

AGRICULTURE DECISIONS

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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

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

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 number, e.g., AWA Docket No. 99-0022, 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 in *Agriculture Decisions*. However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) format and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

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Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1082 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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hearing. Its counsel, Paul T. Gentile, Esq., submitted the following letter regarding Respondent's decision not to appear.

* * *

Gentile & Dickler
Attorneys at Law
15 Maiden Lane
New York, NY 10038

March 25, 2002

James W. Hunt, A.L.J.
c/o U.S. District Courthouse
500 Pearl Street
New York, NY 10007

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

Late Friday afternoon, March 22, 2002, I was notified by the principals of the above named Respondent, that personal and financial considerations would prevent any further litigation of the case. Thereafter, I unsuccessfully attempted to prevent the necessity of persons traveling to New York in order to conduct the hearing. I have been informed by Mr. Paul that the Department intends to proceed with the case.

In conjunction with the hearing, I have previously supplied Mr. Paul with copies of promissory notes presented to the produce creditors of the Respondent. It is my understanding that Tennessee counsel for the Respondent, Lynn Tarp, Esq., prepared and presented the notes to the creditor. He further informs me that no note was returned or rejected.

Regretfully, the posture of my clients prohibit my appearance at the hearings. In addition no one else will appear on behalf of the Respondent.

Thank you for the courtesies extended the Respondent and this office.

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2. During the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities and failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15.

3. As of March 26, 2002, \$1,305,148.78 of the \$1,602,736.15 that Respondent owed to 19 sellers for purchases of perishable agricultural commodities in interstate commerce remained past due and unpaid.

Conclusion of Law

The failure of Respondent, Kirby Produce Company, Inc., to make full payment promptly of its purchases of perishable agricultural commodities constitutes repeated, flagrant, and wilful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Order

Respondent's PACA license is hereby revoked.

This Order shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final August 19, 2002. - Editor]

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ALTO DAIRY, ET AL. v. USDA, ET AL.

No. 02-3422.

Filed July 15, 2003.

(Cite as: 336 F.3d 560).

**AMAA – APA – Standing – Notice, adequate, for rule-making - Remedy, denial of right to sue
– Pooling, paper**

Dairy farmers brought action to enjoin amendment to federal rules regulating price of milk. The amendment being challenged cancelled a marketing practice which had existed since 2000 allowing “paper pooling” of milk shipped by Wisconsin dairy farmers into the neighboring Midwest milk marketing region to receive the higher blended price even though only up to 30% of their milk was actually shipped to the Midwest region. Alto Dairy, et al. was an entity which had its interests adversely affected by agency action under the Administrative Procedures Act (APA). Further, Alto Dairy, et al. was among the protected class of persons under the milk marketing law. Alto Dairy, et al. contended that notice of the hearing did not give the identical proposals to be discussed at the hearing as those finally passed. Alto Dairy, et al. thus claimed that the USDA failed to give adequate notice to interested persons contrary to the APA. The District Court dismissed plaintiff’s appeal for lack of federal jurisdiction. Farmers appealed. The Court of Appeals, held that: (1) farmers could assert challenge to amendment based on alleged failure of to provide adequate notice of relief contemplated by Department, and (2) notice of rulemaking proceeding was adequate to take action cancelling paper-pooling.

United States Court of Appeals,
Seventh Circuit.

Before FLAUM, Chief Judge, and POSNER and MANION, Circuit Judges.
POSNER, Circuit Judge.

Dairy farmers located mainly in Wisconsin brought this suit to enjoin an amendment to the federal rules regulating the price of milk. (The amendment, adopted by the Department after a formal rulemaking proceeding, is published at 7 C.F.R. § 1033.7(c)(2), and explained in *Milk in the Mideast Marketing Area; Interim Order Amending the Order*, 67 Fed.Reg. 48743 (July 26, 2002).) These rules are called “milk marketing orders,” and so the amendment is also a milk marketing order. The district judge held that the plaintiffs lacked standing to challenge the amendment, not in the Article III sense that the plaintiffs had suffered and would suffer no harm from the amendment, or

would derive no benefit from a judgment invalidating the amendment, but in the sense of having been denied by Congress a right to sue. So he dismissed the suit for lack of federal jurisdiction. But he went on to declare that, if he was wrong about jurisdiction, the suit would still have to be dismissed because the plaintiffs' challenge lacked merit. The plaintiffs have appealed, challenging the judge's ruling on standing and also arguing that if there is standing we should reach the merits and vacate the amendment because the Department of Agriculture failed to give them proper notice concerning the relief that might emerge from the rulemaking proceeding. While the Department defends the judge's ruling on standing, it has also responded to the plaintiffs' argument on the merits. The merits having thus been fully briefed, we can decide them if there is standing.

The federal scheme for regulating the price of milk pivots on the fact that milk is more highly valued by the market when it is sold for fluid consumption than when it is sold as an input into the manufacture of cheese or other dairy products. If milk were perishable, as it was in the days before refrigerated storage and transportation, dairy farmers serving urban markets (where milk is more likely to be consumed in fluid form than made into cheese or butter) would get higher prices for their output than dairy farmers remote from cities, who being unable to ship their milk a long distance would perforce sell most of it to manufacturers of cheese and other dairy products. But when refrigerated storage and transportation arrived on the scene, it became feasible for the remote dairy farmers--Wisconsin dairy farmers, for example--to ship milk to cities in other states, pushing down the price of fluid milk there and so hurting the dairy farmers who were located near those cities.

This was a natural, procompetitive development, as in other cases in which a reduction in the quality-adjusted cost of transportation enlarges geographic markets. But the federal regulatory scheme for milk, like so much economic regulation adopted during the Great Depression of the 1930s (much of it, however, since abolished as a consequence of the deregulation movement), is premised on dissatisfaction with the results of competition, polemically described as "ruinous" by those producer interests that it pinches. (For a near unintelligible description of conditions thought to render competition among dairy farmers unworkable, see *Nebbia v. New York*, 291 U.S. 502, 517- 18, 54 S.Ct. 505, 78 L.Ed. 940 (1934).) To limit the competition between remote and proximate dairy farmers for the lucrative fluid-milk business of the cities, Congress in the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. §§ 601 *et seq.*, authorized the Department of Agriculture

to proceed as follows. The Department fixes a minimum price for each "class" of milk, with class determined by end use: thus the price fixed for milk intended for fluid consumption is higher than the price fixed for milk intended for cheese. This "value of service" pricing, conventional in regulated industries, is actually a form of price discrimination, that is, pricing guided not by cost (the cost of producing milk is the same regardless of the use to which the milk is put by the purchaser), as under competition, but by differences across consumers in willingness to pay. Price discrimination increases sellers' profits, thus counteracting the alleged (though almost certainly spurious) tendency of dairy farmers to destroy their business by competing overvigorously. More realistically, milk price discrimination is intended to redistribute wealth from consumers to producers of milk.

Farmers of course do not sell directly to the ultimate consumer. The direct purchasers of milk from dairy farmers are referred to as "handlers." They might be owners of supply plants (of which more later), or milk distributors, cheese factories, or other intermediaries in the milk market. It is the handlers who pay the prices fixed by the federal regulators. The revenues generated by the discriminatory pricing scheme and received in the first instance by the handlers are pooled, and each dairy farmer whose sales contributed to the pool receives a share of the revenues that is equal to his percentage not of the total revenues of the pool's members but of their total physical output. By virtue of this method of dividing up the pie, each farmer receives the same price (called a "blended" price) for each unit of milk that he sells regardless of the end use of his milk. A farmer who sold all his milk to a cheese factory (in fact most milk produced in Wisconsin is used to make cheese, rather than being drunk) would receive from the pool the same price per unit of output as a farmer who sold all his milk for fluid consumption, even though the handler would have paid a much lower price for the former than for the latter milk. The result, or at least the intended result, is that the first farmer in our example, the one who sells all his milk to a cheese factory, will have no incentive to divert some of his output to the fluid market, where the price is higher, because the price that he receives for the milk he sells is independent of the use to which that milk is put. Such a diversion, what economists call "arbitrage," would undermine and, if uncontrolled, eventually destroy the scheme of discriminatory pricing and thus reduce the incomes of dairy farmers as a group. The distant farmers are "kept in their place," as it were--kept selling locally to the cheesemakers rather than trying to sell to fluid-milk distributors in the cities--by being given a share of fluid-milk revenues.

The fly in the ointment, and the cause of the present litigation, is that the Agriculture Department has divided the nation into regions and fixed different blended prices in the different regions. The blended price is higher in regions in which fluid-milk consumption is a higher fraction of total milk use, because in such regions a higher fraction of milk is sold to handlers at the high minimum price that the Agriculture Department has set for milk consumed in fluid form. The "Mideast," which comprises Indiana, Michigan, Ohio, and parts of Pennsylvania and West Virginia, is one of these regions. Wisconsin, which is a large manufacturer of cheese, is not in the Mideast region and the blended price in its region is lower because of the high fraction of its milk output that goes to make cheese rather than being drunk. Naturally, therefore, Wisconsin dairy farmers would like to sell as much of their milk in the Mideast as they can (and for the further reason that the Department has fixed a higher minimum price for milk sold for consumption in fluid form in the Mideast states than in Wisconsin, see 7 C.F.R. § 1000.52)--or rather, they would like as many of their sales as possible to be pooled with the Mideast producers' sales and so be remunerated at the higher Mideast blended price. For they have no wish to incur the costs of actually shipping their milk to the Mideast; they would much rather continue to ship it to nearby cheese factories in Wisconsin, their traditional customers. To the extent that Wisconsin milk production is pooled with that of the Mideast dairy farmers, the latter will lose revenues because the Wisconsinites will be taking out revenue at the Mideast blended price while contributing to the pool the revenue generated by sales at lower prices to the cheese factories. If *all* their output were sold to cheese factories, the revenue they would be contributing to the pool would be their output multiplied by the low price fixed for the sale of milk destined for use as an input into the making of cheese, while the revenues they would be receiving as their share of the Mideast pool would be their output multiplied by the Mideast blended price.

To limit the type of arbitrage described in the preceding paragraph, the Agriculture Department has long required that a supply plant--a handler that buys milk from the farmer for storage and redistribution--resell 30 percent of its milk into a region in order to be eligible for the blended price fixed for that region. If it does sell 30 percent there, however, its entire output, not just the 30 percent, qualifies for the region's blended price. Moreover, the Agriculture Department also authorizes a practice called "paper pooling," which permits a supply plant in one region to "associate" with dairy farmers in another region, who by virtue of the "association"--which can be completely informal--are treated as if they shipped their milk to the supply plant. Thus,

if a dairy farm in Indiana is "associated" with a milk supply plant in Wisconsin, but sells its milk to a milk distributor in Indiana and ships the milk directly there rather than via the supply plant, its sales, though entirely within Indiana, nevertheless are counted as part of the 30 percent of the Wisconsin supply plant's sales that must be made in the Mideast region in order to allow the supply plant's entire sales to be included in the Mideast pool. Ten percent of the 30 percent must actually be shipped into the distant region, but the other 27 percent need not be. So the nominal 30 percent requirement is reduced to 3 percent. A supply plant in Wisconsin, buying all its milk from local farmers, need ship only 3 percent of its milk to the Mideast to qualify for the Mideast blended price for its entire output, so long as another 27 percent is supplied by Mideast dairy farmers associated with the Wisconsin plant.

The rationale for paper pooling, which makes perfectly good sense, is that farmers should be permitted to ship directly to distributors, without having to go through supply plants. And until 2000, paper pooling did not create significant arbitrage opportunities, because the Agriculture Department forbade distant supply plants to receive the full blended price in the region of their associated dairy farmers. But the prohibition was rescinded that year, see 7 C.F.R. § 1000.50, and with that rescission paper pooling became a loophole through which the Wisconsin dairy farmers rushed. The amendment they challenge closes the loophole by forbidding the qualifying 30 percent to include local shipments from distant supply plants. 7 C.F.R. § 1033.7(c)(2). If a supply plant in Wisconsin wants to associate with a dairy farmer in the Mideast region, so that sales by that farmer will qualify for the Mideast blended price, the plant must now require the farmer to ship his milk to the supply plant for reshipment to customers in the Mideast. The plaintiffs criticize the requirement because it is often more economical for the dairy farmer to bypass the supply plant, especially as the quality of the milk may drop when it is pumped into and then out of the supply plant, and especially when the farmer and the distributor are near each other but distant from the supply plant. Were the blended price in the Mideast sufficiently high, an Indiana dairy farmer might be induced to ship his milk to a Wisconsin supply plant for resale to an Indiana milk distributor, in order that the dairy farmer's output would contribute to the supply plant's making its 30 percent quota. That would be a great waste. But the plaintiffs' criticism is neither here nor there, since the only challenge they mount in this court to the amendment is that it was adopted without proper notice to them.

Before we consider that issue, which is the issue on the merits, we must satisfy ourselves that the plaintiffs have a right to seek judicial review of the Agriculture Department's order amending the Mideast milk marketing order. The district judge, as we mentioned, thought they did not. The circuits have divided over the question. Compare *Minnesota Milk Producers Ass'n v. Madigan*, 956 F.2d 816, 817-18 (8th Cir.1992); *Farmers Union Milk Marketing Co-op v. Yeutter*, 930 F.2d 466, 471-74 (6th Cir.1991), and *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1065-67 (5th Cir.1979), all holding that milk producers (dairy farmers) do have a right to judicial review of milk marketing orders, with *United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1165 (9th Cir.2002), and *Pescosolido v. Block*, 765 F.2d 827, 832-33 (9th Cir.1985), holding that they do not. The judge thought that this court had taken the latter position in *Uelmen v. Freeman*, 388 F.2d 308 (7th Cir.1967) (see also *United Milk Producers v. Benson*, 225 F.2d 527, 529 (D.C.Cir.1955), a similar case), and he felt bound by that decision, which in addition he thought bolstered by the Supreme Court's ruling in *Block v. Community Nutrition Institute*, 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984), that consumers do not have standing to challenge milk market orders.

Uelmen is not controlling. The Supreme Court had held in *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944), that even though the milk marketing law did not in so many words confer on producers a right to judicial review of milk marketing orders, they could challenge such an order if in issuing it the Agriculture Department had exceeded the authority delegated to it by Congress and in doing so had infringed a definite right of the producer, *id.* at 307-10, 64 S.Ct. 559, criteria not satisfied in *Uelmen*. The plaintiffs in our case seek judicial review not on the basis of the extrastatutory rule of *Stark*, 321 U.S. at 307-10, 64 S.Ct. 559, but on the basis of the Administrative Procedure Act, which confers a right to mount a judicial challenge to agency action on persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, unless the statute in question "preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Section 702 certainly describes these plaintiffs, who are injured in their pocketbooks by having their access to the Mideast blended price, which is higher than the blended price in their region, curtailed. Moreover, dairy farmers, the plaintiffs in this case, are, as the Court noted in *Stark*, 321 U.S. at 305-06, 64 S.Ct. 559, the very group that the milk marketing law seeks to protect. "The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected

class may have judicial review the statutory objectives might not be realized." *Barlow v. Collins*, 397 U.S. 159, 167, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); see also *American Federation of Government Employees, Local 2119 v. Cohen*, 171 F.3d 460, 469 (7th Cir.1999); *First National Bank & Trust Co. v. National Credit Union Administration*, 988 F.2d 1272, 1275 (D.C.Cir.1993).

The Agriculture Department argues that the milk marketing law repeals so much of the APA as would otherwise entitle dairy farmers to challenge a milk marketing order that harmed them. The milk marketing law expressly authorizes judicial review of milk marketing orders at the behest of handlers, 7 U.S.C. § 608c(15), but is silent on the right of a dairy farmer (that is, a producer, rather than a purchaser from the producer) to get judicial review. The Department asks us to infer from this silence that Congress meant to preclude judicial review by farmers, thus bringing this case within 5 U.S.C. § 701(a)(1). But inferences from congressional silence are treacherous; oversights are common in the hurly-burly of congressional enactment; omissions are not enactments; and even deliberate omissions are often subject to alternative interpretations, as here. Handlers are not indifferent to the price of milk, since they are the purchasers of milk from the dairy farmers. But as middlemen, able to pass on a portion, maybe a very large portion, of any higher price to their customers--the milk distributors, cheese factories, and so forth--they may be indifferent to many changes in milk marketing orders, including the one at issue in this case, which basically transfers wealth from Mideast to Wisconsin dairy farmers. No such indifference can attend the farmers who have brought the present suit; every additional cent they receive for their milk goes directly to their bottom line. Congress may have thought it obvious that as the intended beneficiaries of milk marketing orders, dairy farmers could challenge those orders in court, but not obvious that handlers could, and so it expressly authorized suits by them as well.

History supports this interpretation. What is now the milk marketing law was originally a part of the first Agricultural Adjustment Act, passed in 1933, 48 Stat. 31, and that act contained no provision for judicial review of pricing orders issued under it, including milk marketing orders. The statutory provision authorizing handlers to sue was added to the AAA in 1935 and was retained when the Act's provisions dealing with milk marketing were split off and made the subject of a separate statute, the statute involved in this case, the Agricultural Marketing Agreement Act of 1937. *Block v. Community Nutrition Institute*, *supra*, 467 U.S. at 346, 104 S.Ct. 2450. This was years

before the Administrative Procedure Act was enacted. After it was enacted, with the provision quoted earlier (5 U.S.C. § 702) that by its terms would have seemed to entitle milk producers as persons aggrieved by adverse milk marketing orders to obtain judicial review, there was no urgent need for Congress to revisit the milk marketing law and add a provision expressly authorizing that review.

Now it is true that in denying standing to milk consumers, the Supreme Court in *Block* had emphasized that allowing them to challenge milk marketing orders in court would cause the administrative remedies that the milk marketing law had created to be bypassed; and the concern extends to producers (though not in every case, and specifically, as we'll see, not in this case). The provision entitling handlers to judicial review starts off by saying that "any handler subject to [a milk marketing order] may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law." 7 U.S.C. § 608c(15)(A). The handler can seek review of that ruling in federal district court. *Id.*, § 608c(15)(B). There is no similar provision regarding petitions for administrative review by consumers--or producers. So if permitted to sue, consumers or producers might raise in court objections to the milk marketing order that the regulators had not had a chance to consider. "Nowhere in the [milk marketing] Act is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process." *Block v. Community Nutrition Institute, supra*, 467 U.S. at 347, 104 S.Ct. 2450.

The implication is less that judicial review should be denied to all aggrieved persons except handlers than that aggrieved persons should be required to exhaust administrative remedies before suing. The distinction was not important in *Block*. Consumers' interests are aligned with handlers' interests, and handlers, who have to exhaust their administrative remedies as we have just seen, have express authority to sue. So there was little need to complicate the administrative scheme by allowing (more precisely, by

imputing to Congress an intent to allow) consumers to sue as well. Cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-47, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), denying indirect purchasers (generally consumers) the right to bring antitrust suits seeking damages from remote sellers since direct purchasers can do so. Milk producers' interests, however, tend to be antagonistic to handlers' interests, producers being the sellers and handlers the buyers.

All this is made clear in *Block*. "The structure of this Act indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objectives would be realized. Respondents [i.e., the consumers who had brought the suit in *Block*] would have us believe that, while Congress unequivocally directed handlers first to complain to the Secretary that the prices set by milk market orders are too high, it was nevertheless the legislative judgment that the same challenge, if advanced by consumers, does not require initial administrative scrutiny Allowing consumers to sue the Secretary [of Agriculture] would severely disrupt this complex and delicate administrative scheme. It would provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies. A handler ... would need only to find a consumer who is willing to join in or initiate an action in the district court. The consumer or consumer-handler could then raise precisely the same exceptions that the handler must raise administratively. Consumers or consumer-handlers could seek injunctions against the operation of market orders that 'impede, hinder, or delay' enforcement actions, even though such injunctions are expressly prohibited in proceedings properly instituted under 7 U.S.C. § 608c(15) [i.e., by handlers]." *Block v. Community Nutrition Institute, supra*, 467 U.S. at 347-48, 104 S.Ct. 2450. Notice the distinction that the Court draws between consumers and producers, properly so since the stepping-on-the-heels-of-the-handlers concerns that it expresses about allowing consumers to sue do not arise when the suit is by a producer.

The reasoning of *Block*, transposed from consumer to producer suits, suggests that imposing a requirement of exhausting administrative remedies would be greatly preferable to abrogating the right to sue. Every federal court and agency has inherent authority (unless abrogated by Congress) to reexamine its decisions if asked to do so within a reasonable time, *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir.1995); *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1018 (7th Cir.1988); *Isle Royale Boaters Ass'n v.*

Norton, 330 F.3d 777, 786 (6th Cir.2003); *Dun & Bradstreet Corp. Foundation v. United States Postal Service*, 946 F.2d 189, 193-94 (2d Cir.1991), including we assume the Agriculture Department; and so the producers could have complained to the Department about the loophole-closing amendment. But the courts do not have the power to require an agency to make the persons subject to its regulatory powers jump through procedural hoops not found in its organic statute or implementing regulations, as a precondition to obtaining judicial review. That's what 5 U.S.C. § 704 says, and the Supreme Court explained in *Darby v. Cisneros*, 509 U.S. 137, 146-47, 113 S.Ct. 2539, 125 L.Ed.2d 113 (1993), that adding those hoops would make it too difficult for aggrieved persons to determine when agency action was final so that they could seek judicial review. The milk marketing law authorizes only handlers to ask the Department for relief from a milk marketing order. We cannot impose a similar rule on producers.

But presumably the Department can by amending the procedures that it has promulgated for milk-marketing hearings. See 7 C.F.R. pt. 900; cf. 5 U.S.C. § 553(e); *Auer v. Robbins*, 519 U.S. 452, 459, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). "Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, *unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative*, for an appeal to superior agency authority." 5 U.S.C. § 704 (emphasis added). This provision, as the Court remarked in *Darby*, "by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute *or rule* clearly mandates." 509 U.S. at 146, 113 S.Ct. 2539 (emphasis added). "Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be 'inoperative' pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review." *Id.* at 152, 113 S.Ct. 2539.

The absence of a requirement that the producers exhaust their administrative remedies weakens the argument for allowing them to seek judicial review. For the argument if accepted creates a risk of their bypassing the agency and raising objections that the agency might have responded to more effectively than in its brief in the reviewing court--but not in this case. And maybe not in any case, since as we have just seen the Agriculture Department can impose a requirement of exhaustion, and it ought not be

allowed to use its failure to do so to block judicial review of its orders. But let us set that point to one side and focus narrowly on this case. Remember that the only complaint the plaintiffs are pressing in this appeal is that they didn't receive adequate notice of the relief contemplated by the Department; they didn't know what was at stake for them in the proceeding and therefore they didn't participate fully in it, though some of them, as the defendants stress, did participate to a greater or lesser extent. Although the Department is in a better position than we are to decide whether their objections to the amendment have sufficient merit to warrant reopening the rulemaking proceeding, they are not asking us to rule on those objections. They are asking us to decide the purely procedural question whether the Department gave them adequate notice. Requiring them to tender this issue first to the Department would be a waste of time.

The Department's final argument against allowing producers to sue is that many of them, dairy co-ops for example, are both producers and handlers (that is, these producers have cut out the middleman) and could sue in the latter capacity. But these hybrids have no quarrel *as handlers* with the order. If the Department nevertheless believes, as it seems to, that they could sue to protect their interests as producers, it is giving away the game; for there is no reason to confine the right to sue to producers adventitiously engaged in handling as well.

We conclude that producers can seek judicial review of milk marketing orders that pinch them, and so we can proceed at last to the merits, which is to say to the issue of notice. The Administrative Procedure Act requires published notice of proposed rulemaking, 5 U.S.C. § 553(b), but does not specify how detailed the notice must be. We have said that "notice is adequate if it apprises interested parties of the issues to be addressed in the rulemaking proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner." *American Medical Ass'n v. United States*, 887 F.2d 760, 767 (7th Cir.1989). But "while an agency must explain and justify its departures from a proposed rule, it is not straitjacketed into the approach initially suggested on pain of triggering a further round of notice-and-comment." *Id.* at 769. "The law does not require that every alteration in a proposed rule be reissued for notice and comment. If that were the case, an agency could 'learn from the comments on its proposals only at the peril of' subjecting itself to rulemaking without end." *First American Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C.Cir.2000).

The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced before the proceeding begins, but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding. If every modification is to require a further hearing at which that modification is set forth in the notice, agencies will be loath to modify initial proposals, and the rulemaking process will be degraded.

The notice that the Department issued, *Milk in the Mideast Marketing Area; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreement and Order*, 66 Fed.Reg. 49571 (Sept. 28, 2001), stated: "A public hearing is being held to consider proposals that would amend certain pooling and related provisions of the Mideast order. Proposals include ... decreasing the amount of producer milk that can be diverted to nonpool plants for varying months of the year; and increasing the minimum amount of milk that a producer needs to deliver to pool plants in order to qualify as a producer and to be eligible to be pooled on the order ... [and] eliminating a provision that currently permits a pool plant to have both a pool and a nonpool portion; [and] establishing a 'net shipment' provision for milk received at pool plants for determining pooling eligibility." Though this is gobbledygook to an outsider, insiders such as the plaintiffs would realize that the focus of the proceeding would be on their eligibility to be pooled with the Mideast producers (that is what being "pooled on the [Mideast] order" means).

What is true is that none of the proposals was identical to the amendment that the Department adopted at the end of the proceeding, namely the prohibition of paper pooling with distant plants. But paper pooling was one of the principal methods by which the plaintiffs got to pool with the Mideast producers, so that they had to assume that it would be one of the issues in the proceeding and a possible target for reform. They knew their aggressive inroads into the Mideast were controversial; they knew that in engaging in paper pooling with Mideast farmers they were exploiting the loophole created by the Department's abolition in 2000 of the price penalties for such pooling; they knew therefore that a curtailment of their access to the Mideast blended price was a likely outcome of a rulemaking proceeding expressly concerned with the criteria for eligibility for pooling with the Mideast producers. They knew enough to know that if they wanted to protect their participation in the Mideast pool they would have to participate in the rulemaking proceeding. Their choice not to do so cannot be attributed to a lack of notice.

The judgment dismissing the suit is modified to base dismissal on the merits rather than on lack of jurisdiction, and as so modified is affirmed.

PONDEROSA DAIRY v. USDA, ET AL.
No. 99-16981, 99-16982.
D.C. No. CV-97-01185-GEB(JFM), CV-97-01179-GEB(JFM).
Filed August 12, 2003.

(Cite as: 71 Fed. Appx. 757, (9th Cir.(Cal.)).

AMMA – Milk Marketing Order.

United States Court of Appeals,
Ninth Circuit.

Before SNEED and SILVERMAN, Circuit Judges and SEDWICK, District Judge.*

ORDER

This court's decision has been reversed by the United States Supreme Court and remanded for further proceedings. Our decision had affirmed the district court, so we now remand these cases to the United States District Court for the Eastern District of California for further proceedings consistent with the decision by the United States Supreme Court.

*The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

AGRICULTURAL MARKETING AGREEMENT ACT**DEPARTMENTAL DECISION****In re: KREIDER DAIRY FARMS, INC.****98 AMA Docket No. M 4-1.****Decision and Order.****Filed August 5, 2003.****AMAA - Milk marketing – Producer-handler – Application for producer-handler status – Issue preclusion – Feasible defined – Law of the case doctrine.**

The Judicial Officer (JO) affirmed Administrative Law Judge Jill S. Clifton's decision denying Petitioner's amended petition instituted under 7 U.S.C. § 608c(15)(A). In the amended petition, Petitioner challenges the Market Administrator's failure to designate Petitioner a producer-handler for the period December 1995 through December 1999, under former Milk Marketing Order No. 2 (7 C.F.R. pt. 1002 (1999)). The JO stated that Petitioner previously litigated the issue of its status as a producer-handler during the period January 1991 through April 1997, in *In re Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M 1-2 (*Kreider I*). The JO concluded that issue preclusion bars Petitioner from relitigating its status under former Milk Marketing Order No. 2 for the period December 1995 through April 1997. The JO found Petitioner's January 1991 application for designation as a producer-handler, which was the subject of *Kreider I*, was not an application for designation as a producer-handler during the period December 1995 through December 1999; therefore, Petitioner was not eligible for designation as a producer-handler under former Milk Marketing Order No. 2 for the period December 1995 through December 1999. Further, the JO concluded that each month during the period May 1997 through December 1999, Petitioner distributed milk to subdealers. Therefore, Petitioner did not have complete and exclusive control over the distribution of its milk, a requirement for designation as a producer-handler under former Milk Marketing Order No. 2. Finally, the JO, treating the United States District Court for the Eastern District of Pennsylvania's remand order in *Kreider I* as the law of the case with respect to *In re Kreider Dairy Farms, Inc.*, 98 AMA Docket No. M 4-1, found it was feasible for Petitioner's subdealer customers to obtain milk from other handlers during periods of short production; thus, Petitioner was "riding the pool" and was not eligible for designation as a producer-handler under former Milk Marketing Order No. 2.

Sharlene A. Deskins, for Respondent.

Marvin Beshore, for Petitioner.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.***PROCEDURAL HISTORY*****Kreider I* (A Related Proceeding)**

On December 28, 1993, Kreider Dairy Farms, Inc. [hereinafter Petitioner], instituted a proceeding, *In re Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M 1-2 [hereinafter *Kreider I*], under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the former marketing order

regulating milk in the New York-New Jersey Marketing Area (7 C.F.R. pt. 1002 (1999)) [hereinafter former Milk Marketing Order No. 2];¹ 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].

In *Kreider I*, Petitioner: (1) challenged the determination by the Market Administrator for former Milk Marketing Order No. 2 [hereinafter the Market Administrator] that, beginning in November 1991, Petitioner was a handler regulated under former Milk Marketing Order No. 2; (2) asserted it was a producer-handler under former Milk Marketing Order No. 2 exempt from the obligation under former Milk Marketing Order No. 2 to pay into the producer-settlement fund; and (3) sought a refund, with interest, of the money it paid into the producer-settlement fund (*Kreider I* Pet. ¶¶ 13-14).

The Judicial Officer dismissed the *Kreider I* Petition concluding the Market Administrator correctly determined Petitioner was a handler and Petitioner was not a producer-handler exempt from the obligation under former Milk Marketing Order No. 2 to pay into the producer-settlement fund. The Judicial Officer held the producer-handler exemption in former Milk Marketing Order No. 2 requires that, in order to be a producer-handler, a person must exercise complete and exclusive control over all facilities and resources used for the production, processing, and distribution of milk. The Judicial Officer found Petitioner relinquished the complete and exclusive control of milk distribution necessary for designation as a producer-handler under former Milk Marketing Order No. 2 when Petitioner delivered milk to two subdealers, Ahava Dairy Products, Inc. [hereinafter Ahava], and The Foundation for the Propagation and Preservation of Torah Laws and Customs [hereinafter FPPTLC], which milk was subsequently distributed by Ahava and FPPTLC to their retail and wholesale customers.²

Petitioner appealed *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995). The United States District Court for the Eastern District of Pennsylvania found that neither the plain language of the producer-handler exemption in former Milk Marketing Order No. 2 nor the rulemaking

¹Former Milk Marketing Order No. 2, which is the subject of the instant proceeding and was the subject of *Kreider I*, ceased to be effective January 1, 2000. 64 Fed. Reg. 70,868 (Dec. 17, 1999). The area to which former Milk Marketing Order No. 2 was applicable is now encompassed by the Northeast Milk Marketing Order (7 C.F.R. pt. 1001).

²*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995).

proceeding applicable to the producer-handler exemption in former Milk Marketing Order No. 2 supports a finding that Petitioner should be denied designation as a producer-handler without further factual findings that Petitioner was “riding the pool.”³ The United States District Court for the Eastern District of Pennsylvania remanded the action to the Secretary of Agriculture for further factual findings and a decision regarding whether Petitioner was “riding the pool.” The Court explained the purpose of its remand order, as follows:

The [Judicial Officer] and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind [Milk Marketing] Order [No.] 2’s producer-handler exemption. The [Judicial Officer] explains the economic purpose as follows:

“[M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the necessary burdens of surplus milk . . . through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to “ride the pool, i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this “pool riding” problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

[Kreider] does not have to produce enough milk to satisfy its customers’ needs in the period of short production, because,

³*Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-6648, slip op. at 24, 1996 WL 472414, at *11 (E.D. Pa. Aug. 15, 1996).

during the period of short production, [Kreider] can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive. (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 3 & 3 n.2.) Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production.

If the record cannot support the economic justification behind the Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of [Milk Marketing] Order [No.] 2 is ambiguous and the [Market Administrator's] action is not clearly supported by the promulgation history of [Milk Marketing] Order [No.] 2 or departmental interpretation. . . . Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool. To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

Kreider Dairy Farms, Inc. v. Glickman, No. Civ. A. 95-6648, slip op. at 18-21 (footnote omitted), 1996 WL 472414, at *8-9 (E.D. Pa. Aug. 15, 1996).

On December 30, 1996, Administrative Law Judge Edwin S. Bernstein issued a notice of hearing stating:

In a December 30, 1996, telephone conference with Denise Hansberry and Marvin Beshore, counsel for the parties, the following were agreed and/or decided:

I reviewed with counsel that the remand was triggered by the following language in the Judicial Officer's September 28, 1995, Decision:

Respondent is arguing that Petitioner avoids producing a great deal of surplus milk. That is, Petitioner does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, Petitioner can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying Petitioner's milk. If a producer-handler could turn over its distribution functions to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

[*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. at 847-48.]

Based upon this language, the United States District Court for the Eastern District of Pennsylvania stated in its August 15, 1996, Decision:

Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production.

[p. 19]

.....

Therefore, this action is remanded to the Secretary to hold such

further proceedings necessary to determine whether in fact Kreider is 'riding the pool.' To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.
p[p. 20-21]

....

The issue is, during the Ahava and Kreider dealings going back to November 1990, were there any instances of short production by Kreider when Ahava acquired kosher milk from other handlers from the pool? This includes the following questions:

Are there seasonal periods of shortages in milk production from Kreider and other similar producer-handlers?

What are the patterns as to whether and how regularly Kreider maintains a surplus?

Summary of Telephone Conference--Notice of Hearing, filed in *Kreider I*, December 30, 1996.

On April 23, 1997, Judge Bernstein conducted a hearing in Washington, DC, to receive evidence on the remand issue. On August 12, 1997, Judge Bernstein issued a Decision and Order [hereinafter Decision and Order on Remand]: (1) finding it was feasible for Ahava to obtain fluid milk products from other handlers in periods of Petitioner's short production; (2) finding Ahava was supplied with fluid milk products by at least one producer other than Petitioner during the period January 1991 through December 1996; (3) finding an inference can be made that Petitioner was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs; (4) finding Petitioner was "riding the pool" and receiving an unearned economic benefit; (5) concluding the decision of the Market Administrator to deny Petitioner producer-handler status under former Milk Marketing Order No. 2 must be upheld; and (6) dismissing Petitioner's *Kreider I* Petition.⁴ Petitioner failed to file a timely appeal, and the *Kreider I* Decision and Order

⁴In *re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997).

on Remand became final.⁵

***Kreider II* (The Instant Proceeding)**

On February 17, 1998, Petitioner instituted the instant proceeding, *In re Kreider Dairy Farms, Inc.*, 98 AMA Docket No. M 4-1 [hereinafter *Kreider II*], by filing a “Petition Pursuant to 7 U.S.C. § 608c(15)(A) and 7 C.F.R. § 900.50 - 900.71 [hereinafter the *Kreider II* Petition].

On March 12, 1998, the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a “Motion to Dismiss stating the doctrine of res judicata requires dismissal of the *Kreider II* Petition. On June 20, 2000, the Hearing Clerk received Petitioner’s opposition to Respondent’s Motion to Dismiss. On June 29, 2000, Respondent filed “Respondent’s Reply to Petitioner’s Opposition to Motion to Dismiss. Petitioner filed “Final Reply Brief of Petitioner Kreider Dairy Farms, Inc. in Opposition to Respondent’s Motion to Dismiss. On September 15, 2000, Administrative Law Judge Dorothea A. Baker denied Respondent’s Motion to Dismiss stating neither the factual nor the legal issues raised in the *Kreider II* Petition were decided in *Kreider I* (*Kreider II* Ruling on Motion to Dismiss).

On September 7, 2000, Petitioner filed an “Amended Petition Pursuant to 7 U.S.C. § 608c(15)(A) and 7 C.F.R. § 900.50 - 900.71 [hereinafter Amended Petition]. Petitioner: (1) challenges the determination by the Market Administrator that Petitioner was a handler regulated under former Milk Marketing Order No. 2 during the period December 1995 through December 1999; (2) asserts it was a producer-handler under former Milk Marketing Order No. 2 exempt from the obligation under former Milk Marketing Order No. 2 to pay into the producer-settlement fund during the period December 1995 through December 1999; and (3) seeks a refund, with interest, of the money it paid into the producer-settlement fund during the period December 1995 through December 1999 (Amended Pet. ¶¶ 13-16).

Petitioner alleges the six former Milk Marketing Order No. 2 customers to which Petitioner distributed fluid milk products during the period December 1995 through December 1999 were Ahava, FPPTLC, Jersey Lynn Farms, Parmalat Farmland Dairies, D.B. Brown, Inc., and Readington Farms, Inc. Further, Petitioner identifies which of its six former Milk Marketing Order No. 2 customers paid for fluid milk products in each month during the period

⁵*In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 397 (1998) (Order Denying Late Appeal), *aff’d*, 190 F.3d 113 (3d Cir. 1999), *reprinted in* 58 Agric. Dec. 719 (1999).

December 1995 through December 1999. Petitioner alleges Ahava paid for fluid milk products in each month during the period December 1995 through April 1997. (Amended Pet. ¶ 14-15.)

On September 29, 2000, Respondent filed “Respondent’s Motion to Dismiss Amended Petition II; Motion for Reconsideration; Motion to Certify Question for the Judicial Officer; and Answer to Petition II and Amended Petition II [hereinafter Motion to Dismiss Amended Petition]. On October 23, 2000, the Hearing Clerk received “Petitioner’s Opposition to Motion to Dismiss Amended Petition II; Opposition to Respondent’s Motion for Reconsideration; and Opposition to Motion to Certify Question for Judicial Officer. On October 24, 2000, Administrative Law Judge Dorothea A. Baker certified the following question to the Judicial Officer:⁶

I am hereby certifying to the Judicial Officer the question of whether or not the Amended Petition filed September 7, 2000, should be dismissed for the reasons stated by Respondent, including collateral estoppel and res judicata.

Certification to Judicial Officer.

On December 21, 2000, I issued a ruling stating Petitioner is not barred by collateral estoppel or res judicata from litigating in *Kreider II* its status under former Milk Marketing Order No. 2 during the period after Petitioner ceased distributing fluid milk products to Ahava, viz., during the period from May 1997 through December 1999.⁷

On June 15, 2001, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided over a hearing in Washington, DC. Marvin Beshore, Milspaw & Beshore Law Offices, Harrisburg, Pennsylvania, represented Petitioner. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On August 17, 2001, Petitioner filed “Post Hearing Brief of Petitioner, Kreider Dairy Farms, Inc. [hereinafter Petitioner’s Brief]. On September 26, 2001, Respondent filed “The Respondent’s Proposed Findings of Fact,

⁶Section 900.59(b) of the Rules of Practice (7 C.F.R. § 900.59(b)) authorizes administrative law judges to certify questions to the Judicial Officer.

⁷*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 779, 786-87 (2000) (Ruling on Certified Question).

Conclusions of Law and Brief in Support Thereof [hereinafter Respondent's Brief]. On October 9, 2001, Petitioner filed "Reply Brief of Petitioner, Kreider Dairy Farms, Inc. [hereinafter Petitioner's Response Brief].

On May 31, 2002, the ALJ issued a "Decision [hereinafter Initial Decision and Order] in which she: (1) concluded Petitioner's January 1991 application to the Market Administrator for designation as a producer-handler did not constitute an application for designation as a producer-handler for the period May 1997 through December 1999; (2) concluded the Market Administrator's interpretation of complete and exclusive control over fluid milk distribution was not contrary to law; and (3) denied Petitioner's Amended Petition⁸ (Initial Decision and Order at 27-28).

On August 6, 2002, Petitioner appealed to the Judicial Officer. On September 18, 2002, Respondent filed "The Respondent's Opposition to the Petitioner's Appeal Petition. On September 23, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's denying Petitioner's Amended Petition. However, I do not agree with the ALJ's finding that Petitioner was not "riding the pool" with respect to its distribution of fluid milk products to FPPTLC. Therefore, while I retain most of the ALJ's Initial Decision and Order, I do not adopt the ALJ's Initial Decision and Order as the final Decision and Order.

Petitioner's nine exhibits admitted into evidence at the hearing are referred to as "PX 1 through "PX 9. Respondent's one exhibit admitted into evidence at the hearing is referred to as "RX 1. Transcript references are designated by "Tr. Attached to Petitioner's Brief are Exhibits A through F, which the ALJ admitted into evidence pursuant to her instructions to the parties to identify evidence from *Kreider I* that should be considered in the instant proceeding (Tr. 206). These exhibits are referred to as "PX A through "PX F.

APPLICABLE STATUTES AND REGULATIONS

7 U.S.C.:

⁸The ALJ states "[t]he Petition is denied. (Initial Decision and Order at 28.) Petitioner filed a Petition on February 17, 1998, and an Amended Petition on September 7, 2000. Section 900.52b of the Rules of Practice (7 C.F.R. § 900.52b) authorizes parties to amend their pleadings. Therefore, I find the operative pleading in the instant proceeding is Petitioner's Amended Petition, not Petitioner's Petition. Based on the record before me, I infer the ALJ denied Petitioner's Amended Petition.

TITLE 7—AGRICULTURE

.....

CHAPTER 26—AGRICULTURAL ADJUSTMENT

.....

SUBCHAPTER III—COMMODITY BENEFITS

.....

§ 608c. Orders regulating handling of commodity.

.....

**(15) Petition by handler for modification of order or exemption;
court review of ruling of Secretary**

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such 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. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought

pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(15).

7 C.F.R.:

TITLE 7—AGRICULTURE

.....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

.....

**CHAPTER X—AGRICULTURAL MARKETING SERVICE
(MARKETING AGREEMENTS AND ORDERS; MILK),
DEPARTMENT OF AGRICULTURE**

.....

**PART 1002—MILK IN NEW YORK-NEW JERSEY
MARKETING AREA**

Subpart—Order Regulating Handling

GENERAL PROVISIONS AND DEFINITIONS

.....

§ 1002.12 Producer-handler.

Producer-handler means a handler who, following the filing of an application pursuant to paragraph (a) of this section, has been so designated by the market administrator upon determination that the requirements of paragraph (b) of this section have been met. Such designation shall be effective on the first of the month after receipt by the market administrator of an application containing complete information on the basis of which the market administrator determines that the requirements of paragraph (b) of this section are being met.

The effective date of designation shall be governed by the date of filing new applications in instances where applications previously filed have been denied. All designations shall remain in effect until cancelled pursuant to paragraph (c) of this section.

(a) *Application.* Any handler claiming to meet the requirements of paragraph (b) of this section may file with the market administrator, on forms prescribed by the market administrator, an application for designation as a producer-handler. The application shall contain the following information:

(1) A listing and description of all resources and facilities used for the production of milk which are owned or directly or indirectly operated or controlled by the applicant.

(2) A listing and description of all resources and facilities used for the processing or distribution of milk or milk products which are owned, or directly or indirectly operated or controlled by the applicant.

(3) A description of any other resources and facilities used in the production, handling, or processing of milk or milk products in which the applicant in any way has an interest, including any contractual arrangement, and the names of any other persons having or exercising any degree of ownership, management, or control in, or with whom there exists any contractual arrangement with respect to, the applicant's operation either in his capacity as a handler or in his capacity as a dairy farmer.

(4) A listing and description of the resources and facilities used in the production, processing, and distribution of milk or milk products which the applicant desires to be determined as his milk production, processing, and distribution unit in connection with his designation as a producer-handler: *Provided*, That all milk production resources and facilities owned, operated, or controlled by the applicant either directly or indirectly shall be considered as constituting a part of the applicant's milk production unit in the absence of proof satisfactory to the market administrator that some portion of such facilities or resources do not constitute an actual or potential source of milk supply for the applicant's operation as a producer-handler.

(5) Such other information as may be required by the market administrator.

(b) *Requirements.* (1) The handler has and exercises (in his capacity as a handler) complete and exclusive control over the operation and management of a plant at which he handles milk

received from production facilities and resources (milking herd, buildings housing such herd, and the land on which such buildings are located) the operation and management of which also are under the complete and exclusive control of the handler (in his capacity as a dairy farmer), all of which facilities and resources for the production, processing, and distribution of milk and milk products constitute an integrated operation over which the handler (in his capacity as a producer-handler) has and exercises complete and exclusive control.

(2) The handler, in his capacity as a handler, handles no fluid milk products other than those derived from the milk production facilities and resources designated as constituting the applicant's operation as a producer-handler.

(3) The handler is not, either directly or indirectly, associated with control or management of the operation of another plant or another handler, nor is another handler so associated with his operation.

(4) The handler sells more than an average of 100 quarts per day of Class I-A milk to persons in the marketing area other than to other plants.

(5) In case the plant of the applicant was operated by a handler whose designation as a producer-handler previously had been cancelled pursuant to paragraph (c) of this section, the quantity of fluid milk products handled during the 12 months preceding the application which was derived from sources other than the designated milk production facilities and resources constituting the applicant's operation as a producer-handler is less than the volume set forth for cancellation pursuant to paragraph (c)(3) or (4) of this section.

(c) *Cancellation.* The designation as a producer-handler shall be cancelled under conditions set forth in paragraphs (c)(1) and (2) of this section or, except as specified in paragraphs (c)(3) and (4) of this section, upon determination by the market administrator that any of the requirements of paragraph (b) of this section are not continuing to be met, such cancellation to be effective on the first day of the month following the month in which the requirements were not met.

(1) Milk from the designated production facilities and resources of the producer-handler is delivered in the name of another person as pool milk to another handler or except in the months of June through November with prior notice to the market administrator, a dairy herd, cattle barn, or milking parlor is transferred to another person who uses such facilities or resources for producing milk which is delivered as pool milk to another handler. This provision, however, shall not be

deemed to preclude the occasional sale of individual cows from the herd.

(2) A dairy herd, cattle barn, or milking parlor, previously used for the production of milk delivered as pool milk to another handler, is added to the designated milk production facilities and resources of the producer-handler, except in the months of December through May, with prior notice to the market administrator, or if such facilities and resources were a part of the designated production facilities and resources during any of the preceding 12 months. This provision, however, shall not be deemed to preclude the occasional purchase of individual cows for the herd.

(3) If the producer-handler handles an average of more than 150 product pounds per day of fluid milk products which are derived from sources other than the designated milk production facilities and resources, the cancellation of designation shall be effective the first of the month in which he handled such fluid milk products.

(4) If the producer-handler handles fluid milk products derived from sources other than the designated milk production facilities and resources in a volume less than specified in paragraph (c)(3) of this section, the designation shall be cancelled effective on the first of the month following the third month in any six-month period in which the producer-handler handled such fluid milk products: *Provided*, That the receipt of up to an average of ten pounds per day of packaged fluid milk products in the form of fluid skim milk, or of any volume of other packaged fluid milk products (except milk) from pool plants, shall not be counted for purposes of this paragraph (c)(4).

(d) *Public announcement.* The market administrator shall publicly announce the name, plant, and farm location of persons designated as producer-handlers, and those whose designations have been canceled. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from such producer-handler on and after the first of the month following the date of such announcement.

(e) *Burden of establishing and maintaining producer-handler status.* The burden rests upon the handler who is designated as a producer-handler (and upon the applicant for such designation) to establish through records required pursuant to § 1000.5 that the requirements set forth in paragraph (b) of this section have been and are continuing to be met and that the conditions set forth in paragraph

(c) of this section for cancellation of designation do not exist.

7 C.F.R. § 1002.12 (1999).

DECISION

Decision Summary

The Market Administrator's failure to designate Petitioner a producer-handler under former Milk Marketing Order 2, for each month during the period December 1995 through December 1999, was not contrary to law. A handler seeking designation as a producer-handler under former Milk Marketing Order No. 2, in order to be exempt from paying into the producer-settlement fund, must file an application with the Market Administrator and must be designated by the Market Administrator as a producer-handler pursuant to 7 C.F.R. § 1002.12 (1999). Petitioner's January 1991 "Application for Designation as Producer-Handler (PX C) did not constitute an application for designation as a producer-handler for the period December 1995 through December 1999.

Issue

Did the Market Administrator unlawfully fail to designate Petitioner a producer-handler for each month during the period December 1995 through December 1999, under former Milk Marketing Order 2?

Discussion

Petitioner's Operation

Petitioner, a Pennsylvania corporation, has its place of business in Manheim, Lancaster County, Pennsylvania. Petitioner produces, processes, and distributes fluid milk products. During the period December 1995 through December 1999, Petitioner produced milk on its own dairy farm, processed that milk in its own processing plant on its farm, and distributed that milk in its own trucks to the various customers. (Amended Pet. ¶¶ 1-2; Tr. 106-07.) Petitioner asserts each month, during the period December 1995 through December 1999, it met the former Milk Marketing Order No. 2 requirements

for designation as a producer-handler (Amended Pet. ¶¶ 15-15⁹).

Application Required

In 1990, the Market Administrator became aware that Petitioner was distributing fluid milk products into the area covered by former Milk Marketing Order No. 2. In a letter dated December 19, 1990, the Market Administrator informed Petitioner that it must pay into the producer-settlement fund or apply for and obtain designation as a producer-handler, as follows:

It has come to the attention of this office that you are supplying packaged fluid milk products to Ahava Dairy Products, Inc., 120 Third Street, Brooklyn, NY 11231 for distribution in the New York-New Jersey Milk Marketing Area. Pursuant to Section 1002.30 of the orders regulating milk in the New York-New Jersey milk marketing area, you are required to submit a report of receipts and utilization to this office. Accordingly, you will find enclosed copies of the required report forms, along with a copy of Order No. 2 Regulating the handling of milk in the New York-New Jersey Marketing Area. The report for the month of November 1990 or any prior period in which you supplied milk to Ahava Dairy should be promptly filed with this office.

You may qualify as a Producer-Handler under this order pursuant to Section 1002.12. If you believe this to be the case, please contact John Poole at this office for the appropriate application forms. Otherwise, you may have a payment obligation to the Producer Settlement Fund of the order.

PX B.

In January 1991, Petitioner filed its first and only application for designation as a producer-handler under former Milk Marketing Order No. 2 with the Market Administrator (PX C). The Market Administrator did not designate Petitioner as a producer-handler and in August 1992 denied Petitioner's application for designation as a producer-handler (PX E). Petitioner litigated the Market Administrator's denial of its January 1991

⁹Petitioner's Amended Petition contains two paragraphs identified as "15.

application. Judge Bernstein upheld the Market Administrator's denial of Petitioner's application for designation as a producer-handler under former Milk Marketing Order No. 2.¹⁰ Petitioner failed to file a timely appeal of Judge Bernstein's *Kreider I* Decision and Order on Remand and the *Kreider I* Decision and Order on Remand became final.¹¹

Petitioner never reapplied for designation as a producer-handler under former Milk Marketing Order No. 2. Ronald Kreider testified on cross-examination that he did not believe Petitioner was required to file another application for designation as a producer-handler, as follows:

[BY MS. DESKINS:]

Q. Okay. Okay. Let's move on then. Sometime in the 1990s did Kreider stop selling milk to Ahava?

[BY MR. RONALD KREIDER:]

A. Yes.

Q. I think you testified earlier that Ahava was one of your biggest customers?

A. Yes.

Q. And, of course, you're aware that Kreider did have a previous case against the Department of Agriculture regarding its status under Order No. 2, correct?

A. That's correct.

Q. Okay. And one of the issues in that case was whether Kreider's sales to Ahava affected its status under Order No. 2, right?

A. Yes.

¹⁰*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997).

¹¹*In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 397 (1998) (Order Denying Late Appeal), *aff'd*, 190 F.3d 113 (3d Cir. 1999), *reprinted in* 58 Agric. Dec. 719 (1999).

Q. Okay. Did you think at the time that Kreider stopped selling to Ahava that that was a change that would necessitate reapplying for producer/handler status in Order No. 2?

A. No.

Q. Well, didn't stopping the sales of milk to Ahava change how Kreider could be considered under Order No. 2?

A. I guess we're still trying to figure that out.

Tr. 120-21.

I conclude Petitioner's January 1991 "Application for Designation as Producer-Handler (PXC) did not constitute an application for designation as a producer-handler for the period December 1995 through December 1999. *Kreider I*, the proceeding regarding Petitioner's January 1991 application, is concluded. A necessary prerequisite to the Market Administrator's designation of a person as a producer-handler is that person's filing an application for designation as a producer-handler (Tr. 77-78).¹² Since Petitioner failed to file an application for designation as a producer-handler under former Milk Marketing Order No. 2 subsequent to the January 1991 application, Petitioner's Amended Petition should be denied as a premature challenge to a denial of an application for designation as a producer-handler that has not yet been filed or denied.

Producer-Handler Status For the Period December 1995 - April 1997

Even if Petitioner had filed an application for designation as a producer-handler for the period December 1995 through December 1999, I would uphold any denial of the application for the period December 1995 through April 1997, based on issue preclusion.

Petitioner claims it is entitled to recover payments Petitioner made to the producer-settlement fund during the period December 1995 through April 1997. Petitioner distributed fluid milk products to Ahava in each month of this December 1995 through April 1997 period (Amended Pet. ¶¶ 13-16). The

¹²⁷ C.F.R. § 1002.12 (1999).

issue of Petitioner's status under former Milk Marketing Order No. 2 in those months in which Petitioner distributed fluid milk products to Ahava was decided in *Kreider I*. Thus, Petitioner is barred by issue preclusion from relitigating in *Kreider II* Petitioner's status under former Milk Marketing Order No. 2 during the period December 1995 through April 1997.¹³ Petitioner could have been designated as a producer-handler under former Milk Marketing Order No. 2 only if Petitioner's entire distribution of fluid milk products within former Milk Marketing Order No. 2 qualified. Distribution of fluid milk products to one disqualifying customer, such as Ahava, results in person's ineligibility for designation as a producer-handler. There can be no "customer-by-customer" determination of producer-handler status.

*Market Administrator's Basis for Denying Producer-Handler Status
For The Period May 1997 - December 1999*

Even if Petitioner had filed an application for designation as a producer-handler for the period December 1995 through December 1999, I would uphold any denial of the application for the period May 1997 through December 1999, based on Petitioner's sales to "subdealers."

The Market Administrator, who, in 1990, became aware that Petitioner was distributing fluid milk products into the area covered by former Milk Marketing Order No. 2, did not designate Petitioner a producer-handler based on the types of customers to which Petitioner distributed a portion of its fluid milk products (PX B, PX E). Further, the Assistant Market Administrator for former Milk Marketing Order No. 2 testified that Petitioner did not qualify as a producer-handler under former Milk Marketing Order No. 2 during the period May 1997 through December 1999, because of the types of customers to which Petitioner distributed a portion of its fluid milk products (Tr. 34-41). The requirements to be a producer-handler do not prohibit any types of customers;¹⁴ however, in order to meet the requirements for designation as a producer-handler, a person must exercise complete and exclusive control over

¹³*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 779, 786-87 (2000) (Ruling on Certified Question).

¹⁴7 C.F.R. § 1002.12(b) (1999).

the distribution of its fluid milk products (Tr. 36).¹⁵ Thus, an applicant for producer-handler status could be denied producer-handler status based upon the applicant's customer's subsequent distribution of fluid milk products.

The Market Administrator denied producer-handler status to Petitioner on the ground that Petitioner distributed fluid milk products to "subdealers. Having a "subdealer as a customer is sufficient grounds to deny Petitioner producer-handler status under former Milk Marketing Order No. 2, according to Respondent. Respondent maintains Petitioner "is not distributing all of the milk it sells because of the "subdealers. Therefore, Petitioner does not exercise complete and exclusive control over the distribution of its fluid milk products which is necessary to meet the requirements for designation as a producer-handler under former Milk Marketing Order No. 2. (Respondent's Brief at 7, 12.)

An administrative agency's interpretation of its own regulations must be accorded deference in any administrative or court proceeding, and an agency's construction of its own regulations becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations.¹⁶

The Market Administrator was the official responsible for administering former Milk Marketing Order No. 2. It is well settled that an official who is responsible for administering a regulatory program has authority to interpret the provisions of the statute and regulations. Moreover, the interpretation of that official is entitled to great weight.¹⁷

¹⁵7 C.F.R. § 1002.12(b)(1) (1999).

¹⁶*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

¹⁷*Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966); *In re Stew Leonard's*, 59 Agric. Dec. 53, 73 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 Fed. Appx. 606, 2002 WL 500344 (2d Cir.), *cert. denied*, 123 S. Ct. 89 (2002); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 76-77 (1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 19 (1990); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 876 (1989); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 58-60 (1986); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 87 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re John Bertovich*, 36 Agric. Dec. 133, 137 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 982 (1974); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1055-56 (1973), *aff'd*, 369 F. Supp. 632 (S.D.N.Y. (continued...))

The doctrine of affording considerable weight to interpretation by the administrator of a regulatory program is particularly applicable in the field of milk. As stated by the court in *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 980 (2d Cir. 1943) (footnotes omitted):

The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

Similarly, in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966), the court stated:

A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

Therefore, I give considerable weight to the Market Administrator's determination that Petitioner was not a producer-handler under former Milk Marketing Order No. 2 during the period May 1997 through December 1999.

The Market Administrator's interpretation of former Milk Marketing Order No. 2 differed from Petitioner's interpretation, concerning whether Petitioner exercised complete and exclusive control over the distribution of its fluid milk products. The Market Administrator had greater access than did Petitioner to information about the distribution by Petitioner's customers of Petitioner's fluid milk products. Petitioner was largely unaware of what happened to its fluid milk products once Petitioner had delivered those products to its customers. The distribution of Petitioner's fluid milk products beyond Petitioner's "subdealer" customers was adequate grounds for the Market Administrator to determine that Petitioner had not maintained complete and exclusive control over the distribution of its fluid milk products.

¹⁷(...continued)
1973).

The Market Administrator sought to ensure that Petitioner bore all the risk of supplying its customers with fluid milk products during the months of short production and bore all the burden of carrying surplus fluid milk products during the months of excess production. If neither Petitioner nor its “subdealer” customers were accountable to the producer-settlement fund, and if Petitioner’s “subdealer” customers were accessing fluid milk products from other producers, even if Petitioner was not, Petitioner could obtain an unearned economic benefit by not bearing the full risk or the full burden of supplying its customers with fluid milk products. At *Kreider I’s* conclusion, the Market Administrator’s determination not to designate Petitioner as a producer-handler was justified, according to Judge Bernstein’s Decision and Order on Remand.¹⁸ Judge Bernstein concluded Petitioner’s customer Ahava was at all times supplied by at least one producer other than Petitioner and Ahava could obtain fluid milk products from other producers if Petitioner could not meet Ahava’s needs during periods of short production. Judge Bernstein also concluded Petitioner maintained an annual surplus that was lower than the average of producer-handlers in former Milk Marketing Order No. 2 and Petitioner was able to reduce its surplus because of its ability to rely on other producers to meet Ahava’s needs.

The Market Administrator’s interpretation of complete and exclusive control over the distribution had a rational basis and was applied consistently and not arbitrarily or capriciously. I conclude the Market Administrator’s interpretation of the term “complete and exclusive control” as used in 7 C.F.R. § 1002.12(b)(1) was not contrary to law.

The “Subdealers”

During May 1997 through December 1999, Respondent claims three of Petitioner’s customers were “subdealers”: (a) the FPPTLC; (b) D.B. Brown, Inc.; and (c) Jersey Lynn (Respondent’s Brief at 4; Tr. 40).

Petitioner did not distribute fluid milk products to Jersey Lynn during the period May 1997 through December 1999 (PX 4).

Petitioner distributed fluid milk products to D.B. Brown, Inc., in 7 months of the period May 1997 through December 1999, the last 6 months of 1997, and the first month of 1998. The Assistant Market Administrator for former Milk Marketing Order No. 2 testified that D.B. Brown, Inc., is a food

¹⁸*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997).

wholesale distributor in the business of buying food products and distributing those products to its customers. (PX 4; Tr. 40-41, 191.) The Assistant Market Administrator's testimony indicates that, during the period Petitioner distributed fluid milk products to D.B. Brown, Inc., Petitioner did not have complete and exclusive control over the distribution of its fluid milk products as required for designation as a producer-handler under former Milk Marketing Order No. 2. Petitioner has the burden of establishing that it meets the requirements for designation as a producer-handler.¹⁹ Petitioner failed to carry the burden of establishing that it met the requirements for designation as a producer-handler with respect to D.B. Brown, Inc. Therefore, I conclude, during the 7 months (July 1997 through January 1998) that Petitioner distributed fluid milk products to D.B. Brown, Inc., Petitioner was not a producer-handler under former Milk Marketing Order No. 2.

Petitioner distributed fluid milk products to FPPTLC in each month during the period May 1997 through December 1999 (PX 4; Tr. 131, 191). Consequently, Petitioner emphasizes the facts concerning its distribution of fluid milk products to FPPTLC in this "post-Ahava" period.

FPPTLC is a cooperative that purchases kosher dairy products and sells those products to its members. FPPTLC considers its members, its customers. (Tr. 89, 94-95.) One of FPPTLC's customers, Beth Medrash Govoha Cooperative, purchases fluid milk products from FPPTLC but buys other dairy products from other sources (Tr. 93-94). Another FPPTLC customer, Green Spring Dairy, which has purchased fluid milk products from FPPTLC, is a handler and accordingly has access to the milk pool to purchase milk and dairy products (Tr. 47). Since FPPTLC has its own customers, Petitioner lacks complete and exclusive control over its distribution of fluid milk products. Ronald Kreider, one of the Petitioner's owners, testified that Petitioner did not know who FPPTLC was selling to, as follows:

BY MS. DESKINS:

Q. Mr. Kreider, when you sell milk to FPPTLC do you bill Green Spring?

[BY MR. KREIDER:]

A. I don't know.

¹⁹ 7 C.F.R. § 1002.12(e) (1999).

Q. You wouldn't be billing BMG Coop?

A. I don't know. Those are two new names to me today.

Q. Okay. Because you wouldn't have known who FPPTLC was selling milk to?

A. That's correct.

Q. Now when you sell milk within your own restaurants or stores if someone wants to -- if someone returns milk they bring it back to your store, correct? It probably never happened.

A. I'm not sure that that ever happened.

Q. It probably never happens. If it ever did and someone for some reason brought milk back they'd bring it back to your store if they brought it from your store, right?

A. Most likely you're right.

Q. But if they brought milk from say the BMG Coop store they'd bring it back to the coop store, right?

A. Most people take products back to where they paid the cash for it.

Q. Okay. So let me just ask you another question to understand distribution. If I walked into a Kreider store and bought milk in theory you might know -- you would know who your customers are, maybe not their names but their faces, correct?

A. Me?

Q. Well, your Store Manager?

A. I'm not sure.

....

Q. You don't know who the customers are for FPPTLC, do you?

A. No, I don't.

Q. So you don't know where the milk that you sell to FPPTLC finally ends up in someone's house?

A. That's correct.

Q. So you didn't know that, for example, FPPTLC said they're selling milk in Michigan?

A. That's correct.

Q. So it would be a surprise to you if you walked into a house in Michigan and found Kreider milk? Is that correct?

A. Yeah. That's pretty far.

Tr. 137-39.

Petitioner's lack of control over its distribution of fluid milk products is demonstrated by Petitioner's lack of knowledge of the locations where FPPTLC distributed fluid milk products purchased from Petitioner. Therefore, I conclude, during the months (May 1997 through December 1999) that Petitioner distributed milk to FPPTLC, Petitioner was not a producer-handler under former Milk Marketing Order No. 2.

The Regulated Pool Plants

During May 1997 through December 1999, Petitioner's former Milk Marketing Order No. 2 customers included two regulated pool plants: (a) Farmland Dairies, Wallington, New Jersey; and (b) Readington Farms, Whitehouse, New Jersey (Tr. 39-40; PX 4; RX 1). Petitioner's distribution to Farmland Dairies and to Readington Farms did not disqualify Petitioner from designation as a producer-handler. Under former Milk Marketing Order No. 2, a producer-handler could distribute fluid milk products to regulated pool plants without losing its producer-handler status. (Tr. 55-57.)

Judge Cahn's Decision in Kreider I

In *Kreider I*, Judge Cahn held Petitioner should not be denied producer-handler status unless Petitioner was riding the pool. Judge Cahn remanded *Kreider I*, stating, to determine whether Petitioner is riding the pool, the Secretary of Agriculture must determine whether it is feasible for the subdealers to which Petitioner distributes fluid milk products to turn to other handlers in a period of short production.²⁰

Kreider II is not on remand from the United States District Court for the Eastern District of Pennsylvania. Nevertheless, a reviewing court may conclude that Judge Cahn's decision in *Kreider I* is the law of the case in *Kreider II*, as Petitioner argues in its "Appeal of Petitioner, Kreider Dairy Farms, Inc. [hereinafter Appeal Petition]. Therefore, I find facts that would have been required if *Kreider II* were being decided on remand from Judge Cahn.

If I were deciding *Kreider II* as directed by Judge Cahn, I would find Petitioner was riding the pool because it was feasible²¹ for subdealers to which

²⁰*Kreider Dairy Farms, Inc. v. Glickman*, No. Civ. A. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), reprinted in 55 Agric. Dec. 749 (1996).

²¹Judge Cahn's use of the word "feasible" indicates that the Secretary of Agriculture must determine whether subdealers to which Petitioner distributed fluid milk products could obtain kosher fluid milk products from other handlers, not whether those subdealers actually obtained kosher fluid milk products from other handlers. See generally, e.g., Merriam Webster's Collegiate Dictionary 425 (10th ed. 1997):

feasible . . . *adj.* . . . **1** : capable of being done or carried out <a ~ plan> **2** : capable of being used or dealt with successfully : SUITABLE **3** : REASONABLE, LIKELY **syn** see POSSIBLE

The Oxford English Dictionary, vol. V, 783 (2d ed. 1991):

feasible . . .

1. Of a design, project, etc.: Capable of being done, accomplished or carried out; possible, practicable.

.....

3. Of a proposition, theory, story, etc.: Likely, probable.

See also, e.g., *American Textile Manufactures Institute, Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981) (citing Webster's Third New International Dictionary of the English Language (1976) for the plain meaning of the word *feasible*: "capable of being done, executed, or effected"); *Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) (concluding *feasible* means capable of being done or physically possible); *Friends of the Boundary Waters Wilderness v.*

(continued...)

Petitioner distributed fluid milk products to turn to other handlers to obtain kosher fluid milk products in periods of short production. The Assistant Market Administrator for former Milk Marketing Order No. 2 testified that there were several sources of kosher milk in the area covered by former Milk Marketing Order No. 2, as follows:

BY MS. DESKINS:

Q. Other than Kreider Dairy are there other sources for kosher milk in the Order 2 area from May 1997 through December 1999?

[BY MR. JOHN POOLE:]

A. Several that I'm aware of. Ahava being one of the them. Farmland Dairies had a kosher supply and I believe Tuscan had a kosher supply.

Q. So FPPTLC wanted to buy kosher milk -- you're talking about just this time period May '97 to December '99 could they have gone to other sources being Kreider?

A. To the best of my knowledge, yes.

Tr. 48-49.

Similarly Rabbi Joseph Tendler, the president of FPPTLC, testified that, while FPPTLC did not actually purchase fluid milk products from sources other than Petitioner, FPPTLC could have purchased fluid milk products from sources other than Petitioner (Tr. 97).

²¹(...continued)

Robertson, 978 F.2d 1484, 1487-88 (8th Cir. 1992) (concluding *feasible* means capable of being done or physically possible), *cert. denied*, 508 U.S. 972 (1993); *Asarco, Inc. v. OSHA*, 746 F.2d 483, 495 (9th Cir. 1984) (stating *feasible* is defined as capable of being done); *Turner Co. v. Secretary of Labor*, 561 F.2d 82, 83 (7th Cir. 1977) (stating the ordinary and common sense meaning of *feasible* is "practicable"); *Smith v. Chickamauga Cedar Co.*, 82 So.2d 200, 202 (Ala. 1955) (citing with approval the definition of *feasible* in Webster's New International Dictionary (2d ed.): "[c]apable of being done, executed, or effected; possible of realization . . ."); *Mastorgi v. Valley View Farms, Inc.*, 83 A.2d 919, 921 (Conn. 1951) (stating to be *feasible* is to be capable of being successfully done or accomplished); *Lowe v. Chicago Lumber Co.*, 283 N.W. 841, 844 (Neb. 1939) (citing with approval the definition of *feasible* in Webster's New International Dictionary: "capable of being done, executed, or [e]ffected"); *Gilmartin v. D. & N. Transportation Co.*, 193 A. 726, 729 (Conn. 1937) (stating to be *feasible* is to be capable of being successfully done or accomplished).

I find subdealers to which Petitioner distributed fluid milk products could turn to other handlers in periods of short production for their fluid milk product needs. Therefore, following Judge Cahn's decision in *Kreider I*, I conclude Petitioner was "riding the pool" and was not a producer-handler under former Milk Marketing Order No. 2 during the period May 1997 through December 1999.

Petitioner's Appeal Petition

Petitioner raises three issues in its Appeal Petition. First, Petitioner contends the ALJ's dismissal of Petitioner's Amended Petition, based on Petitioner's failure to renew its application for designation as a producer-handler under former Milk Marketing Order No. 2, is error (Appeal Pet. at 3-5).

Petitioner filed an application for designation as a producer-handler under former Milk Marketing Order No. 2 in January 1991 (PX C). In August 1992, the Market Administrator denied Petitioner's application for designation as a producer-handler (PX E). On December 28, 1993, Petitioner instituted a proceeding challenging the Market Administrator's denial of Petitioner's January 1991 application for designation as a producer-handler (*Kreider I* Pet.). On August 12, 1997, Judge Bernstein issued a Decision and Order on Remand in which he upheld the Market Administrator's denial of Petitioner's application for designation as a producer-handler under former Milk Marketing Order No. 2 and dismissed Petitioner's *Kreider I* Petition.²² Petitioner failed to file a timely appeal, and the August 12, 1997, *Kreider I* Decision and Order on Remand became final.²³ Consequently, the proceeding regarding Petitioner's January 1991 application for designation as a producer-handler under former Milk Marketing Order No. 2 is concluded.

Section 1002.12 of former Milk Marketing Order No. 2 (7 C.F.R. § 1002.12 (1999)) defines a producer-handler as a handler who, following the filing of an application for designation as a producer-handler, has been so designated by the Market Administrator. Petitioner has not filed another application for designation as a producer-handler under former Milk Marketing Order No. 2; therefore, Petitioner's Amended Petition constitutes

²²*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 21 (1997).

²³*In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 397 (1998) (Order Denying Late Appeal), *aff'd*, 190 F.3d 113 (3d Cir. 1999), *reprinted in* 58 Agric. Dec. 719 (1999).

a premature challenge to a denial of an application which has not yet been filed or denied, and Petitioner's Amended Petition should be dismissed.

Petitioner states, until the ALJ's Initial Decision and Order, it had no notice that its failure to file another application for designation as a producer-handler under former Milk Marketing Order No. 2 was an issue. Petitioner contends the ALJ's dismissal of its Amended Petition on grounds that were not raised prior to the issuance of the Initial Decision and Order denies Petitioner due process.

Former Milk Marketing Order No. 2 unambiguously requires a handler claiming to meet the requirements for designation as a producer-handler to file an application with the Market Administrator (7 C.F.R. § 1002.12 (1999)). The application requirement was published in the *Federal Register*; thereby constructively notifying Petitioner of the application requirement.²⁴ Moreover, based on Petitioner's filing an application for designation as a producer-handler in January 1991, I infer Petitioner had actual notice of the former Milk Marketing Order No. 2 application requirement.

Second, Petitioner contends the ALJ erroneously held, even though Petitioner met the criteria for designation as a producer-handler set down by Judge Cahn, Petitioner was not entitled to relief (Appeal Pet. at 5-7).

The ALJ found, during May and June 1997 and from February 1998 through December 1999, Petitioner met the criteria for designation as a producer-handler set down by Judge Cahn. However, the ALJ departed from Judge Cahn's 1996 *Kreider I* direction in *Kreider II*, for the reasons that: (1) the January 1991 application did not constitute an application for designation as a producer-handler for the period May 1997 through December 1999; and (2) the Market Administrator's interpretation of complete and exclusive control over distribution was not contrary to law (*Kreider II* Initial Decision and Order at 13-14, 27). Petitioner contends the ALJ's departure from Judge Cahn's 1996 *Kreider I* decision is error because Judge Cahn's *Kreider I* decision is the law of the case (Appeal Pet. at 6).

²⁴See *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Comp. Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Comp. Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), cert. denied, 396 U.S. 867, and cert. denied, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965).

Generally, under the law of the case doctrine, when a court decides upon a rule of law, that decision continues to govern the same issue in subsequent stages of the same case.²⁵ While *Kreider I* and *Kreider II* are related cases, *Kreider I* and *Kreider II* are two separate distinct proceedings. Therefore, Judge Cahn's decision in *Kreider I* would not appear to be the law of the case in *Kreider II*. However, a number of cases hold that, at least under certain circumstances, the law of the case doctrine is applicable not only to the same case, but also to closely related cases.²⁶ Nevertheless, even if a court reviewing *Kreider II* were to conclude that Judge Cahn's *Kreider I* decision is the law of the case in *Kreider II* because *Kreider I* and *Kreider II* are closely related cases, the reviewing court might allow departure from the application of the law of the case doctrine because material facts in *Kreider I* are not identical to the facts in *Kreider II*.²⁷ I find particularly significant Petitioner's filing an

²⁵*Agostini v. Felton*, 521 U.S. 203, 236 (1997); *Arizona v. California*, 460 U.S. 605, 618 (1983); *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997); *Matter of Resyn Corp.*, 945 F.2d 1279, 1281 (3d Cir. 1991); *Constar, Inc. v. National Distribution Centers, Inc.*, 101 F. Supp.2d 319, 323 n.2 (E.D. Pa. 2000).

²⁶*Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 856 n.11 (3d Cir.) (stating law of the case rules, including the mandate rule, have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit; other law of the case rules apply to subsequent rulings by the same judge in the same case or a closely related case), *stay denied*, 510 U.S. 1309 (1994); *Antonioli v. Lehigh Coal and Navigation Co.*, 451 F.2d 1171, 1178 (3d Cir. 1971) (stating, even if the Court were to find that res judicata did not apply, the Court would be bound under the doctrine of the law of the case by a decision in a prior related case), *cert. denied*, 406 U.S. 906 (1972); *Coleco Industries, Inc. v. Universal City Studios, Inc.*, 637 F. Supp. 148, 150 (S.D.N.Y. 1986) (stating it is the duty of the District Court to follow the law of the case, albeit a related case, particularly when the law has been pronounced, at least *pro tem*, by this Court); *United States v. Musick*, 534 F. Supp. 954, 956-57 (N.D. Cal. 1982) (stating the law of the case is not properly invoked where the case is not the same; nevertheless, the general rule is that a decision in one case is controlling as the law of the case in a related action if it involves the same subject matter and if the points of decision and facts are identical).

²⁷Numerous courts have held that extraordinary circumstances, including changed facts or new evidence, may warrant reconsideration of previously decided issues. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (stating the law of the case doctrine should be applied absent changed circumstances or unforeseen issues not previously litigated); *In re City of Philadelphia Litigation*, 158 F.3d 711, 718 (3d Cir. 1998) (stating the law of the case doctrine does not preclude the court's reconsideration of previously decided issues in extraordinary circumstances such as where: (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice); *Patel v. Sun Co.*, 141 F.3d 447, 461 n.9 (3d Cir. 1998) (stating there are three traditional exceptions to the law of the case doctrine: (1) new evidence is available; (2) a supervening new law has been announced; and (3) the earlier decision was (continued...)

application for designation as a producer-handler in *Kreider I* and Petitioner's failure to file an application for designation as a producer-handler in *Kreider II*. As an application for designation as a producer-handler is a necessary prerequisite for producer-handler status,²⁸ Judge Cahn's remand to determine whether Petitioner was "riding the pool" is a question that need not be addressed in *Kreider II* where Petitioner has not taken the necessary first step of applying for designation as a producer-handler. Nonetheless, as stated in this Decision and Order, *supra*, since a reviewing court may conclude that Judge Cahn's *Kreider I* decision is the law of the case in *Kreider II*, I find facts that would be required if a reviewing court were to conclude that Judge Cahn's *Kreider I* decision is the law of the case in *Kreider II*.

Third, Petitioner contends it should be refunded billings related to its sales of fluid milk products during the period from December 1995 to May 1997 (Appeal Pet. at 7-9).

Petitioner litigated the issue of its status as a producer-handler under former Milk Marketing Order No. 2 in *Kreider I*. The *Kreider I* Decision and Order on Remand decided, on the merits, the issue of Petitioner's status under former Milk Marketing Order No. 2 during the period in which Petitioner distributed fluid milk products to Ahava. Issue preclusion bars Petitioner's claim that it was a producer-handler in those months in which Petitioner distributed fluid milk products to Ahava. Petitioner distributed fluid milk products to Ahava in each month during the period December 1995 through April 1997. Thus, Petitioner is barred by issue preclusion from relitigating in the instant proceeding Petitioner's status under former Milk Marketing Order No. 2 during the period December 1995 through April 1997.²⁹

Findings of Fact

²⁷(...continued)

clearly erroneous and would create manifest injustice); *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-17 (3d Cir. 1997) (stating extraordinary circumstances that warrant the court's reconsideration of an issue decided earlier in the course of litigation include situations in which new evidence is available, supervening new law has been announced, or the earlier decision was clearly erroneous and would create manifest injustice); *NL Industries, Inc. v. Commercial Union Insurance Co.*, 65 F.3d 314, 324 n.8 (3d Cir. 1995) (stating courts should reconsider an issue when there has been an intervening change in controlling law, when new evidence has become available, or when there is a need to correct clear error or prevent manifest injustice).

²⁸7 C.F.R. § 1002.12 (1999).

²⁹*In re Kreider Dairy Farms, Inc.*, 59 Agric. Dec. 779 (2000) (Ruling on Certified Question).

1. Petitioner is a Pennsylvania corporation. Petitioner has its place of business in Manheim, Lancaster County, Pennsylvania. Ronald Kreider is an owner and the president of Petitioner (Tr. 106-07).

2. During the period December 1995 through December 1999, Petitioner produced milk on its own dairy farm, processed that milk in its own processing plant on its farm, and distributed that milk in its own trucks to its customers (Tr. 106-07).

3. In 1990, the Market Administrator became aware that Petitioner was distributing fluid milk products into the area covered by former Milk Marketing Order No. 2. In a letter dated December 19, 1990, the Market Administrator informed Petitioner that it must pay into the producer-settlement fund or apply for and obtain designation as a producer-handler (PX B).

4. In January 1991, Petitioner filed an application for designation as a producer-handler under former Milk Marketing Order No. 2 with the Market Administrator (PX C).

5. The Market Administrator did not designate Petitioner as a producer-handler and in August 1992 denied Petitioner's application for designation as a producer-handler under former Milk Marketing Order No. 2 and continued to classify Petitioner as a handler (PX E).

6. As a handler, Petitioner was required to pay into the producer-settlement fund a percentage of its fluid milk (Class I) proceeds (7 C.F.R. pt. 1002 (1999)). Petitioner paid \$244,977.97 into the producer-settlement fund because of being classified as a handler, instead of a producer-handler, for the months of December 1995 through December 1999. Petitioner paid \$78,118.64 into the producer-settlement fund because of being classified as a handler, instead of a producer-handler, for the months of May 1997 through December 1999 (PX 4).

7. If the Market Administrator had designated Petitioner a producer-handler, Petitioner would have been exempt from paying into the producer-settlement fund (7 C.F.R. pt. 1002 (1999)).

8. Petitioner litigated the Market Administrator's denial of its January 1991 application for designation as a producer-handler. On August 12, 1997, Administrative Law Judge Edwin S. Bernstein issued a Decision and Order on Remand in *Kreider I*, which became final, upholding the Market Administrator's denial of Petitioner's January 1991 application for designation as a producer-handler under former Milk Marketing Order No. 2. Judge Bernstein's *Kreider I* Decision and Order on Remand was based on Petitioner's distribution of fluid milk products to Ahava. *In re Kreider Dairy*

Farms, Inc., 59 Agric. Dec. 21 (1997). Petitioner distributed fluid milk products to Ahava in each month during the period December 1995 through April 1997 (PX 4).

9. Petitioner's January 1991 application for designation as a producer-handler under former Milk Marketing Order No. 2 was the only application for designation as a producer-handler under former Milk Marketing Order No. 2 filed by Petitioner (Tr. 120-21).

10. The Market Administrator's determination that Petitioner was not a producer-handler was based on the types of former Milk Marketing Order No. 2 customers to which Petitioner distributed a portion of its fluid milk products (Tr. 34-41).

11. Petitioner distributed fluid milk products to FPPTLC, a "subdealer, in each month during the period May 1997 through December 1999 (PX 4).

12. Petitioner distributed fluid milk products to D.B. Brown, Inc., a "subdealer, in each month during the period July 1997 through January 1998 (PX 4).

13. Petitioner distributed fluid milk products to no "subdealer other than FPPTLC and D.B. Brown, Inc., during the period May 1997 through December 1999.

14. Petitioner distributed fluid milk products to Readington Farms, Whitehouse, New Jersey, a regulated pool plant, in each month during the period May 1997 through July 1997 (PX 4).

15. Petitioner distributed fluid milk products to Farmland Dairies, Wallington, New Jersey, a regulated pool plant, in each month during the periods May 1998 through December 1998, and February 1999 through December 1999 (PX 4).

16. FPPTLC obtained its fluid milk products solely from Petitioner (Tr. 89-90).

17. Subdealers to which Petitioner distributed fluid milk products during the period May 1997 through December 1999, could turn to other handlers for fluid milk products in periods of short production (Tr. 48-49, 97).

18. The distribution of Petitioner's fluid milk products by Petitioner's "subdealer customers was adequate grounds for the Market Administrator to determine that Petitioner had not maintained complete and exclusive control over the distribution of its fluid milk products.

19. The Market Administrator's interpretation of complete and exclusive control over the distribution of fluid milk products had a rational basis and was applied consistently and not arbitrarily or capriciously.

Conclusions of Law

1. Petitioner's January 1991 "Application for Designation as Producer-Handler" did not constitute an application for designation as a producer-handler for the period December 1995 through December 1999.

2. Petitioner is barred by issue preclusion from litigating its status under former Milk Marketing Order No. 2 during the period Petitioner distributed fluid milk products to Ahava, December 1995 through April 1997.

3. The Market Administrator's interpretation of complete and exclusive control over the distribution of fluid milk products was not contrary to law. Petitioner failed to exercise complete and exclusive control over the distribution of its fluid milk products during the period May 1997 through December 1999.

4. During the period May 1997 through December 1999, Petitioner did not meet the criteria set down by Judge Cahn in *Kreider I* for designation as a producer-handler under former Milk Marketing Order No. 2.

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

ORDER

1. Petitioner's Amended Petition is denied.
2. This Order shall become effective on the day after service on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to obtain review of this Order in any district court of the United States in which Petitioner is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture. 7 U.S.C. § 608c(15)(B). The date of entry of this Order is August 5, 2003.

AGRICULTURE MARKET TRANSITION ACT*

BARBARA BISHOP v. USDA.
No. 02-4184-SAC.
Filed August 14, 2003.

(Cite as: 283 F.Supp. 2d 1207).

AMTA – CCC – NAD — Scope of Review – Vagueness, constitutionality due to lack of – Discrimination, by agency officials – Retaliation, by agency officials – Penalty, payment reduction as – Presumption of validity, agency's determination.

Farmer appealed administrative procedure of USDA, challenging reduction in payment under production flexibility contract (PFC) between farmer and government. The payment reduction had been made because of farmer's failure to control weeds on land withheld from production. Farmer appealed affirmance by Director of National Appeals Division of Department. The District Court held inter alia: that the issue of whether the regulation providing for reduction was void for vagueness was beyond scope of review; (2) the issue of whether Department discriminated against farmer in enforcement of regulation was beyond scope of review; (3) the reduction of payment by three times the actual cost of weed control was enforceable damages provision in the contract rather than unenforceable penalty.

United States District Court,
D. Kansas.

MEMORANDUM AND ORDER

CROW, Senior District Judge.

This case comes before the court on plaintiff's appeal from a decision of the Director of the National Appeals Division for the United States Department of Agriculture ("USDA"). Plaintiff contends that the USDA erred in reducing by \$14,906.00 its annual payment to her, pursuant to contract, for certain conservation and land-use restrictions on her cropland.

*The Agriculture Market Transition Act and appeals therefrom are not within the jurisdiction of the JO and OALJ, however it is suggested that the court's analysis is persuasive and relevant in USDA administrative procedures that are the within the jurisdiction of the JO and OALJ. - Editor

FACTS

The parties agree upon most of the facts which give rise to this case. Plaintiff is a 75 year-old widow who owns approximately 2/3 of the property which is the subject of this case. Her nephew owns the other 1/3 in a trust. Plaintiff executed a Production Flexibility Contract (PFC) with the USDA, through the Logan County Farm Service Office, Commodity Credit Corporation, on May 24, 1996. Under the terms of the PFC, the USDA agreed to make annual payments to the plaintiff, as producer, over the seven year term of the PFC (1996 through 2002), in exchange for plaintiff's agreement to, among other matters, protect the land from weeds and erosion in the event she chose not to plant a crop on the land. ®. at 751). Plaintiff understood that she was expected to control the weeds on PFC land. The contract includes a proviso in the event a producer fails to control weeds on contract acreage. It states:

COC shall establish rates for calculating payment reductions if the maintenance requirements are not met. The rate shall represent the normal cost per acre in the county of the necessary action to correct the default ... If a maintenance default is determined according to this paragraph a payment reduction applies equal to the acres in default times COC established rate times 3.

®. at 564).

Plaintiff received a letter dated June 20, 1997, stating in pertinent part as follows:

One of the provisions of the [PFC] program is producers must protect idled contract acres from wind and water erosion, and weeds shall be controlled. Weed control generally means preventing weed seed production.

A maintenance spot check conducted on June 17, 1997 revealed that weeds were not being controlled on 557.4 acres of idle contract acreage.

You have 15 calendar days to control the weeds in a manner that will ensure that the seed will not spread to other acreage. After 15 days, a Logan County Office representative will inspect the acreage in question and, if the necessary action has not been taken, PFC payments on this farm will be reduced.

®. at 389).

By the time plaintiff received this letter, she had already controlled the weeds on the land at issue. No reduction of plaintiff's payment under the PFC was made, thus plaintiff's payment for 1997 included payment for the 557 acres of land on which the weeds had gone to seed before such land was worked. In fact, the report of the farm service agent who conducted the drive-by inspection concluded in his report dated July 7, 1997, "Therefore, this farm is not in violation." ®. at 301).

In 2001, plaintiff's equipment broke down, and the Logan County FSA again noted uncontrolled weeds on some of plaintiff's land subject to the PFC. On August 29, 2001, plaintiff was notified that her payment under the PFC program would be reduced by the amount of \$11,448.00 for her failure to control weeds on 709.8 acres of her land¹. Specifically, the letter stated:

Field maintenance spot-checks were completed on June 19, August 8, and August 14, 2001, on your land in Farm # 2557 with findings revealing that weeds were not being controlled on **709.8** idle contract (PFC) acres. Because these weeds are not being controlled on these idle PFC acres a violation has occurred

.....

A review of your PFC file for Farm # 2557 showed that on June 20, 1997, you were issued your first maintenance default violation warning letter concerning weeds not being controlled on 557.4 idle contract acres and given (15) days to remedy this problem.

This letter is to notify you that a second violation has occurred whereby weeds are again not being controlled to prevent weed seed production the County Committee has determined that a payment reduction of **\$11,448** will be assessed against your share of Farm # 2557 for this subsequent violation. Furthermore, you will have (15) calendar days from the date of this letter to remedy this problem to avoid further payment reductions

®. at 369.)

The County Committee reached the figure of \$11,448 as follows. In 2001, the normal cost in Logan County to maintain weeds was \$7 per acre. That year, the PFC payments for the farm plaintiff owned part of totaled \$34,343. Plaintiff received \$22,987 for her 2/3 share. In determining that \$11,448 was

¹ At that time, plaintiff had a farm total of 2,513.4 PFC acres. R. at 334.

owed, the FSA began with the standard calculation (709.8 acres x \$7 COC established rate x 3 = \$14,906). It found this to be plaintiff's "second maintenance default violation," and applied the rule that "the producer is assessed a payment reduction not to exceed 50% of the farm's total PFC payment" for the year. It then assessed approximately two-thirds of half the total PFC payments for 2001 in accordance with plaintiff's 2/3 ownership of the farm (half of \$34,343 = \$17,172 x .6667 share = \$11,448).

Soon thereafter, plaintiff remedied the problem and no further payment reductions were made. Plaintiff appealed the FSA's decision to reduce her payments to the Kansas State Farm Service Agency Committee. That committee affirmed the decision that plaintiff was in violation for failing to control weeds, but found the amount of her payment reduction should be \$14,906². This amount is greater than that assessed by the County because the state committee found that the amount of the payment reduction should not have been reduced by one-third to reflect plaintiff's 2/3 ownership of the farm. ®. at 16-17.)

Plaintiff appealed the state agency's decision to the National Appeals Division, where the hearing officer affirmed the state agency's decision and the assessment of a payment reduction of \$14,906. ®. at 844-850.) Thereafter, plaintiff appealed the hearing officer's decision to the Director of the National Appeals Division, but without success. ®. at 840-843.) Plaintiff filed this case seeking judicial review of the Director's final order that she had failed to control weeds, that she had thereby violated the contract, and that her payments pursuant to the PFC should thus be reduced by \$14,906 for 2001.

SCOPE OF REVIEW

This court has jurisdiction to review the agency action in this case. *See* 7 U.S.C. § 6999; *Payton v. U.S. Dept. of Agriculture*, 337 F.3d 1163 (10th Cir.2003). This court's review is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which authorizes this court to set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The duty of a court reviewing agency action under

² Payment reduction for a second violation is fixed at three times the cost to maintain an acre. Here, the cost to maintain weeds in plaintiff's county was determined to be \$7.00 per acre. (\$21 x 709.8 acres = \$14,906.00)

the "arbitrary or capricious" standard is to determine whether the agency examined the relevant evidence and articulated a rational connection between the facts found and the decision made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir.1994)." *Payton*, 337 F.3d at 1168-69.

An agency's factual determinations will be set aside only if they are unsupported by substantial evidence. "The substantial-evidence standard does not allow a court to displace the [Agencies'] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir.1999) (quotation marks and citations omitted). The appellant bears the burden of proof that an agency's factual determinations are not supported by substantial evidence. *Payton*, 337 F.3d at 1168-69.

Matters of law are reviewed de novo. *Trimmer*, 174 F.3d at 1102. When reviewing an agency's interpretation and implementation of the relevant Act, the court gives strict effect to the unambiguous intent of Congress if Congress has clearly spoken to the issue before the court. However, if Congress is silent on the issue and has delegated authority over the subject matter to the agency, the court defers to the agency's construction, unless, in context of the Act, its construction is unreasonable or impermissible. *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1232 (10th Cir.2000) (citing cases).

STATUTORY CONTEXT

PFC contracts are "seven-year contracts, administered by the Commodity Credit Corporation on behalf of the USDA, under which participants agree to subject eligible cropland to certain conservation and land-use restrictions in exchange for annual contract payments. 7 U.S.C. § 7211." *McBride Cotton and Cattle Corp. v. Veneman*, 290 F.3d 973, 977 (9th Cir.2002).

...

Congress enacted the Federal Agriculture Improvement and Reform Act of 1996 ("FAIR Act"), Pub.L. No. 104-127, 110 Stat. 888, which replaced most crop subsidy programs under previous statutes with a new production flexibility contract ("PFC") payment program. Under the PFC program, the USDA pays fixed but declining amounts to eligible producers for a

seven-year period. Under the FAIR Act, the USDA does not have discretion to withhold PFC payments or otherwise use those payments to control the ... decisions of farmers. The Act requires that the payments be made so long as the statutory prerequisites have been satisfied. *See* 7 U.S.C. § 7211(a). *Sierra Club v. Glickman*, 156 F.3d 606, 611 (5th Cir.1998).

The stated purpose of this law is:

to authorize the use of binding production flexibility contracts between the United States and agricultural producers to support farming certainty and flexibility while ensuring continued compliance with farm conservation and wetland protection requirements.

7 U.S.C.A. § 7201(b)(1).

The Secretary of the USDA published regulations governing the policy and regulatory implementation for PFCs, the authority for which was delegated by Congress. Therefore, the regulations have "the force and effect of law." *Batterton v. Francis*, 432 U.S. 416, 425 n. 9, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977).

The regulations in effect during 2001 required producers who did not plant a crop on contract acreage to protect any such land from weeds and erosion. Specifically, the regulation in effect at the time provided:

§ 1412.401--Contract violations.

Producers who do not plant a crop on contract acreage must protect any such land from weeds and erosion, including providing sufficient cover if determined necessary by the county committee. The first violation of this provision by a producer will result in a reduction in the producer's payment for the farm by an amount equal to 3 times the cost of maintenance of the acreage, but not to exceed 50 percent of the payment for the farm for that fiscal year. The second violation of this provision will result in a reduction in the payment for the farm by an amount equal to 3 times the cost of maintenance of the acreage, not to exceed the payment for the farm for that fiscal year.

§ 1412.401(b)(2)(c), 61 FR 37544, 37580, July 18, 1996, as corrected at 61 FR 49049, 49050, Sept. 18, 1996.

ARGUMENTS

Plaintiff contends that the Director erred in many respects, including failing

to find that 1) the PFC contracts were void for vagueness; 2) the enforcement was discriminatory or in retaliation for her having previously reported the person who reported her violation; 3) the payment reduction constituted an illegal penalty; and 4) the payment reduction was unjust because this was her first violation on this farm or contract, and she had already paid the cost to remedy it.

Void for vagueness

Plaintiff claims that the regulations underlying the PFC contract are void for vagueness in failing to define terms such as "weeds" and to specify how to control them. The government claims that this issue is beyond the court's scope of review.

The court agrees. The void for vagueness doctrine raises a constitutional challenge. *See e.g., In re Stewart*, 175 F.3d 796 (10th Cir.1999).

It is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies. *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975); *Johnson v. Robison*, 415 U.S. 361, 368, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974).

Further, the regulations governing the procedures for National Appeals Division (NAD) for the USDA preclude challenges to the statutes. *See* 7 CFR § 11.3(b) ("The procedures contained in this part may not be used to seek review of statutes or USDA regulations issued under Federal Law.") Accordingly, as the NAD Division Director advised plaintiff in his decision, NAD procedures may not be used to challenge a statute or regulation as void for vagueness. *See* R. at 842.

Because the posture of this case is on appeal from the decision of the NAD, the court's scope of review is narrow, as stated above. Any determination that the statute is void for vagueness is beyond this court's review of the action taken by the agency.

Retaliation/Discrimination

Plaintiff next contends that she was selectively prosecuted in retaliation for her previously having turned in a member of the county committee for a

violation. As above, the government contends that this issue is beyond the court's scope of review, and notes that the national hearing officer advised plaintiff of the fact that discrimination claims are not within the scope of the agency's authority.

The hearing officer's decision states:

...
the Appellant contends she is a victim of discriminatory and unequal enforcement since she was the only producer sited (sic) for not controlling weeds in 2001. Allegations of discrimination are beyond the scope of the hearing Officer's authority. However, if the Appellant and her representative wish to pursue these allegations, they should contact in writing the address indicated at the end of this determination.

R. at 845.

The end of the decision not only stated an address where plaintiff could file a complaint of discrimination, but also stated the policy of the USDA prohibiting discrimination in all its programs and activities.

The court finds that issues of retaliation and discrimination were not within the issues properly before the agency, and they are thus beyond this court's scope of review on appeal. *See Payton*, 337 F.3d at 1169-70 (the court has no basis for questioning the agency action on issues not presented in the agency proceeding).

Payment Reduction as Penalty

Plaintiff additionally asserts that the payment reduction is not a reasonable damages provision, but rather is an unenforceable penalty provision. Plaintiff's contention is that the amount she was assessed is cost-based, because it is determined based upon the "normal cost per acre in the county of the necessary action to correct the default" times three, times the number of acres involved. (R. at 564). Because plaintiff controlled the weeds on her land soon after her violations and paid the cost to do so herself, she believes that any reduction of her payments constitutes an illegal penalty.

The court disagrees. This is not a penalty provision. *See Varney Business Services, Inc. v. Pottroff*, 275 Kan. 20, 59 P.3d 1003 (2002) (a penalty is to

secure performance and is not for payment of sum in lieu of performance); *Unified School Dist. No. 315, Thomas County v. DeWerff*, 6 Kan.App.2d 77, 78, 626 P.2d 1206, (1981) (It is well settled that parties to a contract may stipulate to the amount of damages for breach of the contract). The agreement plaintiff signed made clear that if plaintiff did not comply with its terms, her payments would accordingly be reduced.

Plaintiff argues that the amount of payment reduction established in the contract is intended to reflect the cost to the county of controlling weeds, and since the county had no cost, no payment reduction is warranted. Although the cost in the county of controlling weeds is a factor in determining the amount of payment reduction, the intent of the contract is broader--to ensure continued compliance with farm conservation and wetland protection requirements by monetarily rewarding those who comply with the contract's terms and by withholding that payment in proportion to the producer's non-compliance with the contract. *See* 7 U.S.C.A. § 7201(b)(1). Because plaintiff failed to abide by her agreement to control weeds on contract acreage, the payments she otherwise would have received were properly reduced, in accordance with the terms of the contract and the law.

Notice

Plaintiff next contends that the 2001 violation was her first violation and that therefore she was entitled to a warning, rather than a payment reduction. The regulations do not require a warning letter. The PFC contract, however, provides for a warning of default, in stating:

All producers sharing in PFC payments are entitled to 1 warning letter for the first default on each farm during the term of the contract.

®. at 564).

Plaintiff asserts that a different farm or contract was involved in 1997 than in 2001, but that even if the same farms and contracts were involved in both those years, her first default was in 2001 since no violation was found in 1997. Thus she claims entitlement to a warning letter in accordance with the PFC contract.

Different farms/contracts

The 1997 letter related to farm serial number ("FSN") 2129, while the 2001

letter related to FSN 2557. The agency found that "appellant enrolled FSN 1777 into the AMTA program in 1996. FSN 1777, the parent farm, was reconstituted into FSN 2129, and subsequently into FSN 2557." ®. at 841; 16.) Plaintiff provides no record evidence from which the court could conclude that this analysis is erroneous.

The record shows that plaintiff signed separate papers in 1997 and 2001 when her land was reconstituted and her farm was given new serial numbers. Plaintiff does not dispute that substantially the same land was included in both agreements. *See* 7 CFR § 718.201 *et seq.* ("The constitution and identification of land as a farm for the first time and the subsequent reconstitution of a farm made hereafter, shall include all land operated by an individual entity or joint operation as a single farming unit ...") Instead, she contends that the contract she signed in 1996 is separate and distinct from the one she signed in 1999.

The court finds substantial evidence supporting the agency's finding that both the 1997 and the 2001 violations related to only one contract. *See* R. at 842. The fact that a farm is reconstituted, or certain land is sold, does not change the nature of the agreement under the PFC contract. Although plaintiff signed PFC agreements after 1996 when she first enrolled her land in the program, those are merely amendments to the original agreement, as they evidence only minor variations in the number of acres subject to the contract or the addition of a number of acres in the sorghum program, and reflect the reduced number of years remaining on the contract. *See* R. at 750, 751.

First violation

Plaintiff additionally contends that the 2001 violation was her first, because: 1) no payment reduction was made pursuant to the 1997 letter; 2) the report dated July 7, 1997, by the farm service agent who conducted the drive-by inspection concluded, "this farm is not in violation;" ®. at 301); and 3) she had already controlled the weeds by the time she received the 1997 letter.

The state committee rejected this argument, stating:

The June 20, 1997 letter did constitute a valid first warning letter as the violation occurred upon the time the inspection was made and found uncontrolled weeds. The fact that Ms. Bishop had controlled the weeds

when the letter was received is not material to the case. The violation had occurred at the time of inspection and the first warning was valid. Ms. Bishop did not dispute the warning at the time of issuance of the June 20, 1997, letter.

R. at 17.

Similarly, the NAD hearing officer rejected this argument in these words: Agency Handbook procedures do not circumvent federal regulations. The governing regulations in this matter do not provide for a warning letter to be issued. The regulations clearly set forth that the first violation by a producer will result in a reduction in the producer's payment for the farm by an amount equal to 3 times the cost of maintenance of the acreage. Consequently, the Agency's decision is in compliance with the regulations.

R. at 847.

The record provides ample support for the factual finding that weeds were uncontrolled on the stated number of contract acres farmed by plaintiff in 1997. This alone is sufficient to constitute a violation. The fact that plaintiff had already controlled the weeds by the date she received the warning letter in 1997 is immaterial to the finding of a violation. Although the 1997 report of the farm service agent who concluded that plaintiff was not in violation adds confusion to the issue, the record does not reflect that plaintiff saw that report at any time prior to her administrative appeals of this matter, or that it is controlling on this issue.

Lastly, the fact that no payment reduction was made in 1997 does not compel the conclusion that no violation occurred, as warnings of violations routinely gave producers 15 days (or more if requested) to control the weeds in a manner that would ensure that the seed would not spread to other acreage before PFC payments for the farm would be reduced. *See* R. 17-184 (providing sample letter for the first weed control default).

In conclusion, the court has carefully examined each claim of error raised by the plaintiff, and finds no basis for reversal.

IT IS THEREFORE ORDERED that the final decision of the USDA is affirmed.

ANIMAL WELFARE ACT

COURT DECISION

DORIS DAY ANIMAL LEAGUE, ET AL. v. USDA.
No. 02-1807.
Filed October 6, 2003.

(Cite as: 124 S.Ct. 151).

AWA .

Supreme Court of the United States

Petition for writ of certiorari to the United States Court of Appeals for the
District of Columbia Circuit denied.

ANIMAL WELFARE ACT
DEPARTMENTAL DECISION

In re: WANDA McQUARY, RANDALL JONES, AND GARY JACKSON.

AWA Docket No. 03-0013.

Decision and Order as to Wanda McQuary and Randall Jones.

Filed October 1, 2003.

AWA - Failure to file answer – Waiver of right to hearing – Default – Animal welfare – Dealer – Civil penalty – License revocation – Cease and desist order – Disqualification from obtaining license.

The Judicial Officer affirmed the Default Decision issued by Administrative Law Judge Marc R. Hillson (ALJ) finding that Respondents McQuary and Jones violated the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act as alleged in the Complaint, ordering Respondents McQuary and Jones to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, assessing Respondents McQuary and Jones an \$8,800 civil penalty, revoking Respondents McQuary's and Jones' Animal Welfare Act license, and disqualifying Respondent McQuary and Jones from obtaining Animal Welfare Act licenses. The Judicial Officer deemed Respondent McQuary's and Respondent Jones' failures to file timely answers admissions of the allegations in the Complaint and waivers of hearing (7 C.F.R. §§ 1.136(c), .139).

Frank Martin, Jr., for Complainant.

Respondent Wanda McQuary and Respondent Randall Jones, Pro se.

Initial decision issued by Marc R. Hillson, Administrative Law Judge.

Decision and Order as to Wanda McQuary and Randall Jones issued by William G. Jensen, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 13, 2003. Complainant instituted the 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].

Complainant alleges Wanda McQuary, Randall Jones, and Gary Jackson

[hereinafter Respondents] committed willful violations of the Animal Welfare Act and the Regulations and Standards on September 13, 2001, October 2, 2001, March 26, 2002, and September 26, 2002 (Compl. ¶¶ II-V).

The Hearing Clerk served Respondent Wanda McQuary and Respondent Randall Jones with the Complaint, the Rules of Practice, and a service letter on February 15, 2003.¹ The Hearing Clerk served Respondent Gary Jackson with the Complaint, the Rules of Practice, and a service letter on February 22, 2003.² Respondents failed to answer the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondents a letter dated April 30, 2003, informing them that an answer to the Complaint had not been received within the time required in the Rules of Practice.

On May 6, 2003, 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 Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Motion for Default Decision] and a “Proposed Decision and Order [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent Wanda McQuary and Respondent Gary Jackson with Complainant’s Motion for Default Decision, Complainant’s Proposed Default Decision, and a service letter on May 15, 2003.³ The Hearing Clerk served Respondent Randall Jones with Complainant’s Motion for Default Decision, Complainant’s Proposed Default Decision, and a service letter on May 17, 2003.⁴ Respondents failed to file objections to Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On July 21, 2003, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Marc R. Hillson [hereinafter the

¹United States Postal Service Domestic Return Receipts for Article Number 7000 1670 0011 8982 7401 and Article Number 7000 1670 0011 8982 7425.

²United States Postal Service Track/Confirm - Intranet Item Inquiry for Item Number: 7000 1670 0011 8982 7418.

³United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 5357 and Article Number 7001 0360 0000 0304 5364.

⁴United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 5340.

ALJ] issued a “Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Initial Decision and Order]: (1) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents an \$8,800 civil penalty; (4) revoking Respondents’ Animal Welfare Act license; and (5) disqualifying Respondents from becoming licensed under the Animal Welfare Act and the Regulations.

Respondent Gary Jackson did not appeal the Initial Decision and Order which the Hearing Clerk served on him on August 4, 2003.⁵ In accordance with the terms of the Initial Decision and Order (Initial Decision and Order at 8) and section 1.142 of the Rules of Practice (7 C.F.R. § 1.142), the Initial Decision and Order became final and effective as to Respondent Gary Jackson on September 8, 2003.

On August 20, 2003, Respondent Randall Jones appealed to the Judicial Officer. On August 29, 2003, Complainant filed “Opposition to Motion by Respondent Randal [sic] Jones to Set Aside Default. On September 4, 2003, Respondent Wanda McQuary appealed to the Judicial Officer. On September 17, 2003, Complainant filed “Opposition to Respondent Wanda McQuary’s Appeal. On September 24, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ’s Initial Decision and Order; therefore, I adopt, with minor modifications, the Initial Decision and Order as the final Decision and Order as it relates both to Respondent Wanda McQuary and Respondent Randall Jones. Additional conclusions by the Judicial Officer follow the ALJ’s conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

⁵United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3378.

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[.]

§ 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. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3)

such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 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. . . .

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

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. §§ 2131, 2132(f), 2141, 2146(a), 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

....

PART VI—PARTICULAR PROCEEDINGS

....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990 .

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other

sanction that—

- (A)(i) is for a specific monetary amount as provided by Federal law; or
- (ii) has a maximum amount provided for by Federal law; and
- (B) is assessed or enforced by an agency pursuant to Federal law; and
- (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and
- (3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION
ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act; and
- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;

- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
 - (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
 - (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
 - (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
 - (6) multiple of \$25,000 in the case of penalties greater than \$200,000.
- (b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—
- (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds
 - (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*. . . .

. . . .

(2) *Animal and Plant Health Inspection Service.* . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of \$2,750; and knowing failure to obey a cease and desist order has a civil penalty of \$1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

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 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.

(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, 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.

(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.

(4) When any dealer has made a reasonable effort to affix an official tag to a cat, as set forth in paragraphs (a) and (b) of this section, and has been unable to do so, or when the cat exhibits serious distress from the attachment of a collar and tag, the dealer shall attach the collar and tag to the door of the primary enclosure containing the cat and take measures adequate to maintain the identity of the cat in relation to the tag. Each primary enclosure shall contain no more than one weaned cat without an affixed collar and official tag, unless the cats are identified by a distinctive and legible tattoo or plastic-type collar approved by the Administrator.

....

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

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 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.

....
(b) *Ventilation.* Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85 °F (29.5 °C) or higher. The

relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices.

....

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. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

- (1) Provide the dogs and cats with adequate protection and shelter from the cold and heat;
- (2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;
- (3) Be provided with a wind break and rain break at the entrance; and
- (4) Contain clean, dry, bedding material if the ambient temperature is below 50 °F (10 °C). Additional clean, dry bedding is required when the temperature is 35 °F (1.7 °C) or lower.

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities—including houses, dens, etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

§ 3.6 Primary enclosures.

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

- (a) *General requirements.*
 - (1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.
 - (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 temperature and weather conditions that may be uncomfortable or hazardous to all dogs and cats;
 - (vii) Provide sufficient shade to shelter all dogs and cats housed in the primary enclosure at one time;
 - (viii) Provide all 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 replaced 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' or cats' feet to pass through any openings in the floor;
 - (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; and
 - (xii) Primary enclosures constructed on or after February 20, 1998 and floors replaced on or after that date, must comply with the requirements in this paragraph (a)(2). On or after January 21, 2000, all primary enclosures must be in compliance with the requirements in this paragraph (a)(2). If the suspended floor of a primary enclosure is constructed of metal strands, the strands must either be greater than 1/8 of an inch in diameter (9 gauge) or coated with a material such as plastic or fiberglass. The suspended floor of any primary enclosure

must be strong enough so that the floor does not sag or bend between the structural supports.

....

ANIMAL HEALTH AND HUSBANDRY STANDARDS

....

§ 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 soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors.

(b) *Sanitization of primary enclosures and food and water receptacles.* (1) Used primary enclosures and food and water receptacles must be cleaned and sanitized in accordance with this section before they can be used to house, feed, or water another dog or cat, or social grouping of dogs or cats.

(2) Used primary enclosures and food and water receptacles for dogs and cats must be sanitized at least once every 2 weeks using one of the methods prescribed in paragraph (b)(3) of this section, and more often if necessary to prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards.

(3) Hard surfaces of primary enclosures and food and water receptacles must be sanitized using one of the following methods:

- (i) Live steam under pressure;
- (ii) Washing with hot water (at least 180 °F (82.2 °C)) and soap or

detergent, as with a mechanical cage washer; or

(iii) Washing all soiled surfaces with appropriate detergent solutions and disinfectants, or by using a combination detergent/disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surfaces to remove organic material, so as to remove all organic material and mineral buildup, and to provide sanitization followed by a clean water rinse.

(4) Pens, runs, and outdoor housing areas using material that cannot be sanitized using the methods provided in paragraph (b)(3) of this section, such as gravel, sand, grass, earth, or absorbent bedding, must be sanitized by removing the contaminated material as necessary to prevent odors, diseases, pests, insects, and vermin infestation.

(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.

9 C.F.R. §§ 1.1; 2.40, .50(a)-(b), .100(a), .126; 3.1(f), .2(b), .4(b)-(c), .6(a)(1)-(2), .11 (footnotes omitted).

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

Statement of the Case

Respondent Wanda McQuary and Respondent Randall Jones failed to file answers 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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as Findings of Fact. This Decision and Order as to Wanda McQuary and Randall Jones is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Wanda McQuary and Respondent Randall Jones are individuals with a business mailing address of 565 County Road 131, Black Rock, Arkansas 72455.

2. Respondent Wanda McQuary and Respondent Randall Jones are, and at all times material to this proceeding were, operating as dealers as defined in the Animal Welfare Act and the Regulations.

3. On September 13, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

4. On September 13, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

5. On September 13, 2001, Respondent Wanda McQuary and Respondent Randall Jones 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 have the records of animals on hand, a program of veterinary care, and sales records located at Respondents' premises.

6. On September 13, 2001, Respondent Wanda McQuary and Randall Jones willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in Findings of Fact 6(a)-6(e):

(a) Housing facilities were not 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 (9 C.F.R. § 3.1(f));

(b) Surfaces of outdoor housing facilities for dogs were not maintained on a regular basis (9 C.F.R. § 3.4(c));

(c) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1));

(d) Primary enclosures for dogs were not structurally sound and maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals (9 C.F.R. § 3.6(a)(1), (a)(2)); and

(e) Excreta was not removed from primary enclosures daily to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a)).

7. On October 2, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

8. On October 2, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

9. On October 2, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in Findings of Fact 9(a)-9(b):

(a) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)); and

(b) Primary enclosures for dogs were not structurally sound and maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals (9 C.F.R. § 3.6(a)(1), (a)(2)).

10. On March 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

11. On March 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in Findings of Fact 11(a)-11(c):

(a) Indoor housing facilities for dogs were not adequately ventilated and cooled so as to provide for the health and comfort of the animals at all times (9 C.F.R. § 3.2(b));

(b) Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b)); and

(c) The premises, including buildings and surrounding grounds, were not kept in good repair, clean, and free of trash (9 C.F.R. § 3.11).

12. On September 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

13. On September 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

14. On September 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones 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 have the records of animals on hand, a program of veterinary care, and sales records located at Respondents' premises.

15. On September 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in Findings of Fact 15(a)-15(e):

(a) Indoor housing facilities for dogs 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. § 3.2(b));

(b) The building surfaces in contact with the animals in outdoor housing facilities for dogs were not impervious to moisture (9 C.F.R. § 3.4(c));

(c) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1));

(d) Primary enclosures for dogs were not kept clean and sanitized, as required (9 C.F.R. § 3.11(b)(2)); and

(e) The premises, including buildings and surrounding grounds, were not kept in good repair, clean, and free of trash (9 C.F.R. § 3.11).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact, Respondent Wanda McQuary and Respondent Randall Jones have willfully violated the Animal Welfare Act and the Regulations and Standards.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Wanda McQuary's Appeal Petition

The Hearing Clerk served Respondent Wanda McQuary with the Initial Decision and Order on August 4, 2003.⁶ On September 4, 2003, 31 days after service, Respondent Wanda McQuary filed a letter dated August 22, 2003 [hereinafter McQuary's Appeal Petition]. Section 1.145(a) of the Rules of Practice provides that an appeal must be filed within 30 days after service of an administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, . . . a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Respondent Wanda McQuary's late-filed appeal could be denied. However, section 1.139 of the Rules of Practice provides that an administrative law judge's default decision becomes final 35 days after service of the default decision, as follows:

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

. . . Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145.

7 C.F.R. § 1.139.

Thus, in accordance with section 1.139 of the Rules of Practice (7 C.F.R.

⁶United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3330.

§ 1.139), a default decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. This provision was placed in the Rules of Practice so that if an appeal is inadvertently filed up to 4 days late, *e.g.*, because of a delay in the mail system, an extension of time could be granted by the Judicial Officer for the filing of a late appeal.⁷ The Judicial Officer has jurisdiction to hear an appeal petition filed after the 30-day appeal time has elapsed but before the administrative law judge's decision becomes final.

The ALJ's Initial Decision and Order had not become final on September 4, 2003, when Respondent Wanda McQuary filed her appeal petition. The postmark on the envelope containing Respondent Wanda McQuary's appeal petition establishes that Respondent Wanda McQuary mailed her appeal petition from Pocahontas, Arkansas, on August 27, 2003. Under these circumstances, I grant Respondent Wanda McQuary a 1-day extension of time for filing her appeal petition.⁸ Thus, I deem Respondent

⁷*In re David Finch*, 61 Agric. Dec. 567, 582-84 (2002); *In re Scamcorp, Inc.*, 55 Agric. Dec. 1395, 1405-06 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal); *In re Sandra L. Reid*, 55 Agric. Dec. 996, 999-1000 (1996); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985) (Order Denying Pet. for Recons.); *In re William T. Powell*, 44 Agric. Dec. 1220, 1222 (1985) (Order Denying Late Appeal); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-01 (1985) (Order Denying Late Appeal), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108 (1984) (Order Denying Late Appeal), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 315 (1975) (Order Granting Motion to Withdraw Appeal).

⁸Had the ALJ's Initial Decision and Order become final prior to Respondent Wanda McQuary's filing an appeal, the Judicial Officer would not have had jurisdiction to consider Respondent Wanda McQuary's appeal petition. See *In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the initial decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the initial decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the initial decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing

(continued...)

Wanda McQuary's appeal petition filed September 4, 2003, to have been timely filed.

Respondent Wanda McQuary's raises one issue related to the instant

⁸(...continued)

the respondent's appeal petition filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition 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 the respondent's appeal petition filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition 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 the respondent's appeal petition filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating 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 Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating 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 Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the 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 since the 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 administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

proceeding in her appeal petition.⁹ Respondent Wanda McQuary states she “would like to have the opportunity [t]o continue raising dogs (Respondent McQuary’s Appeal Pet.).

The ALJ revoked Respondent Wanda McQuary’s Animal Welfare Act license and disqualified Respondent Wanda McQuary from becoming licensed under the Animal Welfare Act and the Regulations (Initial Decision and Order at 8). However, the ALJ’s Initial Decision and Order does not prohibit Respondent Wanda McQuary’s raising dogs. Individuals who merely raise dogs are not required by the Animal Welfare Act or the Regulations to obtain an Animal Welfare Act license. Therefore, I reject Respondent Wanda McQuary’s request that I modify the sanction imposed against her to allow her to raise dogs because nothing in the ALJ’s Initial Decision and Order, which I adopt as the final Decision and Order as to Wanda McQuary and Randall Jones, prohibits Respondent Wanda McQuary from raising dogs.

Respondent Randall Jones’ Appeal Petition

On August 20, 2003, Respondent Randall Jones filed a letter [hereinafter Jones’ Appeal Petition], in which he raises four issues. First, Respondent Randall Jones requests a reduction of the civil penalty assessed against him and the removal of the disqualification from obtaining an Animal Welfare Act license (Respondent Jones’ Appeal Pet. at 1-2).

Respondent Randall Jones, by his failure to file an answer within 20 days after the Hearing Clerk served him with the Complaint, is deemed to have admitted the allegations in the Complaint.¹⁰ Thus, Respondent Randall Jones is deemed to have admitted that he willfully violated the Animal Welfare Act and the Regulations and Standards 24 times during the period from September 13, 2001, through September 26, 2002.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violation, the person’s good faith, and the history

⁹Respondent Wanda McQuary also addresses a July 22, 2003, United States Department of Agriculture inspection report, a copy of which she attached to her appeal petition (Respondent McQuary’s Appeal Pet.). The July 22, 2003, United States Department of Agriculture inspection report is not relevant to this proceeding which relates to September 13, 2001, October 2, 2001, March 26, 2002, and September 26, 2002, violations of the Animal Welfare Act and the Regulations and Standards.

¹⁰See 7 C.F.R. § 1.136(c).

of previous violations.¹¹

The limited record before me does not provide any indication of the size of Respondent Randall Jones' business; therefore, for the purposes of determining the amount of the civil penalty, I give Respondent Randall Jones the benefit of the lack of a record and assume for purposes of this Decision and Order as to Wanda McQuary and Randall Jones that Respondent Randall Jones' business is a small business.

Many of the violations of the Animal Welfare Act and the Regulations and Standards, which Respondent Randall Jones is deemed to have admitted, are grave. For example, Respondent Randall Jones' September 13, 2001, October 2, 2001, and September 26, 2002, failures to provide veterinary care for animals in need of care are serious violations of the Regulations which affect the health and well-being of Respondents' animals.

Respondent Randall Jones' conduct over a period of 1 year reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

The United States Department of Agriculture'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

¹¹See 7 U.S.C. § 2149(b).

day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant seeks: (1) revocation of Respondent Randall Jones' Animal Welfare Act license; (2) Respondent Randall Jones' disqualification from becoming licensed under the Animal Welfare Act and the Regulations; (3) the assessment of an \$8,800 civil penalty against Respondents; and (4) a cease and desist order (Complainant's Proposed Decision and Order; Complainant's Opposition to Motion by Respondent Randal [sic] Jones to Set Aside Default).

Respondent Randall Jones could be assessed a maximum civil penalty of \$66,000 for his 24 violations of the Animal Welfare Act and the Regulations and Standards.¹² After examining all the relevant circumstances, in light of the United States Department of Agriculture'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 cease and desist order, revocation of Respondent Randall Jones' Animal Welfare Act license, disqualification of Respondent Randall Jones from obtaining an Animal Welfare Act license, and assessment of an \$8,800 civil penalty are appropriate and necessary to ensure Respondent Randall Jones' compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

Second, Respondent Randall Jones states all of the violations alleged in the Complaint occurred at "9470 Hwy[,] 251[,] [P]ocahontas, AR 72455[,] and his "site is located at "565 Lawerance Rd. 131[,] Black Rock, AR 72415[,] a site that "has always been in good standing except for small write ups which "are always fixed (Respondent Jones' Appeal Pet. at 1).

Respondent Randall Jones' denial that the violations alleged in the Complaint occurred on a premises in which he had an interest comes far too late. Respondent Randall Jones is deemed to have admitted the allegations in the Complaint by his failure to file a timely answer. Complainant alleged the violations occurred on "respondents' premises (Compl. ¶¶ II-V). Therefore,

¹²Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from \$2,500 to \$2,750 (7 C.F.R. § 3.91(b)(2)(v)).

Respondent Randall Jones is deemed to have admitted that the violations occurred on a premises in which he had an interest.

Third, Respondent Randall Jones contends he recently bought a whelping building which he is currently fixing (Respondent Jones' Appeal Pet. at 1).

Respondent Randall Jones' recent purchase of a whelping building and his efforts to fix that building are not relevant to his violations of the Animal Welfare Act and the Regulations and Standards that occurred during the period from September 13, 2001, through September 26, 2002.

Fourth, Respondent Randall Jones states he is "in the process now of getting [his] own license. (Respondent Jones' Appeal Pet. at 2.)

This Decision and Order as to Wanda McQuary and Randall Jones disqualifies Respondent Randall Jones from obtaining an Animal Welfare Act license. Respondent Randall Jones' initiation of the process to obtain an Animal Welfare Act license does not alter the sanction imposed against Respondent Randall Jones. If Complainant intends to issue Respondent Randall Jones an Animal Welfare Act license and no longer believes disqualification of Respondent Randall Jones from obtaining an Animal Welfare Act license is necessary to accomplish the remedial purposes of the Animal Welfare Act, Complainant is instructed to file a petition for reconsideration requesting modification of the sanction imposed in this Decision and Order as to Wanda McQuary and Randall Jones and setting forth the reasons for any requested modification.

Basis for Adopting the ALJ's Initial Decision and Order

Respondent Wanda McQuary and Respondent Randall Jones are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to answer the Complaint within 20 days after the Hearing Clerk served them with the Complaint.

The Hearing Clerk served Respondent Wanda McQuary and Respondent Randall Jones with the Complaint, the Rules of Practice, and the Hearing Clerk's February 14, 2003, service letter on February 15, 2003.¹³ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

¹³See note 1.

§ 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 paragraph (a) of this section 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 clearly informs Respondent Wanda McQuary and Respondent Randall Jones of the consequences of failing to file a timely answer, as follows:

The respondents 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 6.

Similarly, the Hearing Clerk informed Respondent Wanda McQuary and Respondent Randall Jones in the February 14, 2003, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

February 14, 2003

Ms. Wanda McQuary
Mr. Randall Jones and
Mr. Gary Jackson
565 Country [sic] Road 131
Black Rock, Arkansas 72455

Dear Sir/Madam:

Subject: *In re: Wanda McQuary, Randall Jones, and Gary Jackson -*
Respondents
AWA Docket No. 03-0013

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 [sic].

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 [sic] on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

The Hearing Clerk sent Respondent Wanda McQuary and Respondent Randall Jones a letter dated April 30, 2003, informing them that their answers to the Complaint had not been received within the time required in the Rules of Practice. On May 6, 2003, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision. The Hearing Clerk served Respondent Wanda McQuary with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on May 15, 2003.¹⁴ The Hearing Clerk served Respondent Randall Jones with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and the Hearing Clerk's May 6, 2003, service letter on May 17, 2003.¹⁵

The Hearing Clerk informed Respondent Wanda McQuary and Respondent Randall Jones in the May 6, 2003, service letter that they had 20 days in which to file objections to Complainant's Proposed Default Decision, as follows:

May 6, 2003

Ms. Wanda McQuary
Mr. Randall Jones
Mr. Gary Jackson
565 Country [sic] Road 131
Black Rock, Arkansas 72455

Dear Sir/Madam:

Subject: *In re: Wanda McQuary, Randall Jones, and Gary Jackson*
Respondents
AWA Docket No. 03-0013

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default, together with a copy of the Proposed Decision and Order Upon Admission of Facts by Reason [of] Default, which have been filed with

¹⁴United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 5357.

¹⁵See note 4.

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

Respondent Wanda McQuary and Respondent Randall Jones failed to file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,¹⁶ generally there is no basis for

¹⁶See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *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) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did

(continued...)

setting aside a default decision that is based upon a respondent's failure to file a timely answer.¹⁷

¹⁶(...continued)

not object to the respondent's motion to reopen after default).

¹⁷See generally *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where Respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and Respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing in the proceeding was 5 months 13 days after they were served with the complaint and 4 months 24 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 16 days after the respondents' answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default (continued...))

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent Wanda

¹⁷(...continued)

decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

McQuary and Respondent Randall Jones failed to file timely answers. Respondent Wanda McQuary's first and only filing in this proceeding is Respondent McQuary's Appeal Petition, which she filed 6 months 20 days after being served with the Complaint. Respondent Randall Jones' first and only filing in this proceeding is Respondent Jones' Appeal Petition, which he filed 6 months 5 days after being served with the Complaint.

Respondent Wanda McQuary's and Respondent Randall Jones' failures to file timely answers are deemed, for purposes of this proceeding, admissions of the allegations in the Complaint and constitute waivers of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive Respondent Wanda McQuary or Respondent Randall Jones of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁸

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

ORDER

1. Respondent Wanda McQuary and Respondent Randall Jones, 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, and in particular, shall cease and desist from:

- (a) Failing to provide veterinary care to animals in need of care;
- (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;

¹⁸See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

- (c) Failing to individually identify animals, as required;
- (d) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required;
- (e) Failing to maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain the animals securely, and restrict other animals from entering;
- (f) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes and dead animals, in a manner that minimizes contamination and disease risks;
- (g) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated;
- (h) Failing to provide animals with adequate shelter from the elements; and
- (I) Failing to provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals.

The cease and desist provisions of this Order shall become effective as to Respondent Wanda McQuary on the day after service of this Order on Respondent Wanda McQuary. The cease and desist provisions of this Order shall become effective as to Respondent Randall Jones on the day after service of this Order on Respondent Randall Jones.

2. Respondent Wanda McQuary and Respondent Randall Jones are jointly and severally assessed an \$8,800 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Frank Martin, Jr., within 60 days after service of this Order on Respondent Wanda McQuary and Respondent Randall Jones. Respondent Wanda McQuary and Respondent Randall Jones shall state on the certified check or money order that payment is in reference to AWA Docket No. 03-0013.

3. Respondent Wanda McQuary's and Respondent Randall Jones' Animal

Welfare Act license is revoked. Respondent Wanda McQuary and Respondent Randall Jones are permanently disqualified from becoming licensed under the Animal Welfare Act and the Regulations.

The Animal Welfare Act license revocation provisions of this Order shall become effective as to Respondent Wanda McQuary on the 60th day after service of this Order on Respondent Wanda McQuary. The Animal Welfare Act license revocation provisions of this Order shall become effective as to Respondent Randall Jones on the 60th day after service of this Order on Respondent Randall Jones. The Animal Welfare Act license disqualification provisions of this Order shall become effective as to Respondent Wanda McQuary upon service of this Order on Respondent Wanda McQuary. The Animal Welfare Act license disqualification provisions of this Order shall become effective as to Respondent Randall Jones upon service of this Order on Respondent Randall Jones.

RIGHT TO JUDICIAL REVIEW

Respondent Wanda McQuary and Respondent Randall Jones have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent Wanda McQuary and Respondent Randall Jones must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is October 1, 2003.

BEEF PROMOTION AND RESEARCH ACT**COURT DECISION****LIVESTOCK MARKETING ASSOCIATION, v. USDA, ET AL. AND
GARY SHARP ET AL. - INTERVENORS.****Nos. 02-2769, 02-2832.****Filed: July 8, 2003.****Rehearing and Rehearing En Banc Denied Oct. 16, 2003.****(Cite as: 335 F.3d 711).****BPRA – First Amendment – Standing --Beef Checkoffs – Commercial speech – Government speech – Regulatory scheme, broad – Producer communications – Compelled speech – Controlled speech.**

Court affirmed lower court which held that the advertising paid by “Beef Checkoffs” is not immune from First Amendment considerations. The Beef Board was using BPRA funds to send messages to its members discouraging members from supporting a referendum to suspend or terminate the then current BPRA beef order [and its beef checkoffs] and to influence governmental action concerning the beef checkoff program. The market practices of beef producers were not regulated in any manner under the beef checkoff order. Livestock Marketing Association, et al. (LMA) had standing since they were being compelled (under the checkoff order) to support commercial speech to which they objected. LMA objected to their beef checkoff dollars being used for generic advertising such as to “promot[e] all cattle rather than American cattle. The court independently reviewed the material facts and determined that the beef checkoff order is in all material respects identical to the mushroom checkoff order in *United Foods*.

The court favorably compared the advertising aspects of the marketing order statutes in *United Foods*, *Washington State Apple Advertising Comm’n*, *Michigan Pork Producers* while distinguishing it from *Wileman Bros. & Elliott, Inc.* The court held that “mandated support [via checkoffs] is contrary to First Amendment principals set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. The court also distinguished *Central Hudson* [controlled speech] versus *United Foods* [compelled speech].

United States Court of Appeals,
Eighth Circuit.

Before LOKEN¹, Chief Judge, and McMILLIAN and FAGG, Circuit Judges.
McMILLIAN, Circuit Judge.

¹ The Honorable James B. Loken became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 1, 2003.

The United States Department of Agriculture ("USDA"), the Secretary of the USDA ("the Secretary"), the Cattlemen's Beef Promotion and Research Board ("the Beef Board"), the Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones (collectively "appellants") appeal from an order of the United States District Court² for the District of South Dakota in favor of the Livestock Marketing Association ("LMA"), the Western Organization of Resource Councils, and several individual beef producers (collectively "appellees") enjoining as unconstitutional the collection of mandatory assessments from beef producers under the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* ("the Beef Act"), to pay for generic advertising of beef and beef products. *Livestock Marketing Ass'n v. United States Dep't of Agric.*, 207 F.Supp.2d 992 (D.S.D.2002) (*LMA II*) (holding that the Beef Act violates the free speech clause of the First Amendment and granting permanent prospective injunctive relief). For reversal, appellants argue that the district court erred in its analysis because the advertising conducted pursuant to the Beef Act is "government speech" and therefore immune from First Amendment scrutiny or because the Beef Act survives First Amendment scrutiny either as regulation of commercial speech or as part of a broader regulatory scheme. Appellants additionally argue that the district court abused its discretion in fashioning an overly broad injunction. For the reasons stated below, we now affirm the order of the district court.

Jurisdiction

Jurisdiction was proper in the district court based upon 28 U.S.C. §§ 1331, 1361. Jurisdiction is proper in this court based upon 28 U.S.C. §§ 1291, 1292(a)(1). The notices of appeal were timely filed pursuant to Fed. R.App. P. 4(a).

Background

Following the enactment of the Beef Act, the Secretary promulgated a Beef Promotion and Research Order ("the Beef Order"), which established the Beef Board and a Beef Promotion Operating Committee ("the Beef Committee"). *See* 7 U.S.C. §§ 2903, 2904 (directing Secretary to promulgate order and setting forth required terms of order). The Beef Order requires beef producers and beef importers to pay transaction-based assessments, as mandated by the

² The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

Beef Act. *See id.* § 2904(8). This mandatory assessment program is commonly referred to as the "beef checkoff" program. The funds from the beef checkoff program are designated for promotion and advertising of beef and beef products, research, consumer information, and industry information. *See id.* § 2904(4)(B).

Under the Beef Act, the Beef Order was subject to approval by qualified beef producers through a vote by referendum. *Id.* § 2906(a). In 1988, the Beef Order was put to an initial referendum vote and was approved by a majority of the participating beef producers. Thereafter, LMA began efforts to challenge the continuation of the beef checkoff program. *See id.* § 2906(b) ("After the initial referendum, the Secretary may conduct a referendum on the request of a representative group comprising 10 per centum or more of the number of cattle producers to determine whether cattle producers favor termination or suspension of the order."). On November 12, 1999, LMA submitted petitions to the USDA requesting a referendum on whether to terminate or suspend the Beef Order. The Secretary took no action on LMA's petitions.

On December 29, 2000, appellees filed the present lawsuit in the district court seeking: (1) declaratory judgment that the Beef Act, or the Secretary's actions or inactions pursuant thereto, violate federal law; (2) an injunction prohibiting the Secretary from continuing the beef checkoff program; (3) a preliminary injunction ordering defendants to take immediate action toward a referendum on the continuation of the beef checkoff program; and (4) an order requiring the Beef Board to cease expenditures for "producer communications" (i.e., messages designed to discourage cattle producers from supporting a referendum) and to make restitution to producers of over \$10 million, representing producer communications expenditures since 1998. The district court held a hearing on January 25, 2001, and issued a preliminary injunction on February 23, 2001, enjoining defendants from further use of beef checkoff assessments to create or distribute any communications for the purpose of influencing governmental action or policy concerning the beef checkoff program. *Livestock Marketing Ass'n v. United States Dep't of Agric.*, 132 F.Supp.2d 817 (D.S.D.2001) (*LMA I*).

On June 25, 2001, the Supreme Court held that mandatory assessments imposed on mushroom producers for the purpose of funding generic mushroom advertising under the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.* ("the Mushroom Act"),

violated the First Amendment. *United States v. United Foods, Inc.*, 533 U.S. 405, 413, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (*United Foods*) ("[T]he mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.") (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (*Abood*); *Keller v. State Bar*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (*Keller*)). The Supreme Court distinguished the circumstances in *United Foods* from those in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) (*Glickman*) (rejecting First Amendment challenge to mandatory agricultural assessments which paid for generic advertising of California tree fruits), decided four years earlier. The Court explained that, in *Glickman*, "[t]he producers of tree fruit who were compelled to contribute funds for use in cooperative advertising 'd[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme,' whereas, in *United Foods*, 'the compelled contributions for advertising [were] not part of some broader regulatory scheme' and the advertising was itself the 'principal object' of the regulatory scheme. *United Foods*, 533 U.S. at 412, 415, 121 S.Ct. 2334.

Thereafter, in the present case, the district court granted appellees leave to amend their complaint to include a First Amendment claim in light of the Supreme Court's *United Foods* decision. On August 3, 2001, appellees filed an amended complaint adding a claim that generic advertising conducted pursuant to the Beef Act violates their rights under the First Amendment to freedom of speech and freedom of association. The parties thereafter filed cross-motions for partial summary judgment on the First Amendment claim, and those motions were denied.

The case proceeded to a bench trial on January 14, 2002, solely to address appellees' First Amendment claim. Upon considering the evidence presented, the district court issued *LMA II*, setting forth its findings of facts and conclusions of law. The district court held that appellees, or at least some of them, had standing to allege that they were being compelled to support speech to which they objected, in violation of their rights under the First Amendment. *See* 207 F.Supp.2d at 996-97. In this context, the district court found that individual plaintiffs objected to the use of their checkoff dollars to "promot[e] all cattle rather than American cattle," "to promote imported beef," "for

generic advertising of beef," "for generic advertising which implies that beef is all the same," and for "messages that are contrary to [the] belief that only American beef should be promoted." *Id.* at 996-97. The district court then reviewed several of the Supreme Court's pertinent First Amendment precedents, including *Abood* (1977), *Keller* (1990), *Glickman* (1997), and *United Foods* (2001). *See id.* at 997-1002. In this context, the district court discussed the Supreme Court's reasoning in *United Foods*, distinguishing the mandatory assessments for California tree fruit advertising at issue in *Glickman*, which " 'were ancillary to a more comprehensive program restricting marketing autonomy,' " from the mandatory assessments for mushroom advertising at issue in *United Foods*, which funded speech that, " 'far from being ancillary, [wa]s the principal object of the regulatory scheme.' " *Id.* at 1000 (quoting *United Foods*, 533 U.S. at 411-12, 121 S.Ct. 2334).

Regarding the underlying circumstances in the present case, the district court found, among other things:

Like the plaintiffs in *Abood* and *Keller*, the plaintiff cattle producers are compelled to associate. They are required by federal law, by virtue of their status as cattle producers who desire to sell cattle, to pay "dues," if you will, to an entity created by federal statute.

....

The beef checkoff is, in all material respects, identical to the mushroom checkoff: producers and importers are required to pay an assessment, which assessments are used by a federally established board or council to fund speech. Each sale of a head of cattle requires a one dollar payment as a checkoff. Thus, the beef checkoff is more intrusive, if you will, than was the case with the mushroom checkoff. The evidence presented to the court in this case was that at least 50% of the assessments collected and paid to the Beef Board are used for advertising. Only 10-12% of assessments collected and paid to the Beef Board are used for research. Clearly, the principal object of the beef checkoff program is the commercial speech itself. Beef producers and sellers are not in any way regulated to the extent that the California tree fruit industry is regulated. Beef producers and sellers make all marketing decisions; beef is not marketed pursuant to some statutory scheme requiring an anti-trust exemption. The assessments are not germane to a larger regulatory purpose.

Id. at 997-98, 1002 (internal citations and quotation marks omitted).

Thus, consistent with the Supreme Court's decision in *United Foods*, the

district court concluded:

The beef checkoff is unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object. The Constitution requires that expenditures for advertising of beef be financed only from assessments paid by producers who do not object to advancing the generic sale of beef and who are not coerced into doing so against their wills.

Id. at 1002.

Addressing appellants' "government speech" argument, which was essentially asserted as an affirmative defense to appellees' First Amendment claim, the district court apparently assumed that, if the generic advertising conducted pursuant to the Beef Act qualifies as government speech, then the Beef Act is immune from First Amendment scrutiny. Upon considering whether the Beef Board is "more akin to a governmental agency, representative of the people," or more "akin to a labor union or state bar association whose members are representative of one segment of the population" *id.* at 1004, the district court ultimately determined the latter to be true and concluded that "[t]he generic advertising funded by the beef checkoff is not government speech and is therefore not excepted from First Amendment challenge." *Id.* at 1006. In reaching this conclusion, the district court relied upon *United States v. Frame*, 885 F.2d 1119 (3d Cir.1989) (*Frame*), and disagreed with appellants' contention that *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) (*Lebron*), conclusively supported the contrary view. The district court explained:

Lebron could hardly be regarded as a "government speech" case. [The defendant] Amtrak was contending that it was not a governmental agency for the purposes of an artist's First Amendment challenge to the denial of his request to display an advertisement on an Amtrak billboard. The question in *Lebron* was not whether the speech was constitutional (because the government can use compelled contributions to pay for speech which is repugnant to some who contributed) but whether Amtrak could constitutionally prevent the artist's speech.

LMA II, 207 F.Supp.2d at 1005.

The district court also rejected appellants' argument that the Beef Act survives First Amendment scrutiny as a regulation of commercial speech. In so doing, the district court declined to apply the test for commercial speech used in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S.

557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (*Central Hudson*). The district court noted, among other things, that "[t]he Supreme Court in *Glickman* rejected the use of the *Central Hudson* test because [*Central Hudson*] involved a restriction on commercial speech rather than the compelled funding of speech involved in the California tree fruit marketing orders." *LMA II*, 207 F.Supp.2d at 999 (citing *Glickman*, 521 U.S. at 474 n. 18, 117 S.Ct. 2130).

On the issue of appropriate relief, appellants argued in the district court that the injunction should apply to only those who were plaintiffs in the case and only those expenditures that related to political or commercial speech. The district court disagreed as a practical matter, but recognized that retroactive enforcement of an injunction would result in undue hardships. Thus, the district court declared the Beef Act and the Beef Order unconstitutional and prospectively enjoined appellants "from any further collection of beef checkoffs as of the start of business on July 15, 2002" (i.e., approximately three weeks after the date of the district court's order). *Id.* at 1008.

The district court certified its order, which partially disposed of the issues in the case, as a final judgment pursuant to Fed.R.Civ.P. 54(b). Appellants thereafter timely filed the present appeals. We granted appellants' motion for a stay of the district court's order pending our decision³. For the reasons stated below, we now affirm the order of the district court.

Discussion

I.

We review *de novo* the question of whether the Beef Act violates the First Amendment. See *United States v. Washam*, 312 F.3d 926, 929 (8th Cir.2002) (challenge to constitutionality of federal statute reviewed *de novo*). We generally review the district court's findings of facts for clear error; however, in a case such as this involving a First Amendment claim, we will, where necessary, examine the record as a whole and "make a fresh examination of crucial facts." *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); see also *Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d

³ The stay order will remain in effect until our mandate issues.

1408, 1411 (8th Cir.1997) (en banc) ("[W]e review findings of noncritical facts for clear error.... We independently review the evidentiary basis of critical facts, giving due regard to the trial court's opportunity to observe the demeanor of witnesses.").

In the present case, we have independently reviewed the record and agree with the district court's findings of crucial facts. For example, we agree with the district court's finding that appellees are compelled to pay the statutorily-mandated assessments in question. *See LMA II*, 207 F.Supp.2d at 997-98. Unlike fees charged for the use of recreational facilities or special taxes imposed on non-essential consumer products, the mandatory assessments at issue in the present case are directly linked to appellees' source of livelihood, and they have no meaningful opportunity to avoid these assessments. We also agree with the district court that appellees, or at least some of them, disagree with the generic advertising conducted pursuant to the Beef Act. *See id.* at 996-97. Finally, upon careful consideration of the record and the pertinent statutory provisions, we agree with the district court that "[t]he beef checkoff is, in all material respects, identical to the mushroom checkoff" at issue in *United Foods*, that "at least 50% of the assessments collected and paid to the Beef Board are used for advertising," and that "the principal object of the beef checkoff program is the commercial speech itself." *Id.* at 1002.

II.

Appellants first argue that appellees' First Amendment claim is barred because the advertising conducted pursuant to the Beef Act is government speech and therefore immune from First Amendment scrutiny. The Supreme Court has never specifically addressed this government speech argument in a case involving an agricultural checkoff program. In *United Foods*, it was undisputed that the government speech argument had not been asserted or addressed in the court below. Therefore, the Supreme Court declined to consider whether or not the Mushroom Act was immune from First Amendment scrutiny on that basis. *See United Foods*, 533 U.S. at 416-17, 121 S.Ct. 2334 ("As the Government admits in a forthright manner, ... this [government speech] argument 'was not raised or addressed' in the Court of Appeals.' ... The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government.").

Since the Supreme Court's *United Foods* decision, many district courts have addressed the government speech issue in determining the constitutionality of various agricultural checkoff programs. Compare, e.g., *Charter v. United States Dep't of Agriculture*, 230 F.Supp.2d 1121 (D.Mont.2002) (*Charter*) (upholding the beef checkoff program on ground that generic advertising under the Beef Act is government speech), with *Pelts & Skins, L.L.C. v. Jenkins*, No. CIV.A.02-CV-384, 2003 WL 1984368, at (M.D.La. Apr.24, 2003) (holding that mandatory assessments imposed to fund generic advertising of alligator products violate alligator farmer's First Amendment rights; reasoning in part: "[b]ecause the generic advertising here involved is not government speech, plaintiff is free to challenge such advertising on First Amendment grounds"); *In re Washington State Apple Advertising Comm'n*, 257 F.Supp.2d 1290, 1305 (E.D.Wa.2003) (holding that mandatory assessments imposed to fund generic advertising of Washington State apples violate apple producers' First Amendment rights; reasoning in part: "the Commission's activities are not protected by the government speech doctrine"); *Michigan Pork Producers v. Campaign for Family Farms*, 229 F.Supp.2d 772, 785-89 (W.D.Mich.2002) (holding that mandatory assessments imposed to fund generic advertising of pork and pork products violate pork producers' First Amendment rights; reasoning in part: "[t]hough the Secretary is integrally involved with the workings of the Pork Board, this involvement does not translate the advertising and marketing in question into 'government speech' "). In the present case, appellants have specifically urged us to follow the reasoning and disposition in *Charter*.

Appellants describe the government speech doctrine as follows:

The government is constitutionally entitled to engage in its own speech without implicating the First Amendment. As this Court has recognized, "[t]he First Amendment does not prohibit the government itself from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial discretion over its own medium of expression." "

Brief for Appellants⁴ at 26 (quoting *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir.)) (*Ku Klux Klan*) (where underwriting acknowledgments by nonprofit public broadcast ratio

⁴ Citations to the "Brief for Appellants" refer to the brief filed by United States Department of Justice on behalf of the federal appellants.

station constituted governmental speech, state university operating the station could exercise editorial discretion over content of such acknowledgments without being subject to First Amendment forum analysis), *cert. denied*, 531 U.S. 814, 121 S.Ct. 49, 148 L.Ed.2d 18 (2000), (quoting *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1044 (5th Cir.1982) (en banc)).

As to the determination of whether generic advertising under the Beef Act is or is not government speech, appellants cite our decision in *Ku Klux Klan* for proposition that government speech may be identified based upon the central purpose of the program, the degree of editorial control exercised by the government over the content of the message, and whether the government bears the ultimate responsibility for the content of the message. In addition, appellants cite *Lebron*, 513 U.S. at 400, 115 S.Ct. 961, in which the Supreme Court stated that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." Applying these principles to the present case, appellants contend that the generic advertising under the Beef Act is government speech. They emphasize, among other things, that the Beef Board and the Beef Committee were created pursuant to the Beef Act, members of the Beef Board and the Beef Committee serve at the direction and under the control of the Secretary, the Beef Act itself prescribes the content of the Beef Board's and the Beef Committee's speech as generic promotion of beef and beef products, and the Beef Act defines the powers and duties of the Beef Board and the Beef Committee vis- a-vis those promotional activities. Moreover, they argue, the First Amendment exemption for government speech applies whether it is the government itself speaking or a private entity enlisted by the government to speak on the government's behalf. *See, e.g., Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

Appellants also dispute the district court's reasoning based upon the Third Circuit's 1989 decision in *Frame*. In *Frame*, the Third Circuit emphasized that funding for advertising under the Beef Act comes from an identifiable group rather than a general tax fund and reasoned that this type of funding creates a "coerced nexus" between the message and the group. However, appellants argue, such reasoning based upon a "coerced nexus" has been rejected by the Supreme Court in cases such as *Board of Regents v. Southworth*, 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000)

(*Southworth*) (in evaluating a First Amendment compelled speech claim based upon the use of mandatory student activity fees to fund private organizations engaging in political or ideological speech, holding that "the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle").

III.

We begin our analysis by examining the so-called "government speech doctrine" at a fundamental level. The government speech doctrine has firm roots in our system of jurisprudence. As the Supreme Court has explained:

Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he [or she] disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller, 496 U.S. at 12-13, 110 S.Ct. 2228 (citing *United States v. Lee*, 455 U.S. 252, 260, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (religious belief in conflict with payment of taxes affords no basis under the free exercise clause for avoiding uniform tax obligation)).

However, the government speech doctrine clearly does not provide immunity for all types of First Amendment claims. *Cf. Santa Fe Sch. Dist. v. Doe*, 530 U.S. 290, 302-10, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (student-led prayers delivered prior to home football games at a public high school constituted public speech attributable to the school district and thus violated the establishment clause of the First Amendment), *cited in Charter*, 230 F.Supp.2d at 1134-36. Nor do the cases cited by appellants hold that, when the government speaks, it is entirely immune from all types of First Amendment free speech claims. Our decision in *Ku Klux Klan*, for example, upheld a discretionary decision by a state university-run radio station to decline an offer of an underwriting donation because the university did not wish to publicly acknowledge the source of the offered donation, as was required by law. That case stands for the proposition--embodied in the language from *Keller* quoted above--that, when the government speaks in its role as the government, it may

be immune from First Amendment challenge based upon its choice of content. *Cf. Rust v. Sullivan*, 500 U.S. 173, 192-95, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (the government may, without violating the First Amendment, selectively fund speech that is believed to be in the public interest, while at the same time restricting funding for speech that promotes an alternate viewpoint). Indeed, as appellants themselves argue: "Because the First Amendment limits government interference with private speech rather than the Government's own speech, 'when the State is the speaker, it may make content-based choices ... [and] it is entitled to say what it wishes.'" Brief for Appellants at 26 (quoting *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)).

Appellants have inadvertently identified the precise flaw in their government speech argument. Unlike in *Ku Klux Klan*, where the plaintiffs challenged a decision concerning the content of government speech, appellees in the present case are challenging the government's authority to compel them to support speech with which they personally disagree; such compulsion is a form of "government interference with private speech." The two categories of First Amendment cases--government speech cases and compelled speech cases--are fundamentally different. *See, e.g., Southworth*, 529 U.S. at 234-35, 120 S.Ct. 1346 (in addressing a First Amendment compelled speech claim based upon the use of mandatory student activity fees to fund private organizations engaging in political or ideological speech, the Supreme Court noted that "the analysis likely would be altogether different" if the matter concerned speech by the University)⁵.

In the present case, appellees have not invoked the First Amendment to influence the content of the generic beef advertising at issue. Rather, they

⁵ Similarly, appellants' reliance on *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) (*Lebron*), is misplaced. *Lebron* involved an artist's First Amendment claim against the entity commonly known as Amtrak, challenging Amtrak's refusal to allow him to lease billboard space for political advertising. The issue before the Supreme Court was whether Amtrak was a private corporation or part of the government for purposes of determining its exposure to a constitutional challenge. *Id.* at 379, 115 S.Ct. 961. Amtrak argued that it was *not* part of the government and therefore not subject to the constitutional challenge. By contrast, in a government speech case, the defendant typically argues that it *is* part of the government and therefore immune from content-related First Amendment scrutiny of its own speech under the government speech doctrine. Moreover, even if the Beef Board and the Beef Committee were deemed to be parts of the government under the *Lebron* standard and the speech in question was therefore deemed to be government speech, our First Amendment inquiry would not end there. *See infra* at 19-20 & n. 9.

assert their First Amendment free speech and free association rights to protect themselves from being compelled to pay for that speech, with which they disagree. Their First Amendment claim predominantly raises a free speech issue⁶, and our analysis is generally governed by the Supreme Court's compelled speech line of cases, including *Keller* and *Abood*. See *United Foods*, 533 U.S. at 413, 121 S.Ct. 2334 ("It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.") (citing *Keller* and *Abood*). As suggested by Justice Stevens in his concurring opinion in *United Foods*, 533 U.S. at 417-18, 121 S.Ct. 2334, cases such as *Keller*, *Abood*, and the case at bar--involving compelled payment of money--may be viewed as the "compelled subsidy" subset of the compelled speech cases.

[5] In compelled speech cases, the Supreme Court has traditionally applied a balancing-of-interests test to determine whether or not the challenged governmental action is justified. See, e.g., *Keller*, 496 U.S. at 13, 110 S.Ct. 2228 ("[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services."); *Wooley v. Maynard*, 430 U.S. 705, 715-16, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (*Wooley*) ("Identifying the [appellees'] interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to [convey the message to which they object]."). In the present case, we must decide what constitutional standard applies when compelled subsidies are used to fund generic commercial advertising. On this question, appellants have consistently argued that, even if the Beef Act is not immune from First Amendment scrutiny under the government speech doctrine, it nevertheless survives First Amendment scrutiny as regulation of commercial speech under the *Central Hudson* standard.

⁶ As indicated in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222-23, 233-36, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), if appellees' First Amendment claim challenged only the fact that they are being compelled to contribute to a collective fund, their claim would implicate only their free association right. However, because appellees are additionally challenging the use of those funds to pay for disfavored speech, their claim predominantly implicates their free speech right.

We are again faced with an issue that was not directly addressed by the Supreme Court in *United Foods*. In *United Foods*, 533 U.S. at 409- 10, 121 S.Ct. 2334 (internal citations omitted), the Supreme Court stated:

We have used standards for determining the validity of speech regulations which accord less protection to commercial speech than to other expression. That approach, in turn, has been subject to some criticism. We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case. It should be noted, moreover, that the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test.

In the present case, as stated above, the district court declined to apply the *Central Hudson* test to appellees' First Amendment claim, noting that the Supreme Court had declined to apply that test in *Glickman*. See *LMA II*, 207 F.Supp.2d at 999 ("The Supreme Court in *Glickman* rejected the use of the *Central Hudson* test because [*Central Hudson*] involved a restriction on commercial speech rather than the compelled funding of speech involved in the California tree fruit marketing orders.") (citing *Glickman*, 521 U.S. at 474 n. 18, 117 S.Ct. 2130). However, we disagree with the district court's reasoning because it fails to account for the more recent pronouncements in *United Foods*. In *United Foods*, the Supreme Court went out of its way to distinguish the broad cooperative scheme that comprehensively regulated the California tree fruit industry at issue in *Glickman* from the comparatively unregulated, and more commercially competitive, mushroom industry. The Court also emphasized that collective advertising was the "principal object" of the Mushroom Act, *United Foods*, 533 U.S. at 415, 121 S.Ct. 2334, whereas the collective advertising in *Glickman* was just one among many of the "anticompetitive features of the [California tree fruit] marketing orders," *Glickman*, 521 U.S. at 470, 117 S.Ct. 2130. Accordingly, we conclude that *Glickman* does not provide a complete answer to this commercial speech issue. We infer that, had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case, but would nevertheless have held that the Mushroom Act unconstitutionally regulated commercial speech. Such an inference, we believe, is consistent with the language from *United Foods* quoted above. We reach this conclusion recognizing that *Central Hudson*

involved a restriction on speech⁷ while the present case involves compelled speech. In our view, it is more significant that *Central Hudson* and the case at bar both involve government interference with private speech in a commercial context. Accordingly, because the beef checkoff program at issue in the present case is identical in all material respects to the mushroom checkoff program at issue in *United Foods*, we now adapt the *Central Hudson* test to appellees' First Amendment claim.

In *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343, the Supreme Court explained:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In adapting the *Central Hudson* test to the particular circumstances of this case, we ask not whether the expression at issue is protected but rather whether appellees have a protected interest in avoiding being compelled to pay for the expression at issue (the generic beef advertising). We have already answered that question; under the compelled speech line of cases, appellees have a protected First Amendment interest at stake. The remaining questions are whether the governmental interest in the beef checkoff program is substantial and, if so, whether the beef checkoff program directly advances that governmental interest and is not more extensive than necessary to serve that interest. Stated more succinctly, the issue is whether the governmental interest in the commercial advertising under the Beef Act⁸ is sufficiently substantial to justify the infringement upon appellees' First Amendment right not to be compelled to subsidize that commercial speech.

⁷ In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570-71, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court held that a regulation promulgated by the New York Public Service Commission, which completely banned promotional advertising by a utility company, violated the company's First Amendment free speech right because it was more extensive than necessary to further the State's governmental interest in energy conservation.

⁸ Appellants describe the governmental interest as "protecting the welfare of the beef industry." Brief for Appellants at 51.

At this juncture, we may now revisit appellants' government speech arguments, to put them into proper perspective. Appellants' government speech arguments are relevant to our assessment of the substantiality of the government's interest⁹. As a general proposition, the greater the government's responsibility for, and control over, the speech in question, the greater the government's interest therein. In this sense, we do take into account the quasi-governmental nature of the Beef Board and the Beef Committee and the oversight, albeit limited, exercised by the Secretary over the generic advertising conducted pursuant to the Beef Act. However, consistent with the district court's conclusion that the advertising in question is not government speech, we consider the substantiality of the government's interest to be highly doubtful. In any event, even assuming that the government's interest is substantial, our First Amendment inquiry does not end there. We must determine whether the government's interest is sufficiently substantial to justify the infringement upon appellees' First Amendment rights. At this point, the analysis turns largely upon the nature of the speech in question. *See, e.g., Central Hudson*, 447 U.S. at 563, 100 S.Ct. 2343 (constitutional protection available turns on both the nature of the governmental interest served by the regulation and the nature of the expression).

In *Keller* and *Abood*, the Supreme Court considered the nature of the speech at issue in terms of whether or not it was *germane* to the institutional purposes which justified the mandatory dues in the first place. In *Keller*, 496 U.S. at 13-14, 110 S.Ct. 2228, the Court explained:

Abood held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those

⁹ As we have already explained, a determination that the expression at issue is government speech does not preclude First Amendment scrutiny in the compelled speech context. For example, in *Wooley v. Maynard*, 430 U.S. 705, 715-16, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), the issue was whether New Hampshire motorists could be compelled to convey a message with which some of them disagreed, by having it displayed on their state-issued license plates. The message was clearly "government speech" in the sense that it came directly from the state, yet it was ultimately held to violate the First Amendment. *See id.* at 717, 97 S.Ct. 1428 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh the individual's First Amendment right to avoid becoming the courier for such message.").

goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

More recently, in *Southworth*, 529 U.S. at 232-35, 120 S.Ct. 1346, the Supreme Court determined that the germaneness standard was "unmanageable" in the context of a state university, "particularly where the State undertakes to stimulate the whole universe of speech and ideas." Thus, the Court held in that particular case that "[t]he proper measure, and the principal standard of protection for objecting students ... is the requirement of viewpoint neutrality in the allocation of funding support." *Id.* at 233, 120 S.Ct. 1346. The Court explained:

Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Id. at 233-34, 120 S.Ct. 1346.

As observed above, the Court also alluded to the government speech doctrine in *Southworth* by stating:

Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or--of particular importance--its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. *The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.*

Id. at 234-35, 120 S.Ct. 1346 (emphasis added) (internal citations omitted).

The Supreme Court has repeatedly warned that, when assessing the nature of the speech in the compelled speech context--whether based upon germaneness, viewpoint neutrality, or some other benchmark--the analysis often comes down to a difficult line-drawing exercise. *See Keller*, 496 U.S. at 15, 110 S.Ct. 2228 ("Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the

legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern."); *Abood*, 431 U.S. at 236, 97 S.Ct. 1782 ("There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited."). In the case at bar, however, we need not, ourselves, engage in such a line-drawing exercise. The Supreme Court has already drawn the relevant line for us. In *United Foods*, the Supreme Court explained:

The statutory mechanism as it relates to handlers of mushroom is concededly different from the scheme in *Glickman*; here the statute does not require group action, save to generate the very speech to which some handlers object. In contrast to the program upheld in *Glickman*, where the Government argued the compelled contributions for advertising were "part of a far broader regulatory system that does not principally concern speech," there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. Although greater regulation of the mushroom market might have been implemented, ... the compelled contributions for advertising are not part of some broader regulatory scheme. The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech.

533 U.S. at 415-16, 121 S.Ct. 2334 (internal citation omitted); *see also id.* at 418, 121 S.Ct. 2334 (Stevens, J., concurring) ("As we held in *Glickman*, *Keller*, and a number of other cases, such a compelled subsidy is permissible when it is ancillary, or 'germane,' to a valid cooperative endeavor. The incremental impact on the liberty of a person who has already surrendered far greater liberty to the collective entity (either voluntarily or as a result of permissible compulsion) does not, in my judgment, raise a significant constitutional issue if it is ancillary to the main purpose of the collective program. This case, however, raises the open question whether such

compulsion is constitutional when nothing more than commercial advertising is at stake. The naked imposition of such compulsion, like a naked restraint on speech itself, seems quite different to me. We need not decide whether other interests ... might justify a compelled subsidy like this, but surely the interest in making one entrepreneur finance advertising for the benefit of his [or her] competitors, including some who are not required to contribute, is insufficient." (internal footnote omitted).

This court is duty-bound to reconcile and apply the precedents of the Supreme Court to the best of our ability. The beef checkoff program is, in all material respects, identical to the mushroom checkoff program at issue in *United Foods*. See 207 F.Supp.2d at 1002. Therefore, notwithstanding the reasoned counterpoints advanced by the dissent in *United Foods*, see 533 U.S. at 419-31, 121 S.Ct. 2334 (Breyer, J., dissenting), we conclude that the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right. Accordingly, the district court did not err in holding that the Beef Act and the Beef Order are unconstitutional and unenforceable.

IV.

Having carefully reviewed the arguments asserted by the parties concerning the scope of the injunction imposed by the district court, we further hold that the district court did not abuse its discretion in fashioning its relief. Our holding that the Beef Act is unconstitutional is not limited solely to the plaintiffs in the present case. See, e.g., *United Foods*, 533 U.S. at 416, 121 S.Ct. 2334 (holding that "the assessments are not permitted under the First Amendment"). We also reject the suggestion that a portion of the assessments may continue to be collected because some of the funds are spent on activities other than commercial or political speech. When the Beef Act was amended in 1985, Congress specifically deleted a pre-existing severability provision. The legislative history of that deletion is described as follows:

Separability of Provisions

Section 19 of Pub.L. 94-294, which provided that if any provision of this Act [enacting this chapter and provisions set out as notes under this section] or

the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby, *was omitted* in the general revision of sections 2 through 20 of Pub.L. 94-294 by Pub.L. 99-198, Title XVI, § 1601(b), Dec. 28, 1985, 99 Stat. 1597.

7 U.S.C.A. § 2901 (West 1985) (Historical and Statutory Notes) (emphasis added). In view of this clear expression of non-severability and the fact that the "principal object" of the Beef Act is the very part that makes it unconstitutional (i.e., compelled funding of generic advertising), no remaining aspects of the Act can survive.

Conclusion

For the reasons set forth above, the order of the district court is affirmed.

EQUAL ACCESS JUSTICE ACT**DEPARTMENTAL DECISION****DONALD J. AND DIANA KLOSTERMAN.****EAJA-FSA Docket No. 202WEA0855.****Decision and Order.****Filed September 24, 2003.****Failure to follow procedures when filing a Petition for Review is excused – Request for additional fees and expenses is not a new EAJA application and is not untimely.**

The Director of the National Appeals Division affirmed the Adjudicating Officer's award of \$7,424.73 to Equal Access to Justice Act Applicants. Moreover, the Director concluded that Applicants did not follow USDA regulations for filing a Petition for Review. However, because the Adjudicating Officer provided incorrect instructions to Applicants for filing a review, the Director accepted Applicants' March 14, 2003 letter as a Petition for Review. In that Petition for Review, Applicants requested an amendment of \$992.84 for additional fees and expenses. The Director awarded Applicants \$8,417.57 for legal fees and expenses.

Margit Halvorson, for Respondent.

Adam W. Hamm, for Respondent.

Initial decision issued by Carol Christianson, Adjudicating Officer.

Decision and Order issued by Roger Klurfeld, Director, National Appeals Division.

Donald J. and Diana Klosterman [hereinafter Applicants] instituted this proceeding under the Equal Access to Justice Act (5 U.S.C § 504) [hereinafter EAJA] 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 (2003) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture [hereinafter USDA], National Appeals Division [hereinafter NAD] on November 4, 2002. Applicants seek fees and other expenses incurred in connection with *Donald J. and Diana Klosterman*, NAD Case No. 2002W000855.

INTRODUCTION

On March 21, 2002, the Farm Service Agency [hereinafter Respondent] issued an adverse decision in which Respondent determined that Diana Klosterman did not meet the producer eligibility requirements for the 2001 Sugar PIK program. Respondent determined that Ms. Klosterman owed \$9,995.75 plus interest for sugar already received. Liquidated damages of

\$29,987.25 were also assessed. By letter dated April 17, 2002, Applicants requested an appeal of Respondent's adverse decision pursuant to 7 U.S.C. §§ 6991-7002 and NAD Rules of Procedures, 7 C.F.R. §§ 11.1-.14. On October 7, 2002, the NAD Hearing Officer issued an Appeal Determination in which she found Respondent was erroneous in requesting a refund of \$9,995.75 plus interest and liquidated damages of \$29,987.25. Neither party requested a Director Review of the Hearing Officer's determination. NAD issued a notice concluding the appeal on November 15, 2002.

FACTURAL BACKGROUND

Applicants allege in their November 4, 2002 EAJA Application that (1) they were the prevailing parties in *Donald J and Diana Klosterman*, NAD Case No. 2002W000855, in which they appealed Respondent's adverse decision; (2) the adverse decision stating Diana Klosterman was ineligible for benefits under the 2001 Sugar Payment-In-Kind Diversion Program (2001 Sugar PIK Program) was reversed; (3) they had incurred fees and expenses of \$7,059.06 as of November 4, 2002 in connection with their appeal of Respondent's adverse decision; and (4) Respondent's position in NAD Case No. 2002W000855 was not substantially justified.

On November 25, 2002, NAD informed Applicants their EAJA Application was incomplete. Applicants were given until December 15, 2002, to submit a complete application.

By letter dated November 27, 2002, the USDA Office of General Counsel [hereinafter OGC] submitted on behalf of Respondent "Government's Answer to Application for Fees Under the Equal Access to Justice Act. Respondent stated that (1) the application did not show that Applicants were eligible to receive an award for expenses because the application neither contained a declaration that Applicants' net worth did not exceed \$2 million as required by 7 C.F.R. § 1.190, nor provided a detailed exhibit showing the net worth of Applicants; (2) the application did not contain a written verification under oath or affirmation under penalty or perjury; (3) the statement supporting Applicants' request for award reflected an hourly rate for two attorneys at \$130 and \$160 per hour, which amounts exceed the maximum hourly rate of \$125 permitted under the EAJA; and (4) only "reasonable and "necessary expenses are recoverable under EAJA.

By letter dated December 11, 2002, Applicants submitted the additional information requested by NAD. In the letter, Applicants revised their fees and expenses. As of December 5, 2002, Applicants claimed attorney fees and

expenses totaled \$7,748.23.

By letter dated December 12, 2002, Applicants submitted a "Response to Government's Answer to Application for Attorney Fees. Applicants stated (1) the contentions made by Respondent concerning the statements regarding net worth, the net worth exhibit, and the issue involving affirmation or verification were without merit; (2) the statute allows for the possibility that a rate may exceed \$125 per hour; and (3) Respondent's contention is without merit when claiming that the \$162, \$43, and \$69 facsimile costs are unreasonable and unnecessary.

On December 13, 2002, NAD issued a "Notice of EAJA Application. The Notice stated Applicants had filed a timely application and that written responses were to be filed with NAD Hearing Officer Carol Christianson [hereinafter Adjudicating Officer].

On January 10, 2003, Respondent submitted the "Government's Reply to Appellants' Response to Government's Answer to Application for Attorney Fees. Respondent withdrew its objections regarding the statement of net worth, the net worth exhibit, and the affirmation or verification. Respondent continued to maintain, however, that the attorney fees should not be awarded in excess of the \$125 rate and that only "reasonable expenses may be compensated.

On January 22, 2003, Applicants submitted their "Reply to Government's Reply to Applicants' Response to Government's Answer to Application for Attorney Fees. In that submission, Applicants stated Respondent's assertion is without merit regarding Respondent's contention that their facsimile costs were unreasonable.

On March 6, 2003, the Adjudicating Officer issued her decision [hereinafter Initial Decision and Order] in which she determined that (1) the application met all the conditions of eligibility for an award of EAJA fees and expenses; (2) Respondent's actions and decision were not substantially justified; (3) Applicants were the prevailing party in the adversarial adjudication; (4) Applicants did not unduly or unreasonably delay or protract the proceedings; and (5) there were no special circumstances that would make the award of expenses unjust. As a result, the Adjudicating Officer awarded Applicants \$7,424.73 [\$6,943.50 in legal fees and \$481.23 in expenses].

By letter dated March 14, 2003, Applicants submitted an amendment requesting an increase of the award to include additional attorney fees and expenses. Applicants requested that the March 6, 2003 decision be amended to include additional

attorney fees and expenses for a total award of \$8,417.57. The additional costs were incurred during the period December 6, 2002 to January 23, 2003.

On March 25, 2003, NAD issued an "EAJA Notice of Petition for Judicial Officer Review. Attached to the Notice was a March 20, 2003 letter from Respondent objecting to the submission or consideration of Applicants' amendment request for additional attorney fees and expenses. Respondent contended the request is a new application for attorney fees and expenses and is therefore untimely.

Applicants submitted a letter dated March 25, 2003, in which they claim that the amendment request is an extension of the original application. Applicants disagreed with Respondent's position that their March 14, 2003 letter is a new application simply because Applicants ask for additional attorney fees and expenses.

Applicants submitted to NAD, attention the Judicial Officer, a letter dated March 28, 2003, acknowledging receipt of the March 25, 2003 EAJA Notice of Petition for Judicial Officer Review. Attached to the letter was a March 25, 2003 letter explaining that the request for additional attorney fees and expenses was a request for fees and expenses incurred during the period December 6, 2002 to January 23, 2003.

Respondent submitted "Government's Response to Petition for Judicial Officer Review" on April 4, 2003. Respondent stated (1) Applicants did not comply with the requirements for filing a Petition for Review in accordance with 7 C.F.R. §§ 1.145(a), 1.146(a), and 1.201; (2) Applicants' March 14, 2003 letter, which is not a Petition for Review, does not allege an error or omission in the award of fees but is an application for new fees; (3) Applicants' attorney failed to comply with regulations governing Petitions

for Review by submitting a letter to the Judicial Officer on March 28, 2003 and enclosing the March 25, 2003 letter that requested an amendment increase of fees; and

(4) Applicants are not entitled to fees and costs for work involved in submitting the EAJA application itself.

ISSUES NOT CONTESTED

There is no dispute that Applicants were the prevailing party in the adversarial adjudication. Respondent did not request a Director Review Determination of the Hearing Officer determination that found Diana Klosterman was eligible for the 2001 Sugar PIK program. The determination

issued by NAD Hearing Officer, Case No. 2002W000855, was the final agency decision issued. Ms. Klosterman prevailed over the Respondent's decision to deny eligibility.

Neither Applicants nor Respondent disputed the Adjudicating Officer's determination that: (1) Respondent's actions and decision were not substantially justified; (2) Applicants had not unduly or unreasonably delayed or protracted the proceedings; (3) and there were no special circumstances that would make the award of expenses unjust. In particular, Respondent has been silent as to whether its actions were substantially justified.

Applicants' EAJA application contains a statement of Diana Klosterman's net worth, which did not exceed \$2 million, as well as an itemization of legal fees and other expenses incurred in prosecuting Applicants' appeal. After Applicants filed these documents, Respondent withdrew its objections to Applicants' failure to meet the EAJA application requirements. I therefore find that Applicants' EAJA meets the regulatory requirements.

Respondent claims that attorney fees are limited to \$125 per hour for EAJA claims. Applicants' position is that EAJA allowed for the possibility that the rate may exceed \$125 per hour. However, when Applicants submitted their amended claim, dated March 14, 2003, to increase fees for additional hours incurred by their attorney, the amount requested [\$925] was based on a rate of \$125 per hour. On appeal to the Judicial Officer, Applicants have not challenged the Adjudicating Officer's decision to reduce their attorney fees to \$125.

Respondent did not continue to pursue its argument to deny Applicants' cost of \$274 for sending documents via facsimile on three separate days. Respondent had insufficient evidence in the record to support its position that the uses of facsimile on the days in question were an unreasonable expense. The \$274 facsimile cost was included in the \$481.23 expenses awarded by the Adjudicating Officer.

ISSUES OF THE CASE

EAJA and the EAJA Rules of Practice provide that a decision concerning an applicant's eligibility for an award of fees and other expenses incurred by the party in connection with an adversary adjudication must be based on the

record of the adversary adjudication. Therefore, this Decision and Order is based on the record in *Donald J. and Diana Klosterman*, NAD Case No. 2002W000855, and Applicants' and Respondent's filings in this proceeding.

The issues to be resolved in this proceeding are (1) whether Applicants followed correct procedures to file a Petition for Review, and (2) whether Applicants' request for additional fees and expenses is a new application for fees and is therefore untimely.

LEGAL STANDARDS

The following are the statutory and regulatory provisions pertaining to these issues.

I. Statutory Provisions

5 U.S.C.:

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

....

CHAPTER 5 ADMINISTRATIVE PROCEDURE

SUBCHAPTER I – GENERAL PROVISIONS

....

§ 504. Cost 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 based on 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 that 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 reason or basis therefore. 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) “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;
- (D) “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. . . .
- (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. III 1997).

II. Regulatory Provisions

7 C.F.R.:

§ 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 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. . . . Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.
- (b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the

appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

§ 1.146(a) Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

- (a) *Petition requisite – (1) Filing; service; ruling.* A petition for reopening the hearing to take further evidence, or for rehearing or reargument of the proceeding, or for reconsideration of the decision of the Judicial Officer, must be made by petition filed with the Hearing Clerk. Every such petition must state specifically the grounds relied upon. Any such petition filed prior to the filing of an appeal of the Judge's decision pursuant to § 1.145 shall be ruled upon by the Judge, and any such petition filed thereafter shall be ruled upon by the Judicial Officer.

ANALYSIS

1. APPLICANTS' FAILURE TO FOLLOW CORRECT PROCEDURES WHEN FILING A PETITION FOR REVIEW IS EXCUSED

Applicants submitted two letters dated March 14, 2003, in which they requested an amendment to the Adjudicating Officer's March 6, 2003 decision. One letter was sent to the Adjudicating Officer and the other was addressed to both OGC and NAD. The letters acknowledge that the legal fees awarded are at the rate of \$125 per hour and the total award is \$7,424. Applicants' explanation for submitting the letter was that the additional attorney fees and expenses covered the period December 6, 2002 to January 23, 2003, and were necessary to reply to Respondent's filings. Applicants submitted a March 25, 2003 letter to the Adjudicating Officer objecting to Respondent's argument that Applicants' March 14, 2002 letter was a new application for fees and was untimely. Finally, Applicants submitted a March 28, 2003 letter to NAD, attention Judicial Officer, requesting an amendment to the award of attorney fees and expenses. Attached to that letter was a copy of the March 25, 2003 letter.

I agree with Respondent that Applicants did not follow USDA regulations for filing a Petition for Review. Respondent argued that Applicants did not file

a Petition for Review as set forth in 7 C.F.R. §§ 1.145(a), 1.146(a), and 1.201. However, Applicants followed the review rights provided by the Adjudicating Officer and the attachments, “Notice of Right to Request Director Review” and “Request for Director Review” that were included with the decision. Although §§ 1.145(a), 1.146(a) and 1.201 were included in the Adjudicating Officer’s instructions, she added the statement that the Secretary had delegated EAJA authority to the Director. Unfortunately, at the time the Review rights were granted, the delegation of authority given the NAD Director by the Secretary of Agriculture had expired.¹ Because the instructions provided by the Adjudicating Officer were incorrect, I accept Applicants’ March 14, 2003 letter as a Petition for Review.

2. APPLICANTS’ REQUEST FOR ADDITIONAL FEES AND EXPENSES IS NOT A NEW EAJA APPLICATION AND IS NOT UNTIMELY

In Applicants’ March 14, 2003 letter to the Adjudicating Officer, they requested that the March 6, 2003 decision be amended to include additional attorney fees and expenses. The additional fees and expenses were incurred during the period December 6, 2002 to January 23, 2002. The total amount requested was \$992.84. The additional attorney fees for 7.4 hours were at a rate of \$125 per hour and totaled \$925. The additional expenses totaled \$67.84 and include (1) facsimile charges of \$54.00, (2) postage of \$1.44, (3) telephone calls of \$10.20, and (4) photocopies of \$2.20. Applicants consider their request as an amendment and extension of the original claim for attorney fees. They incurred these expenses because of the need to continue to reply to Respondent’s filings. Applicants argued their March 14, 2003 amendment was similar to one they requested on December 11, 2002.

¹ The Secretary of Agriculture, by memorandum dated June 14, 1999, delegated EAJA authority to the NAD Director. This authority was for a two-year period and expired June 14, 2001.

On May 20, 2003 the Secretary delegated EAJA authority to the Director. Seven C.F.R. § 1.189 revised
68 Fed. Reg. 27,435 (2003) to read as follows:

§ 1.189 Delegations of authority.

(b)(1) The Secretary of Agriculture delegates to the Director of the National Appeals Division authority to take final actions on matters pertaining to the Act for proceedings under 7 C.F.R. Part 11.

Previously, Applicants had requested an amendment to increase their fees and expenses incurred through November 26, 2002. This requested amount, that totaled \$104.17 for expenses, was approved by the Adjudicating Officer and awarded in her March 6, 2003 decision.

I disagree with Respondent that the amendment for fees and expenses was not part of the evidentiary record upon which the Adjudicating Officer based her decision. The EAJA statute does not specify that fees and expenses are to be awarded for work and expenses incurred before the filing of an EAJA application. While it is true that for the purpose of reimbursement under EAJA, the rate at which fees and some other expenses are compensated is limited, nothing in the statute limits those costs incurred before an applicant files its EAJA petition. Moreover, the definition of "adversary adjudication" does not contain a limitation on awarding fees and expenses incurred for an adversary adjudication prior to the filing of an EAJA application. The additional 7.4 hours are attorney fees for work done for Applicants' EAJA application. Applicants' request is not a request for a new EAJA application but a continuation of Applicants' original EAJA application. Therefore, I conclude that Applicants' request for additional attorney fees and expenses is not a new EAJA request.

CONCLUSION

Based upon a careful reading of the record in this proceeding, I affirm the Adjudicating Officer's Initial Decision and Order. For the foregoing reasons, the following Order should be issued.

ORDER

Pursuant to the Equal Access to Justice Act, Applicants are awarded \$8,417.57 for legal fees and expenses they incurred in connection with *Donald J. and Diana Klosterman*, NAD Case No. 2002W000855.

Done at Washington, D.C.
September 29, 2003

FEDERAL CROP INSURANCE ACT

COURT DECISION

**TRUDY TYLER BELGARD, et vir, AND BELWISE AQUACULTURE
SYSTEM, INC., v. USDA.**

No. 03-289.

Filed October 14, 2003.

Cite as: 124 S.Ct. 413).

CLDAP.

Crop Loss Disaster Assistance Program.

Supreme Court of the United States

Petition for writ of certiorari to the United States Court of Appeals for the Fifth
Circuit denied.

FEDERAL MEAT INSPECTION ACT

COURT DECISION

MICHAEL BAUR FARM SANCTUARY, INC. v. USDA.

Docket No. 02-6249.

Filed: December 16, 2003.

(Cite as: 352 F.3d 625).

FMIA – FSIS – Standing – BSE – Risk, exposure to enhanced – Risk, hypothetical – Injury-in-fact – Concrete and particularized – Actual and eminent.

Although at the time of the pleading the risk of exposure to BSE in the United States food supply was hypothetical, Plaintiff, Bauer, alleged that the enhanced risk of death (no known cure or treatment) justified a cautious approach including mandatory testing of every animal exhibiting symptoms of “downed cattle. Bauer requested that meat products from “downed animals be classified as “adulterated. FSIS argued that consensus of scientific literature indicated that BSE had not been detected in the US.* and challenged Bauer’s standing on the grounds that the perceived risk was simply speculative and based on a series of “hypothetical events. Court determined that at the pleading stage, enhanced risk of disease transmission may constitute injury-in-fact citing *Thompson v. County of Franklin*, 15 F. 3d 245, 248-49 and *Public Citizen v. Foreman*, 631 F. 2d 969, 974 n.12. Court saw a tight connection between the type of injury alleged and the fundamental goals of the statute which Bauer sued. The dissent does not find that Bauer has sufficiently particularized “his potential for injury. (i.e. He could stop eating beef.)

United States Court of Appeals,
Second Circuit.

Pooler, Circuit Judge, filed dissenting opinion.

Before: STRAUB and POOLER, Circuit Judges, and HURD, District Judge.*

Judge POOLER dissents in a separate opinion.

STRAUB, Circuit Judge.

This appeal centers on a narrow issue of standing in the context of a category of progressive neurological diseases, Transmissible Spongiform

*While this case was under consideration, the nation’s first bona fide case of BSE “mad cow disease was discovered on December 9, 2004 in the state of Washington at the Moses Lake Meats slaughter house. The result was a condemnation of many tons of meat already in transit plus the outright ban of U.S. beef in several countries. - Editor

* The Honorable David N. Hurd, Judge of the United States District Court for the Northern District of New York, sitting by designation.

Encephalopathies ("TSEs"), of which the most widely publicized example is Bovine Spongiform Encephalopathy ("BSE," commonly known as "mad cow" disease), a fatal neuro-degenerative disease that affects the central nervous system of adult cattle¹. Plaintiff, Michael Baur ("Baur"), has filed suit to require defendants, Ann M. Veneman, Secretary of Agriculture, and the United States Department of Agriculture ("USDA") to ban the use of downed livestock as food for human consumption. "Downed" is an industry term used to describe animals that collapse for unknown reasons and are too ill to walk or stand prior to slaughter. Baur alleges that downed livestock are particularly likely to be infected with TSEs, as TSEs typically cause animals to lose coordination and the ability to stand upright.

Under current USDA regulations, downed livestock may be used for human consumption after passing a mandatory post-mortem inspection by a veterinary officer. Baur claims that this policy violates the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§ 601-605, and the Federal Food, Drug, and Cosmetic Act ("FFDCA"), 21 U.S.C. §§ 301-399, and further alleges that the consumption of downed animals creates a serious risk of disease transmission--most specifically the risk that humans will contract a fatal form of TSE known as variant Creutzfeldt-Jacob disease ("vCJD") by eating BSE-contaminated beef products.

Without reaching the merits of Baur's suit, the District Court, (Naomi Reice Buchwald, *Judge*), granted defendants' motion to dismiss for lack of standing, concluding that Baur's exposure to meat products from downed livestock was insufficient to establish a cognizable Article III injury-in-fact. Focusing on Baur's inability to allege that BSE has ever been detected in the United States or that BSE-contaminated food products had ever been offered for sale in this country, the District Court reasoned that the alleged risk of disease transmission was too hypothetical and speculative to support standing. *See Farm Sanctuary, Inc. v. Veneman*, 212 F.Supp.2d 280, 282-84 (S.D.N.Y.2002). Because we conclude that exposure to an enhanced risk of disease transmission may qualify as injury-in-fact in consumer food and drug safety suits and further find that Baur has alleged a sufficiently credible risk

¹Other animal TSEs include transmissible mink encephalopathy, feline spongiform encephalopathy, chronic wasting disease in deer and elk, and scrapie in sheep and goats. TSEs that affect humans include kuru, classic Creutzfeldt Jakob disease, variant Creutzfeldt Jakob disease, Gerstmann-Straussler-Scheinker syndrome, and fatal familial insomnia

of harm to survive a motion to dismiss, we vacate the judgment of the District Court and remand for further proceedings.

BACKGROUND

The underlying administrative challenge in this suit arises from a March 4, 1998 petition which Baur filed with the USDA and the Food and Drug Administration ("FDA"). Baur requested that the agencies immediately "label all downed cattle as adulterated" pursuant to the FFDCFA, 21 U.S.C. § 342(a)(5), which provides that any food that is "in whole or part, the product of a diseased animal" shall be deemed "adulterated²." Baur argued that downed cattle are classified as "diseased" according to the USDA's own regulations, *see* 9 C.F.R. § 301.2 (2003) (defining "dying, diseased, or disabled livestock" as including animals displaying a "lack of muscle coordination" or an "inability to walk normally or stand"), and therefore, necessarily fall within the FFDCFA's definition of adulteration.

Because humans who consume meat products from BSE-infected cattle may contract vCJD, a fatal neurological disease for which there is no effective treatment or cure, Baur argued that exposure to downed cattle posed a significant health risk and that the elimination of downed cattle from the food stream was necessary to protect public health. In his petition, Baur claimed that the British outbreak of mad cow disease had already "demonstrated the very real threat of human disease through exposure to BSE,"--a threat made all the more serious by scientific research suggesting that downed cattle in the United States may already be infected with a unidentified variant of BSE.

Baur also argued that preventing the human consumption of downed cattle was necessary, because "current [BSE] surveillance efforts, including slaughterhouse inspection procedures," could provide only limited screening. Pointing out that the required "ante-mortem inspection of downed cattle commonly takes five minutes or less," and that "[i]t would be very difficult to identify central nervous system (CNS) symptoms in this amount of time," Baur noted that existing inspection procedures provided only a partial safeguard

² The FFDCFA prohibits the manufacture, delivery, receipt, or introduction of adulterated food into interstate commerce. *See* 21 U.S.C. § 331.

against disease transmission. "More importantly, although there are observable clinical signs of BSE," scientists believe that BSE has a long incubation period of up to eight years during which there may be no observable symptoms and as a result BSE "can only be confirmed following [post-mortem] histologic examination of the brain."

In May 1998, Baur submitted an amended petition, seeking to expand his original request for administrative action. Citing a recently published study which allegedly raised the possibility that BSE infectivity may persist in animals previously thought to be BSE-resistant, Richard Race and Bruce Chesboro, *Scrapie Infectivity Found in Resistant Species*, NATURE, Vol. 392, 770 (1998)³, Baur claimed that all downed livestock, and not just downed cattle, should be classified as adulterated under the FFDCA and banned for human consumption due to the risk of disease transmission.

The Food Safety and Inspection Service ("FSIS"), a division of the USDA, denied Baur's administrative petition on May 25, 1999, concluding that it was not required under the FFDCA "to remove all downed cattle without exception, from the nation's food supply." Contrary to Baur's interpretation of the applicable food safety statutes, FSIS stated that it was bound by the definition of adulteration set forth in the FMIA, and not the FFDCA, for all livestock presented for slaughter at a federally inspected slaughter establishment. FSIS argued that, unlike the FFDCA, the FMIA did not automatically classify all products from a diseased animal as adulterated. FSIS also explained that its regulations for downed livestock were consistent with the FMIA which permits the carcasses of diseased animals to be passed for human food if a FSIS veterinary officer determines that the carcass is safe for human consumption⁴.

³ While the authors of the study acknowledged that "[s]o far, there is no evidence for the secondary transmission of BSE from [] resistant species to more susceptible species," they noted that "the results presented [in this study] would strongly favour a decision to stop feeding ruminant-derived products to all animal species. Additional experiments should be carried out to detect possible BSE infectivity in clinically normal BSE-exposed animal species."

⁴ Currently, the USDA classifies all downed livestock presented for slaughter as "U.S Suspects." See 9 C.F.R. § 301.2 (2003) (defining U.S. Suspects as livestock "suspected of being affected with a disease or condition which may require condemnation in whole or in part, when slaughtered, and [which] is subject to further examination by an inspector to determine its disposal"); 9 C.F.R. § 309.2(b) (2003) (providing that "[a]ll seriously crippled animals and animals commonly termed 'downers,' shall be identified as U.S. Suspects"). If upon inspection the downed animal shows signs of
(continued...)

In addition, FSIS disputed Baur's claim that all downed livestock should be classified as diseased pursuant to 9 C.F.R. § 301.2, pointing out that the regulation refers to both "diseased" as well as "disabled" livestock and noting that a disabled animal, suffering from a broken leg, would not require condemnation as a potential health threat.

Finally, FSIS defended the adequacy of current federal inspection policies, stating that: "It is not difficult to distinguish a recumbent cow ... affected with a central nervous system (CNS) condition. If proper clinical observations are combined with an adequate history and appropriate laboratory test evaluations, a differential diagnosis is possible in the vast majority of cases." FSIS also disagreed with Baur's assessment of the potential risk of disease transmission from downed livestock, noting that:

[T]he consensus of the scientific literature is that BSE does not exist in the U.S. BSE has not been detected in this country, despite active surveillance efforts for several years. Since 1990, nearly 6,500 specimens, from animals in 43 states, have been laboratory tested by an ongoing BSE surveillance system in the U.S. No evidence of BSE (in the form of characteristic lesions) or related transmissible spongiform encephalopathies (TSE) has been seen. In addition, to prevent BSE-contaminated animals or animal products from entering the U.S., severe restrictions exist on the importation of live ruminants and ruminant products from countries where BSE is known to exist.

Following the denial of his petitions and the failure of subsequent discussions with the USDA, Baur filed suit in the District Court seeking judicial review of the USDA's decision under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* The complaint briefly summarizes the allegations made in Baur's prior petitions, specifically alleging that downed livestock are more likely to be affected with diseases such as TSEs, and that given the inherent limitations in current BSE testing capabilities, "it is simply impossible to determine with certainty whether a downed animal is infected with BSE" by relying on a slaughterhouse inspection scheme. Baur claims standing to pursue his APA claims as "a regular consumer of meat products

⁴(...continued)

certain diseases, it is condemned and disposed of according to specified procedures. *See* 9 C.F.R. §§ 309.4-309.15 (2003). However, if the downed animal passes postmortem inspection by a veterinary officer, it may be passed in whole or in part for human food. *See generally* 9 C.F.R. § 311.1 (2003).

who is concerned about eating adulterated meat." He alleges that "each time he eats meat he is at risk of contracting a food-borne illness such as vCJD," and is consequently "injured by the risk that he may consume meat that is the product of a downed animal, and by his apprehension and concern arising from this risk."

Defendants subsequently moved to dismiss Baur's complaint, arguing, *inter alia*, that Baur lacked standing to bring suit because he did not allege that BSE had ever been detected in the United States. In the absence of any allegation that BSE has spread to the United States, defendants claimed that Baur's asserted injury was simply speculative and "based on a series of hypothetical events"--that BSE will enter the country, that existing surveillance and inspection procedures will fail to detect downed animals infected with BSE, and finally that Baur will consume the meat from an infected animal. *See Farm Sanctuary*, 212 F.Supp.2d at 282-83.

The District Court granted defendants' motion to dismiss by written memorandum and order on July 30, 2002, rejecting Baur's contention that "the increased risk to the food supply created by the threat of BSE contamination" constituted an adequate injury-in-fact for Article III standing purposes⁵. *Id.* at 283. Noting that "[t]he record provides no evidence of BSE in the United States," the District Court classified Baur's alleged harm as too "remote" and "hypothetical" to support standing. *Id.* at 283-84. In dismissing Baur's complaint, the District Court also expressed concern over the potential breadth of Baur's standing claim, noting that if it "were to find that Baur's fear of contracting vCJD constituted a direct injury, then any citizen would have standing to sue to direct the federal government to take an action to improve health, occupational, or environmental safety"--impermissibly blurring the proper distinctions between legislative and judicial oversight of agency action. *Id.* at 284.

⁵ Farm Sanctuary, Inc., ("Farm Sanctuary"), a non-profit organization dedicated to the promotion of humane food production practices, joined in the administrative petitions below and served as co-plaintiff in the eventual suit before the District Court. The District Court dismissed Farm Sanctuary's claims for failure to meet the zone of interests test for prudential standing. *See Farm Sanctuary*, 212 F.Supp.2d at 284-85 (noting that "Farm Sanctuary's [asserted] injury, that its members are harmed when they observe the treatment of animals at slaughterhouses, is beyond the scope of the FMIA"). Because Farm Sanctuary does not appeal this judgment, we focus solely on the allegations raised by Baur.

Judgment was entered on August 5, 2002, and this timely appeal followed.

DISCUSSION

We review the District Court's dismissal of Baur's complaint for lack of standing *de novo*, accepting as true all of the complaint's material allegations and construing the complaint in Baur's favor. *See Excimer Assocs. v. LCA Vision, Inc.*, 292 F.3d 134, 139 (2d Cir.2002) (per curiam) (citing *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Although standing is a fundamental jurisdictional requirement, it is still subject to the same degree of proof that governs other contested factual issues. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Thus, at the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury. *See id.* (recognizing that "[a]t the pleading stage, general factual allegations of injury ... may suffice [to establish standing], for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim' ") (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)) (alteration in original). It bears emphasis that under federal pleading rules, "[c]omplaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally." *See South Austin Coalition Comm. v. SBC Communications*, 274 F.3d 1168, 1171 (7th Cir.2001).

A. Article III Standing and Injury-In-Fact

On appeal, the parties frame a narrow question for us to consider: whether Baur's allegation that he faces an increased risk of contracting a food-borne illness from the consumption of downed livestock constitutes a cognizable injury-in-fact for Article III standing purposes. The underlying law that governs this inquiry is well-established. Article III, § 2 of the United States Constitution restricts federal courts to deciding "Cases" and "Controversies" and thus imposes what the Supreme Court has described as the "irreducible constitutional minimum of standing,"--injury-in-fact, causation, and redressibility. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. To establish Article III standing, a plaintiff must therefore allege, and ultimately prove, that he has suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief. *See*

Bennett v. Spear, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). These core requirements are designed to ensure that the exercise of federal jurisdiction is consistent with separation of powers, limiting federal jurisdiction to those suits "traditionally thought to be capable of resolution through the judicial process." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)).

In this case, only the injury-in-fact requirement of Article III standing is at issue⁶. To qualify as a constitutionally sufficient injury-in-fact, the asserted injury must be "concrete and particularized" as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Because "[t]he standing inquiry focuses on whether the plaintiff is the proper party to bring ... suit," the injury analysis "often turns on the nature and source of the claim asserted." *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Moreover, the assessment of injury is functionally tied to the separation of powers and judicial competence concerns underlying the standing doctrine. *See Valley Forge*, 454 U.S. at 471-72, 102 S.Ct. 752. Thus, in evaluating whether the alleged injury is concrete and particularized, we assess whether the injury "affect[s] the plaintiff in a personal and individual way," *see Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130, to confirm that the plaintiff has a personal stake in the controversy and avoid having the federal courts serve as "merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding," *Valley Forge*, 454 U.S. at 473, 102 S.Ct. 752. Likewise, the requirement of concrete injury recognizes that if an injury is too abstract, the plaintiff's claim may not be capable of, or otherwise suitable for, judicial resolution. *See Raines*, 521 U.S. at 819, 117 S.Ct. 2312. Similarly, to support standing, the plaintiff's injury must be actual or imminent to ensure that the court avoids deciding a purely hypothetical case in which the projected harm may ultimately fail to occur. *See Lujan*, 504 U.S. at 564-65 n. 2, 112 S.Ct. 2130 (noting that "[a]lthough imminence is concededly a somewhat elastic

⁶ The government does not contest causation and redressibility, and it seems clear that if the alleged risk of disease transmission from downed livestock qualifies as a cognizable injury-in-fact then Baur's injury is fairly traceable to the USDA's decision to permit the use of such livestock for human consumption and could be redressed if the court granted Baur's request for equitable relief.

concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes--that the injury is certainly impending") (internal quotation marks omitted).

B. Enhanced Risk as Injury in Food and Drug Safety Suits

Here, the government largely concedes, at least for the purposes of this type of administrative action, that relevant injury-in-fact may be the *increased risk* of disease transmission caused by exposure to a potentially dangerous food product. Thus, the heart of the standing dispute in this case lies not in the notion that risk may qualify as injury-in-fact, but instead in whether Baur has succeeded in alleging more than a merely speculative risk of disease transmission from downed livestock. Nonetheless, because we have an independent obligation to address standing issues, *see Thompson v. County of Franklin*, 15 F.3d 245, 248-49 (2d Cir.1994), we explain the reasons why an enhanced risk of disease transmission may constitute injury-in-fact.

Although the Supreme Court has yet to speak directly on this issue⁷, the courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir.2000) (en banc) (concluding that "[t]hreats or increased risk constitutes cognizable harm" sufficient to meet the

⁷ Without questioning standing, the Supreme Court has decided cases in which it appeared to assume that enhanced risk may cause real injury. *See, e.g., Helling v. McKinney*, 509 U.S. 25, 35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (concluding that a prisoner could bring an Eighth Amendment claim for injunctive relief based on allegations that prison officials had exposed him "to levels of [second-hand smoke] that pose an unreasonable risk of serious damage to his future health"); *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 434-36, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997) (noting that exposure to known carcinogens may reasonably cause distress but holding for various policy reasons that a plaintiff cannot recover emotional distress damages under the Federal Employers' Liability Act until the manifestation of disease symptoms).

Because these cases did not specifically address the issue of standing, they do not provide direct precedential authority for finding standing in this case. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Lewis v. Casey*, 518 U.S. 343, 352 n. 2, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). However, the Supreme Court's analysis in both *Helling* and *Metro-North* displays a willingness, at least under some circumstances, to conceptualize exposure to enhanced risk as a type of cognizable injury. *See Helling*, 509 U.S. at 33, 113 S.Ct. 2475 (reasoning that a prisoner can seek injunctive relief from exposure to an unreasonable risk of future harm, such as exposure to an infectious disease, without alleging "that the likely harm [will] occur immediately and ... [al]though the possible infection might not affect all of those exposed").

injury-in-fact requirement); *Central Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir.2002) (holding that "the possibility of future injury may be sufficient to confer standing on plaintiffs" and concluding that plaintiffs could proceed with their suit where they "raised a material question of fact ... [as to] whether they will suffer a substantial risk of harm as a result of [the government's] policies"); *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 888 (7th Cir.2001) (holding that the "increased risk that a plan participant faces" as a result of an ERISA plan administrator's increase in discretionary authority satisfies Article III injury-in-fact requirements); *Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir.1998) (reasoning that "[a] probabilistic harm, if nontrivial, can support standing"), *cert. denied*, 526 U.S. 1146, 119 S.Ct. 2022, 143 L.Ed.2d 1033 (1999); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-35 (D.C.Cir.1996) (recognizing that an incremental increase in the risk of forest fires caused by the Forest Service's action satisfied Article III standing requirements).

We have also recognized similar types of standing claims. For example, in deciding a suit under the Clean Air Act, this Court recently determined that the likelihood of exposure to additional sulfur dioxide emissions, even where the emissions will not exceed government air quality standards, qualifies as an injury-in-fact sufficient to confer standing. *See LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir.2002). We have also held that where plaintiffs reside in close proximity to sources of air pollution, "uncertainty" as to the health effects of such pollution constitutes cognizable injury-in-fact. *See N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 325-26 (2d Cir.2002).

In this case, we need not decide as a matter of law whether enhanced risk generally qualifies as sufficient injury to confer standing, nor do we purport to imply that we would adopt such a broad view. In the specific context of food and drug safety suits, however, we conclude that such injuries are cognizable for standing purposes, where the plaintiff alleges exposure to potentially harmful products. *See, e.g., Public Citizen v. Foreman*, 631 F.2d 969, 974 n. 12 (D.C.Cir.1980) (concluding that plaintiffs had standing to seek a declaratory judgment that nitrates are an unsafe food additive where they alleged that nitrate-free bacon was not readily available at a reasonable price); *Stauber v. Shalala*, 895 F.Supp. 1178, 1187-88 (W.D.Wis.1995) (reasoning that where the purpose of the statute is to eliminate uncertainty as to health risks, the "increased risk of potential harm that the consumer must bear is an injury in fact for standing purposes" and holding that plaintiffs demonstrated

standing where they alleged "exposure to a potentially dangerous drug whose safety has not been demonstrated in accordance with the [FFDCA]"; *Cutler v. Kennedy*, 475 F.Supp. 838, 848-50 (D.D.C.1979) (reasoning that exposure to drugs that had allegedly been approved without adequate FDA testing was sufficient to support standing given the resulting risk of harm), *overruled on other grounds in Chaney v. Heckler*, 718 F.2d 1174, 1188 n. 35 (D.C.Cir.1983)⁸.

Although this type of injury has been most commonly recognized in environmental cases, the reasons for treating enhanced risk as sufficient injury-in-fact in the environmental context extend by analogy to consumer food and drug safety suits. Like threatened environmental harm, the potential harm from exposure to dangerous food products or drugs "is by nature probabilistic," yet an unreasonable exposure to risk may itself cause cognizable injury. *Gaston Copper*, 204 F.3d at 160. Significantly, the very purpose of the FMIA and the FFDCA, the statutes which Baur alleges the USDA has violated, is to ensure the safety of the nation's food supply and to minimize the risk to public health from potentially dangerous food and drug products. *See* 21 U.S.C. § 602 (stating that "[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged"); *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596, 71 S.Ct. 515, 95 L.Ed. 566 (1951) (the purpose of the FFDCA is to protect public health by keeping impure and adulterated food from the channels of commerce).

Thus, in this case, there is a tight connection between the type of injury which Baur alleges and the fundamental goals of the statutes which he sues under--reinforcing Baur's claim of cognizable injury. *See Gaston Copper*, 204 F.3d at 156 (affirming plaintiff's standing to sue where the plaintiff "alleged

⁸ The District Court distinguished this line of precedent for recognizing enhanced risk as a basis for standing in food and drug suits, because in the prior cases, "the contaminated or untested product was actually on the market," establishing the plaintiff's exposure to the allegedly harmful product. *Farm Sanctuary*, 212 F.Supp.2d at 283. This case admittedly presents a different factual scenario: while there is no dispute as to the potential danger of BSE, defendants claim that Baur's risk of exposure is purely speculative. However, we can discern no reason to distinguish between uncontested exposure to a potentially harmful substance and potential exposure to an undisputedly dangerous contaminant for standing purposes. In both types of cases, standing should rest on all of relevant facts underlying the plaintiff's claim, not on the happenstance of which particular facts happen to be in dispute.

precisely [those] types of injuries that Congress intended to prevent by enacting the Clean Water Act"); *Cutler*, 475 F.Supp. at 848- 49 (recognizing that "[p]laintiffs' claim of injury must be considered in the context of the comprehensive regulatory scheme created by the FFDCA," and concluding that plaintiffs' alleged exposure to drugs marketed in violation of the statute "constitutes a distinct and palpable injury to plaintiffs' statutory interests as drug consumers"); *see also* Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 58 (1994) (reasoning that where the very purpose of the regulatory statute is risk minimization, it should be presumed that plaintiffs "should be allowed to bring suit to prevent the sorts of injuries that the regulatory scheme was designed to prevent ... to ensure that the agencies adhere to the will of Congress"); Jerry L. Mashaw, *"Rights" in the Federal Administrative State*, 92 YALE L.J. 1129, 1168 (1983) (noting that some Supreme Court precedent "suggest[s] that increased risk will satisfy the requirement of injury in fact, at least where the statutory scheme that gives rise to the complaint is itself essentially concerned with restructuring risks").

It may well be that recognizing enhanced risk as a type of cognizable injury in consumer safety suits would suggest that any citizen could have standing to challenge government safety regulations, a concern which the District Court cited in dismissing Baur's suit. *See Farm Sanctuary*, 212 F.Supp.2d at 284. However, "standing is not to be denied simply because many people suffer the same injury." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *see also Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."). As the Supreme Court recently explained in *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), injury-in-fact may be found although the asserted harm is "widely shared" if the harm is sufficiently concrete and particularized. Here, there is no question that Baur alleges a discrete, individual risk of personal harm from exposure to contaminated beef and bases his claim of standing on more than a generalized concern that the government obey the law⁹. And

⁹ The dissent concludes that Baur has asserted no more than a generalized grievance, because Baur cannot distinguish himself from the millions of other Americans who regularly consume beef. But if a concrete harm is "widely shared" there is no additional requirement that a plaintiff demonstrate
(continued...)

while Baur could certainly seek redress through the political process, as recommended by the District Court, *see Farm Sanctuary*, 212 F.Supp.2d at 284, "the fact that a political forum may be more readily available where an injury is widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes." *Akins*, 524 U.S. at 24, 118 S.Ct. 1777.

Finally, although this case is concerned with constitutional standing requirements, there are other overlapping jurisdictional doctrines that "cluster about Article III" which address related concerns. *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (Bork, J., concurring)). Despite the potential expansiveness of recognizing exposure to enhanced risk as injury-in-fact, the constitutional standing requirements of causation and redressibility as well as the related doctrines of prudential standing, mootness, and ripeness all serve to effectively narrow the types of cases which may be adjudicated. *See generally id.* at 750-51, 104 S.Ct. 3315. Indeed, precisely because Article III injury-in-fact is such "an elastic concept, capable of encompassing nearly all who are effected in some way by an agency action," the Supreme Court has interpreted § 10(a) of the APA, 5 U.S.C. § 702, as imposing a "a further limitation on access to a judicial forum--the zone of interests test." *Am. Fed'n of Gov't Employees, Local 2119 v. Cohen*, 171 F.3d 460, 468 (7th Cir.1999). The zone of interests test is "a prudential standing requirement," *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) that ensures that the injury asserted by a plaintiff challenging regulatory action "falls within the 'zone-of-interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint," *Lujan*, 497 U.S. at 883, 110 S.Ct. 3177, further limiting the scope of potential citizen suits that may be brought under the APA. While we share the District Court's and dissent's concerns about overly broad claims of standing and lawsuits that assert no more than "generalized grievances," it does not follow that Article III injury- in-fact must serve as the sole

⁹(...continued)

enhanced susceptibility to establish constitutional standing. The fact that many other citizens could assert the same injury, by itself, is not sufficient to defeat standing. *See Akins*, 524 U.S. at 23-24, 118 S.Ct. 1777 (concluding that plaintiffs' inability to obtain information about a political organization qualified as Article III injury-in-fact, although injury was potentially shared by many other citizens); *see also Pye v. United States*, 269 F.3d 459, 469 (4th Cir.2001) (noting that "[s]o long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury").

mechanism for deciding whether particular claims are judicially cognizable. In sum, to honor separation of powers principles, we need not enshrine, as a matter of constitutional principle, barriers to suit that may be addressed through other, potentially more flexible limitations on federal jurisdiction¹⁰.

C. Credible Threat of Harm

Although we conclude that Baur has asserted a type of injury-- exposure to potentially unsafe food products--that is cognizable under Article III, this threshold determination does not end the standing inquiry. The burden of establishing standing lies squarely with Baur, *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), and to satisfy that burden Baur must allege that he faces a direct risk of harm which rises above mere conjecture. While the standard for reviewing standing at the pleading stage is lenient, a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing. *See, e.g., Schmier v. United States Court of Appeals for the Ninth Cir.*, 279 F.3d 817, 820 (9th Cir.2001). Given the potentially expansive and nebulous nature of enhanced risk claims, we agree that plaintiffs like Baur must allege a "credible threat of harm" to establish injury-in-fact based on exposure to enhanced risk. *See Central Delta Water Agency*, 306 F.3d at 950.

In evaluating the degree of risk sufficient to support standing, however, we are mindful that "Supreme Court precedent teaches us that the injury in fact requirement ... is qualitative, not quantitative, in nature." *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 357-58 (5th Cir.1999). Moreover, like the other aspects of standing, the injury-in-fact analysis is highly case-specific, *see New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996), and the risk of harm necessary to support standing cannot be defined according to a universal standard. *Lujan*, 504 U.S. at 564 n. 2, 112 S.Ct. 2130. Because the evaluation of risk is qualitative, the probability of harm which a plaintiff must demonstrate in order

¹⁰ Indeed, the great virtue of the zone of interests test may be its inherent flexibility. *See Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (recognizing that "that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes").

to allege a cognizable injury-in-fact logically varies with the severity of the probable harm. *See Mountain States Legal Found.*, 92 F.3d at 1234 (stating that "[t]he more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing"). In this case, Baur alleges that downed cattle may transmit vCJD, a deadly disease with no known cure or treatment. Thus, even a moderate increase in the risk of disease may be sufficient to confer standing.

Moreover, there are two critical factors that weigh in favor of concluding that standing exists in this case: (1) the fact that government studies and statements confirm several of Baur's key allegations, *see Central Delta Water Agency*, 306 F.3d at 950 (concluding that plaintiffs successfully alleged a credible threat of future injury based, in part, on the defendant agency's own estimate that salinity standards would be violated under its proposed operational plan), and (2) that Baur's alleged risk of harm arises from an established government policy. *Cf. 31 Foster Children v. Bush*, 329 F.3d 1255, 1265-66 (11th Cir.) (recognizing that "when the threatened acts that will cause injury are authorized or part of a[n] [established government] policy, it is significantly more likely that the injury will occur"), *cert. denied sub nom. Reggie v. Bush*, --- U.S. ---, 124 S.Ct. 483, --- L.Ed.2d ---- (2003); *Deshawn E. v. Safir*, 156 F.3d 340, 344-45 (2d Cir.1998) (concluding that there was an increased likelihood of injury where the challenged interrogation methods were authorized by "officially endorsed policies").

(1) Government Confirmation

Based on Baur's complaint and the accompanying materials submitted by the parties, we believe that Baur has successfully alleged a credible threat of harm from downed cattle¹¹. Significantly, the USDA itself as well as other government agencies have recognized that downed cattle are especially susceptible to BSE infection. *See, e.g.*, Food Safety and Inspection Service, Current Thinking on Measures that Could be Implemented to Minimize Human Exposure to Materials that Could Potentially Contain the Bovine Spongiform Encephalopathy Agent (2002), available at <http://>

¹¹ Some of the materials submitted by the parties post-date Baur's complaint. Although a plaintiff's standing is "assessed as of the time the lawsuit is brought," *Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir.1994), post-filing events may confirm that a plaintiff's fear of future harm is reasonable. *See, e.g., Hargrave, Vermont Prot. & Advocacy, Inc. v. Vermont*, 340 F.3d 27, 34 (2d Cir.2003).

www.fsis.usda.gov/OA/topics/BSE_thinking.htm (hereinafter "FSIS Think Paper") (acknowledging that downed cattle are among the cattle most likely to be infected with BSE); Risk Reduction Strategies for Potential BSE Pathways Involving Downer Cattle and Dead Stock of Cattle and Other Species, 68 Fed.Reg. 2703, 2703-04 (Jan. 21, 2003) (hereinafter "USDA Proposed Rulemaking") (noting that surveillance data from Europe indicates that BSE is present in a higher percentage in nonambulatory livestock and recognizing that "[b]y their nature, downer animals and dead stock include many animals dead or dying from communicable diseases [and] ... [t]herefore represent a significant pathway for spread of disease if they are not handled or disposed of with appropriate safeguards")¹².

The USDA acknowledges that since BSE was first detected in the United Kingdom in 1986, the disease has spread to over twenty-three countries and that presently over 180,000 cases of BSE have been detected worldwide. In addition, over one hundred people have died after contracting vCJD, and some experts predict that the mortality rates from vCJD could exceed one hundred thousand in the UK alone. In response to this threat, the USDA has imposed various import controls and adopted a feed ban prohibiting the use of most animal-derived proteins in cattle feed. The USDA has also adopted a surveillance program which "consists primarily of collecting and analyzing brain samples from adult cattle with neurological symptoms and adult animals that were non-ambulatory at slaughter." Because FSIS has determined that downed animals are at particular risk for neurological illnesses such as BSE, it has focused its testing efforts on downed cattle which currently account for over 90% of the animals tested in the federal BSE surveillance program.

Pointing to these regulatory safeguards as well as the results of a study by the Harvard Center for Risk Analysis, *see* United States Department of Agriculture, Evaluation of the Potential for Bovine Spongiform Encephopathy in the United States (2001), available at, <http://www.aphis.usda.gov/lpa/issues/bse/bse-riskassmt.html> (hereinafter "Harvard Study"), defendants argue that there is no evidence that BSE is currently

¹² Prior to argument, we asked the parties to submit letter-briefs addressing the potential impact of the proposed rulemaking on Baur's standing and related jurisdictional issues. *See City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 172 (4th Cir.2002) (acknowledging that the court of appeals may take judicial notice of a proposed rule published in the *Federal Register* even if the proposed rule was not called to the attention of the trial court).

present in the United States or is ever likely to enter this country. The Harvard Study concluded that the United States "is highly resistant to any introduction of BSE or a similar disease," and that given current regulations, it would be "extremely unlikely" that BSE would become established even if the disease were to enter this country. *Id.* at 1. While the Harvard Study may ultimately be persuasive, Baur has not yet been afforded an opportunity to dispute its results. Baur alleges that a form of BSE may already be present in the United States and that current inspection procedures may fail to detect cases of BSE-infection in downed cattle, an allegation which receives some support from government reports. For example, FSIS has previously acknowledged that "the typical clinical signs associated with BSE cannot always be observed in downer cattle infected with BSE. Thus, if BSE were present in the U.S., downer cattle infected with BSE could potentially be offered for slaughter and, if the clinical signs of the disease were not detected, pass ante-mortem inspection. These cattle could then be slaughtered for human food." FSIS Think Paper at 9; *see also* USDA Proposed Rulemaking at 2706 (noting that "because the signs of BSE often cannot be differentiated from the signs of many other diseases and conditions affecting downer cattle," BSE-infected animals may pass inspection and be offered for human consumption). Moreover, a January 2002 report by the General Accounting Office may call the Harvard Study into doubt by raising concerns about the effectiveness of current federal BSE prevention and detection efforts. *See* United States General Accounting Office, Rep. No. GAO-02-183, *Mad Cow Disease: Improvements in the Animal Feed Ban and Other Regulatory Areas Would Strengthen U.S. Prevention Efforts* (2002) (hereinafter "GAO Report") (noting that "[w]hile BSE has not been found in the United States, federal actions do not sufficiently ensure that all BSE-infected animals or products are kept out or that if BSE were found, it would be detected promptly and not spread to other cattle through animal feed or enter the human food supply").

Critically, while it is undisputed that BSE has not been detected in the United States despite over ten years of government surveillance, the significance of this fact in evaluating the present risk from the disease is vigorously contested by the parties. *Cf. Central Delta Water Agency*, 306 F.3d at 950 (noting that "a standing determination should not be based only on statistical probabilities if other specific circumstances render the threat of injury more or less likely than the statistics might otherwise suggest"). In support of his claim, Baur has pointed to the inherent limitations in current BSE testing capabilities, suggesting that current screening procedures may fail

to detect current cases of BSE among downed cattle. Indeed, FSIS has itself noted that there are no reliable tests for detecting BSE in a live animal and that the:

[A]vailable post mortem diagnostic tests can only indicate that cattle have the disease two to three months prior to the onset of clinical disease or after the onset of clinical disease. Thus, given the limitations of the diagnostics available today, certain tissues of cattle infected with BSE may contain the BSE agent before a diagnostic test could indicate that the animal has BSE ... [with the result that] exempting cattle that have tested negative for BSE ... would not provide the same level of protection against potential human exposure to the BSE agent as would removing those materials for use as, or in the production of, human food¹³.

FSIS Think Paper at 10.

In light of these questions over the presence of BSE in the United States and the adequacy of current testing and detection abilities, we do not agree that Baur's standing rests solely on his ability to allege that BSE has been found in the United States. Significantly, government reports confirm some of the risk factors that Baur has cited, and government agencies have already taken preemptive steps to minimize human exposure to BSE *without waiting* for definitive evidence that BSE has entered the country, strongly suggesting that they view the potential health risks from BSE as both serious and imminent. *See, e.g.*, FSIS Think Paper at 1 (noting that "the FSIS is considering implementing a number of measures to minimize human exposure to materials that could potentially contain" BSE); GAO Report at 28 (stating that the FDA's TSE Advisory Committee has recommended that the "FDA consider taking regulatory action to ban brains and other central nervous system tissue from human food because of the potential risk of exposure to BSE-infected tissue").

(2) Risk Attributable to a Specific Government Policy

In addition, the risk of disease transmission which Baur alleges arises directly

¹³ Development of such diagnostic testing has been hampered by our "limited scientific understanding of BSE and other TSEs, including when during the incubation period infectivity appears, what mechanism causes infection, and whether infectivity is ever present in blood." GAO Report at 7.

from the USDA's regulatory policy of permitting the use of downed cattle for human consumption. In concluding that "Baur's harm is more appropriately classified as hypothetical rather than imminent," the District Court relied on *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) and *Northwest Airlines, Inc. v. Fed. Aviation Admin.*, 795 F.2d 195 (D.C.Cir.1986). However, in both *Lyons* and *Northwest Airlines* the occurrence of the alleged future injury rested on the independent actions of third-parties not before the court, rendering the asserted injury too speculative for standing purposes. See *Lyons*, 461 U.S. at 106, 103 S.Ct. 1660 (to find a credible threat of future harm, the Court would have to assume that police officers would again subject plaintiff to a chokehold during the course of routine traffic stop without any justifiable provocation)¹⁴; *Northwest Airlines*, 795 F.2d at 201 (concluding that the alleged safety risk caused by the FAA's recertification of a airplane pilot, previously suspended for flying while intoxicated, was too speculative to support standing where there was no allegation that any other airline had hired the suspended pilot and no indication that the pilot would ever fly in the same areas as the plaintiff airline).

While the dissent argues that the standing inquiry must be guided by *Lyons*, we do not believe that *Lyons* controls, as this case is not solely about future injury. Reading the complaint in Baur's favor, Baur has alleged that: (1) a form of BSE may already be present in the United States, (2) available testing methods do not adequately detect BSE in downed cattle, and (3) under the USDA's current regulations, infected beef from downed cattle can enter the food stream. If Baur's allegations are to be credited, as they must be at the pleading stage, then Baur faces a *present, immediate* risk of exposure to BSE as a consumer of beef products--not a future risk that awaits intervening events. This present exposure to a credible threat of harm constitutes the relevant injury in fact for Article III purposes. Unlike in *Lyons*, or other similar Supreme Court cases where standing was found wanting because the

¹⁴ Notably, in *Lyons*, the Supreme Court specifically emphasized that there was no official policy authorizing the use of chokeholds without prior provocation, suggesting that if the plaintiff could make such an "incredible assertion" he could potentially establish standing. *Lyons*, 461 U.S. at 105-06, 103 S.Ct. 1660. Thus, while the City of Los Angeles was a defendant in the action, the risk of future injury for Lyons himself was solely contingent on "having an encounter with police wherein police would administer an allegedly illegal 'chokehol[d].'" *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (quoting *Lyons*, 461 U.S. at 105, 103 S.Ct. 1660) (alteration in the original).

threatened injury was wholly contingent on independent and unpredictable events that did not stem from an established government policy, *see generally Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (discussing prior precedents), this is not a case where "no amount of evidence" could possibly establish the existence of a "real and immediate" risk. *Id.* at 160, 110 S.Ct. 1717.

Although a chain of contingencies may need to occur for Baur to actually contract vCJD as a result of his exposure to contaminated beef, to sustain standing, it is not the materialization of the feared risk itself that must be "certainly impending." *Lujan*, 504 U.S. at 564-65 n. 2, 112 S.Ct. 2130. Such a narrow rule would effectively bar standing in any case where the threatened medical injury has a complex etiology or delayed manifestation. And as we have clarified, the relevant "injury" for standing purposes may be exposure to a sufficiently serious risk of medical harm--not the anticipated medical harm itself--thus only the exposure must be imminent, not the actual onset of disease. Nor do we agree, as the dissent concludes, that Article III injury-in-fact can only be found if there is an imminent likelihood that Baur will actually consume contaminated meat, a risk that would concededly be speculative even if BSE had already been detected in substantial numbers of downed cattle in the United States. Under the dissent's reasoning most food and drug safety suits involving potential contamination or adulteration would simply not be judicially cognizable--and Congress would lack the power to permit such suits, *see Bennett*, 520 U.S. at 162, 117 S.Ct. 1154 (noting that Congress does not have the authority to modify or abrogate constitutional standing requirements)--because the chance that any particular plaintiff will consume the contaminated product will likely be exceedingly remote. Indeed, under the dissent's analysis, even if the USDA completely stopped enforcing its current import restrictions and BSE inspection programs, no consumer would have standing to sue, as it would remain purely speculative that any individual consumer would actually consume contaminated beef and contract vCJD as a result.

D. Evaluation of Standing at the Pleading Stage

Given the allegations in Baur's complaint and the supporting materials submitted by the parties, we believe that Baur has adequately alleged a credible

threat of harm from downed cattle¹⁵, and because this case remains at the pleading stage, no more is required. To survive a motion to dismiss, Baur need not present more specific scientific evidence or statistical verification to prove that the risk actually exists. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 168, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (noting that at the pleading stage, standing will be upheld where a plaintiff provides some support for his claim of standing and it is possible to "presume facts under which [the plaintiff] will be injured"); *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir.2002) (reasoning that where "[i]t is easy to imagine facts *consistent with* [the] complaint and affidavits that will show plaintiffs' standing ... no more is required" to establish standing at the pleading stage) (emphasis in original). The dissent points out that in other cases where standing has been upheld on an enhanced risk theory, the plaintiffs presented specific statistical evidence of enhanced risk. However, each of these cases was decided at a later procedural stage where plaintiffs can properly be expected to present a full factual record to meet their burden of establishing standing. *See Central Delta Water Agency*, 306 F.3d at 946 (standing decided at summary judgment stage); *Gaston Copper*, 204 F.3d at 153 (standing decided after a six-day bench trial); *Mountain States Legal Foundation*, 92 F.3d at 1232 (standing decided at summary judgment stage).

Moreover, "[t]o the degree that defendants challenge the factual underpinnings" of Baur's standing "the argument is premature." *Fair Hous.*

¹⁵ Although the parties have focused solely on the risk of BSE transmission from downed cattle, a plaintiff must demonstrate standing for each claim and form of relief sought. *See, e.g., Donahue v. City of Boston*, 304 F.3d 110, 116 (1st Cir.2002); *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir.2001). In his complaint, Baur seeks wider injunctive and declaratory relief with regard to all downed livestock. To pursue such broad relief, Baur must also demonstrate a credible threat of disease transmission from livestock other than cattle. *Cf. Lewis v. United States*, 518 U.S. 322, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996) (noting that standing is necessarily limited to the injury shown; thus a plaintiff who is injured by one administrative deficiency does not necessarily obtain standing to challenge all similar deficiencies).

Baur does allege that animals other than cattle may be susceptible to BSE. While some of the materials in the record do suggest that other types of livestock may carry dangerous forms of TSE, *see, e.g.,* GAO Report at 52 (stating that "recent research suggests the possibility of 'silent' incubation in species not previously thought susceptible to TSEs. This research argues against waiting until BSE is found to strengthen measures shown to prevent the spread of the disease."), we lack adequate information to fully assess Baur's standing as to the broader category of downed livestock, and therefore remand this issue to the District Court for additional consideration. *See Fund for Animals v. Babbitt*, 89 F.3d 128, 134 (2d Cir.1996) (declining to rule on standing and remanding to the district court where the disputed standing issue "was neither ruled on by the district court nor fully briefed by the parties").

in Huntington Comm., Inc. v. Town of Huntington, 316 F.3d 357, 361 (2d Cir.2003). Defendants may certainly test Baur's standing as the litigation progresses by requesting an evidentiary hearing or by challenging Baur's standing on summary judgment or even at trial. *See id.* at 361-62; *In re: Bennett Funding Group, Inc.*, 336 F.3d 94, 102 (2d Cir.2003). However, allegation of a credible risk may be sufficient at the pleading stage without further factual confirmation or quantification of the precise risk at issue. Adopting a more stringent view of the injury-in-fact requirement in environmental cases and food and drug safety suits would essentially collapse the standing inquiry into the merits. *Cf. Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1280 (11th Cir.2001) (finding defendants' argument that plaintiff suffered no injury-in-fact "unconvincing because, at bottom, it conceives of the standing inquiry as duplicating an inquiry into the merits").

It may well be that Baur has little chance of success on his administrative claim if defendants are ultimately correct that BSE has not yet entered the United States. Nonetheless, Article III standing requirements are not intended as a screen for potentially frivolous lawsuits, for there is certainly no independent constitutional barrier to the federal courts entertaining unsuccessful claims. *See Alliant Energy*, 277 F.3d at 920 (emphasizing that "[s]kepticism about a plaintiff's ability to prove [his] claims is not a reason to dismiss a pleading ... it is at most a reason to hold a hearing [on the question of standing] and require the plaintiff to pony up the proof"); *cf. Wooden*, 247 F.3d at 1280 n. 16 (noting that while "some overlap may be inevitable, standing doctrine was not intended to provide a vehicle for resolution ... of fundamentally merits issues" at the threshold of litigation). Because the degree of risk posed by allowing the use of downed livestock for human consumption lies at the core of Baur's administrative claim, we are reluctant to adopt an interpretation of the injury-in-fact requirement that would conflate standing with an evaluation of the underlying soundness of the USDA's action. For example, it is unclear what statistical showing the dissent would deem sufficient to establish standing in this case. Would a 0.00011% chance of exposure to BSE contaminated beef be sufficient to demonstrate sufficient injury, or would the risk of exposure be too minuscule to merit standing? In our view, the evaluation of the amount of tolerable risk is better analyzed as an administrative decision governed by the relevant statutes rather than a constitutional question governed by Article III.

CONCLUSION

While we acknowledge the valid concerns cited by the District Court and dissent in questioning Baur's standing to bring suit, we believe that the Article III inquiry must be shaped by the nature of the plaintiff's claims and the procedural posture of the case. Fundamentally, "standing simply means that the plaintiff is entitled to 'walk through the courthouse door' and raise his grievance before a federal court," *Wooden*, 247 F.3d at 1280, and we conclude that Baur's allegations are sufficient at the pleading stage to give him that opportunity.

For the reasons stated above, we VACATE the judgment of the District Court as to Baur and remand for further proceedings consistent with this opinion, including a determination as to whether Baur has standing to challenge the defendants' action with regard to downed livestock other than cattle.

POOLER, Circuit Judge, dissenting:

The plaintiff, Michael Baur, challenges the wisdom of current United States Department of Agriculture ("USDA") practices which allow "downed" livestock to enter the nation's food supply. Because I do not believe Baur has met well-established standards of standing to sue, I respectfully dissent.

The district court and the majority disagree over the extent to which Baur has established the threat posed to livestock by bovine spongiform encephalopathy ("BSE") and to humans who may contract variant Creutzfeldt-Jacob disease ("vCJD") if they consume the meat of an animal infected with BSE. The district court emphasized that Baur and his co-plaintiff, which does not join him on this appeal, "have provided no evidence that BSE has been detected in the United States, let alone that any BSE-infected meat has actually been sold." The district court declared that this was sufficient to demonstrate that Baur had alleged a "hypothetical rather than imminent" harm, and concluded as a result that he lacked standing to bring this lawsuit.

The majority observes, however, that although no case of BSE or vCJD has yet been documented within the United States, Baur has noted the existence of "a recently published study which allegedly raised the possibility that BSE

infectivity may persist in animals previously thought to be BSE-resistant. The majority also finds it significant that 'the USDA itself as well as other government agencies have recognized that downed cattle are especially susceptible to BSE infection' " and that the USDA "has also adopted a surveillance program" to monitor a potential outbreak of BSE. Concluding on the basis of such evidence that Baur has asserted a threat that is more imminent than hypothetical, the majority finds that Baur does have standing to litigate the adequacy of current USDA policies for preventing BSE.

The majority, however, has not made any substantial effort to consider the strength of Baur's allegations that *he* faces injury from a possible future outbreak of BSE. But adequate allegations of personal injury are an essential element of standing to sue. It is not sufficient that Baur has asserted the plausible existence of an imminent threat to the health and well-being of society at large.

I.

In order to establish "the 'irreducible constitutional minimum' of standing, a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471- 72, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). The phrase "injury in fact," is imprecise, but the Supreme Court's "extensive body of case law on standing ... hardly leaves courts at sea in applying the law of standing." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (citation omitted).

One element of the Supreme Court's holdings regarding a plaintiff's demonstration of injury in fact is particularly germane to the instant appeal. When a plaintiff is challenging some general policy or practice of a government entity, such as the USDA practices that Baur challenges here, injury in fact is not established by positing injury to someone other than the plaintiff or to society at large. *See Friends of the Earth, Inc. V. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (in a lawsuit challenging an environmental regulation, "[t]he

relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff"). On the contrary, the plaintiff must establish "*distinct and palpable injury to himself*." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (emphasis added). The Supreme Court held eighty years ago that a plaintiff must establish "that he has sustained or is immediately in danger of sustaining some direct injury as a result of [government policy], and not merely that he suffers in some indefinite way in common with people generally." *Valley Forge Christian College*, 454 U.S. at 477, 102 S.Ct. 752 (quoting *Commonwealth v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)).

Baur's concern for public health is a laudable thing. But a plaintiff's desire to right what he sees as misguided public health policy has no bearing on the question of whether he has established injury in fact. *See Vermont Agency of Natural Resources v. Stevens*, 529 U.S. 765, 772, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing."). Thus, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian College*, 454 U.S. at 486, 102 S.Ct. 752. A showing that the government is engaging in a policy that is wrongheaded, or even callous, "is not a permissible substitute for the showing of injury itself." *Id.* In short, a plaintiff who wishes to advance the public good by altering government policy should direct his efforts to the political process in particular, and to public discourse in general, for these are the realms where the public good is most directly addressed¹⁶. By contrast, the federal courts are primarily charged with providing relief for identifiable injuries suffered by parties appearing before them. Stated somewhat brusquely, a plaintiff's desire to effect reform of government policy as to an issue of public concern "does not provide a special license to roam the country in search of governmental wrongdoing and to reveal [his] discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare." *Id.* at 487, 102 S.Ct. 752.

I acknowledge that "[a]t the pleading stage, general factual allegations of

¹⁶ It bears noting in this connection that the federal government's initial efforts to regulate American meat quality were motivated in no small part by public reaction to *The Jungle*, Upton Sinclair's 1906 novel about Chicago's meat packing plants. *See* Roger Roots, "A Muckraker's Aftermath: The Jungle of Meat-Packing Regulation After a Century," 27 *Wm. Mitchell L.Rev.* 2413 (2001). [NOTE: This was FN1 of the dissent.- Editor]

injury resulting from the defendant's conduct may suffice," for avoiding dismissal on the basis of a lack of standing. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. But "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). Most especially, the Supreme Court has "consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (citations and internal quotations omitted). While Baur may have demonstrated that *someone* will be harmed as a proximate result of the USCA practices he challenges, he certainly fails to demonstrate that he possesses any quality or characteristic which makes him particularly susceptible to such harm.

The problematic nature of Baur's assertion of injury in fact becomes immediately apparent upon reading the complaint. For all purposes relevant to the question of Baur's injury in fact, it contains nothing but the following allegations:

6. Plaintiff Michael Baur is an adult individual residing in Riverdale, New York. He is a regular consumer of meat products. Because Mr. Baur regularly eats meat, he is concerned about eating adulterated meat and about the health risks associated with meat from downed animals.

* * * * *

28. Mr. Baur is a regular consumer of meat products who is concerned about eating adulterated meat. Since the meat he eats can come from downed animals, each time he eats meat he is at risk of contracting a food-borne illness such as vCJD. Because of the British mad cow epidemic and the recent scientific evidence showing the link between eating meat from BSE-affected animals and the development of vCJD, Mr. Baur is particularly concerned about eating adulterated meat from downed animals.

29. As a direct and proximate result of the USDA's failure to label downed livestock as adulterated and to remove adulterated livestock from the food supply, Mr. Baur has been injured by the risk that he may consume meat that is the product of a downed animal, and by his apprehension and concern arising from this risk. Mr. Baur's injuries in this respect would be redressed

by the relief requested of this Court. The labeling of all downed animals as adulterated and the subsequent removal of those animals from the nation's food supply would ensure that no meat or meat products consumed by Mr. Baur comes from downed animals.

It is clear from this that Baur, like scores of millions of his fellow Americans, eats meat. But how does he distinguish himself from these scores of millions such that a court might conclude that he is particularly susceptible to injury as a result of his meat eating? We are not told whether or not Baur consumes meat in excess of the national per capita average. Rather, we are told that he experiences "apprehension" about his consumption of meat. Since concerns about the health risks of meat consumption are not unknown in contemporary America--they have even been the subject of recent class action litigation in this Circuit, *see Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512 (S.D.N.Y.2003)--this certainly does not make Baur unique among American meat eaters. But let us grant that Baur has succeeded in distinguishing himself as an American meat consumer who is "particularly concerned" about contracting illness as a result of consuming the meat of a BSE-infected animal. Is this, in addition to the fact that he eats meat, sufficient to establish that he has standing to challenge the manner in which the USDA currently approaches the problem of BSE infection?

II.

I believe that this question is best answered by analogy to *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In that case, an individual plaintiff sought to enjoin the police of the City of Los Angeles from the practice of using "chokeholds" to restrain suspects. The plaintiff, who had once been subjected to a chokehold by Los Angeles police officers, alleged in his complaint that he "and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life, and that [he] 'justifiably fears that any contact he has with Los Angeles Police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse.' " *Id.* at 98, 103 S.Ct. 1660.

The Supreme Court held that the plaintiff failed to demonstrate injury in fact. Even as it acknowledged the possibility that some as yet unidentifiable citizens of Los Angeles might be subjected to chokeholds in the future, and suffer injury as a result, the Court found it to be nothing beyond conjecture that

the plaintiff himself would be among these:

Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim. As we have said, however, it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse. And it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury. *Id.* at 108, 103 S.Ct. 1660.

None of this is to say that the Court did not recognize that the use of force against criminal suspects by the Los Angeles police is a matter of legitimate public concern. But the Court concluded in *Lyons* that the future course of conduct by Los Angeles police officers was not best fashioned in the context of a lawsuit brought by an individual plaintiff who could do no more than posit the mere possibility that he would be harmed by Los Angeles police officers in the future. Even given that he had been harmed by officers in the past, the Court held that "[a]bsent a sufficient likelihood that he will again be wronged in a similar way, [he] is no more entitled to an injunction than any other citizen of Los Angeles." *Id.* at 111, 103 S.Ct. 1660.

Baur's contentions of injury in fact are much like those asserted by the plaintiff in *Lyons*, but weaker. The plaintiff in *Lyons* had suffered past injury as the result of the government policy he challenged in his lawsuit, but Baur makes no allegation that purportedly lax USDA monitoring procedures have already caused him to consume the meat of a BSE-infected animal. Indeed, he does not allege that *anyone* in the United States has yet consumed BSE-infected meat. Baur does allege that he suffers a form of current injury in that, as he puts it in his brief, "he continually suffers from apprehension and concern that he will contract vCJD and die." As already noted, however, the plaintiff in *Lyons* also alleged that he suffered as a result of his apprehension and concern that he would be subjected to another chokehold. The Supreme Court squarely rejected this as a basis for establishing injury in fact: "It is the *reality* of the threat ... that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Id.*, at 107, n. 8, 103 S.Ct. 1660 (emphasis in

original).

This leaves Baur's assertion that he faces potential injury as a result of the alleged failure of the USDA to adequately protect him from consuming BSE-infected meat. While the Supreme Court has held that standing to sue may exist on the part of a plaintiff who attempts to satisfy the injury in fact requirement through allegations of potential injury, the Court has been careful to emphasize that such allegations must rise above the merely conjectural. "A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (quotation omitted). That is, "[w]here there is no actual harm" alleged, "its imminence (though not its precise extent) must be established." *Lujan*, 504 U.S. at 564, n. 2, 112 S.Ct. 2130. And it is particularly well to repeat here what is noted by the majority; that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes." *Id.*¹⁷

Neither Baur nor the majority make any argument that convinces me that this case is not best analogized to *Lyons*. The majority attempts to distinguish *Lyons* by asserting that, in that case, "the occurrence of the alleged future injury rested on the independent actions of third parties not before the court, rendering the asserted injury too speculative for standing purposes." But the

¹⁷ In light of these precedents, I do not understand the majority's assertion that "the Supreme Court has yet to speak directly" on the question of whether threatened harm may satisfy injury in fact.

Baur's attempt to establish injury in fact is at least as difficult as that faced by the plaintiff in *Lyons*. Just as the plaintiff in *Lyons* was only one citizen of a megalopolis, each one of whom might have an encounter with the police in the future, so Baur is just one among the scores of millions of American meat eaters who might at some point in the future conceivably eat the meat of a BSE-infected animal and become ill. That is, if we consider the future of meat consumption in the United States, we may confidently predict that, to borrow the advertising slogan of a prominent chain of hamburger restaurants, there will be "billions and billions served." Baur has perhaps sufficiently alleged that, among these billions of future servings, current USDA screening procedures will cause some of those being served to become ill because they have eaten the meat of a BSE-infected animal. It is certainly speculative to assert that this will happen, and is doubly speculative to predict how many American meat consumers will be injured should an outbreak of vCJD occur. But it is something well beyond speculation to assert that *Baur* will be among these unfortunate individuals. I therefore do not understand the majority's conclusion that "if Baur's allegations are to be credited, then he faces a *present, immediate* risk of exposure to BSE through the consumption of downed livestock." Specifically, I fear that the majority's finding that Baur has established injury in fact allows the requirement of an imminent threat of injury to be satisfied by the merely conceivable. [NOTE: This was FN2 in the dissent - Editor]

institutional entity that could harm the plaintiff in *Lyons*--the City of Los Angeles--was before the Court, just as the USDA is before this Court. Lyon's injury was speculative because he was only one of the millions of citizens of Los Angeles any one of whom might be harmed in the future by a chokehold, just as Baur's injury is speculative because he is only one of scores of millions of meat eaters any one of whom might eat BSE-infected meat.

The majority also asserts that the instant case "is not solely about future injury." Nor was *Lyons*. There were two components to the injury alleged by the plaintiff in *Lyons*: the possibility that he would be injured by a chokehold in the future and his present fear that he would be so injured. The two components of the injury alleged by Baur are precisely analogous: the possibility that he will contract vCJD in the future and his present fear that this will happen.

Baur attempts to distinguish *Lyons* by asserting that "Lyons could not allege that he would ever again be stopped by the police, especially since the police for the most part, only stop people who are violating the law. As a result, it was entirely speculative whether he would ever again be stopped and injured by a police chokehold. In contrast, Mr. Baur regularly eats meat, and each time he eats meat, he experiences an injury because the meat may come from a downed animal. Therefore, his injury is certain and direct, unlike Lyon's speculative injury." But this is to assert nothing but that Baur's subjective fear of imminent injury is more reasonable than Lyons' subjective fear of imminent injury. As already noted, however, the Court explicitly held in *Lyons* that an individual's subjective fear of injury is not sufficient to establish injury in fact. 461 U.S. at 107, n. 8, 103 S.Ct. 1660. Lyons failed to establish injury in fact because he failed to demonstrate any objective basis for concluding that he faced a greater injury than any other citizen of Los Angeles. Baur fails *a fortiori* because he cannot demonstrate that he faces any objective danger greater than that faced by any other American consumer of meat.

Both the majority and Baur make much of the fact that the government has recognized that BSE-infected meat poses a risk to public health. The majority declares that Baur should not be charged with demonstrating that an outbreak of BSE has actually occurred in the United States because it is sufficient for proof of injury in fact that government reports confirm some of the risk factors that Baur has cited, and government agencies have already taken preemptive steps to minimize human exposure to BSE *without waiting* for definitive

evidence that BSE has entered the country, strongly suggesting that they view the potential health risks from BSE as both serious and imminent. Baur himself goes so far as to assert that it is actually illogical for the defendants to simultaneously seek to prevent an outbreak of BSE in this country and to argue that he has no standing to bring the instant lawsuit. It is, Baur declares, "internally inconsistent" for the defendants to claim that he has not established injury in fact on the basis of a possible future outbreak of BSE while they at the same time undertake efforts to prevent such an outbreak.

Nevertheless I do not see that the fact that the defendants recognize that BSE poses a risk to public health adds anything to the necessary demonstration that Baur must make that *he* faces an imminent threat of injury from BSE. The defendants in *Lyons* had recognized the problematic nature of the use of chokeholds to such an extent that, subsequent to the filing of the lawsuit, they "imposed a six-month moratorium on the use of the carotid-artery chokehold except under circumstances where deadly force is authorized." 461 U.S. at 100, 103 S.Ct. 1660. This added nothing to *Lyons*' demonstration that *he* would be especially subject to injury once the moratorium expired.

Further, as a general matter, I think it is plain that the fact that the government recognizes something to be a problem, and that it is addressing that problem in a certain fashion, does not at all mean that an individual plaintiff is thereby afforded standing to bring a lawsuit asserting that the government is not addressing that problem in the wisest fashion. On the contrary, the "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Valley Forge Christian College*, 454 U.S. at 483, 102 S.Ct. 752.

Both the majority and Baur also argue that standing is demonstrated because the potential future injury Baur faces includes the possibility of death. The majority asserts that because vCJD is "a deadly disease with no known cure or treatment ... even a moderate increase in the risk of disease may be sufficient to confer standing." Baur makes the claim that the fact that "the harm [he] faces is death is all the more reason that he has alleged sufficient injury in fact to satisfy standing."

Even though death is a self-evidently irreparable injury, however, I do not see that its possibility makes any particular difference for the standing inquiry.

The plaintiff in *Lyons* asserted the possibility of death by chokehold, and this was not sufficient to invest him with standing. Furthermore, in *Whitmore v. Arkansas*, the Supreme Court directly held that the fact that the plaintiff in that case was challenging state death penalty procedures had no significance for the question of standing. On the contrary, the Court stated that "[t]he uniqueness of the death penalty and society's interest in its proper imposition" do not "justify a relaxed application of standing principles." 495 U.S. at 161, 110 S.Ct. 1717.

III.

No case cited by either the majority or Baur appears to me to come close to conferring standing upon a similarly situated litigant. The majority asserts that our Circuit has recently "recognized similar types of standing claims." But in both cases cited by the majority, the alleged injuries were by leaps and bounds more imminent than the injuries asserted by Baur. *LaFleur v. Whitman*, 300 F.3d 256 (2d Cir.2002), involved a claim under the Clean Air Act, as that statute's provisions had been applied by the Environmental Protection Agency to the proposed operation of a single waste processing plant. We held that an individual plaintiff who "alleged that she works in a shopping center adjacent to the proposed site of the facility" had satisfied the requirement of injury in fact because "there can be no question that [she] is likely to be exposed to emissions from the facility." *Id.* at 270. The imminence of injury posed to nearby residents of a single facility, however, is clearly of no help to Baur, who asserts the imminence of injury merely because he falls into the class of Americans who consume meat. *New York Public Interest Research Grp. v. Whitman*, 321 F.3d 316 (2d Cir.2003), was also an action under the Clean Air Act. The alleged injury there was arguably more speculative in that the plaintiffs challenged the Environmental Protection Agency's approval of a New York State program for issuing operating permits to potentially polluting facilities. But, as in *LaFleur*, it was physical proximity to an identifiable danger that was crucial in finding that the injury in fact requirement had been satisfied. Specifically, we held that the plaintiffs' "allegations about the health effects of air pollution and of uncertainty as to whether the EPA's actions expose them to excess air pollution are sufficient to establish injury in fact, given that each lives near a facility subject to [the state program's] permitting requirements." *Id.* at 325 (emphasis supplied).

Baur directs our attention to *Roe v. City of New York*, 151 F.Supp.2d 495

(S.D.N.Y.2001), but that case is particularly indicative of how wanting is his demonstration of injury in fact. In *Roe*, a putative class of heroin addicts challenged the alleged practice of the New York City Police Department of arresting individual participants of a state-authorized needle exchange program. The district court made some effort to distinguish these plaintiffs from the plaintiff in *Lyons*, noting that "the putative plaintiff class ... claims to be consistently targeted by the NYPD by virtue of their registered participation in, and regular visits to, state-authorized needle exchange programs." *Id.* at 503. "[U]nlike the individual plaintiff in *Lyons*," the district court continued, "[c]ourts have repeatedly found that plaintiffs who are members of such an identifiable class of targeted individuals have standing to sue." *Id.* at 504 (citations omitted). Here, Baur has only alleged that he is part of the vast class of American meat eaters, and he makes no allegation that he has been "targeted" by the USDA practices he challenges.

The majority and Baur also cite a number of environmental cases from outside our Circuit. But, as with the environmental cases from our Circuit considered above, all of these are of little help to Baur because they involved plaintiffs who lived in physical proximity to an identifiable--indeed, a quantifiable-- environmental harm. Thus, in *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C.Cir.1996), standing was granted to challenge certain Forest Service policies where the plaintiffs offered the court specific predictions concerning the likelihood of harm. *See id.* at 1234 (describing "a table comparing the respective effects" of Forest Service policy alternatives which "project[ed] a 5.4% reduction in high-risk fuels acres for alternative 9A, but a 14.2% reduction for alternative 6"). In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir.2000), a suit under the Clean Water Act, the plaintiff had "plainly demonstrated injury in fact" because he was "a property owner whose lake lies in the path of [an allegedly polluting facility's] toxic chemical discharge, *id.* at 156, and because he had produced scientific reports that "show over 500 violations of the company's discharge limits, including unlawful releases of cadmium, copper, iron, lead, and zinc, as well as pH violations." *Id.* at 157. Similarly, in *Central Delta Water Agency v. U.S.*, 306 F.3d 938 (9th Cir.2002), the Ninth Circuit granted standing to two individual farmers to challenge Department of Interior water policies based upon the existence of precise calculations of possible harm the farmers faced. *See id.* at 948 ("a Bureau engineer concluded that under the plan now in effect, the Vernalis standard will be violated at least one month a year in 41% of the next 71 years").

By contrast, Baur offers nothing but an assertion of the possibility that he, among scores of millions of American meat eaters, will eat meat infected with BSE. He therefore strikes me as being precisely the sort of plaintiff who fails to demonstrate injury in fact because he cannot show that "he is immediately in danger of sustaining some direct injury as a result of" the USDA's policies, as opposed to being able to show "merely that he suffers in some indefinite way in common with people generally." *Commonwealth v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)¹⁸.

The majority notes that "[i]n the specific context of food and drug safety suits" certain courts have found sufficient injury in fact "where the plaintiff alleges exposure to potentially harmful products." Thus, in *Public Citizen v. Foreman*, 631 F.2d 969, 974 n. 12 (D.C.Cir.1980), the District of Columbia Circuit held that two members of a consumer protection group had standing to challenge the USDA's approval of nitrites as an additive in the production of bacon. And in *Cutler v. Kennedy*, 475 F.Supp. 838, 847-50 (D.D.C.1979), *overruled on other grounds sub nom., Chaney v. Heckler*, 718 F.2d 1174 (D.C.Cir.1983), a district court of that Circuit granted standing to three consumers of certain over-the-counter drugs who alleged that these drugs had improperly received marketing approval from the Food and Drug Administration. But, as opposed to the instant case, the plaintiffs in these *pre-Lyons* cases alleged that they were at present consuming products which they alleged to be harmful. See also *Stauber v. Shalala*, 895 F.Supp. 1178, 1188 (W.D.Wis.1995) (where defendants did not challenge that plaintiffs were already consumers of milk treated with an allegedly dangerous hormone, the question of the hormone's actual dangerousness went to the merits of case and was not relevant to the question of standing). Here, as we have seen, Baur only alleges his "apprehension and concern" that he might consume BSE-infected meat. The majority notes that Baur points to evidence in the record to the effect "that a form of BSE may already be present in the United States." But this in itself is speculation insufficient to establish injury in fact, as is any assertion that Baur will be injured by any current presence of BSE.

¹⁸ In response to the majority's query, and for the sake of argument, I would say that "a 0.00011% chance of exposure to BSE contaminated beef" would be insufficient to confer standing. Allowing a lawsuit to go forward on the basis of such a remote harm would be akin to saying that any citizen has standing to sue the National Aeronautics and Space Administration because it currently does not do enough to prevent meteorites from falling to Earth. The more interesting point about the hypothetical, however, is that Baur has not made any demonstration of his chance of exposure to BSE contaminated beef. He merely alleges that he fears such exposure, and the majority, wrongly in my view, deems this alone to be a sufficient demonstration of injury.[NOTE: This was FN3 in the dissent -Editor]

Finally, I am sensitive to the majority's concern that, at the pleading stage, we must avoid "collaps[ing] the standing inquiry into the merits." Such concern, however, does not free us from the Supreme Court's instruction that "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?" *Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. 3315.

The specific allegations contained in Baur's complaint as to injury in fact are limited to claiming that: 1) an outbreak of BSE could happen in the United States; 2) current USDA policies and practices enhance this risk; and 3) as a consumer of meat, he is concerned about this state of affairs. Even accepting all of this as true, the complaint is utterly devoid of the necessary showing a plaintiff must make to the effect that "the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. at 819, 117 S.Ct. 2312. That is, he has made no effort whatever to establish that he, as opposed to any other person among the scores of millions of meat eaters in America, faces the hypothetical possibility of eating BSE-infected meat. As the district court feared, a finding that Baur has standing to sue here is to impliedly conclude that "any citizen [has] standing to sue to direct the federal government to take an action to improve health, occupational or environmental safety." To avoid this result, I must conclude that Baur has asserted an "abstract question[] of wide public significance which amount[s] to [a] generalized grievance[] pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College*, 454 U.S. at 475, 102 S.Ct. 752 (quotations omitted).

IV.

I agree with the majority, and with Baur, that an outbreak of BSE in the United States would be a disastrous event that could possibly injure many people. I also acknowledge that Baur has set forth in the record many disturbing facts concerning the allowance of "downed" livestock into the nation's food supply¹⁹. It may very well be that Baur is correct that the defendants should take different measures to avoid the occurrence of this event.

¹⁹ See also, Kerri E. Machado, "Unfit for Human Consumption": Why American Beef is Making Us Sick," 13 *Alb. L.J. Sci. & Tech.* 801 (2003). [NOTE: This was FN4 in the dissent - Editor]

However, lacking any plausible showing that he faces imminent harm as a result of the measures that the defendants are currently taking, I believe that Baur cannot properly use this Court as vehicle to advance his claims as to proper policy. Accordingly, I respectfully dissent.

FOOD STAMP PROGRAM

COURT DECISION

ALI A. SALEH, HASSAN ALMADRHI, ET AL. v. USDA, ET AL.

Docket No. 01-9298.

Filed November 4, 2003.

(Cite as: 80 Fed.Appx. 119).

FSP– Equal protection – Targeting, ethnic related, when not.

Arabic owners of delicatessens sued city under § 1983, claiming they were singled out for searches of their delis, conducted by special deli task force, due to their ethnicity in violation of their Fourth, Fifth and Fourteenth Amendment rights. Following adverse jury verdict, owners moved for judgment as matter of law, and alternatively for new trial. The United States District Court for the Western District of New York, John T. Elfvin, J., 2002 WL 31655002, denied motions. Owners appealed. The Court of Appeals held that: (1) jury could find that task force did not consider owner's ethnicity in deciding which delis to search; (2) jury could find that owners of delis consented to search of premises; and (3) new trial would not be granted on grounds that publicized terrorist attack, occurring just prior to trial, prejudiced jury.

United States Court of Appeals,
Second Circuit.

New trial would not be granted, at request of Arabic delicatessen owners who sustained adverse jury verdict in suit claiming that special delicatessen task force had selectively targeted their stores for inspection, on grounds that trial was conducted few days after terrorist attack on public buildings in New York and Washington, attributed to persons of Arabic ethnicity, and jury was consequently biased against them; owners sought no delay of trial, or declaration of mistrial. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

Upon Due Consideration of this appeal from a judgment of the United States District Court for the Western District of New York (Elfvin, J.), it is hereby.

ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

PRESENT: NEWMAN, SOTOMAYOR, and WESLEY, Circuit Judges.

SUMMARY ORDER

Plaintiffs appeal from a judgment of the United States District Court of the Western District of New York (Elfvig, J.) entered on October 1, 2001, dismissing their claims against the defendants, four Buffalo Police Officers, the Buffalo Police Department, and James Sevchik, Chief Inspector of the New York State Department of Agriculture, following a jury trial, as well as from the denial of their motion for a new trial on November 12, 2002.

Plaintiffs are five Arab-Americans of Yemeni descent, who in 1996 and 1997, the time period relevant to this case, owned and operated delicatessens, or "delis," in Buffalo, New York. Following increasing community complaints about alleged outdated food, trash buildup, loitering, overpricing, sales of single cigarettes and drug paraphernalia relating to delis in the Fillmore district of Buffalo, the Mayor held neighborhood summits to solicit community input on issues that needed to be addressed. A "Deli Task Force" ("DTF") was subsequently assembled, involving officers from the Buffalo Police Department, Immigration and Naturalization Services, New York State Department of Agriculture, New York State Department of Taxation and Finance, the Buffalo City Inspections Department, the Mayor's Housing Task Force, the Erie County Health Department and the United States Department of Agriculture. *See* Tr. at 666-68, 677, 682, 688. Based on the community complaints, the DTF engaged in approximately eighteen searches of delis in or near the Fillmore district in 1996 and 1997. Sixteen of the targeted delis were owned by Arab-Americans; the other two delis were owned by persons of Vietnamese nationality. The DTF ceased operation in 1997.

Plaintiffs filed suit alleging that the defendants violated their Fourth Amendment rights to be free from unreasonable searches and seizures by conducting the searches of their delis without a warrant, and violated equal protection by targeting only Arab-owned delis based on the owners' race.¹ Following a lengthy trial, the district court granted defendant Sevchik's Fed.R.Civ.P. 50 motion for judgment as a matter of law, denied plaintiffs' Rule

¹ Plaintiffs also sued John Lubecki and fifteen "John Doe" officers. Those defendants were dismissed by the district court, and plaintiffs do not appeal that dismissal.

50 motion, and dismissed the claims of plaintiffs Ali A. Saleh and Ali S. Mugalli against all defendants. The jury returned a verdict in favor of the remaining defendants on September 14, 2001. Plaintiffs' Rule 50 post-trial motion was denied.

On appeal, plaintiffs raise numerous objections, which can be summarized as follows: (1) the district court erred in refusing to give a charge on the equal protection claim after they submitted proposed language and objected to the absence of such a charge; (2) the district court erred in denying plaintiffs' Rule 50 motion on the equal protection and Fourth Amendment claims; (3) the district court erred in dismissing the claims against Sevchik; (4) the district court erred in granting the defendants' Rule 50 motion as to plaintiffs Saleh and Mugalli; (5) the district court erred in refusing to vacate the verdict in light of the events of September 11, 2001, which plaintiffs assert may have led to anti-Arab bias among the jury; and (6) the district court committed numerous trial errors.

"We review a claim of error in the district court's jury instructions *de novo*, and will reverse on this basis only if the plaintiffs-appellants can show that in viewing the charge given as a whole, they were prejudiced by the error." *Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir.1994). We also review *de novo* a district court's grant of a motion for judgment as a matter of law under Fed.R.Civ.P. 50. *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir.2000). Judgment as a matter of law may not properly be granted under Rule 50 unless the evidence, viewed in the light most favorable to the non-moving party, is insufficient to permit a reasonable juror to find in that party's favor. *Provost v. City of Newburgh*, 262 F.3d 146, 154 (2d Cir.2001).

I. Equal Protection Claim

We have held that "[a] litigant is entitled to an instruction on a claim where that claim is supported by evidence of probative value." *Anderson*, 17 F.3d at 557. Where a party has objected to the failure to give the requested charge and shows that there is sufficient evidence supporting the theory behind the instruction that a question of fact may be presented to the jury, the failure to give such an instruction is error that warrants a new trial. *See Boyle v. Revici*, 961 F.2d 1060, 1063 (2d Cir.1992). It is undisputed that plaintiffs

properly submitted a request to charge on equal protection and objected to the district court's unexplained refusal to do so. Having reviewed the underlying trial record *de novo*, however, we are unable to say that the district court erred in refusing to give an equal protection instruction.

To prevail on an equal protection claim based on selective enforcement, plaintiffs must show "(1) that they were treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494, 499 (2d Cir.2001) (citations and internal quotation marks omitted). Members of the DTF testified that the DTF was formed in response to complaints received by the Buffalo Police Department, Councilman Franczyk's office and the Mayor's office about the operation of delis, particularly in the Fillmore District. Tr. at 737, 750, 754-55, 762-63, 809, 1452, 1807-10, 2004-05. Witnesses further testified that the initial list of delis to be targeted by the DTF reflected those delis with the greatest number of citizen complaints. *Id.* at 739, 1943, 2029-31. Accepting plaintiffs' proffered evidence that community leaders during the initial meetings discussed the nationality of the deli owners while identifying those delis that were the object of the complaints, *id.* at 1352-53, 1810, there is still no evidence in the record that the twelve non-Arab owned delis in the geographical area targeted by the DTF presented similar problems, nor that there were any complaints about those delis. *Cf. Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir.2000) (holding that where the police allegedly stopped and questioned only minority suspects about a particular crime, the plaintiffs were still required to show that a similarly situated group of non-minorities were not so treated because the plaintiffs were "questioned on the altogether legitimate basis of a physical description given by the victim of a crime"). In the absence of any such evidence of probative value as to whether appellants were treated differently than similarly situated individuals, appellants were not entitled to an instruction on their equal

protection claim.²

II. Fourth Amendment Claim

Plaintiffs next argue they are entitled to judgment as a matter of law on their Fourth Amendment claim of unreasonable search and seizure. Plaintiffs characterize the searches as intended to uncover evidence of criminal activity, and argue that a warrant was therefore required. As the district court held, this argument overlooks the evidence in the record from which the jury was entitled to conclude that plaintiffs consented to the searches. *See* Tr. at 864, 890 (Almadrhi opened door for police and signed consent form); *id.* at 405-06 (Saide signed consent form); Tr. at 435-40 (Homasin assisted the officers with the search). The district court's denial of plaintiffs' Rule 50 motion, therefore, was not erroneous. *See United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir.1993) (holding that consent is a defense to a Fourth Amendment claim, and that consent may be implied under the totality of the circumstances). More fundamentally, we also note that there was ample evidence in the record from which the jury could have concluded that the searches of their commercial property were administrative in nature, and that the Buffalo police had accompanied the inspectors to provide security. *Cf. Anobile v. Pelligrino*, 303 F.3d 107, 117 (2d Cir.2002) ("Under certain circumstances, however, the Fourth Amendment permits warrantless administrative searches of commercial property."). Accordingly, we conclude that the denial of judgment as a matter of law was proper, and we will not set aside the jury's verdict on this issue.

We further find no error in the district court's grant of defendants' Rule 50 motions as to the claims of plaintiffs Saleh and Mugalli. Saleh was unable to identify any of the named defendants as the officers who searched his store. While he challenges the dismissal of the Buffalo Police Department, the undisputed evidence established that Saleh's employee gave consent to the search, Tr. at 1366, and dismissal was therefore appropriate. Dismissal of Mugalli's claims was proper because undisputed testimony established that

² For the same reasons, plaintiffs' argument that the district court erred in denying judgment as a matter of law on the equal protection claim fails.

Officers Devlin and O'Brien entered his store and searched it in response to claims by a person outside the deli that someone inside the deli had a machine gun. *See United States v. Medina*, 944 F.2d 60, 68 (2d Cir.1991) (holding that exigent circumstances may permit warrantless searches).

Plaintiffs also argue that the dismissal of Inspector Sevchik at the close of evidence was improper because Sevchik's administrative searches were used as a pretext by the other officers, and because the statutory scheme under which the food inspection occurred was insufficient to allow warrantless searches. We have held that warrantless administrative searches of commercial premises conducted pursuant to a regulatory scheme are constitutionally permitted if they meet three criteria: [1] there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made; ... [2] the warrantless inspections must be necessary to further [the] regulatory scheme; ... [3] the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers....

Anobile, 303 F.3d at 117 (citations and internal quotation marks omitted). Notwithstanding plaintiffs' conclusory allegations of "unbridled discretion," there was no evidence in the record that Sevchik's authority was not properly limited by New York's regulations. More importantly, however, there is no evidence that any of the plaintiffs in any way objected to Sevchik's inspection of their stores at the time they occurred. Because we find that Sevchik had the authority to conduct the inspections, plaintiffs' argument that Sevchik's presence was used as pretext for other officers is insufficient to sustain a claim against Sevchik. *See Whren v. United States*, 517 U.S. 806, 815-19, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

IV. Alleged Trial Errors

Plaintiffs next argue that the denial of their motion for a new trial after the verdict was rendered was an abuse of discretion in light of the events of September 11, 2001. We disagree. At the beginning of the day on September 12, 2001, the district court raised the issue of possible bias among the jury, and proposed to the counsel that each juror be questioned individually before the

case continue. Notably, plaintiffs' counsel agreed with this proposed course of action. The district court then conducted individual voir dire in the presence of counsel, and the jurors all stated that they would not be prejudiced. Because plaintiffs waited until after the verdict was returned against them to request a mistrial, they cannot now be heard to object to that verdict on these grounds.

Finally, plaintiffs challenge the district court's approval of defendants' peremptory challenge to an Arab-American juror as improper under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The Supreme Court has held that a challenge to a juror is non-discriminatory when justified by concerns that the juror's ability to speak a foreign language may compromise his impartiality in a case where that language will be spoken by witnesses and translated. *See Hernandez v. New York*, 500 U.S. 352, 360-61, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). The attorneys believe, based on their recollections, that the district court judge himself may have provided this justification for the *Batson* challenge. *Batson*, however, requires us to determine whether the attorney exercising the peremptory challenge has proffered a legitimate non-discriminatory rationale for the exclusion of that juror. *Batson*, 476 U.S. at 97-98. Because the voir dire in this case was not conducted on the record and the recollection of the attorneys at this time is not sufficiently clear for us to say as a matter of law that an error occurred here, however, we cannot find this possible error a basis for ordering a new trial.³

We have fully considered all of plaintiffs remaining contentions, and find them without merit. The district court's judgment is therefore affirmed.

³ We do note, however, that *Batson* challenges to the voir dire process should be conducted on the record to allow appellate review.

HORSE PROTECTION ACT

COURT DECISIONS

ROBERT B. MCCLOY, JR., v. USDA.

No. 02-9543.

Filed December 2, 2003.

(Cite as: 351 F.3d 447).

HPA – Sored horse – “Allowing” the entry or showing – “Allowing- plus” distinguished.

Horse owner found liable under the Horse Protection Act (HPA) for allowing a "sore" horse to be entered in a horse show. The Court held that substantial evidence supported finding that owner violated HPA. The court distinguished *Baird* and adopted the ruling in *Carl Edwards & Sons Stables*. In essence, the USDA's interpretation of the statute is that "it imposes on the owner a nondelegable duty not to engage in the practice of soring.

United States Court of Appeals,
Tenth Circuit

Paul J. Kelly, Jr., Circuit Judge, filed dissenting opinion.

Before KELLY, HENRY, and HARTZ, Circuit Judges.

HARTZ, Circuit Judge.

Petitioner Robert B. McCloy, Jr., appeals from an order of the Secretary of Agriculture (the Secretary) finding him liable under the Horse Protection Act (HPA), 15 U.S.C. §§ 1821-31, for allowing a sore horse to be entered in a horse show. We have jurisdiction under 15 U.S.C. § 1825(b)(2), and we affirm.

BACKGROUND

Congress enacted the HPA in 1970 to combat the "cruel and inhumane" practice of soring Tennessee Walking Horses in order to improve their performance at horse shows. 15 U.S.C. § 1822. "If the front feet of the horse were deliberately made sore, the intense pain which the animal suffered when

placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly the desired gait." H.R. Rep. No. 91-1597 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. "[S]oring is usually done by applying a blistering agent, such as oil of mustard, to the pastern area of the horse's leg and by wrapping this area with chains or metal rollers." *Id.*

The HPA prohibits:

The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).

Those found in violation of the HPA are subject to civil penalties of up to \$2,200 for each violation and suspension from showing horses for a period of at least one year. *See* 15 U.S.C. § 1825(b)(1); 7 C.F.R. § 3.91(b)(2)(vii) (adjusting fine upward to \$2,200 in accordance with Federal Civil Penalties Inflation Adjustment Act of 1990); 15 U.S.C. § 1825(c). Knowing violations are subject to criminal penalties. 15 U.S.C. § 1825(a). The HPA authorizes the Secretary "to issue such rules and regulations as he deems necessary to carry out the provisions of [the HPA]." 15 U.S.C. § 1828.

Dr. McCloy purchased Ebony's Threat's Ms. Professor (Missy), a Tennessee Walking Horse, in 1995 and placed her with trainer Ronal Young in 1997. According to Dr. McCloy, he instructed Young that "[t]here was no need to sore the horse," Tr. 152, and he made unannounced visits to Young's stables to insure that Missy was not sored, Tr. 170, although Dr. McCloy also admits in his affidavit that he gave Young "no verbal or written instructions concerning the training of [Missy]. Mr. Young was given complete custody in training the horse." Complainant's Exh. 4. Despite the apparently inconsistent testimony, the Judicial Officer (JO) for the United States Department of Agriculture (USDA) found that Dr. McCloy had given Young a genuine instruction not to sore Missy. *Aplt.App. I at 58.*

Missy was entered in the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on September 4, 1998. Officials from the horse show inspected Missy and disqualified her from participating on the ground that she was sore. Two veterinarians from the Animal and Plant Health Inspection Service (APHIS), an agency of the USDA, then examined Missy and determined that she was indeed sore. Dr. McCloy learned of the disqualification while watching the show in the stands and testified later that he was not aware that Missy would be shown.

The APHIS filed a complaint against Dr. McCloy in May of 1999. An Administrative Law Judge (ALJ) determined on August 10, 2001, that Dr. McCloy had violated the HPA by allowing entry of a sore horse and assessed a fine of \$2,200. On appeal to the JO, the APHIS argued that Dr. McCloy should also be disqualified from showing horses for a period of time; and Dr. McCloy argued that the ALJ had erred in concluding that he had violated the HPA. On March 22, 2002, the JO filed a 73-page opinion affirming the finding that Dr. McCloy violated the HPA, affirming imposition of the \$2,200 fine, and additionally imposing a one-year disqualification period.

The JO determined that the "evidence establishes that [Dr. McCloy] did not know that Ronal Young entered Missy . . . until he was informed . . . that Missy had been 'turned down,' " and the JO also noted that there is "no evidence that [Dr. McCloy] objected to his trainers entering Missy in horse shows or horse exhibitions, and, specifically, the record contains no evidence that [Dr. McCloy] objected to Ronal Young's entering Missy in the 60th Annual Tennessee Walking Horse National Celebration." *Aplt.App. I* at 28-29. Adopting the USDA's position on what constitutes "allowing" a sore horse to be entered, the JO further found that Dr. McCloy was a "guarantor that Missy would not be sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration . . . [and] . . . [Dr. McCloy] breached his guarantee as a horse owner that Ronal Young . . . would not enter Missy in the [show] . . . while she was sore." *Id.* at 29-30. The Secretary's position, as characterized by the JO, is that "a horse owner who allows a person to enter the owner's horse in a horse show or horse exhibition for the purpose of showing or exhibiting the horse is a guarantor that the horse will not be sore when the horse is entered in that horse show or horse exhibition." *Id.* at 28 (citing *In re Carl Edwards & Sons Stables*, 56 Agric.

Dec. 529, 589-90 (1997); *In re Gary R. Edwards*, 55 Agric. Dec. 892, 979 (1996); *In re John T. Gray*, 55 Agric. Dec. 853, 888 (1996)). A subsequent motion for reconsideration was denied, and Dr. McCloy filed a timely petition for review with this court.

DISCUSSION

Our review of the JO's decision is limited to determining "whether the proper legal standards were employed and substantial evidence supports the decision." *Gray v. USDA*, 39 F.3d 670, 675 (6th Cir.1994) (internal quotation marks omitted); *see also* 15 U.S.C. § 1825(b)(2) ("[F]indings of the Secretary shall be set aside if found to be unsupported by substantial evidence."). Dr. McCloy challenges both the legal standard employed by the JO and the sufficiency of the evidence to support the JO's findings. We begin with the challenge to the legal standard.

Section 1824(2) of the HPA prohibits:

The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

Clause (D) is the clause that governs the liability of owners. It states that the owner is liable for "allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore." The decisive question is *what* must the owner allow if he is to be liable. The USDA reading of the statute is that the owner need only allow the entry of the horse in a show, the sale of the horse, etc. The fact of the horse's being sore is not a component of what the owner must allow. The owner need have no knowledge of the horse's being sore, nor need the owner bear any fault with respect to the soring. If, for example, the owner allows a horse to be entered in an exhibition, then the owner is liable if it turns out that the horse was sore. We will refer to this interpretation as the "simply-allowing" interpretation.

The alternative reading of the statute is that the owner must allow not just the entry of a horse, but the entry of a *sore* horse. If that is the proper reading of the statute, there remains the issue of what it means to "allow" the entry of a sore horse. One could say that the owner "allows" the entry of a sore horse only if the owner *knows* the horse is sore. Or one might say that an owner can "allow" such entry by failing to take reasonable steps to prevent the horse from being entered when sore. Or one might interpret "allow" to require some other degree of responsibility by the owner. All such interpretations, however, would require some element of owner responsibility for the soring itself. We will refer to these interpretations as "allowing-plus" interpretations. Dr. McCloy argues for an allowing-plus interpretation. He contends that USDA's contrary construction of the statute is simply wrong.

When an agency charged with the administration of a statute consistently applies a reasonable construction of the statute in the course of formal adjudication, we ordinarily defer to that construction. *See SEC v. Zandford*, 535 U.S. 813, 819, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002) (consistent interpretation of § 10(b) by SEC in formal adjudication is entitled to deference if reasonable); *United States v. Mead Corp.*, 533 U.S. 218, 229-30, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Crawford v. USDA*, 50 F.3d 46, 50-51 (D.C.Cir.1995) (deferring to USDA interpretation of § 1824(2)). There can be no dispute that the USDA is charged with administering the HPA, and that it has consistently interpreted § 1824(2)(D) in the context of formal adjudication. But there is a circuit split regarding whether the USDA's construction of the HPA with respect to owner liability is reasonable. *Compare Crawford v. USDA*, 50 F.3d 46, 50-51 (D.C.Cir.1995) (deferring to USDA interpretation of § 1824(2)) *with Baird v. USDA*, 39 F.3d 131, 137 n. 10 (6th Cir.1994) (USDA interpretation does not "fall[] within the range of permissible interpretations"). In our view, the USDA interpretation is a reasonable one. That interpretation is supported by the following analysis.

The key to deciding what the statute requires the owner to allow is the phrase "respecting a horse which is sore" in clause (D). The inclusion of this phrase supports the "simply-allowing" interpretation, because, as we now proceed to explain, the phrase would seem to serve no purpose if the statute were intended to impose an "allowing-plus" requirement for liability.

With the words "respecting a horse which is sore" deleted from clause (D), § 1824(2) would prohibit:

The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) by the owner of such horse.

The natural reading of the subsection as so rewritten would be that clause (D)'s phrase "activity described in clause (A)" (and similarly for clauses (B) and (C)) refers to "showing or exhibiting, in any horse show or horse exhibition, *of any horse which is sore.*" (emphasis added). With the words "respecting a horse which is sore" omitted, there would be no reason to construe the "activity described in clause (A)" as anything other than the activity described by all the words in clause (A). Accordingly, clause (D) would prohibit the owner from "allowing" the "showing or exhibiting, in any horse show or exhibition, of any horse which is sore." The statutory language would seem to call for an allowing-plus interpretation. To be liable, the owner would have to bear some measure of responsibility (the precise measure being unnecessary to decide for present purposes) for the soiling.

This construction becomes questionable, however, once the words "respecting a horse which is sore" are reinserted in clause (D). When those words are added, what the owner is prohibited from doing is "allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore." Consequently, the "activity described in clause (A)" cannot be the activity described by all the words in clause (A): "showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore." If that were the "activity described in clause (A)," then clause (D), as written in the statute, would prohibit an owner from "allowing [the showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore] respecting a horse which is sore." The words "respecting a horse which is sore" would become sloppy surplusage. Under a long-standing canon of statutory interpretation, one should avoid construing a statute so as to render statutory language superfluous. *See, e.g., Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10th Cir.2001) (en banc). That canon is particularly apt and persuasive here,

because in this short subsection the uselessness of the words "respecting a horse which is sore" could not have escaped the drafters' notice. Thus, one could reasonably conclude that in clause (D) the words "activity described in clause (A)" (and similarly for (B) and (C)) should be interpreted as "showing or exhibiting [a horse] in any horse show or horse exhibition," not "showing or exhibiting, in any horse show or horse exhibition, *of any horse which is sore.*"

Proceeding, then, from this construction of the phrase "activity described in clause (A)," what clause (D) prohibits an owner from doing is "allowing [the showing or exhibiting in any horse show or horse exhibition] respecting a horse which is sore." This can reasonably be read to say that what the owner must "allow" is merely the showing or exhibiting of the horse, but that there is no violation unless the showing or exhibiting was with respect to (*i.e.*, involved) a sore horse. In other words, the statute prohibits "simply allowing." The language might also support an allowing-plus interpretation--that what the owner is prohibited from doing is allowing the showing or exhibiting of a *sore* horse. But, as explained above, one would reach this interpretation even if the words "respecting a horse which is sore" were deleted from clause (D). Why would the drafters bother to insert the phrase "respecting a horse which is sore," if the same meaning would be conveyed (indeed, conveyed more clearly) without the phrase? Again, the USDA could properly avoid construing the statute so as to render statutory language surplusage. *See Oxy USA*, 268 F.3d at 1006.

In sum, the words "respecting a horse which is sore" in clause (D) pose a significant obstacle to an allowing-plus interpretation of the clause--an interpretation that would limit the prohibition to allowing, for example, the entry of a *sore* horse. If that were the intended meaning, it would have been easier, and cleaner, to convey the point by omitting the words "respecting a horse which is sore" from § 1824(2)(D). Reluctant to assume that the drafters were trying to be clumsy and confusing, the USDA could reasonably read the statute to say that if a sore horse is entered in a show, etc., the owner is liable simply for allowing it to be entered, regardless of whether the owner is implicated in any way (by intent, negligence, or even failure to exercise greater control) in the showing.

Moreover, the USDA's interpretation of the statute does not produce a remarkable result. In essence, it imposes on the owner a nondelegable duty not to engage in the practice of soring. This may be a heavy burden on owners. But it may be justified as a prophylactic measure necessary to ensure that trainers have no incentive to sore their horses. *See Crawford*, 50 F.3d at 51-52. Although some circuits appear reluctant to uphold sanctions when there is uncontradicted testimony that the owner instructed the trainer not to engage in soring, *see, e.g., Burton v. USDA*, 683 F.2d 280, 283 (8th Cir.1982), one can be skeptical of self-serving testimony to that effect by the owner or trainer. Of course, when an owner can convince the USDA of his or her efforts to prevent soring, the agency may decide to impose only a light sanction or none at all. *See* 15 U.S.C. § 1825(b)(1). (Also, recall that *criminal* penalties are authorized only for *knowing* violations of § 1824. *See* 15 U.S.C. § 1825(a).)

As for Dr. McCloy's challenge to the sufficiency of the evidence, we need only find that there was sufficient evidence for the JO to be persuaded that the trainer had authority to enter Missy in the show. The JO wrote the following:

[T]he record is clear that Respondent allowed Ronal Young to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration. Respondent testified that trainers who Respondent hired, including Ronal Young, entered Missy in horse shows and horse exhibitions approximately 25 times before September 4, 1998, and Ronal Young entered Missy in at least two horse shows or horse exhibitions after September 4, 1998.

(Tr. 151, 174-75).

The record contains no evidence that Respondent objected to his trainers entering Missy in horse shows or horse exhibitions, and, specifically, the record contains no evidence that Respondent objected to Ronal Young's entering Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy in that horse show. Moreover, Respondent does not contend that he did not allow Ronal Young to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration.

In addition, there was no evidence that Dr. McCloy ever complained to

Young about having entered Missy.

In our view, the JO could reasonably infer that Young had authority to enter Missy in shows and exhibitions without obtaining specific approval for each entry.

CONCLUSION

Holding that the JO employed the proper legal standard and that his decision is supported by substantial evidence, we AFFIRM the Secretary's decision.

PAUL KELLY, JR., Circuit Judge, dissenting.

The court adopts the USDA's position that an owner is liable regardless of knowledge or fault for a sore horse. *See Crawford v. USDA*, 50 F.3d 46, 50-51 (D.C.Cir.1995). In so doing, the court ignores the language of the statute and does not consider the language as a whole and rejects an interpretation that would require the USDA to prove that the owner is somehow responsible for the soring, either by authorizing, condoning, or remaining deliberately ignorant about it. *See Lewis v. Sec'y of Agric.*, 73 F.3d 312, 315-16 (11th Cir.1996); *Baird v. USDA*, 39 F.3d 131, 136 (6th Cir.1994); *Burton v. USDA*, 683 F.2d 280, 282-83 (8th Cir.1982). According to the court, the key to this issue is contained in a phrase used in § 1824(2)(D)--"respecting a horse which is sore." The court reasons that this phrase could not mean the same thing as "any horse which is sore," which is used three times before in the statute. According to the court, the phrase "any horse which is sore" does not inform the reading of § 1824(2)(D); rather, "respecting a horse which is sore" means that entering, showing, or exhibiting a horse in a horse show results in liability if the horse turns out to be sore.

In my view, the court reads far too much into what appears to be ordinary language rather than perfection in draftsmanship. This novel approach to the statute is not that of the USDA, although surely the USDA will agree with the result. According to the USDA, "[w]hether [Dr.] McCloy violated the HPA turns on the meaning of the term 'allow.'" Respondent's Br. at 15. I agree, and note that several other circuits resolved the issue based upon the meaning of "allows." Regardless of whether "respecting a horse which is sore" is surplusage, it is clear that the statute prohibits entering, showing or exhibiting

a sore horse, § 1824(2)(A)-(B), and also prohibits an owner allowing such entry, show or exhibition. § 1824(2)(D).

The USDA contends that the act of entering a sore horse establishes liability under § 1824(2)(B), so in like manner § 1824(2)(D) should do the same for owners. Respondent's Br. at 14-16. The fact that the statute differentiates between those who directly enter, show, or exhibit horses and those who do not suggests just the opposite. The USDA's interpretation reads "allows" out of the statute. *Cf. Baird*, 39 F.3d at 137 n. 10 (refusing to extend *Chevron* deference to USDA's interpretation of § 1824(2)(D) because it would render the term "allow" a nullity). Congress chose a more nuanced approach. The term "allow" connotes more than strict liability (or the liability of a guarantor)-according to the Oxford English Dictionary the term means "[t]o praise, commend, approve of," or "[t]o admit the realization of, permit." Oxford English Dictionary (2d ed.1989).

The undisputed testimony of Dr. McCloy was that he was not even aware that Missy would be shown on the day the horse was disqualified for being sore before the show. Dr. McCloy further offered uncontradicted testimony that he did not praise, commend, or approve of soring Missy, nor did he permit it in any meaningful sense. Rather, Dr. McCloy made unannounced visits to check on Missy and, in the JO's own words, the USDA "did not prove that [Dr. McCloy's] admonitions directed to Ronal Young concerning the soring of Missy constituted merely a pretext or a self-serving ruse." *Id.* at 38. In light of these facts and my interpretation of § 1824(2)(D), I would hold that Dr. McCloy cannot be held liable for violating the HPA. *See Lewis*, 73 F.3d at 315-17.

PHILLIP TRIMBLE v. USDA.

No. 03-3568.

Filed December 10, 2003.

(Cite as: 2003 WL 23095662 (6th Cir.).

HPA – Default – Due Process via Certified Mail – Fifth amendment.

Petitioner contended his fifth amendment rights of due process were violated when USDA obtained a default judgment against him resulting in a fine and disqualification for one year from his chosen profession. The court determined that the USDA followed its rules of procedure designed to give actual notice of an intent to take a punitive action by sending notice via certified mail to Respondent's last know business address. As long as legal standards were met and substantial evidence is present to support the default judgement, the court will not disturb the administrative action.

United States Court of Appeals, Sixth Circuit.

Before ROGERS and COOK, Circuit Judges; and COHN, District Judge.*

ORDER

Phillip Trimble seeks review of a final order by the Secretary for the United States Department of Agriculture issued on March 27, 2003, under the Horse Protection Act of 1970, 15 U.S.C. §§ 1821-31. The parties have waived oral argument and this panel unanimously agrees that oral argument is not needed. Fed. R.App. 34(a).

On February 4, 2002, Bobby Acord, Administrator of the Animal and Plant Health Inspection Service, an agency of the Department of Agriculture, filed a complaint charging Trimble with violating the Horse Protection Act. The complaint alleged that Trimble was the trainer of a horse known as "Pushover The Top." Trimble allegedly violated 15 U.S.C. § 1824(2)(B) by entering "Pushover The Top" on April 29, 2000, at the Second Annual Gulf Coast Charity Celebration Walking Horse Show at Panama Beach, Florida, while the horse was sore.

On February 4, 2002, the Department's Hearing Clerk sent to Trimble and other parties a service letter and a copy of the Department's Rules of Practice under which administrative adjudications are conducted, 7 C.F.R. §§ 1.130-1.151. The complaint package was sent by certified mail to Trimble's last known business address. The package was signed for by Alfonso Avila. Trimble failed to file an answer to the complaint within twenty days after service of the complaint as required by 7 C.F.R. § 1.136(a). On March 11,

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

2002, the Hearing Clerk sent a letter to Trimble informing him that his answer to the complaint had not been filed within the time required.

On October 11, 2002, in accordance with 7 C.F.R. § 1.139, the Inspection Service filed a motion for a default decision which the Hearing Clerk mailed to Trimble on October 15, 2002. Trimble did not object to the motion for a default decision. On December 30, 2002, Administrative Law Judge James W. Hunt (ALJ) issued a decision finding that Trimble entered "Pushover The Top" in the Charity Celebration while the horse was sore and concluded that Trimble had violated 15 U.S.C. § 1824(2)(B). The ALJ imposed a \$2,200 civil penalty and disqualified Trimble for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. Trimble received personal service of the ALJ's decision in Frankewing, Tennessee, on February 3, 2003.

On February 20, 2003, Trimble filed an appeal of the ALJ's decision and order. The Secretary of Agriculture issued a final decision on March 27, 2003. The Secretary adopted the ALJ's decision and order as his final decision and added additional conclusions. The Secretary affirmed the ALJ's conclusion that Trimble failed to file an answer to the complaint within the time provided for under 7 C.F.R. § 1.136(a). The Secretary also concluded that the "[a]pplication of the default provisions of the Rules of Practice does not deprive [Mr. Trimble] of his rights under the due process clause of the Fifth Amendment to the United States Constitution." The Secretary assessed Trimble a civil penalty of \$2,200 and disqualified him for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. This petition for review followed.

On appeal, Trimble asserts that his due process rights were violated because he was not notified in a reasonable manner of the administrative action against him regarding the alleged violations of the Horse Protection Act.

The court's review of an administrative decision regarding the Horse Protection Act is limited to a determination of whether proper legal standards were used and whether substantial evidence exists to support the decision.

Bobo v. United States Dep't of Agric., 52 F.3d 1406, 1410 (6th Cir.1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence means more than a scintilla, but less than a preponderance, and must be based on the record taken as a whole. *Id.*

Trimble contends that the service of process by certified mail of the February 4, 2002, complaint was insufficient under the due process clause of the Fifth Amendment. The facts establish that the Hearing Clerk for the Department of Agriculture sent the complaint to Trimble's last known business address by certified mail. Service by certified package is a constitutionally adequate method of notice. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). The fact that Trimble may not have received the certified package does not negate the constitutional adequacy of the attempt to accomplish actual notice. *United States v. Clark*, 84 F.3d 378, 381 (10th Cir.1996). The Secretary had no other address for notifying Trimble of the proceedings. Under these circumstances, the Secretary's effort to send the complaint to Trimble's last known address is "reasonably calculated under all the circumstances" to notify Trimble of the proceedings. *DePiero v. City of Macedonia*, 180 F.3d 770, 788-89 (6th Cir.1999) (serving a summons to the plaintiff's last known address is sufficient where the plaintiff was not incarcerated and where the city had no information about the plaintiff's whereabouts that would give the city reason to suspect he would not actually receive the notice mailed to his last known address).

Accordingly, the petition for review is denied.

HORSE PROTECTION ACT**DEPARTMENTAL DECISIONS**

**In re: BOWTIE STABLES, LLC, A TENNESSEE CORPORATION;
JAMES L. CORLEW, SR., AN INDIVIDUAL; BETTY CORLEW, AN
INDIVIDUAL; AND B.A. DORSEY, AN INDIVIDUAL.**

HPA Docket No. 00-0017.

Decision and Order.

Filed July 11, 2003.

**HPA - Horse protection – Entry – Allowing entry – Palpation – Sore – Substantial evidence –
Civil penalty – Disqualification.**

The Judicial Officer affirmed the decision by Administrative Law Judge Jill S. Clifton concluding that James L. Corlew, Sr., and B.A. Dorsey entered Ebony's Bad Bubba in a horse show while the horse was sore in violation of 15 U.S.C. § 1824(2)(B) and Bowtie Stables, LLC, and Betty Corlew allowed the entry of Ebony's Bad Bubba in a horse show while the horse was sore in violation of 15 U.S.C. § 1824(2)(D). The Judicial Officer assessed each Respondent a \$2,200 civil penalty and disqualified each Respondent from participating in horse shows, horse exhibitions, horse sales, and horse auctions for 1 year. The Judicial Officer found substantial evidence supported the finding that the horse was sore. The Judicial Officer also found the horse manifested abnormal sensitivity in both of his forelimbs raising the presumption that he was sore and Respondents failed to rebut the presumption. The Judicial Officer held palpation is a highly reliable method for determining whether a horse is sore. The Judicial Officer also held that Ebony's Bad Bubba was entered in the 32nd Annual National Walking Horse Trainers Show even though two Designated Qualified Persons disqualified the horse from competing in the show after concluding their pre-show inspection of the horse. The Judicial Officer found that Betty Corlew could be found to have allowed the entry of Ebony's Bad Bubba in violation of 15 U.S.C. § 1824(2)(D) based on her ownership of Ebony's Bad Bubba and her control of Bowtie Stables, LLC, which was also an owner of Ebony's Bad Bubba.

Sharlene A. Deskins, for Complainant.

David F. Broderick, for Respondents.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

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

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint on July 5, 2000. Complainant instituted the proceeding under the Horse

Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; 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]. The Complaint includes “Billy Corlew, an individual as one of the Respondents. On August 31, 2000, Complainant filed a “Notice of Withdrawal of Complaint Without Prejudice as to Respondent Billy Corlew. On September 8, 2000, Chief Administrative Law Judge James W. Hunt issued an “Order Allowing Withdrawal of ‘Billy Corlew’ as a Respondent and Order Amending Case Caption. On May 9, 2001, Complainant filed an “Amended Complaint which added “Betty Corlew, an individual, as a Respondent.

Complainant alleges that: (1) on or about March 22, 2000, James L. Corlew, Sr., and B.A. Dorsey entered a horse known as “Ebony’s Bad Bubba as entry 181 in class 9 at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while Ebony’s Bad Bubba was sore, for the purpose of showing or exhibiting the horse, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); and (2) on or about March 22, 2000, Bowtie Stables, LLC, and Betty Corlew allowed James L. Corlew, Sr., and B.A. Dorsey to enter Ebony’s Bad Bubba as entry 181 in class 9 at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while Ebony’s Bad Bubba was sore, for the purpose of showing or exhibiting the horse, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Amended Compl. ¶¶ 7-8). On June 4, 2001, Bowtie Stables, LLC, James L. Corlew, Sr., Betty Corlew, and B.A. Dorsey [hereinafter Respondents] filed “Respondent’s Answer to Amended Complaint [hereinafter Answer to Amended Complaint] in which Respondents deny violating the Horse Protection Act (Answer to Amended Compl. ¶ 3).

Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided at a hearing in Clarksville, Tennessee, on August 8 and 9, 2001. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. David F. Broderick, Broderick & Thornton, Bowling Green, Kentucky, represented Respondents.

On October 17, 2001, Respondents filed “Respondents’ Proposed Findings of Fact, Conclusions and Order and “Respondents’ Opening Brief and Complainant filed “Complainant’s Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof. On November 7, 2001,

Complainant filed “Complainant’s Reply to the Respondent’s Proposed Findings of Fact, Conclusions and Order of Dismissal. On November 8, 2001, Respondents filed “Respondents’ Responsive Brief.

On April 4, 2002, the ALJ issued a “Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded Bowtie Stables, LLC, and Betty Corlew allowed Ebony’s Bad Bubba to be entered at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while Ebony’s Bad Bubba was sore, for the purpose of showing or exhibiting the horse, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)); (2) concluded James L. Corlew, Sr., Betty Corlew, and B.A. Dorsey entered Ebony’s Bad Bubba at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, while Ebony’s Bad Bubba was sore, for the purpose of showing or exhibiting the horse, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (3) assessed each Respondent a \$2,200 civil penalty; and (4) disqualified each Respondent from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction for 1 year (Initial Decision and Order at 22-25).

On June 5, 2002, Respondents appealed to the Judicial Officer. On July 19, 2002, Complainant filed “Complainant’s Opposition to the Respondents’ Appeal Petition. On July 23, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ’s Initial Decision and Order, except for the ALJ’s finding that Betty Corlew was not an owner of Ebony’s Bad Bubba and the ALJ’s conclusion that Betty Corlew violated 15 U.S.C. § 1824(2)(B). Therefore, I adopt, with modifications, the Initial Decision and Order as the final Decision and Order.

Complainant’s exhibits are designated by “CX. Respondents’ exhibits are designated by “RX. Transcript references are designated by “Tr.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

....

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

....

(3) The term “sore” when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that—

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

....

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 1824. Unlawful acts

The following conduct is prohibited:

....

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than \$3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than \$3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in

both of its forelimbs or both of its hindlimbs.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1823(a), (c), 1824(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

.....

PART VI—PARTICULAR PROCEEDINGS

.....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

.....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an

important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(I) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION
ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and
- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

28 U.S.C. § 2461 note.

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*

....

(2) *Animal and Plant Health Inspection Service*. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of \$2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

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 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as “Webster’s.

Action Device means any boot, collar, chain, roller, or other device which encircles or is placed upon the lower extremity of the leg of a horse in such a manner that it can either rotate around the leg, or slide up and down the leg so as to cause friction, or which can strike the hoof, coronet band or fetlock joint.

Designated Qualified Person or *DQP* means a person meeting the

requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

Exhibitor means (1) any person who enters any horse, any person who allows his horse to be entered, or any person who directs or allows any horse in his custody or under his direction, control or supervision to be entered in any horse show or horse exhibition; (2) any person who shows or exhibits any horse, any person who allows his horse to be shown or exhibited, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be shown or exhibited in any horse show or horse exhibition; (3) any person who enters or presents any horse for sale or auction, any person who allows his horse to be entered or presented for sale or auction, or any person who allows any horse in his custody or under his direction, control, or supervision to be entered or presented for sale or auction in any horse sale or horse auction; or (4) any person who sells or auctions any horse, any person who allows his horse to be sold or auctioned, or any person who directs or allows any horse in his custody or under his direction, control, or supervision to be sold or auctioned.

. . . .

Horse Exhibition means a public display of any horses, singly or in groups, but not in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

. . . .

Horse Sale or Horse Auction means any event, public or private, at which horses are sold or auctioned, regardless of whether or not said horses are exhibited prior to or during the sale or auction.

Horse Show means a public display of any horses, in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

Inspection means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed

appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

9 C.F.R. § 11.1.

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

Decision Summary

In this Decision and Order, I determine the act of being the scheduled rider, who is to show a horse, is an act of entering the horse to be shown or exhibited in a horse show, within the meaning of 15 U.S.C. § 1824(2)(B); however, I do not conclude the scheduled rider of Ebony's Bad Bubba, Betty Corlew, entered Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show in violation of 15 U.S.C. § 1824(2)(B) because that violation was not alleged in the Amended Complaint. I determine an individual who controls the corporate owner of a horse can be liable for a violation of 15 U.S.C. § 1824(2)(D). I determine Bowtie Stables, LLC, James L. Corlew, Sr., Betty Corlew, and B.A. Dorsey violated the Horse Protection Act, even if they were unaware that Ebony's Bad Bubba was sore. I determine the assessment of the usually-imposed \$2,200 civil penalty against each Respondent is appropriate. Further, while disqualification is discretionary, I determine the usual practice of imposing the minimum 1 year disqualification period for the first violation of the Horse Protection Act is appropriate as to each Respondent.

Discussion

The first issue is whether Ebony's Bad Bubba was entered to be shown or exhibited in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000. If so, the second issue is whether Ebony's Bad Bubba was sore at the time. Complainant need merely prove the case by a preponderance of the evidence. If Complainant can prove the horse was sore, Complainant need not prove who sored the horse or how the horse was sored. Complainant need not even prove that any of the Respondents knew the horse was sore.

The remaining issues concern Betty Corlew. Did she enter Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show to be shown or exhibited? Was she Ebony's Bad Bubba's owner or co-owner?

First issue: Was Ebony's Bad Bubba entered to be shown or exhibited in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000? Respondents claim Ebony's Bad Bubba's entry was never completed; therefore, he was not entered.¹ I find to the contrary, that Ebony's Bad Bubba was entered. During the pre-show inspection, two designated qualified persons [hereinafter DQPs],² Robert (Bob) Flynn and Mark Thomas, inspected Ebony's Bad Bubba (CX 3, CX 4). The DQPs agreed on an "Exam Score" of seven points; prepared and issued Ticket No. 21878 to Ebony's Bad Bubba's trainer, B.A. Dorsey; and prevented the horse from competing in the 32nd Annual National Walking Horse Trainers Show (CX 2-CX 5). Ebony's Bad Bubba was "disqualified" or "excused," based on the seven-point score. I find Ebony's Bad Bubba was entered to be shown or exhibited, even though, based on the pre-show inspection, he was disqualified or excused from competing. A finding of soreness made during

¹Complainant alleges and Respondents admit James L. Corlew, Sr., and B.A. Dorsey entered Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show and Bowtie Stables, LLC, and Betty Corlew allowed James L. Corlew, Sr., and B.A. Dorsey to enter Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show (Amended Compl. ¶¶ 5-6; Answer to Amended Compl. ¶ 2). Moreover, each individual Respondent states in an affidavit that Ebony's Bad Bubba was entered in the 32nd Annual National Walking Horse Trainers Show on March 22, 2000 (CX 9, CX 10, CX 11). Therefore, I find Respondents' contention that Ebony's Bad Bubba was not entered in the 32nd Annual National Walking Horse Trainers Show perplexing. Nonetheless, I address the entry of Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show.

²A designated qualified person or DQP is an individual appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

pre-show inspection has consistently been a sufficient basis upon which to find that a violation of “entering a horse while sore” has occurred.³

Second issue: Was Ebony’s Bad Bubba sore at the time of the pre-show inspections? Relying on palpation results from Ebony’s Bad Bubba’s front feet, Dr. Lynn P. Bourgeois and Dr. David C. Smith, Animal and Plant Health Inspection Service veterinary medical officers, each found the horse had been sore in both front feet. Based upon their pre-show inspections of Ebony’s Bad Bubba on March 22, 2000, I find Ebony’s Bad Bubba was sore.

Drs. Bourgeois and Smith opined that the horse was sore by overuse of action devices or other mechanical means or by chemical means. Because of the specific location of the painful areas, they testified they could reasonably expect that Ebony’s Bad Bubba would have been in physical pain if he had been exhibited on March 22, 2000. Both veterinarians concluded that the horse’s pain was not due to accidental causes.

Before detailing the findings by the Animal and Plant Health Inspection Service veterinary medical officers, I now mention evidence presented by Mr. Lonnie Messick, an official at the 32nd Annual National Walking Horse Trainers Show, and additional findings by the DQPs. Mr. Messick was subpoenaed by Respondents to bring a copy of a videotape recorded at the 32nd Annual National Walking Horse Trainers Show (Tr. 244). The tape was marked as RX 2 and was viewed at the hearing. Mr. Messick testified that exhibitors should have been aware that the inspections of their horses were videotaped. He said he has a sign outside the inspection area that states the horses are video and audio taped during inspection, and he normally holds pre-show conferences in which he discusses, among other things, the videotaping of the inspection of horses. (Tr. 308-09.) Mr. Messick also testified about the DQP inspection of horses. He said very few horses receive a score of nine, occasionally a horse receives a score of eight, and a score of seven is not given very often (Tr. 284-85). Mr. Messick was asked if a score of seven indicates a horse is sore. Mr. Messick answered:

In March of 2000 a score of seven would have been a penalty of eight months and a \$600 fine from the National Horse Show

³*In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff’d*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

Commission. A Horse Protection violation at that time, normally individuals would have received for a horse in violation of a sore horse, would have been anywhere from eight months to a year plus some fine. Now that's just from the experience that I've had.

Your VMOs will have to answer that question as to what the penalty is for a sore horse from USDA.

Tr. 286.

Mr. Messick also testified "the reason we have two examination sheets is our procedure is any score of seven or above requires two DQPs to inspect that horse and they have to agree that that horse is a seven or greater before it would receive that score. (Tr. 300.) He said the DQPs and Animal and Plant Health Inspection Service veterinary medical officers are jointly trained by the United States Department of Agriculture to conduct horse inspections (Tr. 304).

DQP Robert Flynn determined Ebony's Bad Bubba presented at the pre-show inspection with the following indicators (CX 3):

Locomotion (2 points): Gait, slow around cone putting a lot of weight on his back end.

Physical examination (3 points): Palpation, Very strong reaction in both feet—hind & front.

Appearance (2 points): Tucking of Flanks, Flexing Abdominal Muscles, horse was hot—tucked flanks—shifted weight to the back end.

DQP Mark Thomas determined Ebony's Bad Bubba presented at the pre-show inspection with the following indicators (CX 4):

Locomotion (2 points): Stance, Gait, Freedom of Movement When Led, Turning Around Cone, Led slow and in a cramped position—taking very short steps at times. Led on a very

tight rein.

Physical examination (3 points): Palpation, Reacted to palpation on both front feet down the center and around both sides on both front feet and also in both pockets on both feet

Appearance (2 points): Tucking of Flanks, Flexing Abdominal Muscles, Rocking Forward or Standing on Toes, Rear Limbs, Stayed tensed in his abdominal muscles, tucked flanks during palpation. Rocked back and forth during palpation.

Dr. Bourgeois inspected Ebony's Bad Bubba after the DQPs had completed their inspections. Dr. Bourgeois testified as to his knowledge, training, and experience in the field of horse inspections. He is a doctor of veterinary medicine with 20 years of experience as to the Horse Protection Act (Tr. 162-63). Dr. Bourgeois had no specific recollection of Ebony's Bad Bubba and his inspection (Tr. 163-64). Dr. Bourgeois stated that the Xs on APHIS Form 7077 (CX 6) were his marks (Tr. 167). Upon review of his affidavit (CX 7) and review of his marks on APHIS Form 7077 (CX 6), Dr. Bourgeois opined that Ebony's Bad Bubba was sore and that the "[soring was] concurrent [sic] with chemical soring or working with chains (Tr. 168). He stated he and Dr. Smith discussed their findings with each other at the pre-show inspection before coming to a conclusion that Ebony's Bad Bubba was sore (Tr. 167). Both of the United States Department of Agriculture veterinary medical officers observed Ebony's Bad Bubba's reaction to palpation when he was being inspected by the DQPs (CX 7, CX 8).

Dr. Bourgeois explained that the proper procedure for palpating a horse is that "we palpate that area at least three times. If you get a reproducible, repeatable response in that one area, that is considered enough to call a hard [sic] sore (Tr. 173). The APHIS Form 7077 completed by Drs. Bourgeois and Smith shows that they agreed on 12 out of 16 locations where palpation resulted in pain responses (CX 6).

Dr. Smith inspected Ebony's Bad Bubba after both DQPs and Dr. Bourgeois had inspected the horse. Dr. Smith testified as to his

knowledge, training, and experience in the field of horse inspection. He is a doctor of veterinary medicine with 5 years of experience with Tennessee Walking Horse shows and special training as to the Horse Protection Act (Tr. 30, 63). He testified that he had no independent recollection of the inspection, but his recollection was refreshed upon review of his affidavit and APHIS Form 7077 (Tr. 34-35). He stated that the notes from which he prepared his affidavit were prepared within 45 minutes of the inspection (Tr. 115).

Dr. Smith opined that Ebony's Bad Bubba was sore. Dr. Smith determined that due to the symmetry of the horse's reaction to his palpation, the soring was not accidental. He likewise ruled out developmental changes, such as "contracted heels, as a basis for the horse's reaction to palpation on all sides of the horse's front feet (Tr. 47-50).

Dr. Smith explained the marking system on APHIS Form 7077 (CX 6). He stated that the places where he tested and found painful reaction to palpation were shown as circles (0s) on the front, back, left, and right side views of Ebony's Bad Bubba's front pasterns (the area between the hoof and what looks like an ankle joint on the leg) (Tr. 42-46). As Dr. Smith explained, "[p]alpation consists of taking my thumb and gently pressing on these areas, looking for areas that are painful (Tr. 42). "[T]he horse, if it's painful, will try to jerk the foot away. That's just a natural pain response. (Tr. 43.) "Every time I pressed on those areas [indicated by circles on APHIS Form 7077 (CX 6)], the horse gave me a withdrawal reflex. Now that's the gentle pressure of my thumb on the horse's pastern (Tr. 45-46). Dr. Smith was also able to narrate the horse's reaction to palpation upon reviewing the video (Tr. 128-34, 142; RX 2).

While Dr. Smith viewed Ebony's Bad Bubba being led, he observed that the horse was "moving slowly . . . tentatively . . . stabbing into the ground in choppy motions. He made these observations from a distance of approximately 20 feet (Tr. 47, 89, 96, 126).

Respondents argue Drs. Bourgeois and Smith reached their mutual conclusion that Ebony's Bad Bubba was sore based solely upon palpation without evidence that chemical irritants or other mechanical devices were used and therefore their conclusions were flawed (Respondents' Responsive Brief at 3). Respondents further argue the opinions expressed (a) by Dr. Bourgeois, that "this horse was sore with caustic chemicals, overwork in chains, or a combination of both (CX 7 at 2), and (b) by Dr. Smith, that "this horse was

sored by mechanical and/or chemical means (CX 8 at 2), are faulty conclusions without any specific evidence of chemical or physical injury (Respondents' Responsive Brief at 3). Neither Dr. Bourgeois nor Dr. Smith found evidence of: (a) prohibited chemicals that might be associated with chemical burns (Tr. 138-39, 192, 205); (b) violations of the Scar Rule (Tr. 100, 195-96); or (c) inflammation at the sored site (Tr. 106-07, 196, 199). Respondents' cross-examinations of Dr. Bourgeois and of Dr. Smith establish that certain tests, which might have tended to rebut the presumption of soreness, were not conducted, to wit, (a) they did not measure the horse's temperature, (b) they did not measure the horse's pulse, and (c) they did not measure the horse's respiration rate (Tr. 106-10, 200-01). Both doctors observed, but did not measure, the horse's heel-to-toe measurements and pad measurements (Tr. 111-12, 214). Neither Dr. Bourgeois nor Dr. Smith requested that Ebony's Bad Bubba be trotted while they observed (Tr. 110-11, 200).

A horse shall be presumed to be sore if it manifests abnormal sensitivity in both of its forelimbs or both of its hindlimbs.⁴ The Secretary of Agriculture's policy has been that palpation alone is a reliable method to determine soring. The method of using palpation alone to determine whether a horse is sore has not been found suspect by the United States Court of Appeals for the Sixth Circuit Court or the United States Court of Appeals for the District of Columbia Circuit. The United States Court of Appeals for the Sixth Circuit has held that a finding of soreness based upon the results of palpation alone is sufficient to invoke the rebuttable presumption that a horse is sore.⁵

Respondents argue even if I were to find that Complainant has met the threshold test of proving Ebony's Bad Bubba was sore, then the testimony of B.A. Dorsey and Dr. Kimmons rebut that threshold finding (Respondents' Responsive Brief at 5). I respectfully must disagree. Even though it appears to me that Ebony's Bad Bubba reacted to quick and rough handling by one or both DQPs just prior to the Animal and Plant Health Inspection Service veterinary medical officers' inspections, and even though it appears to me that Ebony's Bad Bubba's peculiar gait and stance were characteristic of him and

⁴15 U.S.C. § 1825(d)(5).

⁵*Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1413 (6th Cir. 1995).

did not necessarily show reluctance to put weight on his front feet, I rely on the Animal and Plant Health Inspection Service veterinary medical officers' expert ability to distinguish a pain response from other reactions and to identify pain that has been caused by soring.

Respondents may have been unaware that Ebony's Bad Bubba was sore, but they nevertheless are responsible for a violation if the horse was sore, because they each entered him to be shown or exhibited or allowed him to be entered to be shown or exhibited. As the Judicial Officer has observed, "[i]ntent and knowledge are not elements of the violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) and rarely is there any proof of a knowing or intentional violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 602 (2001). And also, "it is clear under the 1976 amendments [to the Horse Protection Act] that intent and knowledge are not elements of a violation *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 604 (2001).

Respondents offer alternate theories, other than being sore, as to why Ebony's Bad Bubba reacted upon palpation (Respondents' Responsive Brief at 6-7). Respondents suggest the horse was reacting due to having being handled roughly by one or more examiners. B.A. Dorsey noted that the initial inspection conducted by DQP Robert Flynn included snatching the horse's front leg up and pulling it off to the left. B.A. Dorsey said, "[i]f you remember that tape, you can see where he picked him up, snatched him up, and pulled him off to the left. If he would have just picked him up normal, the horse would have been fine. Right off the bat, he just snatched him up and went to probing on him, and that horse will not take it (Tr. 453). B.A. Dorsey believed the horse was treated roughly by design (Tr. 453-54).

In watching the videotape, I saw what I believe was quick and rough handling of Ebony's Bad Bubba by the DQPs. It appeared to me that DQP Robert Flynn pulled the horse's front leg not just up and back, but out to the side, in what looked to me to be a painful position (Tr. 453).

B.A. Dorsey said he palpated Ebony's Bad Bubba probably three times before the first DQP inspected him, and Ebony's Bad Bubba was "fine. B.A. Dorsey suggested that the procession of inspections (four inspections) caused Ebony's Bad Bubba to react progressively more agitated as different persons inspected him. The horse had never been inspected that much before (Tr. 431-33, 451-52).

Respondents suggest that Ebony's Bad Bubba was disturbed by other horses, that he is a stallion and mares were present; consequently, he was nervous. As Dr. Kimmons stated, however, veterinarians typically have the skills to determine whether a horse is moving due to being in pain, for example, reacting because the horse has been touched [palpated], as opposed to just being curious about his environment or just looking around (Tr. 399-400).

The evidence indicates that during the pre-show inspection, Ebony's Bad Bubba was being led on a "tight rein" and that he did not always have a "loose rein" (CX 4; Tr. 222). The implication is that Ebony's Bad Bubba was reluctant to be led. B.A. Dorsey stated that the manner in which Ebony's Bad Bubba moved when being led around the cones was normal for him (Tr. 431-35). I accept as accurate B.A. Dorsey's characterization of Ebony's Bad Bubba's normal movements. Nevertheless, I am persuaded by the evidence presented by the two Animal and Plant Health Inspection Service veterinary medical officers, given their training and experience, that bilateral, reproducible reaction to palpation, found in 16 separate locations, 12 of which they agreed upon, proved Ebony's Bad Bubba was sore on March 22, 2000, when he was entered in the 32nd Annual National Walking Horse Trainers Show.

Respondents request that I consider that because Ebony's Bad Bubba has a lower back end due to his body size and body makeup, he has an unusual stride or gait (Tr. 409-10). B.A. Dorsey describes Ebony's Bad Bubba as having a "deep, really deep behind . . . sort of setting down on his haunches . . . short stride . . ." (Tr. 435.) Dr. Kimmons described Ebony's Bad Bubba as "a small horse in stature, in height . . . has a short back, short rump, somewhat short strided" (Tr. 379). My view of the horse at the beginning of the second day of the hearing confirmed that B.A. Dorsey's and Dr. Kimmons' descriptions of Ebony's Bad Bubba's structure are accurate. It appeared that the horse's gait and stance are somewhat unusual, as B.A. Dorsey and Dr. Kimmons described, but I have no way of knowing whether the horse was sore at the time I viewed him. B.A. Dorsey's and Dr. Kimmons' testimony about Ebony's Bad Bubba's structure and his normal gait, together with my view of the horse, persuade me to give little weight to the DQPs' and the Animal and Plant Health Inspection Service veterinary medical officers' visual observations about the horse's appearance and locomotion. Nevertheless, the palpation evidence still persuades me that

Ebony's Bad Bubba was sore on March 22, 2000.

Ebony's Bad Bubba wore pads on his feet during shows. During Dr. Smith's cross-examination, he admitted that putting 3-inch pads on the horse would probably have altered his gait (Tr. 140-41). Respondents argue that if Drs. Smith and Bourgeois had requested the horse to have been trotted, they could have better determined whether or not Ebony's Bad Bubba was sore (Respondents' Responsive Brief at 5). While that may be true, their failure to have the horse trot does not negate their findings upon palpation.

Dr. Kimmons opined that there was no reason for disqualifying Ebony's Bad Bubba from participation in the 32nd Annual National Walking Horse Trainers Show (Tr. 378). Dr. Kimmons' opinion was derived from his video review (RX 2) of others conducting the pre-show inspection of Ebony's Bad Bubba. Dr. Kimmons stated a horse that is bright, alert, and not sweating indicates to him that the horse is not sore. He agreed that he could not tell from the video if Ebony's Bad Bubba was sweating (Tr. 393). DQP Robert Flynn's examination report states the "horse was hot (CX 3).

Although I value Dr. Kimmons' testimony, he had no opportunity to inspect Ebony's Bad Bubba on March 22, 2000. His examination of the horse was in April 1998 (Tr. 370). Dr. Kimmons testified he had never seen a walking horse in his practice that had been sore (Tr. 387-88, 391). Even though Dr. Kimmons was able to make observations from his review of the videotape, he agreed that he could give a better professional opinion if he had actually inspected the horse (Tr. 391).

In conclusion, after careful evaluation of the evidence as a whole, I must conclude that Ebony's Bad Bubba was sore when he was entered on March 22, 2000, to be shown or exhibited in the 32nd Annual National Walking Horse Trainers Show. As earlier stated, I rely upon the results of palpation of Ebony's Bad Bubba's front feet by Dr. Lynn P. Bourgeois and Dr. David C. Smith.

Third issue: Did Betty Corlew enter Ebony's Bad Bubba to be shown or exhibited? The evidence is sufficient to find that she did. Betty Corlew was scheduled to be "up" as the rider who was to show Ebony's Bad Bubba at the 32nd Annual National Walking Horse Trainers Show (CX 2; Tr. 479-80). Riding a horse is one of those activities necessary to entering a horse show, each of which constitutes "entering" the horse to be shown or exhibited. These acts of "entering" include clerical entries such as completing the entry form and paying the entry fees, and include presenting the horse for pre-show

inspection.⁶ The act of being the scheduled rider to show the horse, is also an act of entering. However, Complainant does not allege that Betty Corlew entered Ebony's Bad Bubba to be shown or exhibited in violation of 15 U.S.C. § 1824(2)(B); therefore, based on Complainant's failure to allege that Betty Corlew violated 15 U.S.C. § 1824(2)(B), I do not conclude that Betty Corlew violated 15 U.S.C. § 1824(2)(B).

Last issue: Was Betty Corlew Ebony's Bad Bubba's owner, who can therefore be found to have allowed the horse to be entered in the 32nd Annual National Walking Horse Trainers Show while sore, in violation of 15 U.S.C. § 1824(2)(D)? I find Betty Corlew was an owner of Ebony's Bad Bubba. Complainant alleges Betty Corlew was the owner or a co-owner of Ebony's Bad Bubba on or about March 22, 2000 (Amended Compl. ¶ 2). Respondents admit this allegation (Answer to Amended Compl. ¶ 2). Based on Respondents' admissions in Respondents' Answer to Amended Complaint, I conclude Betty Corlew was an owner of Ebony's Bad Bubba at the time Ebony's Bad Bubba was entered for the purpose of showing or exhibiting the horse in the 32nd Annual National Walking Horse Trainers Show.⁷

Moreover, an individual who controls the corporation that owns a horse can be found to have violated 15 U.S.C. § 1824(2)(D). Otherwise, the intent of the Horse Protection Act could be thwarted. There is no formula under 15 U.S.C. § 1824(2)(D) for evaluating the responsibility of corporate officers, directors, or major shareholders who control the corporation that owns a horse. Nevertheless, under the circumstances here, I conclude that Betty Corlew, for purposes of the Horse Protection Act only, controlled Bowtie Stables, LLC, an owner of Ebony's Bad Bubba, and is thereby responsible under 15 U.S.C. § 1824(2)(D).

Findings of Fact

1. Bowtie Stables, LLC, is a Tennessee corporation whose business

⁶See note 3.

⁷*In re Jack Kelly*, 52 Agric. Dec. 1278, 1297 (1993) (stating the respondents have no real defense to the allegation that they entered and allowed the entry of the horse in a horse show because the respondents stipulated these facts in their answer and at the hearing), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994).

mailing address is 4501 Trough Springs Road, Adams, Tennessee 37041, and whose registered agent is James L. Corlew, Sr., 4501 Trough Springs Road, Adams, Tennessee 37041. Bowtie Stables, LLC, is a limited liability company, owned by James L. Corlew, Sr., and Betty Corlew. The only directors and officers of Bowtie Stables, LLC, are James L. Corlew, Sr., and Betty Corlew (Amended Compl. ¶ 1; Answer to Amended Compl. ¶ 2; Tr. 477, 489).

2. James L. Corlew, Sr., Betty Corlew, and B.A. Dorsey are individuals with the same mailing address: 4501 Trough Springs Road, Adams, Tennessee 37041 (Amended Compl. ¶¶ 2-4; Answer to Amended Compl. ¶ 2; Tr. 419, 476).

3. Bowtie Stables, LLC, and Betty Corlew are owners of Ebony's Bad Bubba (Amended Compl. ¶¶ 1-2; Answer to Amended Compl. ¶ 2).

4. Bowtie Stables, LLC, and Betty Corlew allowed Ebony's Bad Bubba to be entered for the purpose of showing or exhibiting the horse in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000 (Amended Compl. ¶ 6; Answer to Amended Compl. ¶ 2).

5. James L. Corlew, Sr., prepared the entry form for Ebony's Bad Bubba to be shown or exhibited in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000 (Tr. 489; CX 9 at 2, CX 10 at 2, CX 11 at 2).

6. James L. Corlew, Sr., paid the entry fee for Ebony's Bad Bubba to be shown or exhibited in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000 (Tr. 489; CX 9 at 2, CX 10 at 2, CX 11 at 2).

7. B.A. Dorsey was Ebony's Bad Bubba's trainer and had responsibility for the day-to-day operation of Bowtie Stables, LLC (Tr. 421, 432, 478, 489; CX 5, CX 10 at 2, CX 11 at 2).

8. B.A. Dorsey presented Ebony's Bad Bubba to the Animal and Plant Health Inspection Service veterinary medical officers for pre-show inspection at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000 (CX 6, CX 7 at 1, CX 9 at 3).

9. During the time Ebony's Bad Bubba was undergoing pre-show inspection, Betty Corlew was scheduled to be the rider who was to show Ebony's Bad Bubba at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000 (Tr. 479-80; CX 2).

10. Betty Corlew, for purposes of the Horse Protection Act only, controlled Bowtie Stables, LLC, and is thereby responsible for allowing

Ebony's Bad Bubba to be entered for the purpose of showing or entering the horse in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000. Betty Corlew is an owner of Ebony's Bad Bubba and is thereby responsible for allowing Ebony's Bad Bubba to be entered for the purpose of showing or exhibiting the horse in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000. (Amended Compl. ¶ 2; Answer to Amended Compl. ¶ 2; Tr. 477, 489.)

11. At least five individuals evaluated Ebony's Bad Bubba for pain on March 22, 2000: (a) B.A. Dorsey palpated Ebony's Bad Bubba approximately three times (before the first DQP inspected him) and found Ebony's Bad Bubba was "fine; (b) two DQPs, Robert Flynn and Mark Thomas, inspected Ebony's Bad Bubba and disqualified him from participating in the 32nd Annual National Walking Horse Trainers Show; and (c) the two Animal and Plant Health Inspection Service veterinary medical officers, Drs. Lynn P. Bourgeois and David C. Smith, inspected Ebony's Bad Bubba and found him to be sore (Tr. 451-52; CX 3-CX 8).

12. The palpation by the two Animal and Plant Health Inspection Service veterinary medical officers consisted of gently pressing with the thumb to find areas that were painful (Tr. 42-46). Ebony's Bad Bubba's pain responses included withdrawal reflexes, when he tried to jerk his foot away (CX 7, CX 8).

13. The Animal and Plant Health Inspection Service veterinary medical officers observed painful reactions to palpation on the front, back, left, and right side of Ebony's Bad Bubba's front pasterns (the area between the hoof and what looks like an ankle joint on the leg) (CX 6-CX 8).

14. The Animal and Plant Health Inspection Service veterinary medical officers palpated each area at least three times, looking for a reproducible, repeatable response in each area (Tr. 173). The APHIS Form 7077 completed by Drs. Bourgeois and Smith (Dr. Bourgeois used Xs; Dr. Smith used circles (Os)) shows that they agreed on 12 out of 16 separate locations on Ebony's Bad Bubba's front feet that, upon palpation, produced pain responses (CX 6).

15. Ebony's Bad Bubba was "sore, as that word is defined in the Horse Protection Act, during pre-show inspection, at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000.

Conclusions of Law

1. A horse shall be presumed to be sore if it manifests abnormal sensitivity in both of its forelimbs or both of its hindlimbs (15 U. S. C. § 1825(d)(5)).

2. The results of palpation of Ebony's Bad Bubba's front feet by two Animal and Plant Health Inspection Service veterinary medical officers outweigh in probative value the remainder of the evidence and persuade me that Ebony's Bad Bubba was sore when he was entered for the purpose of showing or exhibiting him in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000.

3. Bowtie Stables, LLC, an owner of Ebony's Bad Bubba, allowed Ebony's Bad Bubba to be entered, while he was sore, for the purpose of showing or exhibiting him in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

4. Betty Corlew, an owner of Ebony's Bad Bubba and an individual who controlled Bowtie Stables, LLC, allowed Ebony's Bad Bubba to be entered, while he was sore, for the purpose of showing or exhibiting him in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

5. The acts of preparing the entry form and paying the entry fee are acts of entering a horse to be shown or exhibited in a horse show within the meaning of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). James L. Corlew, Sr., who prepared the entry form and paid the entry fee, thereby entered Ebony's Bad Bubba to be shown or exhibited while the horse was sore, in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

6. The act of presenting a horse for pre-show inspection is an act of entering a horse to be shown or exhibited in a horse show, within the meaning of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). B.A. Dorsey, Ebony's Bad Bubba's trainer, who presented Ebony's Bad Bubba for pre-show inspection, thereby entered Ebony's Bad Bubba to be shown or exhibited while the horse was sore, in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March

22, 2000, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents' Appeal Petition

Respondents raise five issues in "Respondents' Appeal Petition and Brief [hereinafter Appeal Petition]. First, Respondents contend the ALJ's finding that Ebony's Bad Bubba was sore is not supported by substantial evidence and is contrary to law (Appeal Pet. at 1-8).

The ALJ's finding that Ebony's Bad Bubba was "sore, as that word is defined in the Horse Protection Act, during the pre-show inspection, at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000, must be supported by substantial evidence.⁸ "Substantial evidence" is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁹ I have reviewed the record. I agree with the ALJ that the record contains substantial evidence that Ebony's Bad Bubba was "sore, as that word is defined in the Horse Protection Act, during the pre-show inspection, at the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000. In the Initial Decision and Order, the ALJ thoroughly discusses the evidence establishing that Ebony's Bad Bubba was sore, during the pre-show inspection, at the 32nd Annual National Walking Horse Trainers Show, on March 22, 2000. I adopt that discussion, with minor modifications, in this Decision and Order, *supra*. I find no reason to reiterate that discussion

⁸5 U.S.C. § 556(d).

⁹*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); *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003); *Wright v. Massanari*, 321 F.3d 611, 614 (6th Cir. 2003); *NLRB v. V & S Schuler Engineering, Inc.*, 309 F.3d 362, 372 (6th Cir. 2002); *Van Dyke v. NTSB*, 286 F.3d 594, 597 (D.C. Cir. 2002); *JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608, 611 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *Corrections Corp. of America v. NLRB*, 234 F.3d 1321, 1323 (D.C. Cir. 2000); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995).

here.

Relying on *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), and *Bradshaw v. United States Dep't of Agric.*, 254 F.3d 1081 (5th Cir. 2001) (Table), Respondents contend the reaction of a horse to digital palpation alone is not substantial evidence that the horse is sore (Appeal Pet. at 2-8).

The ALJ based her finding that Ebony's Bad Bubba was sore during the pre-show inspection at the 32nd Annual National Walking Horse Trainers Show on the results of digital palpation of Ebony's Bad Bubba's front feet by two Animal and Plant Health Inspection Service veterinary medical officers, Dr. Lynn P. Bourgeois and Dr. David C. Smith (Initial Decision and Order at 9, 19). However, notwithstanding *Young* and *Bradshaw*, I find the ALJ properly relied on the results of digital palpation.

Young and *Bradshaw* are inapposite because jurisdiction to review this Decision and Order does not lie with the United States Court of Appeals for the Fifth Circuit. The United States Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the District of Columbia Circuit, the two courts which have jurisdiction to review this Decision and Order,¹⁰ have each held that digital palpation alone is a reliable method for determining whether a horse is "sore," as defined in the Horse Protection Act.¹¹

Moreover, the United States Department of Agriculture has long held that palpation is a highly reliable method for determining whether a horse is "sore," as defined in the Horse Protection Act.¹² The United States Department

¹⁰15 U.S.C. § 1825(b)(2), (c).

¹¹*Reinhart v. United States Dep't of Agric.*, 39 Fed. Appx. 954, 957 (6th Cir. 2002) (per curiam) (stating the Secretary of Agriculture's finding that Reinhart violated the Horse Protection Act appears to be supported by substantial evidence, particularly in light of the fact that this court has specifically held that a finding of soreness for the purposes of the Horse Protection Act may be based solely upon the results of palpation), *cert. denied*, 123 S. Ct. 1802 (2003); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1413 (6th Cir. 1995) (stating a finding of soreness based upon the results of digital palpation alone is sufficient to invoke the rebuttable presumption of 15 U.S.C. § 1825(d)(5)); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 50 (D.C. Cir.) (stating we have no legitimate basis to reject digital palpation as a diagnostic technique, whether used alone or not), *cert. denied*, 516 U.S. 824 (1995).

¹²*See, e.g., In re William J. Reinhart*, 59 Agric. Dec. 721, 751 (2000), *aff'd per curiam*, 39 Fed. Appx. 954 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re John T. Gray* (Decision as to (continued...))

of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act.

Second, Respondents contend Dr. Kimmons' testimony and B.A. Dorsey's testimony rebut the presumption that Ebony's Bad Bubba was sore during the pre-show inspection conducted on March 22, 2000, and the ALJ "completely disregarded the Respondents' evidence rebutting the presumption of soreness (Appeal Pet. at 8-16).

The record establishes that Ebony's Bad Bubba manifested abnormal sensitivity in both of his forelimbs during a pre-show inspection conducted on March 22, 2000, at the 32nd Annual National Walking Horse Trainers Show. This manifestation raises the presumption that Ebony's Bad Bubba was sore.¹³ I disagree with Respondents' contention that the ALJ disregarded Respondents' evidence offered to rebut the presumption that Ebony's Bad

¹²(...continued)

Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

¹³See note 4.

Bubba was sore.

The ALJ discussed Respondents' rebuttal evidence and explained her reasons for disagreeing with Respondents' contention that Dr. Kimmons' and B.A. Dorsey's testimony rebutted the presumption that was raised by the manifestation of abnormal sensitivity in both of Ebony's Bad Bubba's forelimbs (Initial Decision and Order at 15-19). I agree with the ALJ's conclusion and her reasons for her conclusion that Respondents failed to rebut the presumption that Ebony's Bad Bubba was sore. Therefore, I reject Respondents' contention that the ALJ erroneously failed to consider Respondents' evidence offered to rebut the presumption that Ebony's Bad Bubba was sore. Moreover, I adopt the ALJ's conclusion that Respondents failed to rebut the presumption that Ebony's Bad Bubba was sore and the ALJ's reasons for this conclusion in this Decision and Order, *supra*.

Third, Respondents contend they did not enter Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show; therefore, they are not liable for a violation of the Horse Protection Act. Respondents state Ebony's Bad Bubba was not entered in the 32nd Annual National Walking Horse Trainers Show because two DQPs disqualified him from participating in the show during the pre-show inspection. (Appeal Pet. at 16-19.)

I am perplexed by Respondents' contention that they did not enter Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show. Complainant alleged that on March 22, 2000, James L. Corlew, Sr., and B.A. Dorsey entered Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show for the purpose of showing or exhibiting the horse, and on March 22, 2000, Bowtie Stables, LLC, and Betty Corlew allowed James L. Corlew, Sr., and B.A. Dorsey to enter Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show (Amended Compl. ¶¶ 5-6). Respondents admit these allegations (Answer to Amended Compl. ¶ 2). Further, each individual Respondent states in an affidavit that Ebony's Bad Bubba was entered in the 32nd Annual National Walking Horse Trainers Show (CX 9 at 2, CX 10 at 2, CX 11 at 2-3). Based on Respondents' admissions in their Answer to Amended Complaint and the statements made in the individual Respondents' affidavits, I conclude: (1) on March 22, 2000, James L. Corlew, Sr., and B.A. Dorsey entered Ebony's Bad Bubba in the 32nd Annual National Walking Horse Trainers Show for the purpose of showing or exhibiting the horse; and (2) on March 22, 2000, Bowtie Stables, LLC, and Betty Corlew allowed James L. Corlew, Sr., and B.A. Dorsey to enter Ebony's

Bad Bubba in the 32nd Annual National Walking Horse Trainers Show for the purpose of showing or exhibiting the horse.

Moreover, I disagree with Respondents' contention that Ebony's Bad Bubba was not entered because he did not participate in the 32nd Annual National Walking Horse Trainers Show. It is well-settled that "entering as that term is used in section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) is a process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited. The process generally begins with the payment of the fee to enter a horse in a horse show or horse exhibition and includes the pre-show inspection of the horse by DQPs or Animal and Plant Health Inspection Service veterinarians or both.¹⁴

¹⁴*Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (stating entry of a horse in a horse show, for purposes of liability under the Horse Protection Act includes paying the entry fee, registering the horse, and presenting the horse for inspection); *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 143, 145 (4th Cir.) (stating entering a horse in a horse show is a process and includes all activities required to be completed before a horse can actually be shown or exhibited), *cert. denied*, 510 U.S. 867 (1993); *In re William J. Reinhart*, 60 Agric. Dec. 241, 253 (2001) (Order Denying William J. Reinhart's Pet. for Recons.) (stating it is well settled that "entry within the meaning of the Horse Protection Act is a process, not an event; the process of entry includes all activities required to be completed before a horse can be shown or exhibited; the process generally begins with the payment of the fee to enter a horse in a horse show and includes the examination of the horse by DQPs or United States Department of Agriculture veterinarians or both); *In re Jack Stepp*, 57 Agric. Dec. 297, 309 (1998) (stating "entering, within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and includes pre-show examination by the DQP or the United States Department of Agriculture veterinarian or both), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Danny Burks*, 53 Agric. Dec. 322, 334 (1994) (rejecting the respondent's argument that "the mere act of submitting a horse for pre-show inspection does not constitute 'entering' as that term is [used in the Horse Protection] Act"); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 280 (1994) (rejecting the respondent's argument that "entering, as used in the Horse Protection Act, is limited to "doing whatever is specifically required by the management of any particular horse show to cause a horse to become listed on the class sheet for a specific class of that horse show"), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 206 (1994) (stating the United States Department of Agriculture has always construed entry to be a process), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Billy Gray*, 52 Agric. Dec. 1044, 1055 (1993) (stating the United States Department of Agriculture has considered entry to be a process which includes pre-show inspection for at least 13 years), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 293 (1993) (stating "entering a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1183 (1993) (stating entry is a process that gives a status of being entered to a horse and entry includes filling out (continued...)

James L. Corlew, Sr., paid the entry fee and prepared the entry forms for Ebony's Bad Bubba's participation in the 32nd Annual National Walking Horse Trainers Show (Tr. 489; CX 9 at 2, CX 10 at 2, CX 11 at 2); B.A. Dorsey presented Ebony's Bad Bubba for pre-show inspection at the 32nd Annual National Walking Horse Trainers Show (CX 6, CX 7 at 1, CX 9 at 3); and Betty Corlew was scheduled to be the rider who was to show Ebony's Bad Bubba at the 32nd Annual National Walking Horse Trainers Show (Tr. 479-80; CX 2). Therefore, I find that at the time of Ebony's Bad Bubba's pre-show inspection, he was entered in the 32nd Annual National Walking Horse Trainers Show, and I reject Respondents' contention that Ebony's Bad Bubba was not entered in the 32nd Annual National Walking Horse Trainers Show because he did not participate in the horse show.

Fourth, Respondents contend Respondent Betty Corlew is not an owner of Ebony's Bad Bubba (Appeal Pet. at 19-20).

I find Respondents' contention that Betty Corlew is not an owner of Ebony's Bad Bubba perplexing. Complainant alleged that Betty Corlew was the owner or a co-owner of Ebony's Bad Bubba on or about March 22, 2000 (Amended Compl. ¶ 2). Respondents admit this allegation (Answer to Amended Compl. ¶ 2). Based on Respondents' admissions in their Answer to Amended Complaint, I conclude Betty Corlew was an owner of Ebony's Bad Bubba at the time Ebony's Bad Bubba was entered in the 32nd Annual National Walking Horse Trainers Show for the purpose of showing or exhibiting the horse.¹⁵

Fifth, Respondents contend the ALJ's finding that Betty Corlew controlled Bowtie Stables, LLC, is error (Appeal Pet. at 19-20).

I disagree with Respondents' contention that the ALJ's finding that Betty Corlew controlled Bowtie Stables, LLC, is error. The record establishes that Betty Corlew and James L. Corlew, Sr., owned Bowtie Stables, LLC. Betty Corlew and James L. Corlew, Sr., are the only officers of Bowtie Stables, LLC, and the only members of the board of directors of Bowtie Stables, LLC.

¹⁴(...continued)

forms and presenting the horse to the Designated Qualified Person for inspection); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1146-47 (1993) (stating "entering, within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee).

¹⁵See note 7.

(Tr. 481, 485, 493.) B.A. Dorsey conducts the day-to-day operations of Bowtie Stables, LLC, but he reports to Betty Corlew and James L. Corlew, Sr. (Tr. 493-94). Decisions regarding the purchase and showing of horses ultimately reside with Betty Corlew and James L. Corlew, Sr. (Tr 494-95). Therefore, I agree with the ALJ that, at all times material to this proceeding, Betty Corlew (along with James L. Corlew, Sr.) controlled Bowtie Stables, LLC.

Complainant's Appeal

Complainant states the ALJ's Initial Decision and Order "should be affirmed. (Complainant's Opposition to the Respondents' Appeal Pet. at cover page, 8.) However, Complainant also appeals the conclusion that Betty Corlew violated 15 U.S.C. § 1824(2)(D) based solely on her ownership of Bowtie Stables, LLC. Complainant contends Betty Corlew's liability under 15 U.S.C. § 1824(2)(D) is based upon her ownership of Ebony's Bad Bubba, as well as her ownership of Bowtie Stables, LLC. (Complainant's Opposition to the Respondents' Appeal Pet. at 7 n.4.)

As discussed in this Decision and Order, *supra*, based on Respondents' admissions in Respondents' Answer to Amended Complaint, I conclude Betty Corlew was an owner of Ebony's Bad Bubba at the time Ebony's Bad Bubba was entered in the 32nd Annual National Walking Horse Trainers Show for the purpose of showing or exhibiting the horse. My conclusion that Betty Corlew violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) is based upon her ownership of Ebony's Bad Bubba, as well as her control of Bowtie Stables, LLC.

Sanction

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than \$2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act

(15 U.S.C. § 1824) by increasing the maximum civil penalty from \$2,000 to \$2,200.¹⁶ The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.¹⁷

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of “soring” horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the p[a]stern area of a horse’s limb, or by using various action or training devices such as heavy chains or “knocker boots” on the horse’s limbs. When a horse’s front limbs are deliberately made sore, the intense pain suffered by the

¹⁶62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(vii).

¹⁷15 U.S.C. § 1825(c).

animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The United States Department of Agriculture's 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 the 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.

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides that in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Complainant recommends that I assess each Respondent a \$2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof at 20-24). The extent and gravity of Respondents' prohibited conduct are great. Two United States Department of Agriculture veterinary medical officers found Ebony's Bad Bubba's pain so great that it affected his ability to walk (Tr. 46-47, 168-69; CX 7). Dr. Lynn P. Bourgeois described Ebony's Bad Bubba's pain responses to his examination of his left front foot as "marked" and right front foot as "severe" (CX 7 at 1-2), and Dr. David C. Smith described Ebony's Bad Bubba's pain responses to his examination of the palmar aspects of both forefeet as "clear" (CX 8 at 1).

James L. Corlew, Sr., testified that he, Bowtie Stables, LLC, and Betty Corlew could each afford to pay the civil penalty (Tr. 492). B.A. Dorsey is gainfully employed by Bowtie Stables, LLC, and he presented no evidence that he is unable to pay a \$2,200 civil penalty. Further, James L. Corlew, Sr., is the owner of a Chevrolet dealership and a \$2,200 civil penalty would not

adversely affect his ability to continue in business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.¹⁸ Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for each violation of the Horse Protection Act. Therefore, I assess each Respondent a \$2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to

¹⁸See, e.g., *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173 (2002), *appeal docketed*, No. 02-9543 (10th Cir. July 19, 2002); *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

pay civil penalties as a cost of doing business.¹⁹

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.²⁰

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to

¹⁹See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

²⁰*In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *appeal docketed*, No. 02-9543 (10th Cir. July 19, 2002); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in*, 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for the first violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

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

ORDER

1. Bowtie Stables, LLC, James L. Corlew, Sr., Betty Corlew, and B.A. Dorsey are each assessed a \$2,200 civil penalty (\$8,800 total). The civil penalty shall be paid by certified check(s) or money order(s) made payable to the "Treasurer of the United States" and sent to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Respondents' payment(s) of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 60 days after service of this Order on Respondents. Respondents shall indicate on the certified check(s) or money order(s) that payment is in reference to HPA Docket No. 00-0017.

2. Bowtie Stables, LLC, James L. Corlew, Sr., Betty Corlew, and B.A. Dorsey are each disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating

in any horse show, horse exhibition, horse sale, or horse auction. "Participating means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondents shall become effective on the 60th day after service of this Order on Respondents.

3. Respondents have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondents must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.²¹ The date of this Order is July 11, 2003.

²¹15 U.S.C. § 1825(b)(2), (c).

ORGANIC FOOD PROGRAM ACT

COURT DECISION

ARTHUR HARVEY v. USDA.

No. Civ. 02-216-P-H.

Filed October 23, 2002.

Cite as: 2003 WL 22327171 (D.Me.).

OFPA – APA – Rule making – Standing – Organic – 100% organic – Made with organic – National list – Synthetic ingredients – Differentiated interest - Regulations, presumption of validity – Processed food – made with organic – 100% Organic – Organic – principal display panel – Certificate of organic operation – ISO 65.

As a USDA certified organic food inspector, certified organic farmer, and an organic food handler, Petitioner had a differentiated interest to acquire standing to challenge the OFPA regulations. Petitioner objected to the Secretary's regulations which were promulgated after public hearing and a period of comment. The injury complained of must be concrete, actual and eminent. Petitioner challenged multiple aspects of the regulations promulgated by USDA: (1) He contended that the inclusion of certain non-"organic (synthetic) food additives which are permitted under the regulations are contrary to the meaning of the Act; (2) He contended that the USDA regulations which permit labeling variously as "Organic, "Made with Organic, and "100% Organic are confusing to the market place; (3) He challenged the basis of the "National List of synthetic products which may be included in foods otherwise labeled as organic (up to 5% in weight), and further stated that the list will impermissibly degrade into thousands of private lists under the "commercially non-available clause of the regulations; (4) He challenged the regulations which make public access to laboratory analysis, location of factories and fields difficult; (5) He challenged the retail food-handler exception from the OFPA regulations; (6) He challenged the prohibition of advice-giving by inspectors for a fee to organic operation applicants by the regulations; (7) He challenged the shortened transition period (12 months instead of 36 months) afforded to milk producers to obtain certification as organic milk; (8) He challenged the lack of regulations relating to "wild crops to be harvested and sold. In each instance, except the regulations relating to "wild crops, the USDA received comments and issued regulations after considering the comments. Great deference is granted to an agency's decisional and rule-making process. The Secretary's rule-making process is presumed to be valid and will not be set aside when consistent with statutory powers and supported by substantial evidence in the record. The court granted summary judgement for the Secretary in all claims except for the lack of regulations relating to "wild crops where the issue was remanded to the Secretary.

United States District Court,
D. Maine.

RECOMMENDED DECISION ON CROSS MOTIONS FOR SUMMARY

JUDGMENT

KRAVCHUK, Magistrate J.

Arthur Harvey has filed this civil action challenging the validity of several aspects of the regulatory rules established by the Department of Agriculture to implement the Federal Organic Foods Production Act of 1990 (OFPA), 7 U.S.C. §§ 6501-6522. In this recommended decision I address the parties' cross motions for summary judgment. (Dockets Nos. 27 & 31), ultimately concluding that the Secretary's motion should be GRANTED, except for Count Nine which I recommend be remanded to the Secretary for further rulemaking.

Scope of Administrative Procedures Act Review of Agency Rulemaking

A party is entitled to summary judgment if, "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). However, because the Administrative Procedures Act (APA) "standard affords great deference to agency decisionmaking and because the Secretary's action is presumed valid, judicial review, even at the summary judgment stage, is narrow." *Associated Fisheries Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir.1997) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) and *Sierra Club v. Marsh*, 976 F.2d 763, 769 (1st Cir.1992)).

As applicable to Harvey's challenges, the APA provides that this Court "shall":

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be-
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and

557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

This is a dispute over the propriety of the rules promulgated by the Secretary. The First Circuit has explained that the standard for judicial review of informal notice and comment rulemaking under the "arbitrary and capricious" standard of subsection (A) "is narrow, and a court may not set aside an agency rule that is 'rational' and 'based on a consideration of the relevant factors.'" *Brewer v. Madigan*, 945 F.2d 449, 456-57 (1st Cir.1991) (quoting *Motor Vehicle Mfrs. Assoc. v. State Farm Mut.*, 463 U.S. 29, 42-43 (1983)). This Court need only determine whether the Secretary's decision with respect to the promulgation of these regulations "was consonant with [her] statutory powers, reasoned, and supported by substantial evidence in the record." *Associated Fisheries*, 127 F.3d at 109.

The delegation of rulemaking authority by Congress to agencies can be either express or implicit. *Chevron U.S.A. Inc. v. Natural Res. Def. Counsel*, 467 U.S. 837, 844 (1984). In *United States v. Mead Corp.*, the Court expounded on *Chevron*:

Congress ... may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. [*Chevron*, 467 U.S.] at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, *see id.*, at 845-846, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable, *see id.*, at 842-845; *cf.* 5 U.S.C. § 706(2) (a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law").

533 U.S. 218, 229 (2001). And, although he might have it otherwise, in this suit Harvey's submissions only support a facial, as opposed to an as applied, challenge to the rules and he cannot use this suit to attack an imagined unlawful application of the rule, *Massachusetts v. United States*, 856 F.2d 378, 384 (1988), a limitation that I have applied in my review in a manner that should assuage the Secretary's various ripeness concerns.

Standing

With respect to the Secretary's challenge to Harvey's standing, I conclude that Harvey has standing with respect to at least eight of the nine claims. It is uncontested that Harvey is a certified organic farmer, a handler as defined under OFPA, an organic foods consumer, and an organic inspector employed by USDA accredited certifiers. (Harvey Aff., Docket No. 28.) There are three elements to "the irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992): concrete injury that "must affect the plaintiff in a personal and individual way" and that is "actual or imminent," *id.* at 560 & n. 1; "a causal connection between the injury and the conduct complained of," *id.*; and the prospect of redress from the injury must be likely versus speculative, *id.* at 561. In *Lujan* the Court observed:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Id. at 561-62. Vis-a-vis Harvey's challenges to the propriety of the procedures used during rulemaking, he does not have "standing merely because of the government's failure to comply with the relevant procedural requirements." *Cent. & S.W. Servs., Inc. v. E.P.A.*, 220 F.3d 683, 699 (5th Cir.2000). "Instead," Harvey "must show an injury that is both concrete and particular, as opposed to an undifferentiated interest in the proper application of the law." *Id.* Because of Harvey's status as an approved certifier, an organic grower, an organic consumer, and an individual actively involved in the rule making process, I do not, for the most part, credit the Secretary's standing concern,

except, as noted below, with respect to Count VII.

Overview of OFPA

OFPA was enacted "to establish national standards governing the marketing of certain agricultural products as organically produced products"; "to assure consumers that organically produced products meet a consistent standard"; and "to facilitate interstate commerce in fresh and processed food that is organically produced." 7 U.S.C. § 6501. These aims are pursued by the establishment of "an organic certification program for producers and handlers of agricultural products that have been produced using organic methods." *Id.* § 6503(a).

OFPA provides:

To be sold or labeled as an organically produced agricultural product under this chapter, an agricultural product shall-

- (1) have been produced and handled without the use of synthetic chemicals, except as otherwise provided in this chapter;
- (2) except as otherwise provided in this chapter and excluding livestock, not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied during the 3 years immediately preceding the harvest of the agricultural products; and
- (3) be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent.

7 U.S.C. § 6504. Section 6505(a)(1) addresses the compliance requirement and resulting labeling of products:

- (A) a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and
- (B) no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter.

"A label affixed, or other market information provided, in accordance with paragraph (1) may indicate that the agricultural product meets Department of Agriculture standards for organic production and may incorporate the Department of Agriculture seal." *Id.* § 6505(a)(2). *See also id.* § 6506 (listing

OFPA's general requirements for the certification program).

Harvey's Nine Counts

First Three Counts

Counts I, II, and III pertain to processed food. OFPA defines processing to include manufacturing treatments such as cooking, drying, extracting, eviscerating, and the like, as well as techniques used to enclose food in a container. 7 U.S.C. § 6502(17). It also defines a handler as "any person engaged in the business of handling agricultural products, except ... final retailers [who] do not process agricultural products." *Id.* § 6502(9). In his first three counts, Harvey addresses the regulations pertaining to handlers, as opposed to the regulations that pertain to producers, who are persons "who engage [] in the business of growing and producing food or feed." *Id.* § 6502(18).

Counts I & III

Counts I and III attack the rules promulgated vis-a-vis the "The National List of Allowed and Prohibited Substances." Section 6517 of title 7 directs the Secretary of Agriculture to establish a list of approved and prohibited substances with respect to standards for organic production, *id.* § 6517(a), a list that must include an itemization of each synthetic substance not prohibited under OFPA, *id.* § 6517(b), (c)(1). Congress in 7 U.S.C. § 6517 has expressly delegated rulemaking authority to the Secretary with respect to the National List, although it has required that she exercise this authority only based upon the proposals of the National Organic Standards Board (NOSB). *Id.* § 6517(d)(1); *compare U.S.S. v. F.T.C.*, ___ F.Supp. ___, 2003 WL 22203719, *5-7, 2003 U.S. Dist. LEXIS 16650, *14-17 (W.D.Okla. Sept. 23, 2003) (concluding that Congress had not expressly granted authority to the Federal Trade Commission to establish a "do-not-call" registry vis-a-vis the telemarketing industry, and that there was no implied authority for the agency to establish the registry, noting that the Federal Communications Commission was expressly granted the authority).

Count I National List of nonorganically produced agricultural products

In Count I Harvey challenges the rules list of nonorganically produced *agricultural* products, in particular 7 C.F.R. § 205.606:

The following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s))" only in accordance with any restrictions specified in this section.

Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section and when the product is not commercially available in organic form.

- (a) Cornstarch (native)
- (b) Gums--water extracted only (arabic, guar, locust bean, carob bean)
- (c) Kelp--for use only as a thickener and dietary supplement
- (d) Lecithin--unbleached
- (e) Pectin (high-methoxy)

Section 6510 of title 7 speaks to the certification for organic foods handling operations and provides:

For a handling operation to be certified under this chapter, each person on such handling operation shall not, with respect to any agricultural product covered by this chapter-

(1) add any synthetic ingredient during the processing or any postharvest handling of the product;

* * * *

(4) add any ingredients that are not organically produced in accordance with this chapter and the applicable organic certification program, unless such ingredients are included on the National List and represent not more than 5 percent of the weight of the total finished product (excluding salt and water)[.]

7 U.S.C. § 6510(a). "The term 'synthetic,' ' the definitional section relates, "means a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes." *Id.* § 6502(21).

Harvey asks this Court to order the deletion of 7 C.F.R. § 205.606's language: "Any nonorganically produced agricultural product may be used in accordance

with the restrictions specified in this section and when the product is not commercially available in organic form." He claims that this provision defeats the National List sunset provisions. *See* 7 U.S.C. § 6517(e) ("No exemption or prohibition contained in the National List shall be valid unless the National Organic Standards Board has reviewed such exemption or prohibition as provided in this section within 5 years of such exemption or prohibition being adopted or reviewed and the Secretary has renewed such exemption or prohibition."). This is because the nonorganic products that are used under 7 C.F.R. § 205.606 are not expressly exempted under the National List procedures identified in 7 U.S.C. § 6517, yet these products that are not on a unified national list can account for five percent of the weight of processed food under 7 U.S.C. § 6510(a)(4). Harvey reads the provision as allowing each manufacturer to make the "commercially [non]available" determination, thereby creating thousands of private lists rather than one national list. Harvey argues that there is a "fundamental conflict" between the statute and the regulation. He also contends that the regulation impermissibly bypasses 7 U.S.C. § 6518(k)(3) which speaks of technical advisory panels to evaluate materials for the National List. 7 U.S.C. § 6518(k)(3) ("The Board shall develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 6517 of this title.").

The Secretary counters that § 205.606 "permits the use of only the five types of nonorganically produced agricultural products as ingredients in or on processing products that are labeled as 'organic' or 'made with organic' ' and provides for this use only if the ingredient is not commercially available in an organic form. (Def's Opp'n & Cross Mot. at 15.) This is consistent, the Department argues, with the 7 U.S.C. § 6517(c)(1)(A)(ii) exemption in instances of commercial unavailability. (*Id.*)¹

Although 7 C.F.R. § 205.606 may be awkwardly phrased, I agree with the Secretary that the regulation is consistent with the OFPA. My reading of the

¹ Commercially available is defined by the rule: "The ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling, as determined by the certifying agent in the course of reviewing the organic plan." 7 C.F.R. § 205.2

statute and the regulation is that there is no countenance of private lists but that one national list of these nonorganically produced agricultural products is to be maintained and the ingredients thereon are to be identified through the formal process set forth. The Senate Report thoroughly supports this reading. S.Rep. No. 547, 1990 U.S.C.C.A.N. 4656, 4943. The sunset provision, therefore, applies to all the national list ingredients.² Furthermore, the National Organic Standards Board did make recommendations vis- a-vis this list in conformity with its 7 U.S.C. § 6158(k)(2) mandate. (*See, e.g.*, App. No. 16 at 13-16.) Accordingly, I conclude that there are no 5 U.S.C. § 706(2) grounds for disturbing 7 C.F.R. § 205.606 at this juncture in the framework of a facial challenge. *See Brewer*, 945 F.2d at 456-57.

Count III National List of allowable nonagricultural, nonorganic substances

In Count III Harvey takes on two of the regulation's provisions concerning the National List and allowable *nonagricultural*, nonorganic substances (as opposed to the above discussion of agriculture nonorganic substances). Subsection 205.600(b) reads:

In addition to the criteria set forth in the Act, any synthetic substance used as a processing aid or adjuvant will be evaluated against the following criteria:

- (1) The substance cannot be produced from a natural source and there are no organic substitutes;
- (2) The substance's manufacture, use, and disposal do not have adverse effects on the environment and are done in a manner compatible with organic handling;
- (3) The nutritional quality of the food is maintained when the substance is used, and the substance, itself, or its breakdown products do not have an adverse effect on human health as defined by applicable Federal regulations;
- (4) The substance's primary use is not as a preservative or to recreate or

² I do agree with Harvey that, while the Department implies without stating straight-out, that the five ingredients listed in 7 C.F.R. § 205.606 are the only ingredients that can be used if an organic product is not commercially available, I, too, found the equivocation puzzling. In this review of the rulemaking I examine only whether the rule is consistent with the statute and do not speculate whether it could be misconstrued in such a manner that contravened the act. Declaratory judgment at this stage is not available. Actual violations of the rule can be redressed through 7 U.S.C. § 6519.

improve flavors, colors, textures, or nutritive value lost during processing, except where the replacement of nutrients is required by law;

(5) The substance is listed as generally recognized as safe (GRAS) by Food and Drug Administration (FDA) when used in accordance with FDA's good manufacturing practices (GMP) and contains no residues of heavy metals or other contaminants in excess of tolerances set by FDA; and

(6) The substance is essential for the handling of organically produced agricultural products.

7 C.F.R. § 205.600(b). Subsection 205.605 provides a list of thirty-six "nonagricultural substances [that] may be used as ingredients in or on processed products labeled as 'organic' or 'made with organic.'" 7 C.F.R. § 205.605.

Harvey contends that these two regulatory subsections violate the spirit of the OFPA's "corner stone," 7 U.S.C. § 6510(a)(1), which states that a certified handling operation "shall not, with respect to any agricultural product covered by this chapter ... add any synthetic ingredient during the processing or any post harvest handling of the product."³

The Secretary counters that OFPA expressly directs her to deal with the exemption of otherwise prohibited synthetic substances vis-a-vis the establishment of a "National List":

The National List may provide for the use of substances in an organic farming or handling operation that are otherwise prohibited under this chapter only if-

(A) the Secretary determines, in consultation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, that the use of such substances-

(i) would not be harmful to human health or the environment;

(ii) is necessary to the production or handling of the agricultural product because of the unavailability of wholly natural substitute products; and

(iii) is consistent with organic farming and handling;

(B) the substance-

³ Harvey also asserts that § 205.600(b) and § 205.605 are "generally acknowledged" to violate OFPA. As best as I can garner, his support for this statement is his own memorandum on the subject. (Docket No. 2, App. 1.)

- (i) is used in production and contains an active synthetic ingredient in the following categories: copper and sulfur compounds; toxins derived from bacteria; pheromones, soaps, horticultural oils, fish emulsions, treated seed, vitamins and minerals; livestock parasiticides and medicines and production aids including netting, tree wraps and seals, insect traps, sticky barriers, row covers, and equipment cleansers;
 - (ii) is used in production and contains synthetic inert ingredients that are not classified by the Administrator of the Environmental Protection Agency as inerts of toxicological concern; or
 - (iii) is used in handling and is non-synthetic but is not organically produced; and
- (C) the specific exemption is developed using the procedures described in subsection (d) of this section.

Id. § 6517(c). This section also sets forth the procedures for establishing the list:

(1) In general

The National List established by the Secretary shall be based upon a proposed national list or proposed amendments to the National List developed by the National Organic Standards Board.

(2) No additions

The Secretary may not include exemptions for the use of specific synthetic substances in the National List other than those exemptions contained in the Proposed National List or Proposed Amendments to the National List.

(3) Prohibited substances

In no instance shall the National List include any substance, the presence of which in food has been prohibited by Federal regulatory action.

(4) Notice and comment

Before establishing the National List or before making any amendments to the National List, the Secretary shall publish the Proposed National List or any Proposed Amendments to the National List in the Federal Register and seek public comment on such proposals. The Secretary shall include in such Notice any changes to such proposed list or amendments recommended by the Secretary.

Id. § 6517(d).

The Secretary agrees with Harvey that 7 U.S.C. § 6510 contains a "general prohibition" against adding synthetic ingredients in handling operations.

However, she argues that OFPA's § 6517 admits for exemptions if those ingredients meet the criterion to be placed on the National List. Accordingly, the Rule's provisions that deal with exemptions, 7 C.F.R. § 205.600 and § 205.605, are legitimate offspring of the OFPA statutory scheme that anticipates exemptions.

Facially, I do not see how these provisions of the rule violate the spirit of the OFPA. Harvey has not pointed to any evidence in the administrative record that the Secretary has failed to act in accordance with subsections (c) and (d) of 7 U.S.C. § 6517; rather he argues that any exemption to the § 6510(a)(1) prohibition on synthetics is contrary to OFPA. I simply cannot agree with his position given the contemporaneous enactment of § 6517 anticipating the possibility of some exemptions and the discussion of the Secretary's discretion in this area in the Senate Report. *See* S. Rep. 101-357, reprinted in 1990 U.S.C.C.A.N. 4943, 4952-53.⁴ Furthermore, it is clear that Congress did not intend the Secretary to countenance the existence of numerous private lists. *Id.* at 4952-53 ("The Committee does not intend to allow the use of many synthetic substances. This legislation has been carefully written to prevent widespread exceptions or 'loopholes' in the organic standards which would circumvent the intent of this legislation.... The Secretary may not include exemptions for synthetic substances other than those exemptions recommended by the National Organic Standards Board. The Proposed National List represents the universe of synthetic materials from which the Secretary may choose.").

Count II

Harvey argues in Count II that the rules's contemplation of the use of the term "made with organic" on products that are 70 to 95 percent organic creates a

⁴Harvey's perception may be different, but it is apparent that the synthetic allowance for the USDA labeled products is subject to the five percent by weight ceiling on synthetic ingredients. *See* 7 U.S.C. § 6510(a); S. Rep. 101-357, reprinted in 1990 U.S.C. .C.A.N. 4943, 4953 ("The Secretary may not include exemptions for synthetic substances other than those exemptions recommended by the National Organic Standards Board. The Proposed National List represents the universe of synthetic materials from which the Secretary may choose. Before establishing the final National List the Secretary shall publish the Proposed National List in the Federal Register and seek public comment. The same procedures are to be followed for any amendments to the National List."); *accord id.* at 5222.

conflict with OFPA. In Harvey's view 7 U.S.C. § 6510(a)(4) forbids the certification of products containing more than five-percent of ingredients that are non-organic. Harvey argues that only exceptionally well-informed consumers can understand the difference between "made with organic," "organic," and "100% organic" products. He contends that the USDA should amend the rules to have the labels read "made partly with organic."

The Secretary argues that Harvey has not correctly read the statutory and regulatory scheme. She states that certain processed food is exempt from § 6505(a), because that subsection does not apply to agricultural products that:

- (1) contain at least 50 percent organically produced ingredients by weight, excluding water and salt, to the extent that the Secretary, in consultation with the National Organic Standards Board and the Secretary of Health and Human Services, has determined to permit the word "organic" to be used on the principal display panel of such products only for the purpose of describing the organically produced ingredients; or
- (2) contain less than 50 percent organically produced ingredients by weight, excluding water and salt, to the extent that the Secretary, in consultation with the National Organic Standards Board and the Secretary of Health and Human Services, has determined to permit the word "organic" to appear on the ingredient listing panel to describe those ingredients that are organically produced in accordance with this chapter.

Id. § 6505(c). This section gives the Secretary the discretion to develop an additional two tiers in the labeling hierarchy that are inferior to the USDA seal of approval used to identify products that meet the 7 U.S.C. § 6510(a)(4) ninety-five percent standard.

The attendant regulations are 7 C.F.R. § 205.301 and § 205.304. Section 205.301 provides:

- (a) Products sold, labeled, or represented as "100 percent organic." A raw or processed agricultural product sold, labeled, or represented as "100 percent organic" must contain (by weight or fluid volume, excluding water and salt) 100 percent organically produced ingredients. If labeled as organically produced, such product must be labeled pursuant to § 205.303.
- (b) Products sold, labeled, or represented as "organic." A raw or processed agricultural product sold, labeled, or represented as "organic" must contain (by weight or fluid volume, excluding water and salt) not less than 95

percent organically produced raw or processed agricultural products. Any remaining product ingredients must be organically produced, unless not commercially available in organic form, or must be nonagricultural substances or nonorganically produced agricultural products produced consistent with the National List in subpart G of this part. If labeled as organically produced, such product must be labeled pursuant to § 205.303.

(c) Products sold, labeled, or represented as "made with organic (specified ingredients or food group(s))." Multiingredient agricultural product sold, labeled, or represented as "made with organic (specified ingredients or food group(s))" must contain (by weight or fluid volume, excluding water and salt) at least 70 percent organically produced ingredients which are produced and handled pursuant to requirements in subpart C of this part. No ingredients may be produced using prohibited practices specified in paragraphs (f)(1), (2), and (3) of § 205.301. Nonorganic ingredients may be produced without regard to paragraphs (f)(4), (5), (6), and (7) of § 205.301. If labeled as containing organically produced ingredients or food groups, such product must be labeled pursuant to § 205.304.

(d) Products with less than 70 percent organically produced ingredients. The organic ingredients in multiingredient agricultural product containing less than 70 percent organically produced ingredients (by weight or fluid volume, excluding water and salt) must be produced and handled pursuant to requirements in subpart C of this part. The nonorganic ingredients may be produced and handled without regard to the requirements of this part. Multiingredient agricultural product containing less than 70 percent organically produced ingredients may represent the organic nature of the product only as provided in § 205.305.

7 C.F.R. § 205.301. Section 205.304 states, as applicable:

Packaged products labeled "made with organic (specified ingredients or food group(s))."

(a) Agricultural products in packages described in § 205.301(c) may display on the principal display panel, information panel, and any other panel and on any labeling or market information concerning the product:

(1) The statement:

- (i) "Made with organic (specified ingredients)": Provided, That, the statement does not list more than three organically produced ingredients; or
- (ii) "Made with organic (specified food groups)": Provided, That, the statement does not list more than three of the following food groups: beans,

fish, fruits, grains, herbs, meats, nuts, oils, poultry, seeds, spices, sweeteners, and vegetables or processed milk products; and, Provided further, That, all ingredients of each listed food group in the product must be organically produced; and

(iii) Which appears in letters that do not exceed one-half the size of the largest type size on the panel and which appears in its entirety in the same type size, style, and color without highlighting.

(2) The percentage of organic ingredients in the product. The size of the percentage statement must not exceed one-half the size of the largest type size on the panel on which the statement is displayed and must appear in its entirety in the same type size, style, and color without highlighting.

(3) The seal, logo, or other identifying mark of the certifying agent that certified the handler of the finished product.

(b) Agricultural products in packages described in § 205.301(c) must:

(1) In the ingredient statement, identify each organic ingredient with the word, "organic," or with an asterisk or other reference mark which is defined below the ingredient statement to indicate the ingredient is organically produced. Water or salt included as ingredients cannot be identified as organic.

(2) On the information panel, below the information identifying the handler or distributor of the product and preceded by the statement, "Certified organic by * * *," or similar phrase, identify the name of the certifying agent that certified the handler of the finished product: Except, That, the business address, Internet address, or telephone number of the certifying agent may be included in such label.

(c) Agricultural products in packages described in § 205.301(c) must not display the USDA seal.

Id. § 205.304.

As with the Count I challenge, Congress has expressly delegated rule making authority to the Secretary and conferred discretion to make rules about allowance of the use of the word "organic" in labeling products that do not meet the ninety-five-percent mark of 7 U.S.C. § 6510(a)(4). Given the express statutory authority granted the Secretary under § 6505(c) to permit other uses of the term organic, the development of the rules on this score is not contrary to OFPA. *See* S. Rep. 101-357, *reprinted in* 1990 U.S.C.C.A.N. 4943, 4955-56, 5221. Although Harvey may have preferred a different phrasing, he

has not articulated how the administrative record supports a conclusion that the Secretary was "arbitrary and capricious" in exercising her rulemaking discretion granted by § 6505(c).

Count IV

In Count IV Harvey seeks a "finding" that the Secretary has arbitrarily failed to implement 7 U.S.C. § 6506(a)(9), a subsection that requires the OFPA program to "provide for public access to certification documents and laboratory analysis that pertain to certification." Harvey claims that Rules § 205.504(b)(5)(ii) and § 205.404(b) "shrink the documents which are publicly available to almost the vanishing point." (Compl. at 10.) He faults these rules for allowing the public to remain ignorant of the location of fields and factories; unaware of whether non-organic products are produced in the vicinity of organic products; and not privy to any noncompliance that a producer is required to correct, certifications that have been revoked, or commitments that the producer had to make to obtain certification. Harvey would have the rule divide the system plan into two sections, one for financial-marketing-propriety information and one for general data.

The Secretary responds that the public disclosure provision of 7 U.S.C. § 2506(a)(9) must be juxtaposed against the confidentiality provision of § 6515(g). The latter subsection of OFPA states:

Except as provided in section 6506(a)(9) of this title, any certifying agent shall maintain strict confidentiality with respect to its clients under the applicable organic certification program and may not disclose to third parties (with the exception of the Secretary or the applicable governing State official) any business related information concerning such client obtained while implementing this chapter.

7 U.S.C. § 6515.

The Secretary recognized the tension between the disclosure and confidentiality provisions of OFPA during the rulemaking process. The preamble to the Final Rule observed:

Public Access to Records. Several commenters asked that the public have full access to any certifying agent record on organic production and/or handling operations. Other commenters expressed concerns about certifying

agents divulging confidential business information and asked that records containing confidential business information not be taken from the business's physical location.

We have not changed this provision. The recordkeeping requirements are designed to seek a balance between the public's right to know and a business's right to retain confidential business information. Certifying agents must have access to certain records during their review of the operation to determine the operation's compliance with the NOP. However, certifying agents are required to protect an operation's confidential business information. Requiring full public access could compromise a business's competitive position and place an unfair burden on the organic industry.

65 Fed.Reg. 80548, 80556. Later, the Secretary reported:

Comments on section 205.504(b)(5) were mixed. Some commenters felt that the proposal fell short of the OFPA requirement to "Provide for public access to certification documents and lab analysis." Others thought that too much confidential information would be released.

The Act requires public access, at section 2107(a)(9), to certification documents and laboratory analyses pertaining to certification. Accordingly, we disagree with those commenters who requested that such documents not be released to the public. We also disagree with the commenters who contend that the requirement for public disclosure falls short of what is required by the Act. Section 205.504(b)(5) meets the requirements of the Act by requiring the release of those documents cited in section 2107(a)(9) of the Act. The section also authorizes the release of other business information as authorized in writing by the producer or handler.

Id. at 80608. The final promulgated rule provides:

A copy of the procedures to be used, including any fees to be assessed, for making the following information available to any member of the public upon request:

- (i) Certification certificates issued during the current and 3 preceding calendar years;
- (ii) A list of producers and handlers whose operations it has certified, including for each the name of the operation, type(s) of operation, products produced, and the effective date of the certification, during the current and 3 preceding calendar years;
- (iii) The results of laboratory analyses for residues of pesticides and other prohibited substances conducted during the current and 3 preceding calendar

years; and

(iv) Other business information as permitted in writing by the producer or handler[.]

7 C.F.R. § 205.504(b)(5).⁵ Harvey argues that "the scope of information that certified operations must provide is so limited that it is barely enough for commerce in organic products to proceed ." (Pl.'s Resp. at 18.) The Secretary, of course, views her resolution of OFPA's disclosure/confidentiality tension as one that strikes a reasonable balance.

It is clear that Congress has expressly required the Secretary to include in this program a provision for public access to certification documents and laboratory analyses as they pertain to certification. *See* 7 U.S.C. §§ 6506(a)(9), 6506(11). Furthermore, it is not as if the Secretary has failed to act on her § 6509(a)(9) mandate and needs to be compelled to act, *see* 5 U.S.C. § 706(1); rather, it is a question of whether her rule making on this score was arbitrary, capricious, and/or an abuse of discretion, *see id.* § 706(2). The Secretary's resolution of the tension between confidentiality and public access cannot be characterized as arbitrary, capricious, or an abuse of discretion. The Secretary has provided a rational articulation of her reason for her rule and the choices made based on the comments and concerns before her. *See Motor Vehicle Mfrs. Assoc.*, 463 U.S. at 42-43; *Brewer*, 945 F.2d at 56-57.

Count V

Count V faults the Secretary for "unnecessarily and arbitrarily" excluding wholesalers and many retailers from OFPA's compliance, inspection, and certification requirements. He wants the Court to order the deletion of 7 C.F.R. § 205.101(b) which provides:

Exclusions.

(1) A handling operation or portion of a handling operation is excluded from

⁵ The other subsection Harvey cites is 7 C.F.R. § 205.404(b). The certifying agent must issue a certificate of organic operation which specifies the:

- (1) Name and address of the certified operation;
- (2) Effective date of certification;
- (3) Categories of organic operation, including crops, wild crops, livestock, or processed products produced by the certified operation; and
- (4) Name, address, and telephone number of the certifying agent.

the requirements of this part, except for the requirements for the prevention of commingling and contact with prohibited substances as set forth in § 205.272 with respect to any organically produced products, if such operation or portion of the operation only sells organic agricultural products labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" that:

(i) Are packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and

(ii) Remain in the same package or container and are not otherwise processed while in the control of the handling operation.

(2) A handling operation that is a retail food establishment or portion of a retail food establishment that processes, on the premises of the retail food establishment, raw and ready-to-eat food from agricultural products that were previously labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" is excluded from the requirements in this part, except:

(i) The requirements for the prevention of contact with prohibited substances as set forth in § 205.272; and

(ii) The labeling provisions of § 205.310.

7 C.F.R. § 205.101(b). Harvey complains that this subsection forfeits regulatory oversight "from those sectors of the organic industry where most violations of organic integrity occur" (Compl. at 11), much to the detriment of consumers and small farmers (who must shoulder the fee burden of the act, a burden that these handlers of value-added products could share and more easily absorb). He notes that the USDA justifies the exclusion of these entities on the basis of a lack of consensus on certification standards and the inability to assure there would be a sufficient number of certifying agencies to cover the volume of such businesses.

The Secretary responds by stating that OFPA primarily regulates producers and handlers of organic agricultural products, citing 7 U.S.C. §§ 6503(a), 6504, 6506(a). And, read as a whole, for the most part OFPA does not attempt to regulate retailers and retail food establishments. Instead, it is aimed at producers engaged in the business of growing or producing food or feed, *see id.* § 6502(17), (18), and handlers or handling operations, expressly excluding final retailers that are not processors of the products also, *id.* § 6502(9),(10),(17). The Secretary's rule exempts only wholesale and retail

operations selling previously packaged organic food and retail food establishments that sell processed food containing organic ingredients. By dint of 7 C.F.R. § 205.272, these entities are prohibited from contaminating and commingling organic products, and are subject to 7 U.S.C. § 6505(a)(1)(b)'s directive that "no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter" and the civil penalty provisions of § 6519(a).

The Secretary notes that she received many comments on the question of whether wholesale and retail operations selling previously packaged organic products and retail food establishments selling processed foods would fall within the embrace of OFPA. The Federal Register reads on this score:

Retailer Exclusion from Certification. Many commenters objected to the provisions of section 205.101(b)(2) which exclude retail food establishments from certification. These commenters assert that only final retailers that do not process agricultural products should be excluded from certification. There is clearly a great deal of public concern regarding the handling of organic products by retail food establishments. We have not required certification of retail food establishments at this time because of a lack of consensus as to whether retail food establishments should be certified, a lack of consensus [sic] on retailer certification standards, and a concern about the capacity of existing certifying agents to certify the sheer volume of such businesses. In addition, most existing certification programs do not include retail food establishments, and we do not believe there is sufficient consensus [sic] to institute such a significant expansion in the scope of certification at this time. However, since a few [s]tates have established procedures for certifying retail food establishments, we will assess their experience and continue to seek consensus on this issue of establishing retailer provisions under the NOP. Any such change would be preceded by rulemaking with an opportunity for public comment. The exclusion of nonexempt retail food establishments from this final rule does not prevent a [s]tate from developing an organic retail food establishment program as a component of its SOP. However, as with any component of an SOP, the Secretary will review such components on a case-by-case basis.

65 Fed.Reg. at 80555. As there were comments on both sides of the spectrum

and no consensus, the Secretary chose, she thinks reasonably, to defer regulations of these sectors of the organic community until she can discern greater agreement on the appropriate scope of the regulation. She notes that states can fill the void if they desire, through components of a State Organic Program, just as long the Secretary first reviews and approves the state initiative.⁶

With respect to the question of whether these entities should be subject to regulation as Harvey argues, Congress has not directly addressed the question and the statute is ambiguous on the issue, so I must ask "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The delegation of authority on this point is implicit as opposed to explicit, and this Court "may not substitute its own construction ... for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. The decision made vis-a-vis these entities cannot be described as an unreasonable "policy choice". *Id.* at 845.

The Senate report thoroughly supports the Secretary's position as it seems that the Senate did not have in mind the immediate application of OFPA to wholesale and retail operations. It is fair to read the thrust of OFPA as being towards regulating producers and handlers and the Senate Report emphasizes as being of "particular importance" that the definition of producer and handler encompass "all those involved in the farming, processing, packaging, storing, or selling of organically produced products, *excluding the final retailer who does not process the food.*" Sen. Rep. No. 357, *reprinted in*, 1990 U.S.C.C.A.N. 4656, 5220. Vis-a-vis the "National organic production program[:]" the Senate report states that the Secretary is authorized "to establish standards for producers and handlers who produce organic agricultural products," *id.* at 5220, with no mention of retailers. The report marked the concerns of "large food chains and distributors" by acknowledging

⁶ Harvey complains that although the Secretary was given three years to implement OFPA, she dragged her feet in this area for ten additional years. He argues that at the time when the act was passed retailers of organic products were small, mom-and-pop type operations that did not process and were reasonably exempt from the Act. (Pl.'s Reply at 21.) Today, Harvey states, the situation is very different as there has been a rise of national and regional chain stores selling organic foods and most of these fall under the definition of handler due to their baking, processing, and packaging activities. (*Id.* at 21-22.)

that they were concerned about "verifying the authenticity of organic items" and OFPA could serve them because "they are not in a position to work directly with growers on certification as some smaller health food stores have done. They also find it difficult to handle the wide array of labels." *Id.* at 4944. I see further support for the Secretary's approach to wholesalers and retailers in the statement that "this legislation covers all food products from their inception through *final processing*." *Id.* at 4946. Finally, with respect to the composition of the National List, the Senate reported, "The Secretary is required to appoint a 13-member National Organic Standards Board to assist generally in the development of standards and specifically to formulate a Proposed National List. The Committee regards this Board as an essential advisor to the Secretary on all issues concerning this bill and anticipates that many of the key decisions concerning standards will result from recommendations by this Board." *Id.* at 4950. Yet, of the fifteen pivotal positions on the board, only one is to be held by a retail member, while four are to be individuals who own or operate organic farming operations, and two who own or operate organic handling operations. 7 U.S.C. § 6518(b). The remaining four categories are individuals who have expertise in the area of environmental protection and conservation, public and consumer interest, food science and certification. *Id.* While the Secretary may have the discretion under OFPA to regulate retailers in the future as she suggests, *cf.* 1990 U.S.C.C.A.N. 4656, 4946 (suggesting that the Secretary working with the Board may in the future elaborate standards on livestock criteria and develop standards for aquaculture products), it is clear on my review that her decision not to do so in the initial rulemaking cycle was not unreasonable within the meaning of *Chevron*.

Count VI

In his sixth count, Harvey attacks OFPA's prohibition of advice-giving by certifiers and inspectors. The challenged rule prohibits a certifying agent from "giving advice or providing consultancy services, to certification applicants or certified operations, for overcoming identified barriers to certification." 7 C.F.R. § 205.501(a)(11)(IV). Harvey wants this Court to strike "giving advice or" from the Rule. He notes that OFPA only provides that a certifying agent cannot give "advice concerning organic practices or techniques for a fee, other than fees established under such program." 7 U.S.C. § 6515. The rule, in

contrast, prevents inspectors like Harvey from making timely suggestions to farmers, particularly small farmers who may not understand each complex facet of the organic standards. This restraint harms farmers in need of the information inspectors might impart; harms consumers in that inspector advice could improve crops and the economic viability of local food production and availability; and it harms Harvey as an inspector because it hinders his ability to pursue his objectives of supporting the integrity of organic production and marketing and helping farmers to understand organic systems and how to produce efficiently. (Compl. at 12.)

Harvey also argues in his motion for summary judgment that 7 C.F.R. § 205.501(a)(11) was promulgated without adequate notice and comment and speculates that this procedural short-circuit was driven, at least in part, by the hope of facilitating international trade by complying with the International Service Organization (ISO) Guide Number 65. He states that this guide was not available to him during the key notice and comment period due to its cost of acquisition and copyrighted nature.

The Secretary contends that the advice prohibition is consistent with OFPA and is "an entirely reasonable measure to avoid conflicts of interest". (Def.'s Reply & Cross Mot. at 30-31.) She argues that the restriction in the Rule is an "elaboration" and "permissible interpretation" of the 7 U.S.C. § 6515(h) conflict of interest/anti-bribery restraints against inspecting operations in which the agent has a commercial interest, accepting payments and the like beyond the prescribed fee, and providing advice concerning organic practice and techniques for a fee. (*Id.* at 31.) Countering Harvey's argument that OFPA is intended to prohibit only advice for a fee, the Secretary argues that the Rule does not prohibit all free advice, as certifying agents can do general educational workshops, training programs, and the like. The Secretary concedes that she attempted to make the rule consistent with ISO 65 in order to facilitate United States producers' and handlers' access to European Union markets. (Def.'s Reply & Cross Mot. at 32.) She asserts that the rule was made in the spirit of the Senate Report. The applicable paragraph of the report reads:

American farmers are beginning to benefit from lucrative organic export markets. However, in absence of national standards, American businesses are finding it increasingly difficult to negotiate in foreign markets. Several countries have national organic standards. There is a proposal before the

European Economic Community on organic food that, if passed would establish production and inspection standards for member countries. The International Federation of Organic Agricultural Movements, among other organizations, is working to harmonize standards internationally. 1990 U.S.C.C.A.N. at 4944.

Although 7 U.S.C. § 6515(h) expressly prohibits certifier conduct identified by Congress as creating a conflict of interest, it does not state that this is the only conduct that can be prohibited under the rules. In this sense Congress has not "directly spoken on the precise question at issue." *Chevron*, 467 U.S. at 842-43. Here the Secretary has made a policy decision to promulgate a rule that brings the federal program into compliance with international standards. *See id.* at 843-44. The Senate Report supports her efforts in this direction. Furthermore, the restriction of giving advice, while not mandated by Congress, harmonizes with the statutory conflict of interest provision and is certainly not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

With respect to the process, the Secretary points to the comments submitted by Harvey in the administrative record, and claims that his difficulty in obtaining a copy of ISO 65 aside, Harvey had an opportunity to participate in the rulemaking process with respect to this section. I agree that Harvey's inability to obtain a copy of the ISO rule, alone, does not render the process attackable under 5 U.S.C. § 706(2)(D), in that he was given notice of the proposed text of the rule and the opportunity to comment.

Harvey also argues that this limitation on giving advice infringes his right to free speech. This amounts to a claim that the rule is unlawful and must be set aside because it is contrary to his "constitutional right." 5 U.S.C. § 706(2)(B). "[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." *United States West, Inc. v. F.C.C.*, 182 F.3d 1224, 1231 (10th Cir.1999) (collecting cases). The Secretary argues, in response, that the limitation on speech is minimal and that if Harvey wants the benefit of being an accredited certifying agent he must abide by this condition. He is free to forgo this role and thereby shed the limitation.

The parties have not provided this Court with much input with respect to the

analysis of this constitutional claim. Harvey argues from the heart that he should be able to give advice and that the risk to program integrity is imaginary. The Secretary asserts that the limitation is constitutional because it serves a legitimate and necessary governmental interest of maintaining the certifiers's integrity and objectivity by prohibiting them from laboring under conflicts of interest. In support of this assertion, the Secretary cites to a portion of the Senate Report that does not address this concern, 1990 U.S.C.C.A.N. at 4948, and cites as authority *Rust v. Sullivan*, 500 U.S. 173 (1991). The latter involved speech restrictions on governmental grantees and it does not clearly control this facial challenge to restrictions on government approved certifiers performing inspection mandated by a federal act. It is not at all clear to me that the appropriate First Amendment framework would not involve cases such as *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995); *Waters v. Churchill*, 511 U.S. 661 (1994), *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Although on an appropriate record I might be inclined to put a greater burden on the Secretary to explain how a prospective ban on advice-giving comports with the First Amendment, I do not believe that Harvey's skeletal argument that this conflict of interest speech limitation violates his First Amendment rights provides a sufficient basis for the Court to require placing such a burden on the Secretary at this juncture. If the matter were appropriately fleshed out in an "as applied" challenge, it might become appropriate to place a heavier burden on the Secretary, but given the record I have reviewed the regulation does not appear unreasonable on its face.

Count VII

In Count VII, Harvey seeks a finding that 7 C.F.R. § 205.236(a)(2)(i) violates 7 U.S.C. § 6509(e)(2),⁷ which provides:

A dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handled in accordance with this chapter for not less than the 12-month period immediately prior to the sale

⁷ Harvey also argues that the Rule violates subsection (c) of § 6509. However, as the Secretary points out, this provision of the statute is applicable to livestock raised for meat.

of such milk and milk products.

In apparent disregard of the statutory language, the rule makes a one-time exception for conversion of an entire dairy herd from conventional to organic production. The provision reads:

(2) Dairy animals. Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic: Except, That, when an entire, distinct herd is converted to organic production, the producer may:

(i) For the first 9 months of the year, provide a minimum of 80-percent feed that is either organic or raised from land included in the organic system plan and managed in compliance with organic crop requirements; and

(ii) Provide feed in compliance with § 205.237 for the final 3 months.

(iii) Once an entire, distinct herd has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation.

7 C.F.R. § 205.236(a).

Harvey objects to the Secretary's minimum of eighty-percent organic or quasi-organic feed because "organic feed" does not mean "a fraction of organic feed." Furthermore, he argues that because feed makes up roughly half of a cow's nutrition, the eighty-percent standard actually means that half of a cow's nourishment can be entirely nonorganic for three quarters of the year prior to milk sales. Harvey also objects to the procedure used to insert this exception into the final rule. He states that a similar provision was in the first proposed rule of December 1997 but was removed from the 2000 rules following intense public comment. Harvey quotes from the USDA website commenting on the decision to remove the exemption that acknowledges that there was "strong opposition to any nonorganic feed allowance by consumers" and that rejection of the scheme was appropriate due to inconsistencies with the NOSB recommendations. (Compl. at 14.) However, the "offending section" was placed in the final rule without any public comment in response to dairy industry lobbying. (*Id.* at 15.)

The Secretary states that "the Rule is avowedly an exception to the Act and the rest of the Rule in this respect." (Def.'s Reply & Cross Mot. at 35.) She offers no justification for the change but cites to a June 12, 2000, document,

"Comments from National Organic Standards Board for the National Organic Program," which recommends, without explanation, that the rule be implemented in this manner with the exception for whole-herd conversion. (App. No. 16 at 5- 6.) The Secretary also cites to a September 15, 2000, memorandum from an administrator in the USDA Agricultural Marketing Service to the Office of Management and Budget providing responses to comments on the Organic Livestock Production Requirements. (App. No. 6.) Therein is this discussion of 7 C.F.R. § 205.266(a)(2):

Comment: Commenters stated that requiring producers to provide existing dairy herd one year of organic feed prior to the production of organic milk created an insurmountable economic barrier for small and medium size operations seeking to convert. Commenters support the "new entry" of "whole heard conversion" provision offered by several existing certification programs.

AMS Response: AMS concurs. AMS amended the origin of livestock requirements to reflect the whole herd conversion provisions recommended by the NOSB at its June 2000 meeting. The Final Rule requires that an entire, distinct dairy herd must be under organic management for one year prior to the production of milk. During the first nine months of that year, the producer must provide a feed ration containing a minimum of 80% organic feed or feed that is raised from land included in the organic system plan and managed in compliance with organic crop requirements. The balance of the feed ration may be nonorganically produced, but it must not include prohibited substances including antibiotics or hormones. The producer must provide the herd 100% organic feed for the final three months before the production of organic milk. The producer must comply with the provisions in the livestock health and living conditions practice standards during the entire year of conversion. After the dairy operation has been certified, animals brought on the operation must be organically raised from the last third of gestation, except that a producer may provide young stock with feed from land included in the organic system plan and managed in compliance with organic crop requirements up to twelve months prior to production of organic milk.

(*Id.* at 2.)

The Secretary argues that OFPA is at least ambiguous, perhaps silent, with respect to what the feed standards should be for organic dairy animals in the

twelve-month period leading up to the sale of milk. Section 6509(c)(1) of title 7 provides that livestock should be fed "organically produced feed." Section 6502(14) defines "organically produced" as "produced and handled in accordance with [OFPA]." Rule 205.237(a) is a reasonable interpretation of the sections because it requires that organic livestock be fed "a total feed ration composed of agricultural products ... that are organically produced and, if applicable, organically handled."

Furthermore, the Secretary points out that the exception created by 7 C.F.R. § 205.235(a)(2) arose out of notice and comment rulemaking. With respect to Harvey's complaints about process, the Secretary only states, "Plaintiff is incorrect. The USDA followed proper rulemaking procedure and addressed this particular issue during notice and comment rulemaking. The fact that Plaintiff did not get a second bite at the apple does not make section 205.236(a)(2)(i) procedurally invalid." (Def.'s Resp. & Cross Mot. at 36, record citation omitted.) The record support for this "aint so" response is a September 20, 2000, memorandum from an AMS administrator to the Office of Management and Budget providing responses to comments on the definitional section. (App. No. 4.) The cited page seems to have nothing to do with the Count VII contest and, without further explication by the Secretary, I am baffled by its significance, much less its probity to the question of whether there was or was not an irregularity in the inclusion of the exception in the final rules after the completion on the notice and comment period.

It appears as though the Secretary may have been 'cow-towing' to cow farmers. However, Harvey has not explained to me how the procedures for notice and comment rulemaking were impermissibly violated by the Secretary's change of heart on the whole-herd conversion standards. *See* 5 U.S.C. § 553 ("Rule Making"). In a recent case of national notoriety the District Court for the Western District of Oklahoma observed with respect to a similar challenge:

The plaintiffs have also challenged the Final Amended Rule's regulation of preacquired account information on the grounds the FTC promulgated this regulation in violation of the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. §§ 553(b), (c). In particular, the plaintiffs have argued that certain entities and individuals, who believed, based upon the language of the proposed rule, that they would not be (but now are) subject to the Final Amended Rule, were deprived of their right to

notice and an opportunity to comment on this provision of the Final Amended Rule.

"The rulemaking process requires an agency 'to fairly apprise interested parties of all significant subjects and issues involved,' so that they can participate in the process. This policy is not undermined when an agency promulgates a final rule that does not mirror precisely the proposed rule outlined in the notice. A 'substantially different' rule is permissible as long as the participants had sufficient notice at the start of the process." *Fertilizer Institute v. Browner*, 163 F.3d 774, 779 (3d Cir.1998) (quoting *American Iron & Steel Institute v. EPA*, 568 F.2d 284, 291 (3d Cir.1977)) (other citations omitted).

The Court has considered the allegedly "marked departures" between the proposed rule and the admittedly broader Final Amended Rule about which the plaintiffs have complained and in doing so, finds the relief requested by the plaintiffs is not warranted.

As case law demonstrates, "notice requirements do not require that the final rule be an exact replication of the proposed rule." *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C.Cir.2000). "[N]otice and comment requirements are met when an agency issues rules 'that do not exactly coincide with the proposed rule so long as the final rule is the "logical outgrowth" of the proposed rule.'" *Id.* at 1058-59 (quoting *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C.Cir.1991)).

U.S. Sec., 2003 WL 22203719, *8, 2003 U.S. Dist. LEXIS 16650, *22-23.

Although there may have been some wavering on the part of the Secretary in this case, there is no indication that the proper procedures were not followed and all parties did have notice of the potential for the rule as finally promulgated, as the fact that there was a change (that better suited Harvey) suggested. And, it cannot be said even though there was some intermediate wavering, that neither the initial nor the final version was a "logical outgrowth" of the competing concerns facing the Secretary. *See Chevron*, 467 U.S. at 865-66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

I also note that the question of Harvey's standing on this count is premised mostly on his consumption of organic food in general (there is no allegation that he is a milk drinker) and his familiarity with dairy producers. That is, Harvey defends his standing on this count on the ground that the rule harms him as an organic consumer because it results in milk being labeled as organic under standards lower than would reasonably be anticipated based on the language of OFPA. (Pl.'s Reply at 28.) As a consequence, Harvey will not be able to tell whether the milk he purchases is truly organic and will not have the choice to purchase only truly organic milk. (*Id.*) In his affidavit in support of his standing, Harvey avers that as an organic inspector he has obtained familiarity with "organic field crops, herbs, fruits and dairy cows." (Harvey Aff. at 1, Docket No. 28.) It is not clear that he is certified to inspect dairy operations. He also states that he has "regular commercial dealings with organic dairy farmers, and [is] therefore familiar with the economic realities of that business, which is also fairly common knowledge in Maine." (*Id.* at 2.) These relationships are not sufficient to confer standing on Harvey. *Lujan*, 504 U.S. at 560 (holding that injury must be concrete and it "must affect the plaintiff in a personal and individual way").

Count VIII

With respect to state certification programs, OFPA provides:

(a) In general

The governing State official may prepare and submit a plan for the establishment of a State organic certification program to the Secretary for approval. A State organic certification program must meet the requirements of this chapter to be approved by the Secretary.

(b) Additional requirements

(1) Authority

A State organic certification program established under subsection (a) of this section may contain more restrictive requirements governing the organic certification of farms and handling operations and the production and handling of agricultural products that are to be sold or labeled as organically produced under this chapter than are contained in the program established by the Secretary.

(2) Content

Any additional requirements established under paragraph (1) shall-

- (A) further the purposes of this chapter;
 - (B) not be inconsistent with this chapter;
 - (C) not be discriminatory towards agricultural commodities organically produced in other States in accordance with this chapter; and
 - (D) not become effective until approved by the Secretary.
- 7 U.S.C. § 6507.

Count VIII of Harvey's complaint relates to the rule's limitation on private certifiers. The rule provides as relevant:

A private or governmental entity accredited as a certifying agent under this subpart may establish a seal, logo, or other identifying mark to be used by production and handling operations certified by the certifying agent to indicate affiliation with the certifying agent: Provided, That, the certifying agent:

....

(2) Does not require compliance with any production or handling practices other than those provided for in the Act and the regulations in this part as a condition of use of its identifying mark: Provided, That, certifying agents certifying production or handling operations within a State with more restrictive requirements, approved by the Secretary, shall require compliance with such requirements as a condition of use of their identifying mark by such operations.

7 CFR § 205.501(b). The offending language, according to Harvey, is: "Does not require compliance with any production or handling practices other than those provided for in the Act and the regulations in this part as a condition of use of its identifying mark." Harvey asks that the court delete this sentence.

The problem, in Harvey's view, is that this subsection prevents competition between private certifiers; harms consumers by not allowing standards which exceed the rule's; and prevents the future development of standards that would keep pace with emerging research and technology. This rule harms Harvey particularly as a certified organic blueberry grower. He explains that all of the twenty or so such growers have been certified by the Maine Organic Farmers and Gardeners Association (MOFGA). Up until 2002, MOFGA prohibited the use of hexazinone to control weeds in the field but this prohibition was removed so as to make MOFGA certification compatible with the USDA accreditation. This places Harvey in a disadvantage to growers who now use

hexazinone. Furthermore, while the State could attempt to approve stricter standards than the Secretary, MOFGA cannot and, thus, Harvey's equal protection rights are violated as growers elsewhere (presumably in states with adopted certification programs) have an avenue to pursue recourse. He also complains that he is disadvantaged by the fact that MOFGA, vis-a-vis processing, must under OFPA certify products "made with organic" and these inferior products compete with Harvey's products labeled "organic."

More broadly, Harvey argues that rather than implement "consistent standards" the USDA has implemented standards that emphasize "uniformity." In addition, the "USDA has gone even further by imposing its standards as a maximum, and suppressing any private certifier who would put into the marketplace a stricter organic standard." (Compl. at 18.) He claims that the USDA exceeded its authority when it enacted maximum standards that pre-empt stricter state standards. (*Id.* at 20.)

The Secretary responds that the issue of higher production standards by private certifying agents was considered and rejected in the rulemaking process. The Federal Register recounts this:

Numerous commenters stated that they wanted USDA to permit higher production standards by private certifying agents. A common argument for allowing higher standards was that practitioners must be allowed to "raise the bar" through superior ecological on-farm practices or pursuit of other social and ecological goals. Some commenters recommended that the language in section 205.501(b)(2) be replaced with provisions that would allow certifying agents to issue licensing agreements with contract specifications that clearly establish conditions for use of the certifying agent's identifying mark.

We believe the positions advocated by the commenters are inconsistent with section 6501(2) of the Act, which provides that a stated purpose of the Act is to assure consumers that organically produced products meet a consistent national standard. We believe that, to accomplish the goal of establishing a consistent standard and to facilitate trade, it is vital that an accredited certifying agent accept the certification decisions made by another certifying agent accredited or accepted by USDA pursuant to section 205.500. All organic production and handling operations, unless exempted or excluded under section 205.101 or not regulated under the NOP (i.e., a producer of

dog food), must be certified to these national standards and, when applicable, any State standards approved by the Secretary. All certified operations must be certified by a certifying agent accredited by the Administrator. No accredited certifying agent may establish or require compliance with its own organic standards. Accredited certifying agents may establish other standards outside of the NOP. They may not, however, refer to them as organic standards nor require that applicants for certification under the NOP or operations certified under the NOP comply with such standards as a requirement for certification under the NOP. Use of the certifying agent's identifying mark must be voluntary and available to all of its clients certified under the NOP. However, a certifying agent may withdraw a certified operation's authority to use its identifying mark during a compliance process. The certifying agent, however, accepts full liability for any such action.

The national standards implemented by this final rule can be amended as needed to establish more restrictive national standards. Anyone may request that a provision of these regulations be amended by submitting a request to the NOP Program Manager or the Chairperson of the NOSB. Requests for amendments submitted to the NOP Program Manager will be forwarded to the NOSB for its consideration. The NOSB will consider the requested amendments and make its recommendations to the Administrator. When appropriate, the NOP will conduct rulemaking on the recommended amendment. Such rulemaking will include an opportunity for public comment.

65 FR 80548, 80607-08. The Secretary also notes that both the OFPA *and* the rules allow States to enact more restrictive certification requirements and that the rule allows certifiers to certify additional standards but these cannot be referred to as organic standards and cannot be made a condition to receiving the USDA certification.

The Secretary's decision with respect to the promulgation of these regulations was consonant with her statutory powers and reasoned, given the concern for consistent standards that motivate the OFPA's enactment. *Associated Fisheries Me., Inc.*, 127 F.3d at 109. Although Harvey protests that it would allow more innovation to allow variation, he points to nothing in the record that would lead this Court to conclude that the Secretary was arbitrary or capricious in her resolution of the concern. With respect to Harvey's equal protection claim,

Harvey and the citizens of Maine have equal access to the legislative process and are equally able to press for the enactment of State certification programs that represent the will of Maine's population.

Count IX

Harvey's final count seeks a finding that the USDA neglected to implement important aspects of 7 U.S.C. § 6513(f)(4), which concerns the management of "wild" crops:

An organic plan for the harvesting of wild crops shall--

- (1) designate the area from which the wild crop will be gathered or harvested;
- (2) include a 3 year history of the management of the area showing that no prohibited substances have been applied;
- (3) include a plan for the harvesting or gathering of the wild crops assuring that such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop; and
- (4) include provisions that no prohibited substances will be applied by the producer.

7 USCA § 6513(f). Harvey contends that subsection (f)(4) is an intentional effort on the part of Congress to prohibit the rotation of wild crops out of and then back into organic status.

The Secretary counters that 7 C.F.R. § 205.207 governs wild-crop harvesting practices:

Wild-crop harvesting practice standard.

(a) A wild crop that is intended to be sold, labeled, or represented as organic must be harvested from a designated area that has had no prohibited substance, as set forth in § 205.105, applied to it for a period of 3 years immediately preceding the harvest of the wild crop.

(b) A wild crop must be harvested in a manner that ensures that such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop.

7 C.F.R. § 205.207. She contends that Harvey's is not a reasonable interpretation and that OFPA, when read in its entirety, with particular attention to the § 6504(2) three-year pre-harvest period, "contemplates a three

year period for withdrawal of fields from organic production." (Def's Reply at 10.)

I could find no reference to wild crops in the Senate Report. The Register reflects the Secretary's rationale on wild crop regulation, in particular in the following three comments:

One commenter stated that the definition for "wild crop" only referred to a plant or part of a plant that was harvested from "an area of land." This commenter was concerned that the definition would preclude the certification of operations that produce wild aquatic crops, such as seaweed, and stated that the OFPA does allow for certifying such operations. We agree with this commenter and changed the definition to refer to a plant or part of a plant harvested from a "site."

65 FR 80548, 80550.

A wild crop that is to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" must be harvested from a designated area that has had no prohibited substances applied to it for a period of 3 years immediately preceding the harvest of the wild crop. The wild crop must also be harvested in a manner that ensures such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop.

Id. at 80560.

A number of commenters stated that the wild-crop harvesting practice standard was insufficiently descriptive and that the proposed rule failed to apply the same oversight to wild harvest operations as it did to those producing crops and livestock. Some commenters maintained that the proposed rule did not require a wild harvest producer to operate under an approved organic system plan. These commenters proposed specific items, including maps of the production area that should be required in a wild harvest operation's organic system plan. One commenter recommended that the definition for "wild crop" be modified to allow the harvest of plants from aquatic environments.

We amended the practice standard for wild-crop harvesting to express the compliance requirements more clearly. Wild-crop producers must comply with the same organic system plan requirements and conditions, as applicable to their operation, as their counterparts who produce crops and

livestock. Wild harvest operations are production systems, and they must satisfy the general requirement that all practices included in their organic system plan must maintain or improve the natural resources of the operation, including soil and water quality. We modified the practice standard to emphasize that wild harvest production is linked to a designated site and expect that a certifying agent would incorporate mapping and boundary conditions into the organic system plan requirements. Finally, we changed the definition of "wild crop" to specify that harvest takes place from a "site" instead of "from land," thereby allowing for aquatic plant certification.

Id. at 80566.

It seems that the Secretary reads OFPA to intend that wild crops be treated in the same manner as non-wild crops with respect to the allowance of rotation in and out of organic status. This is apparent not only in her decision to permit areas that have been purposefully treated with prohibited substances to become classified as wild, but also in her expansive definition of "wild crop," which definition ("a plant or plant part harvested from a 'site' ") would include even crops grown through traditional agricultural practices. However, the requirement enacted in 7 U.S.C. § 6513(f)(4) on its face goes beyond (or at least adds something to) the requirement of 7 U.S.C. § 6513(f)(2) and 7 U.S.C. § 6504(2) and the Secretary has either assumed it is a nullity or an unintended anomaly. Indeed, § 6513(f)(4), read in tandem with § 6513(f)(2), would appear to require not only that prohibited substances not have been applied to wild crops, but also that they not have been applied and not be applied to the *area*. That § 6513(f)(4) speaks to the area from which the crop is obtained is further reflected in the Congress's choice to impose the prohibition on "the producer" rather than simply the harvester. Without record (or logical) support for the Secretary's position I cannot conclude that she has acted in accordance with OFPA and the APA. *Quinn v. City of Boston*, 325 F.3d 18, 34 (1st Cir.2003) ("[T]he judiciary is the final arbiter as to questions of statutory construction and must refuse to accept administrative interpretations that contradict clearly ascertainable legislative intent...."). Accordingly, with respect to this claim I recommend that unless, in response to this Recommended Decision, the Secretary is able to satisfy the Court that she has satisfactorily carried out her rulemaking responsibilities with respect to this section, the Court issue an order pursuant to 5 U.S.C. § 706(1) remanding the matter to the Secretary to implement 7 U.S.C. § 6513(f)(4).

Conclusion

For the reasons stated herein, I RECOMMEND that the Court GRANT Mr. Harvey the relief he requests on Count IX by ordering the Secretary to promulgate a rule implementing 7 U.S.C. § 6513(f)(4), and otherwise DENY Mr. Harvey's motion for summary judgment in all respects. Conversely, I RECOMMEND that the Court DENY the Secretary's motion for summary judgment as to Count IX, but otherwise GRANT it in all respects.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

**PORK PROMOTION RESEARCH AND CONSUMER
INFORMATION ACT**

COURT DECISION

**MICHIGAN PORK PRODUCERS ASSOCIATION, INC., ET AL. v.
USDA AND CAMPAIGN FOR FAMILY FARMS, ET AL.**

Nos. 02-2337, 02-2338.

Filed October 22, 2003.

(Cite as: 348 F.3d 157).

**PPRCIA – Check-off – Severability clause, lack of – First Amendment – Standing –
Government speech – Compelled speech – Subsidized speech – Private speech.**

Campaign for Family farms (CFF) objected to being compelled to contribute through a compulsory pork “check-off” order to fund an advertizing campaign which favored large commercial farms and downplayed benefits of family farms. At least one of the moving parties had standing negating the need to further consider the other parties. The Court determined that advertizement by the PPRCIA was not “government speech, but was “private speech” since the pork industry exercised extensive control over its promotional activities, its funds were not from general revenues, and the government exercised only limited “pro-forma” governmental oversight. Citing *United Foods*, the Court determined the Pork Act is identical in purpose, structure, and implementation to the Mushroom Act. Unlike *Wileman Bros. & Elliott, Inc.*, the Pork act does not regulate prices, output, and quality. Because the court found the forced contribution through the pork check-off to fund private speech was unconstitutional and since the Pork Act lacked a severability clause, the entire act was invalidated.

United States Court of Appeals,
Sixth Circuit.

Before COLE, GILMAN, and BRIGHT, Circuit Judges.*

OPINION COLE, Circuit Judge.

Michigan Pork Producers Association, Inc., et al. ("MPPA") and the Secretary of Agriculture (the "Secretary") (collectively "Appellants") appeal the grant of summary judgment to Appellees Campaign for Family Farms,

* The Honorable Myron H. Bright, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation

et al. ("CFF"). The United States District Court for the Western District of Michigan declared the Pork Promotion, Research and Consumer Information Act (the "Pork Act"), 7 U.S.C. § 4801 *et seq.*, and the Pork Promotion Order issued thereunder, 7 C.F.R. § 1230, unconstitutional and issued an injunction terminating all activities under the Pork Act and the Pork Promotion Order. The Act mandates that pork producers and importers (collectively "pork producers") pay assessments, known as "checkoffs," to fund promotion, research, and consumer information to benefit the pork industry.

The district court held that requiring the payment of these assessments violates the First Amendment rights of pork producers by compelling them to subsidize speech with which they do not agree. Appellants argue that: (1) the assessments subsidize a government program that advances the government's policy of promoting pork consumption, and, therefore, are immune from First Amendment scrutiny; (2) even if not part of a government program, the assessments are not compelled speech; (3) the Pork Act program that requires the collection of assessments, is a lawful restraint on commercial speech; and (4) even if the use of assessments for promotion under the Pork Act violates the First Amendment, the injunction ordered by the district court is overly broad in that it eliminates funding for programs that are constitutional.

For the reasons stated below, we **AFFIRM** the grant of summary judgment by the district court.

I. BACKGROUND

As part of the Food Security Act of 1985, Congress enacted the Pork Act. The purpose of the Pork Act is to:
[A]uthorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to--
(A) strengthen the position of the pork industry in the marketplace; and
(B) maintain, develop, and expand markets for pork and pork products.
7 U.S.C. § 4801(b)(1). The Pork Act provides for the creation of a National Pork Producers Delegate Body ("Delegate Body"). 7 U.S.C. § 4806. The

Delegate Body--which determines the amount and distribution of the assessments--consists of pork producers, who are nominated by the state pork producers associations and appointed by the Secretary, and pork importers, who are appointed by the Secretary based on the amount of assessments collected from importers. 7 U.S.C. § 4806(b)(1). The Pork Act also provides for the creation of a 15-member National Pork Board ("the Board"), 7 U.S.C. § 4808(a)(1), whose nominees are chosen by the Delegate Body and appointed by the Secretary. The Board is to develop and implement programs that fulfill the statutory mandates of promotion, research, and the provision of consumer information. 7 U.S.C. § 4808(b)(1). Although the United States Department of Agriculture ("USDA") provides some oversight over the Board, its Executive Vice President noted that it "is not to be considered as a governmental entity/agency or a government contractor." Moreover, the members of the Board receive no compensation from the government, and are reimbursed for expenses from the collected assessments. 7 U.S.C. § 4808(a)(1)(6).

Because the Pork Act explicitly states that its programs "shall be conducted at no cost to the Federal Government," 7 U.S.C. § 4801(b)(2), the Act provides for funding through mandatory assessments. 7 U.S.C. § 4809 *et seq.* In accordance with the provisions of the Pork Act, an initial Pork Promotion Order, establishing the Pork Checkoff Program, was issued by the Secretary in 1986. An initial referendum on the Pork Checkoff Program was held in 1988, and it was approved with the support of nearly eighty percent of pork producers. Payments are assessed against all producers of porcine animals that are sold or slaughtered for sale, and all importers of porcine animals, pork, or pork products.¹ 7 U.S.C. § 4809(a)(1). The Board receives all assessments, and distributes them according to formulas detailed in the Pork Act. Although most of the funds support generic advertising, some of the money is spent to promote specific brands of pork products.

CFF, a non-profit advocacy group consisting of a coalition of four family farm organizations as well as individual hog farmers, is devoted to "ensuring

¹ In 2002, the Farm Security and Rural Investment Act of 2002 was passed, exempting organic hog farmers from paying the assessments. Pub. L. No. 107-171, § 1(a), 116 Stat. 134 (2002).

the continued existence of family farms, particularly hog farms." Since 1998, CFF's primary goal has been to end the Pork Checkoff Program. CFF believes that the advertising funded by the Pork Checkoff Program favors those who sell processed meats, misrepresents the safety and desirability of large commercial farming, and downplays the benefits of family farms. In May 1999, after CFF filed petitions with the USDA seeking a referendum on the termination of the Pork Checkoff Program, then-Secretary Glickman decided to conduct a voluntary, "fairness" referendum on the checkoff program's future.

On January 11, 2001, Secretary Glickman announced that a majority of individuals had voted to terminate the program, and that as a result, he would terminate it. MPPA filed suit the next day to enjoin the program's termination. *Mich. Pork Producers Ass'n, Inc. v. Campaign for Family Farms*, 174 F.Supp.2d 637, 639 (W.D.Mich.2001) ("*MPPA I*"). On January 19, 2001, the district court issued a temporary restraining order pending hearing of the preliminary injunction motion. *Id.* Between the restraining order and the scheduled hearing, newly-appointed Secretary of Agriculture Veneman decided to preserve the Pork Checkoff Program, albeit with the funds collected by the Pork Checkoff Program administered directly by the Board instead of by the NPPC.

On June 25, 2001, the Supreme Court in *United States v. United Foods*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001), invalidated--as contrary to the First Amendment's prohibition against compelled speech--the Mushroom Checkoff Program created by the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq.* (the "Mushroom Act"). Like the Pork Act, the Mushroom Act required producers and importers of mushrooms to pay assessments that were primarily used to fund generic advertising that promoted the sale of mushrooms. CFF subsequently added to its complaint a First Amendment challenge to the Pork Act. *MPPA I*, 174 F.Supp.2d at 639. On December 4, 2001, the district court upheld the legality of Secretary Veneman's decision to preserve the Pork Checkoff Program. *MPPA I*, 174 F.Supp.2d at 643-44. The court explicitly stated, however, that its ruling had no effect on the other claims of the parties, including CFF's First Amendment challenges. *Id.* at 648.

CFF then voluntarily dismissed all of its remaining challenges to the Pork

Checkoff Program, save for its First Amendment claims. *Mich. Pork Products v. Campaign for Family Farms*, 229 F.Supp.2d 772, 777 (W.D.Mich.2002) ("*MPPA II*"). The parties filed cross-motions for summary judgment. On October 25, 2002, the district court granted CFF's summary judgment motion, holding that the First Amendment prohibited the Pork Checkoff Program and enjoining it in its entirety. *Id.* at 792. MPPA and the Secretary filed timely Notices of Appeal, and this Court subsequently granted a stay of the district court's injunction pending the appeal.

II. ANALYSIS

A. Standard of Review

We review the district court's grant of summary judgment *de novo*. See *Watkins v. City of Battle Creek*, 273 F.3d 682, 685 (6th Cir.2001). Summary judgment is granted when the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. Standing

Plaintiffs have standing under Article III to challenge the Pork Act. MPPA challenges the standing of CFF, claiming that: (1) several named appellees lacked standing because they do not pay assessments under the Pork Act and are unaffected by these provisions of the Pork Act requiring such payments; and (2) CFF does not have standing as an association under the test articulated in *Hunt v. Wash. Apple Adver. Comm.*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). In its brief to this Court, however, MPPA concedes that "two individuals, Mr. Smith and Mr. Jones, had standing to pursue their claims." Since at least one appellee in this action has standing, there is no need to consider MPPA's standing challenges to the individual appellees or to CFF. See, e.g. *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (explaining that if one plaintiff has standing, it is unnecessary to consider the issue of standing as to other plaintiffs in the action).

C. First Amendment Challenge

1. Governmental Speech

We first consider whether the subsidies generated under the Pork Act are properly analyzed as private speech or as governmental speech. The Supreme Court has made clear that the government may dictate the content and even the viewpoint of speech when the government itself is the speaker: "[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker...." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). But the Court has yet to consider whether programs similar in nature to the Pork Checkoff Program constitute governmental speech--the Court declined to do so in *United Foods* because the government had failed to raise the governmental speech argument in the court below. *United Foods*, 533 U.S. at 417, 121 S.Ct. 2334.

We conclude that the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government. First, the primary purpose of the Pork Act is to strengthen the market position of the pork industry and increase the domestic markets for pork and pork products. 7 U.S.C. § 4801. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 13, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (categorizing as private the speech of an organization created "not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession."). Second, unlike the typical scenario in which speech is considered governmental in nature, the programs' funding does not come from general tax revenues. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir.2001); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir.2000), *cert. denied*, 532 U.S. 994, 121 S.Ct. 1653, 149 L.Ed.2d 636 (2001). The Pork Act's funding comes solely from mandatory assessments paid by pork producers; the Act specifically forbids the use of government funds for its operations, and the Secretary and her staff are reimbursed from the assessments for any time spent working on activities under the Pork Act. 7 C.F.R. § 1230.73(c)(4).

Third, the government exercises only limited oversight over the programs.

See United Foods, 533 U.S. at 417, 121 S.Ct. 2334 (suggesting that merely *pro forma* government oversight over a promotional program counsels against classifying it as governmental speech). Only one USDA staff member is responsible for overseeing all of the duties relating to the Pork Checkoff Program, including attending all meetings of the Pork Board and reviewing all advertisements and communications it develops. The government itself does not propose or draft any of the advertisements. Indeed, the trademark for the most recognizable ad, "Pork. The Other White Meat," is owned by the NPPC, not the government. The Pork Board itself is comprised only of private pork producers, appointed by the Secretary based on nominations made by the private state pork producers associations--which themselves are run entirely by industry officials.

In sum, the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private.

2. *Compelled Speech*

With its programs properly characterized as private speech, the constitutionality of the Pork Act turns on whether pork is more like mushrooms or more like peaches. *See* F.J. Dindinger, *Free Speech for Mushrooms but not Peaches: Economic Regulations after United Foods, Inc.*, COLO. LAW. 61 (April 2002). In *United Foods*, the Supreme Court held that the Mushroom Act--which provided for mandatory assessments that were used primarily to fund the generic advertising of mushrooms--violated the First Amendment's prohibitions against compelled speech. *Id.* at 411, 121 S.Ct. 2334. However, in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), the Supreme Court held that the Agricultural Marketing Agreement Act-- which established mandatory assessments that funded a broad regulatory apparatus that included, as one of its many programs, promotional advertising of California tree fruit--did not

constitute unlawful compelled speech.²

Because the Pork Act is nearly identical in purpose, structure, and implementation to the Mushroom Act, the Pork Act is unconstitutional under the analysis set forth in *United Foods*. The Pork Act mandates that:

- (3) Nothing in this chapter may be construed to--
 - (A) permit or require the imposition of quality standards for pork or pork products;
 - (B) provide for control of the production of pork or pork products; or
 - (C) otherwise limit the right of an individual pork producer to produce pork and pork products.

7 C.F.R. § 4801(b)(3). This scheme is a far cry from that upheld in *Glickman*, which--in addition to funding a promotional campaign--provided for regulated price, output, and quality, and also authorized joint research and development projects, inspections, and even standardized packaging. *Glickman*, 521 U.S. at 461, 117 S.Ct. 2130. With the express prohibition on this type of non-promotional regulation, the Pork Act serves but one purpose: promotion. This case is therefore governed by *United Foods*.

MPPA attempts to distinguish the Mushroom Act from the Pork Act, claiming that most of the funds collected by the former were used for generic advertising, whereas only 16 percent of the total expenses in the 2001 Budget for all the activities funded under the latter were used for generic, nationwide advertising. In fact, the record reflects that the majority of the Pork Act's funds support advertising and promotions. The 2001 Budget called for \$29,388,491, or 51 percent of the total expenses, to be used under the category of "Demand Enhancement." *Id.* Expenditures in this area were budgeted as follows:

² The federal courts have yet to weigh in on many other agriculture-promoting programs, including those touting "The Incredible, Edible Egg"; "Ah ... the Power of Cheese"; and "The Touch ... the Feel of Cotton ... the Fabric of Our Lives." See Note, *The Constitution--It's What's for Dinner*, 2 WYO. L. REV. 617, 638 (2002). Earlier this year, however, the Eighth Circuit invalidated, as unconstitutional compelled speech, the mandatory assessment program bearing the slogan "Beef--It's what's for Dinner." See *Livestock Mktg. Ass'n v. United States Dep't of Agric.*, 335 F.3d 711 (8th Cir.2003).

Demand Enhancement Programming	\$2,816,000
Advertising	\$8,825,000
Merchandising	\$5,400,000
Foodservice	\$3,697,000
Pork Information Bureau	\$2,800,000
Foreign Market Development/World Trade	\$5,850,491

The district court also found that Pork Act programs providing for "education" and "research" were designed to further the Act's promotional goals. *MPAA II*, 229 F.Supp.2d at 777. Thus, the use of the assessments to fund advertising under the Pork Act is prohibited by the First Amendment because the expression that CFF and its members must support "is not germane to a purpose related to an association independent from the speech itself." *United Foods*, 533 U.S. at 415-16, 121 S.Ct. 2334.

Finally, we find inapplicable to this case the relaxed scrutiny of commercial speech analysis provided for by *Central Hudson*, and relied upon by Appellants. The Pork Act does not directly limit the ability of pork producers to express a message; it compels them to express a message with which they do not agree. Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech--commercial or otherwise--that is compelled. *See Glickman*, 521 U.S. at 474 n. 18 (questioning whether "the *Central Hudson* test, which involved restrictions on commercial speech, should govern a case involving the compelled funding of speech"). It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece.

3. Remedy

Finally, we conclude that the district court properly invalidated the Pork Act in its entirety. Because the Act has no "severability clause" providing for the preservation of those statutory provisions that comply with the Constitution, we must invalidate the entire statute if the "balance of the legislation is incapable of functioning independently." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). The very basis for holding that the Act violates the First Amendment--that its assessment of fees to promote pork is the chief goal of the Act, which does not create a broader regulatory program--prevents us from preserving other parts

of the statute. See *Livestock Mktg. Ass'n v. United States Dep't of Agric.*, 335 F.3d 711, 726 (8th Cir.2003) ("[T]he fact that the 'principal object' of the Beef Act is the very part that makes it unconstitutional, (i.e., compelling funding of generic advertising) [means that] no remaining aspects of the Act can survive."). It would be paradoxical to conclude simultaneously that Congress sought only to promote pork and that Congress still intended the incidental provisions of the Act to operate independently.

Nor does *United Foods* instruct otherwise. Appellant contends that: (1) this Court's decision in that case invalidated only part of the Mushroom Act; and (2) the Supreme Court affirmed the decision of this Court in its entirety. This argument misunderstands both decisions. The lone sentence in this Court's decision upon which Appellants rely--which states that "[t]he portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional"--was part of the analysis that distinguished the Mushroom Act from the statute upheld in *Glickman*, and in its context is most fairly read only as a comparison of the two statutes. This reading is confirmed by the Supreme Court's discussion of the decision below, which states only that "the Sixth Circuit held this case is not controlled by *Glickman*." *United Foods*, 533 U.S. at 409, 121 S.Ct. 2334. Even more illustrative is the Supreme Court's conclusion in *United Foods* that "[t]he only program the Government contends the compelled contributions serve is the very advertising scheme in question." *Id.* at 415, 121 S.Ct. 2334. The decision to invalidate the advertising provisions of the Mushroom Act *by definition* resulted in the invalidation of the entire statute.

It would contort congressional intent if we were to take a statute that seeks entirely to promote a particular product and then strain to preserve the purportedly non-promotional provisions of that very statute. And the Supreme Court does not require that we do so. The district court was correct in striking down the entire Pork Act.

III. CONCLUSION

For the reasons stated, we **AFFIRM** the grant of summary judgment by the district court.

SUGAR MARKETING ALLOTMENT

COURT DECISION

ROSS BAIR, d/b/a BAIR BROTHERS, ET AL. v. USDA, ET AL.

No. 02-35462.

D.C. No. CV-01-00310-AAM.

Filed September 16, 2003.

Amended January 15, 2004.

(Cite as: 85 Fed.Appx. 555).

SMA - Bankruptcy - Liens, priority of - CCC.

United States Court of Appeals,
Ninth Circuit.

Background: Sugar beet growers that had supplied sugar beets to sugar processor brought action against processor and Commodity Credit Corporation (CCC), seeking a declaration that their liens were superior to those of the CCC. The United States District Court for the Eastern District of Washington, Alan A. McDonald, J., granted the CCC's motion for summary judgment, and growers appealed.

Holding: The Court of Appeals held that statute governing priority of security interest obtained by the CCC as a result of the execution of a security agreement by the processor of sugarcane or sugar beets gave CCC a super-priority lien on refined sugar and the proceeds from that sugar. Affirmed.

Betty B. Fletcher, Circuit Judge, filed dissenting opinion.

Opinion, 75 Fed.Appx. 654, amended and superseded.

Before B. FLETCHER, BRUNETTI, and MCKEOWN, Circuit Judges.

ORDER AMENDING MEMORANDUM AND DENYING PETITION FOR REHEARING

The Memorandum filed September 16, 2003, is replaced with the Amended Memorandum filed concurrently with this order. Judge B. Fletcher's dissent remains unchanged and shall be refiled along with the Amended Memorandum.

With the Memorandum as amended, the panel has voted to deny appellants' petition for rehearing. The petition for rehearing, filed October 27, 2003, is DENIED.

AMENDED MEMORANDUM*

Sugar beet growers in Washington state ("Growers") sued the Pacific Northwest Sugar Company ("PNSC"), a sugar processor, for money owed on sugar beets they sold to the PNSC. The Growers also sued the Commodity Credit Corporation ("CCC"), an agency of the United States Department of Agriculture, seeking a declaration that their liens are superior to those of the CCC. The district court granted the CCC's motion for summary judgment. The Growers appeal, arguing that the CCC's liens are not superior to their liens and that the CCC failed to obtain adequate assurances from the PNSC that the PNSC would pay certain amounts to the Growers. For the reasons stated below, we affirm the district court's judgment. The parties are familiar with the facts of this case and we refer to them only as necessary in this disposition.

1. Superiority of Liens

As a preliminary matter, we note that this case is governed by federal law, not state law, because the lien priority of a federal lending program is at issue. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979).

This case requires us to interpret 7 U.S.C. § 7284(d) and determine whether it gives the CCC a super-priority lien on refined sugar and the proceeds from that sugar. In performing statutory interpretation, we begin with the language of the statute. *Duncan v. Walker*, 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). We must give effect to every word in the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

statute, if possible, so as not to treat words as surplusage. *Id.* at 174. We construe a statute to avoid an absurd result. *In re County of Orange*, 262 F.3d 1014, 1018 (9th Cir.2001). We strive to avoid interpreting a statute in such a way that renders the statute unconstitutional. *Chapman v. United States*, 500 U.S. 453, 464, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

Using the text of the statute as our starting point, we hold that its plain meaning is dispositive in favor of the CCC. The text of § 7284(d) states:

A security interest obtained by the Commodity Credit Corporation as a result of the execution of a security agreement by the processor of sugarcane or sugar beets shall be superior to all statutory and common law liens on raw cane sugar and refined beet sugar in favor of the producers of sugarcane and sugar beets and all prior recorded and unrecorded liens on the crops of sugarcane and sugar beets from which the sugar was derived.

7 U.S.C. § 7284(d). The Growers advance many arguments to the contrary. We address each in turn.

The Growers first argue that the text of the statute supports their conclusion. They contend that because the word "prior" is used with only crop liens, and not with refined sugar liens, a super-priority lien is created only as to crop liens. They argue that CCC liens trump producer liens in the refined sugar only if the producer liens arise after the CCC liens. The Growers argue that to interpret the statute differently is to render the word "prior" surplusage.

Despite the Growers' argument, the word "prior" is not rendered surplusage. The word "prior" is descriptive of liens on crops, which Congress may have presumed would typically arise prior to liens in refined sugar. Although the word "prior" does not have significant legal effect, it is not rendered completely useless. Indeed, the fact that the word "prior" does not add much to the statute is consistent with other language in the statute that, while descriptive, is not entirely necessary. For example, the statute refers to "all statutory and common law liens" where it could just say "all liens" and it refers to "all prior recorded and unrecorded liens" where it could just say "all prior liens." The use of the word "prior" in describing crop liens is not sufficient to support the negative inference that the Growers would have us draw from the word's absence in the description of the refined sugar liens. The Growers' textual argument effectively requires the addition of the word "subsequent" to the description of the CCC's liens' superiority over refined sugar liens, so that the CCC's liens would be superior only to "all [*subsequent*]

statutory and common law liens on ... refined beet sugar in favor of the producers of ... sugar beets." But the statute does not contain the word "subsequent," and we decline to add it.

The Growers also argue that the CCC's super-priority lien works a hardship on them and thus conflicts with the CCC's statutory mandate to stabilize, support and protect farm income. *See* 15 U.S.C. § 714. They also argue that when Congress suspended the CCC's direct price support authority for producers, 7 U.S.C. § 7301(b)(1) (suspending 7 U.S.C. § 1421 until 2002), they were left with little protection. But Congress is free to adjust this statutory scheme so as to provide greater protection to the CCC, which in turn benefits growers and processors alike because without CCC support, there is the risk that processing will cease and result in a total loss of crops. The Growers must turn to Congress to address their concerns, not the courts, as Congress is the body responsible for establishing this statutory scheme.

The Growers further argue that the CCC's own contracts and regulations suggest that the CCC does not have a super-priority lien on the refined sugar. The Growers point to the "Notification of CCC's Security Interest," which states that where the CCC fails to obtain a lien waiver "from a superior lienholder," it will be subject to that lien "if ... the lien is established to be legally superior to CCC's interest." The Growers also focus on 7 C.F.R. § 1435.105(b) (2000), which states,

If there are any liens or encumbrances on sugar pledged as collateral for a loan, the processor must obtain waivers that fully protect CCC's interest even though the liens or encumbrances are satisfied from the loan proceeds. No additional liens or encumbrances shall be placed on the sugar after the loan is approved.

7 C.F.R. § 1435.105(b) (2000). Contrary to the Growers' argument, however, the Notification and the regulation do not imply that the CCC does not have a super-priority lien. Rather, the Notification is expressly limited to situations where the CCC is determined to have an inferior interest. By its statement, the CCC is merely protecting other lienholders should a court determine that the CCC's lien is somehow inferior to that of another lienholder. But there is no basis for holding that the CCC's liens in the present case are inferior. As for the regulation, it simply reduces the risk that the CCC will have to defend against claims from other lienholders. It also makes the collateral taken by the CCC more marketable by reducing encumbrances.

The Growers next argue that interpreting 7 U.S.C. § 7284(d) against their favor will present the risk of a Fifth Amendment taking, and that we should therefore adhere to their interpretation. Although we are not persuaded that our interpretation of 7 U.S.C. § 7284(d) presents such a risk, we need not and do not address the merits of any Fifth Amendment takings claim.

The parties disagree as to the helpfulness of two out-of-circuit cases in resolving the present dispute: the Federal Circuit's decision in *Montana v. United States*, 124 F.3d 1269 (Fed.Cir.1997), and the Fifth's Circuit decision in *United States v. Scottsbluff National Bank & Trust Co.*, 902 F.2d 351 (5th Cir.1990). Neither case is on point. In *Montana*, the state's interest was acquired after the CCC's liens, not before them. 124 F.3d at 1271, 1275- 76. As for *Scottsbluff*, although it predated the statute at issue in this case, a nearly identical provision, 7 U.S.C. § 1425(b), was in effect. Nonetheless, the *Scottsbluff* case made no mention of the statute in its opinion and consequently sheds no light on the issues presented in this case.

Finally, the Growers argue that if we rely on the statute's plain language in recognizing super-priority liens in favor of the CCC in the refined sugar, then we must also adhere to the plain language and determine that there is no coverage for the proceeds from that sugar. They point out that 7 U.S.C. § 7284(d) does not refer to the proceeds of refined sugar. The Growers cite no authority, however, for the proposition that we are bound to use only one mode of exegesis while performing statutory interpretation. And, as the CCC correctly argues, reading the statute not to apply to the proceeds of the sugar would produce the absurd result of nullifying the value of the CCC's liens. By contrast, such a concern with an absurd result is not presented in the analysis of the superiority of the CCC's liens in the refined sugar.

2. Adequate Assurances Requirement

The Secretary of Agriculture is required to obtain adequate assurances from processors who receive CCC loans that they will pay certain amounts to producers. 7 U.S.C.A. § 7272(e)(2)(A) (formerly § 7272(e)(2)) (West Supp. 2003). The Growers contend that such assurances were not provided in the present case.

The language of the statute leaves the determination of adequacy to the Secretary. As the CCC points out, the regulations pertaining to CCC loans

state that "[n]onrecourse loan recipients shall pay all eligible producers who have delivered or will deliver sugar beets or sugarcane to such processor for processing not less than the minimum payment levels CCC specifies." 7 C.F.R. § 1435.106(c) (2000). This being the case, the Growers' hardship is attributable to the PNSC's execution of a security interest in favor of the CCC, not the CCC's acceptance of that interest. At any rate, although we recognize the hardship suffered by the Growers, we note that if not for the CCC's loans to the PNSC, the PNSC may very well have been unable to process the Growers' crops, resulting in a complete loss of all remaining unprocessed crops.

The judgment of the district court is AFFIRMED.

The Memorandum filed September 16, 2003, is replaced with the Amended Memorandum filed concurrently with this order. Judge B. Fletcher's dissent remains unchanged and shall be refiled along with the Amended Memorandum.

With the Memorandum as amended, the panel has voted to deny appellants' petition for rehearing. The petition for rehearing, filed October 27, 2003, is DENIED.

BETTY B. FLETCHER, Circuit Judge, dissenting.

I respectfully dissent. In enacting 7 U.S.C. § 7284(d) Congress intended to give priority to those security interests that the CCC *properly* perfected. Here the CCC failed to follow its own regulations in the administration of the loans it made to PNSC, as well as congressional enactments intended to protect sugar growers. Were it not for these failures, the CCC would not have made the loans at issue. No "security interest" in the sugar at issue was created for the purposes of 7 U.S.C. § 7284(d), and the CCC cannot now use that provision to remedy its own deficiencies.

The authority of the CCC to make loans to entities like PNSC is not absolute. In the first instance, Congress has set forth certain requirements that must be met when the CCC makes loans to sugar processors. *See, e.g.*, 7 U.S.C. § 7272(e)(2) (2000). In addition, and perhaps more importantly in this case, Congress has given the CCC (through the Secretary of Agriculture) the authority to set further requirements in the administration of these loans. 7

U.S.C. § 7281(d) (2000). Under this authority, the CCC has issued regulations which set eligibility requirements for sugar processors seeking loans and impose a variety of other requirements on those processors once the loans are made. 7 C.F.R. §§ 1435.104--1435.106 (2001).¹ One of these regulations requires that

If there are any liens or encumbrances on sugar pledged as collateral for a loan, the processor must obtain waivers that fully protect CCC's interest even though the liens or encumbrances are satisfied from the loan proceeds. No additional liens or encumbrances shall be placed on the sugar after loan approval.

7 C.F.R. § 1435.105(b) (2001). The regulations also provide that "[n]o loan proceeds may be disbursed until the sugar has actually been processed *and is otherwise established as being eligible to be pledged as loan collateral.*" 7 C.F.R. § 1435.105(c) (2001) (emphasis added).

In this case, the CCC failed to obtain any lien waivers from the sugar growers, as required by 7 C.F.R. § 1435.105(b). The district court dismissed this issue by pointing to the language of § 1435.105(b), which mandates that the processor, not the CCC obtain the lien waivers. But while the literal language of that regulation places requirements on the processor, it is the CCC's responsibility to ensure that the regulations under which it operates the sugar loan program are followed. That responsibility is made clear by the next section of the regulation, which specifies that no loan proceeds may be disbursed until the sugar is "established as being eligible to be pledged as loan collateral." 7 C.F.R. § 1435.105(c) (2001). That section places an affirmative obligation on the CCC to ensure that the waivers are obtained *before* the loans are disbursed. In the instant case, the PNSC never obtained the appropriate waivers from the growers, and the sugar was therefore never eligible as collateral. It then follows that, pursuant to its own regulations, the CCC should not have disbursed the loan proceeds in the first place.

Under the majority's reading of 7 U.S.C. § 7284(d), none of this matters, however, since any liens obtained by the CCC, whether properly or not, would

¹ While there was some dispute as to when the CCC loans to PNSC were actually made, the district court below assumed for purposes of its decision that all of the loans had been made between December 4, 2000 and January 16, 2001. The pertinent regulations are therefore those in effect during that time period, even though these sections have since changed.

have priority over all others. Congress meant to protect the CCC's liens only when they had been properly perfected. This is consistent with the language in 7 U.S.C. § 7284(d) and that of the CCC's regulations. If, as the majority asserts, § 7284(d) gives priority to the CCC's liens over any and all other liens on sugar, then there is no reason for the requirement in 7 C.F.R. § 1435.105(b) that the CCC obtain waivers to "fully protect" its interest. The CCC's interest would already be completely protected by § 7284(d) under the majority's reading.² Instead, there is a dual purpose for the regulation: first, as its own language indicates, it is meant to protect the CCC's interest in case of litigation such as the instant one; but, more importantly, the regulation serves to give notice to growers and other lien holders that, by operation of 7 U.S.C. § 7284(d), their liens are to be subordinated to those of the CCC.³ The agency's interpretation is reasonable and consistent with congressional intent. We should defer to it.

The CCC's failure to ensure that waivers had been obtained from prior lienholders was not its only deficiency in this case. 7 U.S.C. § 7272(e)(2) requires the CCC to obtain "such assurances as the Secretary considers adequate" to ensure that processors would provide payments to producers that are proportional to the value of the loan received by the processor for the sugar in question. In this case, the CCC contends, in essence, that it was taking PNSC's word that it would make such payments to sugar growers. Appellee Br. at 18-19. While the statute does give the CCC substantial leeway in determining what assurances are adequate, surely Congress did not intend to let the CCC simply take processors' word that it would make such payments. Some minimum level of oversight appears to be intended by this provision, and the CCC appears to have failed the sugar growers in this additional way.

In the end, CCC seeks § 7284(d)'s protection for loans that it should not

² It should be noted that the regulations discussed here were finalized by the Department of Agriculture several months after Congress had enacted § 7284(d). *Compare* Implementations of the Farm Program Provisions of the 1996 Farm Bill, 61 Fed. Reg. 37,544, 37,618 (July 18, 1996) *with* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (enacted April 4, 1996).

³ This analysis also explains the CCC's statements in its "Notification of CCC's Security Interest." That document states that "[i]n the event that CCC has failed to obtain a lien waiver from a superior lienholder," it will be subject to that lien if "the lien is established to be legally superior to CCC's interest." Under the majority's reading of 7 U.S.C. § 7284(d), it would appear that no lien could ever be established as legally superior to that of the CCC.

have made in the first place since it never ensured that the proper waivers had been obtained. Congress certainly meant § 7284(d) to give priority to CCC's security interests, but only to give such protection when the CCC was administering the loan program properly. Since the sugar at issue here was never eligible as collateral in the first place, I would hold that the CCC never gained a "security interest" in that sugar, and that the CCC's "liens" at issue here are therefore not protected by § 7284(d).

GENERAL

MISCELLANEOUS ORDERS

In re: TUT BROTHERS & SONS, INC.
AMAA Docket No. 02-0001.
Order Dismissing Case.
Filed October 7, 2003.

Robert Ertman, for Complainant.
Respondent, William L. Cowin.
Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant, the Administrator of the Agricultural Marketing Service, moved to dismiss the complaint without prejudice. The Motion states that “the attorney for Respondent does not oppose this motion. I have decided to grant Complainant’s motion, subject to the following limitations.

Either party may request that the case be restored to the active docket, so long as such request is filed within one (1) year from the date of this dismissal. If no such request is filed, without further action or notice the dismissal will become final and with prejudice. Accordingly, this case is **DISMISSED**.

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

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2002 AMA Docket No. F&V 989-5.
Order Vacating Order Granting Motion to Dismiss and Remand Order.
Filed December 4, 2003.

AMAA-F&V – Raisins – Order dismissing amended petition – Counsel’s timeliness in prior proceedings – Lack of prejudice to respondent – Service – Proof of service.

The Judicial Officer vacated Administrative Law Judge Leslie B. Holt’s (ALJ) Order Granting Motion to Dismiss and remanded the proceeding to the ALJ to provide Petitioner with an opportunity to respond to Respondent’s Motion to Dismiss Amended Petition. The Judicial Officer found that the Hearing Clerk had not served Petitioner with Respondent’s Motion to Dismiss Amended Petition in accordance with the applicable rules of practice (7 C.F.R. § 900.69(b)).

Colleen A. Carroll, for Respondent.

Brian C. Leighton, for Petitioner.

Order Granting Motion to Dismiss issued by Leslie B. Holt, Administrative Law Judge.

Order Vacating Order Granting Motion to Dismiss and Remand Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation [hereinafter Petitioner], filed an Amended Petition¹ on May 16, 2003. Petitioner filed the Amended Petition under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of “Raisins Produced From Grapes Grown In California (7 C.F.R. pt. 989); 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].

On June 27, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a “Motion to Dismiss Amended Petition. On September 29, 2003, Administrative Law Judge Leslie B. Holt [hereinafter the ALJ] dismissed the Amended Petition on the ground that Petitioner failed to file a timely response to Respondent’s Motion to Dismiss Amended Petition (Order Granting Motion to Dismiss).

On October 27, 2003, Petitioner appealed to the Judicial Officer.² On November 7, 2003, Respondent filed a response to Petitioner’s Appeal Petition. On November 18, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner states that it never received Respondent’s Motion to Dismiss

¹Petitioner entitles its Amended Petition “Amended Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Set Aside Reserve Percentages of All Varieties of Raisins Established for the 2002-2003 Crop Year, Pursuant to 7 C.F.R. § 989.1 *et seq.* and to Exempt Petitioner from Various Provisions of the Raisin Marketing Order and/or Any Obligations Imposed in Connection Therewith with Respect to the Reserve Requirements, That Are Not in Accordance with Law [hereinafter Amended Petition].

²Petitioner entitles its appeal petition “Petitioner’s Motion for the Court to Revoke Its Order Granting Motion to Dismiss the Second Amended Petition and Allowing Petitioner to Respond to the Motion to Dismiss [hereinafter Appeal Petition].

Amended Petition and requests that I vacate the ALJ's Order Granting Motion to Dismiss and grant Petitioner 20 days to respond to Respondent's Motion to Dismiss Amended Petition. Petitioner cites three bases for its requests. (Petitioner's Appeal Pet. at 1-3.)

First, Petitioner asserts that its attorney, Brian C. Leighton, has probably filed more petitions pursuant section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), than any other attorney and that Mr. Leighton always files timely responses to motions (Petitioner's Appeal Pet. at 2).

Mr. Leighton has appeared before me as counsel in numerous administrative proceedings.³ While there is no record evidence to support Petitioner's contention that Mr. Leighton always files timely responses, I do not recall any proceeding in which Mr. Leighton filed a late response to a motion. However, Mr. Leighton's punctilious adherence to the time requirements in the Rules of Practice in previous proceedings is not relevant to Petitioner's requests in this proceeding. Therefore, I reject Petitioner's contention that Mr. Leighton's diligence in previous proceedings is a basis for vacating the ALJ's Order Granting Motion to Dismiss and providing Petitioner 20 days to respond to Respondent's Motion to Dismiss Amended Petition.

Second, Petitioner urges that I vacate the ALJ's Order Granting Motion to Dismiss and grant Petitioner 20 days to respond to Respondent's Motion to Dismiss Amended Petition on the ground that vacating the ALJ's order and granting Petitioner time to respond to Respondent's motion will not prejudice Respondent (Petitioner's Appeal Pet. at 2-3).

The lack of prejudice to an opposing party is not a basis for vacating a properly issued order granting a motion to dismiss and granting a party

³See, e.g., *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. May 29, 2003); *In re Saulsbury Enterprises*, 59 Agric. Dec. 28 (2000) (Decision on Remand), *rev'd*, CV-97-5136-REC (E.D. Cal. July 12, 2000), *appeal withdrawn*, No. 00-16854 (9th Cir. Oct. 10, 2000); *In re Gallo Cattle Co.*, 57 Agric. Dec. 357 (1998), *dismissed*, No. CIV S-98-1619 EJJ/JFM (E.D. Cal. Oct. 1, 1998), *printed in* 57 Agric. Dec. 890 (1998), *aff'd*, 189 F.3d 473 (Table), 1999 WL 547427 (9th Cir. 1999), *printed in* 58 Agric. Dec. 828 (1999); *In re Cal-Almond*, 57 Agric. Dec. 24 (1998); *In re United Foods, Inc.*, 57 Agric. Dec. 329 (1998), *aff'd*, Nos. 96-01252, 98-01082 (W.D. Tenn. 1998), *rev'd*, 197 F.3d 221 (6th Cir. 1999), *reprinted in* 58 Agric. Dec. 822 (1999), *aff'd*, 553 U.S. 405 (2001), *reprinted in* 60 Agric. Dec. 147 (2001); *In re Daniel Strebin*, 56 Agric. Dec. 1095 (1997); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. 1567 (1997), *aff'd*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Mar. 26, 1998), *printed in* 57 Agric. Dec. 11 (1998); *In re Midway Farms, Inc.*, 56 Agric. Dec. 102 (1997), *aff'd*, No. CV F 97-5460 (E.D. Cal. May 18, 1998), *printed in* 58 Agric. Dec. 1 (1999), *rev'd and remanded*, 188 F.3d 1136 (9th Cir. 1999), *reprinted in* 58 Agric. Dec. 714 (1999).

additional time to respond to the motion to dismiss.⁴

Third, Petitioner contends the Hearing Clerk has never served Petitioner's counsel with Respondent's Motion to Dismiss Amended Petition (Petitioner's Appeal Pet. at 2-3).

Section 900.69(b) of the Rules of Practice (7 C.F.R. § 900.69(b)) provides three methods by which the Hearing Clerk may serve a document or paper on a party's attorney of record: (1) by delivering a copy of the document or paper to the attorney; (2) by leaving a copy of the document or paper at the principal office or place of business of the attorney; or (3) by registering and mailing a copy of the document or paper addressed to the attorney at the attorney's last known principal office, place of business, or residence. Moreover, section 900.69(b) of the Rules of Practice (7 C.F.R. § 900.69(b)) provides that proof of service shall be made by the affidavit of the person who actually made the service and that the affidavit shall be filed with the Hearing Clerk and the fact of filing shall be noted on the docket of the proceeding.

The record does not indicate that the Hearing Clerk served Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance with section 900.69(b) of the Rules of Practice (7 C.F.R. § 900.69(b)). Instead, the record establishes that the Hearing Clerk sent Petitioner's attorney a copy of Respondent's Motion to Dismiss Amended Petition by regular mail on June 27, 2003.⁵ Moreover, I cannot locate, and neither Respondent nor Petitioner cites, any notation in the record of the filing of an affidavit of the person who

⁴*Cf. In re Heartland Kennels, Inc.*, 61 Agric. Dec. 549, 551-52 (2002) (stating the lack of prejudice to the complainant is not a basis for postponing the proceeding) (Ruling Denying Motion to Postpone Proceedings); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating, even if the complainant would not be prejudiced by allowing the respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting the respondent's contention that the complainant must allege or prove prejudice to the complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced the complainant's ability to present its case).

⁵*See* Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form, stating that the Hearing Clerk sent Respondent's Motion to Dismiss Amended Petition by regular mail on June 27, 2003, to:

Mr. Brian C. Leighton, Esquire
701 Pollasky Avenue
Clovis, CA 93612

actually served Petitioner with Respondent's Motion to Dismiss Amended Petition.

Therefore, as the record does not contain any indication that the Hearing Clerk served Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance with the Rules of Practice, the ALJ's September 29, 2003, Order Granting Motion to Dismiss should be vacated, the Hearing Clerk should serve Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance with the Rules of Practice, and Petitioner should be given an opportunity to respond to Respondent's Motion to Dismiss Amended Petition in accordance with the Rules of Practice.

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

ORDER

1. The ALJ's September 29, 2003, Order Granting Motion to Dismiss is vacated.
2. The proceeding is remanded to the ALJ to:
 - a. order the Hearing Clerk to serve Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance with the Rules of Practice; and
 - b. provide Petitioner with an opportunity to respond to Respondent's Motion to Dismiss Amended Petition in accordance with the Rules of Practice.

**In re: BOGHOSIAN RAISINS PACKING CO.
2002 AMA Docket No. F&V 989-6.
Order.
Filed November 7, 2003.**

Colleen Carroll for Complainant.
Respondent, Howard Sagaser.
Order issued by Leslie B. Holt, Administrative Law Judge.

The Petitioner, Boghosian Raisin Packing Co., Inc., has filed a Second Amended Petition to Modify Raisin Marketing Order pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937 alleging that the Secretary of Agriculture has acted arbitrarily, capriciously and contrary to the requirements of the Marketing Order of Raisins Produced from Grapes Grown in California in calculating the trade demand and establishing

reserve and free tonnage percentages for California raisins for the 2002-2003 crop year.

Respondent filed a Motion to Dismiss the Second Amended Petition on August 29, 2003. Petitioner filed an Opposition to Dismiss on October 23, 2003.

Upon consideration of the Second Amended Petition to Modify Raisin Marketing Order, the Motion to Dismiss the Second Amended Petition, the Opposition thereto and the entire record herein, it appears that;

- 1.) The Second Amended Petition does not contain a “clear and concise statement of facts supporting Petitioner’s claims. Specifically, it fails to set forth facts in a clear and concise manner describing how the Petitioner claims to have been negatively affected by any of the terms of the Order or the interpretation of the Order. See, Rules of Practice 900.52(b)(3).
- 2.) The Second Amended Petition states obsolete and inaccurately paraphrased provisions of the Order. Specifically reference to *Desirable Carryout Levels*, *Trade Demand* and *Factors* are erroneous readings of the complained of Order. Petitioner’s Second Amended Petition misrepresentation of the provisions of the Order is a failure to state a clear and concise complaint.
- 3.) The Second Amended Petition’s reference to “RID certificates and “RID program are undefined phrases that are not found in either the Act or the Order. There is therefore no cognizable basis to provide a remedy.
- 4.) The Second Amended Petition fails to contain any allegation that any act complained of has affected anybody, much less the Petitioner, in any way. It is entirely speculative in nature and therefore cannot be “arbitrary, capricious and not in accordance with law .
- 5.) Petitioner’s philosophical disagreement with the Order and the RAC does not make the Order or the RAC actions illegal.

IT IS THEREFORE ORDERED that the Motion to Dismiss the Second

Amended Petition to Modify Raisin Marketing Order is **GRANTED**, and it is further;

ORDERED that the Second Amended Petition to Modify Raisins Marketing Order is **DISMISSED** in its entirety.

SO ORDERED this 7 day of November, 2003.

**In re: BELINDA ATHERTON, d/b/a BEL-KAY KENNEL.
AWA Docket No. 03-0005.
Order Denying Late Appeal.
Filed October 20, 2003.**

AWA – Late appeal.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer concluded that he had no jurisdiction to hear Respondent's appeal filed after Administrative Law Judge Marc R. Hillson's Decision and Order Upon Admission of Facts by Reason of Default became final.

Bernadette R. Juarez, for Complainant.
Respondent, Pro se.

Initial decision issued by Marc R. Hillson, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint on December 26, 2002. Complainant instituted the 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].

Complainant alleges that on or about November 1, 2000, through on or about March 6, 2001, Belinda Atherton, d/b/a Bel-Kay Kennel [hereinafter Respondent], operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)) (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on January 3, 2003.¹ Respondent failed to answer the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent two letters, one dated January 29, 2003, and the second dated June 5, 2003, informing Respondent that an answer to the Complaint had not been filed within the time required in the Rules of Practice. Respondent did not respond to either the January 29, 2003, letter or the June 5, 2003, letter.

On June 10, 2003, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a “Motion for Adoption of Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Motion for Default Decision] and a “Proposed Decision and Order [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant’s Motion for Default Decision, Complainant’s Proposed Default Decision, and a service letter on June 17, 2003.² Respondent failed to file objections to Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On August 13, 2003, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Marc R. Hillson [hereinafter the ALJ] filed a “Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Decision and Order]: (1) concluding that from approximately November 1, 2000, through March 6, 2001, Respondent operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license 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) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations; and (3) assessing Respondent a \$14,850 civil penalty (Decision and Order at 2-3).

On August 18, 2003, the Hearing Clerk served Respondent with the ALJ’s

¹United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 1793.

²United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3156.

Decision and Order and a service letter.³ On September 22, 2003, Respondent appealed to the Judicial Officer. On October 14, 2003, Complainant filed "Complainant's Opposition to Respondent Belinda Atherton's Appeal of Decision and Order. On October 16, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

The record establishes that the Hearing Clerk served Respondent with the ALJ's Decision and Order on August 18, 2003.⁴ Section 1.145(a) of the Rules of Practice provides that an administrative law judge's written decision must be appealed to the Judicial Officer within 30 days after service, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after the issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Therefore, Respondent was required to file her appeal petition with the Hearing Clerk no later than September 17, 2003. On September 22, 2003, Respondent filed an appeal petition with the Hearing Clerk.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision and order becomes final.⁵

³United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3439.

⁴See note 3.

⁵*In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the administrative law judge's decision and order became final); *In re Paul Eugenio*, (continued...)

⁵(...continued)

60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the administrative law judge's decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the administrative law judge's decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the administrative law judge's decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the administrative law judge's decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the administrative law judge's decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the administrative law judge's decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the administrative law judge's decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the administrative law judge's decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the administrative law judge's decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the administrative law judge's decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the administrative law judge's decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the administrative law judge's decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the administrative law judge's decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the administrative law judge's decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the administrative law judge's decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the administrative law judge's decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer

(continued...)

The ALJ's Decision and Order became final on September 22, 2003,⁶ the day Respondent filed an appeal petition with the Hearing Clerk. Therefore, I have no jurisdiction to hear Respondent's appeal.

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)(A) of the Federal Rules of Appellate Procedure provides, as follows:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

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

⁵(...continued)

has no jurisdiction to hear an appeal that is filed after the administrative law judge's decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the administrative law judge's decision and order became final, but not filed until 4 days after the administrative law judge's 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 since the 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 administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the administrative law judge's decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the administrative law judge's decision).

⁶7 C.F.R. § 1.142(c)(4); Decision and Order at 3.

a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.⁷

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 administrative law judge's 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 to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.⁸ 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 administrative law judge's decision and order has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the ALJ's Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision and order becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs

⁷*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating 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 (1978) (stating 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), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating 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) (stating the 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) (stating 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) (stating 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), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (stating 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).

⁸Fed. R. App. P. 4(a)(5).

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 602.⁹

Accordingly, Respondent’s appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), “no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

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

ORDER

Respondent’s appeal petition filed September 22, 2003, is denied. The Decision and Order filed by Administrative Law Judge Marc R. Hillson on August 13, 2003, is the final decision and order in this proceeding.

⁹*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating 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) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

**In re: HARRY LEVY.
DNS-FNS Docket No. 03-0001.
Order Dismissing Decision.
Filed October 14, 2003.**

Rachel Bishop, for Complainant.
Respondent, Pro se.

Decision issued by Jill S. Clifton, Administrative Law Judge.

For the reasons stated in the Debarring Official's Response to the Appeal Petition, filed August 6, 2003, and based upon the Administrative Record, which was filed August 6, 2003, both of which were provided by the Food and Nutrition Service, United States Department of Agriculture, I uphold the initial suspension, the continuation of the suspension, the proposed debarment and debarment of Harry Levy, each of which ended on or before October 2, 2003.

This decision is final and is not appealable within the United States Department of Agriculture. 7 C.F.R. § 3017.515.

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

**In re: TERRY BUECHLER.
FCIA Docket No. 03-0004.
Order Dismissing Case.
Filed November 20, 2003.**

Donald Brittenham, Jr., for Complainant.
Respondent, Ross H. Espeth.

Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant, the Manager of the Federal Crop Insurance Corporation; and Respondent, Terry Buechler, jointly requested that this case be dismissed with prejudice. The request stated that Complainant and Respondent have reached a settlement agreement.

Accordingly, this case is **DISMISSED**.

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

**In re: DON CAMPBELL.
FCIA Docket No. 03-0005.
Order Dismissing Case.
Filed October 31, 2003.**

Donald Brittenham, Jr., Complainant.
Respondent, Kenneth Bulie.
Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant, the Manager of Federal Crop Insurance Corporation; and Respondent, Don Campbell, jointly requested that this case be dismissed with prejudice. The request stated that Complainant and Respondent have reached a settlement agreement.

Accordingly, this case is **DISMISSED**.

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

**In re: STATE OF COLORADO
COLORADO DEPARTMENT OF HUMAN SERVICES.
FSP Docket No. 03-0001.
Withdrawal of Appeal.
Filed August 22, 2003.**

Richard Hill, for Appellee.
Appellant, Pro se.
Order issued by Marc R. Hillson, Administrative Law Judge.

By communication dated August 13, 2003 and received by the Hearing Clerk on August 20, 2003, the State of Colorado, Colorado Department of Human Services withdrew its appeal in the above-captioned proceeding. This office now considers the case closed.

**In re: STATE OF MICHIGAN FAMILY INDEPENDENCE AGENCY.
FSP Docket No. 02-0001.
Withdrawal of Appeal.
Filed October 22, 2003.**

Angela Kliine for Appellee.
Appellant, Erica Weiss Marsden.
Order issued by Leslie B. Holt, Administrative Law Judge.

By communication dated October 6, 2003, and received by the Hearing Clerk's Office on October 21, 2003, the State of Michigan, Family Independence Agency, withdrew its appeal in the above-captioned proceeding. The office now considers the case closed.

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

**In re: WILLIAM J. REINHART, d/b/a REINHART STABLES.
HPA Docket No. 99-0013.
Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and
Ruling Granting Motion to Amend Case Caption.
Filed September 8, 2003.**

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order and Rulings issued by William G. Jenson, Judicial Officer.

HPA - Stay, Lift

Judicial Officer denied Respondent's Motions for Permanent Stay to enforcement of civil remedies due to alleged shortcoming on part of USDA and making error by Hearing Clerk's office.

PROCEDURAL HISTORY

On November 9, 2000, I issued a Decision and Order concluding William J. Reinhart, d/b/a Reinhart Stables [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831)

[hereinafter the Horse Protection Act].¹ On November 27, 2000, Respondent filed a petition for reconsideration, which I denied on January 23, 2001.² On May 30, 2001, Respondent requested a stay of the Order in *In re William J. Reinhart*, 60 Agric. Dec. 241 (2001) (Order Denying William J. Reinhart's Pet. for Recons.), pending the outcome of proceedings for judicial review. On June 20, 2001, I granted Respondent's request for a stay.³

Respondent appealed to the United States Court of Appeals for the Sixth Circuit which dismissed Respondent's late-filed appeal petition for lack of jurisdiction.⁴ On April 21, 2003, the Supreme Court of the United States denied Respondent's petition for writ of certiorari.⁵

On July 22, 2003, Complainant requested that I lift the June 20, 2001, Stay Order on the ground that proceedings for judicial review have concluded (Complainant's Second Motion to Lift Stay Order). On August 15, 2003, Respondent filed a response to Complainant's motion to lift the stay order, a motion for a permanent stay, and a motion to amend the case caption (Response to Complainant's Second Motion to Lift Stay Order, and Motion for Permanent Stay). I provided Complainant 10 days within which to file a response to Respondent's motion for a permanent stay and Respondent's motion to amend the case caption. On September 2, 2003, 14 days after the Hearing Clerk served Complainant with Respondent's motion for a permanent stay and Respondent's motion to amend the case caption, Complainant filed "Complainant's Response to Respondent's Motion for Permanent Stay." ⁶ On September 3, 2003, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Second Motion to Lift

¹*In re William J. Reinhart*, 59 Agric. Dec. 721 (2000).

²*In re William J. Reinhart*, 60 Agric. Dec. 241 (2001) (Order Denying William J. Reinhart's Pet. for Recons.).

³*In re William J. Reinhart*, 60 Agric. Dec. 267 (2001) (Stay Order).

⁴*Reinhart v. United States Dep't of Agric.*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. 2002).

⁵*Reinhart v. Department of Agric.*, 123 S. Ct. 1802 (2003).

⁶Complainant filed Complainant's Response to Respondent's Motion for Permanent Stay 4 days late. Therefore, I have not considered Complainant's Response to Respondent's Motion for Permanent Stay, and Complainant's Response to Respondent's Motion for Permanent Stay forms no part of the record in this proceeding.

Stay Order, a ruling on Respondent's motion for a permanent stay, and a ruling on Respondent's motion to amend the case caption.

COMPLAINANT'S SECOND MOTION TO LIFT STAY ORDER

I issued the June 20, 2001, Stay Order to postpone the effective date of the Order issued in *In re William J. Reinhart*, 60 Agric. Dec. 241 (2001) (Order Denying William J. Reinhart's Pet. for Recons.), pending the outcome of proceedings for judicial review. Respondent does not dispute Complainant's contention that proceedings for judicial review are concluded.

I find proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired. Therefore, Complainant's Second Motion to Lift Stay Order is granted; the June 20, 2001, Stay Order is lifted; and the Order issued in *In re William J. Reinhart*, 60 Agric. Dec. 241 (2001) (Order Denying William J. Reinhart's Pet. for Recons.), is effective, as set forth in the Order, *infra*.

RESPONDENT'S MOTION FOR PERMANENT STAY

Respondent raises five issues in support of his motion for a permanent stay. First, Respondent contends "Double Pride Lady, the horse in question in the instant proceeding, was not sore on October 28, 1998, when Respondent entered Double Pride Lady for the purpose of showing or exhibiting Double Pride Lady at the National Walking Horse Trainers Show in Shelbyville, Tennessee (Response to Complainant's Second Motion to Lift Stay Order, and Motion for Permanent Stay at 1).

As fully explicated in the November 9, 2000, Decision and Order and the January 23, 2001, Order Denying William J. Reinhart's Petition for Reconsideration, Complainant proved by a preponderance of the evidence⁷ that

⁷The 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. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in an administrative proceeding conducted under the Horse Protection Act is preponderance of the evidence. *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 195 n.6 (2002), *appeal docketed*, No. 02-9543 (10th Cir. July 19, 2002); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric.

(continued...)

on October 28, 1998, Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Double Pride Lady for the purpose of showing or exhibiting Double Pride Lady at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore.⁸ Moreover, the United States Court of Appeals for the Sixth Circuit states, even if it had jurisdiction to hear William J. Reinhart's appeal, it "would not have been inclined to set aside the Secretary's order because "[t]he Secretary's finding that Reinhart violated the [Horse Protection Act] appears to be supported by substantial evidence, particularly in light of the fact that this court has specifically held that a finding of soreness for the purposes of the [Horse Protection Act] may be based solely upon the results of palpation."⁹ Therefore, I reject Respondent's contention that Double Pride Lady was not sore when Respondent entered her in the National Walking Horse Trainers Show on October 28, 1998.

Second, Respondent contends he followed every procedure prescribed by

⁷(...continued)

Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

⁸*In re William J. Reinhart*, 60 Agric. Dec. 241 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000).

⁹*Reinhart v. United States Dep't of Agric.*, 39 Fed. Appx. 954, 957 (6th Cir. 2002).

the United States Department of Agriculture “to have this matter favorably reviewed within the USDA system and “filed all appropriate briefs and responses to motions numbering nearly 200 documents. (Response to Complainant’s Second Motion to Lift Stay Order, and Motion for Permanent Stay at 1, 3.)

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], which are applicable to this proceeding, are designed to promote the efficient and orderly conduct of adjudicatory proceedings. However, a party’s observance of the Rules of Practice, by itself, does not entitle that party to prevail on the merits and does not provide a basis for the issuance of a permanent stay of an order.

Third, Respondent contends a United States Department of Agriculture mailing error made Respondent’s compliance with the statutory deadline for filing an appeal impossible (Response to Complainant’s Second Motion to Lift Stay Order, and Motion for Permanent Stay at 1-2).

The United States Court of Appeals for the Sixth Circuit found the United States Department of Agriculture’s mailing error did not completely excuse Respondent’s untimely appeal because Respondent had an affirmative duty to monitor the United States Department of Agriculture’s docket to determine if the Judicial Officer had ruled on Respondent’s petition for reconsideration. The Court held that had Respondent monitored the docket, he could have filed a timely appeal.¹⁰ Therefore, I reject Respondent’s contention that the United States Department of Agriculture made Respondent’s compliance with the statutory deadline for filing an appeal impossible.

Fourth, Respondent contends the attorney for the United States Department of Agriculture had a legal responsibility to inform the United States Court of Appeals for the Sixth Circuit that the United States Department of Agriculture does not maintain a published docket of its cases where parties can check the status of cases (Response to Complainant’s Second Motion to Lift Stay Order, and Motion for Permanent Stay at 2).

Respondent cites no basis for his contention that a party to a United States Department of Agriculture adjudicatory proceeding cannot determine the status of the proceeding. As the United States Court of Appeals for the Sixth Circuit indicated, Respondent could have, but did not, call the Office of the Hearing

¹⁰*Reinhart v. United States Dep’t of Agric.*, 39 Fed. Appx. 954, 956-57 (6th Cir. 2002).

Clerk to determine the status of his petition for reconsideration.¹¹

Fifth, Respondent contends the United States Department of Agriculture will not accept responsibility for its failure to serve Respondent with the January 23, 2001, Order Denying William J. Reinhart's Petition for Reconsideration prior to the expiration of the time for Respondent's appeal to the United States Court of Appeals for the Sixth Circuit (Response to Complainant's Second Motion to Lift Stay Order, and Motion for Permanent Stay at 3).

Respondent cites no basis for his contention that the United States Department of Agriculture failed to take responsibility for the failure to serve him with the January 23, 2001, Order Denying William J. Reinhart's Petition for Reconsideration prior to the expiration of the time for appeal. Contrary to Respondent's contention, the United States Court of Appeals for the Sixth Circuit states the United States Department of Agriculture conceded error in connection with the mailing of the January 23, 2001, Order Denying William J. Reinhart's Petition for Reconsideration, as follows:

The USDA, however, concedes that a clerical error on its part contributed to Reinhart's delay in filing his notice of appeal. Specifically, the USDA's Office of the Hearing Clerk mistakenly sent Reinhart a decision from a totally unrelated case rather than the order denying his petition for reconsideration. The record does not indicate when Reinhart received this decision, but the USDA acknowledges that Reinhart notified it of the mistake and that the decision from his case was then sent out to him on February 15, 2001. Reinhart did not receive this order until February 26, 2001, 34 days after the order was issued and 4 days after the time period for appealing that order had expired.

Reinhart v. United States Dep't of Agric., 39 Fed. Appx. 954, 955-56 (6th Cir. 2002).

Therefore, I reject Respondent's contention that the United States Department of Agriculture failed to take responsibility for the failure to serve Respondent with the January 23, 2001, Order Denying William J. Reinhart's Petition for Reconsideration prior to the expiration of the time for appeal.

¹¹*Reinhart v. United States Dep't of Agric.*, 39 Fed. Appx. 954, 956-57 (6th Cir. 2002).

RESPONDENT'S MOTION TO AMEND CASE CAPTION

Respondent "takes exception to Complainant's repeated attempts to include Reinhart Stables as a party to these proceedings. (Response to Complainant's Second Motion to Lift Stay Order, and Motion for Permanent Stay at 3.)

I found Reinhart Stables was merely a name under which William J. Reinhart did business and concluded that "William J. Reinhart, doing business as Reinhart Stables, violated the Horse Protection Act.¹² Based on the finding that Reinhart Stables was merely a name under which William J. Reinhart was doing business, I conclude Reinhart Stables is not a proper party in this proceeding. Therefore, I amend the caption of this proceeding to read "In re: William J. Reinhart, d/b/a Reinhart Stables.

ORDER

1. William J. Reinhart is assessed a \$2,000 civil penalty. 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
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343 South Building
Washington, DC 20250-1417

William J. Reinhart's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on William J. Reinhart. William J. Reinhart shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0013.

2. William J. Reinhart is disqualified for a period of 5 years from showing, exhibiting, or entering any horse directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the

¹²*In re William J. Reinhart*, 59 Agric. Dec. 721, 731, 738, 766-68 (2000).

transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

This 5-year period of disqualification is to be served consecutive to the disqualification of William J. Reinhart ordered in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). The disqualification shall become effective on the 60th day after service of this Order on William J. Reinhart.

**In re: WILLIAM J. REINHART, d/b/a REINHART STABLES.
HPA Docket No. 99-0013.**

**Rulings Denying: (1) Motion to Set Aside Order Lifting Stay; (2) Motion for Permanent Stay; and (3) Motion for Taking Depositions.
Filed October 10, 2003.**

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Rulings issued by William G. Jenson, Judicial Officer.

HPA - Decision, initial, when not - Rules of procedure.

PROCEDURAL HISTORY

On November 9, 2000, pursuant to 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], I issued a Decision and Order concluding William J. Reinhart, d/b/a Reinhart Stables [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended.¹ Respondent filed a petition for reconsideration, which I denied on January 23,

¹*In re William J. Reinhart*, 59 Agric. Dec. 721 (2000).

2001.² Respondent requested a stay of the Order in *In re William J. Reinhart*, 60 Agric. Dec. 241 (2001) (Order Denying William J. Reinhart's Pet. for Recons.), pending the outcome of proceedings for judicial review. On June 20, 2001, I granted Respondent's request for a stay.³

Respondent appealed to the United States Court of Appeals for the Sixth Circuit which dismissed Respondent's late-filed appeal for lack of jurisdiction.⁴ On April 21, 2003, the Supreme Court of the United States denied Respondent's petition for writ of certiorari.⁵

On July 22, 2003, Complainant requested that I lift the June 20, 2001, Stay Order on the ground that proceedings for judicial review have concluded. Respondent filed a response to Complainant's motion to lift the stay order, a motion for a permanent stay, and a motion to amend the case caption. On September 8, 2003, I issued an "Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption."⁶ On September 30, 2003, Respondent filed "Petition for Reconsideration of Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption."⁷ On October 7, 2003, Complainant filed "Complainant's Reply to Respondent's Petition for Reconsideration of Order Lifting Stay." On October 8, 2003, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Petition for Reconsideration of Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption.

²*In re William J. Reinhart*, 60 Agric. Dec. 241 (2001) (Order Denying William J. Reinhart's Pet. for Recons.).

³*In re William J. Reinhart*, 60 Agric. Dec. 267 (2001) (Stay Order).

⁴*Reinhart v. United States Dep't of Agric.*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. 2002).

⁵*Reinhart v. Department of Agric.*, 123 S. Ct. 1802 (2003).

⁶*In re William J. Reinhart*, 62 Agric. Dec. ____ (Sept. 8, 2003) (Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption).

⁷The title of Respondent's September 30, 2003, filing indicates that Respondent requests reconsideration of the September 8, 2003, ruling granting Respondent's request to amend the case caption. However, the body of Respondent's September 30, 2003, filing does not include a request for reconsideration of the ruling granting Respondent's request to amend the case caption.

As an initial matter, I find Respondent's Petition for Reconsideration of Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption cannot be considered pursuant to section 1.146 of the Rules of Practice (7 C.F.R. § 1.146), which provides that a party to a proceeding under the Rules of Practice may file a petition for reconsideration of the decision of the Judicial Officer. Section 1.132 of the Rules of Practice defines the word *decision* as follows:

§ 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

....
Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

In re William J. Reinhart, 62 Agric. Dec. ____ (Sept. 8, 2003) (Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption), is not a decision and order by the Judicial Officer upon appeal of an administrative law judge's decision. Therefore, the September 8, 2003, Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption is not a *decision* as defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132), and section 1.146 of the Rules of Practice (7 C.F.R. § 1.146), which provides that a party may file a petition for reconsideration of the Judicial Officer's *decision*, is not the proper section of the Rules of Practice under which to request reconsideration of the September 8, 2003, Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case

Caption. However, I find Respondent may request reconsideration of the September 8, 2003, Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption pursuant to section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), which provides that any motion will be entertained other than a motion to dismiss on the pleading. Therefore, I treat Respondent's Petition for Reconsideration of Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption as motions filed pursuant to section 1.143 of the Rules of Practice (7 C.F.R. § 1.143).

RESPONDENT'S MOTION TO SET ASIDE ORDER LIFTING STAY

I issued the June 20, 2001, Stay Order to postpone the effective date of the Order issued in *In re William J. Reinhart*, 60 Agric. Dec. 241 (2001) (Order Denying William J. Reinhart's Pet. for Recons.), pending the outcome of proceedings for judicial review.⁸ Proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired. Therefore, Respondent's motion to set aside the September 8, 2003, order lifting stay is denied.

RESPONDENT'S MOTION FOR PERMANENT STAY

Respondent asserts the Office of the Hearing Clerk's delay in mailing Respondent a copy of the Order Denying William J. Reinhart's Petition for Reconsideration is the sole cause for his untimely appeal to the United States Court of Appeals for the Sixth Circuit and deprived him of the right to judicial review. Respondent requests the issuance of a permanent stay based upon the Office of the Hearing Clerk's alleged deprivation of his right to judicial review. (Respondent's Petition for Reconsideration of Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption at 3-8.)

As an initial matter, Respondent presents no argument that the appropriate remedy for the Office of the Hearing Clerk's purported deprivation of Respondent's right to judicial review, is my granting Respondent's motion for a permanent stay of an order that is warranted in law and justified by the facts.

⁸See note 3.

Moreover, the United States Court of Appeals for the Sixth Circuit considered and rejected Respondent's contention that the Office of the Hearing Clerk's delay in mailing Respondent a copy of the Order Denying William J. Reinhart's Petition for Reconsideration was the sole cause for his untimely appeal and dismissed Respondent's untimely appeal for lack of jurisdiction.⁹ Respondent reiterates the argument that he made to the United States Court of Appeals for the Sixth Circuit in Respondent's Petition for Reconsideration of Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption. Respondent presents no basis for my disagreeing with the Sixth Circuit's finding in *Reinhart v. United States Dep't of Agric.* that the Office of the Hearing Clerk's delay in mailing Respondent a copy of the Order Denying William J. Reinhart's Petition for Reconsideration does not excuse Respondent's untimely appeal. Therefore, I deny Respondent's motion for a permanent stay.

MOTION FOR TAKING DEPOSITIONS

Respondent moves to take the depositions of the Hearing Clerk, the legal technician in the Office of the Hearing Clerk who mailed Respondent a copy of the Order Denying William J. Reinhart's Petition for Reconsideration, and Complainant's attorney (Respondent's Petition for Reconsideration of Order Lifting Stay, Ruling Denying Motion for Permanent Stay, and Ruling Granting Motion to Amend Case Caption at 5).

As an initial matter, the salient facts regarding the Office of the Hearing Clerk's delay in mailing Respondent a copy of Order Denying William J. Reinhart's Petition for Reconsideration are not in dispute. Moreover, Respondent's motion for taking depositions does not comply with the requirements for motions for taking depositions in section 1.148 of the Rules of Practice (7 C.F.R. § 1.148). Therefore, Respondent's motion for taking depositions must be denied.

**In re: MASSACHUSETTS INDEPENDENT CERTIFICATION, INC.
OFPA Docket No. 03-0001.
Order Dismissing Complaint.**

⁹See note 4.

Filed November 4, 2003.

Nazima Razick, for Respondent.
Petitioner, Jill Krueger.
Order issued by Jill S. Clifton, Administrative Law Judge.

OFPA - Certifying agent - Producer - Organic - Jurisdictions, subject matter appeal of certification.

On February 26, 2003, Petitioner Massachusetts Independent Certification, Inc. (MICI) filed a multi-page, multi-count Complaint, seeking to appeal an action by the Administrator of Agricultural Marketing Service, United States Department of Agriculture (USDA) (Administrator), who, on or about October 25, 2002, sustained The Country Hen's appeal of MICI's denial of organic certification. Respondents, the Administrator and the Secretary of Agriculture (Secretary), moved to dismiss MICI's Complaint on March 14, 2003, for lack of subject matter jurisdiction.

Petitioner MICI is a "certifying agent" for the National Organic Program under 7 U.S.C. § 6514 and 7 C.F.R. § 205.500 *et seq.* The Country Hen had on or about July 15, 2002, applied for certification as a producer of organic eggs under the USDA organic seal. For various reasons, on or about October 4, 2002, MICI issued a notice of noncompliance to The Country Hen and in an additional procedure, MICI's certification committee denied organic certification to The Country Hen and on October 22, 2002, issued a formal ruling of its decision to The Country Hen.

A certifying agent such as MICI acts on behalf of the Secretary of Agriculture (and not adverse to the Secretary), and, as is pertinent here, is defined:

7 U.S.C. § 6502 (3) Certifying agent

The term "certifying agent" means . . . any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation in accordance with this chapter.

Respondents raise a preliminary issue, that the Office of Administrative Law Judges lacks subject matter jurisdiction to decide this case, citing in particular 7 C.F.R. § 205.681 (a)(1):

7 C.F.R. §205.681 **Appeals.**

(a) *Certification Appeals* . . .

(1) If the Administrator . . . sustains a certification applicant's or certified operation's appeal of a certifying agent's decision, the applicant will be issued organic certification, or a certified operation will continue its certification, as applicable to the operation. **The act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.** (emphasis added)

The issues have been well-briefed. I accept as filed the following documents submitted by Petitioner MICI: Complaint, filed February 26, 2003; Opposition to Motion to Dismiss, filed April 3, 2003; Opposition to Respondents' Motion to Dismiss filed May 27, 2003; and Motion to Strike and Motion to File Surreply, filed May 27, 2003. I accept as filed the following documents submitted by Respondents Secretary and the Administrator: Motion to Dismiss Complaint, filed March 14, 2003; Response to Petitioner's Opposition, filed May 8, 2003; and Supplemental Memorandum to Clarify Issues, filed October 28, 2003.

In cases where a denial of certification is appealed, the prefatory comments in the final rule (65 Fed. Reg. 80636, col. 1) state:

"The Administrator . . . will review the case and render an opinion on the appeal. When the appeal is sustained, the certified operation and certifying agent are notified and **the case ends.** (emphasis added)

I conclude that the Office of Administrative Law Judges lack subject matter jurisdiction and that **the Complaint must be and is hereby ordered DISMISSED.**

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

**In re: KINH NGUYEN.
P.Q. Docket No. 03-0018.
Order Granting Motion to Dismiss Without Prejudice.
Filed November 14, 2003.**

Thomas Bolick, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on September 23, 2003, be dismissed without prejudice, this the 14th day of November, 2003.

**In re: LESLIE GRICHE.
P.Q. Docket No. 01-0022.
Order Dismissing Case.
Filed December 16, 2003.**

Margaret Burns, for Complainant.
Respondent, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, filed a Motion to Withdraw Complaint on December 11, 2003. Complainant requested that the Complaint, filed on August 29, 2001, be withdrawn.

Accordingly, this case is hereby ordered **DISMISSED**.

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

**In re: PACIFIC NORTHWEST SUGAR COMPANY.
SMA Docket No. 03-0003.
Order.
Filed September 12, 2003.**

Jeffrey Kahn, for Respondent.
Petitioner, William C. Bridgeforth.
Order issued by Leslie B. Holt, Administrative Law Judge.

Pacific Northwest Sugar Company's petition is granted and its appeal is dismissed with prejudice.

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

GENERAL**DEFAULT DECISIONS****AGRICULTURAL MARKETING AGREEMENT ACT**

**In re: BETTY JEAN EASTERLING AND EASTERLING FARMS, INC.
AMAA Docket No. 02-0005.**

Decision and Order.

Filed August 21, 2003.

AMAA -- Default.

Robert Ertman, for Complainant.

Respondent, J. Michael Hall.

Decision and Order issued by Marc R. Hillson, 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”), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that the respondents willfully violated the Marketing Order Vidalia Onions Grown in Georgia, 7 C.F.R. Part 955 (the “Vidalia Onion Order”).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on respondents by regular mail on April 3, 2002. 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.

The respondents have 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 respondents’ 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. Respondent Betty Jean Easterling is an individual whose mailing address is Route 5, Box 135, Glennville, Georgia 30427. At all times material hereto, said Respondent was a “handler” as that term is defined in the Act, 7

U.S.C. § 608c(1), and the Vidalia Onion Order, 7 C.F.R. § 955.6.

2. Respondent Easterling Farms, Inc., is a corporation whose mailing address is Route 5, Box 135, Glennville, Georgia 30427. At all times material hereto, said Respondent was a “handler” as that term is defined in the Act, 7 U.S.C. § 608c(1), and the Vidalia Onion Order, 7 C.F.R. § 955.6.

3. From July 2001 to the present, the Respondents have willfully violated sections 955.60 and 955.101 of the Vidalia Onion Order, 7 C.F.R. §§ 955.60, 955.101, by failing to file with the Vidalia Onion Committee monthly reports of the Respondents’ receipts and shipments of Vidalia onions.

4. From July 2001 to the present, the Respondents have willfully violated sections 955.42 and 955.142 of the Vidalia Onion Order, 7 C.F.R. §§ 955.42, 955.142, by failing to remit \$12,148.08 in assessments owed in the 2001 fiscal period, plus late payment charges and accrued interest thereon.

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. Respondents are jointly and severally assessed a civil penalty of \$2,200, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

2. 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 in particular.

(a) shall cease and desist from failing to pay the Vidalia Committee \$12,148.08 in past due assessments, plus interest of one percent per month pursuant to section 955.142 of the Vidalia Onion Order and from paying any and all assessments which may become due in the future under the Vidalia Onion Order; and

(b) shall cease and desist from failing to file past due monthly reports of receipts and shipments of Vidalia onions and from filing reports which may become due in the future under the Vidalia Onion Order.

The provisions of this order shall become effective on the first day after this decision become 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.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final October 1, 2003.-Editor]

DEFAULT DECISION

ANIMAL QUARANTINE ACT

In re: JURGITA SNIRIENE.

A.Q. Docket No. 02-0001.

Decision and Order.

Filed August 13, 2003.

A.Q. - Default.

Margaret Burns, for Complainant.

Respondent, Pro se.

Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of animal products (9 C.F.R. § 94 *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 Act of August 30, 1890, as amended (21 U.S.C. §§102-105), the Act of February 2, 1903, as amended (21 U.S.C. §111), and the Act of July 2, 1962 (21 U.S.C. §134a-134f)(Acts), and the regulations promulgated thereunder (9 C.F.R. §94 *et seq.*) (regulations), by a complaint filed on October 30, 2001, 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 admission of the allegations in the complaint 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. Jurgita Sniriene, hereinafter referred to as respondent, is an individual with a mailing address of 158 Third Street, 3 Fl. R, Elizabeth, New Jersey 87206.
2. On or about September 1, 2000, the respondent imported into the

United States at Detroit, Michigan from Lithuania approximately one (1) kilogram of pork in violation of 9 C.F.R. § 94.9 because the importation into the United States of pork products from Lithuania, without a health certificate specifying treatment against hog cholera is prohibited.

3. On or about September 1, 2000, the respondent imported into the United States at Detroit, Michigan from Lithuania approximately one (1) kilogram of pork in violation of 9 C.F.R. § 94.12 because the importation into the United States of pork products from Lithuania, without a health certificate specifying treatment against swine vesicular disease is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts. 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 A.Q. Docket No. 02-0001.

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 October 16, 2003-Editor]

DEFAULT DECISIONS

ANIMAL WELFARE ACT

In re: WANDA MCQUARY, RANDALL JONES AND GARY JACKSON.
AWA Docket No. 03-0013.
Decision and Order.
Filed July 21, 2003.

AWA - Default.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.

Decision and Order as to Gary Jackson 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 wilfully 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. §§ 1.130-1.151, were served upon the respondents by the Hearing Clerk. 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 by respondents' failure to file an Answer pursuant to the Rules of Practice, 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. Wanda McQuary, Randall Jones and Gary Jackson, hereinafter referred to as respondents, are individuals with a business mailing address of 565

County Rd 131, Black Rock, Arkansas 72455.

2. The respondents are, and at all times material hereto were, operating as a dealer as defined in the Act and the regulations.

3. On September 13, 2001, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

4. On September 13, 2001, respondents willfully violated section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

5. On September 13, 2001, 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 have the records of animals on hand, program of veterinary care and sales records located at their premises.

6. On September 13, 2001, 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 were not 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 (9 C.F.R. § 3.1(f));

(b) Surfaces of outdoor housing facilities for dogs were not maintained on a regular basis (9 C.F.R. § 3.4(c));

(c) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1));

(d) Primary enclosures for dogs were not structurally sound and maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals, (9 C.F.R. §§ 3.6(a)(1); 3.6(a)(2)); and

(e) Excreta was not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)).

7. On October 2, 2001, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

8. On October 2, 2001, respondents willfully violated section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

9. On October 2, 2001, respondents willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a) and the standards specified below:

(a) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)); and

(b) Primary enclosures for dogs were not structurally sound and

maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals, (9 C.F.R. §§ 3.6(a)(1); 3.6(a)(2)).

10. On March 26, 2002, respondents willfully violated section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

11. On March 26, 2002, 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 dogs were not adequately ventilated and cooled so as to provide for the health and comfort of the animals at all times (9 C.F.R. § 3.2(b));

(b) Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b)); and

(c) The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash (9 C.F.R. § 3.11).

12. On September 26, 2002, respondents willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

13. On September 26, 2002, respondents willfully violated section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

14. On September 26, 2002, 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 have the records of animals on hand, program of veterinary care and sales records located at their premises.

15. On September 26, 2002, 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 dogs 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. § 3.2(b));

(b) The building surfaces in contact with the animals in outdoor housing facilities for dogs were not impervious to moisture (9 C.F.R. § 3.4(c));

(c) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1));

(d) Primary enclosures for dogs were not kept clean and sanitized as required (9 C.F.R. §§ 3.11(b)(2)); and

(e) The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash (9 C.F.R. § 3.11).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondents have violated the Act, as well as 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 in particular, shall cease and desist from:
 - (a) Failing to provide proper veterinary care to 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;
 - (c) Failing to individually identify animals, as required;
 - (d) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required.
 - (e) Failing to 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;
 - (f) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes and dead animals, in a manner that minimizes contamination and disease risks;
 - (g) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated;
 - (h) Failing to provide animals with adequate shelter from the elements; and
 - (i) Failing to provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals.
2. The respondents are assessed a civil penalty of \$8,800, which shall be paid by a certified check or money order made payable to the Treasurer of United States.
3. The respondents' license is revoked and the respondents are permanently disqualified from becoming licensed under the Act and

regulations.

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 section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145. Copies of this decision shall be served upon the parties.

[This Decision and Order became final September 9, 2003. - Editor]

In re: BELINDA ATHERTON d/b/a BEL-KAY KENNEL.
AWA Docket. No. 03-0005.
Decision and Order.
Filed August 13, 2003.

AWA - Default.

Bernadette R. Juarez, for Complainant.
Respondent, Pro se.

Decision and Order issued by Marc R. Hillson, 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 wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

The Hearing Clerk served on respondent Belinda Atherton, by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). Said 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 said 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. Belinda Atherton, doing business as Bel-Kay Kennel, hereinafter referred to as respondent, is an individual whose address is 589 Harmon Road, Saginaw, Texas 76177.

2. The respondent, at all times material hereto, was operating as a dealer as defined in the Act and the regulations.

3. Between approximately November 1, 2000, through March 6, 2001, respondent operated as a dealer, as defined in the Animal Welfare Act and the regulations, without being licensed, and sold, in commerce, 28 dogs for resale use as pets. The sale of each dog constitutes a separate violation of the Animal Welfare Act and 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 approximately November 1, 2000, through March 6, 2001, 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) by selling 28 dogs in commerce, for resale 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 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 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. The respondent is assessed a civil penalty of \$14,850, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

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 section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145. Copies of this decision shall be served upon the parties.

[This Decision and Order became final September 22, 2003. - Editor]

Belinda Atherton, d/b/a Bel-Kay Kennel
62 Agric. Dec. 717

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DEFAULT DECISION**PLANT QUARANTINE ACT**

In re: FRANCISCO ROBLES d/b/a LA MEXICANA ENTERPRISES.

P.Q. Docket No. 01-0021.

Decision and Order.

Filed August 26, 2003.

P.Q. - Default.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violations of the regulations governing the importation of fruit from Mexico to the United States (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 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 August 8, 2001, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that (1) on or about December 6, 1999, the respondent imported approximately four hundred and thirty-seven (437) fresh canes of sugarcane from Mexico into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.15(a); (2) or or about December 6, 1999, the respondent also imported approximately three (3) boxes of fresh guavas from Mexico into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56(c); and (3) on or about December 6, 1999, the respondent also imported approximately three (3) cartons of fresh haw apples (*crataegus spp*) from Mexico into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56(c).

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 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 Robles, the respondent, is an individual doing business as La Mexicana Enterprises whose mailing address is 301 South Broadway, Yonkers, New York 11368.

2. On or about December 6, 1999, the respondent imported approximately four hundred and thirty-seven (437) fresh canes of sugarcane from Mexico into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.15(a).

3. On or about December 6, 1999, the respondent also imported approximately three (3) boxes of fresh guavas from Mexico into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319-56(c).

4. On or about December 6, 1999, the respondent also imported approximately three (3) cartons of fresh haw apples (*crataegus spp*) from Mexico into the United States at Jamaica, New York, in violation 7 C.F.R. § 319.56(c).

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. § 319.56 *et seq.*). Therefore, the following Order issued.

Order

Respondent, Francisco Robles, d/b/a. La Mexicana Enterprises, is hereby assessed a civil penalty of one thousand five hundred dollars (\$1,500.00). 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 on the certified check or money order that payment is in reference to P.Q. Docket No. 01-0021.

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.

[This Decision and Order became final October 16, 2003.-Editor]

DEFAULT DECISION

WATERMELON RESEARCH AND PROMOTION ACT

**In re: J.D. BOYD WATERMELONS AND JEFFERY D. BOYD.
AMA WRPA Docket No. 03-0001.
Decision and Order.
Filed October 31, 2003.**

WRPA -- Default.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.

Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This proceeding was instituted under the Watermelon Research and Promotion Act, 7 U.S.C. § 4901 *et seq.* (the “Act”), alleging that the respondents violated the Watermelon Research and Promotion Plan, 7 C.F.R. § 1210.301-1210.405 (the “Plan”), and the rules and regulations issued thereunder, 7 C.F.R. § 1210.500-1210.532 (the “Regulations”).

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 respondents by the Office of the Hearing Clerk. 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 have 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 respondents’ 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. Respondent J.D. Boyd Watermelons is a corporation whose address is 17251 Williams Rd., N. Ft. Myers, Florida 33917.
2. Respondent Jeffery D. Boyd is an individual whose address is 17251 Williams Rd., N. Ft. Myers, Florida 33917.
3. At all times material herein, the respondents were handlers of watermelons as defined in the Act, 7 U.S.C. § 4902(4), and the Plan, 7 C.F.R.

§ 1210.308, and the actions of respondent J.D. Boyd Watermelons were directed, managed, and controlled by respondent Jeffery D. Boyd as president.

4. Respondents violated section 1210.341 of the Plan, 7 C.F.R. § 1210.341, section 1210.350 of the Plan, 7 C.F.R. § 1210.350, and section 1210.518 of the Regulations, 7 C.F.R. § 1210.518, by failing to maintain and file required reports, and by failing to remit assessments owed for crop years 2000, 2001, and 2002.

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. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act, Plan and the regulations issued thereunder, and in particular, shall cease and desist from failing to pay assessments for watermelons handled as required.

2. Respondents are jointly and severally assessed a civil penalty of \$10,000 which shall be paid by certified check or money order made payable to the Treasurer of United States.

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 December 12, 2003.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

J.R. Sales, Inc. and Carr Hussey. AMA WRPA Docket No. 03-0003. 8/22/03.

Sunsweet Growers, Inc. AMAA Docket No. 03-0003. 9/22/03.

Rio Rico Farms, Inc. AMAA Docket No. 03-0004. 11/13/03.

ANIMAL WELFARE ACT

City of Los Angeles. AWA Docket No. 01-0047. 7/16/03.

Consent Decision and Order as to Ken Alvarez. AWA Docket No. 02-0025.
7/18/03.

Consent Decision and Order as to Kenneth Alvarez and Vicki Guerrieri.
AWA Docket No. 02-0028. 7/18/03.

Winifred M. Canavan d/b/a Westport Aquarium. AWA Docket No. 03-0003.
7/24/03.

Kenneth Wiese. AWA Docket No. 02-0008. 7/24/03.

Bax Global, Inc., a Delaware corporation. AWA Docket No. 03-0017.
7/24/03.

Shannon J. Brockman. AWA Docket No. 03-0033. 8/8/03.

Iona Miller and Harlan Miller. AWA Docket No. 03-0006. 8/8/03.

Gerald LeRoy Lincoln. AWA Docket No. 02-0002. 9/30/03.

Bill Strong d/b/a Bill's Pawn Shop. AWA Docket No. 01-0024. 10/7/03.

Clarence and Sue Milliom d/b/a Burkett Lane Aviary. AWA Docket No. 03-
0027. 10/10/03.

Corpus Christi Zoological Association d/b/a Corpus Christi Zoo. AWA Docket No. 02-0016. 10/17/03.

Cash B. Wiley, Jr. AWA Docket No. 03-0008. 10/20/03.

Greg Blackburn d/b/a Pet Shop. AWA Docket No. 03-0015. 10/22/03.

Cindy Brooks and Cindy's Noveta Chihuahuas. AWA Docket No. 03-0028. 10/22/03.

Garry Rogers, Darlene Rogers and Paradise Kennel. AWA Docket No. 03-0020. 10/30/03.

Robert McKnight and R-NI's Shebas-N-More. AWA Docket No. 03-0021. 11/6/03.

Sylvia Jackson d/b/a Lonesome Owl Kennel. AWA Docket No. 01-0039. 11/13/03.

Rick Rowden. AWA Docket No. 03-0009. 11/20/03.

Richard Mielke, Kaye Mielke and Mielke's Peke Patch. AWA Docket No. 03-0019. 12/3/03

FEDERAL MEAT INSPECTION ACT

Vanguard Culinary Group, LTD d/b/a Cross Creek Foods, Inc., James G. Stancil and Robert C. Stackhouse (Order to Terminate Consent Decision and Order). FMIA Docket No. 99-0008. 9/4/03.

Point Catering, Inc. d/b/a Rainbow Catering and Gilberto O. Broche (Stipulation and Consent Decision and Order). FMIA Docket No. 04-0002. 11/14/03.

Phuc Huong and Phuc (Paul) Pham (Stipulation and Consent Decision and Order) FMIA Docket No. 03-0004. 12/15/03.

PLANT QUARANTINE ACT

Hyde Shipping Corporation. P.Q. Docket No. 03-0013. 11/10/03.

POULTRY PRODUCTS INSPECTION ACT

Vanguard Culinary Group, LTD d/b/a Cross Creek Foods, Inc., James G. Stancil and Robert C. Stackhouse (Order to Terminate Consent Decision and Order). PPIA Docket No. 99-0006. 9/4/03.

Point Catering Inc. d/b/a Rainbow Catering and Gilberto O. Broche (Stipulation and Consent Decision and Order). PPIA Docket No. 04-0002. 11/14/03.

Phuc Huong and Phuc (Paul) Pham (Stipulation and Consent Decision and Order) PPIA Docket No. 03-0003. 12/15/03.