95-6648, 1996 WL 472414 (E.D. Pa. Aug.

15, 1996) ("*Kreider I*") (denying motions for summary judgment and remanding).[1] In *Kreider I*,

> Kreider challenge[d] the ruling of the [JO] who affirmed the decision of the Market Administrator ("MA") for the New York-New Jersey Milk Marketing Order ("Order 2") to regulate Kreider as a handler under Order 2 rather than designating Kreider as a producer-handler exempt from paying certain fees for sales of fluid milk.

Id. at *1 (footnote omitted). The court held that

> neither the plain language of Order 2 nor its promulgation history supports a finding that Kreider should be denied producer-handler status without further factual findings that Kreider is `riding the pool' in this factual context. Thus, the refusal to designate Kreider as a producer-handler appears arbitrary on the record before this court.

Id. at *11. Therefore, the court remanded this case to the Secretary and directed the Secretary "to hold such further proceedings necessary to determine whether in fact Kreider is `riding the pool.'" *Id.* at *9.

On remand and following an evidentiary hearing, the ALJ issued the August 12 decision, in which he found, *inter alia*, that

> Kreider was `riding the pool' and receiving an unearned economic benefit. Accordingly, the decision of the Market Administrator to deny Kreider producer-handler status must be upheld and the petition [challenging the MA's decision] must be denied.

In re: Kreider Dairy Farms, Inc., No. 94 AMA M-1-2, at 10 (U.S.D.A. ALJ 8/12/97 Decision & Order) (Admin. R., Tab 55). The ALJ therefore dismissed Kreider's petition.

At the end of the August 12 decision, the ALJ notified the parties that the decision "shall become final and effective without further procedure thirty-five (35) days after service upon the parties unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service." *Id.*; *see* Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From

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[1]Unless otherwise indicated, the court uses the same abbreviated terms used in *Kreider I*.

Marketing Orders ("Rules of Practice"), 7 C.F.R. §§ 900.50-71, at 900.64(c), 900.65(a) (1998) (same). The August 12 decision was served on Kreider on August 15, 1997.

On September 12, 1997, Kreider moved by telephone for an extension of time to file its appeal of the ALJ's decision, and the JO granted an extension until September 19, 1997. *See In re: Kreider Dairy Farms, Inc.*, No. 94 AMA M-1-2 (U.S.D.A. JO 9/12/97 Informal Order) (Admin. R., Tab 56). On September 19, 1997, a Friday, Kreider gave its appeal petition (the "Appeal Petition") to Federal Express for delivery to the hearing clerk on the next business day. The Office of the Hearing Clerk stamped the Appeal Petition as received on September 25, 1997. (*See* Admin. R., Tab 57.)

Upon consideration of the Appeal Petition, the JO issued the January 12 decision, in which he noted that § 900.69(d) of the Rules of Practice provides, in relevant part:

> Any document or paper . . . required or authorized under these rules to be filed shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk.

7 C.F.R. § 900.69(d). The JO focused on the term "postmarked," which the applicable regulations do not define. *See In re: Kreider Dairy Farms, Inc.*, No. 94 AMA M-1-2, 1998 WL 25746, at *7 (U.S.D.A. JO Jan. 12, 1998); 7 C.F.R. §§ 1.132, 900.51 (1998) (definitions). The JO noted that several dictionaries define "postmark" as a mark placed on pieces of mail by the post office, and that some courts have adopted similar definitions. *See id.* & n.7 (citing, for example, Black's Law Dictionary 1167 (6th ed. 1990) and *United States v. Maude*, 481 F.2d 1062, 1065-66 (D.C. Cir. 1973) ("It is commonly known that a postmark is the official mark which the Post Office Department places on mail.")). In addition, the JO cited one decision by the Secretary suggesting such a definition. *See id.* at *7-8 (citing *In re: Sequoia Orange Co.*, No. 90 AMA F&V 908-6, 56 Agric. Dec. 1632, 1992 WL 139549, at *1 (U.S.D.A. JO 1/3/92 Remand Order) (ruling that Pitney Bowes, Inc., meter stamp, which stamping individual can manipulate to show any desired date, is not a "postal department cancellation mark")).

In light of the foregoing definitions of "postmark," the JO ruled that because the Federal Express label (also known as an "airbill") accompanying the Appeal Petition does not contain the mark of the U.S. Postal Service, the Appeal Petition is not postmarked for purposes of § 900.69(d). *See id.* at *8. Therefore, pursuant to 7 C.F.R. § 900.69(d), the JO deemed the Appeal Petition filed on the date the hearing clerk received it, September 25, 1997, which was six days after the

September 19 deadline. *See id.* As a result, the JO found that the Appeal Petition was not timely, and that he lacked jurisdiction over the Appeal Petition. *See id.* In addition, the JO found that he lacked jurisdiction to further extend the time for filing the Appeal Petition because the August 12 decision had become final on September 20, 1997, thirty-five days after service on Kreider. *See id.* Accordingly, the JO denied the Appeal Petition without reaching the merits, and noted that the merits

> should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for the purpose of judicial review except a final decision issued by the Secretary[2] pursuant to an appeal [of the ALJ's decision] by a party to the proceeding."

Id. at *9 (citing 7 C.F.R. § 900.64(c)).

On January 27, 1998, Kreider filed a Petition for Reconsideration, which the JO denied in the February 20 decision. *In re: Kreider Dairy Farms, Inc.*, No. 94 AMA M-1-2, 1998 WL 92814 (U.S.D.A. JO Feb. 20, 1998). The JO again found that the Appeal Petition was not timely, citing the reasons set forth in the January 12 decision. The JO acknowledged that the Appeal Petition would have been timely if, on September 19, 1997, Kreider had sent it to the hearing clerk via the U.S. Postal Service[3] instead of Federal Express, but found this fact irrelevant. In addition, the JO distinguished *Edmond v. United States Postal Service*, 727 F. Supp. 7, 11 (D.D.C. 1989) (finding service by Federal Express to be service "by mail" for purposes of serving pleadings pursuant to Fed. R. Civ. P. 5(b)), *rev'd in part on other grounds*, 949 F.2d 415 (D.C. Cir. 1991), because the Federal Rules of Civil Procedure do not govern the administrative proceedings on remand in the instant case. The JO again declined to consider the merits of the Appeal Petition.

On February 2, 1998, while Kreider's Petition for Reconsideration was pending before the JO, Kreider filed a Complaint After Remand ("Complaint") in this court, seeking judicial review of the Secretary's decision to deny Kreider producer-handler status. (*See* Compl. at ¶ 28.) Kreider requests a declaration that it is

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[2]Pursuant to 7 C.F.R. § 2.35 (1998), the Secretary delegated to a JO the authority to consider appeals of ALJ decisions and issue final agency decisions.

[3]Under this scenario, Kreider presumably would have secured a postmark dated September 19, 1997, and pursuant to § 900.69(d), the JO would deem the Appeal Petition filed on this date.

exempt from Order 2, and a refund, with interest, of all of its payments to the Order 2 MA to date. (*See id.* at 7.) On April 3, 1998, after the JO denied the Petition for Reconsideration, Kreider filed a First Amended Complaint After Remand ("Amended Complaint") which: (1) adds a count challenging the JO's January 12 and February 20 decisions as "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law," (Am. Compl. ¶ 29); and (2) specifies that Kreider seeks the court's review of the ALJ's August 12 decision to deny Kreider producer-handler status, (*see id.* ¶ 30). Kreider alleges that as of the date it filed the Amended Complaint, the total payments it has made to the Order 2 MA exceed $800,000. (*See id.* ¶ 4.)

On April 7, 1998, the Secretary filed a motion to dismiss the Complaint,[4] unaware that Kreider filed the Amended Complaint four days earlier. On April 21, 1998, the Secretary filed a motion to dismiss the Amended Complaint. On May 29, 1998, Kreider filed a response, to which the Secretary filed a reply on June 16, 1998.

II. DISCUSSION

The Secretary makes three arguments in support of the motion to dismiss the Amended Complaint. As explained below, the court rejects the first and second arguments, but finds the third argument persuasive.

A. Jurisdiction to Review the JO's January 12 and February 20 Decisions

The Secretary first argues that the court lacks jurisdiction to review the JO's January 12 and February 20 decisions because Kreider appeals the decisions for the first time in the Amended Complaint, which Kreider did not file within twenty days of the decisions as required by 7 U.S.C.A. § 608c(15)(B)(West 1980).

Section 608c of title 7 of the U.S. Code provides, in relevant part:

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

(15) . . .

(B) The District Courts of the United States . . . are vested with

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[4]The court will deny the motion as moot.

> jurisdiction in equity to review such ruling [of the Secretary on a petition for modification of order or exemption], provided a bill in equity for that purpose is filed *within twenty days from the date of the entry of such ruling.*

(Emphasis added.) The Secretary correctly notes that Kreider appeals the January 12 and February 20 decisions for the first time in the Amended Complaint, which Kreider filed on April 3, 1998, after the twenty-day period set forth in § 608c(15)(B) expired with respect to each decision. Given the statutory language and the above facts, the Secretary's argument appears to have merit.

Closer analysis, however, reveals that it does not. Rule 15(c) of the Federal Rules of Civil Procedure provides that

> [a]n amendment of a pleading *relates back to the date of the original pleading* when
>
> * * *
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

(Emphasis added.) The Complaint makes explicit reference to the January 12 decision, (*see* Compl. ¶ 26), and the Petition for Reconsideration which resulted in the February 20 decision, (*see* Compl. ¶ 27). Therefore, the Complaint "set forth or attempted to set forth" the occurrences that are the subject of the appeals of the January 12 and February 20 decisions raised in the Amended Complaint. Accordingly, Kreider satisfies the requirements of Rule 15(c)(2), and the Amended Complaint relates back to the filing date of the Complaint, February 2, 1998.

Treating the Amended Complaint as filed on February 2, 1998, the court finds that the appeal of the January 12 decision is timely. Although February 1, 1998, was the twentieth and final day to file a timely appeal of the January 12 decision pursuant to 7 U.S.C. § 608c(15)(B), February 1, 1998, was a Sunday. Therefore, the twenty-day period was automatically extended until February 2, 1998. Fed. R. Civ. P. 6(a). Accordingly, the court has jurisdiction to review the January 12 decision.

The court also finds that the appeal of the February 20 decision is timely. Although the February 2, 1998, filing date of the Amended Complaint precedes the February 20 decision itself, the court of appeals has held that, "[i]n the civil context, . . . where only property interests are implicated, a premature appeal becomes operative upon entry of the final order and in the absence of a showing of prejudice to the other party." *United States v. Hashagen*, 816 F.2d 899, 905 (3d

Cir. 1987) (in banc) (citing *Richerson v. Jones*, 551 F.2d 918, 922 (3d Cir. 1977)). Here, the Secretary suffers no prejudice from Kreider's premature appeal of the February 20 decision.[5] The court therefore regards the appeal of the February 20 decision as having ripened on the day the decision issued, February 20, 1998, which is well within the twenty-day period set forth in 7 U.S.C. § 608c(15)(B). Accordingly, the court has jurisdiction to review the February 20 decision.

B. The Postmark Requirement of Section 900.69(d) of the Rules of Practice[6]

The Secretary next argues that even if the court has jurisdiction to review the JO's January 12 and February 20 decisions, the decisions are correct. Although the JO made several rulings in each decision, the outcome of the instant dispute depends on one ruling in particular: the ruling that the Appeal Petition that Kreider gave to Federal Express on September 19, 1997, the last day to file a timely appeal of the ALJ's August 12 decision, is not postmarked within the meaning of the postmark requirement of section 900.69(d) of the Rules of Practice.[7]

The decision of the Secretary, and of the JO as the Secretary's delegatee, is entitled to substantial weight. As the court of appeals held in *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315 (3d Cir. 1968), *cert. denied sub nom. Lewes Dairy, Inc. v. Hardin*, 394 U.S. 929 (1969),

> [t]he power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a *de novo* fact finding process. It is limited to a determination whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence.

(Footnote omitted.)

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[5]The Secretary had notice that Kreider would appeal the February 20 decision, because Kreider suggested in the Complaint that it would appeal an adverse decision on the then-pending Petition for Reconsideration. (*See* Compl. ¶ 27.)

[6]In this memorandum, the court uses the term "postmark requirement" to refer to the provision in § 900.69(d) for deeming a document "filed when it is postmarked."

[7]The Secretary suggests that if the JO correctly ruled that the Appeal Petition was not timely, then the JO also correctly ruled that he lacked jurisdiction to consider the Appeal Petition's merits, and that this court lacks jurisdiction to review the ALJ's August 12 decision.

Although the standard of review is deferential, the JO's ruling regarding the postmark requirement cannot be upheld. The court first notes that the question of whether the Appeal Petition satisfies the postmark requirement is a legal one. Therefore, the court must determine whether the JO's ruling—pursuant to which a party that sends a document to the hearing clerk via the U.S. Postal Service satisfies the postmark requirement, whereas a party that sends a document to the hearing clerk via Federal Express does not—is in accordance with law. The court finds that the JO's ruling is not in accordance with law for two reasons.

First, the JO's ruling elevates form over substance. The purpose of the postmark requirement is to ensure that there is reliable evidence of the date a party sends a document to the hearing clerk before the document will be deemed filed on such date.[8] By ruling that the only way a party can satisfy the postmark requirement is to send a document to the hearing clerk via the U.S. Postal Service, the JO construes the postmark requirement too literally and, as a result, too narrowly. Although Federal Express (also known as "FedEx") is not affiliated with the U.S. Postal Service, it is nevertheless a well-known delivery service, and there is no reason to doubt the reliability of a Federal Express label, especially one generated and affixed by Federal Express employees, insofar as it establishes the date a party gives an item to Federal Express for delivery.[9]

Moreover, in light of the fact that the applicable regulations do not define the term "postmark," a party that sends a document to the hearing clerk via Federal Express has made at least a reasonable effort to comply with the postmark requirement, and consequently should be permitted to consider the document filed on the date it was given to Federal Express for delivery. *Cf. State of Oregon v.*

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[8]The court's explanation of the postmark requirement's purpose is consistent with the outcome in *Sequoia Orange Co.* At issue in that case was the reliability of the date shown by the Pitney Bowes, Inc., meter stamp. As the JO noted, a private individual applying the stamp could manipulate it to show any desired date. *See* 1992 WL 139549, at *1.

[9]Federal Express follows certain procedures that make it possible to reliably determine the date a party gives an item to Federal Express for delivery.

> All items [Federal Express] delivers carry an electronically generated label that includes the date on which the item was given to FedEx for delivery. . . . The information in FedEx's database can be used to show when the item was given to or picked up by a FedEx employee if (1) there is a customer-generated label or (2) there is a FedEx-generated label but the date is illegible or otherwise unavailable.

Four Private Delivery Services Okayed, 86 J. Tax'n 259 (1997) (summarizing Notice 97-26, 1997-17 I.R.B. 6).

FCC, 102 F.3d 583, 585 (D.C. Cir. 1996) (Ginsburg, J.) (holding that "the FCC acts arbitrarily and capriciously when it rejects an application as untimely based on an ambiguous cut-off provision, not clarified by FCC interpretations, if the applicant made a reasonable effort to comply") (citation, brackets, and internal quotation marks omitted). Such a result is particularly appropriate when a literal construction of the postmark requirement would prevent the party from having its claims decided by the Secretary on the merits. As the Supreme Court explained with respect to the Federal Rules of Civil Procedure, "[i]t is too late in the day . . . for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962).[10]

Second, the JO's ruling is at odds with the realities of the modern practice of law. Over the past several years, the court has observed that lawyers' use of delivery services such as Federal Express is rising steadily. Because delivery services can reliably deliver documents worldwide, and often faster than the U.S. Postal Service, it appears to the court that in at least some legal markets, delivery services have supplanted the U.S. Postal Service as the normal means of document delivery.[11] As a New York lawyer recently said in response to the court's suggestion that he send a document by "regular mail" (the U.S. Postal Service) instead of Federal Express, which costs more, "Out here, FedEx *is* regular mail."

The JO's construction of the postmark requirement bucks the current trend favoring the use of delivery services, because the JO's construction effectively compels a party that sends a document to the hearing clerk on the date the filing is due to use the U.S. Postal Service. Ironically, the use of a delivery service in such a situation, while it may effect delivery of the document sooner, will result in a document that the JO deems to be filed later and, as in this case, too late to be considered.

In the instant case, the correct approach—one that elevates substance over form and is more in tune with the practices of today's legal community as the court perceives them—is to construe the postmark requirement to cover use of the U.S.

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[10]Kreider alleges that it "served its notice of appeal of the 1995 ALJ decision by Federal Express on the date the filing was due and it [was] accepted [by the JO] without objection." (Br. Opp. Mot. at 16.) If true, the allegation suggests that the JO rejected a literal construction of the postmark requirement in the past.

[11]In fact, the Secretary sent a copy of the administrative record and the motion to dismiss the Complaint to Kreider's counsel via Federal Express.

Postal Service and Federal Express for purposes of determining a filing date.[12] The court notes that statutes and regulations regarding "postmarks" in some other contexts already take this approach. *See, e.g.*, 26 U.S.C.A. § 7502(f)(1) (West 1989 & Supp. 1998) (Internal Revenue Code) ("[A]ny reference . . . to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked . . . by any designated delivery service."[13]); 50 C.F.R. § 285.2 (1998) (Wildlife and Fisheries) (defining postmark as, *inter alia*, "independently verifiable evidence of date of mailing, such as U.S. Postal Service postmark, United Parcel Service (U.P.S.) or other private carrier postmark"); *but see* 38 U.S.C.A. § 7266(a)(3)(B) (West 1991 & Supp. 1998) (Veterans' Benefits) ("[A] notice of appeal shall be deemed to be received by the Court [of Veterans Appeals] . . . on the date of the United States Postal Service postmark.").

The Appeal Petition bears two Federal Express labels, one generated by Federal Express and the other apparently generated by Kreider. (*See* Resp't Opp'n to Pet'r Appeal Pet., Ex. A) (Admin. R., Tab 59). Each of the labels is dated September 19, 1997, indicating that Kreider gave the Appeal Petition to Federal Express on that date for delivery to the hearing clerk. On these facts, the court holds that the Appeal Petition is postmarked for purposes of section 900.69(d) of the Rules of Practice.[14] The court further holds that the Appeal Petition has a postmark date of September 19, 1997, is deemed filed on that date, and is timely.

C. Jurisdiction to Review the ALJ's August 12 Decision

The Secretary's final argument is that even if the court has jurisdiction to review the JO's January 12 and February 20 decisions, and the decisions are incorrect, the court lacks jurisdiction to review the ALJ's August 12 decision because the August 12 decision is not a ruling of the Secretary for purposes of 7 U.S.C. § 608c(15)(B)

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[12]The court expresses no opinion on whether use of delivery services other than Federal Express satisfies the postmark requirement.

[13]Pursuant to 26 U.S.C.A. § 7502(f)(2), one of the requirements of a "designated delivery service" is that it "is at least as timely and reliable on a regular basis as the United States mail." *Id.* at § 7502(f)(2)(B). Federal Express is a designated private delivery service for purposes of § 7502(f). See Notice 97-26, 1997-17 I.R.B. 6, *modified*, Notice 97-50, 1997-37 I.R.B. 21 (providing that "the list [in Notice 97-26] of private delivery services . . . will remain in effect until further notice").

[14]The court's holding does not cover situations in which customer-generated and FedEx-generated labels have conflicting dates, or in which one of the labels is missing or illegible. The court notes, however, that these scenarios are addressed in the tax context. *See* Notice 97-26, 1997-17 I.R.B. 6.

or a "final decision issued by the Secretary" for purposes of 7 C.F.R. § 900.64(c).

This argument, which Kreider does not dispute, is correct. Pursuant to 7 U.S.C. § 608c(15)(B), the court may review a ruling of the Secretary as described in § 608c(15)(A). Section 608c(15)(A), in turn, describes such a ruling as a final ruling made by the Secretary after holding a hearing in accordance with applicable regulations. *See* 7 U.S.C.A. § 608c(15)(A) (West 1980). The applicable regulations provide that "no decision shall be final for the purpose of judicial review except a final decision issued by the Secretary pursuant to an appeal by a party to the proceeding." 7 C.F.R. § 900.64(c) (1998).

Here, the JO, as the Secretary's delegatee, did not consider the Appeal Petition's merits. As a result, for the purpose of judicial review, there has not been a "final decision issued by the Secretary," 7 C.F.R. § 900.64(c), or a ruling of the Secretary, 7 U.S.C. §§ 608c(15)(A)-(B), concerning the ALJ's August 12 decision. Accordingly, the court lacks jurisdiction to review the ALJ's August 12 decision.

The court will, however, remand this case to the Secretary. As provided in 7 U.S.C.A. § 609c(15)(B) (West 1980),

> [i]f the court determines that [the Secretary's] ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

Because the court has found that the JO's ruling regarding the postmark requirement is not in accordance with law, the court will vacate the JO's January 12 and February 20 decisions and remand this case to the Secretary. The court will also direct that on remand the JO treat the Appeal Petition as timely and consider and rule on the Appeal Petition's merits.

III. CONCLUSION

Kreider has sought producer-handler status for almost five years. Because a substantial amount of money is at stake, Kreider's persistence is understandable. What is surprising to the court, however, is the number of times during the litigation that Kreider has needlessly risked dismissal of its claims on the basis of late filings. Continued procrastination can only lead to more disputes such as the instant one that consume the parties' time and resources, and, at best, will further delay the merits determination that Kreider seeks.

For all the foregoing reasons, the court will deny the Secretary's motion to

dismiss Kreider's Amended Complaint. In addition, the court will vacate the JO's January 12 and February 20 decisions and remand this case to the Secretary for further proceedings consistent with the court's decision.

An appropriate order follows.

ORDER

AND NOW, this 7 day of August, 1998, upon consideration of: Defendant's Motion to Dismiss (Dkt. 4); Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Dkt. 5); Plaintiff's response; and Defendant's reply; and for the reasons set forth in the court's memorandum of even date herewith in this case, it is hereby ORDERED as follows:

1. Defendant's Motion to Dismiss (Dkt. 4) is DENIED as MOOT.
2. Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Dkt. 5) is DENIED.
3. The Judicial Officer's ("JO") January 12, 1998, and February 20, 1998, decisions in this case are VACATED.
4. This case is REMANDED to the Secretary. On remand, the JO shall treat Kreider's Appeal Petition, (Admin. R., Tab 57), as timely filed on September 19, 1997, and shall consider and rule on the Appeal Petition's merits.
5. The Clerk shall close the docket for statistical purposes.

ANIMAL WELFARE ACT

COURT DECISIONS

C.C. BAIRD, DOING BUSINESS AS MARTIN CREEK KENNEL v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 98-3296.
Filed October 29, 1998.

United States Court of Appeals
Eighth Circuit

JUDGMENT

After consideration of the court, this appeal is dismissed as untimely taken.

SAMUEL ZIMMERMAN v. UNITED STATES OF AMERICA and SECRETARY OF AGRICULTURE.
No. 98-3100.
Filed December 21, 1998.

Animal Welfare Act — Sanction.

A dealer licensed under the Animal Welfare Act brought an action challenging a $7,500 civil penalty and a 40-day license suspension imposed by the Judicial Officer for violations of the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. The United States Court of Appeals for the Third Circuit held that an agency's choice of sanction is not to be overturned unless unwarranted in law or unjustified by the facts or an abuse of discretion. Further, the Court held that a sanction is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. The Court affirmed the Judicial Officer, holding that the sanctions imposed by the Judicial Officer were well within the range of options available to the Judicial Officer and the Judicial Officer did not abuse his discretion.

United States Court of Appeals
Third Circuit

Before: STAPLETON and NYGAARD, Circuit Judges, and GOLDBERG*, Judge

NYGAARD, Circuit Judge.

MEMORANDUM OPINION OF THE COURT

Petitioner Samuel Zimmerman is a dog kennel operator and a licensed animal dealer under the Animal Welfare Act. He was charged by the Animal and Plant Health Inspection Service in a disciplinary administrative proceeding under the Animal Welfare Act. A hearing was held before an Administrative Law Judge ("ALJ") which resulted in a Decision and Order imposing a $500 fine. The Department of Agriculture appealed the order, and the Judicial Officer, on review, issued an Opinion increasing the sanction to a $7,500 fine and a forty day suspension. Zimmerman then requested reconsideration, which was denied. He has filed a Petition for Review with this Court.

Zimmerman argues that the ALJ, who found that only two of the charges against him were "serious," correctly assessed the gravity of the situation. Zimmerman contends that the larger $7,500 fine imposed by the Judicial Officer was "arbitrary and capricious" and must be vacated. He requests that the case be remanded, or, in the alternative, that the ALJ's less severe fine be reinstated. We will affirm.

I. BACKGROUND

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, the Complainant, instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended, *see* 7 U.S.C. §§ 2131-2159; the regulations and standards issued under the Animal Welfare Act, *see* 9 C.F.R. §§ 1.1-3.142; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, *see* 7 C.F.R. §§ 1.130-.151. The Complainant alleged that on October 5, 1994, November 15, 1994, and January 31, 1995, Zimmerman did some or all of

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*The Honorable Richard W. Goldberg, Judge for the United States Court of International Trade, sitting by designation.

the following: (1) failed to maintain complete records showing the acquisition, disposition, and identification of animals; (2) failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care; (3) failed to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation; (4) failed to provide structurally sound and well-maintained primary enclosures for dogs in order to protect the animals from injury; (5) failed to remove excreta from primary enclosures daily in order to prevent soiling of the animals and to reduce disease hazards, insects, pests, and odors; (6) failed to keep premises where the housing facilities were located clean and in good repair to protect the animals from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin; (7) failed to individually identify dogs; (8) failed to make provisions for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes in a manner that minimized contamination and disease risks; and (9) denied the Animal and Plant Health Inspection Service entry to inspect his facility, all in willful violation of various portions of the statutes, regulations and standards governing his conduct.

Zimmerman filed an Answer denying the material allegations in the Complaint. The ALJ held a hearing at which Zimmerman appeared pro se. On May 29, 1997, the ALJ's Decision and Order: (1) concluded that Zimmerman violated the Regulations and Standards; (2) ordered Zimmerman to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessed Zimmerman a civil penalty of $500. The government appealed to the Judicial Officer.

The Judicial Officer issued a Decision and Order that affirmed the ALJ's findings of fact and concluded that Zimmerman was indeed responsible for essentially all of the failures alleged in the Complaint. Based on this conclusion, the Judicial Officer increased the civil penalty against Zimmerman to $7,500, ordered him to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and suspended his Animal Welfare Act license for a period of forty days.

Zimmerman filed a Petition for Reconsideration in which he contended (as he does before us) that the $7,500 civil penalty and the forty day license suspension were excessive. The Judicial Officer denied his Petition.

II. ISSUE AND DISCUSSION

Specifically, the question before us on appeal is: "Did the Judicial Officer abuse his discretion and consider matters outside the record in increasing the penalty from a $500 fine to a $7,500 fine plus a forty-day suspension?" As previously stated, we will affirm.

The Judicial Officer found that Zimmerman had corrected some of the cited violations either during inspections or between inspections. He also found that there was no proof that Zimmerman had intentionally harmed his animals. He further determined that the refusal to allow an inspection occurred in the heat of the moment, and not in defiance of the law. Based on these factors, Zimmerman contends the penalty was excessive. We disagree.

Despite finding that Zimmerman corrected a number of the cited violations, the Judicial Officer concluded that, although corrections are encouraged and may be taken into account when determining the sanction, the correction of a condition has no bearing on the fact that a violation occurred. This is true. The law requires each dealer to be in compliance in all respects with the Regulations and Standards, and this duty exists regardless of a correction date.

Section 19 of the Animal Welfare Act provides that:

> [i]f the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.
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> . . .
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> Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation,

the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a) - (b).

The Judicial Officer also found that "[t]here is no evidence that Zimmerman deliberately harmed his animals." However, in regard to the effect and potential effect of Zimmerman's violations on the health and well-being of his animals, it found that:

> [f]our of [Zimmerman's] violations, [Zimmerman's] failures to provide adequate veterinary care, and failures to remove excreta from primary enclosures on October 5, 1994, and November 15, 1994, constitute "serious" violations in that they directly affected the health and well-being of [Zimmerman's] animals . . . . [Zimmerman's] 10 other violations, while not "serious, are "significant" in that they constitute violations of the Regulations and Standards which could have affected the health and well-being of animals under certain circumstances.

Zimmerman could have been assessed a maximum daily penalty of $2,500 for each of his fifteen violations, for a total of $37,500. Moreover, his license under the Animal Welfare Act could be revoked for a single willful violation of the Animal Welfare Act or the Regulations and Standards. Hence, the sanction was well within the range of options of the Judicial Officer.

Our review is very deferential. An agency's choice of sanction is not to be overturned unless it is unwarranted by the law or unjustified by the facts or represents an abuse of discretion. *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88, 93 S. Ct. 1455, 1459 (1973). Zimmerman's primary argument is that the fine amount of $7,500 is excessive in light of the fact that he only grosses between $15,000 and $25,000 per year. He points out that this level of fine is often imposed on kennel operators who earn much more each year. However, in Butz, the Supreme Court explicitly noted that a sanction is "not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Id.* at 187, 93 S. Ct. at 1459. This holding effectively counters Zimmerman's argument. Hence, the fine imposed, being well within the statutory limits and the Department's discretion, is valid.

III.

The Judicial Officer examined each of the pertinent factors under section 19 of the Animal Welfare Act, the recommendation of the Acting Administrator of the

Animal and Plant Health Inspection Service, and all the relevant circumstances. The sanction imposed in the November 6, 1997, Decision and Order is consistent with the Animal Welfare Act and the Department's sanction policy.

We will affirm.

BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

JERRY GOETZ d/b/a JERRY GOETZ AND SONS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED v. DAN GLICKMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, et al.

No. 96-3120.
Filed July 10, 1998.

(Cite as 149 F.3d 1131)

Beef promotion - Assessments - Commerce clause - First amendment - Freedom of speech - Freedom of association - Tax - Equal protection clause.

The Tenth Circuit Court of Appeals affirmed the decision of the United States District Court for the District of Kansas. The Tenth Circuit concluded that the enactment of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) is a valid exercise of Congress' commerce power and the $1.00 per head assessment on the sale and importation of cattle under the Beef Promotion Act is not a tax that must be apportioned uniformly among the states under the Taxing Clause because the primary purpose of the Beef Promotion Act is regulation. The Tenth Circuit held that the district court erred by concluding that advertising under the Beef Promotion Act to support promotion of beef is commercial speech and applying the test in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), to determine whether use of assessments for such advertising violates appellant's First Amendment rights to freedom of speech and association. Instead, the Tenth Circuit held that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of appellant's First Amendment challenges, that the promotion of beef under the Beef Promotion Act is government speech, and that there are no First Amendment restrictions on government speech. The Tenth Circuit rejected appellant's contention that the Beef Promotion Act violates the Equal Protection Clause because it unfairly burdens some parts of the beef industry while benefitting the entire industry. The Court held that the classification scheme under the Beef Promotion Act does not jeopardize a fundamental right or a suspect class; therefore, the Equal Protection Clause only requires that the classification rationally further a legitimate governmental interest. Relying on *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 439 U.S. 1094 (1990), the Tenth Circuit held that Congress had several rational bases for the enactment of the Beef Promotion Act and that the Act does not violate appellant's right to equal protection of the laws.

United States Court of Appeals
Tenth Circuit

Before MURPHY and LOGAN, Circuit Judges, and MILES-LaGRANGE, District

Judge.*

MILES-LaGRANGE, District Judge.

Plaintiff Jerry Goetz ("Goetz"), a Kansas cattle farmer, appeals the district court's ruling in favor of Dan Glickman, Secretary, U.S. Department of Agriculture ("Secretary"). Goetz claims the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901(a) ("Beef Promotion Act" or "Act"), is unconstitutional. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Facts and Proceedings Below

Goetz filed this class action lawsuit against the Secretary contending that his and other class members' constitutional rights are being violated because they must pay a $1.00 per head "assessment" on the sale and importation of cattle as authorized by the Beef Promotion Act. The district court's decision provides a succinct description of the Act's regulatory scheme:

> The Act directs the Secretary to promulgate a Beef Promotion and Research Order ("the Order"), that provides for financing beef promotion and research through the assessments on cattle sold in the United States and cattle, beef, and beef products imported into the United States. 7 U.S.C. § 2901(b), 2903, 2904(8)(A)-(C). The Order established by the Secretary (7 C.F.R. Part 1260, Subpart A) established the Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Beef Board") and the Beef Promotion Operating Committee ("the Operating Committee"). 7 U.S.C. § 2904(1)-(7); 7 C.F.R. 1260.141, 1260.161. The Cattlemen's Beef Board is made of cattle producers and importers appointed by the Secretary. 7 U.S.C. § 2904(1); 7 C.F.R. 1260.141. The Board's principal duties are to administer the Order, make rules and regulations to effectuate the terms and provisions of the Order, elect members of the Board to serve on the Operating Committee, to approve or disapprove the budget submitted by the Operating Committee, to receive, investigate and report to the Secretary complaints of violations of the Order, and [to] recommend to the Secretary amendments to the Order. 7 U.S.C. § 2904(2)(A)-(F).

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*The Honorable Vicki Miles-LaGrange, United States District Judge of the Western District of Oklahoma, sitting by designation.

The Operating Committee is composed of ten members of the Cattlemen's Beef Board and ten members elected by a federation of State beef councils. 7 U.S.C. § 2904(4)(A); 7 C.F.R. 1260.161. The Operating Committee develops and submits to the Secretary for approval promotion, advertising, research, consumer information and industry information plans and projects. 7 U.S.C. § 2904(4)(B); 7 C.F.R. 1260.168. The Act prohibits the use of funds for political purposes. 7 U.S.C. § 2904(10).

The Act requires cattle producers in the United States to pay a one dollar per head assessment on cattle sold in this country. 7 U.S.C. § 2904(8)(A) & (C); 7 C.F.R. 1260.172(a)(1), 1260.310. Each person making payment to a cattle producers [sic] for cattle is a "collecting person" who is required to collect the assessments and remit them to a qualified State beef council in the State in which the collecting person resides, or, if there is no qualified State beef council, to the Cattlemen's Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. 1260.311(a), 1260.312(c). Each collecting person must report to the Board certain information for each calendar month at the time the assessments are remitted and must maintain and make available for the Secretary's inspection the records necessary to verify the reports. 7 U.S.C. § 2904(11); 7 C.F.R. 1260.201, 1260.312(a)-(c), 1260.202.

The Secretary is authorized to conduct investigations and to issue subpoenas to determine if there has been a violation of the Act, the Order, or the rules and regulations thereunder. 7 U.S.C. § 2909. After an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for each violation of the Act and the Order. *Id.* § 2908(a). In addition, the Secretary may request the Attorney General to initiate a civil action to enforce, and to restrain a person from violating, any order or regulation under the Act. *Id.* § 2908(b), (c).

Within 22 months of the issuance of the Order, the Act required the Secretary to conduct a referendum among those persons who were producers and importers during that trial period. The Order would continue to operate only upon approval by a majority of those participating in the referendum. 7 U.S.C. § 2906(a). Prior to the referendum, a cattle producer who paid the assessment could demand a one-time refund. *Id.* § 2907; 7 C.F.R. 1260.173, 1260.174. On May 10, 1988, the referendum was conducted and the Order was approved.

> Plaintiff is a "producer" within the meaning of the Act. 7 U.S.C. § 2902(12). As a producer, plaintiff is subject to the one dollar per head assessment upon the sale of cattle. Plaintiff alleges that at times he makes payments to other producers for cattle purchased from such producers, and thus he is a "collecting person" under the Act. *Id.* § 2904(8)(A). As a collecting person, plaintiff is subject to the collecting provisions of the Act and accompanying regulations.

See Goetz v. Glickman, 920 F. Supp. 1173, 1176-77 (D. Kan. 1996) (footnote omitted).

On October 29, 1993, the Secretary commenced administrative proceedings against Goetz because he failed to comply with the Beef Promotion Act and pay the assessment. A hearing before an administrative law judge was set for August 8, 1994. On August 2, 1994, Goetz filed a civil action in district court and moved for a temporary restraining order to enjoin the Secretary from proceeding with the administrative hearing. The district court entered a temporary restraining order which expired on August 15, 1994. On August 19, 1994, the parties agreed, with the court's approval, to stay the administrative proceedings until October 1, 1994. As part of the agreement, Goetz agreed to let an accounting firm audit his company. Over the objection of the Secretary, the district court continued the stay throughout the litigation.

Four Kansas cattle producers and three non-profit associations representing cattle producers in Kansas and throughout the nation intervened in the lawsuit to defend the Act.[1] On Dec. 8, 1995, the district court heard oral arguments from the parties.[2] Goetz argued the Act was unconstitutional because it (1) was beyond Congress' power to regulate interstate commerce, (2) imposed an unconstitutional direct tax, (3) effected an impermissible delegation of legislative authority, (4) violated the Takings Clause of the Fifth Amendment, (5) violated the Equal Protection Clause of the Fourteenth Amendment, and (6) infringed on the first amendment rights of cattle producers. He sought a ruling in the district court that the Act is unconstitutional, an injunction against its enforcement, and a refund of

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[1]In their brief, the intervenors/appellees adopted the arguments made by the Secretary and addressed Goetz' first amendment challenge arguing the Act is not subject to first amendment scrutiny because it is government speech.

[2]The National Pork Producers Council, the American Soybean Association and the National Potato Council filed amicus briefs in the district court.

assessments he has paid.

On Feb. 28, 1996, the district court upheld the constitutionality of the Act adopting the reasoning of the Third Circuit Court of Appeals in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S. Ct. 1168, 107 L.Ed.2d 1070 (1990).[3] The district court found that promoting the beef industry is a proper object of legislation under Congress' commerce power because it is reasonably adapted to the goal of strengthening the beef industry. 920 F. Supp. at 1180. The district court also held that the assessment imposed by the Beef Promotion Act is not a tax because the Act does not raise revenue for the government and regulation is the primary purpose of the statute. *See id.* at 1181. The court further held that Congress did not unlawfully delegate its legislative authority to the members of the beef industry because the Act places the Board under the Secretary's authority, Congress sets the amount of the assessments, and the Secretary decides how the funds will be spent. *See id.* at 1182. As to Goetz' takings clause claim, the district court concluded there was no fifth amendment violation because the government is not taking money for private use or to confer a private benefit on private interests (beef groups) in the beef industry. *See id.* Since Congress has determined beef promotion is in the public interest, the district court held courts should not substitute their judgment for Congress'. *See id.*

With regards to Goetz' first amendment claim, the district court agreed with the *Frame* court and found there was no free speech or free association violation because the Act is "commercial speech" not "government speech."[4] The district court concluded that the Act passed the test outlined in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) on the free speech claim.[5] The court also concluded Goetz' first amendment free association claim should be analyzed under the higher standard of scrutiny set forth in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct.

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[3]The plaintiff in *Frame* also challenged the constitutionality of the Beef Promotion Act.

[4]The district court, like the court in *Frame*, recognized the issue was a close one. *See id.* at 1182.

[5]Restrictions on commercial speech are subject to the test outlined in *Central Hudson*: (1) the State must assert a substantial government interest; (2) the regulatory technique must be in proportion to that interest; and (3) the incursion on commercial speech be designed carefully to achieve the State's goal. 447 U.S. at 564, 100 S.Ct. 2343.

3244, 82 L.Ed.2d 462 (1984).[6] 920 F. Supp. at 1182. The district court found the Act's restrictions passed this test because there was only a slight incursion on Goetz' associational rights, the national interest was compelling, the purpose of trying to bolster the beef image was neutral, the Act did not proscribe any official view, and no political funding was authorized by the statute. *See id.* at 1183.

Finally, the district court found there was no equal protection violation. The court held that Congress had a rational basis for enactment of the statute. Specifically, the district court determined that an assessment was easier to administer, ranchers would be the most benefitted by the Act and ranchers could pass any costs incurred on to others, and since Congress gave cattle producers the maximum influence in shaping the program, it rationally decided to pass along the corresponding financial burden to them.[7] *See id.* The district court (1) granted the motion to dismiss filed by the Secretary and intervenors; (2) denied Goetz' motion for summary judgment; (3) declared Goetz' motion for class certification moot; and (4) set aside its prior orders staying the administrative proceedings. *See id.* at 1184. Goetz appeals the district court's decision and asks this court to declare the Act unconstitutional, give him injunctive relief from the administrative proceedings, and order the return of funds he and other class members paid as assessments under the Beef Promotion Act.

On July 9, 1997, we directed the parties to file supplemental briefs addressing the effect of the Supreme Court's decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ____, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) on Goetz' first amendment claim. In *Wileman Bros.*, the Supreme Court, resolving a circuit split, held the regulations imposing a generic advertising program for California peaches, nectarines, and plums paid for by mandatory assessments on fruit handlers, did not implicate or violate the First Amendment.

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[6]Under *Roberts*, the governmental interference with associational rights must be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." 468 U.S. at 623, 104 S.Ct. 3244.

[7]The district court also held that because no fundamental right was involved the Equal Protection Clause only required that the classification rationally further legitimate governmental interests. *See id.* at 1183 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 8-12, 112 S.Ct. 2326, 2331-32, 120 L.Ed.2d 1 (1992); *United States v. Phelps*, 17 F.3d 1334, 1344 (10th Cir.), *cert. denied*, 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1223 (10th Cir. 1990)).

Analysis

In this appeal, Goetz raises all of the same claims made in the district court except the unconstitutional delegation of power and taking clause claims. The ruling of the district court is reviewed de novo. *National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1243-44 (10th Cir. 1989) (legal issues are reviewed *de novo*).

Commerce Clause

Goetz first argues the Beef Promotion Act is unconstitutional because it violates the Commerce Clause. He contends (1) the Act does not have a public purpose, (2) the Act does not regulate an activity which substantially affects interstate commerce, and (3) there is no rational connection between the regulatory means selected and the asserted ends. In response, the Secretary argues beef purchases and sales substantially affect interstate commerce. Furthermore, the Secretary argues, the Act, which authorizes promotion and research to strengthen the beef industry and is funded by a regulatory assessment, represents a valid exercise of Congress' commerce power. In addition, the regulation of interstate commerce encompasses promotion as well as prohibition. The Secretary contends promotion and research are reasonably adapted to the Act's goal of strengthening the market through increased consumption because advertising affects demand.

The United States Supreme Court has clearly defined a court's function in examining Congress' exercise of its power under the Commerce Clause:

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution. The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme. Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. Moreover, this Court has made clear that the commerce power extends not only to the use of channels of interstate or foreign commerce and to

> protection of the instrumentalities of interstate commerce or persons or things in commerce, but also to activities affecting commerce. As we explained in *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975), even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. Thus, when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (internal citations and quotations omitted). *See also State of Oklahoma v. Federal Energy Regulatory Commission*, 661 F.2d 832, 837 (10th Cir.1981), *cert. denied*, *Texas v. Federal Energy Regulatory Commission*, 457 U.S. 1105, 102 S.Ct. 2902, 73 L.Ed.2d 1313 (1982); *United States v. Hampshire*, 95 F.3d 999, 1001-1002 (10th Cir. 1996), *cert. denied*, ___ U.S. ____, 117 S.Ct. 753, 136 L.Ed.2d 690 (1997).

In examining the validity of Congress' exercise of power, we begin with the language contained in the Act itself. Congress made the following findings when it passed the Beef Promotion Act:

> (1) beef and beef products are basic foods that are a valuable part of human diet;
> (2) the production of beef and beef products plays a significant role in the Nation's economy, beef and beef products are produced by thousands of beef producers and processed by numerous processing entities, and beef and beef products are consumed by millions of people throughout the United States and foreign countries;
> (3) beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;
> (4) the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation;
> (5) there exist established State and national organizations conducting beef promotion, research, and consumer education programs that are invaluable to the efforts of promoting the consumption of beef and beef products; and
> (6) beef and beef products move in interstate and foreign commerce, and

beef and beef products that do not move in such channels of commerce directly burden or affect interstate commerce of beef and beef products.

7 U.S.C. § 2901(a).

Congress' purpose and objectives are clearly set forth in the Act:

It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this Act shall be construed to limit the right of individual producers to raise cattle.

7 U.S.C. § 2901(b).

Goetz first contends that beef production does not substantially affect interstate commerce.[8] For congressional exercise of power to be valid under the commerce clause, the legislation must involve an activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 1630, 131 L.Ed.2d 626 (1995) (Court struck down the Gun Free School Zone Act of 1990 enacted under the commerce clause because it had nothing to do with any sort of economic enterprise). As the district court noted, "It should be beyond dispute that beef moves in and substantially affects interstate commerce, thus making the beef industry a proper object of legislation under the commerce clause." 920 F. Supp. at 1179. We also conclude Congress had a rational basis for finding the beef industry substantially affects interstate commerce.

Goetz also argues Congress really intended to regulate advertising. However, the plain language of the statute reveals the purpose of the Act is to strengthen the

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[8]Goetz contends the Act is unconstitutional because it does not have a public purpose. Essentially, he argues the Act's primary purpose is to raise revenue, therefore it is a direct tax impermissibly levied upon him. *See* Brief of Appellant at 31. As set forth below, we hold the Act's primary purpose is to regulate, therefore it is not a tax.

beef industry and we conclude this is a legitimate congressional goal. We further conclude the objective of the Act is valid and the stimulation of the beef market is a proper regulatory activity.

Goetz contends Congress' commerce power is limited to restricting or prohibiting an activity.[9] We agree with the well reasoned opinion of our sister circuit in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990). The Third Circuit said, "[I]t is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce." *Id.* at 1126. The Act regulates commerce by authorizing the collection of an assessment that is used to promote and advertise beef. The Supreme Court has recognized that advertising stimulates consumer demand for the product being promoted. *See Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986). The court in *Frame* also rejected the argument that the Act is not regulatory noting that Congress chose to promote and stimulate the demand side of the beef market indirectly, by influencing consumer attitudes toward beef. 885 F.2d at 1126. The *Frame* court likewise rejected Goetz' argument that the Act is unconstitutional because no activity is being regulated. The court stated: "[W]e decline to invalidate an otherwise lawful exercise of the commerce power on the basis Congress has not specified whether it is regulating the 'activity' of 'consumer beef purchases,' 'interstate beef sales,' or 'national beef markets.' Each activity is related, and is validly regulated by Congress." *Id.* at 1127.

Goetz also contends there is no rational connection between the regulatory means selected and the asserted end. Goetz contends since the government has set up a pork promotion and research board (among others), and pork is the primary competitor of beef, it is not reasonable for the Secretary to engage in conflicting programs. In addition, Goetz argues the Act does not serve its stated purpose to regulate beef and Congress is actually trying to regulate advertising.

In considering this argument, the *Frame* court stated: "To stimulate the demand for beef, the lack of which Congress has determined is harming the beef industry, Congress has chosen from its arsenal of regulatory means promotion and advertising, research, consumer information and industry information. These endeavors are rationally related to the maintenance and expansion of the nation's beef markets." *Id.* The *Frame* court found that the Act was a valid exercise of

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[9]Goetz contends Congress does not have the power to "stimulate and promote" commerce since Congress' power is limited to a) leaving the activity alone; b) restricting the activity; or c) prohibiting the activity.

Congress' power to regulate interstate commerce. *See id.* We agree. Goetz' argument that the promotion of beef is offset by other promotion schemes such as for pork is without merit. We hold Congress has a rational basis for stimulating different areas of the agricultural economy and determining its various promotional programs are in the best interest of the public.

In sum, we conclude that under current Supreme Court precedent, Congress has validly exercised its commerce powers in enacting the Beef Promotion Act.

Direct Tax

Goetz also argues the assessment is a direct tax that must be apportioned uniformly among the states to be constitutional under the Taxing Clause because the Act's primary purpose is to raise revenue. Goetz argues the Act is a direct tax and relies on legislative history to support his contention Congress never intended it to be a regulatory program. Goetz contends the assessments flow to qualified beef councils and national private trade associations in the beef industry.

The Secretary argues the Apportionment Clause is inappropriate because Congress clearly intended to exercise its authority under the Commerce Clause. The Secretary contends assessment is not the objective of the Act but merely a funding mechanism for the promotion of the beef industry and research. The Secretary further argues the assessment is not a tax but is like a "special assessment" imposed on convicted criminals under the Victims of Crimes Act, or mandatory bar dues or union dues. Finally, the Secretary points out that Goetz has no evidence that the assessment is a direct tax.

The test for determining whether an assessment is a tax has been clearly enunciated by the Sixth Circuit Court of Appeals:

> The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943). *See also Chickasaw Nation v. State of Oklahoma ex rel Oklahoma Tax Commission*, 31 F.3d 964, 968 (10th Cir. 1994) (quoting *American Petrofina Co. of Texas v. Nance*, 859 F.2d 840,

841 (10th Cir. 1988) ("[t]he mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised.")). We agree with the district court that the primary purpose of the Act is regulation, not to raise revenues.

First Amendment

Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption.[10] Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef).

The Secretary responds that the Act does not suppress or restrict Goetz' speech, it merely requires he pay an assessment to fund the promotion of a commodity that he markets and is no different than compelled funding of unions or integrated bars. Furthermore, the Secretary and intervenors argue the Act is "government speech" (as opposed to commercial speech) and there are no First Amendment restrictions on "government speech."

This Court agrees with the Secretary and intervenors. *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ____, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), involved a First Amendment challenge to a generic advertising program for California peaches, nectarines, and plums which was established pursuant to a marketing order promulgated by the Secretary of Agriculture and supported by mandatory assessments imposed on the handlers of fruit. The Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit in *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (1995), which held the peach promotion program violated the First Amendment, and the Third Circuit in *Frame*, which held the Beef Promotion Act did not violate the First Amendment.

In *Wileman Bros.* the Supreme Court held that the generic marketing program did not raise a First Amendment issue for the Court because the marketing order did not impose restraint on the freedom of any producer to communicate any message to any audience, did not compel any person to engage in any actual or symbolic speech, and did not compel the producers to endorse or to finance any political or ideological views. *See id.* at 2138. The Supreme Court found its

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[10]The $1.00 per head assessment on the sale and importation of cattle funds the Operating Committee's activities, which include the promotion of the beef industry throughout the country through "generic advertising." The generic advertisements include the familiar "Beef, it's what's for dinner" promotion.

compelled speech cases inapplicable because there is no "compelled speech." The Court held the assessments for ads did not require the fruit producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond to a hostile message when they prefer to remain silent or require them to be publicly identified or associated with another's message. *See id.* at 2139. Furthermore, the Court said, the assessments are financial contributions for generic advertising that program participants do not disagree with, and the advertising is not attributed to individual handlers. *See id.* In addition, none of the generic ads promote any particular message other than encouraging consumers to buy California tree fruit. *See id.*

The Court concluded that the generic ads for California fruit are germane to the purposes of the marketing orders and the assessment is not used for ideological activities. *See id.* at 2140. The Court further concluded that generic advertising is a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords other policy judgments made by Congress. *See id.* at 2141. Finding the generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard, the Supreme Court reversed the Ninth Circuit decision. *See id.* at 2142.

In the case at bar, the district court incorrectly concluded that the Act was commercial speech and applied *Central Hudson.* The district court found the Act passed the *Central Hudson* test and did not violate Goetz' freedom of speech and association. *Goetz v. Glickman*, 920 F. Supp. at 1182-83. We find the district court erred in applying the *Central Hudson* test to Goetz' First Amendment claim. However, we can affirm the district court on a basis not relied on by the court if supported by record and law. *United States v. Corral*, 970 F.2d 719, 726 n. 5 (10th Cir. 1992). Therefore, we affirm the district court and find under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless.

Equal Protection

Finally, Goetz contends the assessment violates the Equal Protection Clause because it infringes on his First and Fifth amendment rights. Therefore, he argues, the Act must be reviewed under strict scrutiny to determine whether the statute is narrowly tailored to further a compelling governmental interest. Goetz argues the Act unfairly burdens producers, importers and collecting persons while benefitting the entire beef industry. Goetz also contends Congress' interests in preserving the American cattlemen's traditional way of life and avoiding the free rider problem are not compelling or substantial governmental interests. Goetz further argues the refund provisions of the Act suggest the government's interest is not compelling or

substantial. Goetz contends there are numerous less restrictive means available to Congress as evidenced by the legislative discussions.[11]

In response, the Secretary argues the failure of Goetz' First Amendment claim dooms his equal protection challenge as well. Since he does not allege a suspect class, the Secretary contends the strict scrutiny standard of review does not apply. Furthermore, the Act does not infringe on Goetz' equal protection rights because it makes an economic distinction and need only be rationally related to a legitimate governmental interest. The Secretary argues the Act easily survives the rational basis test because Congress has a compelling interest in strengthening the beef industry. In addition, the Secretary argues, Congress also rationally decided the members of the industry that have the most to gain should bear the economic costs involved.

The Fifth Amendment's Equal Protection Clause prohibits the federal government from discriminating between individuals or groups. Government classification that actually jeopardizes the exercise of a fundamental right or a suspect class (race, gender, etc.) must be reviewed under a strict scrutiny standard and must be precisely tailored to further a compelling governmental interest. *Edwards v. Valdez*, 789 F.2d 1477, 1483 (10th Cir. 1986). If no suspect class or fundamental right is involved, the Equal Protection Clause only requires that the classification rationally further a legitimate governmental interest. *See Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1223-24 (10th Cir. 1990).

We agree with the district court's determination that the Act does not violate Goetz' First and Fifth Amendment rights, and the strict scrutiny standard of review does not apply. Although Goetz failed to address his equal protection claims under the rational basis test, the court in *Frame* identified several rational bases for Congress' enactment of the statute: (1) an assessment on the initial sale of cattle is easier to administer; (2) ranchers would be most benefitted by the Act; and (3) ranchers could pass the cost on to others. *Frame*, 885 F.2d at 1137-38. This Court

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[11]Goetz contends his fundamental rights under the First and Fifth Amendments have been infringed and therefore strict scrutiny applies. In addition, Goetz contends that the Beef Promotion Act is presumed to be unconstitutional for the purposes of analysis of his First and Fifth Amendment claims. However, we conclude Goetz' claims must be analyzed under the rational basis test and the Act, therefore, is presumptively constitutional and the burden falls on Goetz to show that the Act is irrational or arbitrary and cannot further a legitimate governmental interest. *See United States v. Phelps*, 17 F.3d 1334, 1345 (10th Cir. 1994), *cert. denied*, 513 U.S. 844, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994). In his appellate brief, Goetz fails to address his equal protection claim under the rational basis test, arguing only the strict scrutiny standard of review.

finds the Act easily survives Goetz' equal protection challenge as well.

Conclusion

The judgment of the district court is AFFIRMED in all respects on Goetz' Commerce Clause, Taxing Clause and Equal Protection Clause claims. The district court's decision is AFFIRMED on Goetz' first amendment claims under the reasoning of the Supreme Court in *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ____, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997).

NATIONAL DAIRY PROMOTION AND RESEARCH BOARD

COURT DECISION

GALLO CATTLE COMPANY v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CIV. NO. S-98-1619 EJG/JFM.
Filed October 1, 1998.

Dairy order — Promotional program — First amendment — Freedom of speech — Freedom of association — Sanction.

The district court granted the United States Department of Agriculture's (USDA) motion to dismiss plaintiff's petition, in which plaintiff contends that the National Dairy Board's (NDB) requirement that dairy producers pay assessments to fund generic advertising violates plaintiff's first amendment speech and association rights; but denied USDA's motion for sanctions pursuant to Federal Rule of Civil Procedure 11, in which USDA contends that plaintiff continued to litigate the generic advertising issue despite Supreme Court precedent. The district court, relying on *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S.Ct. 2130 (1997), held that NDB's collection of mandatory fees and use of those fees to promote Bovine Growth Hormone does not violate plaintiff's first amendment rights because the NDB promotional program does not curtail plaintiff's right to disseminate its own message; is not actual or symbolic speech by, or attributable to, plaintiff; and is politically and ideologically neutral.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ORDER OF DISMISSAL

This matter is before the court on defendant's motions to dismiss and for sanctions. After reviewing the record and the documents filed in connection with the motions the court has determined that oral argument will not be of material assistance. Accordingly, the hearing set for October 5, 1998 is VACATED and the matter is ordered submitted. *See* Local Rule 78-230(h). For the reasons that follow, the motion to dismiss is GRANTED and the motion for sanctions is DENIED.

BACKGROUND

This is a complaint for review of federal agency action, brought pursuant to 7 U.S.C. § 4509(b). On April 16, 1996 plaintiff filed a petition with defendant contending that the National Dairy Board's requirement that dairy producers pay

assessments to fund generic advertising violates plaintiff's first amendment speech and association rights.[1] On April 22, 1998 defendant issued its decision denying plaintiff's petition.

The instant complaint seeking judicial review was filed May 11, 1998 in the Fresno Division of the Eastern District of California. By order filed August 31, 1998, the complaint was transferred to the Sacramento Division and reassigned to Judge Edward J. Garcia.[2]

Defendant moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the complaint does not state a claim in light of the Supreme Court's ruling in *Glickman v. Wileman Brothers & Elliott, Inc.*, 117 S.Ct. 2130 (1997). In addition, defendant moves for sanctions pursuant to Federal Rule of Civil Procedure 11 contending that plaintiff's counsel's continued litigation of this issue in the face of Supreme Court precedent and numerous lower court rulings is sanctionable conduct. The court agrees with defendant's first premise and will dismiss the complaint without leave to amend; however, the motion for sanctions will be denied. While plaintiff's counsel has stretched the bounds of zealous advocacy to its zenith, he has not exceeded them.

DISCUSSION

A. Motion to Dismiss

Wileman involved a first amendment challenge to the requirement of mandatory assessments for generic advertising in the California tree fruit industry. The court held that compelled funding of advertising in a regulated industry was a form of economic regulation, not commercial speech. *Wileman*, 117 S.Ct. at 2142. Such a regulatory scheme neither violates nor implicates the first amendment because: 1) it does not restrain a producer's right to communicate any message to any audience; 2) it does not compel a producer to engage in any actual or symbolic speech; and 3) it does not compel endorsement or financing of political or ideological views. *Id.* at 2138.

Plaintiff contends *Wileman* doesn't apply because of distinctions between the

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[1]The Board's requirements are derived from the Dairy Stabilization Act, 7 U.S.C. § 4501 *et seq.*, and the Dairy Promotion Program, 7 C.F.R. § 1150.101 *et seq.*

[2]The order of transfer included a related case order, relating the above-captioned case to two other cases on Judge Garcia's civil docket: *Gallo Cattle Company v. USDA*, Civ. No. S-96-1146 EJG/JFM and *Gallo Cattle Company v. Veneman*, Civ. No. S-96-0740 EJG/JFM.

dairy and tree fruit industries. One is less regulated than the other, and one involves manufactured commodities while the other does not. However, as pointed out to plaintiff and its counsel by this very court on more than one occasion in the last year, these are distinctions without a difference.[3]

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

Matsui Nursery, Inc. v. The California Cut Flower Commission, Civ. No. S-96-0102 EJG/GGH, Reporter's Transcript of Hearing on Defendants' motions, August 4, 1997, 12:15 - 13:2.

> Plaintiff says defendant reads the Supreme Court's opinion too broadly, that *Wileman* does not require dismissal of its case because the marketing order at issue here does no more than compel participation in generic advertising and does not otherwise regulate the dairy industries.
>
> It appears plaintiff misunderstands the regulatory scheme underlying the dairy industry, as well as misinterprets *Wileman*. . . . [N]umerous facets of the milk producers businesses are regulated, including the setting of minimum prices and distribution of revenues, which requirements clearly displace competition.
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> While the marketing order at issue in this case does not specifically concern

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[3]In this regard, the court takes judicial notice of the decisions emanating from both the Fresno and Sacramento divisions of this court appended to defendant's moving and reply papers. *See Matsui Nursery v. California Cut Flower Commission*, Civ. No. S-96-0102 EJG/GGH; *Delano Farms v. California Table Grape Commission*, Civ. No. F-96-6053 OWW/DLB; *Gallo Cattle Company v. Veneman*, Civ. No. S-96-0740 EJG/JFM; *Donald B. Mills, Inc. v. USDA*, Civ. No. F-97-5890 OWW/SMS; *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Commission*, Civ. No. F-95-5428 OWW/DLB.

> itself with these other aspects, and is limited solely to collection of assessments for participation in generic advertising, that does not make the industry itself any less regulated. In addition, the Supreme Court's *Wileman* opinion does not turn on the degree to which the Government has otherwise displaced free market [competition].

Gallo Cattle Company v. Veneman, Civ. No. S-96-0740 EJG/JFM, Reporter's Transcript of hearing on Defendant's Motion for Summary Judgment, November 17, 1997, 4:1-23.

Plaintiff's first amendment claim against the federal government's program of compelled funding of generic advertising for the dairy industry at the national level, fails for the same reasons as plaintiff's virtually identical claim against the state government's virtually identical program which is in place at the state level, a case already resolved by this court against plaintiff. The only discernible difference is the existence of one additional argument against the national program which is absent from plaintiff's complaint against the state program.

In paragraph 22 of the instant complaint plaintiff objects to what it describes as the "National Dairy Board's tax expenditure promoting Bovine Growth Hormone." Plaintiff does not provide this substance to its dairy cows nor is it present in plaintiff's cheese. Because plaintiff is opposed to artificial hormones and does not want its tax dollars used in this manner, it objects to the Board's promotion of the same. Apparently, plaintiff contends that because the promotion of artificial hormones is contrary to plaintiff's practice, assessing money from plaintiff to promote artificial hormones contravenes the first amendment.

This argument is not persuasive. Application of the three-step *Wileman* analysis shows that the collection of mandatory fees to promote the use of artificial growth hormones does not run afoul of the first amendment. First, plaintiff's right to disseminate its own message is not curtailed. In fact, plaintiff has done just that by seeking and receiving approval to use the phrase "no artificial hormones" on its cheese. Complaint, ¶ 22.

Second, promotion of bovine growth hormone by the *Board* does not translate into actual or symbolic speech by *plaintiff*. As the Supreme Court noted in *Wileman*: "The use of assessments to pay for advertising does not require respondents to repeat an objectional message out of their own mouths. . . . Respondents are not required themselves to speak, but are merely required to make contributions for advertising. . . . Furthermore, the advertising is attributed not to respondents, but to the California Tree Fruit Agreement or `California Summer Fruits.'" *Wileman*, 117 S.Ct. at 2139. Similarly, promotion of artificial growth

hormones is not a message attributed to plaintiff; rather, it is the message of the National Dairy Board.

Third, plaintiff has failed to show a connection between the "promotion" of artificial growth hormones and endorsement of a specific political or ideological message. Nor could it. The purpose of the legislation challenged in this case is to "strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States." 7 U.S.C. § 4501(b). To the extent the use of growth hormones increases milk production, the entire dairy industry benefits; thus, the legislation's purpose is met. *Cf. United States v. Frame*, 885 F.2d 1119, 1135-37 (3d Cir. 1989) (promotion of message that eating beef is healthy is ideologically neutral).

Finally, plaintiff has failed to characterize his objection to the promotion of growth hormones in a way in which the court could "infer a dispute over anything more than mere strategy." *Frame*, 885 F.2d at 1137. A disagreement with the content of the advertising or the promotional purposes espoused by the Board are administrative challenges to the program, not constitutional ones.

Based on the foregoing, plaintiff's complaint fails to state a claim and defendant's motion to dismiss is GRANTED.

B. Motion for Sanctions

Defendant seeks reimbursement of its reasonable attorneys fees incurred preparing its motion to dismiss contending that plaintiff's complaint was filed in violation of Federal Rule of Civil Procedure 11. Specifically, defendant argues that the first amendment claim raised in the complaint is frivolous in light of the Supreme Court's *Wileman's* decision and the subsequent reliance on *Wileman* by the judges of this district.

Plaintiff characterizes its complaint somewhat differently, describing the claims and arguments raised within it as recognition of a disagreement between the parties and the court concerning the scope and breadth of *Wileman*. Since neither the Ninth Circuit nor the Supreme Court have ruled on *Wileman's* applicability outside the tree fruit industry, plaintiff's counsel contends that his continued efforts to advocate for the modification of *Wileman* within the context of other industries are not just warranted, but are required lest he waive his client's rights.

The court is inclined to agree. While plaintiff has failed to persuade the judges of this district that mandatory funding of generic advertising may implicate the first amendment dependent upon the nature of the industry, the *Wileman* decision has not been applied by either the Ninth Circuit or the Supreme Court outside of the

tree fruit industry. Accordingly, plaintiff's complaint is not filed in violation of Rule 11.

Based on the foregoing, defendant's motion for sanctions is DENIED.

CONCLUSION

1. Defendant's motion to dismiss is GRANTED with prejudice and without leave to amend.
2. Defendant's motion for sanctions is DENIED.
3. The Clerk is directed to close this case.

IT IS SO ORDERED.

GALLO CATTLE COMPANY, a California limited partnership v. THE UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 97-15198.
Decided November 3, 1998.

(Cite as: 159 F.3d 1194) (9th Cir.).

Dairy Promotion — Interim relief — Judicial review — Jurisdiction.

A milk producer sought judicial review of the Judicial Officer's denial of its request for interim relief. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the Eastern District of California dismissing the complaint for lack of subject matter jurisdiction. The court of appeals held that the Dairy and Tobacco Adjustment Act of 1983 does not grant the district court jurisdiction to review the agency's denial of interim relief until the agency issues a final ruling on the merits of the underlying petition; the Administrative Procedure Act does not independently vest district courts with jurisdiction to review an agency's discretionary denial of interim relief; the Administrative Procedure Act's waiver of sovereign immunity in suits seeking judicial review of agency action under 28 U.S.C. § 1331 does not apply because the agency's denial of interim relief is not made reviewable by statute and is not final agency action; and due process does not require immediate judicial review of the agency's denial of interim relief.

United States Court of Appeals
Ninth Circuit.

Before: FLETCHER, T.G. NELSON, Circuit Judges, and WHALEY,* District Judge.

WHALEY, District Judge:

Gallo Cattle Company appeals the district court's dismissal of its Complaint for lack of subject matter jurisdiction. Gallo, a milk producer required under federal law to pay assessments to the National Dairy Promotion and Research Board, is currently challenging the constitutionality of these assessments in an ongoing administrative proceeding before the Secretary of Agriculture. In the administrative proceeding Gallo sought permission to escrow current and future assessments pending resolution of the administrative proceeding. Gallo's request was denied and Gallo brought suit in district court seeking review of the Secretary's decision denying Gallo's request for interim relief. Concluding that it lacked subject matter jurisdiction, the district court granted the Department of Agriculture's Motion for Judgment on the Pleadings. We affirm.

FACTUAL BACKGROUND

Gallo Cattle Company ("Gallo") owns one of the largest dairy herds in the nation. Gallo uses the milk from its herd solely for the production of cheese. As a dairy producer, Gallo is subject to the provisions of the Dairy and Tobacco Adjustment Act of 1983 ("Dairy Act"), Pub.L. No. 98-180, 97 Stat. 1128 (1983) (codified as amended 7 U.S.C. §§ 4501-38). The Dairy Act requires the Secretary of Agriculture to establish a national program for dairy product promotion, research, and consumer education, *see* 7 U.S.C. § 4504 (1992), which the Secretary did in 1984. *See* 7 C.F.R. pt. 1150 (1997). This program, the Dairy Promotion Program, is administered by the National Dairy Promotion and Research Board ("National Board"), which consists of 36 milk producers appointed by the Secretary of Agriculture. 7 C.F.R. § 1150.131 (1997).

Pursuant to the Dairy Promotion Program, milk producers are required to pay to the National Board a 15 per hundredweight assessment on milk for commercial

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*Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

use in fluid form or for manufactured products, including cheese. 7 C.F.R. § 1150.152 (1997). The assessment is reduced by up to 10 per hundredweight for payments made to a "qualified" state dairy program. 7 C.F.R. §§ 1150.153, 1150.152(c)(1997).[1] The National Board uses the assessments to defray the cost of administering the Dairy Promotion Program, which includes the costs associated with dairy product promotion, research projects, and nutrition education projects. *See generally* 7 C.F.R. § 1150.140 (1997).

PROCEDURAL BACKGROUND

On April 16, 1996, Gallo filed a petition with the United States Secretary of Agriculture ("Secretary") challenging the assessments it was required to pay to the National Board pursuant to the Dairy Promotion Program as violative of the First Amendment of the United States Constitution. In its Petition, Gallo sought interim relief. Specifically, Gallo sought permission to pay its assessments into escrow pending a decision on the merits of the petition. In an Order filed on May 29, 1996, the judicial officer, who acts for the Secretary in the adjudication of these petitions, denied Gallo's request for interim relief.

On June 18, 1996, Gallo filed an action in the United States District Court for the Eastern District of California seeking review of the judicial officer's Order denying interim relief. On October 7, 1996, Gallo moved for a preliminary injunction and/or summary judgment, and on October 8, 1996, the respondent, the United States Department of Agriculture ("USDA") moved for judgment on the pleadings. On November 8, 1996, the district court ruled from the bench that neither the Dairy Act nor the Administrative Procedure Act vested it with jurisdiction over the action. Accordingly, the district court dismissed Gallo's Complaint for lack of subject matter jurisdiction and filed an order memorializing that ruling on November 13, 1996. On January 10, 1997, Gallo timely filed its Notice of Appeal.

Since the dismissal by the district court, the United States Supreme Court issued its opinion in *Glickman v. Wileman Bros.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). In *Glickman*, the Court upheld a marketing order promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act

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[1]Gallo participates in a California dairy program administered by the California Milk Producers Advisory Board. Pursuant to that program, Gallo pays to the California Board 10 per hundredweight of milk produced. Accordingly, because California's program is a "qualified" dairy program as defined by the National Dairy Act, Gallo's payment to the California program reduces its assessment due under the National Dairy Act. *See* 7 U.S.C. § 4504(g) (1992).

of 1937, the constitutionality of which had also been challenged as violative of the First Amendment. On November 14, 1997, this court ordered the parties to submit supplemental briefing on the effect, if any, of the *Glickman* decision on this appeal.[2]

DISCUSSION

We review *de novo* a district court's conclusion that it lacks subject matter jurisdiction. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996).

I. THE DAIRY PROMOTION PROGRAM DOES NOT GRANT THE DISTRICT COURT JURISDICTION TO REVIEW THE AGENCY'S DENIAL OF INTERIM RELIEF, UNTIL SUCH TIME AS THE SECRETARY RULES ON THE MERITS OF THE UNDERLYING PETITION.

Title 7 U.S.C. § 4509 (1992) sets forth the petition and review provisions of the Dairy Promotion Program. The statutory provision for administratively challenging the legality of any order issued pursuant to the Dairy Promotion Program is found in subsection (a) of § 4509, which provides:

> Any person subject to any order issued under this subchapter may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, *the Secretary shall make a ruling on the petition*, which shall be final if in accordance with law.

7 U.S.C. § 4509(a) (emphasis added). The statutory provision conferring jurisdiction in the federal district courts to review the Secretary's administrative ruling is found in the next subsection of § 4509, which provides in relevant part:

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[2]Given this court's conclusion that the district court did not have jurisdiction to review the Judicial Officer's denial of interim relief, any impact of the decision in *Glickman* on Gallo's underlying Petition currently before the Secretary is not before the court.

> The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review *such ruling*, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling.

7 U.S.C. § 4509(b) (emphasis added).

Thus, Congress has explicitly provided the procedure that is to be used to challenge orders issued pursuant to the Dairy Promotion Program.[3] Such a procedure mandates exhaustion of administrative remedies prior to seeking judicial review in district court. *See Rasmussen v. Hardin*, 461 F.2d 595, 597-98 (9th Cir. 1972) (interpreting the same language in 7 U.S.C. § 608c(15) as requiring a milk handler to exhaust administrative remedies prior to challenging marketing orders promulgated under the Agricultural Marketing Agreement Act). Further, while judicially-created exhaustion requirements may be waived by the courts for discretionary reasons, statutorily-provided exhaustion requirements deprive the court of jurisdiction and, thus, preclude any exercise of discretion by the court. *See Reid v. Engen*, 765 F.2d 1457, 1462 (9th Cir. 1985).

Here, the district court correctly interpreted § 4509 as vesting it with jurisdiction only after the Secretary rules on the merits of Gallo's petition. Section 4509(a) provides that the Secretary will make "a ruling" on the petition. The use of the singular form of "ruling" in § 4509(a) indicates that only one ruling will be rendered for each petition filed-the Secretary's final decision on the merits of the petition. Pursuant to § 4509(b), "such ruling[s]" are reviewable by the district courts to determine if they are in accordance with law. The word "such" in § 4509(b), identifying those rulings over which the district court has jurisdiction to review, necessarily refers back to the "ruling on the petition" made by the Secretary

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[3]We have interpreted such provisions as requiring that all challenges, including constitutional ones, first be presented to the Secretary of Agriculture. *See, e.g., Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1195-96 (9th Cir. 1990) (holding that an action challenging the constitutionality of almond marketing orders was properly dismissed by the district court for failure to exhaust administrative remedies before the Secretary of Agriculture); *see also Rasmussen v. Hardin*, 461 F.2d 595, 597-98 (9th Cir. 1972) (holding that a milk producer-handler's due process challenge to a marketing order was properly dismissed for failure to exhaust administrative remedies). Sound policy reasons underlie the requirement that all challenges, including constitutional ones, be presented first to the Secretary; it prevents circumvention of the exhaustion requirement, gives the district court the benefit of the Secretary's experience and understanding of the milk industry, and allows for the possibility of resolution of the challenge without reaching the constitutional question. *See Saulsbury*, 917 F.2d at 1195 (internal citations omitted).

pursuant to § 4509(a). *Cf. Public Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 628 (9th Cir. 1985) (concluding that beginning a sentence with the words "such suits" necessarily refers back to the "suits" specified in the previous sentence). Therefore, § 4509(b) vests jurisdiction in the district courts to review only the Secretary's final ruling on a petition filed pursuant to § 4509(a).

The administrative decision that Gallo seeks the district court to review is not "such [a] ruling" as contemplated by § 4509 because it is not the ruling by the Secretary on Gallo's Petition. To the contrary, it is merely an order denying the interim relief, which Gallo is seeking *pending the Secretary's ruling* on its Petition. Accordingly, because the Secretary has not yet ruled on Gallo's Petition, the district court correctly concluded it had not yet acquired jurisdiction Pursuant to § 4509(b).

Gallo's argument to the contrary is difficult to discern; it is premised on the erroneous conclusion that § 4509(b) also vests the district court with jurisdiction to review final agency action by the Secretary that inflicts actual injury, even if that action occurs prior to the Secretary's ruling on a petition. That conclusion, however, cannot be reconciled with the plain language of § 4509. The agency action complained of here, whether denominated a ruling, a decision, or an order, is not the Secretary's ruling on Gallo's Petition challenging the assessments imposed by the Dairy Promotion Program. Accordingly, § 4509(b) cannot be the basis for district court jurisdiction to review the decision.

II. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT INDEPENDENTLY VEST THE FEDERAL DISTRICT COURTS WITH JURISDICTION TO REVIEW AN AGENCY'S DISCRETIONARY DENIAL OF INTERIM RELIEF.

Gallo alternatively asserts that the district court had jurisdiction to review the judicial officer's denial of interim relief pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1989) ("APA"). However, despite the broad language of the Administrative Procedure Act, it is well settled that the APA does not independently confer jurisdiction on the district courts. *See Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998); *Bonneville Power Admin.*, 767 F.2d at 627; *McCartin v. Norton*, 674 F.2d 1317, 1319 (9th Cir. 1982). Rather. the APA prescribes standards for judicial review of an agency action, once jurisdiction is otherwise established. *See Staacke v. United States Secretary of Labor*, 841 F.2d 278, 282 (9th Cir. 1988) (citing *Califano*, 430 U.S. at 106-07 & n. 6, 97 S.Ct. 980). Accordingly, the APA could not provide the district court with jurisdiction to review the judicial officer's denial

of interim relief.

Nonetheless, while beyond dispute that the APA does not provide an independent basis for subject matter jurisdiction, a federal court has jurisdiction pursuant to 28 U.S.C. § 1331 over challenges to federal agency action as claims arising under federal law, unless a statute expressly precludes review. *See Parola v. Weinberger*, 848 F.2d 956, 958 (9th Cir. 1988). Thus, while the APA does not confer a district court with jurisdiction, it does provide a waiver of sovereign immunity in suits seeking judicial review of a federal agency action under § 1331. *Id.*

However, the APA's waiver of sovereign immunity contains several limitations. Of relevance here is § 704, which provides that only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review." 5 U.S.C. § 704. As we have already concluded that the agency action complained of here is not made reviewable by § 4509, the judicial review provision of the Dairy Promotion Program, it is only reviewable if it constitutes "final agency action" for which there is no other adequate remedy in a court. Gallo's assertion that the decision to deny interim relief is "final agency action" is without merit.

Agency action is "final" if a minimum of two conditions are met: "[f]irst, the action must mark the consummation of the agency's decision making process . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1196 (9th Cir. 1997) (internal quotes omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997)); *see also FTC v. Standard Oil Co.*, 449 U.S. 232, 241, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980) (noting that the action must be a definitive statement of the agency's position with concrete legal consequences).

The judicial officer's discretionary decision not to allow Gallo to pay its assessments into escrow is not a "final agency action" because it does not determine the rights or obligations of the parties, nor are there legal consequences flowing from it. While Gallo has an obligation to pay assessments to the National Board, that obligation arises pursuant to the Dairy Promotion Program and the regulations promulgated thereunder. *See* 7 U.S.C. § 4504; 7 C.F.R. § 1150.152. It does not arise from the judicial officer's denial of interim relief. The judicial officer's denial of interim relief imposes no obligation on Gallo at all. Further, there are no legal consequences arising from the decision denying interim relief, nor does the decision fix the rights of the parties.

While Gallo obliquely refers to the civil penalty that can be imposed for failure

to timely pay any assessment due, that potential consequence does not result from the judicial officer's denial of interim relief. Rather, any penalty imposed on Gallo for untimely payment of assessments would result from Gallo's disregard of its statutory obligation. Further, the authority for any such penalty is 7 U.S.C. § 4510(b), not the judicial officer's order denying interim relief. Accordingly, as there are no legal consequences resulting from the order denying interim relief and, thus, no "final agency action," 28 U.S.C. § 1331 and § 704 of the APA could not vest the district court with jurisdiction to review the order.

Finally, Gallo asserts that due process requires that either § 4509 or the APA be construed as vesting the district court with jurisdiction over its Complaint because a contrary construction would result in "irreparable injury" to Gallo with no "clear and certain remedy." A monetary assessment on milk producers is without question a deprivation of property. Further, since the judicial officer here has denied interim relief pending the conclusion of the administrative proceeding, the constitutionality of those assessments will be determined post-deprivation. Accordingly, the Due Process Clause requires that Gallo have, in addition to a fair opportunity to challenge the assessments, a clear and certain remedy for a successful challenge. *See McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18, 36-39, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). Gallo has both.

First, Gallo has an opportunity to challenge these assessments both in an administrative proceeding before the Secretary of Agriculture and in a suit filed in district court to determine whether the Secretary's ruling is in accordance with law. Second, Gallo has a clear and certain remedy for a successful challenge because a refund of any assessments found not to have been due would be in order. *See, e.g., Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 559 (9th Cir. 1988); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983).

Indeed, this court has already held that the post-deprivation remedy available to Gallo, namely a refund of assessments found not to have been due, is constitutionally sufficient in that it provides a "clear and certain remedy." *See Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993). The court in *Cal-Almond* rejected a due process challenge to a statutory scheme that required annual assessments to be paid pending the conclusion of the administrative proceeding wherein the constitutionality of the assessments was being challenged. *Id.* While the plaintiffs in *Cal-Almond* argued that this procedure did not provide them with a "clear and certain remedy" in the event they prevailed, the court held that a refund of any assessments found not to have been due is a sufficient remedy

for parties successfully challenging the constitutionality of a marketing order. *Id.* (*citing Saulsbury*, 917 F.2d at 1195).

Gallo's attempt to distinguish *Cal-Almond* from the instant case is unsuccessful. Gallo asserts that since the Government's counsel here has refused to stipulate to a refund of all assessments found not to have been due, the constitutionally sufficient remedy available to the plaintiffs in *Cal-Almond* is not present here. The *Cal-Almond* decision, however, does not suggest that due process requires plaintiffs be given a pre-trial guarantee that a favorable judgment will be paid. *See also Saulsbury*, 917 F.2d at 1195 (refusing to find that the remedy available to milk handlers who succeed in challenging a marketing order is constitutionally deficient because there was no fund from which the Secretary could award damages). We are satisfied that if Gallo prevails in its challenge to the dairy assessments, an appropriate remedy may be fashioned. The refusal of defense counsel to stipulate to a refund does not foreclose that remedy.

Gallo also cites *United States v. Cal-Almond, Inc.*, 102 F.3d 999 (9th Cir. 1996) ("*Cal-Almond II*") in support of its due process argument. That decision, however, is inapposite. *Cal-Almond II*, an enforcement proceeding, was "an unusual case," wherein we upheld the district court's use of its inherent equitable power to stay the enforcement proceeding and the distribution of assessments already paid, pending the resolution of an administrative challenge to the constitutionality of the assessments. The court in *Cal-Almond II* noted that its conclusion that a district court has the inherent equitable power to stay an enforcement proceeding and the distribution of assessments, is particularly true when there is unreasonable delay by the Secretary in ruling on the petition challenging the assessment or bad faith by the Secretary in bringing the enforcement proceeding. *Id.* at 1004.

While the court in *Cal-Almond II* recognized the district court's equitable power to fashion such a remedy in an "unusual case" properly before it, *see id.* at 1005, it did not suggest that due process requires that such a remedy be available in every case. Indeed, the availability of such a remedy would effectively eviscerate the statutory exhaustion requirement. *See Saulsbury*, 917 F.2d at 1195-96. Accordingly, we find no merit to Gallo's argument that due process requires immediate judicial review of an agency's decision denying interim relief.

CONCLUSION

The district court properly dismissed Gallo's Complaint for lack of subject matter jurisdiction. The district court was not yet vested with jurisdiction pursuant to § 4509(b) of the Dairy Act, because the Secretary had not yet ruled on Gallo's Petition. Additionally, the APA could not vest the district court with jurisdiction

since the APA does not independently confer jurisdiction in federal district courts but, rather, prescribes the standards for judicial review once jurisdiction is independently established. Finally, general federal question jurisdiction, pursuant to 28 U.S.C. § 1331 and § 704 of the APA, is also precluded as the Secretary's discretionary denial of interim relief does not constitute "final agency action."

AFFIRMED.

ANIMAL QUARANTINE AND RELATED LAWS

DEPARTMENTAL DECISIONS

In re: GARLAND E. SAMUEL.
A.Q. Docket No. 98-0002.
Decision and Order filed August 17, 1998.

Default — Failure to answer — Swine health — Legal representation - Ability to pay — Civil penalty.

The Judicial Officer affirmed Judge Baker's (ALJ) Default Decision and Order assessing a civil penalty of $2,000 for eight violations of the Swine Health Protection Act and the regulations issued under the Swine Health Protection Act. Respondent failed to file a timely answer to the Complaint, and the Default Decision and Order was properly issued in accordance with 7 C.F.R. § 1.139. Respondent may appear by or with counsel in an agency proceeding (5 U.S.C. § 555(b)), but Respondent bears the responsibility of obtaining counsel and has no right in disciplinary administrative proceedings under the Swine Health Protection Act to have counsel provided by the government. Respondent's inability to pay a civil penalty is a circumstance to be considered for the purpose of determining the amount of a civil penalty to be assessed in an animal quarantine case. However, the burden is on Respondent to plead and prove, by producing documentation, the lack of ability to pay the civil penalty. Based on Respondent's suggestion that he is able to pay the civil penalty by making monthly payments and Complainant's agreement to the payment of the civil penalty over a period of 80 months, the ALJ's Order assessing a $2,000 civil penalty is modified to provide that Respondent shall pay the civil penalty in 80 monthly payments of $25 each.

James A. Booth, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Swine Health Protection Act, as amended (7 U.S.C. §§ 3801-3813) [hereinafter the Swine Health Protection Act]; the regulations issued under the Swine Health Protection Act (9 C.F.R. §§ 166.1-.15) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on January 14, 1998.

The Complaint alleges that: (1) on or about February 19, 1997, and March 6, 1997, Garland E. Samuel [hereinafter Respondent] permitted untreated garbage to be fed to swine, in violation of section 166.2(a) of the Regulations (9 C.F.R. §

166.2(a)) (Compl. ¶¶ II, IV(A)); (2) on or about March 3, 1997, March 6, 1997, and March 27, 1997, Respondent permitted a dead hog to rot in a garbage treatment area, in violation of section 166.5(a) of the Regulations (9 C.F.R. § 166.5(a)) (Compl. ¶¶ III, IV(B), V(A)); (3) on or about March 27, 1997, and April 10, 1997, Respondent refused to provide information concerning the source of garbage, in violation of section 166.13(d) of the Regulations (9 C.F.R. § 166.13(d)) (Compl. ¶¶ V(B), VII); and (4) on or about April 4, 1997, Respondent failed to make his facility available for inspection during normal business hours, in violation of section 166.10(c)(2) of the Regulations (9 C.F.R. § 166.10(c)(2)) (Compl. ¶ VI).

Respondent was served with the Complaint on February 27, 1998. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on May 7, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. On June 1, 1998, Respondent filed objections to Complainant's Motion for Default Decision and Proposed Default Decision.

On June 16, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued a Default Decision and Order [hereinafter Initial Decision and Order] in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), in which the ALJ: (1) found that Respondent's objections to Complainant's Motion for Default Decision and Proposed Default Decision were not meritorious; (2) concluded that Respondent violated the Swine Health Protection Act and sections 166.2(a), 166.5(a), 166.10(c)(2), and 166.13(d) of the Regulations (9 C.F.R. §§ 166.2(a), .5(a), .10(c)(2), .13(d)), as alleged in the Complaint; and (3) assessed a civil penalty of $2,000 against Respondent.

On July 15, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On August 7, 1998, Complainant filed Complainant's Response to Respondent's Appeal to the Secretary from the Decision of the Administrative Law Judge [hereinafter Complainant's Response], and on August 11, 1998, the Hearing Clerk transmitted the record of this proceeding to the

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

Judicial Officer for a decision.

Based upon a careful consideration of the record in this proceeding, I adopt the Initial Decision and Order as the final Decision and Order.[2] Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusion.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 69—SWINE HEALTH PROTECTION

. . . .

§ 3803. Prohibition of certain garbage feeding; exemption

(a) No person shall feed or permit the feeding of garbage to swine except in accordance with subsection (b) of this section.

(b) Garbage may be fed to swine only if treated to kill disease organisms, in accordance with regulations issued by the Secretary, at a facility holding a valid permit issued by the Secretary, or the chief agricultural or animal health official of the State where located if such State has entered into an agreement with the Secretary pursuant to section 3808 of this title or has primary enforcement responsibility pursuant to section 3809 of this title.

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[2]While I adopt the $2,000 civil penalty assessed against Respondent by the ALJ, I have, based on Respondent's suggestion that he is able to pay the civil penalty by making monthly payments (Respondent's July 15, 1998, filing [hereinafter Appeal Petition]) and Complainant's agreement to the payment of the civil penalty in 80 equal monthly payments of $25 each (Complainant's Response at 5-6), provided that Respondent shall pay the $2,000 civil penalty in 80 equal monthly payments of $25 each. (Decision and Order, *infra*.)

§ 3805. Civil penalties

(a) Assessment by Secretary

Any person who the Secretary determines, after notice and opportunity for a hearing on the record in accordance with sections 554 and 556 of title 5, is violating or has violated any provision of this chapter or any regulation of the Secretary issued hereunder, other than a violation for which a criminal penalty has been imposed under this chapter, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation. Each offense shall be a separate violation. The amount of such civil penalty shall be assessed by the Secretary by written order, taking into account the gravity of the violation, degree of culpability, and history of prior offenses[.]

§ 3807. General enforcement provisions

. . . .

(b) Access to premises or facility and books and records; examination; samples

Any person subject to the provisions of this chapter shall, at all reasonable times, upon notice by a duly authorized representative of the Secretary, afford such representative access to his premises or facility and opportunity to examine the premises or facility, the garbage there at, and books and records thereof, to copy all such books and records and to take reasonable samples of such garbage.

7 U.S.C. §§ 3803, 3805(a), 3807(b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER L—SWINE HEALTH PROTECTION

. . . .

§ 166.2 General restrictions.

(a) No person shall feed or permit the feeding of garbage to swine unless the garbage is treated to kill disease organisms, pursuant to this Part, at a facility operated by a person holding a valid license for the treatment of garbage[.]

§ 166.5 Licensed garbage-treatment facility standards.

Garbage-treatment facilities shall be maintained as set forth in this section.

(a) Insects and animals shall be controlled. Accumulation of any material at the facility where insects and rodents may breed is prohibited.

§ 166.10 Licensing.

. . . .

(c) *Demonstration of compliance with the regulations. . . .*

(2) The licensee shall make the premises, facilities, and equipment available during normal business hours for inspections by an inspector to determine continuing compliance with the Act and regulations.

§ 166.13 Licensee responsibilities.

. . . .

(d) A licensee shall supply, upon request by an inspector, information concerning sources of garbage. Such information shall include the dates of supply and the names and addresses of the person and/or organization from which the garbage was received.

9 C.F.R. §§ 166.2(a), .5(a), .10(c)(2), .13(d).

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

. . . .

. . . [R]espondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139.) Accordingly, the material allegations in the Complaint are adopted and set forth in this . . . Decision and Order as the Findings of Fact, and this Decision [and Order] is issued pursuant to section 1.139 of the Rules of Practice. . . . (7 C.F.R. § 1.139.)

In response to the Complainant's Motion for . . . Default Decision [and Proposed Default Decision], Respondent filed a 3-page response, plus attachments, including three tapes. . . . [Respondent's response to Complainant's Motion for Default Decision and Proposed Default Decision] would have constituted an answer to the Complaint had [it] been timely filed, which [it was] not. However, [Respondent has not raised meritorious objections to Complainant's Motion for Default Decision and Proposed Default Decision. Therefore, this Decision and Order is issued without further procedure, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139)].

Findings of Fact

1. [Garland] E. [Samuel] is an individual whose mailing address is 318 S. Walters, San Antonio, Texas 78203.

2. On or about February 19, 1997, and March 6, 1997, Respondent permitted untreated garbage to be fed to swine, in violation of 9 C.F.R. § 166.2(a).

3. On or about March 3, 1997, March 6, 1997, and March 27, 1997, Respondent permitted a dead hog[, which could be a breeding host for insects and rodents,] to rot in a garbage treatment area, in violation of 9 C.F.R. § 166.5(a).

4. On or about March 27, 1997, and April 10, 1997, Respondent refused to provide information concerning the source of garbage, in violation of 9 C.F.R. § 166.13(d).

5. On or about April 4, 1997, Respondent failed to make his facility available for inspection during normal business hours, in violation of 9 C.F.R. § 166.10(c)(2).

Conclusion

By reason of the Findings of Fact [in this Decision and Order, *supra*], Respondent has violated the [Swine Health Protection] Act and the Regulations issued under the [Swine Health Protection] Act (9 C.F.R. §[§ 166.1-.15]). . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in Respondent's Appeal Petition. First, Respondent contends that he was unable to obtain counsel to represent him in this proceeding and states that he needs assistance with respect to this proceeding (Appeal Petition).

The Administrative Procedure Act provides that a party in an agency proceeding may appear by or with counsel, as follows:

> **§ 555. Ancillary matters**
>
> . . . .
>
> (b) . . . A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

5 U.S.C. § 555(b).

However, a respondent who desires assistance of counsel in an agency proceeding bears the responsibility of obtaining counsel. Moreover, a respondent who is unable to obtain counsel has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary administrative proceedings, such as those conducted under the Swine Health Protection Act.[3]

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[3]*See generally Elliott v. SEC*, 36 F.3d 86, 88 (11th Cir. 1994) (per curiam) (rejecting petitioner's assertion of prejudice due to his lack of representation in an administrative proceeding before the Securities and Exchange Commission and stating that there is no statutory or constitutional right to counsel in disciplinary administrative proceedings before the Securities and Exchange Commission); *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993) (stating that it is well settled that deportation hearings are in the nature of civil proceedings and that aliens therefore have no constitutional right to counsel under the Sixth Amendment); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (stating that a

(continued...)

Second, Respondent contends that he receives $611 per month in social security benefits "to live out of" and is not able to pay a $2,000 civil penalty (Appeal Petition). Section 6(a) of the Swine Health Protection Act (7 U.S.C. § 3805(a)) requires the Secretary to take into account the gravity of the violation, degree of culpability, and history of prior offenses for the purpose of determining the amount of any civil penalty to be assessed. While the Swine Health Protection Act does not require consideration of a violator's inability to pay a civil penalty for the purpose of determining the amount of a civil penalty to be assessed, the Judicial Officer has held that a violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be

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[1](...continued)
deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (stating that because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979) (per curiam) (stating that 5 U.S.C. § 555(b) and due process assure petitioner the right to obtain independent counsel and have counsel represent him in a civil administrative proceeding before the Securities and Exchange Commission, but the Securities and Exchange Commission is not obliged to provide petitioner with counsel); *Feeney v. SEC*, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners' argument that the Securities and Exchange Commission erred in not providing appointed counsel for them and stating that, assuming petitioners are indigent, the Constitution, the statutes, and prior case law do not require appointment of counsel at public expense in administrative proceedings of the type brought by the Securities and Exchange Commission), *cert. denied*, 435 U.S. 969 (1978); *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969) (stating that petitioner has a right under 5 U.S.C. § 555(b) to employ counsel to represent him in an administrative proceeding, but the government is not obligated to provide him with counsel); *Boruski v. SEC*, 340 F.2d 991, 992 (2nd Cir.) (stating that in administrative proceedings for revocation of registration of a broker-dealer, expulsion from membership in the National Association of Securities Dealers, Inc., and denial of registration as an investment advisor, there is no requirement that counsel be appointed because the administrative proceedings are not criminal), *cert. denied*, 381 U.S. 943 (1965); *Alvarez v. Bowen*, 704 F. Supp. 49, 52 (S.D.N.Y. 1989) (stating that the Secretary of Health and Human Services is not obligated to furnish a claimant with an attorney to represent the claimant in a social security disability proceeding); *In re Steven M. Samek*, 57 Agric. Dec. 185, 188 (1998) (stating that a respondent who is unable to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary proceedings, such as those under the Animal Welfare Act) (Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 442 (1984) (stating that a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, is not a criminal proceeding and respondent, even if he cannot afford counsel, has no constitutional right to have counsel provided by the government), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984).

assessed in animal quarantine cases and plant quarantine cases.[4] (Disciplinary administrative proceedings instituted under the Swine Health Protection Act fall under the rubric of animal quarantine cases.[5]) However, the burden is on the respondents in animal quarantine cases and plant quarantine cases to plead and prove, by producing documentation, the lack of ability to pay the civil penalty.[6] Respondent has failed to produce any documentation supporting his assertion that he lacks the ability to pay a $2,000 civil penalty, and Respondent's undocumented assertion that he lacks the ability to pay the civil penalty falls far short of the proof necessary to establish an inability to pay.[7]

Moreover, Respondent suggests that he is able to pay the assessed $2,000 civil penalty in $10 monthly payments (Appeal Petition). Complainant states that "[b]ased on [R]espondent's claim of limited income, Complainant is willing to accept that [R]espondent make 80 equal monthly payments of twenty five dollars ($25.00) per month until the two thousand dollars ($2,000.00) civil penalty is paid in full." (Complainant's Response at 5.) In view of Respondent's suggestion that he is able to pay the civil penalty by making monthly payments, and Complainant's agreement to the payment of the civil penalty in 80 equal monthly payments of $25 each, I am modifying the ALJ's Initial Decision and Order to provide for Respondent's payment of the $2,000 civil penalty in 80 equal monthly payments of $25 each.

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[4]*In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[5]*See generally In re Rex Kneeland*, 50 Agric. Dec. 1571, 1574 (1991) (reducing civil penalties for violations of the Swine Health Protection Act and regulations issued under the Swine Health Protection Act in accordance with the *Kaplinsky* policy, and stating that the *Kaplinsky* policy only applies to animal quarantine cases and plant quarantine cases).

[6]*In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[7]*See In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding that undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

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

Order

Respondent Garland E. Samuel is assessed a civil penalty of $2,000. The civil penalty shall be paid by certified checks or money orders made payable to the "Treasurer of the United States," and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The civil penalty assessed in this Order shall be paid by Respondent in 80 equal monthly payments of $25 each. The initial $25 monthly payment must be received by the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 90 days after service of this Order on Respondent. After the initial $25 monthly payment, Respondent shall pay $25 in each of the next succeeding 79 months, and the payments must be received by the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, on or before the 15th day of each of those 79 months. If Respondent fails to make any payment in full or if any payment is received by the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, after the date on which the payment is due, all remaining payments shall become due and payable in full immediately.

Respondent shall indicate on each certified check or money order that payment is in reference to A.Q. Docket No. 98-0002.

In re: JERRY LYNN STOKES, d/b/a TAYLOR CATTLE.
A.Q. Docket No. 98-0007.
Decision and Order filed October 6, 1998.

Default — Failure to answer — Intent — Ability to pay — Civil penalty.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120) [hereinafter the Animal Quarantine Acts]; regulations issued under the Animal Quarantine Acts (9 C.F.R. §§ 71.1-.20, 78.1-.43); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on April 6, 1998.

The Complaint alleges that: (1) on or about July 23, 1997, Jerry Lynn Stokes, d/b/a Taylor Cattle [hereinafter Respondent], moved approximately two cows interstate from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 71.18(a)(1)(i), because the cattle were not accompanied interstate by a statement or other document containing required information (Compl. ¶ II); (2) on or about July 23, 1997, Respondent moved a brucellosis exposed cow from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 78.8, because the brucellosis exposed cow was not moved to a recognized slaughtering establishment, a quarantined feedlot, or otherwise, as required (Compl. ¶ III); (3) on or about July 23, 1997, Respondent moved approximately one cow from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 78.9(b)(3)(ii), because the cow was not accompanied interstate by a certificate, as required (Compl. ¶ IV).

Respondent was served with the Complaint on April 13, 1998.[1] Respondent failed to answer the Complaint within 20 days after service of the Complaint, as provided by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On June 24, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. Respondent was served with Complainant's Motion for Default Decision and Complainant's

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[1]The Domestic Return Receipt for Article Number [P] 368421006 indicates that the Complaint was delivered to Respondent on April 13, 1994. However, the violations alleged in the Complaint are alleged to have occurred on or about July 23, 1997; the Complaint was not filed until April 6, 1998; the letter from the Hearing Clerk accompanying the Complaint is dated April 6, 1998; and the Domestic Return Receipt for Article Number [P] 368421006 was returned to the Hearing Clerk on April 20, 1998. I find that the Complaint was not served on Respondent on April 13, 1994, as indicated on the Domestic Return Receipt for Article Number [P] 368421006, and I infer that the Complaint was served on Respondent on April 13, 1998.

Proposed Default Decision on July 6, 1998. Respondent failed to file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service, as provided by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On August 12, 1998, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] filed a Default Decision and Order [hereinafter Initial Decision and Order] in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), in which the Chief ALJ: (1) concluded that Respondent violated 9 C.F.R. §§ 71.18(a)(1)(i), 78.8, and 78.9(b)(3)(ii), as alleged in the Complaint; and (2) assessed Respondent a $3,000 civil penalty (Initial Decision and Order at 4).

On August 25, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On September 18, 1998, Complainant filed Complainant's Response to Respondent's Appeal, and on October 1, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

Based upon a careful consideration of the record in this proceeding, I adopt the Initial Decision and Order as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion.

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

. . . .

. . . [R]espondent failed to file an answer within the time prescribed in [section 1.136(a) of the Rules of Practice] (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under [section 1.136(a) of the Rules of Practice] (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint.

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

Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139.) Accordingly, the material allegations in the Complaint are adopted and set forth . . . [in this Decision and Order] as the Findings of Fact, and this Decision [and Order] is issued pursuant to section 1.139 of the Rules of Practice . . . (7 C.F.R. § 1.139).

Findings of Fact

1. Jerry Lynn Stokes is an individual who does business as Taylor Cattle with a mailing address of P.O. Box 545, Garrison, Texas 75946.

2. On or about July 23, 1997, Respondent moved interstate approximately two cows from Garrison, Texas, to Coushatta, Louisiana, in violation of . . . 9 C.F.R. § 71.18(a)(1)(i), because the cattle were not accompanied interstate by a statement or other document containing required information.

3. On or about July 23, 1997, Respondent moved a brucellosis exposed cow from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 78.8, because the brucellosis exposed cow was not moved to a recognized slaughtering establishment, a quarantined feedlot, or otherwise, as required.

4. On or about July 23, 1997, Respondent moved approximately one cow from Garrison, Texas, to Coushatta, Louisiana, in violation of 9 C.F.R. § 78.9(b)(3)(ii), . . . because the cow was not accompanied interstate by a certificate, as required.

Conclusion

By reason of the facts contained in the Findings of Fact [in this Decision and Order], Respondent has violated 9 C.F.R. §§ 71.18(a)(1)(i), 78.8, and 78.9(b)(3)(ii). . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in Respondent's untitled August 25, 1998, filing [hereinafter Appeal Petition]. First, Respondent contends that the civil penalty assessed by the Chief ALJ is excessive because the brucellosis exposed cow that was moved from Garrison, Texas, to Coushatta, Louisiana, on or about July 23, 1997, was moved "across the state line [by] accident," and he violated 9 C.F.R. § 78.8 by "mistake" (Respondent's Appeal Pet. at 1-2).

Civil penalties may be imposed for violations of the brucellosis regulations (9 C.F.R. §§ 78.1-.43) even under circumstances in which the violations are unintentional and result from a "mistake" or "accident," as Respondent contends

occurred in this case.[3]

Section 3 of the Act of February 2, 1903, as amended, sets forth the sanctions that may be imposed for violations of the regulations at issue in this proceeding, 9 C.F.R. §§ 71.18(a)(1)(i), 78.8, and 78.9(b)(3)(ii), as follows:

§ 122. Offenses; penalty

Any person, company, or corporation *knowingly* violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The

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[3]See *In re John Casey*, 54 Agric. Dec. 91, 102 (1995) (stating that it is well settled that civil penalties may be imposed for violations of the brucellosis regulations irrespective of whether the violations are committed knowingly or with intent); *In re Myles C. Culbertson* (Decision as to Myles C. Culbertson, M.S. "Buddy" Major, Jr., and Stuart Major), 53 Agric. Dec. 1030, 1056 (1994) (concluding that respondents violated a provision of the brucellosis regulations (9 C.F.R. § 78.9(b)(3)(ii) (1987)) and stating that respondents M.S. "Buddy" Major, Jr., and Stuart Major erroneously imply in their appeal petition that complainant must prove that the violations were knowing), *rev'd on other grounds*, 69 F.3d 465 (10th Cir. 1995); *In re Dean Reed* (Decision as to Dean Reed and Pete Donathan), 52 Agric. Dec. 90, 108 (1993) (concluding that respondents violated numerous provisions of the brucellosis regulations and stating that civil penalties are routinely imposed without proof that respondents "knowingly" committed the violations), *aff'd*, 39 F.3d 1192 (10th Cir. 1994); *In re Howard Eastland*, 51 Agric. Dec. 1033, 1045 (1992) (concluding that respondent violated provisions of the brucellosis regulations (9 C.F.R. § 78.7(a)-(c) (1987)) and stating that intent is not an element of the violation of the regulations); *In re Bob Smith* (Decision as to Charles Reed), 50 Agric. Dec. 356, 367 (1991) (concluding that respondent Charles Reed violated provisions of the brucellosis regulations (9 C.F.R. §§ 78.7 (1986), 78.7(b) (1986), 78.9(b)(3)(ii) (1988)) and stating that intent is not an element of a violation of the regulations); *In re Basil L. Burns*, 48 Agric. Dec. 881, 882 (1989) (concluding that respondent violated provisions of the brucellosis regulations (9 C.F.R. § 78.8(a)(2)-(a)(3) (1986)); rejecting respondent's contention that the civil penalties should be reduced because the violations were not intentional; and stating that intent is not an element of respondent's violations of administrative regulations); *In re Harry L. Floyd*, 48 Agric. Dec. 94, 97 (1989) (concluding that respondent violated provisions of the brucellosis regulations (9 C.F.R. §§ 78.7(a)(1), 78.8(a)(1)(i), 78.9(c)(3) (1986)); rejecting respondent's contention that the civil penalties should be reduced because the violations were not intentional; and stating that intent is not an element of respondent's violations of the administrative regulations); *In re Roy Carter*, 46 Agric. Dec. 207, 211 (1987) (concluding that respondent violated 9 C.F.R. §§ 71.18, and 78.9(d)(3) (1984) and rejecting respondent's contention that complainant must show that the violations were willful or knowing).

> Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

21 U.S.C. § 122 (emphasis added).

The plain language of 21 U.S.C. § 122 authorizes the Secretary of Agriculture to issue an order assessing a civil penalty, after an opportunity for an administrative proceeding, without proof that the respondent *knowingly* or intentionally violated the Act of February 2, 1903, as amended, or the regulations or orders issued thereunder. The term *knowingly* in 21 U.S.C. § 122 is used only in connection with criminal proceedings.[4] Therefore, even if Respondent's violation of 9 C.F.R. § 78.8 was an accident or mistake, as Respondent contends, Respondent has presented no basis for finding that the $3,000 civil penalty assessed by the Chief ALJ is excessive.

Second, Respondent requests a waiver or significant reduction of the civil penalty assessed by the Chief ALJ on the ground that he (Respondent) is unable to pay the civil penalty (Respondent's Appeal Pet. at 2). A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in animal quarantine cases and plant quarantine cases.[5] However, the burden is on the respondents in animal quarantine cases and plant quarantine cases to prove, by producing documentation, the lack of ability to pay the civil penalty.[6] Respondent has failed to produce any documentation supporting his assertion that he lacks the ability to pay a $3,000 civil penalty, and Respondent's undocumented assertion that he lacks the ability to pay the civil penalty falls far short of the proof necessary to establish

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[4]*In re Dean Reed* (Decision as to Dean Reed and Pete Donathan), 52 Agric. Dec. 90, 108 (1993), *aff'd*, 39 F.3d 1192 (10th Cir. 1994).

[5]*In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 10 (Aug. 17, 1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

[6]*In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 10-11 (Aug. 17, 1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

an inability to pay the civil penalty.[7]

Moreover, even if a violator proves that he or she is unable to pay the civil penalty, the civil penalty is not reduced if the violation is serious or the violator is a repeat violator.[8] In 1994, Respondent moved at least one test eligible cow interstate without a certificate and without a document listing proper individual identification information, in violation of 9 C.F.R. §§ 71.18(a)(1)(i) and 78.9(b)(3)(ii), and Respondent was assessed a civil penalty of $500 for the violations. *In re Jerry Stokes*, 54 Agric. Dec. 1103 (1995). Therefore, even if Respondent had met his burden and proven, with documentation, that he was unable to pay the civil penalty, I would not reduce the civil penalty assessed by the Chief ALJ because Respondent is a repeat violator.

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

Order

Respondent Jerry Lynn Stokes, d/b/a Taylor Cattle, is assessed a civil penalty of $3,000. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States," and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

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[7]*See In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 11 (Aug. 17, 1998) (holding that undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding that undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

[8]*See In re Robert L. Heywood*, 53 Agric. Dec. 1315, 1321 (1993) (setting forth the policy in animal quarantine and plant quarantine cases regarding the reduction of civil penalties based on inability to pay and stating that civil penalties will not be reduced for serious violations or repeat violators) (Decision and Order and Remand Order).

Respondent's payment of the civil penalty shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 98-0007.

In re: CONRAD PAYNE.
A.Q. Docket No. 98-0004.
Decision and Order filed December 8, 1998.

Failure to file timely answer — Default — Civil Penalty — Pork sausage — Sixth amendment —Seventh amendment.

The Judicial Officer affirmed the default decision by Administrative Law Judge Dorothea A. Baker (ALJ) assessing a civil penalty of $750 against Respondent for importing approximately 4 pounds of pork sausage from The Netherlands into the United States, in violation of 9 C.F.R. §§ 94.11 and 94.13. The default decision was properly issued because Respondent failed to file an answer to the Complaint in accordance with 7 C.F.R. § 1.136(c). Therefore, Respondent is deemed to have admitted the allegations in the Complaint and waived his right to a hearing. 7 C.F.R. § 1.139. The Judicial Officer rejected Respondent's contentions that his rights under the Fifth, Sixth, and Seventh Amendments to the United States Constitution were violated. Respondent did not indicate the manner in which the proceeding violated his rights under the Fifth, Sixth, and Seventh Amendments. However the Judicial Officer: (1) reviewed the record and found nothing to indicate that Respondent's Fifth Amendment rights had been violated; (2) noted that the proceeding was not a criminal prosecution and that it is well settled that the Sixth Amendment is only applicable to criminal proceedings and is not applicable to administrative proceedings; and (3) noted that Congress may create statutory public rights, as it did with the enactment of the Act of February 2, 1903, as amended, and assign their adjudication to an administrative agency before which a litigant has no right to a jury trial, without violating the Seventh Amendment, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). Respondent contended that Complainant failed to prove its case beyond a reasonable doubt. The Judicial Officer stated that the standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard, *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983); *Steadman v. SEC*, 450 U.S. 91 (1981), and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the Act of February 2, 1903, as amended, is preponderance of the evidence. The Judicial Officer further stated that Complainant is not required to prove that Respondent violated 9 C.F.R. §§ 94.11 and 94.13, as alleged in the Complaint, because Respondent is deemed, for the purposes of the proceeding, to have admitted the allegations in the Complaint and waived his right to a hearing, based on Respondent's failure to file an answer within 20 days after he was served with the Complaint. Respondent contended that Complainant did not prove that the pork sausage carried animal diseases. The Judicial Officer found that the disease status of the pork sausage, which is the subject of the Complaint, is not relevant to Respondent's violation of 9 C.F.R. §§ 94.11 and 94.13.

James A. Booth, for Complainant.
Respondent, pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111); regulations issued under the Act of February 2, 1903, as amended (9 C.F.R. pt. 94); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 11, 1998.

The Complaint alleges that on or about June 30, 1997, Conrad Payne [hereinafter Respondent], "in violation of 9 C.F.R. §§ 94.11(a), (b), (c), and 94.13(a) and (b), imported approximately 4 pounds of pork sausage ('Cervelaat Worst') from The Netherlands into the United States at Chicago, Illinois, and the pork sausage was not prepared in an eligible inspected establishment, not fully cooked in a container hermetically sealed, not accompanied by an approved meat inspection certificate, and not in accordance with other requirements of 9 C.F.R. §§ 94.11(b), (c), and 94.13(a) and (b)" (Compl. ¶ II).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on May 8, 1998.[1] Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On June 12, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. Respondent was served with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision, and on July 7, 1998, Respondent filed objections to Complainant's Motion for Default Decision and Proposed Default Decision.

On September 18, 1998, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued a Default Decision and Order in which the ALJ: (1) found that Respondent violated 9 C.F.R. pt. 94, as alleged in the Complaint; and (2) assessed a civil penalty of $750 against Respondent (Default Decision and Order at 2-3).

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[1]Memorandum to the File, dated May 8, 1998, from Regina Paris, Hearing Clerk's Office.

On October 27, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2]

On November 19, 1998, Complainant filed Complainant's Response to Respondent's Appeal, and on November 25, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Default Decision and Order as the final Decision and Order. Additions or changes to the Default Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusion.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

21 U.S.C.:

TITLE 21—FOOD AND DRUGS

. . . .

CHAPTER 4—ANIMALS, MEATS, AND MEAT AND DAIRY PRODUCTS

. . . .

SUBCHAPTER III—PREVENTION OF INTRODUCTION AND SPREAD OF CONTAGION

. . . .

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

§ 111. Regulations to prevent contagious diseases

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

21 U.S.C. § 111.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER C—EXPORTATION AND IMPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

. . . .

PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, BOVINE SPONGIFORM ENCEPHALOPATHY; PROHIBITED AND RESTRICTED IMPORTATIONS

. . . .

§ 94.11 Restrictions on importation of meat and other animal products from specified regions.

(a) Austria, The Bahamas, Belgium, Channel Islands, Chile, Czech Republic, Denmark, Finland, France, Germany, Great Britain (England, Scotland, Wales, and the Isle of Man), Hungary, Italy, Japan, The Netherlands, Northern Ireland, Norway, Papua New Guinea, Poland, Republic of Ireland, Republic of Korea, Spain, Sweden, Switzerland, and Uruguay, which are declared in § 94.1 to be free of rinderpest and foot-and-mouth disease, supplement their national meat supply by the importation of fresh (chilled or frozen) meat of ruminants or swine from regions that are designated in § 94.1(a) to be infected with rinderpest or foot-and-mouth disease; or have a common land border with regions designated as infected with rinderpest or foot-and-mouth disease; or import ruminants or swine from regions designated as infected with rinderpest or foot-and-mouth disease under conditions less restrictive than would be acceptable for importation into the United States. Thus, even though this Department has declared such regions to be free of rinderpest and foot-and-mouth disease, the meat and other animal products produced in such free regions may be commingled with the fresh (chilled and frozen) meat of animals from an infected region, resulting in an undue risk of introducing rinderpest or foot-and-mouth disease into the United States. Therefore, meat of ruminants or swine, and other animal products, and ship stores, airplane meals, and baggage containing such meat or animal products originating in the free regions listed in this section shall not be imported into the United States unless the following requirements in addition to other applicable requirements of chapter III of this title are met. However, meat and meat products which meet the requirements of § 94.4 do not have to comply with the requirements of this section. As used in this section the term "other animal product" means all parts of the carcass of any ruminant or swine, other than meat and articles regulated under part 95 or 96 of this chapter.

(b) All meat or other animal product from such regions, whether in personal-use amounts or commercial lots (except that which has been fully cooked by a commercial method in a container hermetically sealed promptly after filling but before such cooking and sealing produced a fully sterilized product which is shelf-stable without refrigeration) shall have been prepared only in an inspected establishment that is eligible to have its

products imported into the United States under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and the regulations in § 327.2, chapter III of this title, issued thereunder, and shall be accompanied by a Department-approved meat inspection certificate prescribed in § 327.4 in chapter III of this title, or similar certificate approved by the Administrator, as adequate to effectuate the purposes of this section, regardless of the purpose or amount of product in the shipment.

(c) *Additional certification.* Meat of ruminants or swine or other animal products from regions designated in paragraph (a) of this section must be accompanied by additional certification by a full-time salaried veterinary official of the agency in the national government that is responsible for the health of animals within that region. Upon arrival of the meat of ruminants or swine or other animal products in the United States, the certification must be presented to an authorized inspector at the port of arrival. The certification must give the name and official establishment number of the establishment where the animals were slaughtered, and shall state that:

(1) The slaughtering establishment is not permitted to receive animals that originated in, or have ever been in, or that have been aboard a means of conveyance at the time such means of conveyance called at or landed at a port in, a region listed in § 94.1(a) as a region infected with rinderpest or foot-and-mouth disease;

(2) The slaughtering establishment is not permitted to receive meat or other animal products derived from ruminants or swine which originated in such a rinderpest or foot-and-mouth disease infected region, or meat or other animal products from a rinderpest and foot-and-mouth disease free region transported through a rinderpest or foot-and-mouth disease infected region except in containers sealed with serially numbered seals of the National Government of the noninfected region of origin;

(3) The meat or other animal product covered by the certificate was derived from animals born and raised in a region listed in § 94.1(a)(2) as free of rinderpest and foot-and-mouth disease and the meat or other animal product has never been in any region in which rinderpest or foot-and-mouth disease existed;

(4) The meat or other animal product has been processed, stored, and transported to the means of conveyance that will bring the article to the United States in a manner to preclude its being commingled or otherwise in contact with meat or other animal products that do not comply with the conditions contained in this certificate.

§ 94.13 Restrictions on importation of pork or pork products from specified regions.

Austria, The Bahamas, Bulgaria, Chile, Denmark, Germany, Great Britain (England, Scotland, Wales, and the Isle of Man), Hungary, Luxembourg, The Netherlands, Northern Ireland, Republic of Ireland, Spain, Switzerland, and Yugoslavia, which are declared to be free of swine vesicular disease in § 94.12(a), are regions that either supplement their national pork supply by the importation of fresh (chilled or frozen) pork from regions where swine vesicular disease is considered to exist; have a common border with such regions; or have certain trade practices that are less restrictive than are acceptable to the United States. Thus, the pork or pork products produced in such regions may be commingled with fresh (chilled or frozen) meat of animals from a region where swine vesicular disease is considered to exist resulting in an undue risk of swine vesicular disease introduction into the United States. Therefore, pork or pork products and ship stores, airplane meals, and baggage containing such pork, other than those articles regulated under part 95 or part 96 of this chapter, produced in such regions shall not be brought into the United States unless the following requirements are met in addition to other applicable requirements of part 327 of this title:

(a) All such pork or pork products, except those treated in accordance with § 94.12(b)(1)(i) of this part, shall have been prepared only in inspected establishments that are eligible to have their products imported into the United States under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) and under § 327.2 of this title and shall be accompanied by the foreign meat inspection certificate required by § 327.4 of this title. Upon arrival of the pork or pork products in the United States, the foreign meat inspection certificate must be presented to an authorized inspector at the port of arrival.

(b) Unless such pork or pork products are treated according to one of the procedures described in § 94.12(b) of this part, the pork or pork products must be accompanied by an additional certificate issued by a full-time salaried veterinary official of the agency in the national government responsible for the health of the animals within that region. Upon arrival of the pork or pork products in the United States, the certificate must be presented to an authorized inspector at the port of arrival. The certificate shall state the name and official establishment where the swine involved were slaughtered and the pork was processed. The certificate shall also state that:

(1) The slaughtering establishment is not permitted to receive animals that originated in, or have ever been in a region listed in § 94.12(a) as a region in which swine vesicular disease is considered to exist;

(2) The slaughtering establishment is not permitted to receive pork derived from swine which originated in such a region or pork from swine from a swine vesicular disease free region which has been transported through a region where swine vesicular disease is considered to exist except pork which was transported in containers sealed with serially numbered seals of the National Government of a region of origin listed in § 94.12 as a region considered free of the disease.

(3) The pork has been processed, stored, and transported to the means of conveyance that will bring the article to the United States in a manner that precludes its being commingled or otherwise coming in contact with pork or pork products that have not been handled in accordance with the requirements of this section.

9 C.F.R. §§ 94.11(a)-(c), .13(a)-(b).

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

. . . .

. . . Respondent failed to file an answer within the time prescribed in [section 1.136(a) of the Rules of Practice] (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under [section 1.136(a) of the Rules of Practice] (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139.) Accordingly, the material allegations in the Complaint are adopted and set forth in this . . . Decision and Order as the Findings of Fact, and this Decision [and Order] is issued pursuant to section 1.139 of the Rules of Practice. . . . (7 C.F.R. § 1.139.) On July 7, 1998, Respondent filed . . . objections to the Motion for Default Decision. However, [Respondent's] objections do not dispute the factual allegations of the Complaint nor do they furnish a basis for not granting Complainant's Motion for Default Decision. . . .

Findings of Fact

1. Conrad Payne is an individual whose mailing address is CEG-E Unit 21615, Box 36, APO AE 09703.

2. On or about June 30, 1997, Conrad Payne, Respondent, in violation of 9 C.F.R. §§ 94.11(a), (b), and (c), and 94.13(a) and (b), imported approximately 4 pounds of pork sausage from The Netherlands into the United States at Chicago, Illinois, and the pork sausage was not prepared in an eligible inspection establishment, not fully cooked in a container hermetically sealed, not accompanied by an approved meat inspection certificate, and not in accordance with other requirements of 9 C.F.R. §§ 94.11(a), (b), and (c), and 94.13(a) and (b).

Conclusion

By reason of the Findings of Fact [in this Decision and Order], Respondent has violated the Act [of February 2, 1903, as amended,] and . . . regulations issued under the Act [of February 2, 1903, as amended] (9 C.F.R. § 94.0 *et seq.*). . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises six issues in a letter which Respondent filed on October 27, 1998, and addressed to "Mrs. Dawson," Hearing Clerk, Office of the Administrative Law Judges, USDA [hereinafter Appeal Petition]. First, Respondent states that he is appealing the ALJ's Default Decision and Order based on the Fifth Amendment to the United States Constitution (Appeal Pet. at 1), which provides, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Respondent does not indicate the manner in which this proceeding violated his

rights under the Fifth Amendment to the United States Constitution. However, I have carefully reviewed the record in this proceeding, and I find nothing to indicate that Respondent's rights under the Fifth Amendment to the United States Constitution have been violated.

Second, Respondent states that he is appealing the ALJ's Default Decision and Order based on the Sixth Amendment to the United States Constitution (Appeal Pet. at 1), which provides, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

Respondent does not indicate the manner in which the proceeding violated his rights under the Sixth Amendment to the United States Constitution. However, I note that this proceeding is not a criminal prosecution, but rather, a civil disciplinary administrative proceeding conducted in accordance with the Administrative Procedure Act, under the Act of February 2, 1903, as amended, and the sanction imposed against Respondent in this proceeding is a civil penalty. It is well settled that the Sixth Amendment to the United States Constitution is only applicable to criminal proceedings and is not applicable to administrative proceedings.[3] Thus, I conclude that Respondent's rights under the Sixth

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[3]*See United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating that the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Loaisiga*, 104 F.3d 484, 486 (1st Cir.) (stating that deportation proceedings are civil matters exempt from Sixth Amendment protections; they are primarily conducted by administrative bodies and not by courts), *cert. denied*, 117 S. Ct. 2447 (1997); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (stating that deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment); *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6th Cir. 1991) (holding that the Sixth Amendment does not apply to a civil matter, such as a labor relations proceeding conducted by the National Labor Relations Board); *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983) (holding that the Sixth Amendment does not apply to administrative discharge proceedings conducted by the National Guard because such

(continued...)

Amendment to the United States Constitution are not implicated in this administrative proceeding.

Third, Respondent states that he is appealing the ALJ's Default Decision and Order based on the Seventh Amendment to the United States Constitution (Appeal Pet. at 1), which provides, as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

Respondent does not indicate the manner in which the proceeding violated his rights under the Seventh Amendment to the United States Constitution. However, I note that courts have long construed the phrase "Suits at common law" in the Seventh Amendment as referring to cases analogous to those tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was

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[1](...continued)
proceedings are not criminal in nature); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1366 (10th Cir. 1979) (rejecting the characterization of Occupational Safety and Health Administration administrative proceedings, in which civil penalties can be assessed, as criminal proceedings and the argument that the Sixth Amendment is applicable to such proceedings); *Camp v. United States*, 413 F.2d 419, 422 (5th Cir.) (holding that there is no Sixth Amendment right to counsel in non-criminal administrative proceedings before the Selective Service Board), *cert. denied*, 396 U.S. 968 (1969); *Haven v. United States*, 403 F.2d 384, 385 (9th Cir. 1968) (holding that the Sixth Amendment right to counsel does not apply in administrative proceedings in the selective service process), *cert. dismissed*, 393 U.S. 1114 (1969); *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9th Cir. 1960) (stating that the Sixth Amendment applies only to criminal proceedings and that Congress may properly provide civil proceedings for the collection of civil penalties which are civil or remedial sanctions rather than punitive and the Sixth Amendment has no application to such proceedings); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee under the Sixth Amendment applies only to those proceedings technically criminal in nature); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the Sixth Amendment is only applicable to proceedings technically criminal in nature and concluding that the Sixth Amendment is not applicable to administrative proceedings under the Packers and Stockyards Act of 1921); *In re Saulsbury Enterprises, Inc.*, 57 Agric. Dec. 82, 100 (1997) (concluding that Article III, § 2 of the United States Constitution and the Sixth Amendment, which afford the right to a jury trial in criminal proceedings, are not applicable to administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)).

customary.[4] Congress may create statutory public rights, as it did with the enactment of the Act of February 2, 1903, as amended, and assign their

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[4]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that "[t]he Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right'"); *Tull v. United States*, 481 U.S. 412, 417 (1987) (stating that the Court has construed the language of the Seventh Amendment to require a jury trial on the merits in those actions that are analogous to "Suits at common law"); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449 (1977) (stating that "[t]he phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (stating that the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Parsons v. Bedford*, 3 Pet. 433, 445-46 (1830) (construing the phrase "Suits at common law" in the Seventh Amendment as referring to cases tried in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not customary); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating that the Seventh Amendment right to a jury trial attaches in cases involving legal rather than equitable claims); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that the Supreme Court has consistently interpreted the phrase "Suits at common law" in the Seventh Amendment to refer to suits in which legal rights are to be ascertained and determined, in contradistinction to those suits in which equitable rights alone are recognized and equitable remedies are administered), *cert. denied*, 513 U.S. 1148 (1995); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that the right to a jury turns on the nature of the issue to be resolved and on the forum in which it is to be resolved); *Welch v. TVA*, 108 F.2d 95, 99 (6th Cir. 1939) (stating that the usual method of determining the value of private property taken for public use has been to accord the land owner the right to have damages assessed by a jury, but this is a matter of legislative discretion because condemnation proceedings by the United States for the use and benefit of the Tennessee Valley Authority are not suits at common law in which the right to trial by jury is guaranteed by the Seventh Amendment), *cert. denied*, 309 U.S. 688 (1940); *NLRB v. Tidewater Exp. Lines, Inc.*, 90 F.2d 301, 303 (4th Cir. 1937) (per curiam) (stating that the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits as were maintainable under common law at the time the amendment was adopted); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits of such character as were maintainable at common law at the time the amendment was adopted); *In re Hudson*, 170 B.R. 868, 873-74 (E.D.N.C. 1994) (stating that the right to a jury trial under the Seventh Amendment extends only to matters of private right and finding that a creditor who files a claim with the bankruptcy court loses the Seventh Amendment right to a jury trial); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating that the United States Supreme Court has interpreted the right to trial by jury to mean the right which existed in suits under common law in 1791, when the Seventh Amendment was adopted; the Seventh Amendment does not create a jury trial right, it simply preserves the right that already existed under the common law).

adjudication to an administrative agency before which a litigant has no right to a jury trial, without violating the Seventh Amendment's requirement that jury trial is to be preserved in suits at common law.[5] Thus, I conclude that the

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[5]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that if a claim that is legal in nature asserts a public right, then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (noting that the Seventh Amendment is not applicable to administrative proceedings); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449-461 (1977) (stating that when Congress creates statutory public rights, it may assign their adjudication to an administrative agency with which a jury trial would be incompatible without violating the Seventh Amendment's injunction that jury trial is to be preserved at common law); *Pernell v. Southhall Realty*, 416 U.S. 363, 383 (1974) (assuming that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency; and stating that *Block v. Hirsh*, 256 U.S. 135 (1921), stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (stating that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication); *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1378 (5th Cir. 1996) (stating that application to the Environmental Protection Agency for a boiler and industrial furnace permit required under the Resource Conservation and Recovery Act triggered a public rights dispute; therefore the applicant has no right to a jury trial under the Seventh Amendment), *cert. denied*, 519 U.S. 1055 (1997); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating that when the government sues in its sovereign capacity to enforce public rights, Congress may assign the fact-finding and initial adjudication to an administrative forum); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that in cases in which "public rights" are being litigated, e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, the Seventh Amendment does not prohibit Congress from assigning that fact-finding function and initial adjudication to an administrative forum with which a jury would be incompatible), *cert. denied*, 513 U.S. 1148 (1995); *Sasser v. Administrator, EPA*, 990 F.2d 127, 130 (4th Cir. 1993) (holding that a person charged in an administrative complaint for discharging pollutants has no Seventh Amendment right to a jury trial and stating that "[g]enerally speaking, the Seventh Amendment does not apply to disputes over statutory public rights, 'those which arise between the Government and persons subject to its authority in connection with the performance of constitutional functions of the executive and legislative departments'"); *Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226, 228 (Fed. Cir.) (stating that public rights may be constitutionally adjudicated by legislative courts and administrative agencies without implicating the Seventh Amendment right to a jury trial), *cert. denied*, 506 U.S. 829 (1992); *Myron v. Hauser*, 673 F.2d 994, 1004 (8th Cir. 1982) (stating that generally the Seventh Amendment is not applicable to administrative or statutory proceedings and concluding that the Seventh Amendment is not applicable to reparation proceedings before the Commodity Futures Trading Commission); *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979) (stating that the Supreme Court has held that the Seventh Amendment right to a jury trial does not extend to situations where Congress has seen fit to set up an administrative procedure

(continued...)

Seventh Amendment to the United States Constitution does not entitle Respondent to a jury trial in this administrative proceeding.

Fourth, Respondent contends that Complainant has failed to prove beyond a reasonable doubt that Respondent violated 9 C.F.R. pt. 94, as alleged in the Complaint (Appeal Pet. at 1).

As an initial matter, the standard of proof applicable in this proceeding is not

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[5](...continued)
for adjudication of disputes arising out of statutorily created rights), *cert. denied*, 449 U.S. 854 (1980); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that at least when only public rights are involved, Congress may provide for administrative fact-finding with which a jury trial would be incompatible and even where the statutory public rights are enforceable in favor of a private party they can be committed to an administrative agency for determination); *Floyd S. Pike Electrical Contractor, Inc. v. Occupational Safety and Health Review Comm'n*, 557 F.2d 1045 (4th Cir. 1977) (per curiam) (stating that the Seventh Amendment is not a bar to the imposition of civil penalties by an administrative tribunal, as authorized by the Occupational Safety and Health Act of 1970); *Penn-Dixie Steel Corp. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 1078, 1080 (7th Cir. 1977) (stating that the Supreme Court held in *Atlas Roofing Co., supra*, that the Seventh Amendment does not bar Congress from assigning to an administrative agency the task of adjudicating Occupational Safety and Health Act violations); *Dorey Electric Co. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 357, 358 (4th Cir. 1977) (per curiam) (stating that the Supreme Court held in *Atlas Roofing Co., supra*, that the Seventh Amendment poses no bar to the disposition of a charge of the violation of the Occupational Safety and Health Act and the assessment of a civil penalty by an administrative tribunal); *Mohawk Excavating, Inc. v. Occupational Safety and Health Review Comm'n*, 549 F.2d 859, 865 (2d Cir. 1977) (stating that the Seventh Amendment is not a bar to the imposition of civil penalties through the administrative process without a jury trial in the enforcement of the Occupational Safety and Health Act); *Clarkson Construction Co. v. Occupational Safety and Health Review Comm'n*, 531 F.2d 451, 455-56 (10th Cir. 1976) (stating that it is within the power of Congress to choose an administrative process for the enforcement of the safe and healthful working conditions objective of the Occupational Safety and Health Act of 1970 and the administrative proceeding which resulted in the imposition of a civil sanction for the violation of the Act is not an action at common law within the meaning of the Seventh Amendment; hence no jury trial right arises); *National Velour Corp. v. Durfee*, 637 A.2d 375, 379 (R.I. 1994) (stating that if an action involves the adjudication of public rights, no jury is required pursuant to the Seventh Amendment); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating that where a right is created by statute and committed to an administrative forum, jury trial is not required by the Seventh Amendment); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 100 (1997) (holding that there is no constitutional right to a jury trial in administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988) (rejecting respondent's contention that he was improperly denied a jury trial in an administrative proceeding under the Animal Welfare Act, and stating that it is well settled that a jury trial is not required in an administrative disciplinary proceeding), *aff'd*, 878 F.2d 358, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989).

"beyond a reasonable doubt," as Respondent contends. Instead, the standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[6] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the Act of February 2, 1903, as amended, is preponderance of the evidence.[7]

Moreover, Complainant is not required to prove that Respondent violated 9 C.F.R. §§ 94.11 and 94.13, as alleged in the Complaint, because Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint and waived his right to a hearing, based on Respondent's failure to file an answer within 20 days after he was served with the Complaint (7 C.F.R. §§ 1.136(c), .139).

A copy of the Complaint and a copy of the Rules of Practice were served on Respondent on May 8, 1998.[8] Sections 1.136, 1.139, and 1.141 of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed

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[6]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

[7]*In re Myles C. Culbertson* (Decision as to Myles C. Culbertson, M.S. Buddy Major, Jr., and Stuart Major), 53 Agric. Dec. 1030, 1045 (1994), *rev'd on other grounds*, 69 F.3d 465 (10th Cir. 1995); *In re Dean Reed* (Decision as to Dean Reed and Pete Donathan), 52 Agric. Dec. 90, 106 (1993), *aff'd*, 39 F.3d 1192 (10th Cir. 1994); *In re Terry Horton*, 50 Agric. Dec. 430, 441 (1991); *In re Bob Smith* (Decision as to Charles Reed), 50 Agric. Dec. 356, 366 (1991); *In re Ralph Mooney*, 45 Agric. Dec. 484, 498 (1986).

[8]See note 1.

to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on May 8, 1998, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondent must file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130 et seq. and 70.1 et seq.). Failure to file an answer within the prescribed time shall constitute an admission of all material allegations of this Complaint and a waiver of hearing.

Compl. at 2.

Likewise, Respondent was informed in the letter of service, which accompanied the Complaint and Rules of Practice, that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

February 12, 1998

Mr. Conrad Pyane [sic]
CEG-E Unit 21615
Box 36
APO AE 09703

Dear Mr. Payne:

Subject: In re: Conrad Payne, Respondent -
A.Q. Docket No. 98-0004

Enclosed is a copy of a Complaint, which has been filed with this office under . . . Section 2 of the Act of February 2, 1903, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal

in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated February 12, 1998, from Joyce A. Dawson, Hearing Clerk, USDA, Office of Administrative Law Judges, to Mr. Conrad Payne (emphasis in original).

On June 12, 1998, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On July 7, 1998, Respondent filed objections to Complainant's Motion for Default Decision and Proposed Default Decision, but Respondent did not dispute the factual allegations in the Complaint or furnish any basis for not granting Complainant's Motion for Default Decision. On September 18, 1998, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ issued the Default Decision and Order in which she found that Respondent admitted the allegations in the Complaint by reason of default and assessed a civil penalty of $750 against Respondent.

I find, under the circumstances in this proceeding, that the Default Decision and Order was properly issued and that the Complainant is not required to prove the allegations in the Complaint by a preponderance of the evidence, since Respondent, by his failure to file an answer, is deemed to have admitted the allegations of the

Complaint.

Fifth, Respondent states that "[t]he Department of Agriculture has failed to prove that the pork sausage carried animal disease(s) that do not occur in the United States and would infect domestic farm animals in the United States" (Appeal Pet. at 1).

The disease status of the pork sausage, which is the subject of the Complaint, is not relevant to this proceeding. Proof that the pork sausage imported by Respondent carried animal disease is not a prerequisite to concluding that Respondent violated 9 C.F.R. §§ 94.11 and 94.13, as alleged in the Complaint. Title 9 C.F.R. §§ 94.11 and 94.13 require, *inter alia*, that pork sausage imported into the United States from The Netherlands must have been prepared as prescribed and must be accompanied by a meat inspection certificate, and neither 9 C.F.R. § 94.11 nor 9 C.F.R. § 94.13 provides an exemption for pork sausage that does not carry a disease. Thus, even if I found that the pork sausage, which is the subject of the Complaint, did not carry any disease, that finding would not constitute a defense to the allegation that Respondent violated 9 C.F.R. §§ 94.11 and 94.13.

Sixth, Respondent states that "[t]he Department of Agriculture has admitted to willfully destroying evidence that would have been instrumental in proving my innocence in a court of law or judicial hearing" (Appeal Pet. at 1). Respondent does not indicate the nature of the evidence that was destroyed, and I find nothing in the record to indicate that any evidence was destroyed.

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[9] Respondent has shown no basis for

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[9]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (setting aside the default decision, which was based upon respondent's statements during two telephone conference calls with the administrative law judge and complainant's counsel, because respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived respondent of its right to due process under the Fifth Amendment to the United States Constitution) (Remand Order); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted) (Remand Order), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer) (Order Vacating Default Decision and Remanding Proceeding), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remanding the

(continued...)

setting aside the Default Decision and Order and allowing Respondent to file an Answer.[10] The Rules of Practice clearly provide that an answer must

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[9](...continued)
proceeding to the administrative law judge for the purpose of receiving evidence because complainant had no objection to respondent's motion for remand) (Remand Order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (setting aside a default decision and accepting a late-filed answer because complainant did not object to respondent's motion to reopen after default) (Order Reopening After Default).

[10]*See generally In re Hines & Thurn Feedlot, Inc.*, 57 Agric. Dec. ___ (Aug. 24, 1998) (holding that the default decision was proper where respondents filed an answer 23 days after they were served with the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. __ (July 16, 1998) (holding that the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); In *re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where
(continued...)

[10](...continued)
respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984)
(continued...)

be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)).

Further, the requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its large workload in an expeditious and economical manner. The United States Department of Agriculture's four administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 40 to 60 cases per year. As such, the courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[11] If Respondent was permitted to contest some of the allegations of fact after failing to file a timely answer, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

Accordingly, the Default Decision and Order was properly issued in this

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[10](...continued)
(holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[11]*See Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (stating that the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (stating that administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution.[12]

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

Order

Respondent Conrad Payne is assessed a civil penalty of $750 which shall be paid by a certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 98-0004.

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[12]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980).

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: JACK D. STOWERS, d/b/a SUGAR CREEK KENNELS.
AWA Docket No. 97-0022.
Decision and Order filed July 16, 1998.

Default — Admissions — Rules of practice — Civil penalty — Failure to file timely answer — Cease and desist order.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein assessing a civil penalty of $5,000 against Respondent and directing Respondent to cease and desist from violating the Animal Welfare Act (AWA) and the Regulations and Standards issued under the AWA. Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. There is no indication in the disposition of a previous disciplinary proceeding instituted against Respondent, *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), *modified by In re Jack D. Stowers*, 56 Agric. Dec. 300 (1997) (Order Modifying Order), that the United States Department of Agriculture would initiate no further action against Respondent for violations of the AWA and the Regulations and Standards. The civil penalty assessed against Respondent is warranted in law and justified by the facts.

Colleen A. Carroll, for Complainant.
C. David Little, Frankfort, IN, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 20, 1997.

The Complaint alleges that: (1) on June 20, November 6, and November 13, 1996, Jack D. Stowers, d/b/a Sugar Creek Kennels [hereinafter Respondent], failed to allow United States Department of Agriculture [hereinafter USDA] officials to inspect his facility in violation of section 16 of the Animal Welfare Act (7 U.S.C.

§ 2146) and section 2.126 of the Regulations (9 C.F.R. § 2.126); and (2) on September 25, 1996, Respondent (a) failed to make available to the Animal and Plant Health Inspection Service [hereinafter APHIS] records of the acquisition, disposition, and identification of dogs in violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75 of the Regulations (9 C.F.R. § 2.75); (b) failed to have the required health certificates for dogs in violation of section 2.78 of the Regulations (9 C.F.R. § 2.78); (c) failed to have any pound certificates for dogs in violation of section 2.133 of the Regulations (9 C.F.R. § 2.133); (d) failed to identify dogs in violation of section 2.50(b) of the Regulations (9 C.F.R. § 2.50(b)); (e) failed to provide adequate veterinary care for dogs in violation of section 2.40 of the Regulations (9 C.F.R. § 2.40); and (f) failed to ensure that primary enclosures for dogs were constructed and maintained so as to have no sharp points or edges that could injure the animals in violation of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2) of the Standards (9 C.F.R. § 3.6(a)(2)) (Compl. ¶ II).

Respondent was served with the Complaint and the Rules of Practice on April 24, 1997. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On March 10, 1998, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondent violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act; and (3) assessed a civil penalty of $5,000 against Respondent (Default Dec. at 2-3).

On May 6, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).*

On May 26, 1998, Complainant filed Complainant's Response to Respondent's Objections to Decision and Order, and on May 27, 1998, the Hearing Clerk

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

transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter

or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness

of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2140, 2146(a), 2149(a), (b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

SUBPART E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

. . . .

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase

which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer. . . . The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

(2) Each dealer and exhibitor shall use Record of Acquisition and Dogs and Cats on Hand (APHIS Form 7005/VS Form 18-5) and Record of Disposition of Dogs and Cats (APHIS Form 7006/VS Form 18-6) to make, keep, and maintain the information required by paragraph (a)(1) of this section: *Provided*, that if a dealer or exhibitor who uses a computerized recordkeeping system believes that APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6 are unsuitable for him or her to make, keep, and maintain the information required by paragraph (a)(1) of this section, the dealer or exhibitor may request a variance from the requirement to use APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6.

(i) The request for a variance must consist of a written statement describing why APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6 are unsuitable for the dealer or exhibitor to make, keep, and maintain the information required by paragraph (a)(1) of this section, and a description of the computerized recordkeeping system the person would use in lieu of APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6 to make, keep, and maintain the information required by paragraph (a)(1) of this section. APHIS will advise the person as to the disposition of his or her request for a variance from the requirement to use APHIS Form 7005/VS Form 18-5 and APHIS Form 7006/VS Form 18-6.

(ii) A dealer or exhibitor whose request for a variance has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the request for a variance should not be denied. The denial of the variance shall remain in effect until the final legal decision has been rendered.

(3) The USDA Interstate and International Certificate of Health Examination for Small Animals (APHIS Form 7001/VS Form 18-1) may

be used by dealers and exhibitors to make, keep, and maintain the information required by § 2.79.

(4) One copy of the record containing the information required by paragraph (a)(1) of this section shall accompany each shipment of any dog or cat purchased or otherwise acquired by a dealer or exhibitor. One copy of the record containing the information required by paragraph (a)(1) of this section shall accompany each shipment of any dog or cat sold or otherwise disposed of by a dealer or exhibitor: *Provided, however*, that, except as provided in § 2.133(b) of this part for dealers, information that indicates the source and date of acquisition of a dog or cat need not appear on the copy of the record accompanying the shipment. One copy of the record containing the information required by paragraph (a)(1) of this section shall be retained by the dealer or exhibitor.

. . . .

§ 2.78 Health certification and identification.

(a) No dealer, exhibitor, operator of an auction sale, broker, or department, agency, or instrumentality of the United States or of any State or local government shall deliver to any intermediate handler or carrier for transportation, in commerce, or shall transport in commerce any dog, cat, or nonhuman primate unless the dog, cat, or nonhuman primate is accompanied by a health certificate executed and issued by a licensed veterinarian. The health certificate shall state that:

(1) The licensed veterinarian inspected the dog, cat, or nonhuman primate on a specified date which shall not be more than 10 days prior to the delivery of the dog, cat, or nonhuman primate for transportation; and

(2) when so inspected, the dog, cat, or nonhuman primate appeared to the licensed veterinarian to be free of any infectious disease or physical abnormality which would endanger the animal(s) or other animals or endanger public health.

(b) The Secretary may provide exceptions to the health certification requirement on an individual basis for animals shipped to a research facility for purposes of research, testing, or experimentation when the research facility requires animals not eligible for certification. Requests should be addressed to the Animal and Plant Health Inspection Service, Regulatory Enforcement and Animal Care, Animal Care, 4700 River Road, Unit 84, Riverdale, Maryland 20737-1234.

(c) No intermediate handler or carrier to whom any live dog, cat, or

nonhuman primate is delivered for transportation by any dealer, research facility, exhibitor, broker, operator of an auction sale, or department, agency, or instrumentality of the United States or any State or local government shall receive a live dog, cat, or nonhuman primate for transportation, in commerce, unless and until it is accompanied by a health certificate issued by a licensed veterinarian in accordance with paragraph (a) of this section, or an exemption issued by the Secretary in accordance with paragraph (b) of this section.

(d) The U.S. Interstate and International Certificate of Health Examination for Small Animals (APHIS Form 7001/VS Form 18-1) may be used for health certification by a licensed veterinarian as required by this section.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, condi-

tions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

. . . .

§ 2.133 Certification for random source dogs and cats.

(a) Each of the entities listed in paragraphs (a)(1) through (a)(3) of this section that acquire any live dog or cat shall, before selling or providing the live dog or cat to a dealer, hold and care for the dog or cat for a period of not less than 5 full days after acquiring the animal, not including the date of acquisition and excluding time in transit. This holding period shall include at least one Saturday. The provisions of this paragraph apply to:

(1) Each pound or shelter owned and operated by a State, county, or city;

(2) Each private pound or shelter established for the purpose of caring for animals, such as a humane society, or other organization that is under contract with a State, county, or city, that operates as a pound or shelter, and that releases animals on a voluntary basis; and

(3) Each research facility licensed by USDA as a dealer.

(b) A dealer shall not sell, provide, or make available to any person a live random source dog or cat unless the dealer provides the recipient of the dog or cat with certification that contains the following information:

(1) The name, address, USDA license number, and signature of the dealer;

(2) The name, address, USDA license or registration number, if such number exists, and signature of the recipient of the dog or cat;

(3) A description of each dog or cat being sold, provided, or made available that shall include:

(i) The species and breed or type (for mixed breeds, estimate the two dominant breeds or types);

(ii) The sex;

(iii)The date of birth or, if unknown, then the approximate age;

(iv)The color and any distinctive markings; and

(v) The Official USDA-approved identification number of the animal. However, if the certification is attached to a certificate provided by a prior

dealer which contains the required description, then only the official identification numbers are required;

(4) The name and address of the person, pound, or shelter from which the dog or cat was acquired by the dealer, and an assurance that the person, pound, or shelter was notified that the cat or dog might be used for research or educational purposes;

(5) The date the dealer acquired the dog or cat from the person, pound, or shelter referred to in paragraph (b)(4) of this section; and

(6) If the dealer acquired the dog or cat from a pound or shelter, a signed statement by the pound or shelter that it met the requirements of paragraph (a) of this section. This statement must at least describe the animals by their official USDA identification numbers. It may be incorporated within the certification if the dealer makes the certification at the time that the animals are acquired from the pound or shelter or it may be made separately and attached to the certification later. If made separately, it must include the same information describing each animal as is required in the certification. A photocopy of the statement will be regarded as a duplicate original.

(c) The original certification required under paragraph (b) of this section shall accompany the shipment of a live dog or cat to be sold, provided, or otherwise made available by the dealer.

(d) A dealer who acquires a live dog or cat from another dealer must obtain from that dealer the certification required by paragraph (b) of this section and must attach that certification (including any previously attached certification) to the certification which he or she provides pursuant to paragraph (b) of this section (a photocopy of the original certification will be deemed a duplicate original if the dealer does not dispose of all of the dogs or cats in a single transaction).

(e) A dealer who completes, provides, or receives a certification required under paragraph (b) of this section shall keep, maintain, and make available for APHIS inspection a copy of the certification for at least 1 year following disposition.

(f) A research facility which acquires any live random source dog or cat from a dealer must obtain the certification required under paragraph (b) of this section and shall keep, maintain, and make available for APHIS inspection the original for at least 3 years following disposition.

(g) In instances where a research facility transfers ownership of a live random source dog or cat acquired from a dealer to another research facility, a copy of the certification required by paragraph (b) of this section

must accompany the dog or cat transferred. The research facility to which the dog or cat is transferred shall keep, maintain, and make available for APHIS inspection the copy of the certification for at least 3 years following disposition.

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

. . . .

(2) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the dogs and cats;

(ii) Protect the dogs and cats from injury;

(iii) Contain the dogs and cats securely;

(iv) Keep other animals from entering the enclosure;

(v) Enable the dogs and cats to remain dry and clean;

(vi) Provide shelter and protection from extreme temperatures and weather conditions that may be uncomfortable or hazardous to all the dogs and cats;

(vii) Provide sufficient shade to shelter all the dogs and cats housed in the primary enclosure at one time;

(viii) Provide all the dogs and cats with easy and convenient access to clean food and water;

(ix) Enable all surfaces in contact with the dogs and cats to be readily cleaned and sanitized in accordance with § 3.11(b) of this subpart, or be replaceable when worn or soiled;

(x) Have floors that are constructed in a manner that protects the

dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' and cats' feet to pass through any openings in the floor. If the floor of the primary enclosure is constructed of wire, a solid resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably must be provided; and

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

9 C.F.R. §§ 2.40, .50(b), .75(a), .78, .100(a), .126, .133; 3.6(a)(2) (footnotes omitted).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

A copy of the Complaint and [a copy of] the Rules of Practice . . . [footnote 1 omitted] were served on Respondent . . . on April 24, 1997. Respondent was informed in the letter of service [which accompanied the Complaint and Rules of Practice] that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation.

Respondent . . . has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted as set forth [in this Decision and Order] by Respondent's failure to file [a timely] answer, are adopted and set forth [in this Decision and Order] as Findings of Fact and Conclusions of Law.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. Jack D. Stowers is an individual doing business as Sugar Creek Kennels, and whose address is 2203 S. CR 1300 E, Frankfort, Indiana 46041.

2. At all times material [to this proceeding] . . . Respondent was operating as a dealer as defined in the [Animal Welfare] Act and the Regulations.

3. On June 20, November 6, and November 13, 1996, Respondent willfully violated section 16 of the [Animal Welfare] Act (7 U.S.C. § 2146) and section

2.126 of the Regulations (9 C.F.R. § 2.126) by failing to allow department officials to inspect his facility.

4. On September 25, 1996, Respondent willfully violated section 10 of the [Animal Welfare] Act (7 U.S.C. § 2140) and section 2.75 of the Regulations (9 C.F.R. § 2.75) by failing to make available to APHIS, records of the acquisition, disposition, and identification of dogs.

5. On September 25, 1996, Respondent willfully violated section 2.78 of the Regulations (9 C.F.R. § 2.78) by failing to have any health certificates for dogs . . . .

6. On September 25, 1996, Respondent willfully violated section 2.133 of the Regulations (9 C.F.R. § 2.133) by failing to have any pound certificates for dogs . . . .

7. On September 25, 1996, Respondent willfully violated section 2.50(b) of the Regulations (9 C.F.R. § 2.50(b)) by failing to identify dogs . . . .

8. On September 25, 1996, Respondent willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide adequate veterinary care for dogs.

9. On September 25, 1996, Respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.6(a)(2) of the Standards (9 C.F.R. § 3.6(a)(2)) by failing to ensure that primary enclosures for dogs were constructed and maintained so as to have no sharp points or edges that could injure the animals contained [in the primary enclosures].

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the [Animal Welfare] Act and warranted under the circumstances.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues and requests that I vacate the Default Decision in Respondent's Objections to Proposed Decision and Motion to Vacate Order of March 10, 1998 [hereinafter Respondent's Appeal Petition].

First, Respondent contends that he was not served with a copy of the Complaint, until April or May 1998 (Respondent's Appeal Pet. ¶¶ 1-2). I disagree with Respondent. On February 21, 1997, the Hearing Clerk sent a letter dated February 21, 1997, and one copy each of the Complaint and the Rules of Practice,

by certified mail, return receipt requested, to Respondent at his address, 2203 S. CR 1300 E, Frankfort, Indiana 46041. Respondent acknowledges that 2203 S. CR 1300 E, Frankfort, Indiana 46041, is his address (Respondent's Appeal Pet. ¶ 3(1)). Nevertheless, the envelope containing the February 21, 1997, mailing was returned to the Hearing Clerk by the postal service marked "unclaimed." Thereafter, on April 24, 1997, the Hearing Clerk mailed the envelope containing the February 21, 1997, mailing by ordinary mail to Respondent at the same address.

Section 1.147(c)(1) of the Rules of Practice provides:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

In addition, sections 1.136, 1.139, and 1.141 of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by

the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on April 24, 1997, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R.

§ 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 2-3.

Likewise, the letter from the Hearing Clerk accompanying the Complaint and the Rules of Practice served April 24, 1997, on Respondent, provides:

CERTIFIED RECEIPT REQUESTED

February 21, 1997

Mr. Jack Stowers dba
Sugar Creek Kennels
2203 S. CR 1300 E.
Frankfort, Indiana 46041

Dear Mr. Stowers:

Subject: In re: Jack Stowers dba Sugar Creek Kennels - Respondent
AWA Docket No. 97-0022

Enclosed is a copy of a complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated February 21, 1997, from Joyce A. Dawson, Hearing Clerk, to Mr. Jack Stowers (emphasis in original).

On May 19, 1997, the Acting Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the allotted time (Letter dated May 19, 1997, from Regina A. Paris, Acting Hearing Clerk, to Mr. Jack Stowers). Respondent did not respond to this letter.

On December 10, 1997, Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. On December 12, 1997, the Hearing Clerk sent a letter dated December 12, 1997, and one copy each of Complainant's Motion for Default Decision and Proposed Default Decision, by certified mail, return receipt requested, to Respondent at his address, 2203 S. CR 1300 E, Frankfort, Indiana 46061. The December 12, 1997, letter from the Hearing Clerk clearly informs Respondent that he must file timely objections to the Proposed Default Decision, as follows:

CERTIFIED RECEIPT REQUESTED December 12, 1997
Mr. Jack Stowers dba
Sugar Creek Kennels
2203 S. CR 1300 E.
Frankfort, Indiana 46041

Dear Mr. Stowers:

Subject: In re: Jack Stowers dba Sugar Creek Kennels, Respondent
AWA Docket No. 97-0022

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order, together with a copy of the Proposed Decision and Order Upon Admission of Facts by Reason of Default, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated December 12, 1997, from Joyce A. Dawson, Hearing Clerk, to Mr. Jack Stowers. The December 12, 1997, mailing was returned to the Hearing Clerk by the postal service marked "unclaimed." On February 13, 1998, the Hearing Clerk mailed the envelope containing the December 12, 1997, mailing by ordinary mail to Respondent in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)). Respondent did not file objections to the Motion for Default Decision or the Proposed Default Decision within 20 days after service, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). On March 10, 1998, the ALJ issued the Default Decision in which he found that Respondent admitted the allegations in the Complaint by reason of default, ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and assessed a civil penalty of $5,000 against Respondent.

On May 6, 1998, 82 days after Respondent was served with a copy of Complainant's Motion for Default Decision and Proposed Default Decision,

Respondent filed objections to Complainant's Motion for Default Decision and Proposed Default Decision (Respondent's Appeal Pet.). In his objections, Respondent contends that "he . . . did not receive notice of the pendency of the Complaint filed in this matter" (Respondent's Appeal Pet. ¶ 1), and states

> [t]hat he became aware of some sort of proceeding in the latter part of February 1998 when he received a letter from the United States Department of Agriculture dated December 12, 1997 concerning a proposed decision and Order. Mr. Stowers brought this to his counsel, C. David Little, who is also mystified by the letter and Motion for Adoption, Proposed Decision and Order. . . .

Affidavit of Jack D. Stowers ¶ 1. However, Respondent admits that he is an individual doing business as Sugar Creek Kennels and that his address is 2203 S. CR 1300 E, Frankfort, Indiana 46061 (Compl. ¶ I(A); Respondent's Appeal Pet. ¶ 3(1)).

It was to Respondent's acknowledged address that the Hearing Clerk mailed a copy of the Complaint, a copy of the Rules of Practice, and a cover letter, by certified mail, return receipt requested, on February 21, 1997, and by ordinary mail on April 24, 1997. Moreover, the Complaint, Rules of Practice, and cover letter of the Hearing Clerk each expressly state that a failure to file a timely answer in this proceeding is deemed an admission of the allegations in the Complaint and could result in the entry of a default decision against Respondent. Respondent's answer, which is contained in Respondent's Appeal Petition (Respondent's Appeal Pet. ¶¶ 3-11), was filed on May 6, 1998, 1 year and 12 days after Respondent was served with the Complaint. Respondent's answer, which was due May 14, 1997, is filed too late, and Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint.

Further, Respondent's objections to Complainant's Motion for Default Decision and Proposed Default Decision, which are contained in Respondent's Appeal Petition, were filed on May 6, 1998, 82 days after Respondent was served with Complainant's Motion for Default Decision and Proposed Default Decision. Respondent's objections to Complainant's Motion for Default Decision and Proposed Default Decision, which were due March 5, 1998, are filed too late.

I disagree with Respondent's contention that he was not served with the Complaint until April or May 1998. The record clearly establishes that Respondent was properly served with a copy of the Complaint on April 24, 1997, but failed to file an answer within the allotted time as prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). I find that Respondent's answer and objections to

Complainant's Motion for Default Decision and Proposed Decision were not timely filed, and I find that the Default Decision was properly issued.

Second, Respondent contends that resolution of a previous disciplinary proceeding instituted against him under the Animal Welfare Act[2] includes an understanding that USDA would initiate no further actions against him (Respondent's Appeal Pet. ¶¶ 8-9). The record does not reveal how Respondent could have been under "the clear and unmistakable impression that no further action had been or was to be initiated by the United States Department of Agriculture against [him]" (Respondent's Appeal Pet. ¶ 9).

On December 23, 1996, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a decision in *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), in which he assessed Respondent a civil penalty of $15,000; revoked Respondent's license under the Animal Welfare Act; and ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. Nothing in the Chief ALJ's December 23, 1996, Decision and Order suggests that Respondent would thereafter be immune from "actions" instituted by USDA against him under the Animal Welfare Act. The Chief ALJ's December 23, 1996, Decision and Order concerns violations stemming from inspections and attempted inspections in 1995 or earlier. The violations, which are the subject of the instant proceeding, are based on inspections and attempted inspections of Respondent's facility in June, September, and November 1996. Nothing in the record in this proceeding, the Decision and Order in *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), or the modification of the Chief ALJ's December 23, 1996, Decision and Order in *In re Jack D. Stowers*, 56 Agric. Dec. 300 (1996) (Order Modifying Order), establishes that the 1996 violations, which are the subject of the instant proceeding, were adjudicated in *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996).

Third, Respondent challenges the propriety of the assessment of a $5,000 civil penalty against him in this proceeding, stating:

> . . . that the additional Complaint filed by the United States Department of Agriculture after a $15,000.00 civil penalty was imposed and after the Respondent basically was forced out of the business and eventually conceded to voluntarily surrender his license, to be vindictive, unwarranted, and superfluous, and constitutes unnecessary imposition on the Court to

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[2]*In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996), *modified by In re Jack D. Stowers*, 56 Agric. Dec. 300 (1997) (Order Modifying Order).

> adjudicate matters which have already taken considerable time and effort and expense on the Court's time to have adjudicated.
>
> The quest of the United States Department of Agriculture to add an additional civil penalty is simply adding "salt to the wound" and is unconscionable and unjustified.

Respondent's Appeal Pet. ¶¶ 10-11. Respondent's assertions are without merit. The $5,000 civil penalty assessed against Respondent is warranted in law and justified in fact.

The Animal Welfare Act authorizes the Secretary of Agriculture to assess a civil penalty of $2,500 for each violation (7 C.F.R. § 2149(b)). Respondent committed nine violations under the Animal Welfare Act and the Regulations and Standards and could be assessed a maximum civil penalty of $22,500.

Section 19(b) of the Animal Welfare Act requires the Secretary to consider "the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations" when assessing a civil penalty (7 U.S.C. § 2149(b)). Respondent's nine violations were serious and willful. Moreover, Respondent has a history of previous violations of the Animal Welfare Act and the Regulations and Standards, *In re Jack D. Stowers*, 56 Agric. Dec. 279 (1996).

Respondent's history of previous violations clearly evidences chronic noncompliance and a lack of good faith. The circumstances support the assessment of a $5,000 civil penalty against Respondent, and the $5,000 civil penalty is well within the range of sanctions imposed in these kinds of cases.[3]

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[3]*See, e.g.*, *In re C.C. Baird*, 57 Agric. Dec.___ (July 7, 1998) (imposing a $5,350 civil penalty and a 10-day suspension for 51 violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189 (1998) (imposing a $200,000 civil penalty, permanent revocation of respondent's license, and permanent disqualification from obtaining a license for 103 violations of the Animal Welfare Act and the Regulations and Standards); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419 (1997) (imposing a $7,500 civil penalty and a 40-day suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the

(continued...)

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[4] Respondent has shown no basis for

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[3](...continued)
Standards) (Modified Order); *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act, the Regulations, and the Standards), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998) (unpublished); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Lifting Stay Order and Decision and Order); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.)(Table), *cert. denied*, 476 U.S. 1108 (1986).

[4]*See generally In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. 1121 (1996) (setting aside a default decision because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (setting aside a default decision because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*,
(continued...)

setting aside the Default Decision and allowing Respondent to file an Answer.[5]

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[4](...continued)
35 Agric. Dec. 195 (1976); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (vacating a default decision and remanding the case to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[5]*See generally In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal docketed*, No. 96-7124 (11th Cir. Nov. 8, 1996); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988)
(continued...)

[5](...continued)
(holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would
(continued...)

The Rules of Practice clearly provide that an answer must be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's answer was filed 1 year and 12 days after Respondent was served with the Complaint. Moreover, the Rules of Practice require that any objections to a motion for a decision must be filed within 20 days after service of the motion and the proposed decision (7 C.F.R. § 1.139). Respondent's objections to Complainant's Motion for Default Decision and Proposed Default Decision were filed 82 days after Respondent was served with Complainant's Motion for Default Decision and Proposed Default Decision.

Further, the requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its large workload in an expeditious and economical manner. The Department's four ALJs frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year. As such, the courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[6] If Respondent was permitted to contest some of the allegations of fact after failing to file a timely answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would

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[5](...continued)
be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[6]*See Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (stating that the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (stating that administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

require additional personnel.

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution.[7]

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

Order

1. Respondent Jack D. Stowers, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent Jack D. Stowers is assessed a civil penalty of $5,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2014-South Building
Washington, D.C. 20250-1417

The certified check or money order shall be forwarded to, and received by, Colleen A. Carroll, within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 97-0022.

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[7]*See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

In re: KARL MITCHELL d/b/a ALL ACTING ANIMALS.
AWA Docket No. 97-0028.
Decision and Order filed September 9, 1998.

Cease and Desist Order - Civil Penalty - Filing License Application and PVC Form Falsely Purporting to be Signed by Applicant and Veterinarian.

Chief Administrative Law Judge Victor W. Palmer found that Respondent violated the Animal Welfare Act and a regulation issued pursuant thereto by submitting a license application and a Program of Veterinary Care form (PVC) which were purportedly signed by the applicant for the license and the veterinarian who completed the PVC form, which instead had been signed by the Respondent. Chief Judge Palmer imposed a $750.00 civil penalty and a cease and desist order. In determining the penalty, Chief Judge Palmer noted that the violation did not endanger the welfare of animals and was unlikely to recur.

Donald A. Tracy, for Complainant.
Benjamin Zvenia, Las Vegas, NV, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (hereinafter "the Act") instituted by a Complaint filed on May 1, 1997, by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA). The Complaint alleged that the Respondent willfully violated the Act and the regulations and standards issued pursuant thereto (9 C.F.R. § 1.1 *et seq.*). Complainant requests a cease and desist order, assessment of civil penalties and suspension of Respondent's license.

I presided over a hearing in Las Vegas, Nevada, on May 14, 1998. Complainant was represented by Donald A. Tracy, Esq., Office of the General Counsel, Washington, D.C., and Respondent was represented by Benjamin Zvenia, Esq., Las Vegas, Nevada. Complainant filed proposed findings of fact, conclusions, order and brief on August 18, 1998. Respondent, filed its proposed findings, conclusions, order and brief on August 28, 1998, which, though late, have been accepted and considered.

References to the transcript of the hearing are cited herein as "Tr.". Complainant's exhibits are cited as "Cx". Respondent's exhibits are cited as "Rx".

For the reasons hereinafter stated, an order is being issued requiring Respondent to cease and desist from violating the Act and the regulations and assessing a civil penalty of $750.00.

Findings of Fact

1. Respondent, Karl Mitchell d/b/a All Acting Animals, is an individual whose address is P.O. Box 1085, Pahrump, Nevada 89041. (Answer.)
2. At all times material herein, Karl Mitchell was an "exhibitor", as defined in the Act, and held an exhibitor's license issued under the Act. (Answer.)
3. On May 28, 1996, Karl Mitchell submitted an application to the United States Department of Agriculture (USDA) for an exhibitor's license on behalf of Mike Tyson, his client, which Karl Mitchell signed as Mike Tyson, who purportedly acknowledged receipt of the regulations and agreed to comply with them. (Tr. 123.)
4. On May 28, 1996, Karl Mitchell submitted to the USDA, a Program of Veterinary Care form, which he signed both as Stephen Whipple, the veterinarian who purportedly filled out the form, and as Mike Tyson, the applicant for the license who purportedly certified that he understood his responsibilities to provide veterinary care. (Tr. 123.)
5. Prior to these submissions, Karl Mitchell had prepared an application for an exhibitor's license for Mike Tyson, which Mike Tyson signed. (Tr. 124.) Karl Mitchell also had Dr. Stephen Whipple, the veterinarian who treated animals Mitchell personally owned and exhibited, examine tigers owned by Mike Tyson, and Dr. Whipple did complete and sign a Program of Veterinary Care form (PVC), respecting Tyson's tigers, for submission to the United States Department of Agriculture. (Tr. 117, Tr. 118, Tr. 124.) However, Karl Mitchell and his wife had a rancorous separation during which time these documents were lost or destroyed. (Tr. 122.)
6. Karl Mitchell had been engaged by Mike Tyson to instruct him in the proper care and handling of tigers that Mr. Tyson owned and wished to raise, breed and use for publicity photographs. (Tr. 120-21.) Inasmuch as this use of his tigers constituted an "exhibition", Mr. Mitchell counseled Mr. Tyson on his need for an exhibitor's license under the Act. Mr. Tyson told Mitchell, "handle it" (Tr. 125 and Tr. 145), and Mitchell then obtained the requisite forms and saw to their completion. When they were lost or destroyed, Mitchell was reluctant to tell Mr. Tyson and ask him to sign new forms. Moreover, Mitchell was in Ohio at Mr. Tyson's home when Mr. Tyson was not, and Mitchell wished to have the tigers' housing facilities in Las Vegas pre-approved before their return to Las Vegas. (Tr. 125-26). He therefore undertook to submit duplicate forms for those which had been lost, and Mitchell signed both Tyson's and Whipple's names. (Tr. 124-26.)
7. Karl Mitchell did not recall all the data that was needed to complete the PVC

form when he attempted to duplicate it and it was incomplete. Gregory Wallen, the USDA inspector who received the PVC form noted the lack of needed information and the fact that handwriting did not vary between the body of the form and the signatures, and sent these documents to his regional office. (Tr. 57-61.) Upon subsequent investigation Mr. Mitchell admitted signing the forms, but denied that he had intended anything fraudulent, he merely was trying to expedite his job of getting the permits for Mr. Tyson. (Tr. 127.)

8. Karl Mitchell has been continuously licensed as an exhibitor since 1988 (Tr. 132) and there is no evidence of any prior violations. He fully cooperated with the investigators. (Tr. 35 and Tr. 65). His personal income at this time is low and diminished. (Tr. 146-48). No false information was contained in the documents submitted by Respondent (Tr. 137), other than the fact that the acknowledgment of the receipt of the regulations and standards and the agreement to comply with them had not been signed by the applicant.

Conclusions of Law

1. Respondent violated the Act and a regulation (9 C.F.R. § 2.2(a)) in that he submitted a license application and a Program of Veterinary Care form (PVC) which were purportedly signed by the applicant for the license and the veterinarian who completed the PVC form, which instead had been signed by the Respondent.
2. The appropriate sanction for this violation by Respondent is the issuance of a cease and desist order and the assessment of a civil penalty in the amount of $750.00.

Discussion

When Karl Mitchell was engaged by Mike Tyson to instruct him in the proper care and handling of his tigers, Mitchell told Tyson that he needed a USDA exhibitor's license to raise, breed and use the tigers for publicity photographs. Tyson told Mitchell to "handle it".

Thereupon, Mitchell obtained the needed forms; had his own veterinarian, Dr. Stephen Whipple, examine the animals and their housing facilities; and saw to the forms being duly completed and signed by both Mike Tyson and Dr. Whipple. But he lost them. Mitchell, who had accompanied the tigers when they were temporarily moved to Tyson's Ohio home, found himself in a serious predicament. Neither Tyson nor Whipple were available to sign new forms and he didn't want to delay the necessary USDA inspection of the Las Vegas property in advance of

the tigers' return. Nor, one would suspect, did he wish to provoke Tyson by asking him to sign new forms because the originals had been lost. So he duplicated the documents as best he could and signed both names. There was no attempt to defraud anyone, but the license application must be concluded to be false in that the pertinent regulation requires:

> ". . . The applicant shall acknowledge receipt of the regulations and standards and agree to comply with them by signing the application form before a license will be issued." 9 C.F.R. § 2.2(a).

Inasmuch as Mike Tyson denies that Mitchell has authority to sign his name (Cx 2), if a license had been issued based on this application, its enforceability would have been in doubt. Accordingly, Mitchell is a licensed exhibitor who has violated the Act and a pertinent regulation, and is therefore subject to the sanctions set forth at 7 U.S.C. § 2149.

In that this violation did not endanger the welfare of animals, is not ongoing, and is unlikely to recur, it would be inappropriate and excessive to apply the Act's provisions for suspension or revocation set forth at 7 U.S.C. § 2149(a).

On the other hand, under 7 U.S.C. § 2149(b), a civil penalty not to exceed $2,500.00 for a violation, may be assessed and a cease and desist order issued. In respect to the appropriate amount of the civil penalty, the Act requires that due consideration be given to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

Taking those factors into consideration, a civil penalty substantially less than the $2,500.00 maximum is appropriate. Mitchell's business is small and not very profitable. He has no prior violations. His commission of this violation is better characterized as a foolish rather than a fraudulent act.

Accordingly, the following order is being entered.

ORDER

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the regulations and, in particular, shall cease and desist from furnishing any false records to the Department.
2. Respondent is assessed a civil penalty of $750.00, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and shall be forwarded to Donald A. Tracy, United States Department

of Agriculture, Office of the General Counsel, Room 2022 South Building, Washington, D.C. 20250-1400.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service upon the parties unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.130, 1.142 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.130, 1.142, 1.145).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final October 19, 1998.-Editor]

In re: CHERYL A. ZIEMANN.
AWA Docket No. 98-0007.
Decision and Order filed September 29, 1998.

Failure to appear at hearing - Admission of material allegations - Acting as a dealer without obtaining a license.

Operated as a dealer, as defined in the Act, without obtaining a license. Respondent, in her Answer, conceded that she transported puppies but contended that she did so as an employee. Judge Bernstein found that because an IRS Form 1099 indicated that Respondent was not an employee and her alleged employer paid no social security and unemployment taxes for her and provided no health plan or retirement plan for her, Respondent was not acting as an employee but was acting as a dealer. Therefore, Respondent violated the Act by acting as a dealer without obtaining a license.

Donald A. Tracy, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Animal Welfare Act, as amended, (7 U.S.C. § 2131 *et seq.*) ("the Act"), instituted by a Complaint filed on January 13, 1998, by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"). The Complaint alleged that Respondent wilfully violated the Act and the regulations and standards issued under the Act (9 C.F.R. §§ 1.1 *et seq.*).

Both Complainant and I made repeated requests to Respondent to participate in a telephone conference to establish a time and place for the oral hearing in this matter. Although Respondent apparently received the letters in which such requests were made, she failed to make herself available for a conference call.

Following these unsuccessful attempts, on May 29, 1998, I issued an order

scheduling the hearing for August 19, 1998, in Washington, D.C. A copy of the order was served upon Respondent. Several days before the hearing, Respondent sent Complainant a letter discussing Complainant's exhibits. However, Respondent failed to appear at the hearing.

The Rules of Practice governing these proceedings provide that a respondent who fails to appear at the hearing, "shall be deemed to have . . . admitted any facts which may be presented at the hearing." This failure to appear also "constitutes an admission of all the material allegations of fact contained in the complaint." 7 C.F.R. § 1.141(e). In addition, Complainant presented persuasive evidence in support of the Complaint's allegations. This consisted of credible testimony by Mr. Jimmy Patschke, an experienced USDA investigator who investigated the charges against Respondent, and documentary evidence.

Based upon Complainant's credible and uncontroverted evidence, and Complainant's factual allegations which I deem to be admitted by Respondent, I make the following findings, conclusions, and order.[1]

Findings of Fact

1. Respondent, Cheryl A. Ziemann, is an individual whose address is Route 1, Box 25, Decatur, Nebraska 68020.

2. At all times material, Respondent was operating as a dealer as defined in the Act and the regulations (Tr. 18, 23-25, 31, 41; Complaint, para. I) .

3. At no time material, did Respondent have a license under the Act (Tr. 14; Complaint, para. II).

4. On over 20 occasions between August 14, 1995, and January 2, 1996, Respondent negotiated the purchase of dogs for Mr. Richard Waldron (Tr. 23, 25, 31, 39, 41; Complaint, para. II).

5. On these same occasions, Respondent transported the dogs, whose purchase she had negotiated, from the sellers to Mr. Waldron (CX 1-77; Tr. 18, 24; Complaint, para. II).

6. Respondent was not an employee of Mr. Waldron. She received an Internal Revenue Service ("IRS") Form 1099 reflecting that the money which Mr. Waldron paid her was for "Nonemployee compensation" (CX 90).

7. Ms. Ziemann's relationship with Mr. Waldron did not have any of the indicia of employment. Mr. Waldron did not pay social security, he did not provide a health plan or a retirement plan, and he did not pay unemployment taxes

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[1]Complainant's exhibits are referred to as "CX" and the hearing transcript is referred to as "Tr."

(Tr. 26).

8. Both USDA and Mr. Waldron told Ms. Ziemann that she would need a license for her activities (CX 83, 91).

Conclusions of Law

1. The Secretary has jurisdiction.

2. Respondent operated as a dealer as defined in the Act without obtaining a license, and thereby wilfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1).

Discussion

The Act requires anyone operating as a dealer to be licensed by the Secretary, 7 U.S.C. § 2134. The Act defines dealer to include any person who, "in commerce, for compensation or profit, . . . transports . . . or negotiates the purchase or sale of . . . any dog . . . for . . . use as a pet," 7 U.S.C. § 2131(f).

Mr. Jimmy Patschke, an experienced APHIS investigator, conducted an investigation which included interviews of Ms. Ziemann, Mr. Waldron, and other purchasers for whom Ms. Ziemann obtained puppies, and sellers of the puppies. These interviews revealed that Ms. Ziemann was operating as a dealer. Mr. Patschke also obtained documentary evidence in the form of animal transfer records and canceled checks which confirmed Ms. Ziemann's status as a dealer.

Ms. Ziemann, in her Answer, conceded that she transported the puppies. In addition, the evidence demonstrates that she negotiated the purchase of the puppies. The transportation of the puppies constitutes dealing under the Act.

Ms. Ziemann's contention was that she was an employee of Mr. Waldron and thus exempt from the licensing requirements. The uncontradicted evidence, however, is that Ms. Ziemann was an independent contractor working on a fee basis. Her pay was reported to the IRS as "Nonemployee compensation" and she had none of the normal indicia of employment. Most tellingly, Mr. Waldron did not pay either social security or unemployment compensation as he would be required to do if she had been an employee. Therefore, Ms. Ziemann was operating as a dealer, not an employee, while not licensed.

In assessing a civil penalty under the Act, a judge must consider the size of Respondent's business, the gravity of the violation, and Respondent's good faith and previous violations. The record indicates that Respondent was able to make a small living through her brokering and transport of puppies. The violations are serious and go to the heart of the Act. In order to implement and enforce the Act's

goals, all dealers must go through a licensing process. This enables the Secretary to monitor their activities and the care they provide their animals. Moreover, licensing is necessary to permit the enforcement of the holding period and other anti-pet theft aspects of the Act and regulations. Ms. Ziemann did not display good faith since both Mr. Waldron and the Department alerted her to the need to obtain a license, but she refused to do so. Ms. Ziemann does not have any previous violations.

The Department has limited resources available in its enforcement efforts and therefore relies heavily on the deterrent effect of disciplinary proceedings and sanctions. Sanctions are necessary to dissuade Respondent and others from committing similar violations. The Act authorizes a maximum penalty of $2,500 per violation. I, therefore, find that the civil penalty of $2,000, requested by Complainant, is appropriate. In addition, as requested by Complainant, Respondent should be disqualified from obtaining a license under the Act for one year and continuing until she has paid the civil penalty assessed against her.

Order

1. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards and, in particular, shall cease and desist from operating as a dealer without first obtaining a license from the Secretary.

2. Respondent is assessed a civil penalty of $2,000, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and forwarded to Donald A. Tracy, Office of the General Counsel, Room 2014, South Building, United States Department of Agriculture, Washington, DC 20250-1417.

3. Respondent is disqualified for a period of one year from becoming licensed under the Act and regulations, and continuing until she has paid the civil penalty assessed against her.

This Decision and Order shall become final and effective without further proceedings 35 days after the date of service upon Respondent as provided by section 1.142 of the Rules of Practice, 7 C.F.R. § 1.142, unless appealed to the Judicial Officer by Respondent within 30 days of service as provided in section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final December 22, 1998.-Editor]

In re: RICHARD LAWSON, STANLEY CURTIS, AND JOHN M. CURTIS, d/b/a NOAH'S ARK ZOO.
AWA Docket No. 96-0047.
Decision and Order filed October 15, 1998.

Cease and desist order — Civil penalty — Willful — Sanction policy — Disqualification order — Preponderance of the evidence — Failing to allow inspection — Failing to maintain complete records — Failing to provide adequate veterinary care — Failing to identify animals — Failing to provide adequate housing — Failing to provide clean premises and clean primary enclosures — Failing to rapidly remove excess water — Failing to properly store food — Failing to provide adequate water.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondents failed to comply with the Regulations by failing to allow APHIS to inspect Respondents' animals, facilities, and records (9 C.F.R. § 2.126); by failing to provide and maintain programs for disease control and prevention, euthanasia, and adequate veterinary care supervised by a veterinarian, and by failing to provide veterinary care to animals in need of care (9 C.F.R. § 2.40); by failing to maintain complete records showing the acquisition and disposition of animals (9 C.F.R. § 2.75); by failing to properly identify animals (9 C.F.R. § 2.50); and by failing to comply with the Regulations and Standards relating to the care and housing of animals: that Respondents failed to remove animal and food wastes (9 C.F.R. § 3.125(d)); that Respondents failed to properly store food (9 C.F.R. §§ 3.1(e), .125(c)); that Respondents failed to adequately ventilate indoor housing facilities (9 C.F.R. § 3.126(b)); that Respondents failed to rapidly eliminate excess water from housing facilities for animals (9 C.F.R. § 3.127(c)); that Respondents failed to provide polar bears with primary enclosures that were clean and had adequate space and water (9 C.F.R. §§ 3.104(a), (e), .107(a)(1)); that Respondents failed to keep the premises clean and in good repair, free of accumulations of trash (9 C.F.R. § 3.131(c)); and that Respondents failed to keep primary enclosures clean of animal waste (9 C.F.R. § 3.131(a)). However, since the ALJ erroneously found no willfulness and did not impose a disqualification period, the Judicial Officer found willfulness and imposed a 2-year disqualification period. A violation is willful within the meaning of the Administrative Procedure Act if a person carelessly disregards statutory requirements (*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996)). The Department's sanction policy places great weight upon the recommendations of administrative officials, who recommended a $22,500 civil penalty, a 2-year disqualification, and (implicitly) a cease and desist order. However, the Judicial Officer modified the recommended sanction, as follows: (1) The Judicial Officer adopted the ALJ's cease and desist order, (2) the civil penalty is increased to $13,500, and (3) Respondents are disqualified from becoming licensed under the Animal Welfare Act for 2 years.

Sharlene A. Deskins, for Complainant.
Russell L. McLean, III, Waynesville, North Carolina, for Respondents.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and

standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on May 6, 1996.

The Complaint alleges that Richard Lawson, Stanley Curtis, and John M. Curtis, d/b/a Noah's Ark Zoo [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards: (1) by operating as a dealer and an exhibitor without a license; (2) by failing to allow the Animal and Plant Health Inspection Service [hereinafter APHIS] to inspect Respondents' animals, facilities, and records; (3) by failing to provide and maintain programs for disease control and prevention, euthanasia, and adequate veterinary care supervised by a veterinarian and failing to provide veterinary care to animals in need of care; (4) by failing to maintain complete records showing the acquisition and disposition of animals; (5) by failing to properly identify animals; and (6) by failing to comply with the Regulations and Standards relating to the care and housing of animals. On May 24, 1996, Respondents filed an Answer denying the material allegations of the Complaint. On December 17, 1996, Complainant filed Motion to Correct Error in Complaint, and also on December 17, 1996, Administrative Law Judge Edwin S. Bernstein issued Order to Correct Typographical Error in Complaint. On January 29, 1997, Respondents refiled Respondents' Answer.

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing on July 30-31, 1997, in Asheville, North Carolina, and on September 17, 1997, in Waynesville, North Carolina. Sharlene Deskins, Esq., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Russell L. McLean, III, of Waynesville, North Carolina, represented Respondents. On November 21, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof [hereinafter Complainant's Brief], and Respondents filed their Brief [hereinafter Respondents' Brief].

On January 13, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] assessing Respondents a civil penalty of $4,000 and ordering Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On February 11, 1998, Complainant filed Complainant's Appeal Petition and Motion for Extension of Time in Which to File Its Brief in Support of Its Appeal Petition to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings

subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* The time for filing Complainant's brief in support of Complainant's Appeal Petition was extended to April 21, 1998.**

On March 2, 1998, Respondents filed Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition. By Informal Order of March 12, 1998, the time for filing Complainant's opposition to Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition was extended to April 2, 1998.

On April 21, 1998, Complainant filed Complainant's Appeal Petition, and Brief in Support of Its Appeal Petition and Opposition To the Respondents' Motion To Dismiss the Complainant's Appeal Petition [hereinafter Complainant's Appeal]; however, since the time for filing Complainant's opposition to the Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition expired on April 2, 1998, the portion of Complainant's Appeal relating to Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition is rejected. On May 19, 1998, Respondents filed Respondents' Brief in response to Complainant's Appeal [hereinafter Respondents' Reply]. On May 21, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition and a decision.

Respondents contend in Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition, as follows:

> 1. That the Complainant has failed to file a proper notice of appeal pursuant to 7 C.F.R. § 1.145 in that the issues on appeal are not clearly designated.
>
> 2. Further, the Complainant has failed to cite the record, statutes, regulations or authorities that they have relied upon for their issues on appeal pursuant to 7 C.F.R. § 1.145.
>
> 3. That the Complainant has failed to follow other procedures necessary for a proper appeal in this venue.

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

**See Informal Order, filed February 11, 1998; Informal Order, filed March 12, 1998; Informal Order, filed March 31, 1998; Informal Order, filed April 10, 1998.

Based upon a careful consideration of Complainant's Appeal Petition and Motion for Extension of Time in Which to File Its Brief in Support of Its Appeal Petition, and of Complainant's Appeal, I find that Complainant complied with the requirements of 7 C.F.R. § 1.145. Respondant's [sic] Motion To Dismiss Complainant's Appeal Petition is dismissed.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ that Respondents violated*** the Animal Welfare Act and the Regulations and Standards, as alleged in paragraphs IV and V of the Complaint. However, I disagree with the ALJ that Complainant did not prove the violation alleged in paragraph III of the Complaint. But, my disagreement with the ALJ on paragraph III of the Complaint does not invalidate the ALJ's analyses, findings, or conclusions beyond paragraph III. Further, although I disagree with much of the ALJ's dicta in the ALJ's discussion, again, my disagreement does not invalidate the rest of the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I am adopting the Initial Decision and Order as the final Decision and Order, with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law.

Complainant's exhibits are referred to as "CX"; Respondents' exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

***The ALJ did not find that Respondents' violations of the Animal Welfare Act and the Regulations and Standards were willful. As discussed in this Decision and Order, *infra*, I find that Respondents' violations were willful.

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes . . .;

(g) The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is

intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes horses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes;

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

. . . .

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.]

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not

have been suspended or revoked.

. . . .

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2141. Marking and identification of animals

All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe: *Provided*, That only live dogs and cats need be so marked or identified by a research facility.

. . . .

§ 2145. Consultation and cooperation with Federal, State, and local governmental bodies by Secretary of Agriculture

(a) The Secretary shall consult and cooperate with other Federal departments, agencies, or instrumentalities concerned with the welfare of animals used for research, experimentation or exhibition, or administration of statutes regulating the transportation in commerce or handling in connection therewith of any animals when establishing standards pursuant to section 2143 of this title and in carrying out the purposes of this chapter.

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

. . . .

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the

Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2131, 2132(f)-(h), 2133, 2134, 2140, 2141, 2145(a), 2146(a), 2149(a), (b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit,

delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not.

. . . .

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license.

. . . .

(3) The following persons are exempt from the licensing requirements under section 2 or section 3 of the Act:

. . . .

(viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license[.]

. . . .

§ 2.5 Duration of license and termination of license.

(a) A license issued under this part shall be valid and effective unless:

. . . .

(2) The license is voluntarily terminated upon request of the licensee, in writing, to the APHIS, REAC Sector Supervisor.

. . . .

§ 2.11 Denial of initial license application.

(a) A license will not be issued to any applicant who:

(1) Has not complied with the r[e]quirements of §§ 2.1, 2.2, 2.3, and 2.4 and has not paid the fees indicated in § 2.6;

(2) Is not in compliance with any of the regulations or standards in this subchapter[.]

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

SUBPART E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

. . . .

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats [footnote omitted]; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

. . . .

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

. . . .

(c) A class "C" exhibitor shall identify all live dogs and cats under his or her control or on his or her premises, whether held, purchased, or otherwise acquired:

(1) As set forth in paragraph (b)(1) or (b)(3) of this section, or

(2) By identifying each dog or cat with:

(i) An official USDA sequentially numbered tag that is kept on the door of the animal's cage or run;

(ii) A record book containing each animal's tag number, a written description of each animal, the data required by § 2.75(a), and a clear photograph of each animal; and

(iii) A duplicate tag that accompanies each dog or cat whenever it leaves the compound or premises.

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the

animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS [Footnote omitted]

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

. . . .

(e) *Storage*. Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

. . . .

SUBPART E—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.101 Facilities, general.

. . . .

(d) *Storage*. Supplies of food shall be stored in facilities which adequately protect such supplies from deterioration, molding, or contamination by vermin. Refrigerators and freezers shall be used for perishable food. No substances which are known to be or may be toxic or

harmful to marine mammals shall be stored or maintained in the marine mammal food storage areas.

. . . .

§ 3.104 Space requirements.

(a) *General.* Primary enclosures, including pools of water housing marine mammals, shall comply with the minimum space requirements prescribed by this part. They shall be constructed and maintained so that the animals contained therein are provided with sufficient space, both horizontally and vertically so that they are able to make normal postural and social adjustments with adequate freedom of movement, in or out of the water. An exception to these requirements is provided for in § 3.110, "Veterinary care." Primary enclosures smaller than required by the standards are also allowed to be used for temporary holding purposes such as training and transfer. Such enclosures shall not be used for permanent housing purposes or for periods longer than specified by an attending veterinarian.

. . . .

(e) *Polar bears.* Primary enclosures housing polar bears shall consist of a pool of water, a dry resting and social activity area, and a den.

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.106 Water quality.

(a) *General.* The primary enclosure shall not contain water which would be detrimental to the health of the marine mammal contained therein.

. . . .

§ 3.107 Sanitation.

(a) *Primary enclosures.* (1) Animal and food waste in areas other than the pool of water shall be removed from the primary enclosure at least daily, and more often when necessary to prevent contamination of the marine mammals contained therein and to minimize disease hazards.

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

. . . .

(c) *Storage.* Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

§ 3.126 Facilities, indoor.

. . . .

(b) *Ventilation.* Indoor housing facilities shall be adequately ventilated by natural or mechanical means to provide for the health and to prevent discomfort of the animals at all times. Such facilities shall be provided with fresh air either by means of windows, doors, vents, fans, or air-conditioning and shall be ventilated so as to minimize drafts, odors, and moisture condensation.

. . . .

§ 3.127 Facilities, outdoor.

. . . .

(c) *Drainage.* A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

(b) *Sanitation of enclosures.* Subsequent to the presence of an animal with an infectious or transmissible disease, cages, rooms, and hard-surfaced pens or runs shall be sanitized either by washing them with hot water (180 F. at source) and soap or detergent, as in a mechanical washer, or by washing all soiled surfaces with a detergent solution followed by a safe and effective disinfectant, or by cleaning all soiled surfaces with saturated live steam under pressure. Pens or runs using gravel, sand, or dirt, shall be sanitized when necessary as directed by the attending veterinarian.

(c) *Housekeeping.* Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

9 C.F.R. §§ 1.1; 2.1(a)(1), (a)(3)(viii), .5(a)(2), .11(a)(1)-(2), .40, .50(b)(1)(i), (ii), (3)(i)-(iii), (c), .75(b)(1)(i)-(vii), .100(a), .126; 3.1(e), .101(d), .104(a), (e), .106(a), .107(a)(1), .125(c), (d), .126(b), .127(c), .131(a)-(c).

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

. . . .

Statement of the Case

Respondents, Richard Lawson, Stanley Curtis, and John Curtis, moved to North Carolina from Florida . . . around 1990 [(Tr. 293, 448-49, 511-13)]. John Curtis, formerly known as John Disken, changed his name to John Curtis after his adoption by Stanley Curtis [(Tr. 19-20, 327, 447); and Stanley Curtis was Stanley Creighton before Stanley Curtis' adoption (Tr. 504). On October 11, 1991, Lawrence D. Briles, Jr.,] applied for an [Animal Welfare Act] license . . . to open a zoo at Route 6, Box 399, Murphy, North Carolina, to be called King Kong Zoo[, Inc. (CX 3). Stanley R. Curtis was] listed as the president and John Disken (Curtis) as secretary/treasurer (CX [3]). The exotic animals to be exhibited at the zoo were owned by Stanley Curtis who had owned the animals for over [15] years in Florida [(Tr. 454, 475, 515)].

On January [31,] 1992, APHIS conducted a pre-license inspection of the facility [(CX 24 at 1, items 1, 3)]. The inspection report states that the facility had two sites [(CX 24 at 2, item 5)]. The first site was identified as being on "Hwy 64, 3.9 miles west of Murphy, NC, next to livestock market" [(CX 24 at 1, item 8).] The address for the second site, which the inspection report described as an "indoor petting zoo under construction . . ." [(CX 24 at 2, item 7, at "2nd site"),] was in the "Flea Market Area" [(CX 24 at 2, item 5).] The inventory for the zoo listed a variety of animals, including such exotic animals as polar bears, tigers, leopards, and jaguars (CX 24 [at 2, item 7 at "Inventory"]).

John Curtis responded to the [pre-license] inspection with a letter[, dated February 12, 1992, explaining] . . . many of the deficiencies found by the inspector related to construction activities at the proposed zoo [(CX 32 at 2)]. John Curtis also added that "[t]he license applied for was for our `flea market' location. This structure will house baby animals. It was this facility that we requested to have inspected, not the main facility" (CX 32 [at 2]).

APHIS wrote back [on March 4, 1992,] to John Curtis that:

> Please be aware that both locations must be in compliance before a license will be issued. All regulated animals owned by King Kong Zoo, Inc.[,] will be held to the standards of the Animal Welfare Act. New applications are not required at this time; however, you may discuss with Dr. Zaidlicz [the

APHIS inspector], postponing the prelicense process in order to have time to bring the main facility into compliance.

CX 31.

. . . [A]bout this time [in 1992, APHIS inspector] Dr. Zaidlicz and agents from federal and state wildlife agencies "raided" King Kong Zoo (Tr. 289[-90]). Complainant did not provide any additional information about this raid apart from a newspaper article[, *Cherokee Scout*, at A9, dated August 21, 1996], which reported that as a result of this "early morning raid" it was determined that, except for two black bears [and cubs,] Stanley "Curtis had a valid license to hold and care for exotic animals" ([Tr. 403-05;] CX 38).

After the raid, Respondents decided to discontinue their efforts to build a zoo at the King Kong site and to expand the site of the petting zoo at 100 Blairsville Road (Highway 129) in Murphy[, North Carolina,] to include large animals [(Tr. 291, 450)]. Robert Disken, John Curtis' brother, had been operating the petting zoo until Respondents took it over (Tr. 291, 449-52). Richard Lawson was issued a license for the zoo [on June 24, 1992], which was called "Noah's Ark Zoo," and became the owner of the petting zoo (CX 26; Tr. 453). The record indicates that the facility had been [last] inspected on June 16, 1992, a week before being licensed, but a copy of the [June 16, 1992,] inspection report was not presented at the hearing (CX 30 [at 1, item 5]). The facility was presumably in compliance with the Regulations and Standards since [section 2.11(a)(2) of the Regulations states that] a license cannot be issued unless a facility is in compliance [with the Regulations and Standards] (9 C.F.R. § 2.11[(a)(2)]).

Although [billboards advertised] both King Kong Zoo and Noah's Ark Zoo . . . to the public . . . [(CX 21 at 1, CX 40)], the record is not clear whether King Kong Zoo had ever exhibited animals to the public or whether Noah's Ark Zoo exhibited animals for more than a few months after it was acquired by Respondents in 1992. What the record shows is that [o]n October [20,] 1993, APHIS issued an "Official Warning" to Stanley Curtis, alleging that King Kong Zoo[, Inc.,] was "[p]roviding animals for exhibition without a valid USDA [l]icense" (CX 37). The circumstances prompting the warning were not given at the hearing nor was there any clarification as to whether this ambiguous warning meant that King Kong [Zoo, Inc.,] was allegedly exhibiting animals or was providing animals to someone else for exhibition. William Groce, an APHIS investigator, [testified that John Curtis told him (investigator Groce) that lion cubs] . . . were being transferred daily between [King Kong Zoo, Inc., and Noah's Ark Zoo] (. . . [Tr. 303, 624]). [Investigator Groce] testified that lion cubs were being "loaned" by Stanley and John Curtis to Noah's Ark Zoo to have people have their photographs taken with

them and that he was told that the animals at King Kong Zoo were to be transferred to Noah's Ark Zoo (Tr. 303, 420[, 613]), but no records or other evidence was presented at the hearing showing a daily transfer of animals, and investigator Groce said he did not see anyone from the public at Noah's Ark Zoo [on August 24,] 1993 (Tr. 611). [Dr. John Michael] Guedron, an APHIS [Veterinary Medical Officer [hereinafter VMO]], stated in an affidavit dated January 31, 1996, that Noah's Ark Zoo "has been open to the public since before I began doing the inspections [in 1993]" (CX 20 [at 2]). However, [VMO Dr. Guedron] provided no supporting details and at the hearing testified that he did not know whether the zoo was open or exhibiting animals to the public (Tr. 132). John Curtis testified that King Kong Zoo had existed in name only [(Tr. 535)] and . . . never [got past a pre-license inspection (Tr. 535-37)] . . . and that Noah's Ark Zoo was [open only as a petting zoo for only 8 months and then] closed to the public in 1992 [(Tr. 450-52),] when construction for a larger facility was started (Tr. . . . 467 . . .). Violet Harris, a frequent visitor of the flea market located across the street from Noah's Ark Zoo, testified [on September 17, 1997,] that the zoo had not been open for the last 3 years (Tr. 438[-39]).

John Curtis testified that his job at Noah's Ark [Zoo] was to be the animal "keeper" [(Tr. 451)] and to convert it from a petting zoo by building new facilities to accommodate larger animals [(Tr. 455)]. From 1992 until at least 1996, the facility was under construction [(Tr. 467)]. Mr. Curtis said the construction included a perimeter fence, a new sewer system, animal cages that exceeded the space requirements of federal and state regulations, heated dens, and two 60,000-gallon water tanks for the polar bears [(Tr. 455-56, 464)]. John Curtis said that Stanley Curtis, who provided the money for the construction, had invested over $300,000 (Tr. . . . 455-56). Respondent presented photographs at the hearing reflecting the status of the zoo's construction at the time of the hearing in September 1997 (Tr. 541-55; RX 2-18[, 20, 24]).

Some of the exotic animals owned by Stanley Curtis were kept at a quonset hut leased by John Curtis on property adjacent to the site of the former King Kong Zoo located 4 or 5 miles from Noah's Ark Zoo [(Tr. 170, 172, 177, 510, 515)]. APHIS VMO Dr. John Guedron [testified] John Curtis told him that the animals at the quonset hut were to be ["brought over"] . . . to Noah's Ark [Zoo] as construction of their cages was completed[; and there is testimony by APHIS senior investigator Terry Groce that the animals would be loaned or transferred to Noah's Ark Zoo] (Tr. 175, 219-20, 296-99). Investigator Groce also [testified] he was told by John Curtis that the animals at Noah's Ark [Zoo], including polar bears, had come from the site of the quonset hut [(Tr. 290-97)]. Records further show that Stanley Curtis had transferred or donated exotic animals to Noah's Ark [Zoo and Richard Lawson

(CX 7, 15)]. The last of the animals at the quonset hut were transferred to Noah's Ark Zoo on May [8,] 1996 [(Tr. 207-10)]. Inspectors referred to the quonset hut as "site 2," while Respondents referred to it as the "Hunters Ridge" property (Tr. [88-89, 207, 264-65, 310], . . . 516, 538 . . .). John Curtis [testified that] the animals at the quonset hut were Stanley [Curtis'] "private collection" and that Stanley [Curtis] was not in the business of buying and selling exotic animals (Tr. . . . 475).

On February [9], 1993, APHIS inspector Ralph Ayers went to Noah's Ark Zoo to conduct an inspection, but ["]no one was [available to accompany [inspector Ayers] to the facility"] (CX 30 [at 2, item 7, III, item 51]). [Inspector Ayers] returned to the facility on May 17, 1993, and again no one was present [(CX 29 at 2, item 7, IV, item 51)]; he saw several signs saying "Keep Out," [and] he went to the residence of Richard Lawson who told him that John Disken (Curtis) had the key, but that he was not home [(CX 29 at 2, item 7, IV, item 51)]. John Curtis was the contact person for inspections (Tr. 41). [Inspector] Ayers told [Richard] Lawson that [inspector Ayers] considered [Richard] Lawson to be "refusing inspection" (CX 29 [at 2, item 7, IV, item 51]). APHIS then sent [Richard] Lawson [an official] warning [letter dated October 20, 1993, documenting Richard Lawson's] failure to allow APHIS officials to have access to the [facilities, property, animals, and records] (CX 1). Nevertheless, APHIS renewed [Richard] Lawson's license on June 24, 1993, and again [on June 24,] 1994 (CX 26, 27). [On December 27,] 1994, APHIS sent [Richard] Lawson another [official] warning letter about four items at [Noah's Ark Z]oo not being in compliance with the Regulations [and Standards] for the care of animals[, but t]he warning did not refer to any failure to allow an inspection and the inspection report on which this warning is based, and which presumably would have provided more information about the basis for the violations, was not presented at the hearing (CX 2).

In an affidavit, [VMO Dr.] John Guedron said he conducted inspections of the facility in June and October 1995, but, again, the reports of the inspections were not presented at the hearing and there were no allegations that [VMO Dr. Guedron] was refused access to the zoo (CX 20). The only information about the 1995 inspections was provided by John Curtis who testified that:

> [BY JOHN CURTIS:]
>
> A. Dr. Guedron, he was coming in to do the regular inspection. Well, I'm back there and I'm all by myself, right, so I'm back there in the back and I've got my wire welder, my torch set and I'm building a cage, okay, and he come back there and everything else was all right, yeah, looking good.

Then he starts complaining about the miscellaneous building material. He called it trash, a brand new twelve hundred dollar wire welder. Well, he come in there and started writing it up for form board, he just took off the thing. There's no animal in the cage, matter of fact, there was no wire on the cage. He'd write that up. It just seemed like the best thing -- then they fined Richard thirteen hundred and some dollars for miscellaneous building material. I measured it. It was something like eighty feet away from the nearest -- that was the lions, and it was form boards, I mean.

BY MR. McLEAN:

Q. Okay. So anyway he started writing up Richard for a construction project. Is that right?

A. Well, the construction. So, I think Richard or somebody called Ms. Goldentire [Elizabeth Goldentyer, DVM, an APHIS Animal Care Specialist] in Florida and made the suggestion to her that they'd probably be better off just to voluntarily surrender the license until the thing was done, I mean, because you can't strap a welder on your back, a torch in one hand, pliers in this hand, and figure that every time someone's going to walk in the door, you got building material on the ground. That just blew my top, also. It's not that whatever you were doing was good and right, it was what you did wrong. I mean, he's step right over, if you were doing a great job, he'd step over it and say "well look at that, there's a bent nail." Just can't handle that.

Tr. 487-88.

On June 24, 1995, APHIS renewed Noah's Ark [Zoo's] license for another year with an expiration date of June 24, 1996 (CX 4).

On January 17, 1996, [VMO Dr.] Guedron went to Noah's Ark Zoo to conduct an inspection [(CX 20 at 2; Tr. 20). VMO Dr. Guedron] told John Curtis that he also wanted to inspect two polar bears and a tiger which were reportedly [housed] behind a trailer located adjacent to the zoo [(Tr. 20-21). John] Curtis responded that the animals were Stanley Curtis' privately-owned animals, that they were on private property and that APHIS had no authority to inspect such animals [(CX 20 at 2). John Curtis] added that since the zoo was not exhibiting any animals, a license was not needed and that Richard Lawson would surrender the license and apply for a new one when the facility was completed [(Tr. 23, 530; CX 20 at 2). John Curtis] then refused to allow [VMO Dr.] Guedron to conduct an inspection [(Tr. 23). VMO Dr.] Guedron advised [John] Curtis to use APHIS' "voluntary

surrender form" to surrender the license (Tr. 24 . . .[; CX 20 at 2]). [Section 2.5(a)(2) of t]he Regulations provides that a licensee can voluntarily [terminate] his/her license "upon request of the licensee, in writing, to the APHIS, REAC Sector Supervisor" (9 C.F.R. § 2.5[(a)](2)).

[Richard] Lawson sent a Mailgram to APHIS at 2:59 p.m., on January 17, 1996, stating that he was voluntarily surrendering his license (CX 9). [Richard Lawson] also sent on the same date the "Voluntary Surrender Affidavit" form containing under "Remarks" the statement that "[n]ew construction not compleated [sic] at this time, and zoo will remain closed untill [sic] compleated [sic]" (CX 10).

[VMO Dr.] Guedron reported the incident to his supervisor, Richard Watkins, a doctor of veterinary medicine, who contacted William Groce, a senior investigator with APHIS' regulatory enforcement branch [(Tr. 309]). [Investigator] Groce then began making plans for APHIS to "enter the premises" [(Tr. 309). Investigator Groce] contacted a special agent for the Office of the Inspector General [hereinafter OIG] "requesting assistance of his people to gain access as peaceful as possible" [(Tr. 310)] and followed this [contact] with a meeting with two OIG agents "at which time [he] . . . updated them on the intelligence that [he] had gathered" [(Tr. 310)]. Next, the local sheriff's office and the state troopers were notified [(Tr. 310-11)]. State wildlife officials also became involved [when they heard a radio transmission from the OIG agents to the State of North Carolina Highway Patrol (Tr. 311). Investigator] Groce assembled the group for a planning session at a motel on January 25, 1996, before proceeding to Noah's Ark [Zoo (Tr. 259-60, 310-11)]. The group that gathered was composed of [investigator] Groce, VMO Dr.] Guedron, [sector supervisor] Watkins, two armed OIG special agents, two state troopers, one wildlife official, and one or two deputy sheriffs [(Tr. 311)]. The plan was for the group to proceed to the Noah's Ark site in three or four cars and for [investigator] Groce, the two OIG agents, and the two state troopers to approach the trailer at the site while [VMO Dr.] Guedron and [sector supervisor] Watkins were to wait in their cars in radio contact until "we made sure that everything was okay . . ." [(Tr. 311).]

The group's vanguard advanced as planned on the trailer where they were met by Stanley Curtis [(Tr. 311-12)]. Stanley [Curtis] invited them into the trailer and called John Curtis who was . . . in the zoo [(CX 21 at 3; Tr. 312). Investigator] Groce told John and Stanley [Curtis] that his group was there to inspect Noah's Ark Zoo and also the animals at the site of the quonset hut [(Tr. 312-13)]. John Curtis [testified that he] asked the two OIG agents for identification . . . [but that] they told him they did not have to show him any identification because they were Federal Bureau of Investigation [hereinafter FBI] agents [(Tr. 492)]. John Curtis told [investigator] Groce that [investigator Groce] did not have the authority to

inspect the polar bears and tiger because they were privately-owned animals, but acquiesced in the inspection because these animals had been moved by Stanley Curtis to [Noah's Ark Z]oo the day before [(Tr. 313; CX 15, 21)]. After being in the trailer a few minutes, [investigator] Groce came out, waved to [inspector] Guedron and [sector supervisor] Watkins, and told them that they could proceed with the inspection (. . . CX 21 at 3). As for the state troopers, John Curtis [testified] that "all they did when they were there on the 25th was kick around the dirt and stand over there and look at the fence" (Tr. 495).

[VMO Dr.] Guedron testified that the site [had been] under construction [as long as he had been going there (Tr. 142, 198)], that it had a "closed today" sign [(Tr. 131-32; CX 17A)], and that there was no indication that the animals were being exhibited [(Tr. 131-33). Investigator] Groce testified that he saw an unidentified man and a woman at the site . . . looking for John Curtis and who told him that "they were there on behalf of Noah's Ark Zoo to try to keep the facility open as a zoo because they thought it served a good function in the community" (Tr. . . . [318-]19).

The inspectors, accompanied by John Curtis, began their inspection [(Tr. 131; CX 14 at 2, item 7). VMO Dr.] Guedron said they began with a barn on the site where farm animals were kept [(Tr. 139). The inspectors] found three dogs in the barn, including one Doberman [(Tr. 136). VMO Dr. Guedron] cited the dogs as a non-compliant item because the zoo had no identifying records or tags for the dogs and had no exercise program for them [(Tr. 136-39; CX 14 at 3-4, item 7, III, items 32, 45, 46)]. Other items he identified as non-compliant were a strong odor of ammonia in the barn due to poor ventilation [(CX 14 at 3, item 7, III, item 15)]; backed-up [waste material] in the tiger cage due to a clogged drain [(Tr. 157; CX 14 at 2, item 7, III, item 14)]; inadequate water drainage around enclosures [(Tr. 163; CX 14 at 3, item 7, III, item 24)]; inadequate enclosure space, inadequate water, and no resting area and den for the polar bears [(Tr. 87-88, 141-42; CX 14 at 3, 5, item 7, III, items 29, 35, Addendum to III, item 30)]; poor housekeeping caused by trash and scrap material at the site [(Tr. 164; CX 14 at 3, item 7, III, item 37)]; unrefrigerated meat [(CX 14 at 2, item 7, III, item 13(4))]; chicken parts spilling from a box with ice [(Tr. 146-48; CX 14 at 2, item 7, III, item 13(3); CX 17Q)]; an unrefrigerated cattle carcass in the back of a truck [(Tr. 151; CX 14 at 2, item 7, III, item 13(1))]; inadequate cleaning of enclosures [(CX 14 at 4, item 7, IV, item 36(1), (2))]; excessive feces in the llama enclosure [(CX 14 at 4, item 7, IV, item 36(3))]; and lack of veterinary care for a lion with signs of lameness in one foot and two young lions with dull, dry hair (. . . [CX 14 at 4, item 7, IV, item 48(1), (2))].

VMO Dr. Guedron testified that, after the inspection of the zoo, [investigator]

Groce told John Curtis that they wanted to inspect the quonset hut [at site number 2 (Tr. 88-89). John] Curtis said the animals at the quonset hut were privately-owned . . ., that APHIS had no authority to inspect them, and that he would not accompany them to the site [(CX 21 at 4). Investigator] Groce, [VMO Dr.] Guedron, [sector supervisor] Watkins, and two of their armed escort proceeded to the quonset hut, but [John] Curtis did not appear [(Tr. 313-14). VMO Dr. Guedron and sector supervisor Watkins] said they heard a chimpanzee [vocalizing] inside the hut[. However,] the building was locked and they did not conduct an inspection. (Tr. 88-89, 266, 313-14; CX 21 at 4-5.)

On the following day, January 26, [1996, VMO Dr. Guedron, sector supervisor Watkins, and investigator Groce] returned to Noah's Ark [Zoo (CX 20 at 3, CX 21 at 5)]. While [checking] records, [VMO Dr.] Guedron spotted a [gun] in a desk . . . [(Tr. 494-95)]. . . . John Curtis picked it up to show the inspectors that it was just a broken BB gun that he had used to control rodents [(Tr. 495). John Curtis] then gave the BB gun to [investigator] Groce at his request (Tr. . . . 357, 495). [VMO Dr.] Guedron and [sector supervisor] Watkins [testified that they] did not . . . go to the quonset hut site on January 26[, 1996] (Tr. 90, 234). [However, investigator Groce testified that he asked John Curtis to go to "Site Number Two" (where the quonset hut is located), but John Curtis refused (Tr. 314-15)].

John Curtis testified that when the inspectors had appeared on January 25[, 1996,] he was in the process of performing the daily cleaning of the animal cages [(Tr. 482, 484)]. [John Curtis] said he had to interrupt his cleaning to accompany the inspectors before he had time to clean the debris around the drains to allow water to drain from the pens after hosing them down, but cleaned the drains during the inspection as [VMO Dr.] Guedron cited the backed-up water as a non-compliant item (Tr. 482-84).

As for the dogs, [John Curtis] said they were his personal animals and that they were never exhibited [(Tr. 472)]. He had brought them into the barn on the day of the inspection because the temperature was below freezing that day, noting that the Doberman was a short-haired dog (Tr. 47[1-72]). [VMO Dr.] Guedron said he knew the dogs were John Curtis' personal dogs, but that they were still "regulated" dogs because they were "on a licensed facility, on the property adjacent to and in proximity of exhibit animals" (Tr. 137-38).

[John] Curtis [testified that] the fan for the cooler that was used to keep meat for the animals at [Noah's Ark] Zoo broke 2 days before the inspection [(Tr. 500)], but that the temperature [(17 degrees)] in any event was below that of a cooler at the time of the inspection [(Tr. 501). John Curtis testified] that after the inspection, he put the chicken parts . . . in a freezer that he owned at the flea market across the street [(Tr. 501-02)]. As for the [cow carcass, John Curtis testified] that [the cow

carcass] had been put in the truck to be taken with other trash to be buried at a dump (Tr. . . . 542[-43]).

[John] Curtis testified that the cage for the polar bears [at Noah's Ark Zoo (Tr. 461-62; RX 20)] was still under construction at the time of the [January 25, 1996,] inspection [(Tr. 519-22)], but that he gave them water every day [(Tr. 555-56)]. As for the animals that [VMO Dr.] Guedron said needed veterinary care, [John] Curtis said he had a veterinarian check them the following day and that the veterinarian . . . ["wrote a letter up saying they looked okay], except for maybe a worn spot . . . on one of the leopards, and I think a couple of other things" (Tr. . . . 556).

On January 31, 1996, [sector supervisor] Watkins sent [Richard] Lawson a letter stating "per your request, your USDA License under the Animal Welfare Act has been cancelled effective the date shown above" [(CX 18).] The caption above the letter states:

RE: CANCEL LICENSE
License No. : 55-C-114
Cancellation Date: 01/17/96

[CX 18.]

At the hearing[, sector supervisor Richard] Watkins testified that [he told Richard Lawson in a telephone conversation that the date that the written surrender statement is processed is the date the license is terminated (Tr. 58); and that] the license was not canceled until January 31, 1996, when the information was entered into the computer (Tr. [60-]63).

In May [of 1996], 4 months after the cancellation of the license, [inspector Groce], [VMO Dr.] Guedron, and [sector supervisor] Watkins conducted an inspection of the quonset hut [(Tr. 190-92)]. They found 2 leopards, 2 tigers, 2 ligers, and a chimpanzee [(Tr. 217)] in what [VMO Dr.] Guedron said were "deplorable conditions" [(Tr. 208). VMO Dr.] Guedron, who said the animals were not being exhibited [(Tr. 218)], claimed that the inspection was conducted pursuant to ["a verbal agreement and a handshake" (Tr. 212)], but [sector supervisor] Watkins testified that they had inspected the facility pursuant to a search warrant (Tr. . . . 235). [VMO Dr.] Guedron qualified his testimony by saying that the "agreement" had come about after APHIS had threatened Respondents with an action to confiscate the animals if they refused to allow an inspection (Tr. 216-17). On May 8[, 1996,] the animals were transferred to Noah's Ark Zoo, where the tigers were put in their completed cages [(Tr. 219-20), the leopards were put into transport enclosures (Tr. 220), and] the other animals were placed in temporary

enclosures [(Tr. 219-20). VMO Dr.] Guedron [testified] that APHIS then decided not to proceed with its action to confiscate the animals because their living conditions had improved and Respondents had "corrected the non compliants [sic] at the quonset hut" (Tr. 2[16-19]).

In October 1996, Stanley Curtis contacted Ty Sutherlin, a licensed animal dealer, about getting a chimpanzee [(Tr. 560-61)]. Stanley [Curtis] told [Ty] Sutherlin that he wanted the chimpanzee for John Curtis whose "chimp had just died . . . that John was heart broke and he wanted to get John another chimp" [(Tr. 571).] In the course of their conversation, they reached an agreement for Stanley [Curtis] to trade a [white] lion cub for [two of Ty] Sutherlin's chimpanzee[s] [(Tr. 562-63)]. Stanley [Curtis] told [Ty] Sutherlin that he could not sell animals, but that he could trade for them [(Tr. 562). Stanley] Curtis received one chimpanzee in April 1997 (Tr. . . . 570).

. . . .

Law

The purpose of the Animal Welfare Act is to provide for the humane care and treatment of animals regulated under the Animal Welfare Act (7 U.S.C. § 2131). . . . Section [2 of the Animal Welfare Act] defines "dealer," "animal," and "exhibitor," as follows:

> (f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet . . .;
>
> (g) The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet . . .;
>
> (h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether

operated for profit or not[.][1]

7 U.S.C. § 2132(f)-(h).

Section [3 of the Animal Welfare Act (7 U.S.C. § 2133)] provides for the licensing of dealers and exhibitors. Section 4 of the Animal Welfare Act provides:

> No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

7 U.S.C. § 2134.

Section [16(a) of the Animal Welfare Act] gives the Secretary the authority to inspect exhibitors and dealers subject to the [Animal Welfare] Act; it also gives the Secretary the authority to confiscate any animals that are suffering because of the failure of a dealer or exhibitor to comply with Regulations or Standards promulgated by the Secretary for the care of animals [(7 U.S.C. § 2146(a))].

The Regulations and Standards promulgated by the Secretary are contained in 9 C.F.R. §§ 1.1-3.142. Section 2.1 [of the Regulations] applies, *inter alia*, to the licensing of dealers and exhibitors, but section 2.1(a)(3)(viii) excludes from the licensing requirement "[a]ny person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license" [(9 C.F.R. § 2.1(a)(3)(viii)).]

Complainant has the burden of proving a violation of the Animal Welfare Act and [the] Regulations [and Standards] by a preponderance of the evidence. *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993)[, *aff'd*, 34 F.3d 1301 (7th Cir. 1994)].

Discussion

At the hearing, Respondents took the position that they did not allow an inspection of the polar bears and tiger on January 17[, 1996,] and did not allow an inspection of the quonset hut on January 25[, 1996,] because the animals were

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[1]Respondents' activities meet the [Animal Welfare] Act's jurisdictional requirements, since Stanley Curtis . . . moved his animals in commerce from Florida to North Carolina.

Stanley Curtis' "private collection" animals and were located on private property, rather than being on the [Noah's Ark Z]oo's property [(Tr. 20-25; CX 20 at 2-3)]. [Respondents] also contend in their brief that they did not have to allow an inspection because they had canceled their license and were not exhibiting animals at the time of the inspections [(Respondents' Brief at 1-3)].

With respect to whether the animals were being exhibited, Noah's Ark [Zoo] displayed a sign that the public could see, which . . . could create an inference that animals were being offered for exhibition to the public [(CX 17A, 17B, 40)]. But a sign, in itself, does not necessarily establish that the animals were in fact being exhibited. Complainant's witnesses claimed that [Noah's Ark Z]oo was open to the public [(Tr. 132-33, 611)], but provided no information on which they based this assertion, other than to say that they saw two persons at [Noah's Ark Z]oo on January 25, [1996,] who, as it turns out, were there to support [Noah's Ark Z]oo, rather than to see the animals being exhibited [(Tr. 276-77, 318-19)]. On the other hand, as early as 1993, Respondents had posted [several] "keep out" sign[s] at the zoo [(CX 29 at 2, item 7, IV, item 51)] and at the time of the January 1996 inspections, the zoo had a "closed today" sign [(Tr. 131-34)] and was still undergoing construction [(Tr. 142). VMO Dr. Guedron and sector supervisor Watkins] also testified that they had not seen signs of the animals being exhibited in January or May 1996 [(Tr. 133-34, 277-78)]. Complainant has thus failed to show by a preponderance of the evidence that Noah's Ark Zoo was exhibiting animals at any time after 1993, and, specifically, did not show that [Noah's Ark Z]oo was exhibiting animals [o]n or after January 1996.

Since Respondents were not exhibiting animals, [Respondents] were not exhibitors as defined by the [Animal Welfare] Act, and therefore [Respondents] were not required to have a license as exhibitors for their privately-owned animals [o]n or after January 1996. However, when [Respondents] . . . voluntarily sought an exhibitor's license from APHIS in 1992, they subjected themselves to the Regulations [and Standards] and, until the license was . . . terminated, had to abide by those Regulations [and Standards], which include [a requirement that licensees allow APHIS officials to inspect] their facility pursuant to 9 C.F.R. § 2.126 . . . . APHIS [officials] not only had the authority to inspect the animals actually on [Noah's Ark Z]oo's premises, but also the animals owned by Stanley Curtis who, by his actions (providing animals to the zoo), clearly made [his animals] a part of the licensed Noah's Ark Zoo venture. Section 2.1(a)(2) of the Regulations (9 C.F.R. § 2.1(a)(2)) provides in pertinent part that "[a]ll premises, facilities, or sites where such person operates or keeps animals shall be indicated on the application form or on a separate sheet attached to it." . . . [T]his requirement is to identify sites where animals associated with the licensed facility are located so that

they can be inspected for compliance with the [Animal Welfare] Act and the Regulations and Standards, which, in this case, would be Stanley Curtis' animals located at the trailer and quonset hut destined for Noah's Ark Zoo. Thus, as long as Noah's Ark Zoo was licensed, whether actually exhibiting animals or not, APHIS [officials were] acting within [their] authority by demanding an inspection of the animals at the trailer and at the quonset hut. [Footnote omitted.]

Respondents contend that they had [terminated] their license [(CX 9, 10). VMO Dr.] Guedron, however, had attempted . . . inspection on January 17, 1996 [(CX 20 at 2)], before [Richard] Lawson requested that the license be [terminated (CX 20 at 2)]. Respondents therefore violated [section 2.126 of] the Regulations (9 C.F.R. § 2.126) [by] failing to allow an inspection on January 17[, 1996,] while Noah's Ark Zoo was still a licensed facility.

As for the inspections on January 25 and 26, 1996, Complainant contends that its inspectors could still conduct an inspection at that time because the [termination] did not take effect until January 31[, 1996 (Complainant's Brief at 12-15). Richard] Lawson, however, had followed exactly [section 2.5(a)(2) of] the Regulations [(9 C.F.R. § 2.5(a)(2))] and [VMO Dr.] Guedron's advice to [terminate] the license [(Tr. 24; CX 9, 10, 20 at 2)]. . . . Moreover, even [sector supervisor] Watkins' letter gives January 17[, 1996,] as the cancellation date [(CX 18)]. Accordingly, I find that the license was [terminated] on January 17, 1996, but after [VMO Dr.] Guedron had attempted . . . inspection.

However, even though the license had been [terminated], I further find, on the basis of equitable estoppel, that Respondents' refusal to allow an inspection on January 17, [1996,] before the [termination], should not allow them to conceal what a lawful inspection would have revealed. "Equitable estoppel . . . precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or a defense, regardless of its substantive validity." *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1107 (1st Cir. 1986). Because of Respondents' improper conduct [in refusing to allow APHIS officials to inspect their place of business] on January 17, [1996,] they are precluded from claiming that their license had been [terminated] at the time of the inspections on January 25 and 26[, 1996]. The findings of the inspectors on those dates can therefore be considered in determining whether Respondents at that time were complying with the [Animal Welfare Act and the Regulations and S]tandards for the care of animals.

The inspectors' findings, for the most part, were not challenged by Respondents. [The inspectors] found that three lions were not being provided veterinary care. Although a later examination by a veterinarian did not reveal any significant problems with the animals, the lack of veterinary care is, nevertheless, a violation of section 2.40 of the [Regulations] (9 C.F.R. § 2.40).

A broken refrigerator, even if only broken for a day or two, would not allow for the proper storage of perishable food items. It constitutes a violation of the food storage provisions of sections 3.1(e) and 3.125(c) of the Standards [(9 C.F.R. §§ 3.1(e), .125(c))]. However, with respect to the storage of the [cattle] carcass, there was no violation [of section 3.101(d) of the Standards (9 C.F.R. § 3.101(d))] as [the cattle carcass] was destined to be buried at the dump.

The failure to properly ventilate the barn constitutes a violation of section 3.126(b) [of the Standards (9 C.F.R. § 3.126(b))].

The polar bears did not have adequate space and water. Although Respondents were constructing what appears to be a spacious enclosure and pool for the bears, this [fact] does not preclude a finding that, as of the date of the inspection, the facilities for these animals did not meet the requirements of section 3.104[(a) and] (e) [of the Standards (9 C.F.R. § 3.104(a), (e))].

The failure to keep the facility clean of standing water, excessive trash, and animal wastes constitutes violations of sections 3.107(a), 3.125(d), 3.127(c), and 3.131(a) and (c) [of the Standards (9 C.F.R. §§ 3.107(a), .125(d), .127(c), .131(a), (c))] even though the construction activities at [Noah's Ark Z]oo accounted for part of these problems. However, [while waste material in the tiger cage] due to a clogged drain [is a] violation [of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)), I am not assessing Respondents a civil penalty for the violation because John Curtis was cleaning the tiger cage at the time the inspection began and his cleaning was interrupted by the inspection].

Complainant contends that John Curtis' dogs -- his personal pets -- were regulated animals even though not exhibited because they were on the same premises as animals to be exhibited. . . . [N]either the [Animal Welfare] Act nor the Regulations [and Standards] prohibit APHIS in these circumstances from . . . [regulating] personal pets . . . on an exhibitor's premises. . . . [Footnote omitted. Considerable] weight is . . . given to . . . APHIS' . . . interpretation of the Regulations [issued under] the statute [APHIS] enforces. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 84[2-45] (1984). Therefore, since Respondents did not maintain records on John [Curtis'] pets, or provide tags . . . or . . . an exercise program, [Respondents] violated [sections 10 and 11 of the Animal Welfare Act (7 U.S.C. §§ 2140, 2141) and] sections 2.50 and 2.75 of the [Regulations (9 C.F.R. §§ 2.50, .75), but, since Complainant failed to allege a lack of an exercise program for dogs in the Complaint, a violation of section 3.8 of the Standards (9 C.F.R. § 3.8) is not found].

Complainant contends that Respondents refused an inspection of the quonset hut on January 25 and 26[, 1996]. John Curtis' conduct constituted a refusal to allow an inspection on January 25[, 1996 (CX 20 at 3); moreover, inspector Groce

asked to inspect the site on January 26[, 1996, and John Curtis refused to allow inspection (Tr. 314-15)]. . . .

Respondents are also alleged to have been an exhibitor on and after February 1, 1996. As [discussed in this Decision and Order, *supra*,] Respondents had [terminated] their license and were not exhibiting animals. Respondents, therefore, were not an exhibitor as defined by the Animal Welfare Act on and after February 1, 1996.

Finally, [Complainant argues that] Respondents are alleged to have acted as a dealer or exhibitor without having a license in October 1996 when they traded for a chimpanzee [(Complainant's Brief at 25)]. However, Respondents were not exhibiting animals at the time of the acquisition of the chimpanzee [and] had not been an exhibitor for at least the previous 3 years. . . . Moreover, the record shows that Stanley Curtis had acquired the chimpanzee for John Curtis' use and enjoyment. In these circumstances, Respondents did not violate the Animal Welfare Act or the Regulations and Standards, as they were within the licensing exemption for non-exhibiting animal owners, as provided by section 2.1(a)(3)(viii) of the Regulations (9 C.F.R. § 2.1(a)(3)(viii)).[4]

Sanction

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

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section [19](b) of the Animal Welfare Act also commands, in determining the civil penalty to assess, that:

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[4][Almost at the end of the hearing, Complainant's motion to amend the Complaint to conform to the evidence was granted, in that John Curtis and Stanley Curtis were charged for operating without a license from January 1, 1993, to September 17, 1997 (Tr. 626-29). However, since the animal exchange described by Complainant was not shown to be for compensation or profit, the exchange was exempt under 7 U.S.C. § 2132(f) and 9 C.F.R. §§ 1.1 and 2.1(a)(3)(viii).]

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such penalty may be compromised by the Secretary.

7 U.S.C. § 2149(b).

Complainant contends that the warning letters sent to Respondents in 1993 [(Tr. 305-06; CX 1)] and 1994 [(Tr. 307; CX 2)] should also be considered in the imposition of a sanction [(Complainant's Brief at 8, ¶ 12)]. The Secretary has held that such warnings can be considered. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 264 (1997)[, *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997)]. . . . Respondents were given a warning in 1993 about a failure to allow an inspection [(CX 1)]. . . . [Respondents were given a warning in 1994 about a failure to provide sufficient space for two lions and a failure to clean food and water receptacles and a cage (CX 2)].

Complainant [originally sought] a [civil] penalty of $36,000 and a 5-year license disqualification [(Complainant's Brief at 26), but later changed its recommendation to a civil penalty of $22,500 and a 2-year license disqualification).]

. . . .

. . . Respondents' refusal . . . to allow APHIS [officials] to conduct an inspection at a time when they had the legal authority . . . to conduct inspections was serious for the reason that it frustrates the purpose of the Animal Welfare Act to insure that regulated animals are given humane care.

Findings of Fact

1. [Respondents,] Richard Lawson, Stanley Curtis [(formerly known as Stanley Creighton) (Tr. 440, 504)], and John Curtis (formerly known as John Disken) [(Tr. 447-51)], doing business as Noah's Ark's Zoo, . . . are individuals who direct, manage, and control Noah's Ark Zoo [(Tr. 340; CX 1, 3, 4, 7, 15, 20, 21)].

2. Richard Lawson [was licensed] as an exhibitor [doing business as] Noah's Ark Zoo until January 17, 1996, when [he terminated] the license . . . [(CX 4, 18)].

3. John Curtis refused an inspection of Noah's Ark Zoo by an APHIS inspector on January 17, 1996, before the license was [terminated (CX 20 at 2)].

4. On January 25, 1996, APHIS officials conducted an inspection of Noah's Ark Zoo [(CX 14)]. They found that three lions were not receiving proper veterinary care [(CX 14 at 4, item 7, IV, item 48)]; three dogs had inadequate

records and identification [(CX 14 at 4, item 7, III, items 45, 46)]; food was not stored and refrigerated properly [(CX 14 at 2, item 7, III, item 13)]; an animal barn was not properly ventilated [(CX 14 at 3, item 7, III, item 15)]; polar bears did not have adequate space or water [(CX 14 at 3, item 7, III, items 29, 35)]; trash was scattered around the facility [(CX 14 at 3, item 7, III, item 37)]; the llama enclosure had an excessive accumulation of feces [(CX 14 at 4, item 7, IV, item 36(3); backed-up waste material was in the tiger cage due to a clogged drain (CX 14 at 2, item 7, III, item 14);] and water was not properly drained [(CX 14 at 3, item 7, III, item 24)].

5. On January 25 [and 26], 1996, Respondents failed to allow an inspection of a quonset hut called "site 2" or the "Hunters Ridge Property[,]" where animals destined for the Noah's Ark Zoo were located [(CX 13 at 2, item 7, III, item 51: January 25, 1996; Tr. 314-15: January 26, 1996)].

6. Since January 17, 1996, Respondents have not shown or exhibited animals.

Conclusions of Law

1. On January 17, . . . January 25, [and January 26,] 1996, Respondents [failed] to allow APHIS [officials] to inspect their animals[, records,] and facilities, in [willful] violation of section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and section 2.126 of the Regulations (9 C.F.R. § 2.126).

2. On January 25, 1996, Respondents failed [both properly to identify animals and properly] to maintain records, in [willful] violation of sections 10 and 11 of the Animal Welfare Act (7 U.S.C. §§ 2140, 2141) and sections 2.50 and 2.75 of the Regulations (9 C.F.R. §§ 2.50, .75).

3. On January 25, 1996, Respondents failed to provide adequate veterinary care, in [willful] violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

4. On January 25, 1996, Respondents did not provide for the adequate removal of animal wastes, in [willful] violation of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

5. On January 25, 1996, Respondents failed to properly store and refrigerate food items, in [willful] violation of sections 3.1(e) and 3.125(c) of the Standards (9 C.F.R. §§ 3.1(e), .125(c)).

6. On January 25, 1996, Respondents failed to provide adequate ventilation, in [willful] violation of section 3.126(b) of the Standards (9 C.F.R. § 3.126(b)).

7. On January 25, 1996, Respondents [failed to] provide for the adequate elimination of excess water, in [willful] violation of section 3.127(c) of the Standards (9 C.F.R. § 3.127(c)).

8. On January 25, 1996, Respondents [failed to] provide adequate space [and

water] for polar bears, in [willful] violation of section 3.104[(a) and (e)] of the Standards (9 C.F.R. § 3.104[(a), (e)]).

9. On January 25, 1996, Respondents did not keep the area clean[, in good repair,] and free of accumulations of trash, in [willful] violation of section 3.131(c) [of the Standards] (9 C.F.R. § 3.131(c)).

[10. On January 25, 1996, Respondents did not keep primary enclosures clean, in willful violation of sections 3.107(a)(1) and 3.131(a) of the Standards (9 C.F.R. §§ 3.107(a)(1), .131(a))].

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard.[5] The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence.[6] Complainant made a list of the violations alleged in the Complaint, reproduced below; I matched

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[5]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981).

[6]*In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal docketed*, No. 98-60463 (5th Cir. July 23, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 149 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246-47 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998) (unpublished); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

the paragraph numbers in the Complaint to Complainant's enumeration for ease of location, as follows:

> The number of the violations [alleged] in the [C]omplaint [is] 21. Those [alleged] violations are as follows:
>
> 1. 1 violation of 9 C.F.R. § 2.40 [¶ IV(B)].
> 2. 1 violation of 9 C.F.R. § 2.75 [¶ IV(C)].
> 3. 1 violation of 9 C.F.R. § 2.50 [¶ IV(D)].
> 4. 1 violation of 9 C.F.R. § 3.125(d) [¶ IV(E)(1)].
> 5. 1 violation of 9 C.F.R. § 3.1(e) [¶ IV(E)(2)].
> 6. 1 violation of 9 C.F.R. § 3.101(d) [¶ IV(E)(2)].
> 7. 1 violation of 9 C.F.R. § 3.125(c) [¶ IV(E)(2)].
> 8. 1 violation of 9 C.F.R. § 3.126(b) [¶ IV(E)(3)].
> 9. 1 violation of 9 C.F.R. § 3.127(c) [¶ IV(E)(4)].
> 10. 1 violation of 9 C.F.R. § 3.104(a) [¶ IV(E)(5)].
> 11. 1 violation of 9 C.F.R. § 3.106 [¶ IV(E)(6)].
> 12. 1 violation of 9 C.F.R. § 3.131(c) [¶ IV(E)(7)].
> 13. 1 violation of 9 C.F.R. § 3.107(a)(1) [¶ IV(E)(8)].
> 14. 1 violation of 9 C.F.R. § 3.131(a) & (b) [¶ IV(E)(8)].
> 15. 3 violations of 9 C.F.R. § 2.126 [¶¶ III, IV(A), V].
> 16. 4 violations of [s]ection 4 of the [Animal Welfare] Act [7 U.S.C. § 2134] and 9 C.F.R. § 2.1 for a) negotiating the purchase; b) buying; c) selling; and d) transporting animals without a license [¶ II].

Complainant's Brief at 26 n.20.

An examination of the record reveals that the ALJ found that Complainant proved 15 of the 21 alleged violations: paragraphs IV(A), IV(B), IV(C), IV(D),

IV(E)(1), IV(E)(2),[7] IV(E)(3), IV(E)(4), IV(E)(5),[8] IV(E)(6),[9] IV(E)(7), IV(E)(8),[10] and V of the Complaint.

I agree with the ALJ that Complainant proved the violations alleged in paragraphs IV and V of the Complaint, except the violation of 9 C.F.R. § 3.101(d),

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[7]Paragraph IV(E)(2) of the Complaint alleges that Respondents violated sections 3.1(e), 3.101(d), and 3.125(c) of the Standards (9 C.F.R. §§ 3.1(e), .101(d), .125(c)). The ALJ concluded that Respondents violated 9 C.F.R. §§ 3.1(e) and 3.125(c), but did not violate 9 C.F.R. § 3.101(d) (Initial Decision and Order at 23). I agree with the ALJ's conclusion that Respondents violated 9 C.F.R. §§ 3.1(e) and 3.125(c), but did not violate 9 C.F.R. § 3.101(d).

[8]Paragraph IV(E)(5) of the Complaint alleges that Respondents failed to provide adequate space for polar bears, in violation of section 3.104(a) of the Standards (9 C.F.R. § 3.104(a)). The ALJ concluded that Respondents did not provide adequate space for polar bears, but concluded that the failure to provide adequate space for polar bears constitutes a violation of 9 C.F.R. § 3.104(e) (Initial Decision and Order at 24). I agree with the ALJ's conclusion that Respondents failed to provide adequate space for polar bears, but conclude that Respondents violated 9 C.F.R. § 3.104(a) and (e).

[9]Paragraph IV(E)(6) of the Complaint alleges that polar bears were not provided with adequate water on a continuing basis, in violation of section 3.106 of the Standards (9 C.F.R. § 3.106). However, 9 C.F.R. § 3.106 concerns water quality, and it appears that the reference to 9 C.F.R. § 3.106 in paragraph IV(E)(6) of the Complaint is error. The ALJ found in his discussion that Respondents failed to provide polar bears with adequate water and that this failure "did not meet the requirements of section 3.104(e)" (Initial Decision and Order at 17-18). Further, the ALJ found in the Findings of Fact that polar bears did not have adequate water (Initial Decision and Order at 22). However, the ALJ did not conclude that the Respondents' failure to provide polar bears with adequate water constitutes a violation of 9 C.F.R. § 3.104(e). Instead, the ALJ concluded that Respondents did not provide adequate space for polar bears, in violation of 9 C.F.R. § 3.104(e) (Initial Decision and Order at 24). I find that the ALJ's failure to include a reference to Respondents' failure to provide adequate water to polar bears in his Conclusions of Law was inadvertent error. I agree with the ALJ's finding that Respondents did not provide polar bears with adequate water, and I conclude that Respondents failed to provide adequate water to polar bears, in violation of 9 C.F.R. § 3.104(a) and (e).

[10]Paragraph IV(E)(8) of the Complaint alleges that primary enclosures were not kept clean and sanitized, in violation of sections 3.107(a)(1) and 3.131(a) and (b) of the Standards (9 C.F.R. §§ 3.107(a)(1), .131(a)-(b)). The ALJ found in his discussion that Respondents' "failure to keep the facility clean of standing water, excessive trash and animal wastes constitutes a violation of 3.125(d), 3.131(a), (b) and (c), 3.107(a) and 3.127(c)" (Initial Decision and Order at 18). Further, the ALJ found in the Findings of Fact that "the llama enclosure had an excessive accumulation of feces" (Initial Decision and Order at 23). However, the ALJ did not include in his Conclusions of Law a conclusion that Respondents failed to keep primary enclosures clean and sanitized, as alleged in paragraph IV(E)(8) of the Complaint. I find that the ALJ's failure to include a reference to Respondents' failure to keep primary enclosures clean was inadvertent error. I agree with the ALJ's finding that Respondents violated 9 C.F.R. §§ 3.107(a) and 3.131(a) and have included references to those violations in the Conclusions of Law.

by a preponderance of the evidence. Moreover, neither Respondents nor Complainant appealed the ALJ's findings of the violations alleged in paragraphs IV and V of the Complaint, and Complainant did not appeal the violation of 9 C.F.R. § 3.101(d) alleged in paragraph IV(E)(2) of the Complaint not found by the ALJ. Therefore, the ALJ is affirmed as to his findings in paragraphs IV and V of the Complaint.

Regarding paragraph II of the Complaint, at almost the end of the hearing, the ALJ granted Complainant's motion to conform the Complaint to the evidence presented, to the effect that Stanley Curtis and John Curtis are charged "with operating without a license from January 1, 1993 through the present" (Tr. 626-29). Stanley Curtis and John Curtis are already named Respondents in paragraph II of the Complaint. It is not entirely clear why Richard Lawson is not included in the expanded time period sought in Complainant's motion to amend the Complaint, but Complainant sought only charges against Stanley Curtis and John Curtis. The motion, as granted, changes the period of time covered from February 1, 1996, through May 6, 1996, to the period from January 1, 1993, to the day of the hearing motion on September 17, 1997. For reasons explained in this Decision and Order, *infra*, I find that Complainant did not prove the allegation in paragraph II of the Complaint or the Amended Complaint. Since the ALJ found no violation as alleged in paragraph II of the Complaint, his conclusion is not disturbed.

Regarding paragraph III of the Complaint, Complainant proved by a preponderance of the evidence that Respondents refused to allow APHIS officials to inspect their animals, facilities, and records. Therefore, the ALJ is reversed as to paragraph III of the Complaint, as explained in this Decision and Order, *infra*.

In summary, of the 21 violations charged, I affirm the ALJ on the 15 violations he found, and I add the one violation alleged in paragraph III of the Complaint, for a total of 16 violations, leaving unproven only the four violations alleged in paragraph II of the Complaint and one of the three violations alleged in paragraph IV(E)(2) of the Complaint.

Complainant raises four issues on appeal. The first issue concerns the ALJ's reasoning vis-a-vis the effective date of Respondents' voluntary license termination, as follows:

> I. The reasoning employed by the ALJ in the Decision to determine when the Respondents' license was terminated is inconsistent with the language in the regulations.

Complainant's Appeal at 3. Should Complainant prevail in this argument, then both the January 25 and 26, 1996, inspections would be duly conducted inspections

of a licensee, rather than inspections of a voluntarily-terminated licensee, pursuant to the ALJ's theory of equitable estoppel (Initial Decision and Order at 17). However, I agree with the ALJ.

Complainant quotes the ALJ's allegedly inconsistent reasoning (Complainant's Appeal at 3), which I reproduce directly from the Initial Decision and Order, as follows:

> As for the inspections on January 25 and 26, 1996, Complainant contends that its inspectors could still conduct an inspection at that time because the cancellation did not take effect until January 31[, 1996. Richard] Lawson, however, had followed exactly the regulations and [VMO Dr.] Guedron's advice to cancel the license. As a general principal of law, the cancellation became effective when [Richard] Lawson served notice of the cancellation on APHIS. (See e.g. 66 C.J.S. *Notice* § 18.) Moreover, even [APHIS sector supervisor] Watkins' letter gives January 17[, 1996,] as the cancellation date. Accordingly, I find that the license was canceled on January 17, 1996, but after [VMO Dr.] Guedron had attempted his inspection.

Initial Decision and Order at 16.

The facts are that, following the advice of VMO Dr. Guedron and the plain words of section 2.5(a)(2) of the Regulations (9 C.F.R. § 2.5(a)(2)), Respondents requested of APHIS, REAC, in writing, both by Mailgram and by Voluntary Surrender Affidavit, both of January 17, 1996, that Respondents' license be terminated (Tr. 24; CX 9, 10, 20 at 2). I find that Respondents fulfilled the requirements of 9 C.F.R. § 2.5(a)(2) and Respondents terminated the license as of January 17, 1996.

Section 2.5(a)(2) of the Regulations establishes a procedure for a licensee to voluntarily terminate a license: "[a] license issued under this part shall be valid and effective unless: . . . (2) The license is voluntarily terminated upon request of the licensee, in writing, to the APHIS, REAC Sector Supervisor" (9 C.F.R. § 2.5(a)(2)). In the case, *sub judice*, it is not necessary to determine when Respondents made their request to the APHIS, REAC sector supervisor, because sector supervisor Richard Watkins acknowledged receipt of Respondents' voluntary license termination request in his letter of January 31, 1996, in which letter sector supervisor Watkins wrote that the cancellation date is January 17, 1996 (CX 18).

Moreover, I find this voluntary license termination controversy irrelevant. Respondents' voluntary termination of their license, whether occurring on January 17, 1996, or later, does not permit Respondents to refuse to allow APHIS officials

to inspect their facilities, property, animals, and records on January 17, 1996, because (1) the attempted inspection occurred while Respondents were licensed, and (2) the attempted inspection occurred prior to any possible time of Respondents' license termination.

APHIS officials were acting under color of law under the theory of equitable estoppel on January 25 and 26, 1996, when they inspected and sought to inspect Respondents' two facilities: site 2 and Noah's Ark Zoo. The legal concept of equitable estoppel in USDA regulatory proceedings was set forth in the *Big Bear* case, as follows:

> The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct. *Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986). One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his position for the worse. *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, *supra*, 965 F.2d at 418.

In re Big Bear Farm, Inc., 55 Agric. Dec. 107, 129 (1996). I find that there is no question but that APHIS' position to enforce the Animal Welfare Act was changed for the worse, when APHIS officials sought to inspect Respondents' licensed facilities on January 17, 1996, but were refused, because Respondents attempted to terminate Respondents' license rather than submit to a lawful inspection.

Therefore, the ALJ is correct that Respondents are equitably estopped from preventing inspection by voluntarily terminating Respondents' license. I find that APHIS officials may lawfully make such inspections as are necessary and reasonable to ensure that a licensee is in compliance with the Animal Welfare Act and the Regulations and Standards, and may continue such reasonable and necessary inspections, even after a licensee voluntarily terminates the license, if the attempted inspection occurs before the license is terminated.

Complainant makes several arguments concerning the determination of the termination date. Complainant argues that "[t]he general rule regarding license termination is not applicable to the procedure for canceling a license pursuant to the [Animal Welfare Act]" (Complainant's Appeal at 3). I agree with Complainant

that a general rule taken from a legal encyclopedia does not control a duly promulgated regulation, such as 9 C.F.R. § 2.5(a)(2). Therefore, the part of the ALJ's reasoning based upon a general rule of law is not adopted in this Decision and Order.

Moreover, Complainant argues that APHIS procedure requires that the sector supervisor respond to the licensee and list the date that the license was terminated by the Sector Office, and that sector supervisor Watkins testified (Tr. 58, 60, 63) that the date of termination was actually the date that the termination was entered into the computer, January 31, 1996 (Complainant's Appeal at 4-5). Also, Complainant argues that APHIS would not be able to carry out its "statutory" responsibilities to publish licensees' names in the Federal Register, as required in 9 C.F.R. § 2.127, if APHIS is not allowed to use the date that the license termination is entered into the computer as the actual termination date (Complainant's Appeal at 4-5). These arguments are rejected because the implied requirements underlying Complainant's arguments form no part of the requirements for license termination in accordance with 9 C.F.R. § 2.5(a)(2).

Complainant argues that the ALJ may have been "confused," because January 17, 1996, cannot be the termination date, because 9 C.F.R. § 2.5(a)(2) requires that the termination request be in writing and "sent" to the Sector Office (Complainant's Appeal at 5). While Complainant's argument is one possible interpretation of 9 C.F.R. § 2.5(a)(2), the word "sent" does not appear in this regulation. Moreover, it appears that Respondents did send their written requests for termination of their Animal Welfare Act license to the sector supervisor, APHIS, REAC, on January 17, 1996 (CX 9, 10).

Complainant argues that sector supervisor Dr. Richard Watkins' testimony (Tr. 58, 60, 63) is that the termination date in these kinds of circumstances is the date on which the termination is entered into the APHIS Sector Office's computer, and that irrespective of the ALJ's erroneous finding of a termination date of January 17, 1996, Dr. Watkins testified that the termination date is the date of computer entry and simultaneous letter announcing termination, which both occurred on January 31, 1996 (Complainant's Appeal at 5-6). However, I find that Dr. Richard Watkins' testimony contradicts the plain words of his January 31, 1996, letter (CX 18) that the cancellation date is January 17, 1996. Therefore this argument, based upon sector supervisor Watkins' contradictory testimony, is rejected.

Complainant argues that Respondents were still licensed on January 25 and 26, 1996, and asks that the ALJ's equitable estoppel reasoning be reversed (Complainant's Appeal at 6). The adoption of Complainant's reasoning would mean that Respondents were subject to unannounced inspections on January 25 and 26, 1996, which Complainant argues is crucial to enforcement of the Animal

Welfare Act (Complainant's Appeal at 6-7).

Respondents argue that the ALJ's reasoning is consistent with the language in the Regulations, submit a chronology of the facts and events upon which the ALJ based his decision that January 17, 1996, was the termination date, and urge that the ALJ be affirmed (Respondents' Reply at 2-3).

While I agree with Complainant that inspection authority is crucial to enforcement of the Animal Welfare Act, the requirements of 9 C.F.R. § 2.5(a)(2) are clear and those requirements were clearly met by Respondents on January 17, 1996. Therefore, Complainant's argument is rejected.

Complainant contends that the ALJ's decision in this case would encourage licensees to terminate their licenses to avoid imminent inspections (Complainant's Appeal at 6-8). Complainant argues that the ALJ's decision "should be changed to note that a request for license cancellation becomes effective when APHIS grants the cancellation not when requested" (Complainant's Appeal at 8). The argument is rejected for the reason that the plain words of 9 C.F.R. § 2.5(a)(2) clearly state that the termination of an Animal Welfare Act license is effective upon request of the licensee; termination of an Animal Welfare Act license in accordance with section 2.5(a)(2) of the Regulations (9 C.F.R. § 2.5(a)(2)) is not dependent upon APHIS' granting a licensee's request for termination.

Complainant's second issue concerns the ALJ's conclusion (Initial Decision and Order at 19) that Respondents did not violate the Animal Welfare Act when Stanley Curtis acquired a chimpanzee for the personal enjoyment of John Curtis, as follows:

> II. Anyone engaging in an activity that requires a license under the AWA must be licensed, even if the covered activity occurred only once.

The AWA requires that people who act as dealers of animals be licensed. The Act defines a dealer as:

> *Dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, <u>or negotiates the purchase or sale of</u>: Any dog or other animal whether alive or dead * * * * 9 C.F.R. § 1.1 (emphasis added [by Complainant]).

The regulations provide for several exemptions from the licensing requirements. One of these exemptions as noted in the <u>Decision</u> is an

exemption that provides:

> Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license. 9 C.F.R. § 2.1(a)(3)(viii).

Complainant's Appeal at 8-9.

Complainant argues that Respondents negotiated the trade of a white lion for the chimpanzee in October 1996, based upon the testimony of Ty Sutherlin (Tr. 559-73) and documents detailing the exchange (CX 39) of the chimpanzee for a white lion (Complainant's Appeal at 9). I agree with the ALJ's conclusion not to find a violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1), as alleged in paragraph II of the Complaint.

Paragraph II of the Complaint reads in pertinent part "[s]ince February 1, 1996, and continuing to the present, the respondents have operated as an exhibitor and dealer . . . ." The Complaint was filed on May 6, 1996, but the activity complained of occurred in October 1996. I find that the activity complained of occurred well after the date of the Complaint, and thus the activity of October 1996 may form no basis for a violation in the Complaint of May 6, 1996. However, only Richard Lawson is exculpated from a violation of paragraph II of the May 6, 1996, Complaint.

At almost the end of the hearing, Complainant moved to conform the Complaint to the evidence presented, because it was apparent to Complainant that Respondents had claimed that Respondents Stanley Curtis and John Curtis were operating separately from Respondent Richard Lawson, such that Complainant deemed it necessary to charge Stanley Curtis and John Curtis "with operating without a license from January 1, 1993, through the present" (Tr. 626). The ALJ granted Complainant's motion to conform the Complaint to the evidence presented (Tr. 628-29). I have carefully examined Complainant's argument (Complainant's Appeal at 8-10), which essentially is that Respondents Stanley Curtis and John Curtis negotiated for the sale of a white lion, which Complainant argues is all that is necessary to deem them dealers under the definition of *dealer* in the Animal Welfare Act (7 U.S.C. § 2132(f)) and the Regulations (9 C.F.R. § 1.1). However, Complainant ignores the provision in the definition of *dealer*, which states that the covered activities must be "for compensation or profit . . ." (9 C.F.R. § 1.1; 7 U.S.C. § 2132(f)). Nowhere in Complainant's argument is there discussion, accusation, or evidence that Respondents Stanley Curtis and John Curtis negotiated for the sale of animals *for compensation or profit*. Therefore, Complainant's argument fails, and I find that the ALJ is correct that the activity described by

Complainant as requiring a license is specifically exempted by 9 C.F.R. § 2.1(a)(3)(viii).

The third issue raised by Complainant is that the ALJ erred by not finding a violation when Respondents denied APHIS officials access to their facilities on January 26, 1996, as follows:

> III. The ALJ erred to fail to find that the Respondents violated the regulations by denying APHIS personnel access to their facilities on January 26, 1996.

In the Decision, the ALJ found that the Respondents twice failed to allow APHIS access to their facility on January 17, and January 25, 1996. The Decision states the following reasons for not finding that the Respondents refused to allow access on January 26, 1996:

> Complainant contends that Respondents refused an inspection of the quonset hut on January 25 and 26. John Curtis' conduct constituted a refusal to allow an inspection on January 25. However, the inspectors did not ask to inspect the site on January 26. Without a request, there could hardly be a refusal. Decision, p. 19.

According to the testimony [inspector] Terry Groce asked the Respondents for access to the King Kong Zoo site on January 26th. Mr. Groce testified that:

> [BY MS. DESKINS:]
>
> Q. On the 26th, did you ask either of the Curtis' [sic] about going to Site Number Two? [Footnote omitted.]
>
> [BY MR. GROCE:]
>
> A. I again asked them that we needed to gain access to it, asked John, and he said, "I haven't changed my mind, I'm not going to go." TR. 314-315 [Groce].

This evidence established that APHIS did request access to the King Kong Zoo Site (Site Two) on January 26, 1996. [Footnote omitted.] Since the ALJ stated that a request by APHIS for access is necessary to find a

> violation of Section 2.126 [9 C.F.R. § 2.126], the testimony then proves that such a request was made, and is sufficient reason for modifying the Decision to include the 26th of January as the third time the Respondents denied APHIS access.

Complainant's Appeal at 10-11.

I agree with Complainant's argument. The ALJ's criterion, that APHIS officials must actually request access to inspect Respondents' facilities before there can be a denial of access by Respondents, is met for both January 25 and 26, 1996. Therefore, I find that Respondents refused to allow APHIS officials to inspect their animals, facilities, and records on January 26, 1996, as alleged in paragraph III of the Complaint.

The fourth issue raised by Complainant concerns the sanctions imposed by the ALJ, as follows:

> IV. The sanctions assessed by the ALJ should be increased because the evidence does not support the ALJ's conclusions.

Complainant's Appeal at 11. Complainant makes six discrete arguments in support of Complainant's contention that the ALJ failed to follow the Department's sanction policy, as follows:

> The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):
>
>> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.
>
> The ALJ failed to follow this policy in assessing sanctions in this case.

Complainant's Appeal at 11-12.

Complainant correctly cites the Department's sanction policy, and I have examined Complainant's six arguments to determine if the ALJ did not follow the sanction policy, such that the sanction should be increased. Complainant styles the first argument as follows:

> A. The Complainant can submit exhibits that it believes are relevant to the assessment of sanctions.

First, the Decision states in regards to sanctions:

> However, Complainant elected to pick-and-cho[o]se what inspections and other background materials should be considered. Decision, p. 20.

Complainant's Appeal at 12. Complainant argues that Respondents were represented by counsel at the hearing; that Respondents could have presented documents or arguments to rebut evidence of previous warning notices; that Complainant has a right under the Rules of Practice (*see* 7 C.F.R. § 1.141(h)) to submit as evidence documents it perceives as relevant evidence; that Complainant's choice of which documents to submit as evidence is no basis for the ALJ not to impose the appropriate sanction; and that for the most part Complainant did not "pick-and-choose" the documents, but rather, the documents were in response to issues raised by Respondents' counsel (Complainant's Appeal at 12-13).

Respondents admit that Respondents were given a warning in 1993 for failure to allow an inspection, but argue that the ALJ is correct to assume that Respondents were in compliance between 1993 and 1996, because Complainant did not introduce reports of all the inspections from those years (Respondents' Reply at 3).

I agree with Complainant because it is axiomatic that a litigant will pick and choose the evidence best to support his or her case. In our adversary legal system, it is the other litigant's job, and opportunity, to rebut that evidence. Therefore, I find it is error for the ALJ to assume that Respondents were in compliance during the period 1993 through 1996, on the basis that Complainant did not introduce inspection reports from that epoch. A failure to introduce into evidence all inspection reports for the period 1993 through 1996 militates neither for compliance nor for non-compliance during 1993 through 1996. Further, Complainant did introduce other evidence of violations occurring in 1993 and 1994 (CX 1, 2, 37).

Complainant's second argument regarding the sanctions imposed by the ALJ is as follows:

B. The ALJ misconstrued the facts regarding a raid on the Respondents['] facilities in 1992.

In the Decision, the ALJ states:

> Complainant's reference to a "raid" on King Kong Zoo in 1992 connotes some sort of mischief by Respondents, but, so far as the record shows, the only information about the incident indicates that APHIS had no basis for conducting the raid [(Initial Decision and Order at 21)].

Complainant's Appeal at 13.

Complainant persuasively argues that the context of this item about a "raid" in 1992 is that Complainant's witness, investigator Terry Groce, only broached the subject of the 1992 raid to establish the joint ownership of King Kong Zoo and Noah's Ark Zoo; and that the "raid" was a United States Fish and Wildlife Service venture (Tr. 289) in which APHIS joined (Complainant's Appeal at 13-14). Thus, I find that the ALJ can neither correctly characterize the Complainant's discussion of the raid as connoting Respondents' "mischief," nor can the ALJ correctly claim that there was no basis for the raid.

Complainant's third argument regarding the sanctions imposed by the ALJ is as follows:

C. The ALJ erred to find that OIG agents claimed they were FBI agents.

Complainant's Appeal at 15. Complainant argues that the ALJ should have believed the testimony of inspector Terry Groce, rather than Respondent John Curtis, that agents from USDA's OIG did not misidentify themselves as agents of the FBI (Complainant's Appeal at 16).

Respondents reply that two OIG agents claimed to be FBI agents and that there was no explanation why a large and intimidating force of APHIS employees and state and local law enforcement officers were needed to conduct the inspection (Respondents' Reply at 3-4).

It is not apparent from the record what significance there is in the allegation, if true, that the OIG agents misidentified themselves as FBI agents. In any event, I do not find that the record has a preponderance of evidence that the OIG agents misidentified themselves as FBI agents. Respondent John Curtis testified (Tr. 491-93) that the OIG agents misidentified themselves, but inspector Terry Groce testified (Tr. 353-54) that the OIG agents did not misidentify themselves. Thus, I

find that the ALJ erred by finding as he did, since there is no preponderance of the evidence that the OIG agents either did or did not misidentify themselves. But, even if they had misidentified themselves, the misidentification would not be a reason to reduce the sanction that would otherwise be imposed.

Complainant's fourth argument regarding the sanctions imposed by the ALJ is as follows:

> D. APHIS does not have to obtain a search warrant in order to perform an inspection.
>
> The ALJ [made] the following claim in the Decision:
>
> > It would seem that if there was a genuine concern about gaining peaceful access, a search warrant could have been obtained at far less expense to the government or risk to all the parties involved. Decision, p. 21.
>
> Warrantless searches are permitted under the Animal Welfare Act. *Lesser v. Espy,* 34 F.3d 1301 (7th Cir. 1994). The ALJ's claim that a warrant should have been sought in order to conduct an inspection of the facility indicates a misunderstanding of the inspection authority of APHIS. [Footnote omitted.] Moreover, this misunderstanding formed a basis for the ALJ to reduce the sanctions requested which is a sound reason for the Judicial Officer to increase the sanctions.

Complainant's Appeal at 16-17.

I agree with Complainant. Section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) specifically provides that the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and records required to be kept of any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. Further, the United States Court of Appeals for the Seventh Circuit specifically found that warrantless searches are permitted under the Animal Welfare Act. *Lesser v. Espy*, 34 F.3d 1301, 1306 (7th Cir. 1994).

Complainant's fifth argument regarding the sanctions imposed by the ALJ is as follows:

> E. APHIS had authority to confiscate the Respondents' animals that were found in the Respondents' facilities in May of 1996.

> The ALJ misinterpreted the facts surrounding a May 1996 search of the Respondents' facilities that did not form a part of the [C]omplaint.

Complainant's Appeal at 17.

An inspection or search occurring after a complaint is filed and which is not part of an amended complaint is virtually always irrelevant. The May 1996 search of Respondents' facilities forms no part of the Complaint or Amended Complaint; therefore, the May 1996 search is irrelevant to this proceeding.

Complainant's sixth and final argument regarding the sanctions imposed by the ALJ is as follows:

> F. The civil penalty against the Respondents should be increased and a disqualification period imposed since the ALJ's sanction determination was based on a misapprehension of the facts.
>
> The ALJ failed to understand the facts and the laws of this case in determining the sanctions. This misapprehension resulted in the ALJ not giving appropriate consideration to the sanction recommendation of the Complainant. The sanctions must be change[d] to be in accordance with the facts of this case.

Complainant's Appeal at 19.

Complainant argues that Respondents committed three extremely serious violations of the Regulations (9 C.F.R. § 2.126) by denying Complainant access to Respondents' facilities on three separate occasions and urges that Respondents be assessed the maximum civil penalty of $2,500 per violation, for a total of $7,500 (Complainant's Appeal at 19). I agree.

Complainant urges that the violations of the Regulations and Standards the ALJ found on January 25, 1996, after Respondents refused inspection on January 17, 1996, be assessed at or near the maximum amount of $2,500, as provided in the Animal Welfare Act (7 U.S.C. § 2149(b)), because the refusal prevented Complainant from finding the violations earlier and could have prevented the inspectors from finding even more serious violations which may have existed on January 17, 1996 (Complainant's Appeal at 19-20). I disagree with Complainant. I am assessing Respondents the maximum civil penalty for their refusal to allow APHIS officials to inspect their business premises. Respondents' refusal to allow inspection is not a basis to assess the maximum civil penalty for each violation of the Regulations and Standards which was found once Respondents allowed inspection. Therefore, I am assessing Respondents a civil penalty of $6,000 for

their violations of 7 U.S.C. §§ 2140 and 2141 and 9 C.F.R. §§ 2.40, 2.50, 2.75, 3.1(e), 3.104(a) and (e), 3.107(a)(1), 3.125(c), 3.126(b), 3.127(c), and 3.131(a) and (c).[11]

Complainant argues that Respondents should be assessed a civil penalty for negotiating the sale of animals after surrendering their license (Complainant's Appeal at 20). However, I have already concluded that Respondents' negotiation of the trade for a chimpanzee did not constitute a violation of the Animal Welfare Act or the Regulations and Standards. Therefore, Respondents' negotiation for a chimpanzee in October 1996 forms no part of the sanction in this Decision and Order.

Complainant seeks Respondents' disqualification from becoming licensed under the Animal Welfare Act for a period of 2 years, based upon Respondents' refusal to allow APHIS officials to inspect Respondents' place of business and USDA policy (Complainant's Appeal at 21). Since Respondents have a history of refusing inspection (CX 1), and since this proceeding includes three separate violations of section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126 of the Regulations (9 C.F.R. § 2.126) for refusing to allow inspection, I agree with Complainant that a 2-year disqualification is appropriate.

Sanction

As to the appropriate sanction, the Animal Welfare Act provides:

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

> If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

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[11]As discussed in this Decision and Order, *supra*, I am not assessing Respondents a civil penalty for their violation of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

(b) Civil penalties for violation of any section, etc; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

> Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a), (b).

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

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by

administrative officials.[12]

Complainant originally sought: (1) a 5-year disqualification from applying for an Animal Welfare Act license for all named Respondents jointly and severally; (2) a civil penalty of $36,000; and (3) a cease and desist order (Complainant's Brief at 26-29). In Complainant's Brief, Complainant addresses the sanction criteria in 7 U.S.C. § 2149(b), arguing that Respondents' business is large because it has two locations and Respondents have spent $300,000 on construction at Noah's Ark Zoo (Tr. 455-56); and that Respondents have not acted in good faith because Respondents committed serious violations after receiving warning notices (CX 1, 2, 37) for previous violations in 1993 and 1994 (Complainant's Brief at 23-24).

In Complainant's Appeal, Complainant reduces the recommended sanction to a civil penalty of $22,500, a 2-year disqualification from applying for an Animal Welfare Act license, and, although a cease and desist order is not specifically mentioned, I infer from Complainant's proposed order in Complainant's Brief (Complainant's Brief at 27-28) that Complainant still seeks a cease and desist order, as well (Complainant's Appeal at 21).

Complainant argues that the ALJ's imposition of only a $4,000 civil penalty and no disqualification from applying for an Animal Welfare Act license is based on the ALJ's misapprehension of both the facts and law (Complainant's Appeal at 22). Complainant argues that Respondents' three refusals to allow inspections are extremely serious violations (Complainant's Appeal at 19). Complainant argues that the violations of the Regulations and Standards found by the ALJ are particularly serious and deserving of the maximum civil penalty because of possibly more serious violations not found because of Respondents' refusal to allow inspections (Complainant's Appeal at 21). Complainant argues that the requested civil penalty and disqualification period should fulfill the purposes of the Animal Welfare Act to ensure that animals receive the minimum care required under the Animal Welfare Act and deter others from refusing to allow access (Complainant's Appeal at 21).

Complainant's sanction recommendation is well within the range of sanctions in these kinds of cases. USDA consistently imposes significant sanctions for

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[12]*In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Mar. 30, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

violations of the Animal Welfare Act and the Regulations and Standards.[13] USDA

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[13]*See, e.g.*, *In re Marilyn Shepherd*, 57 Agric Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189 (1998) (imposing a $200,000 civil penalty, permanent revocation of respondent's license, and permanent disqualification from obtaining a license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 98-60463 (5th Cir. July 23, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127 (1998) (imposing a $9,250 civil penalty and a 14-day suspension for 23 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419 (1997) (imposing a $7,500 civil penalty and a 40-day suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards) (Modified Order); *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act, the Regulations, and the Standards), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998) (unpublished); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Lifting Stay Order and Decision and Order); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and

(continued...)

in the past has permanently disqualified persons from becoming licensed or revoked dealers' and exhibitors' licenses for the kind of violations that are found in this proceeding.[14] As to the civil penalty, the Animal Welfare Act authorizes up to $2,500 *per violation per day*. I find that Respondents committed 16 violations of the Animal Welfare Act and the Regulations and Standards. Complainant could have recommended, and Respondents could be assessed, a maximum civil penalty of $40,000.

Although not addressed specifically by the ALJ in the Initial Decision and Order, the Complaint alleges that each alleged violation was willful and Complainant argues willfulness in Complainant's Brief (Complainant's Brief at 8-9). An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[15] I find that Respondents' violations

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[13](...continued)
license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.)(Table), *cert. denied*, 476 U.S. 1108 (1986).

[14]*See, e.g.*, *In re John D. Davenport*, 57 Agric. Dec. 189 (1998) (imposing a $200,000 civil penalty, permanent revocation of respondent's license, and permanent disqualification from obtaining a license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 98-60463 (5th Cir. July 23, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

[15]*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 286-87 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219-20 (1998), *appeal docketed*, No. 98-60463 (5th Cir. July 23, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 167-68 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476
(continued...)

were willful.

Respondents reply, as follows:

> The penalty assessed is appropriate because Respondents have incurred ongoing financial loss during the pendency of this action because they have been prevented from obtaining a license because of this proceeding. Respondents should not be further penalized with an additional disqualification period.

Respondents' Reply at 4.

The record does not establish, as Respondents contend, that they have been prevented from obtaining a license because of this proceeding. Instead, the record establishes that Respondents voluntarily terminated their license to escape inspection (CX 9, 10).

Based on the Complainant's evidence that Respondents owned and kept many large, expensive, exotic animals, including polar bears, lions, leopards, tigers, and chimpanzees, as well as many other animals (CX 6, 7, 15, 16, 25), at two locations, one location of which had undergone over $300,000 in new construction (Tr. 455-56), I find that Respondents operate a large facility. On the criteria of good faith

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[15](...continued)
(1997), *aff'd*, No. 97-3414 (3d Cir. May 26, 1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondents' violations would still be found willful.

and history of previous violations, Respondents did not exercise good faith, in that Respondents received warning letters (CX 1, 2, 37) in 1993 and 1994 for previous alleged violations, but, nevertheless, committed the same and similar violations in 1996.

After examining all relevant circumstances in light of USDA's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a $13,500 civil penalty, a cease and desist order, and a 2-year disqualification period before Respondents may apply for an Animal Welfare Act license, are appropriate.

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

Order

1. Respondents, Richard Lawson, Stanley Curtis, and John M. Curtis, jointly and severally, are assessed a civil penalty of $13,500. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Sharlene A. Deskins
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Ave., SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be forwarded to, and received by, Sharlene A. Deskins, within 120 days after service of this Order on Respondents. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0047.

2. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

(a) Failing to allow APHIS officials access to Respondents' place of business to inspect Respondents' records, facilities, property, and animals;

(b) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, and failing to provide veterinary care

to animals in need of care;

(c) Failing to maintain complete records showing the acquisition, disposition, description, and identification of all animals on the premises, including personal pets;

(d) Failing to properly identify all animals on the premises;

(e) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, to minimize vermin infestation, odors, and disease hazards;

(f) Failing to store supplies of food so as to adequately protect them against deterioration due to lack of refrigeration for perishable food items, molding, or contamination by vermin;

(g) Failing to construct and maintain indoor housing facilities for animals so that they are adequately ventilated;

(h) Failing to provide a suitable method for the rapid elimination of excess water from housing facilities for animals;

(i) Failing to construct primary enclosures for polar bears so as to provide sufficient space for each animal to make normal postural and social adjustments with adequate freedom of movement in or out of the water;

(j) Failing to provide polar bears with adequate water;

(k) Failing to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash from designated areas; and

(*l*) Failing to keep primary enclosures for animals clean of animal and food waste.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

3. Respondents, Richard Lawson, Stanley Curtis, and John M. Curtis, jointly and severally, are disqualified from becoming licensed under the Animal Welfare Act for 2 years. The Animal Welfare Act license disqualification provisions in this Order shall become effective on the day after service of this Order on Respondents, for a period of 2 years, and continuing thereafter, until Respondents demonstrate by license application to the Animal and Plant Health Inspection Service that Respondents are in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order.

In re: DAVID M. ZIMMERMAN.
AWA Docket No. 98-0005.
Decision and Order filed November 18, 1998.

Dealer — Failing to obtain license — Actual notice of regulations — Constructive notice of regulations — Willful — Burden of proof — Standard of proof — Preponderance of the evidence — ALJ credibility determinations — Hearsay evidence — Sanction policy — Revocation of license — Disqualification from obtaining license — Cease and desist order — Civil penalty.

The Judicial Officer affirmed Chief Administrative Law Judge Palmer's (Chief ALJ) decision. The Judicial Officer found that Complainant proved by a preponderance of the evidence that Respondent operated as a dealer without a license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1. The Judicial Officer found that Respondent's violations were willful because, at the very least, Respondent carelessly disregarded statutory and regulatory requirements. The Judicial Officer stated that he is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility. However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify and there was no basis for finding that the Chief ALJ's credibility determinations were error. The Judicial Officer found that even if Respondent understood a USDA employee's statements in breeder meetings to mean that a person could sell dogs without a license, Respondent relies on the representations of federal employees at Respondent's peril because it is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice, findings, or compliance determinations of federal employees. The Judicial Officer held that hearsay evidence was properly admitted into evidence. The Judicial Officer found that the $20,000 civil penalty assessed by the Chief ALJ was in accord with the Animal Welfare Act, the Department's sanction policy, and consistent with the sanctions imposed in other Animal Welfare Act cases. The Judicial Officer held that, while there is no provision in the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, 7 U.S.C. § 2151 authorizes orders disqualifying unlicensed persons from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards.

Brian T. Hill and Frank Martin, Jr., for Complainant.
Eugene R. Campbell, York, PA, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on December 9, 1997.

The Complaint alleges that on or about May 13, 1997, through October 14, 1997, David M. Zimmerman [hereinafter Respondent] operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1). On December 29, 1997, Respondent filed an Answer denying the material allegations of the Complaint and requesting a hearing.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on August 25, 1998, in Lancaster, Pennsylvania. Brian T. Hill and Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Eugene R. Campbell of York, Pennsylvania, represented Respondent. During the hearing, Complainant submitted Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Pre-hearing Brief in Support Thereof and a Proposed Decision and Order. On September 2, 1998, Complainant filed Complainant's Supplemental Brief, and on September 10, 1998, Respondent filed Respondent's Supplemental Brief.

On September 16, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that from May 13, 1997, through October 14, 1997, Respondent operated as a dealer, as defined by the Animal Welfare Act and the Regulations, when he was not licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1); (2) assessed Respondent a civil penalty of $20,000; (3) revoked Respondent's Animal Welfare Act license; and (4) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations. (Initial Decision and Order at 2, 9.)

On October 14, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).* On October 23, 1998, Complainant filed Complainant's Memorandum in Opposition to Respondent's Appeal and Complainant's Cross-Appeal. On November 13, 1998, Respondent filed Respondent's Response to Complainant's Cross-Appeal, and on November 16, 1998, the Hearing Clerk transmitted the

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

record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the Chief ALJ that Respondent willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1), as alleged in the Complaint. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I am adopting the Initial Decision and Order as the final Decision and Order, with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

. . . .

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

. . . .

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2131, 2132(f), 2134, 2149(a), (b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the APHIS, REAC Sector Supervisor in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the APHIS, REAC Sector Supervisor.

(2) If an applicant for a license or license renewal operates in more than one State, he or she shall apply in the State in which he or she has his or her principal place of business. All premises, facilities, or sites where such person operates or keeps animals shall be indicated on the application form or on a separate sheet attached to it. The completed application form, along with the application fee indicated in paragraph (d) of this section, and the annual license fee indicated in table 1 or 2 of § 2.6 shall be filed with the APHIS, REAC Sector Supervisor.

(3) The following persons are exempt from the licensing requirements under section 2 or section 3 of the Act:

(i) Retail pet stores which sell non-dangerous, pet-type animals, such as dogs, cats, birds, rabbits, hamsters, guinea pigs, gophers, domestic ferrets, chinchilla, rats, and mice, for pets, at retail only: *Provided, That*, Anyone wholesaling any animals, selling any animals for research or exhibition, or selling any wild, exotic, or nonpet animals retail, must have a license;

(ii) Any person who sells or negotiates the sale or purchase of any animal except wild or exotic animals, dogs, or cats, and who derives no more than $500 gross income from the sale of such animals to a research facility, an exhibitor, a dealer, or a pet store during any calendar year and is not otherwise required to obtain a license;

(iii) Any person who maintains a total of three (3) or fewer breeding female dogs and/or cats and who sells only the offspring of these dogs or cats, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license;

(iv) Any person who sells fewer than 25 dogs and/or cats per year which were born and raised on his or her premises, for research, teaching, or testing purposes or to any research facility and is not otherwise required to obtain a license. The sale of any dog or cat not born and raised on the premises for research purposes requires a license;

(v) Any person who arranges for transportation or transports animals solely for the purpose of breeding, exhibiting in purebred shows, boarding (not in association with commercial transportation), grooming, or medical treatment, and is not otherwise required to obtain a license;

(vi) Any person who buys, sells, transports, or negotiates the sale, purchase, or transportation of any animals used only for the purposes of food or fiber (including fur);

(vii) Any person who breeds and raises domestic pet animals for direct retail sales to another person for the buyer's own use and who buys no animals for resale and who sells no animals to a research facility, an exhibitor, a dealer, or a pet store (e.g. a purebred dog or cat fancier) and is not otherwise required to have a license; [and]

(viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license[.]

. . . .

(d) A license will be issued to any applicant, except as provided in §§ 2.10 and 2.11, when the applicant:

(1) Has met the requirements of this section and of §§ 2.2 and 2.3; and

(2) Has paid the application fee of $10 and the annual license fee indicated in § 2.6 to the APHIS, REAC Sector Supervisor and the payment has cleared normal banking procedures.

. . . .

(f) The failure of any person to comply with any provision of the Act, or any of the provisions of the regulations or standards in this

subchapter, shall constitute grounds for denial of a license; or for its suspension or revocation by the Secretary, as provided in the Act.

9 C.F.R. §§ 1.1; 2.1(a), (d), (f).

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

. . . .

Findings of Fact

1. David M. Zimmerman . . . is an individual whose address is 951 East Main Street, Ephrata, Pennsylvania 17522 (Answer ¶ I(A)).

2. At all times material [to this proceeding], Respondent was operating as a dealer, as defined in the [Animal Welfare] Act and the Regulations. Respondent . . . voluntarily terminated [his Animal Welfare Act license] on May 5, 1997. (CX 1, CX 2, CX 3, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10, CX 13, CX 14, CX 15.)

3. From May 13, 1997, through October 14, 1997, Respondent operated as a dealer, as defined in the [Animal Welfare] Act and the Regulations, when he was no longer licensed, and sold, in commerce, 33 dogs for resale for use as pets (CX 1, CX 2, CX 3, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10). The sale of each dog constitutes a separate violation [of the Animal Welfare Act and the Regulations].

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent was a dealer, as defined in the [Animal Welfare] Act and the Regulations, who, from May 13, 1997, through October 14, 1997, willfully violated section 4 of the [Animal Welfare] Act (7 U.S.C. § 2134) and section 2.1 of the [R]egulations (9 C.F.R. § 2.1) by selling 33 dogs in commerce, for resale for use as pets, without being licensed. The sale of each dog constitutes a separate violation [of the Animal Welfare Act and the Regulations].

3. The appropriate sanctions in this case are the issuance of a cease and desist order, the assessment of a $20,000 civil penalty, and [Respondent's permanent disqualification from obtaining an Animal Welfare Act] license.

Discussion

1. Jurisdiction

[On May 5, 1997,] Respondent . . . voluntarily [terminated] his [Animal Welfare Act dealer's] license. . . . Respondent was notified by USDA on two separate occasions that his [Animal Welfare Act] license was terminated and advised that he could no longer continue to operate as a dealer. (CX 13, CX 14, CX 15.) However, after voluntarily [terminating] his license, [Respondent] continued to engage in activities for which an [Animal Welfare Act] license [is] required. Respondent sold, in commerce, . . . 33 dogs for resale for use as pets (CX 1, CX 2, CX 3, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10).

2. Dealing Without a License

The testimony of USDA investigators William Swartz and James Finn that they obtained records from three different pet stores and a [dealer] licensed [under the Animal Welfare Act] showing that Respondent was the source for dogs, proved that Respondent was selling dogs as a dealer, as defined in the [Animal Welfare] Act and Regulations, after he voluntarily [terminated] his [Animal Welfare Act] license [(Tr. 44-52, 54-88)]. The pet store and dealer records were required to be kept by state and federal law and were created at the time the animals were acquired by the pet stores and dealer [(Tr. 55, 130-31, 146)]. This evidence is both substantial and probative and is accorded great weight.

Respondent attempted to rebut this evidence by offering the testimony of his friend and business associate, Ronald Kreider, who owns the pet stores to which most of the dogs were sold [(Tr. 134-40)]. Mr. Kreider's testimony must be viewed in the context of his relationship with Respondent and his economic reliance on Respondent. The cross-examination of Mr. Kreider clearly demonstrated that he was not a credible witness.

Mr. Kreider relied on Respondent since 1986 for dogs which he sold in his pet stores (Tr. 119, 134). He also purchased dog food from Respondent on credit [(Tr. 136-39)]. In fact, Mr. Kreider still owes Respondent money . . . [(Tr. 139)]. Mr. Kreider testified that . . . after Respondent stopped selling him dogs, he obtained the dogs needed to operate his pet stores from Respondent's children [(Tr. 134-35)]. He testified that he had to beg Respondent's sons to [sell him dogs] (Tr. 125). It is against this background that Mr. Kreider's credibility and his attempts to refute his business records must be considered.

Mr. Kreider testified that each time Respondent's name appeared in his pet store

records, which he is required by the [Commonwealth] of Pennsylvania to accurately keep and maintain, the name was recorded in error (Tr. 140[-]45). During cross-examination, Mr. Kreider's testimony kept changing. At first, [Mr. Kreider] testified that only the entries after Respondent had given up his license were inaccurate (Tr. 119). Then [Mr. Kreider] asserted that all the entries showing Respondent's name could be inaccurate (Tr. 16[0-]61, 165). This testimony is inconsistent with his testimony that he relied on Respondent for dogs while Respondent was licensed. Finally, Mr. Kreider asserted that most, if not all, of the entries in his records were inaccurate. Mr. Kreider's credibility is seriously damaged by the obvious differences between his affidavit (CX 4) and his inconsistent statements at the hearing.

Mr. Kreider testified that the dogs his records show he acquired from Respondent actually came from people who had them at Respondent's kennel for Mr. Kreider to pick up [(Tr. 235-37)]. He testified that they were mixed breeds for which he did not pay [(Tr. 236-37)]. However, [Mr. Kreider's] affidavit states that he gave money to Respondent to pay the owners of these dogs [(CX 4)]. On cross-examination, [Mr. Kreider] was at first evasive in an apparent effort to support Respondent's testimony that Mr. Kreider never gave Respondent money (Tr. [226-]28), but upon being confronted by the statements in his affidavit, he again stated that he gave Respondent money to pay the dogs' owners (Tr. 232-33). Mr. Kreider first testified that when people would bring dogs to Respondent's kennel, the dogs would be in . . . cars or trucks (Tr. 158-59). When questioned why he did not get [the names of the owners of the dogs] for his records, [Mr. Kreider] changed his [testimony] and said that people would leave the dogs at Respondent's kennel in transport enclosures (Tr. 236-37). Mr. Kreider was unable to explain the entries for purebred dogs in his records that indicate Respondent is the source (Tr. 141-43).

Respondent next introduced the testimony of his son[, Ervin S. Zimmerman,] to explain one of the entries in [CX 3 at 12. Ervin S. Zimmerman] testified that he sold the dog[, an eskipoo,] that the pet store recorded as being sold by his father [(CX 3 at 12; Tr. 217). Ervin S. Zimmerman] is a [dealer licensed under the Animal Welfare Act] and is required to keep records [of the acquisition and disposition of dogs, in accordance with section 2.75(a)(1) of the Regulations] (9 C.F.R. § 2.75(a)(1)). . . . When asked on cross-examination if he had his records to prove that he sold the dog, [Ervin S. Zimmerman] stated that he did not have his records with him [(Tr. 217)]. For these reasons, [Ervin S. Zimmerman's] testimony . . . that he[, rather than Respondent, sold the eskipoo listed on CX 3 at 12,] . . . is rejected as untrustworthy and lacking in credibility.

As a separate defense, Respondent and his brother[, Amos M. Zimmerman,]

testified that Mr. Markmann[**] and Dr. Binkley[***] told them at a meeting in 1993 that they could sell 24 dogs without having to obtain a[n Animal Welfare Act] license [(Tr. 167-68, 173, 201-04)]. Respondent argues that this statement caused confusion and if he did subsequently sell some dogs, . . . he must be construed to have acted in good faith and should not be sanctioned [(Respondent's Supplemental Brief ¶ 5[****])]. However, Mr. Markmann testified that he would not have made that . . . statement and explained that, under 9 C.F.R. § 2.1(a)(3)(iii), only a person who has three or fewer breeding female dogs can sell the offspring of those dogs, which were born on the premises, to the wholesale pet trade without having a license [(Tr. 246-47)]. Mr. Markmann explained further that he uses the number "24" as a guideline because three breeding females, producing an average of eight puppies a year, would [produce] 24 [puppies (Tr. 248-54)]. Mr. Markmann explained that, under . . . section [2.1(a)(3)(iv) of the Regulations] (9 C.F.R. § 2.1(a)(3)(iv)), a person [without a license] can sell up to 24 dogs, which were born on the premises, for research, teaching, or testing purposes, if [he or she is] not otherwise required to obtain a license [(Tr. 254)]. Dr. Binkley's testimony corroborated Mr. Markmann's testimony [(Tr. 258-63)].

Moreover, Respondent was instructed at the time he voluntarily [terminated his] license that he could not engage in regulated activities without getting a new license [(CX 13, CX 14, CX 15)]. Even assuming, *arguendo*, that Respondent believed he could sell up to 24 dogs while unlicensed, the record reveals that he sold more than 24 dogs. Respondent also testified that he always had more than three breeding females [(Tr. 256)]. Therefore, he would not be eligible for the exemption in 9 C.F.R. § 2.1(a)(3)(iii), for sales to pet stores. He would also not be eligible for the exemption in 9 C.F.R. § 2.1(a)(3)(iv), for sales to research facilities because he was required to be licensed for his wholesale activities. Both Respondent and his brother[, Amos M. Zimmerman,] testified that they were licensed for years and that they received copies of the Regulations and read them. They admitted that they bore personal responsibility for compliance with the Regulations. [(Tr. 169-73, 193-94, 203.)] "[I]t is the Respondent's duty to be in compliance with the Animal Welfare Act, and the Regulations and the Standards

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[**][Mr. Robert Gerard Markmann is an animal care inspector employed by USDA (Tr. 8).]

[***][Dr. Francis Miava Binkley is a supervisory animal care specialist (Tr. 257-58). I infer from Dr. Binkley's testimony that she is employed in this capacity by USDA.]

[****][Respondent's Supplemental Brief contains two paragraphs identified as "5." The reference here is to the paragraph identified as "5. GOOD FAITH".]

[set forth in 9 C.F.R. §§ 3.1-.142 [hereinafter the Standards]] at all times. It is not the duty of [Animal and Plant Health Inspection Service] inspectors to instruct licensees as to the details of meeting those requirements." *In re John D. Davenport*, [57 Agric. Dec. 189, 209 (1998)[, *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998)]. "[I]t is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice, findings, or compliance determinations of federal employees." *See id.* at 227; *See also FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re C.C. Baird*, 57 Agric. Dec. 127, 171-72 (1998)[, *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998)]; *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988).

3. The Appropriate Sanctions

The term "willful violation" has been defined, in the context of a regulatory statute, to mean that the violator "(1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 29[3, 306] (1978), *aff'd [mem.,]* 582 F.2d 39 (5th Cir. 1978).

Respondent's behavior over the [5]-month period in question constitutes, at the very least, a careless disregard of the statutory and regulatory requirements and must be construed as willful.

It is therefore appropriate to issue a cease and desist order[, to permanently disqualify Respondent from obtaining an Animal Welfare Act license,] and to [assess a] civil penalt[y,] as provided in section 19(b) of the [Animal Welfare] Act (7 U.S.C. § 2149(b)).

When assessing [a] civil penalt[y], which may be as much as $2,500 [for each] violation, [section 19(b) of] the [Animal Welfare] Act states:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.[1]

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[1]It may be noted that the Judicial Officer has pointed out that consideration need not be given under the Animal Welfare Act to a respondent's ability to pay [the] civil penalt[y]. *In re Jerome A. Johnson*, [51 Agric. Dec. 209, 216 (1992)].

[7 U.S.C. § 2149(b).]

With regard to the size of Respondent's business, I find that Respondent has a substantial business. His facility generally houses between 200 and 300 dogs [(Tr. 15-16, 105)].

The gravity of the violations is clearly evident from the record. The failure to obtain a license undercuts the ability of the Animal and Plant Health Inspection Service to monitor and enforce all other provisions of the Animal Welfare Act and the Regulations [and the Standards] . . . and is very serious [(Tr. 104).] Respondent did not display good faith. After voluntarily giving up his license, he continued to engage in activities for which a license [is] required. Respondent's conduct over a period of [5] months reveals consistent disregard for and unwillingness to abide by the requirements of the [Animal Welfare] Act and the [R]egulations.

An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the [Animal Welfare] Act. It is appropriate to view the evidence . . . as establishing prior violations in determining the appropriate level of the civil penalty. The record in this proceeding establishes that Respondent violated the [Animal Welfare] Act and the [R]egulations . . . 33 [times] (CX 1, CX 2, CX 3, CX 5, CX 6, CX 7, CX 8, CX 9, CX 10). [Moreover, Respondent has a history of violations previous to those that are the subject of the instant proceeding. Specifically, Respondent committed 75 violations of the Animal Welfare Act and the Regulations and the Standards during the period August 3, 1993, through October 31, 1995. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997), *aff'd*, 156 F.3d 1227] (3d Cir. 1998) (Table). The $20,000 civil penalty requested in Complainant's Proposed Decision and Order is commensurate with the nature and extent of the [33] violations [proven in the instant proceeding] and is consistent with USDA's established sanction policy.[2]

This case involves serious violations. The failure to obtain a license undercuts the ability of the Animal and Plant Health Inspections Service to enforce the Animal Welfare Act [and the Regulations and the Standards]. During fiscal year 1997, 4,043 dealers held Animal Welfare Act licenses. *See Animal Welfare Report, Fiscal Year 1997, Report of the Secretary of Agriculture to the President of the*

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[2]The Department's sanction policy states that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose." See *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 4[97] (1991)[, *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3)].

Senate and the Speaker of the House of Representatives, at 10 (APHIS 41-35-054, May 1998). The Department has a limited number of resources available to it in its enforcement efforts, and therefore relies heavily on the deterrent effect disciplinary proceedings and sanctions have on regulated individuals. In light of the fact that the [Animal Welfare] Act authorizes a maximum penalty of $2,500 per violation, the civil penalty requested by Complainant is not excessive. . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises 12 issues in Respondent's Appeal Petition. First, Respondent contends that the Chief ALJ erred in finding that Respondent operated as a dealer who sold 33 dogs improperly (Respondent's Appeal Pet. ¶¶ 1, 7).

I disagree with Respondent's contention that the Chief ALJ erred in finding that Respondent operated as a dealer who sold 33 dogs improperly. The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard.[3] The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence.[4] The Chief ALJ set

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[3]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981).

[4]*In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 45-46 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 149 (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246-47 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992);

(continued...)

determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[5] The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

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[5]*See also In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 48 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 687-88 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating that the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating that agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating that the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating that the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating that the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

forth the basis for his conclusion that Respondent acted as a dealer after Respondent voluntarily terminated his license. I have thoroughly reviewed the record, and I agree with the Chief ALJ that Complainant proved by a preponderance of the evidence that "Respondent operated as a dealer who sold 33 dogs improperly[,]" in violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1).

Second, Respondent contends that the Chief ALJ "erred in accepting the records of pet shop owners as creditable evidence where other evidence refuted their accuracy" (Respondent's Appeal Pet. ¶ 2).

I disagree with Respondent's contention that the Chief ALJ erred in accepting records of pet store owners as creditable evidence. The Chief ALJ found that records from three different pet stores, which indicate that Respondent sold dogs to those pet stores, were required to be kept by state and federal law and were created at the time that the dogs were acquired by the pet stores (Initial Decision and Order at 3). The Chief ALJ thoroughly discussed the evidence introduced by Respondent to rebut the accuracy of these pet store records and found that Respondent's rebuttal evidence was not credible (Initial Decision and Order at 3-5). Instead, the Chief ALJ found the pet store records to be substantial and probative evidence, and the Chief ALJ accorded the pet store records great weight (Initial Decision and Order at 3). I have closely examined the pet store records and Respondent's rebuttal evidence. I find that the Chief ALJ did not err when he found that Respondent's rebuttal evidence was not credible, found that the pet store records are substantial and probative evidence, and gave the pet store records great weight.

Third, Respondent contends that the Chief ALJ "erred in finding the testimony of Ron Kreider not to be creditable when he testified that his records were in error and that he had not bought any dogs from Respondent after he turned in his USDA license" (Respondent's Appeal Pet. ¶ 3).

I disagree with Respondent's contention that the Chief ALJ erred in finding that Mr. Kreider's testimony was not credible. The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate

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[4](...continued)
In re Gus White, III, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

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(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative

law judges, since they have the opportunity to see and hear witnesses testify.[6] The Chief ALJ explained in great detail his reasons for concluding that Mr. Kreider's testimony regarding the inaccuracy of his pet store records is not credible (Initial Decision and Order at 3-5). The record supports the Chief ALJ's credibility determination with respect to Mr. Kreider, and I do not find that the Chief ALJ erred.

Fourth, Respondent contends that the Chief ALJ "erred in failing to consider the conflicting and contradictory testimony of Mr. Markman[n] as to what he told breeders regarding how many dogs they could breed without obtaining a USDA wholesale license" (Respondent's Appeal Pet. ¶ 4). Respondent further contends that the Chief ALJ disregarded "the testimony of Respondent's brother" regarding "statements made to breeders by USDA representatives concerning the number of dogs that could be bred without a license" (Respondent's Appeal Pet. ¶ 6).

As an initial matter, the Animal Welfare Act does not require persons who merely breed dogs to obtain a license, and the record does not indicate that Mr. Markmann or other USDA representatives testified that they discussed with breeders the number of dogs they could breed without an Animal Welfare Act license.

However, Mr. Markmann did testify that he told breeders that, under section 2.1(a)(3)(iii) of the Regulations (9 C.F.R. § 2.1(a)(3)(iii)), a person with three or fewer breeding female dogs can sell the offspring, which were born and raised on the person's premises, for pets without obtaining a license (Tr. 246-48). Despite the absence, in 9 C.F.R. § 2.1(a)(3)(iii), of any limitation on the number of

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[6]*In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 47 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

offspring that a person can sell for pets without a license, Mr. Markmann admitted that he uses the number "24" as a guideline for the number of offspring that a breeder may sell without a license in accordance with 9 C.F.R. § 2.1(a)(3)(iii), because three breeding female dogs generally can produce an average of 24 puppies per year (Tr. 248-54). The information Mr. Markmann admits he provides to breeders regarding 9 C.F.R. § 2.1(a)(3)(iii) may not be entirely clear to all breeders, because some breeders may incorrectly interpret Mr. Markmann's statements to mean that, in addition to the limitation on the number of breeding female dogs that one may maintain, there is a limitation on the number of offspring that may be sold under 9 C.F.R. § 2.1(a)(3)(iii). However, the Chief ALJ did not describe Mr. Markmann's testimony regarding what he tells breeders as "conflicting and contradictory." I have carefully reviewed Mr. Markmann's testimony, and I do not find it "conflicting and contradictory."

Further, Mr. Markmann's statements to dog breeders are not relevant to this proceeding. Respondent admits that, at the time of the hearing, he had approximately 100 breeding female dogs and that at all times material to this proceeding, he maintained more than three breeding female dogs (Tr. 256). Based on Respondent's admission alone, there is no basis for finding that Respondent qualifies for the exemption under section 2.1(a)(3)(iii) of the Regulations (9 C.F.R. § 2.1(a)(3)(iii)) from having to obtain an Animal Welfare Act license.

Moreover, even if Respondent understood Mr. Markmann's statements in breeder meetings to mean that a person could sell up to 24 dogs, without any reference to the number of breeding female dogs maintained by that person, Mr. Markmann's statements would not operate as a defense. First, the evidence establishes that Respondent sold more than 24 dogs. Second, even if Respondent sold less than 25 dogs, Respondent was licensed under the Animal Welfare Act for 25 or 26 years and, therefore, had actual notice of the Animal Welfare Act licensing requirements because each year during that period Respondent received a copy of the Regulations and the Standards and agreed to abide by the Regulations and the Standards (Tr. 193-94).[7] Moreover, the Regulations and the Standards are published in the *Federal Register*; thereby constructively notifying Respondent of the Regulations and the Standards.[8]

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[7]Section 2.1(a)(3)(iii) of the Regulations (9 C.F.R. § 2.1(a)(3)(iii)) became effective on October 30, 1989, and has not been amended since that time (54 Fed. Reg. 36,123 (1989)).

[8]*FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, (continued...)

Respondent relies on the representations of federal employees at Respondent's peril because it is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice, findings, or compliance determinations of federal employees.[9] Therefore, even if Respondent could show that he sold less than 25 dogs and that Mr. Markmann stated that no license was required for the sale of less than 25 dogs for pets, Mr. Markmann's statements would not operate as a defense.

I infer that Respondent contends that the Secretary of Agriculture is estopped from imposing a sanction against Respondent because of Mr. Markmann's statements to Respondent and other dog breeders. The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.[10] One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his or her position for the worse.[11] Mr. Markmann did nothing to lead Respondent to believe that he could sell 33 dogs for resale as pets without obtaining an Animal Welfare Act license. This record does not support a finding that Mr. Markmann's statements caused Respondent to violate section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1), and I do not find any statements made by Mr. Markmann upon which Respondent could have reasonably relied for his failure to comply with section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1).

Further, even if Respondent had acted to his detriment based on Mr.

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[8](...continued)
1405 (10th Cir. 1976).

[9]*See FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re John D. Davenport*, 57 Agric. Dec. 189, 226-27 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 172 (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988).

[10]*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

[11]*Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, 965 F.2d 413, 418 (7th Cir. 1992).

Markmann's statements, it is well settled that the government may not be estopped on the same terms as any other litigant.[12] It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.[13] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[14] as it was doing in this case,[15] and estoppel is only available if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.[16] Respondent bears a heavy burden when asserting estoppel against the government, and he has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Fifth, Respondent contends that the Chief ALJ "erred in finding that Respondent had a `substantial' business, consisting of between 200 and 300 dogs" and "disregarded the testimony of Respondent's brother as to the relative size of Respondent's operation" (Respondent's Appeal Pet. ¶¶ 5, 6).

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[12]*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

[13]*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

[14]*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

[15]*See In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act). *Cf. In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

[16]*City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

I disagree with Respondent's contention that the Chief ALJ erred in finding that Respondent had a "substantial" business, consisting of between 200 and 300 dogs. Mr. Markmann testified that he had been inspecting Respondent's facility since 1986 and that the last time he inspected the facility, on September 17, 1996, Respondent had 278 dogs (Tr. 15-16). Mr. Swartz testified that he was familiar with Respondent's facility and that prior to the hearing, he had last been to the facility during the summer of 1997. Mr. Swartz characterized Respondent's facility as "a large kennel" (Tr. 53-54). Dr. Goldentyer, Eastern Director for Animal Care, Animal and Plant Health Inspection Service, USDA, testified that Mr. Markmann's inspection reports show that Respondent consistently had in the range of 270 dogs, that Respondent reported gross income from his facility of $39,000 in 1997, and that most of the kennels licensed under the Animal Welfare Act maintain between 30 and 40 dogs (Tr. 105, 108). Dr. Goldentyer also characterized Respondent's facility as "a large dog kennel" (Tr. 105, 108). This evidence regarding the size of Respondent's business supports the Chief ALJ's finding that Respondent "has a substantial business," and I do not find that the Chief ALJ's finding regarding the size of Respondent's facility is error.

Amos M. Zimmerman, Respondent's brother, did testify that he knows of two breeders in the Lancaster County, Pennsylvania, area that maintain around 700 dogs, that he "would think" there are more than 12 facilities in Pennsylvania that maintain more than 250 dogs, and that "out in the midwest they're a lot bigger yet" (Tr. 166, 168). I do not find that Amos M. Zimmerman's testimony regarding the number of dogs in other dog breeding facilities rebuts the evidence that Respondent has a large facility.

Sixth, Respondent contends that the Chief ALJ "erred in considering dogs that were left at Respondent's property, but which were not bred by him" (Respondent's Appeal Pet. ¶ 8).

As an initial matter, the Chief ALJ concluded that Respondent operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1), based upon Respondent's sale of 33 dogs in commerce, for resale for use as pets. The identity of the person who bred the dogs which Respondent sold in commerce for resale for use as pets is not relevant to this proceeding.

Mr. Kreider testified that his pet store records, which show that he acquired dogs from Respondent, are inaccurate and that he actually acquired these dogs from people who left the dogs at Respondent's kennel for Mr. Kreider (Tr. 235-37). The Chief ALJ rejected this evidence and fully discussed his reasons for rejecting this evidence and for his determination that Mr. Kreider was not a credible witness

(Initial Decision and Order at 3-5). I have thoroughly reviewed the record, and the record supports the Chief ALJ's rejection of this evidence and the Chief ALJ's finding that Mr. Kreider was not a credible witness with respect to the persons from whom he acquired the dogs identified on his pet store records.

Seventh, Respondent contends that the Chief ALJ "erred in finding that Respondent was acting in bad faith and that any violations were willful" (Respondent's Appeal Pet. ¶ 9).

The Chief ALJ did not find, as Respondent contends, that Respondent acted in bad faith. Instead, the Chief ALJ found that "Respondent did not display good faith" and cited, as support for this finding, Respondent's 5-month disregard for and unwillingness to abide by the requirements of the Animal Welfare Act and the Regulations (Initial Decision and Order at 7). The record supports the Chief ALJ's finding that Respondent did not display good faith.

I disagree with Respondent's contention that the Chief ALJ erred by concluding that Respondent's violations of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) were willful. An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[17] The Chief ALJ found that Respondent's sale

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[17]*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 71-72 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 287, (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 10, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 219, (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in

(continued...)

of dogs to pet stores and a dealer without a license over a 5-month period "constituted, at the very least, a careless disregard of the statutory and regulatory requirements and must be construed as wilful" (Initial Decision and Order at 7). I agree with the Chief ALJ.

Eighth, Respondent contends that "[t]he amount of the civil penalty is excessive" (Respondent's Appeal Pet. ¶ 10).

I disagree with Respondent's contention that the civil penalty assessed by the Chief ALJ is excessive. This case involves extremely serious willful violations of the Animal Welfare Act and the Regulations by a Respondent who has not displayed good faith. Moreover, Respondent has a history of previous violations of the Animal Welfare Act, the Regulations, and the Standards.[18]

A dealer or exhibitor who fails to obtain an Animal Welfare Act license in violation of the Animal Welfare Act and the Regulations thwarts the Secretary of Agriculture's ability to monitor the dealer's or exhibitor's compliance with the Animal Welfare Act, the Regulations, and the Standards and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act, the Regulations, and the Standards. Therefore, in order to deter future violations of this gravity, a substantial civil penalty is warranted.

The Animal Welfare Act authorizes the assessment of a maximum civil penalty of $2,500 per violation per day (7 U.S.C. § 2149(b)). Respondent committed 33

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[17](...continued)
those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations would still be found willful.

[18]The ongoing pattern of violations of the Animal Welfare Act and the Regulations between May 13, 1997, and October 14, 1997, evidenced by the record in this proceeding, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)). Moreover, Respondent committed 75 violations of the Animal Welfare Act, the Regulations, and the Standards between August 3, 1993, and October 31, 1995. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table).

violations of the Animal Welfare Act and the Regulations. The Chief ALJ could have assessed Respondent a maximum civil penalty of $82,500. Further, the civil penalty assessed by the Chief ALJ was recommended by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act (Tr. 104-05; Complainant's Proposed Decision and Order at 8), and is in accord with USDA's sanction policy which is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Moreover, the $20,000 civil penalty assessed by the Chief ALJ against Respondent, is well within the range of sanctions in these kinds of cases. USDA consistently imposes significant sanctions for violations of the Animal Welfare Act and the Regulations and the Standards.[19]

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[19]*See, e.g.*, *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (imposing a $13,500 civil penalty and a 2-year disqualification from obtaining a license for 16 violations of the Animal Welfare Act and the Regulations and Standards); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189 (1998) (imposing a $200,000 civil penalty, permanent revocation of respondent's license, and permanent disqualification from obtaining a license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127 (1998) (imposing a $9,250 civil penalty and a 14-day suspension for 23 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419 (1997) (imposing a $7,500 civil penalty and a 40-day suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards) (Modified Order); *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997) (imposing a

(continued...)

The purpose of an administrative sanction is deterrence of future violations by the violator and other potential violators. The $20,000 civil penalty assessed by the Chief ALJ is necessary to deter Respondent and other potential violators from committing the same or similar violations.

Ninth, Respondent contends that the Chief ALJ "erred in disregarding the testimony of Respondent's son regarding the poodle, that the puppy in question was bred by David Zimmerman, Jr." (Respondent's Appeal Pet. ¶ 11).

I disagree with Respondent's contention that the Chief ALJ erred by disregarding testimony that a puppy was bred by David Zimmerman, Jr. The Chief ALJ concluded that Respondent operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the

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[19](...continued)
$13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act, the Regulations, and the Standards), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Lifting Stay Order and Decision and Order); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.)(Table), *cert. denied*, 476 U.S. 1108 (1986).

Regulations (9 C.F.R. § 2.1), based upon Respondent's sale of 33 dogs in commerce, for resale for use as pets. The identity of the person who bred a poodle, which Respondent sold in commerce for resale for use as a pet, is not relevant to this proceeding.

Tenth, Respondent contends that the Chief ALJ erred in disregarding the testimony of Respondent that he did not raise golden retrievers or samoyeds (Respondent's Appeal Pet. ¶ 12).

I disagree with Respondent's contention that the Chief ALJ erred by disregarding testimony that Respondent did not raise golden retrievers or samoyeds. The Chief ALJ concluded that Respondent operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1), based upon Respondent's sale of 33 dogs in commerce, for resale for use as pets. The identity of the person who raised the golden retrievers and samoyeds that Respondent sold in commerce for resale for use as pets is not relevant to this proceeding.

Eleventh, Respondent contends that the Chief ALJ "placed an impossible burden on Respondent to bring pet store owners from distant areas to refute the records that were introduced" (Respondent's Appeal Pet. ¶ 13).

I disagree with Respondent's contention that the Chief ALJ placed an impossible burden on Respondent. The Chief ALJ did not require Respondent to call any witnesses.

Twelfth, Respondent contends that "[t]he pet store records were hearsay and were not properly authenticated" (Respondent's Appeal Pet. ¶ 14).

I do not find that the Chief ALJ erred when he admitted pet store records into evidence. Neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence. The Administrative Procedure Act provides, with respect to the admission of evidence, that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence*—(1) *In general*. . . .

. . . .

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act and may be relied upon.[20] Responsible hearsay has long been admitted in the Department's

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[20]*See, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (stating that the only limit on hearsay evidence in an administrative context is that it bear satisfactory indicia of reliability; it is not the hearsay nature *per se* of the proffered evidence that is significant, it is the probative value, reliability, and fairness of its use that are determinative), *cert. denied*, 511 U.S. 1081 (1994); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991) (stating that hearsay statements are admissible in administrative hearings, as long as they are relevant and material); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (stating that hearsay evidence is admissible in administrative proceedings, so long as the admission of evidence meets the test of fundamental fairness and probity); *Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 846 (6th Cir. 1990) (stating that hearsay evidence is admissible in an administrative proceeding, provided it is relevant and material); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (stating that hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (stating that it is well established that hearsay evidence is admissible in administrative

(continued...)

administrative proceedings.[21]

Complainant contends that the Chief ALJ "erred in finding that the Animal Welfare Act does not provide authority to permanently disqualify a respondent from obtaining a license" (Complainant's Memorandum in Opposition to Respondent's Appeal and Complainant's Cross-Appeal ¶ II(A)). Respondent responds that if he is permanently barred from obtaining a license, he has no incentive to pay the civil penalty, and Complainant has not offered any authority to support the position that disqualification is authorized by the Animal Welfare Act (Respondent's Response to Complainant's Cross-Appeal at 1).

The Chief ALJ states that "there is no provision for [the sanction of disqualification] in the [Animal Welfare] Act"; therefore, even though Respondent voluntarily terminated his license, "it is appropriate to now revoke [Respondent's license] in order to reinforce the fact that a new license should not be issued to Respondent in the future" (Initial Decision and Order at 8).

I disagree with the Chief ALJ's holding that there is no authority under the Animal Welfare Act to disqualify a person from obtaining an Animal Welfare Act license. While there is no provision in the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, section 21 of the Animal Welfare Act (7 U.S.C. § 2151)[22]

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[20](...continued)
proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982) (stating that hearsay evidence is admissible in administrative proceedings and depending on reliability, can be substantial evidence).

[21]*In re Fred Hodgins*, 56 Agric. Dec. 1242, 1355 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *In re John T. Gray* (Decision as to Glen Edward Cole) 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

[22]Section 21 of the Animal Welfare Act provides, as follows:

§ 2151. Rules and regulations

(continued...)

authorizes the issuance of an order disqualifying an unlicensed violator from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards,[23] and there are numerous instances in which the Secretary of Agriculture has exercised the authority to disqualify unlicensed violators from becoming licensed under the Animal Welfare Act.[24]

Further, I find that the Chief ALJ erred by revoking an Animal Welfare Act license, which the Chief ALJ knew Respondent did not have at the time the Chief ALJ imposed the sanction of revocation. Under section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)), the Secretary of Agriculture may revoke the license of "any person *licensed* as a dealer, exhibitor, or operator of an auction sale" if the person "has violated or is violating" the Animal Welfare Act, the Regulations, or the Standards (emphasis added). I read section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) to mean that the Secretary of Agriculture may revoke the license of a violator who holds a license at the time the Secretary issues an order revoking the license. However, the Secretary of Agriculture cannot revoke the license of a violator who does not hold a license, even if that violator was a licensee under the Animal Welfare Act at the time he or she violated the Animal Welfare Act, the Regulations, or the Standards. My reading of section

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[22](...continued)

> The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. § 2151.

[23]*In re William Joseph Vergis*, 55 Agric. Dec. 148, 165 n.3 (1996); *In re James Petersen*, 53 Agric. Dec. 80, 86 (1994); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

[24]*See In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (disqualifying respondents from obtaining an Animal Welfare Act license for 2 years where respondents had previously voluntarily terminated their license and were not licensed on the date the disqualification order was issued); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (providing for a 7-day suspension of the respondent's Animal Welfare Act license, but stating that if the respondent is not licensed when the order is issued, the respondent is disqualified from becoming licensed under the Animal Welfare Act for 7 days); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (disqualifying the respondent from obtaining an Animal Welfare Act license for one year where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re James Petersen*, 53 Agric. Dec. 80 (1994) (prohibiting the respondents from obtaining an Animal Welfare Act license for one year where the respondents were not licensed when the violations occurred or on the date the disqualification order was issued).

19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) appears to be in accord with the common meaning of the word *revoke* which, in connection with a license, connotes "recalling" or "taking back" a license that is valid until it is revoked.[25] If

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[25]*See generally, e.g.*, Merriam Webster's Collegiate Dictionary 1003 (10th ed. 1997):

revocation . . . *n* . . . : an act or instance of revoking

. . . .

'revoke . . . *vt* . . . **1**: to annul by recalling or taking back : RESCIND < ≈ a will> **2** : to bring or call back

Black's Law Dictionary 1321-22 (6th ed. 1990):

Revocation. . . . The withdrawal or recall of some power, authority, or thing granted, or a destroying or making void of some will, deed, or offer that had been valid until revoked. . . .

See also Abrogation; Cancel; Cancellation; Rescind.

. . . .

Revoke. To annul or make void by recalling or taking back. To cancel, rescind, repeal, or reverse, as to revoke a license or will. *See also* Revocation.

The Oxford English Dictionary Vol. XIII. 837-38 (2d ed. 1991):

revocation . . . .

1. The action of recalling; recall (of persons); a call or summons to return. . . . .

. . . .

2. The action of revoking, rescinding, or annulling; withdrawal (of a grant, etc.).

. . . .

revoke . . . .

I. . . . **1.** To recall, bring back. *to* a (right) belief, way of life, etc.

. . . .

3. To recall; to call or summon back[.] . . .

(continued...)

a violator terminates his or her license prior to the issuance of an order, as occurred in this proceeding, the violator has no license that may be revoked (recalled or

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[25](...*continued*)

4. To annul, repeal, rescind, cancel.

Bouvier's Law Dictionary 2955 (3d ed. 1914):

REVOCATION. The recall of a power or authority conferred, or the vacating of an instrument previously made.

See also, e.g., *Commonwealth Trust Co. of Pittsburgh v. United States*, 96 F. Supp. 712, 717 (W.D. Pa. 1951) (citing with approval the definition of *revoke* in Webster's New International Dictionary (2d ed.): to recall; to annul by recalling or taking back; to repeal; to take back; to reassume; to recover; to draw back); *State v. Ayala*, 610 A.2d 1162, 1170 (Conn. 1992) (citing with approval the definition of *revoke* in Black's Law Dictionary (6th ed. 1990): to annul or make void by recalling or taking back; to cancel, rescind, repeal, reverse, as to revoke a license or will); *Armstrong v. Butler*, 553 S.W.2d 453, 456 (Ark. 1977) (stating that, as applied to a will, *to revoke* is to recall, cancel, set aside, annul, nullify, set at naught, declare null and void); *Halfmoon v. Moore*, 291 P.2d 846, 848 (Idaho 1955) (stating that the word *revoke* is defined by Funk & Wagnalls New Standard Dictionary as meaning "[t]o annul or make void by recalling or taking back; cancel; rescind; repeal; reverse; as to revoke a license"); *In re Braun's Estate*, 56 A.2d 201, 203 (Pa. 1948) (stating that *to revoke* means to recall, to take back, to repeal); *Glenram Wine & Liquor Corp. v. O'Connell*, 67 N.E.2d 570, 572 (N.Y. 1946) (stating that *to revoke* means to recall; citing the definition of *revoke* in the Oxford Dictionary: to annul, repeal, rescind, or cancel; citing the definition of *revocation* in Bouvier's Law Dictionary: the recall of a power or authority conferred or the vacating of an instrument previously made); *In re Barrie's Will*, 65 N.E.2d 433, 435 (Ill. 1946) (stating that *to revoke* is to recall, to cancel, or to set aside); *In re Walters' Estate*, 104 P.2d 968, 971 (Nev. 1940) (holding that: revocation of a will is an act done by the party who made the will, by which the party recalls the will; stating that *to revoke* is to recall, cancel, or set aside, and a *revocation* can only be done by the grantor, licensor, or maker of an instrument granting a right or privilege); *Ford v. Greenawalt*, 126 N.E. 555, 557 (Ill. 1920) (stating that: *to revoke* is to recall, to cancel, or to set aside, and a *revocation* can only be by the grantor, licensor, or maker of an instrument granting a right or privilege; a *revocation* is the annulment or cancellation of an instrument, act, or promise by or on behalf of the party who made it); *In re Morrow's Estate*, 54 A. 342, 343 (Pa. 1903) (stating that *to revoke* means to recall, to take back, to repeal); *In re Watt's Estate*, 32 A. 42, 44 (Pa. 1895) (stating that *to revoke* means to recall, to take back, to repeal); *Mayor of City of Houston v. Houston City St. Ry. Co.*, 19 S.W. 127, 130 (Tex. 1892) (stating that *revocation* means, *inter alia*, recalling of power); *Vogulkin v. State Bd. of Education*, 15 Cal. Rptr. 335, 337 (Cal. Dist. Ct. App. 1961) (stating that *revoke* means to annul or make void by recalling or taking back); *Touli v. Santa Cruz County Title Co.*, 67 P.2d 404, 406 (Cal. Dist. Ct. App. 1937) (stating that the word *revoke* literally means to call back; it is synonymous with to rescind, to recall, and to cancel); *Bradford v. First Nat. Bank*, 164 N.E. 494, 496 (Ind. Ct. App. 1929) (stating that *to revoke* is to repeal, to annul, to withdraw, to rescind, or to cancel); *Baker v. Fifth Avenue Bank of New York*, 232 N.Y.S. 238, 241 (N.Y. App. Div. 1928) (stating that *revocation* is defined in Bouvier's Law Dictionary as "the recall of a power or authority conferred or the vacating of an instrument previously made"); *Wilmington City Ry. Co. v. Wilmington & B.S. Ry. Co.*, 46 A. 12, 16 (Del. Ch. 1900) (indicating that *revocation* means recall).

taken back) by the Secretary of Agriculture.[26]

Thus, while the Secretary of Agriculture may revoke a current licensee's Animal Welfare Act license for violations which occurred while that person was not licensed, the Secretary of Agriculture cannot revoke a person's Animal Welfare Act license if the person is not licensed at the time the order revoking the license is issued. The appropriate sanction to be imposed against a person whose license would be revoked for violations of the Animal Welfare Act, the Regulations, or the Standards, but for the violator's being unlicensed, is disqualification from becoming licensed.

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations issued under the Animal Welfare Act, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act, without being licensed, as required. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $20,000, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and forwarded to:

Frank Martin, Jr.
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Ave., SW
Room 2014 South Building
Washington, DC 20250-1417

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[26]*But see, e.g.*, *Marmorstein v. New York State Liquor Authority*, 144 N.Y.S.2d 275, 277-78 (N.Y. Sup. Ct. 1955) (citing with approval the definition of the word *revoke* in *Glenram Wine & Liquor Corp. v. O'Connell*, 67 N.E.2d 570, 572 (N.Y. 1946), but stating that the fact that a license had already been surrendered did not bar the board from revoking the license after a hearing); *American Employers' Ins. Co. v. Radzeweluk*, 4 N.Y.S.2d 74, 75, (N.Y. Sup. Ct. 1938) (stating that the fact that a license had already been surrendered did not exonerate defendants from a previous violation nor prevent the subsequent revocation of the license because of such previous violation).

The certified check or money order shall be forwarded to, and received by, Frank Martin, Jr., within 65 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 98-0005.

3. Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act. The disqualification provisions of this Order shall become effective upon service of this Order on Respondent.

In re: JUDIE HANSEN.
AWA Docket No. 96-0048.
Decision and Order filed December 14, 1998.

Cease and desist order — Civil penalty — License suspension — Failing to remove and dispose of animal and food waste — Failing to allow APHIS inspector access to facilities — Failing to provide adequate housing — Failing to provide clean and safe primary enclosures — Preponderance of the evidence — Correction dates — Willful — Sanction policy — Jury trial — Venue — License to practice law — Esquire.

The Judicial Officer affirmed the decision by Judge Hunt (ALJ) that Respondent failed to comply with the Regulations by failing to allow an APHIS inspector access to her facility and records (9 C.F.R. § 2.126); that Respondent failed to comply with the Standards of care for animals: that Respondent failed to ensure that primary enclosures for kittens had an elevated resting surface (9 C.F.R. § 3.6(b)); that Respondent failed to keep the premises clean in order to protect animals from injury and to facilitate the required husbandry practices (9 C.F.R. § 3.131(c)); that Respondent failed to provide for the removal and disposal of animal waste, so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. §§ 3.1(f), .125(d)); that Respondent failed to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement (9 C.F.R. § 3.53(c)); that Respondent failed to keep the premises where housing facilities for dogs are located clean and to control weeds (9 C.F.R. § 3.11(c)); that Respondent failed to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation (9 C.F.R. § 3.1(e)); that Respondent failed to ensure that animal areas were free of clutter, including equipment, furniture, and stored material (9 C.F.R. § 3.1(b)); that Respondent failed to design and construct housing facilities for dogs so as to be structurally sound and to maintain the facilities in good repair, to protect animals from injury (9 C.F.R. § 3.1(a)); that Respondent failed to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors (9 C.F.R. § 3.131(a)); and that Respondent failed to construct indoor and outdoor housing facilities so as to be structurally sound, and to maintain them in good repair, to protect animals from injury and to contain them (9 C.F.R. § 3.125(a)). The Judicial Officer affirmed the ALJ's finding that the violations were willful. A violation is willful within the meaning of the Administrative Procedure Act if a person carelessly disregards statutory requirements. *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996). The Judicial Officer held that reliable hearsay evidence is admissible. *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971). Due process requires an impartial administrative

law judge, *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); however, the fact that the ALJ is an employee of the Department neither disqualifies the ALJ nor renders the hearing unfair. Further, the Judicial Officer held that the Department may combine investigative, adversarial, and adjudicative functions, as long as an agency employee engaged in the performance of investigative or prosecuting functions in the case does not participate in, or advise in, the decision (5 U.S.C. § 554(d)). The Judicial Officer also rejected Respondent's contention that she was entitled to a jury trial in the county in which the violations occurred under Article III, § 2 of the United States Constitution or the Sixth or Seventh Amendments. Instead, the Judicial Officer found that the place of the hearing was to be conducted with due regard for the convenience and necessity of the parties or their representatives (5 U.S.C. § 554(b)). The Department's sanction policy places great weight upon the recommendations of administrative officials who recommended an $8,000 civil penalty, a 30-day suspension, and a cease and desist order. However, the Judicial Officer modified the recommended sanction, as follows: the Judicial Officer issued a cease and desist order, assessed Respondent a civil penalty of $4,300, and suspended Respondent's license for 30 days.

Colleen A. Carroll, for Complainant.
Judie Hansen, Pro se, and Greg Bommelman, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on May 6, 1996.

On July 1, 1996, Judie Hansen, d/b/a Wild Wind Petting Zoo [hereinafter Respondent], filed an Answer to the Complaint. On July 11, 1997, Complainant filed Motion to Amend Complaint requesting the addition of paragraph 8 to the Complaint. Also, on July 11, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] granted Complainant's Motion to Amend Complaint, but waived the requirement that Respondent file a pre-hearing written answer to the Amended Complaint (Order Granting Motion to Amend Complaint).

The Complaint and the Amended Complaint allege that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards.

The ALJ presided over a hearing on July 23, 1997, in Minot, North Dakota. Colleen Carroll, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Respondent represented herself, with assistance from her partner, Gregory Bommelman. On October 10, 1997, Complainant filed Complainant's Proposed Findings of Fact,

Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]. On January 30, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a $3,000 civil penalty; and suspending Respondent's Animal Welfare Act license for 30 days.

The Hearing Clerk served the Initial Decision and Order upon Respondent on February 4, 1998, by certified mail,* accompanied by the Hearing Clerk's January 30, 1998, letter advising Respondent to file any appeal within 30 days of service, or the Initial Decision and Order would be final. Respondent requested, and I granted, an extension of time to March 20, 1998, in which to file an appeal (Informal Order of March 2, 1998).

On March 24, 1998, Respondent filed Motion to Arrest the Decision [hereinafter Respondent's Appeal], which I infer to be Respondent's appeal to the Judicial Officer, to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).** But, since Respondent's Appeal was due March 20, 1998, it is late-filed.

On April 14, 1998, Respondent filed Motion for Dismissal. On May 8, 1998, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order, which contains Complainant's eight arguments in the nature of a cross-appeal [hereinafter Complainant's Response and Cross-Appeal], and on May 12, 1998, Complainant filed Complainant's Response to Respondent's Motion for Dismissal. On October 7, 1998, Respondent filed Respondent's Response to Complainant's Response and Cross-Appeal, and on October 15, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Dismissal and decision.

Respondent's Motion for Dismissal is dismissed. The Rules of Practice provide that "[a]ny motion will be entertained other than a motion to dismiss on the

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*See Domestic Return Receipt for Article Number P 093 041 165.

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

pleading" (7 C.F.R. § 1.143(b)).*** Moreover, Respondent's Motion for Dismissal is redundant because it raises issues that Respondent raised in Respondent's Appeal and are addressed in this Decision and Order, *infra*, in response to Respondent's Appeal.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ in 20 out of the 23 violations the ALJ found out of the 33 alleged violations in the Complaint and Amended Complaint. I also agree with the ALJ that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards. Therefore, pursuant to the Rules of Practice (7 C.F.R. § 1.145(i)), I am adopting the Initial Decision and Order as the final Decision and Order, with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law.

Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

***See In re Lindsay Foods, Inc.*, 56 Agric. Dec. 1643, 1650 (1997) (Remand Order) (stating that 7 C.F.R. § 1.143(b)(1) prohibits administrative law judges and the judicial officer from entertaining a motion to dismiss on the pleading); *In re Far West Meats*, 55 Agric. Dec. 1045, 1049 (Clarification of Ruling on Certified Questions) (stating that 7 C.F.R. § 1.143(b)(1) prohibits an administrative law judge from entertaining a motion to dismiss on the pleading); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414 (1991) (Remand Order) (holding that the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (stating that the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and that under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading). *Cf. In re Don Van Liere*, 34 Agric. Dec. 1641 (1975) (Order of Dismissal) (stating that the purpose of 9 C.F.R. § 202.10(b), which provides that, in proceedings under the Packers and Stockyards Act, 1921, as amended and supplemented, any motion will be entertained "except a motion to dismiss on the pleadings," is to prevent a respondent from filing a motion to dismiss on the pleadings).

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes[.]

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not[.]

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.]

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period

of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe.

§ 2141. Marking and identification of animals

All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe: *Provided*, That only live dogs and cats need be so marked or identified by a research facility.

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

7 U.S.C. §§ 2132(f), (h); 2133; 2140; 2141; 2146(a).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. . . .

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. . . .

. . . .

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. . . .

. . . .

SUBPART E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

(a) A class "A" dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats [footnote omitted], or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

(2) Live puppies or kittens, less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

. . . .

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

. . . .

(c) A class "C" exhibitor shall identify all live dogs and cats under his or her control or on his or her premises, whether held, purchased, or otherwise acquired:

(1) As set forth in paragraph (b)(1) or (b)(3) of this section[.]

. . . .

(d) Unweaned puppies or kittens need not be individually identified as required by paragraphs (a) and (b) of this section while they are maintained as a litter with their dam in the same primary enclosure, provided the dam has been individually identified.

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and
(vii) The number of animals in the shipment.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

(a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, or stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

(f) *Drainage* and waste disposal. Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and

disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

. . . .

§ 3.2 Indoor housing facilities.

. . . .

(d) *Interior surfaces.* The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels).

§ 3.3 Sheltered housing facilities.

. . . .

(e) *Surfaces.* (1) The following areas in sheltered housing facilities must be impervious to moisture:

(i) Indoor floor areas in contact with the animals;

(ii)Outdoor floor areas in contact with the animals, when the floor areas are not exposed to the direct sun, or are made of a hard material such as wire, wood, metal, or concrete; and

(iii) All walls, boxes, houses, dens, and other surfaces in contact with the animals.

. . . .

§ 3.4 Outdoor housing facilities.

. . . .

(b) *Shelter from the elements.* Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely.

. . . .

§ 3.6 Primary enclosures.

. . . .

(b) *Additional requirements for cats.*

. . . .

(4) *Resting surfaces.* Each primary enclosure housing cats must contain a resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably. The resting surfaces must be elevated, impervious to moisture, and be able to be easily cleaned and sanitized, or easily replaced when soiled or worn. Low resting surfaces that do not allow the space under them to be comfortably occupied by the animal will be counted as part of the floor space.

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.9 Feeding.

. . . .

(b) Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize contamination by excreta and pests, and be protected from rain and snow. Feeding pans must be either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized. . . .

. . . .

§ 3.11 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent the soiling of dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. . . .

. . . .

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

(d) *Pest control.* An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

. . . .

SUBPART C—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT AND TRANSPORTATION OF RABBITS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.53 Primary enclosures.

All primary enclosures for rabbits shall conform to the following requirements:

. . . .

(c) *Space requirements for primary enclosures acquired on or after*

August 15, 1990.

(1) Primary enclosures shall be constructed and maintained so as to provide sufficient space for the animal to make normal postural adjustments with adequate freedom of movement.

(2) Each rabbit housed in a primary enclosure shall be provided a minimum amount of floor space, exclusive of the space taken up by food and water receptacles[.] . . .

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

. . . .

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. . . .

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. . . .

. . . .

(c) *Housekeeping.* Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

9 C.F.R. §§ 1.1; 2.1(a)(1), .50(a), (b)(1), (b)(3), (c)(1), (d), .75(a)(1)(i)-(ix), (b)(1)(i)-(vii), .100(a), .126(a); 3.1(a)-(b), (e)-(f), .2(d), .3(e)(1)(i)-(iii), .4(b), .6(b)(4), .9(b), .11(a), (c)-(d), .53(c)(1)-(2), .125(a), (d), .131(a), (c) (footnotes omitted).

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

. . . .

Statement of the Case and Law

Respondent . . . [was] licensed by [the Animal and Plant Health Inspection Service [hereinafter APHIS]] as a [class "C"] animal exhibitor from 1992 to 1996 [(Tr. 242-45; CX 1-4, 6)]. In 1996, [Respondent] changed her license from [class "C"] exhibitor to [class "A"] dealer [(breeder)**** (Tr. 245; CX 6, 22). Respondent] does business as the Wild Wind Petting Zoo [(Tr. 26-27, 245; CX 4). Respondent] has exhibited . . . animals to the public in North Dakota, South Dakota, and Minnesota (Tr. 2[58-]59).

The APHIS inspector for [Respondent's] facility has been Mr. Donovan Borchert [(Tr. 13, 17)]. The Complaint in this proceeding alleges that [Respondent] violated the Animal Welfare Act and the Regulations and Standards for the care of animals [as revealed] at inspections conducted by [inspector] Borchert on June 19, August 8, and October 25, 1995 [(Compl. ¶¶ 1-7)]. The Amended Complaint alleges that [Respondent also] refused to allow [inspector] Borchert to inspect her facility on June 11, 1997 [(Amended Compl. ¶ 8)].

[Respondent's] alleged violations of the Regulations and Standards are based

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****The class of license held can be determined by looking at the letter designation in the license number, *viz.*, Respondent's license number as of October 1996 was 45-A-0017, indicating that Respondent was a class "A" dealer.

almost entirely on the findings contained in [inspector] Borchert's inspection reports. [Inspector Borchert] testified that he could not remember "a whole lot" about the actual inspections (Tr. 24[-25], . . ., 29).

The factual findings necessary to support the conclusion that a respondent violated the Regulations [and Standards] must be based on reliable, probative, and substantial evidence. Substantial evidence is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The findings in an APHIS inspector's report may constitute substantial evidence. *In re Fred Hodgins*, 56 Agric. Dec. [1242, 1294-95 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997)]. However, the probative value of a report depends on the extent to which the inspector documents the facts supporting [the inspector's] findings. . . .

The purpose of the Animal Welfare Act is to [ensure] the humane care and treatment of animals regulated under the [Animal Welfare] Act (7 U.S.C. §§ 2131[-2159]). [Animals regulated by the Animal Welfare Act] include animals [sold to or] exhibited to the public. . . .

The [Animal Welfare] Act and Regulations require that [dealers and] exhibitors be licensed (7 U.S.C. § 2133; 9 C.F.R. § 2.1[(a)(1))]. Section 2.100(a) of the Regulations provides that "[e]ach dealer [and] exhibitor . . . shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals" (9 C.F.R. § 2.100(a)). Complainant can seek [civil] penalties and the suspension or revocation of a dealer's [or exhibitor's] license for a violation of the [Regulations or S]tandards. Complainant has the burden of proving a violation by a preponderance of the evidence. *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993)[, *aff'd*, 34 F.3d 1301 (7th Cir. 1994)].

Violations

1. Paragraph 5 of the Complaint alleges that [on October 25, 1995, Respondent] violated section 2.50(c) of the Regulations (9 C.F.R. § 2.50(c)) by failing to identify dogs under her control.[1] However, section 2.50(d) [of the Regulations (9 C.F.R. § 2.50(d)) provides that] unweaned puppies [are not required to be individually identified] while they are maintained as a litter with their dam in the same primary enclosure, provided the dam has been individually identified.

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[1]The violations alleged in the . . . Complaint are discussed in the order in which Complainant . . . presented them in Complainant's Brief.

. . . .

[Inspector] Borchert's October 25, 1995, inspection report, on which the alleged violation of [9 C.F.R. §] 2.50 is based, [states] only that "new dogs and puppies kept back for breeding need to be identified[.] Correct by 10-30-95[.]" (CX 3 [at 2], item 7, III, #45.) It does not state whether the puppies were weaned or not.

[Respondent's] testimony regarding dog identification is as follows:

[BY MS. CARROLL:]

Q. Okay. And you do have dogs that do not always wear their tags. Is that correct?

[BY RESPONDENT:]

A. I try to put the tags on them during the day, but I -- I just can't have a collar and a tag on them at night because they -- several of them sleep on the bed and they get up and they shake and it wakes me up and I have a hard time getting back to sleep. So I'll take them off at night, sometimes I don't put them back on in the daytime.

Q. And on an inspection, during the day, Mr. Borchert found puppies that did not have collars.

A. Those were dogs . . .

Q. Is that correct?

A. Yes. Those were poodles that I had recently groomed. I hadn't washed them yet and that's when I was using those paper collars that you write on. I had taken off the old collars, groomed the puppies and I ran out of time that day so I put them back in the pen and hadn't put their tags back on them because I was going to wash them the next day. You know, there I'd just go through a whole bunch more tags. These puppies are all identified with numbers on a health card that's on the front of the pen.

Q. They weren't wearing their tags though. You agree?

A. They weren't wearing the tags, but they were identified.

Tr. 276-77.

Complainant contends that [Respondent's] testimony constitutes an admission that [Respondent] did not identify her dogs.

[Respondent's] testimony, however, is not that she failed to identify her dogs, but that their tags were temporarily removed at night, or for grooming. [While section 2.50(c) of the Regulations (9 C.F.R. § 2.50(c)) does not provide any exception from the identification requirement for dogs being groomed and it applies [during] the night as well as [during] the day, the record supports a finding that the "new dogs" referred to in inspector Borchert's report (CX 3) are puppies.] . . . [T]he record does not show, and [inspector] Borchert's report [(CX 3)] does not [state], that the[se puppies] were weaned and thereby required to be identified. Complainant has failed to meet its burden of proving that [Respondent] failed to identify her dogs, in violation of section 2.50(c) of the Regulations [(9 C.F.R. § 2.50(c))].

2. Paragraph 3 of the Complaint alleges that on June 19[, 1995,] and October 25, 1995, [Respondent] failed to [make,] keep, and maintain required records, in violation of section[] 2.75(a) and (b) of the Regulations [(9 C.F.R. § 2.75(a), (b))].

Section[] 2.75(a) and (b) [of the Regulations (9 C.F.R. § 2.75(a), (b))] requires a dealer and exhibitor to make, keep, and maintain records or forms which fully and correctly disclose information concerning animals purchased or otherwise acquired, owned, held, or otherwise in the exhibitor's or dealer's possession or under his or her control.

[Inspector] Borchert's inspection report states that on June 19, 1995, "(1) sales at pet zoo's [sic] are not being made (2) puppies must have ID numbers and item 7 and 11 and breed placed on sales records (3) add porcupine to records[.]" (CX 1 [at 3, item 7, IV,] #46.) [Inspector Borchert's] report for October 25, 1995, states that "items #7 and 9-13 old 7006 and 4A new 7006 are not being filled out[.] Correct by 10-26-95[.]" (CX 3 [at 2, item 7, III,] #46.)

[Inspector] Borchert testified that [Respondent's] reports were "not being completely filled out," but that he could not remember what he meant when he referred to items 7 and 11 (Tr. 34, 77).

[Respondent] admitted that some of her forms and reports were not always completely filled out (Answer at 11-14). [Respondent blamed her failure to complete forms and reports on the] . . . difficulty [she had] obtaining information from buyers. [Respondent] also said that [inspector] Borchert insisted that she put a buyer's telephone number on the form even though [the buyer's telephone number is] not required by the Regulations.

. . . .

[The record is not sufficiently clear to determine the nature of the information that Respondent failed to include in her records and whether the information that Respondent failed to include in her records was required to be kept by 9 C.F.R. § 2.75(a) and (b). Therefore, paragraph 3 of the Complaint is dismissed.]

3. Paragraph 4(c) of the Complaint alleges that on [June 19, 1995, and] October 25, 1995, [Respondent] failed to keep her facility in good repair so as to protect her animals from injury. Section 3.1(a) of the Standards requires that "[h]ousing facilities for dogs and cats must be designed and constructed so that they are structurally sound[,]" "must be kept in good repair," and "must protect the animals from injury" [(9 C.F.R. § 3.1(a)].

[Inspector] Borchert's October 25, 1995, inspection report states: "(1) ground wire along sides and fronts of runs needs to be covered or sharp points trimed [sic] off and wire put down so dogs can not become entangled[.] Correct by 11-25-95[.]" (CX 3 [at 2, item 7, III], #10.)

[Respondent] did not deny that the wire had sharp points, but contended that [the sharp points] would not injure the dogs because the wire was pushed into the ground and covered with gravel (Tr. 266).

Nevertheless, wire with sharp points, even if covered with gravel, reflects a need for repair and a potential source of injury to animals. It constitutes a violation of section 3.1(a) [of the Standards (9 C.F.R. § 3.1(a))].

4. Paragraph 4(b) of the Complaint alleges that [on June 19, 1995, and October 25, 1995, Respondent] failed to ensure that the dog areas were free of clutter, including equipment, furniture, and stored material, in violation of section 3.1(b) of the Standards [(9 C.F.R. § 3.1(b))].

. . . .

[Inspector] Borchert's June 19, 1995, [inspection] report [states:] "(1) all open feed sacks and dishes or pails setting [sic] around outside of enclosures must be placed in closed containers with lids (2) feed supply of baged [sic] feed stored on top of enclosures must not be kept in animal area[.] Correct by 6-30-95[.]" (CX 1 [at 2, item 7, III], #13.)

[Inspector] Borchert's August 8[, 1995, inspection] report . . . [also lists a violation of section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)), but Complainant did not include the August 8, 1995, violation in the Complaint or Amended Complaint.

Inspector Borchert's] October 25[, 1995, inspection] report states:

> (1) new welp [sic]/kennel area in garage or shop needs to have all machinery parts, tools and supplys [sic] removed and kept back at least 6 ft. from enclosures inside and discarded matter, old wood, scrap metal and

pickup box around outside runs.

CX 3 [at 3, item 7, IV], #11.

[Respondent] said the clutter was in the "shop area" and admitted that the area needed cleaning, but contended that it did not harm the animals (Tr. 265).

[The evidence supports a finding that on June 19, 1995, and October 25, 1995, Respondent failed] to keep the housing facility free from clutter, [in] violation of section 3.1(b) [of the Standards (9 C.F.R. § 3.1(b))].

5. Paragraph 4(a) of the Complaint alleges that on June 19[, 1995,] and October 25, 1995, [Respondent] failed to store supplies of food and bedding [in a manner that protects the supplies from spoilage, contamination, and vermin infestation, in violation of] section 3.1(e) of the Standards [(9 C.F.R. § 3.1(e))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report [states]:

> (1) All open feed sacks and dishes or pails setting [sic] around outside of enclosures must be placed in closed containers with lids (2) Feed supply of baged [sic] feed stored on top of enclosures must not be kept in animal area[.] Correct by 6-30-95[.]

CX 1 [at 2, item 7, III], #13.

[Inspector] Borchert's October [25, 1995, inspection] report states:

> (1) Bottels [sic] of bleach and toxic substances around enclosure in shop area must be stored in cabinets with doors[.] Correct by 11-25-95[.]

CX 3 [at 2, item 7, III], #13.

[Respondent] said the bottle of bleach had been diluted, but admitted that there were empty feed sacks and that a food container was left open on one occasion (Tr. 260, 274-75).

[Respondent's] failures [on June 19, 1995, and October 25, 1995,] to properly store supplies [are] violations of section 3.1(e) [of the Standards (9 C.F.R. § 3.1(e))].

6. Paragraph 6(a) of the Complaint alleges that on August 8[, 1995,] and October 25, 1995, [Respondent] failed to [provide for the regular and frequent collection, removal, and disposal of animal waste and bedding, in violation of] section 3.1(f) of the [S]tandards [(9 C.F.R. § 3.1(f))].

. . . .

[Inspector] Borchert's August 8[, 1995, inspection] report states:

(1) Sack of old soilded [sic] newspapers and soild [sic] newspapers laying down in front of enclosures must be placed in a closed container with a tight fitting lid and the container must be leakproof[.] Correct by 8-10-95[.]

CX 2 [at 2, item 7, III], #14.

[Inspector Borchert's] October 25[, 1995, inspection] report states:

(1) Open 5 gal. pail holding feces at end of dog runs must be covered or removed.

CX 3 [at 3, item 7, IV], #14.

[Respondent] testified that a worker was collecting soiled newspapers as he was cleaning the enclosures and had placed them on the ground to answer the telephone before removing them. She said they were on the ground for no more than 5 minutes (Tr. 280).

As for the open pail of feces, she said a worker was using the pail to clean the cages and had left it on the ground to accompany [inspector] Borchert on his inspection (Tr. 211[-12]).

The soiled newspapers did not constitute a violation, as they occurred as part of the regular cleaning of the facility. [Respondent], however, . . . violated [section] 3.1(f) of the [S]tandards [(9 C.F.R. § 3.1(f)) on October 25, 1995,] by leaving the pail of feces temporarily uncovered . . . . [Section 3.1(f) of t]he [S]tandards requires a container of feces to be covered "at all times." . . . .

7. Paragraph 2(a) of the Complaint alleges that [on June 19, 1995, and August 8, 1995, Respondent] failed to [ensure that the floors and walls of indoor housing facilities were] impervious to moisture, as required by sections 3.2(d) and 3.3(e) of the [S]tandards [(9 C.F.R. §§ 3.2(d), .3(e))].

[Inspector] Borchert's June [19, 1995, inspection] report states:

All raw and clawed or chewed wood throughout exposed to dogs must be sealed.

CX 1 [at 3, item 7, IV], #16 & #20.

[Inspector Borchert's] August [8, 1995, inspection] report states:

(1) All raw wood and chewed siding in enclosures on east end of house and all raw wood on enclosures and welp [sic] boxes in enclosures needs [sic] to be sealed so it is impervious to moisture. (2) Dogs in house must be moved to a facility 10-15 dogs.

CX 2 [at 3, item 7, IV], #16 & #20.

[Respondent] testified that she painted all surfaces with Thompson's Water Seal, a colorless water sealer (Tr. 211).

[Inspector] Borchert did not explain how he determined that the surfaces, even those that were clawed or chewed, were not impervious to moisture. He said that the only way to test the surface is by spraying it with water and that he did not spray water on the surface. (Tr. [119-]20, 194.) I find that Complainant has not met the burden of proving that [Respondent] violated sections 3.2(d) and 3.3(e) of the [S]tandards [(9 C.F.R. §§ 3.2(d), .3(e)), as alleged in paragraph 2(a) of the Complaint].

8. Paragraph 1(a) of the Complaint alleges that [on June 19, 1995, Respondent] did not provide sufficient space for dogs in an out[door] facility[, in violation of s]ection 3.4(b) of the [S]tandards [(9 C.F.R. § 3.4(b))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states that "2 x 4 shelter in pen #6 housing 6 poodles must be enlarged to hold all dogs comfortably and protect them[.] Correct by 6-30-95[.] Additional shelter provided 6-19-95." (CX 1 at 2, item 7, III], #23.)

[Respondent] said that the enclosure contained two dogs, but that she had allowed her four house dogs to go into the outdoor pen for "a few hours" the day of the inspection . . . [and that] the dogs could find protection under the deck and ramp, as well as in the shelter (Answer at 1).

[Complainant did not prove that the shelter structures were not large enough to allow each animal in the shelter to sit, stand, lie in a normal manner, and turn about freely, in violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b))].

[9]. Paragraph 1(b) of the Complaint alleges that [on June 19, 1995, Respondent] housed kittens in a primary enclosure that lacked an elevated resting surface[, in violation of s]ection 3.6(b) of the [S]tandards [(9 C.F.R. § 3.6(b))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states:

Enclosure housing kittens must have a[n] elevated rest area placed in the enclosure large enough to hold all animals in the enclosures[.] Correct by 6-30-95[.]

CX 1 [at 2, item 7, III,] #30.

[Respondent] said that a neighbor had given the kittens to her to find a home for them and that she had put them in a "traveling" pen. She said she was not aware of the requirement for an elevated resting [surface] for the kittens and she had found a home for them the following day. (Answer at 2.)

Whether [Respondent] was aware of the requirement or not, as an animal exhibitor, [Respondent is] charged with knowing the requirements for the care of animals. Her failure to provide the kittens with an elevated resting [surface] is a violation of section 3.6(b) [of the Standards (9 C.F.R. § 3.6(b))].

10. Paragraph 1(c) of the Complaint alleges that [on June 19, 1995, Respondent] failed to keep non-disposable food receptacles clean and sanitized[, in violation of s]ection 3.9(b) [of the Standards (9 C.F.R. § 3.9(b))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states only that "Dirty feed receptacles must be kept clean[.] Correct by 6-20-95[.]" (CX 1 [at 3, item 7, III], #34.) The report does not state that the alleged dirt was due to earth, soil, excreta, or pests.

[Respondent] said that, except for this one incident, she had never been charged with a dirty receptacle and that in this instance [inspector] Borchert was not referring to a food utensil, but to a water receptacle which, in any event, was not dirty, but which had mineral deposits caused by hard water [(Tr. 282-83; Answer at 3)].

It is not shown that mineral deposits constitute a dirty receptacle. I find that Complainant has failed to show by a preponderance of the evidence that [Respondent] violated section 3.9(b) [of the Standards (9 C.F.R. § 3.9(b))].

11. Paragraph 1[(f)] of the Complaint alleges that [on June 19, 1995, Respondent] failed to remove excreta from . . . primary enclosure[s for dogs, in violation of s]ection 3.11(a) [of the Standards (9 C.F.R. § 3.11(a))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states:

> Chicken and ducks housed in with dogs in enclosures beside dogs with large feces accumulated [sic] must be moved to prevent pest problems[.] Correct by 6-25-95[.]

CX 1 [at 3, item 7, III], #36.

[Inspector] Borchert's testimony did nothing to clarify this vague finding. He said he could not remember the matter (Tr. 153-56). [Respondent] said chickens, ducks, and dogs were not housed together and that the ducks caused their wood

chip bedding to get wet, causing it to look like feces [(Tr. 283-84). . . .

. . . .

. . . I conclude that Respondent rebutted Complainant's evidence that Respondent violated section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) on June 19, 1995, as alleged in paragraph 1(f) of the Complaint, and therefore paragraph 1(f) of the Complaint is dismissed.]

12. Paragraph 2(d) of the Complaint alleges that [on June 19, 1995, and August 8, 1995, Respondent] failed to keep the premises clean and to control weeds[, in violation of s]ection 3.11(c) of the [S]tandards [(9 C.F.R. § 3.11(c))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report states:

> (1) pallets and supplys [sic] stored around dog facility must be removed from aginst [sic] house and stored neatly away to prevent pest problems. Correct by 6-25-95[.]

CX 1 [at 3, item 7, III], #37.

[Inspector Borchert's] August [8, 1995, inspection] report states:

> (1) tall weeds around enclosures on east end of house need to be mowed or removed[.] Correct by 8-15-95[.]

CX 2 [at 2, item 7, III], #37.

[Respondent] said that the pallets and other material were due to construction activities at her facility and that they were kept away from the animals so as not to be a danger to them [(Answer at 9)]. As for the weeds, she said they were only "pig weeds" which had not been cut because her mower was broken, but that she cut the weeds after the inspection [(Tr. 162; Answer at 10)].

[Respondent's] failure to keep the facility clean and her failure to cut the weeds constitute violation[s] of section 3.11(c) [of the Standards (9 C.F.R. § 3.11(c))].

13. Paragraph 1(e) of the Complaint alleges that [on June 19, 1995, Respondent] failed to maintain an effective pest control program[, in violation of] section 3.11(d) of the [S]tandards [(9 C.F.R. § 3.11(d))].

. . . .

[Respondent] said that this was the only occasion when there were "a lot of flies" during an inspection. She said she promptly removed the dogs and sprayed the enclosure with a kennel-approved spray she kept in the enclosure. She said she also uses baits and traps and has turkeys to eat flies and bugs. [(Answer at 4-5.)]

An "effective" program under section 3.11(d) [of the Standards (9 C.F.R. § 3.11(d)) does not require the complete elimination of pests, such as flies, which is probably impossible to achieve, but a program to "reduce" contamination by pests. The appearance of flies on only one occasion does not necessarily establish that [Respondent] lacked an effective pest control program. The action she took also reflects the maintenance of such a program. [Respondent] did not violate section 3.11(d) [of the Standards (9 C.F.R. § 3.11(d))].

14. Paragraph 2(c) of the Complaint alleges that [on June 19, 1995, and August 8, 1995, Respondent] failed to provide sufficient space for rabbits in their primary enclosure, as required by section 3.53(c) of the [S]tandards [(9 C.F.R. § 3.53(c)),[2] which] . . . sets forth in tables the minimum space for rabbits in inches according to the weight of the rabbits and whether they are housed in groups, as individuals, or as nursing females.

In [the] June [19, 1995,] inspection report, [inspector] Borchert found that:

> 11 rabbits, 7 small and 4 large, house[d] in an enclosure measuring 2 x 4 ft. does not provide the required space need for each animal house in the enclosure [-] small rabbits need 1.5 sq. ft. each and large rabbits 3 sq. ft. - correct by 6-25-95[.]

CX 1 [at 3, item 7, III], #30.

The appropriate table in section 3.53(c) [of the Standards (9 C.F.R. § 3.53(c))] requires that each individual small rabbit have 1.5 square feet of floor space and each larger (up to 8.8 pounds) rabbit have at least 3 square feet. An enclosure that measures 2 feet by 4 feet is too small for th[e] number [and size] of [rabbits identified on inspector Borchert's June 19, 1995, inspection report].

[Respondent] contends that [inspector] Borchert used the wrong table to calculate the space requirements. She states that the table for rabbits in groups should be used. [(Answer at 8-9.)]

Even using that table, however, the enclosure was still too small for the number of [rabbits] it contained. The [S]tandards require that a group of 11 rabbits housed together must be in an enclosure that provides at least 432 square inches of space for each [rabbit]. For this group, each of the seven small rabbits would be entitled to one square foot of space, and each of the four large rabbits would be entitled to two square feet. Therefore, the enclosure was too small for these [rabbits.

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[2][At the hearing, the ALJ granted Complainant's motion, without objection, to substitute 9 C.F.R. § 3.53(c) in place of 9 C.F.R. § 3.53(b) in paragraph 2(c) of the Complaint (Tr. 187-89).]

Inspector] Borchert also found in his August [8, 1995, inspection] report that [Respondent] housed 8 rabbits in an 8-square foot enclosure, 5 rabbits in another 8-square foot enclosure, and 7 rabbits in a 6.25-square foot enclosure [(CX 2 at 3, item 7, IV, #30)]. These enclosures do not meet the minimum space requirements.

[Respondent] contended that some of the rabbits are not subject to the [Animal Welfare] Act because they are "meat" rabbits (Tr. 189-93). However, there was nothing to distinguish those from the exhibition or breeding rabbits housed in the enclosures.

Accordingly, I find that [Respondent] violated section 3.53(c) [of the Standards (9 C.F.R. § 3.53(c))].

15. Paragraph 7 of the Complaint alleges that [on June 19, 1995, August 8, 1995, and October 25, 1995, Respondent] failed to maintain facilities in good repair for the protection of the animals[, in violation of] section 3.125(a) of the [S]tandards [(9 C.F.R. § 3.125(a))].

. . . .

The inspection reports [for] June [19, 1995,] and August [8, 1995,] refer to a cougar. The June [19, 1995, inspection] report states:

> Cougar is now being house[d] in a school bus with no perimeter fence and the back bus door is left open so one can walk right in and up to cougar. A door to prevent this must be used.

[CX 1 at 3, item 7, IV, #10, #26.]

The August [8, 1995, inspection] report states:

> Cougar is now being house[d] in a school bus with no perimeter fence and the back door of the bus is left open so one can walk right up to the cougar on his chain. A perimeter fence must be placed around the school bus enclosure.

[CX 2 at 3, item 7, IV, #10, #26.]

The June [19, 1995,] and October [25, 1995, inspection] reports refer to enclosures for ferrets. The June [19, 1995, inspection] report states:

> (1) Floor wire in ferret enclosure is broken and rusted off leaving sharp points exposed. Also this floor wire is 1 x 1½ in holes which are to [sic] large for ferrets housed in the enclosure to walk normally[.] Correct by 6-25-95[.]

[CX 1 at 2, item 7, III, #10.]

The October [25, 1995, inspection] report states:

(1) Nails around entrance to ferret enclosure inside shelter need to be removed[.] Correct by 10-26-95[.]

[CX 3 at 2, item 7, III, #10.]

[Respondent] did not deny these allegations. [Respondent] said that the cougar had been moved at inspector Borchert's recommendation from being chained in a pen to the bus [(Answer at 18). Respondent] said the bus is normally locked but had been left open to allow a person to take pictures of the animal [(Tr. 275). Respondent] said that the ferret cage did not have nails, but had exposed heads, which she removed [(Answer at 17)].

[Respondent] violated section 3.125(a) of the [S]tandards [(9 C.F.R. § 3.125(a))] by failing to maintain the facility so as to protect the animals from injury.

16. Paragraph 2(b) of the Complaint alleges that [on June 19, 1995, and August 8, 1995, Respondent] failed to remove and dispose of animal waste, in violation of section 3.125(d) of the [S]tandards [(9 C.F.R. § 3.125(d))].

. . . .

[Inspector] Borchert's June [19, 1995,] inspection report states: "manure piles around barn need to be removed - correct by 7-19-95" (CX 1 [at 2, item 7, III,] #14), and the August [8, 1995, inspection] report states: "manure pile in front of barn needs to be removed 5-6 dump trucks full - correct by 9-8-95" (CX 2 [at 3, item 7, III], #14).

[Respondent] said this pile was horse manure and straw, which was largely decomposed, and presented no health hazard to her animals. [Respondent] also said she has moved the pile. (Answer at 8.)

Nevertheless, manure [is] animal waste [and Respondent is required by] the [S]tandards [to provide for removal and disposal of animal waste. Respondent] violated section 3.125(d) [of the Standards (9 C.F.R. § 3.125(d))] by maintaining the manure pile at the time of the [June 19, 1995, and August 8, 1995,] inspection[s].

17. Paragraph 6(b) of the Complaint alleges that [on August 8, 1995, and October 25, 1995, Respondent] violated section 3.131(a) of the [S]tandards [(9 C.F.R. § 3.131(a))] by failing to remove excreta from the ferret enclosure. . . .

. . . .

Inspector Borchert's August [8, 1995, inspection] report [states] that "ferret

enclosure needs feces accumulations removed - correct by 8-15-95" (CX 2 [at 3, item 7, III], #36) and the October [25, 1995, inspection] report likewise [states] that "ferret and enclosures needs feces accumulations removed. Item #36 corrected in my presence." (CX 3 [at 3, item 7, IV], #36.)

[Respondent] did not deny the accumulation of feces, but said this problem was due to [inspector] Borchert requiring her to put the ferrets in a pen with smaller screening [(Answer at 21). Respondent] said she had had no problem for years with the pen she had been using, but that the one required by [inspector] Borchert "proved impossible to keep clean" and that she ended up having to sell all her ferrets. (Answer at 21[-22].)

Even though [Respondent] may have been in an inspector-created dilemma, Respondent's failures to remove the accumulation of feces in the ferret enclosure were violation[s] of section 3.131(a) [of the Standards (9 C.F.R. § 3.131(a))].

18. Paragraph 1(d) of the Complaint alleges that [on June 19, 1995, Respondent] did not keep her facilities clean and in good repair, in violation of section 3.131(c) of the [S]tandards [(9 C.F.R. § 3.131(c))].

. . . .

[Inspector] Borchert's June [19, 1995, inspection] report [states] that:

> Alleyway of barn needs empty feed sacks cleaned up and feed barrels straightened up and covers replaced[.] Correct by 6-20-95[.]

CX 1 [at 3, item 7, III], #37 housekeeping 3.131(c).

[Respondent] protested in her Answer that:

> d. This is not correct - the premises was <u>not</u> dirty - there were <u>empty</u> feed sacks chicken feed, hog pellets etc. in the alleyway of the barn - it needed sweepin [sic] - water pails stacked, hatters hung up - but there was <u>nothing</u> that could <u>injure</u> an animal (besides they arn't [sic] loose in the alleyway) - The feed bags were removed and burned - I certainly can't imagine a less than perfect barn alleyway is reason for a fine. I need to stress that my petting zoo was a <u>traveling</u> zoo - No one came to the farm to view the animals. I didn't feel my barn had to be spotless - I'd sure like it to be but sometimes something comes up & there isn't time to do it all - I do not feel I deserve a fine for a cluttered alleyway.

Answer at 3-4.

[Inspector] Borchert's finding appears to be a minimal violation. Nevertheless,

[Respondent's] . . . failure to keep the [premises] clean [is a violation of] section 3.131(c) [of the Standards (9 C.F.R. § 3.131(c))].

19. Paragraph 8 of the Amended Complaint alleges that [Respondent] violated [section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and] section 2.126 of the [R]egulations [(9 C.F.R. § 2.126)] by refusing an inspection of her facility on June 11, 1997 . . . .

. . . .

[Inspector] Borchert testified that on June 11, 1997, [Respondent] denied him and Larry Neustel, an APHIS regulatory enforcement investigator, access to her facility to conduct an inspection. He did not elaborate on the circumstances. (Tr. 19[-20].) Mr. Neustel did not testify.[3]

[Respondent's] account of the incident is as follows:

BY MR. BOMMELMAN:

Q. Okay, in regards to R-11 dated June 11, 1997. In regards to an inspection, did you refuse the inspection when Don Borchert and Larry Neustel, I don't know if I pronounced his name right, came to your facility? Did you refuse to let those guys do an inspection?

A. I refused to let Don do the inspection because we had asked the Texas office and the Maryland office . . .

* * *

MS. CARROLL: Objection; non-responsive. She's answered the question and he's calling for a narrative -- or she's volunteering a narrative.

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[3]In [Respondent's] Answer . . ., [Respondent] states:

P.S. - your investigator - Larry Neustel was here Sept. 20-95 - we showed him our entire kennel & pointed out where Don found fault - He told us he found nothing to warrant a fine and would recommend only a warning - I didn't know why we would be issued even a warning - Larry was a super, nice guy - we could easily work with someone like him - He had a lot of common sense on how a working kennel operates - He understood it is not a show place that is 100% perfect - 100% of the time!

[Answer at 25.]

ADMINISTRATIVE LAW JUDGE: All right, I'll allow her to talk in narrative form. Go ahead, Miss Hansen.

THE RESPONDENT: Where was I? What was the question?

MR. BOMMELMAN: Okay, dated June 11th.

THE RESPONDENT: Did I refuse the inspection? No. I refused the inspector. We did ask for a different inspector. We believe that a different inspector would find totally different, or much less - much less minor, cosmetic violations. We asked for a different inspector. When -- when Don and Larry came, I didn't want Don to do the inspection. I asked Larry if he would do the inspection, so did you.

ADMINISTRATIVE LAW JUDGE: Who is Larry?

THE RESPONDENT: Larry Neustel, he's an investigator. He was an inspector, so we felt he should be qualified. He said he could not do it because he was an investigator. I asked him if he would just go out to the kennel and look at it just for his opinion so he could see what it looked like at the present time. We've done a great deal of improvement, a lot of new material and he said he couldn't do it. I wish he would have, you know. I really wish he would have gone through it. I wish he would have been here, I would have asked him this same thing and he would have told you the same thing. When we got the witness . . .

MS. CARROLL: Objection, Your Honor. She's speculating about testimony of somebody. I move to strike.

ADMINISTRATIVE LAW JUDGE: Yes, it's -- you're speculating of what he might say if he were here.

THE RESPONDENT: When we got the witness list that you would be presenting, his name was on there so we assumed that was -- you know, for sure that he'd be here. If I knew he wasn't going to be here, I would have called him as -- as my own witness. I don't know why he isn't here when he was listed on the witness sheet.

Tr. 217-19.

[Respondent] had also apparently encountered problems with [inspector] Borchert over a period of time. [Respondent] said [inspector Borchert] would only criticize her facility when he conducted an inspection and that "I literally get sick to my stomach when Don [Borchert] drives in because I know he's only there to find fault & never has a positive word." (Answer at first unnumbered page.)

[Respondent] also said:

> . . . Don does not tell you where the problem areas are when he does his inspections - He just looks at everything then goes in the house and starts writing - When he hands the inspection sheet over to be signed I've learned to read it all over - then I ask him to go back outside and show me where the problem is - otherwise, I don't know[.]

Answer at 7.

> . . . Sometimes I forget to ask [animal buyers for their phone numbers] - after all there is no space [on forms] that specifically asks for the buyer's phone number - I explained this to Don - that if USDA wanted or required the phone # they'd have a space for it - Don really lost his temper - He shook his finger at me and his voice got high and squeaky and he shouted. "I told you to put the phone number in that box and I gave you a sheet where I wrote that in!" . . . After Don lost his temper we called Maryland & told them what happened - They assurred [sic] us that USDA does not require the phone number of the buyer and that if Don spoke to me that way again that I was to gather up my papers and ask him to leave and to tell him that the inspection was over - then I was to call Maryland and Texas.

Answer at 12-13.

[Respondent] also testified about [inspector] Borchert not wearing protective clothing on another occasion until she complained to his superiors:

> . . . He did not ever wear protective gear when he first was doing the inspection until we found out it was available. We had parvo on our place and never had a clue where it came from. After we found out he did have protective gear available, we called the Texas office and said the inspector was standing in our kennel without any protective gear. And they called him back and talked to him for quite a length of time and after that he

> always wore his protective gear. It's -- I think it's a real danger having him go from somebody's pet shop, somebody else's kennel. We know other inspectors that brought -- it was some chicken disease onto a place. They just inspected a chicken. . .

Tr. 303-04.

[Respondent] said that other dog breeders had also complained about [inspector] Bo[r]chert's inspections (RX 19).

However, regardless of [Respondent's] reasons for objecting to [inspector] Borchert as an inspect[or], or what other animal handlers may have thought of [inspector] Borchert, he was still an APHIS official with the authority under the [Animal Welfare] Act and [the R]egulations to conduct inspections for the Secretary. [Respondent] could not refuse to allow him to conduct an inspection. [Respondent] therefore violated [section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and] section 2.126 of the [R]egulations [(9 C.F.R. § 2.126)] even if she were willing to allow another APHIS official to conduct the inspection.

Sanction

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

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section [19](b) of the Animal Welfare Act also commands, in determining the [civil penalty] to impose, that:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(b).

[Respondent] contends that she corrected many of the deficiencies found at her facility and offered statements from many persons with whom she deals attesting to the condition of her facility and her animals (RX 20). Even though [Respondent] may have corrected deficiencies and even corrected them within the time period allowed by the inspector, it is the Department's policy that a [subsequent correction of a condition not in compliance with the Animal Welfare Act or the Regulations and Standards has no bearing on the fact that a violation has occurred.] *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996).

There is no showing, however, that, despite the deficiencies found by [inspector] Borchert, [that Respondent intentionally mistreated her animals]. . . . [Inspector] Borchert also testified that [Respondent] kept her animals in "good condition" (Tr. 194).

Considering all the circumstances, I find a penalty of $[4,3]00 is appropriate. As for a suspension of [Respondent's Animal Welfare Act] license, Complainant contends that the violations were willful and seeks a 30-day license suspension. As . . . [these] violations [were] willful, [Respondent's Animal Welfare Act] license [is] suspended for 30 days.

Findings of Fact

1. Respondent, Judie Hansen, doing business as Wild Wind Petting Zoo, was [a class "C"] animal exhibitor licensed from 1992 to 1996 by APHIS [and currently holds a class "A" dealer license].

2. On June 19, 1995, Respondent . . . failed to:

a. ensure that primary enclosures for kittens had an elevated resting surface; and

b. keep the premises clean . . . in order to protect animals from injury and to facilitate the required husbandry practices.

[3]. On June 19[, 1995,] and August 8, 1995, Respondent . . . failed to:

a. provide for the removal and disposal of animal . . . waste . . . so as to minimize vermin infestation, odors, and disease hazards;

b. construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement; and

c. keep the premises where housing facilities for dogs are located clean and . . . control weeds. . . .

[4]. On June 19[, 1995,] and October 25, 1995, Respondent . . . failed to:

a. store supplies of food . . . in a manner that protects the supplies from

spoilage, contamination, and vermin infestation; and

b. ensure that animal areas were free of clutter, including equipment, furniture, and stored material.

[5]. On August 8, [1995,] and October 25, 1995, Respondent . . . failed to remove excreta from primary enclosures for ferrets as often as [necessary] to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors.

6. On June 19, [1995,] August 8, [1995,] and October 25, 1995, Respondent . . . failed to construct indoor and outdoor housing facilities so as to be structurally sound and maintain [indoor and outdoor facilities] in good repair, to protect animals from injury and to contain them.

[7]. On October 25, 1995, Respondent failed to:

a. design and construct housing facilities for dogs so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury; and

b. provide for the regular and frequent collection, removal, and disposal of animal waste in a manner that minimizes the risk of contamination and disease.]

[8]. On June 11, 1997, Respondent failed to allow an APHIS inspector access to her facility and records.

Conclusions of Law

Respondent . . . willfully violated [section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and] the following Regulations and Standards: 9 C.F.R. §§ . . . 2.100(a), 2.126; 3.1(a), 3.1(b), 3.1(e), 3.1(f), 3.6(b), . . . 3.11(c), 3.53(c), 3.125(a), 3.125(d), 3.131(a), and 3.131(c).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard.[4] The standard of proof in administrative proceedings conducted

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[4] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981).

under the Animal Welfare Act is preponderance of the evidence.[5] An examination of the record reveals that the ALJ found that Complainant proved 23 of the 33 violations alleged in the Complaint and the Amended Complaint.[6] I agree with the

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[5]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 19 (Nov. 18, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 45-46 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 149 (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246-47 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

[6]The ALJ found that: (1) Respondent violated section 3.6(b) of the Standards (9 C.F.R. § 3.6(b)) on June 19, 1995, as alleged in paragraph 1(b) of the Complaint; (2) Respondent violated section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)) on June 19, 1995, as alleged in paragraph 1(d) of the Complaint; (3) Respondent violated section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)) on June 19, 1995, as alleged in paragraph 1(f) of the Complaint; (4) Respondent violated section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)) on June 19, 1995, and August 8, 1995, as alleged in paragraph 2(b) of the Complaint; (5) Respondent violated section 3.53(c) of the Standards (9 C.F.R. § 3.53(c)) on June 19, 1995, and August 8, 1995, as alleged in paragraph 2(c) of the Complaint; (6) Respondent violated section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)) on June 19, 1995, and August 8, 1995, as alleged in paragraph 2(d) of the Complaint; (7) Respondent violated section 2.75 of the Regulations (9 C.F.R. § 2.75) on June 19, 1995, and October 25, 1995, as alleged in paragraph 3 of the Complaint; (8) Respondent violated section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)) on June 19, 1995, and October 25, 1995, as alleged in paragraph 4(a) of the Complaint; (9) Respondent violated section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)) on June 19, 1995, and October 25, 1995, as alleged in paragraph 4(b) of the Complaint; (10) Respondent violated section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)) on August 8, 1995, and October 25, 1995, as alleged in paragraph 6(b) of the Complaint; (11) Respondent

(continued...)

ALJ, except that I dismiss the three violations alleged in paragraphs 1(f) and 3 of the Complaint. Thus, I find that Complainant has proven 20 of the 33 violations alleged.

Respondent's Appeal consists of two separately handwritten appeal documents by Greg Bommelman and Judie Hansen, respectively. The portion of Respondent's Appeal written by Mr. Bommelman is referred to as "Respondent's Appeal A"; the portion of Respondent's Appeal written by Respondent is referred to as "Respondent's Appeal B."

Respondent's Appeal A contains 17 arguments. First, Respondent contends that the ALJ decided not upon facts, but upon hearsay (Respondent's Appeal A at 1, ¶ 1). However, an examination of the record does not reveal that the ALJ relied upon unreliable hearsay evidence or that the ALJ's decision is factually unsupported. Moreover, neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence. The Administrative Procedure Act provides, with respect to the admission of evidence, that:

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[6](...continued)
violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) on June 19, 1995, August 8, 1995, and October 25, 1995, as alleged in paragraph 7 of the Complaint; and (12) Respondent violated section 2.126 of the Regulations (9 C.F.R. § 2.126) on July 11, 1997, as alleged in paragraph 8 of the Amended Complaint.

Moreover, the ALJ, in Finding of Fact 3(c), states that on June 19, 1995, and October 25, 1995, Respondent "failed to design and construct housing facilities for dogs and cats so as to be structurally sound and to maintain the facilities in good repair, to protect animals from injury, to contain them and to restrict the entrance of other animals" (Initial Decision and Order at 24), in violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)), as alleged in paragraph 4(c) of the Complaint. However, the ALJ's discussion only includes Respondent's failure to keep her facility in good repair, in violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) on October 25, 1995 (Initial Decision and Order at 6). Therefore, I infer that the ALJ only found the October 25, 1995, violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)), alleged in paragraph 4(c) of the Complaint. Further still, the ALJ, in Finding of Fact 4(a), states that on August 8, 1995, and October 25, 1995, Respondent failed to "provide for the regular and frequent collection, removal and disposal of animal waste and bedding in a manner that minimizes the risk of contamination and disease" (Initial Decision and Order at 24), in violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), as alleged in paragraph 6(a) of the Complaint. However, the ALJ explicitly states in his discussion of the violations that the evidence was not sufficient to find that Respondent violated section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) on August 8, 1995 (Initial Decision and Order at 9). Therefore, I infer that the ALJ only found the October 25, 1995, violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) alleged in paragraph 6(a) of the Complaint.

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

. . . .

(d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

§ 1.141 Procedure for hearing.

. . .

(h) *Evidence*—(1) *In general*. . . .

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act.[7] Moreover,

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[7]*See, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (stating that the only limit on hearsay evidence in an

(continued...)

responsible hearsay has long been admitted in the Department's administrative proceedings.[8]

Second, Respondent argues that Respondent cannot "achieve" a decision because the ALJ is prejudiced by being employed by USDA. However, no instances of prejudicial actions by the ALJ are cited (Respondent's Appeal A at 1, ¶ 2). Due process requires an impartial tribunal, and a biased administrative law judge deprives the litigant of this impartiality.[9]

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[7](...continued)
administrative context is that it bear satisfactory indicia of reliability; it is not the hearsay nature *per se* of the proffered evidence that is significant, it is the probative value, reliability, and fairness of its use that are determinative), *cert. denied*, 511 U.S. 1081 (1994); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991) (stating that hearsay statements are admissible in administrative hearings, as long as they are relevant and material); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (stating that hearsay evidence is admissible in administrative proceedings, so long as the admission of evidence meets the test of fundamental fairness and probity); *Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 846 (6th Cir. 1990) (stating that hearsay evidence is admissible in an administrative proceeding, provided it is relevant and material); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (stating that hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (stating that it is well established that hearsay evidence is admissible in administrative proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982) (stating that hearsay evidence is admissible in administrative proceedings and depending on reliability, can be substantial evidence).

[8]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 39 (Nov. 18, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1355 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

[9]*Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (stating that a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (stating that any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating that essential to
(continued...)

Further, the Administrative Procedure Act requires an impartial proceeding, as follows:

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

. . . .

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under

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[9](...continued)
a fair administrative hearing is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating that bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating that due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating that trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating that a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating that a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating that a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating that quasi-judicial proceedings entail a fair trial and fairness requires an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating that a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating that it is the essence of a valid judgment that the body that pronounces judgment in a judicial or quasi-judicial proceeding be unbiased); *Inland Steel Co. v. NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (stating that trial by a biased judge is not in conformity with due process, and the recognition of this principle is as essential in proceedings before administrative agencies as it is before the courts).

section 3105 of this title.

. . . The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b).

However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair.[10] The fact that the administrative law judge who presides over a hearing and issues an initial decision in the proceeding is an employee of the agency which instituted the proceeding neither disqualifies the administrative law judge nor renders the hearing unfair. Administrative law judges are employed by the agency whose actions they review. If employment by an agency constituted legal bias, as Respondent contends, administrative law judges would be forced to recuse themselves in every case.

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[10]*Akin v. Office of Thrift Supervisor*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating that in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a reasonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating that in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judge's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1989) (stating that a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating that the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating that in order to maintain a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating that a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating that it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

I have reviewed the record in this proceeding, and I find neither a basis for Respondent's allegation that the ALJ is biased or prejudiced against Respondent in this proceeding nor evidence that Respondent did not receive a fair hearing.

Third, Respondent argues that Complainant did not call Mr. Larry Neustel, who was on Complainant's witness list, and that the ALJ failed to "read" a report by Mr. Neustel, which report Respondent argues would show Respondent "not at fault" (Respondent's Appeal A at 1, ¶ 3). A party is not required to call a person as a witness merely because that person's name appears on that party's list of anticipated witnesses. If Complainant believes that Complainant's case would not be advanced by Mr. Neustel's testimony, Complainant is not constrained to call Mr. Neustel as a witness. Moreover, the ALJ committed no error by not "reading" Mr. Neustel's report.

Fourth, Respondent argues that the ALJ did not find a "pattern of abuse of power created" by inspector Borchert, which means to Respondent that the ALJ did not take the "Breeder Opinions" in RX 19 under advisement as the ALJ had said he would do in the hearing (Respondent's Appeal A at 1, ¶ 4). I disagree with Respondent because the ALJ did address RX 19, even though the ALJ was specific at the hearing that other breeders' opinions of inspector Borchert would be given little weight, as follows:

> Hansen said that other dog breeders had also complained about Bouchert's [sic] inspections. (RX 19.)
>
> However, regardless of Hansen's reasons for objecting to Borchert as an inspection [sic], or what other animal handlers may have thought of Borchert, he was still an APHIS official with the authority under the Act and regulations to conduct inspections for the Secretary. She could not refuse to allow him to conduct an inspection. Hansen therefore violated section 2.126 of the regulations even if she were willing to allow another APHIS official to conduct the inspection.

Initial Decision and Order at 21-22.

> THE RESPONDENT: It's my belief that a lot of these charges that we've been written up for would not have been written up by other inspectors and it's my attempt to find out how other inspectors do their inspecting. And I think you'd be pretty interested in our response.

ADMINISTRATIVE LAW JUDGE: That's been marked as R-19, then. All right.

* * *

. . . .

THE RESPONDENT: What about these packets that we gave you?

. . . .

THE RESPONDENT: There are some dog breeders that have made statements in there that they said that Don said about other breeders and us. Do we have any way of refuting anything that, you know, that he . . .

. . . .

MS. CARROLL: They want to refute the hearsay.

THE RESPONDENT: He's made comments to other people about our kennels and the condition of our animals.

ADMINISTRATIVE LAW JUDGE: Well, that's -- that's hearsay. Even if I admit those, I'm not going to give a whole lot of weight to what was said or allegedly said in those comments because I don't think that's relevant to make a determination but whether what's specifically in the complaint today and that's what I'm concerned about and not what may have been said someplace else. It's whether there is substantial evidence to support his findings that there were violations.

. . . .

ADMINISTRATIVE LAW JUDGE: I understand the point you're making, yes. I understand, but that's why I'm reserving on deciding -- I'm going to look through it to see if I shall admit it or not.

Tr. 205, 321-23.

Fifth, Respondent claims to have a tape of a USDA attorney stating that dog breeders cannot win at a hearing (Respondent's Appeal A at 2, ¶ 5). Such a tape

has no relevance to this proceeding.

Sixth, Respondent contends that she wrote USDA a letter requesting a different inspector than inspector Borchert, but that USDA purposely sent the same inspector, so that USDA could write a violation for refusal to allow inspection (Respondent's Appeal A at 2, ¶ 6). This argument has no merit. If a dealer or exhibitor refuses to allow an APHIS official to inspect the dealer's or exhibitor's facility during business hours, then a violation of section 2.126 of the Regulations (9 C.F.R. § 2.126) has occurred, and the ALJ was correct in finding the violation.

Seventh, Respondent argues that she proved that the inspector has poor credibility (Respondent's Appeal A at 2, ¶ 7). This argument is not supported in the record.

Eighth, Respondent argues no dealer "can be 100% correct 100% of the time" (Respondent's Appeal A at 2, ¶ 8). However, each dealer and exhibitor is required to be in compliance with the Regulations and Standards at all times (9 C.F.R. § 2.100(a)). The fact that compliance with the Regulations and Standards may be difficult for Respondent is neither a defense nor a mitigating circumstance.

Ninth, Respondent accuses USDA of allowing USDA inspectors to engage in the character assassination of breeders (Respondent's Appeal A at 2, ¶ 9). Breeder character assassination by USDA personnel is not proven in this record, but, even if USDA inspectors engaged in character assassination, such activity would not be relevant to this proceeding.

Tenth, Respondent argues that the testimonials from puppy buyers in RX 20 should be sufficient evidence to show that Respondent has been wrongfully accused of violations (Respondent's Appeal A at 3, ¶ 10). I disagree. The testimonials of Respondent's customers are irrelevant to Respondent's compliance with the Animal Welfare Act and the Regulations and Standards.

Eleventh, Respondent complains that the ALJ denied Respondent's request to have a number of days equal to Complainant to file a brief (Respondent's Appeal A at 3, ¶ 11; Respondent's Appeal B at 19). The Rules of Practice do not require between parties an equal number of days within which to file a brief, but require only that each party have a "reasonable" opportunity to file a brief (7 C.F.R. § 1.142(b)). Respondent had from the close of the hearing on July 23, 1997, to November 21, 1997, to file her brief. I find that this period of time afforded Respondent a reasonable opportunity to file her brief, and I do not find error because Complainant was given a longer period of time within which to file a brief than Respondent.

Twelfth, Respondent argues that USDA sets its own rules in the hearing to suppress Respondent's evidence and prevent the truth about USDA's inspector from revelation (Respondent's Appeal A at 3, ¶ 12). This argument has no merit. The

Rules of Practice apply to all parties, including Complainant, and do not provide for the suppression of evidence.

Thirteenth, Respondent argues that the inspector had difficulty remembering how "bad" the kennel was (Respondent's Appeal A at 3, ¶ 13). However, the inspector is not required to remember details, which may be gleaned from the inspection reports made at the time of the inspection.

Fourteenth, Respondent argues that the "bookkeeping" violations are based upon the inspector requiring more information than is required under the Regulations (Respondent's Appeal A at 4, ¶ 14) and contends that she did not violate the recordkeeping requirements in section 2.75 of the Regulations (Respondent's Appeal B at 1-4). The Complaint alleges that Respondent willfully violated section 2.75(a) and (b) of the Regulations (9 C.F.R. § 2.75(a), (b)) by failing to make, keep, and maintain records and forms of the sale or acquisition of animals (Compl. ¶ 3). As discussed in this Decision and Order, *supra*, Complainant did not prove by a preponderance of the evidence that Respondent violated section 2.75 of the Regulations (9 C.F.R. § 2.75), as alleged in the Complaint, and paragraph 3 of the Complaint is dismissed.

Fifteenth, Respondent implies that the reason for inspector Borchert's duty stations with USDA are because of the type of information in the "Breeder Reports" (Respondents Appeal A at 4, ¶ 15). The reason for inspector Borchert's duty station is not relevant to any issue in this proceeding.

Sixteenth, Respondent reiterates previous arguments that the inspector has spread rumors, has committed character assassination, and has tried to damage Respondent's business (Respondent's Appeal A, at 4, ¶ 16). The record does not support these charges as true. Moreover, even if true, such behavior by the inspector is not a defense to the allegations in the Complaint nor a mitigating circumstance.

Seventeenth, Respondent argues that Wild Wind Kennels has "a difficult time passing any inspection, because the rules change" (Respondent's Appeal A at 5, ¶ 17). To illustrate the argument, Respondent argues that everything was fine at Respondent's pre-license inspection, but then inspector Borchert "tore off the top copy after it was signed" and wrote non-complying items on it for the next inspection (Respondent's Appeal A at 5, ¶ 17). This argument has no merit. In fact, Respondent disproves the argument, since Respondent passed the inspection prior to license. I find that an inspector's remarks on a pre-license inspection report for items to be in compliance by the next inspection cannot reasonably be construed to be a "rules change."

Respondent's Appeal B contains 21 arguments which are not raised in Respondent's Appeal A. First, Respondent denies that she violated section 3.1(a)

of the Standards (9 C.F.R. § 3.1(a)) by having sharp points and exposed wire on dog runs, as alleged in paragraph 4(c) of the Complaint (Respondent's Appeal B at 4-5). Respondent argues that the sharp points were "blunt cut with a wire cutter - the long points were left on purpose - they were pushed into the dirt to hold the wire in place while the gravel was shoveled over it" (Respondent's Appeal B at 4-5). I infer that Respondent's point is that there was a repair job in progress which would have buried the exposed wire and sharp points safely under gravel. However, I find that Respondent has admitted the violation. The violation occurred when the dogs were exposed to the hazard of the sharp pointed wire. Moreover, Respondent does not explain how "blunt cut" wire would not continue to be a dangerous, flesh-penetrating hazard, even when not sharpened into points. Further, Respondent does not explain how the burial of the wire points would protect dogs who dig, if the reason for the repair job was to counter digging dogs: "I was repairing a place where dogs could have dug under the fence" (Respondent's Appeal B at 5 (emphasis in original)). Therefore, I reject Respondent's argument.

However, paragraph 4(c) of the Complaint alleges that the violation of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) occurred on both June 19, 1995, and on October 25, 1995. The ALJ referenced only the evidence from the October 25, 1995, inspection report (Initial Decision and Order at 6). Inspector Borchert's June 19, 1995, inspection report (CX 2) does not provide any evidence that Respondent violated section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) on June 19, 1995. Therefore, Complainant has proven only one of the two violations of section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) alleged in paragraph 4(c) of the Complaint.

Second, Respondent denies that she violated section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)), as alleged in paragraph 4(b) of the Complaint (Respondent's Appeal B at 5). Although Respondent admits to having "various items" in the housing area for dogs, Respondent argues that the kennel was being built in a former machinery repair shop and that the items still there could not be put out in the weather, but that Respondent still did nothing "to violate the dogs health and safety" (Respondent's Appeal B at 5). However, Respondent fails to state how having equipment and stored materials in the housing facilities does not violate the prohibition in section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)) against having "equipment" and "stored materials" in the housing facilities. Respondent's argument is rejected.

Third, Respondent denies that she violated section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)), as alleged in paragraph 4(a) of the Complaint (Respondent's Appeal B at 5). Respondent argues that the feed was placed on pallets away from the wall on the advice of inspector Borchert. Respondent admits that the feed was

on top of the enclosures in the animal area, but argues that she was unaware that that constituted a violation. When Respondent learned it was a violation, Respondent states that it was corrected the next day (Respondent's Appeal B at 5). Respondent admits to having bleach and open food containers not properly stored. Respondent argues that the bleach was diluted and the food sack was a bag containing a small amount of feed which would not fit in a plastic storage container (Respondent's Appeal B at 6). Since Respondent admits the violations, and because the excuses offered do not exculpate Respondent's violations, I affirm the ALJ's conclusion that Respondent violated section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)), as alleged in paragraph 4(a) of the Complaint.

Fourth, Respondent denies that she violated section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), as alleged in paragraph 6(a) of the Complaint (Respondent's Appeal B at 6-7). Although Respondent admits that the pail of feces did not have a lid on it at the time of the October 25, 1995, inspection, Respondent argues that her employee was cleaning pens at the time of the inspection. The ALJ found that the open pail of feces was caused by the inspection and constituted a "technical" violation (Initial Decision and Order at 9). Under the circumstances, I find this violation to be minor and neither the civil penalty assessed against Respondent nor the suspension of Respondent's Animal Welfare Act license is based upon this violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)). As discussed in this Decision and Order, *supra*, neither the ALJ nor I found that Respondent violated section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) on August 8, 1995, as alleged in paragraph 6(a) of the Complaint.

Fifth, Respondent denies that she violated section 3.6(b) of the Standards (9 C.F.R. § 3.6(b)), as alleged in paragraph 1(b) of the Complaint (Respondent's Appeal B at 7-8). Respondent admits that she did not know of the elevated surface requirement in the Standards (Answer at 2). However, Respondent argues that the kittens were in a traveling enclosure, which has no shelf, and is not required to have a shelf, but that the Complaint charges her with housing the kittens in a primary enclosure, which must have an elevated resting surface.

This record does not reveal that inspector Borchert drew a distinction between primary enclosures for cats, regulated under section 3.6(b)(4) of the Standards (9 C.F.R. § 3.6(b)(4)), requiring elevated resting surfaces and mobile or traveling housing facilities for cats, regulated under sections 3.5 and 3.14 of the Standards (9 C.F.R. §§ 3.5, .14), which have no requirement for elevated resting surfaces (CX 1 at 2, item 7, III, #30; Tr. 68-69). I infer that inspector Borchert meant primary enclosures, rather than mobile or traveling housing facilities, because the Complaint charges Respondent that way (Compl. ¶ 1(b)) and because the context of inspector Borchert's testimony (Tr. 68-69) indicates that Complainant and the

ALJ understood the charge to be for primary enclosures.

The evidence is that Respondent obtained these kittens from a neighbor for adoption and that the kittens were adopted the "next day." I conclude that Respondent did not transport the kittens anywhere and that Respondent committed a violation by housing kittens in a traveling enclosure used as a primary enclosure, without an elevated resting surface. Nonetheless, based on the short duration of this violation, neither the civil penalty assessed against Respondent nor the suspension of Respondent's Animal Welfare Act license is based on this violation of section 3.6(b) of the Standards (9 C.F.R. § 3.6(b)).

Sixth, Respondent denies that she violated section 3.11(a) of the Standards (9 C.F.R. § 3.11(a)), as alleged in paragraph 1(f) of the Complaint (Respondent's Appeal B at 8). I find that Complainant did not prove the violation of 9 C.F.R. § 3.11(a) alleged in paragraph 1(f) of the Complaint by a preponderance of the evidence. First, while CX 1 at 3, item 7, III, #36, which is the basis for the allegation in paragraph 1(f) of the Complaint, provides some evidence that Respondent violated 9 C.F.R. § 3.11(a), it is not clear. Second, as stated in this Decision and Order, *supra*, Respondent rebutted Complainant's evidence.

Seventh, Respondent denies that she violated section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)), as alleged in paragraph 2(d) of the Complaint (Respondent's Appeal B at 8-9). However, Respondent nevertheless admits the charge from the June 19, 1995, inspection report (CX 1 at 3, item 7, III, #37), when she states that "2 or 3 pallets were stood on end off the ground on a metal shelf at the end of a van body - they were stored neatly - and were <u>not</u> a violation of 3.11(c)" (Respondent's Appeal B at 8). Also, Respondent admits to having "pig weeds" at the east end of her house (Tr. 162), as alleged in the August 8, 1995, inspection report (CX 2 at 2, item 7, III, #37), but argues that the particular weeds in question are such that no vermin could hide there (Respondent's Appeal B at 9). Therefore, I conclude that Respondent admits to the facts supporting the violations of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)), even though Respondent disagrees that these facts should constitute violations. I agree with the ALJ that these facts constitute violations of section 3.11(c) of the Standards (9 C.F.R. § 3.11(c)).

Eighth, Respondent denies that she violated section 3.53(c) of the Standards (9 C.F.R. § 3.53(c)), as alleged in paragraph 2(c) of the Complaint (Respondent's Appeal B at 9). Respondent once again argues, as Respondent did before the ALJ, that the rabbits cited by inspector Borchert as being housed in insufficient space were actually "meat" rabbits not subject to regulation under the Animal Welfare Act (Respondent's Appeal B at 9).

However, I agree with the ALJ that there was nothing at the kennel to distinguish breeding rabbits or exhibition rabbits from "meat" rabbits (Initial

Decision and Order at 15). Therefore, the ALJ's decision finding the violation of section 3.53(c) of the Standards (9 C.F.R. § 3.53(c)), as alleged in paragraph 2(c) of the Complaint, is affirmed.

Ninth, Respondent denies that she violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)), as alleged in paragraph 7 of the Complaint, concerning the cougar's housing facilities and primary enclosure, on June 19, 1995, and August 8, 1995 (Respondent's Appeal B at 10). Respondent argues that her facilities were in good repair and did protect the cougar from injury and contain the cougar; that there is no possibility that the cougar could escape; that the cougar was chained to keep the cougar several feet from the back door of the school bus; that the door was only open when Respondent was actually nearby and interacting with the cougar; that the door was otherwise always closed and locked; and that inspector Borchert's report that the door was left open is incorrect (Respondent's Appeal B at 10).

Inspector Borchert provided photographs documenting his conclusions that the lack of a perimeter fence and the open door to the school bus housing the cougar means that humans or animals could move right up to the cougar, possibly endangering the cougar (CX 19, 20, and 21). Respondent's arguments that the structure is sufficient to protect the cougar from injury and contain the cougar are not supported by the evidence.

Tenth, Respondent denies that she violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)), as alleged in paragraph 7 of the Complaint, concerning the ferrets' facility on June 19, 1995, and October 25, 1995 (CX 1 at 2, item 7, III, #10; CX 3 at 2, item 7, III, #10) (Respondent's Appeal B at 10). Respondent argues that the exposed "ends of brads (small nails) did <u>not</u> constitute and [sic] danger of injury to the ferrets" (Respondent's Appeal B at 10 (emphasis in original)). Thus, Respondent admits to having protruding small nails in the ferret cage. Respondent's argument that the small nails could not cause injury to the ferrets is not credible. Respondent's argument is rejected.

Eleventh, Respondent denies that she violated section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)), as alleged in paragraph 2(b) of the Complaint, concerning the manure pile on June 19, 1995, and August 8, 1995 (Respondent's Appeal B at 10-11). Respondent argues that collecting the animal and food wastes and bedding and composting this material in a pile (CX 17) at the kennel constitutes compliance with the "[d]isposal facilities" requirements of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

However, I agree with the ALJ that heaping manure in a pile, with corral straw and bedding, next to the kennel, to allow the natural decomposition process to occur, is not "removal and disposal" as contemplated by the Standards.

Twelfth, Respondent denies that she violated section 3.131(a) of the Standards

(9 C.F.R. § 3.131(a)) on August 8, 1995, and October 25, 1995, as alleged in paragraph 6(b) of the Complaint, concerning feces accumulation in the ferret enclosure (Respondent's Appeal B at 12). Respondent does not deny the accumulation of feces in the ferret enclosure, but argues that the amount was not enough to contaminate the animals. Respondent's main point is that ferrets only foul one corner of the pen and the pertinent pen was large enough to let feces accumulate without contaminating the animals, in violation of section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)). (Respondent's Appeal B at 12.) However, regardless of the habits of ferrets to isolate their feces, Respondent is also required to clean the primary enclosure of the ferrets often enough to "minimize disease hazards and to reduce odors" (9 C.F.R. § 3.131(a)). I affirm the ALJ's conclusion that Respondent violated 9 C.F.R. § 3.131(a) on August 8, 1995, and October 25, 1995.

Thirteenth, Respondent denies that she violated section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)), as alleged in paragraph 1(d) of the Complaint (Respondent's Appeal B at 12-13). Respondent does not argue that she did not keep the barn alleyway free of empty feed sacks, but argues that nothing in the alleyway could injure the animals. However, section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)) requires that the premises must be kept clean to not only protect animals, but also facilitate prescribed husbandry practices. Respondent admits she failed to keep the premises clean and her description of the manner in which she kept the barn (Answer at 3-4) indicates that, at a minimum, the barn was not sufficiently clean to facilitate prescribed husbandry practices. Therefore, Respondent's argument is rejected.

Fourteenth, Respondent does not deny that she violated section 2.126 of the Standards (9 C.F.R. § 2.126), as alleged in paragraph 8 of the Amended Complaint (Respondent's Appeal B at 13). Respondent argues, however, that her refusal to allow inspection is justified because: the agency was trying to get a "refusal" on Respondent's record; inspector Borchert and the "Texas office" knew that Respondent had "repeatedly" asked for a new inspector; Respondent cannot go along with an inspector who has said he is "out to get us" and who "wants to shut us down"; Respondent is being fined for having the courage to "stand up to" unfair and exaggerated violations; Respondent believes a different inspector would not "write [Respondent] up" for the same things as inspector Borchert; and Respondent asked Larry Neustel to inspect on June 11, 1997, but Mr. Neustel said he could not (Respondent's Appeal B at 13).

I have carefully examined all of Respondent's justifications for refusing to allow an APHIS inspector to inspect her premises. However, Respondent has not advanced any arguments which justify or mitigate Respondent's violation of section

2.126 of the Standards (9 C.F.R. § 2.126). Respondent may not choose her inspector. The Regulations state that "[e]ach dealer [or] exhibitor . . . shall, during business hours, allow APHIS officials . . ." to examine records required to be kept by the Animal Welfare Act and the Regulations and to inspect the facilities, property, and animals (9 C.F.R. § 2.126). Therefore, I find Respondent's arguments irrelevant to the question whether she refused to allow an APHIS official access, during business hours, to her regulated kennel. I reject Respondent's arguments.

Fifteenth, Respondent makes a large number of disparaging accusations against inspector Borchert and references the "breeder opinions" survey in RX 19 (Respondent's Appeal B at 13-15). However, inspector Borchert's performance and the survey of breeder opinion on inspector Borchert in RX 19 have already been addressed in response to Respondent's fourth argument in Respondent's Appeal A in this Decision and Order, *supra*. It bears repeating that an inspector is only an evidence gatherer. The inspector has no authority to find that anyone violated the Animal Welfare Act or the Regulations and Standards, but merely presents evidence, first to the agency and the agency's counsel, and then before an administrative law judge. If the allegations in the Complaint are not supported by a preponderance of the evidence, then the allegations in the Complaint suffering lack of evidentiary support will be dismissed. Therefore, I find that Respondent's allegations against the inspector are irrelevant to whether Respondent committed the violations in the Complaint.

Sixteenth, Respondent argues that the ALJ pointed out in the decision (Initial Decision and Order at 22-23) that Respondent provided overall humane care to her animals and that Respondent's animals were kept in good condition (Respondent's Appeal B at 15-16). Respondent argues that the "bottom line" is that she has a good vaccination and de-worming program, that her animals are healthy, and that her animals have never been found to be injured, mistreated, unhealthy, crowded, or dirty (Respondent's Appeal B at 16). There is no evidence that Respondent intentionally mistreated her animals. Moreover, the evidence supports a finding that Respondent's animals were in "good condition" (Tr. 194). When assessing a civil penalty, the gravity of the violation must be taken into account (7 U.S.C. § 2149(b)), and I have taken into account the condition of Respondent's animals when determining the amount of the civil penalty to be assessed.

Seventeenth, Respondent argues that the $3,000 civil penalty assessed against Respondent by the ALJ is what a $30,000 civil penalty would be like to other people (Respondent's Appeal B at 15). Respondent argues that all income at the kennel goes back into the kennel and that income is so small that a time payment of a large civil penalty would not be realistic (Respondent's Appeal B at 16). As

discussed in this Decision and Order, *infra*, a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed.

Eighteenth, Respondent denies that any violations were willful, because she "did not ever deliberately commit an act with the intention to ignore rules or standards" (Respondent's Appeal B at 16). However, I agree with the ALJ (Initial Decision and Order at 23) that Respondent's violations are willful, as explained in this Decision and Order, *infra*.

Nineteenth, Respondent questions what a 30-day suspension would mean to her business operations (Respondent's Appeal B at 16-18).

Complainant contends that Respondent has been informed of the effects of a 30-day suspension of Respondent's Animal Welfare Act license and provides a letter dated March 20, 1998, from opposing counsel to Respondent which purports to answer the questions on the 30-day suspension raised by Respondent (Complainant's Response at 33, Attach. A).

Twentieth, Respondent accuses opposing counsel of saying Respondent admitted things not admitted by Respondent (Respondent's Appeal B at 18-19). However, the Judicial Officer will not accept that the Respondent admitted something, unless the Complainant points to the place in the record where that purported admission is located, and the admission is actually there.

Finally, Respondent argues that there cannot be a decision in Respondent's favor because the inspector, the attorney, and the ALJ all work for USDA (Respondent's Appeal B at 20). Respondent's complaint is meritless. An agency may combine investigative, adversarial, and adjudicative functions, as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case, does not participate in or advise in the decision or agency review in the case or a factually related case. (5 U.S.C. § 554(d).)[11]

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[11]*See also Sheldon v. SEC*, 45 F.3d 1515, 1518-19 (11th Cir. 1995) (holding that Securities and Exchange Commission proceedings do not violate the "separation of powers" or deny broker-dealers due process of law merely because the agency combines investigative, adversarial, and adjudicative functions); *Trust & Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 297 (7th Cir. 1994) (stating that it has long been settled that the combination of investigative and adjudicative functions within an agency, absent more, does not create an unconstitutional risk of bias in administrative adjudication); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) (stating that an agency may combine investigative, adversarial, and adjudicative functions, as long as no employees serve in dual roles); *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164, 167 (2d Cir. 1992) (stating that the Administrative Procedure Act is violated only where an individual actually participates in a single case as both a prosecutor and an adjudicator); *Touche Ross & Co. v. SEC*, 609 F.2d 570,

(continued...)

Respondent makes no assertion that any USDA employee or agent engaged in the performance of investigative or prosecuting functions in this proceeding, participated in or advised in the ALJ's Initial Decision and Order or the agency review of the ALJ's Initial Decision and Order.

Complainant's Response and Cross-Appeal

Complainant's Response to Respondent's Appeal contains eight arguments in the nature of a cross-appeal, in which Complainant appeals the ALJ's sanction and all seven paragraphs of the Complaint wherein the ALJ found no violations (Complainant's Response and Cross-Appeal at 7-8, 16-18, 20-21, 24, 27, 33-35). Respondent's response to Complainant's Response to Respondent's Appeal consists of two separate handwritten responses by Greg Bommelman and Judie Hansen, respectively. The portion of Respondent's response to Complainant's Response to Respondent's Appeal written by Respondent is referred to as Respondent's Response A and the portion of Respondent's response written by Mr. Bommelman is referred to as Respondent's Response B.

Complainant contends that Respondent's Appeal is untimely, in that Respondent's Appeal was due on March 20, 1998, but Respondent's Appeal was not filed until March 24, 1998 (Complainant's Response and Cross-Appeal at 2-3). Respondent contends that Respondent's Appeal was "mailed well in advance" of the date it was due, but due to a blizzard and road conditions, it was late. Respondent further states that she believed Respondent's Appeal could be deemed to be filed on the date the envelope containing Respondent's Appeal was postmarked. (Respondent's Response A at 1; Respondent's Response B at 2.)

Section 1.145(a) of the Rules of Practice provides that an appeal petition must be filed with the Hearing Clerk within 30 days after receiving service of the Judge's decision. The Respondent's mailing of the Respondent's Appeal prior to the due date of the appeal petition is not "filing with the Hearing Clerk" and Respondent's Appeal Petition, which was filed with the Hearing Clerk after the date it was due, is untimely as Complainant contends.

Complainant's Response and Cross-Appeal is timely. Moreover, Respondent

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[11](...continued)
581 (2d Cir. 1979) (stating that it is uniformly accepted that many agencies properly combine the functions of prosecutor, judge, and jury, and a hearing conducted by such an agency does not automatically violate due process); *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940) (stating the blending of the functions of enforcement and adjudication in a single agency is not sufficient to invalidate a hearing fairly conducted).

filed a timely reply to Complainant's Response and Cross-Appeal and properly incorporated by reference Respondent's untimely original appeal. Therefore, Respondent's untimely original appeal was resuscitated, because the Rules of Practice allow "any relevant issue" to be raised in response to an appeal (7 C.F.R. § 1.145(b)).[12]

First, Complainant contends that the ALJ erred by not finding the violation of section 2.50(c) of the Regulations (9 C.F.R. § 2.50(c)) alleged in paragraph 5 of the Complaint (Complainant's Response and Cross-Appeal at 7-8). The ALJ found, with respect to paragraph 5 of the Complaint, that section 2.50(d) of the Regulations (9 C.F.R. § 2.50(d)) exempts unweaned puppies from the identification requirement in section 2.50(c) of the Regulations and that the record does not show that the puppies in question were weaned and thereby required to be identified. Complainant has failed to meet its burden of proving that Respondent failed to identify her dogs, in violation of section 2.50(c) of the Regulations (9 C.F.R. § 2.50(c)) (Initial Decision and Order at 3-5).

Complainant argues that the puppies are not exempt under 9 C.F.R. § 2.50(d) because the evidence supports a finding that the puppies were weaned and were not maintained as a litter with their dam in the same primary enclosure (Complainant's Response and Cross-Appeal at 7). As evidence, Complainant argues that Respondent testified that Respondent had prepared ID tags for the puppies and it "stands to reason" that Respondent would not have individually identified unweaned members of a litter kept with the mother that Respondent did not have to identify individually; that inspector Borchert stated that the unidentified dogs were held back from sale for breeding purposes, which "suggests" that the litter was of marketable age, but unweaned puppies are not marketable; that inspector Borchert stated that some animals had been removed from the litter, which "suggests" that the litter was not intact as the exemption requires; and, that even if the dogs were unweaned, Respondent let the animals sleep on Respondent's bed, which "means" that the puppies were not maintained as a litter with their dam in the

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[12]*In re Daniel Strebin*, 56 Agric. Dec. 1095, 1145 (1997) (stating that the Rules of Practice provide for filing of a response to an appeal and in such response, any relevant issue not presented in the appeal petition may be raised); *In re Otto Berosini*, 54 Agric. Dec. 886, 888 n.** (1995) (stating that respondent's original appeal was late-filed and would have been dismissed on jurisdictional grounds; however, since respondent's reply to complainant's timely appeal properly incorporated by reference respondent's original appeal, respondent's original appeal constitutes a timely cross-appeal); *In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 424-25 (1994) (stating that the Rules of Practice provide for filing of a response to an appeal and in such response any relevant issue not presented in the appeal petition may be raised), *aff'd*, 48 F.3d 305 (8th Cir. 1995).

same primary enclosure, which the exemption requires (Complainant's Response and Cross-Appeal at 8).

Respondent contends that inspector Borchert never inspected any dogs to determine if they had tags or tattoos (Respondent's Response B at 4). However, I find that the record clearly indicates that inspector Borchert did find that new dogs and puppies were not identified (CX 3 at 2, item 7, III, #45) and that their identification numbers were listed on a card on their pen (Respondent's Response A at 4). Respondent also contends that there were only three puppies involved. However, the number of puppies involved is not a defense to a violation of section 2.50(c) of the Standards.

I reject Complainant's argument because it is speculative. Complainant uses terms like "stands to reason" and "suggests," and it appears that Complainant relies not on facts evidenced in the record, but rather Complainant's interpretation of facts evidenced by the record.

Second, Complainant argues that the ALJ erred by not finding the August 8, 1995, violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), concerning soiled newspapers, alleged in paragraph 6(a) of the Complaint (Complainant's Response and Cross-Appeal at 16-18). The ALJ found, with respect to paragraph 6(a) of the Complaint, that the soiled newspapers did not constitute a violation, as they occurred as part of the regular cleaning of the facility (Initial Decision and Order at 9).

Complainant argues that the presence of the soiled newspapers did represent a violation. Inspector Borchert noted two distinct categories of newspapers: old, soiled newspapers and soiled newspapers. Complainant argues that distinguishing one group as "old" soiled newspapers indicates that they had been in the animal area for longer than 5 minutes, thus, violating the Standard for frequent removal of waste (Complainant's Response and Cross-Appeal at 16-17). Respondent responds that all of the newspapers were being gathered to be placed in trash containers, were not in the animal enclosures, and were placed in trash containers within 5 minutes after having been collected (Respondent's Response A at 5-6; Respondent's Response B at 6).

Since all the soiled newspapers were outside the enclosure, I infer that Complainant is arguing that the "sack of old" newspapers had already been there for longer than 5 minutes, when the other papers were put on the ground. Although Complainant's interpretation is one way to look at the evidence, it is just as likely that the two sets of soiled newspapers were generated during the same cleaning. Perhaps, inspector Borchert was only distinguishing between papers still on the ground and those papers already bagged for disposal. However, the evidence does not support either scenario. I find the Complainant's argument speculative, in that

it interprets the evidence rather than providing the requisite preponderance of the evidence that the "old" soiled newspapers were put there at a time prior to the rest of the soiled newspapers.

Third, also concerning paragraph 6(a) of the Complaint, Complainant argues that the ALJ's characterization of Respondent's leaving the cover off the pail of feces as merely a "technical" violation of section 3.1(f) of the Standards, is error (Complainant's Response and Cross-Appeal at 16-18).

I disagree with Complainant. I infer that the ALJ meant that Respondent met the technical requirements for a violation of 9 C.F.R. § 3.1(f), but that the violation was *de minimis*. I agree with the ALJ that the pail was left uncovered, which constitutes a violation, but I find the circumstances such that I am not assessing a civil penalty or suspending Respondent's Animal Welfare Act license for this violation.

Fourth, Complainant argues that the ALJ erred by not finding that on June 19, 1995, and August 8, 1995, Respondent failed to ensure that the floors and walls of indoor housing facilities were impervious to moisture, as required by sections 3.2(d) and 3.3(e) of the Standards (9 C.F.R. §§ 3.2(d), .3(e)), as alleged in paragraph 2(a) of the Complaint. The ALJ found that inspector Borchert said that the only way to test the surface to determine if it is impervious to moisture is by spraying it with water and that he did not spray water on the surface. Inspector Borchert did not explain how he determined the surfaces were not impervious to moisture and under these circumstances, the ALJ found that Complainant had not met its burden of proving Respondent violated sections 3.2(d) and 3.3(e) of the Standards (9 C.F.R. §§ 3.2(d), .3(e)) (Tr. 119-20, 194; Initial Decision and Order at 9-10).

The gravamen of Complainant's argument is that "[i]t is axiomatic that in order to be sealed, a surface must be of sufficient uniformity so that the sealant can adhere to it" (Complainant's Response and Cross-Appeal at 20). The rest of Complainant's argument implies that to achieve compliance with the Standards all "surfaces to be covered be sanded and free from dirt and loose paint" (Complainant's Response and Cross-Appeal at 20). Respondent responds that she did paint or put water sealer on everything that was required to be sealed (Respondent's Response A at 6-7). Further, Respondent notes that inspector Borchert never properly tested the surfaces to determine whether they were in fact impervious to moisture (Respondent's Response B at 3).

I reject Complainant's argument because the Standard has no requirement that surfaces to be sealed must be sanded and free from dirt and loose paint.

Moreover, Complainant cites no authority for the axiom on surface uniformity. I agree with the ALJ that inspector Borchert could not have determined

imperviousness to moisture by only looking at the surfaces, and inspector Borchert testified that the only test for imperviousness is to spray water, which inspector Borchert testified he did not do (Tr. 194).

Fifth, Complainant argues that the ALJ erred by not finding the violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)) alleged in paragraph 1(a) of the Complaint.

Paragraph 1(a) of the Complaint alleges that Respondent failed to provide outdoor housing facilities for dogs that are large enough to allow each animal to sit, stand, lie in a normal manner, and turn about freely, in violation of section 3.4(b) of the Standards (9 C.F.R. § 3.4(b)).

Section 3.4(b) of the Standards requires that each outdoor facility include one or more shelter structures that are large enough to allow each animal in the shelter to sit, stand, lie in a normal manner, and turn about freely. Complainant did not prove that the shelter structures were not large enough to allow each animal in the shelter to sit, stand, lie in a normal manner, and turn about freely.

Sixth, Complainant argues that the ALJ erred by not finding the violation of section 3.9(b) of the Standards (9 C.F.R. § 3.9(b)), concerning failure to keep non-disposable food receptacles clean and sanitized, as alleged in paragraph 1(c) of the Complaint (Complainant's Response and Cross-Appeal at 23-24). The ALJ found, with respect to paragraph 1(c) of the Complaint, based on Respondent's Answer and testimony, that inspector Borchert was not referring to a food utensil, but to a water receptacle which, in any event, was not dirty, but which had mineral deposits caused by hard water (Initial Decision and Order at 11).

Complainant makes the following arguments:

> First, the ALJ erred in failing to find a violation. In his inspection report, [inspector] Borchert specified that the violation was due to "dirty food receptacles." This means that the receptacles were not for water, but for food, and that there were more than one.
>
> Second, [Respondent] is required to sanitize food and water receptacles. To sanitize means to "make physically clean and to remove and destroy, to the maximum degree that is practical, agents injurious to health." [(Footnote omitted). Respondent's] receptacles were not sanitized.

Complainant's Response and Cross-Appeal at 24.

The ALJ did not err in crediting the testimony of Respondent that the receptacle in question was a water, and not a food, receptacle, and not finding a violation. Respondent's Answer informed Complainant that Respondent's defense to the

charge of a dirty dog bowl would be that the bowl in question was an old water pail with lime deposits from the local hard water (Answer at 3c). Respondent testified to this same set of facts at the hearing (Tr. 282-83). (Respondent reiterates this position in Respondent's Response A at 7; Respondent's Response B at 7.) Complainant could have refuted the facts from Respondent's Answer and testimony, but did not; leaving only the terse statement from inspector Borchert's report: "[d]irty feed receptacles must be kept clean[.] Correct by 6-20-95[.]" (CX 1 at 3, item 7, III, #34.)

Therefore, Complainant has not shown by a preponderance of the evidence that the receptacle in question was a food receptacle.

Seventh, Complainant seemingly argues that the ALJ erred by not finding the violation of section 3.11(d) of the Standards (9 C.F.R. § 3.11(d)), concerning failure to control pests, as alleged in paragraph 1(e) of the Complaint (Complainant's Response and Cross-Appeal at 27). The ALJ found, with respect to paragraph 1(e) of the Complaint, as follows:

> 13. Paragraph 1.e. of the Complaint alleges that [on June 19, 1995, Respondent] failed to maintain an effective pest control program as required by section 3.11(d) of the [S]tandards. . . .
>
> . . . .
>
> [Respondent] said that this was the only occasion when there were a "lot of flies" during an inspection. She said she promptly removed the dogs and sprayed the enclosure with a kennel-approved spray she kept in the enclosure. She said she also uses baits and traps and has turkeys to eat flies and bugs.
>
> An "effective" program under section 3.11(d) [of the Standards (9 C.F.R. § 3.11(d))] does not require the complete elimination of pests such as flies, which is probably impossible to achieve, but a program to "reduce" contamination by pests. The appearance of flies on only one occasion does not necessarily establish that [Respondent] lacked an effective pest control program. The action she took also reflects the maintenance of such a program. [Respondent] did not violate section 3.11(d) [of the Standards (9 C.F.R. § 3.11(d))].

Initial Decision and Order at 13-14.

Complainant seemingly argues that the ALJ erred, as follows:

> The Standards require that licensees establish effective pest control measures [footnote omitted. Inspector] Borchert inspected [Respondent's] facility on June 19, 1995, and noted the presence of an inordinate number of flies [(footnote omitted). Respondent] admits this, but notes that she sprayed and corrected the problem. The ALJ found no violation because "[t]he presence of flies on only one occasion does not necessarily establish that [Respondent] lacked an effective pest control program [footnote omitted].

Complainant's Response and Cross-Appeal at 27.

My examination of Complainant's "argument" reveals that Complainant describes the ALJ's actions, but Complainant does not actually argue that the ALJ committed error; therefore, Complainant's "argument" is rejected.

Finally, Complainant appeals the ALJ's sanction, reiterating Complainant's recommendation that Respondent be issued a cease and desist order, assessed an $8,000 civil penalty, and suspended for 30 days, and continuing thereafter, until Respondent is in compliance with the Animal Welfare Act and the Regulations and Standards, and has paid the civil penalty (Complainant's Response and Cross-Appeal at 34-35). Complainant argues in support of its recommended sanction that Respondent has the size business for such a sanction; that Respondent lacks good faith; that Respondent refused inspection; that Respondent denies her acts were willful; that Respondent made personal attacks on the inspector; and that Respondent regularly fails to comport with the Animal Welfare Act and the Regulations and Standards, while blaming zealous inspectors and difficult requirements for her failures (Complainant's Response and Cross-Appeal at 33-34). Respondent responds that she has done nothing to warrant a fine, that she is being punished for exercising her right to a hearing, and that the good condition of her animals should be taken into consideration (Respondent's Response A at 9-11). Complainant's arguments are addressed in this Decision and Order, *infra*, in my discussion of the sanction.

Respondent's Reply to Complainant's Cross-Appeal

Respondent's Response contains a number of contentions that were raised in Respondent's Appeal, which I fully addressed in this Decision and Order, *supra*,

and which I do not reiterate here. Further, in addition to responses to arguments raised by Complainant in Complainant's Response and Cross-Appeal, Respondent raises five new issues. First, Respondent contends that she is entitled to a jury trial in the county in which the alleged violations occurred and asks whether this proceeding is civil or criminal (Respondent's Response B at 2-3). This proceeding is not a criminal prosecution and the constitutional provisions in Article III, § 2 of the United States Constitution and the Sixth Amendment to the United States Constitution, which afford the right to a jury trial in criminal proceedings, are not applicable to this proceeding.[13] The Seventh Amendment to the United States

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[13]*See United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating that the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Loaisiga*, 104 F.3d 484, 486 (1st Cir.) (stating that deportation proceedings are civil matters exempt from Sixth Amendment protections; they are primarily conducted by administrative bodies and not by courts), *cert. denied*, 117 S. Ct. 2447 (1997); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (stating that deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment); *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6th Cir. 1991) (holding that the Sixth Amendment does not apply to a civil matter, such as a labor relations proceeding conducted by the National Labor Relations Board); *United States v. Schellong*, 717 F.2d 329, 336 (7th Cir. 1983) (holding that denaturalization proceedings are not criminal proceedings; therefore, there is no right to a jury trial under Article III of the United States Constitution or the Sixth Amendment), *cert. denied*, 465 U.S. 1007 (1984); *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983) (holding that the Sixth Amendment does not apply to administrative discharge proceedings conducted by the National Guard because such proceedings are not criminal in nature); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1366 (10th Cir. 1979) (rejecting the characterization of Occupational Safety and Health Administration administrative proceedings, in which civil penalties can be assessed, as criminal proceedings and the argument that the Sixth Amendment is applicable to such proceedings); *Camp v. United States*, 413 F.2d 419, 422 (5th Cir.) (holding that there is no Sixth Amendment right to counsel in non-criminal administrative proceedings before the Selective Service Board), *cert. denied*, 396 U.S. 968 (1969); *Haven v. United States*, 403 F.2d 384, 385 (9th Cir. 1968) (holding that the Sixth Amendment right to counsel does not apply in administrative proceedings in the selective service process), *cert. dismissed*, 393 U.S. 1114 (1969); *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9th Cir. 1960) (stating that the Sixth Amendment applies only to criminal proceedings and that Congress may properly provide civil proceedings for the collection of civil penalties which are civil or remedial sanctions rather than punitive and the Sixth Amendment has no application to such proceedings); *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402, 407 (7th Cir. 1933) (rejecting contention that proceedings under section 6(a) of the Grain Futures Act of September 21, 1922, are "essentially criminal" and holding that, since the proceedings are not criminal in nature, there is no right to a jury trial under Article III, § 2 of the United States Constitution), *cert. denied*, 291 U.S. 680 (1934); *Gee Wah Lee v. United States*, 25 F.2d 107 (5th Cir.) (per curiam) (concluding that the appeal of a deportation order by a United States commissioner is not a trial on a criminal charge covered by Article III, § 2 of the United States Constitution), *cert. denied*, 277 U.S. 608 (1928); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee under the Sixth

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Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

Courts have long construed the phrase "Suits at common law" as referring to cases analogous to those tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary.[14] Congress is free to create new

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[13](...continued)
Amendment applies only to those proceedings technically criminal in nature); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the Sixth Amendment is only applicable to proceedings technically criminal in nature and concluding that the Sixth Amendment is not applicable to administrative proceedings under the Packers and Stockyards Act of 1921); *In re Conrad Payne*, 57 Agric. Dec. ___, slip op. at 10-11 (Dec. 8, 1998) (concluding that the respondent's rights under the Sixth Amendment are not implicated in an administrative proceeding instituted under section 2 of the Act of February 2, 1903, as amended); *In re Saulsbury Enterprises, Inc.*, 57 Agric. Dec. 82, 100 (1997) (concluding that Article III, § 2 of the United States Constitution and the Sixth Amendment, which afford the right to a jury trial in criminal proceedings, are not applicable to administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)).

[14]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that "[t]he Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right'"); *Tull v. United States*, 481 U.S. 412, 417 (1987) (stating that the Court has construed the language of the Seventh Amendment to require a jury trial on the merits in those actions that are analogous to "Suits at common law"); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449 (1977) (stating that "[t]he phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (stating that the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Parsons v. Bedford*, 3 Pet. 433, 445-46 (1830) (construing the phrase "Suits at common law" in the Seventh Amendment as referring to cases tried in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not customary); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating that the Seventh Amendment right to a jury trial attaches in cases involving legal rather than equitable claims); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that the
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statutory public rights, as it did with the enactment of the Animal Welfare Act, and assign their adjudication to an administrative agency before which a litigant has no right to a jury trial, without violating the Seventh Amendment's requirement that a jury trial is to be preserved in suits at common law.[15] Thus, I conclude that the

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[14](...continued)
Supreme Court has consistently interpreted the phrase "Suits at common law" in the Seventh Amendment to refer to suits in which legal rights are to be ascertained and determined, in contradistinction to those suits in which equitable rights alone are recognized and equitable remedies are administered), *cert. denied*, 513 U.S. 1148 (1995); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that the right to a jury turns on the nature of the issue to be resolved and on the forum in which it is to be resolved); *Welch v. TVA*, 108 F.2d 95, 99 (6th Cir. 1939) (stating that the usual method of determining the value of private property taken for public use has been to accord the land owner the right to have damages assessed by a jury, but this is a matter of legislative discretion because condemnation proceedings by the United States for the use and benefit of the Tennessee Valley Authority are not suits at common law in which the right to trial by jury is guaranteed by the Seventh Amendment), *cert. denied*, 309 U.S. 688 (1940); *NLRB v. Tidewater Exp. Lines, Inc.*, 90 F.2d 301, 303 (4th Cir. 1937) (per curiam) (stating that the Seventh Amendment preserves the right to trial by jury which existed under the common law when the amendment was adopted; thus the Seventh Amendment is not applicable where the proceeding is not in the nature of a suit at common law); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits as were maintainable under common law at the time the amendment was adopted); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the guarantee of the right to trial by jury under the Seventh Amendment applies only to suits of such character as were maintainable at common law at the time the amendment was adopted); *In re Hudson*, 170 B.R. 868, 873-74 (E.D.N.C. 1994) (stating that the right to a jury trial under the Seventh Amendment extends only to matters of private right and finding that a creditor who files a claim with the bankruptcy court loses the Seventh Amendment right to a jury trial); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating that the United States Supreme Court has interpreted the right to trial by jury to mean the right which existed in suits under common law in 1791, when the Seventh Amendment was adopted; the Seventh Amendment does not create a jury trial right, it simply preserves the right that already existed under the common law).

[15]*See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (stating that if a claim that is legal in nature asserts a public right, then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (noting that the Seventh Amendment is not applicable to administrative proceedings); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449-461 (1977) (stating that when Congress creates statutory public rights, it may assign their adjudication to an administrative agency with which a jury trial would be incompatible without violating the Seventh Amendment's injunction that jury trial is to be preserved at common law); *Pernell v. Southhall Realty*, 416 U.S. 363, 383 (1974) (assuming that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency; and stating that *Block v. Hirsh*, 256
(continued...)

[15](...continued)
U.S. 135 (1921), stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (stating that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication); *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1378 (5th Cir. 1996) (stating that application to the Environmental Protection Agency for a boiler and industrial furnace permit required under the Resource Conservation and Recovery Act triggered a public rights dispute; therefore, the applicant has no right to a jury trial under the Seventh Amendment), *cert. denied*, 519 U.S. 1055 (1997); *Cavallari v. Comptroller of the Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (stating that when the government sues in its sovereign capacity to enforce public rights, Congress may assign the fact-finding and initial adjudication to an administrative forum); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that in cases in which "public rights" are being litigated, e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact, the Seventh Amendment does not prohibit Congress from assigning that fact-finding function and initial adjudication to an administrative forum with which a jury would be incompatible), *cert. denied*, 513 U.S. 1148 (1995); *Sasser v. Administrator, EPA*, 990 F.2d 127, 130 (4th Cir. 1993) (holding that a person charged in an administrative complaint for discharging pollutants has no Seventh Amendment right to a jury trial and stating that "[g]enerally speaking, the Seventh Amendment does not apply to disputes over statutory public rights, `those which arise between the Government and persons subject to its authority in connection with the performance of constitutional functions of the executive and legislative departments'"); *Joy Technologies, Inc. v. Manbeck*, 959 F.2d 226, 228 (Fed. Cir.) (stating that public rights may be constitutionally adjudicated by legislative courts and administrative agencies without implicating the Seventh Amendment right to a jury trial), *cert. denied*, 506 U.S. 829 (1992); *Myron v. Hauser*, 673 F.2d 994, 1004 (8th Cir. 1982) (stating that generally the Seventh Amendment is not applicable to administrative or statutory proceedings and concluding that the Seventh Amendment is not applicable to reparation proceedings before the Commodity Futures Trading Commission); *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979) (stating that the Supreme Court has held that the Seventh Amendment right to a jury trial does not extend to situations where Congress has seen fit to set up an administrative procedure for adjudication of disputes arising out of statutorily created rights), *cert. denied*, 449 U.S. 854 (1980); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) (stating that at least when only public rights are involved, Congress may provide for administrative fact-finding with which a jury trial would be incompatible and even where the statutory public rights are enforceable in favor of a private party they can be committed to an administrative agency for determination); *Floyd S. Pike Electrical Contractor, Inc. v. Occupational Safety and Health Review Comm'n*, 557 F.2d 1045 (4th Cir. 1977) (per curiam) (stating that the Seventh Amendment is not a bar to the imposition of civil penalties by an administrative tribunal, as authorized by the Occupational Safety and Health Act of 1970); *Penn-Dixie Steel Corp. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 1078, 1080 (7th Cir. 1977) (stating that the Supreme Court held in *Atlas Roofing Co., supra*, that the Seventh Amendment does not bar Congress from assigning to an administrative agency the task of adjudicating Occupational Safety and Health Act violations); *Dorey Electric Co. v. Occupational Safety and Health Review Comm'n*, 553 F.2d 357, 358 (4th Cir. 1977) (per curiam) (stating that the Supreme Court held in *Atlas Roofing Co., supra*, that the Seventh Amendment poses no bar to the disposition of a charge
(continued...)

Seventh Amendment to the United States Constitution does not entitle Respondent to a jury trial in this administrative proceeding.

Moreover, Respondent has no right under the Administrative Procedure Act to have the hearing conducted in the county in which the alleged violations occurred. The Administrative Procedure Act merely provides, with respect to the location of the hearing, as follows:

§ 554. Adjudications

. . . .

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing[.]

. . . .

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[15](...continued)
of the violation of the Occupational Safety and Health Act and the assessment of a civil penalty by an administrative tribunal); *Mohawk Excavating, Inc. v. Occupational Safety and Health Review Comm'n*, 549 F.2d 859, 865 (2d Cir. 1977) (stating that the Seventh Amendment is not a bar to the imposition of civil penalties through the administrative process without a jury trial in the enforcement of the Occupational Safety and Health Act); *Clarkson Construction Co. v. Occupational Safety and Health Review Comm'n*, 531 F.2d 451, 455-56 (10th Cir. 1976) (stating that it is within the power of Congress to choose an administrative process for the enforcement of the safe and healthful working conditions objective of the Occupational Safety and Health Act of 1970 and the administrative proceeding which resulted in the imposition of a civil sanction for the violation of the Act is not an action at common law within the meaning of the Seventh Amendment; hence no jury trial right arises); *National Velour Corp. v. Durfee*, 637 A.2d 375, 379 (R.I. 1994) (stating that if an action involves the adjudication of public rights, no jury is required pursuant to the Seventh Amendment); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (stating that where a right is created by statute and committed to an administrative forum, jury trial is not required by the Seventh Amendment); *In re Conrad Payne*, 57 Agric. Dec. ___, slip op. at 14-15 (Dec. 8, 1998) (concluding that the Seventh Amendment does not entitle the respondent to a jury trial in an administrative proceeding instituted under section 2 of the Act of February 2, 1903, as amended); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 100 (1997) (holding that there is no constitutional right to a jury trial in administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B)) (Order Denying Pet. for Recons.)); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988) (rejecting respondent's contention that he was improperly denied a jury trial in an administrative proceeding under the Animal Welfare Act, and stating that it is well settled that a jury trial is not required in an administrative disciplinary proceeding), *aff'd*, 878 F.2d 358, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989).

. . . In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

5 U.S.C. § 554(b).

In any event, the record establishes that Respondent's residence and licensed facility are located in Donnybrook, North Dakota, and that all of the alleged violations at issue in this proceeding occurred in Donnybrook, North Dakota. The hearing in this proceeding was conducted in Minot, North Dakota, and both Donnybrook and Minot are located in Ward County, North Dakota. Respondent did not move for a change of venue, and I do not find that conducting the hearing in this proceeding in Minot, North Dakota, violated Respondent's right to due process or the requirement under the Administrative Procedure Act that the location of the hearing be chosen with due regard for the convenience and necessity of the parties or their representatives.[16]

Second, Respondent contends that she has made a Freedom of Information Act request for a report concerning her facility prepared by Mr. Larry Neustel and that the "USDA Central Sector (Dr. Walt Christenson) has stated that no FOIA information will be released to Ms. Hansen until this case is settled" (Respondent's Response B at 3-4 (emphasis in original)).

The Freedom of Information Act (5 U.S.C. § 552) requires each federal agency to make its non-exempt records available, upon request, to a requester. If a request is denied, an aggrieved party may file a complaint in the district court of the United States in which the aggrieved party resides, or has a principal place of business, or in which the agency records are situated, or in the District of Columbia, which court has jurisdiction to enjoin the agency from withholding agency records and order production of agency records improperly withheld. Thus, the exclusive forum for correcting any improper denial of Respondent's Freedom of Information Act request is a district court of the United States.

Third, Respondent argues that Ms. Carroll's license[17] should be suspended until

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[16]*See generally Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir.) (stating that an alien's due process rights were not violated by holding a waiver of deportation proceeding in Louisiana, rather than near his residence in Virginia, where the alien did not move for a change of venue, but indicated a willingness to proceed in Louisiana), *cert. denied*, 516 U.S. 806 (1995).

[17]Based on Ms. Carroll's status in this proceeding and the context of Respondent's argument, I infer that Ms. Carroll is licensed to practice law and that Respondent's reference to "Ms. Carroll's license"

(continued...)

she is in full compliance with the oath she has taken and that Ms. Carroll should be assessed a civil penalty of $250,000 for representing an individual who lied under oath and for trying to obtain money through deception (Respondent's Response B at 8). Respondent does not indicate the nature of the oath that Ms. Carroll has taken; the Complainant, the person who Ms. Carroll represents in this proceeding, did not testify in this proceeding; and there is no evidence that Ms. Carroll tried to obtain money through deception. Further, even if I found that Ms. Carroll violated an oath, represented a perjurer, and attempted to obtain money by deception (which I do not find), I have no jurisdiction to suspend Ms. Carroll's license to practice law or to assess Ms. Carroll a civil penalty either for representing persons who lie under oath or for attempting to obtain money through deception.

Fourth, Respondent contends that Ms. Carroll must be practicing law for a foreign power. Respondent cites as support for her contention that Ms. Carroll must be practicing law for a foreign power, Ms. Carroll's use of the title "Esquire" in reference to herself (Respondent's Response B at 9). However, while the word "esquire" is used in various ways,[18] in the United States, the title "Esquire" is

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[17](...continued)
is to Ms. Carroll's license to practice law.

[18]*See generally, e.g.*, Merriam Webster's Collegiate Dictionary 396 (10th ed. 1997):

esquire . . . **1** : a member of the English gentry ranking below a knight **2** : a candidate for knighthood serving as shield bearer and attendant to a knight **3** — used as a title of courtesy usu. placed in its abbreviated form after the surname <John R. Smith, *Esq.*> **4** *archaic* : a landed proprietor

The Oxford English Dictionary Vol. V, 398 (2d ed. 1991):

esquire . . . .

1.a. *Chivalry.* A young man of gentle birth, who as an aspirant to knighthood, attended upon a knight, carried his shield, and rendered him other services.

. . . .

2. A man belonging to the higher order of English gentry, ranking immediately below a knight.

. . . .

3. As a title accompanying a man's name. Originally applied to those who were

(continued...)

frequently appended after the name of an attorney,[19] and the title "Esquire" does not indicate that the attorney, after whose name the title is appended, is practicing law for a foreign power. Moreover, the record is clear that Ms. Carroll represents Complainant in Complainant's official capacity as an employee of the United States.

Fifth, Respondent asserts that "the House subcommittee on government management . . . gave the USDA a rating of D" (Respondent's Response B at 9). Respondent does not indicate the relevance of this asserted rating to the issues in this proceeding.

Sanction

As to the appropriate sanction, the Animal Welfare Act provides:

§ 2149. Violations by licensees

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[18](...continued)
'esquires' in sense 2; subsequently extended to other persons to whom an equivalent degree of rank or status is by courtesy attributed.

. . . .

4. . . . A gentleman who escorts a lady in public.

Bouvier's Law Dictionary 1074 (3d ed. 1914):

ESQUIRE. A title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law; and therefore it confers no distinction in the law.

See also Esquire, Inc. v. Esquire Slipper Mfg. Co., 243 F.2d 540, 543 (1st Cir. 1957) (stating that the word *esquire* is not capable of precise definition, but it is a word firmly established in the english vocabulary and the word carries with it strong implications of youthful gentility in an aura of wealth); *Christian v. Ashley County*, 24 Ark. 142, 151 (Ark. 1863) (stating that the word *esquire* is a sufficient designation of the occupation of an associate judge); *Call v. Foresman*, 5 Watts 331, 332 (Pa. 1836) (per curiam) (stating that the word *esquire* is properly used to designate a justice of the peace); *Commonwealth v. Vance*, 15 Serg. & Rawle 35, 37 (Pa. 1826) (indicating that the term *esquire* applies to associate justices); *Antonelli v. Silvestri*, 137 N.E.2d 146, 147-48 (App. Ct. Ohio 1935) (stating that by common acceptation an *esquire* has no relation to the law; it is often added to the name of poets or artists and the term may be applied to a landed proprietor or country squire; the term is one of courtesy, indicating a gentleman attending or escorting a lady; nowhere do we find that the term *esquire* denotes an attorney at law).

[19]Black's Law Dictionary 546 (6th ed. 1990).

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a), (b).

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

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with

the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[20]

Complainant seeks: (1) a 30-day suspension of Respondent's Animal Welfare Act license, (2) a civil penalty of $8,000, and (3) a cease and desist order. Complainant bases the requested 30-day suspension on the repeated and ongoing recordkeeping and facilities violations, and refusal to allow inspection. Complainant argues that a civil penalty of $8,000 is appropriate in light of the size of Respondent's business and that a cease and desist order is warranted to ensure the correction of existing violations and to prevent future interference with USDA inspectors. (Complainant's Brief at 23.)

Furthermore, Complainant argues, *inter alia,* that Respondent, despite her claims to the contrary, has not acted in good faith; that Respondent has publicly announced her refusal to allow inspector Borchert to inspect her facility; that refusal to allow inspection is very detrimental to enforcement of the Animal Welfare Act, requiring a severe sanction; and that her actions were willful, despite her denial of willfulness and claims of good faith (Complainant's Brief at 23-24).

Complainant's sanction recommendation is well within the range of sanctions in these kinds of cases. The Department consistently imposes significant sanctions for violations of the Animal Welfare Act and the Regulations and Standards.[21] The

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[20]*In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 67-68 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998), *appeal docketed* No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

[21]*See, e.g.*, *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (imposing a $20,000 civil penalty and a permanent disqualification from obtaining a license for 33 violations of the Animal

(continued...)

[21](...continued)
Welfare Act and the Regulations); *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (imposing a $13,500 civil penalty and a 2-year disqualification from obtaining a license for 16 violations of the Animal Welfare Act and the Regulations and Standards); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day suspension of Respondent's license for 19 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189, 222 (1998) (imposing a $200,000 civil penalty, permanent revocation of respondent's license, and permanent disqualification from obtaining a license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 178-79 (1998) (imposing a $9,250 civil penalty and a 14-day suspension for 23 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419 (1997) (imposing a $7,500 civil penalty and a 40-day suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards) (Modified Order); *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards) (Decision and Order on Remand); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act, the Regulations, and the Standards), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act, the Regulations, and the Standards) (Order Lifting Stay Order and Decision and Order); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license
(continued...)

Department in the past has permanently disqualified or revoked dealers' and exhibitors' licenses for the kind of violations that are found in this proceeding.[22]

Respondent replies that the violations are not willful; that the violations caused no harm to the animals; that the animals are healthy and have never been injured, mistreated, crowded, or dirty; that a $3,000 civil penalty would be like $30,000 to others; that Respondent would not even be able to pay in time-scheduled payments such a large civil penalty; that Respondent lives frugally, but still would not be able to buy vaccines, dog food, and materials for building new cages; that Respondent has no savings; that all income is put back into the kennel; and that if Respondent is fined and suspended, it is the dogs which will suffer (Respondent's Appeal B at 15-18). However, a respondent's ability to pay a civil penalty and the collateral effects of a respondent's payment of a civil penalty are not considered in determining the amount of the civil penalty to be assessed.[23]

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[21](...continued)
suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

[22]*See, e.g.*, *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (imposing a $20,000 civil penalty and a permanent disqualification from obtaining a license for 33 violations of the Animal Welfare Act and the Regulations); *In re John D. Davenport*, 57 Agric. Dec. 189, 222, 237-42 (1998) (imposing a $200,000 civil penalty, permanent revocation of respondent's license, and permanent disqualification from obtaining a license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act, the Regulations, and the Standards), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

[23]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *Gus White III* was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re David M. Zimmerman*, 57
(continued...)

Respondent also raises several concerns over what business activities are allowed while under suspension (Respondent's Appeal B at 16-18), but I direct Respondent to seek information directly from APHIS on that issue.

The Complaint alleges that each of the violations alleged in the Complaint was willful, and the ALJ found the proven violations to be willful (Initial Decision and Order at 23). An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[24]

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[23](...continued)
Agric. Dec. ___, slip op. at 16 n.1 (Nov. 18, 1998) (stating that the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating that respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating that ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating that ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating that the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating that the holding in *In re Gus White III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

[24]*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 32 (Nov. 18, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 71-72 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 286 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219-20 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 167-68 (1998), *appeal docketed*, No. 98-3296 (8th Cir. Sept. 10, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276,
(continued...)

The ALJ found that Complainant proved 23 of the 33 violations alleged in the Complaint.[25] I agree with the ALJ on all the violations which he found, except that I dismiss the three violations alleged in paragraphs 1(f) and 3 of the Complaint. Thus, I find that Complainant has proven 20 of the 33 violations alleged. Also, I find Respondent's violations of 9 C.F.R. § 3.6(b) alleged in paragraph 1(b) of the Complaint and the October 25, 1995, violation of 9 C.F.R. § 3.1(f) alleged in paragraph 6(a) of the Complaint, are *de minimis*, and I do not assess a civil penalty or impose a suspension of Respondent's Animal Welfare Act license for these violations.

Complainant has not charged, and the record does not show, that Respondent has any violations prior to those that are the subject of this proceeding.

Some of Respondent's violations are *de minimis*, but the gravity of refusing to allow inspection and of repeatedly violating the Standards, is significant.

Based upon inspector Borchert's inspection reports for the dates of June 19, 1995, August 8, 1995, and October 25, 1995, I conclude that Respondent usually maintains approximately 100 animals, and sometimes half that many, which makes Respondent's kennel a large facility (CX 1, 2, 3).

I agree with the ALJ that there is no evidence that Respondent's animals were not provided with overall humane care. Corrections were generally promptly

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[24](...continued)
1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations would still be found willful.

[25]See note 6.

made.[26] Moreover, the record does not reveal that there were any injuries emanating from any of the violations. Further, I agree with the ALJ that the record reveals that Respondent kept the animals in good condition (Tr. 194). I also find that Respondent usually exhibited good faith in attempting to achieve and to maintain compliance.

After examining all relevant circumstances, in light of the Department's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendation of the administrative officials, I conclude that a cease and desist order, a 30-day suspension of Respondent's Animal Welfare Act license, and a $4,300 civil penalty are appropriate and necessary to ensure Respondent's compliance in the future, deter others from violating the Animal Welfare Act, and thereby fulfill the remedial purposes of the Animal Welfare Act.

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

Order

1. Respondent Judie Hansen is assessed a civil penalty of $4,300. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

Colleen A. Carroll
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Ave., SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be forwarded to, and received by, Colleen A. Carroll, within 65 days after service of this Order on Respondent. The

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[26]Corrections are to be encouraged and may be taken into account when determining the sanction to be imposed. *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0048.

2. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

a. failing to ensure that primary enclosures for kittens have an elevated resting surface;

b. failing to keep the premises clean in order to protect animals from injury and to facilitate the required husbandry practices;

c. failing to provide for the removal and disposal of animal waste so as to minimize vermin infestation, odors, and disease hazards;

d. failing to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement;

e. failing to keep the premises where housing facilities for dogs are located clean and control weeds;

f. failing to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation;

g. failing to ensure that animal areas are free of clutter, including equipment, furniture, and stored material;

h. failing to design and construct housing facilities for dogs and cats so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury and to contain them;

i. failing to provide for the regular and frequent collection, removal, and disposal of animal waste in a manner that minimizes the risk of contamination and disease;

j. failing to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained in the primary enclosures and to minimize disease hazards and to reduce odors;

k. failing to construct indoor and outdoor housing facilities so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury and to contain them; and

l. failing to allow an APHIS inspector access to her facility and records.

The cease and desist provisions shall become effective on the day after service of this Order on Respondent.

3. Respondent's Animal Welfare Act license is suspended for a period of 30 days, and continuing thereafter, until Respondent demonstrates to the Animal and Plant Health Inspection Service that Respondent is in full compliance with the

Animal Welfare Act, the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding, upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 30-day license suspension period.

The Animal Welfare Act license suspension provisions in this Order shall become effective on the 65th day after service of this Order on Respondent.

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISION

In re: RONALD L. WIECZOREK AND DEANNA WIECZOREK.
EAJA-FSA Docket No. 99-0001.
Decision and Order filed December 17, 1998.

EAJA application — Business days — Substantially justified.

The Judicial Officer affirmed Hearing Officer Paul Handley's award of $1,755 to Equal Access to Justice Act (EAJA) Applicants. The EAJA Applicants were prevailing parties in an adversary adjudication captioned *In re Ronald Wieczorek*, Case No. 97000990W. The Judicial Officer held that fees and other expenses may be awarded under the EAJA, unless, *inter alia*, the agency's position in the adversary adjudication is substantially justified. A position is substantially justified under the EAJA, if the position is reasonable in law and fact. *Pierce v. Underwood*, 487 U.S. 552 (1988). The Judicial Officer found that the Farm Service Agency's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified because the agency's position in the adversary adjudication was based upon the method it used to establish proposed rent under the preservation loan service program, which method was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997). The Judicial Officer also held that the term *business days* in the National Appeals Division Rules of Procedure (7 C.F.R. § 11.9(a)(2)) includes all days, except legal public holidays, as listed in 5 U.S.C. § 6103, Saturdays, and Sundays; therefore, the Hearing Officer's Appeal Determination did not become a final disposition in *In re Ronald Wieczorek*, Case No. 97000990W, until November 19, 1997, and the EAJA Applicants' December 18, 1997, filing was a timely EAJA application under the Department's Procedures Relating to Awards Under the EAJA (7 C.F.R. § 1.193(a)).

Margit Halvorson, for Respondent.
Chris A. Nipe, Mitchell, South Dakota, for Applicants.
Initial decision issued by Paul Handley, Hearing Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Ronald L. Wieczorek and Deanna Wieczorek [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice], by sending an incomplete EAJA application, dated November 25, 1997, to Paul Handley, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter Hearing Officer]. Applicants completed their EAJA application by sending supplemental information, dated December 15, 1997, to Larry Jordan, Western Regional Office, National Appeals Division, United States Department of Agriculture.

Applicants allege in their EAJA Application that: (1) they were prevailing parties in an appeal of a March 3, 1997, adverse decision issued by the Farm

Service Agency, United States Department of Agriculture [hereinafter Respondent], regarding the feasibility of, and rental rate for, the leaseback of Applicants' property through the preservation loan servicing program, *In re Ronald Wieczorek*, Case No. 97000990W; (2) Respondent's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified; (3) Applicants incurred attorney fees and costs of $1,860.30 in connection with their appeal of Respondent's March 3, 1997, adverse decision; and (4) Applicants' net worth does not exceed $2,000,000 (Applicants' November 25, 1997, filing; Invoice Number 00000045; December 15, 1997, Affidavit of Chris A. Nipe; and Summary of Financial Condition).

Respondent submitted Government's Answer to Application for Fees Under the Equal Access to Justice Act [hereinafter Answer], dated January 8, 1998, to the Hearing Officer. The Answer: (1) states that Applicants' EAJA Application was not timely filed (Answer at 1-2); (2) states that Applicants' EAJA Application is not legally sufficient in that (i) the EAJA Application is filed to recover attorney fees from the "Foreign Service Agency," (ii) the EAJA Application does not show the net worth of Applicants at the time the proceeding was initiated, as required by section 1.191(a) of the EAJA Rules of Practice (7 C.F.R. § 1.191(a)), and (iii) some of the attorney fees requested in the EAJA Application were not incurred in connection with the adversary adjudication relating to the adverse decision issued by Respondent regarding the feasibility of Applicants' farm and home plan and the proposed rental rate for the leaseback of Applicants' property (Answer at 2-3); (3) states that Respondent's position regarding the method used to determine the proposed rental rate for the leaseback of Applicants' property and the proposed rental rate was substantially justified (Answer at 3-9); and (4) requests that the Hearing Officer dismiss Applicants' EAJA Application (Answer at 9).

Applicants submitted Appellant's [sic] Reply to Government's Answer to Application for Fees, dated January 21, 1998, to the Hearing Officer. On September 8, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicants submitted a completed EAJA Application on December 15, 1997, and that the EAJA Application was timely (Initial Decision and Order at 2); (2) found that Respondent's position regarding the proposed rental rate for the leaseback of Applicants' property was not substantially justified (Initial Decision and Order at 3-4); (3) found that Applicants were the prevailing parties in *In re Ronald Wieczorek*, Case No. 97000990W (Initial Decision and Order at 5); (4) found that all of the fees and expenses claimed by Applicants were incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W, and are reasonable and justified (Initial Decision and Order at 4-5);

(5) concluded that neither the Equal Access to Justice Act nor the EAJA Rules of Practice permit the award of Applicants' expenses titled "sales tax" (Initial Decision and Order at 5); and (6) awarded Applicants $1,755 (Initial Decision and Order at 5).

On October 8, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer on matters pertaining to the Equal Access to Justice Act in United States Department of Agriculture [hereinafter USDA] proceedings covered by the EAJA Rules of Practice (7 C.F.R. § 1.189).[1] On November 27, 1998, Applicants filed Appellant's [sic] Reply to Farm Service Agency's Petition for Review of Judicial Officer, and on November 29, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful reading of the record in this proceeding, I agree with the Hearing Officer's Initial Decision and Order. Therefore, while I reword the Initial Decision and Order, I am adopting the general format of and findings and conclusions in the Hearing Officer's Initial Decision and Order, as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Hearing Officer's findings of fact and conclusions, as reworded.

Applicable Statutory Provisions

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

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

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to

be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based[.]

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E) (1994 & Supp. II 1996).

HEARING OFFICER'S INITIAL DECISION AND ORDER (AS REWORDED)

HISTORICAL INFORMATION

On March 3, 1997, Respondent issued an adverse decision regarding the feasibility of Applicants' farm and home plan and Respondent's proposed rental rate for the leaseback of Applicants' property under the preservation loan servicing program. Applicants were offered the opportunity to resolve Respondent's March 3, 1997, adverse decision through mediation, which was completed on July 9, 1997, without the matter being resolved. On July 14, 1997, Respondent again issued the denial of leaseback program assistance to Applicants, based upon Applicants' lack of a feasible farm and home plan and Respondent's proposed rental rate, and Applicants appealed Respondent's adverse decision. On August 26, 1997, the Hearing Officer conducted a hearing, and on October 14, 1997, the Hearing Officer issued an Appeal Determination in which the Hearing Officer found that Respondent's proposed rental rate was in error. *In re Ronald Wieczorek*, Case No. 97000990W. Respondent did not submit a request for a review of the Hearing Officer's Appeal Determination.

On November 25, 1997, Applicants submitted an incomplete EAJA Application for fees and expenses under the authority of 5 U.S.C. § 504 and 7 C.F.R. §§ 1.180-.203. Applicants submitted a completed EAJA Application, dated December 15, 1997, which was received on December 18, 1997.

On May 19, 1998, Larry Jordan, Assistant Director, National Appeals Division, USDA, notified Applicants and Respondent that the record pertaining to Applicants' EAJA Application was closed, effective May 19, 1998. Neither Applicants nor Respondent requested further proceedings, as authorized by 7 C.F.R. § 1.199.

The Order in this Equal Access to Justice Act proceeding is issued on the basis of the record in the proceeding for which Applicants seek fees and expenses, *In re Ronald Wieczorek*, Case No. 97000990W, and on submissions relating to Applicants' EAJA Application.

STATEMENT OF THE CASE

Respondent contends that Applicants' EAJA Application was not timely filed, that Respondent's position in *In re Ronald Wieczorek*, Case No. 97000990W, was substantially justified, and that Applicants' EAJA Application is not legally sufficient.

Applicants contend that the EAJA Application for fees and expenses was filed timely, that Respondent's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified, that Applicants are the prevailing parties in *In re Ronald Wieczorek*, Case No. 97000990W, and that Applicants' EAJA Application is authorized by law and fully supportable.

THE APPLICATION FOR FEES AND EXPENSES WAS TIMELY FILED

Respondent contends that Applicants did not file a timely EAJA Application in accordance with 7 C.F.R. § 1.193, which provides that an application must be filed no later than 30 days after final disposition of the proceeding by USDA. Final disposition means the date on which a decision disposing of the merits of the proceeding becomes final and unappealable, both within USDA and to the courts (7 C.F.R. § 1.193(b)). The record establishes that *In re Ronald Wieczorek*, Case No. 97000990W, became final on November 19, 1997, and that Applicants filed their EAJA Application on December 18, 1997. Therefore, Applicants filed their EAJA Application no later than 30 days after final disposition of *In re Ronald Wieczorek*, Case No. 97000990W, in accordance with 7 C.F.R. § 1.193.

RESPONDENT'S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED

A decision concerning whether Respondent's position was "substantially justified" must be based upon the record of the adversary adjudication for which fees and other expenses are sought (5 U.S.C. § 504(a)(1)).

The adversary adjudication for which Applicants seek fees and other expenses, *In re Ronald Wieczorek*, Case No. 97000990W, resulted from Applicants' appeal of Respondent's denial of Applicants' application for leaseback program assistance under 7 C.F.R. pt. 1951, subpart S. The basis for Respondent's denial of Applicants' leaseback application was Respondent's finding that Applicants' October 28, 1996, farm and home plan was not feasible and that the rent for Applicants' property would be $17,952.

The Hearing Officer found that Applicants' farm and home plan was not feasible. However, Applicants presented evidence at the August 26, 1997, hearing that they were able to obtain financing from a bank to pay Respondent's proposed lease amount; thus, pursuant to 7 C.F.R. § 1951.911(a)(6)(i) (1997), the issue of the feasibility of Applicants' farm and home plan was moot (*In re Ronald Wieczorek*, Case No. 97000990W, Appeal Determination at 3). Therefore, the only remaining issue in *In re Ronald Wieczorek*, Case No. 97000990W, was Respondent's proposed rental rate.

Respondent's proposed rental rate was based on a telephone survey of five lenders located in Mitchell, Plankinton, Stickney, and Mount Vernon, South Dakota. Respondent used the data gleaned from this survey to compute an average cash rental rate for average cropland and average pasture land between Mount Vernon and Plankinton, South Dakota. Further, Respondent conducted a telephone survey of two commercial grain elevators, located in Davison County, and a farmer located 2 miles north of Mount Vernon, South Dakota; whereby Respondent obtained an average per bushel grain storage rate, which Respondent incorporated into its proposed rental rate. (*In re Ronald Wieczorek*, Case No. 97000990W, Appeal Determination at 2.)

Section 1951.911(a)(6)(iii) of USDA's Servicing and Collections regulations (7 C.F.R. § 1951.911(a)(6)(iii) (1997)) requires Respondent to make a survey of lease amounts of farms that are in the immediate area of the leaseback applicant's farm and that have soils, capabilities, and income which are similar to the leaseback applicant's farm, in order to determine market rent. Therefore, Respondent's rental rate determination was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997). (*In re Ronald Wieczorek*, Case No. 97000990W, Appeal Determination at 4.)

Respondent contends that its position regarding the leaseback rental proposal was substantially justified, as Respondent's method of survey used to make this determination was reasonable. A review of the record fails to support Respondent's contention that its survey method was substantially justified. In fact, the evidence establishes that the survey method used by Respondent to determine the proposed rental rate fails as a reasonable approach, as it was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997). Therefore, Respondent has failed to meet its burden of proving that its position in *In re Ronald Wieczorek*, Case No. 97000990W, was "substantially justified."

APPLICANTS' FEES AND EXPENSES ARE REASONABLE AND JUSTIFIED

Respondent argues that Applicants' EAJA Application is not legally sufficient because the EAJA Application states that it is being filed to recover attorney fees from the "Foreign Service Agency." Applicants' reference to the "Foreign Service Agency" as the agency from whom Applicants seek an Equal Access to Justice Act award is an obvious typographical error that does not affect the legal sufficiency of Applicants' EAJA Application.

Respondent further argues that the "Summary of Financial Condition" does not indicate Applicants' financial condition at the time the proceeding was initiated.

The time period for the Applicants' "Summary of Financial Condition" can be determined by comparing the information in the "Summary of Financial Condition" with the financial information that is a matter of record, which meets 7 C.F.R. §§ 1.184(a)-(b)(1) and 1.190(a)-(b).

Respondent also contends that some of the fees that Applicants allege they incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W, are unrelated to *In re Ronald Wieczorek*, Case No. 97000990W. Respondent bases this contention on its view that the "adversary adjudication" arose from Respondent's adverse decision dated July 14, 1997, and that some of the fees which Applicants seek to recover are for legal services performed prior to July 14, 1997. This argument is not supported by the record in *In re Ronald Wieczorek*, Case No. 97000990W, as Respondent's original adverse decision was issued on March 3, 1997. Thus, the attorney fees incurred by Applicants from March 3, 1997, were incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W.

Respondent did not contest the rate of $90 per hour, which Applicants allege was charged by their attorney. The Equal Access to Justice Act provides that attorney fees shall not be awarded in excess of $125 per hour, unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee. (5 U.S.C. § 504(b)(1)(A)(ii).)[2] Therefore, Applicants' claim for attorney fees at the rate of $90 per hour is approved, and the claimed hours are similarly approved, excluding those billed prior to March 3, 1997. Applicants' expense titled "sales tax," included as a part of the attorney fees in the amount of $105.30, are not permitted under 5 U.S.C. § 504(b)(1)(A)(ii) or

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[2]Section 1.186(b) of the EAJA Rules of Practice limits attorney fees to $75 per hour, as follows:

§ 1.186 Allowable fees and expenses.

. . . .

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b).

However, Respondent does not contend that the $75 per hour limitation in 7 C.F.R. § 1.186(b) applies in this proceeding.

7 C.F.R. § 1.186(a)-(c) and are denied. There are no special circumstances which would make the award of fees unjust. Applicants have not unduly or unreasonably protracted the final resolution of *In re Ronald Wieczorek*, Case No. 97000990W.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent's position in *In re Ronald Wieczorek*, Case No. 97000990W, was not substantially justified.

2. Applicants meet all conditions of eligibility for an award, under the Equal Access to Justice Act, of fees and expenses incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W.

3. Applicants were the prevailing parties in *In re Ronald Wieczorek*, Case No. 97000990W.

4. Applicants' attorney customarily charges $90 per hour for legal services in the course of his business.

5. The fees awarded in this Decision and Order are based upon prevailing market rates for the kind and quality of services furnished Applicants.

6. Attorney fees incurred by Applicants in connection with *In re Ronald Wieczorek*, Case No. 97000990W, were reasonable.

7. Applicants' expense titled "sales tax" in the amount of $105.30 is not approved, as it is an expense not permitted under 5 U.S.C. § 504(b)(1)(A) or 7 C.F.R. § 1.186(a)-(c).

8. Applicants did not unduly or unreasonably delay or protract the final resolution of *In re Ronald Wieczorek*, Case No. 97000990W.

9. There are no special circumstances that would make the award of fees unjust.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in its Petition for Review by Judicial Officer [hereinafter Appeal Petition]. First, Respondent contends that Applicants' EAJA Application was required to be received by the Hearing Officer no later than December 17, 1997, and if the Hearing Officer received Applicants' EAJA Application later than December 17, 1997, Applicants' EAJA Application must be rejected as untimely (Appeal Pet. at 5-6).

I disagree with Respondent's contention that Applicants were required to file their EAJA Application no later than December 17, 1997. Section 1.193(a) of the EAJA Rules of Practice requires that an EAJA Application must be filed no later than 30 days after final disposition of the proceeding by USDA, and section

1.193(b) of the EAJA Rules of Practice defines the term *final disposition*, as follows:

§ 1.193 Time for filing application.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after final disposition of the proceeding by the Department.

(b) For the purposes of this rule, *final disposition* means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become[s] final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(a)-(b) (emphasis added).

The Hearing Officer issued an Appeal Determination in *In re Ronald Wieczorek*, Case No. 97000990W, on October 14, 1997, and Respondent asserts that Respondent received a copy of the Appeal Determination on October 27, 1997 (Appeal Pet. at 5). Section 11.9(a)(2) of the National Appeals Division Rules of Procedure limits the period during which an agency may seek review of a Hearing Officer's determination, as follows:

§ 11.9 Director review of determination of Hearing Officers.

(a) *Requests for Director review*. . . .

(2) Not later than 15 business days after the date on which an agency receives the determination of a Hearing Officer under § 11.8, the head of the agency may make a written request that the Director review the determination. . . .

7 C.F.R. § 11.9(a)(2).

Respondent contends that Hearing Officer's Appeal Determination became a *final disposition* on November 17, 1997, 15 business days after the date on which Respondent received a copy of the Appeal Determination. However, I find that, using Respondent's method of calculating the date of *final disposition*, the Appeal Determination in *In re Ronald Wieczorek*, Case No. 97000990W, did not become a *final disposition* of the proceeding until November 19, 1997.

The term *business days* is not defined for the purposes of the National Appeals Division Rules of Procedure. However, the term *business days* generally includes all days, except Saturdays, Sundays, and legal public holidays.[3] Therefore, I find that, as used in 7 C.F.R. § 11.9(a)(2), the term *business days* includes all days, except Saturdays, Sundays, and legal public holidays.[4] Using this definition of the term *business days*, I find that Respondent's written request for the Director to review the Hearing Officer's Appeal Determination in *In re Ronald Wieczorek*, Case No. 97000990W, had to be made in accordance with section 11.9(a)(2) of the National Appeals Division Rules of Procedure (7 C.F.R. § 11.9(a)(2)), no later than November 18, 1997,[5] and the Hearing Officer's Appeal Determination became a

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[3]*See generally NLRB v. Frazier*, 144 F.R.D. 650, 657-58 (D.N.J. 1992) (indicating that "business days" are all days except Saturdays, Sundays, and legal holidays); *Kletzien v. Ford Motor Co.*, 668 F. Supp. 1225, 1229 (E.D. Wis. 1987) (indicating that if the term "business days" had been used, it would not include weekends and holidays); *Rock Finance Co. v. Central Nat. Bank of Sterling*, 89 N.E.2d 828, 831 (Ill. App. Ct. 1950) (stating that "[i]n the legal literature it appears that the phrase `business day' is used by courts and text writers to denote a day upon which business is conducted, as contrasted with holidays or Sundays"). *Cf. Kussmaul v. Peters Constr. Co.*, 583 F. Supp. 91, 94-95 (D.R.I. 1983) (indicating that the term "next business day" does not include Saturdays, Sundays, and legal holidays); *State v. Duncan*, 43 So. 283, 287 (La. 1907) (distinguishing between the term "secular or business day" and days of public rest and legal holidays).

[4]The Act of September 6, 1966, as amended, lists legal public holidays, as follows:

§ 6103. Holidays

(a) The following are legal public holidays:

New Year's Day, January 1.
Birthday of Martin Luther King, Jr., the third Monday in January.
Washington's Birthday, the third Monday in February.
Memorial Day, the last Monday in May.
Independence Day, July 4.
Labor Day, the first Monday in September.
Columbus Day, the second Monday in October.
Veterans Day, November 11.
Thanksgiving Day, the fourth Thursday in November.
Christmas Day, December 25.

5 U.S.C. § 6103(a).

[5]I conclude that Respondent's written request for the Director to review the Hearing Officer's Appeal Determination in *In re Ronald Wieczorek*, Case No. 97000990W, had to be made no later than

(continued...)

final disposition of the proceeding on November 19, 1997.

The record indicates that Applicants' EAJA Application was filed December 18, 1997, 29 days after final disposition of the proceeding by USDA.[6] Therefore, Applicants' EAJA Application was not filed late, as Respondent contends.

Second, Respondent contends that the Hearing Officer erred in finding that Respondent was not substantially justified in its determination of the proposed rent amount (Appeal Pet. at 6-7).

Fees and other expenses incurred by Applicants in connection with *In re Ronald Wieczorek*, Case No. 97000990W, may be awarded to Applicants under the Equal Access to Justice Act unless, *inter alia*, Respondent's position in the proceeding was substantially justified.

An agency's position is *substantially justified* under the Equal Access to Justice Act, if, even though it is incorrect, a reasonable person could think the position is correct, *viz.*, the position is reasonable in law and fact.[7] While the agency bears the burden of proving the substantial justification of its position,[8] the fact that the agency lost in the underlying litigation does not create a presumption that its position was not substantially justified.[9]

Section 1951.911(a)(6)(iii) of USDA's Servicing and Collections regulations

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[5](...continued)
November 18, 1997, by counting October 28, 1997, as the first business day after the day on which Respondent received the Hearing Officer's Appeal Determination and by not counting Saturdays, Sundays, and Veterans Day (November 1, 2, 8, 9, 11, 15, and 16, 1997), as business days.

[6]See the date stamp in the lower right-hand corner of the letter, dated December 15, 1997, from Chris A. Nipe to Larry Jordan, which reads "DEC 18 '97 RCVD".

[7]*See Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988) (stating that a position is *substantially justified* under the Equal Access to Justice Act if it is: justified in substance or in the main; justified to a degree that could satisfy a reasonable person; justified to the extent that a reasonable person could think it correct; or a position that has a reasonable basis in law and fact); *Derickson Co. v. NLRB*, 774 F.2d 229, 232 (8th Cir. 1985) (stating that the test of *substantial justification* is a practical one, *viz.*, whether the agency's position was reasonable both in law and fact); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.) (stating that the test of whether the position of the United States is *substantially justified* is essentially one of reasonableness in law and fact), *cert. denied*, 469 U.S. 1088 (1984).

[8]*See Derickson Co. v. NLRB*, 774 F.2d 229, 232 (8th Cir. 1985); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.), *cert. denied*, 469 U.S. 1088 (1984).

[9]*See Keasler v. United States*, 766 F.2d 1227, 1231 (8th Cir. 1985).

describes the survey to be made to determine the amount of the proposed rent for leaseback property, as follows:

> **§ 1951.911 Preservation Loan Service Programs.**
>
> (a) *Leaseback/buyback. . . .*
>
> . . . .
>
> (6) *Processing leaseback requests. . . .*
>
> . . . .
>
> (iii) Leaseback property will be leased for an amount equal to that for which similar properties in the area are being leased or rented (market rent). In no case will inventory property be leased for a token amount. The County Supervisor will make a survey of lease amounts of farms in the immediate area with similar soils, capabilities and income. The amount of the rental will be determined by the County Supervisor. Prior to entering into a Leaseback/Buyback Agreement, the County Supervisor will advise the applicant, by letter, of the rent amount. If the leaseback applicant disagrees with the proposed rental, the applicant can appeal in accordance with subpart B of part 1900 of this chapter.

7 C.F.R. § 1951.911(a)(6)(iii) (1997).

While the County Supervisor did conduct a survey, the Hearing Officer describes the survey, as follows:

> **FINDINGS OF FACT:**
>
> . . . .
>
> 5. Agency documentation dated January 13, 1997, shows the Agency conducted a survey of the cash rental rates of the average cropland and average pasture land between Mount Vernon (in Davison County), South Dakota, and Plankinton (in Aurora County), South Dakota. This survey shows that four commercial banks and Farm Credit Services (located in Mount Vernon, Mitchell and Stickney, South Dakota) were called, with a reported average cropland cash rate of $25.00 to $40.00, and average pasture/grassland at $12.00 to $20.00, which was calculated showing an amount of $12,363 for 542.5 acres of the Appellant's [sic] land. Also, the Agency surveyed one producer two (2) miles north of Mount Vernon, South Dakota, and two (2) commercial grain elevators (located in Mount Vernon

and Mitchell, South Dakota) for the average per bushel grain storage rental amount, which was calculated to be .09 cents per bushel for storage rental or a total of $5,589.00 for the Appellant's [sic] ten grain storage bins. (Agency exhibits E and K)

6. On June 11, 1997[,] an appraisal of Appellant's [sic] approximate 659 acres of land, with 604 acres located six (6) miles east of Plankinton (in Aurora County), South Dakota, and 55 acres located two (@) miles northwest of Mount Vernon (in Davison County), South Dakota, shows a market value for rent income of $18,811.00, based on three (3) comparable sales, with one sale noted located in the same section and most similar to Appellant's [sic] land. (Agency exhibits G and R)

. . . .

CONCLUSIONS

. . . .

The Agency's January 13, 1997[,] surveys document that the lease payment was based on telephone calls to four (4) commercial banks, two (2) commercial grain elevators and Farm Credit Service, and only one farm within two miles of the Appellant's [sic] farm, but that this farm failed to be documented if it met the requirement of having similar soils, capabilities and income potential (FOF 5). Furthermore, the evidence shows an appraisal market rental total of $18,811.00 for the approximate 659 acres, was used in part by the Agency to support their [sic] rental amount determination, in that the amount of $17,952.00 (plus an amount of $5.00 per acre for the remaining 116.5 acres) was less than the appraisal market rental value. However, the appraisal document shows only one out of three (3) sales comparables, used in determining the market rental amount of $18,811.00, documents being in the immediate area and similar to the Appellant's [sic] farm (FOF 6).

In re Ronald Wieczorek, Case No. 97000990W, Appeal Determination at 2-4.

Further, the Hearing Officer concludes that the County Supervisor's survey was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997), as follows:

. . . Therefore, this evidence shows that while the Agency did provide these

> surveys documented in the running record dated January 13, 1997, that the Agency's surveys fail to document nor support farms found in the immediate area with similar soils, capabilities and income potential to the Appellant's [sic] property serving as the basis for the Agency's proposed rental amount of $17,952.00.

In re Ronald Wieczorek, Case No. 97000990W, Appeal Determination at 4.

Respondent has not met its burden of proof that its position in *In re Ronald Wieczorek*, Case No. 97000990W, with respect to the method used to establish a proposed amount of rent under a leaseback/buyback agreement, was substantially justified.

Third, Respondent contends that the Hearing Officer erred "in inferring that the regulations required [the Farm Service Agency] to obtain an appraisal or obtain 'comparable rental farms' using an appraisal approach" (Appeal Pet. at 7-8).

Respondent quotes the portion of the Initial Decision and Order upon which Respondent bases its contention that the Hearing Officer inferred that "the regulations required the Farm Service Agency to obtain an appraisal or obtain 'comparable rental farms' using an appraisal approach." However, the Hearing Officer did not find that the regulations *required* the Farm Service Agency "to obtain an appraisal or comparable rental farms using an appraisal approach," as Respondent contends.

Fourth, Respondent contends that the Hearing Officer erred because the Farm Service Agency's "survey approach was a generally applicable interpretation of the regulations" and "the Hearing Officer's inference that an appraisal approach was required was not based on generally applicable interpretations of the pertinent regulations" (Appeal Pet. 8-9).

As stated in this Decision and Order, *supra*, the method used by the Farm Service Agency to establish a proposed amount of rent was not in accordance with 7 C.F.R. § 1951.911(a)(6)(iii) (1997), and I do not find that the Hearing Officer found that an appraisal approach was *required*.

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

Order

Pursuant to the Equal Access to Justice Act, Applicants are awarded $1,755 for fees which they incurred in connection with *In re Ronald Wieczorek*, Case No. 97000990W.

FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF ACT

DEPARTMENTAL DECISION

In re: KINZUA RESOURCES, LLC.
FSSAA Docket No. 98-0001.
Decision and Order filed June 5, 1998.

Sourcing area application — Geographically and economically separate — Administrative law judge bound by rules of practice — Modification of rules of practice to meet statutory requirements — Constructive notice by Federal Register publication.

The Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer (Chief ALJ) approving the Applicant's proposed sourcing area. The sourcing area is geographically and economically separate from the geographic area from which the Applicant harvests for export timber originating from private lands. The evidence adequately supports the Chief ALJ's Findings and Conclusions. *In re Stimson Lumber Co.*, 54 Agric. Dec. 155 (1995), does not hold that geographic separation is determined by comparing the distance between the sourcing area and an applicant's timber manufacturing facilities to the distance between the area from which an applicant harvests for export unprocessed timber originating from private lands and the applicant's timber manufacturing facilities; instead, *Stimson* holds that areas located west of the Cascade Mountain Range are geographically and economically separate from timber manufacturing facilities located east of the crest of the Cascade Mountain Range. Although two commenters requested a hearing during the comment period, no request for a hearing was made during the review period, which is the only time during which a hearing may be requested (7 C.F.R. § 1.417(c)); therefore, the failure to hold a hearing was not error. The Rules of Practice (7 C.F.R. §§ 1.410-.429) are published in the Federal Register; thereby constructively notifying the parties of the requirement that requests for a hearing must be filed during the 10-day review period. The record establishes that the Regional Forester considered the comments and that the Chief ALJ responded to all of the relevant comments. Parties may file an appeal within 10 calendar days after receiving service of the judge's decision (7 C.F.R. § 1.426), and generally, administrative law judges and the judicial officer are bound by rules of practice. However, administrative law judges and the judicial officer may modify rules of practice when modification is necessary to comply with statutory requirements, such as the deadline in 16 U.S.C.A. § 620b(c)(3)(A). The Chief ALJ did not err when he modified the Rules of Practice to meet a statutory deadline.

Kirk Johansen, Portland, Oregon, for Applicant.
Regional Forester, pro se.
Steve Thompson, Whitefish, Montana, for The Public Lands Council; the Sierra Club, Northwest Conservation Committee; and Montana Wilderness Association.
Daniel Van Vactor, Bend, Oregon, for Blue Mt. Lumber Products, LLC; Malheur Lumber Company; D.R. Johnson Lumber Co.; Joseph Timber Company, LLC; and Ochoco Lumber Company.
Asante Riverwind, Fossil, Oregon, for Blue Mountains Biodiversity Project.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Kinzua Resources, LLC [hereinafter Kinzua], instituted this proceeding on February 6, 1998, pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990, as amended (16 U.S.C. §§ 620-620j) [hereinafter the FRCSRA]; the regulations promulgated pursuant to the FRCSRA (36 C.F.R. §§ 223.185-.203) [hereinafter the Regulations]; and the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (7 C.F.R. §§ 1.410-.429) [hereinafter the Rules of Practice], by filing an application for a sourcing area for its Heppner, Oregon, and Pilot Rock, Oregon, timber manufacturing facilities.

The Regional Forester for Region 6 completed publication of a notice of Kinzua's sourcing area application in newspapers of general circulation in the proposed sourcing area on March 18, 1998. A 30-day comment period followed, ending on April 17, 1998. Seventeen comments were received. Fourteen comments opposed Kinzua's sourcing area application. One commenter supported Kinzua's sourcing area application, and two commenters did not state whether they opposed or supported Kinzua's sourcing area application. In response to a number of the commenters' concerns, Kinzua filed an amended sourcing area application [hereinafter Amended Application] on April 27, 1998. In accordance with section 1.417 of the Rules of Practice (7 C.F.R. § 1.417), following the 30-day comment period, commenters had 10 working days from the close of the comment period to review the written comments and submit written recommendations and requests for a hearing to the administrative law judge.

The Regional Forester recommended approval of Kinzua's Amended Application. No other recommendations were received; and although American Wildlands and Wyoming Outdoor Council requested a hearing in their joint comment filed March 31, 1998, no hearing was requested during the review period, as provided in section 1.417(c) of the Rules of Practice (7 C.F.R. § 1.417(c)). Therefore, no hearing was held, and on May 19, 1998, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a Decision and Order [hereinafter Initial Decision and Order]* in which he approved Kinzua's Amended Application based on the written record (Initial Decision and Order at 6).

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*The Chief ALJ filed the Initial Decision and Order on May 20, 1998.

On May 29, 1998, The Lands Council,** the Sierra Club, Northwest Conservation Committee, and the Montana Wilderness Association filed a joint appeal petition; and Blue Mt. Lumber Products, LLC, Malheur Lumber Company, D.R. Johnson Lumber Company, Joseph Timber Company, LLC, and Ochoco Lumber Company filed a joint appeal petition. On June 1, 1998, Blue Mountains Biodiversity Project filed its appeal petition.

**Section 1.426(a) of the Rules of Practice provides that only a party to the proceeding may appeal the decision of the judge, as follows:

§ 1.426 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 10 calendar days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.426(a).

Section 1.411(h) defines the term "party of record or party" for purposes of a proceeding to determine approval or disapproval of a sourcing area application, as follows:

§ 1.411 Definitions.

As used in these procedures, the terms as defined in the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620, *et seq.* (Act) and in the regulations issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in these procedures:

. . . .

(h) *Party of record or Party* is a party to the proceeding to determine approval or disapproval of a sourcing area application. . . . The sourcing area applicant and persons who submit written comments on the sourcing area application at issue during the 30 calendar day comment period, including the Regional Forester, are the parties of record.

7 C.F.R. § 1.411(h).

"The Lands Council" is not the sourcing area applicant, the Regional Forester, or a person who submitted a written comment on the sourcing area application at issue in this proceeding. Therefore, "The Lands Council" is not a party under the Rules of Practice and cannot appeal the Chief ALJ's Initial Decision and Order. However, based on the record in this proceeding, I infer that "The Lands Council" referenced in the joint appeal petition filed by The Lands Council, the Sierra Club, Northwest Conservation Committee, and the Montana Wilderness Association is "The Public Lands Council" which is a person which submitted a comment on the sourcing area application at issue on March 30, 1998; and thus is a party who may appeal the Chief ALJ's Initial Decision and Order.

On June 1, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer*** for decision. On June 1, 1998, based on the June 6, 1998, deadline for approval or disapproval of Kinzua's Amended Application,**** I issued

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***The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)). The Secretary of Agriculture delegated authority to the Judicial Officer to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).

****Section 490(c)(3)(A) of the FRCSRA requires the Secretary of Agriculture to approve or disapprove a sourcing area application within 4 months of receipt of the application, as follows:

§ 620b. Limitations on substitution of unprocessed Federal timber for unprocessed timber exported from private lands

. . . .

(c) Sourcing areas

. . . .

(3) Grant of approval for sourcing areas for processing facilities located outside of the northwestern private timber open market area

(A) In general

For each applicant, the Secretary . . . shall, on the record and after an opportunity for a hearing, not later than 4 months after receipt of the application for a sourcing area, either approve or disapprove the application.

16 U.S.C.A. § 620b(c)(3)(A) (West Supp. 1998).

Moreover, section 1.426(d) of the Rules of Practice requires that the Judicial Officer rule on an appeal within 4 months after the institution of the proceeding, as follows:

§ 1.426 Appeal to Judicial Officer.

. . . .

(d) *Decision of the Judicial Officer on appeal.* 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 within 4 months after the institution of the proceeding, pursuant to 16

(continued...)

an Informal Order requiring the parties to file any response to the appeal petitions no later than 3:00 p.m., eastern time, June 4, 1998. On June 4, 1998, Kinzua filed Kinzua Resources, LLC's Response To All Appeals.

Based upon a careful consideration of the record in this proceeding, I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

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

. . . .

Findings of Fact

1. Kinzua Resources, LLC, is an Oregon limited liability company [(Amended Application at 1)]. Kinzua owns two sawmills and one whole log chip mill operating in the sourcing area for which application is being made. One sawmill and the chip mill are located in Heppner, Oregon, and the second sawmill is located in Pilot Rock, Oregon. Kinzua's affiliates are: ATR Services, Inc.; ATR Land & Cattle, Inc.; Greg Demers; Lane Plywood, Inc.; Pioneer Aviation, LLC; and Pioneer Resources, LLC. [(Amended Application ¶ 3, Ex. 4; Letter from Robert W. Williams, Regional Forester, to the Chief ALJ, dated April 15, 1998 [hereinafter Regional Forester's Review], at 1.)]

2. Neither Kinzua nor any of its affiliates has purchased National Forest timber during the past 24-month period [(Regional Forester's Review at 1)].

3. Kinzua has exported private timber from lands situated west of the crest of the Cascade Mountains . . . [(Amended Application ¶ 1(C), Ex. 2)].

4. [Timber for] Kinzua's Pilot Rock, Oregon, and Heppner, Oregon, [timber manufacturing facilities is private timber] from private lands and . . . from other [timber manufacturing facilities (Amended Application ¶ 1(C); Regional

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****(...continued)
U.S.C. 620b(c)(3).

7 C.F.R. § 1.426(d).

This proceeding was instituted on February 6, 1998. Therefore, the deadline for the issuance of the Decision and Order is June 6, 1998.

Forester's Review at 1)].

5. Kinzua's Amended Application describes the proposed sourcing area as follows:

> Commencing at the intersection of the Canadian border and the Cascade Mountain Range; proceed southerly along the crest of the Cascade Mountain Range to the intersection with the California state line; then east along the 42nd Latitude line (the Oregon and Idaho southern state lines) to the intersection with the Utah state line; then south along the 114th longitudinal line (western state line of Utah) to the intersection with the Arizona state line; then east along the Utah and Colorado southern state lines to the intersection with Interstate 25; then north along Interstate 25 through Colorado to the Wyoming state line; then east along the Wyoming state line until the intersection with the 104th Longitudinal line; and then north on the 104th Longitudinal line (along the eastern state lines of Wyoming and Montana) to the intersection with the Canadian border; then west along the Canadian border to the point of beginning.

[Amended Application ¶ 1(B).]

6. Kinzua's Amended Application includes a map of sufficient scale and detail to clearly show: Kinzua's desired sourcing area boundary; the location of Kinzua's timber manufacturing facilities in Pilot Rock, Oregon, and Heppner, Oregon; the private lands within and outside the sourcing area from which Kinzua exported, sold, traded, exchanged, or otherwise conveyed timber within the past 24 months for the purpose of exporting such timber [(Amended Application ¶ 1(C), Ex. 2; Regional Forester's Review ¶ 1(a))].

7. The sourcing area boundaries [proposed in Kinzua's Amended Application] follow appropriate features, using major natural and cultural features including . . . prominent ridge systems, main roads or highways, . . . and political subdivisions [(Amended Application ¶ 1(B), Ex. 1, 2; Regional Forester's Review ¶ 1(b))].

8. [Kinzua's proposed sourcing area] includes both private and federal lands from which Kinzua intends to acquire unprocessed timber for its [timber manufacturing facilities in Heppner, Oregon, and Pilot Rock, Oregon (Regional Forester's Review ¶ 1(c))].

9. Kinzua's Amended Application identifies 1[0] competitors with timber manufacturing facilities in the same [general] vicinity as Kinzua's Heppner, Oregon, and Pilot Rock, Oregon, [timber manufacturing facilities (Amended

Application, Ex. 3)]. In addition, the Regional Forester [states that there are] 9 companies that have competed [with Kinzua for timber in the proposed sourcing area (Regional Forester's Review ¶ 1(d)].

10. The State of Washington offers approximately 55 million board feet of timber for bid annually, which is dispersed among the competing [timber manufacturing facilities] throughout the area. The State of Oregon has minimal [acres of] productive timber land in the proposed sourcing area. [(Regional Forester's Review ¶ 1(d).)]

11. Kinzua provided the Regional Forester with a list of its timber purchases for both the Heppner, Oregon, and Pilot Rock, Oregon, [timber manufacturing facilities] for 1996 and 1997. The Regional Forester believes that other companies can and do compete for the private timber that is available. [(Regional Forester's Review ¶ 1(d).)]

12. Kinzua's Amended Application is printed on company letterhead, contains the required certification statement, and is . . . signed and notarized[, as required by section 223.190(c)(4) and (f) of the Regulations (36 C.F.R. § 223.190(c)(4), (f)) (Amended Application)].

13. The [sourcing area that is the subject of Kinzua's Amended Application] is geographically and economically separate from [geographic areas] from which Kinzua harvests or acquires . . . for export [unprocessed timber originating from private lands]. The area from which Kinzua exports private timber is west of the Cascade Mountain Range, while the proposed sourcing area is entirely east of the [crest of the Cascade] Mountain Range. [(Regional Forester's Review ¶ 2.)]

14. [Generally, timber is not hauled over the Cascade Mountain Range from] west to east. Several commenters [state] that this pattern has . . . changed [(Comments filed by Blue Mt. Lumber Products, LLC, March 26, 1998; Ochoco Lumber Company, March 30, 1998; Joseph Timber Company, LLC, March 30, 1998; Malheur Lumber Company, March 30, 1998; D.R. Johnson Lumber Company, March 31, 1998)]. The Regional Forester, however, found that while a change in the flow of timber may be developing, at present, only a limited amount of timber [is] moved from west to east [over the crest of the Cascade Mountain Range (Regional Forester's Review ¶ 2)].

Conclusions of Law

1. The sourcing area that is the subject of [Kinzua's Amended A]pplication is geographically and economically separate from any geographic area from which Kinzua harvests for export any unprocessed timber originating from private lands.

2. Kinzua has satisfied all of the procedural and technical requirements of the

FRCSRA and the Regulations.

Discussion

[Section 490(c)(3)(A) of the FRCSRA] provides that the Secretary may approve a sourcing area application only if the Secretary determines that:

> [T]he area that is the subject of the application, in which the timber manufacturing facilities at which the applicant desires to process timber originating from Federal lands are located, is geographically and economically separate from any geographic area from which that person harvests for export any unprocessed timber originating from private lands.

16 U.S.C.A. § 620b(c)(3)(A) (West Supp. 1998). The Regional Forester reviewed Kinzua's sourcing area application and . . . determined that the requirements of the FRCSRA were met [(Letter from Robert W. Williams, Regional Forester, to the Chief ALJ, filed May 6, 1998 [hereinafter Regional Forester's Recommendation])]. There is no evidence to warrant a finding in contravention of the Regional Forester's determination.

Several commenters opposed Kinzua's sourcing area application on the grounds that Kinzua's proposed sourcing area is not economically and geographically separate from private lands from which Kinzua harvests or acquires private timber for export. These commenters assert that timber moves in both directions across the Cascade Mountain Range, and that the Cascade Mountain Range is, therefore, no longer an appropriate sourcing area boundary, as previously held.[1] The Regional Forester, however, determined that, while patterns may be changing as Federal timber becomes more difficult to obtain, the Cascade Mountain Range is still an appropriate boundary under current purchasing patterns, as movement of timber from west to east [over the Cascade Mountain Range] is still unusual . . . [(Regional Forester's Review ¶ 2)].

Some commenters opposed the size of the proposed sourcing area. Although, size is not a factor to be considered under the FRCSRA, the [proposed sourcing area in the] Amended Application [is] . . . considerably [smaller than the sourcing area proposed in Kinzua's application for a sourcing area filed February 6, 1998],

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[1]*See, e.g., In re Stimson Lumber Co.*, 56 Agric. Dec. 480 (1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155 (1995); *In re Springdale Lumber Co.*, 53 Agric. Dec. 1185 (1994); *In re Crown Pacific, Ltd.*, 53 Agric. Dec. 1118 (1994).

which may alleviate some concern. Several commenters were opposed to sourcing areas, in general, because of concerns about the affect [of sourcing areas] on jobs and on the preservation of natural resources. These concerns do not affect the validity of the proposed sourcing area under the FRCSRA. A few commenters noted technical deficiencies in Kinzua's application, all of which were corrected in the Amended Application.

The record supports the Regional Forester's Recommendation. As such, it shall be followed and Kinzua's Amended Application shall be approved.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

On May 29, 1998, The Public Lands Council,[2] the Sierra Club, Northwest Conservation Committee, and the Montana Wilderness Association filed Appeal of Judge Palmer's May 19, 1998 Order and Decision Approving the Sourcing Area Requested by Kinzua Resources, LLC [hereinafter Thompson Appeal Petition], and Blue Mt. Lumber Products, LLC, Malheur Lumber Company, D.R. Johnson Lumber Co., Joseph Timber Company, LLC, and Ochoco Lumber Company filed Blue Mt. Lumber Products, Malheur Lumber Company, D.R. Johnson Lumber Co., Joseph Timber Company, and Ochoco Lumber Company's Appeal Petition and Brief [hereinafter Oregon Appeal Petition]. On June 1, 1998, Blue Mountains Biodiversity Project filed Appeal to the Judicial Officer [hereinafter Biodiversity Appeal Petition].

The parties that filed the Thompson Appeal Petition raise four issues. First, the parties that filed the Thompson Appeal Petition contend that the Regional Forester's Recommendation is not adequate to support the Initial Decision and Order (Thompson Appeal Petition at 2.)

The Regional Forester's Recommendation by itself is not adequate to support all of the Findings of Fact in the Initial Decision and Order. However, the record consists of much more than the Regional Forester's Recommendation; and in particular, the Chief ALJ relied heavily on the Regional Forester's Review. I find that the Initial Decision and Order is supported by the record, and I adopt, with only minor changes, the Initial Decision and Order as the final Decision and Order.

Second, the parties that filed the Thompson Appeal Petition contend that the Regional Forester failed to fully consider the comments (Thompson Appeal Petition at 2).

I disagree with the parties that filed the Thompson Appeal Petition and find that

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[2]See note **.

the record establishes that the Regional Forester considered the comments. The Regional Forester's Review states that "[w]e are not making a recommendation on whether or not to approve the sourcing area until the 10 day [review] period is completed. That will give us the opportunity to examine any new material that may come to light. . . ." (Regional Forester's Review ¶ 2.) The Regional Forester's Recommendation states:

> As we said in our letter of April 15, we were awaiting the end of the review and comment period before making a recommendation concerning the Kinzua sourcing area application. We have now reviewed all of the comments, the last of which were forwarded to us by your office, via FAX.
>
> . . . .
>
> Therefore, based on our review, including the comments, we believe that Kinzua meets the requirements for being awarded the revised sourcing area for which they [sic] have applied.

Third, the parties that filed the Thompson Appeal Petition contend that the evidence is not sufficient to establish that the areas west of the crest of the Cascade Mountain Range from which Kinzua harvests for export unprocessed timber originating from private lands are geographically and economically separate from areas east of the crest of the Cascade Mountain Range (Thompson Appeal Petition at 5-6). While the record establishes that a change in the flow of timber is developing (Comments filed by Blue Mt. Lumber Products, LLC, March 26, 1998; Ochoco Lumber Company, March 30, 1998; Joseph Timber Company, LLC, March 30, 1998; Malheur Lumber Company, March 30, 1998; D.R. Johnson Lumber Company, March 31, 1998), at present, only a limited amount of timber is moved from west to east over the crest of the Cascade Mountain Range. I do not find that the Chief ALJ erred by concluding that the areas west of the Cascade Mountain Range from which Kinzua harvests for export unprocessed timber originating from private lands are geographically and economically separate from areas east of the crest of the Cascade Mountain Range.

Fourth, the parties that filed the Thompson Appeal Petition contend that the Regional Forester inappropriately refers to the "Forest Resources Conservation and Shortage Relief Act of 1997" (Thompson Appeal Petition at 6-7 (emphasis in original)).

The Regional Forester's Recommendation does reference the "Forest Resources Conservation and Shortage Relief Act of 1997," as parties that filed the Thompson

Appeal Petition contend. Specifically, the Regional Forester's Recommendation states that: comments that Kinzua should not be allowed to begin competing for timber in the area where other purchasers are already competing for National Forest timber and comments that a company should not be able to export private timber in one area and be able to purchase National Forest timber in another area do not respond to whether Kinzua meets the requirements of the Forest Resources Conservation and Shortage Relief Act of 1997.

This proceeding is conducted pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. §§ 620-620j), as amended by the Forest Resources Conservation and Shortage Relief Amendments Act of 1993, Pub. L. No. 103-45, 107 Stat. 223; section 6(d)(35) of the Act of November 2, 1994, Pub. L. No. 103-437, § 6(d)(35), 108 Stat. 4581, 4585; and the Forest Resources Conservation and Shortage Relief Act of 1997, Pub. L. No. 105-83, Title VI, 111 Stat. 1617-24. While I find that the Regional Forester's reference to the Forest Resources Conservation and Shortage Relief Act of 1997 is error, it is harmless error, because the comments in question do not address whether Kinzua's Amended Application should be approved or disapproved under the Forest Resources Conservation and Shortage Relief Act of 1990, as amended (16 U.S.C. §§ 620-620j).

The parties that filed the Oregon Appeal Petition raise two issues. First, the parties that filed the Oregon Appeal Petition contend that the record shows that Kinzua's proposed sourcing area and export area are not adequately separate, geographically and economically, to satisfy the FRCSRA requirements (Oregon Appeal Petition at 3-6).

I disagree with the contention that Kinzua's proposed sourcing area is not geographically and economically separate from the geographic area from which Kinzua harvests for export unprocessed timber originating from private lands.

The parties that filed the Oregon Appeal Petition, relying on *In re Stimson Lumber Co.*, 54 Agric. Dec. 155 (1995), contend that the United States Department of Agriculture "has interpreted 'geographic' separateness by comparing the relative length between the sourcing area and the mills and the export area and the mills." (Oregon Appeal Petition at 4.) However, while there is a finding in *In re Stimson Lumber Co., supra*, 54 Agric. Dec. at 159-60, that "[t]he private land owned by applicant in California from which it sells some timber for export is over 1,000 miles distant from its mills in Montana," *Stimson* does not hold that geographic separation is determined by comparing the distance between the sourcing area and the timber manufacturing facilities to the distance between the area from which an applicant harvests for export unprocessed timber originating from private lands and the timber manufacturing facilities. To the contrary, in *Stimson*, the Judicial

Officer states that no detailed discussion of the evidence is necessary because, as in the instant proceeding, the applicant's western boundary for the proposed sourcing area was the crest of the Cascade Mountain Range and the geographic area from which the applicant harvested for export unprocessed timber originating from private lands was west of the crest of the Cascade Mountain Range, as follows:

> No detailed discussion of the evidence is necessary since the Applicant's western boundary was established, by amendment, as the crest of the Cascade Mountain Range, and it has recently been determined in three cases in which Boise Cascade was the chief opponent of the sourcing area applications that with rare, incidental exceptions, timber does not move from west of the crest of the Cascade Ridge (which is where Applicant's wholly-owned subsidiary has been selling timber for export) to mills east of the crest of the Cascade Ridge. *In re Springdale Lumber Co.*, 53 Agric. Dec. [1185 (1994)]; *In re Crown Pacific, Ltd.*, 53 Agric. Dec. [1118 (1994)]; *In re Crown Pacific Inland Lumber Limited Partnership*, 53 Agric. Dec. [1140 (1994)]. Although the western boundary of the sourcing areas in the two *Crown Pacific* cases was not *identical* to the *Springdale* case, where, as here, the western boundary is the "crest of the Cascade" Mountain Range, the whole thrust of the evidence, findings and conclusions in all three cases was that areas located west of the crest of the Cascade Ridge are geographically and economically separate from mills located east of the crest of the Cascade Ridge.

In re Stimson Lumber Co., supra, 54 Agric. Dec. at 162-63.

The parties that filed the Oregon Appeal Petition also point to the evidence in the record that supports their contention that "the summit of the Cascade Mountains does not represent an economic dividing line" (Oregon Appeal Petition at 5-6). While the record establishes that a change in the flow of timber is developing (Comments filed by Blue Mt. Lumber Products, LLC, March 26, 1998; Ochoco Lumber Company, March 30, 1998; Joseph Timber Company, LLC, March 30, 1998; Malheur Lumber Company, March 30, 1998; D.R. Johnson Lumber Company, March 31, 1998), at present, only a limited amount of timber is moved from west to east over the crest of the Cascade Mountain Range (Regional Forester's Review ¶ 2). I do not find that the Chief ALJ erred by concluding that the areas west of the Cascade Mountain Range from which Kinzua harvests for export unprocessed timber originating from private lands are geographically and

economically separate from areas east of the crest of the Cascade Mountain Range.

Second, the parties that filed the Oregon Appeal Petition contend that the Chief ALJ failed to consider timber purchasing patterns for both Kinzua and others in the vicinity of the sourcing area, as required under the FRCSRA (Oregon Appeal Petition at 7-8). Specifically, the parties that filed the Oregon Appeal Petition state that "[t]he Secretary of Agriculture must consider the timber purchasing patterns, on private and Federal lands, of the applicant as well as other persons in the same local vicinity as the applicant, and the relative similarity of such purchasing pattern before granting a sourcing are [sic] application. (16 U.S.C. 620a(c)(3).) No such review is reflected in the administrative record." (Oregon Appeal Petition at 7 (emphasis in the original).)

As an initial matter, the provision requiring consideration of "patterns" is set forth in 16 U.S.C.A. § 620b(c)(3)(C) (West Supp. 1998), not 16 U.S.C. § 620a(c)(3), as the parties that filed the Oregon Appeal Petition contend. Further, the requirement that the Secretary of Agriculture "consider equally the timber purchasing patterns, on private and Federal lands, of the applicant as well as other persons in the same local vicinity as the applicant, and the relative similarity of such purchasing patterns" was repealed by section 602(a)(2)(C)(ii) of the Forest Resources Conservation and Shortage Relief Act of 1997.

However, section 602(a)(2)(C)(ii) of the Forest Resources Conservation and Shortage Relief Act of 1997 does amend section 490(c)(3) of the FRCSRA by adding a new subsection (C) which requires consideration of sourcing patterns, as follows:

§ 620b. Limitations on substitution of unprocessed Federal timber for unprocessed timber exported from private lands

. . . .

(c) Sourcing areas

. . . .

(3) Grant of approval for sourcing areas for processing facilities located outside of the northwestern private timber open market area

. . . .

(C) For timber manufacturing facilities located in States other than Idaho

> . . . [I]n making the determination referred to in subparagraph (A), the Secretary . . . shall consider the private timber export and the Federal timber sourcing patterns for the applicant's timber manufacturing facilities, as well as the federal timber sourcing patterns for the timber manufacturing facilities of other persons in the same local vicinity of the applicant, and the relative similarity of such Federal timber sourcing patterns. Private timber sourcing patterns shall not be a factor in such determinations in States other than Idaho.

16 U.S.C.A. § 620b(c)(3)(C) (West Supp. 1998).

The Initial Decision and Order reveals that the Chief ALJ considered the sourcing patterns for Kinzua's Heppner, Oregon, and Pilot Rock, Oregon, timber manufacturing facilities, as well as the Federal timber sourcing patterns for timber manufacturing facilities of other persons in the same local vicinity as Kinzua's Heppner, Oregon, and Pilot Rock, Oregon, timber manufacturing facilities and the relative similarity of such Federal timber sourcing patterns (Initial Decision and Order at 2-5).

Blue Mountains Biodiversity Project raises three issues in the Biodiversity Appeal Petition. First, Blue Mountains Biodiversity Project contends that it did not have sufficient time to prepare and file its appeal petition (Biodiversity Appeal Petition at 2-3).

Blue Mountains Biodiversity Project was served with the Initial Decision and Order on May 28, 1998. Section 1.426(a) of the Rules of Practice provides:

§ 1.426 Appeal to Judicial Officer.

> (a) *Filing of petition.* Within 10 calendar days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.426(a).

The Chief ALJ did not provide the parties with the time for filing an appeal, as set forth in section 1.426(a) of the Rules of Practice. Instead, the Chief ALJ provides in the Initial Decision and Order that:

> . . . In order to comply with the statutory deadline, an appeal must be filed no later than May 29, 1998; it may be filed by telefax directed to the Hearing Clerk at (202)720-9776.

Initial Decision and Order at 6.

If the Chief ALJ had given Blue Mountains Biodiversity Project 10 calendar days after its receipt of service of the Initial Decision and Order in which to file its appeal petition, a final agency decision could not have been issued by June 6, 1998, the date that Kinzua's application for a sourcing area must be approved or disapproved, as required by section 490(c)(3)(A) of the FRCSRA (16 U.S.C.A. § 620b(c)(3)(A) (West Supp. 1998)) and section 1.426(d) of the Rules of Practice (7 C.F.R. § 1.426(d)). The Chief ALJ's Initial Decision and Order provides the parties with actual notice that the Chief ALJ had modified the Rules of Practice in this proceeding by ordering that any appeal must be filed no later than May 29, 1998,[3] rather than within 10 calendar days after receiving service of the Initial Decision and Order. Generally, administrative law judges and the judicial officer are bound by rules of practice,[4] but they may modify rules of practice to comply with

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[3]I further note that on May 29, 1998, Mr. Asante Riverwind, co-director, Blue Mountains Biodiversity Project, orally requested that the Judicial Officer grant Blue Mountains Biodiversity Project a 21-day extension of time within which to file its appeal petition. I denied the request for a 21-day extension of time, but extended Blue Mountains Biodiversity Project's time for filing an appeal petition to 4:00 p.m., eastern time, June 1, 1998. (Informal Order as to Blue Mountains Biodiversity Project's Request for Extension of Time, filed June 1, 1998.)

[4]*See In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating that the judicial officer and the administrative law judge are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating that the judicial officer has no authority to depart from Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders).

statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the FRCSRA (16 U.S.C.A. § 620b(c)(3)(A) (West Supp. 1998)).[5] The Chief ALJ did not err when he modified the Rules of Practice to meet a statutory deadline.

Second, Blue Mountains Biodiversity Project contends that the United States Department of Agriculture failed to respond to serious concerns raised by the commenters (Biodiversity Appeal Petition at 3-4).

The Chief ALJ responds, in the Initial Decision and Order, to the comments that are relevant to the issue of whether the area that is the subject of Kinzua's Amended Application is geographically and economically separate from the geographic area from which Kinzua harvests for export unprocessed timber originating from private lands. Additionally, there are a number of comments that identify serious concerns of the commenters, which the Chief ALJ states are not relevant to the issue in this proceeding. However, I do not find that the Chief ALJ erred by failing to address irrelevant comments, even though those comments raise serious societal, economic, and ecological issues. The issue in this proceeding is narrow, viz., whether Kinzua's Amended Application should be approved or disapproved under the criteria in the FRCSRA. The Initial Decision and Order reflects the Chief ALJ's careful consideration of all of the comments submitted in this proceeding that are relevant to the criteria that must be met for approval of Kinzua's Amended Application.

Third, Blue Mountains Biodiversity Project contends that the Chief ALJ failed to respond to a request for a hearing made before the end of the period in which a hearing request must be made and failed to provide notice of the period within which a request for a hearing must be made (Biodiversity Appeal Petition at 3).

I disagree with both of Blue Mountains Biodiversity Project's contentions. The Chief ALJ specifically responds to the request for a hearing, as follows:

> [A]lthough one commenter indicated a desire for a hearing in its comment, no formal request for a hearing was received during the appropriate period. As such, no hearing was held and this [Initial] Decision and Order is based entirely on the written record.

Initial Decision and Order at 2.

American Wildlands and Wyoming Outdoor Council requested a hearing in

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[5]*In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997).

their joint comment which was filed March 31, 1998, during the comment period which ended April 17, 1998. However, the Rules of Practice do not provide that a party may request a hearing during the comment period, but instead provide that a hearing may only be requested during the review period, as follows:

> **§ 1.417 Review period.**
>
> . . . .
>
> (c) *Request for a hearing.* The sourcing area applicant, the sourcing area holder whose sourcing area is the subject of a formal review and persons who submitted written comments, or the attorney of record for a party in the proceeding, may review the comments and request a hearing within 10 working days after the comment period, pursuant to 36 CFR 233.190(h)(2) [sic]. The request must be postmarked no later than the 10th working day of the review period. . . . The request for a hearing shall be filed with the Judge. The hearing is for the purpose of supplementing the written record submitted prior to the hearing. The written record submitted prior to the hearing consists of papers and documents submitted during the 30 calendar day comment period, the 10 working day review period, and any motions submitted before the hearing.

7 C.F.R. § 1.417(c).

Therefore, the Chief ALJ did not err by finding that no request for a hearing was made during the appropriate period (the review period) and concluding that no hearing should be held in this proceeding.

Moreover, I do not find that there was a failure to notify the parties of the time during which requests for a hearing may be filed with the administrative law judge, as Blue Mountains Biodiversity Project asserts. The Rules of Practice are published in the Federal Register,[6] thereby constructively notifying the parties of the requirement that all requests for a hearing must be filed during the 10-day

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[6]*See* 59 Fed. Reg. 8823, 8824-30 (1994).

review period.[7]

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

Order

The Amended Application of Kinzua Resources, LLC, for a sourcing area for its Heppner, Oregon, and Pilot Rock, Oregon, timber manufacturing facilities is approved, and the sourcing area is established pursuant to the FRCSRA and the Regulations.

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[7]*See FCIC v. Merrill*, 332 U.S. 380, 384-85 (1947) (stating that just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989) (stating that publication in the Federal Register constitutes constructive notice of the contents of federal regulations); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F. 117, 122 n.4 (6th Cir. 1988) (stating that it has long been established that publication of regulations in the Federal Register has the legal effect of constructive notice of their contents to all who are affected thereby); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983) (stating that it has long been established that publication in the Federal Register has the legal effect of constructive notice of their contents to all who are affected thereby); *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 787 n.2 (5th Cir. 1978) (stating that it is well settled that publications in the Federal Register are deemed legally sufficient notice to all interested persons); *Cervase v. Office of the Federal Register*, 580 F.2d 1166, 1168-69 (3d Cir. 1978) (stating that publication in the Federal Register gives constructive notice of the existence of the published regulations); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976) (stating that publication of regulations in the Federal Register is constructive notice of their contents); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964) (stating that appellants are bound by regulations since their publication in the Federal Register provides constructive notice), *cert. denied*, 381 U.S. 904 (1981); *In re Jerry Goetz*, 57 Agric. Dec. 1470, 1524-25 (1997) (stating that respondent had constructive notice of the Beef Promotion and Research Order and the Rules and Regulations (7 C.F.R. §§ 1260.101-.316) because they are published in the Federal Register), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1453 (1997) (stating that respondent had constructive notice of the animal welfare regulations and standards (9 C.F.R. §§ 1.1-3.142) because they are published in the Federal Register), *appeal docketed*, No. 98-3100 (3d Cir. Feb. 19, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1353 (1997) (stating that respondents had constructive notice of the animal welfare regulations and standards (9 C.F.R. §§ 1.1-3.142) because they are published in the Federal Register), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 256 (1997) (stating that respondent had constructive notice of 9 C.F.R. § 2.126 because the regulation is published in the Federal Register), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997).

FRESH CUT FLOWERS AND FRESH CUT GREENS PROMOTION AND INFORMATION ACT

DEPARTMENTAL DECISIONS

In re: EVERFLORA, INC., A NEW JERSEY CORPORATION. FCFGPIA Docket No. 97-0001. Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $29,551.50 for assessments under the Act plus late charges of $5,653.47 or $35,204.97 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . [they have] chosen to market, [and] despite . . . [their] objections to the content of the advertising, . . . [there is] no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Everflora, Inc. shall pay to the order of the National Promoflor Council, $29,551.50 for the assessments its owes under the Act plus late charges of $5,653.47, or $35,204.97 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor]

In re: FERRIS BROTHERS, INC., A NEW JERSEY CORPORATION.
FCFGPIA Docket No. 97-0002.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - *First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut* Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $26,303.50 for assessments under the Act plus late charges of $5,166.35 or $31,469.85 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But, from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Ferris Brothers, Inc. shall pay to the order of the National Promoflor Council, $26,303.50 for the assessments its owes under the Act plus late charges of $5,166.35, or $31,469.85 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor]

In re: SUBURBAN WHOLESALE FLORISTS, INC., A NEW JERSEY CORPORATION.
FCFGPIA Docket No. 97-0003.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $62,376.50 for assessments under the Act plus late charges of $15,590.13 or $77,966.63 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm 'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm 'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Suburban Wholesale Florists, Inc. shall pay to the order of the National Promoflor Council, $62,376.50 for the assessments its owes under the Act plus late charges of $15,590.13, or $77,966.63 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor]

In re: DUTCH FLOWER LINE, INC., A NEW YORK CORPORATION. FCFGPIA Docket No. 97-0004. Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $32,799.50 for assessments under the Act plus late charges of $5,761.77 or $38,561.27 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F. 2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977); *Hudson v. U.S.*, 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Dutch Flower Line, Inc. shall pay to the order of the National Promoflor Council, $32,799.50 for the assessments its owes under the Act plus late charges of $5,761.77, or $38,561.27 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor]

In re: FRANK W. MANKER WHOLESALE GROWER, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0005.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
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4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $28,453.50 for assessments under the Act plus late charges of $4,891.33 or $33,344.83 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

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Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); Hudson v. U.S., 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Frank W. Manker Wholesale Grower, Inc. shall pay to the order of the National Promoflor Council, $28,453.50 for the assessments its owes under the Act plus late charges of $4,891.33, or $33,344.83 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: QUALITY WHOLESALE FLORIST, INC., A CONNECTICUT CORPORATION.
FCFGPIA Docket No. 97-0006.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

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2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $42,032.00 for assessments under the Act plus late charges of $11,766.25 or $53,798.25 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra*, at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Quality Wholesale Florist, Inc. shall pay to the order of the National Promoflor Council, $42,032.00 for the assessments its owes under the Act plus late charges of $11,766.25, or $53,798.25 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: HENRY C. ALDERS WHOLESALE FLORIST, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0007.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $28,425.00 for assessments under the Act plus late charges of $5,122.30 or $33,547.30 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra*, at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.*, at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Henry C. Alders Wholesale Florist, Inc. shall pay to the order of the National Promoflor Council, $28,425.00 for the assessments its owes under the Act plus late charges of $5,122.30, or $33,547.30 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: HARRY VLACHOS, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0008.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
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E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $59,569.50 for assessments under the Act plus late charges of $12,555.49 or $72,124.99 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights. "*Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Harry Vlachos, Inc. shall pay to the order of the National Promoflor Council, $59,569.50 for the assessments its owes under the Act plus late charges of $12,555.49, or $72,124.99 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: MUELLER BROTHERS, INC., A NEW JERSEY CORPORATION.
FCFGPIA Docket No. 97-0009.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 15, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $65,952.50 for assessments under the Act plus late charges of $11,882.28 or $77,834.78 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Mueller Brothers, Inc. shall pay to the order of the National Promoflor Council, $65,952.50 for the assessments its owes under the Act plus late charges of $11,882.28, or $77,834.78 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: U.S. EVERGREENS, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0010.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 24, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $7,864.50 for assessments under the Act plus late charges of $1,221.66 or $9,086.16 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, U.S. Evergreens, Inc. shall pay to the order of the National Promoflor Council, $7,864.50 for the assessments its owes under the Act plus late charges of $1,221.66, or $9,086.16 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: GEORGE RALLIS, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0011.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On April 24, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $14,044.00 for assessments under the Act plus late charges of $2,280.89 or $16,324.89 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/ DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id*, *supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: MAJOR WHOLESALE FLORIST, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0012.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On May 5, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $11,230.00 for assessments under the Act plus late charges of $1,699.97 or $12,929.97 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra*, at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); Hudson v. U.S., 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Major Wholesale Florist, Inc. shall pay to the order of the National Promoflor Council, $11,230.00 for the assessments its owes under the Act plus late charges of $1,699.97, or $12,929.97 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: EVERFLORA MIAMI, INC., A FLORIDA CORPORATION.
FCFGPIA Docket No. 97-0013.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On May 5, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia,* that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia*, because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference, filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent

incurred. Respondent owes $10,372.50 for assessments under the Act plus late charges of $1,764.59 or $12,137.09 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros., supra,* the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., supra, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc., et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, George Rallis, Inc. shall pay to the order of the National Promoflor Council, $14,044.00 for the assessments its owes under the Act plus late charges of $2,280.89, or $16,324.89 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros., supra,* at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame, supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F.2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n,* 430 U.S. 442 (1977); *Hudson v. U.S.,* 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Everflora Miami, Inc. shall pay to the order of the National Promoflor Council, $10,372.50 for the assessments its owes under the Act plus late charges of $1,764.59, or $12,137.09 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

In re: HOLLAND FLOWER EXPRESS, INC., A NEW YORK CORPORATION.
FCFGPIA Docket No. 97-0014.
Decision and Order filed May 22, 1998.

Judgment on Admission of Essential Facts - Order Assessing Advertising Assessments and Civil Penalty - First Amendment Does Not Exempt Handler of Fresh Cut Flowers and Fresh Cut Greens From Advertising Assessments - Due Process Not Violated by Voting Scheme Used to Implement Promotional Advertising Order - Administratively Assessed Civil Penalties are Not the Equivalent of Criminal Fines and Not Entitled to Same Due Process Protections.

Judgment was entered based upon the admission of essential facts. Respondent had argued that it was exempt from the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, because the Act violated its rights under the First Amendment and the Due Process Clause. The decision held that respondent's First Amendment arguments were fully answered and rejected by decisions of binding precedent. So too, Respondent's arguments that Procedural Due Process had been violated by the voting scheme used to implement the Promotional Order were rejected under cases of binding precedent. Lastly, respondent's argument that the advertising assessments imposed on it constituted an excessive fine and criminal/quasi-criminal penalties, was also rejected under a long line of controlling cases. In addition to requiring the Respondent to pay advertising assessments plus late charges, a civil penalty was imposed. These amounts, however, were subject to any refunds or offsets Respondent may be owed under the Promotional Order.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The complainant has moved for a judgment based upon sections 1.139 and 1.143 of the governing Rules of Practice (7 C.F.R. §§ 1.139, .143), and on the pleadings and papers that have been filed by the parties. Although a "motion to dismiss on the pleading" may not be entertained, any other motion will be. 7 C.F.R. § 1.143(b)(1). Inasmuch as complainant's motion is not a motion to dismiss, but rather a motion for the entry of a judgment based upon the admission of essential facts, it may therefore be entertained. Upon consideration of the motion, respondent's opposition to it and the arguments of the parties, the motion is being granted, and orders are being entered in this case and in other cases against handlers who refused to pay assessments under the Fresh Cut Flowers and Fresh

Cut Greens Promotion and Information Act of 1993.

Factual Background

A. On September 3, 1996, a group calling itself "Handlers Against Promoflor" ("HAP"), filed a petition under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (7 U.S.C. §§ 6801-6814)(the "Act"), seeking to be exempted from the provisions of the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order. 7 C.F.R. Part 1200 (the "Order")(*In re Handlers Against Promoflor*, Petitioner, FCFGPIA Docket No. 96-1). I granted the government's second motion to dismiss the petition on May 14, 1997. The petitioners appealed to the Judicial Officer, who affirmed the dismissal of that petition on September 8, 1997. The petitioners did not seek review of the dismissal of the petition, and did not file a new petition.

B. On May 5, 1997, this complaint was filed by the government against the above-named respondent for violations of the Act and the Order. Other complaints were filed at about the same time against thirteen other handlers of fresh cut flowers and greens who were similarly alleged to be "handlers", as that term is used in the Act and the Order, who failed to pay requisite assessments to the National Promoflor Council. The complaints seek orders requiring each respondent to pay specified past-due assessments, plus late fees, as well as civil penalties.

C. All of the respondents are represented in these proceedings by James A. Moody, attorney, and have asserted that they are members of HAP. Each respondent filed a timely answer to the complaint. Except for the names, the answers are identical. Each respondent denied that it is a handler. *See* Paragraph 2 of each Answer. ("Deny, on the grounds, *inter alia*, that the definition is vague and uncertain"). Each respondent also denied that it failed to pay assessments, to wit:

> Deny, on the grounds, *inter alia*, that (1) [respondent] has been placing certain monies in escrow for its benefit or for Promoflor, as may ultimately be determined by the result of *Handlers Against Promoflor v. USDA*, Docket No. FCFGPIA 96-1; and (2) [respondent] was forced to retain assessments in escrow because of USDA's unlawful construction of the Act that denies [respondent] (a) a meaningful and realistic tax refund remedy and (b) a meaningful opportunity to challenge the tax in court, and not because of any intent or desire to violate the law." Paragraph 3 of each Answer.

D. Each respondent also asserted the following affirmative defenses:

1. USDA lacks jurisdiction.
2. The tax is unconstitutional and violates [respondent's] rights to free speech guaranteed by the First Amendment.
3. The tax is unconstitutional and violates [respondent's] rights to free association guaranteed by the First Amendment.
4. The tax is unconstitutional and violates [respondent's] due process rights guaranteed by the Fifth Amendment, *inter alia,* because Promoflor is composed of members that can vote on the tax but who do not pay the tax and who cannot vote in any continuation referenda on the program; the tax is not imposed on all similarly situated companies; the referendum violates the one-person-one vote rule; and the tax is imposed without a meaningful and adequate refund remedy.
5. The penalty and late fee provisions violate due process by imposing a tax and burden on [respondent's] right to seek relief and protect its legal rights. Answers at pp. 1 and 2.

E. On May 12, 1997, the complainant filed motions to set the cases for hearing. They were not scheduled pending issuance of a Supreme Court decision relevant to the HAP petition, *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). On June 25, 1997, the Supreme Court decided *Wileman Bros.* On July 29, 1997, the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order was terminated. 60 Fed. Reg. 40,257. During a telephone conference on August 13, 1997, the attorneys for the parties were asked to pursue settlement options, and a status conference was scheduled for mid-September. A settlement was not obtained, and on January 22, 1998, the complainant filed a second set of motions to set these cases for hearing. Neither did this respondent nor the other respondents respond to the motion.

F. On March 30, 1998, complainant filed a Motion For Judgment on the Pleadings applicable to each of the fourteen pending complaints.

G. On May 8, 1998, I conducted a conference to consider arguments on complainant's motion. At the conference, a written opposition to the motion was filed on behalf of respondents. Although the time for filing respondents' response had expired on April 22, 1998, the opposition was received and has been considered in addition to the oral arguments advanced for respondents at the conference.

H. On May 19, 1998, complainant as directed at the May 8, 1998 conference,

filed a status report for each respondent detailing the amount of assessments that each failed to remit together with the consequent late fees each respondent incurred. Respondent owes $14,509.00 for assessments under the Act plus late charges of $2,364.52 or $16,873.52 total.

Discussion

Mr. Moody, respondent's attorney, has been a leader in the fight against the implementation of government programs which assess the costs for the generic advertising of agricultural commodities against unwilling handlers. In *Wileman Bros.*, *supra*, the Ninth Circuit rejected a due process challenge he helped assert under the Administrative Procedure Act to the operation of a marketing order under which assessments for advertising were collected from handlers of nectarines, peaches and other tree fruits grown in California. However, the Ninth Circuit decided that First Amendment rights of freedom of speech and association were implicated and held that the handler's freedom of speech had been abridged. The Supreme Court reversed, finding no First Amendment right to be free of coerced subsidization of commercial speech, stating:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Wileman Bros., *supra*, at 2142.

Wileman Bros. was held to be dispositive of the First Amendment challenge handlers of almonds raised in *Cal-Almond, Inc.*, *et al.*, 56 Agric. Dec. 1158 (1997). In that case, the Judicial Officer found "no material difference between the California tree fruit orders at issue in *Wileman Bros.* and the Almond Order at issue in this proceeding . . . ." 56 Agric. Dec. at 1222.

Respondents argue that inasmuch as these advertising assessments do not arise from a Marketing Order containing other regulatory provisions but from an Order restricted to the collection of assessments for generic advertising, *Wileman Bros.* is not similarly dispositive of the present proceedings. But when the Ninth Circuit decided *Wileman Bros.*, its decision came into conflict with that of the Third

Circuit in *United States v. Frame*, 885 F.2d 1119 (1989), which had rejected a First Amendment challenge to the Beef Promotion and Research Act of 1985. The Supreme Court granted certiorari to resolve that very conflict. *Wileman Bros.*, *supra*, at 2137. Unlike the Marketing Order in *Wileman Bros.*, the regulatory program at issue in *Frame* was limited to promotional advertising. So now we have come full circle. And like the objecting cattleman in *Frame*, *supra*, the respondents in these proceedings object to advertising campaigns conducted "to promote the product . . . (they have) chosen to market, (and) despite . . . (their) objections to the content of the advertising . . . (there is) no violation of . . . First Amendment rights." *Wileman Bros.* at 2137. (Citation omitted.) *See also Delano Farm Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW/DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997); *In re: United Foods, Inc.*, 57 Agric. Dec. ____, slip op. at 17-19 (March 4, 1998); *In re: Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1603 (1997).

Respondents also assert that their Fifth Amendment rights to due process were violated in respect to their voting eligibility and how the votes cast were weighed in the referenda conducted by the Secretary. Respondent's counsel made similar arguments on behalf of his clients in *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). As the Ninth Circuit noted, *id, supra*, at 759:

> "Finally, Sequoia argues that the voting scheme unconstitutionally delegated law-making to a minority of growers. This argument is untenable. In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 577-78, 59 S.Ct. 993, 1014-15, 83 L. Ed. 1446 (1939), the Court upheld the AMAA's requirement of producer approval of marketing orders. The Court cited *Currin v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L. Ed. 441 (1939), which stated that requiring producer approval of a regulation was not an unconstitutional delegation of power, but a legitimate condition precedent to the exercise of authority."

See also, Freeman v. Hygeia Dairy Co., 326 F. 2d 271 (5th Cir. 1964); *Suntex Dairy v. Block*, 666 F.2d 158, 163-164 (5th *Cir.*), *cert. denied*, 459 U.S. 826 (1982); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Respondent also argues in its opposition to the Motion, that its due process rights were violated by "the excessive fine and criminal/quasi-criminal nature of

the penalties."[1] However, there is a long line of cases to the effect that administratively assessed civil penalties are not the equivalent of criminal fines and therefore are not subject to the same procedural and constitutional safeguards. *See, e.g., Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977); *Hudson v. U.S.*, 118 S. Ct. 488 (1997).

Obviously, the Act and the Order did not enjoy the confidence of the entire industry. For that reason it was terminated. But from the month of November 1995 through the termination on July 29, 1997, the assessments and late fees charged these respondents by the National Promoflor Council constituted a lawful exercise of government power under controlling case law. The National Promoflor Council's computation of these assessments has not been challenged and therefore those assessments, together with resulting late fees, shall be imposed upon the respondent. Complainant has also sought a civil penalty of $10,000.00 against each respondent. Inasmuch as the Order has been terminated civil penalties of that magnitude are not appropriate. However, the continued stubborn refusal of respondents to comply with the Order in the face of the *Wileman Bros.* decision, has persuaded me that the minimum civil penalty of $500.00, as provided in the Act, should be imposed. 7 U.S.C.§ 6807(c). Accordingly, the following Order is being entered against the named Respondent.

Order

It is hereby ORDERED that respondent, Holland Flower Express, Inc. shall pay to the order of the National Promoflor Council, $14,509.00 for the assessments its owes under the Act plus late charges of $2,364.52, or $16,873.52 total. These amounts shall be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250; these amounts shall however, be subject to any refunds or offsets respondent may be owed under the Order.

In addition, respondent shall pay to the order of the Treasurer of the United States, a civil penalty of $500.00, which shall likewise be sent to Colleen Carroll, attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.

This Decision and Order shall become final and effective 35 days after service

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[1]The "unfair tax" assertions in respondent's answer were not developed in the opposition filed on respondent's behalf, but were instead replaced by these assertions that the assessments constituted an "excessive fine."

upon respondent unless either party within thirty (30) days after service, files an appeal to the Judicial Officer as provided in the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final July 2, 1998.-Editor.]

MISCELLANEOUS ORDERS

In re: STEW LEONARD'S.
98 AMA Docket No. M 1-1.
Order Denying Interlocutory Appeals filed December 4, 1998.

Interlocutory appeal — Premature appeal — Intervention.

The Judicial Officer denied interlocutory appeals from a ruling by Administrative Law Judge Dorothea A. Baker (ALJ) denying motions to consolidate and striking answers, on the ground that interlocutory appeals are not permitted under the Rules of Practice.

Donald A. Tracy, for Respondent.
James A. Wade, Hartford, Connecticut, for Petitioner.
Sydney Berde, St. Paul, Minnesota, for Agri-Mark, Inc.
John Vetne, Newburyport, Massachusetts, for New England Dairies, Inc.
Ruling issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Stew Leonard's [hereinafter Petitioner] instituted this proceeding on February 17, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter AMAA]; the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. pt. 1001) [hereinafter the New England Milk Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice], by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner: (1) contends that a February 6, 1998, determination by the Market Administrator for the New England Milk Marketing Order that Petitioner is not a producer-handler under 7 C.F.R. § 1001.10, is not in accordance with law (Pet. ¶¶ 3, 15); and (2) requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner is not required to comply with "requirements of a handler under federal statutes, regulations, and milk orders" (Pet. at 5).

On April 24, 1998, the Administrator of the Agricultural Marketing Service [hereinafter Respondent] filed an Answer: (1) denying the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Answer ¶¶ 3, 9); and (2) stating that the Petition fails to state a claim upon which relief can be

granted (Answer at 3).[1]

On June 8, 1998, Agri-Mark, Inc., and the National Milk Producers Federation filed Motion of Agri-Mark, Inc., and National Milk Producers Federation for Leave to Participate in the Above Captioned Proceeding [hereinafter Motion to Intervene], in which Agri-Mark, Inc., and the National Milk Producers Federation requested an order granting them leave to participate in oral argument and to file a brief in this proceeding, pursuant to section 900.57 of the Rules of Practice (7 C.F.R. § 900.57).[2] On June 29, 1998, Respondent filed Respondents [sic] Reply to Motion of Agri-Mark and National Milk Producers Federation to Participate in the Proceeding; and Status Report [hereinafter Respondent's Reply] stating that Respondent takes no position with respect to Agri-Mark, Inc.'s and National Milk Producers Federation's request to file briefs, but "would oppose any motion by a non-party otherwise to appear or act as a party at an evidentiary hearing or any other aspect of this case" (Respondent's Reply at 1).

On July 9, 1998, the ALJ granted the Motion to Intervene "to the extent that [Agri-Mark, Inc., and the National Milk Producers Federation] may file briefs"

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[1]On August 12, 1998, Petitioner filed Motion to Amend Petition Filed Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Motion to Amend Petition] and Amended Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Amended Petition]. The Amended Petition states that the Market Administrator's "February 6, 1998 letter, and the continuing refusal to confirm Stew Leonard's status as a producer-handler are not in accordance with law" (Amended Pet. ¶ 19) and requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner "is no longer required to file handler reports and comply with all other requirements of a handler under federal statutes, regulations, and milk orders" (Amended Pet. at 5-6). On August 21, 1998, Respondent filed Respondent's Reply to Motion to Amend Petition and Answer to Amended Petition [hereinafter Amended Answer]. The Amended Answer: (1) states that Respondent does not object to Petitioner's Motion to Amend Petition (Amended Answer at 1); (2) denies the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Amended Answer ¶¶ 3, 9); and (3) states that the Amended Petition fails to state a claim upon which relief can be granted (Amended Answer at 3). On September 10, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] granted Petitioner's Motion to Amend Petition (Ruling on Motion to Amend).

[2]Section 900.57 of the Rules of Practice provides:

§ 900.57 Intervention.

Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the judge, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

7 C.F.R. § 900.57.

(Ruling on Motion for Leave to Participate in Proceeding).

On September 1, 1998, Agri-Mark, Inc., filed: (1) Petition of Agri-Mark, Inc., pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) in *In re Agri-Mark, Inc.*, 98 AMA Docket No. M 1-2; (2) Motion of Agri-Mark, Inc. For an Order For Consolidated Hearing on Its Petition [hereinafter Agri-Mark, Inc.'s Motion to Consolidate], in which Agri-Mark, Inc., requested consolidation of this proceeding and *In re Agri-Mark, Inc.*, 98 AMA Docket No. M 1-2; and (3) Answer of Agri-Mark, Inc., in this proceeding.

On September 9, 1998, Petitioner filed Motion to Strike Answer of Agri-Mark, Inc., in which Petitioner requested that the ALJ strike the Answer of Agri-Mark, Inc., from the record and Petitioner's Objection to Agrimark's [sic] Motion to Consolidate, in which Petitioner requested that the ALJ deny Agri-Mark, Inc.'s Motion to Consolidate. On September 17, 1998, Respondent filed Respondent's Motion to Strike Agri-Mark, Inc.'s "Answer"; and Respondent's Opposition to Agri-Mark, Inc.'s Motion for Consolidated Hearing, in which Respondent requested that the ALJ deny Agri-Mark, Inc.'s Motion to Consolidate and strike Answer of Agri-Mark, Inc. On September 21, 1998, Agri-Mark, Inc., filed Response of Agri-Mark, Inc. To Petitioner's Objection for Consolidated Hearing. On September 23, 1998, Petitioner filed Petitioner's Memorandum in Support of Its Objection to Agri-Mark's Motion to Consolidate.

On September 14, 1998, New England Dairies, Inc., filed: (1) a petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3; (2) an answer [hereinafter New England Dairies, Inc.'s Answer] to the Amended Petition in this proceeding; and (3) New England Dairies, Inc., Petition to Intervene and to Consolidate for Hearing on its Affirmative Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter New England Dairies, Inc.'s Petition to Consolidate], in which New England Dairies, Inc., requested consolidation of this proceeding and *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3, and intervention in this proceeding.

On September 22, 1998, the ALJ: (1) struck Answer of Agri-Mark, Inc.; (2) denied Agri-Mark, Inc.'s Motion to Consolidate; (3) struck New England Dairies, Inc.'s Answer; (4) denied New England Dairies, Inc.'s Petition to Consolidate; and (5) permitted New England Dairies, Inc., to participate in this proceeding "to the limited extent of filing briefs" (Rulings on Respondent's Motion to Strike Agri-Mark, Inc.'s, "Answer" and Agri-Mark, Inc.'s, Motion for Consolidated Hearing; Rulings on New England Dairies, Inc.'s "Answer" to Amended Petition of Stew Leonard's [Petitioner herein] and Petition to Intervene and Consolidate for Hearing [hereinafter Rulings Denying Motions to Consolidate and Striking Answers] at 2).

On October 13, 1998, and October 26, 1998, respectively, Agri-Mark, Inc., and

New England Dairies, Inc., appealed the ALJ's Rulings Denying Motions to Consolidate and Striking Answers[3] to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[4] On November 4, 1998, Petitioner filed Response of Stew Leonard's in Opposition to the Appeal to the Judicial Officer of Agri-Mark, Inc. On November 9, 1998, Respondent filed Respondent's Reply to Appeal of Agri-Mark and New England Dairies. On November 17, 1998, Agri-Mark, Inc., filed Reply of Agri-Mark, Inc. to Stew Leonard's Response in Opposition to Appeal to Judicial Officer. On November 23, 1998, Petitioner filed Response of Stew Leonard's in Opposition to the Appeal to the Judicial Officer of New England Dairies, Inc., and on November 24, 1998, the Hearing Clerk referred the case to the Judicial Officer for decision.

Section 900.65(a) of the Rules of Practice limits the time during which a party may file an appeal to a 30-day period *after* service of the *judge's decision*, as follows:

> **§ 900.65 Appeals to Secretary: Transmittal of record.**
>
> (a) *Filing of appeal.* Any party who disagrees with a judge's decision or any part thereof, may appeal the decision to the Secretary by transmitting an appeal petition to the hearing clerk within 30 days after service of said decision upon said party.

7 C.F.R. § 900.65(a).

Section 900.51(o) of the Rules of Practice defines the word *decision*, as follows:

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[3]New England Dairies, Inc., filed its appeal of the ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3. The ALJ did not issue Rulings Denying Motions to Consolidate and Striking Answers in *In re New England Dairies, Inc.*, 98 AMA Docket No. M 1-3. I infer that New England Dairies, Inc., intends to appeal the ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers issued in this proceeding.

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

§ 900.51 Definitions.

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

. . . .

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

7 C.F.R. § 900.51(o).

The ALJ's September 22, 1998, Rulings Denying Motions to Consolidate and Striking Answers is not a *decision*, as defined in section 900.51(o) of the Rules of Practice (7 C.F.R. § 900.51(o)), but rather is an interlocutory ruling. Thus, the October 13, 1998, Appeal of Agri-Mark, Inc., to the Judicial Officer [hereinafter Agri-Mark, Inc.'s Appeal Petition] and the October 26, 1998, Appeal of New England Dairies, Inc., to the Judicial Officer [hereinafter New England Dairies, Inc.'s Appeal Petition] are interlocutory appeals, which are not permitted under the Rules of Practice.[5]

Moreover, Agri-Mark, Inc.'s Appeal Petition and New England Dairies, Inc.'s Appeal Petition, both of which were filed prior to the issuance of a decision by the ALJ, must be rejected as premature.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

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[5]*See In re Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1062, 1063 (1982) (stating that interlocutory appeals are not permitted under the Rules of Practice) (Order Denying Appeals); *In re H. Naraghi*, 40 Agric. Dec. 1687 (1981) (dismissing the respondent's interlocutory appeal to the Judicial Officer relating to an administrative law judge's grant of the petitioner's request for the taking of oral depositions for discovery purposes) (Order Dismissing Interlocutory Appeal).

Rule 4. Appeal as of Right—When Taken

(a) *Appeal in a Civil Case.—*

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

Fed. R. App. P. 4(a)(1), *reprinted in* 28 U.S.C. app. at 591 (1994).

The notes of the Advisory Committee on Appellate Rules regarding a 1979 amendment to Rule 4(a)(1) make clear that Rule 4(a)(1) is specifically designed to prevent premature as well as late appeals, as follows:

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "o[f]." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. . . .

Fed. R. App. P. 4(a)(1) advisory committee's note (1979 Amendment).[6]

For the foregoing reasons, Agri-Mark, Inc.'s Appeal Petition and New England Dairies, Inc.'s Appeal Petition are denied.

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[6]*Accord Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (stating that a notice of appeal filed while timely motion to alter or amend judgment was pending in district court was absolute nullity and could not confer jurisdiction on court of appeals); *Willhauck v. Halpin*, 919 F.2d 788, 792 (1st Cir. 1990) (stating that a premature notice of appeal is a complete nullity); *Mondrow v. Fountain House*, 867 F.2d 798, 799 (3d Cir. 1989) (stating that the appellate court had no jurisdiction to hear appeal during pendency of motion for new trial timely filed in trial court).

In re: AGRI-MARK, INC.
98 AMA Docket No. M 1-2.
Dismissal of Petition filed December 15, 1998.

Donald A. Tracy, for Respondent.
Sydney Berde, St. Paul, Minnesota, for Petitioner.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Premised upon a consideration of the pleadings and entire record herein, including the reasons set forth by Respondent in its filing, dated October 30, 1998, entitled: "Respondent's Motion to Dismiss the Petition and to Have the Case Assigned to Judge Baker" the Petition filed by Agri-Mark, Inc. on September 1, 1998, and, as amended by the Amended Petition filed September 21, 1998, is hereby Dismissed.

Copies hereof shall be served upon the parties.

In re: NEW ENGLAND DAIRIES, INC.
98 AMA Docket No. M 1-3.
Dismissal of Petition filed December 15, 1998.

Donald A. Tracy, for Respondent.
Sydney Berde, St. Paul, Minnesota, for Petitioner.
Order issued by Dorothea A. Baker, Administrative Law Judge.

The following Order is issued after a consideration of the record as a whole, including Respondent's Motion to Dismiss the Petition, filed October 30, 1998. Respondent has set forth compelling reasons why the Petitioner herein is attempting to intervene in another 15A proceeding and has filed an inappropriate baseless Petition and one which is not in conformity with the law and regulations, all as more fully set forth by Respondent in its Motion to Dismiss.

New England Dairies, Inc.'s Petition to Intervene and to Consolidate for Hearing on its Affirmative Petition Pursuant to 7 U.S.C. § 608(c)(15)(A); and, its Affirmative Claims of Intervenor/Petitioner filed September 14, 1998, are Dismissed.

Copies hereof shall be served upon the parties.

In re: PAT KNIGHT.
A.Q. Docket No. 98-0010.
Order Dismissing Complaint filed September 15, 1998.

Darlene Bolinger, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint filed herein on August 4, 1998, be dismissed.

In re: PETER A. LANG, d/b/a SAFARI WEST.
AWA Docket No. 96-0002.
Stay Order filed July 1, 1998.

Colleen A. Carroll, for Complainant.
Respondent, pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 13, 1998, I issued a Decision and Order: (1) concluding that Peter A. Lang, d/b/a Safari West [hereinafter Respondent], violated section 2.131(a)(1) of the regulations (9 C.F.R. § 2.131(a)(1)) issued under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159); (2) assessing Respondent a civil penalty of $1,500; and (3) ordering Respondent to cease and desist from failing to handle animals as expeditiously and carefully as possible, in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 16, 43-44 (Jan. 13, 1998). On March 12, 1998, Respondent filed a petition for reconsideration, which I denied. *In re Peter A. Lang*, 57 Agric. Dec. ___ (May 13, 1998) (Order Denying Pet. for Recons.).

On June 30, 1998, Respondent filed a Motion for Stay pending the outcome of proceedings for judicial review, and the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay. On June 30, 1998, counsel for the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed the Office of the Judicial Officer, by telephone, that Complainant does not oppose Respondent's Motion for Stay.

Respondent's Motion for Stay is granted. The Order issued in this proceeding on January 13, 1998, *In re Peter A. Lang*, 57 Agric. Dec. ___ (Jan. 13, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: SOUTH CALHOUN FARM, INC.
AWA Docket No. 95-0042
Order Dismissing Complaint filed July 20, 1998.

Robert A. Ertman, for Complainant.
Robert A. Gilder, Southaven, Mississippi, for Respondent
Order Dismissing Complaint issued by James W. Hunt, Administrative Law Judge.

The parties joint "Stipulation and Motion to Dismiss," filed July 10, 1998, is granted. It is ordered that the complaint and order to show cause filed herein on April 11, 1995, be dismissed without prejudice as moot.

In re: STEVEN M. SAMEK AND TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Ruling Denying Steven M. Samek's Motion for Assistance With Appeal filed August 20, 1998.

Colleen A. Carroll, for Complainant.
Respondent, pro se.
Default Decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on

October 18, 1996.

The Complaint alleges that Steven M. Samek and Trina JoAnn Samek violated the Animal Welfare Act and the Regulations and Standards.[1] Mr. Kent A. Permentier, a senior investigator with the Animal and Plant Health Inspection Service, personally served a copy of the Complaint on Steven M. Samek [hereinafter Respondent] on February 21, 1997 (United States Department of Agriculture, Certificate of Personal Service of Kent A. Permentier, filed June 25, 1997).

Respondent failed to answer the Complaint within 20 days as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On August 22, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a Proposed Decision and Order Upon Admission of Facts by Reason of Default as to Steven M. Samek [hereinafter Default Decision] in which the Chief ALJ found that Respondent violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; assessed a civil penalty of $15,000 against Respondent; suspended Respondent's Animal Welfare Act license for 30 days; and ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On April 6, 1998, Respondent was served with the Default Decision, and on April 10, 1998, Respondent filed a motion requesting appointment of a public defender to appeal the Default Decision. On May 4, 1998, Complainant filed Complainant's Response to Appeal of Decision and Order, and on May 6, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's motion for appointment of a public defender. On May 12, 1998, I issued a Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek.

On May 19, 1998, Respondent filed a motion requesting that the Chief ALJ assist Respondent with Respondent's appeal of the Default Decision to the Judicial Officer [hereinafter Respondent's Motion for Assistance With Appeal]. Complainant made three requests for extensions of time to file a response to Respondent's Motion for Assistance With Appeal. I granted each of Complainant's

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[1]On March 26, 1998, Complainant filed a motion to dismiss the Complaint as to Trina JoAnn Samek (Motion to Dismiss Without Prejudice as to Trina JoAnn Samek), which Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] granted on March 31, 1998 (Dismissal of Complaint Against Trina JoAnn Samek).

requests for extension of time,[2] and Complainant's response to Respondent's Motion for Assistance With Appeal was due August 17, 1998.[3] Complainant failed to file any response to Respondent's Motion for Assistance With Appeal on or before August 17, 1998, and on August 19, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion for Assistance With Appeal.

The Administrative Procedure Act provides that a party in an agency proceeding may appear by or with counsel, as follows:

> **§ 555. Ancillary matters**
>
> . . . .
>
> (b) . . . A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

5 U.S.C. § 555(b).

However, a respondent who desires assistance of counsel in an agency proceeding bears the responsibility of obtaining counsel.[4] Further, a respondent who is unable to obtain counsel has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary administrative proceedings, such as those conducted under the Animal Welfare Act.[5]

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[2]Informal Order, filed June 11, 1998; Informal Order, filed July 8, 1998; Informal Order, filed July 31, 1998.

[3]*See* Informal Order, filed July 31, 1998 (granting Complainant an extension of time to August 17, 1998, to file a response to Respondent's Motion for Assistance With Appeal).

[4]*In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 8 (Aug. 17, 1998).

[5]*See generally Elliott v. SEC*, 36 F.3d 86, 88 (11th Cir. 1994) (per curiam) (rejecting petitioner's assertion of prejudice due to his lack of representation in an administrative proceeding before the Securities and Exchange Commission and stating that there is no statutory or constitutional right to counsel in disciplinary administrative proceedings before the Securities and Exchange Commission); *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993) (stating that it is well settled that deportation hearings are in the nature of civil proceedings and that aliens therefore have no constitutional right to counsel under the Sixth Amendment); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (stating that a

(continued...)

Moreover, the Act of September 6, 1966, as amended by the Act of March 27, 1978, provides that administrative law judges may not perform duties inconsistent with their duties and responsibilities as administrative law judges, as follows:

§ 3105. Appointment of administrative law judges

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. *Administrative law judges* shall be assigned to cases in rotation so far as practicable, and *may not perform duties inconsistent with their duties and responsibilities as administrative law judges.*

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[5](...continued)
deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (stating that because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979) (per curiam) (stating that 5 U.S.C. § 555(b) and due process assure petitioner the right to obtain independent counsel and have counsel represent him in a civil administrative proceeding before the Securities and Exchange Commission, but the Securities and Exchange Commission is not obliged to provide petitioner with counsel); *Feeney v. SEC*, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners' argument that the Securities and Exchange Commission erred in not providing appointed counsel for them and stating that, assuming petitioners are indigent, the Constitution, the statutes, and prior case law do not require appointment of counsel at public expense in administrative proceedings of the type brought by the Securities and Exchange Commission), *cert. denied*, 435 U.S. 969 (1978); *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969) (stating that petitioner has a right under 5 U.S.C. § 555(b) to employ counsel to represent him in an administrative proceeding, but the government is not obligated to provide him with counsel); *Boruski v. SEC*, 340 F.2d 991, 992 (2nd Cir.) (stating that in administrative proceedings for revocation of registration of a broker-dealer, expulsion from membership in the National Association of Securities Dealers, Inc., and denial of registration as an investment advisor, there is no requirement that counsel be appointed because the administrative proceedings are not criminal), *cert. denied*, 381 U.S. 943 (1965); *Alvarez v. Bowen*, 704 F. Supp. 49, 52 (S.D.N.Y. 1989) (stating that the Secretary of Health and Human Services is not obligated to furnish a claimant with an attorney to represent the claimant in a social security disability proceeding); *In re Garland E. Samuel*, 57 Agric. Dec. ___, slip op. at 8-9 (Aug. 17, 1998) (stating that a respondent who is unable to obtain counsel has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary proceedings, such as those conducted under the Swine Health Protection Act); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 442 (1984) (stating that a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, is not a criminal proceeding and respondent, even if he cannot afford counsel, has no constitutional right to have counsel provided by the government), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984).

5 U.S.C. § 3105 (emphasis added).

One of the primary duties of the Chief ALJ is to act as an impartial decisionmaker in the United States Department of Agriculture's adjudicatory proceedings conducted in accordance with 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.27). While the Chief ALJ has completed his duties with respect to the instant proceeding (barring an order remanding the proceeding to the Chief ALJ), I find that the Chief ALJ's representation of Respondent on appeal of the Chief ALJ's Default Decision to the Judicial Officer would be inconsistent with the Chief ALJ's duty and responsibility to act as an impartial decisionmaker in the instant proceeding.

Therefore, Respondent's motion requesting that the Chief ALJ assist Respondent with Respondent's appeal of the Default Decision to the Judicial Officer, is denied.

In re: MARILYN SHEPHERD.
AWA Docket No. 96-0084.
Order Denying Petition for Reconsideration filed September 15, 1998.

The Judicial Officer denied Respondent's Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

Sharlene A. Deskins, for Complainant.
Respondent, pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on September 24, 1996.

The Complaint alleges that Marilyn Shepherd [hereinafter Respondent] willfully violated the Animal Welfare Act and the Regulations and Standards by failing to properly identify animals and by failing to comply with the Regulations and Standards relating to the care and housing of animals. On October 17, 1996,

Respondent filed an Answer denying the material allegations of the Complaint, and on October 24, 1996, Respondent filed a Supplemental Answer, requesting a hearing.

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing on July 16, 1997, in Springfield, Missouri. Sharlene Deskins, Esq., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Respondent represented herself. On September 10, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof. On September 15, 1997, Respondent filed a Brief. On October 8, 1997, Respondent filed a response to Complainant's Brief.

On October 30, 1997, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] assessing Respondent a civil penalty of $600 and ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards (Initial Decision and Order at 22).

On December 1, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On January 14, 1998, Complainant filed Complainant's Appeal Petition, Brief in Support of Its Appeal Petition and Opposition to the Respondent's Appeal Petition. On March 24, 1998, Respondent filed a response to Complainant's Appeal. On March 26, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On June 26, 1998, I issued a Decision and Order: (1) concluding that Respondent violated the Animal Welfare Act (7 U.S.C. §§ 2131-2159) and the following sections of the Regulations and Standards: 9 C.F.R. §§ 2.40; 2.50; 2.100(a); 3.1(a); 3.1(c)(1)(i); 3.1(f); 3.4(b); 3.6; 3.9(b); 3.10; and 3.11(a); (2) assessing Respondent a civil penalty of $2,000; (3) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (4) suspending Respondent's license under the Animal Welfare Act for a period of 7 days, or if Respondent is not licensed, disqualifying Respondent from becoming licensed under the Animal Welfare Act for a period of 7 days. *In re Marilyn Shepherd*, 57 Agric. Dec. ___, slip op. at 38, 60-62 (June 26, 1998). On

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

July 6, 1998, Respondent was served with a copy of the June 26, 1998, Decision and Order and a letter dated June 29, 1998, from the Hearing Clerk.[2]

On July 17, 1998, 11 days after Respondent was served with the Decision and Order, Respondent filed Request Petition for Reconsideration of the Judicial Officers [sic] Decision [hereinafter Petition for Reconsideration]. On August 7, 1998, Complainant filed Complainant's Opposition to the Respondent's "Request Petition for Reconsideration of Judicial Officer Decision," and on August 11, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the June 26, 1998, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice provides:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite. . . .*
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

The letter dated June 29, 1998, from the Hearing Clerk, expressly advises Respondent of the time for filing a petition for reconsideration, as follows:

> CERTIFIED RECEIPT REQUESTED
> June 29, 1998
>
> Marilyn Shepherd
> Route 2, Box 819
> Ava, MO 65608

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[2]Domestic Return Receipt for Article Number P 368 426 977.

Dear Ms. Shepherd:

Subject: In re: Marilyn Shepherd-Respondent
AWA Docket No. 96-0084

Enclosed is a date-stamped copy of the Decision and Order issued by the Judicial Officer on the Secretary's behalf in the above-captioned proceeding.

Judicial review of this decision is available in an appropriate court if an appeal is timely filed. This office does not provide information on how to appeal. Please refer to the governing statute. If you are not currently represented by an attorney, you may choose to seek legal advice regarding an appeal.

Prior to filing an appeal, you may file a petition for reconsideration of the Judicial Officer's decision within **10 days** of service of the decision. An original and three copies of the petition for reconsideration must be filed with this office.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

June 29, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Shepherd (emphasis in original).

Respondent's Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after service of the Decision and Order, was filed too late, and, accordingly, Respondent's Petition for Reconsideration is denied.[3]

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[3]*See In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after respondents were served with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after respondent was served with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after

(continued...)

Since Respondent's Petition for Reconsideration was not timely filed, the Decision and Order filed June 26, 1998, was not stayed in accordance with section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)). Therefore, the effective dates of the provisions of the Order in the June 26, 1998, Decision and Order, are not changed.

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

Order

Respondent's Petition for Reconsideration is denied.

In re: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Order Denying in Part and Granting in Part Petition for Reconsideration filed July 7, 1998.

Willful — Substantial evidence — Sanction.

The Judicial Officer denied in part and granted in part Respondent's Petition for Reconsideration. Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful violations. Respondent's failures to examine the drivers' licenses of persons who sold him dogs or cats do not constitute violations of 9 C.F.R. § 2.75(a)(1); however, Respondent's failure to fully and correctly maintain records which disclosed the names, addresses, and drivers' licenses of persons from whom he acquired animals are violations of 9 C.F.R. § 2.75(a)(1). "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The record contains substantial evidence of Respondent's willful violations of 7 U.S.C. § 2140 and 9 C.F.R.

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[3](...continued)
respondent was served with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after respondent was served with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after service of the decision and order on respondent); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after service of the decision and order on respondent); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing petition for reconsideration because it was not filed within 10 days after service of the decision and order on respondent); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after service of the decision and order on respondent).

§§ 2.75(a)(1), 2.100, 2.132, and 3.1(f). The facts establish that a 10-day suspension of Respondent's Animal Welfare Act license and the assessment of a $5,350 civil penalty against Respondent are warranted.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 17, 1995.

The Complaint alleges that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], willfully violated the Animal Welfare Act and the Regulations and Standards by failing to keep complete records, by acquiring *random source* dogs from prohibited sources, and by failing to comply with the Regulations and Standards relating to the care, transportation, and handling of animals. On March 16, 1995, Respondent filed an Answer denying the material allegations of the Complaint; and on May 16, 1995, Respondent filed an Amended Answer containing affirmative defenses.

Administrative Law Judge James W. Hunt [hereinafter ALJ] presided over a hearing on October 1 and 2, 1996, in Memphis, Tennessee. Robert A. Ertman, Esq., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Robert G. Gilder, Esq., of Southaven, Mississippi, and Kevin N. King, Esq., of Hardy, Arkansas, represented Respondent.[1] On January 31, 1997, Respondent filed Proposed Findings of Fact, Proposed Conclusions of Law, and Memorandum in Lieu of Oral Closing Argument. On February 3, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof.

On April 9, 1997, the ALJ issued an Initial Decision and Order assessing Respondent a civil penalty of $5,000 and ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

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[1]On April 10, 1998, Jefferson D. Gilder, Esq., of Southaven, Mississippi, entered an appearance on behalf of Respondent (Entry of Appearance, filed April 10, 1998).

On May 1, 1997, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On May 30, 1997, Respondent filed Respondent's Response to Appeal Petition. On June 9, 1997, Complainant filed Complainant's Memorandum in Support of Appeal. On July 30, 1997, Respondent refiled Respondent's May 30, 1997, Response to Appeal Petition, together with Respondent's Brief in Opposition to the Complainant's Appeal of Initial Decision and Order. On August 27, 1997, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

On March 20, 1998, I issued a Decision and Order: (1) assessing Respondent a civil penalty of $9,250; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) suspending Respondent's Animal Welfare Act license for 14 days. *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 71-72 (Mar. 20, 1998).

On April 10, 1998, Respondent filed Petition for Reconsideration and requested an extension of time within which to file a brief in support of his Petition for Reconsideration. On May 11, 1998, Respondent filed Respondent's Memorandum in Support of Petition to Reconsider [hereinafter Petition for Reconsideration]. On June 29, 1998, Complainant filed Complainant's Response to Petition for Reconsideration, and on June 30, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued March 20, 1998.

Complainant's Response to Petition for Reconsideration was filed late. Therefore, I have not considered Complainant's Response to Petition for Reconsideration, and Complainant's Response to Petition for Reconsideration forms no part of the record of this proceeding.

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARD

7 U.S.C.:

TITLE 7—AGRICULTURE

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

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use

as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) *Civil penalties for violation of any section, etc.*; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2131, 2132(f), 2140, 2149(a), (b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general

usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

. . . .

Random source means dogs and cats obtained from animal pounds or shelters, auction sales, or from any person who did not breed and raise them on his or her premises.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer. . . . The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

(v) The date a dog or cat was acquired or disposed of, including by euthanasia;

(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;

(vii) A description of each dog or cat which shall include:

(A) The species and breed or type;

(B) The sex;

(C) The date of birth or approximate age; and

(D) The color and any distinctive markings;

(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle;

(ix) The date and method of disposition of a dog or cat, e.g., sale, death, euthanasia, or donation.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.132 Procurement of random source dogs and cats, dealers.

(a) A class "B" dealer may obtain live random source dogs and cats only from:

(1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;

(2) State, county, or city owned and operated animal pounds or shelters; and

(3) A legal entity organized and operated under the laws of the State in which it is located as an animal pound or shelter, such as a humane shelter or contract pound.

(b) A class "B" dealer shall not obtain live random source dogs and cats from individuals who have not bred and raised the dogs and cats on their own premises.

(c) Live nonrandom source dogs and cats may be obtained from persons who have bred and raised the dogs and cats on their own premises, such as hobby breeders.

(d) No person shall obtain live random source dogs or cats by use of false pretenses, misrepresentation, or deception.

(e) Any dealer, exhibitor, research facility, carrier, or intermediate handler who also operates a private or contract animal pound or shelter shall comply with the following:

(1) The animal pound or shelter shall be located on premises that are physically separated from the licensed or registered facility. The animal housing facility of the pound or shelter shall not be adjacent to the licensed or registered facility.

(2) Accurate and complete records shall be separately maintained by the licensee or registrant and by the pound or shelter. The records shall be in accordance with §§ 2.75 and 2.76, unless the animals are lost or stray. If the animals are lost or stray, the pound or shelter records shall provide:

(i) An accurate description of the animal;

(ii) How, where, from whom, and when the dog or cat was obtained;

(iii) How long the dog or cat was held by the pound or shelter before being transferred to the dealer; and

(iv) The date the dog or cat was transferred to the dealer.

(3) Any dealer who obtains or acquires a live random source dog or cat from a private or contract pound or shelter, including a pound or shelter he or she operates, shall hold the dog or cat for a period of at least 10 full days, not including the day of acquisition, excluding time in transit, after acquiring the animal, and otherwise in accordance with § 2.101.

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

. . . .

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and the animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

9 C.F.R. §§ 1.1; 2.75(a)(1), .100(a), .132; 3.1(f) (footnote omitted).

Respondent raises seven issues in his Petition for Reconsideration. First, Respondent contends that the Judicial Officer's conclusion that Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.75(a)(1), 2.100, and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a)(1), .100, .132), and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)) were willful, is error (Pet. for Recons. at 2, 6, 12-14).

I disagree with Respondent's contention that his violations of the Animal Welfare Act and the Regulations and Standards were not willful. The basis for my conclusion that Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful are fully explicated in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 24-25, 48-56.

Second, Respondent contends that:

> The Judicial Officer quotes in support of its records keeping facts "I don't understand how I can be asked to do anymore than that[]" (Tr. 269) which deals solely with random source bred and raised questions and not driver[]s['] licenses. (Order p. 50).

Pet. for Recons. at 5.

I agree with Respondent's point that Respondent's testimony at Tr. 269 ll. 5-6 was in response to a question relating to Respondent's acquisition of random source dogs from unauthorized sources and was not in response to a question regarding Respondent's failure to fully and correctly maintain records. Therefore, the following in *In re C.C. Baird, supra*, slip op. at 50, is deleted:

> Respondent expressed frustration that he would be expected to do more than just take down the information, testifying at one point that "I don't understand how I can be asked to do anymore than that." (Tr. 269.)

However, this error is harmless, and it does not cause me to change the findings of fact, conclusions of law, or the sanction imposed in *In re C.C. Baird, supra*.

Third, Respondent contends that:

> The overwhelming proof in this case and uncontradicted proof is that the Respondent did request to see drivers['] licenses of sellers. There is no requirement in the regulations clearly requiring inspection of the actual license of sellers nor clearly as to vehicle or drivers['] licenses of sellers could as easily be read to require that information of only purchasers read

literally.

Pet. for Recons. at 5.

I disagree with Respondent's contention that the evidence supports a finding that he examined the driver's license of each person from whom he purchased a dog or cat; however, I agree with Respondent that there is no requirement in the Regulations that he inspect the driver's license of each person from whom he acquires a dog or cat.

Section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)) requires that each dealer make, keep, and maintain records or forms which fully and correctly disclose, *inter alia*, the name and address of the person from whom a dealer acquires a dog or cat and, if the person from whom a dog or cat is acquired is not registered or licensed under the Animal Welfare Act, the vehicle license number and state and the driver's license number and state of the person from whom the dog or cat is acquired. Considering the circumstances in this proceeding, particularly that some persons from whom Respondent acquired animals lied or were otherwise deceptive about their drivers' licenses and addresses, I found that, in order to comply with the recordkeeping requirements in section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)), Respondent was required to verify the information he received by looking at the sellers' drivers' licenses. *In re C.C. Baird, supra*, slip op. at 20. However, I did not find that Respondent's failures to examine the drivers' licenses of persons who sold him dogs or cats constitute violations of the Regulations. Instead, I based my conclusion that Respondent willfully violated the recordkeeping provisions of the Animal Welfare Act (7 U.S.C. § 2140) and the recordkeeping requirements of the Regulations (9 C.F.R. § 2.75(a)(1)) on Respondent's failure to fully and correctly maintain records which disclosed the names, addresses, and drivers' licenses of at least 23 persons from whom he acquired animals. *In re C.C. Baird, supra*, slip op. at 26.

Fourth, Respondent contends that the findings of fact in the Decision and Order "[a]re [n]ot [s]upported [b]y [s]ubstantial [e]vidence" (Pet. for Recons. at 6).

Except with respect to the number of Respondent's violations of 9 C.F.R. § 2.132, as discussed in this Order Denying in Part and Granting in Part Petition for Reconsideration, *infra*, I disagree with Respondent's contention that the findings of fact in the Decision and Order, *In re C.C. Baird, supra*, slip op. at 25-26, are not supported by substantial evidence.

The Administrative Procedure Act provides, with respect to substantial evidence, that:

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

. . . .

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

5 U.S.C. § 556(d) (emphasis added).

"Substantial evidence" is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The record contains substantial evidence of Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.75(a)(1), 2.100, and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a)(1), .100, .132), and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)), which substantial evidence is fully discussed in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 12-25, 28-41, 47-61.

Fifth, Respondent contends that in light of Complainant's contention that Respondent acquired a minimum of 29 random source dogs from unauthorized sources, it was error for the Judicial Officer to conclude that Respondent acquired a minimum of 67 random source dogs from unauthorized sources (Pet. for Recons. at 8-9).

I based my finding that Respondent acquired a minimum of 67 dogs from unauthorized sources on signed affidavits from 11 persons who sold random source

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[3]*Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); *Griffith v. Callahan*, 138 F.3d 1150, 1152 (7th Cir. 1998); *Beverly Enterprises, Inc. v. NLRB*, 139 F.3d 135, 140 (2d Cir. 1998); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 91 (2d Cir. 1997); *Diaz v. Shalala*, 59 F.3d 307, 314 (2d Cir. 1995); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995); *United States Dep't of Agric. v. Kelly*, 38 F.3d 999, 1002-03 (8th Cir. 1994); *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (per curiam); *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 924 (3d Cir. 1994); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 144 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1104 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Minnesota Mining & Mfg., Co. v. Coe*, 118 F.2d 593, 594 (D.C. Cir. 1940), *cert. denied*, 314 U.S. 624 (1942); *NLRB v. Arcade-Sunshine Co.*, 118 F.2d 49, 51 (D.C. Cir. 1940), *cert. denied*, 313 U.S. 567 (1941); *NLRB v. Empire Furniture Corp.*, 107 F.2d 92, 95 (6th Cir. 1939).

animals to Respondent (CX 152, 163, 171, 175, 179, 187, 192, 196, 198, 211, 218). These affidavits state that the affiants sold a minimum of 67 animals to Respondent. However, on further examination of the affidavits, I find that the affiants do not state that all of the animals sold to Respondent were random source dogs. Therefore, I agree with Respondent that my conclusion in *In re C.C. Baird, supra*, that Respondent willfully acquired a minimum of 67 random source dogs from unauthorized sources, in violation of section 2.132 of the Regulations (9 C.F.R. § 2.132), is error. Instead, I find, based on a careful examination of the 11 signed affidavits (CX 152, 163, 171, 175, 179, 187, 192, 196, 198, 211, 218), that Respondent willfully acquired a minimum of 28 random source dogs from unauthorized sources, in violation of section 2.132 of the Regulations (9 C.F.R. § 2.132), as alleged in paragraph III of the Complaint.[4]

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[4]Complainant alleges that from approximately January 1992 to approximately May 1993, Respondent acquired random source dogs in willful violation of section 2.132 of the Regulations (9 C.F.R. § 2.132) (Compl. ¶ III). Mr. Virgil Belding states in his affidavit that in 1992 he sold 23 dogs to Respondent and that he (Mr. Belding) only raised some of the dogs (CX 152). Therefore, I find that Respondent acquired at least 1 random source dog from Mr. Belding, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Julius Waller states that in 1992 he sold 3 dogs to Respondent and that he (Mr. Waller) "obtained these dogs from trading for them at different dog swaps" (CX 163). Therefore, I find that Respondent acquired 3 random source dogs from Mr. Waller, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. William P. Hillis states that on various dates he sold a number of dogs to Respondent and that they were not all raised by Mr. Hillis on Mr. Hillis' premises (CX 171). Since Mr. Hillis did not state the date on which he sold dogs to Respondent, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Hillis during the period from approximately January 1992 to approximately May 1993, as alleged in paragraph III of the Complaint. Mr. Jack Coomer states that in 1992 he sold 13 dogs to Respondent and that he (Mr. Coomer) acquired these dogs "from different individuals sometimes I pay for them or trade for them for hunting purposes" (CX 175). Therefore, I find that Respondent acquired 13 random source dogs from Mr. Coomer, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Shelby Sellerc states that on various dates he sold about 3 dogs to Respondent and that they were not all raised by Mr. Sellerc on Mr. Sellerc's premises (CX 179). Since Mr. Sellerc did not state the date on which he sold dogs to Respondent, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Sellerc during the period from approximately January 1992 to approximately May 1993, as alleged in paragraph III of the Complaint. Mr. Harold Odell states that on various dates in 1992 and 1993 he sold an unknown number of "dogs/cats" to Respondent and that they were not all raised by Mr. Odell on Mr. Odell's premises (CX 187). Since Mr. Odell did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Odell, as alleged in paragraph III of the Complaint. Mr. Clinton Stevenson states that in 1992 he sold 8 dogs to Respondent and that "most of the . . . dogs were given to me" and "most came from neighbor farmers" (CX 192). Therefore, I find that Respondent acquired at least 5 random source dogs from Mr. Stevenson, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. James

(continued...)

The $9,250 civil penalty which I assessed against Respondent and the 14-day period during which I suspended Respondent's Animal Welfare Act license in *In re C.C. Baird, supra*, were based, in part, on the number of Respondent's violations. Since I now conclude that Respondent acquired a minimum of 28 random source dogs from unauthorized sources, rather than a minimum of 67 random source dogs from unauthorized sources, I am reducing the civil penalty assessed against Respondent from $9,250 to $5,350 and the period of suspension of Respondent's Animal Welfare Act license from 14 days to 10 days.

Sixth, Respondent contends that Dr. Gregory Gaj, an Animal and Plant Health Inspection Service inspector, who inspected Respondent's facility, willfully allowed and encouraged Respondent's violations of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and sections 2.75(a)(1) and 2.132 of the Regulations (9 C.F.R. §§ 2.75(a), .132) (Pet. for Recons. at 10-13).

The record contains no evidence to support Respondent's contention that Dr. Gaj encouraged Respondent to violate either the Animal Welfare Act or the Regulations and Standards. Moreover, there is no evidence to support Respondent's contention that Dr. Gaj allowed Respondent to violate the recordkeeping provisions of the Animal Welfare Act (7 U.S.C. § 2140) or the recordkeeping requirements in the Regulations (9 C.F.R. § 2.75(a)). However, as fully discussed in the Decision and Order, the record reveals that Dr. Gaj knew of Respondent's violations of the regulation concerning the procurement of random-source dogs and cats (9 C.F.R. § 2.132), and instead of citing Respondent for the

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[4](...continued)
Hendershott states that in January 1993 he sold 2 dogs to Respondent and that he (Mr. Hendershott) "obtained both of these dogs - one from Glen Morton a farmer down the road and the other from a dog trader Darrell at the Poplar Bluff dog swap" (CX 196). Therefore, I find that Respondent acquired 2 random source dogs from Mr. Hendershott, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint. Mr. Michael G. Seets states that in October 1993 he sold 5 mixed breed "dogs/cats" to Respondent and that he (Mr. Seets) acquired these dogs/cats "from different individuals from local area" (CX 198). Since Mr. Seets did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Seets, as alleged in paragraph III of the Complaint. Mr. Felix Blevis states that he sold "dogs/cats" to Respondent and that the dogs/cats were not all raised by Mr. Blevis on Mr. Blevis' premises (CX 211). Since Mr. Blevis did not state whether the animals were dogs or cats, or both dogs and cats, the evidence is not sufficient to find that Respondent acquired random source dogs from Mr. Blevis, as alleged in paragraph III of the Complaint. Mr. Lee L. Tharp states that he sold 4 random source dogs to Respondent about May 1992 and sold 7 random source dogs to Respondent on three other occasions (CX 218). Therefore, I find that, during the period relevant to this proceeding, Respondent acquired 4 random source dogs from Mr. Tharp, in violation of 9 C.F.R. § 2.132, as alleged in paragraph III of the Complaint.

violations or reporting the violations to his superiors, Dr. Gaj merely advised Respondent that Respondent would be held accountable if the random-source regulation was enforced in the future. Even if I found that Dr. Gaj's failure to cite Respondent for violations of 9 C.F.R. § 2.132 constitutes "allowing" Respondent to violate 9 C.F.R. § 2.132, Dr. Gaj's failure to cite Respondent for violations would not be material to the issue of whether Respondent violated 9 C.F.R. § 2.132. My determination that Dr. Gaj's failure to cite Respondent for violations of 9 C.F.R. § 2.132 is immaterial is fully discussed in the Decision and Order. *In re C.C. Baird, supra*, slip op. at 16-17, 21-22, 52-55.

Seventh, Respondent contends that the facts establish that the 14-day suspension of his Animal Welfare Act license is not warranted and that the $5,000 civil penalty assessed against Respondent by the ALJ is "more than adequate" (Pet. for Recons. at 15).

Based on my conclusion that Respondent willfully acquired a minimum of 28 random source dogs from unauthorized sources, rather than a minimum of 67 random source dogs from unauthorized sources, I agree with Respondent's contention that the facts do not establish that a 14-day suspension of Respondent's Animal Welfare Act license and the assessment of a $9,250 civil penalty against Respondent are warranted. Instead, I find that a cease and desist order, a 10-day suspension of Respondent's Animal Welfare Act license, and the assessment of a $5,350 civil penalty against Respondent are warranted.

For the foregoing reasons and the reasons set forth in the Decision and Order filed March 20, 1998, *In re C.C. Baird, supra*, Respondent's Petition for Reconsideration is denied in part and granted in part.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[5]

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[5]*In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110-11 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797-98 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*,

(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the March 20, 1998, Decision and Order. Since Respondent's Petition for Reconsideration is granted in part, the Order in the Decision and Order, filed March 20, 1998, is not reinstated.

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act and, in particular, shall cease and desist from:

A. Failing to make, keep, and maintain records which fully disclose all required information;

B. Acquiring random source dogs from unauthorized sources; and

C. Failing to make provision for the regular and frequent collection, removal, and disposal of water in a manner that minimizes contamination and disease risks.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $5,350. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and sent to: Robert A. Ertman, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, 1400 Independence Avenue, SW, Washington, D.C. 20250-1417. Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 95-0017.

3. Respondent's Animal Welfare Act license is suspended for 10 days and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and

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[5](...continued)
56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 10-day license suspension period.

The Animal Welfare Act license suspension provisions in this Order shall become effective on the 90th day after service of this Order on Respondent.

In re: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Stay Order filed December 17, 1998.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 20, 1998, I issued a Decision and Order: (1) concluding that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act] and the Regulations and Standards issued under the Animal Welfare Act; (2) assessing Respondent a civil penalty of $9,250; (3) suspending Respondent's Animal Welfare Act license for 14 days; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. *In re C.C. Baird*, 57 Agric. Dec. 127, 149, 184-85 (1998). Respondent filed a timely petition for reconsideration which automatically stayed the March 20, 1998, Decision and Order. I issued an Order Denying in Part and Granting in Part Petition for Reconsideration, in which the Order issued March 20, 1998, was not reinstated and an Order (1) assessing Respondent a civil penalty of $5,350, (2) suspending Respondent's Animal Welfare Act license for 10 days, and (3) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, was issued. *In re C.C. Baird*, 57 Agric. Dec., slip op. 18-21 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.).

On December 16, 1998, Respondent filed a Motion for Stay of Execution requesting a stay of the Order Denying in Part and Granting in Part Petition for Reconsideration, *nunc pro tunc*. On December 16, 1998, the Hearing Clerk

transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay of Execution.

Respondent states in his Motion for Stay of Execution that the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], "has no objection to the granting of [a Stay] Order." On December 16, 1998, counsel for Complainant informed the Office of the Judicial Officer that Complainant does not oppose Respondent's Motion for Stay of Execution.

Respondent's Motion for Stay of Execution is granted. The Order issued in this proceeding on July 7, 1998, *In re C.C. Baird*, 57 Agric. Dec. ___ (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.), is stayed, *nunc pro tunc*.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: C.C. BAIRD, d/b/a MARTIN CREEK KENNEL.
AWA Docket No. 95-0017.
Order Lifting Stay and Modified Order filed December 18, 1998.

Robert A. Ertman, for Complainant.
Jefferson D. Gilder, Southaven, Mississippi, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 20, 1998, I issued a Decision and Order: (1) concluding that C.C. Baird, d/b/a Martin Creek Kennel [hereinafter Respondent], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act] and the Regulations and Standards issued under the Animal Welfare Act; (2) assessing Respondent a civil penalty of $9,250; (3) suspending Respondent's Animal Welfare Act license for 14 days; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. *In re C.C. Baird*, 57 Agric. Dec. 127, 149, 184-85 (1998). Respondent filed a timely petition for reconsideration which automatically stayed the March 20, 1998, Decision and Order. I issued an Order Denying in Part and Granting in Part Petition for Reconsideration, in which the Order issued March 20, 1998, was not reinstated and an Order (1) assessing Respondent a civil penalty of $5,350, (2) suspending Respondent's Animal Welfare Act license for 10 days, and (3) ordering Respondent to cease and desist from

violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, was issued. *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. 18-21 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.).

On December 16, 1998, Respondent filed a Motion for Stay of Execution requesting a stay of the Order Denying in Part and Granting in Part Petition for Reconsideration, *nunc pro tunc*, and on December 17, 1998, I granted Respondent's Motion for Stay of Execution. *In re C.C. Baird*, 57 Agric. Dec. ___ (Dec. 17, 1998) (Stay Order).

On December 16, 1998, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], and Respondent filed a joint Motion to Lift Stay and Modify Suspension. On December 16, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's and Respondent's joint Motion to Lift Stay and Modify Suspension.

Complainant's and Respondent's December 16, 1998, joint Motion to Lift Stay and Modify Suspension is granted. The Stay Order issued December 17, 1998, *In re C.C. Baird*, 57 Agric. Dec. ___ (Dec. 17, 1998) is lifted, and the Order issued in *In re C.C. Baird*, 57 Agric. Dec. ___ (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.), is modified as set forth in Complainant's and Respondent's joint Motion to Lift Stay and Modify Suspension, as follows:

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act and, in particular, shall cease and desist from:

A. Failing to make, keep, and maintain records which fully disclose all required information;

B. Acquiring random source dogs from unauthorized sources; and

C. Failing to make provision for the regular and frequent collection, removal, and disposal of water in a manner that minimizes contamination and disease risks.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $5,350. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States," and sent to: Robert A. Ertman, Esq., United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building,

1400 Independence Avenue, SW, Washington, D.C. 20250-1417. Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 90 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 95-0017.

3. Respondent's Animal Welfare Act license is suspended for 14 days from December 19, 1998, through January 1, 1999, inclusive.

In re: SEVERIN PETERSON AND SHARON PETERSON.
EAJA-FSA Docket No. 99-0002.
Order Denying Late Appeal filed November 9, 1998.

Late appeal — EAJA application.

The Judicial Officer denied Applicants' late-filed appeal. The Judicial Officer has no jurisdiction to consider Applicants' appeal filed after Hearing Officer Michael W. Shea's Equal Access to Justice Act Application Determination became final. The Rules of Practice require that within 30 days after receiving service, a party may appeal by filing an appeal petition with the Hearing Clerk (7 C.F.R. § 1.145(a)) and 7 C.F.R. § 1.147(g) provides that any document authorized under the Rules of Practice to be filed, shall be deemed to be filed at the time it reaches the Hearing Clerk. Neither Applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of Applicants' appeal petition by the National Appeals Division, Eastern Regional Office, constitutes filing with the Hearing Clerk.

Dustan J. Cross, New Ulm, Minnesota, for Applicants.
Margit Halvorson, for Respondent.
Initial decision issued by Michael W. Shea, Hearing Officer.
Order issued by William G. Jenson, Judicial Officer.

Severin Peterson and Sharon Peterson [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by sending a letter, dated April 1, 1998 [hereinafter EAJA Application], to Mr. Michael W. Shea, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter Hearing Officer].

Applicants allege in their EAJA Application that: (1) the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], initially denied Applicants' entitlement to benefits for 1994 under the Disaster Payment Program for 1990 and Subsequent Crop Years [hereinafter the Disaster Payment Program]

(EAJA Application at 2); (2) after Applicants established their entitlement to benefits for 1994 under the Disaster Payment Program, Respondent substantially understated the amount of the benefits to which Applicants were entitled, and on July 16, 1997, Respondent took the position that Respondent's method of calculating the Applicants' 1994 benefits under the Disaster Payment Program was not appealable (EAJA Application at 4-5); (3) on November 7, 1997, the National Appeals Division, United States Department of Agriculture, concluded that Applicants have a right to appeal Respondent's method of calculating benefits due to Applicants for 1994 under the Disaster Payment Program (EAJA Application at 5); (4) on February 5, 1998, the Hearing Officer issued a determination that Respondent erred in its method of calculating benefits to which Applicants are entitled for 1994 under the Disaster Payment Program (EAJA Application at 5); (5) Respondent's positions regarding Applicants' entitlement to benefits for 1994 under the Disaster Payment Program were not substantially justified (EAJA Application at 2, 6); (6) Applicants are prevailing parties with respect to their request for benefits for 1994 under the Disaster Payment Program (EAJA Application at 6); (7) Applicants incurred attorney fees and other expenses totaling $5,637.65, in connection with the Applicants' appeals for benefits for 1994 under the Disaster Payment Program (EAJA Application at 1, 8); and (8) Applicants' net worth does not exceed $2,000,000 and Applicants do not employ more than 500 persons (EAJA Application at 7). Applicants request that the Hearing Officer issue an order directing Respondent to pay $5,637.65 to Applicants for attorney fees and other expenses which Applicants allege they incurred in connection with appeals for benefits for 1994 under the Disaster Payment Program (EAJA Application at 1, 8).

On April 23, 1998, Respondent issued Government's Answer to Application for Fees Under the Equal Access to Justice Act [hereinafter Answer]: (1) stating that it is not yet known whether Applicants are prevailing parties under the Equal Access to Justice Act, because Applicants' benefits for 1994 under the Disaster Payment Program have not yet been recalculated and it is not known whether the recalculation will result in Applicants' receiving greater benefits than those to which they were originally determined to be entitled (Answer at 4); (2) stating that Respondent's position regarding the method to calculate Applicants' benefits for 1994 under the Disaster Payment Program was substantially justified (Answer at 4-7); and (3) stating that the adversary adjudication at issue in this proceeding was instituted by Respondent's March 20, 1996, "adverse determination" advising Applicants of the amount of disaster payments for 1994 to which they were entitled and that if Applicants are entitled to any fees and expenses under the Equal Access to Justice Act incurred in connection with the Applicants' appeals for benefits for

1994 under the Disaster Payment Program, they are only entitled to those fees and expenses incurred on and after March 20, 1996 (Answer at 7). Respondent requests that the Applicants' EAJA Application be denied (Answer at 8).

The Hearing Officer presided over an evidentiary hearing on June 18, 1998, in Shakopee, Minnesota. Mr. Dustan J. Cross, Gislason, Dosland, Hunter & Malecki, P.L.L.P., New Ulm, Minnesota, represented Applicants, and Ms. Margit Halvorson, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On August 13, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicants' April 1, 1998, EAJA Application and Respondent's April 23, 1998, Answer were timely filed (Initial Decision and Order at 1); (2) found that Applicants are prevailing parties with respect to the disputed benefits for 1994 under the Disaster Payment Program (Initial Decision and Order at 3); (3) found that Respondent's actions and positions regarding the method of calculating Applicants' benefits for 1994 under the Disaster Payment Program were reasonable and substantially justified (Initial Decision and Order at 4); and (4) determined that since Respondent's actions and decision were substantially justified, the question of whether Applicants' fees and expenses are reasonable and justified is moot (Initial Decision and Order at 4-5).

On October 14, 1998, Applicants appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer on matters pertaining to the Equal Access to Justice Act in United States Department of Agriculture [hereinafter USDA] proceedings covered by the EAJA Rules of Practice (7 C.F.R. § 1.189).[1] On November 2, 1998, Respondent filed Response to Letter Petition for Review, and on November 3, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Applicable Statutory Provisions

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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

. . . .

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

. . . .

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include

written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based[.]

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E) (1994 & Supp. II 1996).

Applicants assert that their attorney received the Initial Decision and Order on August 17, 1998, and that their appeal "is well within the 35 days for appeal provided for in 7 C.F.R. § 1.201(a)" (Letter dated September 16, 1998, to Regional Director, National Appeals Division, from Dustan J. Cross [hereinafter Appeal Petition] at 1).

I disagree with Applicants' contention that their Appeal Petition was timely filed. The Initial Decision and Order states, as follows:

> . . . If neither party seeks a review of this decision, it shall become a final decision of the Department 35 days after it is served upon the Applicant.
>
> A review of this decision must be requested in accordance with the provisions of 7 CFR 1.145 and 7 CFR 1.146.

Initial Decision and Order at 5.

Section 1.201(a) of the EAJA Rules of Practice provides, as follows:

> **§ 1.201 Department review.**
>
> (a) Except with respect to a proceeding covered by § 1.183(a)(1)(ii) of this part, either the applicant or agency counsel may seek review of the initial decision on the fee application, in accordance with the provisions of §§ 1.145(a) and 1.146(a) of this part. If neither the applicant nor agency counsel seeks review, the initial decision on the fee application shall become a final decision of the Department 35 days after it is served upon the applicant. If review is taken, it will be in accord with the provisions of §§ 1.145(b) through (i) and 1.146(b) of this part.

7 C.F.R. § 1.201(a).

Section 1.145(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides that:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may

appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

On October 14, 1998, 58 days after Applicants admit that they were served with the Initial Decision and Order, Applicants filed Applicants' Appeal Petition with the Hearing Clerk.[2] For the reasons set forth below, Applicants' Appeal Petition must be rejected as untimely.

In accordance with 7 C.F.R. § 1.201(a), the Initial Decision and Order became the final decision of USDA on September 21, 1998, 35 days after service on Applicants. Applicants' Appeal Petition, filed with the Hearing Clerk on October 14, 1998, was not filed within 35 days after service of the Initial Decision and Order on Applicants.[3] It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that

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[2]On October 13, 1998, the National Appeals Division provided the Office of the Judicial Officer with a file concerning the instant proceeding. After reviewing the file, I determined that it contained, *inter alia*, the original of Applicants' Appeal Petition. I then contacted the Hearing Clerk's office which informed me that neither Applicants nor Respondent had filed any documents in this proceeding and there was no record of this proceeding having been docketed with the Hearing Clerk. On October 14, 1998, I filed the entire file provided to the Office of the Judicial Officer by the National Appeals Division, including Applicants' Appeal Petition, with the Hearing Clerk.

[3]The record establishes that Applicants sent their Appeal Petition, dated September 16, 1998, to the Regional Director, National Appeals Division, 3500 DePauw Boulevard, Suite 2052, Indianapolis, Indiana 46268-0978, and that the Appeal Petition was received by the National Appeals Division, Eastern Regional Office, Indianapolis, Indiana, at 2:54 p.m., September 18, 1998 (Appeal Petition at 1). Section 1.145(a) of the Rules of Practice requires that appeal petitions must be filed with the Hearing Clerk (7 C.F.R. § 1.145(a)) and section 1.147(g) of the Rules of Practice provides that "[a]ny document . . . required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk" (7 C.F.R. § 1.147(g)). Neither Applicants' act of mailing the Appeal Petition to the Regional Director, National Appeals Division, nor the receipt of Applicants' Appeal Petition by the National Appeals Division, Eastern Regional Office, constitutes filing with the Hearing Clerk. Moreover, the National Appeals Division's act of delivering Applicant's Appeal Petition to the Office of the Judicial Officer does not constitute filing with the Hearing Clerk. *Cf. In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the hearing clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

is filed after an initial decision and order becomes final.[4] Therefore, the Judicial Officer no longer has jurisdiction to consider Applicants' Appeal Petition.

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

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[4]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. ___ (May 13, 1998) (dismissing respondent's appeal, filed 58 days after the Initial Decision and Order became final), *appeal docketed*, No. 98-1991 (1st Cir. Sept. 10, 1998); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became final); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became final); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .[5]

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[5]*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *reh'g denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after an initial decision and order becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[6]

Accordingly, Applicants' Appeal Petition must be denied since it is too late for the matter to be further considered.

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

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[6]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

Order

Applicants' Appeal Petition, filed October 14, 1998, is denied. The Equal Access to Justice Act Application Determination, issued by Hearing Officer Michael W. Shea on August 13, 1998, is the final Decision and Order in this proceeding.

In re: EVERFLORA, INC., FCFGPIA Docket No. 97-0001.
In re: FERRIS BROTHERS, INC., FCFGPIA Docket No. 97-0002.
In re: SUBURBAN WHOLESALE FLORISTS, INC., FCFGPIA Docket No. 97-0003.
In re: DUTCH FLOWER LINE, INC., FCFGPIA Docket No. 97-0004.
In re: FRANK W. MANKER WHOLESALE GROWER, INC., FCFGPIA Docket No. 97-0005.
In re: QUALITY WHOLESALE FLORIST, INC., FCFGPIA Docket No. 97-0006.
In re: HENRY C. ALDERS WHOLESALE, INC., FCFGPIA Docket No. 97-0007.
In re: HARRY M. VLACHOS, INC., FCFGPIA Docket No. 97-0008.
In re: MUELLER BROTHERS, INC., FCFGPIA Docket No. 97-0009.
In re: U.S. EVERGREENS, INC., FCFGPIA Docket No. 97-0010.
In re: GEORGE RALLIS, INC., FCFGPIA Docket No. 97-0011.
In re: MAJOR WHOLESALE FLORIST, INC., FCFGPIA Docket No. 97-0012.
In re: EVERFLORA-MIAMI, INC., FCFGPIA Docket No. 97-0013.
In re: HOLLAND FLOWER EXPRESS, INC., FCFGPIA Docket No. 97-0014.
Ruling Denying Respondents' Motion for Extension of Time filed August 6, 1998.

Colleen A. Carroll, for Complainant.
James A. Moody, Washington, D.C., for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On June 29, 1998, Respondents in the above-captioned proceedings jointly requested that the time for filing appeal petitions be extended to August 3, 1998. On June 30, 1998, I granted Respondents' joint request and extended the time for

filing Respondents' appeal petitions to August 3, 1998. At 10:15 a.m., on August 4, 1998, Respondents in the above-captioned proceedings filed Consent Motion for Extension of Time to File Appeal [hereinafter Motion for Extension of Time] jointly requesting an extension of time, to September 7, 1998, within which to file appeal petitions in the above-captioned proceedings.[1]

Respondents' August 4, 1998, Motion for Extension of Time is denied. Chief Administrative Law Judge Palmer's [hereinafter Chief ALJ] decisions in the above-captioned proceedings[2] became final at 4:01, p.m., August 3, 1998,[3] prior to Respondents' filing Respondents' Motion for Extension of Time.

It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.[4]

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[1]The date and time on which Respondents filed Respondents' Motion for Extension of Time is evidenced by the date and time stamped by the Office of the Hearing Clerk on the first page of Respondents' Motion for Extension of Time.

[2]*In re Everflora, Inc.*, FCFGPIA Docket No. 97-0001 (May 22, 1998); *In re Ferris Bros., Inc.*, FCFGPIA Docket No. 97-0002 (May 22, 1998); *In re Suburban Wholesale Florists, Inc.*, FCFGPIA Docket No. 97-0003 (May 22, 1998); *In re Dutch Flower Line, Inc.*, FCFGPIA Docket No. 97-0004 (May 22, 1998); *In re Frank W. Manker Wholesale Grower, Inc.*, FCFGPIA Docket No. 97-0005 (May 22, 1998); *In re Quality Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0006 (May 22, 1998); *In re Henry C. Alders Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0007 (May 22, 1998); *In re Harry Vlachos, Inc.*, FCFGPIA Docket No. 97-0008 (May 22, 1998); *In re Mueller Bros., Inc.*, FCFGPIA Docket No. 97-0009 (May 22, 1998); *In re U.S. Evergreens, Inc.*, FCFGPIA Docket No. 97-0010 (May 22, 1998); *In re George Rallis, Inc.*, FCFGPIA Docket No. 97-0011 (May 22, 1998); *In re Major Wholesale Florist, Inc.*, FCFGPIA Docket No. 97-0012 (May 22, 1998); *In re Everflora-Miami, Inc.*, FCFGPIA Docket No. 97-0013 (May 22, 1998); and *In re Holland Flower Express, Inc.*, FCFGPIA Docket No. 97-0014 (May 22, 1998).

[3]The Office of the Hearing Clerk closes for the purpose of filing documents in proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter Rules of Practice] at 4:00 p.m. Therefore, Respondents' failure to file their Motion for Extension of Time on or before 4:00 p.m., August 3, 1998, resulted in the Chief ALJ's decisions becoming final at 4:01 p.m., August 3, 1998. (*See In re Peter A. Lang*, 57 Agric. Dec. 59, 61 n.2 (1998) (denying complainant's motion for an extension of time to file a response to respondent's appeal because complainant's response was due September 26, 1997, and complainant's motion was orally submitted to the Judicial Officer at 4:13 p.m., September 26, 1997, 13 minutes after the Office of the Hearing Clerk closed).)

[4]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal filed 63 days after the Initial decision and Order became effective); *In re Gail Davis*, 56 Agric. Dec. 373

(continued...)

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

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[4](...continued)
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(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .[5]

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district

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[5]*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an initial decision and order becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[6]

Accordingly, Respondents' Motion for Extension of Time is denied, since any appeal petitions filed in the above-captioned proceedings would be too late to be considered.

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[6]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

In re: OTTO WAGNER, JR.
FCIA Docket No. 98-0005.
Order Dismissing Disqualification Proceeding filed July 14, 1998.

Donald McAmis, for Complainant.
Tom Wilkins, McAllen, TX, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Counsels for Complainant and Respondent have filed a Joint Stipulation for Dismissal. The disqualification proceeding, *In re Otto Wagner, Jr.*, FCIA Docket Number 98-0005, is hereby dismissed.

In re: ROBERT SKLOSS, d/b/a ROBERT A. SKLOSS and B&A FARMS.
FCIA Docket No. 98-0012.
Order Dismissing Disqualification Proceeding filed July 14, 1998.

Donald McAmis, for Complainant.
Tom Wilkins, McAllen, TX, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Counsels for Complainant and Respondent have filed a Joint Stipulation for Dismissal. The disqualification proceeding, *In re Robert Skloss, d/b/a Robert A. Skloss and B&A Farms*, FCIA Docket Number 98-0012, is hereby dismissed.

In re: RAYMOND J. FULLER.
FCIA Docket No. 97-0008.
Order filed August 12, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The Complainant, Federal Crop Insurance Corporation, and Respondent, Raymond J. Fuller, having jointly moved that the disqualification action of Raymond J. Fuller, FCIA Docket No. 97-0008, be dismissed. It is so ordered.

In re: JAMES L. AULT.
FCIA Docket No. 98-0014.
Order of Dismissal filed November 12, 1998.

Donald McAmis, for Complainant.
Barry M. Barash, Galesburg, Il, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

On November 9, 1998, the parties filed a "Joint Stipulation for Dismissal." It is ordered that the Complaint, filed herein on July 23, 1998, is dismissed.

In re: HAWAIIAN MACADAMIA PLANTATION, INC.
P.Q. Docket No. 98-0011.
Complaint Dismissal filed August 12, 1998.

Howard Levine, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to Motion therefor, filed August 10, 1998, the Complaint in the above entitled cause is hereby Dismissed.

Copies hereof shall be served upon the parties.

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: BEN MORA, d/b/a MORA FARMS, A SOLE PROPRIETORSHIP.
AMAA Docket No. 98-0002.
Decision and Order filed October 1, 1998.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (the "Act"), and the Marketing Orders for Nectarines Grown in California, 7 C.F.R. Part 916 (the "Nectarine Order"), and for Pears and Peaches Grown in California, 7 C.F.R. Part 917 (the "Peach Order"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondent Ben Mora, doing business as Mora Farms, a sole proprietorship, willfully violated the Order, and the Regulations.

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-.151). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, or at all, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Ben Mora is an individual whose mailing address is 1014 L Street, Reedley, California 93654. Respondent Mora does business as, and is the sole proprietor of, Mora Farms, located at the same address.

2. At all times mentioned herein, respondent Ben Mora, d/b/a Mora Farms, was a handler of California peaches and nectarines as defined in the Act, 7 U.S.C. § 608c(1), and the Peach and Nectarine Orders, 7 C.F.R. §§ 916.10 and 917.7.

3. Respondent willfully violated section 916.41 of the Nectarine Order, 7 C.F.R. § 916.41, by failing to remit to the Nectarine Administrative Committee $3,132.91 in assessments owed in the 1996 marketing season.

4. Respondent willfully violated section 916.60 of the Nectarine Order (7 C.F.R. § 916.60) by failing to file with the Nectarine Administrative Committee reports of the shipment of nectarines during the 1996 marketing season.

5. Respondent willfully violated section 917.37 of the Peach Order (7 C.F.R. § 917.37) by failing to remit to the Control Committee $2,131.39 in assessments owed in the 1996 fiscal period.

6. Respondent willfully violated section 917.50 of the Peach Order (7 C.F.R. § 917.50) by failing to file with the Control Committee reports of the shipment of peaches during the 1996 fiscal period.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 916.41 and 916.60 of the Nectarine Order (7 C.F.R. §§ 916.41, .60) and sections 917.37 and 917.50 of the Peach Order (7 C.F.R. §§ 917.37, .50).

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent is assessed a civil penalty of $4,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

2. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, from paying to the Nectarine Administrative Committee $3,132.91 in past due assessments for crop year 1996, and from paying to the Control Committee $2,131.39 in past due assessments for crop year 1996.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final November 12, 1998.-Editor]

ANIMAL WELFARE ACT

In re: PEGGY LEE MILLER
AWA Docket No. 96-0033.
Decision and Order filed May 29, 1998.

Default - Failure to file answer - Cease and desist order - Civil penalty - Disqualification order.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.)*, by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.)*.

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent Peggy Lee Miller on April 11, 1996. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Peggy Lee Miller has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted, as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. Peggy Lee Miller, hereinafter referred to as respondent, is an individual whose address is Post Office Box 443, Blanco, Texas 78606.

2. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

3. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations, without having obtained a license, in willful

violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). After being warned that her premises would not pass a pre-licensing inspection and that she could not sell animals without being licensed, the respondent advertised and sold a baboon for use as a pet in February 1993. The respondent also maintained exotic animals for sale for exhibition or for pets and offered them for sale both on her own behalf and as a broker for others. The sale or offer for sale of each animal constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.
2. Respondent is assessed a civil penalty of $2,500 which shall be paid by a certified check or money order made payable to the Treasurer of United States and shall be sent to Robert A. Ertman, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, D.C. 20250.
3. Respondent is disqualified for a period of one year from becoming licensed under the Act and regulations.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

[This Decision and Order became final July 20, 1998.-Editor]

In re: MARIANO V. RUGGERI, CYNTHIA V. RUGGERI, and CRANE LABORATORIES.
AWA Docket No. 98-0009.
Decision and Order filed June 15, 1998.

Failure to file an answer - Failure to comply with the regulations for the care of animals - Failure to permit APHIS inspectors to conduct inspections - Failure to maintain complete records - Civil penalty - Cease and desist order.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.)*, by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act, and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.)*.

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-.151, were served upon respondents by certified mail on January 31, 1998. Respondents were informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondents failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. Mariano V. Ruggeri and Cynthia V. Ruggeri, hereinafter referred to as the respondents, are individuals with a mailing address of 4711 S. Salina Street, Syracuse, New York 13205.

2. Respondent Crane Laboratories, Inc., is a corporation, and has the same mailing address.

3. The respondents, at all times material hereto, were licensed and operating as dealers as defined in the Act and the regulations and the actions of respondent Crane Laboratories, Inc., were directed, managed, and controlled by respondents Mariano V. Ruggeri and Cynthia V. Ruggeri.

4. On August 17, 1994, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

5. On August 17, 1994, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standard specified below:

(a) The interior surface of indoor housing facility was not impervious to moisture (9 C.F.R. § 3.26(d)).

6. On February 23, 1995, respondents willfully violated section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126) by failing to permit Animal and Plant Health Inspection Service employees to conduct a complete inspection of their animal facilities and records.

7. On May 3, 1995, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

8. On May 3, 1995, respondents willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

9. On May 3,1995, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Housing facilities for guinea pigs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.25(a));

(b) An effective program for the control of pests was not established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas (9 C.F.R. § 3.31(c));

(c) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(d) Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)).

10. On February 28, 1996, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and

assistance of a doctor of veterinary medicine.

11. On February 28, 1996, respondents willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

12. On February 28, 1996, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Housing facilities for guinea pigs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.25(a));

(b) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(c) Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)).

13. On March 18, 1996, respondents willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

14. On March 18, 1996, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Indoor housing facilities for guinea pigs were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation (9 C.F.R. § 3.26(b));

(b) Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.125(a));

(c) Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129); and

(d) Primary enclosures were not kept clean, as required by (9 C.F.R. § 3.31(a)).

15. On March 20, 1996, respondents willfully violated of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to permit Animal and Plant Health Inspection Service employees to conduct a complete inspection of their animal facilities and records.

16. On January 2, 1997, respondents willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records on the premises showing the acquisition, disposition, and identification of animals.

17. On January 2, 1997, respondent willfully violated section 2.100(a) of the

regulations (9 C.F.R. § 2.100(a)) and the standard specified below:

(a) Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.125(a)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact and Conclusions of Law above, the respondent has violated the Act and the regulations and standards promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(d) Failing to maintain records of the acquisition, disposition, description and identification of animals, as required;

(e) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated; and

(f) Failing to provide animals with wholesome and uncontaminated food.

2. The respondents are jointly and severally assessed a civil penalty of $7,500.00, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. Respondents' license is suspended for 30 days and continuing thereafter until they demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the Act, the regulations and standards issued

thereunder, and this order, including payment of the civil penalty imposed herein. When respondents demonstrate to the Animal and Plant Health Inspection Service that they have satisfied this condition, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142, .145.

[This Decision and Order became final August 12, 1998.-Editor]

In re: CHARLES CATHEY, d/b/a T-BO's LOUNGE.
AWA Docket No. 98-0006.
Decision and Order filed July 10, 1998.

Donald A. Tracy, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.)*, by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-.151, were served upon respondent by certified mail on February 27, 1998. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. A. Charles Cathey, hereinafter referred to as respondent, is an individual whose address is 725 John Street, Camden, Arkansas 71791.

B. The respondent, at all times material hereto, was operating as an exhibitor as defined in the Act and the regulations.

2. On or about July 16, September 3 and November 16, 1996, respondent operated as an exhibitor as defined in the Act and the regulations, without being licensed, in willful violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1)). Each exhibition constitutes a separate violation.

3. On or about July 16, September 3 and November 16, 1996, respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the handling regulations specified below:

(A) During a public exhibition of dangerous animals, namely two cougars, the respondent failed to provide a sufficient distance or barrier between the animal and the general viewing public so as to assure the safety of the animal and the public (9 C.F.R. § 2.131(b)(1)).

(B) During a public exhibition of dangerous animals, namely two cougars, respondent failed to have the animals under the direct control and supervision of a knowledgeable and experienced animal handler (9 C.F.R. § 2.131(c)(3)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Engaging in any activity for which a license is required under the Act and regulations without being licensed as required;

(b) Failing, during public exhibition of dangerous animals, to have the animals under the direct control and supervision of a knowledgeable and experienced animal handler; and

(c) Failing, during public exhibition of dangerous animals, to have a sufficient distance or barrier between the animals and the general viewing public so as to assure the safety of the animals and the public.

2. The respondent is assessed a civil penalty of $3,000.00 which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified from obtaining a license under the Act and regulations for a period of six months.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 -.145.

[This Decision and Order became final September 24, 1998.-Editor]

In re: STEVEN M. SAMEK and TRINA JOANN SAMEK.
AWA Docket No. 97-0015.
Decision and Order filed August 22, 1997.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This proceeding was instituted under the Animal Welfare as amended (7 U.S.C. § 2131 *et seq.)*(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, alleging that respondents willfully violated the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.)*(the "Regulations" ans "Standards").

On February 21, 1997, APHIS investigator Kent Permentier personally served on respondent Steven M. Samek copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-.151). Said respondent was also informed in an accompanying letter of service from the Department's Office of the Hearing Clerk that an answer should be filed pursuant to the Rules of

Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

A. Respondents Steven M. Samek and Trina Joann Samek are individuals whose mailing address is 1984 W. State Road 10, Lake Village, Indiana 46349.

B. At all times mentioned herein, said respondents were licensed and operating as dealers as defined in the Act and the Regulations.

II

A. On July 14, 1995, APHIS inspected the respondents' facility and found that they:

1. Failed to provide for the removal and disposal of dead animals;
2. Housed rabbits in the same primary enclosure with pigs;
3. Housed hamsters in outdoor facilities;
4. Failed to ensure that housing facilities for rabbits, hamsters and other animals are structurally sound and maintained in good repair, to protect the animals from injury, to contain the animals and to restrict the entrance of other animals;
5. Failed to store supplies of food in facilities that adequately protect them from deterioration, mold or contamination by vermin;
6. Failed to provide shelter from sunlight and inclement weather to animals housed outdoors;
7. Failed to keep the buildings and grounds clean and in good repair in order to protect animals from injury and to facilitate prescribed husbandry practices; and
8. Failed to identify dogs as required.

B. On September 28, 1995, APHIS inspected the respondents' facility and found that they had placed a barrier at the entrance to their facility.

C. On July 14 and September 28, 1995, and March 6, 1996, APHIS inspected the respondents' facility and found that they:

1. Failed to maintain and have available complete and accurate records of the acquisition and disposition of animals;

2. Failed to ensure that housing facilities for animals are structurally sound and maintained in good repair, to protect the animals from injury, to contain the animals and to restrict the entrance of other animals; and

3. Failed to provide adequate veterinary care to animals, or to have a program of veterinary care available for review.

D. On September 28, 1995, and March 6, 1996, APHIS inspected the respondents' facility and found that they:

1. Failed to ensure that housing facilities for animals are structurally sound and maintained in good repair, to protect the animals from injury, to contain the animals and to restrict the entrance of other animals;

2. Failed to provide sufficient potable water to rabbits and pigs;

3. Failed to provide food of sufficient quantity and nutritive value to maintain animals in good health; and

4. Failed to keep the buildings and grounds clean and in good repair in order to protect animals from injury and to facilitate prescribed husbandry practices.

E. On March 6, 1996, APHIS inspected the respondents' facility and found that they:

1. Failed to hire a sufficient number of adequately trained employees to maintain the required level of husbandry practices;

2. Failed to provide sufficient potable water to a lion;

3. Failed to construct and maintain enclosures so that they provide sufficient space to allow the lion to make normal postural adjustments with adequate freedom of movement;

4. Failed to provide outdoor shelter to protect the lion from inclement weather and to prevent discomfort; and

5. Failed to remove excreta from primary enclosures as often as necessary to prevent contamination of the animal contained therein and to minimize disease hazards and to reduce odors.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, respondent Steven M. Samek has violated sections 10 and 11 of the Act (7 U.S.C. §§ 2140, 2141), sections 2.40, 2.50, 2.75, 2.100 and 2.126 of the Regulations (9 C.F.R. §§ 2.40, .50, .75, .100, .126), and sections 3.1(e), 3.4(b), 3.25(a), 3.25(c), 3.25(d), 3.27(a), 3.31(b), 3.50(a), 3.50(c), 3.52(a), 3.52(b), 3.55, 3.56(c), 3.58(a), 3.125(a), 3.125(c), 3.125(d), 3.127(a), 3.127(b), 3.128, 3.129, 3.130, 3.131(a), 3.131(c), and

3.132 of the Standards (9 C.F.R. §§ 3.1(e), .4(b), .25(a), .25(c), .25(d), .27(a), .31(b), .50(a), .50(c), .52(a), .52(b), .55, .56(c), .58(a), .125(a), .125(c), .125(d), .127(a), .127(b), .128, .129, .130, .131(a), .131(c), and .132)

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent Steven M. Samek is assessed a civil penalty of $15,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States;

2. Respondent Steven M. Samek's license is suspended for a period of 30 days, and continuing thereafter until APHIS determines that said respondent is in full compliance with the Act and the Regulations and Standards, and has paid the civil penalty assessed herein; and

3. Respondent Steven M. Samek, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice.

BEEF PROMOTION AND RESEARCH ACT

In re: GERALD MURNION.
BPRA Docket No. 98-0001.
Decision and Order filed October 1, 1998.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Beef Promotion and Research Order (7 C.F.R.§§ 1260.101-1260.217)("Order"), issued pursuant to the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2901 *et seq.*)("Act"), and the Rules and Regulations issued pursuant to the Act and Order (7 C.F.R. §§ 1260.301-316)("Regulations"), by a complaint filed by the Administrator, Agricultural Marketing Service, United States Department of Agriculture, alleging that the Respondent violated the Act, Order and Regulations.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130 - .151, were served on said Respondent by the Hearing Clerk by regular mail on or about December 12, 1998. The Respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

The Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by the Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Gerald Murnion, hereinafter referred to as the respondent, is an individual whose mailing address is HCR 62, Box 53, Jordan, Montana 59337.

2. The Respondent, at all material times herein, was engaged in the business of selling and purchasing cattle. The Respondent was the collecting person and therefore was required by the Act, Order and Regulations to remit assessments for

cattle he purchased or sold in the manner provided in the Order and Regulations.

3. The Respondent willfully violated section 1260.172 of the Order and Sections 1260.311 and 1260.312 of the Regulations (7 C.F.R §§ 1260.172, .311, .312) in that the respondent as the collecting person failed to remit the assessments due for the purchase and sale of 573 head of cattle. Each transaction constitutes a separate violation.

Conclusion

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, said Respondent violated the Act, Order and Regulations thereunder.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. The respondent is assessed a civil penalty of $5,500. The payments shall be made by certified check or money order made payable to the Treasurer of the United States and shall be sent to Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Stop 1417, 1400 Independence Ave., S.W., 20250-1417.

2. The respondent shall pay his past-due assessments and accrued late-payment charges to the Montana Beef Council. The amount of past-due assessments and late-payment charges is $962.82. The payment shall be made by certified check or money order and shall be sent to the Montana Beef Council, P. O. Box 5386 Helena, Montana 59601.

3. The respondent, his agents and employees, successors and assigns, directly, indirectly or through any corporate or other device, shall cease and desist from violating the Order and regulations and in particular, shall cease and desist from :

(a) failing to remit all assessments when due; and

(b) failing to remit overdue assessments and late payment charges thereof.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142, .145.

Copies of this decision shall be served upon the parties.

FEDERAL CROP INSURANCE ACT

In re: EDWARD E. SHOOK.
FCIA Docket No. 98-0009.
Decision and Order filed June 25, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, the Answer filed by Edward E. Shook is an admission of the allegations contained in the Complaint and an agreement to accept disqualification from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Federal Crop Insurance Act, as amended (7 U.S.C. § 1501 *et seq.*) for a period of two years' judgment. Since the allegations in the Complaint are admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 2 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final August 24, 1998.-Editor]

In re: RICHARD WAYNE HARP.
FCIA Docket No. 97-0016.
Decision and Order filed July 30, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, failure of respondent, Richard Wayne Harp, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final September 11, 1998.-Editor]

In re: ROBERT L. "BILLY" BURKS.
FCIA Docket No. 98-0006.
Decision and Order filed July 30, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, failure of respondent, Robert

L. "Billy" Burks, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final September 11, 1998.-Editor]

In re: DONALD B. ALDERMAN.
FCIA Docket No. 98-0008.
Decision and Order filed July 31, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, failure of respondent, David B. Alderman, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506 (n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing

catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final September 12, 1998.-Editor]

In re: HENRY KRUP.
FCIA Docket No. 98-0011.
Decision and Order filed August 12, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, failure of respondent, Henry Krup, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 2 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final September 19, 1998.-Editor]

In re: EDWARD LEROY BREHM.
FCIA Docket No. 98-0003.
Decision and Order filed August 12, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, failure of respondent, Edward Leroy Brehm, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final September 21, 1998.-Editor]

In re: JIMMY HALL "PETE" BURKS.
FCIA Docket No. 98-0007.
Decision and Order filed July 30, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, failure of respondent, Jimmy

Hall "Pete" Burks, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act. (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final October 21, 1998.-Editor]

In re: CHARLES WILKERSON, d/b/a WILKERSON & WILKERSON.
FCIA Docket No. 98-0013.
Decision and Order filed September 29, 1998.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, failure of respondent, Charles Wilkerson, d/b/a Wilkerson & Wilkerson, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the 1990 Act (7 U.S.C. § 1506(n)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after

the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of 10 years. The period of disqualifications shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final November 9, 1998.-Editor]

PLANT QUARANTINE ACT

In re: FRANCISCO IVITZ ABAN.
P.Q. Docket No. 98-0010.
Decision and Order filed June 12, 1998.

Rick Herndon, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of guavas, sapodillas and star apples into the United States from Mexico, 7 C.F.R. § 319.56 *et seq.*, hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and § 380.1 *et seq.*

This proceeding was instituted under the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj)(Acts) and the regulations promulgated thereunder, by a complaint filed on January 15, 1998, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Francisco Ivitz Aban is an individual with a mailing address of 1230 Myrtle Avenue, Inglewood, California 90301.

2. On or about February 18, 1997, respondent imported eight guavas, ten sapodillas and three star apples into the United States from Mexico in violation of 7 C.F.R. § 319.56.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403
(612) 370-2221

Respondent shall indicate that payment is in reference to P.Q. Docket No. 98-0010.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final July 24, 1998.-Editor]

In re: FRANK SHORTER (FRANK STREETER), d.b.a KAPOHA PALMS, RARE PALMS & CYCADS.
P.Q. Docket No. 98-0009.
Decision and Order filed July 17, 1998.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fresh fruit from Hawaii to the continental United States (7 C.F.R. § 318.13 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on January 14, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about November 4, 1996, respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 21.4 pounds of fresh pulpy palm seeds from Hawaii to the continental United States, without a certificate or permit, in violation of section 318.13(b) of the regulations (7 C.F.R. § 318.13(b)).

The return receipt accompanying the Complaint was signed on January 21, 1998. However, respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and has not filed an answer as of the date of the filing of the motion for this Order. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Frank Shorter (Frank Streeter), d.b.a. Kapoho Palms, Rare Palms & Cycads, herein referred to as the respondent, is an individual whose mailing address is 25 Lakeview Avenue, Cambridge, Massachusetts 02138.

2. On or about November 4, 1996, respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 21.4 pounds of fresh pulpy palm seeds from Hawaii to the continental United States, without a certificate or permit, in violation of section 318.13(b) of the regulations (7 C.F.R. § 318.13(b)).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 318.13 et seq.). Therefore, the following Order is issued.

Order

Respondent, Frank Shorter (Frank Streeter), d.b.a. Kapoho Palms, Rare Palms & Cycads, is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 98-0009.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

In re: SUNDER KISHINGHAND GANGLANI.
P.Q. Docket No. 98-0012.
Decision and Order filed August 12, 1998.

Sheila Hogan Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables into

the United States (7 C.F.R. §§ 319.56 *et seq.* and 319.28 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*, and 380.1 *et seq.*.

This proceeding was instituted by a compliant filed on March 4, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 16, 1997, at Boston, MA, the respondent imported into the United States approximately one fresh cucumber from India in violation of 7 C.F.R. § 319.56-2(e) and two fresh citrus fruits from India in violation of 7 C.F.R. § 319.28 because the cucumber was not accompanied by a permit and was not treated, as required, and because the importation of fresh citrus fruit from India is prohibited.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Sunder Kishinghand Ganglani is an individual with a mailing address of 130 Commerce Way, Woburn, MA 01801.

2. On or about August 16, 1997, at Boston, MA, respondent imported into the United States approximately one fresh cucumber from India in violation of 7 C.F.R. § 319.56-2(e) and two fresh citrus fruits from India in violation of 7 C.F.R. § 319.28 because the cucumber was not accompanied by a permit and was not treated, as required, and because the importation of fresh citrus fruit from India is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. §§ 319.28 and 319.56-2(e). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403.

Respondent shall indicate that payment is in reference to P.Q. Docket No. 98-0012.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicble to this proceeding. (7 C.F.R. § 1.145)

[This Decision and Order became final September 21, 1998.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Torres Date Packing, a general partnership; Guadalupe E. Torres, an individual; Fernando Torres, an individual; Jose Luis Torres, an individual; and Rogelio Torres, an individual. AMAA Docket No. 97-0001. 7/23/98.

Almond Valley Nut Co., a general partnership; John Avila, an individual; and Brent Zehrung, an individual. AMAA Docket No. 97-0005. 11/24/98.

ANIMAL QUARANTINE and RELATED LAWS

Gaston C. Herrera, M.D. A.Q. Docket No. 98-0006. 10/13/98.

ANIMAL WELFARE ACT

Alex Marion Chambers, d/b/a Road Runner Pets and Supplies. AWA Docket No. 96-0063. 7/6/98.

Feld Entertainment, Inc., d/b/a Ringling Bros. & Barnum & Bailey Circus. AWA Docket No. 98-0020. 7/15/98.

John D. Woodmark, d/b/a Depoe Bay Aquarium. AWA Docket No. 98-0016. 7/16/98.

Deerpath Animal Haven and Zoological Park, Inc. AWA Docket No. 98-0021. 7/21/98.

Max Lapp and Patricia Lapp, d/b/a Lapp Kennels. AWA Docket No. 97-0016. 7/22/98.

LaVerne and Sandra Baker, d/b/a LaSan Kennel. AWA Docket No. 95-0038. 8/4/98.

Heidi Berry Riggs and Bridgeport Nature Center, Inc. AWA Docket No. 98-0034. 8/19/98.

City of Gainsville, Texas, d/b/a Frank Buck Zoo. AWA Docket No. 98-0024. 8/25/98.

Sandy Keast. AWA Docket No. 98-0029. 8/31/98.

Carl Minneci, d/b/a M&M Exotics. AWA Docket No. 98-0025. 9/10/98.

Craig Collier and Elaine Collier, d/b/a Santa's Forest Zoo. AWA Docket No. 97-0011. 9/10/98.

Ross Wilmoth, d/b/a Wild Wilderness Safari. AWA Docket No. 95-0072. 9/15/98.

US Airways, Inc. AWA Docket No. 97-0032. 9/22/98.

Gregg Holland, d/b/a Animal Arts. AWA Docket No. 98-0027. 10/5/98.

Topeka Zoological Park. AWA Docket No. 98-0041. 11/3/98.

Navis Carlisle and Diana Carlisle, Delana Darrow, d/b/a Friends of Man. AWA Docket No. 98-0038. 12/1/98.

Boise City Zoo. AWA Docket No. 98-0035. 12/24/98.

FEDERAL CROP INSURANCE ACT

Bobby Harold Higgins. FCIA Docket No. 98-0010. 12/7/98.

FEDERAL MEAT INSPECTION ACT

Thorn Apple Valley/Walker West, Thorn Apple Valley/Grand Rapid and Gary L. Hosteter. FMIA Docket No. 97-0003. 7/30/98.

B&R Quality Meats, Inc. FMIA Docket No. 98-0004. 9/9/98.

HORSE PROTECTION ACT

Consent Decision as to Wayne E. Yoder, and Lois M. Yoder. HPA Docket No. 97-0008. 9/18/98.

Consent Decision as to Claude D. Johnson. HPA Docket No. 97-0008. 9/18/98.

Consent Decision and Order as to Ben L. Cate and Leslie L. Cate. HPA Docket No. 98-0007. 9/22/98.

Consent Decision and Order as to Franklin LaRue McWaters. HPA Docket No. 94-0038. 10/8/98.

Consent Decision and Order as to Franklin LaRue Mcwaters. HPA Docket No. 98-0002. 10/8/98.

Consent Decision and Order as to Margaret Y. Baird. HPA Docket No. 98-0010. 11/19/98.

Consent Decision and Order as to Charles Baldwin, Jr. HPA Docket No. 98-0002. 11/25/98.

PLANT QUARANTINE ACT

Steve Leffler. P.Q. Docket No. 97-0024. 9/30/98.

Puerto Rico Aviation Co., Inc. P.Q. Docket No. 97-0005. 12/17/98.

POULTRY PRODUCTS INSPECTION ACT

Thorn Apple Valley/Walker West, Thorn Apple Valley/Grand Rapid and Gary L. Hosteter. PPIA Docket No. 97-0003. 7/30/98.

B&R Quality Meats, Inc. PPIA Docket No. 98-0002. 9/9/98.