

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

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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*.

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LIST OF DECISIONS REPORTED

JANUARY - JUNE 2006

AGRICULTURE MARKETING AGREEMENT ACT

DEPARTMENTAL DECISION

GERAWAN FARMING, INC., 01 AMA Docket No. F&V 916-1 and 917-1;
In re: GERAWAN FARMING, INC. AMAA Docket No. 02-0008.
Decision and Order. 1

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

JEWEL BOND d/b/a BONDS KENNEL.
AWA Docket No. 04-0024.
Decision and Order. 45

JEROME SCHMIDT, D/B/A TOP OF THE OZARK AUCTION.
AWA Docket No. 05-0019.
Decision and Order. 60

KAREN SCHMIDT d/b/a SCR KENNELS.
AWA Docket No. 03-0024.
Decision and Order 70

JOHN F. CUNEO, JR., AN INDIVIDUAL; THE HAWTHORN CORPORATION, AN ILLINOIS CORPORATION; THOMAS M. THOMPSON, AN INDIVIDUAL; JAMES G. ZAJICEK, AN INDIVIDUAL; JOHN N. CAUDILL, III, AN INDIVIDUAL; JOHN N. CAUDILL, JR., AN INDIVIDUAL; WALKER BROTHER'S CIRCUS, INC., A FLORIDA CORPORATION; AND DAVID A. CREECH, AN INDIVIDUAL.
AWA Docket No. 03-0023.
Decision and Order as to James G. Zajicek. 87

JEWEL BOND, d/b/a BONDS KENNEL.
AWA Docket No. 04-0024.
Decision and Order. 92

SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC.
AWA Docket No. D-05-0002.
Decision and Order. 113

**DEPARTMENT AND SUSPENSION
(NON-PROCUREMENT)**

BLUE MOON SOLUTIONS, INC. AND MARTY HALE.
DNS-RUS Docket 06-0001.
Decision and Order. 126

FEDERAL CROP INSURANCE ACT

COURT DECISION

ACE PROPERTY AND CASUALTY INS. CO, ET AL. v. USDA.
C.A.8 (Iowa), 2006.
No. 05-2321. 140

FOOD NUTRITION SERVICE

COURT DECISION

BURCH v. USDA.
C.A.6 (Ohio), 2006.
No. 04-3640. 153

FARM SERVICE ACT*

COURT DECISION

STEVEN E. CLASON v. USDA.
C.A.8 (Neb.), 2006.
No. 05-1547. 160

*We regret the inadvertent result of disordering the alphabetical presentation of cases by the nominal Statute name. - Editor.

FARM SERVICE ACT

DEPARTMENTAL DECISION

ANNA BRAMBLETT, FORMERLY ANNA J. EDWARDS.
FSA Docket 06-0001.
Decision and Order. 165

FOOD SAFETY INSPECTION SERVICE

COURT DECISION

LEE A. BARNES, JR., v. USDA.
C.A.8 (Mo.),2006. No. 05-2329. 171

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

KIM BENNETT.
HPA Docket No. 04-0001.
Decision and Order. 174

INSPECTION AND GRADING

DEPARTMENTAL DECISION

LION RAISINS, INC., A CALIFORNIA CORPORATION, f/k/a LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; ISABEL LION, AN INDIVIDUAL; AND JEFFREY LION, AN INDIVIDUAL; AND LARRY LION, AN INDIVIDUAL.
I & G Docket No. 04-0001.
Decision and Order. 193

PLANT PROTECTION ACT

COURT DECISION

CACTUS CORNER, LLC, ET AL. v. U.S.D.A.
C.A.9 (Cal.),2006 No. 04-16003. 234

SUGAR MARKETING ALLOTMENT

COURT DECISION

HOLLY SUGAR CORP. v. USDA.
C.A.D.C.,2006. No. 05-5067. 245

SUGAR MARKETING ALLOTMENT

DEPARTMENTAL DECISION

AMALGAMATED SUGAR COMPANY, L.L.C.
SMA Docket No. 04-0003.
Decision and Order. 252

MISCELLANEOUS ORDERS

IDAHO POWER COMPANY - HELLS CANYON COMPLEX.
FERC Project No. 1971.
EPAAct Docket No. 06-0001.
Ruling. 273

IDAHO POWER COMPANY - HELLS CANYON COMPLEX.
FERC Project No. 1971
EPAAct Docket No. 06-0001.
Ruling. 275

IDAHO POWER COMPANY HELLS CANYON COMPLEX.
FERC Project No. 1971.
EPAAct Docket No. 06-0001.
Ruling. 278

ROBERT HARRIS.
FCIA Docket No. 05-0008.
Order Dismissing Case. 280

HAROLD CHUHLANTSEFF. FCIA Docket No. 06-0001. Ruling.	280
RONALD BELTZ, AN INDIVIDUAL; AND CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL. HPA Docket No. 02-0001. Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd.	281
KIM BENNETT. HPA Docket No. 04-0001. Order Denying Petition for Reconsideration.	285
RONALD BELTZ, AN INDIVIDUAL; AND CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL. HPA Docket No. 02-0001. Stay Order as to Christopher Jerome Zahnd.	291
HEREFORD, TEXAS FACTORY (SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE). SMA Docket No. 04-0005. Order Denying Petitioner’s Appeal Petition.	293

DEFAULT DECISIONS

ANIMAL QUARANTINE ACT

TRENT WAYNE WARD AND MICHAEL LEE MCBARRON d/b/a T&M HORSE COMPANY. A.Q. Docket No. 06-0003. Default Decision.	307
MITCHELL STANLEY d/b/a STANLEY BROTHERS. A.Q. Docket No. 06-0007 Default Decision and Order	314

ANIMAL WELFARE ACT

MILTON WAYNE SHAMBO, d/b/a WAYNE’S WORLD SAFARI AND ARBUCKLE WILDERNESS; ANIMALS, INC., d/b/a WAYNE’S WORLD SAFARI; AND ANIMALS, INC., d/b/a ARBUCKLE WILDERNESS. AWA Docket No. 05-0024.
Default Decision. 318

CHERYL MORGAN d/b/a EXOTIC PET CO.
AWA Docket No. 05-0032.
Default Decision. 342

MARJORIE AND HAROLD WALKER, d/b/a LINN CREEK KENNEL.
AWA Docket No. 04-0021.
Default Decision and Order. 356

PLANT QUARANTINE ACT

JOHN M. BRUCE, d/b/a ST. JOHN GROUP
P.Q. Docket No. 04-0015.
Decision and Order. 363

FONONGA LELENOA.
P.Q. Docket No. 06-0003.
Decision and Order. 365

EMILYN QUIMOYOG.
P.Q. Docket No. 06-0002.
Decision and Order. 367

LOUIS A. BARRERA.
P.Q. Docket No. 06-0010.
Decision and Order. 369

CYNTHIA E. LAIDLEY
P.Q. Docket No. 06-0011.
Default Decision. 372

WENDY MILLER.
P.Q. Docket No. 05-0024
Decision and Order. 374

Consent Decisions 377

AGRICULTURAL MARKETING AGREEMENT ACT
DEPARTMENTAL DECISIONS

In re: GERAWAN FARMING, INC., 01 AMA Docket No. F&V 916-1 and 917-1;
In re: GERAWAN FARMING, INC. AMAA Docket No. 02-0008.
Decision and Order.
Filed June 15, 2006.

AMA– AMMA – First amendment – Government speech – Government interests – Marketing Orders – Anti-trust, when not – Germane speech – Conduct, not speech – Commercial speech – Collectivize – Severability.

Sharlene Deskins for Complainant.
Brian C. Leighton and James A. Moody for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

Three U.S. Supreme Court Cases

[1] Three U.S. Supreme Court cases, each of which has addressed the compelled subsidy of generic advertising for agricultural commodities, direct this Decision:

(a) *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 125 S.Ct. 2055, 161 L. Ed. 2d 896 (2005) (herein frequently “*Livestock Marketing*”);

(b) *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (herein frequently “*United Foods*”); and

(c) *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) (herein frequently “*Glickman v. Wileman*”).

[2] The result in both *Glickman v. Wileman* and *Livestock Marketing* suggests that First Amendment claims such as Gerawan Farming, Inc.’s are trumped by the Secretary of Agriculture’s involvement in the promotion of agricultural commodities. But *United Foods* is not overruled. And the description in *Glickman v. Wileman* and *United*

Foods of the extent of the AMAA’s provisions¹ does not match the reality of marketing California-grown nectarines and California-grown peaches.

Introduction

[3] Gerawan Farming, Inc. (“Gerawan” or “Petitioner”), a handler of California-grown nectarines and California-grown peaches, is required to comply with marketing orders which are federal regulations. These federal marketing orders have required Gerawan to pay assessments of about 19-20 cents per 25 pound box shipped. Gerawan is Petitioner (in the 15(A)² case) and Respondent (in the “injunction and penalty” case). Gerawan both grows and handles nectarines and peaches (and other agricultural commodities) and participates in the California Tree Fruit Agreement.

[4] Gerawan initiated this case, petitioning to modify (or to be exempted from) requirements to pay that portion of the assessments used to pay for promotion including paid advertising, and for research (under the Nectarine Marketing Order³ and the Peach Marketing Order⁴).

[5] Gerawan argues that it is being forced to speak when it does not wish to speak, that it does not agree with the message or the messenger. Gerawan claims that the promotion violates its First Amendment rights and is illegal. Gerawan asks: Why should a handler lose its First Amendment rights⁵ simply by participating in a regulated industry?

¹ The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601-627 (AMAA).

² 7 U.S.C. § 608c(15)(A).

³ 7 C.F.R. § 916 *et seq.*

⁴ 7 C.F.R. § 917 *et seq.*

⁵ See Justice Breyer’s dissent in *United Foods*, 533 U.S. at 419, including at 428 “the Court’s unreasoned distinction between heavily regulated and less heavily regulated speakers could lead to less First Amendment protection in that it would deprive the former of protection. But see *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n. of N.Y.*, 447 U.S. 530, 534, n. 1, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (Even “heavily regulated businesses may enjoy constitutional protection”) (citing, as an example, (continued...))

[6] Since May 2001 (through five marketing seasons, now into the sixth marketing season), Gerawan has been paying about one-half of each assessment and withholding payment of the other half. Gerawan states that it bases the amount it withholds on estimates obtained from the California Tree Fruit Agreement former President or CEO Jon Field, who had estimated that the “speech-related services” amounted to eight or nine cents (out of the 18 or 19 or 20 cent assessment).

[7] The half that Gerawan has withheld, roughly a quarter million dollars per year, now amounts to more than \$1,391,981.97 (the amount withheld as of September 28, 2005). *See* AMS’s Status Report filed October 13, 2005. Gerawan has been depositing the withheld payments in an interest-bearing account, awaiting the outcome of this litigation.

[8] The Administrator of the Agricultural Marketing Service of the United States Department of Agriculture (“AMS” or “Complainant”), argues that Gerawan has no justification for withholding payment, particularly in light of *Glickman v. Wileman*.

[9] AMS is Respondent (in the 15(A) case) and Complainant (in the “injunction and penalty” case). AMS requested not only findings regarding the unpaid portions of the assessments (more than \$1,391,981.97), but also a \$150,000 civil penalty, for having withheld payment. Tr. 743, 744-767; CX 68.

[10] Gerawan explains that it is forced to withhold payment, because the assessments paid are fully spent every year, so there will be nothing to recover if Gerawan prevails. Gerawan, motivated and bolstered by *United Foods*, explains that it is acting in good faith and not for delay and has good grounds for its expectation that it will prevail. Gerawan states that it offered to abide by an appropriate escrow arrangement with USDA, but USDA made no such arrangement available.

Gerawan Relies on the First Amendment

[11] To oppose paying part of its nectarine and peach marketing orders assessments (that portion used for promotion and research), Gerawan relies on its freedom of speech and freedom of association, guaranteed

⁵(...continued)
Virginia Bd. of Pharmacy, supra, at 763-765, 96 S.Ct. 1817”.

by the First Amendment to the United States Constitution.

U.S. Const.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Procedural History

[12] The hearing was held in Fresno, California, on February 18-21, and Sept 8-9, 2003. Gerawan, Petitioner is represented by Brian C. Leighton, Esq. and James A. Moody, Esq. AMS, Complainant, is represented by Sharlene A. Deskins, Esq.

[13] The transcript is cited as “Tr.” The proposed transcript corrections, filed September 20, 2004, and October 15, 2004, are accepted. Additional transcript corrections, on my own motion, are reflected in quotations from the transcript found in this Decision.

[14] Gerawan called three witnesses: Mr. Raymond M. (“Ray”) Gerawan (Tr. 26-144); Mr. Dan Gerawan (Tr. 148-234, 240-393, 1389-1412); and Mr. Marco Luna (Tr. 395-430).

[15] AMS called seven witnesses: Dr. Melvin Peter Enns (Tr. 432-489); Mr. Douglas Andrew Phillips (Tr. 496-554); Mr. Jonathan W. (“Jon”) Field (Tr. 554-712, 928-1132); Mr. Ronald Cioffi (Tr. 721-908); Mr. Kurt Kimmel (Tr. 1133-1160, 1168-1227); Ms. Jacqueline Terry (“Terry”) Vawter (Tr. 1228-1273); and Mr. Blair Robin Richardson (Tr. 1275-1387).

[16] The following exhibits were admitted into evidence:
Petitioner’s (Gerawan’s) Exhibits: PX 1, 2, 4, 5, 8-12, 20-28.
Complainant’s (AMS’s) Exhibits: CX 1-3, 5-12, 14-24, 26-61, 66, 68-69, 72, 74-75, 77, 79-83, 85-86.

[17] The record includes the following transcripts:

Transcripts *Final Set* (Tr.) Volumes I - VI (Feb 18-21, Sept 8-9,

2003):

Volumes 2003	Pages	rec'd by Hearing Clerk
I February 18	1-237	September 22, 2003
II February 19	238-492	September 22, 2003
III February 20	493-716	September 22, 2003
IV February 21	717-916	September 22, 2003
V September 8	917-1161	September 22, 2003
VI September 9	1162-1418	September 30, 2003.

[18] [Also part of the record are the *initial* transcripts⁶ (which are superseded by the *Final Set*):

Volumes 2003	Pages	rec'd by Hearing Clerk
February 18	1-237	February 26, 2003
February 19	236-508	March 3, 2003
February 20	508-630	March 4, 2003
February 20 (revised)	509-732	August 28, 2003
February 21	631-830	March 12, 2003.]

[19] AMS's Findings of Fact, Conclusions of Law and Brief in Support Thereof was timely filed on September 20, 2004; AMS's reply was timely filed on January 25, 2005.

[20] Gerawan's Post-Hearing Findings of Fact and Conclusions of Law was filed late (but nevertheless accepted) on October 15, 2004.

[21] AMS's Status Report was filed on October 13, 2005, and Gerawan filed no objection or other response.

Analysis

[22] Gerawan Farming, Inc. ("Gerawan") is a corporation with its main offices located in Sanger, California. Gerawan is one of the largest growers (producers) of nectarines and peaches in California, if not the largest. Gerawan has developed its own varieties of nectarines and peaches that it markets under the brand name Prima. Gerawan promotes its Prima brand to the retail trade with brochures, and the Prima brand includes peaches, nectarines, plums, and table grapes. PX-2.

⁶ These superseded transcripts are retained because their page numbers may be cited in briefs or elsewhere in the record. The page numbers can be used for orientation to the Final Set of transcripts.

[23] The Nectarine Marketing Order⁷ and the Peach Marketing Order⁸ (the Marketing Orders) are operated through the California Tree Fruit Agreement. The Marketing Orders concern fresh California-grown nectarines and peaches, which are perishable and are marketed principally during May through October each year.

[24] The California-grown nectarine and peach marketing reality is far more competitive than cooperative. Neither producers nor handlers have been deprived of their ability to compete. Producers and handlers make their own marketing decisions regarding sellers, buyers, price, and terms; the standardization provided by the Marketing Orders has little effect on competition but does establish minimum requirements for grade, size, and maturity, and for standard packaging. Justice Souter's dissent in *Glickman v. Wileman* accurately characterizes the use to which the Marketing Orders are put. 521 U.S. 457.

[25] Gerawan both produces and handles nectarines and peaches. As a handler, Gerawan is required to belong to the group of handlers who operate according to the Marketing Orders in order to ship nectarines and peaches. Gerawan handles nectarines and peaches in a highly competitive free market with razor-thin margins.

[26] Gerawan, in its capacity as a handler of nectarines and peaches, in May of 2001, and at subsequent times during 2001, 2002, 2003, 2004, and 2005, shipped nectarines and peaches that were subject to assessments imposed under the California Tree Fruit Agreement. CX 66; Tr. 1305-1309; AMS's Status Report filed October 13, 2005.

[27] Gerawan objects to paying the portion of the assessments imposed under the California Tree Fruit Agreement used to pay for promotion including paid advertising, and research (roughly half of the total assessment).

[28] Mr. Dan Gerawan is Gerawan's corporate President; he testified that he concentrates on the administrative aspects of running the company and mostly on the packing and shipping operations. Tr. 149.

⁷ 7 C.F.R. part 916.

⁸ 7 C.F.R. part 917.

[29] Since May 2001, Gerawan has chosen to pay roughly half of each assessment imposed for nectarines and peaches that it shipped, and to withhold the other half, the amount that Gerawan estimates would be devoted to promotion including paid advertising and research. The amount withheld is roughly a quarter million dollars per year (CX 66, CX 71), and as of September 28, 2005, totaled \$1,391,981.97. AMS's Status Report filed October 13, 2005.

[30] Awaiting the outcome of this litigation, Gerawan has reserved the withheld amount, depositing that amount in an interest-bearing account.

[31] On May 23, 2005, the Supreme Court of the United States issued its third decision in 8 years, *Livestock Marketing*, which considered “whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment.” *Livestock Marketing* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech. On May 31, 2005, the Supreme Court of the United States remanded to various courts of appeals for further consideration, in light of *Livestock Marketing*, cases involving the constitutionality of compelled assessments to pay for generic advertising of pork,⁹ alligator products,¹⁰ and milk.¹¹

[32] In *Livestock Marketing*, the Supreme Court held that the beef promotion program is government speech; Congress had directed the implementation of a “coordinated program” of promotion, “including paid advertising, to advance the image and desirability of beef and beef products.” *Livestock Marketing*, 125 S.Ct. at 2063.

⁹ *Johanns v. Campaign for Family Farms*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Sixth Circuit).

¹⁰ *Landreneau v. Pelts & Skins, LLC*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

¹¹ *Johanns v. Cochran*, 125 S.Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit); and see *Cochran v. Veneman*, 252 F.Supp.2d 126 (M.D.Pa. 2003) *aff'd upon review of Livestock Marketing*, *Cochran v. Secretary of Agriculture*, 2005 WL 2755711, *1 (3rd Cir. Sep 15, 2005) (upholding constitutionality of the Dairy Promotion and Research Program and Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.*).

[33] In this case, I determine that under *Livestock Marketing*, the California-grown nectarine and peach promotion is not government speech. I determine that under *Glickman v. Wileman* (which previously addressed the California-grown nectarine and peach marketing orders), the “restrictions on marketing autonomy” are minimal compared with the free market characteristics of California-grown nectarine and peach marketing.

[34] *Glickman v. Wileman* describes what the AMAA authorizes, but because the Nectarine Marketing Order and the Peach Marketing Order do not employ much that the AMAA authorizes, marketing is fiercely competitive and marketing autonomy is not significantly impacted. The Nectarine Marketing Order and the Peach Marketing Order restrictions ensure baseline minimum standards for the size, maturity and grade of the fruit, and standard packaging.

[35] The California-grown nectarine and peach industry cannot be characterized as “collectivist” or “cooperative” to any significant degree, even though the AMAA reads as if it could be. Even though the AMAA seems to grant an anti-trust exemption, the Department of Justice is vigilant against anti-trust activities and has, with the USDA, made clear how limited that apparent exemption is. *See* PX 22; Tr. 1207. Further, even though volume control or market allotments or reserves or pools or price supports or price controls appear to be AMAA methodology, such tools are not employed in the California-grown nectarine and peach industry.

[36] I determine that under the three cases, *United Foods*, *Glickman v. Wileman*, and *Livestock Marketing*, read together, while the promotion here is not government speech, the speech is germane to the purpose of the AMAA, and the government has reasonable interests in the speech. Consequently, Gerawan’s First Amendment rights must be balanced against the government’s reasonable interests.

[37] If, on balance, Gerawan’s First Amendment rights are outweighed by the government’s reasonable interests, Gerawan must endure those messages that Gerawan finds to be damaging with regard to its own marketing and not truthful with regard to the nectarines and peaches that Gerawan markets, and Gerawan must pay the withheld portion of the assessments to the California Tree Fruit Agreement.

[38] If, on the other hand, on balance, the government’s reasonable

interests are outweighed by Gerawan's First Amendment rights, the government must exempt Gerawan from the promotion provisions of the Marketing Orders, and Gerawan must return the withheld portions of assessments to the grower(s) from which it was collected (presumably largely from itself).

[39] If requiring Gerawan to participate in promotion including paid advertising were found to be unconstitutional, the unconstitutional provisions would be legally and practically "severable" from the remaining portions of the Marketing Orders, which would remain intact. *See* 7 U.S.C. § 614, regarding "Separability". The Committees would remain empowered to undertake their remaining activities. USDA officials expressed reservations, however, with whether the industry would choose to keep the remaining provisions in effect absent the promotion provisions.

[40] Either way, Gerawan must disgorge the interest it accumulated on the monies it withheld; when Gerawan pays the withheld portion of the assessments, the interest earned thereon shall also be paid, whether to California Tree Fruit Agreement (if Gerawan loses), or to the grower(s) (if Gerawan prevails).

[41] Regarding being required to subsidize research, even if that research were strictly for promotion, Gerawan's First Amendment defense must fail. Research is conduct, not speech. Consequently, Gerawan must pay to the California Tree Fruit Agreement the withheld assessment portion proportional to research, regardless of the outcome otherwise.

[42] I determine that the efficacy of the promotion materials and efforts is not relevant to this Decision.

**APPLICABLE STATUTORY
PROVISIONS**

[43] 7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 26—AGRICULTURAL ADJUSTMENT

SUBCHAPTER I—DECLARATION OF CONDITIONS AND POLICY

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c (6)(I) of this title, such container and pack requirements provided in section 608c (6)(H) of this title [1] such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this

title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c (2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

....

SUBCHAPTER III—COMMODITY BENEFITS

....

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as “handlers.”

....

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products

12 AGRICULTURAL MARKETING AGREEMENT ACT

thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers

thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

.....

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251–256) and the Standard Containers Act of 1928 (15 U.S.C. 257–257i).

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries, and loganberries), Florida grown strawberries, or cranberries, such

projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

....

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: Provided, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. §§ 601, 602(1)-(5), 608c(1), (6)(A)-(F), (6)(H)-(I), & (7) [excerpts from the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601-627].

[44] The AMAA, the statute under which the Marketing Orders were promulgated, was established primarily as a supply and volume control type program with traditional mechanisms of volume control.¹² Tr. 560. Promotion activities were brought within the federal order and terminated from the state orders in 1975. Tr. 562.

[45] Use of the AMAA is different today than at its inception during the Great Depression. The statute is amended on an ongoing basis upon a determination by Congress recommended by the Secretary of Agriculture that authorization is appropriate for new or revised marketing orders. Several rulemaking hearings are held each year to consider new marketing orders or revisions to those already in place. Likewise, marketing orders are terminated on occasion and proposed marketing orders are occasionally denied. The Fruits and Vegetables Program marketing orders website shows current events and provides background: <http://www.ams.usda.gov/fv/moab.html>

[46] Of approximately 35 fruit and vegetable marketing orders operating under the AMAA, about half of them (17) have active promotion programs; the other half do not, according to USDA employee (since 1968) Mr. Ronald Cioffi, then Chief (since 1986) of the Marketing Order Administration Branch (MOAB). Tr. 815.

[47] USDA employee Mr. Kurt Kimmel, regional office manager, was,

¹² Volume control and supply control are not employed under the Marketing Orders here.

with the help of staff, overseeing and administering 11 of those marketing orders, those within California, Hawaii, and parts of Arizona, including the ones at issue here. Tr. 1135, 1201-02.

[48] Under the AMAA, marketing orders are basically self-help programs which operate under the supervision of USDA. Tr. 723. Congress has established majority rule programs that have government oversight.¹³

[49] Unlike the mushroom promotion act or the beef promotion act, though, the overarching message for the promotion including paid advertising is not specified by the AMAA or the Marketing Orders or the Secretary of Agriculture or the Committees or the Subcommittees; there has been no rulemaking regarding the overarching message.

[50] Orderly marketing is the purpose of the AMAA. Ronald Cioffi testified that the purpose of promotion including paid advertising is to promote the product to expand markets, to develop new markets (foreign and domestic), and to develop new uses for those products. Tr. 751.

[51] The purpose of the promotion program for California-grown nectarines and California-grown peaches, is to increase the consumption of tree fruit. Tr. 812. . . . (W)e expect advertising to have a positive return to producers. Tr. 814.

[52] The purpose of promotion including paid advertising has also been expressed as follows: to increase demand for nectarines and peaches; to increase demand for California-grown nectarines and California-grown peaches; to promote sales of California-grown nectarines and California-grown peaches; and to raise the prices for producers of California-grown nectarines and California-grown peaches.

[53] The AMAA restricts marketing orders “to the smallest regional production areas . . . practicable” (7 U.S.C. § 608c(9)(B)); perhaps it is

¹³ See Justice Breyer’s dissent in *United Foods*, 533 U.S. at 419, including at 422 “Compared with traditional ‘command and control,’ price or output regulation, this kind of regulation - - which relies upon self-regulation through industry trade associations and upon the dissemination of information - - is more consistent, not less consistent, with producer choice.” (Justice Breyer was discussing the mushroom promotion act, but this statement would apply also to marketing orders under the AMAA.)

awkward for the U.S. government to lay claim to the promotion of California nectarines and peaches, when so many states produce fine nectarines and peaches.

[54] The California nectarine and peach handlers and growers are not exempted from the antitrust laws. "Antitrust Guidelines" prepared by the USDA and the Department of Justice designed to advise the members and employees of Federal marketing order committees with regard to the U.S. antitrust law make that clear. Price fixing is not permitted; there is no uniform price. PX 22; Tr. 1207.

[55] There are no price support subsidies available to those within the California nectarine and peach industry.

[56] Cooperatives exist within the California nectarine and peach industry but are not the norm. Tr. 840, 190-191.

[57] In contrast to *Livestock Marketing*, the AMAA does not control the overarching message of the advertising - - how could it? Under the AMAA, marketing orders addressing an array of agricultural commodities have been authorized. The AMAA has been put to different uses as marketing needs have evolved. The ***merely authorized*** promotion and advertising under the AMAA are in sharp contrast to the ***specified and controlled*** promotion and advertising that the U.S. Supreme Court characterized as government speech. When the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 LEd.2d 700 (1995).

[58] One attribute of government speech is strict compliance with Congressional or other legislative directives, but under the AMAA, the Congressional directives are neither ***specific*** nor ***controlling***.

[59] Likewise, the Regulations promulgated under the AMAA, do not establish the overarching message. Like the statute, the marketing orders authorize but do not control the promotion including advertising. The marketing orders do not "set the overall message" (as in *Livestock Marketing*) or establish the message from beginning to end.

[60] The two marketing orders promulgated pursuant to the AMAA at issue here are 7 C.F.R. Part 916 (Nectarine Order) and Part 917 (Peach

18 AGRICULTURAL MARKETING AGREEMENT ACT

Order). 7 C.F.R. Parts 916 and 917. Pertinent parts follow.

**APPLICABLE REGULATORY
PROVISIONS**

[61] 7 C.F.R.:

TITLE 7—AGRICULTURE

....

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

....

**CHAPTER XI—AGRICULTURAL MARKETING SERVICE
(MARKETING AGREEMENTS AND ORDERS;
MISCELLANEOUS COMMODITIES),
DEPARTMENT OF AGRICULTURE**

....

[regarding nectarines]

PART 916—NECTARINES GROWN IN CALIFORNIA

Subpart—Order Regulating Handling

....

RESEARCH

§ 916.45 Marketing research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. Such projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected

pursuant to § 916.41.

[36 FR 9290, May 22, 1971]

7 C.F.R. § 916.45.

[AND, regarding peaches]

PART 917—FRESH . . . PEACHES GROWN IN CALIFORNIA

Subpart—Order Regulating Handling

. . . .

RESEARCH

§ 917.39 Production research, market research and development.

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid by funds collected pursuant to § 917.37.

7 C.F.R. § 917.39.

[62] Lack of attribution of the message to the government¹⁴ - - is a contributing factor to the determination that the speech here is not government speech.

¹⁴ Justice Souter's dissent in *Livestock Marketing* explains why, for speech to be regarded as government speech, the government must put that speech forward as its own. 125 S.Ct. at 2068-69. The majority in *Livestock Marketing*, where there were so many other indicia of government speech, did not find the lack of attribution to the government to be fatal to the claim of government speech.

[63] The “funding tagline” of the nectarines and peaches promotional materials varies. Most often the funding tagline is “California Tree Fruit Agreement”, “California Peaches, Plums and Nectarines”, “California Summer Fruits” (CX 42-51, 54-61, 73, 76), or nothing at all. A few of the promotional materials in evidence are attributed to the author of the article (a model/actress/ author, a Ph.D., an M.D.), such as CX 39-41.

[64] A few of the promotional materials in evidence are attributed to growers or handlers as a group. Tr. 337, 355-56, PX 5 at 18. Gerawan is a member of and required to belong to that group, in order to ship nectarines and peaches. The promotional messages are not attributed to the United States government or to the government of California and do not bear a government symbol. The promotional messages are not attributed to individual producers (growers) or handlers.

[65] The Secretary of Agriculture (through AMS) selects the members of the Committees (the Control Committee and the Commodity Committee) in accordance with the Marketing Orders. The Control Committee includes shipper (handler) members and grower members; the Commodity Committee also includes one public member, if nominated. Tr. 724-25.

[66] The Committees meet two times a year, sometimes three times a year. Tr. 1232-33. A USDA representative usually attends, sometimes more than one USDA representative attends. Tr. 726, 1233.

[67] Although the Committees are not government entities, they have been identified as “agents” of the United States. *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356, 1364 (2005).

[68] When USDA employee Ms. Terry Vawter, a marketing specialist with a bachelor’s degree in agricultural economics and a masters degree in agriculture with a specialization in agricultural economics, being cross-examined by Mr. Moody, was asked “. . . . do you intend your regulations to have an economic impact?” she replied, “Well, we intend, we hope that they are a positive impact on the industry at large.” Mr. Moody asked, “. . . .do you intend them to benefit, economically benefit somebody?” Ms. Vawter: “That is the anticipation.” Mr. Moody: “Okay. And that’s the handlers or the growers?” Ms. Vawter: “We regulate handlers but we believe that that affects, those benefits affect growers as well.” Tr. 1258-59.

[69] Ms. Vawter testified that the Marketing Orders' flexibility has advantages in addressing changes that are inherent in the industry as far as what retailers demand; and that the Marketing Orders are reflective of the times, somewhat like the Constitution. Tr. 1256.

[70] Regarding promotional projects and materials, each year the process was from the bottom up, not the top down. The paid staff (not government agents) developed programs to present to the Subcommittees; once the Subcommittees and the staff had details and the proposed cost for the program, the Subcommittees recommended to the full Committees (both the Nectarine Committees and the Peach Committees); once the full Committees approved, the program became part of the budget and the budget was sent to USDA for approval. Tr. 1284-86.

[71] The USDA/AMS guidelines for review of promotional activities or items were not intended to control the message, but rather to check the message for certain limited factors: the promotional material must be truthful. It must not disparage another product. It must treat all participants equitably. There ought to be a good quality product to promote. Promotional things that the Committees do are to be generic and available to everybody. Tr. 781-82, 1243-44, 1246; PX 21.

[72] The USDA's review of promotional materials was focused on compliance with the AMAA and the Marketing Orders, discrimination laws, USDA diversity policies, AMS guidelines (paragraph [70]), Federal Trade Commission advertising laws and regulations, Food and Drug Administration labeling requirements, and antitrust rules. PX 21.

[73] The Secretary of Agriculture, through AMS, approved the budgets that included the promotion and advertising; and did look for compliance with requirements specified by Ms. Terry Vawter and Mr. Kimmel; but usually did not look at individual promotion pieces.

[74] The Promotion Subcommittees and the Committees approved the promotion, including paid advertising, but did not exercise tight control. Tr. 1122.

[75] In 2003 the USDA began reviewing specific pieces of promotional material for their content, a new approach. Tr. 734-36, 779-80, 1235, 1243-44, 1246-47, 1269-71. Prior to that, no piece-by-piece evaluation of the promotional materials was undertaken by the

government or government agents. The message could not have been controlled from top to bottom.

[76] Paid staff had the authority to plan the promotional activities and then to obtain approvals at the various upper levels (the governmental levels), that is, the Subcommittees, the Committees, and the Secretary of Agriculture (through AMS). Whether the expenditures, or even proposed expenses in the budget, were reasonably necessary (Tr. 728) to accomplish the mission is difficult to know because “the mission” evolved from paid staff’s starting place. Tr. 781-83.

[77] Whether an objective under the Marketing Orders was to heighten awareness on the part of retailers and consumers (a) of the diversity among California-grown nectarines and California-grown peaches; and (b) of the characteristics held in common among California-grown nectarines and California-grown peaches, is unclear.

[78] The Marketing Orders establish a minimum grade and distinguish two grades, U.S. #1 and utility grade, but the promotion and advertising do not appear to highlight either the minimum or the distinction.

[79] The Marketing Orders establish a minimum maturity standard and distinguish two maturity standards, California well-mature and U.S. mature, but the promotion and advertising do not appear to highlight either the minimum or the distinction.

[80] The Marketing Orders establish minimum size requirements, but the promotion and advertising do not appear to highlight the size requirements.

[81] The Marketing Orders establish standard packaging, but the promotion and advertising do not appear to highlight the packaging requirements.

[82] Ideally, compelled “generic” advertising would promote the agricultural commodities group’s common interests and would avoid spending the grouped money in ways that are divisive. Leaving off brand names is not always adequate protection, however, against favoring one producer over another, one handler over another, or one target market area over another.

[83] “Generic” advertising can be unfair in a highly competitive

market such as that for California-grown nectarines and peaches. Established market areas differ from one competitor to the next, and the choice of what market areas to target can make a difference in the benefits that growers or handlers will derive from promotional efforts. Distinct qualities of fruit belonging to one competitor and not another can make a difference in the benefits that growers or handlers will derive from promotional efforts.

[84] The evidence did not answer the following questions: What market areas are the targets for which messages? How are marketing target areas chosen so that there is no favoritism toward some producers at the expense of others, and no favoritism toward some handlers at the expense of others?

[85] Gerawan complains that featuring the SUMMERWHITE® (trademarked) nectarines and peaches, which Gerawan does not grow or handle, helps Gerawan's competitor at Gerawan's expense. Tr. 783-85; CX 47. The government evidence showed that featuring white nectarines and peaches increases sales of both white and yellow nectarines and peaches.

[86] Gerawan complains that the message "ripen your peaches in a paper bag on the counter for a few days" is false as to Gerawan's peaches, because Gerawan's peaches are ripened on the tree and ripe enough when purchased at retail to ripen without going into a bag. Tr. 38-39, 196-97. Gerawan harvests multiple times from the same tree, as many as eight to ten times per season, each time taking only the tree-ripened fruit and leaving the rest to continue ripening. Tr. 39, 41-45, 47. Gerawan complains that advertising such as the "paper bag campaign" does not increase the demand for peaches but has the opposite effect.

[87] Even if the promotion under the Marketing Orders had a well-meaning purpose to educate retailers and consumers how to care for California-grown nectarines and California-grown peaches upon acquisition, Gerawan argues that the message is false at least to its fruit and damaging.

[88] Thus, argues Gerawan, promotion including paid advertising, if designed to deliver a pleasurable eating experience to consumers of California-grown nectarines and California-grown peaches, would send entirely different messages from the ones being sent under the Marketing Orders. Dan Gerawan believes the best way to promote

Gerawan's fruit is to stop the Marketing Orders promotion altogether. Tr. 164.

[89] Gerawan would avoid generic advertising altogether and concentrate on the distinctions of the fruit it handles. Gerawan complains that generic advertising fails to address important distinctions from one brand to the next. For example, Gerawan believes that its practices result in a higher sugar content per piece of fruit and consequently a much more enjoyable eating experience for the consumer; that the available sugar of the tree, divided among fewer pieces of fruit, makes each piece of fruit sweeter. Tr. 39-45, 49-52, 192-94.

**I. Not Government Speech;
rather, Commercial Speech,
in which the Government has Reasonable Interests.**

[90] The California Tree Fruit Agreement promotion including advertising for nectarines and peaches, funded through compelled assessments paid by handlers such as Gerawan, is not government speech as delineated by *Livestock Marketing* and as previously suggested in *United Foods*; rather, it is commercial speech paid for by marketing orders assessments, authorized by both statute and the marketing orders, in which the government has reasonable interests.

[91] The AMAA does not establish the overarching message. (The overarching message is not established by the statute or the regulations; the overarching message is not established by the Secretary of Agriculture, or even by the Committees that administer the Marketing Orders.) The AMAA is not comparable to the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901, *et seq.*, addressed by "*Livestock Marketing*".

[92] As U.S. District Judge Gladys Kessler wrote of *Livestock Marketing*, while considering the Hass Avocado Promotion, Research, and Information Act of 2000, 7 U.S.C. § 7801, *et seq.*, in her Memorandum Opinion issued in the United States District Court for the District of Columbia on March 15, 2006:

Writing for a 6-3 majority, Justice Scalia concluded that the Beef Act advertising programs constituted government speech to

which the producers had no First Amendment right to object.¹⁵ The Court rejected respondents' argument that because the Beef Board and state beef councils play such a central role in creating and disseminating those advertisements, the government speech doctrine does not apply. "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated," the Court held, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Id.* at 2063. In other words, when a "message . . . is from beginning to end . . . established by the federal government" it constitutes government speech even if private actors are enlisted to convey it. *Id.* at 2062. *Avocados Plus Inc. v. Johanns*, Civil Action No. 02-1798, at 11-12 (GK), 2006 U.S. Dist. LEXIS 10144, 2006 WL 637108 (D.D.C. Mar. 15, 2006).

[93] The specific and controlling language, of both the **Beef** Promotion and Research Act of 1985 (addressed in "*Livestock Marketing*"), and the **Mushroom** Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101-6112 (addressed in "*United Foods*"), is comparable to that of the following statutes that also generate "government speech": (a) the **Pork** Promotion, Research and Consumer Information Act, 7 U.S.C. § 4801 *et seq.*; see *Johanns v. Campaign for Family Farms*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Sixth Circuit); (b) The **Dairy** Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.*; see *Johanns v. Cochran*, 125 S.Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit); (c) the **Cotton** Research and Promotion Act of 1966, as amended, 7 U.S.C. § 2101, *et seq.*; see *Cricket Hosiery, Inc. v. United States*, 28 CIT ____ slip op. 06-56, Court of International Trade, Judge R. Kenton Misgave (April 24, 2006); (d) the Has **Avocado** Promotion, Research, and Information Act of 2000, 7 U.S.C. § 7801, *et seq.*; see *Avocados Plus Inc. v. Johanns*, 2006 WL 637108 (D.D.C. March 15, 2006); (e) the **Honey** Research, Promotion, and Consumer Information Act, as amended, 7 U.S.C. §§ 4601-4613; see *Walter L. Wilson, d/b/a Buzz 76 Apiaries*, 64 Agric. Dec. ____ slip op., USDA Judicial Officer, HRPCIA Docket No. 01-0001

¹⁵ The Court included a lengthy analysis of the government speech doctrine which, in general, precludes citizens from challenging expressive activities by government actors or the government itself. See *Livestock Marketing*, 125 S.Ct. at 2060-63.

(November 28, 2005); and (f) the **Watermelon** Research and Promotion Act, 7 U.S.C. § 4901, *et seq.*; see *Red Hawk Farming & Cooling*, 64 Agric. Dec. 1258 (2005), USDA Judicial Officer, AMA WRPA Docket No. 01-0001 (November 8, 2005). *Emphasis added.*

[94] Both the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901, *et seq.*, addressed by *Livestock Marketing*, and the Mushroom Promotion, Research, and Consumer Information Act of 1990, addressed by *United Foods*, are characterized by *specific* and *controlling* Congressional directives. So are the other Acts including those identified in paragraph [93] under which advertising and promotion are regarded as government speech, instead of government facilitation of private speech.¹⁶

[95] The AMAA, in sharp contrast, authorizes but does not control the promotion and advertising. The AMAA does not “set the overall message” (as in *Livestock Marketing*) or establish the message from beginning to end. The AMAA authorizes the Secretary of Agriculture to issue marketing orders (regulations) that, among other things, establish or provide for the establishment of “**production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order**”; and regarding numerous agricultural commodities including California peaches and nectarines, “**such projects may provide for any form of marketing promotion including paid advertising.**” 7 U.S.C. § 608c(6)(I).

[96] The attributes of government speech identified in *Livestock Marketing* are missing under the California Tree Fruit Agreement. The statute (the AMAA), and the regulations (the Marketing Orders): (a) do not specifically identify the government interest in promoting nectarines and peaches; (b) do not specifically articulate the purpose of the promotion and the advertising; (c) do not specify the overarching message to be communicated; (d) do not control the message from the top down; and (e) do not control the message from beginning to end.

¹⁶ But contrast the **Alligator** case, *Landreneau v. Pelts & Skins, LLC*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

[97] Whether the compelled monetary contributions are necessary and proportionate to the legitimate promotional goals of the Committees and Subcommittees is difficult to determine.¹⁷

[98] The U.S. Supreme Court's guidance in compelled subsidy cases has perhaps impacted the business of promoting California-grown nectarines and peaches. Perhaps adequately detailed initial government control has been undertaken, by the Committees or the Subcommittees, or by the Secretary of Agriculture, with specificity that serves as a yardstick for the promotion projects initiated.

[99] Based on the evidence before me, which predated *Glickman v. Wileman* and is now 2-1/2 years old, the U.S. government had not definitively controlled the overall purpose or objective for promotion including paid advertising. Rather, the governmental components reacted in a somewhat cursory review of what paid staff had undertaken.

[100] Not a factor to be addressed in this 15(A) action is the effectiveness of the expenditures for promotion including paid advertising. *Glickman v. Wileman*. Consequently, Dan Gerawan's testimony that the forced assessments are largely wasted; that much of the money is spent on point of sale (retail store) display items that end up in the trash, will not be evaluated here. Nor will Gerawan's complaint that the promotion reduces rather than increases consumption be evaluated here, because the effectiveness of the promotion is not relevant. Also, except for determining that the materials were germane to the purposes of the AMAA, I do not evaluate or describe the promotion and advertising materials in evidence. Tr. 806.

[101] Likewise, since the effectiveness of the expenditures for promotion including paid advertising is not a factor for me to consider, I will not evaluate the Apex study or the assumptions upon which the Apex study is based. Tr. 734, 736.

¹⁷ The Committees and Subcommittees identified and articulated and circulated a general theme of "working on category management and how to help improve the demand and movement of California peaches and nectarines through the marketing channels." Tr. 1286. Determining the governmental connection in the promotion undertaken, and whether the assessments for promotion are reasonably necessary and proportionate to the legitimate promotional goals, is difficult without clearly delineated Committees' objectives prior to development of the promotion. The Committees' objectives for promotion, including paid advertising, are formulated year-by-year in response to input from below.

[102] The effectiveness of the expenditures is of course of concern to those who set the assessment amounts and who approve the budgets, including the Secretary of Agriculture, the Committees and Subcommittees.

[103] During 2003, the assessment rate was 20 cents per box of California nectarines and peaches. Tr. 1311. The assessment had been 19 cents per box. Tr. 1311. The President of the California Tree Agreement, Mr. Richardson, attributed the penny per box increase to Gerawan's withholding (about half) of its payment of each amount assessed. Tr. 1310-11. The assessment had previously been 18.5 cents for nectarines and 19 cents for peaches per 25 pound container. CX 6. From year-to-year there is rulemaking regarding the amount of the assessment only if a change in the amount is to be considered.

[104] The Nectarine and Peach Marketing Orders do not employ volume controls *per se* (Tr. 776, 853-54), or restrictions on supply such as "reserves" or "surplus".

[105] Under the guise of quality control, Dan Gerawan testified, the Nectarine and Peach Marketing Orders accomplished volume control, during 1985-1990. Tr. 150-153. Discussion at the California Tree Fruit Agreement meetings would frequently address reducing the volume of fruit on the market in the hopes of increasing prices back to the grower. Tr. 152. The changes since 1990 have resulted in less talk among members of the industry of volume control, and USDA does not support volume control.

[106] Dan Gerawan testified that the California Tree Fruit industry experienced "a big deregulation" since 1990 (when the record closed in "*Glickman v. Wileman*"). Tr. 149. Since 1990, Dan Gerawan testified, the relaxation of standards through the addition of utility grade has given Gerawan the freedom to market all the fruit which customers will buy.

[107] Dan Gerawan testified that when "*Glickman v. Wileman*" was filed, although there were not volume controls *per se*, fruit for which there would have been customers was kept off the market through (a) the minimum size regulations, (b) the regulations against cosmetically challenged fruit, which is blemished fruit, and (c) the maturity regulations. Tr. 149.

II. Highly Competitive, Minimally "Collectivistic" or

“Cooperative” and Not in a Manner that Displaces Competition

[108] *Glickman v. Wileman and United Foods* describe “collectivistic” and “cooperative” marketing that displaces competition, in a way that does not apply to the marketing of nectarines and peaches at issue here, by handlers such as Gerawan, under the California Tree Fruit Agreement.

[109] Under the AMAA, agricultural commodities are regulated to varying degrees. Milk is an example of a commodity that can be tightly regulated under the AMAA. Milk marketing orders can involve pooling, and redistributing certain sales receipts. It can be argued that certain milk marketing orders under the AMAA may establish the type of cooperative marketing that displaces competition. Most agricultural commodities addressed by the AMAA are not so highly regulated.

[110] Actions taken under the AMAA range from **highly** regulating marketing orders, to **minimally** regulating marketing orders. Examples of **highly** regulating marketing orders could include dairy (regulated in numerous but not all regions of the country). Other agricultural commodities, including the California nectarines and peaches here, and including other fruits or vegetables in various regions, are examples of **minimally** regulating marketing orders. The specifics for one marketing order addressed by the AMAA would not be appropriate for another. The AMAA is versatile and has been put to many uses over more than 70 years.¹⁸

[111] The objective of the AMAA, “orderly marketing”, does not require the type of cooperative marketing that displaces competition. Tremendous diversity exists among the various marketing orders promulgated under the AMAA. Nectarine and peach handlers under the California Tree Fruit Agreement are fiercely competitive, among themselves, as well as among packers who are not part of the California Tree Fruit Agreement.

[112] Nectarine and peach handlers under the California Tree Fruit Agreement do provide buyers with some uniformity regarding certain

¹⁸ The AMAA reenacted specified provisions of the Agricultural Adjustment Act of 1933, as amended).

aspects of their nectarines and peaches. These nectarine and peach handlers (a) are not exempt from antitrust requirements; (b) do not set minimum prices; (c) do not "pool" their fruit to provide buyers with only one source (such as a cooperative); and (d) do not use volume control to keep prices up. These handlers do (a) identify according to grades; (b) identify according to two standards for maturity: a minimum standard (U.S. Mature), and a higher standard (California Well-Mature); (c) specify the level of cosmetic defects, including blemishes; (d) predictably size the fruit, and (e) provide uniform packaging.

Fierce Competition Dominates the Tree Fruit Industry

[113] On direct examination, Gerawan's counsel questioned Gerawan's President:

Mr. Moody: Well, as you -- if someone were to say to you -- ask you the question is the CTFA -- or is the tree fruit industry in California characterized by competition or is it a competitive industry, how would you answer that?

Mr. Dan Gerawan: It's extremely competitive.

Mr. Moody: Okay. And what do you mean by that?

Mr. Dan Gerawan: I mean that I'm trying to get my competitors' customers. He's trying to get mine. We're trying to get new customers. It's extremely competitive.

Tr. 165-66.

[114] On cross examination, Gerawan's President answered a question by AMS's counsel Ms. Deskins:

Mr. Dan Gerawan: This is a very highly competitive business we're in. The competition -- I don't know that you understand how competitive this business really is. But it's highly competitive. And we're -- the margins are cut razor thin. And when per capita consumption goes down, that is more indication that there's a general level of dissatisfaction of the people buying the fruit from this industry. And it's -- I'm being harmed by that.

Tr. 319.

[115] On direct examination, Gerawan's counsel questioned Gerawan's President:

Mr. Moody: But the price you get though is really subject to matter of negotiation between you and the buyer?

Mr. Dan Gerawan: Yes.

Mr. Moody: And is there anything CTFA can do that affects the prices you're able to get?

Mr. Dan Gerawan: That's a pretty broad question. Yes.

Mr. Moody: Okay. What are some examples?

Mr. Dan Gerawan: Well, you used the conditional form of the verb, which means if they were to stop all their generic advertising we might be able to get a higher price for our product.

Mr. Moody: Okay. Is there anything CTFA can do to restrict entry into the business, meaning the new growers can come in and grow peaches and nectarines?

Mr. Dan Gerawan: Another broad question but there's nothing that CTFA could do to keep someone out. No, there isn't.

Mr. Moody: Okay. Is there anything CTFA can do to keep a packer out of the business?

Mr. Dan Gerawan: Aside from bringing some kind of USDA enforcement action for breaking some law or regulation, no.

Mr. Moody: And does CTFA have any control over relative market shares between the packers? Mr. Dan Gerawan: No.

Mr. Moody: Does CTFA have any role in setting any form of producer allotment?

Mr. Dan Gerawan: No.

Mr. Moody: Does CTFA have any power to regulate the price?

Mr. Dan Gerawan: No.

Mr. Moody: Does CTFA have any power to grant anti-trust immunity in case of for example you and Fower Packing wanted to agree between the two of you on a price?

Mr. Dan Gerawan: No.

Mr. Moody: Is it your understanding the anti-trust laws are fully applicable to your activities as a packer?

Mr. Dan Gerawan: Yes.

Mr. Moody: Is there any kind of market allocation regulation that CTFA is able to implement?

Mr. Dan Gerawan: No.

Tr. 164-65.

[116] The challenged assessment (roughly one-half of the total assessment) is part of a "broader regulatory system", but the extent to which it "collectivizes" aspects of the market is minimal. The primary object of the Marketing Orders is to ensure some minimum standards including grade, maturity, blemishes, and size; and some uniformity in packaging. Under the Marketing Orders, customers will know the size, number of pieces and overall weight of fruit in each box.

[117] Is Gerawan part of a group that is "bound together and required ... to market their products according to cooperative rules?" The answer is "Yes" with respect to those items in paragraph [116]; but "No" with respect to many important aspects of marketing. The "No" answer: Under the Marketing Orders, the fruit is not jointly marketed (there is no Order-wide cooperative; a few cooperatives exist; they are the exception rather than the rule). The "No" answer continues, with the following important marketing features **not** set, variable: the market areas; the customers; the quantity of fruit that a handler may market; and the prices (and the prices best not be set, as there is no anti-trust exemption for price fixing!). Further, the "No" answer continues with the following, beyond the minimum standards, **not** set, variable in ways that make a tremendous difference in the consumer's eating experience: growing methods; harvesting methods; degree of ripeness when picked; the sugar content; the color; the variety; the flavor; the firmness; and other factors.

[118] I questioned Gerawan's President:

ALJ: How does Gerawan measure the maturity of a peach? What does it depend on? What are the factors?

Mr. Dan Gerawan: Measuring, what way, in order to determine harvest time?

ALJ: Well, I'm beginning to think that when you determine whether it meets the highest grade of maturity or the lesser grade of maturity, that perhaps it has to do with size and color. But I don't know for sure.

Mr. Dan Gerawan: Color, firmness, sweetness.

ALJ: Color, firmness, and sweetness.

Mr. Dan Gerawan: A mixture of those three. And depending on variety, you would give one or more of those factors more weight.

Tr. 366-67.

[119] Is the assessment regulation related to and in furtherance of other non-speech purposes, carrying out other aspects to further other economic, societal, or governmental goals? *See United Foods*, 533 U.S. at 415. The answer is Yes, but promotion including paid advertising is severable, and the expenses for the compelled generic advertising are severable.

[120] Gerawan's Petition attacks neither the Act nor the regulations (the Marketing Orders). Gerawan's Petition attacks one of the Committees' activities, that of compelling Gerawan and the other handlers to pay assessments for generic advertising.

[121] On cross examination, AMS's counsel questioned Gerawan's person in charge of marketing (*See* Tr. 34-35):

Mr. Ray Gerawan: My - - the fact of CTFA, I'm not entirely against the agreement. I'm against the advertising portion of the agreement.

Ms. Deskins: Okay. Okay.

Mr. Ray Gerawan: - - my preference would be CTFA have a two-person office, and that's all, and all they would do is consumers would call in to get some information about California fruit. That would be my preference.

Ms. Deskins: Okay.

Mr. Ray Gerawan: I wouldn't want to do away with CTFA.

Ms. Deskins: Okay. Because you . . .

Mr. Ray Gerawan: I would say a two-person office, maybe three, and that's it.

Ms. Deskins: Okay. Because you believe the CTFA could inform people about California nectarines and peaches.

Mr. Ray Gerawan: Yeah. If they want to call in to find out, but I don't want them to use my money to put out advertisements on stuff that - - a product that I'm growing that's counter to my message.

Tr. 98-99.

[122] Gerawan proved that the California nectarine and peach industry, although always competitive, is even more competitive since the *Glickman v. Wileman* decision. Gerawan was a proponent of changing the regulations to allow for a utility grade of peaches and nectarines. Gerawan finds that with a utility grade it is able to improve the quality of its premium label and provide a lower-priced label with fruit of reduced quality that was previously packed in the premium label or culled out of shipments.

[123] Douglas Andrew Phillips, a "grower, packer, shipper of fruits" since 1971, described the utility grade, and the allowing of the sale of "U.S. mature", as regulation changes that did not cause his company to pack that much extra fruit but did allow the packing of some fruit that wouldn't have been allowed 10 years earlier. Tr. 497-98, 533-34.

[124] Dr. Melvin Peter Enns is a businessman in a family of growers, packers, and shippers of fresh fruit, peaches, plums, nectarines, apricots, and persimmons. Tr. 432-33. Dr. Enns has his PhD in psychology and was a professor for 18 years. Tr. 434. He was Vice-Chair of the CTFA

Executive Committee at the time of his testimony. Tr. 434.

[125] On direct examination, AMS's counsel questioned Dr. Enns:
Ms. Deskins: Can you tell us what, if any, changes there have been in these size and maturity regulations?

Dr. Enns: I'll use an analogy from an educational background. I perceive it as a two by two matrix. And if we have maturity on one (axis), we have Cal Well Mature being one category, and U.S. Mature being a second category. And then if we have grade on the other axis, we have U.S.#1 and Utility. so that would give you four boxes that you can pack,

- a U.S.#1, Cal Well Mature;
- a U.S.#1, U.S. Mature;
- a Utility, Cal Well Mature, and
- a Utility, U.S. Mature.

And I think the main change is we - - now to use my educational example - - we've gone from a pass/fail system, to a grading system. So instead of just having one box, and that being the passing box, and the rest failing, we now have an A box, a B box, a C box, and a D box.

Tr. 436.

[126] Dr. Enns identified PX 5, p. 7, the SUMMERIPE® ad. Tr. 459. He identified his company, WesPak (Tr. 459), as one of the four "Exclusive Distributors of SUMMERIPE® Premium Ready to Eat California Tree Fruit". PX 5 at 7.

[127] Dr. Enns confirmed: "The marketing order does not allow us to engage in price fixing. No. I don't think the marketing order is related to this issue. Tr. 462.

[128] On cross examination, Gerawan's counsel questioned Dr. Enns:

Mr. Moody: Okay. Would you characterize the California Tree Fruit Industry as fairly competitive?

Dr. Enns: Yes. I would.

Mr. Moody: And what's the impact of the highest grade and maturity regulations on your ability to compete?

Dr. Enns: I look at it as allowing us to really go out, as the State of California, and bust through some really tough markets and present a product that consumers know is going to be an excellent product. And if it's not an excellent product, it is going to be graded as, and clearly stated as a second product, a third product, a fourth product. And it's

going to allow people to buy a perishable product from thousands of miles away and have confidence that this product that they're buying is going to be what it was, and that they could buy it from Producer A, fill their load from Producer B, garner some of this and some of that, and it's coming from California. This stuff is quality regulated, and it's the finest in the world. Mr. Moody: Okay.

Dr. Enns: You hit a hot spot.

Mr. Moody: Oh, good. And you believe that they help you compete more effectively in the marketplace?

Dr. Enns: I think they allow us to bust down trade into other countries. I think MAP funds allow us to have - - to double our promotion that we could never get as individuals. I think that they provide a level playing surface for all the growers, large and small, and I think California fresh fruit is the envy of everywhere in the world.

Tr. 477-79.

Mr. Moody: Dr. Enns, does the marketing order place any restrictions of which customers you can sell to?

Dr. Enns: No.

Mr. Moody: Does it place any restrictions on the price you can offer your fruit for?

Dr. Enns: No.

Mr. Moody: Does it place any restrictions on the size of your grower base? Dr. Enns: No.

Mr. Moody: Does it place any restrictions on the timing of your sales?

Dr. Enns: No.

Tr. 488.

[129] On redirect examination, AMS's counsel questioned Dr. Enns: Ms. Deskins: Mr. Enns, I want you to clarify, you used the term MAP. What does that mean, the MAP Program?

Dr. Enns: Oh, this is where CTFA applies for matching funds for export markets.¹⁹ And CTFA is awarded funds close to \$1 million a year for developing export markets.

Ms. Deskins: Okay.

Dr. Enns: And it's matching funds with our assessments that are used in primarily Taiwan, secondarily, and Hong Kong

Tr. 482.

¹⁹ These are matching funds for promotion in foreign markets through USDA's Foreign Agriculture Service.

[130] Ms. Vawter confirmed that California tree fruit marketing is competitive rather than cooperative in the following aspects: the growers are free to change handlers anytime they please; the handlers are free to sell to any customer they please; the committee does not take title to any of the commodity and sell it on behalf of the growers (as does the Date Committee). Tr. 1261, 864.

III. Gerawan's Withholding Payment of a Portion of its Assessments was in Good Faith and Not for Delay

[131] **Gerawan's withholding of payment of a portion of its assessments was in good faith and not for delay and in reliance on the advice of counsel.** Tr. 389-90.

[132] On direct examination, Gerawan's counsel questioned Gerawan's President:

Mr. Moody: Okay. In addition to what you told Ms. Deskins that motivated filing the Petition in May of 2001, did the Supreme Court's Decision of *United Foods* also play a role?

Mr. Dan Gerawan: Yes.

Mr. Moody: And why was that?

Mr. Dan Gerawan: When I read in *United Foods* that the Supreme Court presumed that a comprehensive scheme of regulations had displaced competition in the industry, and that that's what they based their *Wileman* Decision on, it was clear to me at that point that whatever the Supreme Court was thinking then, certainly is not the case now, especially since the great degree of deregulation we've had since then. So that's what I got from the *United Foods* decision.

Tr. 360-61.

[133] 7 U.S.C.:

§ 608c. Orders regulating handling of commodity

(14) Violation of order; penalty

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding \$1,000 for each violation. Each day during which such violation continues shall be deemed a separate violation,

except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this subsection only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B).

[134] Gerawan's Petition has been on file since August 13, 2001. Gerawan's unpaid portion of assessments began to accrue with the production of May 2001, for which Gerawan's payment was due sometime thereafter.

[135] As counsel for Gerawan expressed (Mr. Moody at Tr. 13), it would be a pyrrhic victory to win a case ten years later and have no remedy at the end of the line.

[136] It is proper to deny AMS's request for a civil penalty. The 1946 case cited by AMS, *Ruzicka v. U.S.*, 329 U.S. 287 (1946), was decided during a time when promotional activities such as generic advertising had not been undertaken. The holding in *United Foods* sparked Gerawan's hope that it would win this time. Witness the numerous cases besides this one that sprang up in response to *United Foods*. See paragraph [93].

[137] On June 25, 2001, *United Foods* had struck down on First Amendment grounds the mushroom checkoff program created under the Mushroom Promotion, Research, and Consumer Information Act (the "Mushroom Act"), 7 U.S.C. § 6101, *et seq.* Gerawan's reliance on *United Foods* was justified, particularly since Gerawan knew there is no

government “collectivist” centralization of the market for tree fruit; competition has not been displaced by the regulations.

Gerawan knew that the California nectarine and peach growers and handlers are engaged in deep-seated free enterprise that can be characterized as fiercely competitive.

[138] Before *Livestock Marketing*, the reasoning in *Pelts & Skins v. Landreneau*, 365 F.3d 423 (5th Cir. 2004) (the alligator case) was very persuasive.

[139] Gerawan’s position was also reinforced by language in *Delano Farms Company v. California Table Grape Commission*, 318 F.3d 895 (9th Cir. 2003). Noting the distinction between *Glickman v. Wileman* and *United Foods*, the Court said the “grape growers do not operate under the 1937 statute that substituted ‘collective action’ for the ‘aggregate consequences of independent competitive choices’ and expressly exempted them from the antitrust laws”. Gerawan knew that the California nectarine and peach handlers in fact have not substituted collective action for their independent competitive choices and that they must abide by the antitrust laws.

[140] Further, Gerawan was justified in categorizing “research” with “promotion including paid advertising”, even though I have separated out research in this Decision. The phrase “promotion including paid advertising” is included in the research provisions of the Marketing Orders, as in the AMAA.

[141] Illustrative is the following provision in the Peach Marketing Order with regard to using handlers’ money:

§ 917.36 Expenses.

Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research and service activities relating to handling of the fruit for which the commodity committee was established as the Secretary may determine to be appropriate. The funds to cover such expenses shall be acquired by the levying of assessments as provided in §§917.37.

7 C.F.R. § 917.36.

Note the use of the term “research” - - it must be meant to encompass promotion including paid advertising; otherwise, would fundraising for paid advertising be authorized?

Findings of Fact

[142] Congress has conferred powers on the Secretary of Agriculture to establish and maintain orderly marketing conditions for certain agricultural commodities specified within the Act known as the Agricultural Marketing Agreement Act of 1937, as amended (frequently herein, “the AMAA” or “the Act”). 7 U.S.C. §§ 601-627. (The AMAA reenacted specified provisions of the Agricultural Adjustment Act of 1933, as amended.)

[143] Where majority rule conflicts with constitutional rights such as those Gerawan enjoys under the First Amendment, balancing tests are required. The question, as it was in *United Foods*, is “whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.” 533 U.S. at 410.

[144] In balancing Gerawan’s First Amendment rights against the government’s interests in promotion including paid advertising under the Marketing Orders, these factors weigh against Gerawan’s claim:

- a. The promotion including paid advertising under the Marketing Orders relates to and is consistent with the government’s goal under the AMAA of orderly marketing, including expanding and maintaining markets, creating demand, and increasing consumption.
- b. The Marketing Orders’ promotion including paid advertising incorporates the will of the majority of those in California-grown nectarines and peaches industry, tempered by the Secretary’s oversight which includes veto power, and eliminates “free-riders”.
- c. The Secretary has a reasonable interest in developing promotion including paid advertising through the paid staff of “agents” of the United States (the Committees, *see* paragraph [67]), with subsequent approval by the Subcommittees, the Committees, and the Secretary.
- d. The Secretary has a reasonable interest in encouraging sales in foreign markets and encouraging CTFA’s award of nearly \$1 million a year in matching funds for developing export markets through USDA’s Foreign Agriculture

Service's Market Access Program (MAP) and may have a particular interest in encouraging sales in primarily Taiwan, and secondarily, Hong Kong. (*See* paragraphs [128] and [129].)

e. Government intervention in the marketplace has traditionally included collective research and promotion such as that being done under the Marketing Orders.

f. The government has a substantial interest in communicating health and safety messages regarding the fruit, and the Marketing Orders' promotion including paid advertising could and occasionally does include communications regarding health and safety.

g. The Secretary seeks not to compel Gerawan to speak, but to compel Gerawan to pay for the speech.

h. Gerawan is free to do its own advertising (as is each of the other handlers), to the extent it can afford to after paying its Marketing Orders assessments.

[145] In balancing Gerawan's First Amendment rights against the government's interests in promotion including paid advertising under the Marketing Orders, these factors weigh in favor of Gerawan's claim:

a. Gerawan has a vital interest in independence and competition in promotion including paid advertising that relates to and is consistent with the goal under the AMAA of orderly marketing, including expanding and maintaining markets, creating demand, and increasing consumption. (*See* paragraph [139], mentioning the 'aggregate consequences of independent competitive choices'.)

b. Gerawan has a reasonable interest in encouraging sales in foreign markets and may have a particular interest in encouraging sales in primarily Canada and Mexico. Tr. 115.

c. Applying the power of the United States government to force Gerawan to pay for promotion including paid advertising for its competitors, or even for itself, absent reasonably necessary requirements to achieve governmental objectives, abridges Gerawan's freedom of speech.

d. Gerawan has a substantial interest in communicating health and safety messages regarding its fruit, and either independently or through voluntary trade associations, Gerawan's promotion including paid advertising could include communications regarding health and safety.

e. Gerawan has a reasonable interest in targeting its own marketing areas with its message.

- f. Gerawan has a reasonable, Constitutionally-protected interest in speaking its own marketing message.
- g. Gerawan has a reasonable, Constitutionally-protected interest in choosing its own marketing messenger.
- h. Gerawan has a reasonable interest in not being required to subsidize the expense²⁰ of the Marketing Orders' promotion including paid advertising, all of which Gerawan considers to be generally wasted, and which Gerawan considers to be at times skewed in favor of Gerawan's competitors, at times damaging to Gerawan and its own message, and at times not truthful about Gerawan's fruit.
- i. Gerawan has a substantial interest in using its roughly one-quarter million dollars per year in its own way, rather than having that money spent in the Marketing Orders' promotion including paid advertising.

Conclusions of Law

[146] Governmental control and foresight over promotion including paid advertising are not built into the AMAA or the Marketing Orders in the same way as under the Beef Promotion and Research Act Beef of 1985 (addressed in "*Livestock Marketing*"). Under the Beef Promotion Act, the message is government speech: "The message of the promotional campaigns is effectively controlled by the Federal Government itself."

[147] In contrast, under the California Tree Fruit Agreement, the compelled promotion including paid advertising is authorized but is not government speech. Congress authorized "any form of marketing promotion including paid advertising". 7 U.S.C. § 608c(6)(I). Nevertheless, the attributes of government speech are missing. See paragraphs [90] through [99].

[148] The speech at issue here is "the statement of one self-interested group the government is currently willing to invest with power";²¹ but it is not government speech.

²⁰ Subsidizing includes not only helping pay for, but also enduring that speech that Gerawan was required to help pay for.

²¹ See Justice Souter's dissent in *Livestock Marketing*, 125 S.Ct. at 2069.

[149] While *Glickman v. Wileman* describes what the AMAA authorizes, and consequently how the Marketing Orders *could* be operated, it does not describe how the Marketing Orders here are operated, which is at a much more minimal level of restriction on marketing autonomy.

See paragraphs [104] - [130].

[150] I disagree with Gerawan that it has a First Amendment claim not to pay for the research activities (even if they are marketing or promotion research activities) under the Marketing Orders. *See* paragraph [41]. Gerawan can be lawfully forced to pay for the research projects and activities under the Marketing Orders.

[151] Gerawan's First Amendment interests in not subsidizing promotion including paid advertising under the Marketing Orders outweigh the Secretary's interests in forcing Gerawan to pay; consequently, it is contrary to law for the Secretary to abridge Gerawan's First Amendment rights by confiscating Gerawan's money to pay for promotion including paid advertising.

[152] Gerawan had the burden of proof pursuant to section 8c(15)(A) of the AMAA. 7 U.S.C. § 608c(15)(A). Gerawan met its burden of proof.

[153] The Secretary's administration of the promotion including paid advertising under the Marketing Orders had a rational basis, was reasonable, was neither arbitrary nor capricious, and is entitled to deference, but nevertheless abridged Gerawan's freedom of speech guaranteed under the Constitution and thus was not in accordance with law; consequently, Gerawan's Petition must be granted in part.

Order

[154] Gerawan's Petition is **denied** in part and **granted** in part, as shown below.

[155] Gerawan's Petition is **denied** as to that proportion of withheld payment of assessments corresponding to research projects and activities under the Nectarine Marketing Order and the Peach Marketing Order; Gerawan's Petition is **granted**, and Gerawan is exempted from its obligation to pay, as to that proportion of withheld payment of assessments corresponding to promotion including paid advertising

under the Nectarine Marketing Order and the Peach Marketing Order. Gerawan is exempted from any further obligation to pay assessments corresponding to promotion including paid advertising under the Nectarine Marketing Order and the Peach Marketing Order.

[156] This Order shall be effective on the 11th day after this Decision becomes final.

[157] No sooner than 30 days, and no later than 60 days, following the effective date of this Order, Gerawan shall pay to the California Tree Fruit Agreement that amount of withheld payment of assessments under the Nectarine Marketing Order and the Peach Marketing Order that is proportional to research projects and activities, plus interest actually accrued on that portion while it was held in an interest-bearing account; except that, if either party files an appeal with the Judicial Officer, Gerawan shall maintain status quo with regard to the withheld portions of the assessments on deposit, awaiting further Order from the Judicial Officer.

[158] No sooner than 30 days, and no later than 60 days, following the effective date of this Order, Gerawan shall pay the remainder of the withheld payment of assessments under the Nectarine Marketing Order and the Peach Marketing Order to the producer(s) from which it was collected (presumably Gerawan, for the most part), plus interest actually accrued on that portion while it was held in an interest-bearing account; except that, if either party files an appeal with the Judicial Officer, Gerawan shall maintain status quo with regard to the withheld portions of the assessments on deposit, awaiting further Order from the Judicial Officer.

[159] AMS's Complaint is **granted** in part and **denied** in part, as shown below.

[160] Gerawan shall cease and desist from withholding payment of assessments that is proportional to research projects and activities under the Nectarine Marketing Order and the Peach Marketing Order.

[161] Gerawan shall not be required to pay any civil penalty pursuant to 7 U.S.C. § 608(c)(14)(B). AMS's request for a \$150,000 civil penalty is **denied**. AMS's request for a civil penalty is **denied** in any amount, because Gerawan in good faith and not for delay, in reliance in part on *United Foods* and the advice of counsel, reserved the challenged

assessments which would otherwise have been spent and irretrievable. *See* paragraphs [131] through [141].

Finality

[162] This Decision becomes final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, in accordance with sections 900.64 and 900.65 of the Rules of Practice (7 C.F.R. §§ 900.64-900.65), and section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

ANIMAL WELFARE ACT
DEPARTMENTAL DECISIONS

In re: JEWEL BOND d/b/a BONDS KENNEL.
In re: AWA Docket No. 04-0024.
Decision and Order.
Filed January 9 , 2006.

AWA – Suspension of License – Willful – Correction of violations – Repeated.

Brian T. Hall for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Victor M. Palmer.

DECISION AND ORDER

Jewel Bond, the respondent in this proceeding, breeds dogs and sells them in interstate commerce under the trade name of Bonds Kennel. She is licensed as a Class B Dealer and is subject to regulation under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159; “the AWA”). Jewel Bond is charged in a complaint filed on August 19, 2004, by the Administrator of the Animal and Health Inspection Service (“APHIS”) with violating the AWA and the regulations and standards issued under it (9 C.F.R. §§ 1.1-3.142), by failing to provide adequate veterinary care to dogs she has owned; failing to adequately construct, maintain, clean and sanitize the facilities where she houses dogs so as to protect their health and well-being; failing to provide her dogs with safe and adequate shelter; and failing to protect them from other animals, pests, contaminants, injury and disease.

Jewel Bond has elected to represent herself, *pro se*, and has denied the allegations. An oral hearing was held in Springfield, Missouri, on May 24-25, 2005. At the hearing, APHIS was represented by Brian T. Hill, Esq., Office of the General Counsel, Washington, D.C. Jewel Bond represented herself with the assistance of her former husband and present business helper, Larry Bond, who was allowed to interrogate and cross-examine witnesses, voice objections to evidence and present arguments. The testimony was transcribed (TR___), and exhibits were received from both APHIS, the complainant (CX___), and from Jewel Bond, the respondent (RX___). Subsequent to the hearing, both APHIS and Jewel Bond filed briefs in support of their positions. APHIS seeks

a cease and desist order, a one year suspension of Jewel Bond's dealer's license and a civil penalty of \$10,000.00.

For the reasons that follow, I have found and concluded that Jewel Bond committed willful violations of the AWA and applicable regulations and standards, and that a cease and desist order, the suspension of her dealer's license for one year and the imposition of a \$10,000.00 civil penalty are appropriate sanctions that are needed to deter future violations.

Pertinent Statutory Provisions, Regulations and Standards

The Animal Welfare Act (7 U.S.C. §§ 2131-2159)

§ 2131 states the purposes of The Animal Welfare Act:

(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....

§ 2132 defines the term "dealer":

(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.

§ 2143 (a) authorizes the promulgation of standards for humane care and treatment:

(1) The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities and exhibitors.

(2) The standards described in paragraph (1) shall include

minimum requirements---

(A) for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals; and

(B) for exercise of dogs, as determined by an attending veterinarian in accordance with general standards promulgated by the Secretary....

§ 2146 (a) places administration and enforcement with the Secretary of Agriculture:

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer...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...of any such dealer....

§ 2149 provides for license suspension or revocation, civil penalties and cease and desist orders:

(a)...If the Secretary has reason to believe that any person licensed as a dealer... 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)...Any dealer... 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 \$2,500¹ for each such violation, and the Secretary may also make an

¹ In accordance with the Federal Civil Penalties Act of 1990 (28 U.S.C. § 2461), and the applicable implementing regulation (7 C.F.R. § 3.91(a), (b)(2)(v)), the civil penalty for a violation of the Animal Welfare Act was increased to a maximum of \$2,750; and a knowing failure to obey a cease and desist order now has a civil penalty (continued...)

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 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....

§ 2151 authorizes the issuance of miscellaneous 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.

The regulations and standards
(9 C.F.R. §§ 1.1 – 3.142)

§ 1.1 reiterates the Animal Welfare Act's "dealer" definition:
...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 ...for use as a pet.

§ 2.40 requires each dealer to provide its animals adequate veterinary care:

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

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

. . .

¹(...continued)
of \$1,650.

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

§ 2.100 requires each dealer to comply with the regulations and standards:

Each dealer... 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.

§ 3.1 specifies standards for housing facilities for dogs and cats:

(a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

(c) *Surfaces—(1) General requirements.* The surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface; and

(ii) Be free of jagged edges or sharp points that might injure the animals.

(2) *Maintenance and replacement of surfaces.* All surfaces must be maintained on a regular basis. Surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

(3) *Cleaning.* Hard surfaces with which dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11 (b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be

raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in §3.11(b) (3) for primary enclosures.

(f) *Drainage and water 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 are 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.

§ 3.4 specifies standards for the outdoor facilities used to house dogs and cats:

(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 specifies standards for primary enclosures used to house dogs and cats:

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 enclosure 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 temperatures and weather conditions that may be uncomfortable or hazardous to all the dogs and cats;

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

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

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

(x) Have floors that are constructed in a manner that protects the dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' and cats' feet to pass through any openings in the floor;

(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 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 metal 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....

§ 3.11 (a) and (d) specify standards for the cleaning of primary enclosures 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.

. . . .

(d) Pest control. A 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.

Findings of Fact

1. Jewel Bond, doing business as Bonds Kennel, 12250 Hwy 43, Seneca, Missouri 64865, is a dog breeder and dealer who currently holds and has annually renewed Class B Dealer's License 43-B-170 since its issuance on March 16, 1993. Jewel Bond was previously licensed as an "A" Dealer from January 10, 1983 until January 10, 1993. (RX 1). For the past ten years, she has kept about 200 dogs at a time at her facility which her attending veterinarian who testified to seeing a lot of kennels, has characterized as "a lot of dogs". (TR 223). During the period September 4, 2002 through July 23, 2003, she sold 222 puppies in interstate commerce to Okie Pets, PO Box 21, Ketchum, Oklahoma 74349, for \$39,690.00; averaging about \$4,000.00 per month in sales to this one outlet alone.(CX 1; CX 4).

2. Animal dealers are required to comply with the AWA and the implementing regulations and standards for the protection of the health and well-being of the animals in their possession. To assure their compliance, APHIS employs Animal Care Inspectors and Veterinarian Medical Officers who periodically inspect the facilities that dealers operate and prepare written inspection reports of the violations that are found. The dealer is given a copy of each inspection report; an exit interview going over the report is conducted; and the dealer is given the opportunity to correct the deficiencies. (TR 5-6; TR 11-112).

3. On the basis of such periodic inspections of her facilities, Jewel Bond was charged with violating the AWA and the implementing regulations and standards in a disciplinary proceeding that resulted in the entry of a consent decision and order on September 6, 2002. (AWA Docket No. 01-0023; CX 70). In the consent decision, Jewel Bond, the named respondent, admitted that the Secretary had jurisdiction; neither admitted nor denied the remaining allegations of the complaint; agreed to a 30 day suspension of her license; agreed to pay a civil penalty of \$6,000.00 of which \$4,500.00 was to be spent for repairs on her facilities on or before August 1, 2002; and agreed to the entry of the following order:

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall not violate the Act and the regulations and standards issued thereunder, and in particular, shall:

(a) Construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to

protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated;

(c) Construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(d) Provide for the rapid elimination of excess water from housing facilities for animals;

(e) Provide animals with adequate shelter from the elements;

(f) Provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals;

(g) Provide sufficient space for animals in primary enclosures;

(h) Maintain primary enclosures for animals in a clean and sanitary condition;

(i) Keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

(j) Establish and maintain an effective program for the control of pests;

(k) Establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and

(l) Maintain records of the acquisition, disposition, description, and identification of animals, as required.

4. Periodic inspections of the facilities where Jewel Bond keeps her dogs were made by APHIS officials on May, 13, 2003, July 16, 2003 and August 25, 2003.

5. The inspection conducted on May 13, 2003, revealed the following:

(a) A female pug had suffered a prolapsed vagina or prolapsed uterus requiring surgical repair to prevent dryness and necrosis. (TR 7-8; TR 113-114; CX 4, CX 42 and CX 45). Also, a shar-pei exhibited swelling and inflamed areas on its rear extremities and redness, irritation and hair loss on its trunk, face and limbs, and itching skin. (TR 7-8; CX 42). At the conclusion of this inspection, Jewel Bond was charged with violating the standard set forth at 9 C.F.R. § 2.40 (b) (2) that requires the availability of emergency veterinary care. However, the inspector gave

her until May 15, 2003 to have the dogs examined by the attending veterinarian and apparently did not believe earlier attention was required. Inasmuch as Jewel Bond and the attending veterinarian have both testified that the dogs were examined within the prescribed two days time and received appropriate treatment, I conclude that 9 C.F.R. § 2.40 (b) (2) was not violated.

(b) There were violations of 9 C.F.R. § 3.1 (a), the general standard that regulates the construction and maintenance of structures housing dogs or cats. Three of the easternmost structures housing 15 dogs, had nails sticking through roofs; deteriorated plywood decking on the roofs with large portions rotted away; decayed wooden rafters that no longer supported the roof; and a black insulation board under the decking, as well as various wooden supports, had been eaten away by mice. The southwestern structure housing 11 dogs had plywood decking on the roofs that was deteriorated with large portions rotted away; the metal roofing portion was loose in several areas allowing rain to enter. Two other structures housing 49 dogs had rusted and broken hinges that did not securely attach the doors. The ramps on a newer large dog structure housing 8 dogs, were not properly secured to the building and were warped and free moving. (TR 8-11; CX 42).

(c) There were violations of 9 C.F.R. § 3.4 (c), the standard regulating the construction of outdoor facilities. The wooden surfaces of many of the interiors of the easternmost 3 structures and a newer large dog structure had not been regularly maintained as required by the standard and showed evidence of chewing and scratching that prevented proper cleaning and sanitizing. Approximately 50 animals were affected. (TR 10; CX 42).

(d) There was a violation of 9 C.F.R. § 3.6 (a) (2) (x), the standard regulating the design and construction of the floors of primary enclosures. The structure housing puppies had openings in the wire floors of the cages of the puppy building so large that the feet of the puppies were allowed to pass through the holes. One yorkie puppy was observed to have a leg completely through the floor of its cage. Eight puppies were affected by this condition. (TR 11; CX 42).

(e) There were violations of 9 C.F.R. § 3.11 (a) and (d), the standards for the cleaning of primary enclosures and pest control. Various deficiencies in respect to the cleaning, sanitization, housekeeping and pest control at the facilities that Jewel Bond had been previously instructed to correct, were still uncorrected. There was excessive accumulation of fecal waste due to inadequate cleaning. In addition to dog feces, there was rodent waste in boxes where dogs were housed with a buildup of 1 ½ inches in one box; and mice had chewed through the walls, floors and exterior

areas of the buildings. The APHIS inspector also found a wasp nest and bird droppings on rafters of the central, metal structure, but inasmuch as it is uncertain how long either condition existed and their minor nature, I do not find these conditions violated the standard. (TR 11-13; CX 42).

6. The inspection conducted on July, 16, 2003, revealed the following:
(a) There were violations of 9 C.F.R. § 3.1(c)(1)(i) in that the northeast kennel, the whelping building, and the puppy building exterior had rusted metal wire that was excessive and prevented required cleaning and sanitization.(TR 14-15; CX 62).

(b) There was a violation of 9 C.F.R. § 3.1(a) in that the floor in one of the boxes housing a dog was not structurally sound. It sagged as the dog walked on it and had gaping wire that could allow a paw to become wedged.(TR 15; CX 62).

(c) There was a violation of 9 C.F.R. § 3.1(F) in that the drainage system for waste disposal for the northwest large dog building was not working properly. It allowed waste to wash out on the ground and the wall of the building thereby failing to minimize vermin, insects and pest infestation, odors and disease hazards. This was a repeat violation. (TR 15-16; CX 62).

(d) The violations revealed in the prior inspection of May 13, 2003, respecting chewed and scratched wooden surfaces of buildings had been corrected. However, again in violation of 9 C.F.R. § 3.4 (c), wooden surfaces of the interior of boxes of the kennels were chewed and scratched and in need of repair and proper sealing to allow for cleaning and sanitization. (TR 16; CX 62).

(e) The insect control program at the facility was ineffective, in violation of 9 C.F.R. § 3.11 (d). (TR 16; CX 62).

7. The inspection conducted on August 25, 2003 revealed the following:

(a) There was a violation of 9 C.F.R. § 3.4 (c), in that there was raw, unsealed wood on the door frames of the northeast two buildings.(TR 17; CX 67).

(b) There was a violation of 9 C.F.R. § 3.6 (a) (2), in that the edge of metal flooring installed in replacement of earlier defective flooring, had sharp points that could easily damage the dogs in those pens.(TR 17; CX 67).

(c) There was a violation of 9 C.F.R. § 3.11 (c), in that a plastic washdown had large cracks in it that allowed debris and waste to collect that prevented proper cleaning and sanitizing of the facility.(TR 17; CX 67).

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Jewel Bond is a dealer as defined in the Animal Welfare Act and the regulations.
3. As more fully set forth in findings 5, 6 and 7, *supra*, Jewel Bond willfully violated the Animal Welfare Act, the regulations and the standards as revealed by inspections conducted by APHIS on May 13, 2003, July 16, 2003 and August 25, 2003.
4. The appropriate sanctions for deterrence of future violations, is the issuance of a cease and desist order, the imposition of a one year suspension of Jewel Bond's dealer's license, and the assessment of a \$10,000.00 civil penalty. In concluding that this penalty is appropriate, due consideration has been given to the size of Jewel Bond's business, the gravity of the violations, her good faith and the history of previous violations.

Discussion

Jewel Bond has engaged in business as Bonds Kennel for over 20 years selling dogs in interstate commerce as a "dealer" licensed under the Animal Welfare Act. She keeps some 200 dogs at her facility which is considered to be large, and averages over \$4,000.00 per month in sales of dogs and puppies.

On September 6, 2002, she entered into a consent decision with APHIS in which she agreed to a 30 day suspension of her license, the payment of a \$6,000.00 civil penalty of which \$4,500.00 was to be spent on repairs to her facility, and the entry of a cease and desist order to not violate the Animal Welfare Act and the regulations and standards issued under it. Yet I find that on May 13, 2003, July 16, 2003 and August 25, 2003, Jewel Bond violated regulations and standards that were of the very type with which she agreed to comply under the terms of the consent decision. Testimony establishing these violations was given by an APHIS Animal Care Inspector and a Veterinarian Medical Officer. Both were extremely credible witnesses who produced photographic evidence corroborating their observations. I have, however, dismissed a charge in the complaint alleging an inadequate response to needed emergency veterinary care. I dismissed this charge because the APHIS Animal Care Inspector did not at the time of the inspection treat the

matter as an emergency in that he gave Jewel Bond two days to obtain veterinary care and she complied.

Each violation found in the course of the three inspections conducted in 2003 was willful. An act is considered “willful” under the Administrative Procedure Act (5 U. S. C. § 558 (c)) if the violator “(1) intentionally does an act which is prohibited, -irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements.” *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff’d mem.*, 582 F. 2d 39 (5th Cir. 1978); and *In re James E. Stephens, et al.*, 58 Agric. Dec. 149, 180 (1999). Jewel Bond’s chronic failure to comply with the Animal Welfare Act and the regulations and standards, throughout the year that followed her signing the consent decree, constitutes obvious and careless disregard of the statutory and regulatory requirements, and her violations are clearly willful. *See Stephens, supra*, at 180

Jewel Bond’s testimony and actions demonstrate a lack of good faith compliance with the Animal Welfare Act, and the regulations and standards that apply to her as a licensed dog dealer. She has obstinately refused to heed specific APHIS instructions. She became so incensed when told by an APHIS investigator that a building in her facility still did not meet applicable standards, she removed some ten dogs it housed and put them outside on a cold winter night when the temperature was only 20 degrees Fahrenheit. (TR 274-278). Her obstinacy, her fierce temper that can blind her to the needs and welfare of her dogs, her history of previous violations, and the gravity of her present violations which ignored basic needs of the dogs and puppies that she sells in interstate commerce, combine to require the imposition of a substantial sanction to achieve compliance and deter future violations.

I have accepted the recommendations of APHIS officials which I have concluded fully accord with the Animal Welfare Act’s sanction and civil penalty provisions. If each standard that was found to have been violated at each of the three inspections is treated as a single violation, Jewel Bond committed 12 violations. Arguably, there were multiple violations of several of the standards. Therefore, the \$10,000.00 civil penalty that is being assessed is far less than may be imposed by applying the \$2,750.00 per violation amount authorized by the AWA against, at a minimum, 12 violations. A one year suspension of Jewel Bond’s dealer’s license is also presently indicated in that the prior, lesser thirty day suspension was an ineffective deterrent. The recommended inclusion of cease and desist provisions is also appropriate and needed. Accordingly, the following Order is being entered.

ORDER

It is hereby ordered:

1. Jewel Bond, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Failing to construct and maintain housing facilities for animals so that surfaces are free of jagged edges or sharp points, and may be readily cleaned and sanitized or be replaced when necessary;

(c) Failing to provide for the rapid elimination of excess water and waste from housing facilities for animals and properly maintaining the drainage systems for waste disposal;

(d) Failing to maintain primary enclosures for animals in a clean and sanitary condition, that have no sharp points or edges that could injure animals, and have floors that are constructed in a manner that protects the animal's feet from injury and do not allow their feet to pass through any opening in the floor;

(e) Failing to establish and maintain effective programs for the cleaning of primary enclosures and for the control of pests.

2. Jewel Bond is assessed a civil penalty of \$10,000.00. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent by Fed-Ex, UPS, or another overnight delivery service to:

Brian T. Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division, Room 2325 A, South Building
1400 Independence Avenue, SW
Washington, DC 20250-1417

3. Jewel Bond's dealer's license is suspended for a period of one year and continuing thereafter until she demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act, the regulations and standards issued under it, and this order, including payment of the civil penalty imposed herein. When

respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied this condition, a supplemental order shall be issued in this proceeding upon the motion of the Animal and Plant Inspection Service, terminating the suspension.

This decision and order shall become effective without further proceedings 35 days after the date of service thereof upon Jewel Bond, unless there is an appeal to the Judicial Officer by a party to the proceeding within 30 days after receiving this decision and order. In the event neither party files an appeal, payment of the civil penalty shall be sent to and received by Brian T. Hill within 60 days after service of this decision and order on Jewel Bond. The certified check or money order shall state upon it that it is in reference to AWA Docket No. 04-0024. Also, in the event neither party files an appeal, the one year suspension shall commence on the 60th day after service of this decision and order on Jewel Bond.

In re: JEROME SCHMIDT, D/B/A TOP OF THE OZARK AUCTION.
AWA Docket No. 05-0019.
Decision and Order.
Filed February 10, 2006.

AWA – Auction barn sales – Refusal of access – Inspections, risk based, when not.

Frank Martin, Jr., for Complainant.
Jerome A. Schmidt, D.V.M for Respondent.
Decision and Order filed by Administrative Law Judge, Peter M. Davenport.

DECISION AND ORDER

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant] instituted this disciplinary proceeding by filing a Complaint on June 22, 2005 under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [hereinafter the Act] and the Regulations and Standards [hereinafter Regulations and Standards] promulgated thereunder. (9 C.F.R. §§ 1.1 *et seq.*). The Complaint alleges that Jerome Schmidt, an individual doing business as Top of the Ozark Auction [hereinafter Respondent] willfully violated the Regulations and Standards. Complaint, ¶¶ II-XI.

JEROME SCHMIDT d/b/a TOP OF THE OZARK AUCTION 61
65 Agric. Dec. 60

The Respondent answered, denying the factual allegations contained in the Complaint and indicating that the facility has been found by many repeat consignors and buyers to be “an ideal venue for finding, replacing, and dispersing breeding stock. (Answer, pp 1-6).

An oral hearing was held on December 6, 2005 in Springfield, Missouri. The Complainant was represented by Frank Martin, Jr., Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. The Respondent, not represented by counsel, participated *pro se*, assisted by his wife, Karen Schmidt. The record in this case consists of the pleadings filed by the parties, the testimony of the four witnesses called by the Complainant, the thirteen witnesses, including the Respondent called by the Respondent and the 28 exhibits which were admitted during the course of the hearing.¹ Both parties have submitted post-hearing briefs in support of their respective positions.

The Respondent, Jerome A. Schmidt, is a veterinarian who has held a USDA license as a Class B Dealer since 1997.² Tr. 210, 290. The violations alleged in the Complaint are based upon ten inspections, all conducted by Sandra Meek, a USDA Inspector, at the Respondent’s Top of the Ozark Auction facility where he conducts dog auctions which are open to both dealers and to the general public. Auctions at the facility are conducted only six or seven times per year, exclusive of full dispersal sales. Tr. 212. The auctions are conducted in a multi-purpose structural steel building. Half of the building contains cages for holding the dogs that are being sold³ and is used for storage of items including hay. The other half contains the auction stand and the area for sale attendees, with the auction stand adjacent to the cage area situated so that the cage area is to the auctioneer’s back. Tr. 213. Although the cage area contains approximately 400 steel and wire cages, no more than 240 are used for any particular sale. Tr. 212. The number of dogs sold at the facility increased from 890 in 2000, 1219 in 2001 to a high of 1342 in 2002, with the numbers sold in 2003 and 2004 only slightly less than the

¹ Complainant’s Exhibits 1-16 and 37-48 were admitted.

² CX 1-CX 5 are copies of the Respondent’s applications for annual renewals of his license for 2001 through 2005. CX 6 is a copy of the Respondent’s current license which bears an expiration date of March 24, 2006.

³ Dogs are received at the facility and delivered to the purchasers on the day of the sale. Sales commence around 11:00 AM and are completed before 5:00 PM the same day.

number for 2002. Similarly, the gross dollar amount generated from commissions and fees on the sales increased from \$15,500 in 2000 to \$44,149 in 2004.⁴ Although the Answer which was filed denied all of the allegations contained in the Complaint, at the hearing, the Respondent conceded that some of the violations cited by the USDA Inspector were valid,⁵ denigrated the severity of the majority of the violations written up and emphatically disputed the balance. Tr. 300-302.

Implicitly embedded in his defense to the alleged violations is a strongly held and emotionally charged belief that the Respondent, those associated with him (including his wife⁶), and those employing his services as a veterinarian are being singled out as targets of harassment and increased scrutiny and inspection by USDA Inspectors. Dr. Schmidt's involvement with another Respondent was previously noted by Administrative Law Judge Dorothea A. Baker in *In re Marilyn Shepard, d/b/a Cedarcrest Kennel*, 61 Agric. Dec 478 (2002). In that case, there was indication in the record that "a superior to these inspectors [testifying in the case] indicated that he wanted to get the Respondent and to make an example of her." *Id* at 484. In giving great weight to the testimony of Dr. Schmidt whom she described as "an extremely qualified and reliable witness" (*Id* at 487) whose testimony differed significantly from that given by the inspectors, Judge Baker concluded "The evidence seems clear that the inspectors⁷ were, for whatever reason, going out of their way to find violations." *Id* at 487. The disproportionately high frequency of inspections of the Respondent's facility which is operated on a part-time or infrequent

⁴ CX 1-CX 5.

⁵ The Respondent's position is explained in more detail in his brief where he explains that some of what was observed related to transport containers used by the consignors which would not be a violation attributable to his facility. Respondent's Brief, pages 21-22. Although included on the Inspection Report, the allegation concerning the transport containers was not included in the complaint.

⁶ The Respondent's wife, Karen Schmidt, is the respondent in a separate proceeding. AWA Docket No. 03-0024 currently pending before Chief Administrative Law Judge Marc Hillson.

⁷ Inspector Jan Feldman, one of the inspectors criticized by Judge Baker, appeared as a witness and testified against Dr. Schmidt in this action. She was present at five of the ten inspections (November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003 and June 6, 2004). CX 9, CX 10, CX 12, CX 13 and CX 15.

basis,⁸ the timing of findings of non-compliance beginning after his presence at one of the inspections and later participation in the *Shephard* case; the fact that violations were written for conditions which appear to have existed since the facility opened without being raised in prior or in subsequent inspections; the clear departures from published Agency policy, inspection protocols, and procedures; the inconsequential and subjective nature of some of the violations advanced in this proceeding; and the failure to corroborate more serious charges with objective evidence when the means to do so were obviously available all lend significant credence to his belief that he has been singled out for questionable treatment.

A total of 39 violations were alleged to have been observed during the course of the ten inspections conducted by Ms. Meek. Complaint ¶¶ II-XI. Of these, the Complainant withdrew two of the violations at the hearing and did not request findings for a third. Tr. 62; Complaint ¶¶ IV A.4, VI A.3, and VIII A.2. The remaining 36 alleged violations fall into the general categories of housing standards, structural soundness, soundness and security of the enclosures, house keeping and sanitation, trash on the premises, sufficiency of the lighting, the adequacy of the Respondent's insect and rodent control program, and most seriously, interference and refusal of access to the USDA Inspector.⁹

The Act authorizes the Secretary of Agriculture to promulgate the standards and other requirements governing the humane handling,

⁸ Dr. Gibbens testified that a risk-based inspection system is used to inspect licensed facilities, with the number of inspections based upon the expectation of finding non-compliance. Tr. 82. Despite this testimony, the first of the inspections finding non-compliance followed an inspection only one month prior in which no violations were noted. Four inspections were conducted in 2001 (March 18, 2001 [no violations], April 22, 2001, October 14, 2001 and November 4, 2001), two in 2002 (March 21, 2002 and October 13, 2002), three in 2003 (March 23, 2003, June 1, 2003 [no violations], and November 2, 2003) and three in 2004 (March 21, 2004, June 6, 2004 and September 12, 2004). The inspection on June 1, 2003 was conducted by Inspectors Meek and Jerry West. Tr. 74. The facility was also visited on September 17, 2004; however, no violations were reported on that occasion. (The photographs marked CX 17-36 were taken on that date, but were not admitted.) As the facility was only operated six or seven times a year, the facility was inspected more than 50% of the time it operated in 2001 and nearly that percentage in both 2003 and 2004. While facilities with chronic violations are targeted for inspection more frequently than other facilities as part of a risk-based inspection system, it would appear unlikely that any full-time facility has been inspected with anywhere near this percentage of days that it was operated.

⁹ Although interference with an inspector is generally considered sufficiently serious to warrant suspension or revocation of a dealer's license, Dr. Gibbens, the USDA sanction witness was of the opinion that a civil penalty would be sufficient.

housing, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, carriers and intermediate handlers. The Secretary has delegated the responsibility of enforcing the Act to the Administrator of the Animal and Plant Health Inspection Service (APHIS). The regulations established under the Act are contained in Title 9 of the Code of federal Regulations (9 C.F.R. Chapter 1, Subchapter A, Parts 1, 2, and 3).

The following extract from the *Federal Register* sets forth an explanation of the Agency philosophy and position on inspections:

Enforcement of the AWA [Animal Welfare Act] is based upon random, unannounced inspections to determine compliance. In addition, APHIS uses a risk-based assessment to determine minimum inspection frequency. After inspection, all licensees are given an appropriate amount of time to correct any problems and become compliant. This cooperative system has been more effective than enforcement actions for each citation. *Federal Register*, Vol. 69, No. 134, Wednesday, July 14, 2004 at page 42094.

The above extract prefaced a regulatory change to 9 C.F.R. 2.126(b) which added a provision that a responsible adult must be made available to accompany officials during the inspection process. Prior to July 14, 2004, there was no such requirement.¹⁰ One of the comments to the proposed change suggested that APHIS inspectors should inspect the property unaccompanied if no responsible adult were present. In responding to the comments, the following Agency position was clearly and unambiguously enunciated:

We do not perform unaccompanied inspections for many reasons, including the safety of the inspector. *Id.* at 42095

Provisions contained in The Animal Care Resource Guide, Dealer Inspection Guide¹¹ (which predate the regulatory change) are consistent and reflect this philosophy:

Prior to conducting the actual inspection:

- . contact the licensee or authorized representative
- . introduce yourself in a professional manner

¹⁰ CX 1-CX 5 indicate in Box 3 of the Application for License-License Renewal that the Respondent was the sole individual authorized to conduct business. Beginning in September of 2004, Dr. Schmidt designated Ronnie Lee Williams, an individual employed as a security guard, to accompany any inspectors. Tr. 197-202.

¹¹ This publication is available on the USDA Website.

JEROME SCHMIDT d/b/a TOP OF THE OZARK AUCTION 65
65 Agric. Dec. 60

- state the purpose for the visit
- show your USDA badge and ID if requested
- if appropriate, provide a business card

The inspector must be accompanied by the licensee or the licensee's designated representative (who should be at least 18 years of age), when conducting the inspection. Animal Care Resource Guide, Dealer Inspection Guide, Section 6.1.1 (4/00).

The Guide also sets forth the procedures for the Exit Briefing:

EXIT BRIEFING The exit briefing is the time to summarize everything that occurred during the inspection.

- Take as much time as necessary during this opportunity to:
- discuss the non-compliant items in detail with the licensee or the facility representative
 - assess his/her understanding of the problem(s)
 - discuss what he/she may do to correct the problem, if asked
 - make sure that licensee/representative understands what is expected of him/her
 - educate him/her about animal welfare and the AWA regulations and standards

- The exit briefing includes, but is not limited to:
- presenting the licensee or facility representative with a copy of the inspection report
 - reading the inspection report with the licensee/facility representative
 - reviewing the details of the inspection report
 - answering questions
 - obtaining signatures
- Animal Care Resource Guide, Dealer Inspection Guide, Section 6.2.1 (3/99).

The testimony of Ms. Meek makes it clear that she understands how inspections are supposed to be conducted:

Q Ms. Meek, would you briefly describe for us how you go about conducting an inspection?

A. Initially, when we arrive on site at the facility, we contact the licensee or a designated representative. And it's my practice

to go through the facility first after that initial contact, identifying any or all non-compliances with the licensee, suggesting corrective measures, and then follow up with a review of the required paperwork.

And at the end of this, we conclude with an exit interview ensuring that the licensee does understand that these are non-compliant items. (Tr.13).

While this misleading testimony might be reflective of how her inspections are normally conducted at other facilities, no effort was made during her direct examination to indicate that her inspection technique at the Respondent's facility was different than what she had described other than to indicate that she mailed the inspection reports to the Respondent rather than presenting him with a copy prior to her departure from the premises.¹² On cross-examination however, she acknowledged that she had notified the Respondent of her presence at the facility only twice, once when she visited the facility for the very first time when she was introduced by Jim Depew, another inspector and when she conducted an inspection accompanied by Dr. Sabala:

Q Did you ever introduce yourself when you came to my sale barn, ever?

A Yes, I have.

Q When?

A During the inspection with Jim Depew, when Dr. Sabelli¹³ [phonetic] was with me during the last inspection that I was at your facility.

Q And you done - - Jim Depew introduced you when he came the first time.

A Correct. (Tr. 49-50).

Far from supporting the factual allegations contained in the Complaint, the record before me more clearly establishes that the inspections of the Respondent's facility were based upon some motivation or rationale other than the risk-based inspection system described by both Dr. Gibbens (Tr. 82) and contained in the previously cited portion of the *Federal Register*. The disproportionately high number of inspections previously noted, the findings of non-compliance for structural components that had been inspected numerous times in the past as well as subsequent to the inspections in question here without

¹² No testimony was presented that an exit briefing was conducted for the inspection on September 12, 2004. CX 16 bears the notation "refused to sign".

¹³ This appears to be Dr. David Sabala according to CX 16.

JEROME SCHMIDT d/b/a TOP OF THE OZARK AUCTION 67
65 Agric. Dec. 60

violations being noted¹⁴ and the trivial, if not frivolous nature of the alleged violations for insufficient lighting,¹⁵ cobwebs¹⁶ and trash, including soda bottles and discarded food containers in a facility occupied by the general public during the course of an auction sale¹⁷ all raise significant questions as to the impartiality or fairness of the inspections conducted at the Respondent's facility. The testimony of numerous witnesses, including a veterinarian employed by the Missouri Department of Agriculture and two individuals associated with the American Kennel Club, all tend to dispute the general conditions of non-

¹⁴ Fourteen violations are based upon structural requirements. Of these, four are written for cages with sharp or jagged edges (October 14, 2001, November 4, 2001, June 6, 2004 and September 12, 2004). Inspection of one of the cage panels reflected that what had been alleged as wire protruding into the cage was in fact nylon twine. (Tr. 200-202, 228-242, CX 48) CX 40 which does show a cage with broken wire (without any dog in the cage) but was not alleged as a violation. Two violations related to bare wire flooring (October 14, 2001 and November 4, 2001); however the later one was dropped. Ms. Meek's conclusory testimony failed to establish by competent means that the suspended wire flooring was smaller than 9 gauge. Three violations relate to the failure to have waste drains (April 22, 2001 [which alleged failure to remove excreta], October 14, 2001 and November 4, 2001). Waste drains are not necessary if there are catch pans filled with sufficient absorbent material to catch waste. Other structural violations allege rust and pitted surfaces on the support structures holding the cages. CX 42 shows an extremely sturdy support system with angle iron over the exposed edges of the wood. Even if the angle iron surface did have some rust, it would in no way affects the soundness of the structure. Other photographs which indicate the presence of rust appear to be of galvanized metal which is mildly oxidized.

¹⁵ Two of the alleged violations (March 21, 2004 and June 6, 2004) were for insufficient lighting to conduct the inspection. The light in the facility is adequate however to read the sales program (Tr. 105), inspect AKC microchip information and compare it with a print out (even by a woman with older and dimmer eyesight) (Tr. 144) and presumably for prospective purchasers to visually inspect the dogs in their cages. Moreover, the section cited (3.1(d)) requires only that the lighting be sufficient to carry out husbandry requirements.

¹⁶ Three such violations are alleged (March 23, 2004, March 21, 2004 and June 6, 2004). CX 37 reflects cobwebs on a rafter in the facility and CX 38 which is alleged to show spider webs in a support structure. The material contained in the photograph also resembles the absorbent material used in the facility. Dr. Schmidt's testimony which was not disputed that spiders pose no threat to the animals is credible. CX 45 and CX 46 also reflect spider webs in the support structure as opposed to the primary enclosure. CX 47 is a photo of a mud dauber nest identified by Dr. Schmidt as being in an area not available to the general public.

¹⁷ Four such violations are alleged (November 2, 2003, March 21, 2004, June 6, 2004 and September 12, 2004).

compliance which are alleged and convey the positive impression that the Top of the Ozark Auction is a well run operation with high standards. The Respondent's witnesses included a number of dealers, breeders and employees who uniformly and without exception attested to Dr. Schmidt's exacting standards of cleanliness and his insistence on doing things correctly.¹⁸ Of significantly greater concern to me after hearing the evidence is the egregious and repeated failure of the inspector to follow Agency policy and well-defined APHIS inspection protocols and procedures in this case. It is abundantly clear that the inspections of the Respondent's facility were not based upon a risk-based assessment, the inspections did not conform to established Agency procedures, and the subjective nature of the inspector's findings are at best inconsistent with either prior or subsequent inspection reports or the preponderance of the evidence. Given these factors, it is difficult to place much, if any, reliance upon either of the two inspectors testifying in this case.

For the above reasons, the following Findings of Fact and Conclusions of Law will be entered.

FINDINGS OF FACT

1. As the inspection of the Respondent's facility on March 18, 2001 found no items in non-compliance, the subsequent frequent inspections of the Respondent's auction facility commencing on April 22, 2001 were inconsistent with and not based upon an objective risk based assessment.

2. The number and frequency of the inspections conducted at the Respondent's facility is grossly disproportionate to the total number of days that the facility operated.

3. None of the ten inspections upon which the Complaint in this action are based, with the possible exception of the one conducted on September 12, 2004, conform to the requirements of established and published Agency guidelines or policy.

4. The failure of the inspector to conduct an Exit Briefing as required by the published guidelines operated to significantly impede or defeat

¹⁸ Tr. 99-102, 104-105, 128-130, 134-143, 150-153, 163-166, 179-187, 197-202 and 243. According to Jessica Lea Ann Vandergrift, Dr. Schmidt was an exacting taskmaster. Tr. 166.

JEROME SCHMIDT d/b/a TOP OF THE OZARK AUCTION 69
65 Agric. Dec. 60

the intent of the cooperative compliance program described in the previously cited extract from the *Federal Register*.

5. The inspector's failure to follow Agency procedures was observed by the other USDA personnel on several occasions, including other inspectors as well as a Veterinary Medical Officer, without corrective action being taken by them to insure that proper procedures were followed.

6. The conduct of the inspector in this case, including the frequency of inspections, the improper, inappropriate, unsupported and/or in many cases subjective violations is questionable at best.

7. The inspector's findings in the ten inspection reports are exaggerated, biased and unsupported by sufficient credible objective evidence of such non-compliance as would warrant punitive action or imposition of a pecuniary penalty against the Respondent.

CONCLUSIONS OF LAW

1. The inspector's conduct and repeated failure to follow Agency procedures and guidance are egregious and so tainted the inspection results as to preclude their being used for the purposes of an enforcement action.

2. The factual allegations of the Complaint alleging non-compliance with the Regulations and Standards on the part of the Respondent were not supported by credible evidence.

ORDER

1. The Complaint against the Respondent is **DISMISSED**.

2. The Administrator, Animal and Plant Health Inspection Service is directed to take appropriate corrective action to insure that published Departmental policy and procedures as expressed in the *Federal Register* and the Animal Care Resource Guide, Dealer Inspection Guide are followed by APHIS personnel in future inspections.

**In re: KAREN SCHMIDT d/b/a SCR KENNELS.
AWA Docket No. 03-0024.
Decision and Order.
Filed March 7, 2006.**

AWA – Allegations, unsupported.

Robert Ertman for Complainant.
Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision, I find that Respondent Karen Schmidt d/b/a SCR Kennels committed seven violations of the Animal Welfare Act. I also find that Complainant Animal and Plant Health Inspection Service failed to meet its burden of proof with regard to nineteen additional violations alleged in the complaint. After weighing the gravity of the violations, I am assessing a civil penalty of \$2,500 against Respondent, and I am not suspending or revoking her license under the Act.

Procedural History

On April 16, 2003, the Administrator of the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture issued a complaint under the Animal Welfare Act alleging that Respondent Karen Schmidt d/b/a SCR Kennels willfully violated the Animal Welfare Act and the regulations thereunder on numerous occasions. Specifically, the complaint alleged that violations were discovered at SCR during the course of five different inspections in 2000, 2001 and 2003. Three violations were alleged as a result of the January 24, 2000 inspection; four violations were alleged as a result of the July 18, 2000 inspection; six from the May 8, 2001 inspection; nine from the October 24, 2001 inspection; and eleven from the January 9, 2003 inspection. The complaint was served on Respondent on May 6, 2003 and Respondent's answer, denying or questioning each of the allegations, was filed with the Hearing Clerk on May 12, 2003. Respondent requested a hearing on the allegations in the complaint.

A hearing was originally slated to commence on September 8, 2004, but was rescheduled and I conducted a hearing on November 3-4, 2004 in Springfield, Missouri. Complainant was represented by Robert Ertman, Esq. Respondent proceeded pro se, but was assisted by Dr. Jerome Schmidt. Complainant called five witnesses and Respondent

called seven, including Dr. Schmidt.

Both parties filed briefs with proposed findings of fact and conclusions of law. In its reply brief, Complainant withdrew its proposed findings of and conclusions relating to the two inspections conducted in 2000. Thus, only the 26 alleged violations resulting from the two inspections conducted in 2001 and the single inspection in 2003 remain for my determination.

The Facts

Respondent Karen Schmidt is an individual doing business as SCR Kennels, located at 6740 Highway F, Hartville, Missouri. CX 6. p.1.¹ She is a retired teacher, and has raised and shown champion quarter horses. Tr. II—79-80. She holds USDA Class A Dealer License #43A2135. CX 6. SCR Kennels is a breeding dog kennel, and at the time of the most recent inspection that is the subject of this proceeding, SCR had 150 breeding females, over 20 breeding males, and a number of puppies. The primary function of SCR Kennels is to sell puppies in commerce, and it sold 442 puppies in 2001. *Id.*

Allegations of inappropriate government conduct

Throughout the course of the hearing, Respondent contended that it had been unfairly singled out by Complainant for a variety of reasons. While I intend to rule only on the existence or non-existence of the violations alleged in the complaint, it is worth noting that a number of witnesses testified, under oath, that USDA inspectors “were on a mission” against Respondent. Respondent attributes this to Dr. Schmidt’s testifying in favor of kennel owners and against USDA at hearings in 1997 and 2001. In the latter case, *In re Marilyn Sheppard*, 61 Agric. Dec. 478 (2002), Administrative Law Judge Dorothea Baker found “The evidence seems clear that the inspectors were, for whatever reason, going out of their way to find violations.” *Id.*, at 487.

Since Dr. Schmidt testified in the 1997 hearing, SCR Kennels, owned and operated by his wife, has been inspected at least ten times. CX 44. This is in addition to annual inspections by State of Missouri officials,

¹ Complainant USDA’s exhibits are cited as “CX.” Respondent Karen Schmidt d/b/a SCR Kennels’s exhibits are cited as “RX.” The transcript for the first day of the hearing is cited as “TR. I” and the transcript of the second day of the hearing is cited as “TR. II.”

who apparently have generally found no violations. Dr. Schmidt testified that other kennels have taken to surreptitiously asking him for advice, because they feared that the USDA would crack down on them if they knew they were directly dealing with him. Tr. II—73-75. He stated that another individual, who he declined to name, was told by a USDA inspector that she should use another auction service than Dr. Schmidt's. Tr. 78. Len Clayton, an inspector with the Missouri Department of Agriculture, testified that he had heard that other kennels were aware of the threat of doing business with Dr. Schmidt, and that it was "common knowledge that USDA was going to take the Schmidts down." Tr. II-7. Mr. Clayton also testified that kennel owners felt that there was a relationship between Dr. Schmidt's name appearing as the veterinarian of record and their getting written up for violations. Tr. I-12. Marilyn Shepherd, who owned the kennel for whom Dr. Schmidt testified in the above-captioned case, indicated that "some of the breeders who had been using Dr. Schmidt . . . had decided that because of pressure from the USDA, that they had decided to no longer use Dr. Schmidt as their attending veterinarian." Tr. I—136-137. Mark Landers, a commercial breeder, testified that after Dr. Schmidt indicated that he believed that James Depue, a USDA inspector, transmitted a disease to Mr. Landers' dogs by not using appropriate protective clothing, Depue advised Landers to no longer list Dr. Schmidt as his veterinarian. Tr. II—46-47. There was no testimony in refutation of these various allegations.

I have made my determinations as to whether violations were present on the dates of the three inspections currently at issue in this matter, based on the evidence presented before me. However, the allegations of Respondent concerning government misconduct, while not being material to my decision, are quite serious. I have referred a copy of the transcript of this hearing to the USDA Inspector General's office for any further action they may wish to take.

The May 8, 2001 Inspection

APHIS Animal Care inspector Sandra Meek inspected Respondent's facility on May 8, 2001. Inspector Meek was accompanied by both Respondent and Dr. Schmidt and recorded her observations in an inspection report. CX 16. Other than the very brief narrative description of the alleged violations contained in CX 16, there was no photographic documentation of the violations alleged at this inspection, nor was there any testimony at the hearing about these violations on behalf of USDA,

other than Ms. Meek verifying that she wrote CX 16.²

With respect to the six willful violations alleged as a result of the May 8, 2001 inspection:

1. There is no reliable evidence to support the allegation that section 3.1(b) was violated as a result of there being an accumulation of weeds. There was no testimony on this allegation, and the inspection report simply states that there was “an accumulation of weed and grass growth around/in the outdoor enclosures which interferes with inspections, cleaning and pest management.” CX 16, p. 2. There is no evidence of the height and thickness of the grass or weeds, or any description of how it would interfere with the above-described activities. As Respondent points out, in CX 44, Daniel Hutchings states that Ms. Meek stated that weeds were 6 to 12 inches or more, but there is no statement in this record that supports his statement. Meek makes no reference to the height of the weeds in her report. Further, as Respondent points out in her brief, it is highly unlikely that weeds of that height would be present that early in the season. Complainant has not carried its burden of proof with respect to this allegation.

2. The evidence does not support a finding of the presence of excessive rust that prevents required cleaning and sanitation of surfaces. The inspection report stated that seven primary enclosure door frames were excessively rusted to the extent that they could not be cleaned and sanitized. Once again, there was no testimony by Complainant on this issue, but just a confirmation by Ms. Meek that she wrote the inspection report which stated the existence of the violation, without any relevant details and without any photographic confirmation. On the other hand, both Dr. Schmidt and Ronnie Lee Williams testified that SCR used Rustoleum paint, which they testified was brown colored and looks like rust in photographs. Tr. II 66-67, 143-144. Nothing was offered to refute their testimony. Without any photographs or samples, and with the only testimony at the hearing being that brown Rustoleum was used on these surfaces, the preponderance of the evidence supports a finding

² Complainant occasionally refers to CX 12 in its brief. The document marked as CX 12, an affidavit executed by Ms. Meek dated March 18, 2001, was never offered into evidence. Furthermore, it basically just states that the May 8, 2001 inspection results are “As noted on the inspection.” Had it been offered into evidence, there presumably would have been questions raised, given that it was dated two months before the May 8, 2001 inspection occurred.

that no violation was committed here.

3. The evidence does not support a finding that outside facilities were not provided with a wind break and a rain break. Once again, there was no oral testimony on this finding on behalf of Complainant. The only evidence presented by Complainant for this inspection date was a statement in Ms. Meek's inspection report that "The wind break for two adult Border Collies has been partially detached from the shelter and needs to be repaired or replaced." CX 16, p. 2. This statement is not even consistent with the charge in the complaint, which states that a wind break and a rain break were not even provided. In the absence of any specifics about the extent of the alleged detachment of the wind break, including whether and to what extent the two border collies alleged to have been impacted were in fact impacted by these conditions, Complainant has not met its burden of proof. Since the regulations only state that a wind break and a rain break are required, and are in effect a performance standard, part of the Complainant's burden is to show how the conditions expose the dogs to wind or rain. In the absence of any statement regarding the extent of the alleged detachment of the wind break, and the degree of exposure to wind that would have resulted, and in the absence of any other documentation of this violation, including photographs, this count must be dismissed.

4. Inspector Meek reported that "sixteen pens in the west side of the red barn . . . have broken wires . . . which need to be repaired." CX 16, p. 3. While the regulation cited prohibits an enclosure from having "sharp point or edges that could injure the dogs," 7 C.F.R. 3.6(a)(2)(I), Inspector Meek's report documents no actual or potential exposure to sharp points or edges that could harm the dogs. There is no photographic evidence, and no observations that would corroborate Complainant's conclusion that this regulation was violated. There must be some nexus shown between allegedly broken wires at the bottom of the pens and the sharp points or edges that could injure the animals. The regulation does not bar broken wires, unless the wires presented potential injury to the dogs. There is no factual allegation that would lead me to conclude that sharp points or edges were present at SCR on May 8, 2001. Complainant does not even make a prima facie showing regarding this violation.

5. The fifth allegation arising out of the May 8, 2001 inspection was that feeding receptacles were excessively chewed and worn and could not be sanitized. In support of this allegation, Complainant proffered

zero testimony, zero photographs, and a conclusory statement in the inspection report that “twenty-four food receptacles that are excessively chewed, worn and no longer able to be cleaned and sanitized.”

On the other hand, SCR witness Ronnie Lee Williams, holder of a Missouri Class C license in Sanitary Water Supplies, Tr. I-143, testified to his sanitizing of plastic pails with chewed areas. He stated that it took approximately four minutes to sanitize a plastic pail and that even though there were chew marks and some discoloration, the pail was sanitized. Tr. I-149, RX 36. His testimony showed that the edges of a feeding pail could be chewed without preventing it from being easily sanitized. RX 42 (bottom photo). Complainant had no challenges to this testimony either in cross-examination or in rebuttal. Complainant has failed to show by a preponderance of the evidence that these twenty-four food receptacles were made of a non-durable material, and were no longer able to be cleaned and sanitized.

6. The final allegation of violation based on the May 8, 2001 inspection was that water receptacles were not kept clean and sanitized. As with the previous charge, the only evidence proffered by Complainant was the statement in the inspection report that “There are five water receptacles that are chewed, worn and no longer able to be cleaned and sanitized.” CX 16, p. 2. There was no evidence allowing me to determine whether and to what extent these five water receptacles were chewed or worn. Apparently the type of pails used for feeding and watering were the same or similar, and Mr. Williams’ unrefuted testimony that these receptacles were easily cleanable is persuasive. Dr. Schmidt testified that when a pail is found that is torn up, they simply throw them away, and that the use of plastic pails, particularly in the cold weather, is more beneficial to the dogs because it takes longer for the water to freeze. Tr. II-92-99. There is no basis for me to find that there was a violation of 7 C.F.R. §3.10 on the date of the inspection.

The October 24, 2001 Inspection

APHIS Animal Care Inspector Sandra Meek again inspected SCR on October 24, 2001. She was accompanied during this inspection by Jan Feldman. The two inspectors were accompanied by both Respondent and Dr. Schmidt. Their findings were memorialized in an inspection report. CX 17. In addition to the narrative in the report, Ms. Feldman took a number of photographs to document their observations. CX 18-27.

With respect to the nine willful violations alleged as a result of the October 24, 2001 inspection:

1. The complaint charges a violation of section 3.1(b) of the regulations for an accumulation of weeds at the kennel. Inspector Meek testified that CX 18, a photograph taken that day by Inspector Feldman, showed “excess weeding and grass growth, which can harbor insects, pests, disease . . .,” Tr. I-33, and stated in her inspection report, CX 17, that the grass and weeds needed to be cut to prevent rodents and pests from breeding and “to protect the health and welfare of the animals.” Inspector Feldman testified that she did not know how tall the grass was or how thick it was, and she did not know the type of diseases which could be spread. Tr. I—94-95.

Dr. Schmidt testified that the grass and weeds evident in CX 18 were generally about four inches high—“that it’s getting time to be cut, but it’s not where it’s detrimental to the dogs.” Tr. II-113. Dr. Schmidt testified that the fence depicted in the picture was 28 inches high, so that it appears that with the exception of one or two shrubs, the grass/weed height was not much more than four inches. Tr. II-111-113. The area depicted in CX 18 is very small, and the grass/weed level, while being above the height of a perfectly manicured lawn, does not appear to be a violation of the regulations. In the absence of any regulatory definition or convincing testimony as to what a violative accumulation of weeds is, Complainant has not met its burden here.

2. The second charge arising out of the October 24, 2001 inspection was that “surfaces of housing facilities were not kept free of excessive rust that prevents the required cleaning and sanitization of the surfaces.” The inspection report, CX 17, referred to seven primary enclosures where the metal doors were “excessively rusted,” and CX 20 consisted of four photographs which showed that a number of the enclosures had doors which were indeed rust colored. Inspector Meek testified that the doors were rusted and that one of the pictures showed that the wires were rusted to the point that they were broken. Tr. I—33-34. Dr. Schmidt testified that the doors were painted with Rustoleum, which was rust colored, and which inhibits the formation of rust. Tr. II—66-67. No scraping or samples were taken from these enclosures that would aid me in determining whether the doors were in fact rusted or just painted with Rustoleum as Dr. Schmidt testified without contradiction. Since the burden of proof is on Complainant, I must find that this count has not been proven.

3. The complaint alleges that chemicals and cleaning substances were stored in an unsafe manner, in violation of 9 C.F.R. 3.1(e). The inspection report, CX 17, indicates that chemicals such as paints and paint thinners were stored in SCR's red barn in proximity to bulk food supplies, rather than being stored in a cabinet or a separate area. There was no photographic documentation of this allegation, nor was there any substantive testimony that would support a violation finding here.

4. The complaint alleges that outdoor housing was not large enough to allow each animal to sit, stand and lie in a normal manner and to turn about freely. The gist of this count was that the kennel housing in a particular pen was not considered adequate to accommodate the number of dogs that were in that pen. Inspector Meek stated that CX 21, a photograph depicting a number of dogs in the corner of a pen, demonstrated that only two shelters, plus a lean-to which did not qualify as a shelter from the elements, was insufficient shelter for the eleven dogs in the enclosure. There was no demonstration of the size of the shelters that were in this pen, and why they were inadequate for the number of dogs housed. Looking at CX 21, which only depicts what appears to be a small corner of the pen, it is impossible to discern the nature and number of shelters present. Without any documentation as to the size of the shelters in the pen, a determination as to their adequacy cannot be made.

Respondent contended that the lean-to covered three doghouses, but offered no reliable documentation of this statement. Dr. Schmidt stated that with his training as a practicing veterinarian for many years, his judgment was that the shelter was adequate for these dogs. While I note that neither party presented me with convincing evidence as to the number of dogs involved and the number and dimensions of the shelters, the fact that I cannot determine from Complainant's photograph a reliable depiction of the conditions present on the day of the inspection, coupled with the requirement that it is Complainant's burden to show that the regulations were violated, leads me to find that a preponderance of the evidence does not support a violation here.

5. Complainant's allegation that outside facilities were not provided with a wind break and rain break at the entrance is not supported by the evidence. The regulation provides no specific measurements or standards as to the size or shape of the wind or rain breaks, so the key presumably is whether the shelter is protected against wind and rain. The only testimony proffered by Complainant on this count was the

statement by Inspector Meek describing CX 22 as a photograph of a shelter “without a proper wind break,” and that the opening in front of the shelter was too large so that the wind and rain would go through. Tr. I—35-36. In CX 17, Meek mentioned but did not identify or photographically document two other outdoor wooden shelters as not having a wind break at the entrance, but there was no further testimony on the allegation. Meek also confirmed that there are no specifications for wind breaks and water breaks, but that the standard is they have to “protect the animals from the wind and the rain.” Tr. I-60.

Dr. Schmidt testified in great detail on the nature and quality of the wind breaks at SCR, demonstrating that SCR’s pens were designed to reduce the effects of wind and rain, and pointing out that for the one shelter that had the gap in front, that there was another board inside the shelter that prevented wind or rain from reaching the dogs inside. Tr. II—88-89. Dr. Schmidt stated that his judgment as to the adequacy of these shelters was superior to that of the USDA inspectors, Tr. II-84, and that SCR’s shelters were as good or better than those that he said were recommended by USDA. Dr. Schmidt’s detailed testimony in this area went unchallenged, and given the dearth of testimony proffered by Complainant, no violation is established here.

6. The sixth charge arising from the October 24, 2001 inspection concerns allegations that SCR did not maintain its primary enclosures in such a manner as to protect the animals from injury. Complainant has documented a number of incidences where broken wires or sharp edges in the enclosures presented potential injury hazards to the dogs sheltered therein. Inspector Meek testified that the six photographs contained in CX 23 demonstrated that several wire enclosures had broken wires, which were protruding in a manner which could cause harm to the dogs. Tr. I—37-38. In CX 17, her inspection report, Inspector Meek stated that eighteen primary enclosures posed safety threats to the dogs as a result of broken wires or side/bottom panels, but her testimony and the photographs only appear to document two such instances. Tr. I—66-67.

From Dr. Schmidt’s testimony, it appears that repair of enclosures is a constant activity at SCR, particularly with dachshunds, which have a tendency to chew or claw at the enclosures. It was evident from CX-23, and from photographs proffered by Respondent, that there were many shiny clips on the enclosures that indicated repairs were made not long before the inspection—i.e., that Respondent appeared to be fairly diligent in monitoring and repairing broken wires. On the other hand, it is uncontroverted that at least two broken wires were in a position to potentially cause injury to the dogs, and thus I hold that Complainant

has proven a violation existed at the time of the inspection.

7. The seventh count in this inspection was that feeding receptacles were excessively chewed and worn and could not be adequately cleaned and sanitized. Inspector Meek indicated in CX 17 that five excessively chewed or rusted food receptacles were not able to be cleaned and sanitized. She testified that a rusted surface could not be properly cleaned and sanitized. Tr. I—69. CX 24 appeared to show that several food receptacles had some rust on their outside surfaces, but there is absolutely no evidence of any excessive chewing on these receptacles. Likewise, there is no evidence that there was any rust on the inside of these feeders, nor is there any evidence that any food was contaminated in any way by the rust.

Dr. Schmidt testified that there was no water in the feed or any other contamination and that the feeders were in good working order. Tr. II—142. Mr. Williams testified that the feeders could be easily sanitized with chlorine. Tr. I—146-147. In the absence of any evidence that the light coating of rust on top of and on the outside surfaces of the feeders would have prevented the cleaning or sanitizing of these feeders, Complainant has not met its burden of establishing a violation here.

8. Complainant once again cited SCR for having water receptacles that were not kept clean and sanitized. While CX 25 demonstrates that at least one plastic water container was chewed around the edges, that does not in itself indicate that it cannot be cleaned or sanitized. As I have already discussed with reference to the final count based on the May 8, 2001 inspection, I have no basis to find a violation of the cited regulation.

9. The final count derived from the October 24, 2001 inspection was an alleged failure to keep the kennel clean. Inspector Meek testified to “an accumulation of dirt and debris on the floor” of the whelping room, Tr. I-40-41, CX 26, stating that the dirt and other objects on the floor reflect that there was not a routine cleaning of the room. In addition, Ms. Meek discussed CX 27, a photograph showing an accumulation of spider webs in the ceiling surface area of the red barn, which also indicated to her that “. . . the facility is not being cleaned on a regular basis. Proper practices are not being followed.” Tr. I--42. Dr. Schmidt stated that the inspection occurred before the cited areas had received their daily cleaning.

Looking at the photographs in CX 26, I do not see an accumulation

of dirt or debris that is indicative of a violation. I saw nothing in these photographs that would indicate a likelihood that the area could be a breeding or living area for pests, as alleged in the complaint. At worst, it looks like an area that could use a little cleaning, but hardly to the degree that constitutes a housekeeping violation. Nor do spider webs in the rafters of a barn, high above the area where dogs would be present, appear to present a hazard to the dogs. I find no violation of 9 C.F.R. §3.11 on the date of this inspection.

The January 9, 2003 Inspection

On January 9, 2003, Inspector Meek once again inspected SCR Kennel. On this occasion, Ms. Meek was accompanied by APHIS Senior Inspector Daniel Hutchings. Inspector Meek prepared an inspection report, CX 33, and Inspector Meek took photographs, CX 34-43. The inspectors were accompanied by both Karen Schmidt and Dr. Jerome Schmidt.

With respect to the eleven willful violations alleged as a result of the January 9, 2003 inspection:

1. Inspector Meek once again determined that “surfaces of housing facilities were not kept free of excessive rust that prevents the required cleaning and sanitization of the surfaces.” Other than her statement that two metal door frames needed to be repaired or replaced, there was no documentation of this allegation. No photographs were taken, and no explanation was made as to the nature of the inadequacy of these two door frames. No violation of 9 C.F.R. 3.1(c) has been demonstrated by Complainant.

2. The complaint alleges that chemicals, cleaning substances and food supplies were stored in an unsafe manner. In particular, Inspector Meek testified that she observed an open bag of chemical insecticide near where the bulk food is stored. Tr. I—42-43. Exhibit 34 consists of two photos which document this observation.

Respondent did not deny that the open bag of insecticide was located as described by Inspector Meek, but rather downplayed its significance. Dr. Schmidt identified the insecticide as Rotenone and emphasized that it was a safe insecticide for dogs and humans, and was commonly used in gardening. Tr. II—125-126. He stated that there were no open bags or food containers near the Rotenone and that it presented no danger. Tr. II—124-125.

Complainant has sustained its burden in regard to this allegation.

While an insecticide may be safe to use under certain conditions, it would be hard to argue that it is permissible to store it in the same area that food is being stored, particularly where the regulation is clear that it must be stored either in a separate area or in a cabinet.

3. The third count in the complaint arising from the 2003 inspection was that “Housing facilities were not equipped with a drainage system that minimized contamination and disease risks.” CX 33 discusses two aspects to this charge. First, the report mentioned that waste from two waste removal drainage pipes was running along a fence line rather than into the lagoon. Second, the report indicated that in the “small room” of the red barn, waste materials from the upper enclosures was being washed down between the back of the lower enclosures and the wall. There were no photographs and essentially no testimony on behalf of Complainant to support the lagoon allegation. With respect to the enclosures in the red barn, Complainant proffered CX 35 which appears to show that some hair had been trapped in the upper part of the lower enclosure.

Ron Williams, who has expertise in the area of waste management, testified that the lagoon system was in good shape and was working properly. The lagoon system, as described by Respondent in RX 39, appeared to be clearly separated from the dog enclosures by a fence. Mr. Williams testified it was an aerobic lagoon and was “highly serviceable.” Tr. I—155-156. He was never cross-examined on his conclusion, nor was any evidence presented that would contradict his conclusion. Thus, I conclude that there was no violation with respect to the lagoon.

I also conclude that the testimony on CX 35 is not persuasive in demonstrating a violation of the regulations. From my observation of the photograph, it appears that there is just some accumulation of dog hair at the top of the lower enclosure. Other than that, I see nothing that appears to be waste. There is no readily identifiable solid waste material, contrary to the findings in the inspection report. While the inspection report indicates that only fiber board separates the two layers of enclosures in the small room of the red barn, Respondent points out in her brief (pp. 28-29) that fiber board would dissolve once it became wet, and that CX 20, photograph 4, demonstrated that the two layers of enclosures were actually separated by polymer plastic sheets. In the absence of any evidence that the “waste” was anything more than one day’s accumulation of hair, I find no violation of the drainage and waste disposal regulation.

4. I find no basis for the allegation that the indoor housing facilities did not have adequate lighting to allow routine inspection and cleaning. It appears to me that this regulation does not mean that the facilities had to have sufficient lighting to allow an enforcement inspection of every nook and cranny in the facility, but rather applies to the routine daily inspections associated with running a kennel. That the inspectors needed to use a flashlight to observe the back of the enclosure does not in itself constitute a violation. Dr. Schmidt testified that in his opinion as an experienced veterinarian that the lighting provided was beneficial for animal husbandry, particularly for enhancing the kennel's conception rate. Tr. II-145. Dr. Schmidt also pointed out that the kennel's lighting arrangement had been inspected by compliance inspectors for years, and had never been criticized as being out of compliance with regulations. Id., 144-145. I find no violation here.

5. Complainant alleges that the wind and rain breaks in two of the outdoor shelters were inadequate to protect the dogs from the wind and the rain. In particular, the inspection report, CX-33, p. 2, indicated that the small protrusions extending three inches from the top of these two shelters were inadequate. As Respondent pointed out in her brief at p. 31, Meek apparently based this violation finding solely on her judgment, citing no standards or specifications in support of her exercise of judgment. Tr. I-60. Dr. Schmidt, an experienced veterinarian, testified in great detail how the structures at SCR protected, in his judgment, against wind and rain. Tr. II—80-88. SCR suggests in its brief that in a dispute between a veterinarian and a non-veterinarian as to the adequacy of wind and rain breaks, particularly where there are no specific, measurable standards, I should defer to the experienced veterinarian. I am inclined to agree, particularly where, as here, there was no veterinarian testifying on behalf of Complainant whose judgment differed from Dr. Schmidt's and where no evidence was generated, either through cross-examination or rebuttal, to contradict Dr. Schmidt's educated judgment. Complainant has not met its burden with regard to this allegation.

6. The sixth allegation in the complaint arising out of the January 9, 2003 inspection was that outside facilities were not provided with clean, dry bedding material at temperatures less than 50 degrees, in violation

of 9 C.F.R. 3.4(b)(4).³ The inspection report stated that fifteen shelters did not “have appropriate bedding material that allows the animals to burrow down into.” CX 33, p. 2. While the regulation does require clean and dry bedding material, the requirement that this material should be such that the animals can burrow down into it is nowhere to be found in the regulation. Dr. Schmidt testified at some length why Respondent’s use of rubber mats was superior to other forms of bedding, including the fact that it was resistant to being torn up and thus was better able to insulate the dogs from colder temperatures. Tr. II—101-110. Once again, there is no evidence to contradict Dr. Schmidt’s testimony, and I hold that there was no violation proven here.

With respect to the cleanliness of the bedding and the enclosures, see the discussion of the counts 9 and 10, *infra*.

7. The complaint cited SCR for not maintaining building surfaces in good repair, in violation of 9 C.F.R. §3.4(c). In particular, the inspectors cited SCR for having a broken hinge on a single door in one of the outdoor enclosures, causing the door to hang at an angle. CX 33, p. 3. A photograph, CX 38, confirms that the door to a shelter is indeed hanging by its top hinge. Respondent admits that the hinge was broken, but points out that the different color of the door where the hinge is missing indicates that the hinge could not have been broken for a very long time. Resp. Br. at 33-34, Tr. I-74. In addition, Inspector Meek testified that the missing hinge did not prevent animals from entering or leaving the shelter. Nevertheless, the hinge is missing, and a violation, although an exceedingly minor one, is established.

8. Complainant once again cites SCR for allowing primary enclosures to present sharp points or edges which could injure the dogs. Complainant indicated that there were a number of enclosures with broken and/or protruding wires, that one enclosure had a sheet of tin with sharp edges, and that another enclosure had two large protruding nails. Complainant also indicated that the failure of a light bulb to have a protective covering also constituted a violation due to the possibility of it breaking and exposing the dogs to broken glass.

Testimony on the broken wires was a bit hazy, as were the photographs that purported to show the wires. I saw and heard no evidence in support of the contention that protruding nails were present.

³ The complaint cited 3.4(b)(5), which presumably is a typographical error.

The sheet of tin did appear to have sharp edges; even though Respondent has contended that there were no dogs in the area at the time of the inspection, there was no indication that this was not an area that could be utilized for the dogs. The fact that it was not used by dogs on the day of the inspection is not necessarily dispositive as there was no indication that the enclosure had not been used recently or would not be used again shortly. This constitutes a violation, although in the absence of any showing of exposure of any dogs to this hazard, the violation is not one of great significance.

There is no basis for a finding that the failure to cover a light bulb constituted a violation. The far-fetched interpretation of the regulations, which indicate nothing that would lead any fact-finder to conclude that the covering of a light bulb would be required in these circumstances, combined with the fact that the light bulb had been in the same position through years of previous inspections by both state and federal inspectors without ever being cited, (Resp. Br., p. 35) seem to add credence to Respondent's oft-repeated contention that the inspectors were "out to get" SCR, and were looking for any possible interpretation of the regulations to beef up their complaint.

9. Respondent was charged with failure "to clean and sanitize enclosures as often as necessary to prevent an excessive accumulation of dirt, hair and fecal and food wastes." Complaint. There was an outdoor enclosure (identified as enclosure 13) that had a substantial accumulation of waste material. No dogs were seen in the pen at the time of the inspection and SCR has indicated that that pen had not been used for nearly a year before the inspection. Nevertheless, it is clear that an animal had been using the pen, since the amount of waste in it was clearly excessive. CX 41, p. 9. Len Clayton, a Missouri Department of Agriculture official called by Respondent, admitted on cross-examination that the pen in question appeared not to be in compliance with Missouri regulations. Tr. II—15. Tom Jacques, also with the same state agency, testified similarly. Tr. II—31-32. If the pen was not in use at the kennel, it is reasonable to surmise that the excessive waste observed by at least three inspectors and documented photographically would not have accumulated. While this is not a major violation, it clearly is not a demonstration of compliance.

The other allegations under this count are not as compelling. While it is true that there appear to be waste and hair in a few of the areas photographically depicted, there is nothing like the waste accumulated in enclosure 13. Respondent contends that the daily waste cleanup had not yet been undertaken, particularly since they were dealing with a

crisis from a broken sewage pipe, and the amounts of waste and hair in the other locations were not such as to indicate more than a day's accumulation. Likewise, the presence of rocks in a few of the indoor enclosures did not appear to me to present a cleanliness/sanitation problem, as there was no showing that it was more than the amount of rocks and gravel that dogs tended to bring into the enclosure in a normal day or two. Finally, I reject the contention that the water receptacles could not be cleaned and sanitized for the reasons discussed earlier.

10. The complaint also cited Respondent for failing to maintain housing premises free of accumulations of dirt, fecal matter, hair and debris. While this count seems to overlap with much of the previous count, the photographs and testimony appear to focus on the conditions caused by the broken drainage pipe in the kennel's sewage system. There is no dispute that there was a breakage in one of the pipes of the sewage system that served the kennel, nor is there any dispute that as a result of this breakage there were accumulations of waste matter that normally would not be present in a kennel complying with the requirements of the regulations regarding sanitation and cleanliness. CX 42. Although the problem was the result of an accident, the fact remains that there were violations caused by the sewage problem. The undisputedly accidental nature of the violation and the prompt cleanup that had already begun by the time the inspectors arrived are factors that I will weigh in my discussion on appropriate sanctions, *infra*.

11. The final allegation based on the January 9, 2003 inspection was for a lack of effective pest control. The only matter of significance alleged, other than the trivial observation of approximately 20 gnats, was the presence of rodent holes on the premises near the outdoor pens. The presence of several holes was well-documented. CX 43. The allegation was that these were active rodent dens, but no rodents were actually seen entering or exiting these dens during the course of the inspection. The presence of the holes, which clearly could only be rodent holes, is enough to sustain a violation here. The inspectors were not required to stick their hands in the holes to determine whether there was activity or other indicia of the active presence of rodents. Sound practice would require that if a rodent hole were detected, then appropriate measures should be taken not only to eradicate the rodents, but to fill in the hole.

Conclusions of Law

1. Respondent did not commit any of the violations alleged in the complaint that were based on the May 8, 2001 inspection.
2. On October 24, 2001 Respondent was in violation of 9 C.F.R. § 3.6(a)(2)(i) for not maintaining its primary enclosures in such a manner as to protect all its dogs from injury. Complainant did not sustain its burden of proof with regard to any of the other eight violations alleged as a result of that inspection.
3. On January 9, 2003, respondent was in violation of 9 C.F.R. § 3.1(e), for storing chemicals and food supplies in an unsafe manner; of 9 C.F.R. § 3.4(c) for a minor failure to keep outdoor housing facilities in good repair; of 9 C.F.R. § 3.6(a)(2) for primary enclosures having sharp points or edges which could injure dogs; of 9 C.F.R. § 3.11(a) for the excessive accumulation of waste and dirt in enclosure 13; of 9 C.F.R. § 3.11(c) for the results of the accidental breakage of a drainage pipe in the kennel's sewage system; and of 9 C.F.R. § 3.11(d) for the presence of rodent holes near the outdoor pens. Complainant did not sustain its burden of proof with respect to any of the other allegations in the complaint resulting from that inspection.

Sanctions

Complainant has requested that I impose a civil penalty of \$25,000 and a license suspension of at least a year against Respondent. However, Complainant failed to prove the significant majority of the violations, and many of these violations were minor or non-willful. Many of the citations give great credence to the contention of Respondent that it was being targeted by Complainant, including a number of counts, such as that involving the nature of bedding materials, the sanitization of water receptacles, the need for a protective covering over a light bulb, that involve interpretations of the regulations that are extremely questionable, at best. Even the more serious violations, such as exposing dogs to protruding wires or sharp edges, are obviated by the fact that Respondent has clearly and consistently been repairing these types of conditions as she becomes aware of them.

After closely examining the entire record in this case, I am convinced that no suspension of Respondent's license is warranted. For the violations I sustained, I am imposing a sanction of a \$2,500 civil penalty. In imposing the civil penalty, I considered (1) the gravity of the violations, many of which were not very significant; (2) Respondent's

good faith, which was demonstrated by the generally good state of repair of the facility; and (3) the history of previous violations. I also find the penalty to be appropriate for the size of Respondent's business.

Order

Respondent has committed violations of the Animal Welfare Act and the regulations thereunder as detailed above. Respondent is assessed a civil penalty of \$2,500, which shall be paid by a certified check, cashier's check or money order made payable to the order of "Treasurer of the United States."

Respondent shall cease and desist from violating the Animal Welfare Act and the regulations and standards thereunder. In particular, Respondent shall cease and desist from violating the seven regulations cited in my Conclusions of Law.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. § 1.142(c)(4).

Copies of this decision shall be served upon the parties.

**In re: JOHN F. CUNEO, JR., AN INDIVIDUAL; THE HAWTHORN CORPORATION, AN ILLINOIS CORPORATION; THOMAS M. THOMPSON, AN INDIVIDUAL; JAMES G. ZAJICEK, AN INDIVIDUAL; JOHN N. CAUDILL, III, AN INDIVIDUAL; JOHN N. CAUDILL, JR., AN INDIVIDUAL; WALKER BROTHER'S CIRCUS, INC., A FLORIDA CORPORATION; AND DAVID A. CREECH, AN INDIVIDUAL. AWA Docket No. 03-0023.
Decision and Order as to James G. Zajicek.
Filed May 2, 2006.**

AWA – Animal Welfare Act – Preponderance of the evidence – Complaint dismissed.

The Judicial Officer affirmed the decision by Chief Administrative Law Judge Marc R. Hillson dismissing the Amended Complaint. The Judicial Officer concluded

Complainant failed to prove by a preponderance of the evidence that Respondent James G. Zajicek violated the regulations issued under the Animal Welfare Act as alleged in the Amended Complaint.

Colleen A. Carroll and Bernadette R. Juarez, for Complainant.
Vincent J. Colatrisano and Derek L. Shaffer, Washington, DC, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 11, 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 issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133 (2002)) [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]. On September 22, 2003, Complainant filed an Amended Complaint.

Complainant alleges: (1) on or about June 6, 2001, through on or about July 6, 2001, James G. Zajicek [hereinafter Respondent] willfully violated section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2002)) by operating as an exhibitor without an Animal Welfare Act license; (2) on June 26, 2001, Respondent willfully violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2002)) by failing to handle Ronnie, an Asian elephant, as carefully as possible in a manner that did not cause trauma, physical harm, and unnecessary discomfort to the animal; (3) on June 26, 2001, Respondent willfully violated section 2.131(a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(2)(i) (2002)) by using physical abuse to train, work, and handle Ronnie, an Asian elephant; (4) on June 26, 2001, Respondent willfully violated section 2.131(b)(2) of the Regulations (9 C.F.R. § 2.131(b)(2) (2002)) by failing to provide Joy, an African elephant, a rest period between performances equal to the time of one performance; and (5) on June 26, 2001, Respondent willfully violated section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1) (2002)) by exhibiting Joy, an African elephant, under conditions inconsistent with good health and well-being

(Amended Compl. Alleged Violations ¶¶ 7, 9-16).⁴ On January 20, 2004, Respondent filed an answer denying the material allegations of the Amended Complaint.

On March 8 through 11, 2004, March 25, 2004, and October 28, 2004, the Chief ALJ conducted a hearing in Washington, DC. Colleen A. Carroll and Bernadette R. Juarez represented Complainant. Vincent J. Colatrisano and Derek L. Shaffer, Cooper & Kirk, PLLC, Washington, DC, represented Respondent.

On August 17, 2005, after Complainant and Respondent filed post-hearing briefs, the Chief ALJ issued a Decision as to James G. Zajicek [hereinafter Initial Decision] finding Complainant failed to prove Respondent violated the Regulations as alleged in the Amended Complaint and dismissing the Amended Complaint as it relates to Respondent (Initial Decision at 1, 36).

On October 28, 2005, Complainant filed "Complainant's Appeal Petition." On December 22, 2005, Respondent filed "Response of Respondent James G. Zajicek to Complainant's Appeal Petition." On December 30, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I dismiss the Amended Complaint as it relates to Respondent.

DECISION

Complainant appeals the Chief ALJ's dismissal of the allegations that Respondent violated section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)) (Amended Compl. Alleged

⁴Complainant also alleged that John F. Cuneo, Jr.; The Hawthorn Corporation; Thomas M. Thompson; John N. Caudill, III; John N. Caudill, Jr.; Walker Brother's Circus, Inc.; and David A. Creech violated the Regulations (Amended Compl. Alleged Violations ¶¶ 1-6, 8-61). Complainant and John F. Cuneo, Jr.; The Hawthorn Corporation; Thomas M. Thompson; John N. Caudill, III; John N. Caudill, Jr.; and Walker Brother's Circus, Inc., agreed to consent decisions. Administrative Law Judge Jill S. Clifton entered the consent decision as to Thomas M. Thompson on May 15, 2003. *In re John F. Cuneo, Jr.* (Consent Decision as to Thomas M. Thompson), 62 Agric. Dec. 194 (2003). Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] entered the consent decisions as to John F. Cuneo, Jr.; The Hawthorn Corporation; John N. Caudill, III; John N. Caudill, Jr.; and Walker Brother's Circus, Inc., in March 2004. *In re John F. Cuneo, Jr.* (Consent Decision as to John F. Cuneo, Jr., and The Hawthorn Corporation), 63 Agric. Dec. 314 (2004); *In re John F. Cuneo, Jr.* (Consent Decision as to John N. Caudill, III, John N. Caudill, Jr., and Walker Brother's Circus, Inc.), 63 Agric. Dec. 314 (2004). The record reveals the Hearing Clerk has not served David A. Creech with the Amended Complaint.

Violations ¶¶ 9-14).⁵ Complainant's basis for these six alleged violations of section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)) is Respondent's purported striking an elephant during a performance on June 26, 2001, at Marne, Michigan, resulting in a "mark . . . about one half to three quarters of an inch long" on the trunk of the elephant (Complainant's Exhibit 15).

Section 2.131(a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(2)(i) (2002)) provides physical abuse shall not be used to train, work, or otherwise handle animals. Complainant alleges Respondent's striking an elephant during the June 26, 2001, performance constituted the use of physical abuse to train (Amended Compl. Alleged Violations ¶ 12), work (Amended Compl. Alleged Violations ¶ 13), and otherwise handle (Amended Compl. Alleged Violations ¶ 14) the elephant. Based solely upon Complainant's theory of the case, I find Respondent's purported striking an elephant during the June 26, 2001, performance relates only to Respondent's working the elephant and does not relate to Respondent's training or otherwise handling the elephant. Therefore, I dismiss paragraphs 12 and 14 of the Alleged Violations in the Amended Complaint as those paragraphs relate to Respondent.

As for the four other alleged violations (Amended Compl. Alleged Violations ¶¶ 9-11, 13), Complainant did introduce evidence to support his contention that Respondent committed the violations. However, after weighing all the evidence, I agree with the Chief ALJ's conclusion that Complainant failed to prove by a preponderance of the evidence⁶

⁵Section 2.131(a)(1) and (a)(2)(i) of the Regulations provides, as follows:

§ 2.131 Handling of animals.

(a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

(2)(i) Physical abuse shall not be used to train, work, or otherwise handle animals.

9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002).

⁶The 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 administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re The International* (continued...)

that Respondent violated the Regulations as alleged in paragraphs 9 through 11 and 13 of the Alleged Violations in the Amended Complaint. Since the case turns on the particular testimony and exhibits in this proceeding, no useful purpose would be served by analyzing the evidence in detail. I note, however, that of the three United States Department of Agriculture employees who observed the performance in which Respondent is alleged to have violated the Regulations, Dr. Denise M. Sofranko, Thomas P. Rippy, and Joseph Kovach, only Dr. Sofranko observed the alleged violations. Thomas Rippy testified he did not see Respondent do anything that could have possibly harmed the elephants participating in the performance or that could have been a possible violation of the Animal Welfare Act. Complainant failed to call Joseph Kovach as witness; however, Complainant did introduce a

⁶(...continued)

Siberian Tiger Foundation (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53, 79-80 n.3 (2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 643-44 n.8 (2000) (Order Denying Respondent's Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 149, 151 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), printed in 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), reprinted in 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

United States Department of Agriculture inspection report in which Joseph Kovach states he found no violations of the Animal Welfare Act or the Regulations during his June 26, 2001, inspection. (Transcript 76-79, 125-26, 204; Complainant's Exhibit 109 at 2.)

Complainant raises a number of issues relating to the Chief ALJ's discussion of the factors he relied upon to reach his conclusion that Complainant failed to prove Respondent violated the Regulations as alleged in the Amended Complaint (Complainant's Appeal Pet.). I do not adopt the Chief ALJ's discussion. Therefore, I find the issues raised by Complainant relating to the Chief ALJ's discussion, moot.

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

ORDER

Complainant failed to prove by a preponderance of the evidence that Respondent violated section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)), as alleged in the Amended Complaint. Accordingly, the Amended Complaint, as it relates to Respondent, is dismissed.

In re: JEWEL BOND, d/b/a BONDS KENNEL.
AWA Docket No. 04-0024.
Decision and Order.
Filed May 19, 2006.

AWA – Animal Welfare Act – Willful – Correction of violations – Repeated.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision: (1) finding that Respondent violated the regulations and standards issued under the Animal Welfare Act (Regulations and Standards); (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a \$10,000 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 1 year. The Judicial Officer rejected Respondent's contention that the correction of Respondent's violations negated Respondent's violations. The Judicial Officer also rejected Respondent's contention that her violations were not repeated, stating *repeated* means more than once.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. 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, on May 13, 2003, July 16, 2003, and August 25, 2003, Jewel Bond, d/b/a Bonds Kennel [hereinafter Respondent], violated the Regulations and Standards (Compl. ¶¶ II-IV). On September 15, 2004, Respondent filed an answer denying the material allegations of the Complaint.

On May 24 and 25, 2005, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] conducted a hearing in Springfield, Missouri. Brian T. Hill represented Complainant. Respondent represented herself with the assistance of Larry Bond, Seneca, Missouri. On January 9, 2006, after Complainant and Respondent filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent violated the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a \$10,000 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 1 year (Initial Decision at 13, 16-17).

On February 16, 2006, Respondent filed an appeal to, and requested oral argument before, the Judicial Officer. On March 16, 2006, Complainant filed a response to Respondent's appeal petition. On April 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm, with minor exceptions, the ALJ's Initial Decision.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." References to the transcript are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

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

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

....

(f) The term “dealer” means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or

dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year[.]

§ 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 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), 2149(a)-(c), 2151.

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 at the wholesale level 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 animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; 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 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.

PART 3—STANDARDS

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

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

(a) *Structure*; construction. Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

.....
(c) *Surfaces*—(1) *General requirements*. The surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]

.....
(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.

....

3.4 Outdoor housing facilities.

....

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cans, 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.* . . .

(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; [and]

....

(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[.]

....

....

§ 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 accumulations of feces and food waste and to reduce disease hazards pests, insects and odors.

....

(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, .100(a); 3.1(a), (c)(1)(i), (f), .4(c), .6(a)(2)(i), (x), .11(a), (d) (footnote omitted).

DECISION

Findings of Fact

1. Respondent, doing business as Bonds Kennel, 12250 Highway 43, Seneca, Missouri 64865, is a dog breeder and dealer who currently holds and has annually renewed class B dealer's license number 43-B-0170 since its issuance on March 16, 1993. Respondent was previously licensed as a class "A" dealer from January 10, 1983, until January 10, 1993. (RX 1.) For the past 10 years, Respondent has kept

approximately 200 dogs at a time at her facility, which her attending veterinarian, who testified to seeing numerous kennels, has characterized as “a lot of dogs” (Tr. 223). During the period September 4, 2002, through July 23, 2003, Respondent sold 222 puppies in interstate commerce to Okie Pets, P.O. Box 21, Ketchum, Oklahoma 74349, for \$39,690, averaging about \$4,000 per month in sales to this one outlet alone (CX 1; CX 4).

2. Animal dealers are required to comply with the Animal Welfare Act and the Regulations and Standards for the protection of the health and well-being of the animals in their possession. To assure compliance with the Animal Welfare Act and the Regulations and Standards, the Animal and Plant Health Inspection Service employs animal care inspectors and veterinary medical officers who periodically inspect the facilities that animal dealers operate and prepare written inspection reports of any violations found. The dealer is given a copy of each inspection report; an exit interview is conducted during which the inspection report is reviewed; and the dealer is given the opportunity to correct the deficiencies. (Tr. 5-6, 11-112.)

3. On the basis of periodic inspections of Respondent’s facilities, Respondent was charged with violating the Animal Welfare Act and the Regulations and Standards in a disciplinary proceeding that resulted in the entry of a consent decision on September 6, 2002 (CX 70).¹ In the consent decision, Respondent admitted the Secretary of Agriculture had jurisdiction; neither admitted nor denied the remaining allegations of the complaint; agreed to a 30-day suspension of her Animal Welfare Act license; agreed to pay a civil penalty of \$6,000 of which \$4,500 was to be spent for repairs on her facilities on or before August 1, 2002; and agreed to the entry of the following order:

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall not violate the Act and the regulations and standards issued thereunder, and in particular, shall:

(a) Construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Construct and maintain indoor and sheltered housing facilities for animals so that they are adequately

¹*In re Jewel Bond* (Consent Decision), 61 Agric. Dec. 782 (2002).

- ventilated;
- (c) Construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;
 - (d) Provide for the rapid elimination of excess water from housing facilities for animals;
 - (e) Provide animals with adequate shelter from the elements;
 - (f) Provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals;
 - (g) Provide sufficient space for animals in primary enclosures;
 - (h) Maintain primary enclosures for animals in a clean and sanitary condition;
 - (i) Keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;
 - (j) Establish and maintain an effective program for the control of pests;
 - (k) Establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and
 - (l) Maintain records of the acquisition, disposition, description, and identification of animals, as required.

4. Animal and Plant Health Inspection Service officials inspected Respondent's facilities on May 13, 2003, July 16, 2003, and August 25, 2003.

5. On May 13, 2003, Respondent failed to keep housing facilities for dogs in good repair. Specifically, three of the easternmost structures, housing 15 dogs, had nails sticking through the roofs, deteriorated plywood decking on the roofs with large portions rotted away, decayed wooden rafters that no longer supported the roof, and a black insulation board under the decking, as well as various wooden supports, had been eaten away by mice. The southwestern structure, housing 11 dogs, had plywood decking on the roofs that was deteriorated, with large portions rotted away, and the metal roofing portion was loose in several areas allowing rain to enter. Two other structures, housing 49 dogs, had rusted and broken hinges that did not securely attach the doors. The ramps on a newer large dog structure, housing eight dogs, were not

properly secured to the building and were warped and free moving. (Tr. 8-10; CX 42 at 1-2.) (9 C.F.R. § 3.1(a).)

6. On May 13, 2003, Respondent failed to maintain surfaces in outdoor housing facilities so they could be readily cleaned and sanitized. Specifically, the wooden surfaces of many of the interiors of the easternmost three structures and a newer large dog structure had not been regularly maintained and showed evidence of chewing and scratching that prevented proper cleaning and sanitizing. Approximately 50 animals were affected. (Tr. 10; CX 42 at 2.) (9 C.F.R. § 3.4(c).)

7. On May 13, 2003, Respondent failed to provide primary enclosures that had floors constructed in a manner that protected dogs' feet and legs from injury. Specifically, the structure housing puppies had openings in the wire floors of the cages of the puppy building so large that the feet of the puppies were allowed to pass through the holes. One yorkie puppy was observed to have a leg completely through the floor of its cage. Eight puppies were affected by this condition. (Tr. 11; CX 42 at 2-3.) (9 C.F.R. § 3.6(a)(2)(x).)

8. On May 13, 2003, Respondent failed to clean primary enclosures and maintain an effective program of pest control. Specifically, there was excessive accumulation of fecal waste due to inadequate cleaning. In addition to dog feces, there was rodent waste in boxes where dogs were housed, with a buildup of 1½ inches in one box, and mice had chewed through the walls, floors, and exterior areas of the buildings. There was also a wasp nest and bird droppings on rafters of the central, metal structure. (Tr. 11-13; CX 42 at 3-4.) (9 C.F.R. § 3.11(a), (d).)

9. On July 16, 2003, Respondent failed to maintain interior surfaces of housing facilities and surfaces that came in contact with dogs, free of excessive rust, which prevented required cleaning and sanitization. Specifically, the northeast kennel, the whelping building, and the puppy building exterior had rusted metal wire that was excessive and prevented required cleaning and sanitization. (Tr. 14-15; CX 62 at 1.) (9 C.F.R. § 3.1(c)(1)(i).)

10. On July 16, 2003, Respondent failed to have a properly working drainage system in one of the housing facilities. Specifically, the drainage system for waste disposal for the northwest large dog building was not working properly. The drainage system allowed waste to wash out on the ground and the wall of the building, thereby failing to minimize vermin, insect and pest infestation, odors, and disease hazards. (Tr. 15-16; CX 62 at 1-2.) (9 C.F.R. § 3.1(f).)

11. On July 16, 2003, Respondent failed to maintain surfaces in outdoor housing facilities so they could be readily cleaned and sanitized. Specifically, wooden surfaces of the interior of boxes of the kennels

were chewed and scratched and in need of repair and proper sealing to allow for cleaning and sanitization. (Tr. 16; CX 62 at 1-2.) (9 C.F.R. § 3.4(c).)

12. On July 16, 2003, Respondent failed to maintain an effective program of pest control. Specifically, Respondent's control of flies at her facility was not sufficient. (Tr. 16; CX 62 at 2.) (9 C.F.R. § 3.11(d).)

13. On August 25, 2003, Respondent failed to maintain surfaces in outdoor housing facilities so they could be readily cleaned and sanitized. Specifically, there was raw, unsealed wood on the door frames of the northeast two buildings. (Tr. 17; CX 67.) (9 C.F.R. § 3.4(c).)

14. On August 25, 2003, Respondent failed to maintain primary enclosures so they had no sharp points or edges that could injure dogs. Specifically, the edge of the metal flooring installed in replacement of earlier defective flooring in dog pens, had sharp points that could injure the dogs in those pens. (Tr. 17; CX 67.) (9 C.F.R. § 3.6(a)(2)(i).)

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondent is a dealer as defined in the Animal Welfare Act and the Regulations and Standards.
3. On May 13, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep housing facilities for dogs in good repair as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)).
4. On May 13, 2003, July 16, 2003, and August 25, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain surfaces in outdoor housing facilities so they could be readily cleaned and sanitized as required by section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)).
5. On May 13, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide primary enclosures that had floors constructed in a manner that protected dogs' feet and legs from injury as required by section 3.6(a)(2)(x) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(x)).
6. On May 13, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to clean primary enclosures and maintain an effective program of pest control as required by section 3.11(a) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(a), (d)).

7. On July 16, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain interior surfaces of housing facilities and surfaces that came in contact with dogs, free of excessive rust, which prevented cleaning and sanitization as required by section 3.1(c)(1)(i) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)(i)).

8. On July 16, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to have a properly working drainage system in one of the housing facilities as required by section 3.1(f) of the Regulations and Standards (9 C.F.R. § 3.1(f)).

9. On July 16, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain an effective program of pest control as required by section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).

10. On August 25, 2003, Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain primary enclosures so they had no sharp points or edges that could injure dogs as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)).

11. The appropriate sanctions for deterrence of future violations is the issuance of a cease and desist order, the imposition of a 1-year suspension of Respondent's Animal Welfare Act license, and the assessment of a \$10,000 civil penalty. In concluding that this civil penalty is appropriate, due consideration has been given to the size of Respondent's business, the gravity of Respondent's violations, Respondent's good faith, and Respondent's history of previous violations.

Discussion

Respondent has engaged in business as Bonds Kennel for over 20 years, selling dogs in interstate commerce as a "dealer" licensed under the Animal Welfare Act. Respondent keeps approximately 200 dogs at her facility, which is considered to be large, and averages over \$4,000 per month in sales of dogs and puppies.

On September 6, 2002, Respondent entered into a consent decision with the Animal and Plant Health Inspection Service in which she agreed to a 30-day suspension of her Animal Welfare Act license, the payment of a \$6,000 civil penalty of which \$4,500 was to be spent on repairs to her facility, and the entry of a cease and desist order to not

violate the Animal Welfare Act and the Regulations and Standards.² Yet, I find that on May 13, 2003, July 16, 2003, and August 25, 2003, Respondent violated the Regulations and Standards that were of the very type with which she agreed to comply under the terms of the consent decision. Testimony establishing these violations was given by an Animal and Plant Health Inspection Service animal care inspector and a veterinary medical officer. Both were extremely credible witnesses who produced photographic evidence corroborating their observations. I have, however, dismissed a charge in the Complaint alleging an inadequate response to needed emergency veterinary care (Compl. ¶ II A). I dismissed this charge because the Animal and Plant Health Inspection Service animal care inspector did not, at the time of the inspection, treat the matter as an emergency, in that he gave Respondent 2 days to obtain veterinary care and Respondent complied.

Each violation found in the course of the three inspections conducted in 2003 was willful. An act is considered “willful” under the Administrative Procedure Act (5 U.S.C. § 558(c)) if the violator (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements.³ Respondent’s chronic failure to comply with the Animal Welfare Act and the Regulations and Standards throughout the year that followed her signing the consent decision constitutes obvious and careless disregard of the statutory and regulatory requirements, and Respondent’s violations are clearly willful.⁴

Respondent’s testimony and actions demonstrate a lack of good faith compliance with the Animal Welfare Act and the Regulations and Standards that apply to her as a licensed dog dealer. Respondent has refused to heed specific Animal and Plant Health Inspection Service instructions. Respondent became so incensed when told by an Animal and Plant Health Inspection Service investigator that a building in her facility still did not meet applicable standards, she removed

²See note 1.

³*In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff’d mem.*, 582 F.2d 39 (5th Cir. 1978).

⁴*See In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999) (stating the respondents’ chronic failure to comply with the Animal Welfare Act and the Regulations and Standards over a period of almost 4 months presents an obvious and careless disregard of statutory and regulatory requirements; when an Animal Welfare Act licensee disregards statutory and regulatory requirements over such a period of time, the licensee’s violations are clearly willful.)

approximately 10 dogs it housed and put them outside on a cold winter night when the temperature was only 20 degrees Fahrenheit (Tr. 274-78). Respondent's obstinacy, her temper that can blind her to the needs and welfare of her dogs, and the gravity of her violations which ignored basic needs of her dogs, combine to require the imposition of a substantial sanction to achieve compliance with, and deter future violations of, the Animal Welfare Act and the Regulations and Standards.

I have accepted the recommendations of Animal and Plant Health Inspection Service officials which I conclude fully accord with the Animal Welfare Act's sanction and civil penalty provisions. If each Regulation and Standard that I find to have been violated is treated as a single violation, Respondent committed 11 violations. Arguably, there were multiple violations of several of the Regulations and Standards. Therefore, the \$10,000 civil penalty I assess is far less than may be imposed by applying the \$2,750 per violation amount authorized by the Animal Welfare Act and the Federal Civil Penalties Inflation Adjustment Act of 1990 against, at a minimum, 11 violations.⁵ A 1-year suspension of Respondent's Animal Welfare Act license is also presently indicated in that the prior, lesser 30-day suspension of Respondent's Animal Welfare Act license was not an effective deterrent. The recommended inclusion of cease and desist provisions is also appropriate.

Respondent's Request for Oral Argument

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,⁶ is refused because the issues are not complex and oral argument would appear to serve no useful purpose.

Respondent's Appeal Petition

Respondent raises six issues in Respondent's "Appeal to the Department's Judicial Officer" [hereinafter Respondent's Appeal Petition]. First, Respondent contends the ALJ erroneously concluded she violated sections 3.1(a), 3.4(c), and 3.6(a)(2)(x) of the Regulations

⁵See 7 U.S.C. § 2149(b); 28 U.S.C. § 2461 (note); 7 C.F.R. § 3.91(a), (b)(2)(v).

⁶7 C.F.R. § 1.145(d).

and Standards (9 C.F.R. §§ 3.1(a), .4(c), .6(a)(2)(x)) on May 13, 2003; sections 3.1(a), (c)(1)(i), and (f), 3.4(c), and 3.11(e) of the Regulations and Standards (9 C.F.R. §§ 3.1(a), (c)(1)(i), (f), .4(c), .11(e))⁷ on July 16, 2003; and sections 3.6(a)(2) and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 3.6(a)(2), .11(c)) on August 25, 2003, because she corrected the violations (Respondent's Appeal Pet. at 1-3).

I disagree with Respondent's contention that the ALJ erroneously found she violated the Regulations and Standards because she corrected the violations. Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations and Standards. While Respondent's corrections of her Animal Welfare Act violations are commendable and can be taken into account when determining the sanction to be imposed, Respondent's corrections of her violations do not eliminate the fact that the violations occurred.⁸ Therefore, even if I were to find that, subsequent to Respondent's violations of the Regulations and Standards, Respondent corrected the violations, I would not find the ALJ's Initial Decision error.

Second, Respondent contends her violations of section 3.11(a) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(a), (d)) on May 13, 2003, were not repeated because the violations were not found

⁷The ALJ did not conclude Respondent violated section 3.11(e) of the Regulations and Standards (9 C.F.R. § 3.11(e)) on July 16, 2003. I infer, based on the record before me, Respondent intended to refer to the ALJ's conclusion that Respondent violated section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) on July 16, 2003 (Initial Decision at 12).

⁸*In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206) (Table), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

in the same location as they were found during the Animal and Plant Health Inspection Service October 23, 2001, inspection (Respondent's Appeal Pet. at 2).

Section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) provides standards for cleaning primary enclosures and section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) provides standards for pest control. *Repeated* means more than once.⁹ Therefore, multiple failures to clean primary enclosures constitute repeated violations of section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) even if different primary enclosures are involved in each violation. Further, multiple failures to comply with the standards for pest control constitute repeated violations of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) even if the manner in which a respondent fails to comply with the pest control standards differs each time the violation occurs.

Third, Respondent states the Animal and Plant Health Inspection Service inspector, David Brigance, "was a little harsh" when he wrote an inspection report (CX 67) alleging Respondent violated section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)) on August 25, 2003 (Respondent's Appeal Pet. at 3).

Respondent neither denies she violated section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)) on August 25, 2003, nor contends the ALJ erroneously concluded she violated section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)) on August 25, 2003. Therefore, I find the issue of whether Mr. Brigance "was a little harsh," irrelevant.

Fourth, Respondent contends the ALJ assured Respondent during a pre-hearing conference that the hearing would concern only the May 13, 2003, July 16, 2003, and August 25, 2003, Animal and Plant Health Inspection Service inspections of her facility. Respondent asserts that, contrary to the ALJ's assurance, the ALJ received evidence of violations that had nothing to do with the findings during the May 13, 2003, July 16, 2003, and August 25, 2003, inspections of her facility and she was not prepared to defend against the allegations of these additional violations (Respondent's Appeal Pet. at 3-4).

As an initial matter, the record does not support Respondent's contention that the ALJ assured her during a pre-hearing conference that the hearing would concern only the May 13, 2003, July 16, 2003, and August 25, 2003, Animal and Plant Health Inspection Service

⁹Merriam-Webster's Collegiate Dictionary 991 (10th ed. 1997).

inspections of her facility. The record contains a summary of one pre-hearing conference conducted by the ALJ with Complainant's counsel, Respondent, and Larry Bond on October 21, 2004.¹⁰ The summary of the pre-hearing conference does not indicate that the ALJ assured Respondent that the hearing would concern only the May 13, 2003, July 16, 2003, and August 25, 2003, Animal and Plant Health Inspection Service inspections of her facility.

Moreover, even if I were to find the ALJ assured Respondent that the hearing would concern only the May 13, 2003, July 16, 2003, and August 25, 2003, Animal and Plant Health Inspection Service inspections of her facility and the hearing concerned violations that occurred on other occasions, I would find, at most, harmless error because the ALJ did not conclude that Respondent violated the Animal Welfare Act or the Regulations and Standards on dates other than May 13, 2003, July 16, 2003, and August 25, 2003.

However, the ALJ did find two violations that are not alleged in the Complaint. Specifically, the ALJ found, on July 16, 2003, Respondent violated section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)) and, on August 25, 2003, Respondent violated section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) (Initial Decision at 12-13). As Complainant did not allege these violations in the Complaint, I decline to conclude Respondent violated section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)) on July 16, 2003, and section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) on August 25, 2003.

Fifth, Respondent asserts the ALJ "was running interference for the Complainant" with respect to the issue of the date the Hearing Clerk served Respondent with the Consent Decision and Order (CX 70) issued in *In re Jewel Bond* (Consent Decision), 61 Agric. Dec. 782 (2002) (Respondent's Appeal Pet. at 4).

As an initial matter, I do not find the ALJ "was running interference for the Complainant." Instead, I find the ALJ was merely attempting to discern whether Complainant had proof of the date the Hearing Clerk served Respondent with the Consent Decision and Order (CX 70). Moreover, I find the date the Hearing Clerk served Respondent with the Consent Decision and Order (CX 70) is not relevant to this proceeding, and, even if I were to find the ALJ's inquiry (Tr. 211-14) error (which I do not so find), I would find the ALJ's inquiry harmless error.

Sixth, Respondent contends the ALJ did not allow her to rerun a

¹⁰Notice of Hearing and Exchange Deadline filed by the ALJ on October 28, 2004.

videotape (CX 75) during her cross examination of Dr. Jeffrey Baker (Respondent's Appeal Pet. at 5).

I disagree with Respondent's contention that the ALJ prohibited Respondent's use of the videotape during her cross-examination of Dr. Baker. The record establishes that, while the ALJ expressed a preference that Respondent cross-examine Dr. Baker without using the videotape, the ALJ did not prohibit Respondent's use of the videotape (Tr. 157-62).

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

ORDER

1. Jewel Bond, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards and, in particular, shall cease and desist from:

- (a) Failing to keep housing facilities for dogs in good repair;
- (b) Failing to maintain surfaces in outdoor housing facilities so they can be readily cleaned and sanitized;
- (c) Failing to provide primary enclosures that have floors constructed in a manner that protects dogs' feet and legs from injury;
- (d) Failing to clean primary enclosures;
- (e) Failing to maintain an effective program of pest control;
- (f) Failing to maintain interior surfaces of housing facilities and surfaces that come in contact with dogs free of excessive rust that prevents cleaning and sanitization;
- (g) Failing to have a properly working drainage system in housing facilities; and
- (h) Failing to maintain primary enclosures so they have no sharp points or edges that can injure dogs.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a \$10,000 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:

Brian T. Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building

SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC113
65 Agric. Dec. 113

Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Brian T. Hill within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0024.

3. Respondent's Animal Welfare Act license is suspended for a period of 1 year and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act, the Regulations and Standards, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied this condition, a supplemental order shall be issued in this proceeding upon the motion of the Animal and Plant Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license.

Paragraph 3 of this Order shall become effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order issued in this Decision and 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 the Order issued in this Decision and Order. Respondent must seek judicial review within 60 days after entry of the Order issued in this Decision and Order.¹¹ The date of entry of the Order issued in this Decision and Order is May 19, 2006.

**In re: SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC.
AWA Docket No. D-05-0002.
Decision and Order.
Filed June 7, 2006.**

AWA – Primates – License denied – Inspection, full and complete.

¹¹7 U.S.C. § 2149(c).

Colleen Carroll for Complainant.
Thomas J. Dandar for Respondent.
Decision and Order by Chief Administrative Law Judge Marc H. Hillson.

Decision

In this decision, I sustain the determination of the United States Department of Agriculture Animal and Plant Health Inspection Service (APHIS) to deny the application of Suncoast Primate Sanctuary Foundation, Inc. for a license to exhibit animals under the Animal Welfare Act. However, I remand the case to APHIS to conduct a complete investigation as to whether Petitioner qualifies as a licensee under the Act.

Procedural History

On June 30, 2004, Petitioner Suncoast Primate Sanctuary Foundation, Inc. (Petitioner), located at 4600 Alternate 19, Palm Harbor, Florida, applied to Respondent U.S. Department of Agriculture, APHIS, for a new exhibitor's license to operate an "animal sanctuary and educational facility" and a zoo. PX 1, RX 14.¹ The application was signed by Christy Holley, the Petitioner's president. On July 12, 2004, Dr. Elizabeth Goldentyer, Regional Director of APHIS's Eastern Region, wrote Ms. Holley that "prior to processing the application" APHIS would be "evaluating the application" to determine its relationship to the earlier permanent revocation of the license of The Chimp Farm. PX 3, RX 16. Following an inspection/investigation visit to the premises of Petitioner, the application was denied by letter of August 17, 2004. PX 5, RX 20. Petitioner filed a Request for Hearing dated September 7, 2004. PX 6. The matter was docketed with the Hearing Clerk in May 2005.² A hearing was conducted in Tampa, Florida on November 15, 2005. Thomas J. Dandar, Esq., represented Petitioner, and Colleen A. Carroll, Esq., represented Respondent. Both parties filed briefs with proposed findings of fact and conclusions of law.

¹ PX refers to Petitioner's exhibits. RX refers to Respondent's exhibits. Tr. refers to the transcript page.

² The delay between the filing of the Request for Hearing and the docketing by the Hearing Clerk was due to the absence of regulations concerning the conduct of proceedings to appeal license denials under the Animal Welfare Act. The scope of the Rules of Practice was amended on May 5, 2005 to include license denial appeals, and this matter was docketed shortly thereafter.

SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC115
65 Agric. Dec. 113

Pertinent Facts

APHIS's denial of Petitioner's license application was principally based on APHIS's determination that Petitioner was essentially the same entity that had its license revoked by APHIS in an earlier proceeding. The licensing regulations bar issuance of a license to an applicant whose license has been previously revoked.

The prior license revocation.

In August 1998, APHIS served a complaint on Anna Mae Noell and The Chimp Farm, Inc., alleging numerous serious violations of the Animal Welfare Act and the regulations thereunder. RX 1, p. 2. Although the license was issued to Anna Mae Noell d/b/a The Chimp Farm, Inc., RX 29, the complaint named both Ms. Noell and The Chimp Farm as co-respondents. Neither Anna Mae Noell nor The Chimp Farm filed a timely answer to the complaint or a response to a motion for a default decision. RX 1. Administrative Law Judge Bernstein issued a default decision which, among other sanctions, revoked their license.³ They appealed to the Judicial Officer, who held that the age (Ms. Noell was in her mid-80's), ill-health and hospitalization of Ms. Noell was not a basis for setting aside the default decision. RX 1, p. 22. The Judicial Officer also denied a request on behalf of The Chimp Farm to reconsider his earlier decision, since that request was filed well beyond the time such requests were required to be filed, and since it raised an issue, concerning whether proper service was effectuated on The Chimp Farm, for the first time. RX 2. Finally, the U.S. Court of Appeals dismissed a petition for review filed on behalf of both parties, ruling that it was without jurisdiction because, once again, the parties filed their petition months after the Judicial Officer's decisions. RX 31.

The June 30, 2004 application

Respondent informed Petitioner in a letter dated July 12, 2004, that its application would be evaluated to determine whether issuance of a new license would violate the Decision and Order which permanently

³ Since The Chimp Farm, Inc. was never licensed in its own right, there is some question as to whether USDA can revoke a license that it never granted in the first place. However, the Secretary's action in this case was affirmed by the Court of Appeals and is final and non-reviewable.

revoked the USDA license of The Chimp Farm⁴. PX 3, RX 16. Respondent indicated that an APHIS investigator would “be evaluating the corporate structure of the Suncoast Primate Sanctuary Foundation Inc., the ownership of the animals, property and enclosures, the funding of the operation and the management of the facility and employees.” *Id.* A letter from Christy Holley on behalf of Petitioner, dated July 16, 2004, apparently mailed before receipt of the letter from Respondent, stated that they “would like to set up an appointment for an inspection as soon as possible.” PX 4.

Rather than schedule an appointment to assist in obtaining the information Respondent indicated it would need to make a determination, Respondent instead sent, unannounced, two employees to Petitioner’s premises on July 29, 2004. The team consisted of Greg Gaj, a field veterinarian and supervisor with APHIS’s Animal Care Branch, Tr. 199, and Michael Nottingham, an experienced investigator in APHIS’s Investigative and Enforcement Services. Tr. 224. Gaj stated that he would not normally go on such an investigation, since he was a supervisor, but that the “normal” person who would have gone “would have been potentially biased one way or the other.” Tr. 215. He stated that he was basically an observer, while Nottingham was the lead investigator. Tr. 220.

The facility was closed to the public when they arrived, but there were a number of people on the property. Tr. 218-219, 225. Nottingham asked to speak to the owner or the person in charge and an individual told them that would be Debbie Fletcher⁵. Tr. 205, 226. RX 17, 18. Gaj indicated they were told to wait outside while the worker went inside the office to find Fletcher, and that while waiting 15 to 30 minutes they noticed a sign in the window indicating that Fletcher was manager of the facility. RX 17, Tr. 201. When they were allowed into the office, she told them that she did not have time to answer their questions as she was busy working with a number of 16 year old volunteers, and she told them to wait outside until one of the Petitioner’s board members arrived on the premises to talk with them. *Id.* Approximately 45-60 minutes later, Leslie Smout, a CPA (since retired) and Christie Holley arrived. RX 17, Tr. 202. Nottingham questioned them briefly. Smout told him that he did not think that the animals had ever been formally transferred from the Chimp Farm to the Sanctuary,

⁴ The letter did not mention Anna Mae Noell, even though the revoked license was in her name.

⁵ Since her marriage to Jon Cobb in 2000 she has also been known as Deborah Fletcher Cobb.

SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC117
65 Agric. Dec. 113

but that they should talk to the Petitioner's attorney to be certain. Tr. 209, 286, RX 17, 18. Smout and Holley told the investigators that they would not give a statement without their attorney present, that their attorney was on vacation, and that the attorney would contact them when they got back from vacation. Tr. 203, 226-227, RX 17, 18. Gaj indicated that when he went to get his camera at the close of the meeting, the sign in the window indicating Fletcher was the manager was no longer there. Tr. 204, RX 17.

There was no evidence of any further contact between the parties before Respondent made its final determination denying the application for a license. Gaj indicated that other than the statement he prepared following the July 29 visit, he did no followup and had no further contact with Petitioner. Tr. 222. Nottingham likewise indicated that he was never contacted by Petitioner's attorney or anyone else on behalf of Petitioner subsequent to July 29. Tr. 227.

On August 17, 2004, Dr. Elizabeth Goldentyer, Regional Director of APHIS's Eastern Region, issued a letter rejecting Petitioner's application for a license. PX 5, RX 20. The denial was premised on the prohibition in the licensing regulations, at 9 CFR 2.11(a)(3), which states "A license will not be issued to any applicant who . . . (3) has had a license revoked . . . as set forth in §2.10," and on the prohibition in section 2.10 against issuing a license to any person whose license has been revoked "in his or her own name or in any other manner; nor will any partnership, firm, corporation or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed." Dr. Goldentyer apparently concluded that the applicants for the 2004 license were essentially the same parties subject to the 1999 revocation of the license of Anna Mae Noell and The Chimp Farm—finding that the Chimp Farm continued to house animals at the same principal address and "the precise premises" where the Chimp Farm houses its animals were where Suncoast intended to exhibit its animals. Goldentyer also noted that "at least one of the Chimp Farm's directors is the president of Suncoast, and that the counsel for Chimp Farm is the registered agent for Suncoast." She concluded that issuing the new license to Suncoast Primate Sanctuary Foundation "would be tantamount to issuing a license to" the same entity whose license had earlier been revoked, in contravention of the regulations.

Dr. Goldentyer informed Petitioner that it had a right to request a hearing within 20 days of receipt of the denial letter, and Petitioner filed its Request for Hearing by letter dated September 7, 2004. The case was docketed by the Hearing Clerk in May, 2005 after the Rules of Practice were amended to include appeals of license denials.

At the hearing, and again in the briefs, Respondent retreated on several of the grounds originally offered as the bases for denying the license application. Thus, Dr. Goldentyer agreed that the fact that Mr. Dandar was counsel for The Chimp Farm and the registered agent for Petitioner should not have been a factor in denying the application. Dr. Goldentyer also indicated that she was not relying on the regulation at 9 CFR 2.9, which bans the licensing of any person who was an officer of a licensee whose license has been revoked and who was responsible for or participated in the violation which resulted in the revocation. Tr. 162. Thus, the fact that one of the Chimp Farm's directors—Christy Holley—was the president of Suncoast, would not seem to have any materiality as a basis for denying Suncoast's application, even though it was cited as one of the reasons in the August 17, 2004 letter.

Discussion

This is the first case decided since the Rules of Procedure were amended to allow appeals of license denial decisions under the Animal Welfare Act. Accordingly, there is not a great deal in the way of Agency precedent to guide the review process. However, several matters are clear. First, the Secretary is required to issue an exhibitor's license to an applicant who meets certain standards. Secondly, the Secretary is prohibited from issuing a license to an applicant whose license has been revoked. Third, a license issued to Anna Noell d/b/a The Chimp Farm was revoked in a default action under the Animal Welfare Act. The question is whether Petitioners are in fact so closely related to the persons whose license was revoked as to be barred under the regulations from receiving a license.

It was reasonable for Dr. Goldentyer, as the deciding Agency official, to inquire as to whether Petitioner was the same entity as the entity whose license was revoked. The Chimp Farm had used the fictitious name of "Suncoast Primate Sanctuary" and "Suncoast Primate Sanctuary and Wildlife Rehabilitation Center" and in the very letterhead it had used during portions of the instant application process indicated it had been "Caring for Endangered Species and Other Animals since 1954." RX 6,13,14, 15, 30. Since Petitioner's legal name is Suncoast Primate Sanctuary Foundation Inc., and since The Chimp Farm had used the slogan about caring for endangered species and other animals since 1954 it was hardly unreasonable for Dr. Goldentyer to form a concern that the entities might be the same or at least related. The similarity in names almost seems designed to indicate that the entities are related, if not identical, and when the similarity in addresses is factored in, it is

SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC119
65 Agric. Dec. 113

difficult to conclude other than that Dr. Goldentyer was acting properly in deciding to further investigate. Likewise, the appearance of both Christy Holley's name as a director of The Chimp Farm and president of Suncoast Primate Sanctuary Foundation, and Deborah Fletcher's name as a director and registered agent of The Chimp Farm, while her husband Jon Cobb was listed as an officer on the application for license of Suncoast Primate Sanctuary Foundation would at least give rise for Dr. Goldentyer to inquire as to whether the entities were related.

While I agree with APHIS that they were justified in inquiring into the relationship between Petitioner and Anna Mae Noell d/b/a the Chimp Farm, that does not in itself answer the question of whether APHIS was justified in concluding that the license should be denied. I have serious concerns as to whether the investigation conducted was sufficient to allow Dr. Goldentyer to adequately justify her conclusions regarding Petitioner. The information that Dr. Goldentyer indicated that she was interested in pursuing was the type of information that would require the exchange of documentation, the interview of principals, inspection of property, etc. While it might also involve the unannounced inspection of premises to assure compliance with certain aspects of animal care provisions of the regulations, Dr. Goldentyer was clearly most interested in the aspects of the investigation which would show the scope of the relationship between The Chimp Farm and Petitioner.

The investigation team did not have a great deal of experience in this particular type of investigation. Inspector Gaj testified that he was at the inspection because of a potential bias that the normal investigator had, Tr. 215, that he was there in a secondary role to the more experienced Inspector Nottingham, to whom he deferred, and that he considered himself an observer while Nottingham asked the questions. Tr. 220. Their specific assignment was "to investigate whether or not the Suncoast Primate Sanctuary was a legitimate legal entity separate from the Chimp Farm." Tr. 216. They did not intend to look at any animals that day. Tr. 218. No advance notice of the inspection was given, Gaj believing that was Nottingham's "personal preference." Tr. 221. During the time Nottingham was talking to Smout and Holley, Gaj received a phone call from one of his inspectors and, rather than continuing to participate in the inspection, temporarily left the inspection to handle the phone call. Tr. 202-203.

Michael Nottingham, the lead investigator for APHIS, had no previous experience in investigating applications for Animal Welfare Act licenses. Tr. 275. He had very little independent recollection of the events that transpired on the date of his visit to Suncoast, relying heavily on the inspection report that he prepared. Rx 18, 18a. When it became

evident that the individuals who he talked with at the inspection were not able to provide him with the information he desired, he never followed up with any of the people he met that day, or any of the people that were identified on the application, or with the attorney who he was told was going to get back to him. He never indicated exactly what information he was looking for which would allow him to make recommendations to Dr. Goldentyer as to the unresolved issues regarding the Suncoast application. It was not until the day before the hearing that he picked up deeds from the county clerk which indicated the ownership and the location of the property on which Suncoast was located, and who owned the property, and he also provided business summary reports generated from Lexis Nexis for the Chimp Farm and Suncoast Primate Sanctuary. Obviously, these documents could not have been relied on by Dr. Goldentyer in her decision making, nor were they ever interpreted by any witness.

Testimony from other witnesses did little to clarify the most pertinent matters at issue. One of the least pertinent issues discussed was who greeted the inspectors. Both Gaj and Nottingham indicated that an individual identifying himself as George McCoy let them on the property and indicated that the person in charge was Debbie Fletcher, Tr. 218, 273, RX 17, 18, but Debbie Fletcher stated that McCoy was not on the premises that day, that she knew where he was and that it could not have been him. Tr. 337-338. Since both inspectors confirmed that the individual did identify himself as McCoy and since Ms. Fletcher provided no evidence as to where McCoy was or to who it was who let them in, and since it does not matter anyway, I see no reason to doubt the word of the inspectors as to this point. Similarly, I have no basis to believe the inspectors were other than truthful regarding the sign that indicated Ms. Fletcher was the manager of the facility, even if the sign was left over from the days when the facility was operating as The Chimp Farm. Ms. Cobb, as Ms. Fletcher is now called since her marriage to Jon Cobb, was not the most forthcoming of witnesses, to say the least, and her demeanor was quite defensive throughout her testimony. She even disputed whether an office or even a building containing an office even existed on the premises, Tr. 331-335, even where one of Petitioner's witnesses, Debora Geehring, described herself as the office coordinator, and her place of work as the office. Tr. 35. She also continually indicated that she had virtually no role in managing The Chimp Farm, even where the license renewals for that entity repeatedly listed her as manager, and when she signed a number of documents at the behest of her grandmother, Ms. Noell. E.g., RX 33, 34.

SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC121
65 Agric. Dec. 113

Leslie Smout, a certified public accountant who had retired the July prior to the hearing, essentially confirmed the testimony of the APHIS inspectors. He indicated that he had initially been affiliated with the chimp farm as a donor through his own foundation, and that he had helped them with their taxes and in securing 501(c)(3) status. He stated that he arrived at the premises about an hour after the inspectors and that he said that to the best of his knowledge, The Chimp Farm still owned the animals but that the inspectors should talk to the attorney to be sure. Tr. 286. He testified that he would not have stated that Ms. Cobb owned the animals as they would have been owned by the not-for-profit corporation. Tr. 287.

Dr. David Scott, a trustee of the Anna Mae Noell Trust, testified that the only assets of the trust were land, and that the trust was created to serve "as a steward for animals." Tr. 290. He indicated that his involvement with the trust ceased before the formation of Petitioner, but that it was his understanding that there were two different deeds covering the land occupied by the Petitioner, one of which was owned by the entity that formerly was The Chimp Farm and the other that was owned by the Anna Mae Noell Trust. Tr. 292-293. He also testified that none of the structures on the property are owned by the Trust, but to be certain as to which entity owned what property he would have to check with James Martin, the attorney for the Trust, who was not present at the hearing. In essence, there remains a lack of certainty as to who owns or controls the land on which the Petitioner's facilities are located.

As I indicated earlier, this appeal is the first of its kind under the Animal Welfare Act. As such, it should be decided on a fully-developed record. Instead, I have before me a record that does not even include the very information that the decision-maker indicated she would be gathering to facilitate her decision. Thus, while I agree that there is not sufficient evidence to support the granting of a license to Petitioner, based on the readily apparent similarities in name, management and location between Petitioner and the entity whose license was revoked in the earlier proceeding, I find that neither party met its duty under the Act or the regulations to assure that the record in this matter was complete. Based on this inadequate record, it would have been improper for the Secretary to issue Petitioner an exhibitor's license, but at the same time, it would be improper to permanently deny such a license without the record being more fully developed. If the animals have been properly transferred from the entity which had its license revoked, and is under the care of an independent entity, and is being independently operated, it may be proper, as Dr. Goldentyer implied in her testimony, to issue Petitioner an exhibitor's license. However, no records were provided to

APHIS during the pendency of the application process which would have indicated that animals were transferred to Petitioner.⁶ The best way to assure a proper final decision in this matter is to remand the matter to the Agency with instructions to both parties to assure the development of a more complete record, with a final decision based on that complete record.

Findings of Fact

1. On June 30, 2004, Suncoast Primate Sanctuary Foundation, Inc. (Petitioner) applied for an exhibitor's license pursuant to the Animal Welfare Act. The application indicated Petitioner was a corporation with an address as 4600 Alternate 19, Palm Harbor, Florida. The corporate officers identified in the license application were Christie Holley, Jon Cobb and Nancy Nagel. PX1, RX 14.

2. In January 1999, the USDA Judicial Officer issued a decision affirming a Default Decision issued by Administrative Law Judge Bernstein against Anna Mae Noell and The Chimp Farm for violations of the Animal Welfare Act. In that decision, the license of Ms. Noell and The Chimp Farm was revoked (although The Chimp Farm never had a license in its own right). The Chimp Farm's address was 4612 Alternate 19 South, Palm Harbor, Florida 34683. RX 1.

3. Both The Chimp Farm and Petitioner had the same listed telephone number.

4. On September 25, 2000, after the issuance of the Default Decision referenced in Finding 2, The Chimp Farm filed a fictitious name statement in which it listed "Suncoast Primate Sanctuary and Wildlife Rehabilitation Center" as a name under which it does business. RX 13.

5. Christy Holley was listed both as a director of The Chimp Farm and President of Petitioner.

6. Deborah Fletcher is the granddaughter of the late Anna Mae Noell. Tr. 305, 314, RX 34. Since her marriage to Jon Cobb, she is also known as Deborah Fletcher Cobb. Tr. 332. She had a significant role

⁶ A document purporting to assign all The Chimp Farm's interests in animals and other matters to Petitioner was attached to Petitioner's Reply Brief. It was the first documentation submitted, to my knowledge, which would support the statements made at the hearing that there was some transfer of interest prior to the application process.

SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC123
65 Agric. Dec. 113

in assisting her grandmother in managing The Chimp Farm, and was listed on various documents as manager of that facility. E.g., RX 34. Her husband, Jon Cobb, is listed as a director of Petitioner. PX 1, RX 14. She lives on the premises of Petitioner, and testified that she runs community outreach and ministries programs at Petitioner's facilities. Tr. 298-299.

7. When Petitioner was formed on February 21, 2003, it listed its business and mailing address as 4612 Alt U.S. Hwy 19, Palm Harbor, Florida 34683. RX 5. This was the same address as the entity whose license was revoked. RX 1, p. 4. On April 19, 2004, after an exchange of correspondence with APHIS where APHIS had expressed its concern that Petitioner was the same entity that had its license revoked in the earlier proceeding, RX 4, Petitioner filed a change of address with the Florida Secretary of State, indicating its principal place of business and mailing address were now both 4600 Alt US Hwy 19. RX 19, p. 2.

8. After receiving Petitioner's application, Dr. Goldentyer wrote Petitioner on July 12, 2004, stating that "A USDA Animal Plant Health Inspection Service Investigator will be evaluating the corporate structure of the Suncoast Primate Sanctuary Foundation Inc., the ownership of the animals, property, and enclosures, the funding of the operation and the management of the facility and employees . . . Your cooperation in providing information and documentation will speed the process." RX 16.

9. There is no evidence that Petitioner was ever told what documentation would be needed or helpful for APHIS in its review of the application.

10. On July 29, 2004, APHIS employees Greg Gaj and Michael Nottingham made an unannounced visit to Petitioner's facilities. Neither was experienced in conducting an animal licensing investigation. Although the facility was not open to the public, they were met, and allowed into the facility, by an individual who identified himself as George McCoy. When they asked him if they could speak to the owner, he indicated that Ms. Fletcher was in charge. They noticed a sign outside of the office facility indicating Ms. Fletcher was the manager of the facility. Ms. Fletcher told them she was busy meeting with some students and that they would have to wait and meet with some board members who would be coming later.

11. After waiting outside 45 minutes to an hour, Christy Holley, the president of Petitioner, and Leslie Smout, a volunteer who served as Petitioner's CPA, arrived and briefly met with the inspectors. Mr. Smout indicated that, to the best of his knowledge, The Chimp Farm had never transferred ownership of its animals to Petitioner. Holley and Smout indicated that they would not give the investigators a statement without Petitioner's attorney present, that he was on vacation, and that they would have him contact them when he returned from vacation. Gaj and Nottingham terminated the visit. Gaj noted that the sign indicating that Ms. Fletcher was manager was no longer in the window.

12. There is no evidence of any effort made by either Petitioner or APHIS to contact or otherwise provide evidence or request evidence on any aspect of this case prior to the hearing.

13. I am unable to make a factual finding as to whether the land that is occupied by Petitioner is under the control of Petitioner, The Anna Mae Noell Foundation, The Chimp Farm, or another entity.

14. I am not able to make a factual finding as to who owns the animals which would be exhibited if the application were granted.

15. I am not able to make a definitive finding as to what entity owns the structures in which the animals which would be exhibited are housed.

Conclusions of Law

1. APHIS is obligated to issue an exhibitor's license to an applicant if certain statutory and regulatory conditions are met.

2. APHIS is prohibited from issuing an exhibitor's license to an individual or entity whose license has previously been revoked for violating provisions of the Animal Welfare Act.

3. Anna Mae Noell d/b/a The Chimp Farm was the subject of an Animal Welfare Act proceeding resulting in the revocation of the license of Anna Mae Noell and The Chimp Farm.

4. Petitioner's location, management and operations are similar in many respects to the entity whose license was revoked. The actions of APHIS in scrutinizing Petitioner's application to determine whether they

SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC125
65 Agric. Dec. 113

were in essence the same entity as The Chimp Farm were a legitimate and proper exercise of authority.

5. As the sole entity charged with granting or denying licenses under the Animal Welfare Act, Respondent has the duty to perform a full and complete investigation before denying a license. They did not do so here.

6. The applicant for a license has the obligation to provide all pertinent information to support its license request. After being notified on several instances that Respondent needed information on a number of matters, Petitioner fell short of its obligation to provide pertinent information, or even follow up with Respondent on exactly what information was required.

WHEREFORE, I order the following:

This matter is remanded to APHIS. Within 30 days from the issuance of this decision and order, APHIS shall inform Petitioner exactly what information they require in order to make a full determination as to whether Petitioner is a different entity from Anna Mae Noell d/b/a The Chimp Farm. Within 60 days from the date of this decision and order, Petitioner shall supply all requested information, and the parties may agree to any site visits as necessary. Within 90 days from the date of this decision and order, APHIS shall either grant Petitioner an exhibitor's license or affirm its denial with a sufficient explanation of its criteria for determining that Petitioner is the same entity. I will retain jurisdiction over this matter, and if the license is denied on remand, I will grant expedited consideration to Petitioner's request for supplemental briefing, or hearing, as appropriate.

**DEBARMENT AND SUSPENSION
(NON-PROCUREMENT)**

DEPARTMENTAL DECISIONS

**In re: BLUE MOON SOLUTIONS, INC. AND MARTY HALE.
DNS-RUS Docket 06-0001.**

Decision and Order.

Filed June 14, 2006.

Amended June 20, 2006.

**DNUS – RUS – Suspension from participation, Federal grant program –
Overpayment – Inducement for advances, unsupported – Grant funds, unearned.**

Silas Lamont for Complainant.

James M. Andrew for Respondent.

Decision and Order by Administrative Law Judge Victor W. Palmer.

Amended Decision and Order¹

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.765, in disposition of the appeal by Blue Moon Solutions, Inc. and Marty Hale, its principal, of their suspension by the Rural Utilities Service (“RUS”), an agency of the United States Department of Agriculture, from participation in Federal government programs. Blue Moon and Mr. Hale were initially suspended by RUS by letters dated November 9, 2005. The appeal of these suspensions resulted in a hearing on December 14, 2005, that was presided over by the Administrator of RUS who was assisted by a fact-finder. The Administrator upheld the suspensions. On April 7, 2006, Blue Moon and Mr. Hale filed this appeal of the Administrator’s determination to the Office of Administrative Law Judges and, pursuant to 7 C.F.R. § 3017.765, it has been assigned to me for decision within 90 days after the filing of the appeal. Mr. Hale joins in the reasons advanced on behalf of Blue Moon Solutions, Inc. that go to the merits of the suspension, and has not challenged his inclusion as a subject of the suspension. Under the governing regulation, my decision must be based solely on the administrative record (7 C.F.R. § 3017.765 (b)). For that reason, the request by Blue Moon and Mr. Hale that I hold a hearing is herewith denied. Moreover, I may vacate the decision of the suspending official

¹ The original Decision and Order is amended by deleting the last sentence of the Order.

only if I determine that the decision is:

Not in accordance with law;

Not based on the applicable standard of evidence; or

Arbitrary and capricious and an abuse of discretion.

7 C.F.R. § 3017.765 (a).

For the reasons that follow, after a full and careful review of the administrative record, the suspension decision by the Administrator of RUS is upheld and shall become effective as set forth in the accompanying order.

Findings

1. The Grants

In 2003, RUS awarded Blue Moon Solutions, Inc. (Blue Moon) seven Community-Oriented Connectivity Grants for projects to deploy broadband transmission services in seven rural communities in Texas. The grants totaled approximately \$2.7 million.

The availability of the grants had been announced by RUS through its publication of a Notice in the Federal Register on July 8, 2002 (67 Fed. Reg. 45079-45083). The Notice advised that the grants were to be given to applicants who would undertake feasible and sustainable projects to deploy broadband transmission services to small, rural communities via their schools, libraries, education centers, health care providers, law enforcement agencies and public safety organizations; and the services were to be made available as well to residents and businesses (67 Fed. Reg. 45079). Under the Notice, Blue Moon, a for profit, incorporated company, was as eligible to receive a grant as was a public body; an Indian tribe; a cooperative, nonprofit, limited dividend or mutual association; or a municipality (67 Fed. Reg. 45081). Under "Eligible Grant Purposes", the Notice specified that:

Grant funds may be used to finance:

(a) The construction, acquisition, or lease of facilities, including spectrum, to deploy broadband transmission services to all critical community facilities and to offer such service to all residential and business customers located within the proposed service area;

(b) The improvement, expansion, construction, or acquisition of a community center that furnishes free access to broadband Internet service, provided that the community center is open and accessible to area residents before and after normal working hours and on Saturday and Sunday. Grant funds provided for such costs shall not exceed the greater of 5 percent of the grant amount requested or \$100,000;

DEBARMENT AND SUSPENSION
(NON PROCUREMENT)

- (c) End-user equipment needed to carry out the project;
- (d) Operating expenses incurred in providing broadband transmission service to critical community facilities for the first 2 years of operations and to provide training and instruction. Salary and administrative expenses will be subject to review, and may be limited, by RUS for reasonableness in relation to the scope of the project; and
- (e) The purchase of land, buildings, or building construction needed to carry out the project.

Grant funds may not be used to finance the duplication of any existing broadband transmission services provided by other entities.

Facilities financed with grant funds cannot be utilized, in any way, to provide local exchange telecommunications service to any person or entity already receiving such services.

67 Fed. Reg., at 45081.

A successful applicant was also required to make a matching contribution equal to 15 percent of the grant amount requested and, as part of its application, to state the scope of the work it intended to perform that would include:

...A budget for all capital and administrative expenditures reflecting the line items costs for eligible purposes for the grant funds, the matching contributions, and other sources of funds necessary to complete the project.

67 Fed. Reg., at 45082.

The notice further required an applicant to provide evidence of compliance with other Federal statutes and regulations that included 7 CFR part 3015-Uniform Federal Assistance Regulations (67 Fed. Reg., at 45082).

Blue Moon responded to this Notice by filing applications for grants that stated the scope of work to be performed and included project budgets (NAD Agency Record, at pages 543-555). On May 16, 2003, May 19, 2003 and September 24, 2003, RUS notified Blue Moon of seven Community-Oriented awards, totaling approximately \$2.7 million (NAD Agency Record, at pages 285, 378, 471, 564, 662, 800 and 922). Attached to documents to be executed by Blue Moon to obtain the grants, were instructions with a sample Form 270 (the form that must be submitted to obtain grant funds) advising Blue Moon that: each Form 270 must be supported by paid or unpaid invoices, timesheets, lease agreements or other supporting documentation with a detailed description for eligible purposes for both grant and matching funds.

BLUE MOON SOLUTIONS, INC. AND MARTY HALE 129
65 Agric. Dec. 126

(NAD Agency Record, at pages 269, 364, 455, 537, 654, 792 and 895).

This advice was in implementation of 7 C.F.R. § 3015.61 (g) that requires:

(g) *Source documentation.* Accounting records shall be supported by source documentation. These documentations include, but are not limited to, cancelled checks, paid bills, payrolls, contract and subgrant award documents.

Grant agreements were thereafter executed by Blue Moon as “the grantee” in which it agreed:
Along with the Form 270, the grantee agrees to submit paid or unpaid invoices, employee timesheets, lease agreements or other supporting documentation that adequately supports approved expenditures for allowable grant purposes.
NAD Agency Record, at pages 247, 342, 431, 515, 636, 774, and 873.

2. Drawing on the Grant Funds

On January 22, 2004, Blue Moon started to draw on Grant funds by submitting Form 270 submissions. The submitted Form 270s were signed by Christonya Hill, COO, as authorized certifying official for Blue Moon. Her signatures were adjacent to this certification:

I certify to the best of my knowledge and belief the data on the reverse are correct and that all outlays were made in accordance with the grant conditions or other agreement and that payment is due and has not been previously requested.

NAD Agency Record, at page 200.

Upon receipt of the Form 270s, RUS advanced Grant funds to Blue Moon in accordance with its requests, and advised it:

We have enclosed a copy of the approved Form 270 and supporting documentation. Please retain this material (along with the original invoices) for audit purposes. These documents must be retained on file for at least 3 years after grant closing, except that the records must be retained beyond the 3-year period if audit findings have not been resolved. Please pay special attention to the requirement regarding the use of RUS grant funds for the approved purposes as specified in the Grant Agreement. Auditors may check, among other things, that (1) grant funds were disbursed only for approved purposes, (2) the disbursements are in the proper amounts, and (3) the disbursements are

supported by proper documentation....
NAD Agency Record, at pages 179, 288, 381, 486, 572, 688 and 830.

3. OIG Investigation Report

On October 19, 2004, the United States Department of Agriculture's Office of Inspector General (OIG) issued an investigation report of RUS Grant practices in which it stated that among other concerns, there was a risk of fraud or misuse of the broadband Grant funding to Blue Moon due to Grant funds not being utilized as intended (NAD Agency Record, at pages 4567-4571).

4. Grant Review Compliance Audit by RUS

RUS visited Blue Moon between November 15 through 19, 2004 to address the concerns expressed by OIG and to begin a Grant review compliance audit. There followed various telephone conferences and additional visits to Blue Moon. The Field Activities Report (NAD Agency Record, at pages 4193-4212) shows field visits to Blue Moon on 11/15-19/04, 11/29-12/3/04, 12/13-17/04, 1/10-14/05 and 3/14-18/05 by either an individual RUS Field Accountant, or a team of two RUS Field Accountants.

The RUS accountants found that the disbursed Grant funds to Blue Moon were based on requests that included unacceptable markups, inflated hourly labor rates, and that supplied invoices had been created by Blue Moon rather than being invoices that had actually been paid. Moreover, funds were being requested sometimes two to three years in advance of the money being required and grant monies and company funds were being commingled. They concluded that Blue Moon's accounting records were of questionable accuracy and its controls over grant disbursements were inadequate.

At the conclusion of the Compliance Audit, Blue Moon was notified to return \$910,829.79 in Grant disbursements because they had been requested and advanced considerably before they were required and because a number of construction fund disbursements could not be supported with actual cost documentation (NAD Agency Record, at pages 4143-4163).

5. Independent CPA Audit

Each grantee is required to submit an independent CPA audit of the grantee's financial statements under the Grant Agreement and under 7

C.F.R. § 1773.3. Although Blue Moon filed its audit report four months later than otherwise required, its filing on August 30, 2005 was acceptable under an extension of time it received from RUS (Hearing Transcript, attachment 7, Exhibits B, at pages 77-78). Prior to this audit, Blue Moon engaged a forensic accounting firm, Beakley & Associates, to recreate its accounting records and financial statements. The actual CPA audit was performed by the firm of Bolinger, Segars, Gilbert & Moss. In its Independent Auditors' Report, dated August 19, 2005, the Bolinger firm reported that it was "... unable to obtain support for labor capitalized to plant, property and equipment in 2004 and 2003 in the amount of \$190,916 and \$155,073, respectively" (NAD Agency Record, at page 3992). The report also contained these comments:

... regarding Blue Moon Solutions, Inc.'s internal control over financial reporting and its operation that we consider to be a material weakness as previously defined with respect to:

- * the accounting procedures and records;

There are no established procedures to identify and record vested stock option benefits, depreciation expense, federal and state income tax accrued liabilities, prepaid expenses, and other current and accrued liabilities;

- * the process for accumulating and recording labor, material, and overhead costs, and the distribution of these costs to construction, retirement, and maintenance or other expense accounts;

The procedures over reporting and recording labor do not allow for recording labor costs according to the function work performed;

There are no established procedures to identify and record indirect cost associated with self constructed assets; continuing property records need to be established; and

- * the materials control.

There are no material accounts maintained by the company.
NAD Agency Record, at page 4016.

6. Suspension of the Grants

By letter of September 30, 2005, the Acting Administrator of RUS suspended the Grants to Blue Moon on the basis of "serious discrepancies between the purposes for which grant funds were requisitioned and their actual expenditure by Blue Moon" (NAD Agency Record, at page 3976). Thereafter, on November 9, 2005, RUS terminated the Grants and notified Blue Moon in writing of the termination with a demand for repayment in the amount of \$910,829.79.

Simultaneously, RUS notified Blue Moon and Marty Hale of their suspensions from further federal contracting under 7 C.F.R. § 3017.700 (NAD Agency Record, at pages 1-14; Hearing Transcript, attachments 1 and 2).

7. The Administrator's Determination Upholding the Suspensions

In response to a written request made on behalf of Blue Moon and Mr. Hale by their attorney, a hearing to allow them to contest their suspensions was held on December 14, 2005, in Washington D.C. (Hearing Transcript, attachment 7, Exhibit B, at pages 1-172). It was conducted by the Administrator of RUS, assisted by the Assistant Program Advisor to the Policy Analysis and Risk Management division of RUS, who the Administrator named to be his fact-finder as authorized by 7 C.F.R. § 3017.750 (b). On January 26, 2006, the fact-finder submitted a report to the Administrator ("fact-finder's report", NAD Agency Record, at pages 5318-5329; and Hearing Transcript, attachment 7, Exhibit D). On March 10, 2006, "the Administrator's Determination" was issued that upheld the suspensions (Hearing Transcript, attachment 7). This appeal is taken from that determination. The Administrator stated that his determination to sustain the suspensions of Blue Moon and Mr. Hale was based, in accordance with 7 C.F.R. § 3017.750, on all the evidence in the record, including evidence presented by Blue Moon at the Suspension Hearing, the Contest of Suspension, the fact-finder's report and the records of RUS relating to Blue Moon and the Grants (Hearing Record, attachment 7, at page 2). He further stated that the suspensions were based on 7 C.F.R. § 3017.700(b) and (c) that authorize suspension upon a determination that:

- (b) There exists adequate evidence to suspect any other cause for debarment listed under § 3017.800(b) through (d); and
- (c) Immediate action is necessary to protect the public interest.

In his opinion, there was adequate evidence to suspect a cause for debarment pursuant to 7 C.F.R. § 3017.800(b)(2) for:
Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

...

- (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions....

The Administrator concluded that the determination to suspend Blue Moon and Mr. Hale was needed because of consistent irregularities and failures in Blue Moon's compliance with provisions in the Grant Agreements. He specified ten findings set forth at pages 2-5 of the Suspension Letters, as the basis for the suspensions. (Hearing Transcript, attachment 7, at page 3).

8. This Appeal of the Administrator's Determination

Blue Moon and Mr. Hale in their appeal of the Administrator's Determination, state that their government-wide suspension is based on erroneous conclusions that overlook, dismiss or minimize significant accounting conclusions and data submitted on Blue Moon's behalf by a forensic accounting firm and by a CPA auditing firm recommended to it by RUS. Blue Moon and Mr. Hale argue that: Volumes and volumes of detailed accounting data, financial reports from independent accountants and numerous representations from Blue Moon have been simply overlooked as evidence in this matter. Appeal of Suspension, at page 7.

The Appeal further argues that RUS has treated Blue Moon in a prejudicial manner in abuse of its discretion through a campaign to misinform communities about the suspension by stating that Blue Moon had been debarred, and its refusal to share the OIG report with Blue Moon prior to the hearing. Blue Moon also points out that one of the ten findings given for the suspension was the failure to file an audit report on time when in fact Blue Moon did file the report within the time given it through an extension of the deadline by a RUS official.

Earlier, in the Contest of Suspension filed at the hearing on December 14, 2005, the argument was made that all ten findings upon which the suspensions are based involve nothing more than bookkeeping errors that were rectified and fall short of an actionable or willful misdeed with no indication of fraud or willful wrongdoing (Hearing Transcript, attachment 6, at page 5).

Conclusions

1. Blue Moon was not prejudiced By Late Receipt of the OIG Report

Blue Moon's argument that it was prejudiced by not being given a copy of the OIG report prior to the hearing is baseless. The fact-finder specified that:

DEBARMENT AND SUSPENSION
(NON PROCUREMENT)

The issue of the OIG report is not considered applicable to the finding of fact and was, accordingly, not further considered. Furthermore, that part of the OIG report specifically cited by Blue Moon (footnote on page 10 of the CS(Contest of Suspension), pertains to a tracking system for site visits performed by RUS General Field Representatives under the Broadband Loan and Grant Program and is not directly applicable to this suspension. Hearing Transcript, Attachment 7, Exhibit D, at page 8.

Inasmuch as, the OIG report was not a basis for the finding that Blue Moon sought to refute, it was not prejudiced by the late receipt.

2. Review of the Record Shows Two Assertions By RUS Were Unfounded

Review of the record does show that RUS made two assertions that were unfounded.

The suspension notice and the fact-finder's report stated that Blue Moon failed to timely file the requisite annual independent auditor's report. However, RUS had extended the time for the filing of this report, and hence there was no failure of a legal duty by Blue Moon in this respect.

Secondly, RUS mistakenly advised communities dealing with Blue Moon that debarment rather than suspension proceedings were pending against it.

Neither mistaken assertion, however, rises to a level requiring the Administrator's Determination to be vacated. I find no evidence in the record to support the inference that RUS was deliberately picking on Blue Moon, or, in any other sense acting in an arbitrary and capricious manner in abuse of its discretion.

3. The Administrator's Determination and the Suspensions should be Upheld and Not Vacated

When the record as a whole is reviewed, the Administrator's Determination is shown by a preponderance of evidence to be in accordance with law and based on "adequate evidence that ... (Blue Moon) committed irregularities which seriously reflect on the propriety of further Federal Government dealings with ... (Blue Moon)." 7 C.F.R. § 3017.715 (3).

Though a suspension need not be based on an indictment or conviction (the two other grounds for its initiation), nonetheless, in the words of 7 C.F.R. § 3017.700, "(s)uspension is a serious action." When

reviewing a similar regulation governing suspensions by another agency, the District of Columbia Circuit stated:

There must be a real need for immediate action to protect the public interest in order to justify a suspension. *Sloan v. Dept. of Housing & Urban Development*, 231 F.3d 10, 17 (D.C. Cir. 2000).

The record upon which these suspensions are based, shows such a real need.

Review of the record demonstrates the Administrator's Determination is based on adequate evidence

The suspension letters listed ten sets of reasons as findings demonstrating Blue Moon's unsatisfactory performance of the seven Grants. One finding, the failure to timely submit an annual independent auditor's report, I have previously found and concluded to be erroneous.

The other nine allege five kinds of alleged unsatisfactory performance by Blue Moon under the Grants:

1. Failing to submit invoices; or conversely, submitting invoices for advances or reimbursements that were not actual invoices but had been created with added mark-ups and inaccurate and inflated charges. Under the latter practice, an internal Blue Moon profit of \$410,555.84 was added to equipment costs and \$34,681.99 of profit was added to the costs of university courses made available on internet sites.
2. Failures to maintain adequate timesheets; inadequate time reporting for employees; and claiming costs far in excess of actual costs incurred.
3. Seeking the full budgeted amount of costs for "Backhaul" and "Web Design" costs causing \$215,044 to be advanced for Backhaul when there was documentary support for only \$78,751.67 and causing \$217,350 to be advanced for Web Design when there was documentary support for only \$8,974.97.
4. Having inadequate books, records and financial records that used arbitrary allocations of costs based on unsupported assumptions, and that did not support the requests for advances under the Grants.
5. Lack of support for labor capitalized to plant, property and equipment as shown by the independent CPA audit that was unable to find such support in 2004 and 2003 in the amounts of \$190,916 and

\$155,073, respectively.

As to the first alleged kind of unsatisfactory performance, the fact-finder agreed with Blue Moon that third-party invoices are not explicitly required and that third-party invoices had been turned over to the RUS Field Accountants though not submitted with Blue Moon's submissions of Form 270 (Hearing Transcript, Attachment 7, Exhibit D, at page 4). However, in respect to Blue Moon's argument that there could not have been "additional markups for internal profit" because the independent CPA audit showed Blue Moon had a loss, the fact-finder found that its profit or loss from operations does not relate directly to the over billing. Moreover, he noted that the independent CPA audit showed \$345,989 in non-supported costs of equipment which closely compares to the \$410,556 overcharge claimed by RUS (*Ibid*, at pages 4 and 5).

The fact-finder then addressed the second alleged kind of unsatisfactory performance consisting of inadequate time sheets and time reporting, and applying for labor costs that exceeded what Blue Moon actually paid for labor. He found that Blue Moon did produce its timesheets, but that its submissions to RUS for payment were based upon the labor costs set forth in its grant application and approved project budget; and that the grant monies Blue Moon received for labor did not correspond to what it actually paid for labor. In fact, Blue Moon's actual labor costs were less than what was "invoiced" to RUS. In respect to time reporting, he found that Blue Moon's accounting for allocation of labor was deficient in that it did not clearly allocate work by projects (*Ibid*, at pages 5 and 6).

The fact-finder concluded that the amounts Blue Moon improperly sought in advance for Backhaul and Web Design costs is still undetermined. Some of the advances may eventually be supported and the amount that would remain unsupported could be less than the \$344,667 aggregate amount expressed by RUS in the Suspension letters, perhaps as low as the \$254,310 identified in the independent CPA audit as "unearned USDA grant funds" (*Ibid*, at pages 5, 7 and 8).

The fact-finder also addressed the inadequacy of Blue Moon's books, records and financial records that used arbitrary allocations of costs based on arbitrary assumptions, and did not support the requests Blue Moon made for advances under the Grants. He first noted that although the time for filing an independent CPA audit was extended, the report was dependent on the work of the forensic accountant, Beakley, who had to first produce compiled financial records for the audit to be completed.

...Blue Moon's assertion that the issue of financial statements has

become moot ignores that part of this RUS finding asserting that Blue Moon did not have adequate records as required by the grant agreement.

As to the “arbitrary allocations” based upon unsupported assumptions recounted in this RUS finding, Blue Moon relied upon the Beakley letter. As previously noted..., this Beakley letter is dated November 28, 2005 (after the suspension letters of November 9, 2005), and sets forward in detail the basis used for the allocation of certain direct and indirect labor costs/expenses which allocations apparently formed the basis for the Bolinger audited financial statements. It is worth noting that: (i) Beakley was engaged by Blue Moon and does not represent RUS; and (ii) in its audit reports, Bolinger was “... unable to obtain support for labor capitalized to plant, property and equipment in 2004 and 2003 in the amount of \$190,916 and \$155,073, respectively.” *Ibid*, at pages 8-9.

Finally, the fact-finder addressed the fact that the independent CPA audit was unable to find support for labor capitalized to plant, property and equipment in 2004 and 2003 in the amounts of \$190,916 and \$155,073, respectively. He does so in the context of whether the aggregate amount of \$910,829.78 that RUS initially disallowed as unsupported advances received by Blue Moon could be lowered to perhaps \$600,299 or \$530,664.42, upon review of worksheets prepared by Beakley that have not as yet been furnished to RUS. The point being that without adequate documentation, Blue Moon induced a gross overpayment and the amount it is actually owed is still unclear since its failure to furnish needed documentation has not been rectified.

b. The record shows a real need for immediate action to protect the public interest

Neither the Notice announcing the availability of Grants, nor the seven Grant awards to Blue Moon contained any provision for Blue Moon to profit on the work it was to perform to deploy broadband transmission services to community facilities. Additionally, USDA’s Uniform Federal Assistance Regulations (7 C.F.R. part 3015) that were expressly made part of each Grant award, sets forth principles and provisions to assure that disbursements of grant funds are limited to allowable costs. These regulations are expressly applicable to grants awarded to for profit organizations (7 C.F.R. § 3015.1) and they contain no provision for adding on markups for profit.

The fact-finder found that requests by Blue Moon for labor costs that exceeded actual costs happened to be consistent with the budgets Blue Moon had submitted. Apparently, the submitted budgets either contained

built-in markups for profit, or Blue Moon's actual costs were less than those its budgets anticipated. In any event, unlike procurement contracts for services or equipment, the RUS Grants awards are limited to reimbursing allowable costs that are not inflated to yield profits to Grantee. This is the essential interpretation that underlies the Administrator's Determination and it is an interpretation that is consistent with the Grant awards themselves and the Uniform Federal Assistance Regulations that apply to the Grant awards.

Those regulations make it clear, for example, that a grantee's "acquisition cost" of an item of purchased equipment means the net invoice price of the equipment. (Appendix A to Part 3015-Definitions, Section II). Although this definition does not preclude some charge to be included for ancillary or carrying costs, a markup for profit may not be added (*Ibid*, and Hearing Transcript, Exhibit B, at page 87).

The interpretation is also consistent with the objectives of the Notice that made the grants available to cooperatives and other nonprofits, Indian tribes, public bodies municipalities as well as to for profit corporations. Obviously, the nonprofit groups would not build in a profit on the work they would perform to carry out the purposes of the grant. Their compensation would consist of the satisfaction they would receive from making an improvement to a rural community that otherwise would be without broadband transmission services.

This does not mean that Blue Moon applied for the grants without any expectation of obtaining an eventual profit on its services. Mr. Hale understood that under the terms of the Grant awards, Blue Moon, as a for profit corporation, needed to earn its profits by:

...selling services to the residents and businesses to make enough revenue/profit to be able to provide free services (at the community centers).

Hearing Transcript, attachment 7, Exhibit B, at page 88.

In fact, he specifically denied that markups on equipment purchased for the projects were to enhance Blue Moon's profit margin, but were instead to compensate for the fact that:

...each piece of equipment has to be configured, burned in....

Hearing Transcript, attachment 7, Exhibit B, at page 90. But as the various investigators and the fact-finder have pointed out, nothing to substantiate such added costs was ever provided by Blue Moon. To the contrary, its COO told the investigators that the added markups were to obtain a profit on the projects.

Under these circumstances, Blue Moon's failure to provide needed invoices, timesheets and other documents to support its claim that the amounts it obtained for labor and equipment from RUS were for

allowable costs only, is not properly characterized as mere carelessness or negligent bookkeeping errors. Blue Moon filed false and unsubstantiated requests for grant funds to obtain more money than it was entitled to receive under the Grant awards. Not only did it regularly request funds in excess of the amounts it had actually incurred; its requests for others, such as the \$532,394 it obtained for Web Design and Backhaul, were made before Blue Moon had been invoiced anywhere near the amounts claimed. The record indicates that when all the invoices are in, the overcharges by Blue Moon for Web Design and Backhaul will be between \$254,310 and \$344,667.

Moreover, these practices were persistent. Field visits to Blue Moon were made by RUS investigators on November 15-19, 2004, November 29-December 3, 2004, December 13-17, 2004, January 10-14, 2005 and on March 14-18, 2005. The record shows that the need for documents to support the costs for which Blue Moon had obtained Grant funds was reiterated at the time of each visit, but was largely unsuccessful. Blue Moon's unsatisfactory performance of seven grants demonstrates, as stated in 7 C.F.R. § 3017.800(b)(2), "... (a) history of... unsatisfactory performance of one or more public agreements or transactions".

The persistence of these violations coupled with the large sums of money that Blue Moon improperly obtained through its Grant requests shows its violations to be serious. The existence of a real need to protect the public interest by taking immediate action to suspend Blue Moon and Marty Hale finds additional support in the fact that Blue Moon was attempting to enter into, or be the recipient of funds as a subcontractor on contracts for agency-financed grant projects. (RUS suspension letter of November 9, 2005, NAD Agency Record, at page 5073).

Accordingly, the following Order is hereby entered.

ORDER

It is this 7th day of June, 2006, ORDERED that the Administrator's Determination of March 10, 2006, suspending Blue Moon Solution's Inc. and Marty Hale from participating in Federal government programs, including Federal financial and non-financial assistance and benefits, is hereby upheld.

FEDERAL CROP INSURANCE ACT**COURT DECISION****ACE PROPERTY AND CASUALTY INS. CO, ET AL. v. USDA.
C.A.8 (Iowa), 2006.****No. 05-2321.****Filed March 16, 2006.****(Cite as: 440 F.3d 992).****FCIA – SRA – Administrative remedies, failure to exhaust – Jurisdictional vs. non-jurisdictional statutes – “sweeping and direct” – futile action, when not.**

Federal Crop Insurance Act (FCIA) amended the Standard Reinsurance Agreement (SRA) of the Federal Crop Insurance Act which adversely affected the Appellants and 13 other insurers similarly situated. Appellants (Insurers) brought a action directly to Federal District Court rather than exhausting all their administrative remedies. The court needed to determine whether 7 U.S.C. § 6912(e) was jurisdictional. The court cited *Weinberger v. Salfi*, 422 U.S. 749 for the principal of jurisdictional vs. non-jurisdictional exhaustion of administrative remedies. The court determined that the failure to exhaust administrative remedies for this statute – 7 U.S.C. § 6912(e) was non-jurisdictional since the language used by congress was not “sweeping and direct.” Non-jurisdictional statutes follow the common law principal under which exhaustion of administrative remedies is favored, but may be excused by a limited number of exceptions to the general rule. The court then went on to determine whether the insurers have a legitimate constitutional issue to litigate, or whether the pursuit of the administrative remedy would be “futile” and concluded that the insurers did not present any exception to the general rule concerning exhaustion of administrative remedies.

United States Court of Appeals, Eighth Circuit.

Before MURPHY, HANSEN, and SMITH, Circuit Judges.
MURPHY, Circuit Judge.

This breach of contract action was brought by a group of thirteen insurance companies¹ who provide federal crop insurance, alleging that the Federal Crop Insurance Corporation (FCIC) breached two provisions of the 1998 Standard Reinsurance Agreement (SRA). The FCIC moved

¹Ace Property and Casualty, Alliance Insurance Company, America Agricultural Insurance Company, American Growers Insurance Company, Country Mutual Insurance Company, Farm Bureau Mutual Insurance Company of Iowa, Farmers Alliance Mutual Insurance Company, Great American Insurance Company, Hartford Fire Insurance Company, Nau Country Insurance Company, Producers Lloyds Insurance Company, Rural Community Insurance Company, Farmers Mutual Hail Insurance Company of Iowa.

ACE PROPERTY AND CASUALTY INS. CO et al. 141
v USDA
65 Agric. Dec. 140

to dismiss for lack of jurisdiction, and the district court granted the motion on that ground, but ruled in the alternative that dismissal was also warranted because the insurers had neither exhausted their administrative remedies nor established any exception to the exhaustion requirement. The insurers appeal, and we affirm on the alternate ground.

I

The Federal Crop Insurance Act (FCIA), 7 U.S.C. §§ 1501-1524, established a federal crop insurance program in 1938 to be administered and regulated by the FCIC. 7 U.S.C. § 1503. Originally the FCIC directly provided crop insurance coverage to eligible farmers, but in 1980 Congress revised the FCIA to require the FCIC "to contract with private companies" for insurance "to the maximum extent possible." 7 U.S.C. § 1507(c). The FCIC was to "reimburse such companies...for [their] administrative and program expenses," *id.*, and provide reinsurance "to the maximum extent practicable" to cover catastrophic loss. 7 U.S.C. §§ 1508(k)(1), 1508(b)(1). The FCIC now offers most federal crop insurance through private insurers which it then reinsures.

The federal reinsurance program is governed by a contract between the FCIC and participating insurance providers entitled Standard Reinsurance Agreement (SRA). 7 C.F.R. § 400.164. The SRA is renewed annually, and a company may terminate the agreement by not submitting a Plan of Operation for the next reinsurance year by the date specified in the SRA. The FCIC may only terminate the SRA by giving notice at least 180 days prior to the date of renewal of its intent to terminate.

At issue between the FCIC and these insurers are two provisions of the 1998 SRA which provide Catastrophic Risk Protection (CAT) coverage. The Administrative Fee provision in the 1998 SRA allowed insurers to retain a portion of the administrative fee charged by the FCIA, and the Loss Adjustment Expenses (LAE) provision permitted insurers to recoup 14% of an imputed premium for each CAT policy provided to a farmer. These provisions were affected by congressional action in 1998. In that year Congress enacted the Agricultural Research Extension and Education Reform Act (AREERA), Pub.L. No. 105-185, 112 Stat. 523 (1998), which eliminated the right of private insurance companies to retain any administrative fees and capped LAE reimbursement at 11%. Then in 2000 Congress enacted the Agricultural

Risk Protection Act (ARPA), Pub.L. No. 106-224, 114 Stat. 358 (2000), further lowering the LAE cap to 8%.

The FCIC amended the SRA to implement AREERA and ARPA. Amendment No. 1 was effective at the start of the 1999 fiscal year, and it eliminated the right of private insurers to retain any administrative fees and capped LAE reimbursement at 11%. Amendment No.3 was effective at the start of fiscal year 2000, and it reduced the LAE cap to 8%. When the FCIC notified the insurers of each amendment, it informed them that their SRA would be terminated if they failed to execute either amendment within 10 days of receipt. Appellants all executed the amendments, but they reserved the right to sue the FCIC for damages.

Disputes regarding the SRA are governed by the Federal Crop Insurance Reform and Department of Agriculture Act of 1994, Pub.L. 103-354, 7 U.S.C. §§ 6901-7014 (1994) (Reorganization Act), which created a mandatory administrative appeals process for SRA matters. Under the Reorganization Act, a party who believes that its SRA rights have been violated may request a final agency determination, which can then be appealed to the Department of Agriculture Board of Contract Appeals (the Board). Although the Act grants exclusive jurisdiction to federal district courts, 7 U.S.C. § 1506(d), parties are to exhaust their administrative remedies before pursuing a claim in federal court. 7 U.S.C. § 6912(e).

II.

In February 2003 the insurers brought an action against the United States in the Court of Federal Claims for breach of contract, duress, and unjust enrichment resulting from the implementation of AREERA and ARPA. The government moved to dismiss, arguing that under § 6912(e) exhaustion of administrative remedies was a prerequisite to subject matter jurisdiction, and alternatively that § 1506(d) required complaints to be filed in federal district court. The insurers responded that neither § 1506(d) nor the exhaustion requirements contained in the SRA were binding; they did not directly address § 6912(e) because their suit was against the United States rather than the FCIC. In March 2004 the Court of Federal Claims dismissed the action for lack of jurisdiction under § 6912(e) because the insurers had not exhausted their administrative remedies, and alternatively because § 1506(d) grants federal district courts exclusive jurisdiction over suits against the FCIC. *Ace Property & Cas. Ins. Co. v. United States*, 60 Fed.Cl. 175, 184-85 (Fed.Cl.2004).

ACE PROPERTY AND CASUALTY INS. CO et al. 143
v USDA
65 Agric. Dec. 140

Its decision was affirmed by the Federal Circuit on June 1, 2005, on the ground that the case had been properly dismissed since § 1506(d) provides for exclusive jurisdiction in the federal district courts and that there was therefore "no reason to revisit [the court's] superfluous finding regarding exhaustion of administrative remedies." *Ace Property & Cas. Ins. Co. v. United States*, 138 Fed.Appx. 308, 309 (Fed.Cir.2005).

After the Federal Circuit's decision, the insurers sought a final administrative determination from the FCIC. The FCIC declined because their request had not been made within 45 days after notice of the disputed action. *See* 7 C.F.R. § 400.169(a). The insurers then appealed to the Board, which did not issue its decision until shortly before oral argument on the appeal in this court.

While their appeal was still pending before the Federal Circuit, the insurers filed this action against the FCIC in the Southern District of Iowa seeking damages for the breach of the 1998 SRA. The FCIC moved to dismiss, arguing that the district court lacked subject matter jurisdiction under § 6912(e) because appellants had failed to exhaust their administrative remedies. The insurers responded that the statute did not deprive the federal district court of jurisdiction and that exhaustion should not be required because it would be futile since neither the FCIC nor the Board has the authority to award the relief sought and the issues involved are legal questions better resolved by courts than agencies. The district court dismissed their complaint in February 2005, holding that it had no jurisdiction over the dispute because the insurers had not exhausted their administrative remedies as required by § 6912(e). Alternatively the court held that even if it had jurisdiction, their failure to exhaust was not excused under the traditional exceptions. The insurers now appeal, arguing that § 6912(e) is not a jurisdictional statute and that exhaustion is not required because in this case it would be futile and because the complaint raises only legal issues unsuitable for administrative resolution.

Subsequently on December 21, 2005, the Board rendered its decision on the insurers' administrative appeal. *Ace Property & Cas. Ins. Co.*, AGBCA No.2004-173-F, 2005 WL 3485623 (December 21, 2005). The Board found that it had jurisdiction over the dispute and possessed the authority to issue whatever relief might be necessary to remedy any breach of contract, including the power to award money damages. It also gave examples of instances in the past where it had awarded such relief.

Although it upheld the 45 day rule for bringing administrative claims, it decided that the rule should not have been applied retroactively. Thus it affirmed the agency determination that the insurers' claims for the 2001 and 2002 reinsurance years were time barred for failing to bring them within 45 days of notice of the disputed action, but it remanded the claims for the 1999 and 2000 reinsurance years for further administrative proceedings.

III.

On their appeal from the dismissal of their action, the insurers complain that the district court erred in concluding that exhaustion of administrative remedies was a prerequisite to subject matter jurisdiction. The FCIC responds that the language of § 6912(e) is jurisdictional when considered within the context of the statutory scheme so appellants' failure to exhaust administrative remedies means there is no subject matter jurisdiction over this action.

The Supreme Court has indicated that a statute requiring plaintiffs to exhaust administrative remedies before coming into federal court may be either jurisdictional in nature or non jurisdictional, depending on the intent of Congress as evinced by the language used. *See Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). Under a jurisdictional statute, exhaustion of administrative remedies cannot be excused or waived and the failure by a party to exhaust is a jurisdictional bar. In contrast, a non jurisdictional statute codifies the common law exhaustion principle under which exhaustion of administrative remedies is favored, but may be excused by a limited number of exceptions to the general rule. *Id.* at 765-66, 95 S.Ct. 2457.

In *Salfi*, the Court addressed an appeal dealing with § 405(h) and § 405(g) of the Social Security Act. The Court first considered the third sentence of § 405(h), which provides that "[n]o action ... shall be brought under section 1331 ... of Title 28 to recover on any claim arising under this subchapter." 42 U.S.C. § 405(h). Since the language used by Congress was "more than a codified requirement of administrative exhaustion" and was "sweeping and direct," the district court had lacked federal question jurisdiction over the case before it. *Salfi*, 422 U.S. at 757, 95 S.Ct. 2457. The Court then discussed § 405(g), which provides in pertinent part that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party ... may obtain a review ... by a civil action ..." 42 U.S.C. § 405(g). The Court concluded

ACE PROPERTY AND CASUALTY INS. CO et al. 145
v USDA
65 Agric. Dec. 140

that the term "final decision" was "a statutorily specified jurisdictional prerequisite" and "something more than simply a codification of the judicially developed doctrine of exhaustion." The district court had therefore erred by concluding that futility could excuse the need to exhaust. *Salfi*, 422 U.S. at 766, 95 S.Ct. 2457.

Under *Salfi* the language of a statute must be "sweeping and direct" for it to be considered jurisdictional. *Id.* 422 U.S. at 757, 95 S.Ct. 2457. The language must indicate either that "there is no federal jurisdiction prior to exhaustion" or that exhaustion is "an element of the underlying claim." *Chelette v. Harris*, 229 F.3d 684, 687 (8th Cir.2000). Exhaustion is presumed to be non jurisdictional "unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C.Cir.2004) (internal citations omitted). We review de novo the district court's interpretation of § 6912(e). *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 937 (8th Cir.2005).

The question of whether § 6912(e) is jurisdictional in nature has never been addressed by the Supreme Court, and it presents a question of first impression for this court. Section 6912(e) provides that:

[n]otwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction² against (1) the Secretary; (2) the Department; or (3) an agency, office, officer, or employee of the Department.

7 U.S.C. § 6912(e).

Other circuits that have addressed the issue are split. In *McBride Cotton & Cattle Corp. v. Veneman*, the Ninth Circuit held that "the exhaustion requirement of § 6912(e) is not jurisdictional" because it contains no language expressly conditioning federal question jurisdiction on exhaustion of administrative remedies. 290 F.3d 973, 976 (9th Cir.2002). In contrast, the Second Circuit in *Bastek v. Fed. Crop Ins. Corp.*, held that "the statutory provision mandating exhaustion in 7 U.S.C. § 6912(e) is explicit" and the plaintiffs' failure to exhaust

²A court of competent jurisdiction is any federal district court to which 7 U.S.C. § 1506(d) grants exclusive jurisdiction over suits by or against the FCIC.

administrative remedies "deprived them of the opportunity to obtain relief in the district court." 145 F.3d 90, 94-95 (2d Cir.1998). The lower courts are also split as to whether § 6912(e) is jurisdictional. *Compare Kuster v. Veneman*, 226 F.Supp.2d 1190, 1192 (D.N.D.2002) (implicitly finding § 6912(e) non jurisdictional); *Rain & Hail Ins. Service, Inc. v. Fed. Crop Ins. Corp.*, 229 F.Supp.2d 710, 714 (S.D.Tx.2002) (same); *In re Cottrell*, 213 B.R. 33, 37 (M.D.Ala.1997) (rejecting the claim that § 6912(e) is jurisdictional)³ with *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F.Supp.2d 999, 1004 (D.Minn.2002) (explicitly finding § 6912(e) to be jurisdictional); *Am. Growers Ins. Co. v. FCIC*, 210 F.Supp.2d 1088, 1092-93 (S.D.Iowa 2002) (implies § 6912(e) is jurisdictional); *Gilmer-Glenville, Ltd. P'ship v. Farmers Home Admin.*, 102 F.Supp.2d 791, 794 (N.D.Ohio 2000) (same); *Utah Shared Access Alliance v. Wagner*, 98 F.Supp.2d 1323, 1333 (D.Utah 2000) (failure to exhaust remedies deprives court of subject matter jurisdiction).

We begin our inquiry with the language of § 6912(e). *See United States v. Mickelson*, 433 F.3d 1050, 1052 (8th Cir.2006). Although the language requires exhaustion, nothing in the text indicates that exhaustion was intended as a jurisdictional bar and the FCIC has not pointed to any legislative history evidencing such an intent. Section 6912(e) is directed at "a person" and provides that the person shall exhaust administrative remedies before bringing an action in federal district court against the FCIC. There is no language directed at courts or limiting federal district court jurisdiction.

Our court has examined similar language in the Prison Litigation Reform Act (PLRA) and held that it "does not contain the sort of 'sweeping and direct' language necessary to impose a jurisdictional requirement," but only "governs the timing of the action." *Chelette*, 229 F.3d at 686-87 (internal citations omitted). Section 1997e(a) of the PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). Every circuit which has considered whether § 1997e(a) is jurisdictional in nature has concluded that it is not.

³ There are also unreported decisions which have explicitly held that § 6912(e) is non jurisdictional. *See Farmers Alliance Mut. Ins. Co. v. Fed. Crop Ins. Corp.*, 2001 WL 30443, at *2 (D.Kan.2001) ("Section 6912(e) contains no sweeping and direct language barring federal question jurisdiction absent exhaustion of administrative remedies."); *Pringle v. United States*, 1998 U.S. Dist. Lexis 19378, at * 14-15 (E.D. Mich.1998).

ACE PROPERTY AND CASUALTY INS. CO et al. 147
v USDA
65 Agric. Dec. 140

See Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 677 (4th Cir.2005); *Richardson v. Goord*, 347 F.3d 431, 433-34 (2d Cir.2003); *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1206 (10th Cir.2003); *Ali v. Dist. of Columbia*, 278 F.3d 1, 5-6 (D.C.Cir.2002); *Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir.2002); *Wright v. Hollingsworth*, 260 F.3d 357, 358 n. 2 (5th Cir.2001); *Curry v. Scott*, 249 F.3d 493, 501 n. 2 (6th Cir.2001); *Nyhuis v. Reno*, 204 F.3d 65, 69 n. 4 (3d Cir.2000); *Rumbles v. Hill*, 182 F.3d 1064, 1067-68 (9th Cir.1999); *Massey v. Helman*, 196 F.3d 727, 732 (7th Cir.1999).

The language used by Congress in the Immigration and Nationality Act (INA) provides a useful contrast. In § 242 of the INA, Congress provided that "*a court* may review a final order of removal *only if*... the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1) (emphasis added). Here, the exhaustion requirement explicitly limits subject matter jurisdiction, and § 1252(d)(1) has consistently been treated as a jurisdictional statute and an integral part of the statute. *See Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir.2004); *Theodoropoulos v. I.N.S.*, 358 F.3d 162, 169-72 (2d Cir.2004); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 594-95 (3d Cir.2003); *Fernandez-Bernal v. Attorney General of the United States*, 257 F.3d 1304, 1317 n. 13 (11th Cir.2001); *Singh v. Reno*, 182 F.3d 504, 511 (7th Cir.1999); *Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir.1997).

The language in § 6912(e) of the Reorganization Act resembles that used in the PLRA. Its directive is addressed to the individual litigant rather than the court, and it pertains to the time when an action may be brought in federal district court. Like the language of the PLRA and in contrast to the language of the INA and the Social Security Act, "[n]othing in § 6912(e) mentions, defines or limits federal jurisdiction," *McBride*, 290 F.3d at 980, and its language cannot be considered "sweeping and direct" under *Salfi*.

The FCIC contends that appellants reliance on *Chelette*, and its interpretation of PLRA § 1997e(a), is misplaced due to the Supreme Court's intervening decision in *Booth v. Churner*, 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). In *Booth* the Court dismissed a prisoner's § 1983 action for failure to exhaust administrative remedies, but it did not consider whether § 1997e(a) was jurisdictional or not. Its decision turned instead on its interpretation of "available remedies" under § 1997e(a). *Id.* at 736, 121 S.Ct. 1819. Moreover, all circuits

which have ruled on the jurisdictional issue since *Booth* have continued to treat § 1997e(a) as non jurisdictional. *See Anderson*, 407 F.3d at 677; *Richardson*, 347 F.3d at 433-34; *Steele*, 355 F.3d at 1206; *Ali*, 278 F.3d at 5-6.

The FCIC's reliance on the Second Circuit's decision in *Bastek* is also not persuasive. *Bastek* concluded that exhaustion of administrative remedies was a statutory mandate under § 6912(e) precluding the normal exercise of judicial discretion in balancing the individual interest in access to a federal judicial forum against the institutional interests favoring exhaustion. *Bastek*, 145 F.3d. at 94. As the Ninth Circuit has pointed out, however, "not all statutory exhaustion requirements are created equal. Only statutory exhaustion requirements containing 'sweeping and direct' language deprive a federal court of jurisdiction." *McBride*, 290 F.3d at 980 (*citing Anderson v. Babbitt*, 230 F.3d 1158, 1162 (9th Cir.2000); *Rumbles*, 182 F.3d at 1067); *see also Cottrell*, 213 B.R. 33 (exhaustion of administrative remedies not a jurisdictional prerequisite to court consideration of Chapter 13 debtor's claim even though exhaustion required by statute). In *Bastek* the court did not address whether the language of § 6912(e) was sweeping and direct, but merely stated that § 6912(e) was "explicit." However, the language in § 6912(e) is no more explicit than that in § 1997e(a) of the PLRA which no circuit considers jurisdictional. A contrary interpretation would make virtually all statutory exhaustion provisions jurisdictional, regardless of whether they contain sweeping and direct jurisdictional language. Such a rule cannot be squared with the Supreme Court's decision in *Salfi*.

After reviewing the cases and comparing § 6912(e) to other statutes we conclude that § 6912(e) is nothing more than "a codified requirement of administrative exhaustion" and is thus not jurisdictional. *Salfi*, 422 U.S. at 757, 95 S.Ct. 2457; *see also McBride*, 290 F.3d at 980. Section 6912(e) was promulgated in 1994, almost twenty years after the Supreme Court's decision in *Salfi* distinguishing between jurisdictional and non jurisdictional exhaustion. Had Congress intended to limit subject matter jurisdiction by § 6912(e), it could have done so with explicit language as it has in other statutes. *See, e.g.*, 8 U.S.C. § 1252(d)(1). To now interpret § 6912(e) as jurisdictional "would collapse the Supreme Court's distinction between jurisdictional prerequisites and mere codifications of administrative exhaustion requirements," *Chelette*, 229 F.3d at 687, and would run counter to our prior interpretation of

similar statutes such as the PLRA.⁴ Since we conclude that the district court did have subject matter jurisdiction over this case, we must consider its alternative reason for dismissing the insurers' complaint.

V.

Appellants argue that the district court also erred by its ruling on the alternative ground that the insurers had not exhausted their administrative remedies. Appellants contend that exhaustion is not required since it would be futile because administrative remedies cannot redress their injuries and because their complaint presents legal questions which are best resolved by the courts. The FCIC responds that appellants do not qualify for the limited exceptions to the exhaustion doctrine. It contends that the Deputy Administrator of the FCIC and the Board can consider their claims, the Board can award appropriate monetary relief, and that the agency should have been allowed the opportunity to create an adequate administrative record for review before any complaint was filed in the district court. Because appellants have challenged the agency action, they bear the burden of proving that exhaustion should be excused under their proffered theories. *In Home Health, Inc. v. Shalala*, 272 F.3d 554, 559-61 (8th Cir.2001). We review the district court's decision on exhaustion de novo. *Kinkead v. Southwestern Bell Corp. Sickness & Accident Disability Benefit Plan*, 111 F.3d 67, 68 (8th Cir.1997).

A party may be excused from exhausting administrative remedies if the complaint involves a legitimate constitutional claim, if exhaustion would cause irreparable harm, if further administrative procedures would be futile, *In Home Health*, 272 F.3d at 560, or if the issues to be decided are primarily legal rather than factual. *Missouri v. Bowen*, 813 F.2d 864, 871 (8th Cir.1987). The insurers claim that both the futility and legal issue exceptions apply, and we address each in turn.

An administrative remedy will be deemed futile if there is doubt about whether the agency could grant effective relief. *See McCarthy*

⁴Other statutes that require exhaustion but which have been held to be non jurisdictional include § 7806 of the Hass Avocado Promotion, Research, and Information Act, 7 U.S.C. §§ 7801-7813, *Avocados*, 370 F.3d at 1248; and §§ 405(g)-(h) of the Social Security Act, *Salfi*, 422 U.S. at 757, 766, 95 S.Ct. 2457. *See also Anderson*, 230 F.3d at 1162 (holding that 43 C.F.R. § 4.21(c), which requires exhaustion before appeals from decisions of the Interior Board of Indian Appeals is non jurisdictional).

v. Madigan, 503 U.S. 140, 147, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). In claiming they come under the futility exception the insurers allege that neither the FCIC nor the Board have the power to award damages. The Board's jurisdiction was set out by the Contract Disputes Act (CDA), 41 U.S.C. § 607(d), which provides that [e]ach agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

Appellants argue that because the CDA only covers procurement contracts, 7 C.F.R. § 24.4 (defining contract under the CDA); *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed.Cir.1983), the Board lacks jurisdiction because the SRA is not a procurement contract.

Appellants overlook 7 C.F.R. § 400.169, which provides that "final administrative determinations of the [FCIC] ... may be appealed to the [Board]" if "the company believes that the [FCIC] has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement." Because the implementation of AREERA and ARPA can affect the legal rights of appellants under the SRA, complaints over implementation are properly considered by the Board under 7 C.F.R. § 400.169. *See Nat'l Crop. Ins. Services, Inc. v. Fed. Crop Ins. Corp.*, 351 F.3d 346 (8th Cir.2003); *Ace Property*, AGBCA No.2004-173-F, 2005 WL 3485623. Moreover, Section V of the 1998 SRA provided that an insurer could bring disputes before the Board under 7 C.F.R. § 400.169. While the Board could not decide the legality of the regulations in issue, interpreting the contractual language of the SRA is well within its purview.

Appellants also claim that the Board cannot award damages. Even though the FCIC was required by Congress to implement AREERA and ARPA and thus breach the SRA, it does not follow that the Board cannot award damages for the breach. *See United States v. Winstar Corp.*, 518 U.S. 839, 843, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). "On matters involving disputes over interpreting, explaining, or restricting the terms of the [SRA], the [Board also] has [the] authority and has authorized [the] award of monetary damages." *Ace Property & Cas. Ins. Co.*,

ACE PROPERTY AND CASUALTY INS. CO et al. 151
v USDA
65 Agric. Dec. 140

AGBCA No.2004-173-F thru 2004-184-F, 2005 WL 3485623 (December 21, 2005). "[W]hile FCIC was required to comply with the congressional mandate, nothing in that congressional action barred FCIC from paying or being responsible for breach damages caused by that compliance." *Id.* Because the Board has jurisdiction over the dispute and the power to award monetary relief, we conclude that appellants have not demonstrated that their administrative remedies would be futile.

Appellants finally argue that their failure to exhaust should be excused because the issues involved on this appeal are legal questions which are not suitable for administrative resolution and are more properly resolved by the courts. The FCIC responds that while some of the issues to be determined involve factual questions, they are more properly considered legal questions which should be left to the expertise of the FCIC and the Board.

The legal issues exception is extremely narrow and should only be invoked if the issues involved are ones in which the agency has no expertise or which call for factual determinations. *Jewel Companies, Inc. v. Fed. Trade Comm'n*, 432 F.2d 1155, 1159 (7th Cir.1970). The district court identified several facts which may remain in dispute, such as whether the SRA was a continuous contract with unvariable terms or a renewable contract whose terms will vary from year to year; what type of consideration was given; and whether the parties were under duress when they accepted Amendments No. 1 and 3. *Ace Property*, 357 F.Supp.2d at 1151. Even though some of the issues involved are admittedly legal in nature, that does not necessarily mean they are questions that should excuse exhaustion.

The purpose of exhaustion is to prevent "premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the court the benefit of its experience, and to complete a record which is adequate for judicial review." *Salfi*, 422 U.S. at 765, 95 S.Ct. 2457; *see also West v. Bergland*, 611 F.2d 710, 715 (8th Cir.1979). Those goals would not be advanced if the administrative process was not completed here. The statutory scheme gives the FCIC and the Board special responsibility in respect to the proper application and interpretation of the SRAs. The administrative process is apparently moving forward successfully, *see Ace Property*, AGBCA No.2004-173-F thru 2004-184-F, 2005 WL 3485623, and exercising

jurisdiction at this stage would not allow the expertise of the FCIC and Board to develop a full administrative record for the benefit of any future judicial review. We conclude that appellants have not established any exception to the requirement that they exhaust their administrative remedies.

IV.

Accordingly, we affirm the judgment of the district court on the ground that none of the exceptions to the exhaustion doctrine excuse appellants' failure to exhaust their administrative remedies.

FOOD NUTRITION SERVICE

COURT DECISION

**BURCH v. USDA.
C.A.6 (Ohio), 2006.
No. 04-3640.
Filed March 31, 2006.**

FNS – Trafficking – Clearly erroneous findings, when not – Electronic Benefits Transfer (EBT) – Employee, who is an – disqualification, permanent.

Government's investigators presented creditable evidence of three instances that convenience store's employees engaged in trafficking of federal food stamps. Store part-time cashier and manager (Burch) who claimed he was not a paid employee and contended (without specific evidence) that the investigators entrapped him on two other occasions or otherwise failed to disclose exculpatory evidence at the trial. Court held that the regulatory framework provides that even a single instance of trafficking is sufficient to permanently disqualify a participant in the federal food stamp program. The government also offered electronic benefits (EBT) data which they proffered "could not be legitimate transactions." The court did not rely on the EBT data, but found the investigator's testimony legally sufficient to find that trafficking did occur and was attributed to the employer.

(Cite as: 174 Fed.Appx. 328).

United States Court of Appeals, Sixth Circuit.

Before GIBBONS, GRIFFIN and BRIGHT, Circuit Judges.*

JULIA SMITH GIBBONS, Circuit Judge.

Plaintiff-appellant David Burch appeals from the district court's affirmance of the decision of the United States Department of Agriculture ("USDA"), Food and Nutrition Service ("FNS"), to permanently disqualify Burch's store, DB's Check Mart (the "store" or "Check Mart"), from participation in the federal food stamp program (the "program"). For the following reasons, we affirm the district court's decision.

The FNS permanently disqualified Check Mart from the federal food stamp program after it determined that the store's personnel unlawfully

*The Honorable Myron H. Bright, United States Court of Appeals for the Eighth Circuit, sitting by designation.

trafficked in food stamps in violation of 7 U.S.C. § 2021(b)(3)(B) and C.F.R. § 278.6(e)(1)(i). Following that administrative action, Burch filed a complaint in district court in accordance with 7 U.S.C. § 2023(a)(13), which provides for *de novo* judicial review of final administrative decisions by the FNS. After the parties consented to having the case heard by a magistrate judge, a bench trial was conducted. At trial, William Krause, an FNS program specialist, testified about the administration of the food stamp program. Krause testified that Check Mart was permanently disqualified from the program as a result of an investigation, which was carried out by the USDA Office of Inspector General and the Akron Police Department, that determined that food stamp benefits were being redeemed for cash and non-food items at Check Mart. Krause also testified that the store was disqualified based on an analysis of the store's electronic benefit transfer ("EBT") data, which tracks food stamp transactions electronically. According to Krause, the data revealed that certain transactions at the store could not be legitimate transactions and therefore likely reflected trafficking activity.

Detective Dan Hudnall of the Akron Police Department then testified that he was involved in the investigation of Check Mart that uncovered trafficking. Hudnall testified that an undercover source, Joe Mollis, with whom the investigation was working, was able to exchange food stamps for cash or ineligible items on three occasions: Mollis exchanged \$100 in paper food stamps for \$40 cash and a six pack of beer with Daniel Burch, the plaintiff's brother, on February 14, 2000; Mollis exchanged money on an EBT card for cash and beer with Diane Roebuck on February 24, 2000; and Mollis bought ineligible beer using food stamps on March 16, 2000. Detective Kandy Shoaf of the Akron Police Department testified that she was also involved in the investigation of Check Mart. Shoaf testified that she accompanied Joe Mollis into the Check Mart on March 16, 2000. Mollis attempted to exchange food stamps for cash but was told to come back later to sell food stamp benefits. Shoaf testified that Mollis was able to purchase beer using food stamps at that time. Joe Mollis then testified that he participated as an undercover source and sold food stamps to employees of Check Mart on each of the three different occasions in February and March 2000. Mollis testified that the first transaction was with Daniel Burch, while the second and third were with Diane Roebuck. Finally, James Owens, a USDA agent, testified that he also participated in the investigation and that Joe Mollis was able to sell food stamp benefits for cash.

Diane Roebuck testified that she volunteered at Check Mart, helping with check cashing, money orders, money grams, and cleaning. Daniel Burch testified that he assisted in going to the bank for the store and doing construction for the store. Daniel Burch also testified that Diane Roebuck worked, although without pay, 12- to 14-hour days at Check Mart, seven days a week.

On March 9, 2004, the magistrate judge affirmed the FNS's decision to permanently disqualify Check Mart from the program and dismissed Burch's complaint. In an accompanying memorandum opinion, the magistrate judge made, in part, the following findings of fact: (1) on February 14, 2000, Joe Mollis sold food stamps to Daniel Burch in exchange for cash and alcohol; (2) on February 23, 2000, Joe Mollis sold an authorization card to Diane Roebuck in exchange for cash and alcohol; and (3) on March 16, 2000, Joe Mollis, accompanied by detective Shoaf, exchanged food stamp benefits with Diane Roebuck for alcoholic beverages and other miscellaneous items. The magistrate judge found that Daniel Burch and Diane Roebuck "performed duties in various capacities at the store, including management and occasionally clerking at the cash register." The magistrate judge concluded that Daniel Burch and Diane Roebuck were personnel of the store and had engaged in trafficking on these three occasions. Therefore, the magistrate judge held that the FNS action to permanently disqualify Check Mart from the program was valid. With respect to the EBT data offered by the government, although the magistrate judge did not challenge the authenticity of the data, she concluded that the transactions reflected in the data did not constitute trafficking. Burch filed a timely notice of appeal.

On appeal, we review the district court's findings of fact for clear error. Fed.R.Civ.P. 52(a). The district court's conclusions of law are reviewed *de novo*. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir.1996).

Burch first argues that exculpatory evidence, the discovery of which will demonstrate that FNS intentionally framed Burch, was concealed by FNS. Specifically, Burch argues that there were two instances prior to the three trafficking violations in which various individuals tried to get Daniel Burch to violate the food stamp laws. Burch fails to state what specific evidence he seeks or whether he previously requested any evidence regarding the prior incidents. Based on our review of the bench trial record, it does not appear that he ever did request any such

evidence. Moreover, Burch does not explain how any evidence concerning the earlier incidents, assuming such evidence exists, relates to the narrow issue in this case: whether Check Mart engaged in food stamp trafficking on the three dates in question. Beyond his conclusory assertion that the other two instances provide evidence of a "frame-up" and motive to frame him by the government, Burch offers no basis on which this court could reach such a conclusion.

Burch also argues that the government's enforcement action was untimely. Any claim that the government's delay bars enforcement of the regulation fails, because the government is generally not subject to the defense of laches in enforcing its rights. *Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir.2003). Moreover, at trial, Burch plainly admitted that he could not show any prejudice to him arising from the government's delay in enforcing the regulation.

Burch asserts that the government's failure to preserve exculpatory evidence violated his due process rights. In support of his due process claim, Burch cites to *United States v. Wright*, 260 F.3d 568 (6th Cir.2001), which held that a criminal defendant's due process rights were not violated when investigators negligently failed to preserve potentially useful evidence. This court's *Wright* case derives from principles, outlined in *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) and *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), that involve a criminal defendant's right to present a complete defense and " 'what might loosely be called the area of constitutionally guaranteed access to evidence.' " *Trombetta*, 467 U.S. at 485, 104 S.Ct. 2528 (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)). Burch neither argues nor cites to any authority indicating that a criminal defendant's right to certain evidence is applicable to a civil action challenging an administrative decision to disqualify a business from the federal food stamp program.

The record does not indicate that Burch requested the allegedly exculpatory evidence prior to trial. Moreover, at trial, Burch acknowledged that the absence of the allegedly missing evidence-the cash and non-cash items involved in the transactions and Check Mart's security video tapes on the transaction dates-had not prejudiced his case in any way. Nor does he suggest any prejudice now. With regard to the cash used in the transactions, it is not disputed that an FNS agent, who was not involved in the case, stole the cash from an evidence locker. The

government did not attempt to enter any of the non-cash items into evidence. The security videotapes were erased by Burch before he knew of the administrative investigation or disqualification. There is no basis for finding a due process violation under the circumstances presented here.

Burch also argues that the evidence offered at trial was insufficient to sustain the FNS's decision. Initially, it should be noted that many of Burch's assertions revolve around the alleged invalidity of the EBT data introduced by the government. We need not consider these arguments, however, because the magistrate judge did not rely on the EBT data and specifically concluded that the transactions manifested in that data were not trafficking. Thus, the validity of the EBT data is irrelevant. The remainder of Burch's assertions involve credibility determinations and the weight given to certain evidence. Our own review of the record leads us to conclude that the magistrate judge's factual findings in this case were supported by ample evidence in the form of testimony from the government's investigating officers. The magistrate judge's findings were not clearly erroneous.

Finally, Burch challenges the constitutionality of 7 C.F.R. § 278.6, arguing that the regulation is vague and overbroad. The challenged regulation provides that the FNS shall disqualify a firm permanently from the food stamp program if "personnel" of the firm have "trafficked" in food stamps. 7 C.F.R. § 278.6(e)(1)(i).¹ "Trafficking" is defined in the regulations as "the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food...." 7 C.F.R. § 271.2. Although "personnel" is not defined in the regulations, we have previously defined the word as it is used in this regulation. Giving the word its ordinary meaning, the court interpreted personnel to be " 'a body of persons employed in some service' or 'a body of employees that is a factor in business administration.' " *Bakal Bros., Inc. v. United States*, 105 F.3d 1085, 1089 (6th Cir.1997) (citing Webster's Third New International Dictionary 1687 (1971)).

A challenge to the constitutionality of a regulation is reviewed *de*

¹The statutory basis for this regulation is found at 7 U.S.C. § 2021(b)(3)(B), which provides that a store may be permanently disqualified from the federal food stamp program based on a single instance of the trafficking in or purchasing of coupons or authorization cards. Although the statute allows for a lesser sanction if certain conditions are met, see *Bakal Bros., Inc. v. United States*, 105 F.3d 1085, 1088-89 (6th Cir.1997), those conditions are not relevant to this case.

novo.² See, e.g., *Jifry v. F.A.A.*, 370 F.3d 1174, 1182 (D.C.Cir.2004); *United States v. Hsu*, 364 F.3d 192, 196 (4th Cir.2004); *Gonzalez v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir.1999). The general standard for a vagueness challenge is whether the law gives "fair notice of the offending conduct." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). Moreover, "regulatory statutes governing business activities, where the acts limited are in a narrow category [receive] greater leeway..." *Id.* In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the Supreme Court reaffirmed that economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (footnotes omitted). With this framework in mind, we turn to Burch's challenge to the regulation.

The magistrate judge found that "Diane Roebuck and Daniel Burch performed duties in various capacities at the store, including management and occasionally clerking at the cash register." Indeed, Burch admits in his appellate brief that both "Diane Roebuck and Daniel Burch were volunteer employees at [] Check Mart." Giving personnel its ordinary meaning, as we did in *Bakal Bros.*, the regulation's prohibition on trafficking by "personnel of the firm" gave fair notice to Burch that he could be held liable for the actions of "volunteer employees" or individuals whose duties at the store included "management and occasionally clerking at the cash register."

Burch acknowledges *Bakal Bros.* but argues that our interpretation of personnel in that case actually conflicts with the position of the agency, thereby making the regulation even more vague. Krause, the FNS specialist, testified at trial that personnel could include a non-employee who is allowed by a store owner to go behind the store's counter and has access to the cash register. Relying on Krause's testimony, Burch puts forward various hypothetical individuals that

²Although the government briefly refers to *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), in its brief, we do not understand Burch to raise an issue with the agency's construction of the statute. Burch argues that the regulation is unconstitutionally vague, not that the regulation is either contradictory to or an unreasonable interpretation of the statute.

might test the limits of the agency's proffered definition of personnel. We need not address any theoretical inconsistency between our prior interpretation of the regulation in *Bakal Bros.* and the agency expert's testimony. It is well settled that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). Thus, although Burch posits hypothetical individuals that might fall outside of the ordinary meaning of personnel, the actual individuals involved in trafficking in this case fit squarely within the regulation's plain meaning as this court has previously interpreted it in *Bakal Bros.*

Finally, Burch challenges the regulation as unconstitutionally "overbroad" because it does not give the store owner an opportunity, without fear of liability, to renounce and report trafficking activity after the employer has discovered it. Burch is correct that liability may attach the moment a firm's personnel engage in trafficking; however, there is no requirement that a liable store owner be provided with the opportunity to escape disqualification by renouncing the actions of his employees. Indeed, this court has previously determined that no such provision is required. *See Bakal Bros.*, 105 F.3d at 1088-89 (holding that an innocent owner could be permanently disqualified from the program); *Goldstein v. United States*, 9 F.3d 521, 524 (6th Cir.1993) (same).

For the foregoing reasons, the district court's decision is affirmed.

**FARM SERVICE ACT
COURT DECISION**

**STEVEN E. CLASON v.USDA.
C.A.8 (Neb.), 2006.
No. 05-1547.
Filed: Feb. 22, 2006.**

(Cite as: 438 F.3d 868).

FSA – CCC – “Delivery”, meaning of – Affirmative misconduct by government official, when not – Equitable estoppel.

Corn farmer (Clausen) sold, but did not physically deliver a quantity of corn which was subject to a security interest by FSA. Clausen claimed the earlier recognition of the “sale” qualified him for a better loan repayment rate. Clausen used USDA form CCC-681-1 to notify FSA of the sale. FSA disagreed that the terms of the release of FSA’s security interest was satisfied and assessed Clausen for the differential bushel price. Clausen contended that FSA’s “delivery” terms varied over time and that he (Clausen) had reliance on the definition favorable to him. Clausen also claimed that a FSA official told him that the transaction was complete with the “sale” without delivery. The court held that the National Appeals Division (NAD) officer’s determination that physical delivery is required was not arbitrary and capricious.

United States Court of Appeals, Eighth Circuit.

Before ARNOLD, BEAM, and RILEY, Circuit Judges.
ARNOLD, Circuit Judge.

Steven Clason appeals a judgment affirming a decision by the National Appeals Division (NAD) of the Department of Agriculture that he owed the federal government \$9,703.62 plus interest for the unpaid balance of a marketing assistance loan. The dispute centers on whether Mr. Clason was entitled to repay the loan at an advantageous rate when he sold, but did not physically deliver, the corn securing the loan. The local office of the Farm Service Agency (FSA) (an agency of the Agriculture Department) determined that in order to repay the loan at the lower amount, Mr. Clason was required to make physical delivery of the corn to the buyer. After exhausting his administrative appeals, Mr. Clason sought review in the district court,¹ which affirmed the agency's

¹The Honorable David L. Piester, United States Magistrate Judge for the District of Nebraska, sitting by consent of the parties. *See* 28 U.S.C. 636(c); *see also* Fed.R.Civ.P. (continued...)

decision. Mr. Clason appealed that decision to this court, and we affirm.

In October, 1998, Mr. Clason accepted a marketing assistance loan for over \$66,000 from the Commodity Credit Corporation (CCC), a federal corporation within the Department of Agriculture. As required by the loan's terms, Mr. Clason gave the CCC a security interest in 36,000 bushels of corn valued at \$1.86 per bushel. He agreed not to move the corn from where it was stored on his property or to co-mingle it with other corn without the CCC's approval.

Under the terms of the loan, the interest rate was set at 5.875% and payment was due in July, 1999. The loan program, however, allowed farmers to discharge a marketing assistance loan at a reduced rate if the price of corn dropped during the term of the loan. 7 C.F.R. § 1421.25(b), (c) (1998). Several weeks before the loan was due, Mr. Clason sought approval from the local FSA office, which administers CCC loans, to sell and deliver more than 30,000 bushels of the corn to his brother. To obtain approval from the FSA, Mr. Clason executed a standardized form, CCC-681-1, titled "Authorization for Delivery of Loan Collateral For Sale." The authorization form provided a repayment rate of \$1.49 per bushel "for any quantity delivered on or before" July 26, 1999. Another provision of the form stated that the CCC's security interest would be released "only if the CCC receives payment at the [Furnas County FSA Office] for the quantity of commodity delivered to the buyer."

In August, Mr. Clason notified the Furnas County FSA office that, although he had sold the bulk of his corn to his brother, only 8,573 bushels of corn had been transferred from his storage bins to his brother's operation. The rest of the corn remained in his possession. Mr. Clason nonetheless contended that because that corn now belonged to his brother, it had been "delivered" and he was entitled to the lower repayment rate. In addition, Mr. Clason maintained that he had spoken with an FSA employee prior to the July 26 deadline, and that the employee had assured him that physical delivery was not necessary.

Upon learning that Mr. Clason had not made physical delivery of all of the corn that he had sold to his brother, the FSA determined that Mr. Clason owed the full repayment amount of \$1.935 per bushel for the corn that remained in his possession. After accepting as partial payment

¹(...continued)

the checks that Mr. Clason tendered, the FSA calculated an outstanding balance due of \$9,703.62.

Pursuant to Agriculture Department procedure, Mr. Clason appealed the deficiency notice to the FSA county committee, which determined that Mr. Clason's failure to make physical delivery of the corn disqualified him from repaying the lower rate. Mr. Clason then unsuccessfully appealed to the FSA state committee and to the NAD, the latter of which held an evidentiary hearing. The NAD hearing officer concluded that physical delivery was required to qualify for the lower rate, and the NAD National Director upheld that decision. His administrative appeals exhausted, Mr. Clason sought review in the district court. The magistrate judge determined that the administrative decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and therefore affirmed the agency determination.

II.

Mr. Clason contends that the meaning of the term "delivery," as used on the CCC-681-1 form, is not confined to physical delivery. Neither the form nor the regulations governing marketing assistance loans provide a definition of "delivery." Our task is not to interpret the contract independently, but instead to determine whether the NAD's interpretation was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and should be set aside pursuant to the provisions of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

Because we are reviewing an agency's interpretation of a term in a document that it created, we must first determine the level of deference to give to the NAD's construction of that term. *See Rain & Hail Ins. Serv., Inc. v. Federal Crop Ins. Corp.*, 426 F.3d 976, 979 (8th Cir.2005). In this case, the interpretation at issue involves the language on the CCC-681-1 form. The regulations governing the marketing assistance loans authorized the CCC to set the terms and conditions of the CCC-681-1 form. *See* 7 C.F.R. § 1421.20(a) (1998). The terms of CCC-681-1 involve complex matters within the Department of Agriculture's area of expertise, namely, the repayment terms of subsidized agricultural commodity loans. We also note that the NAD's appeal process, which provided Mr. Clason with a face-to-face hearing, *see* 7 U.S.C. § 6991-7002, qualifies as formal adjudication. *Lane v. United States Dep't of Agriculture*, 120 F.3d 106, 108-110 (8th

Cir.1997). Because of the NAD's expertise and the extensive administrative review afforded to Mr. Clason, we will afford the NAD's interpretation the same level of deference afforded to an agency's interpretation of its own regulations. *See Rain & Hail Ins.*, 426 F.3d at 979 (citing *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991)). This deferential approach requires us to accept the NAD's interpretation of the term "delivery" unless that interpretation is "plainly erroneous." *Rain & Hail Ins.*, 426 F.3d at 979 (citing *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)).

In this case, the NAD determined that the "delivery" required by CCC-681-1 was physical delivery. This was not plainly erroneous. The regulations governing these transactions during the relevant time period referred to the "removal of" and "moving" of farm-stored commodities. *See* 7 C.F.R §§ 1421.20(a), (e); 1421.23(b) (1998). By requiring producers who wish to take advantage of the favorable repayment rate to make physical delivery to the buyer, the Agriculture Department rationally may have believed that it was promoting the actual use of commodities. In any case, although the word "delivery" can be interpreted to include constructive delivery, *see, e.g.*, Black's Law Dictionary (8th ed.2004), the NAD's interpretation is reasonable and consistent with the regulations governing marketing assistance loans.

Mr. Clason contends that the agency has changed its definition of the word "delivery" and therefore the NAD's interpretation deserves no weight. Although an inconsistent agency interpretation is less authoritative than a consistent one, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), Mr. Clason has not identified any previous administrative or judicial decision that establishes a contrary government interpretation. Instead he points to a statement in the record from an Agriculture Department official that "the FSA currently, and for the past several years, has interpreted and defined 'delivery' as the movement to a purchaser of a commodity under loan" to the CCC. Mr. Clason contends that this language necessarily leads to the conclusion that the FSA used a different definition of the term at some previous time. We disagree. The language quoted above, by itself, is insufficient to support Mr. Clason's inference that the FSA has used more than one definition of the term "delivery."

III.

In the alternative, Mr. Clason argues that the government is estopped from requiring physical delivery because of his reliance upon assurances that he allegedly received from a county FSA officer. The FSA officer stated at the hearing that she did not recall telling Mr. Clason that constructive delivery was acceptable. Even if she had made such statements, however, they would not be sufficient to support the application of estoppel against the federal government. Any claim of equitable estoppel against the government would require proof "that the government committed affirmative misconduct." *Charleston Housing Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 739 (8th Cir.2005). The record here does not contain any evidence of affirmative misconduct. At most, the FSA officer's comments were the product of negligence, which is insufficient to satisfy Mr. Clason's heavy burden of proof. *See Morgan v. C.I.R.*, 345 F.3d 563, 566-67 (8th Cir.2003).

IV.

For the reasons stated above, the judgment of the district court is affirmed.

FARM SERVICE ACT

DEPARTMENTAL DECISION

**In re: ANNA BRAMBLETT, FORMERLY ANNA J.
EDWARDS.
FSA Docket 06-0001.
Decision and Order.
Filed January 20, 2006.**

FSA – Federal salary offset – Reliance.

Petitioner - Pro Se.
For Respondent – Sharon Gipson.
Decision and Order by Administrative Law Judge Peter M. Davenport.

Decision

This matter is before the Administrative Law Judge upon the Petition of Anna J. Bramblett who seeks review of a proposed offset of her federal salary. Telephonic hearings were held in this matter on December 20, 2005 and December 30, 2005. the Petitioner, Anna J. Bramblett, who is not represented by counsel, participated *pro Se*. The Natural Resources Conservation Service, (hereafter “NRCS”) the Department of Agriculture agency that has proposed the offset was represented by Sharon Gipson, NRCS State Administrator, United States Department of Agriculture, Athens, Georgia. Following the second telephonic hearing, the Petitioner and NRCS were given time to submit additional documentation addressing the matters raised during the hearing.

The issues before me are whether the Petitioner, a federal employee, owes a debt to the Respondent, whether the debt is eligible to be the subject of an offset, and if so, the amount of the debt. Once the amount of the debt is determined, the Administrative Law Judge is also required to determine the percentage of disposable pay to be deducted in satisfaction of the debt. Heads of agencies are mandated by the Federal Debt Collection Act, 31 U.S.C. § 3711, to “take all appropriate steps to collect [a delinquent] debt” including “Federal Salary Offset.” The statutory basis for offsetting the salary of a federal employee is found 5 U.S.C. § 5514:

(a)(1) When the head of an agency or his designee determines that an employee... is indebted to the United States for debts to which

the United States is entitled to be repaid at the time of the determination... the amount of indebtedness may be collected in monthly installments, or at officially established pay intervals from the current pay account of the individual....The amount deducted for any period may not exceed 15 percent of disposable pay....

Before an offset can be effectuated, the statute requires notice to the employee and an explanation of the employee's rights which include the right to inspect and copy Government records relating to the debt, the opportunity to enter into a written agreement to repay the debt according to a mutually agreed upon schedule and an opportunity for a hearing on the determination of the agency concerning the existence or amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement, upon the terms of the repayment schedule. 5 U.S.C. § 5514 (a)(2).

The implementing regulations are found in 7 C.F.R. Subpart C § 1951.101 *et seq.* and contain specific requirements for the petition for a hearing, direct that the hearings be conducted by an appropriately designated hearing official upon all relevant evidence and place the burden of proof upon the agency to prove the existence of the debt and upon the employee for the ultimate burden of proof once the debt is established.

The file reflects that the procedural prerequisite of notice was properly given by letter dated July 7, 2005.¹

The indebtedness in question arose when the Petitioner transferred from the Department of the Interior ("DOI") to NRCS in October of 2002 and implementation of deductions for her health insurance coverage under the Federal Employee Health Benefits Program ("FEHBP") was not properly transferred. Under the FEHBP, the election of health insurance coverage of an employee who transfers to another federal agency is continued without the necessity of making a new election and in fact, the Petitioner's coverage remained in force despite the fact that no deductions were made by the National Finance Center ("NFC") from the Petitioner's paycheck from the date of her transfer on October 20, 2002 through February 5, 2005. The absence of a deduction for health insurance coverage on her leave and earning statements was not detected by the Petitioner until February 22, 2004 in the process of computing medical deductions for inclusion on her 2003

¹The letter appears as Attachment 3 to the Agency Answer. The July 7, 2005 is written over the typed date of June 8, 2005.

tax returns.² The following day, the Petitioner contacted Shirley Bellows, a NRCS Human Resources employee in the Georgia State Office who indicated that she would check into the problem and get back with her.³ On February 27, 2004, Ms. Bellows verified that NFC was not withholding monies for the Petitioner's health coverage and communicated that fact to the Petitioner, but thereafter made no effective contribution toward resolving the Petitioner's predicament.

Although there is some dispute as to who determined that a new Standard Form 2810 ("SF 2810") was needed,⁴ the record is clear that even with the newly filed SF 2810 in November of 2004, resolution of the Petitioner's problem was far from over. Initiation of the payroll deduction from the Petitioner's paycheck met other seemingly insurmountable obstacles as is recounted in the following remarkable extract from the Agency Answer:

HR also tried to input an action into NFC that would have had health insurance deductions start to come from Anna Edward's paycheck. The system would not allow HR to input the action, it would give errors and NFC could not explain why this was happening and they were investigating it.

It took several months of calling, waiting and working with NFC and BC/BS (Blue Cross/Blue Shield) before we had a

²Employees are strongly encouraged to check their Leave and Earnings Statements regularly and report any discrepancies to their Human Resources Office. This is particularly important upon transfer from one agency to another; however, the Petitioner's failure to detect the error for over a year is far overshadowed by her Human Resources Office's failure, once the error had been reported to them, to follow up and to expeditiously correct the problem.

³The Respondent's Answer confirms that the petitioner contacted them around January/February of 2004. (Answer, first paragraph, page 1).

⁴In her Petition for Review, the Petitioner indicated that she reviewed her past personnel actions, determined that the form had been filed when she transferred before and asked Shirley Bellows if a SF 2810 had been completed and if not, maintained to Ms. Bellows that a new SF 2810 should be filed. According to the Petitioner's account, Ms. Bellows indicated that the form was not required as all insurance issues were handled automatically. The Petitioner eventually prevailed upon Renae Lankford, an individual who by then had joined the Human Resources Office to file the form for her. The Respondent's Answer indicates that NFC suggested that a SF 2810 be filed when it was contacted by the NRCS Human Resources Office. Attachment 5 to the Supplemental Material filed by the Respondent indicates only that OPM determined that Blue Cross Blue Shield had a SF 2810 transferring the Petitioner to the Department of Agriculture with an effective date of October 20, 2002 without identification of the date the form was executed.

breakthrough in this situation. During this time, HR-NRCS-GA was staying in contact with NFC and doing their best to get the situation settled. (Answer, page 2)

In the meantime, the Petitioner remarried and in face of the fact that no resolution was in sight, after her new husband added the Petitioner and her children to his FEHBP coverage, on February 6, 2005 she executed a SF 2809 canceling the BC/BS health insurance coverage effective February 4, 2005 (which still was not being deducted for despite her bringing it to the attention of the human Resources Office nearly a year before).

Upon receipt of the July notification letter, the Petitioner requested verification that the coverage premiums had been paid and for a copy of the computation. Notwithstanding the Agency's Answer which indicated that Human Resources sent NFC an AD-343 on February 15, 2005 showing the dates and the premium amount due,⁵ additional delay was encountered in responding to the Petitioner's requests.⁶

Despite the lamentably inexplicable and egregious joint failure on the part of NRCS and NFC to ever resolve the Petitioner's problem by effectuating a deduction from her paycheck, and despite the lengthy period involved, in view of the fact that the Petitioner's health benefits under the FEHBP continued after her transfer and were not interrupted, I must conclude that the Petitioner is indebted to her employing agency in the amount of Six Thousand, Four Hundred Seventy-Five Dollars and Seventy Cents (\$6,475.70) for the 60 pay periods of coverage that was provided as is reflected on Attachment 2 to the Agency Answer. Under the facts as presented; however, I find that interest should be waived and that the employer may offset no more than Seven Percent of the Petitioner's disposable pay in the collection of this indebtedness.

Accordingly, the following Findings of Fact and Conclusions of Law will be entered.

⁵This appears as Attachment 2 to the Agency Answer.

⁶This delay is documented in the exchange of e-mail correspondence found in Attachment 4 to the Agency Answer

FINDINGS OF FACT

1. The Petitioner was overpaid the amount of \$6,475.70 as a result of the failure of NRCS and NEC to properly initiate a payroll deduction for her health insurance coverage under the FEHBP upon her transfer from 001 to NRCS on October 20, 2002 until cancellation of that coverage effective February 4, 2005.
2. The Petitioner is an employee of the United States Department of Agriculture and as such is an individual whose salary is subject to Federal Salary Offset.
3. The Petitioner was given notice of the proposed offset of her federal salary and the notice dated July 7, 2005 is in full compliance with the statutory requirements of 5 U.S.C. § 5514 and the implementing regulations.
4. The Petitioner is currently indebted to NRCS in the amount of \$6,475.70.

CONCLUSIONS OF LAW

1. The Petitioner received health benefit coverage under FEHBP for period October 20, 2002 until the same was cancelled effective February 4, 2005 for which premiums were not collected from her federal salary.
2. Anna J. Bramblett, as an employee of NRCS, the United States Department of Agriculture, is an employee against whom an offset of her federal salary may be effected.
3. The notice of proposed offset dated July 7, 2005 complied with all statutory and regulatory requirements for offsetting her salary.
4. There are no legal restrictions to the debt within the meaning of 7 C.F.R. §1951.111(c)(2).
5. The amount owed to NRCS is \$6,475.70 to be paid without interest.
6. NRCS is entitled to offset 7% of the Petitioner's disposable federal pay as defined in 7 C.F.R. § 1951.111 (b)(4) until the same shall be paid in full.

FOOD SAFETY INSPECTION SERVICE

COURT DECISION

LEE A. BARNES, JR., v. USDA.
C.A.8 (Mo.), 2006. No. 05-2329.
Filed May 30, 2006.

Cite as: 448 F.3d 1065)

FSIS – PPIA – Negligent inspection – “good Samaritan rule” – “private analogue” situs requirement – Federal tort claims act – Uniquely governmental function.

A Missouri Poultry processor (Barnes) claimed USDA poultry product inspectors negligently inspected his processing plant, issued faulty technical assistance, and subjected his plant to unnecessary shut-downs causing him to go out of business. Barnes brought suit under Federal Tort Claims Act (FTCA) for damages. Court determined that “good Samaritan” rule would be applicable, but that the “private analogue” portion of the rule was not fulfilled in that the purpose of the inspections is intended to benefit and protect the consuming public. FSIS did not owe a state-law duty to Barnes as a plant owner and consequently did not rise to provide a private citizen’s right of action (the private analogue) against the federal government under FTCA.

United States Court of Appeals, Eighth Circuit.

Rehearing and Rehearing En Banc Denied Aug. 4, 2006.

Before WOLLMAN, LAY, and ARNOLD, Circuit Judges.
ARNOLD, Circuit Judge.

Lee Barnes appeals the dismissal by the district court¹ of his action filed under the Federal Tort Claims Act (FTCA), *see* 28 U.S.C. §§ 1346, 2671-2680. We affirm.

Mr. Barnes owned and operated Gammon Brothers Poultry, a business that processed and packaged chickens in Missouri. Under the Poultry Products Inspection Act, 21 U.S.C. §§ 451-471, Gammon Brothers was subject to inspections by the Food Safety and Inspection Service (FSIS), an agency of the Department of Agriculture. Mr. Barnes brought this FTCA action against the United States. He claimed that the FSIS negligently inspected Gammon Brothers, issued vague and misleading noncompliance notices, failed to provide him with technical

¹The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

assistance, and subjected the company to unnecessary periodic shut-downs, eventually causing him to go out of business.

The government moved to dismiss Mr. Barnes's complaint for lack of subject matter jurisdiction. Federal courts generally lack jurisdiction to hear claims against the United States because of sovereign immunity. The court may hear the case, however, if the plaintiff shows that the government has unequivocally waived that immunity. *Cf. V S Ltd. P'ship v. HUD*, 235 F.3d 1109, 1112 (8th Cir.2000). The FTCA waives the government's immunity in certain tort suits by providing that the "United States shall be liable [for torts] ... in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This provision is sometimes called the "private analogue" requirement. The district court granted the government's motion to dismiss, holding that there is no private analogue of the present action under Missouri law.

The determination of whether a private analogue exists is made in accordance with the law of the place where the relevant act or omission occurred. 28 U.S.C. § 1346(b)(1). Relying on *Scottsdale Ins. Co. v. Ratliff*, 927 S.W.2d 531 (Mo.Ct.App.1996), Mr. Barnes contends that his FTCA action may proceed because Missouri law recognizes a cause of action for negligent inspection and negligent advice. But for a defendant to be liable under those theories, it must have first owed the plaintiff a duty under Missouri law to inspect and to advise, and Missouri law imposed no such duty on the FSIS. Although the FSIS is required to follow the inspection standards established by its administrator, 9 C.F.R. § 381.4, this duty is imposed by the federal government, not by the state.

Mr. Barnes maintains that the government is nevertheless liable under Missouri's "good Samaritan" rule, a principle under which one who "undertakes ... to render services to another" may sometimes be held liable for a failure to exercise reasonable care in doing so. *Stanturf v. Sipes*, 447 S.W.2d 558, 561-62 (Mo.1969) (per curiam) (quoting Restatement (Second) of Torts § 323). He relies on *Indian Towing Co. v. United States*, 350 U.S. 61, 61-62, 76 S.Ct. 122, 100 L.Ed. 48 (1955), in which the plaintiff brought an action under the FTCA, contending that its tugboat ran aground because the Coast Guard failed to maintain a lighthouse. The United States sought dismissal for lack of subject matter jurisdiction; because no private person operated lighthouses, the government argued that there was no private analogue of the government's conduct. The district court granted the motion, and the

Fifth Circuit affirmed, *Indian Towing Co. v. United States*, 211 F.2d 886, 886 (5th Cir.1954) (per curiam).

The Supreme Court reversed the dismissal in *Indian Towing*, holding that the FTCA's waiver of sovereign immunity did not turn on whether its conduct was uniquely governmental in nature. Instead, the question was whether a private person in like circumstances could be liable to Indian Towing. The Court found that such a person could be liable under the "good Samaritan" law: By erecting and operating the lighthouse, the Coast Guard had sought to protect mariners and their cargo. The tug operators, in turn, had come to rely on that protection. The Court observed that "under hornbook tort law ... one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Indian Towing*, 350 U.S. at 64-65, 76 S.Ct. 122; see also *Appley Brothers v. United States*, 164 F.3d 1164, 1173-74 (8th Cir.1999).

Mr. Barnes is therefore eminently correct in relying on *Indian Towing* to show that the United States is not immune from suits under the FTCA merely because it was undertaking a uniquely governmental function. But as the Court recently restated in *United States v. Olson*, --- U.S. ----, ----, 126 S.Ct. 510, 513, 163 L.Ed.2d 306 (2005), the relevant question is whether the government's conduct was such that a private individual under like circumstances would be liable under state law. Here a private individual in the position of the FSIS could not be liable to Mr. Barnes under Missouri's good Samaritan rule. That rule requires that the defendant voluntarily " 'undertake[] ... to render services to' " the plaintiff. *Stanturf*, 447 S.W.2d at 561 (quoting Restatement (Second) of Torts § 323). In other words, the good Samaritan rule comes into play only where the plaintiff is the intended beneficiary of the defendant's action. But the FSIS conducts inspections to ensure that the poultry sold to the public is sanitary, not to benefit chicken-processing plants or their owners. For that reason the federal government violated no state-law duty owed to Mr. Barnes that would permit a suit under the FTCA.

We therefore affirm the order of the district court.

HORSE PROTECTION ACT
DEPARTMENTAL DECISIONS

In re: KIM BENNETT.
HPA Docket No. 04-0001.
Decision and Order.
Filed January 13, 2006.

HPA – Horse protection – Refusal to permit inspection – Manner of inspection – Civil penalty – Disqualification.

The Judicial Officer reversed the initial decision by Administrative Law Judge Victor W. Palmer and concluded Respondent refused to permit a United States Department of Agriculture veterinary medical officer to complete an inspection of a horse named “The Duck” at the 64th Annual Tennessee Walking Horse National Celebration Show, in violation of 15 U.S.C. § 1824(9). The Judicial Officer stated the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection, as required by 15 U.S.C. § 1823(e), which authorizes the Secretary of Agriculture’s representatives, upon presentation of appropriate credentials, to inspect any horse at any horse show, horse exhibition, horse sale, or horse auction. The Judicial Officer concluded Respondent’s belief that the Secretary of Agriculture’s representative was not conducting the inspection of The Duck in a reasonable manner was not relevant to Respondent’s violation of 15 U.S.C. § 1824(9), and the failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by 15 U.S.C. § 1823(e), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection. The Judicial Officer assessed Respondent a \$2,200 civil penalty and disqualified Respondent for 1 year.

Frank Martin, Jr., for Complainant.
David F. Broderick, Bowling Green, Kentucky, for Respondent.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 15, 2004. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection 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 August 26, 2002, Kim Bennett [hereinafter Respondent] refused to permit Animal and Plant Health Inspection Service officials to inspect a horse known as "The Duck," entry number 784 in class number 104 in the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)) (Compl. ¶ II.1). On May 17, 2004, Respondent filed an answer denying the material allegations of the Complaint.

On May 17-18, 2005, Administrative Law Judge Victor W. Palmer presided at a hearing in Nashville, Tennessee. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. David F. Broderick, Broderick & Thornton, Bowling Green, Kentucky, represented Respondent.

On June 30, 2005, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof." On August 5, 2005, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof." On August 12, 2005, Complainant filed "Complainant's Reply Brief."

On September 23, 2005, the ALJ issued a "Decision and Order" [hereinafter Initial Decision] concluding Complainant failed to prove by a preponderance of the evidence that Respondent violated the Horse Protection Act and the Horse Protection Regulations and dismissing the Complaint (Initial Decision at 2, 12).

On October 20, 2005, Complainant appealed to the Judicial Officer. On November 15, 2005, Respondent filed a response to Complainant's appeal petition. On November 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the ALJ's conclusion that Complainant failed to prove by a preponderance of the evidence that Respondent violated the Horse Protection Act. Therefore, I do not adopt the ALJ's Initial Decision as the final Decision and Order.

Complainant's exhibits are designated by "CX." Respondent's 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

....

(e) Inspection by Secretary or duly appointed representative

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

§ 1824. Unlawful acts

The following conduct is prohibited:

....

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

§ 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 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.

§ 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(e), 1824(9), 1825(b)(1)-(2), (c), 1828.

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

....

§ 11.4 Inspection and detention of horses.

For the purpose of effective enforcement of the Act:

(a) Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, horse exhibition, or horse sale or auction, shall allow any APHIS representative to reasonably inspect such horse at all reasonable times and places the APHIS representative may designate. Such inspections may be required of any horse which is stabled, loaded on a trailer, being prepared for show, exhibition, or sale or auction, being exercised or otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction, whether or not such horse has or has not been shown, exhibited, or sold or auctioned, or has or has not been entered for the purpose of being shown or exhibited or offered for sale or auction at any such horse show, horse exhibition, or horse sale or auction. APHIS representatives will not generally or routinely delay or interrupt actual individual classes or performances at horse shows, horse exhibitions, or

horse sales or auctions for the purpose of examining horses, but they may do so in extraordinary situations, such as but not limited to, lack of proper facilities for inspection, refusal of management to cooperate with Department inspection efforts, reason to believe that failure to immediately perform inspection may result in the loss, removal, or masking of any evidence of a violation of the Act or the regulations, or a request by management that such inspections be performed by an APHIS representative.

9 C.F.R. § 11.4(a).

DECISION

Decision Summary

I conclude Respondent refused to permit completion of an inspection of a horse by a representative of the Secretary of Agriculture at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). I assess Respondent a \$2,200 civil penalty and disqualify Respondent for a period of 1 year 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.

Discussion

Complainant proved by a preponderance of the evidence¹ that on

¹Complainant, as the proponent of an order, has the burden of proof in this proceeding (5 U.S.C. § 556(d)). The standard of proof by which this burden is met is the preponderance of the evidence standard. See *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 administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1494 (2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 474 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 (2004), *appeal docketed sub nom. Winston T. Groover, Jr. v. United States Dep't of Agric.*, No. 04-4519 (6th Cir. Dec. 13, 2004); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *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 (continued...))

August 26, 2002, Respondent refused to permit Dr. Michael Guedron, a United States Department of Agriculture veterinary medical officer, to complete an inspection of The Duck at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee (CX 3, CX 4A, CX 4B; RX 31; Tr. 102-05, 184-87, 248-53, 284, 290-91, 300-01, 313, 382, 453-60, 463-65). Complainant also proved by a preponderance of the evidence that, at all times relevant to this proceeding, Dr. Guedron displayed appropriate credentials indicating that he was a representative of the Secretary of Agriculture authorized to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee (CX 4A, CX 4B; Tr. 247).

Section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection, as required by section 4 of the Horse Protection Act (15 U.S.C. § 1823). Section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) authorizes the Secretary of Agriculture's representatives, upon presentation of appropriate credentials, to inspect any horse at any horse show, horse exhibition, horse sale, or horse auction. Respondent's belief that Dr. Guedron was not conducting the inspection of The Duck in a reasonable

¹(...continued)

Edwards), 56 Agric. Dec. 529, 539 (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, 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).

manner is not relevant to Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). The failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection.

Findings of Fact

1. Respondent is an individual whose mailing address is 636 Mt. Lebanon Road, Alvaton, Kentucky 42122 (Answer ¶ I.1).

2. Respondent earned a degree in equine science from Middle Tennessee State University in 1976 and has been a trainer and breeder of Tennessee Walking Horses since 1980. Respondent has a horse trainer's license with the Walkers Training Association and an AAA judge's license with the National Horse Show Commission. Both licenses are in good standing. Respondent has judged horse shows throughout the United States and twice judged the Tennessee Walking Horse National Celebration Show. Respondent has served on the National Board of the Tennessee Walkers Breeders and Exhibitors Association for approximately 18 years. Respondent served on the License Enforcement Committee of the Walking Horse Owners Association until its merger with the Trainers Association and Breeders Association to form the National Horse Show Commission. Respondent is a voting member of the National Horse Show Commission and has represented the Tennessee Walking Horse Owners Association on the National Horse Show Commission for approximately 15 years. (Tr. 392-95.)

3. Respondent and his wife, Leigh Bennett, who also has a horse trainer's license and an AAA judge's license, keep more than 50 horses on their farm in Alvaton, Kentucky (Tr. 315-16).

4. In February 2002, Respondent and Leigh Bennett began training The Duck after he had been purchased, based on their advice, for \$100,000 by Elizabeth and Dwight Ottman of Owensboro, Kentucky (Tr. 317, 400-02).

5. The Duck is a stallion and a past world grand champion. The Duck was used exclusively for breeding at the time of his purchase by the Ottmans. In 2002, The Duck was bred with 32 mares for which a \$900 stud fee was charged for each breeding. Respondent undertook to restore The Duck's form to win another championship at the 64th Annual Tennessee Walking Horse National Celebration Show to

increase The Duck's value. The Duck is an unusually nervous and aggressive horse that is sensitive to his environment, can get excited fairly easily, and is not very fond of strangers. (Tr. 14-15, 295, 317, 319, 402-04.)

6. On August 26, 2002, Respondent entered The Duck as entry number 784 in class number 104 in the 64th Annual Tennessee Walking Horse National Celebration Show for the purpose of showing or exhibiting The Duck (CX 1, CX 2, CX 4A, CX 4B; RX 31).

7. On August 26, 2002, Respondent knew Dr. Guedron was a United States Department of Agriculture veterinary medical officer authorized by the Secretary of Agriculture to inspect horses for compliance with the Horse Protection Act. At all times relevant to this proceeding, Dr. Guedron displayed appropriate credentials indicating that he was a representative of the Secretary of Agriculture authorized to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee. (CX 4A, CX 4B; RX 31; Tr. 247, 457.)

8. On August 26, 2002, at approximately 11:00 p.m., Respondent led The Duck into the inspection area of the Calsonic Arena in Shelbyville, Tennessee, where the 64th Annual Tennessee Walking Horse National Celebration Show was being held, and presented The Duck for pre-show inspection (CX 3, CX 4A; Tr. 408).

9. As a stallion recently used for breeding, The Duck became very agitated and easily aroused when near other horses. Because of The Duck's unsteady temperament and the possibility that The Duck might become excited and difficult to handle and mount, Respondent had waited until the inspection area was clear of other horses that might distract The Duck before leading him to the inspection area. (Tr. 321-22, 405-08.)

10. On August 26, 2002, at approximately 11:00 p.m., Mark Thomas, a Designated Qualified Person² employed by the National Horse Show Commission, conducted a pre-show inspection of The Duck (Tr. 9-10, 408-09).

11. Mr. Thomas has been a licensed Designated Qualified Person for 14 years and has inspected horses at hundreds of horse shows (Tr. 7, 13).

²A Designated Qualified Person is defined in 9 C.F.R. § 11.1 as a person meeting the requirements specified in 9 C.F.R. § 11.7. Designated Qualified Persons are licensed by horse industry organizations or associations having a Designated Qualified Person program certified by the United States Department of Agriculture. Designated Qualified Persons may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under 15 U.S.C. § 1823 to detect or diagnose horses which are sore or to otherwise inspect horses and records pertaining to horses for the purpose of enforcing the Horse Protection Act.

12. Mr. Thomas conducted a three-part inspection of The Duck, as he did other horses, consisting of observations of The Duck's (1) general appearance, (2) locomotion, and (3) reaction to palpation. Mr. Thomas gave The Duck the best score in each category. (Tr. 16-18.)

13. Mr. Thomas approved The Duck to be shown and exhibited, and Respondent, who was to be the horse's rider, then led The Duck to the warm-up area (CX 1, CX 2; Tr. 27, 410).

14. Dr. Michael Guedron and Dr. Lynn P. Bourgeois, United States Department of Agriculture veterinary medical officers assigned to the 64th Annual Tennessee Walking Horse National Celebration Show, were present in the inspection area on the evening of August 26, 2002. Dr. Bourgeois was the show veterinarian, the Animal and Plant Health Inspection Service designation for the veterinarian in charge, whose duties included inspecting horses, managing both Dr. Guedron and a team of Animal and Plant Health Inspection Service inspectors, and monitoring the Designated Qualified Persons and their performance. (Tr. 130-31, 134-36, 187, 212-13.)

15. As Respondent led The Duck into the warm-up area on the evening of August 26, 2002, he was followed by Dr. Guedron who stopped Respondent and instructed him to return The Duck to the inspection area for another inspection. Dr. Guedron did not tell Respondent why he wanted to re-inspect The Duck and did not provide a reason when asked. Respondent nonetheless agreed to the re-inspection and permitted Dr. Guedron to conduct the inspection until Respondent observed Dr. Guedron palpate The Duck's left front pastern in a way that Respondent believed to be abusive and calculated to elicit a reaction from a horse that was not sore. At that point, Respondent led The Duck away from Dr. Guedron. Dr. Guedron asked Respondent if he was refusing inspection. Respondent replied: "No, sir. I'm just asking that you inspect him properly." (Tr. 416.) Dr. Bourgeois, the show veterinarian, asked Respondent whether or not he would permit Dr. Guedron to complete his inspection and Respondent replied: "Not Dr. Guedron." (Tr. 160.) Respondent requested that Dr. Bourgeois inspect the horse instead of Dr. Guedron because Respondent believed Dr. Guedron was using the points of his thumbs rather than the balls of his thumbs to palpate The Duck's foot. Dr. Bourgeois denied Respondent's request. (CX 4A; Tr. 137, 160, 162, 199, 220-22, 328-35, 411-20.)

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On August 26, 2002, Respondent refused to permit a United States Department of Agriculture veterinary medical officer, displaying appropriate credentials, to complete inspection of The Duck, entry number 784 in class number 104, at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).

Complainant's Appeal Petition

Complainant raises five issues in "Complainant's Appeal of the ALJ's Decision and Order, and Brief in Support Thereof" [hereinafter Complainant's Appeal Petition]. First, Complainant contends the ALJ erroneously concluded that, under the Horse Protection Act, an exhibitor may refuse to permit completion of the United States Department of Agriculture's inspection of a horse at a horse show if the exhibitor believes the inspection is not being conducted in a reasonable manner (Complainant's Appeal Pet. at 2-5).

The ALJ found Respondent's refusal to permit Dr. Guedron to continue inspection of The Duck did not constitute a refusal of United States Department of Agriculture inspection because Respondent believed Dr. Guedron was not conducting the inspection in a reasonable manner and Respondent sought inspection by another United States Department of Agriculture inspector, as follows:

Kim Bennett allowed Dr. Guedron, an APHIS representative, to start an inspection of the horse Mr. Bennett was about to mount and ride into the show ring, but refused to allow Dr. Guedron to continue the inspection when Mr. Bennett observed that it was not being reasonably conducted. He did not refuse the APHIS inspection per se, but he sought to assure that it would be reasonably conducted by having it performed by another APHIS inspector.

Initial Decision at 8.

I disagree with the ALJ's conclusion that Respondent's refusal to permit Dr. Guedron to continue inspection of The Duck is not a violation of the Horse Protection Act. Section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection as required by section 4 of the Horse Protection Act (15 U.S.C. § 1823). Section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) provides that the Secretary of Agriculture, or *any*

representative of the Secretary of Agriculture, duly designated by the Secretary of Agriculture, may, upon presenting appropriate credentials, inspect any horse at any horse show. The record establishes that on August 26, 2002, Dr. Guedron was a representative of the Secretary of Agriculture, duly designated to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show. Thus, Respondent's refusal to permit Dr. Guedron to complete his inspection of The Duck constitutes a violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). Respondent's belief that Dr. Guedron was not conducting the inspection in a reasonable manner and Respondent's request for inspection by another United States Department of Agriculture official are not relevant to Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). The failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection or as a basis to require inspection by another representative of the Secretary of Agriculture.

Second, Complainant contends the ALJ erroneously found Complainant failed to prove that Dr. Guedron conducted his inspection of The Duck in a reasonable manner (Complainant's Appeal Pet. at 6-9).

The ALJ found "[t]he preponderance of the evidence in this case fails to prove that Dr. Guedron conducted the horse's inspection in a reasonable manner." (Initial Decision at 10.) I make no finding regarding the manner in which Dr. Guedron inspected The Duck because I find the manner in which Dr. Guedron inspected The Duck is not relevant to the issue of Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).³ Thus, I find the issue of the manner in which Dr. Guedron inspected The Duck, moot.

Third, Complainant contends the ALJ "effectively requires that there be evidence proving a USDA veterinarian's inspection of a horse was reasonable before an inspection could be initiated and completed under the HPA" (Complainant's Appeal Pet. at 9).

I disagree with Complainant's contention that the ALJ effectively requires proof that a United States Department of Agriculture veterinary medical officer's inspection of a horse is reasonable before an inspection

³Complainant did not appeal the ALJ's conclusion that Complainant failed to prove Respondent violated section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)); therefore, I reach no conclusion regarding the relevance of the manner in which Dr. Guedron inspected The Duck to Respondent's alleged violation of section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)).

may be initiated and completed. I cannot locate any part of the Initial Decision in which the ALJ even remotely suggests that, prior to initiating and completing an inspection of a horse, there must be evidence proving that the United States Department of Agriculture veterinary medical officer's inspection is reasonable. Requiring proof that an inspection is reasonable prior to initiating the inspection would be an absurdity that, based upon my examination of the Initial Decision, I find the ALJ did not intend to suggest.

Fourth, Complainant contends the ALJ erroneously failed to address Respondent's repeated refusals to permit Dr. Guedron to inspect The Duck (Complainant's Appeal Pet. at 11-12).

The record establishes, after Respondent's initial refusal to permit Dr. Guedron to complete inspection of The Duck, Respondent was given over 1 hour to permit Dr. Guedron to complete his inspection of The Duck and, on multiple occasions, Respondent refused to permit Dr. Guedron to complete his inspection (CX 4A, CX 4B; RX 31; Tr. 381-82, 455-63). The ALJ adequately addresses Respondent's repeated refusals to permit Dr. Guedron to complete his inspection of The Duck (Initial Decision at 6). Therefore, I reject Complainant's contention that the ALJ erroneously failed to address Respondent's repeated refusals to permit Dr. Guedron to complete his inspection of The Duck.

Fifth, Complainant contends the ALJ erroneously found Dr. Guedron's inspection unreasonable because The Duck was the last horse in the inspection area when the event in which The Duck was to participate was about to begin and because the United States Department of Agriculture typically conducts inspections at the completion of the event (Complainant's Appeal Pet. at 12-14).

I make no finding regarding the manner in which Dr. Guedron inspected The Duck because I find the manner in which Dr. Guedron inspected The Duck is not relevant to the issue of Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). Thus, I find the issue of the ALJ's basis for finding Dr. Guedron's inspection of The Duck unreasonable, moot.

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 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 \$2,200.⁴ 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.⁵

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, 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, 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 Respondent a \$2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 7-10). The extent and gravity of Respondent's prohibited conduct are great. Respondent's refusal to permit a United States Department of Agriculture veterinary medical officer to complete an inspection of The Duck thwarts the Secretary of Agriculture's ability to enforce the Horse Protection Act. Weighing all the circumstances, I find Respondent culpable for the violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).

⁴7 C.F.R. § 3.91(b)(2)(vii).

⁵15 U.S.C. § 1825(e).

Respondent presented no argument that he is unable to pay a \$2,200 civil penalty or that a \$2,200 civil penalty would affect his ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.⁶ 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 Respondent's violation of the Horse Protection Act. Therefore, I assess 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. Respondent's refusal to permit a United States

⁶*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (2005); *In re Mike Turner*, 64 Agric. Dec. 1456, 1475 (2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *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).

Department of Agriculture veterinary medical officer to complete an inspection of The Duck thwarts the Secretary of Agriculture's ability to prevent the 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 pay civil penalties as a cost of doing business.⁷

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.⁸

⁷See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

⁸*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, slip op. at 21-22 (2005); *In re Mike Turner*, 64 Agric. Dec. 1456, 1476 (2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 492 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *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. Dec. 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 (continued...))

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 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 Respondent's 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. Respondent is assessed a \$2,200 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, Stop 1417
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and

⁸(...continued)

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).

received by, Mr. Martin within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0001.

2. Respondent is 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 Respondent shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.⁹ The date of the Order in this Decision and Order is January 13, 2006.

⁹15 U.S.C. § 1825(b)(2), (c).

**INSPECTION AND GRADING
DEPARTMENTAL DECISION**

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION, f/k/a LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; ISABEL LION, AN INDIVIDUAL; AND JEFFREY LION, AN INDIVIDUAL; AND LARRY LION, AN INDIVIDUAL.

I & G Docket No. 04-0001.

Decision and Order.

Filed June 9, 2006.

I&G – Debarment from inspection services – Licenses – Grading, poor testing – Officially drawn – Misconduct, pattern of.

Colleen A. Carroll for Complainant.

Wesley Green and James A. Moody for Respondent.

Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This action was brought by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (hereinafter “AMS”), initially against Lion Raisin, Inc., a California corporation (hereinafter “Lion”); Lion Raisin Company, a partnership or unincorporated association; Lion Packing Company, a partnership or unincorporated association; Alfred (Al) Lion, Jr., Bruce Lion, Daniel (Dan) Lion, and Jeffrey (Jeff) Lion for violations of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1621, *et seq.*) and the Regulations governing the inspection and certification of processed fruits and vegetables. By later amendments, Isabel Lion and Larry Lion were added as additional Respondents.¹

¹ This action is the third such action brought against the Respondents seeking debarment, each of which is styled *In re Lion Raisins, et al.* I & G Docket No. 01-0001 is currently pending before United States Administrative Law Judge Jill S. Clifton. I & G Docket No. 03-0001 was dismissed as being barred by the statute of limitations and is presently on appeal before the Judicial Officer. Lion’s differences with USDA have been litigated in a variety of forums, including: *Lion Raisins, Inc. v. United States*, 51 (continued...)

Characterized by Complainant's counsel as a case being about deception and money² and by Respondents' counsel as an absurdity of using a pro-market inspection program to shut down a 103 year old company for its conduct in seeking to better serve the needs of their customers³ suggesting that the inaccuracy of the USDA inspections made their conduct necessary), both the original and amendments to the Complaint allege that the Respondents engaged in a pattern of misrepresentation or deceptive or fraudulent practices in connection with the use of official inspection certificates and or inspection results between the period May 24, 1996 and May 11, 2000. The Respondents answered, generally denying the factual allegations contained in the Complaints, specifically denying any wrong-doing and asserting a number of affirmative defenses. By Order dated December 29, 2005, the allegations contained in numerical paragraphs 11 through 89 of the Second Amended Complaint pertaining to conduct occurring more than five years prior to the date of the filing of the Complaint were dismissed as being barred by the statute of limitations contained in 28 U.S.C. §2462.

Eight days of oral hearing were held addressing the remaining allegations, commencing on February 21, 2006 and continuing through February 23, 2006 in Washington, D.C. and then reconvening in Fresno, California on February 27, 2006 and concluding on March 3, 2006. The Complainant was represented by Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C. The corporate Respondent was represented by Wesley T. Green, Esquire, Selma, California and James A. Moody, Esquire, Washington, D.C., who also represented each of the individual Respondents. During the course of the oral hearing, the Complainant called two witnesses and the Respondents thirteen. In addition to the pleadings contained in the record and the transcript of the oral hearing, the evidence includes the 74 exhibits introduced by the Complainant which were admitted and the

¹(...continued)

Fed. Cl. 238 (Fed. Cl. 2001); *In re Lion Raisins*, 2002 AMA Docket No. F & V 989-1; *Lion Raisins, Inc. v. USDA*, 354 F 3d 1072 (9th Cir. 2004); *Lion Raisins, Inc., et al v. USDA*, No. CV-F-04-5844 REC DLB, (E.D. Ca. 2005); *Lion Raisin, Inc. v. United States*, 416 F 3d 1356 (Fed Cir. 2005); and *Lion Raisins, Inc. v. United States*, 64 Fed Cl. 536 (Fed Cl. 2005).

² See the opening statement of Ms. Carroll. Tr. 7

³ Respondent's brief, pages 6-8.

22 exhibits introduced by the Respondents that were admitted.⁴ Both parties have submitted post hearing briefs in support of their respective positions.

In addition to filing a post hearing brief, the Respondents moved to dismiss the Complaint for lack of subject matter jurisdiction and for summary judgment limiting the scope of relief and for failure to afford pre-litigation warning and opportunity to demonstrate or achieve compliance.⁵ The subject matter jurisdiction argument was addressed by the Department's Judicial Officer as a certified question in another case brought against Lion. In that decision, the Judicial Officer wrote:

The Secretary of Agriculture's authority to prescribe regulations for the inspection, certification, and identification of the class, quality, quantity, and condition of agricultural products and to issue regulations and orders to carry out the purposes of the Agricultural Marketing Act of 1946 includes authority to issue debarment regulations and to debar persons from benefits under the Agricultural Market Act of 1946. (footnote omitted) Moreover, the Secretary of Agriculture has long exercised debarment authority under the Agricultural Marketing Act of 1946. (footnote omitted) *In re Lion Raisins, Inc., et al.*, 63 Agric. Dec. 836 at 840 (2004)

In answering the certified question, the Judicial Officer referenced his earlier decision debarring an entity from receiving raisin inspection services under the Agricultural Marketing Act of 1946 in the case of *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. 2003), as well as citing the well established line of cases relating to the withdrawal of meat grading and inspection services under the Agricultural Marketing Act of 1946.⁶

Respondents also argue that Summary Judgment should be granted

⁴ The record also includes all 131 exhibits of the Complainant and 1291 exhibits of the Respondent; however, only the number indicated were in fact admitted.

⁵ These matters were previously raised prior to the hearing in a Motion for Partial Summary Judgment filed on September 14, 2005.

⁶ Respondents assert that the Judicial Officer's decision should not be regarded as authoritative, in part because his ruling was "simply stated in conclusory terms and without rigorous analysis." Respondent's Motion to Dismiss (May 11, 2006) at page 26. The Judicial Officer's economy of language, a trait not shared by Respondent's counsel, does not detract from the ruling's precedential value. The *Merchant of Venice* argument that only voluntary inspections are at issue in this action also appears to have been addressed by the Ninth Circuit in *American Raisin*.

because Lion was not warned that use of their certificates was potentially unlawful and Lion was not provided a pre-litigation opportunity to demonstrate or achieve compliance, relying upon 5 U.S.C. § 558(c), a part of the Administrative Procedures Act.

5 U.S.C. § 558(c) does provide for notice by the agency and an opportunity to achieve compliance where licenses are involved:

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Both the terms "license" and "licensing" are defined in 5 U.S.C. § 551:

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

Although the above definitions are significantly broad, as neither definition appears to cover inspection services, extension of the "second chance" doctrine to the Respondents does not appear warranted in this case.

BACKGROUND OF THE CASE

The Complainant's first witness, David W. Trykowski, Chief of Investigations, Agricultural Marketing Service Compliance Office, United States Department of Agriculture, Washington, D.C., testified that the investigation of Lion was initiated after the Fresno Office of the Agricultural Marketing Service Inspection Office received an anonymous phone call indicating that USDA inspection certificates were being falsified by Lion. Tr. 37. The information from the anonymous caller was subjected to a "credibility check" which was accomplished by sending letters to 109 known overseas customers of Lion requesting that they provide information concerning the USDA certificates that they had received in connection with shipments of raisins that they had purchased from Lion. Tr. 38. The information provided in the responses received was then compared to the USDA inspection records maintained in the Fresno inspection office, a preliminary report was drafted confirming that irregularities had been found and the matter was referred to the Office of the Inspector General for criminal investigation. Tr. 38-49. Incident to the criminal investigation, a search warrant was obtained and executed on October 19, 2000 and a significant number of Lion's records were seized, primarily consisting of those records pertaining to export customers covering the period from approximately 1995 through October of 2000. Tr. 49.

As the investigation progressed, Mr. Trykowski's involvement increased and he personally worked through both the USDA records and the "shipping files" seized from Lion, compared the parallel sets of records for each transaction, and noted the non-conforming results which appeared.⁷ Three types of fraudulent conduct or misrepresentation were identified. First, existing USDA certificates were found that had been altered; second, USDA certificates which were reported by Lion as lost or unusable were instead completed by Lion reflecting results inconsistent with USDA inspections; and last, Lion certificates resembling those issued by USDA were prepared purporting to report USDA inspection results, but contained results different than those

⁷ The results of the analysis of the two sets of records are summarized in tabular form in Exhibit CX 126A. The exhibit identifies the type of conduct complained of, the alteration involved, the USDA Certificate (if applicable), the date of inspection, the customer, the product, Lion's order number, the sales amount, the cash incentive received, the applicable paragraphs of the Second Amended Complaint and the applicable Complainant's exhibit numbers.

found by USDA.⁸ The comparison of Lion's shipping files with USDA's inspection files reflects that between November 11, 1998 and May 11, 2000 different results were reported in the respective files with respect to 33 invoices in three general areas, moisture, USDA grade and size. Moisture differences were the most prevalent, with twenty such variances. Grade differences, with changes from USDA Grade C to USDA Grade B⁹, accounted for thirteen variances, and there was a single instance where a mixed size determination was changed to midget size.¹⁰

Aside from the single instance in which a USDA Certificate was altered to lower the moisture results from 16.0% to 15.4% (CX 72 and 73), the allegations are primarily based upon Lion's use of facsimile certificates prepared on Lion letterhead, but prepared in the same general format and containing the same information as that used by USDA and in which the source of the sample is identified as being "Officially Drawn," a term defined in the Regulations¹¹. 7 C.F.R. § 52.2.

The Respondents argue forcefully and with some justification that because the moisture content of raisins tends to drop rapidly after processing and even after packing, the USDA moisture testing does not accurately reflect results that are in any way representative of the moisture content of the raisins when they are received by an overseas customer. They also suggest that their customers were neither misled nor dissatisfied with the raisins that they received,¹² that USDA's testing results often are so negligently performed as to be inherently unreliable due to the apparent practice of up or down rounding which resulted in

⁸ The second type of conduct noted above apparently was involved in other cases or counts which were dismissed, but was not present in the remaining counts involved in this case. Although Mr. Moody's opening statement suggested that the hearing would not involve any misuse of USDA Certificates, his statement apparently overlooked the allegations concerning USDA Certificate No. B-034343 (Lion Order No. 48397) contained in paragraphs 177 to 180 of the Second Amended Complaint.

⁹ USDA Grade B requires a higher quality of raisin than USDA Grade C.

¹⁰ There are two instances in which both moisture and grade changes were present. CX 56, 57 and 59.

¹¹ Respondents note the use of a certificate, similar to the Lion certificate, used by SunMaid. RX 3-0187 LR 0745. On Sun Maid's certificate; however, the source of samples is "SunMaid" rather than "Officially Drawn."

¹² The testimony indicates that only one of the customers (Western Commodities) involved in this case is no longer purchasing raisins from Lion, but that the entity is no longer purchasing California raisins. Tr. 1462.

serially repeated identical moisture values¹³ which the uncontroverted testimony indicates is statistically improbable and argue that their own independent quality control moisture testing, the specifics of which differ from those used by USDA is a far more accurate indication of the actual raisin moisture content.¹⁴ The Complainant concedes that mistakes are made by USDA's inspectors and while one might generate some empathy for the Respondents' frustration with their repeated efforts in attempting to effect changes in the way USDA inspections are performed and reported in order to meet the needs of their customers (a service for which Lion must pay), the record amply demonstrates a pattern of repeated conduct by Lion to either deliberately alter or impermissibly misrepresented USDA inspection results to meet Lion's needs.

As a remedy,¹⁵ the Complainant seeks debarment of each of the named Respondents for a period of 15 years. Tr. 374. Although the "remedy" witness, G. Neil Blevins, the Associate Deputy Administrator for Compliance Safety and Security in the Agricultural Marketing Service testified that it was not the intent of the Department to end the use of the Lion name on raisins sold from California,¹⁶ he did indicate that in almost 20 years on this job, he had never seen a company as unethical in its dealing with the Agency and suggested that "it is clearly the aim of the Agency that we never wish to provide service to this

¹³ See Tr. 651, 1435. CX 46 at 12, one of the USDA line check sheets reflects seven consecutive identical readings of 18.0% moisture. CX 98 at 8 contains five identical consecutive readings. A detailed examination of every USDA line check sheets would reflect many other such serial readings which according to the testimony would be "highly unlikely...extremely unlikely." Tr. 651.

¹⁴ The differences between USDA and Lion's testing included the stage of processing at which the raisins were tested for moisture, with Lion testing before the application of oil in the processing, with USDA testing after application of the oil. Other differences include the timing of the testing as well as the size of the sample. Lion would also retain samples and would test the retained sample on occasion. While the question of whether the moisture testing done by USDA is appropriate for international trade possibly should be revisited by the Department in light of market preferences, this action is not the appropriate forum to obtain such relief.

¹⁵ The Complainant took great pains to avoid characterizing the relief sought as a sanction, stressing that the action is remedial in nature. By way of contrast, in *American Raisin*, the Judicial Officer characterized debarment as a sanction. *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165 at 189 (2001).

¹⁶ Tr. 516. Mr. Blevins was also asked if it was the intent of the Department to put the Lion family out of the raisin growing, handling and marketing business and he answered "absolutely not and I don't see how it would do that." Tr. 522.

corporation or this family ever again...” Tr. 375, 377. In arriving at the 15 year period, he suggested that normally two to four years for each willful violation would be appropriate in cases such as this.

On the basis of the evidence before me, I find that Lion and the individual Respondents did engage in a pattern of misrepresentation or deceptive or fraudulent practices in connection with the use of official inspection certificates and or inspection results as alleged but that the requested relief of debarment for fifteen years sought by the Complainant against all Respondents is excessive.¹⁷ After considering all of the evidence, the following Findings of Fact and Conclusions of Law are made.

FINDINGS OF FACT

1. The corporate Respondent, Lion Raisins, Inc., is a California corporation, formerly known as Lion Raisins and Lion Enterprises, Inc. (CX 1 at 6-14), with offices currently in Selma, California¹⁸ that processes, packs and sells processed raisins both domestically and internationally,¹⁹ being the second largest such company in the raisin industry. Lion is a closely held Subchapter S family corporation, with the corporation’s 1000 shares of stock being held by only three individuals: Alfred Lion, Jr. (500 shares), Isabel Lion (499 shares) and

¹⁷ It is initially noted that 7 U.S.C. § 1622 provides a maximum criminal penalty of a fine of not more than \$1,000.00 and one year’s imprisonment for each offense. Given the Congressional objective of promoting the marketing of agricultural products in the enactment of the Agricultural Marketing Act of 1946, the severity of remedy requested in this case might very well adversely impact and act at cross purposes to the objectives of other agencies within the Department as well as the raisin industry’s ability to retain its share of the international market, at least during the near term. No agency witness addressed this issue; however, Kalem Baserian briefly touched upon the subject in his testimony. Tr. 1318-20. Bruce Lion also testified as to the impact of a 15 year debarment upon Lion and his family and noted the impact upon the international market share when Dole exited the market in 1997 or 1998. Tr. 1449-1450.

¹⁸ The corporation moved its operation from 3310 East California Avenue, Fresno, California to 9500 South Dewolf, Selma, California in 1999. CX 3; Tr. 1373.

¹⁹ Lion Raisin Company and Lion Packing Company, both of which were named as Respondents, are alleged to be partnerships or unincorporated associations that were either a subsidiary of or affiliated with the corporate Respondent. Although not listed on the Fictitious Name Statement filed with the Fresno County Clerk’s Office, documents in Lion’s shipping files identify Lion Raisin Company and Lion Raisin Packing as affiliated entities or business names. CX 47-10, 23. Lion Packing was a name used both before and after incorporation. See CX 1.

Larry Lion (1 share).²⁰ Tr. 1085-86; 1113-17. Lion was incorporated in 1967;²¹ however, members of the Lion family have been in the raisin business for over 100 years. Tr. 1117-18.

2. Prior to incorporation, Lion was known as Lion Packing Co. on filings with the Raisin Advisory Committee CX 3 at 12-46. On documents contained in Lion shipping files, the names Lion Raisin Company and Lion Packing Company are indicated as affiliated entities or businesses. CX 47 at 10, 23.

3. Alfred (Al) Lion, Jr. holds the largest number of shares of Lion, is one of its directors, and is named as Lion's President on filings with the Raisin Advisory Committee. CX 3 at 1-17. On other filings with the California Secretary of State's Office, he is listed as the Chief Executive Officer and Chief Financial Officer and Registered Agent of Lion. Tr. 1186-88. CX 1 at 4, 5. Bruce Lion, Daniel Lion and Jeffrey Lion are his sons. The Lion family involvement in the raisin industry began with Alfred Lion Jr.'s grandfather; prior to Lion's incorporation, he and his brother Herbert Lion owned the partnership known as Lion Packing Company. CX 1 at 40-46, Tr. 1082.

4. Bruce Lion is listed as one of Lion's directors on the 1997 and 2000 filings with the California Secretary of State, as a Vice President of Lion on the filings with the Raisin Advisory Committee for the crop years 1996 through 2004, and exercised responsibility and control over the sales and shipping operations of Lion. CX 1 at 4,5, CX 3 at 1-11, Tr. 1129-1121. Bruce Lion testified that he was an officer and director of the corporation (Tr. 1350²²) and that he exercised exclusive authority over whether raisins were to be "released." Tr. 1467.

5. During 1998, 1999 and 2000, Daniel (Dan) Lion exercised responsibility and control over Lion's production or processing department and was listed as one of Lion's Vice Presidents in the filing with the Raisin Advisory Committee only in 1997. CX 3 at 9, CX 4, Tr.

²⁰ Isabel Lion is Herbert Lion's widow; Larry Lion is their son. Tr. 1086.

²¹ Lion was initially incorporated as Lion Enterprises, Inc.; however, its failure to file an annual report with the California Secretary of State's Office allowed another to take that name and the corporation was renamed Lion Raisin, Inc. Tr. 1084.

²² The question of whether he was a director of Lion was answered "A. I'm a vice president." Tr. 1350 at line 17.

1119-21.

6. During 1998, 1999 and 2000, Jeffrey (Jeff) Lion exercised responsibility and control over Lion's ranch and grower's operations and was named as one of Lion's Vice Presidents in filings with the Raisin Advisory Committee, beginning in 1992. CX 3 at 1-15, Tr. 119-21.

7. During 1998, 1999 and 2000, Isabel Lion, the widow of Herbert Lion (Alfred Lion, Jr.'s brother and former partner), was Lion's second largest shareholder and according to one set of minutes, a director of Lion. Tr. 1085-86, CX 1 at CX 127.

8. During 1998, 1999 and 2000, Larry Lion was a shareholder and director of Lion, and according to documents filed with the California Secretary of State's Office and one set of minutes, was Lion's Secretary. CX 1 at 3, 4, 10-14, CX 127, Tr. 1085-86.

9. Lion failed to observe corporate formalities in numerous ways, including the filing of inconsistent documents with the California Secretary of State's Office and the Raisin Advisory Committee, naming different individuals as officers and directors of Lion with the two entities, failing to file required annual reports (which resulted in Lion losing its original corporate name of Lion Enterprises, Inc.), naming of officers of the corporation with a variety of different titles, using titles other than those contained on filings with the Secretary of State's Office, designating individuals as Vice Presidents of the corporation without apparent approval or action by the Board of Directors,²³ failing to either hold annual meetings of either the shareholders or Board of Directors or to maintain accurate and appropriate minutes of those meetings.²⁴ CX 1

²³ This was explained as "being management titles" rather than a corporate officer. Tr. 1044, 1046.

²⁴ One must initially wonder why more than one set of minutes might exist. Alfred Lion testified that Susan Keller, one of Lion's employees prepared the minutes, but did not attend the meetings, if in fact there were such meetings. Tr. 1109-10. In one set of minutes appearing in the record, Larry Lion was indicated as being present for the meeting of the Board of Directors for 1999, 2000 and 2001; however, the testimony indicated that he did not attend corporate meetings or otherwise perform the duties of corporate secretary. Tr. 1102-05, 1109-10. None of the minutes appearing of record contain mention of the any litigation Lion in which was involved, the retention of outside counsel, or mention personnel appointments, such as that of Kalem Baserian as General Manager. Given the informal fashion in which decisions were made, the alter ego standard discussed in *In re Anthony Thomas*, 59 Agric. Dec. 367 at 391 (2000) (continued...)

at 3,4, CX 127, Tr. 1100-06, 1113-17, 1121-22.

10. During the period between November 11, 1998, and May 11, 2000, as is indicated in the AMS Inspection and Grading Manual (RX 3-0189, LR 0748-1025), AMS inspectors recorded the results of their inspection sampling on line check sheets. Id. at LR 0955. AMS provided copies of their line check sheets to Lion Raisins, Inc. Id at LR 0957. AMS retained the original line check sheets, along with the pack-out report provided by the packer. Id at LR 0957.

11. During the period between November 11, 1998, and May 11, 2000, AMS's Processed Products Branch used Form FV-146 Certificate of Quality and Condition (Processed Foods), a packet form that comprised multiple pages, with the top page on white paper, identified as "original" in red in the lower right hand corner, followed by seven blue tissue pages (separated by carbon paper) each identified by the word "copy" (also in red) in the lower right hand corner. Tr. 39-40, CX 47 at 15, 16. Each FV-146 form was identifiable by a singular serial number at the top right side. Id. On the top page only, the number was printed in red. For example, see CX 47 at 15RX (LR 0972-77).

12. During the period between November 11, 1998, and May 11, 2000, if requested by the packer, AMS inspectors prepared a certificate worksheet, using the inspection information from their line check sheets, and product labeling and buyer information supplied by the packer. RX 3- 0189 (LR 0998). The worksheet was essentially a "draft" of the inspection certificate. Tr. 40-41.

13. Packers could and did request USDA Certificates of Quality and Condition (FV-146) after the product had been shipped. In that event, the inspector would prepare the form using the inspection documents and the order information. RX 3-0189 (LR 0980).

14. Once the FV-146 was prepared and signed, the original and up to four of the blue tissue copies were provided to the packer (or designee). RX 3-0189 (LR 0981). USDA retained a blue tissue copy in its files, along with any order information that had been provided by the packer when the certificate was requested, and the certificate worksheet, if it had been returned to the inspector. Tr. 40-42; RX 3-0189 (LR 0981). The certificates were recorded in a ledger maintained by the

²⁴(...continued)
appears to be met.

Inspection Service, with voided certificates being so noted. CX 14; Tr. 41-2, 52-3, RX 3-0189 (LR 0976-77). The voided original certificate was retained in the USDA files, and all blue tissue copies were destroyed. *Id.* If the inspector could not recover the original and all of the blue tissue copies, he or she would issue a superseded certificate, according to the procedures set forth in the inspection manual. Tr. 43; RX 3-0189 (LR 0977)

15. AMS filed the blue tissue copies, in the case of valid certificates, and the original, in the case of void certificates, together in numerical order. Tr. 40-42; RX 3-0189 (LR 0977, 0981).

16. During the period between November 11, 1998, and May 11, 2000, AMS inspectors performed on-line in-plant inspections of product at Lion Raisins, Inc. Although AMS personnel were provided with office space, the inspectors lacked the capability of print official inspection certificates and instead provided Lion Raisins, Inc.'s shipping clerks with blank FV-146 forms. CX 4. When Lion requested a certificate, it would generally give the inspector a copy of Lion's "outside" order form, which contained information regarding the buyer, codes, labels, and product specifications. Tr. 84.

17. Lion's shipping files in evidence typically contain a customer order form, prepared by the sales department, and an "inside" invoice and "invoice trial," prepared by the shipping department. The customer order form prepared by the sale department, contains the customer's order specifications. The "inside" invoice is an internal shipping department document that precedes the "invoice trial." The "invoice trial" is the last document prepared, and denotes the customer's specifications, the contract price, the manner and date of shipment, and, usually, the date when the order documentation was mailed to the customer, generally by United Parcel Service.

18. Under a program operated by the Raisin Administrative Committee (hereinafter the "RAC"), packers who sold raisins for export could apply for, and receive, "cash back" for such sales, by filing an RAC Form 100C. See e.g., CX 47 at 12. The amount of "cash back" was based on the weight of the raisins. *Id.* Lion applied for "cash back" from virtually all of the sales that are the subject of this case.²⁵

²⁵ See generally Findings of Fact 21 through 52; CX 126A does not reflect "cash back" from all transactions.

19. Once Lion developed a “Lion” certificate, Lion implemented the practice of charging its customers for USDA certificates, thereby creating a disincentive to request the official certificate FV-146. CX 7. Customers were advised a “Lion” certificate would be provided without charge and that Lion certificates contained the same information as a USDA certificate. See CX 73 at 44 (“Please note that the Lion certificate and the USDA certificate for each order is the same.”).

20. Lion certificates were prepared not by Lion’s quality control personnel, but rather by those in the shipping department. CX 7. Lion certificates were prepared on Lion letterhead but follow the same format used on the FV-146 in the body of the document, providing the same information categories found on the USDA’s worksheet and/or certificate.

21. Order Number 43387. On October 26, 1998, Western Commodities, Ltd., in Devon, England, contracted for 1,660 cases of oil-dressed, 12.5 kilo, select raisins that were certified U.S. Grade B, and requested a USDA certificate.²⁶ CX 47 at 1-2. On November 11, 1998, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 46 at 8.²⁷ Lion requested an inspection certificate,²⁸ USDA inspectors prepared a worksheet, provided it to Lion’s shipping department, Certificate Y-869392 was prepared, and the inspector signed it. CX 46 at 1. Lion retained the original inspection certificate Y-869392 and one copy in its shipping file. CX 47 at 15-6. Lion’s shipping file contains a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information concerning the raisins as the USDA certificate — except that “U.S. Grade B” was substituted for the Grade C that was found by USDA inspectors. CX 47 at 14. Lion mailed the order documents to the

²⁶ The salesman was Steven Vlamincck, who was identified as a witness on respondents’ witness list, but was not called by respondents to testify. CX 47 at 7.

²⁷ According to the line check sheet, one pallet (which inspectors had found failed because of mold) was set aside, and Lion Raisins, Inc., elected to dump it back into the processing line. On a subsequent sampling the raisins were certified as meeting U.S. Grade C, which was accepted by Lion Raisins, Inc.’s processing personnel. CX 46 at 8 (see entries for mold and remark “C grade OK by Graham”).

²⁸ CX 46 at 3(document given to USDA inspectors shows raisins for Lion order 43387 loaded by “Joe” in container MAEU 6734307, with seal No. 0016729); CX 47 at 2 (same container and seal identified on inside invoice).

buyer on December 2, 1998 and requested and received \$13,661.76 “cash back” from the RAC. CX 47 at 1, 12.

22. Order Number 43588. On November 5, 1998, Central Import, Emsdetter, Germany, contracted for 2,880 cases of oil-dressed, 12.5 kilo, midget raisins, not more than 18% moisture, and requested a USDA certificate. CX 99 at 1. On November 28, 1998, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant, obtaining moisture results of 17.8 to 18.0% from the officially drawn samples. CX 98 at 1. Lion requested an inspection certificate,²⁹ USDA inspectors prepared a worksheet, provided it to Lion’s shipping department, Certificate B-033610 was prepared, and the inspector signed it. CX 98 at 1-2. Lion retained the original certificate B-033610 and one copy in its shipping file. CX 99 at 18-19. Lion’s shipping file contains a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information about the raisins as the USDA certificate — except that the “Moisture” was stated to be “17.8 Percent” rather than 17.8 to 18.0% as was found by the USDA inspectors. CX 99 at 17. Lion mailed the order documents to the buyer on December 10, 1998 and requested and received \$23,702.00 “cash back” from the RAC. CX 99 at 1, 13.

23. Order Number 43598. On November 5, 1998, Central Import placed an order for 1,440 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 49 at 1. On January 6, 1999, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 114 at 7. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion’s shipping department. CX 49 at 11. Lion failed to return the worksheet or a typed certificate; however, the worksheet was found in Lion’s shipping file for this order as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information as the USDA worksheet — except that “U.S. Grade B” was substituted for the Grade C found by the USDA inspectors.” CX 49 at 6, 11. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received \$10,572.50 “cash back” from the RAC. CX 49 at 2, 9.

²⁹ CX 98 at 3 (document given to USDA inspectors shows raisins for Lion order 43588 in containers GSTU 3464037 and MAEU 7857055 with seals 0016817 and 0016818).

24. Order Number 43601. On November 5, 1998, Central Import placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B and requested a USDA certificate. CX 51 at 1. On February 3, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, graded the officially drawn samples as mixed raisins, and as U.S. Grade C. CX 50 at 6, CX 51 at 14.³⁰ The raisins were shipped that day. CX 51 at 1. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 50 at 6. Lion failed to return the worksheet or a typed certificate; however, the worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate worksheet — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors. CX 51 at 13, 14.³¹ Lion mailed the order documents to the buyer on February 11, 1999 and requested and received \$12,187.75 "cash back" from the RAC. CX 51 at 1, 11.

25. Order Number 43603. On November 5, 1998, Central Import placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B and requested a USDA certificate. CX 101 at 1. On February 3, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant and graded the officially drawn samples as mixed size, U.S. Grade C. CX 50 at 6.³² Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 50 at 6, CX 101 at 12, 21. Lion failed to return the worksheet or a typed certificate; however, the worksheet was found in respondents' shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE

³⁰According to the line check sheet, the samples exceeded the maximum allowable number of substandard and underdeveloped raisins. CX 50 at 6. The raisins were certified as meeting U.S. Grade C, which was accepted by Lion Raisins, Inc.'s processing personnel. CX 50 at 6 (see remark "C grade sub OK'd by Robert").

³¹The USDA certificate worksheet contains both the range and average berry count; the "Lion" certificate gives only the average. This difference is present in a number of transactions.

³² The line check sheet reflects that the samples exceeded the maximum allowable number of substandard and underdeveloped raisins and were graded as U.S. Grade C. CX 50 at 6. This grade was accepted by Lion (see remark: "C grade sub OK'd by Robert") Id.

OF SAMPLES: Officially Drawn,” and contained the identical information as the USDA certificate worksheet — except that the “U.S. Grade B” was substituted for the Grade C found by the USDA inspectors.” CX 101 at 12, 21-22. Lion mailed the order documents to the buyer on March 3, 2000 and requested and received \$12,187.75 “cash back” from the RAC. CX 101 at 1, 9.

26. Order Number 43612. On November 5, 1998, Shoei Foods, Marysville, California, placed an order for 1,250 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B and requested a USDA certificate. CX 103 at 1. On November 21, 1998, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant and graded the officially drawn samples as U.S. Grade C. CX 102 at 1. Lion requested an inspection certificate after the raisins were loaded in a container and sealed.³³ USDA inspectors prepared a worksheet, and provided it to Lion’s shipping department. CX 102 at 2. Lion returned the worksheet and a typed Certificate Y-869393 which the inspector signed. CX 102 at 1, CX 103 at 12. The original certificate Y-869393 and a blue tissue copy were found in Lion’s shipping file for this order. CX 103 at 12, 13. The blue tissue copy was annotated with the words “don’t send” written on its face in pencil. CX 103 at 13. Lion’s shipping file also contained a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information about the raisins as the USDA certificate — except that the “GRADE” is typed as “U.S. Grade B” instead of the Grade C found by the USDA inspectors. CX 103 at 11, 12. Lion mailed the order documents to the buyer on November 23, 1998 and requested and received \$8,199.39 “cash back” from the RAC. CX 103 at 1, 10. On the “inside” order sheet located in Lion’s shipping file, there was a Post-it note from “Yvonne” to “Bruce,” stating:

Bruce—
USDA shows Grade C -
Do you want to send Lion
Cert of Quality instead
of USDA for both orders.
Tx, Yvonne

In pencil, the word “yes” was written in response. CX 103 at 2.

³³ CX 102 at 3 (document given to USDA inspectors shows raisins for Lion order 43612 loaded by “A/sert”[?] in container POCU 0125740 with seal No. 0016796).

27. Order Number 43694. On November 12, 1998, Central Import placed an order for 1,440 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 105 at 1. On November 24, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 104 at 6. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 104 at 2-3. Lion returned the worksheet and a typed Certificate Y-869397. CX 104 at 1, CX 105 at 24, 25. The original certificate Y-869397 (and one official copy) were found in Lion's shipping file for this order. CX 105 at 24, 25. Lion's shipping file also contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" is substituted for the Grade C found by the USDA inspectors. CX 105 at 23. Lion mailed the order documents to the buyer on December 8, 1998 and requested and received \$15,025.38 "cash back" from the RAC. CX 105 at 1, 13.

28. Order Number 43922. On December 1, 1998, Farm Gold placed an order for 3,200 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 107 at 1. On November 29, and December 6, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 105 at 5, 8. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 106 at 2. Lion returned the worksheet and a typed Certificate B-033629. CX 106 at 1, CX 107 at 33, 34. The original certificate B-033629 (and one of the official copies) were found in Lion's shipping file for this order. CX 107 at 33, 34. In addition, the shipping file contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" is substituted for the Grade C found by the USDA inspectors. CX 107 at 32. Lion mailed the order documents to the buyer on December 24, 1998 and requested and received \$33,361.84 "cash back" from the RAC. CX 107 at 3, 22.

29. Order Number 43956. On December 3, 1998, Farm Gold placed an order for 1,660 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 109 at 1. On January

20, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 108 at 5, CX 109 at 21. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 109 at 21. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors. CX 109 at 20, 21. Lion mailed the order documents to the buyer and requested and received \$15,844.08 "cash back" from the RAC. CX 109 at 1, 12.

30. Order Number 43957. On December 3, 1998, Farm Gold placed an order for 1,660 cases of 12.5 kilo, oil-treated midget raisins, U.S. Grade B, and requested a USDA certificate. CX 111 at 1. On January 20, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 108 at 5, CX 111 at 25. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 111 at 25. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors." CX 111 at 21, 25. Lion mailed the order documents to the buyer and requested and received \$15,844.08 "cash back" from the RAC. CX 111 at 1, 13.

31. Order Number 43975. On December 4, 1998, Central Import Muenster placed an order for 2,880 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B and requested a USDA certificate. CX 53 at 2. On December 16, 1998, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, grading the officially drawn samples as U.S. Grade C. CX 52 at 17, CX 53 at 13-14. Lion requested an inspection certificate after the raisins were loaded in a container and sealed.³⁴ USDA inspectors prepared a worksheet and provided it to Lion's

³⁴ CX 52 at 3 The document provided to the USDA inspectors reflects this order was loaded by "BH" in containers APMU 2751550 and TRIU 3706610 with seals Nos. 0017053 and 0017054.

shipping department. CX 52 at 2. Lion returned the worksheet and a typed Certificate B-033631. CX 53 at 13-14. Lion's shipping file contained the original certificate and a photocopy as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" was substituted for the Grade C found by the USDA inspectors. CX 53 at 12-14. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received \$23,682.12 "cash back" from the RAC. CX 53 at 1, 10.

32. Order Number 44120. On December 14, 1998, Navimpex, S.A., Charenton, France placed an order for 1,660 cases of oil-treated, 12.5 kilo select raisins, U.S. Grade B, with no more than 15% moisture and requested a USDA certificate and copies of the USDA's line check sheets. CX 55 at 1. On January 21, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, obtaining moisture levels of 16.4 to 16.5% from the officially drawn samples. CX 54 at 5, CX 55 at 7. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 55 at 7. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file for this order contained the certificate worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn,". CX 55 at 6-7. The Lion certificate contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.0 Percent" instead of the 16.4 to 16.5% found by the USDA inspectors. CX 55 at 6-7. On the Invoice, next to "LINE CHECK SHEETS," there appeared a handwritten notation "Do not send (per Bruce)." CX 55 at 1. Lion's shipping file also contained a copy (redacted) of the USDA's line check sheet for the inspection of these raisins. The copy bore a Post-it note, in red ink:

Bruce—
Please note USDA
Line check sheets
show higher moisture
than spec.
Tx, Yvonne

The response, in pencil, said: "don't send or reduce them" The "don't send" was circled. CX 55 at 5. Lion mailed the order documents to the buyer on February 3, 1999 and requested and received \$12,187.75 "cash

back” from the RAC. CX 55 at 1, 15.

33. Order Number 44122. On December 14, 1998, Navimpex placed an order for 1,660 cases of oil-treated, 12.5 kilo select raisins, U.S. Grade B, with no more than 15% moisture, and requested a USDA certificate. CX 113 at 1. On March 1, 1999, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant, obtaining moisture levels of 15.0 to 17.0% from the officially drawn samples. CX 112 at 4.³⁵ Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion’s shipping department. Lion failed to return the worksheet or a typed certificate; however, Lion’s shipping file for this order contained the certificate worksheet as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information about the raisins as the USDA certificate — except that the “Moisture” was typed as “15.0 Percent” rather than the 15.0 to 17.0% found by USDA inspectors. CX 113 at 14. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received \$15,844.08 “cash back” from the RAC. CX 57 at 1, 12.

34. Order Number 44184. On December 16, 1998, Heinrich Bruning, Hamburg, Germany, placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 57 at 1. On January 12, 1999, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant, obtaining moisture levels of 16.7 to 17.0% from the officially drawn samples and grading the raisins as U.S. Grade C. CX 56 at 4. Lion requested an inspection certificate, USDA inspectors prepared a certificate worksheet, and provided it to Lion’s shipping department. CX 57 at 22. Lion failed to return the worksheet or a typed certificate; however, Lion’s shipping file for this order contained the certificate worksheet as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information about the raisins as the USDA certificate — except that the “Moisture” was typed as “16.0 Percent” and the “GRADE” is typed as “U.S. Grade B” rather than the moisture of 16.7 to 17.0% and Grade C found by the USDA inspectors. CX 57 at 17, 22. Lion mailed the order documents to the buyer on March 11, 1999 and requested and received \$12,187.75 “cash back” from the RAC. CX 113 at 1, 7.

³⁵ The inspector noted that she “notified Joe on moisture.” CX 112 at 4.

35. Order Number 44185. On December 16, 1998, Heinrich Bruning, Hamburg, Germany, placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 59 at 1. On January 12, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant, obtaining moisture levels of 16.7 to 17.0% and grading the raisins as U.S. Grade C. CX 56 at 4. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 59 at 19. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file for this order contained the certificate worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.0 Percent" and the "GRADE" is typed as "U.S. Grade B" instead of the moisture level of 16.7 to 17.0% and Grade C found by the USDA inspectors. CX 59 at 18-19. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received \$15,844.08 "cash back" from the RAC. CX 59 at 1, 11.

36. Order Number 44351. On January 4, 1999, Central Import placed an order for 290 cases of 12.5 kilo, oil-treated midget raisins, with no more than 15.5% moisture, and requested a USDA certificate. CX 115 at 1. On January 6, 1999, USDA inspectors sampled processed raisins on-line at Lion's Fresno plant, obtaining moisture levels of 17% from the officially drawn samples. CX 114 at 7. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 115 at 21. Lion returned a typed Certificate B-033650 which stated that the raisins sampled were "officially drawn," and certified at 17% moisture. CX 114 at 1. Lion's shipping files contained the original certificate B-033650 and the certificate worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.5%" rather than the 17% found by the USDA inspectors. CX 115 at 18, 19, 21. Lion's shipping file also contains a Post-it note from "RW" to "Bruce, as follows:

3/9

Bruce,
(See order attached)
The Berry count met the specs,

however the moisture did not.
According to USDA moisture
was 17%.

Tx,
RW

CX 115 at 15. Lion mailed the order documents to the buyer on January 20, 1999 and requested and received \$2,768.03 “cash back” from the RAC. CX 115 at 1, 13.

37. Order Number 44488. On January 11, 1999, Heinrich Bruning placed an order for 4,980 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 61 at 1. On January 22, 1999, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant, obtaining moisture levels of 16.6 to 17.0% from the officially drawn samples. CX 60 at 5. Lion requested an inspection certificate,. USDA inspectors prepared a worksheet, and provided it to the shipping clerks. CX 61 at 16. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in respondents’ shipping file for this order as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information about the raisins as the USDA certificate — except that the “Moisture” was typed as “16.0 Percent” instead of the 16.6 to 17.0% found by the USDA inspectors. CX 61 at 15-16. Lion mailed the order documents to the buyer on February 3, 1999 and requested \$47,531.90 “cash back” from the RAC. CX 61 at 1, 24.

38. Order Number 44865. On February 4, 1999, Primex International placed an order for 440 cases of oil-treated, 30 pound select raisins, with no more than 15% moisture, and requested a USDA certificate. CX 117 at 1. On February 8, 1999, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant, and obtained moisture levels of 17.2% from the officially drawn samples. CX 116 at 2. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion’s shipping department. CX 117 at 14. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion’s shipping file for this order as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information about the raisins as the USDA certificate —

except that the “Moisture” was typed as “15.0 Percent” instead of the 17.2% found by the USDA inspectors. CX 117 at 13. There was a Post-it note on the “Lion” certificate from “RW” to “Bruce”:

Bruce,
Moisture did not
meet spec of 15%
Actual moisture
is 17.2%.
RW

CX 117 at 13. Lion mailed the order documents to the buyer on February 12, 1999 and requested and received \$3, 235.41 “cash back” from the RAC. CX 117 at 1, 11.

39. Order Number 45199. On March 5, 1999, Sunbeam Australian Dried Fruits Sales, Victoria, Australia, placed an order for 3,320 cases of oil-treated, 12.5 kilo zante currant raisins, U.S. Grade B, with no more than 17.5% moisture and requested a USDA certificate. CX 63 at 1. On April 15, 1999, USDA inspectors sampled processed raisins on-line at Lion’s Fresno plant, and obtained moisture levels of 17.6 to 18.9% from the officially drawn samples. CX 62 at 8.³⁶ Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion’s shipping clerks. CX 63 at 25. Lion failed to return the worksheet or a typed certificate to USDA; however, the certificate worksheet was located in Lion’s shipping file for this order as well as a “Lion” certificate, signed by Rosangela Wisley, that used the legend “SOURCE OF SAMPLES: Officially Drawn,” and contained the identical information about the raisins as the USDA certificate — except that the “Moisture” was typed as “17.5 Percent” instead of the 17.6 to 18.9% found by the USDA inspectors. CX 63 at 25, 46. Lion requested and received “cash back” from the RAC. CX 63 at 42 (the amount is obscured).

40. Order Number 46171. On May 21, 1999, Sunbeam Australian Dried Fruits Sales, Victoria, Australia, placed an order for 3,320 cases of oil-treated, 12.5 kilo zante currant raisins, U.S. Grade B, with no more than 16.5% moisture and requested a USDA certificate. CX 65 at 1. On April 15, 1999, USDA inspectors sampled processed raisins on-

³⁶ The inspector notified the processing staff that the moisture was high. CX 62 at 8 (“notified Robert on moist”). The maximum allowable moisture percentage for zante currant raisins is 20%. 7 C.F.R. § 52.1857.

line at Lion's Fresno plant, obtaining moisture levels of 17.6 to 18.9% from the officially drawn samples. CX 64 at 5. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 65 at 41. Lion failed to return the worksheet or a typed certificate to USDA; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.9 to 17.0 Percent" rather than the 17.6 to 18.9% found by the USDA inspectors. CX 65 at 31, 41.³⁷ Lion's shipping file also contained a letter, dated July 21, 1999, sent to Sunbeam, which stated:

"Your P O 8863 has already been processed. Enclosed please find a copy of the signed USDA certificate showing the moisture content of 17 percent which is below the maximum requirement of 18 percent. Per your PO 9003 we have adjusted the maximum moisture specification to 17 percent to ensure the moisture level is reduced as per your request. We will try testing under 17 percent but our production thinks it might be difficult to obtain the moisture any lower than the 17 percent."³⁸

Lion mailed the order documents to the buyer on August 9, 1999 and requested and received \$36,032.50 "cash back" from the RAC. CX 65 at 45.

41. Order Number 46371. On May 14, 1999, Farm Gold, in Neudorf, Austria, placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 16% moisture and requested a USDA certificate. CX 67 at 1. On September 1, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 15.5 to 17.0% from the officially drawn samples.³⁹ CX 66 at 5. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 67 at 23. Lion failed to return the worksheet

³⁷ USDA stated that the certificate covered 91,489.24 pounds of product, while the "Lion" certificate referred to 91,489 pounds.

³⁸ CX 65 at 12-13; see also CX 65 at 14 (noting "USDA readout 17.0%"). "PO" appears to refer to Sunbeam's purchase orders. See CX 65 at 6 (reference to PO9003); 10, 14.

³⁹ According to the line check sheets, the maximum moisture for the order was 17%. CX 66 at 5.

or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as two "Lion" certificates, signed by Barbara Baldwin, both of which used the legend "SOURCE OF SAMPLES: Officially Drawn." CX 67 at 21, 22. One of the "Lion" certificates contained – in typewriting – the identical information about the raisins as the USDA certificate — including the non-conforming "15.5 to 17.0" percent moisture. CX 67 at 22. The entire page, however, was struck through with a red line, and, in pencil, the "17.0 Percent" was obliterated, and corrected with a handwritten "16." Id. On the other "Lion" certificate, presumably the final version, the "Moisture" was typed as "15.5 to 16.0 Percent" instead of the 15.5 to 17.0% found by the USDA inspectors. CX 67 at 21, 23. Lion mailed the order documents to the buyer on September 19, 1999 and requested and received \$10,725.22 "cash back" from the RAC. CX 67 at 1, 16.

42. Order Number 46811. On July 19, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B and requested a USDA certificate. CX 69 at 1. On September 19, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, grading the officially drawn samples as U.S. Grade C.⁴⁰ CX 68 at 3. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 69 at 18. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as two "Lion" certificates, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that on one, the "GRADE" was typed as it is on the USDA worksheet, as "U.S. Grade C." CX 69 at 17-18. The "C" was circled in pencil, and a "B" placed next to it, also in pencil. Id. The other "Lion" certificate was corrected to read "GRADE: U.S. GRADE: B." CX 69 at 16. Lion mailed the order documents to the buyer on October 5, 1999 and requested and received \$10,725.22 "cash back" from the RAC. CX 69 at 1, 25.

43. Order Number 47456. On September 8, 1999, Farm Gold placed an order for 3,320 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, and requested a USDA certificate. CX 119 at 1. On September 23, 1999, USDA inspectors sampled processed raisins on-

⁴⁰ The samples were graded U.S. Grade C as the maximum allowable number of substandard and underdeveloped raisins was exceeded for U.S. Grade B. The remarks reflect "C grade sub OK. Robert" CX 68 at 3.

line at Lion's Selma plant, grading the officially drawn samples as U.S. Grade C. CX 118 at 4. Lion requested an inspection certificate, USDA inspectors prepared a worksheet and provided it to Lion's shipping clerks. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, which used the legend "SOURCE OF SAMPLES: Officially Drawn," and stated that the "GRADE" was "U.S. GRADE: B" rather than the Grade C found by the USDA inspectors. CX 119 at 26. The "Lion" certificate also included an additional case code that does not appear on the USDA worksheet. CX 119 at 26. Lion mailed the order documents to the buyer on October 14, 1999 and requested and received \$28,762.80 "cash back" from the RAC. CX 119 at 1, 12.

44. Order Number 48052. On October 20, 1999, Demos Ciclitira, London, England, placed an order for 1,660 cases of oil-treated, 12.5 kilo Medos zante currant raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 71 at 1, 6, 26. On October 27, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 17.0 to 18.0% from the officially drawn samples. CX 70 at 8. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 71 at 25. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the same information about the raisins as the USDA certificate — except that the moisture read "[blank] To 17.0 Percent" and the principal label marks contained additional information not found on the certificate worksheet. CX 71 at 24, 25.⁴¹ Lion mailed the order documents to the buyer on November 18, 1999 and requested "cash back" from the RAC. CX 71 at 1, 14.

45. Order Number 48137.

a. On October 25, 1999⁴², Borges, S.A., Reus, Spain, contracted to buy 665 cases of 30-pound oil-treated Lion Select raisins, at no more

⁴¹ The Lion shipping file contains an outside order form with the same label information that appears on the "Lion" certificate, but not on the USDA certificate worksheet. CX 71 at 22

⁴² This order date appears to be incorrect as it predates the inspection of the raisins, but is what is reflected by the exhibits.

than 16% moisture, and requested a USDA certificate. CX 121 at 1. On November 4, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 16.8 to 17.0% from the officially drawn samples⁴³. CX 120 at 14. After the raisins were loaded in a container, Lion requested an inspection certificate, the inspector gave a worksheet to Lion's shipping department, and received the worksheet and typed Certificate B-034321 back. CX 120 at 3-5. Lion's shipping file contained the original certificate as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and represented the moisture as 16.0% instead of the 16.86 to 17.0% found by the USDA inspectors. CX 121 at 36, 38.

b. On October 25, 1999, Borges contracted to buy 735 cases of 30-pound oil-treated golden raisins, at no more than 18% moisture, and requested a USDA certificate. CX 121 at 1. On October 15, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 16.5 to 17.3% from the officially drawn samples⁴⁴. CX 120 at 12. After the raisins were loaded in a container, Lion requested an inspection certificate, the inspector gave a worksheet to Lion's shipping department, and received the worksheet and typed Certificate B-034317 back. CX 120 at 1, 2. Lion's shipping files contained the original certificate as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and represented the moisture as 16.0% rather than the 16.0 to 17.9% found by the USDA inspectors. CX 121 at 35, 37.

c. Lion mailed the documents for order 48137 (both parts) to the buyer on January 6, 1999 and requested and received \$6,109.95 "cash back" from the RAC. CX 121 at 1, 10.

46. Order Number 48397. On November 10, 1999, N.A.F. International, Copenhagen, Denmark, placed an order for 650 cases of bagged, oil-treated, raisins, U.S. Grade B, with no more than 15% moisture, and 800 cases of 12.5 kilo, oil-treated select raisins, U.S. Grade B, with no more than 16% moisture and requested a USDA certificate. CX 73 at 1. On December 6, 1999, USDA inspectors

⁴³ The USDA line check sheet reflects only 16.8 to 17.0% moisture levels; however, the FV 146 reflects the 16.86 to 17.0% figures. CX 120 at 1, 14; CX 121 at 42.

⁴⁴ The USDA line check sheet reflects moisture of 16.5 to 17.3; however, the worksheet and the certificate reflected moisture levels of 16.0 to 17.9%. CX 120 at 1, 2, 12.

sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 15.1 to 15.3% from the officially drawn samples. CX 72 at 12. Lion requested an inspection certificate after the raisins were loaded in a container and sealed, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 72 at 8. Lion returned the worksheet and a typed Certificate B-034343. CX 72 at 4⁴⁵. Lion's shipping file contained the original certificate B-034343 (and several photocopies thereof) for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.3 TO 16.0 Percent" rather than the 15.3 to 15.4% recorded on the USDA Certificate found in the USDA file. CX 72 at 4, CX 73 at 34 (original), 39, 40-43. The original USDA certificate was altered to read "Moisture - 15.3 TO 16.0 Percent," and a copy of the altered original was in the shipping file as well. CX 73 at 34, 39. Lion mailed the order documents to the buyer on January 5, 2000 and requested and received \$6,751.94 "cash back" from the RAC. CX 73 at 1, 16.

47. Order Number 48416. November 11, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, no more than 17% moisture, and requested a USDA certificate. CX 123 at 1. On December 13, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 17.9 to 18.0% from the officially drawn samples. CX 122 at 3. Lion requested an inspection certificate, USDA inspectors prepared a worksheet and provided it to Lion's shipping department. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and stated that the "Moisture" was "17.0% rather than the 17.9 to 18.0% found by the USDA inspectors." CX 123 at 30, 31. Lion mailed the order documents to the buyer on January 12, 2000 and requested and received \$17,664.63 "cash back" from the RAC. CX 123 at 1, 10.

48. Order Number 48487. On November 16, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, 12.5 kilo select raisins, no

⁴⁵ Although the certificate worksheet records the moisture as being 15.1 to 15.3% consistent with the line check sheet, Certificate 03343 contains a moisture level of 15.3 to 15.4%.

more than 16% moisture, and requested a USDA certificate. CX 125 at 1. On November 30, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant, and obtained moisture levels of 15.1 to 15.8% from the officially drawn samples. CX 124 at 4. Lion requested an inspection certificate, USDA inspectors prepared a worksheet and provided it to Lion's shipping department. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and stated that the "Moisture" was "15.1 to 15.5% rather than the 15.1 to 15.8% found by the USDA inspectors." CX 125 at 29, 30. Lion mailed the order documents to the buyer on December 23, 1999 and requested and received \$17,664.63 "cash back" from the RAC. CX 125 at 3, 14.

49. Order Number 48523. On November 18, 1999, Heinrich Bruning placed an order for 1,660 cases of oil-treated, 12.5 kilo midget raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 75 at 1. On December 2, 1999, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 16.6 to 17.0% moisture. CX 74 at 3. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping department. CX 75 at 22. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.0 Percent rather than the 16.6 to 17.0% found by the USDA inspectors." CX 75 at 18, 22. The "Lion" certificate bore a Post-it note, in pen:

"USDA certificate shows a moisture of 16.6-17.0."

Lion mailed the order documents to the buyer on December 30, 1999 and requested and received \$17,664.63 "cash back" from the RAC. CX 75 at 1, 9.

50. Order Number 49334. On January 20, 2000, EKO Produktor AB, Gothenburg, Sweden, placed an order for 1,660 cases of oil-treated, 12.5 kilo select raisins, U.S. Grade B, with no more than 17% moisture and requested a USDA certificate. CX 77 at 1. On December 21 and 22, 1999, USDA inspectors had sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 16.6 to 17.8% from the

officially drawn samples. CX 76 at 4, 13. Lion requested an inspection certificate, USDA inspectors prepared a worksheet which bore Order Number 49334, and provided it to Lion's shipping department⁴⁶. CX 77 at 22. Lion failed to return the worksheet or a typed certificate; however, the certificate worksheet was found in Lion's shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn," and which stated that the pack dates were January 21 and 22, 2000, and bore the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "16.6 To 17.0 Percent" rather than the 16.6 to 17.8% found by the USDA inspectors. CX 77 at 21. The "Lion" certificate bore a Post-it note, in pen:

"USDA shows no packing on the 21 & 22 of January.

The moisture for the Dec. Pack date shows 16.6 - 17.8%."

Lion mailed the order documents to the buyer on February 7, 2000 and requested and received \$11,573.38 "cash back" from the RAC. CX 77 at 1, 12.

51. Order Number 50431. On April 14, 2000, N.A.F. International placed an order for 1,440 cases of 12.5 kilo, oil-treated select raisins, U.S. Grade B, with 16 to 18% moisture and requested a USDA certificate. CX 79 at 1. On April 17, 2000, USDA inspectors sampled processed raisins on-line at Lion's Selma plant, obtaining moisture levels of 17.2 to 17.5% from the officially drawn samples. CX 78 at 3. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping clerks. CX 79 at 25. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file contains two "Lion" certificates signed by Barbara Baldwin that used the legend "SOURCE OF SAMPLES: Officially Drawn." CX 79 at 23, 24. One certificate contained the USDA's moisture results, and bore a handwritten (in pencil) notation "16-17 adjacent to the moisture entry." CX 79 at 23. The second "Lion" certificate contained the typewritten "corrected" moisture of 16 to 17%. CX 79 at 24. Lion mailed the order documents to the buyer on April 20, 2000 and requested and received \$13,421.36 "cash back" from the RAC. CX 79 at 1, 4.

52. Order Number 50750. On May 8, 2000, J.L. Priestly, Lincolnshire, England, placed an order for 1,660 cases of 12.5 kilo, oil-

⁴⁶ It is not entirely clear what occurred here as the Order date is well after the inspection date.

treated midget raisins. CX 81 at 1. On April 14 and May 11, 2000, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant, and graded the officially drawn samples as mixed size raisins. CX 80 at 6, 11. Lion requested an inspection certificate, USDA inspectors prepared a worksheet, and provided it to Lion's shipping clerks. CX 81 at 21. Lion failed to return the worksheet or a typed certificate; however, Lion's shipping file for the order contained the worksheet as well as two "Lion" certificates (one signed by Barbara Baldwin), that used the legend "SOURCE OF SAMPLES: Officially Drawn." CX 81 at 23, 24, 26. One certificate contained USDA's size result and the other recorded the size as "midget." Id. There is also a Post-it which stated:

"Bruce,
The USDA certificate
shows a size of Mixed."

The handwritten response, in pencil indicated:

"Change to Midget," circled. CX 81 at 25.

Lion mailed the order documents to the buyer on May 25, 2000 and requested and received \$15,471.78 "cash back" from the RAC. CX 81 at 1, 3.

CONCLUSIONS OF LAW

1. The Secretary of Agriculture has the authority under the Agricultural Marketing Act of 1946 to: (a) prescribe regulations for the inspection, certification, and identification of the class, quality, and condition of agricultural products, and (b) to issue regulations and orders to carry out the purposes of the Act, including the right to issue debarment regulations and to debar persons and entities from benefits under the Act.

2. The term "officially drawn sample" as defined in 7 C.F.R. § 52.2 is limited to those samples selected by USDA inspectors, other licensed samplers or by other persons authorized by the Administrator. The use of such language on Lion certificates indicating that the source of samples was "officially drawn" impermissibly attempts to extend that term to sampling results performed by an entity's quality control personnel if such sampling was in fact performed. While no regulation prohibits the use of a non-USDA certificate or guarantee by a processor, packer or seller of raisins, the use of the term "officially drawn" allows no leeway or deviation from the sampling results found by USDA inspectors.

3. U.S. Grades, as applied to raisins, are based upon a variety of components, only one of which is the maturity of the raisin. Lion's false representation that certain orders (which had been graded by USDA inspectors as U.S. Grade C) were in fact U.S. Grade B based only upon maturity was an impermissible use of the U.S. Grade designation given to the raisins in question.

4. Lion impermissibly attempted to use its own standards to define the term "midget" when that term is defined and used by USDA as part of the identification of the size of a raisin.

5. By reason of Lion's failure to observe corporate formalities, as enumerated above, Lion is not an entity separate and apart from the individual respondents named in the Second Amended Complaint.

6. On 33 occasions between November 11, 1998 and May 11, 2000, in connection with 32 orders, respondents Lion Raisins, Inc., Lion Raisin Company, Lion Packing Company, Alfred Lion, Jr., Daniel Lion, Jeffrey Lion, Bruce Lion, Larry Lion, and Isabel Lion, willfully violated section 203(h) of the Act (7 U.S.C. § 1622(h)), and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)), by engaging in misrepresentation or deceptive or fraudulent practices or acts, as follows:

a. Order Number 43387 (November 11, 1998). Respondents used an official inspection certificate (Y-869392), as a basis to misrepresent the U.S. Grade of 45,744.62 pounds of raisins sold by respondents to Western Commodities, Ltd., as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B, when USDA had in fact certified them as U.S. Grade C, as shown on the official certificate. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents used a facsimile form that simulated in part the official inspection certificate issued for these raisins (Y-869392) for the purpose of purporting to evidence the U.S. grade of the raisins. 7 C.F.R. § 52.54(a)(1)(v).

b. Order Number 43588 (January 6, 1999). Respondents used an official inspection certificate (B-033610), as a basis to misrepresent the moisture content of 79,364 pounds of raisins sold by respondents to Central Import Meunster. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins to be 17.8% moisture, when the USDA's officially drawn sample of those raisins was certified

as 17.8 to 18.0% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents used a facsimile form that simulated in part the official inspection certificate issued for these raisins, for the purpose of purporting to evidence the officially drawn moisture level of the raisins. 7 C.F.R. § 52.54(a)(1)(v).

c. Order Number 43598 (January 6, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 39,682.08 pounds of raisins sold by respondents to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate, for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

d. Order Number 43601 (February 3, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”), falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

e. Order Number 43603 (February 3, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

f. Order Number 43612 (November 21, 1998). Respondents used an official inspection certificate (Y-869393), as a basis to misrepresent the U.S. Grade of 37,500 pounds of raisins sold by respondents to Shoei Foods (U.S.A.) Inc., as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B when the official inspection certificate (Y-869393) for the raisins certified them as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents also used a facsimile form that simulated in part an

official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

g. Order Number 43694 (November 24, 1998). Respondents used an official inspection certificate (Y-869397), as a basis to misrepresent the U.S. Grade of 39,682.08 pounds of raisins sold by respondents to Central Import Meunster, as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B when the official inspection certificate (Y-869397) for the raisins certified them as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

h. Order Number 43922 (December 6, 1998). Respondents used an official inspection certificate (B-033629) to misrepresent the U.S. Grade of 88,182.40 pounds of raisins sold by respondents to Farm Gold as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B when the official inspection certificate certified them as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

i. Order Number 43956 (January 20, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold as U.S. Grade B when the officially drawn sample for that product was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

j. Order Number 43957 (January 20, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold as U.S. Grade B when the officially drawn sample for those raisins was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

k. Order Number 43975 (December 6, 1998). Respondents used an official inspection certificate (B-033631), as a basis to misrepresent the U.S. Grade of 79,364.16 pounds of raisins sold by respondents to Central Import Meunster as U.S. Grade B, when in fact, the official U.S. Grade of those raisins was U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iii). Respondents also used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as U.S. Grade B when the official inspection certificate certified them as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Finally, respondents used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

l. Order Number 44120 (January 21, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Navimpex, at 15.0% moisture, when the officially drawn sample for that product was certified at 16.4 to 16.5% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

m. Order Number 44122 (March 1, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Navimpex at 15.0% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

n. Order Number 44184 (January 12, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Heinrich Bruning, at 16.0% moisture and U.S. Grade B when the officially drawn sample for those raisins was certified at 16.7 to 17.0% moisture, and as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

o. Order Number 44185 (January 12, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely

signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Heinrich Bruning at 16.0% moisture and U.S. Grade B, when the officially drawn sample for that product was certified at 16.7 to 17.0% moisture, and as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

p. Order Number 44351 (January 6, 1999). Respondents used an official inspection certificate (B-033650), as a basis to misrepresent the moisture of 7,991.53 pounds of raisins sold by respondents to Central Import Meunster as 15.5%. 7 C.F.R. § 52.54(a)(1)(iii). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified those raisins as having 15.5% moisture when the officially drawn sample was certified at 17% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

q. Order Number 44488 (January 22, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 137,233.86 pounds of raisins sold by respondents to Heinrich Bruning at 16.0% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

r. Order Number 44865 (February 8, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 13,200 pounds of raisins sold by respondents to Primex International, with final destination of Manila, Philippines, at 15.0% moisture, when the officially drawn sample for those raisins was certified as 17.2% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

s. Order Number 45199 (April 15, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 91,489.24 pounds of raisins sold by respondents to Sunbeam Australian Dried Fruits Sales, at 17.5%

moisture, when the officially drawn sample for those raisins was certified at 17.6 to 18.9% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v)..

t. Order Number 46171 (July 26, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 91,489 pounds of raisins sold by respondents to Sunbeam Australian Dried Fruits Sales, at 16.9 to 17.0% moisture, when the officially drawn sample for that product was certified at 16.9 to 17.5% moisture, and the officially drawn sample for that product also had identified 91,489.24 pounds of product. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

u. Order Number 46371 (September 1, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold at 15.5 to 16.0% moisture, when the officially drawn sample for those raisins was certified at 15.5 to 17.0% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

v. Order Number 46811 (September 19, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold to be U.S. Grade B, when the officially drawn sample for that product was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

w. Order Number 47456 (September 19, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified that 92,489.24 pounds of raisins sold by respondents to Farm Gold were inspected on September 19, 1999, code marked “PKD 19 SEP99L,” and determined to be to be U.S. Grade B. The officially drawn sample for that product was drawn and inspected on September 23, 1999, was code marked “PKD 23SEP99L,” and the sample was certified as U.S. Grade C. 7 C.F.R. § 52.54(a)(1)(iv).

Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

x. Order Number 48052 (October 27, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified, 45,744.62 pounds of raisins sold by respondents to Demos Ciclitira, Ltd., at 17.0% moisture. The officially drawn sample for that product was certified at 17.0 to 18.0% moisture and the product was to have been packed under a different label. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

y. Order Number 48137 (November 4, 1999). Respondents used an official inspection certificate (B-034321) as a basis to misrepresent the moisture and size of 19,950 pounds of raisins sold by respondents to Borges, S.A. 7 C.F.R. § 52.54(a)(1)(iii). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified these raisins as “midget” raisins containing 16% moisture, when the officially drawn sample for that product was not certified at such moisture, and the raisins were not certified as midget raisins. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade and officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

z. Order Number 48137 (October 15, 1999). Respondents used an official inspection certificate (B-034317) as a basis to misrepresent the moisture of 22,050 pounds of raisins sold by respondents to Borges, S.A.. 7 C.F.R. § 52.54(a)(1)(iii). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified these raisins at 16% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

aa. Order Number 48397 (December 9, 1999). Respondents altered an official inspection certificate (Y-034343) to misrepresent the moisture of 22,045.6 pounds of raisins sold by respondents to N.A.F. International, by falsifying the moisture of the officially drawn sample (and obliterating a portion of the remarks section of the certificate). 7 C.F.R. § 52.54(a)(1)(iii). Respondents used a legend (“SOURCE OF

SAMPLES: Officially Drawn”) falsely signifying that USDA had certified these raisins at 15.3 to 16.0% moisture, when the officially drawn sample for that product was not certified at such moisture, and the product from which the official sample was drawn was to be packed under a different label. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

bb. Order Number 48416 (December 13, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold at 17% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

cc. Order Number 48487 (November 30, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Farm Gold at 15.1 to 15.5% moisture, when the officially drawn sample for that product was not certified at such moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

dd. Order Number 48523 (December 2, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to Heinrich Bruning at 16.0% moisture, when the officially drawn sample for that product was certified at 16.6 to 17.0% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

ee. Order Number 49334 (December 22, 1999). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to EKO Produktor AB, at 16.6 to 17.0% moisture, when the officially drawn sample for that product was certified at 16.6 to 17.8% moisture, and the product from which the official sample was drawn was to be packed in containers bearing different code marks. 7 C.F.R. §

52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

ff. Order Number 50431 (April 17, 2000). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 39,682.08 pounds of raisins sold by respondents to N.A.F. International at 16.0 to 17.0% moisture, when the officially drawn sample for that product was certified at 17.2 to 17.5% moisture. 7 C.F.R. § 52.54(a)(1)(iv). Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

gg. Order Number 50750 (May 11, 2000). Respondents used a legend (“SOURCE OF SAMPLES: Officially Drawn”) falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by respondents to J.L. Priestly & Company, Ltd., as “midget” size raisins, when the officially drawn sample for that product certified it as “mixed” size raisins and the product was to have been packed under a different label. Respondents also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. 7 C.F.R. § 52.54(a)(1)(v).

7. Each of the acts and practices outlined above was willful, in violation of section 203(h) of the Act (7 U.S.C. § 1622(h)), and section 52.54(a)(2) of the Regulations (7 C.F.R. § 52.54(a)(2)).

8. The acts and practices set forth herein in connection with inspection documents for respondents’ raisins and raisin products, constitute sufficient cause for the debarment of each of the named Respondents.

ORDER

On the basis of the foregoing, it is **ORDERED** as follows:

1. The Respondents, Lion Raisin, Inc., a California corporation; Lion Raisin Company, a partnership or unincorporated association; Lion Packing Company, a partnership or unincorporated association; and their agents, employees, successors and assigns are debarred for a period of five years from receiving inspection services under the Agricultural Marketing Act and the Regulations and Standards.

2. The Respondents Alfred Lion, Jr., Bruce Lion, Daniel Lion, Isabel Lion, Jeffrey Lion, and Larry Lion are each debarred for a period of five years from receiving inspection services under the Agricultural Marketing Act and the Regulations and Standards.

3. After a period of one year, upon a showing of good faith and adequate assurances of future compliance, the Respondents, or any of them, may petition the Secretary or his designee to suspend the balance of the period of debarment; however, with such suspension conditioned upon no violations being found during the remaining period of suspension. In the event additional violations were to be found, the full suspended balance of the period of debarment would then be reinstated.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

PLANT PROTECTION ACT**COURT DECISION****CACTUS CORNER, LLC, ET AL. v. U.S.D.A.****C.A.9 (Cal.),2006 No. 04-16003.****Filed June 8, 2006.****(Cite as: 450 F.3d 428).****PPA – Medfly – Clementines – Imported from Spain – Prohib 9 – Arbitrary and capricious, when not – Threshold of risk.**

Domestic fruit growers objected to the proposed new APHIS clementine importation rules. The growers viewed the importation of Spanish Clementines as posing an unacceptable risk of accidental importation and release of the Mediterranean fruit fly (Medfly). The prior pre-shipment protocol had failed to eliminate live larvae in the imported fruit and was halted on an emergency basis since 2001 under protest by the foreign producers*. The USDA proposed a revised protocol they contended will meet the Prohib 9 standard (99.99% Medfly larvae mortality) under which clementine importations may resume. While the domestic growers contend that USDA merely “declared” that the new rules will work, the Court found that USDA conducted extensive scientific studies and conducted careful risk analysis and took reasonable actions in reasoned reliance on that scientific evidence. The court ruled that an agency must have discretion to rely on the reasoned opinions of its own qualified experts and an agency has the authority to make a discretionary judgement call to which the court will defer. The court found that the APHIS had articulated a rational connection between the facts found and the choices made.

United States Court of Appeals, Ninth Circuit.

Before: RYMER, FLETCHER, and CLIFTON, Circuit Judges.
CLIFTON, Circuit Judge:

The Mediterranean fruit fly, widely known as the medfly, may be tiny-slightly smaller than a common housefly-but it carries enormous weight. It is widely regarded as one of the world's most destructive fruit pests. The medfly damages citrus and other fruits by planting eggs that hatch inside the fruit, and it reproduces rapidly: a female medfly can lay as many as 800 eggs during a lifetime of less than a month. The species originated in sub-Saharan Africa and is not established in the United States, except in Hawaii, which has been infested for nearly a century. The first U.S. mainland infestation was reported in Florida in 1929. Several infestations have been reported since then, especially in recent

*See *InterCitrus, Ibertrade Commercial Corp and LG Specialty Sales v. USDA*, 61 Agric. Dec. 695 (2002) – Editor.

years, but intensive detection and eradication programs, notably in California, are believed to have prevented the pest from becoming permanently established.

The medfly is viewed as a serious threat to California's agricultural sector and general economy. California, the world's fifth largest agricultural economy, produces more than \$13 billion worth of fruits and vegetables annually. Medfly infestation threatens that production, and an infestation would particularly hinder exports because other countries often restrict imports from medfly-infested areas. Because many believe that California's recent medfly outbreaks have been caused by the importation of infested fruit, it is unsurprising that California growers are wary of fruit brought from other parts of the world. At the same time, there are those who believe that the growers' position is motivated as much or more by their desire to protect themselves against foreign competition in the multi-billion dollar domestic produce market.

It is within that context that this case arises. In 2001, medfly larvae were discovered in fruit imported from Spain, specifically in clementines, a variety of mandarin orange. The U.S. Department of Agriculture promptly halted further imports of clementines from Spain. Several months later, the USDA issued a rule that permitted the importation of Spanish clementines to resume, subject to certain conditions intended to prevent the introduction of medflies into this country. Domestic fruit growers challenged that rule by bringing this action. Spanish fruit growers intervened in support of the rule, and both sides filed motions for summary judgment. The district court granted summary judgment to the USDA, thus sustaining the rule against the domestic growers' challenge. *See Cactus Corner, LLC v. USDA*, 346 F.Supp.2d 1075 (E.D.Cal.2004).

This appeal requires us to consider which requirements administrative agencies must satisfy in decisionmaking. The domestic fruit grower plaintiffs urge us to require agencies to articulate explicit standards, quantitative or otherwise, that would then be used to guide the agency's decisionmaking process. Specifically, plaintiffs argue that the USDA must identify the level of risk it will accept in performing its duty "to prevent the introduction into the United States ... of a plant pest," 7 U.S.C. § 7712(a), and that the department's failure to do so violated the Administrative Procedure Act ("APA"). We are not persuaded. Although a governmental agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the

choice made," it need not define an explicit standard to guide its decisionmaking. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (quotation marks and citation omitted). Because the government has "cogently explain[ed] why it has exercised its discretion in a given manner," *id.* at 48, 103 S.Ct. 2856, we cannot conclude that the USDA's action in adopting the new rule was arbitrary and capricious. We also reject plaintiffs' argument that the USDA's factual determinations are not supported by the administrative record.

I. BACKGROUND

The facts of this case are fully set forth in the district court's opinion, 346 F.Supp.2d at 1081-92, and we summarize them briefly here. Until 2001, clementines were imported from Spain under a permit authorized by 7 C.F.R. § 319.56-2(e). The permit required that Spanish clementines be subjected to a cold treatment-storage at a specified cold temperature for a specified minimum period of time. The cold treatment was designed to kill any medfly larvae before they reached the United States. Importation continued without incident until November 2001, when consumers and agricultural officials discovered live medfly larvae in Spanish clementines at scattered locations around the country. *Id.* at 1081-82.

On December 5, 2001, the USDA's Animal and Plant Health Inspection Service ("APHIS") temporarily suspended the importation of Spanish clementines. The agency did so under the authority of the Plant Protection Act, which permits the Secretary of Agriculture to "prohibit or restrict the importation ... of any plant ... if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States ... of a plant pest." 7 U.S.C. § 7712(a). APHIS quickly assembled a team that visited Spain in mid-December. After identifying several possible causes for the appearance of medfly larvae, the team recommended that a "systems approach" be adopted. 346 F.Supp.2d at 1085. Under this approach, medflies would be subjected to multiple pest control measures, "at least two of which have an independent effect in mitigating" the risk of infestation. 7 U.S.C. § 7702(18) (defining "systems approach"); *see also id.* § 7712(e) (requiring the Secretary of Agriculture to conduct a study of "systems approaches designed to guard against the introduction of plant pathogens").

Because of concerns about the effectiveness of the cold treatment protocol, APHIS also convened a panel of experts to review the existing literature on the subject. The panel issued its findings on May 2, 2002. The panel concluded that the existing cold treatment protocol "does not provide 100% mortality, and even falls short of probit 9 security."¹ The panel therefore recommended revising the protocol by increasing "the required treatment time at each temperature by two days." For example, while the existing protocol only required 12 days of treatment at 34oF, the revised protocol called for 14 days at that temperature. In addition to recommending this immediate revision, the panel stressed the need for "long-term research plans ... to verify the efficacy of the proposed new cold treatment parameters."

APHIS further analyzed the cold treatment protocols in a study prepared by its Office of Risk Assessment and Cost-Benefit Analysis ("ORACBA"). The ORACBA study provided a quantitative analysis of the effectiveness of cold treatment. The report agreed with the May 2002 study that the existing cold treatment protocol was inadequate, but concluded that the revised treatment protocol "should achieve the probit 9 level of security."

In addition to the cold treatment studies, APHIS prepared a risk management analysis, which provided a more comprehensive evaluation of medfly control measures. The agency released the final version on October 4, 2002. This analysis assisted the agency's decisionmaking process by estimating the likelihood that a mated pair of medflies could enter a region of the United States with a climate suitable for medfly populations. The agency focused on mated pairs because a single medfly cannot cause much damage. Unless a mated pair comes together in a suitable climate, there is little risk of infestation.

The risk management analysis evaluated the efficacy of the "systems approach," under which two independent pest control measures would be implemented. One was "the application of quarantine cold treatments such that probit 9 mortality is approximated," as described above. The other was a management program designed to limit medfly populations within Spanish orchards, prior to any cold treatment or shipment of

¹Probit 9 "refers to a level or percentage of mortality of target pests (i.e., 99.9968 percent mortality or 32 survivors out of a million) caused by a control measure. APHIS has historically used the term 'probit 9' in association with the mortality rate caused by commodity treatments (including ... cold treatments) for fruit flies." 67 Fed.Reg. 64702, 64704 (Oct. 21, 2002).

clementines to the United States.

To determine the risk of medfly introduction, the risk management analysis used a five-variable model. These variables estimated (1) the number of clementines shipped from Spain; (2) the proportion of fruit infested with larvae; (3) the number of larvae per fruit that will develop into adults; (4) the mortality rate resulting from the revised cold treatment protocol; and (5) the proportion of fruit discarded in areas of the United States with medfly-suitable climates. After examining these variables, APHIS concluded that the proposed control measures would reduce the likelihood of medfly introduction to less than 0.0001, or "less than one in more than ten thousand years." Even at the 95% confidence level, the likelihood was only 0.0004, or "less than one in two thousand years."

Meanwhile, in July APHIS published a rule proposing that the importation of clementines be resumed. *See* 67 Fed.Reg. 45922 (July 11, 2002). APHIS solicited comments on the proposal and held two public hearings. After evaluating these comments, and making revisions to the risk management analysis and the proposed treatment methods, APHIS issued the Final Rule. 67 Fed.Reg. 64702 (Oct. 21, 2002); *see also* 7 C.F.R. § 319.56-2jj. In promulgating the Final Rule, the agency expressly relied on the risk management analysis, the May 2002 panel review, the ORACBA study, and "the determinations of USDA technical experts." 67 Fed.Reg. at 64703.

The Final Rule follows the recommendations of the risk management analysis by implementing two major changes to the Spanish clementine program. First, the Final Rule mandates the use of the revised cold treatment protocol. 7 C.F.R. § 319.56-2jj(g). Second, the Final Rule requires that the Spanish government take aggressive steps, including an APHIS-approved management program, to reduce the medfly population in that country's orchards. *Id.* § 319.56-2jj(b)-(d). The Final Rule tests the efficacy of those efforts by requiring that 200 fruit from each shipment be sampled before the shipment undergoes cold treatment. *Id.* § 319.56-2jj(f). If, during this pre-treatment sampling, "inspectors find a single live Mediterranean fruit fly in any stage of development ..., the entire shipment of clementines will be rejected." *Id.* In addition, if a single live medfly "is found in any two lots of fruit from the same orchard during the same shipping season, that orchard will be removed from the export program for the remainder of the shipping season." *Id.* The Rule also provides for the inspection of clementines at U.S. ports of

entry. If any live medfly or medfly larvae are found during such an inspection, "the shipment will be held until an investigation is completed and appropriate remedial actions have been implemented." *Id.* § 319.56-2jj(h).

Plaintiffs filed suit in the Eastern District of California, arguing that the Final Rule violates the APA and other laws. After a group of Spanish clementine exporters intervened in support of APHIS and the Final Rule, both sides moved for summary judgment. On March 11, 2004, the district court granted the agency's motion for summary judgment, 346 F.Supp.2d at 1123, and plaintiffs timely appealed.

II. DISCUSSION

Plaintiffs challenge the Final Rule on two grounds. First, they contend that APHIS improperly issued the Final Rule without defining what level of risk it would accept in "prevent[ing] the introduction" of medflies under the Plant Protection Act. Second, they argue that the agency's factual determinations are not supported by the record.

We review the district court's grant of summary judgment *de novo*. *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers*, 425 F.3d 1150, 1153 (9th Cir.2005). We may set aside the agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In our review under the APA, "we ask whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Baccarat Fremont*, 425 F.3d at 1153 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

A. Articulation of an Acceptable Level of Risk

Plaintiffs argue that the Final Rule violates the APA because the agency "simply declar[ed] that the measures it has adopted will 'prevent the introduction' of Medfly without explaining what criterion it applied to make that determination or why." According to plaintiffs, APHIS was obligated to identify the level of risk it considers to be unacceptable, and the agency's failure to do so requires that the Final Rule be set aside. In support of their argument, plaintiffs cite *Harlan Land Company v. USDA*, 186 F.Supp.2d 1076 (E.D.Cal.2001), as well as decisions relied

on in *Harlan Land*, including *Ober v. Whitman*, 243 F.3d 1190, 1195 (9th Cir.2001).

The court in *Harlan Land* overturned a similar rule because APHIS "did not establish a level above which the risk [of pest introduction] would no longer be negligible." *Id.* at 1080. *Harlan Land* thus suggests that APHIS was required to "provide a negligible risk threshold" before issuing the Final Rule. *Id.* at 1087.

Plaintiffs' argument is foreclosed by our recent decision in *Ranchers Cattleman Action Legal Fund v. USDA*, 415 F.3d 1078 (9th Cir.2005). In *Ranchers Cattleman*, we considered this issue in the context of the Animal Health Protection Act, which is substantively identical to the Plant Protection Act.² The district court in that case had relied on *Harlan Land* to enjoin a USDA rule permitting the importation of Canadian beef and cattle. The district court specifically held "that USDA failed adequately to quantify the risk of Canadian cattle to humans." *Id.* at 1091. The agency appealed, and we reversed.

On appeal, we squarely rejected the premise of plaintiffs' argument, holding that the Animal Health Protection Act "does not require the Secretary to quantify a permissible level of risk or to conduct a risk assessment." *Id.* at 1097. We also emphasized the USDA's "wide discretion in dealing with the importation of plant and animal products," and we noted that "the statute's use of the word 'may' suggests that [USDA] is given discretion over such decisions as whether to close the borders." *Id.* at 1094. In this case, where APHIS has issued a rule under a substantively identical statute, we follow our holding in *Ranchers Cattleman* and reject this point of appeal.

B. APHIS's Factual Determinations

Plaintiffs further argue that the administrative record does not support the factual determinations underlying the Final Rule. They have identified four problems with the agency's analysis which, plaintiffs

²The relevant language in the two statutes is nearly identical. Under the Animal Health Protection Act, the Secretary of Agriculture may prohibit or restrict ... the importation ... of any animal ... if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into ... the United States of any pest. 7 U.S.C. § 8303(a)(1). Under the Plant Protection Act, the Secretary may prohibit or restrict the importation ... of any plant ... if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States ... of a plant pest. 7 U.S.C. § 7712(a).

contend, demonstrate that the Final Rule is arbitrary and capricious. We conclude that these objections are without merit.

Plaintiffs first point out that the risk management analysis improperly presented four different estimates, varying by a large margin, for the probability that a mated pair of medflies will be introduced in a medfly-suitable region. These inconsistencies are not fatal to the Final Rule. The underlying data *are* consistent with the figures cited in the analysis's executive summary and with the agency's ultimate conclusions about the likelihood of medfly introduction. Because these discrepancies within the risk management analysis do not appear to have affected APHIS's final decision, we decline to overturn the regulation on this basis. *See Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461, 497, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004) ("Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned.") (quotation marks and citation omitted).

Plaintiffs' second objection concerns the risk management analysis's estimate of eight as the maximum number of larvae per fruit that will lead to viable adults. Plaintiffs assert that this estimate is baseless because the agency's direct sampling in 2001 indicated that the average larvae per fruit varied between four and twelve. We are unpersuaded by this argument for two reasons. First, the estimate used in the risk management analysis is not equivalent to the figure cited by plaintiffs. The risk management analysis estimated the number of *viable larvae* (i.e., those that will reach adulthood), while the 2001 sampling data merely represents the number of *larvae observed*, without adjusting for larvae mortality. Although APHIS discovered clementines that contained as many as twelve larvae, only about 10% of those larvae would be expected to reach adulthood. Plaintiffs argue that this 90% mortality rate is offset by the fact that only 10% of larvae are detected, but the detection rate cited by plaintiffs is based on grapefruit data. Although the agency discussed this grapefruit data in the risk management analysis, APHIS never assumed that the detection rate for grapefruit is identical to the clementine's, a decision supported by the agency's observation that the characteristics of these fruits differ.³ Indeed, elsewhere APHIS assumed that medflies are more easily detected in clementines than in grapefruit. *Compare* A.R. 1401 (citing

³"We note ... that clementines are smaller fruit than grapefruit and have therefore a much larger surface area to inspect. Clementines are also easier to dissect than grapefruit." A.R. 1401.

a study in which only 35% of infested grapefruit were detected) *with* 67 Fed.Reg. at 64736 (assuming that 75% of infested clementines will be detected). In short, the 2001 sampling data does not support plaintiffs' claim that the maximum number of viable larvae is greater than eight.

The second reason we reject plaintiffs' argument is that, even if the 2001 sampling data would support a different estimate than the one chosen, APHIS was within its discretion in using an alternative method to calculate this value. The agency relied on a 1999 study of clementines which suggested that the maximum survival rate for medfly larvae is less than 8%. Conservatively assuming that an infested clementine could contain up to 100 eggs, the risk management analysis estimated that the maximum number of viable larvae was eight. *See* A.R. 1402-03 ((100 eggs per fruit) x (maximum survival rate of .0765) = 8 viable larvae per fruit). Because we "defer to the evaluations of agencies when the evidence presents conflicting views," *Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir.2005), we reject this challenge to the Final Rule.

Third, plaintiffs maintain that the Final Rule's control measures cannot logically fix the medfly problem, because the infestation rate observed in 2001 was 0.16% while the Final Rule only protects against infestation rates greater than 1.5%. Plaintiffs thus question how "[l]imiting the maximum infestation rate under the Rule to a value almost ten times higher than the infestation rate in 2001 would [] be expected to make a difference." But APHIS addressed this issue in the Final Rule, explaining that it was "unconvinced that the level of infestation observed in samples taken later in the shipping season are representative of" the infestation rates that existed earlier in the season. 67 Fed.Reg. at 64713. APHIS believed that the medfly infestation rates in Spain varied over⁴ the course of the 2001-2002 shipping season. The agency concluded that these rates were greater than 0.16% early in the season, when the first shipments reached American shores. It was within these early-season clementines, which were on the market by November 2001, that live medfly larvae were found. According to APHIS, by the time it began collecting data later that season, the infestation rates had fallen. Because "the infestations associated with early season shipments"

⁴APHIS can detect infestation levels as low as 1.5% because the Final Rule requires that "APHIS inspectors [] cut and inspect 200 fruit that are randomly selected" from each shipment of clementines. 7 C.F.R. § 319.56-2jj(f). By sampling 200 fruit, there is a 95% probability that the agency will detect medfly larvae in shipments in which only 1.5% of the clementines are infested. 67 Fed.Reg. at 64712.

were greater than 0.16%, APHIS chose not to rely on its sampling data in the risk management analysis. *Id.* at 64714. The agency's assumption, that the early-season infestation rates exceeded 0.16%, is supported by empirical evidence, including the "higher than average trap captures" and "higher than average temperatures" that existed early in the season. *Id.* Because APHIS addressed plaintiffs' specific concern, and its selection of the target rate is otherwise defensible, we will not disturb the agency's judgment. *See Pacific Coast*, 426 F.3d at 1090 ("an agency must have discretion to rely on the reasonable opinions of its own qualified experts") (citation omitted).

Fourth, Plaintiffs challenge the revised cold treatment protocol, arguing that APHIS was wrong to implement this protocol because the agency's experts could not validate the protocol's effectiveness. Although a panel of experts recommended further research in May 2002, APHIS subsequently conducted the ORACBA study, whose results demonstrated "a high degree of confidence" that the revised treatment protocol "should achieve the probit 9 level of security." Given the ORACBA results, APHIS's decision to implement the revised protocol did not "run[] counter to the evidence before the agency." *Pacific Coast*, 426 F.3d at 1090 (citation omitted).

In their reply brief, plaintiffs argue for the first time that the ORACBA report does not support the risk management analysis's assumption that the revised protocol will result in probit 9 mortality. They contend that the ORACBA report only supports the use of an 18-day treatment, and that the report's conclusions regarding the 14-day treatment (which is permitted under the Final Rule) are inapplicable because ORACBA relied on a study of lemons, not clementines. This argument is without merit. Even assuming that plaintiffs could properly raise this issue in the reply brief, we decline plaintiffs' invitation to second-guess the agency. In promulgating the Final Rule, APHIS considered and addressed numerous comments pertaining to the revised cold treatment protocol, including concerns about the efficacy of treatments shorter than 18 days. *See, e.g.*, 67 Fed.Reg. at 64730-64733. The agency's reliance on a study of lemons in devising the 14-day protocol was a discretionary judgment call to which we defer. *See Pacific Coast*, 426 F.3d at 1090.

III. CONCLUSION

Because APHIS was not required to define a negligible risk standard

under the Plant Protection Act, and because the agency has "articulated a rational connection between the facts found and the choices made," *Ranchers Cattleman*, 415 F.3d at 1093 (citation omitted), we conclude that the Final Rule is neither arbitrary nor capricious. The district court's grant of summary judgment in favor of the government was appropriate.

AFFIRMED.

SUGAR MARKETING ALLOTMENT

COURT DECISION

**HOLLY SUGAR CORP. v. USDA.
C.A.D.C.,2006. No. 05-5067.
Decided Feb. 7, 2006.**

(Cite as: 437 F.3d 1210).

SMA – CCC – FAIR act – Commodity loans – Non-recourse loans– Treasury rate interest – Chevron two prong test.

Pre-1996, the Commodity Credit Corporation (CCC) charged the treasury rate for commodity loans to the cane sugar processors. The FAIR (1996) act mandated that the commodity loan rate charged by CCC be treasury rate plus 1%. In 2002, Congress exempted cane (and beet) sugar from the agricultural commodities subject to the mandated interest loan rate requirements of the F.A.I.R. act, but did not specify a new interest rate or strip CCC of its interest rate-setting authority. The processors contended that Congress intended that CCC reduce the loan rate to the pre-1996 rate-setting level. The court analyzed the facts using *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (467 U.S. 837) two prong test and determined that CCC's rate setting authority remained intact and rendered the commodity loan rate for sugar to be the same as other agricultural commodities.

United States Court of Appeals, District of Columbia Circuit.

Before: TATEL, GARLAND, and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.TATEL, Circuit Judge.

Appellees, a group of sugar processors, receive sugar loans from the federal government. Until 1996, interest rates for all agricultural commodity loans, including sugar, were set by regulations promulgated by the agency charged with administering the loans, the Commodity Credit Corporation (CCC). In that year, however, Congress set the rate by statute, increasing it by one percentage point over the regulatory rate. Six years later, in 2002, Congress exempted sugar from the statutory rate, but the CCC kept the rate the same. Believing that the 2002 statute required a lower interest rate, the sugar processors filed suit, and the district court ordered the CCC to reduce the rate. We reverse. Nothing in the 2002 statute sets an interest rate. Instead, it merely restores the CCC's rate-setting authority.

I.

The Commodity Credit Corporation runs the nation's "sugar program." 7 U.S.C. § 7272 (creating sugar program); *id.* § 7991(a) (assigning it to the CCC). Federal loans to sugar processors form the core of this program. For example, the statute provides that "[t]he Secretary shall make loans available to processors of domestically grown sugarcane at a rate equal to 18 cents per pound for raw cane sugar." *Id.* § 7272(a); *see also id.* § 7272(b) (analogous language for refined beet sugar with rate at "22.9 cents per pound"). Secured by sugar produced by the processors, these loans are nonrecourse, *id.* § 7272(e)(1), meaning that if the processors default, the government's only remedy is to foreclose on the sugar. *See* 7 C.F.R. § 1435.105(b). Thus, if the price of raw cane sugar falls below 18 cents per pound, the processors simply default on the loan, in essence selling their sugar to the government.

For many years, the statute remained silent on the interest rate for these loans, and the CCC set the interest rate for each loan individually. In 1988, a CCC regulation set a uniform rate for all agricultural loans at "the rate of interest charged by the U.S. Treasury for funds borrowed by CCC." Price Support Loans and Purchases, Production Adjustment Programs, and Other Operations, 53 Fed.Reg. 47,658, 47,659 (Nov. 25, 1988) (codified as amended at 7 C.F.R. § 1405.1). The CCC issued this regulation under its statutory authority to "make such loans ... as are necessary in the conduct of its business," 15 U.S.C. § 714b(l), and to "[s]upport the prices of agricultural commodities through loans, purchases, payments, and other operations," *id.* § 714c(a).

So things remained until the Federal Agriculture Improvement and Reform Act of 1996 (FAIR), which, for the first time, set the interest rate by statute:

Notwithstanding any other provision of law, the monthly Commodity Credit Corporation interest rate applicable to loans provided for agricultural commodities by the Corporation shall be 100 basis points greater than the rate determined under the applicable interest rate formula in effect on October 1, 1995.

Federal Agriculture Improvement and Reform Act of 1996, Pub.L. No. 104-127, § 163, 110 Stat. 888, 935 (codified as amended at 7 U.S.C. § 7283(a)). Because the "applicable interest rate formula" was the

Treasury rate, the 1996 legislation effectively set the interest rate at one percentage point above the Treasury rate. The CCC amended its regulations to reflect this change. Implementation of the Farm Program Provisions of the 1996 Farm Bill, 61 Fed.Reg. 37,544, 37,575 (July 18, 1996) (codified at 7 C.F.R. § 1405.1).

Up to this point, sugar loans carried the same interest rate as all other agricultural loans. But Congress changed that in 2002 by appending the following language to section 7283, the section that set the interest rate: For purposes of this section [i.e., section 7283], raw cane sugar, refined beet sugar, and in-process sugar eligible for a loan ... shall not be considered an agricultural commodity.

Farm Security and Rural Investment Act of 2002, Pub.L. No. 107-171, § 1401(c)(2), 116 Stat. 134, 187 (codified at 7 U.S.C. § 7283(b)). The 2002 Act also required the CCC to promulgate implementing regulations, which it exempted from the Administrative Procedure Act's notice and comment provisions. *Id.* § 1601(c), 116 Stat. at 211-12 (codified at 7 U.S.C. § 7991(c)).

The sugar processors expected the interest rate, once freed of the statutory requirement to exceed the Treasury rate, to return to its pre-1996 level. The CCC's response to the 2002 Act therefore must have come as quite a surprise. "The 2002 Act," the CCC explained, "eliminates the requirement that CCC add 1 percentage point to the interest rate as calculated by the procedure in place in 1996 but does not establish a sugar loan interest rate. CCC has decided to use the rates required for other commodity loans." 2002 Farm Security and Rural Investment Act of 2002 Sugar Programs and Farm Facility Storage Loan Program, 67 Fed.Reg. 54,926, 54,927 (Aug. 26, 2002). Having decided the interest rate for sugar should remain at one percentage point above the Treasury rate, the CCC made no change to its interest rate regulation.

Seventeen sugar processors then filed suit in U.S. District Court, arguing that the 2002 Act required the CCC to lower the sugar interest rate. They sought declaratory relief and an injunction prohibiting the CCC from imposing an interest rate other than the Treasury rate as well as restitution for interest they had already paid in excess of the Treasury rate. The district court granted their motion for summary judgment, explaining that the CCC's interpretation would render the 2002 Act "meaningless" or "superfluous," and ordered declaratory and injunctive relief. *Holly Sugar Corp. v. Veneman*, 335 F.Supp.2d 100, 107

(D.D.C.2004), *modified*, 355 F.Supp.2d 181 (D.D.C.2005). Although the district court initially denied restitution, 335 F.Supp.2d at 108-10, it later changed its mind, 355 F.Supp.2d at 190-96. The CCC now appeals, challenging both the district court's interpretation of the CCC's statutory mandate and its restitution award. We review the district court's grant of summary judgment de novo. *Dunaway v. Int'l Bhd. of Teamsters*, 310 F.3d 758, 761 (D.C.Cir.2002).

II.

As all parties agree, we consider the CCC's interpretation of a statute it administers under the two-part test of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We ask first "whether Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. If it has, we end our inquiry, giving "effect to the unambiguously expressed intent of Congress." *Id.* at 843, 104 S.Ct. 2778. In determining whether a statutory provision speaks directly to the question before us, we consider it in context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). In addition, we must "exhaust the 'traditional tools of statutory construction.'" *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C.Cir.1995) (quoting *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. 2778). If, having conducted this analysis, we still find the statute silent or ambiguous on the issue before us, we move on to *Chevron*'s second step, asking "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

Here, the parties dispute the meaning of the 2002 Act's provision exempting sugar from the statutory interest rate. According to the CCC, this provision restored the rate-setting authority it held before the 1996 Act first imposed a statutory rate. The sugar processors contend that the provision restored the interest rate in effect before the 1996 Act, and that the CCC therefore has no authority to deviate from the Treasury rate.

Our analysis, of course, begins with the statute's language. Subsection (a), the portion of the statute enacted in 1996, sets an interest rate for all agricultural commodities. Subsection (b), the portion of the statute added in 2002, exempts sugar from that generic interest rate. On their face, then, the two sections together have no effect on sugar loans-subsection (b) exempts sugar from subsection (a), the only provision that sets an interest rate. It thus appears that the rate-setting

authority for sugar has reverted to the CCC under its authority to "make ... loans."

The processors insist that notwithstanding the statute's language, the CCC must impose the Treasury rate. Like the district court, the processors find significance in the fact that Congress enacted subsections (a) and (b) sequentially rather than simultaneously. They label subsection (a)'s enactment the "Interest Surcharge Act," *see* Appellees' Br. 3, and then conclude that through subsection (b) Congress exempted sugar from the "interest surcharge," thereby expressing its intent to restore the interest rate to its pre-1996 level. But "Interest Surcharge Act" is the processors' label, not Congress's, and the 1996 Act could just as easily be called the "Statutory Interest Rate Act" or even the "Strip the CCC of Authority Act." Exempting sugar from a provision described either of these two ways would restore the CCC's discretion, not the pre-1996 interest rate.

We also disagree with the district court's conclusion that the CCC's interpretation renders the 2002 Act "meaningless," *Holly Sugar*, 355 F.Supp.2d at 188, or "superfluous," *id.* at 189. Under the CCC's interpretation, the agency has now regained its authority to set the sugar interest rate-authority it was given only when Congress passed the 2002 Act and which it lacks for all other agricultural commodities.

The processors also rely on the provision's legislative history. They emphasize most heavily a Senate report's statement that the 2002 Act "reduces the CCC interest rate on sugar loans by 100 basis points." S.Rep. No. 107-117, at 100 (2001). The House report, however, is far more equivocal. It explains that the provision "reduces the CCC interest rate on price support loans" without specifying how much. H.R.Rep. No. 107-191, pt. 1, at 89 (2001). The conference report gives the processors even less support. Mirroring the statute's language, that report states that the Act " makes section 163 of the FAIR Act inapplicable to sugar." H.R.Rep. No. 107-424, at 447 (2002), U.S.Code Cong. & Admin.News 2002, pp. 141, 172 (Conf.Rep.). Taken together, these reports fall far short of the "extraordinary circumstances" in which a statute's unambiguous language might not control. *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C.Cir.2002) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992)). Indeed, of the three reports, only the Senate's gives any inkling that Congress may have had a particular interest rate in mind, and the conference report-to which we ordinarily

ascribe the most weight, *see Moore v. District of Columbia*, 907 F.2d 165, 175 (D.C.Cir.1990) (en banc) ("[the] conference committee report is the most persuasive evidence of congressional intent after [the] statutory text itself" (internal quotation marks omitted))-gives no indication whatsoever that Congress intended to restore the pre-1996 rate.

In short, contrary to the processors' argument, the statute sets no interest rate for sugar. Instead, it sets an interest rate for all other commodities and specifically exempts sugar. By removing sugar from the statutory rate, "Congress has directly spoken to the precise question" of how the rate should be set, namely, by the CCC. *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. Thus agreeing with the CCC that Congress unambiguously gave it discretion over the sugar interest rate, we end our *Chevron* analysis at step one.

III.

Because we disagree with the district court's reasoning, we must consider the processors' claim that even if the CCC has authority to set the rate, such authority does not extend to imposing an interest rate above the Treasury rate. *See EEOC v. Aramark Corp., Inc.*, 208 F.3d 266, 268 (D.C.Cir.2000) ("[B]ecause we review the district court's judgment, not its reasoning, we may affirm on any ground properly raised."). The processors advance three arguments in support of this claim, none persuasive.

The processors first argue that the CCC has never before charged more than its estimated cost of borrowing, i.e., the Treasury rate. True enough, but that doesn't mean the CCC lacks authority to do so. Whether it has such authority turns on the meaning of the statutes we have been discussing, not the agency's past practices.

Next, the processors argue that the CCC has no explicit power to charge interest, and that its implied power to do so must be limited to furtherance of congressional policy. Accordingly, the processors assert, the rate decision falls outside the CCC's authority because charging an interest rate higher than the cost of borrowing creates a windfall for the CCC, a result that is inconsistent with the policies associated with running a subsidy program. As the CCC points out, however, Congress mandated such an interest rate for six years and continues to mandate it for all other agricultural commodities, so it is hard to see how the CCC's

rate conflicts with the program's goals.

Finally, the processors contend that the rate cannot be defended as a form of user fee. But because the rate is an interest rate, not a fee, this argument is irrelevant.

One last point. The processors nowhere argue that the CCC, in lumping sugar in with other agricultural commodities, acted arbitrarily and capriciously. Instead, they challenge only the agency's *authority* to set such a rate, not its *decision* to do so. To be sure, they describe the agency's explanation as "deficient, to say the least," Appellees' Br. 19, but they make this point only in support of their argument that the resulting interest rate "is plainly not an *outcome* that Congress would have sanctioned," *id.* at 20 (emphasis added). As the processors make no claim that the agency's selection of a particular interest rate was arbitrary and capricious, we need not address that possibility. *See Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C.Cir.2000) (distinguishing between *Chevron* argument and argument that "even assuming the statute did not foreclose the [agency's] policy, it was nevertheless unreasonable").

Because the 2002 Act granted the CCC authority to set the interest rate for sugar, we reverse the district court's judgment. Our conclusion that the CCC acted within its discretion eliminates any need to consider the district court's restitution order.

So ordered.

SUGAR MARKETING ALLOTMENT**DEPARTMENTAL DECISIONS****In re: AMALGAMATED SUGAR COMPANY, L.L.C.****SMA Docket No. 04-0003.****Decision and Order.****Filed March 3, 2006.****SMA – Sugar beets – Transfer of allocation to buyer of assets – Distribution of allocation upon termination of operations.**

The Judicial Officer reversed Administrative Law Judge Victor W. Palmer's order requiring the Commodity Credit Corporation to distribute the amount of the beet sugar marketing allocation that the CCC transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company on September 16, 2003, to all beet sugar processors in accordance with 7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003). The Judicial Officer concluded that the Commodity Credit Corporation's September 16, 2003, transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with 7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003).

Jeffrey Kahn, for the Executive Vice President.

Kevin J. Brosch and John Lemke, Washington, DC, for Petitioner.

David A. Biegging, Gina Allery, and Steven A. Adduci, Washington, DC, for Southern Minnesota Beet Sugar Cooperative.

Steven Z. Kaplan, David P. Bunde, and Daniel C. Mott, Minneapolis, MN, for American Crystal Sugar Company.

Initial decision issued by Victor W. Palmer, Administrative Law Judge.

Decision issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On September 16, 2003, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company. On October 2, 2003, Amalgamated Sugar Company, L.L.C. [hereinafter Petitioner], requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], reconsider the September 16, 2003, decision. On November 14, 2003, the Executive Vice President determined on reconsideration that transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938].

On December 4, 2003, Petitioner filed a Petition for Review pursuant

to the Agricultural Adjustment Act of 1938, the Sugar Program regulations (7 C.F.R. pt. 1435) [hereinafter the Sugar Program Regulations], and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice]. In January 2004, Wyoming Sugar Company, LLC, and Southern Minnesota Beet Sugar Cooperative intervened in support of Petitioner.

On December 23, 2003, the Executive Vice President filed: (1) an “Answer and Motion to Dismiss” in response to Petitioner’s Petition for Review; (2) a certified copy of documents relating to Petitioner’s October 2, 2003, request for reconsideration; and (3) a list of “affected persons.”¹ On January 14, 2004, American Crystal Sugar Company intervened in support of the Executive Vice President. On March 25, 2004, American Crystal Sugar Company filed “American Crystal Sugar Company’s Memorandum in Support of Its Motion to Dismiss the Appeal Petition or, in the Alternative, for Summary Judgment.” During the period January 20, 2004, through May 21, 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, and American Crystal Sugar Company made numerous filings related to the Executive Vice President’s motion to dismiss, American Crystal Sugar Company’s motion to dismiss, and American Crystal Sugar Company’s motion for summary judgment.

On June 23, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an “Order Denying Motions to Dismiss and Motion For Summary Judgment”: (1) denying the Executive Vice President’s motion to dismiss; (2) denying American Crystal Sugar Company’s motion to dismiss; (3) denying American Crystal Sugar Company’s motion for summary judgment; (4) ruling, pursuant to section 359i of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359ii), he had subject matter jurisdiction to hear and decide Petitioner’s claim; (5) ruling Petitioner had a legally cognizable claim under the Agricultural Adjustment Act of 1938; and (6) ruling Petitioner is not barred under the doctrine of judicial estoppel from pursuing its claim.

On September 20-21, 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, the Executive Vice President, and American Crystal Sugar Company, filed pre-hearing briefs. On September 21-23, 2004,

¹Rule 2(c) of the Rules of Practice defines an “affected person” as a sugar beet processor, other than the petitioner, affected by the Executive Vice President’s determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

and October 4-5, 2004, the ALJ conducted a hearing in Washington, DC. Kevin J. Brosch and John Lemke, DTB Associates, LLP, Washington, DC, represented Petitioner. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Executive Vice President. Steven A. Adduci, Venable, LLP, Washington, DC, and David A. Biegging, Olsson, Frank and Weeda, P.C., Washington, DC, represented Southern Minnesota Beet Sugar Cooperative. Steven Z. Kaplan, David P. Bunde, and Daniel C. Mott, Fredrikson & Byron, P.A., Minneapolis, Minnesota, represented American Crystal Sugar Company.

In November 2004, Petitioner, Southern Minnesota Beet Sugar Cooperative, the Executive Vice President, and American Crystal Sugar Company filed post-hearing briefs. On February 7, 2005, the ALJ issued a "Decision" [hereinafter Initial Decision]: (1) reversing the Executive Vice President's November 14, 2003, determination on reconsideration; and (2) ordering the CCC to distribute the amount of the beet sugar marketing allocation transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)).

On February 28, 2005, Petitioner, Southern Minnesota Beet Sugar Cooperative, and the Executive Vice President appealed to the Judicial Officer. On March 7, 2005, American Crystal Sugar Company appealed to the Judicial Officer. On April 14, 2005, after Petitioner, Southern Minnesota Beet Sugar Cooperative, and American Crystal Sugar Company filed responses to the appeal petitions, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I reverse the ALJ's February 7, 2005, Initial Decision, and affirm the Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

Petitioner's and Southern Minnesota Beet Sugar Cooperative's exhibits are designated by "AMAL-SM." American Crystal Sugar Company's exhibits are designated by "ACS." Exhibits from the certified copy of the record submitted by the Executive Vice President are designated as "AR." Exhibits from the addendum to the certified copy of the record submitted by the Executive Vice President are designated by "AR Addendum." The transcript is divided into five volumes, one volume for each day of the 5-day hearing. References to

“Tr. I” are to the volume of the transcript that relates to the September 21, 2004, segment of the hearing; references to “Tr. II” are to the volume of the transcript that relates to the September 22, 2004, segment of the hearing; references to “Tr. III” are to the volume of the transcript that relates to the September 23, 2004, segment of the hearing; references to “Tr. IV” are to the volume of the transcript that relates to the October 4, 2004, segment of the hearing; and references to “Tr. V” are to the volume of the transcript that relates to the October 5, 2004, segment of the hearing.

**APPLICABLE STATUTORY AND REGULATORY
PROVISIONS**

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF
1938**

....

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

....

§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

....

(2) Beet sugar

....

(E) Permanent termination of operations of a processor

If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall—

- (i) eliminate the allocation of the processor provided under this section; and
- (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

(F) Sale of all assets of a processor to another processor

If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E).

7 U.S.C. § 1359dd(a), (b)(2)(E)-(F) (Supp. III 2003).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

....

CHAPTER XIV—COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

....

PART 1435—SUGAR PROGRAM

....

Subpart D—Flexible Marketing Allotments For Sugar

....

§ 1435.319 Appeals and arbitration.

(a) A person adversely affected by any determination made under this subpart may request reconsideration by filing a written request with the Executive Vice President, CCC, detailing the basis of the request within 10 days of such determination. Such a request must be submitted at: Executive Vice President, CCC, Stop 0501, 1400 Independence Ave., SW, Washington, DC 20250-0501.

(b) For issues arising under §§ 359d, 359f(b) and (c), and 359(i) of the Agricultural Adjustment Act of 1938, as amended, after completion of the process in paragraph (a) of this section, a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal within 20 days of the issuance of the reconsidered determination with the Hearing Clerk, USDA. The notice of appeal must be submitted at: Hearing Clerk, USDA, Room 1081, South Building, 1400 Independence Ave., SW., Washington, DC, 20250-9200. Any hearing conducted under this paragraph shall be by the Judicial Officer.

7 C.F.R. § 1435.319(a)-(b) (2003).

DECISION

Discussion

The Agricultural Adjustment Act of 1938 establishes flexible marketing allotments for sugar. The Secretary of Agriculture is required to establish flexible marketing allotments for sugar for any crop year in which allotments are required by the Agricultural Adjustment Act of 1938. If allotments are required, the Secretary of Agriculture establishes the overall allotment quantity in accordance with a statutory formula.

The overall allotment quantity is then allocated between sugar derived from sugar beets and sugar derived from sugar cane.²

The Secretary of Agriculture is required to make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity of beet sugar produced by beet sugar processors for each of the 1998 through 2000 crop years.³ The Secretary of Agriculture is required to adjust the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years if the Secretary of Agriculture determines that the processor opened a sugar beet processing factory, closed a sugar beet processing factory, constructed a molasses desugarization facility, or suffered substantial quality losses on stored sugar beets during any crop year from 1998 through 2000.⁴

The CCC determined the percentage of the overall beet sugar allotment to which each beet sugar processor was entitled based on the processor's weighted average quantity of beet sugar produced during the 1998 through 2000 crop years, as adjusted in accordance with the Agricultural Adjustment Act of 1938. Effective October 1, 2002, the CCC assigned to each beet sugar processor, including Pacific Northwest Sugar Company, a percentage of the weighted average quantity of beet sugar produced during the 1998 through 2000 crop years commensurate with the statutory formula. Pacific Northwest Sugar Company's share of the beet sugar allotment was 2.692 percent (AMAL-SM 78). Each beet sugar processor's share of the beet sugar allotment remains fixed for the life of the flexible marketing allotment provisions of the Agricultural Adjustment Act of 1938, unless the Secretary of Agriculture takes some action pursuant to the Agricultural Adjustment Act of 1938. Thus, if the CCC had taken no action, Pacific Northwest Sugar Company would have retained the right to market beet sugar under its allocation through crop year 2007.

The Agricultural Adjustment Act of 1938 provides for the elimination, distribution, assignment, reassignment, and transfer of a beet sugar processor's beet sugar marketing allocation under various circumstances.⁵ Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) provides, if

²7 U.S.C. § 1359cc (Supp. III 2003).

³7 U.S.C. § 1359dd(b)(2)(A) (Supp. III 2003).

⁴7 U.S.C. § 1359dd(b)(2)(D) (Supp. III 2003).

⁵7 U.S.C. § 1359dd(b)(2)(E)-(I) (Supp. III 2003).

the assets of a beet sugar processor are sold to another beet sugar processor, the Secretary of Agriculture is required to transfer the beet sugar marketing allocation of the seller to the buyer, unless the beet sugar marketing allocation has been previously distributed to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

On September 8, 2003, Pacific Northwest Sugar Company sold its assets, including its beet sugar marketing allocation, to American Crystal Sugar Company (AR Addendum 236-49). On September 16, 2003, the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company pursuant to section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) (AR Addendum 250-51).

The only issues in this proceeding are: (1) whether Pacific Northwest Sugar Company and American Crystal Sugar Company were beet sugar processors on September 8, 2003; (2) whether Pacific Northwest Sugar Company sold its assets to American Crystal Sugar Company on September 8, 2003; and (3) whether the CCC had, prior to September 16, 2003, distributed Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). I find Pacific Northwest Sugar Company and American Crystal Sugar Company were beet sugar processors on September 8, 2003, when Pacific Northwest Sugar Company sold its assets, including its beet sugar marketing allocation, to American Crystal Sugar Company. I also find, when the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company on September 16, 2003, Pacific Northwest Sugar Company's beet sugar marketing allocation had not been previously distributed to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). Therefore, I conclude the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company in accordance with the Agricultural Adjustment Act of 1938, and I affirm the Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

Findings of Fact

1. The Columbia River Sugar Company was formed as a cooperative in 1991 to build and operate a sugar beet processing factory in Moses Lake, Washington. Sugar beets had been previously grown in the Columbia River Basin but the sugar beet processing factory located there had gone out of business and was inoperable. (ACS 1 at 3.)

2. Columbia River Sugar Company formed Pacific Northwest Sugar Company in partnership with Holly Sugar Company to construct the sugar beet processing factory, which took place in 1996 through the summer of 1998 (ACS 1 at 3; AMAL-SM 58 at 8).

3. In 1998, sugar beet processing was started at the Moses Lake factory under the direction of Holly Sugar Company whose personnel had experience gained from operating other sugar beet processing factories. The Moses Lake operations did not go well. Equipment and system breakdowns caused frequent factory shutdowns for repairs and changes to the system. Approximately half of the sugar that went into its silos was unmarketable. The factory had a rate of recovery of sugar from the sugar beets it processed of only 25 percent and two-thirds of the sugar beets delivered to the factory were not processed, but instead rotted. (Tr. II at 51-52, 67; AMAL-SM 58 at 8.)

4. In 1999, Holly Sugar Company left the partnership conveying its interest in Pacific Northwest Sugar Company to Columbia River Sugar Company. That year, Pacific Northwest Sugar Company, operating the sugar beet processing factory without assistance from Holly Sugar Company, hired a number of experienced employees to operate the factory. Plant equipment was improved through the investment of several million dollars. The sugar recovery rate for the 1999-2000 processing season increased from 25 percent to 65 percent. However, to be profitable, a sugar beet processing factory requires a recovery rate in excess of 80 percent with 90 percent being the optimum target. (Tr. II at 52- 67; Tr. V at 6-10, 23-24.)

5. In the 2000-2001 processing season Pacific Northwest Sugar Company made additional improvements to its operations at the factory and increased its sugar recovery rate to 82 percent (Tr. II at 66-67; Tr. V at 10-11, 25).

6. Pacific Northwest Sugar Company encountered numerous problems in connection with the operation of the Moses Lake, Washington, sugar beet processing factory, including financing issues, the California energy crisis of 2000-2001, and a drought (AMAL-SM 58; Tr. II at 46-48, 61-66, 72-79, 85-109).

7. Sugar beet processing operations at the Moses Lake factory ceased in February 2001 and never resumed. No sugar beet crop was planted by Columbia River Sugar Company growers in 2002 or 2003.

(Tr. I at 188; Tr. V at 11.)

8. On May 13, 2002, the Farm Security and Rural Investment Act of 2002 was approved. On October 1, 2002, the CCC announced the initial beet sugar marketing allocation for crop year 2002. The CCC provided Pacific Northwest Sugar Company a beet sugar marketing allocation of 2.692 percent of the future beet sugar allotment under the Agricultural Adjustment Act of 1938, on the basis of its beet sugar production during each of the 1998, 1999, and 2000 crop years. (AMAL-SM 78.)

9. Although the CCC provided Pacific Northwest Sugar Company with an initial beet sugar marketing allocation for crop year 2002, the CCC was legally empowered to redistribute any allocation that was not being used. On October 1, 2002, when the CCC announced initial allocations under the provisions of the Farm Security and Rural Investment Act of 2002, it simultaneously redistributed 87 percent (97,639 of 112,639 short tons) of Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors. During the remainder of that same crop year, the CCC subsequently redistributed an additional 24,023 short tons – nearly all the rest of Pacific Northwest Sugar Company's initial beet sugar marketing allocation, as well as any additional allocation that Pacific Northwest Sugar Company might have received because of increases in the total beet sugar allotment – to other beet sugar processors. (Tr. IV at 149-54; AMAL-SM 78 at 1.)

10. Pacific Northwest Sugar Company sought to have its beet sugar marketing allocation increased for crop year 2003. On June 16, 2003, the Executive Vice President presided at a hearing on Pacific Northwest Sugar Company's application to increase its beet sugar marketing allocation. Subsequently, the Executive Vice President denied Pacific Northwest Sugar Company's request to increase its beet sugar marketing allocation. (ACS 23; AR Addendum at 7-88.)

11. American Crystal Sugar Company negotiated to purchase Pacific Northwest Sugar Company's assets. American Crystal Sugar Company's proposal to purchase Pacific Northwest Sugar Company's assets was described in a July 3, 2003, fax by Joseph Talley of American Crystal Sugar Company to Barbara Fesco, a CCC sugar program official (AR Addendum at 89-91), as follows:

First, our understanding is that Pacific Northwest Sugar Company Sugar Company (PNSC) currently holds an allocation to sell sugar. The allocation was initially established as a result of the adoption of the Farm Security and Rural Investment Act of 2002

(Farm Bill). Since that time Pacific Northwest Sugar Company's allocation has not been permanently transferred from them nor terminated, but it has been reassigned (with such reassignment being valid only for the current fiscal year).

American Crystal Sugar Company (ACSC) is currently contemplating a transaction which would effectively result in the allocation, currently owned by PNSC, being transferred to ACSC. As currently contemplated, substantially all of the assets of PNSC would be transferred to an intermediary company (Washington Sugar Company (WSC)). Since PNSC has already transferred ownership of its former processing facility to another party (Central Leasing LLC), substantially all of the assets of PNSC consist mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of WSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). The effect of the transaction would be to move the sugar marketing allocation from PNSC, through WSC, to ACSC.

ACSC does not intend to process sugar beets in Moses Lake, WA after the completion of the transaction.

This transaction structure is clearly our preferred option. Although we did discuss other potential structures, which are outlined below, the alternative structures appear to be less favorable in terms of their complexity, cost and the risks that they would create for ACSC.

Our view of the potential transaction outlined here is that it fits within the area of Sec. 359d(b)(2)(F) of the sugar section of the Farm Bill. The allocation has not been eliminated under Sec. 359d(b)(2)(E), and therefore since ACSC would be acquiring substantially all of the assets of a processor the transfer we are contemplating should be within the guidelines established by the Farm Bill. Our primary question for you is – do you agree that a transaction like this would be approved by the USDA?

We are also considering a couple of other alternative structures for this transaction. One would transfer the assets (primarily the marketing allocation) directly from PNSC to ACSC (or perhaps a 100% owned subsidiary of ACSC). From your perspective,

would this additional aspect have any impact on whether or not the USDA would approve the transfer of the sugar marketing allocation?

Another would include the above aspects, plus ACSC acquiring control of the processing facility (that is now owned by Central Leasing LLC). From your perspective, would this additional factor have any impact on whether or not the USDA would approve the transfer of the sugar marketing allocation?

We also discussed the current appeal to the USDA by PNSC to increase their marketing allocation. Our view relative to that appeal has not changed from the position presented to you earlier by Jim Horvath, and we do not anticipate that the result of that appeal would have any impact on this potential transaction.

Since the USDA typically establishes marketing allocations for the upcoming year before October 1, time is of the essence in this process.

12. On July 30, 2003, American Crystal Sugar Company's president, James J. Horvath, and Scott Lybbert for Washington Sugar Company, sent the CCC a fax that formally notified the CCC of American Crystal Sugar Company's intent to acquire ownership of the assets, including the rights to the production history and the beet sugar marketing allocation, associated with the Moses Lake, Washington, sugar beet processing factory (AR Addendum at 92-93), as follows:

Mr. Dan Colacicco
United States Department of Agriculture
Farm Service Agency
1400 Independence Ave., SW
Room 3752-S, Stop 0516
Washington, DC 20250-0516

Re: Marketing Allocation Transfer

Dear Mr. Colacicco:

We are writing to make you aware of a series of pending transactions by which American Crystal Sugar Company ("ACSC") will acquire ownership or control of the assets

(including the rights to the production history and the marketing allocations), associated with the Moses Lake, Washington sugarbeet processing factory (the "Factory"). The purpose of this letter is to request the USDA's preliminary approval of these transactions as they relate to the transfer of the marketing allocation currently held by the Pacific Northwest Sugar Company, LLC, ("PNSC") to ACSC.

As you know, PNSC currently holds a marketing allocation representing approximately 2.7% of the beet sugar allotment (the "Allocation"). The Allocation was based on PNSC's historical operation of the Factory. PNSC has reached an agreement with the Washington Sugar Company, LLC ("WSC") by which WSC has acquired substantially all of the assets of PNSC, including PNSC's rights to the Allocation. Our understanding is that documentation of this agreement has previously been provided to the USDA, Central Leasing, LLC, ("Central Leasing") an unrelated third party, is the current owner of the Factory.

Through a series of transactions with WSC and Central Leasing, ACSC (or its wholly owned subsidiary) will gain control of both the Factory's ability to produce sugar and the rights to claim the production history and the related Allocation. The Agreement with WSC will provide that the assets it acquired from PNSC, including the Allocation, will be transferred to ACSC. ACSC will simultaneously gain control of the sugar production capabilities of the Factory through a series of contracts with Central Leasing. ACSC will also be obtaining non-competition agreements from WSC, Central Leasing and the principal owners of these entities. ACSC is confident that this combination of agreements will provide ACSC with control of the sugar production capabilities of the Factory and will prevent a "new entrant" from operating the Factory, for the foreseeable future.

Given the fact that the Factory is not currently operating (and there are no growers currently raising sugarbeets in the vicinity of the Factory), it is ACSC's intention that the Factory will not operate in the future as a sugar beet processing facility. In fact, much of the sugar production equipment at the Factory may be used at other ACSC facilities or sold to third parties for use elsewhere. We currently plan to have restrictions in the various agreements that would limit sales of certain key pieces of sugar

production equipment to third parties operating outside of North or South America.

The parties are hereby requesting the USDA's preliminary approval of the transfer of the Allocation from PNSC to ACSC based upon the transactions outlined above. The provisions of Section 359d(b)(2)(F) of the 2002 Farm Bill address the transfer of marketing allocations in connection with the sale of assets of one processor to another. Subparagraph (F) provides as follows:

(F) Sale of all assets of a processor to another processor.—If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

In this case, the series of transactions described above will result in ACSC acquiring the assets currently owned by WSC/PNSC, including the production history and all rights to the Allocation. As of the date of this letter, the USDA has not distributed the Allocation to other sugarbeet processors under subparagraph (E). Given these facts, the provisions of subparagraph (F) provide that the Secretary is to transfer the entire Allocation from PNSC to ACSC. Furthermore, the transfer of the Allocation will not be subject to any pro ration or future operating requirements.

The parties are currently in the process of finalizing the terms of the various documents and agreements necessary to implement the transactions described above. It is anticipated that these transactions will close on or about August 15, 2003. The parties would appreciate your preliminary approval of the Allocation transfer in advance of the closing. We anticipate that final USDA action to transfer the Allocation will not occur until after the closing.

Should you have any questions regarding the proposed transactions or if you require any additional details concerning the contractual arrangements, please feel free to contact either Joe Talley at American Crystal Sugar Company or Scott Lybbert at Washington Sugar Company, LLC. We would also be happy to meet with representatives of the USDA to discuss this matter in

greater detail.

Thank you for your consideration, and we look forward to your response.

Very truly yours,

AMERICAN CRYSTAL SUGAR COMPANY

WASHINGTON SUGAR COMPANY, LLC

13. On August 28, 2003, the CCC replied to American Crystal Sugar Company's and Scott Lybbert's letter of July 30, 2003, advising that the CCC would transfer Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company if provided with documentation showing that all the assets of Pacific Northwest Sugar Company have been purchased by American Crystal Sugar Company (AR Addendum at 234-35), as follows:

Mr. Scott Lybbert
Pacific Northwest Sugar Company
3501 West 42nd Avenue
Kennewick, WA 99337

Dear Mr. Lybbert:

Thank you for your letter of July 30, 2003, advising us of the pending transactions between the American Crystal Sugar Company (American Crystal) and the Pacific Northwest Sugar Company (Pacific Northwest). We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest.

Section 359d(b)(2)(F) of the Agriculture [sic] Adjustment Act of 1938, as amended, requires the Department of Agriculture (USDA) to transfer a processor's sugar marketing allocation when all of the assets of a processor are sold to another processor. Therefore, the Commodity Credit Corporation (CCC) will transfer Pacific Northwest's allocation to American Crystal, upon receipt of the documents listed below. We will accomplish the

transfer of allocation by transferring all of Pacific Northwest's production history during the base period to American Crystal, in the same manner that we transferred the production history of the Holly Sugar's factories to American Crystal when American Crystal purchased the Holly factories.

We will require the following documentation before we will transfer the allocation:

- Settlement documents showing that all of the assets of Pacific Northwest have been purchased by American Crystal, that American Crystal has secured the rights to make sugar at the Pacific Northwest/Central Leasing facility, and that American Crystal has purchased some equipment (including the diffuser and the molasses desugaring equipment from Central Leasing that Pacific Northwest used to make sugar.
- Certification from Pacific Northwest that its [sic] has not marketed any sugar under its 2002-crop sugar marketing allocation, if American Crystal wishes CCC to transfer the Pacific Northwest's 2002-crop allocation to American Crystal.
- American Crystal and Pacific Northwest must each agree in writing to waive their respective rights, if any, to bring an action against the Secretary of Agriculture, USDA and any agency thereof including CCC, and any official of the Department, in the event USDA is required by a Court to reverse the transfer of the allocation to American Crystal as a result of legal action by a third party challenging the original transfer from Pacific Northwest to American Crystal.
- American Crystal must agree in writing to drop Pacific Northwest's appeal of CCC's adverse decision regarding its request for an increased allocation because Pacific Northwest suffered a quality loss on stored beets and built a desugaring facility.

Notwithstanding the foregoing, the USDA agrees that it will vigorously defend any third party challenge to the transfer of the

allocation and will seek to provide the opportunity for American Crystal to participate in the defense of the USDA decision to transfer the allocation.

An identical letter is being sent to Mr. Horvath.

14. On September 8, 2003, American Crystal Sugar Company advised the CCC that, through its wholly-owned subsidiary, Crab Creek Sugar Company, it acquired, that day, ownership or control of all of the assets (including the rights to the production history and the beet sugar marketing allocation) associated with the production of sugar at the Moses Lake, Washington, sugarbeet processing factory. American Crystal Sugar Company's September 8, 2003, letter went on to positively address the requirements for the transfer the CCC specified in its August 28, 2003, letter. A bill of sale was attached. (AMAL-SM 70 at 1; AR Addendum at 243-49.)

15. On September 16, 2003, the CCC wrote to Scott Lybbert informing him that, effective immediately, the CCC was transferring Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company (AR Addendum at 250), as follows:

Mr. Scott Lybbert
Vice-President Finance and Marketing
Pacific Northwest Sugar Company
3501 West 42nd Avenue
Kennewick, Washington 99337

Dear Mr. Lybbert:

This letter is to inform you that the Department of Agriculture (USDA) will transfer, effective immediately, the marketing allocation of the Pacific Northwest Sugar Company (Pacific Northwest) to American Crystal Sugar Company (American Crystal). On the basis the documents you sent to us by facsimile on September 9, 2003, and the withdrawal of Petition for Review, SMA Docket No. 03-0003, USDA has determined that all assets of Pacific Northwest have been sold to American Crystal and that all documentation USDA required in an August 28, 2003 letter to you for proceeding with the transfer of allocation, has been received.

The transfer of allocation will be accomplished by transferring all

of Pacific Northwest's production history during the base period to American Crystal (enclosure).

Thank you for your diligence in meeting all our requirements.

16. American Crystal Sugar Company paid \$6.8 million to acquire Pacific Northwest Sugar Company's beet sugar marketing allocation. The following payments were made from an escrow account (ACS 67 at 30-36; Tr. I at 137-39):

Central Leasing	\$2,125,000
Scott Lybbert	\$ 300,000
Pacific Northwest Sugar Company	\$3,025,000

The \$300,000 paid from the escrow account to Scott Lybbert was designed to be an initial payment on a "non-complete" agreement with the balance to be paid him over a so-called "earn out" period of time, for \$1.65 million total going to him (Tr. I at 138-39).

17. After acquiring the beet sugar marketing allocation, American Crystal Sugar Company realized it could not fully use all of it. American Crystal Sugar Company contacted other beet sugar processors and leased them portions of American Crystal Sugar Company's allocation for undisclosed sums. The other beet sugar processors who leased portions of American Crystal Sugar Company's beet sugar marketing allocation were Michigan Sugar Company and Minn-Dak Farmers Cooperative and because of confidentiality agreements American Crystal Sugar Company has with each of them, American Crystal Sugar Company was not required to reveal the amounts it has received under the lease arrangements. (ACS 85-91, 93; Tr. I at 155-56, 159-66; Tr. V at 121-24.)

18. At all times material to this proceeding, American Crystal Sugar Company was a beet sugar processor. During the period 1998 through September 16, 2003, Pacific Northwest Sugar Company was a beet sugar processor.

19. At no time material to this proceeding did the CCC distribute Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors under section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

Conclusion of Law

The CCC's September 16, 2003, transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938.

**The Executive Vice President's Appeal Petition and
American Crystal Sugar Company's Appeal Petition**

The Executive Vice President and American Crystal Sugar Company each request that I reverse the ALJ's February 7, 2005, Initial Decision and affirm the Executive Vice President's November 14, 2003, determination on reconsideration or remand the matter to the Executive Vice President to make a determination based on the evidence presented to the ALJ.

This proceeding involves the CCC's September 16, 2003, decision to allow the sale of a beet sugar marketing allocation from Pacific Northwest Sugar Company to American Crystal Sugar Company under section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)). The Agricultural Adjustment Act of 1938 provides, if a beet sugar processor has a beet sugar marketing allocation, that allocation can be sold in connection with the sale of the assets of the beet sugar processor. The record clearly reflects that on September 8, 2003, Pacific Northwest Sugar Company still had its beet sugar marketing allocation, which it sold that day to American Crystal Sugar Company. Section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)) provides that the Secretary of Agriculture shall eliminate and distribute the allocation of a processor which has permanently terminated operations other than in conjunction with the sale or other disposition of the processor or the assets of the processor. Section 359d(b)(2)(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(F) (Supp. III 2003)) provides that a processor's allocation can be sold if the allocation has not previously been eliminated and distributed. On September 16, 2003, when the CCC transferred Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company, no previous distribution of Pacific Northwest Sugar Company's beet sugar marketing allocation to other beet sugar processors had been made, as is fully reflected in the ALJ's February 7, 2005, Initial Decision.

The ALJ finds this reading of section 359d(b)(2)(E)-(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)-(F) (Supp. III 2003)) too simplistic (Initial Decision at 30-31). I disagree.

The plain language of section 359d(b)(2)(E)-(F) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E)-(F) (Supp. III 2003)) provides, if a processor still has an allocation, the processor may sell that allocation along with the processor's assets to another processor, and, under those circumstances, the Secretary of Agriculture is required to transfer the allocation of the selling processor to the buying processor.

I find no purpose would be served by remanding this proceeding to the Executive Vice President to make a determination based on the evidence presented to the ALJ. The facts presented to the ALJ and found by the ALJ support the Executive Vice President's November 14, 2003, determination on reconsideration. Therefore, I reverse the ALJ's February 7, 2005, Initial Decision and affirm the Executive Vice President's November 14, 2003, determination on reconsideration.

**Petitioner's and Southern Minnesota Beet
Sugar Cooperative's Appeal Petition**

Petitioner and Southern Minnesota Beet Sugar Cooperative raise one issue in the "Notice of Appeal to the Judicial Officer by Amalgamated Sugar Company, L.L.C. and Southern Minnesota Beet Sugar Cooperative." Petitioner and Southern Minnesota Beet Sugar Cooperative contend the ALJ erroneously limited his order to "future crop years."

The ALJ ordered the distribution, in future crop-years, of the beet sugar marketing allocation transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors, as follows:

[T]he Reconsidered Determination by the Executive Vice President of the CCC that is the subject of the appeal is hereby reversed. Upon this decision becoming final and effective, CCC shall distribute, in future crop years, the amount of marketing allocation that was transferred to American Crystal from Pacific Northwest to all beet sugar processors on a pro rata basis in accordance with 7 U.S.C. § 1359dd(b)(2)(E) of the Act.

Initial Decision at 37.

I reverse the ALJ's February 7, 2005, Initial Decision ordering the CCC to distribute the amount of the beet sugar marketing allocation that was transferred to American Crystal Sugar Company from Pacific

Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)). Therefore, I reject Petitioner's and Southern Minnesota Beet Sugar Cooperative's request that I immediately distribute the amount of the beet sugar marketing allocation that was transferred to American Crystal Sugar Company from Pacific Northwest Sugar Company to all beet sugar processors in accordance with section 359d(b)(2)(E) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(E) (Supp. III 2003)).

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

ORDER

1. The ALJ's February 7, 2005, Initial Decision is reversed.
2. The Executive Vice President's November 14, 2003, determination on reconsideration that the transfer of Pacific Northwest Sugar Company's beet sugar marketing allocation to American Crystal Sugar Company was in accordance with the Agricultural Adjustment Act of 1938, is affirmed.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.⁶ The date of entry of the Order in this Decision and Order is March 3, 2006.

⁶See 28 U.S.C. § 2344.

MISCELLANEOUS ORDERS

In re: IDAHO POWER COMPANY - HELLS CANYON COMPLEX.

FERC Project No. 1971.

EPAct Docket No. 06-0001.

Ruling.

Filed April 24, 2006.

EPAct – Legal issues are beyond subject matter jurisdiction – Material facts, duty to determine.

James Tucker for Complainant.

Jeffrey Vail for Respondent.

Ruling by Chief Administrative Law Judge Marc R. Hillson.

Ruling Denying Motions to Dismiss Issues

With the filing on May 11, 2006 of the Voluntary Withdrawal by Idaho Power Company of its challenge to nine conditions as a result of stipulations entered into with the United States Forest Service, the only condition imposed by the Forest Service on Idaho Power that remains challenged in this proceeding is condition 4.*

Condition 4 concerns sandbar maintenance and restoration. With respect to that condition, Idaho Power has submitted six disputed issues of material fact for a hearing under the new Energy Policy Act. The Forest Service, along with intervenors the National Marine Fisheries Service and Idaho Rivers United and American Rivers, have moved to dismiss with respect to each alleged disputed material fact, and intervenor States of Idaho and Oregon have also moved to dismiss with respect to condition 4.

After carefully reviewing the motions and responses, I am denying all motions to dismiss.

While there is not a great deal of legislative history surrounding the relevant changes to the Federal Power Act, the purpose of the 2005 amendments, as they apply to the role of USDA's administrative judiciary in the hydroelectric power licensing process, is quite clear. Congress wanted to provide the parties an opportunity to develop facts that might prove material to the decision making of the Federal Energy Regulatory Commission, and enhance the review of the federal courts.

*A "condition" is a duty to be imposed on the licensee as a condition for the renewal of the hydroelectric power licensee.- Editor.

If I allow the development of facts, and find that a fact is material, and make a fact finding, and the FERC or the court decides that the fact is not material, the effect on the expedited schedule would be de minimus since all matters within my jurisdiction must be decided by July 19, 2006. However, if I erroneously dismiss a matter as immaterial, the regulatory process could be significantly delayed, as there is the possibility of the FERC or the federal courts remanding the case for a subsequent factual finding.

Additionally, while Judge Heffernan's rationale in the parallel Department of Interior proceeding is not binding on me, I find, too, that the arguments of the government in this matter would render the very purpose of the amended Federal Power Act as it applies to these proceedings virtually meaningless. These proceedings were designed to allow the development of facts, to allow the FERC to make decisions with a solid factual basis, and based upon more than the opinions and recommendations and opinions of government officials. Couching every factual issue as potentially involving a legal or policy decision, as the Forest Service and intervenors consistently appear to do, serves to do little but avoid the very task that Congress sought to impose on the administrative judiciary by the 2005 amendments. Each of the factual issues alleged to be disputed by Idaho Power appears to involve, at least arguably, underlying competing factual issues which I believe it is within my jurisdiction to resolve.

Thus, for example, it is possible that the FERC may find it immaterial the degree to which the Hells Canyon Complex contributes to sandbar degradation vis-à-vis motorboat usage and other causes. However, if the FERC does decide that the degree of the contribution of the Hells Canyon Complex is a material factor, then this administrative forum appears to be the arena that Congress has chosen for findings relating to that factor to be made. Similarly, it is clearly not within my authority to make a determination as to whether certain lands lying in the Hells Canyon area belong to the federal government, or to Idaho or Oregon. But it does not seem outside of the authority that Congress has placed in this forum for me to have the authority to make a factual finding based upon credible evidence as to the location of the Ordinary High Water Mark. And, if it turns out that I make a finding outside of my jurisdiction, the FERC, and the reviewing court, are both free to ignore the finding.

In sum, the overarching intent of Congress in passing the Energy Policy Act of 2005 amendments to the Federal Power Act is to allow licensees such as the Idaho Power Company an opportunity to seek expedited administrative resolution, before a United States Department

of Agriculture Administrative Law Judge, of disputed material facts regarding conditions imposed by the United States Forest Service. Denial of the Forest Service and Intervenor's Motions to Dismiss is the path most consistent with congressional intent.

Accordingly, the Motions to Dismiss Idaho Power Company's Request for Hearing on issues 4.1 through 4.6 are denied.

**In re: IDAHO POWER COMPANY - HELLS CANYON
COMPLEX.
FERC Project No. 1971
EPAct Docket No. 06-0001.
Ruling.
Filed May 26, 2006.**

EPAct – Unduly burdensome discovery, when not – “Trial type” hearing – Duty to find material facts.

James Tucker for Complainant.
Jeffrey Vail for Respondent.
Ruling by Chief Administrative Law Judge Marc R. Hillson.

Order Granting in Part and Denying in Part Motions Objecting to Discovery Requests

At the May 10, 2006, prehearing conference, after being informed that the parties were entering into a joint stipulation leaving only one condition remaining challenged in this proceeding, I directed that the parties file amended discovery requests by May 16, 2006, and any objections to the requests by May 19, 2006. Both the Forest Service and the National Marine Fisheries Service filed revised motions for discovery on Idaho Power Company, and Idaho Power Company served revised motions for discovery on both the Forest Service and the National Marine Fisheries Service. Each entity on whom a revised motion for discovery was served has objected to some or all of the requested discovery, except that Idaho Power did not appear to object to the revised discovery request of the National Marine Fisheries Service.

Idaho Power Company Objections to Forest Service Discovery Requests

Several of Idaho Power's objections were based on the contention that they should not have to respond to interrogatories that would otherwise be covered in their written direct testimony. I do not find this to be a valid basis for objection. Interrogatories are designed to clarify the evidence and narrow issues likely to be presented in a case, and the fact that a question asked would be part of the testimony presented in the direct case of the questioned party is not a basis for not answering the question. Additionally, if the question will be answered a week later in written direct testimony I do not see much chance for prejudicial harm against Idaho Power. Thus, I overrule the objections to interrogatories 1, 3, 4 and 5, and to the portions of interrogatories 19, 21, 22, 23, 24, 25, 26, 27 and 28 covered by that objection.

Idaho Power also objected to a number of interrogatories that would require them, they contend, to conduct new research and perform new analysis (6, 7, 8, 9, 10, and 11), and would be unduly burdensome in that it would require the compilation of extremely large amounts of data (14, 15). Given the limited time period for the completion of discovery, and the general requirement that a party can only discover what is already in existence, I sustain these objections, but I am willing to hear further argument on these objections at the scheduled June 1 follow-up prehearing conference. However, to the extent that these interrogatories can be answered without the conduct of new research and analysis, Idaho Power is directed to do so.

The objection to interrogatory 29 is sustained.

The objection to the Request for Production No. 2 is denied, unless Idaho Power can identify with greater specificity exactly which documents fall into this "unduly burdensome" category.

Forest Service Objections to Idaho Power Discovery Requests

The Forest Service has objected to interrogatories 1-8 and 12 through 25 and requests for production 1, 6 and 10.

I sustain the objection to interrogatories 1 through 5. First, I have considerable difficulty in detecting a connection between the material facts alleged as issues for me to determine in this proceeding, and the information that will be generated by the response to these interrogatories. The information on parcels of land under Forest Service administration is also, according to the Forest Service, not discoverable as it is already either in the license proceeding record or otherwise obtainable by Idaho Power. 7 C.F.R. § 1.641(b)(2)(ii). I sustain the objection to request for production 1 as it covers this same information.

I sustain the objections to interrogatories 6 through 8. The purpose

of this proceeding is for me, as the administrative law judge, to make material fact findings on issues pertaining to conditions raised by Idaho Power. Asking the Forest Service to provide its version of material facts in a proceeding where Idaho Power is being asked to raise disputed issues of material fact for my resolution is not consistent with the purpose of these proceedings. As I will discuss in my ruling on the burden of proof, Idaho Power, as the party raising alleged facts in dispute that are material to conditions imposed by the Forest Service, has the burden of going forward on these facts.

Interrogatories 12 through 25 appear to seek material which may be relevant to issue 4.6, but which also appears to be overreaching in terms of the information which it is seeking. The time period Congress implicitly allowed for discovery in this proceeding is incredibly brief, and the amount of information sought in these interrogatories, and in the accompanying requests for product, appears to be quite broad, particularly in light of the relatively narrow framing of issue 4.6. I will consider, if Idaho Power is able to craft a more finely honed discovery request prior to the June 1 follow-up prehearing conference, attempts to gather pertinent information as to this issue, but as crafted it appears to be far too detailed and burdensome to be compliant with the expedited circumstances associated with this hearing process. I encourage Idaho Power and the Forest Service to confer and try to ascertain whether they can agree on a more suitable exchange of information in this particular area. As currently drafted, however, I sustain the Forest Service's objections to interrogatories 12-15, 17-19, and 22-25. I conclude that interrogatories 16, 16a, 20, 20a and 21 can be answered consistent with this hearing's purpose. I sustain the objection to request for production 6 to the extent it covers the interrogatories for which I sustain the objections, and overrule the objection to request for production 6 as it applies to the remaining interrogatories.

There appears to be no basis for sustaining the Forest Service objection to request for production 10 as the request described does not match up to the objection in the Forest Service's document.

National Marine Fisheries Service Objections to Idaho Power Discovery Requests

Idaho Power served four interrogatories on National Marine Fisheries Service, all relating to issue 6. NMFS objected on two criteria—that the information was already in the FERC record or otherwise readily available to Idaho Power, or that it would be too burdensome to conduct

the studies or otherwise produce the materials requested in the extremely brief period available before the hearing. Under 7 C.F.R. § 1.641(b)(2)(ii), I may not authorize the discovery of information that is “already in the license proceeding record or otherwise obtainable by the party” or is “unduly burdensome.” Thus, unless I hear to the contrary at before or during the follow-up prehearing conference on June 1, I am constrained to sustain the objections of the National Marine Fisheries Service.

In re: IDAHO POWER COMPANY HELLS CANYON COMPLEX.

FERC Project No. 1971.

EPAct Docket No. 06-0001.

Ruling.

Filed May 31, 2006.

EPAct – Burden of proof – Default rule – Congressional expression, absence of – Trial type hearing.

James Tucker for Complainant.

Jeffrey Vail for Respondent.

Ruling by Chief Administrative Law Judge Marc R. Hillson.

Ruling on Motion to Establish Burden of Proof

On May 4, 2006 the Forest Service filed a motion seeking a ruling that the burden of proof in this proceeding lies with Idaho Power Company. On May 15, 2006, Idaho Power filed a response, contending that the burden of proof lies with the Forest Service. In this ruling, I hold that Idaho Power has the burden of proving its case, by a preponderance of the evidence, with respect to the six disputed issues of alleged material facts relating to mandatory condition 4.

This is the first case referred to the United States Department of Agriculture’s Office of Administrative Law Judges under the Energy Policy Act of 2005 (EPAct).¹ The EPAct amended the Federal Power Act² to add a “trial type” administrative hearing process regarding disputed issues of material fact with respect to mandatory conditions that

¹ A parallel case, referred to the Department of Interior, was resolved by stipulation of the parties.

² EPAct P.L. 109-58, 119 Stat. 594 *et seq.*, at Sec. 241

the Forest Service developed for inclusion in hydropower licenses. Neither the EAct, nor the regulations promulgated under the Act at 7 C.F.R. § 1 *et seq.*, subpart O, make mention of which party has the burden of going forward at the hearing nor which party has the burden of proof, or what the standard of proof is. I find that in this proceeding the burden of going forward, and the burden of proving its case by the preponderance of the evidence, is on Idaho Power.

There appears to be no dispute that this issue is governed by Section 7(c) of the Administrative Procedure Act, which pertinently provides that “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” In essence, Idaho Power contends that as the proponent of the condition that is being imposed on its license, the Forest Service should be viewed as the proponent for the purpose of burden of proof, while the Forest Service contends that Idaho Power is the entity challenging an Agency decision and, as such has the burden of proof at the upcoming hearing. Given the purpose of this type of hearing, which is to adjudicate factual issues alleged to be “material” by Idaho Power, as opposed to the issues that will be adjudicated before the Federal Energy Regulatory Commission or in the federal courts, I find that the position advocated by the Forest Service is the most appropriate for this proceeding.

Although Idaho Power contends otherwise, the Supreme Court’s decision in *Schaffer v. Weast*, 126 S. Ct. 528 (2005) does appear to me to be dispositive on the issue of burden of proof (“the default rule”) where a statute or regulation is silent. The Court succinctly held that “. . . the burden lies, as it typically does, on the party seeking relief.” In the instant proceeding, the hearing is being requested by Idaho Power. Idaho Power is seeking [relief] to establish certain facts that it alleges are material, as a basis to challenge, in the subsequent proceeding before the FERC, a mandatory condition imposed by the Forest Service. In *that* proceeding, but not in this one, the Forest Service may well be in a different position than in this one, as it may be required to present to the FERC modified conditions and prescriptions which are a reflection of my findings on disputed issues of material facts, among other things. Likewise, under *Escondido*³, the FERC’s decision must be upheld if supported by substantial evidence. Each of these three proceedings, although part of the same ultimate process, is significantly different in many aspects, not the least of which is which party has the burden of proof. The fact that the conditions are imposed by the Forest Service does not provide a basis for putting the burden of proof on that Agency

³ *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765

for this proceeding as suggested by Idaho Power in its Response Brief. The purpose of the instant proceeding is to make findings in an administrative hearing setting on the disputed issues of material facts contained in Idaho Power's request for hearing, not for ruling on the validity of the conditions themselves.

As both parties must recognize, in a matter where the standard of proof is the preponderance of the evidence, the burden of proof only becomes significant when the weight of the evidence is equally balanced. In the unlikely event that this exact balance of evidence is achieved with respect to any of the six disputed issues of alleged material fact, I will hold that Idaho Power has failed to meet its burden of proof.

In re: ROBERT HARRIS.
FCIA Docket No. 05-0008.
Order Dismissing Case.
Filed April 20, 2006.

Donald A. Brittenham, Jr. for Complainant.
Respondent Pro se.
Order by Administrative Law Judge Victor W. Palmer.

The parties Mutual Request for Dismissal as a result of settlement, filed on April 20, 2006, **GRANTED**.

This case is **DISMISSED** with prejudice.

In re: HAROLD CHUHLANTSEFF.
FCIA Docket No. 06-0001.
Ruling.
Filed April 21, 2006.

Donald L. Brittenham, Jr. for Complainant.
Respondent, Pro se.
Ruling by Chief Administrative Law Judge Marc R. Hillson.

Order Dismissing Case

RONALD BELTZ AND CHRISTOPHER JEROME ZAHND 281
65 Agric. Dec. 281

The parties Mutual Request for Dismissal as a result of settlement, filed on April 20, 2006, is **GRANTED**.
This case is **DISMISSED** with prejudice.

**In re: RONALD BELTZ, AN INDIVIDUAL; AND
CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL.
HPA Docket No. 02-0001.
Order Denying Motion for Reconsideration as to Christopher
Jerome Zahnd.
Filed February 6, 2006.**

HPA – Horse protection – Petition to reconsider – Findings, conclusions, and order supported by the record.

The Judicial Officer denied Respondent's Motion for Reconsideration. The Judicial Officer rejected Respondent's contention that the findings of fact, conclusions of law, and order in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), were not supported by the record.

Brian T. Hill, for Complainant.
Kenneth Shelton, Decatur, Alabama, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

William R. DeHaven, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 25, 2001. 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].

Complainant alleges that on May 25, 2000, Christopher Jerome Zahnd [hereinafter Respondent] entered a horse known as "Lady Ebony's Ace" as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony's Ace, while Lady Ebony's Ace was sore, in violation of section 5(2)(B) of the

Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ II.1).¹ On December 4, 2001, Respondent filed an answer denying the material allegations of the Complaint, and on May 6, 2004, Respondent filed an amended answer denying the material allegations of the Complaint.

On December 1, 2004, the Chief ALJ presided at a hearing in Huntsville, Alabama. Brian T. Hill, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Greg L. Shelton, Shelton & Shelton, Decatur, Alabama, represented Respondent. After the hearing, the parties filed post-hearing briefs.

On September 6, 2005, the Chief ALJ issued a “Decision as to Christopher J. Zahnd” [hereinafter Initial Decision as to Christopher J. Zahnd]: (1) concluding Complainant failed to prove by a preponderance of the evidence that Lady Ebony’s Ace was sore on May 25, 2000, when Respondent entered Lady Ebony’s Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview “S.H.O.W. Your Horses” in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony’s Ace; and (2) dismissing the Complaint (Initial Decision as to Christopher J. Zahnd at 11).

On October 24, 2005, Complainant appealed to the Judicial Officer. On November 16, 2005, Respondent filed a response to Complainant’s appeal petition. On November 23, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On December 28, 2005, I issued a Decision and Order as to Christopher Jerome Zahnd reversing the Chief ALJ and concluding Respondent entered Lady Ebony’s Ace as entry number 15 in class number 13 at the 30th Annual Spring Fun Show Preview “S.H.O.W. Your Horses” in Shelbyville, Tennessee, for the purpose of showing or exhibiting Lady Ebony’s Ace, while Lady Ebony’s Ace was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).²

On January 12, 2006, Respondent filed a “Motion for Reconsideration” of *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). On February 2, 2006, Complainant filed “Opposition to Motion for Reconsideration.” On February 3, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent’s Motion for

¹Complainant also alleged that Ronald Beltz violated the Horse Protection Act (Compl. ¶¶ II.1, II.2). Complainant and Ronald Beltz agreed to a consent decision which Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] entered on January 18, 2005. *In re Ronald Beltz*, 64 Agric. Dec 853 (2005) (Consent Decision as to Ronald Beltz).

²*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec 1487 (2005).

RONALD BELTZ AND CHRISTOPHER JEROME ZAHND 283
65 Agric. Dec. 281

Reconsideration.

**CONCLUSIONS BY THE JUDICIAL OFFICER
ON RECONSIDERATION**

Respondent raises three issues in the Motion for Reconsideration. First, Respondent contends the findings of fact in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), are not supported by the record.

I have reviewed each of the 15 findings of fact in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). I find each of the findings of fact are supported by the record. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), contains numerous citations to the portions of the record that support the findings of fact.

Second, Respondent contends the conclusions of law in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), are not supported by the record, the Horse Protection Regulations, or the Rules of Practice.

I have reviewed the conclusions of law in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). I find the conclusions of law are supported by the record. Moreover, *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), does not contain a conclusion that Respondent violated the Horse Protection Regulations (9 C.F.R. pt. 11) and does not cite the Rules of Practice as support for the conclusion that Respondent violated the Horse Protection Act.

Third, Respondent contends the Order in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), is not supported by the record.

I have reviewed the Order in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). I find the Order is supported by the record. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), contains a detailed discussion of the evidentiary basis for, and purpose of, the Order. A repetition of that discussion here would serve no useful purpose.

For the foregoing reasons and the reasons set forth in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), Respondent's Motion for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be

stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Motion for Reconsideration was timely filed and automatically stayed *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005). Therefore, since Respondent's Motion for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd.

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

ORDER

1. Respondent is assessed a \$2,200 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:

Brian T. Hill
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

Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Hill within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 02-0001.

2. Respondent is 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 Respondent shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.³ The date of the Order in this Order Denying Motion for Reconsideration as to Christopher Jerome Zahnd is February 6, 2006.

In re: KIM BENNETT.
HPA Docket No. 04-0001.
Order Denying Petition for Reconsideration.
Filed February 8, 2006.

HPA – Horse protection – Refusal to permit inspection – Manner of inspection – Inspector’s prior conduct and reputation – Inspector’s failure to testify and to prepare written statement – Civil penalty – Disqualification.

The Judicial Officer denied Respondent’s Petition for Reconsideration. The Judicial Officer rejected Respondent’s contention that a respondent cannot be proven to have refused inspection in violation of 15 U.S.C. § 1824(9) unless the inspection is conducted reasonably in accordance with 15 U.S.C. § 1823(e). The Judicial Officer also rejected Respondent’s contention that the Judicial Officer erroneously failed to make findings regarding the United States Department of Agriculture inspector’s prior conduct and reputation stating the inspector’s conduct prior to the date of Respondent’s violation and the inspector’s reputation on the date of Respondent’s violation are not relevant to the issue of whether Respondent refused to permit completion of inspection of a horse. Finally, the Judicial Officer rejected Respondent’s contention that the Judicial Officer erroneously failed to address the United States Department of Agriculture inspector’s failure to testify or to prepare a written statement regarding Respondent’s alleged violation. The Judicial Officer stated Complainant proved by a preponderance of the evidence that Respondent refused to permit the inspector to complete an inspection of a horse in violation of 15 U.S.C. § 1824(9), and the inspector’s testimony and written

³15 U.S.C. § 1825(b)(2), (c).

statement were not necessary to Complainant's case.

Frank Martin, Jr., for Complainant.

David F. Broderick, Bowling Green, Kentucky, for Respondent.

Initial decision issued by Victor W. Palmer, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 15, 2004. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection 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 August 26, 2002, Kim Bennett [hereinafter Respondent] refused to permit Animal and Plant Health Inspection Service officials to inspect a horse known as "The Duck," entry number 784 in class number 104 in the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)) (Compl. ¶ II.1). On May 17, 2004, Respondent filed an answer denying the material allegations of the Complaint.

On May 17-18, 2005, Administrative Law Judge Victor W. Palmer presided at a hearing in Nashville, Tennessee. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. David F. Broderick, Broderick & Thornton, Bowling Green, Kentucky, represented Respondent. After the hearing, the parties filed post-hearing briefs.

On September 23, 2005, the ALJ issued a "Decision and Order" [hereinafter Initial Decision] concluding Complainant failed to prove by a preponderance of the evidence that Respondent violated the Horse Protection Act and the Horse Protection Regulations and dismissing the Complaint (Initial Decision at 2, 12).

On October 20, 2005, Complainant appealed to the Judicial Officer. On November 15, 2005, Respondent filed a response to Complainant's appeal petition. On November 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On

January 13, 2006, I issued a Decision and Order reversing the ALJ and concluding Respondent refused to permit a United States Department of Agriculture veterinary medical officer, displaying appropriate credentials, to complete inspection of The Duck, entry number 784 in class number 104, at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).¹

On January 31, 2006, Respondent filed a “Petition for Reconsideration of Decision and Order of January 13, 2006” [hereinafter Petition for Reconsideration]. On February 6, 2006, Complainant filed “Complainant’s Opposition to Respondent’s Petition for Reconsideration of the Judicial Officer’s Decision and Order.” On February 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent’s Petition for Reconsideration.

APPLICABLE STATUTORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

....

CHAPTER 44—PROTECTION OF HORSES

....

§ 1823. Horse shows and exhibitions

....

(e) Inspection by Secretary or duly appointed representative

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting

¹*In re Kim Bennett*, 65 Agric. Dec. ____ (Jan. 13, 2006).

appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

§ 1824. Unlawful acts

The following conduct is prohibited:

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

15 U.S.C. §§ 1823(e), 1824(9).

**CONCLUSIONS BY THE JUDICIAL OFFICER
ON RECONSIDERATION**

Respondent raises two issues in his Petition for Reconsideration. First, Respondent contends a respondent cannot be proven to have refused inspection in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) unless the inspection is conducted reasonably in accordance with section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) (Respondent's Pet. for Recons. at 2).

I disagree with Respondent's contention that a respondent cannot be proven to have refused inspection in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) unless the inspection is conducted reasonably in accordance with section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)). Section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection as required by section 4 of the Horse Protection Act (15 U.S.C. § 1823). Section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) provides that any representative of the Secretary of Agriculture may, upon presenting appropriate credentials, inspect any horse at any horse show. A respondent's belief that a representative of the Secretary of Agriculture is not conducting an inspection in a reasonable manner is not relevant to the respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). The failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by section 4(e) of the

Horse Protection Act (15 U.S.C. § 1823(e)), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection.

Second, Respondent contends I erroneously failed to make findings regarding Dr. Michael Guedron's prior conduct and reputation and I erroneously failed to address Dr. Guedron's failure to testify or to prepare a written statement regarding Respondent's alleged violation (Respondent's Pet. for Recons. at 3).

Complainant proved by a preponderance of the evidence² that on

²Complainant, as the proponent of an order, has the burden of proof in this proceeding (5 U.S.C. § 556(d)). The standard of proof by which this burden is met is the preponderance of the evidence standard. See *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 administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1494 (2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 474 (2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 (2004), *aff'd sub nom. Groover v. United States Dep't of Agric.*, No. 04-4519 (6th Cir. Oct. 31, 2005); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *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. 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*, (continued...)

August 26, 2002, Respondent refused to permit Dr. Guedron to complete an inspection of The Duck at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). While Dr. Guedron's testimony and written statement regarding the issue of Respondent's refusal to permit completion of inspection of The Duck may have been helpful, Dr. Guedron's testimony and written statement are not necessary to Complainant's case. Moreover, Dr. Guedron's conduct prior to August 26, 2002, and Dr. Guedron's reputation on August 26, 2002, are not relevant to the issue of whether Respondent refused to permit completion of inspection of The Duck on August 26, 2002. Therefore, I do not find my failure to make findings regarding Dr. Guedron's prior conduct and reputation or my failure to address Dr. Guedron's failure to testify or to prepare a written statement, is error.

For the foregoing reasons and the reasons set forth in *In re Kim Bennett*, 65 Agric. Dec. ____ (Jan. 13, 2006), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition for Reconsideration was timely filed and automatically stayed *In re Kim Bennett*, 65 Agric. Dec. ____ (Jan. 13, 2006). Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Kim Bennett*, 65 Agric. Dec. ____ (Jan. 13, 2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration.

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

ORDER

1. Respondent is assessed a \$2,200 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

²(...continued)

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).

1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Martin within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0001.

2. Respondent is 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 Respondent shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Order Denying Petition for Reconsideration in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Order Denying Petition for Reconsideration and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.³ The date of the Order in this Order Denying Petition for Reconsideration is February 8, 2006.

**In re: RONALD BELTZ, AN INDIVIDUAL; AND
CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL.
HPA Docket No. 02-0001.
Stay Order as to Christopher Jerome Zahnd.**

³15 U.S.C. § 1825(b)(2), (c).

Filed June 15, 2006.

HPA – Stay Order.

Stephen M. Reilly, for the United States Department of Agriculture.
Greg Shelton, Decatur, Alabama, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On December 28, 2005, I issued a Decision and Order as to Christopher Jerome Zahnd: (1) concluding Christopher Jerome Zahnd [hereinafter Respondent] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing Respondent a \$2,200 civil penalty; and (3) disqualifying Respondent for 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.¹ On January 12, 2006, Respondent filed a motion for reconsideration, which I denied.²

On March 8, 2006, Respondent filed a petition for review of *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), and *In re Ronald Beltz*, 65 Agric. Dec. ____ (Feb. 6, 2006) (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), with the United States Court of Appeals for the Eleventh Circuit. On June 14, 2006, Respondent filed a “Motion for Stay by Consent” requesting stay of the Orders in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), and *In re Ronald Beltz*, 65 Agric. Dec. ____ (Feb. 6, 2006) (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), pending the outcome of proceedings for judicial review. Stephen M. Reilly, attorney of record with the Office of the General Counsel, United States Department of Agriculture, concurs in the granting of Respondent’s Motion for Stay by Consent.

In accordance with 5 U.S.C. § 705, Respondent’s Motion for Stay by Consent is granted.

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

ORDER

¹*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005).

²*In re Ronald Beltz*, 65 Agric. Dec. ____ (Feb. 6, 2006) (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd).

SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE 293
65 Agric. Dec. 293

The Orders in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), and *In re Ronald Beltz*, 65 Agric. Dec. ____ (Feb. 6, 2006) (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), are stayed pending the outcome of proceedings for judicial review. This Stay Order as to Christopher Jerome Zahnd shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

**In re: HEREFORD, TEXAS FACTORY (SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE).
SMA Docket No. 04-0005.
Order Denying Petitioner's Appeal Petition.
Filed February 2, 2006.**

SMA – Sugar beets – Adjustment to allocation – Timeliness of request for reconsideration – Jurisdiction to consider late-filed petition for review.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's (ALJ) order dismissing Petitioner's Petition for Review as time-barred. The Judicial Officer found the Executive Vice President, Commodity Credit Corporation (Executive Vice President), issued a reconsidered determination on January 28, 2003, and Petitioner failed to file a petition for review within 20 days after the issuance as required by 7 C.F.R. § 1435.319(b) (2004) and Rule 3 of the applicable rules of practice. The Judicial Officer stated the ALJ did not have jurisdiction to consider a petition for review filed after the time for filing the petition for review expired.

Jeffrey Kahn, for the Executive Vice President.
David A. Biegging and Steven A. Adduci, Washington, DC, for Petitioner.
Steven Z. Kaplan and Jeffrey W. Post, Minneapolis, MN, for American Crystal Sugar Company.
Initial order issued by Victor W. Palmer, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On October 1, 2002, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], announced beet sugar marketing allotment allocations for the 2002 crop. In early October 2002, American Crystal Sugar Company purchased a factory located in Hereford, Texas, from Imperial Sugar Company. On November 18, 2002, the CCC issued Release No. 1693.02 announcing revisions to the beet sugar marketing allotment allocations for the 2002 crop. These revisions included a transfer of the beet sugar marketing allotment allocation commensurate with the Hereford, Texas, factory

production history from Holly Sugar Corporation, a subsidiary of Imperial Sugar Company, to American Crystal Sugar Company to reflect American Crystal Sugar Company's October 2002 purchase of the Hereford, Texas, factory.

On November 27, 2002, Southern Minnesota Beet Sugar Cooperative [hereinafter Petitioner¹] requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], assign the beet sugar marketing allotment allocation commensurate with the Hereford, Texas, factory production history to all beet sugar processors on a pro rata basis. On January 28, 2003, the Executive Vice President issued a reconsidered determination denying Petitioner's November 27, 2002, request. Petitioner did not file a petition for review within 20 days after the Executive Vice President issued the reconsidered determination as required by Sugar Program regulations (7 C.F.R. pt. 1435) [hereinafter the Sugar Program Regulations] and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice].

On September 30, 2003, the CCC issued Release No. 0340 announcing the 2003 crop sugar marketing allotments and allocations. On October 10, 2003, Petitioner requested that the Executive Vice President issue a reconsidered determination reassigning that portion of American Crystal Sugar Company's beet sugar marketing allotment allocation, which was based upon American Crystal Sugar Company's October 2002 purchase of the Hereford, Texas, factory, to all beet sugar processors on a pro rata basis. On March 1, 2004, Larry Walker, Director, Economic and Policy Analysis Staff, Farm Service Agency, United States Department of Agriculture, informed Petitioner that the CCC announcement transferring a portion of Holly Sugar Corporation's beet sugar marketing allotment allocation to American Crystal Sugar Company, had been issued on November 18, 2002, and Petitioner's October 10, 2003, request for a reconsidered determination was late-filed and could not be accepted.

On March 22, 2004, Petitioner filed a Petition for Review seeking reassignment of the beet sugar marketing allotment allocation that the CCC allocated to American Crystal Sugar Company based upon American Crystal Sugar Company's purchase of the Hereford, Texas,

¹The caption of this proceeding indicates that Hereford, Texas, Factory is the Petitioner; however, I conclude, based on a review of the filings in this proceeding, that the Petitioner is Southern Minnesota Beet Sugar Cooperative. Nonetheless, since most of the filings in this proceeding are captioned "In re: Hereford, Texas, Factory, Petitioner," I have retained that caption.

SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE 295
65 Agric. Dec. 293

factory. Petitioner filed the Petition for Review pursuant to the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938]; the Sugar Program Regulations; and the Rules of Practice.

On April 12, 2004, the Executive Vice President filed: (1) an “Answer and Motion to Dismiss” in response to Petitioner’s Petition for Review; (2) a certified copy of documents relating to Petitioner’s requests for reconsideration; and (3) a list of “affected persons.”²

On April 22, 2004, American Crystal Sugar Company filed a “Notice of Intervention and Answer of Intervenor American Crystal Sugar Company.” On May 5, 2004, Petitioner filed a motion for summary judgment and a response to the Executive Vice President’s motion to dismiss. On December 23, 2004, the Executive Vice President filed a brief in support of the Executive Vice President’s Answer and Motion to Dismiss. On December 27, 2004, American Crystal Sugar Company filed a brief in support of the Executive Vice President’s Answer and Motion to Dismiss. On January 18, 2005, Petitioner filed a brief in response to the Executive Vice President’s December 23, 2004, brief and American Crystal Sugar Company’s December 27, 2004, brief.

On February 7, 2005, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an Order of Dismissal [hereinafter Initial Order] dismissing Petitioner’s Petition for Review as time-barred. On March 4, 2005, Petitioner appealed to the Judicial Officer. On March 14, 2005, the Executive Vice President filed a response in opposition to Petitioner’s appeal petition, and on April 4, 2005, American Crystal Sugar Company filed a response in opposition to Petitioner’s appeal petition. On April 13, 2005, 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 February 7, 2005, Initial Order. Therefore, except for minor modifications, I adopt the ALJ’s Initial Order as the Order Denying Petitioner’s Appeal Petition. Additional conclusions by the Judicial Officer follow the ALJ’s discussion, as restated. Exhibits from the certified copy of the documents relating to Petitioner’s requests for reconsideration, which the Executive Vice President filed on April 12,

²Rule 2(c) of the Rules of Practice defines an “affected person” as a sugar beet processor, other than the petitioner, affected by the Executive Vice President’s determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

2004, are designated by “AR.”

**APPLICABLE STATUTORY AND REGULATORY
PROVISIONS**

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

**CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF
1938**

.....

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

.....

§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

.....

(2) Beet sugar

.....

**(G) Sale of factories of a processor to another
processor**

(i) In general

SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE 297
65 Agric. Dec. 293

Subject to subparagraphs (E) and (F), if 1 or more factories of a processor of beet sugar (but not all of the assets of the processor) are sold to another processor of beet sugar during a crop year, the Secretary shall assign a pro rata portion of the allocation of the seller to the allocation of the buyer to reflect the historical contribution of the production of the sold factory or factories to the total allocation of the seller.

(ii) Application of allocation

The assignment of the allocation under clause (i) shall apply—

(I) during the remainder of the crop year during which the sale described in clause (i) occurs (referred to in this subparagraph as the “initial crop year”); and

(II) each subsequent crop year (referred in this subparagraph as a “subsequent crop year”), subject to clause (iii).

(iii) Subsequent crop years

(I) In general

The assignment of the allocation under clause (i) shall apply during each subsequent crop year unless the acquired factory or factories continue in operation for less than the initial crop year and the first subsequent crop year.

(II) Reassignment

If the acquired factory or factories do not continue in operation for the complete initial crop year and the first subsequent crop year, the Secretary shall reassign the temporary allocation to other processors of beet sugar on a pro rata basis.

7 U.S.C. § 1359dd(a), (b)(2)(G)(i)-(iii) (Supp. III 2003).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

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

....

**CHAPTER XIV—COMMODITY CREDIT CORPORATION,
DEPARTMENT OF AGRICULTURE**

....

PART 1435—SUGAR PROGRAM

....

Subpart D—Flexible Marketing Allotments For Sugar

....

§ 1435.319 Appeals and arbitration.

(a) A person adversely affected by any determination made under this subpart may request reconsideration by filing a written request with the Executive Vice President, CCC, detailing the basis of the request within 10 days of such determination. Such a request must be submitted at: Executive Vice President, CCC, Stop 0501, 1400 Independence Ave., SW, Washington, DC 20250-0501.

(b) For issues arising under §§ 359d, 359f(b) and (c), and 359(i) of the Agricultural Adjustment Act of 1938, as amended, after completion of the process in paragraph (a) of this section, a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal within 20 days of the issuance of the reconsidered determination with the Hearing Clerk, USDA. The notice of appeal must be submitted at: Hearing Clerk, USDA, Room 1081, South Building, 1400 Independence Ave., SW., Washington, DC, 20250-9200. Any hearing conducted under this paragraph shall be by the Judicial Officer.

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

Section 1435.319(b) of the Sugar Program Regulations (7 C.F.R. § 1435.319(b) (2004)) and Rule 3 of the Rules of Practice provide that any person adversely affected by a reconsidered determination of the Executive Vice President may appeal the reconsidered determination to an administrative law judge by filing a petition for review with the Hearing Clerk within 20 days after the issuance of the reconsidered determination. Petitioner had requested reconsideration of the determination it seeks to overturn in a letter dated November 27, 2002 (AR 10-12). On January 28, 2003, the Executive Vice President issued a reconsidered determination denying Petitioner's request and informing Petitioner of its right to appeal the reconsidered determination, as follows:

I reconsidered CCC's transfer of allocation commensurate with the Hereford factory's sugar production to the new owners but, unfortunately, cannot provide SMBSC any relief.

....

You may appeal my reconsidered determination within 20 days from the date of this letter, with the Hearing Clerk, USDA, Room 1081-South Building, 1400 Independence Ave., SW, Washington, DC, 20250-9200.

AR 13-14. Petitioner failed to file a petition for review within 20 days after issuance of the Executive Vice President's January 28, 2003, reconsidered determination.

Petitioner contends it did not appeal the January 28, 2003, reconsidered determination because the Executive Vice President's determination "can only be considered a preliminary order . . ." and CCC was, at the time, "statutorily prohibited from granting any 'permanent' transfer of the Hereford related marketing allocation . . ." (Brief of Southern Minnesota Beet Sugar Cooperative in Response to the Briefs of the Commodity Credit Corporation and American Crystal Sugar Company Opposing Motion for Summary Judgment at 17). Petitioner's argument that its appeal of the Executive Vice President's January 28, 2003, reconsidered determination would have been premature since a 2-year operating requirement could still be met, ignores the fact that the CCC transferred the Hereford related beet sugar

marketing allocation to American Crystal Sugar Company knowing that American Crystal Sugar Company never intended to operate the Hereford, Texas, factory. Petitioner's November 27, 2002, request for reconsideration establishes Petitioner had no illusion that the Hereford, Texas, factory would ever again operate stating: "The Hereford facility is not a factory. It is a former factory." (AR 11.) More importantly, the Executive Vice President agreed, responding in his January 28, 2003, reconsidered determination, as follows:

You note, as did CCC, that the Hereford factory cannot "continue" in operation because it was closed prior to the establishment of sugar marketing allotments. CCC determined, in the Hereford factory case, the acquired factory did not have to meet the 2-year operation requirement because it was closed and could not "continue" for any length of time.

AR 13. Therefore, the Executive Vice President made clear in the January 28, 2003, reconsidered determination, that the reconsidered determination was the Executive Vice President's final word on the subject, and, if Petitioner wanted to continue to press its argument, it was required by the Sugar Program Regulations and the Rules of Practice to file a petition for review within 20 days after issuance of the reconsidered determination. Petitioner states:

SMBSC did not seek an appeal of CCC's January 28, 2003 Letter Order determination. Rather, SMBSC recognized that, in light of the governing statutory provision (*i.e.*, Section 1359dd(b)(2)(G)), an appeal of the CCC's Letter Order determination at that time would be procedurally premature and subject to summary dismissal because it technically was still possible for ACS to comply with the two-year operating requirement in Section 1359dd(b)(2)(G) at the time an appeal was due. SMBSC therefore was required to wait for the CCC's establishment of the 2003 crop year beet sugar allotment allocations to determine (i) whether ACS could satisfy the two-year operating requirement for the acquired Hereford factory under Section 1359dd(b)(2)(G), and (ii) whether the CCC would allow ACS to retain the Hereford beet sugar marketing allocation despite the fact that the Hereford factory was closed during the crop year of acquisition and did not operate.

Response of Southern Minnesota Beet Sugar Cooperative to the

SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE 301
65 Agric. Dec. 293

Commodity Credit Corporation's Motion to Dismiss and Cross Motion of Southern Minnesota Beet Sugar Cooperative for Summary Judgment at 4.

But the CCC, the Executive Vice President, and Petitioner knew American Crystal Sugar Company was unable to comply with the 2-year operating requirement when, on January 28, 2003, the Executive Vice President issued his reconsidered determination. If section 359d(b)(2)(G)(iii)(II) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(G)(iii)(II)) could be said to apply, the Hereford, Texas, factory would have been required to continue in operation "for the complete initial crop year and the first subsequent crop year[.]" Inasmuch as the Hereford, Texas, factory was acquired in October 2002 and never operated in the 2002 crop year, it was impossible for the factory to have operated during the complete initial crop year. Therefore, American Crystal Sugar Company could not later meet the 2-year operation requirement. The very point of the reconsidered determination was that the acquired factory did not have to meet the 2-year operation requirement "because it was closed and could not 'continue' for any length of time" (AR 13).

In response to Petitioner's second request for reconsideration of the transfer of the beet sugar marketing allotment allocation from Holly Sugar Corporation to American Crystal Sugar Company based upon American Crystal Sugar Company's purchase of the Hereford, Texas, factory, the Director, Economic and Policy Analysis Staff, Farm Service Agency, United States Department of Agriculture, advised that Petitioner's request could not be accepted stating:

Since your request for reconsideration is dated over 10 months from the announcement of the transfer, we must determine that the 10-day appeal period under the regulation has expired and USDA cannot accept your request for reconsideration on this issue.

AR 24. Purportedly, Petitioner was seeking reconsideration of American Crystal Sugar Company's allocation of the 2003 crop beet sugar marketing allotment to the extent it included the transfer of the allocation share associated with the Hereford, Texas, factory. But the September 30, 2003, announcement in Release No. 0340 (AR 15-18), set forth the overall allotments for beet sugar and cane sugar and the individual allocations for processors for the 2003 crop. The September 30, 2003, announcement did not establish allocation shares or change the allocation shares of American Crystal Sugar Company,

Holly Sugar Corporation, or any other beet sugar processor. The allocation shares remained the same as they were under Release No. 1693.02 issued on November 18, 2002 (AR 8-9). For that reason, the Director, Economic and Policy Analysis Staff, Farm Service Agency, United States Department of Agriculture, advised Petitioner that the 10-day period within which to request reconsideration of the determination Petitioner sought to challenge had long expired and the United States Department of Agriculture could not accept Petitioner's October 10, 2003, request for reconsideration.

This interpretation is consistent with section 1435.319(a) of the Sugar Program Regulations (7 C.F.R. § 1435.319(a) (2004)). Unquestionably, a request made on October 10, 2003, concerning a determination made on November 18, 2002, was untimely coming not within 10 days, as required, but more than 10 months following the determination.

In any event, Petitioner had obtained a reconsidered determination regarding the transfer of the beet sugar marketing allotment allocation from Holly Sugar Corporation to American Crystal Sugar Company based upon American Crystal Sugar Company's purchase of the Hereford, Texas, factory on January 28, 2003, and Petitioner failed to file a petition for review within 20 days as required by section 1435.319(b) of the Sugar Program Regulations (7 C.F.R. § 1435.319(b) (2004)) and Rule 3 of the Rules of Practice.

An administrative law judge has no jurisdiction under the Sugar Program Regulations or the Rules of Practice to consider a petition for review that is filed after the 20-day filing period. The Executive Vice President's January 28, 2003, reconsidered determination became final on February 17, 2003. Petitioner filed a Petition for Review with the Hearing Clerk on March 22, 2004, 1 year 1 month 5 days after the Executive Vice President's reconsidered determination became final. Therefore, the ALJ has no jurisdiction to consider Petitioner's Petition for Review.

This construction of the Rules of Practice is 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.

SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE 303
65 Agric. Dec. 293

(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 a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.³

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a petition for review after the time for filing the petition for review has expired. 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

³*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).

the time otherwise provided in the rules for the filing of a notice of appeal.⁴ The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the administrative law judge to extend the time for filing a petition for review after the time for filing the petition for review has expired.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes an administrative law judge from considering a petition for review that is filed after the time for filing the petition for review has expired, is consistent with the judicial construction of the Administrative Orders Review Act (“Hobbs Act”). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act (“Hobbs Act”) requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.⁵

Accordingly, Petitioner’s Petition for Review must be dismissed, since it is too late for the matter to be further considered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner requests in its Petition of Appeal to the Judicial Officer by Southern Minnesota Beet Sugar Cooperative [hereinafter Petitioner’s Appeal Petition] that I “reinstate as not time-barred the appeal that [Petitioner] filed on March 22, 2004, challenging the announcement by

⁴Fed. R. App. P. 4(a)(5).

⁵*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).

SOUTHERN MINNESOTA BEET SUGAR COOPERATIVE 305
65 Agric. Dec. 293

the . . . CCC of beet sugar marketing allotment allocations to processors for crop year 2003” and issue a decision on the merits in Petitioner’s favor (Petitioner’s Appeal Pet. at 1).

I agree with the ALJ’s Initial Order; therefore, I reject Petitioner’s requests that I reinstate Petitioner’s March 22, 2004, Petition for Review as not time-barred and issue a decision on the merits in Petitioner’s favor.

On October 1, 2002, the CCC assigned to each beet sugar processor, including Holly Sugar Corporation, an allocation share of the beet sugar marketing allotment. Holly Sugar Corporation’s allocation was based, in part, on the production history of the Hereford, Texas, factory. In early October 2002, Imperial Sugar Company sold the Hereford, Texas, factory to American Crystal Sugar Company. Based on this sale, the CCC announced, in Release No. 1693.02, dated November 18, 2002 (AR 8-9), the permanent reassignment to American Crystal Sugar Company of the portion of the Holly Sugar Corporation allocation that was based upon the production history of the Hereford, Texas, factory. Petitioner timely requested reconsideration of this November 18, 2002, reassignment of a share of the allocation from Holly Sugar Corporation to American Crystal Sugar Company. The Executive Vice President issued a reconsidered determination denying Petitioner’s request on January 28, 2003. Petitioner did not file a timely petition for review of the Executive Vice President’s January 28, 2003, reconsidered determination.

In Release 0340, dated September 30, 2003, the CCC announced the 2003 crop sugar marketing allotments and allocations (AR 15-18). Release No. 0340 set forth overall quantity allotments for beet sugar and cane sugar and the individual allocations for beet sugar processors and cane sugar processors for the 2003 crop. Release No. 0340 did not establish allocation shares or change the allocation shares of the beet sugar allotment for American Crystal Sugar Company, Holly Sugar Corporation, or any other beet sugar processor. American Crystal Sugar Company’s and Holly Sugar Corporation’s allocation shares, as well as those of all other beet sugar processors, remained as they had been announced in Release No. 1693.02. Release No. 0340 only set forth the tonnage allocations calculated by multiplying each beet sugar processor’s percentage allocation share times the overall beet sugar marketing allotment. Petitioner’s October 10, 2003, request for a reconsidered determination of the reassignment of a share of the allocation from Holly Sugar Corporation to American Crystal Sugar Company can only relate to the CCC’s November 18, 2002, announcement. Petitioner’s October 10, 2003, request for a

reconsidered determination of the November 18, 2002, announcement came far too late to be considered by the Executive Vice President. Moreover, Petitioner's Petition for Review was filed far too late to be considered by the ALJ; therefore, I must deny Petitioner's Appeal Petition seeking that I reinstate Petitioner's Petition for Review as not time-barred.

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

ORDER

1. The ALJ's February 7, 2005, order dismissing Petitioner's March 22, 2004, Petition for Review as time-barred, is affirmed.
2. Petitioner's Appeal Petition, filed March 4, 2005, is denied.
3. The Executive Vice President's January 28, 2003, reconsidered determination is the final decision in this proceeding.

DEFAULT DECISIONS

ANIMAL QUARANTINE ACT

**In re: TRENT WAYNE WARD AND MICHAEL LEE
MCBARRON d/b/a T&M HORSE COMPANY.**

A.Q. Docket No. 06-0003.

Default Decision.

Filed May 4, 2006.

A.Q. – Default.

Thomas Neal Bollick for Complainant.

Respondent, Pro se

Decision and Order by Administrative Law Judge Jill S. Clifton.

**Decision and Order by Reason of Default
as to Trent Wayne Ward,
d/b/a T&M Horse Company**

This administrative proceeding was instituted by a complaint filed on December 5, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein “APHIS” or “Complainant”). The complaint alleged that the respondents violated the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note (frequently herein “the Act”), and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*).

The complaint seeks civil penalties authorized by section 903(c)(3) of the Act (7 U.S.C. § 1901 note) and 9 C.F.R. § 88.6.¹ The Rules of Practice applicable to this proceeding are 7 C.F.R. § 380.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

The Hearing Clerk sent to respondent Trent Wayne Ward d/b/a T&M Horse Company (frequently herein “respondent Ward”) a copy of the complaint, by certified mail, return receipt requested, on December 5, 2005. Respondent Ward was informed in the complaint and in the Hearing Clerk’s accompanying letter of service, that an answer to the complaint should be filed with the Hearing Clerk within 20 days of receipt, pursuant to the Rules of Practice, and that failure to answer any

¹ The Secretary of Agriculture is authorized to assess civil penalties of up to \$5,000 per violation of the regulations, and each equine transported in violation of the regulations will be considered a separate violation.

allegation in the complaint would constitute an admission of that allegation and waiver of a hearing. 7 C.F.R. § 1.136.

The complaint that was mailed to respondent Ward on December 5, 2005 was returned to the Hearing Clerk on January 10, 2006, marked “Unclaimed” by the U.S. Postal Service. Accordingly, the Hearing Clerk’s office re-mailed the complaint to respondent Trent Wayne Ward d/b/a T&M Horse Company at the same address via regular mail on January 10, 2006. Therefore, respondent Ward is deemed to have been served with the complaint on January 10, 2006.² Respondent Ward’s answer was thus due by January 30, 2006, twenty days after service of the complaint. 7 C.F.R. § 1.136(a).

Respondent Trent Wayne Ward d/b/a T&M Horse Company never filed an answer to the complaint. The Hearing Clerk sent to respondent Trent Wayne Ward d/b/a T&M Horse Company a “no answer” letter by regular mail on February 1, 2006. Further, the Hearing Clerk sent to respondent Trent Wayne Ward d/b/a T&M Horse Company a copy of the “Proposed Default Decision and Order”, a copy of the “Motion for Adoption of Proposed Default Decision and Order”, and the Hearing Clerk service letter dated March 13, 2006, by certified mail, return receipt requested, on March 13, 2006, which were signed for and delivered on behalf of, and thereby served upon, respondent Trent Wayne Ward d/b/a T&M Horse Company on March 16, 2006.

Accordingly, the material allegations in the complaint, which are admitted by the respondent’s failure to file an answer (7 C.F.R. § 1.136(c)), are adopted and set forth in this Decision and Order as the Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.³

Findings of Fact

1. Respondent Trent Wayne Ward d/b/a T&M Horse Company,

² Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) states that any document that is initially sent to a person by certified mail to make that person a party respondent in a proceeding but is returned marked by the postal service as unclaimed shall be deemed to have been received by said person on the date it is re-mailed by ordinary mail to the same address.

³ 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) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent’s failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent’s failure to answer is likewise deemed a waiver of hearing.

frequently hereinafter referred to as respondent Ward, owned and operated T&M Horse Company in the State of Texas and has a mailing address of 1037 Lakeview Circle, Kaufman, Texas 75142. Respondent Ward is a commercial slaughter horse buyer who has been in the business of buying and selling horses, as well as other livestock, most of his adult life.

2. (a) On or about June 10, 2003, respondent Ward shipped 43 horses in commercial transportation from Southwest Livestock to Dallas Crown for slaughter without applying a USDA back tag to each horse in the shipment, in violation of 9 C.F.R. § 88.4(a)(2).

(b) On or about June 10, 2003, respondent Ward shipped 43 horses in commercial transportation from Southwest Livestock to Dallas Crown for slaughter without the required owner-shipper certificate, VS Form 10-13, in violation of 9 C.F.R. § 88.4(a)(3)(i-x).

(c) On or about June 10, 2003, respondent Ward shipped 43 horses in commercial transportation from Southwest Livestock to Dallas Crown for slaughter. The shipment included at least seven (7) stallions but respondent Ward did not load the horses on the conveyance so that each stallion was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

3. (a) On or about August 25, 2003, respondent Ward shipped 30 horses from Southwest Livestock to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper's address and telephone number were not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(i); (2) the license plate number of the conveyance was not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (3) the time the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix). Also, one of the horses, a palomino gelding with USDA back tag # USAZ 0691, had an old injury to its left hind foot such that it could not bear weight on all four limbs, yet respondent did not describe this pre-existing injury on the VS 10-13, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) On or about August 25, 2003, respondent Ward shipped 30 horses from Southwest Livestock to Dallas Crown for slaughter. One of the horses, a palomino gelding with USDA back tag # USAZ 0691, had an old injury to its left hind foot such that it could not bear weight on all four limbs, yet respondent Ward shipped the horse in commercial

transportation to the slaughtering facility in spite of its injuries. By reason of the above, the injured horse was in obvious physical distress, yet respondent Ward failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(c) On or about August 25, 2003, respondent Ward shipped 30 horses from Southwest Livestock to Dallas Crown for slaughter. One of the horses, a palomino gelding with USDA back tag # USAZ 0691, had an old injury to its left hind foot such that it could not bear weight on all four limbs, yet respondent Ward shipped the horse in commercial transportation to the slaughtering facility in spite of its injuries. By transporting it in this manner, respondent Ward failed to handle the injured horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

4. On or about March 14, 2004, respondent Ward shipped 15 horses from Southwest Livestock to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the prefix for each horse's USDA back tag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

5. On or about March 21, 2004, respondent Ward shipped 40 horses from Southwest Livestock to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: it did not indicate the breed or type of each horse, one of the physical characteristics that could be used to identify each horse, in violation of 9 C.F.R. § 88.4(a)(3)(v).

6. On or about August 23, 2004, respondent Ward shipped 10 horses from Southwest Livestock to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the prefix for each horse's USDA back tag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (2) the time the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. At all times material herein, the conduct of respondent Trent Wayne Ward d/b/a T&M Horse Company while in possession of horses for the purpose of transporting them to slaughter was regulated under 9 C.F.R. § 88 *et seq.*

3. Violations of the regulations constitute violations of the Act. By reason of the Findings of Fact set forth above, respondent Trent Wayne Ward d/b/a T&M Horse Company repeatedly violated the Commercial Transportation of Equine for Slaughter Act. 7 U.S.C. § 1901 note.

Order

1. The provisions of this Order shall be effective on the first day after this decision becomes final.

2. Respondent Trent Wayne Ward d/b/a T&M Horse Company is hereby assessed a civil penalty of **\$21,450.00** (twenty-one thousand four hundred fifty dollars). Respondent Trent Wayne Ward d/b/a T&M Horse Company shall pay this penalty by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**" and shall indicate that payment is in reference to **A.Q. Docket No. 06-0003**. Respondent Ward's certified check(s), cashier's check(s), or money order(s) shall be forwarded within **60** (sixty) 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

3. So long as Respondent Ward pays his civil penalty in full as required, Respondent Ward's civil penalty shall be reduced by the amount of civil penalty paid in this case by the end of calendar year 2007 by the remaining respondent in this case, Respondent Michael Lee McBarron d/b/a T&M Horse Company.

Finality

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145

of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

* * *

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

§ 1.145 Appeal to Judicial Officer.

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

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service

of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

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

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

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

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

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

conclude the argument.

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

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

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

7 C.F.R. § 1.145.

**In re: MITCHELL STANLEY D/B/A STANLEY BROTHERS.
A.Q. Docket No. 06-0007.
Default Decision and Order.
Filed June 14 2006.**

AQ – Default.

Thomas Bolick for Petitioner.
Respondent Pro se.

Decision and Order by Administrative Law Judge Peter M. Davenport.

Decision

This is an administrative proceeding for the assessment of a civil penalty for violations of the Animal Health Protection Act (7 U.S.C. §§ 8301 et seq.), 7 U.S.C. § 1901 note, 9 C.F.R. part 75, and 9 C.F.R. part 88 in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 et seq.

and 380.1 et seq.

On January 18, 2006, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, instituted this proceeding by filing an administrative complaint against respondent Mitchell Stanley d/b/a Stanley Brothers. The complaint was served on respondent on January 23, 2006. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent's answer thus was due no later than February 13, 2006, twenty days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent never filed an answer to the complaint and the Hearing Clerk's Office mailed him a No Answer Letter on February 23, 2006.

Respondent Mitchell Stanley d/b/a Stanley Brothers failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise respond to an allegation of the complaint. 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) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent's failure to answer is likewise deemed a waiver of hearing. 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. Mitchell Stanley is an individual who engages in the commercial transportation of equines to slaughter under the name of Stanley Brothers. He handles more than 20 horses per year in interstate commerce and resides at 747 Highway 8 West, Hamburg, Arkansas 71646.

2. (a) On or about October 20, 2003, respondent shipped horses in commercial transportation from Louisiana to Dallas Crown in Kaufman,

Texas (hereinafter referred to as Dallas Crown), for slaughter. Two horses in the shipment, USDA backtag numbers USAU 3602 and USAU 3616, bore a brand on the left side of their necks, 72A, which identified them as positive reactors for Equine Infectious Anemia, but they were not accompanied by the required Permit for Movement of Restricted Animals, VS Form 1-27, in violation of 9 C.F.R. § 75.4(b).

(b) On or about October 20, 2003, respondent shipped horses in commercial transportation from Louisiana to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the license plate number of the conveyance and the name of the driver of the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) the form did not list 72A brands on the two positive reactors for Equine Infectious Anemia and thereby failed to list all of the physical characteristics, including permanent brands, that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

Conclusion

By reason of the Findings of Fact set forth above, respondent Mitchell Stanley d/b/a Stanley Brothers violated the Animal Health Protection Act (7 U.S.C. §§ 8301 et seq.) and 7 U.S.C. § 1901 note. Therefore, the following Order is issued.

Order

Respondent Mitchell Stanley d/b/a Stanley Brothers is hereby assessed a civil penalty of twelve thousand eight hundred dollars (\$12,800.00). 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 Mitchell Stanley d/b/a Stanley Brothers shall indicate that payment is in reference to A.Q. Docket No. 06-0007.

MITCHELL STANLEY d/b/a STANLEY BROTHERS 317
65 Agric. Dec. 314

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 Mitchell Stanley d/b/a Stanley Brothers 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).

DEFAULT DECISIONS

ANIMAL WELFARE ACT

In re: MILTON WAYNE SHAMBO, d/b/a WAYNE'S WORLD SAFARI AND ARBUCKLE WILDERNESS; ANIMALS, INC., d/b/a WAYNE'S WORLD SAFARI; AND ANIMALS, INC., d/b/a ARBUCKLE WILDERNESS.

AWA Docket No. 05-0024.

Default Decision.

Filed February 22, 2006.

AWA – Default.

Bernadette R. Juarez for Complainant.

Respondent, Pro se.

Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

Preliminary Statement

This is a Decision and Order by Reason of Default as to all the respondents, that is, Milton Wayne Shambo; Animals, Inc., a Texas corporation; and Animals, Inc., an Oklahoma corporation. This proceeding was instituted under the Animal Welfare Act (“Act”), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed on July 8, 2005, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (“APHIS”), alleging that the respondents willfully violated the Act and the regulations and standards (“Regulations” and “Standards”) issued thereunder (9 C.F.R. § 1.1 *et seq.*).

The Hearing Clerk sent copies of the complaint, by certified mail, return receipt requested, to respondents on July 12, 2005. Respondents were informed in the accompanying letter of service that an answer to the complaint 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 Milton Wayne Shambo and Animals, Inc., (Oklahoma) received the complaint on July 16, 2005.¹

¹ See Domestic Return Receipt for Article Numbers 7003 1670 0011 8982 5766; 7003 1670 0011 8982 5773.

Respondent Animals, Inc., (Texas) received the complaint on October 4, 2005.²

Respondents have failed to file an answer, and the material facts alleged in the complaint, which are admitted by the respondents' failure to file an answer (7 C.F.R. §1.136(c)), are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice.³

FINDINGS OF FACT

1. Respondent Animals, Inc., is an Oklahoma domestic stock corporation doing business as Arbuckle Wilderness ("AI-OK") and whose agent for service of process is Wayne Shambo, Route 1, Box 63, Davis, Oklahoma 73030. At all material times mentioned herein, said respondent was operating as exhibitor, as that term is defined in the Act and the Regulations, under the direction, control and management of its president, secretary, and sole shareholder: respondent Shambo.

2. Between November 2, 1998 and on or about November 25, 2002, Respondent Animals, Inc., was a Texas domestic stock corporation doing business as Wayne's World Safari ("AI-TX") and whose agent for service of process was Wayne Shambo, 400 Mann Street, Suite 901, Corpus Christi, Texas 78401. At all material times mentioned herein, said respondent was operating as exhibitor, as that term is defined in the Act and the Regulations, under the direction, control and management of its president, secretary, and director: respondent Shambo.

3. Respondent Milton Wayne Shambo is an individual doing business as Wayne's World Safari and Arbuckle Wilderness, whose mailing address is Route 1, Box 63, Davis, Oklahoma 73030. At all times mentioned herein, said respondent was licensed and operating as an exhibitor as that term is defined in the Act and the Regulations.

² The U.S. Postal Service marked the Hearing Clerk's certified mailing to Animals, Inc. (Texas) "undeliverable as addressed" and returned it on July 25, 2005. On August 12, 2005, the Hearing Clerk sent said respondent, by certified mail addressed to its agent's address of record, copies of the complaint and Rules of Practice. *See Memorandum to File*, dated August 12, 2005. The U.S. Postal Service marked this mailing "refused" and returned it on August 29, 2005. *See Memorandum to File*, dated October 4, 2005. On October 4, 2005, in accordance with section 1.147(c)(1) of the Rules of Practice, the Hearing Clerk served respondent, by regular mail, with copies of the complaint and the Rules of Practice. *See id.*

³ 7 C.F.R. § 1.139.

Between August 26, 1999 and August 26, 2002, respondent Shambo held Animal Welfare Act license number 74-C-0467 issued to “WAYNE SHAMBO DBA: WAYNE’S WORLD SAFARI.”

Between April 8, 2002, and April 8, 2004, Respondent Shambo held Animal Welfare Act license number 73-C-0146 issued to “WAYNE SHAMBO DBA: ARBUCKLE WILDERNESS.”

During all material times respondent Shambo exhibited animals at respondent AI-TX’s facility known as Wayne’s World Safari in Mathis, Texas and respondent AI-OK’s facility known as Arbuckle Wilderness in Davis, Oklahoma.

4. The acts, omissions, and failures to act by respondent Shambo identified herein were within the scope of said respondent’s offices, and are deemed the acts, omissions and failures of respondents AI-TX and AI-OK, as well as respondent Shambo, for the purpose of construing or enforcing the provisions of the Act and Regulations. Respondents Shambo, AI-TX, and AI-OK, are herein frequently referred to collectively as “respondents.”

5. APHIS personnel conducted inspections of respondents’ facilities, records and animals for the purpose of determining respondents’ compliance with the Act and the Regulations and Standards on:

<u>Date</u>	<u>Site Location</u>	<u>Regulated Animals</u>
August 21, 2000	Davis, OK	77
September 19, 2000	Mathis, TX	155
January 19, 2001	Mathis, TX	approximately 158
January 23, 2001	Mathis, TX	158
April 19, 2001	Mathis, TX	unavailable
February 12, 2001	Davis, OK	749
May 10, 2001	Mathis, TX	unavailable
September 5, 2001	Davis, OK	609
November 7, 2001	Davis, OK	725
November 29, 2001	Davis, OK	662
February 26, 2002	Davis, OK	466
August 12, 2003	Davis, OK	553

NONCOMPLIANCE WITH REGULATIONS

6. On November 29, 2001, respondents violated section 2.4 of the Regulations by failing to not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties, and specifically, respondents verbally abused

APHIS officials in the course of carrying out their duties.

7. Respondents violated the attending veterinarian and veterinary care regulations, as follows:

a. January 19, 2001 (TX). Respondents failed to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, and specifically, failed to obtain veterinary care for a spider monkey that had an injured finger and sores on his hand.

b. Respondents failed to establish and maintain programs of adequate veterinary care, that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care, and specifically:

(i) October 19, 2000 (TX). Respondents failed to provide veterinary treatment, as directed by their attending veterinarian, to a bobcat that exhibited signs of behavioral stress.

(ii) May 10, 2001 (TX). Respondents failed to provide veterinary treatment, as directed by their attending veterinarian, to a caracal, coatimundi and kinkajou.

(iii) May 10, 2001 (TX). Respondents allowed the goat's hoofs to become overgrown, thereby risking disease and injury.

(iv) February 12, 2001 (OK). Respondents failed to obtain treatment for a female goat in the petting zoo that appeared thin and lame.

c. On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents failed to establish and maintain programs of adequate veterinary care that included the availability of appropriate facilities, personnel, equipment, and services to provide care to three lemurs, one spider monkey, two giraffes, one female addax, one female gemsbok, four blackbucks (two adults, two juvenile), two adult elk, one male nilgai antelope, one adult fallow deer, one juvenile eland, during an eight-day ice storm, which failure resulted the animals' deaths.

8. On September 5, 2001 (OK). Respondents willfully violated the Regulations by failing to make, keep, and maintain records that fully and correctly disclose required information concerning animals in their possession, and specifically, failed to maintain accurate records concerning cavius that arrived at the facility in April 2001 and had no records concerning a fennec fox.

9. On or about December 26, 2000 through on or about January 5, 2001, respondents violated the Regulations by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being, and specifically, failed to provide appropriate heat, shelter, and care to hundreds of animals during an eight-day ice storm, which failure resulted in the deaths of no fewer than eighteen animals.

10. Respondents violated the Regulations by failing to meet the minimum facilities and operating standards for nonhuman primates, as follows:

- a. Respondents failed to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards, and specifically:
 - (i) October 19, 2000 (TX). Respondents failed to remove old food, old bedding and fecal matter from the nonhuman primates' enclosures (Monkey Barn), thereby depriving the animals of the freedom to avoid contact with excreta.
 - (ii) January 19, 2001 (TX). Respondents failed to remove old food, old bedding, excessive feces, and algae from the nonhuman primates' enclosures, thereby exposing the animals to disease hazards.
- b. Respondents failed to equip housing facilities with disposal facilities and drainage systems that are constructed, installed, maintained, and operated so that animal wastes and water are rapidly eliminated and the animals stay dry and as to minimize vermin and pest infestation, insects, odors, and disease hazards, and specifically:
 - (i) January 19, 2001 (TX). The drainage system in the nonhuman primate housing facility allowed water, liquid wastes, feces, and algae to accumulate in the drain, thereby exposing the animals to disease hazards.
 - (ii) January 23, 2001 (TX). The drainage system in the nonhuman primate housing facility allowed water, liquid wastes, feces, and algae to accumulate in and around the animals' enclosures (including two spider and two vervet monkeys), thereby depriving the animals of the ability to stay clean, dry and free from disease.
 - (iii) April 19, 2001 (TX). The drainage system in the nonhuman primate housing facility allowed water, liquid wastes, feces and algae to accumulate in and around the animals' enclosures, thereby depriving the animals of the ability to stay clean, dry and free from disease.

- (iv) May 10, 2001 (TX). The drainage system in the nonhuman primate housing facility allowed water, liquid wastes, feces and black algae to accumulate in and around the animals' enclosures and in the drains, thereby depriving the animals of the ability to stay clean, dry and free from disease.
- c. Respondents failed to maintain all surfaces of nonhuman primate facilities on a regular basis, and specifically:
 - (i) August 21, 2000 (OK). Respondents failed to repair or replace the peeling paint in the nonhuman primates' enclosures.
 - (ii) September 5, 2001 (OK). Respondents failed to repair and remove the chipped concrete flooring from spider monkeys' enclosure, and the peeling paint and rusted posts in the chimpanzees' enclosure.
- d. Respondents failed to light indoor housing facilities well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates, and specifically:
 - (i) August 21, 2000 (OK). There were no functioning lights in and around the enclosure housing six spider monkeys.
 - (ii) November 29, 2001 (OK). Respondents housed nonhuman primates (lemurs and vervets) in an enclosure that contained one small light bulb that failed to provide adequate lighting to permit inspection and cleaning.
 - (iii) February 12, 2001 (OK). The two functioning light bulbs in the chimpanzees' enclosure failed to provide adequate lighting to permit inspection and cleaning.
- e. Respondents failed to construct and maintain facilities so that they are structurally sound for the species of nonhuman primates housed therein, maintained in good repair and that protect the animals from injury, contain the animals, and restrict other animals from entering, and specifically:
 - (i) February 12, 2001 (OK). Respondents failed to repair the sharp, chewed edges of the macaques' enclosure.
 - (ii) September 5, 2001 (OK). Respondents failed to repair or remove sharp, protruding nails that pointed into the lemurs' enclosure and the sagging roof that leaked in the chimpanzees' enclosure.
 - (iii) September 5, 2001 (OK). The interior area of shelters provided to four lemurs could not be readily cleaned and sanitized.
- f. On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents failed to sufficiently heat sheltered housing

when necessary to protect the nonhuman primates from extreme temperatures to provide for their health and well-being, and so the ambient temperature does not fall below 45 F for more than 4 consecutive hours when nonhuman primates are present, and specifically, failed to provide sufficient heat to nonhuman primates during an eight-day ice storm, which failure caused the deaths of three lemurs and one spider monkey.

g. Respondents failed to provide nonhuman primates with adequate shelter from the elements at all times that provides protection from the sun, rain, snow, wind, and cold, and from any weather conditions that may occur, and specifically:

(i) October 19, 2000 (TX). The nonhuman primates' shelters contained gaps between the walls, roofs, and floors and, therefore, failed to adequately protect the animals from wind, rain, and cold temperatures.

(ii) January 19, 2001 (TX). The nonhuman primates' shelters contained gaps between the walls, roofs, and floors and, therefore, failed to adequately protect the animals from wind, rain, and cold temperatures.

h. Respondents failed to have barriers between fixed public exhibits housing nonhuman primates and the public any time the public is present, in order to restrict physical contact between the public and the nonhuman primate, and specifically:

(i) November 7, 2001 (OK). Respondents housed one lemur in an enclosure that lacked an adequate barrier between the enclosure and members of the public, thereby allowing the public to have direct contact with the animal.

(ii) August 12, 2003 (OK). Respondents housed two lemurs and two vervets in enclosures that lacked adequate barriers between the enclosures and members of the public, thereby allowing the public to have direct contact with the animals.

i. August 12, 2003 (OK). Respondents failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian, and specifically, respondents' plan for environmental enrichment failed to describe the methods of enrichment and how often each animal (including two vervets, two lemurs, and one spider monkey) would receive enrichment.

j. September 5, 2001 (OK). Respondents failed to provide nonhuman primates with diets that are appropriate for the species,

size, age, and condition of the animals, and for the conditions in which the animals are maintained and with food that is clean, wholesome, and palatable to the animals that is of sufficient quantity and nutritive value to main a healthful condition, weight range, and to meet the animals' normal daily nutritional requirements, and specifically, respondents fed nonhuman primates expired food that failed to meet the animals' vitamin needs.

k. October 19, 2000 (TX). Respondents failed to provide nonhuman primates with a sufficient quantity of potable water, in water receptacles that are clean and sanitized, and specifically, the squirrel monkeys' water and water receptacle were contaminated with green, dirty water. l. Respondents failed to keep premises where housing facilities are located, including buildings and surrounding grounds, clean and in good repair to protect the nonhuman primates from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents, pests and vermin, and specifically:

(i) August 21, 2000 (OK). Respondents failed to remove rotten produce from the refrigerator (including a fruit box infested with maggots) and the food-prep room was infested with flies and had unsanitary counters and floors.

(ii) February 12, 2001 (OK). The food-prep room had unsanitary floors and counters.

m. August 21, 2000 (OK). Respondents failed to have enough employees to carry out the requisite level of husbandry practices and care, that are trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of nonhuman primates, and specifically, failed to have enough adequately trained and supervised employees to provide the minimally-adequate husbandry and care to their nonhuman primates as evidenced by the unsanitary conditions of respondents' facility, including the animals' enclosures and food-prep area.

11. Respondents violated section the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, as follows:

a. Respondents failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain them in good repair to protect the animals from injury and to contain the animals, and specifically:

(i) October 19, 2000 (TX). Respondents failed to repair the roofs

and sides of four shelters used by hoof stock (drive through area).
(ii) January 19, 2001 (TX). Respondents failed to repair the roofs and the sides of four shelters used by hoof stock in the drive through area.

(iii) May 10, 2001 (TX). Respondents failed to repair, replace or remove the rotting roof and sharp, protruding nails in the cavy's shelter; the chewed shelter in the prairie dogs' enclosure; and housed lions in enclosures that could not adequately contain them.

(iv) February 12, 2001 (OK). Respondents failed to repair the roofs in the tigers' and cavy's enclosures, the broken door in the porcupines' enclosure, and the coatimundi's shelter lacked a back side.

(v) September 5, 2001 (OK). Respondents housed a coatimundi, a fennec fox, three cavy's, three camels, two rhinoceroses, a serval and a white tiger in enclosures that were chewed, splintered and rotting wood; housed deer in enclosures that allowed three animals to escape; housed a tiger in an enclosure that lacked adequate structural integrity to contain him; and, the porcupine's and bears' shelters were structurally unsound and risked injury to the animals.

b. Respondents failed to store supplies of food and bedding in facilities that adequately protect such supplies against deterioration, molding, or contamination by vermin, and to provide refrigeration for perishable food, and specifically:

(i) August 21, 2000 (OK). Respondents failed to protect food supplies against deterioration and contamination by vermin, including food stored in three containers that had cracked lids, one open feed bag, and uncovered meat stored in the freezer.

(ii) February 12, 2001 (OK). Respondents failed to protect food supplies against deterioration and contamination by vermin, including food stored in two containers with holed and cracked lids.

(iii) November 7, 2001 (OK). Respondents failed to protect food supplies against deterioration and molding by storing fresh produce next to spoiled and moldy produce.

c. Respondents failed to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards, and specifically:

(i) April 19, 2001 (OK). Respondents failed to remove excreta and manure from in and around the rhinoceroses' enclosure.

- (ii) September 5, 2001 (OK). Respondents failed to remove trash, insulation, and feces from the entrance of the coatimundi's enclosure.
- d. Respondents failed to provide all animals kept outdoors with sufficient shade by natural or artificial means, when sunlight is likely to cause overheating or discomfort of animals, and specifically:
 - (i) April 19, 2001 (OK). Respondents failed to provide lions and giraffes with sufficient shade from sunlight.
 - (ii) May 10, 2001 (TX). Respondents failed to provide one juvenile deer and two juvenile calves with sufficient shade from sunlight.
- e. Respondents failed to provide animals kept outdoors with natural or artificial shelter to afford them protection and to prevent their discomfort, and specifically:
 - (i) October 19, 2000 (OK). Respondents failed to provide any bedding to the prairie dogs and adequate shelter to four porcupines that shared one small wood box and two adult wolves that shared one dog house.
 - (ii) On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents failed to provide adequate shelter to giraffes, rhinoceroses, gemsbok, blackbucks, elk, antelope, eland and deer, which failure caused the deaths of no fewer than 12 animals.
 - (iii) January 19, 2001 (TX). Respondents failed to provide adequate shelter, including bedding, to no fewer than thirty animals (small felids, caracal, serval, bobcat, civits, kudu, cavies, cappybara, wolves, rhinoceroses, hyena, bears, lions, cougars, leopards, and tigers).
 - (iv) January 23, 2001 (TX). Respondents failed to provide adequate shelter to two wolves that shared one small dog house.
 - (v) May 10, 2001 (TX). Respondents failed to provide adequate shelter to one juvenile deer and two calves.
- f. Respondents failed to provide a suitable method to rapidly eliminate excess water from animal enclosures, and specifically:
 - (i) October 19, 2000 (TX). The bison, camels, pigs and hoofstock had to walk through and stand in water and mud to access their water receptacles.
 - (ii) September 5, 2001 (OK). Respondents housed animals (petting area, four cavies and a fennec fox) in enclosures with standing water, thereby depriving the animals of the ability to stay clean and dry.
 - (iii) November 7, 2001 (OK). Respondents failed to rapidly

eliminate standing water from the giraffe's enclosure; the giraffe had to walk through standing water and mud to access their outdoor paddock.

(iv) November 29, 2001 (OK). The rhinoceros and deer (near petting area) had to walk through and stand in water and mud to access their shelters, food and water receptacles.

g. Respondents failed to construct a perimeter fence that restricts animals and persons from going through or under it, and specifically:

(i) On or about October 19, 2000 through on or about January 19, 2001 (OK). Respondents' perimeter fence lacked sufficient height to keep animals in and unauthorized persons out.

(ii) August 21, 2000 (OK). Respondents failed to construct a perimeter fence around dangerous animals, including large felids, bears, wolves, rhinoceros and nonhuman primates.

(iii) September 5, 2001 (OK). Respondents' perimeter fence failed to contain their animals; APHIS officials observed three deer outside the perimeter fence.

(iv) November 7, 2001 (OK). Respondents' perimeter fence failed to contain their animals; APHIS officials observed two deer in the public parking area.

h. Respondents failed to provide animals with food that is wholesome, palatable, free from contamination and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination, and specifically:

(i) October 19, 2000 (TX). The food trough in the petting zoo contained old, wet, and spoiled food and the red deer appeared thin and had no food.

(ii) January 19, 2001 (TX). The hoofstocks' food supply was contaminated with dirt and mud.

i. October 19, 2000 (TX). Respondents failed to keep food receptacles clean and sanitary at all times, and specifically, provided animals (petting area) with a food receptacle that was contaminated with old, wet, and spoiled food.

j. Respondents failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary, and specifically:

(i) October 19, 2000 (TX). The serval's water receptacle was rusted and could not be sanitized; the water provided to three

- racoons, two wolves, one capybara, three kudu, four lechews and petting zoo animals was contaminated with algae and dirt; the racoons' water receptacle was contaminated with green algae; and two civets had no water at all.
- (ii) January 19, 2001 (TX). The two wolves' water and water receptacle were contaminated with dirty, green water.
- (iii) August 21, 2000 (OK). The only source of water available to animals in the petting zoo was a dirty wading pool and the water receptacles used by the cougars and tigers were dirty.
- k. Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors, and specifically:
- (i) August 21, 2000 (OK). Respondents housed three rhinoceroses in an enclosure that contained excessive feces, urine, and mud.
- (ii) January 19, 2001 (TX). Respondents housed two hyenas and racoons in enclosures that contained excessive feces and waste.
- (iii) February 12, 2001 (OK). Respondents housed a goat in an enclosure (food-prep room) that contained 1½ inches of packed excreta and a coatimundi in an enclosure that had, at least, a two-day accumulation of feces.
- (iv) April 19, 2001 (TX). Respondents housed rhinoceroses in an enclosure that contained excessive excreta.
- l. Respondents failed to keep premises (buildings and grounds) clean and in good repair to protect the animals from injury and to facilitate the prescribed husbandry practices, and to place accumulations of trash in designated areas that are cleared as necessary to protect the health of the animals, and specifically:
- (i) August 21, 2000 (OK). Respondents failed to remove rotten produce from the refrigerator (including a fruit box infested with maggots), failed to repair or replace the leaking water tap and deteriorating plywood the rhinoceros barn, the food-prep room was infested with flies and had unsanitary counters and floors, veterinary instruments were stored in a brown liquid and were rusty, and the giraffes' barn was contaminated with bird feces.
- (ii) February 12, 2001 (OK). Respondents failed to clean the unsanitary floors and counters in the food-prep room and to remove or clean the unoccupied, dirty enclosures outside the food-prep room.
- (iii) September 5, 2001 (OK). Respondents failed to remove flies, feces and trash from in and around the coatimundi's enclosure, the refrigerator's interior surfaces were rusted and

could not be sanitized.

(iv) November 7, 2001 (OK). Respondents failed to remove rotten produce from the refrigerator and failed to repair or remove damaged fencing throughout the facility.

m. September 5, 2001 (OK). Respondents failed to establish and maintain a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests, and specifically, failed to establish and maintain a minimally-adequate program to control fly infestation in and around the food-prep room and the coatimundi's enclosure.

n. Respondents failed to utilize a sufficient number of adequately trained employees to maintain the professionally acceptable level of husbandry practices, under a supervisor who has a background in animal care, and specifically:

(i) January 19, 2001 (TX). Respondents failed to have a supervisor with an adequate background in animal care provide training and supervision to employees who handled or provided husbandry and care to animals.

(ii) January 23, 2001 (TX). Respondents failed to utilize a sufficient number of adequately-trained employees to maintain an acceptable level of husbandry.

(iii) August 21, 2001 (OK). Respondents failed to utilize a sufficient number of adequately-trained employees to provide husbandry and care to their animals.

(iv) September 5, 2001 (OK). Respondents' four week-day employees and three week-end maintenance employees, were not sufficient to provide minimally-adequate care to respondents' 800 regulated animals (including nonhuman primates, large and small felids, large canids, bears, rhinoceroses, giraffes, camels, and hoofstock), as evidenced by the facility's disrepair and deterioration and the condition of the animals and their enclosures.

o. Respondents failed to house animals in compatible groups so as not to interfere with their health or cause them discomfort, and specifically:

(i) October 19, 2000 (TX). Respondents jointly housed incompatible animals, including red deer that appeared thin and overcrowded.

(ii) January 23, 2001 (TX). Respondents jointly housed incompatible animals in the drive through area; the animals competed for food and APHIS officials observed a juvenile Nilgai antelope that appeared to have been trampled to death by

other animals in the enclosure.

CONCLUSIONS

1. The Secretary of Agriculture has jurisdiction.
2. On November 29, 2001, respondents willfully violated section 2.4 of the Regulations by verbally abusing an APHIS official in the course of carrying out his or her duties. 9 C.F.R. § 2.4.
3. Respondents willfully violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40), as follows:
 - a. January 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with section 2.40(a)(1) of the Regulations. 9 C.F.R. § 2.40(a)(1).
 - b. Respondents failed to establish and maintain programs of adequate veterinary care, that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care, and specifically:
 - (i) October 19, 2000 and May 10, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.40(a) and 2.40(b)(2) of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(2).
 - (ii) February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.40(a) and 2.40(b)(2) of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(2).
 - c. On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).
4. September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) willfully violated section 2.75 of the Regulations (9 C.F.R. § 2.75), by failing to make, keep, and maintain records that fully and correctly disclose required information concerning animals in their possession. 9 C.F.R. § 2.75(b)(1).
5. On or about December 26, 2000 through on or about January 5, 2001. Respondents willfully violated the Regulations (9 C.F.R. § 2.131(e)), by failing to take appropriate measures to alleviate the impact

of climatic conditions that present a threat to an animal's health or well-being.

9 C.F.R. § 2.131(e), formerly cited as 9 C.F.R. § 2.131(d), *see* 69 Fed. Reg. 42089, 42102 (July 14, 2004).

6. Respondents willfully violated sections 3.75-3.77 of the Regulations by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. §§ 3.75-3.77), as follows:

a. October 19, 2000 and January 19, 2001(TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.75(c)(3) of the Regulations and Standards by failing to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards. 9 C.F.R. §§ 2.100(a), 3.75(c)(3).

b. January 19, 2001, January 23, 2001, April 19, 2001, and May 10, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a), 3.75(f), and 3.80(a)(2)(v) of the Regulations and Standards by failing to equip housing facilities with disposal facilities and drainage systems that are constructed, installed, maintained, and operated so that animal wastes and water are rapidly eliminated and the animals stay dry and as to minimize vermin and pest infestation, insects, odors, and disease hazards. 9 C.F.R. §§ 2.100(a), 3.75(f), 3.80(a)(2)(v).

c. August 21, 2000 and September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.75(c)(1), (2) of the Regulations and Standards by failing to maintain all surfaces of nonhuman primate facilities on a regular basis. 9 C.F.R. §§ 2.100(a), 3.75(c)(1), (2).

d. August 21, 2000, November 29, 2001 and February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.76(c) by failing to light indoor housing facilities well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates. 9 C.F.R. §§ 2.100(a), 3.76(c).

e. Respondents failed to construct and maintain facilities so that they are structurally sound for the species of nonhuman primates housed therein, maintained in good repair and that protect the animals from injury, contain the animals, and restrict other animals from entering, and specifically:

(i) February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(i),(ii) of the Regulations and

- Standards. 9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(i),(ii).
- (ii) September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(i),(ii) & (v) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(i),(ii) & (v).
- (iii) September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 3.75(a) and 3.80(ix) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(ix).
- f. On or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a), 3.77(a) and 3.80(a)(2)(vi) of the Regulations and Standards by failing to sufficiently heat sheltered housing when necessary to protect the nonhuman primates from extreme temperatures to provide for their health and well-being, and so the ambient temperature does not fall below 45 F for more than 4 consecutive hours when nonhuman primates are present. 9 C.F.R. §§ 2.100(a), 3.77(a), 3.80(a)(2)(vi).
- g. October 19, 2000 and January 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a), 3.75(a), 3.78(b) and 3.80(a)(2)(v),(vi) by failing to provide nonhuman primates with adequate shelter from the elements at all times that provides protection from the sun, rain, snow, wind, and cold, and from any weather conditions that may occur. 9 C.F.R. §§ 2.100(a), 3.75(a), 3.78(b), 3.80(a)(2)(v),(vi).
- h. November 7, 2001 and August 12, 2003 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.78(e) of the Regulations and Standards by failing to have barriers between fixed public exhibits housing nonhuman primates and the public any time the public is present, in order to restrict physical contact between the public and the nonhuman primate. 9 C.F.R. §§ 2.100(a), 3.78(e).
- i. August 12, 2003 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.81 of the Regulations and Standards by failing to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian. 9 C.F.R. §§ 2.100(a), 3.81.
- j. September 5, 2001 (OK). Respondents Milton Wayne Shambo

and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.82(a) of the Regulations and Standards by failing to provide nonhuman primates with diets that are appropriate for the species, size, age, and condition of the animals, and for the conditions in which the animals are maintained and with food that is clean, wholesome, and palatable to the animals that is of sufficient quantity and nutritive value to main a healthful condition, weight range, and to meet the animals' normal daily nutritional requirements. (9 C.F.R. §§ 2.100(a), 3.82(a)).

k. October 19, 2000 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.83 of the Regulations and Standards by failing to provide nonhuman primates with a sufficient quantity of potable water to nonhuman primates, in water receptacles that are clean and sanitized. 9 C.F.R. §§ 2.100(a), 3.83.

l. August 21, 2000 and February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.131(c) of the Regulations and Standards by failing to keep premises where housing facilities are located, including buildings and surrounding grounds, clean and in good repair to protect the nonhuman primates from injury, to facilitate husbandry practices, and to reduce or eliminate breeding and living areas for rodents, pests and vermin. 9 C.F.R. §§ 2.100(a), 3.131(c).

m. August 21, 2000 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a), and 3.85 of the Regulations and Standards by failing to have enough employees to carry out the requisite level of husbandry practices and care, that are trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of nonhuman primates. 9 C.F.R. §§ 2.100(a), 3.85.

7. Respondents willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:

a. Respondents failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain them in good repair to protect the animals from injury and to contain the animals, and specifically:

(i) October 19, 2000, January 19, 2001 and May 10, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX)

- failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.125(a).
- (ii) February 12, 2001 and September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.125(a).
- b. August 21, 2000, February 12, 2001 and November 7, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.125(c) of the Regulations and Standards by failing to store supplies of food and bedding in facilities that adequately protect such supplies against deterioration, molding, or contamination by vermin, and to provide refrigeration for perishable food. 9 C.F.R. §§ 2.100(a), 3.125(c).
- c. April 19, 2001 and September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.125(d) of the Regulations and Standards by failing to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards. 9 C.F.R. §§ 2.100(a), 3.125(d).
- d. Respondents failed to provide all animals kept outdoors with sufficient shade by natural or artificial means, when sunlight is likely to cause overheating or discomfort of animals, and specifically:
- (i) April 19, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.127(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(a).
- (ii) May 10, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.127(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(a).
- e. Respondents failed to provide animals kept outdoors with natural or artificial shelter to afford them protection and to prevent their discomfort, and specifically:
- (i) October 19, 2000, and on or about December 26, 2000 through on or about January 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.127(b) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(b).
- (ii) January 19, 2001, January 23, 2001 and May 10, 2001 (TX).

- Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.127(b) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(b).
- f. Respondents failed to provide a suitable method to rapidly eliminate excess water from animal enclosures, and specifically:
- (i) October 19, 2000 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.127(c) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(c).
 - (ii) September 5, 2001, November 7, 2001 and November 29, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.127(c) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.127(c).
- g. On or about October 19, 2000 through on or about January 19, 2001, August 21, 2000, September 5, 2001 and November 7, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.127(d) of the Regulations and Standards by failing to construct a perimeter fence that restricts animals and persons from going through or under it. 9 C.F.R. §§ 2.100(a), 3.127(d).
- h. October 19, 2000 and January 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.129(a), (b) of the Regulations and Standards by failing to provide animals with food that is wholesome, palatable, free from contamination and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination. 9 C.F.R. §§ 2.100(a), 3.129(a),(b).
- i. October 19, 2000 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.129(b) of the Regulations and Standards by failing to keep food receptacles clean and sanitary at all times. 9 C.F.R. §§ 2.100(a), 3.129(b).
- j. Respondents failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary, and specifically:
- (i) October 19, 2000 and January 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards.

9 C.F.R. §§ 2.100(a), 3.130.

(ii) August 21, 2000 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.130.

k. Respondents failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors, and specifically:

(i) August 21, 2000 and February 12, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.131(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.131(a).

(ii) January 19, 2001 and April 19, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.131(a) of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.131(a).

l. August 21, 2000, February 12, 2001, September 5, 2001 and November 7, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.131(c) of the Regulations and Standards by failing to keep premises (buildings and grounds) clean and in good repair to protect the animals from injury and to facilitate the prescribed husbandry practices, and to place accumulations of trash in designated areas that are cleared as necessary to protect the health of the animals. 9 C.F.R. §§ 2.100(a), 3.131(c).

m. September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.131(d) of the Regulations and Standards by failing to establish and maintain a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests. 9 C.F.R. §§ 2.100(a), 3.131(d).

n. Respondents failed to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under a supervisor who has a background in animal care, and specifically:

(i) January 19, 2001 and January 23, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.132 of the Regulations and Standards. 9 C.F.R. §§ 2.100(a), 3.132.

(ii) August 21, 2001 and September 5, 2001 (OK). Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) failed to comply with sections 2.100(a) and 3.132 of the Regulations and

Standards. 9 C.F.R. §§ 2.100(a), 3.132.
o. October 19, 2000 and January 23, 2001 (TX). Respondents Milton Wayne Shambo and Animals Inc. (AI-TX) failed to comply with sections 2.100(a) and 3.133 of the Regulations and Standards by failing to house animals in compatible groups so as not to interfere with their health or cause them discomfort. 9 C.F.R. §§ 2.100(a), 3.133.

**FINDINGS OF FACT AND CONCLUSIONS REGARDING
RESPONDENTS' COMPLIANCE HISTORY,
SIZE OF RESPONDENTS' BUSINESS, GRAVITY OF THE
VIOLATIONS,
AND RESPONDENTS' LACK OF GOOD FAITH**

8. Respondents have a large business. At all material times mentioned herein respondents held, on average, 461 animals (including wild and exotic animals such as camels, rhinoceroses, zebras, tigers, servals, chimpanzees, lemurs, and spider monkeys) for exhibition purposes.

9. The gravity of the violations identified herein is great. They include repeated instances in which respondents failed to provide minimally adequate husbandry and care to their animals despite having been repeatedly advised of animal care deficiencies.

10. Respondents do not have a previous history of violations. However, respondents' conduct over the material times in the complaint shows 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 lack of good faith.

ORDER

1. The provisions of this order shall be effective on the first day after this decision becomes final.

2. Respondents Milton Wayne Shambo, Animals Inc. (AI-OK), and Animals Inc. (AI-TX), and their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations

and Standards issued thereunder.

3. Animal Welfare Act licenses numbered **74-C-0467 and 73-C-0146 are hereby revoked.**

4. Respondents Milton Wayne Shambo and Animals Inc. (AI-OK) are jointly and severally assessed a **civil penalty of \$23,265**, which they shall pay within 60 days after service of this Order upon them, as follows.

The civil penalty shall be paid by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**". Respondents shall reference **AWA Docket No. 05-0024** on their certified check(s), cashier's check(s), or money order(s).

Payments of the civil penalty shall be sent by a commercial delivery service, such as FedEx or UPS, to, and received by, Bernadette R. Juarez, at the following address:

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Bernadette R. Juarez, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

FINALITY

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

* * *

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

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

PART 1—ADMINISTRATIVE REGULATIONS

**SUBPART H—RULES OF PRACTICE GOVERNING
FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE
SECRETARY UNDER**

VARIOUS STATUTES

§ 1.145 Appeal to Judicial Officer.

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

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

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

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in

connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

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

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

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

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

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any

right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

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

7 C.F.R. § 1.145

In re: CHERYL MORGAN d/b/a EXOTIC PET CO.
AWA Docket No. 05-0032.
Default Decision.
Filed March 29, 2006.

AWA – Default.

Bernadette Juarez for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the Motion of the Complainant for adoption of a Proposed Decision and Order and other pending Motions. Consistent with the Rules of Practice, a copy of the Motion for Adoption of the Proposed Decision and Order was served upon the Respondent. The Respondent replied by letter, indicating that she traveled a lot, had difficulty receiving certified mail, that due to the holidays, she had not had time to talk to an attorney and requested an extension of time in which to “solve this misunderstanding.” By Order dated December 29, 2005 (entered on December 30, 2005), United States Administrative Law Judge Jill S. Clifton granted the Respondent an extension of time until January 31, 2006 to file her response to the Motion for Adoption of the Proposed Decision and Order, but found the Respondent failed to have filed a timely response to the Complaint, found her to be in default and strongly encouraged the Respondent to contact counsel for the Complainant to try to settle the case.

By letter dated January 11, 2006 entered into the record on January 31, 2006, the Respondent again indicated that she traveled a lot, that she did not get certified mail on a timely basis and then generally denied the factual allegations contained in the Complaint. The Complainant then sought and received leave to file a Response to the Respondent's Objections and moved to strike certain pages from the Respondent's letter. The Respondent has filed a Reply to the Complainant's Response and the matter has been referred to the undersigned for disposition.

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards ("Regulations" and "Standards") issued thereunder (9 C.F.R. § 1.1 *et seq.*).

The Hearing Clerk sent copies of the complaint, by certified mail, return receipt requested, to respondent on September 9, 2005.⁴ The United States Postal Service marked said mailing "unclaimed" and returned it to the Hearing Clerk on November 3, 2005. On November 9, 2005, in accordance with section 1.147(c)(1) of the Rules of Practice, the Hearing Clerk served respondent, by regular mail, with copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151).⁵ 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. As previously noted in Judge Clifton's Order, the Respondent failed to file an answer within the time prescribed in the Rules of Practice and was found to be in default. Accordingly, the material facts alleged in the complaint are admitted by the respondent's failure to file an answer, are adopted and will be set forth herein as Findings of Fact.⁶ This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

FINDINGS OF FACT

⁴See Domestic Return Receipt for Article Number 7000 1670 0003 5453 3925.

⁵See Memorandum to File, dated November 9, 2005.

⁶In light of Judge Clifton's finding that the Respondent was in default and granted her additional time in which to "solve this misunderstanding," good cause will not be found to have existed to excuse her failure to have answered the Complaint in a timely manner.

1. Respondent Cheryl Morgan is an individual doing business as Exotic Pet Co and whose mailing address is 2006 Smith Lane, Beeville, Texas 78102. At all times mentioned herein, and between December 16, 2001, and December 16, 2004, said respondent was licensed and operating as an exhibitor, as that term is defined in the Act and the Regulations and held Animal Welfare Act license number 74-C-0406. On December 16, 2004, license number 74-C-0406 expired because it was renewed.

On or about March 16, 2005, respondent applied for a new Animal Welfare Act license and, as of June 21, 2005, respondent has operated as a dealer, as that term is defined in the Act and the Regulations and holds Animal Welfare Act license number 74-B-0530.

2. APHIS personnel conducted inspections of respondent's facilities, records and animals for the purpose of determining respondent's compliance with the Act, Regulations, and Standards on May 23, 2002 (10 animals inspected), February 25, 2003 (28 animals inspected), February 26, 2003 (43 animals inspected), August 28, 2003 (40 animals inspected), September 29, 2003 (20 animals inspected), May 26, 2004 (40 animals inspected), and August 12, 2004 (30 animals inspected).

3 Respondent has a medium-size business. At all material times mentioned herein respondent held, on average, 30 animals for exhibition or resale use (including spider monkeys, capuchin monkeys, baboons, rhesus monkeys, vervet monkeys, kinkajous, cavies, kangaroos, porcupines, a blackbuck antelope and a camel).

4. The gravity of the violations alleged in this complaint is great. They include numerous instances in which respondent failed to provide minimally-adequate veterinary care, husbandry and shelter to her animals.

5. Respondent has a previous history of violations. On July 4, 1999, complainant assessed, and respondent paid, a \$ 2,250 penalty for violations of the Act and Regulations documented in Animal Welfare Act investigation TX 99-086AC. Moreover, throughout the material time herein, respondent has continually failed to provide minimally-adequate veterinary care and husbandry to her animals despite having been repeatedly advised of such deficiencies. 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 lack of good faith.

6. Respondent violated the attending veterinarian and veterinary care regulations, as follows:

a. May 23, 2002, August 28, 2003, and September 29, 2003. Respondent failed to establish and maintain programs of adequate veterinary care that included a written program of veterinary care and regularly scheduled visits to the premises, and specifically, failed to make her written program of veterinary care available to APHIS officials during their inspection of her facility.

b. Respondent failed to establish and maintain an adequate program of veterinary care that included the availability of appropriate facilities, equipment, and services, and the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and specifically:

(i) May 23, 2002. Respondent failed to obtain veterinary treatment for a female Capuchin monkey with a severely injured tail.

(ii) May 23, 2002. Respondent housed nonhuman primates in enclosures that failed to protect them from injuries and disease.

(iii) On or about February 6, 2003. Respondent failed to have appropriate facilities, services and methods available to provide minimally-adequate care to no fewer than eight animals, including: four hypothermic sugar gliders; one sugar glider that suffered from a prolapsed rectum; one neonatal capuchin monkey that suffered from diarrhea; one neonatal capuchin monkey that had nasal discharge and appeared dehydrated and lethargic; and, one neonatal macaque that had nasal discharge and suffered from diarrhea.

(iv) February 25, 2003. Respondent failed to obtain veterinary treatment for a spider monkey that had discharge exuding from both eyes and appeared hypothermic.

(v) February 26, 2003. Respondent failed to obtain veterinary treatment for a spider monkey that had discharge exuding from both eyes and appeared hypothermic and a juvenile blackbuck antelope that appeared bloated, hypothermic and had a rough hair coat.

(vi) August 28, 2003. Respondent failed to obtain veterinary treatment for a juvenile blackbuck antelope that appeared bloated.

(vii) September 29, 2003. Respondent failed to obtain veterinary treatment for a juvenile blackbuck antelope that appeared bloated.

c. On or about May 23, 2002. Respondent failed to establish and maintain programs of adequate veterinary care that included daily observation of all animals to assess their health and well-being with a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinary, and specifically, failed to observe, and convey timely and accurate information to her attending

veterinarian concerning, a female capuchin monkey that had a severely injured tail, which injury became infected, necrotic and resulted in the animal's tail being amputated.

7. On the dates as follows, respondent violated the record-keeping regulations by failing to make, keep, and maintain records which fully and correctly disclose information concerning animals in her possession, and specifically:

a. May 23, 2002, August 28, 2003, and September 29, 2003. Respondent failed to maintain, and make available for inspection, records concerning her acquisition and disposition of animals and animals she had on hand.

b. May 26, 2004. Respondent failed to maintain, and make available for inspection, complete and accurate records concerning animals on hand, records concerning the disposition of animals (including a female spider monkey, two juvenile tigers, a vervet monkey and capuchin monkey), and records concerning the acquisition of four infant rhesus monkeys.

8. Respondent violated the handling regulations by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being, and specifically:

a. February 25, 2003. Respondent failed to provide appropriate heat, shelter, and care to two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys that were exposed to cold, wet weather.

b. February 26, 2003. Respondent failed to provide appropriate heat, shelter, and care to four spider monkeys, seven capuchin monkeys, three vervet monkeys, a baboon, and rhesus monkeys that were exposed to temperatures below 45 degrees Fahrenheit.

9. On or about February 6, 2003. Respondent violated the handling regulations by failing to handle three kinkajous, three nonhuman primates, and twenty-eight sugar gliders as expeditiously and careful as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort.

10. Respondent violated the Regulations and Standards by failing to meet the minimum facilities and operating standards for nonhuman primates, as follows:

a. Respondent failed to construct and maintain housing facilities for nonhuman primates that are structurally sound for the species of

nonhuman primates housed therein, maintained in good repair, and that protect the animals from injury and contain them, and specifically:

(i) May 23, 2002. The wire wall that separated the adjacently housed pig-tailed macaque and five capuchin monkeys lacked adequate structural integrity to contain the animals in their respective enclosures, thereby risking cross-contact injury.

(ii) February 26, 2003. Respondent failed to repair or replace loose wire in an enclosure housing two capuchin monkeys, a collapsed resting shelf in the enclosure housing two rhesus monkeys, and failed to remove an electrical cord in the enclosure housing a vervet monkey and broken glass in the enclosure housing two vervet monkeys.

(iii) May 26, 2004. Respondent housed two capuchin monkeys in an enclosure that lacked adequate structural integrity and safety mechanisms to contain the animals, which failure allowed the animals to escape.

(iv) August 12, 2004. Respondent failed to repair or replace chewed, holed, and splintered shelter structures in enclosures housing macaques, capuchin monkeys, baboons.

b. Respondent failed to keep housing facilities and areas used for storing animal food or bedding free of any accumulation of trash, waste material, junk, weeds, and other discarded materials, and specifically:

(i) August 28, 2003. Respondent failed to remove boxes, tools, and trash from the room used to store animal food and bedding.

(ii) May 26, 2004. Respondent failed to remove caulk, insecticides, bags, a jug, fertilizer and other discarded items from the room used to store animal food and failed to clean and sanitize the refrigerator used to store animal food.

c. May 26, 2004. Respondent failed to construct and maintain all surfaces of nonhuman primate facilities in a manner and of materials that protect the animals from injury, and that allow them to be readily cleaned and sanitized, and specifically, failed to repair or replace chewed shelter boxes with exposed, splintered wood and chipped linoleum from the resting platforms in primate enclosures.

d. Respondent failed to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards, and specifically:

(i) February 25, 2003. Respondent deprived animals of the freedom to avoid contact with excreta by failing to remove excessive feces and old food from the floors, shelters, walls and perches of enclosures that housed a baboon, seven capuchin monkeys, and three vervet monkeys.

(ii) February 26, 2003. Respondent deprived animals of the freedom to avoid contact with excreta by failing to remove excessive feces and

old food from the floors, shelters, and walls and perches of enclosures that housed a female baboon, seven capuchin monkeys, and two vervet monkeys.

(iii) August 28, 2003. Respondent failed to remove old food, feces, and urine from the floors, shelters, walls, resting boards and perches of enclosures that housed four capuchin monkeys, three vervet monkeys, and two white-faced capuchin monkeys. (iv) September 29, 2003. Respondent failed to remove dirt, body oils and feces from the walls in the enclosures that housed five capuchin monkeys.

(v) May 26, 2004. Respondent failed to remove accumulated body oils and old food from the resting shelves and shelter boxes in enclosures housing nonhuman primates.

e. Respondent failed to store supplies of food and bedding in a manner that protected the supplies from spoilage, contamination, and vermin infestation, and specifically:

(i) February 25, 2003. Respondent failed to store three open bags of feed in leakproof containers with tightly fitting lids.

(ii) February 26, 2003. Respondent stored sacks of food on a wet floor and near insecticides, paints, old plastic bags, rags, and other discarded items. (iii) May 26, 2004. Respondent stored food supplies in a dirty refrigerator that contained spoiled food.

f. Respondent failed to only house nonhuman primates that are acclimated, as determined by the attending veterinarian, to the prevailing temperature and humidity at the outdoor housing facility during the time of year they are at the facility, and that can tolerate the range of temperatures and climatic conditions known to occur at the facility without stress or discomfort, and specifically:

(i) February 25, 2003. Two spider monkeys, two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys housed in outdoor enclosures, without the attending veterinarian having determined that the animals were acclimated to the prevailing weather conditions, exhibited symptoms of discomfort and stress (shivered and appeared hypothermic) related to the prevailing climatic conditions.

(ii) February 26, 2003. Four spider monkeys and seven capuchin monkeys housed in outdoor enclosures, without the attending veterinarian having determined that the animals were acclimated to the prevailing weather conditions, exhibited symptoms of discomfort and stress (shivered and appeared hypothermic) related to the prevailing climatic conditions.

g. Respondent failed to provide nonhuman primates housed outdoors with adequate shelter from the elements at all times, and specifically:

(i) February 25, 2003. Respondent failed to provide any heat to two

spider monkeys, two lemurs, one baboon, seven capuchin monkeys, two macaques, and four vervet monkeys when the ambient temperature was below 45 degrees Fahrenheit.

(ii) February 26, 2003. Respondent failed to provide minimally-adequate shelter (including bedding and wind and rain breaks) and heat to four spider monkeys, seven capuchin monkeys, three vervet monkeys, a baboon, and rhesus monkeys when the ambient temperature was below 40 degrees Fahrenheit.

(iii) August 12, 2004. Respondent failed to provide minimally-adequate shelter for four spider monkeys; the animals' sole means of shelter (a plastic barrel and wood box) were too small to accommodate all four animals and lacked wind and rain breaks.

h. Respondent failed to house nonhuman primates in enclosures that provide the minimum space requirements, and specifically:

(i) On or about February 6, 2003. Respondent housed three infant monkeys (two capuchin monkeys and one macaque) in an enclosure that lacked minimally-adequate space, thereby depriving the animals of the ability to make normal postural adjustments with adequate freedom of movement.

(ii) May 26, 2004. Respondent housed four infant macaques in enclosures that lacked minimally-adequate space, thereby depriving the animals of the ability to make normal postural adjustments with adequate freedom of movement.

j. Respondent failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian, and that is available to APHIS upon request, and specifically:

(i) May 23, 2002. Respondent failed to make her written plan for environment enhancement available to APHIS officials during their inspection of her facility and failed to provide five capuchin monkeys with species-typical enrichment activities, including elevated perches and cage complexities.

(ii) On or about February 6, 2003. Respondent failed to provide any environment enhancement to three infant monkeys (two capuchin monkeys and one macaque).

(iii) August 28, 2003. Respondent failed to make her written plan for environment enhancement available to APHIS officials during their inspection of her facility.

(iv) May 26, 2004. Respondent failed to make her written plan for environment enhancement available to APHIS officials during their

inspection of her facility and failed to provide spider monkeys with species-typical enrichment activities, including ropes or brachiating structure.

11. Respondent violated the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals, as follows:

a. Respondent failed to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain them in good repair to protect the animals from injury and to contain the animals, and specifically:

(i) February 26, 2003. Respondent risked injury to her animals by failing to provide any housing for a camel that roamed throughout the facility and was exposed to, among other things, numerous electrical cords and by housing a juvenile blackbuck antelope in an enclosure that contained sharp, protruding chain link fencing.

(ii) August 12, 2004. Respondent failed to house animals in enclosures that protect them from injury by housing a juvenile cougar and juvenile tiger in enclosure that contained holes and gaps in the floor and Patagonian caviars and crested porcupines in enclosures that had floors with exposed, sharp, protruding wires.

b. On or about February 6, 2003. Respondent failed to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards, and specifically, failed to remove animal and food waste, old bedding, and a dead animal from enclosures housing three kinkajous and twenty-eight sugar gliders.

c. Respondent failed to construct a perimeter fence that restricts animals and unauthorized persons from going through or under it and having contact with the animals in the facility, and that acts as a secondary containment system for animals in the facility, and specifically:

(i) February 25, 2003. Respondent failed to construct and maintain a perimeter fence around three kangaroos, a juvenile blackbuck antelope and a camel.

(ii) February 26, 2003. Respondent failed to construct and maintain a perimeter fence around three kangaroos and three porcupines.

d. Respondents failed to provide animals with food that is wholesome, palatable, free from contamination and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal,

and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination, and specifically:

(i) On or about February 6, 2003. Respondent failed to provide twenty-eight sugar gliders with food of sufficient quantity and nutritive value to maintain good animal health; all of the animals ate voraciously when offered food and many appeared malnourished and underweight.

(ii) May 26, 2004. Respondent fed cavies, African porcupines, and capybaras decaying cabbage.

e. On or about February 6, 2003. Respondent failed to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary, and specifically, provided a small amount (if any) of dirty water to twenty-eight sugar gliders; when offered water the animals drank thirstily.

f. Respondent failed to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors, and specifically:

(i) On or about February 6, 2003. Respondent housed three kinkajous in an enclosure that contained excessive feces.

(ii) February 25, 2003. Respondent housed two kinkajous in an enclosure that contained excessive feces.

(iii) February 26, 2003. Respondent housed two kinkajous in an enclosure that contained excessive feces.

g. Respondent failed to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under the supervisor who has a background in animal care, and specifically:

(i) On or about February 6, 2003. Respondent's one unsupervised employee was unable to provide minimally-adequate care and husbandry to her animals as evidenced by the condition of the animals and their enclosures.

(ii) February 25, 2003. Respondent's one unsupervised, part-time employee was unable to provide minimally-adequate care and husbandry to her animals as evidenced by the excessive feces and food in the animals' enclosures and lack of basic shelter.

(iii) February 26, 2003. Respondent's one unsupervised, part-time employee was unable to provide minimally-adequate care and husbandry to her animals as evidenced

by the excessive feces and food in the animals' enclosures and lack of basic shelter.

CONCLUSIONS OF LAW

1. The Secretary had jurisdiction over this matter.

2. Respondent willfully violated the attending veterinarian and veterinary care regulations (9 C.F.R. § 2.40), as follows:

a. On May 23, 2002, August 28, 2003, and September 29, 2003, respondent failed to comply with sections 2.40(a)(1) and 2.126(a)(2) of the Regulations. (9 C.F.R. §§ 2.40(a)(1), 2.126(a)(2)).

b. On May 23, 2002, on or about February 6, 2003, February 25, 2003, February 26, 2003, August 28, 2003, and September 29, 2003, respondent failed to comply with sections 2.40(a) and 2.40(b)(1), (2) of the Regulations. (9 C.F.R. §§ 2.40(a), 2.40(b)(1), (2)).

c. On or about May 23, 2002, respondent failed to comply with sections 2.40(a) and 2.40(b)(3) of the Regulations. (9 C.F.R. §§ 2.40(a), 2.40(b)(3)).

3. On May 23, 2002, August 28, 2003, September 29, 2003, and May 26, 2004, respondent willfully violated sections 2.75(b)(1) and 2.126(a)(2) of the Regulations by failing to make, keep, and maintain records which fully and correctly disclose information concerning animals in her possession. (9 C.F.R. §§ 2.75(b)(1), 2.126(a)(2)).

4. On February 25, 2003, and February 26, 2003, respondent willfully violated section 2.131(e) of the handling regulations by failing to take appropriate measures to alleviate the impact of climatic conditions that present a threat to an animal's health or well-being. (9 C.F.R. § 2.131(e)).

5. On or about February 6, 2003, respondent willfully violated section 2.131(b) of the handling regulations by failing to handle animals as expeditiously and carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort. (9 C.F.R. § 2.131(b)).

6. Respondent willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for nonhuman primates (9 C.F.R. § 3.75-3.92), as follows:

a. Respondent failed to construct and maintain housing facilities for nonhuman primates that are structurally sound for the species of nonhuman primates housed therein, maintained in good repair, and that protect the animals from injury and contain them, and specifically:

(i) On May 23, 2002, respondent failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(ii) of the Regulations and Standards.

- (9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(ii)).
- (ii) On February 26, 2003, respondent failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(i),(ii) of the Regulations and Standards. (9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(i),(ii)).
- (iii) On May 26, 2004, respondent failed to comply with sections 2.100(a), 3.75(a) and 3.80(a)(2)(iii) of the Regulations and Standards. (9 C.F.R. §§ 2.100(a), 3.75(a), 3.80(a)(2)(iii)).
- (iv) On August 12, 2004, respondent failed to comply with sections 2.100(a), 3.75(a), 3.75(c) and 3.80(a)(2)(iii) of the Regulations and Standards. (9 C.F.R. §§ 2.100(a), 3.75(a), 3.75(c), 3.80(a)(2)(iii)).
- b. On August 28, 2003, and May 26, 2004, respondent failed to comply with sections 2.100(a) and 3.75(b) of the Regulations and Standards by failing to keep housing facilities and areas used for storing animal food or bedding free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. (9 C.F.R. §§ 2.100(a), 3.75(b)).
- c. On May 26, 2004, respondent failed to comply with sections 2.100(a), 3.75(c) and 3.80(a)(2)(i),(ii) & (ix) of the Regulations and Standards by failing to construct and maintain all surfaces of nonhuman primate facilities in a manner and of materials that protect the animals from injury, and that allow them to be readily cleaned and sanitized. (9 C.F.R. §§ 2.100(a), 3.75(c), 3.80(a)(2)(i),(ii) & (ix)).
- d. On February 25, 2003, February 26, 2003, August 28, 2003, September 29, 2003, and May 26, 2004, respondent failed to comply with sections 2.100(a), 3.75(c)(3), 3.80(a)(2)(v) and 3.84(a) of the Regulations and Standards by failing to spot-clean hard surfaces of primary enclosures for nonhuman primates daily to prevent accumulation of excreta or disease hazards. (9 C.F.R. §§ 2.100(a), 3.75(c)(3), 3.80(a)(2)(v), 3.84(a)).
- e. On February 25, 2003, February 26, 2003, and May 26, 2004, respondent failed to comply with sections 2.100(a) and 3.75(e) of the Regulations and Standards by failing to store supplies of food and bedding in manner that protected the supplies from spoilage, contamination, and vermin infestation. (9 C.F.R. §§ 2.100(a), 3.75(e)).
- f. On February 25, 2003, and February 26, 2003, respondent failed to comply with sections 2.100(a) and 3.78(a) of the Regulations and Standards by failing to only house nonhuman primates that are acclimated, as determined by the attending veterinarian, to the prevailing temperature and humidity at the outdoor housing facility during the time of year they are at the facility, and that can tolerate the range of temperatures and climatic conditions known to occur at the facility without stress or discomfort. (9 C.F.R. §§ 2.100(a), 3.78(a)).
- g. On February 25, 2003, February 26, 2003, and August 12, 2004,

respondent failed to comply with sections 2.100(a), 3.78(b) and 3.80(a)(2)(vi) of the Regulations and Standards by failing to provide nonhuman primates housed outdoors with adequate shelter from the elements at all times. (9 C.F.R. §§ 2.100(a), 3.78(b), 3.80(a)(2)(vi)).

h. On or about February 6, 2003, and May 26, 2004, respondent failed to comply with sections 2.100(a), 3.80(a)(xi), 3.80(b)(2)(i) and 3.87(e) of the Regulations and Standards by failing to house nonhuman primates in enclosures that provide the minimum space requirements. (9 C.F.R. §§ 2.100(a), 3.80(a)(xi), 3.80(b)(2)(i), 3.87(e)).

j. Respondent failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of nonhuman primates that is in accordance with the currently accepted professional journals or reference guides, or as directed by the attending veterinarian, and that is available to APHIS upon request, and specifically:

(i) On May 23, 2002, and May 26, 2004, respondent failed to comply with sections 2.126(a)(2), 2.100(a), 3.81 and 3.81(b) of the Regulations and Standards. (9 C.F.R. §§ 2.126(a)(2), 2.100(a), 3.81, 3.81(b)).

(ii) On or about February 6, 2003, respondent failed to comply with sections 2.126(a)(2), 2.100(a), 3.81 and 3.81(c)(1) of the Regulations and Standards. (9 C.F.R. §§ 2.126(a)(2), 2.100(a), 3.81, 3.81(c)(1)).

(iii) On August 28, 2003, respondent failed to comply with sections 2.126(a)(2), 2.100(a) and 3.81 of the Regulations and Standards. (9 C.F.R. §§ 2.126(a)(2), 2.100(a), 3.81).

7. Respondent willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:

a. On February 26, 2003, and August 12, 2004, respondent failed to comply with sections 2.100(a) and 3.125(a) of the Regulations and Standards by failing to construct indoor and outdoor housing facilities so that they were structurally sound and failed to maintain them in good repair to protect the animals from injury and to contain the animals. (9 C.F.R. §§ 2.100(a), 3.125(a)).

b. On or about February 6, 2003, respondent failed to comply with sections 2.100(a) and 3.125(d) of the Regulations and Standards by failing to make provisions for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris and to provide and operate disposal facilities as to minimize vermin infestation, odors, and disease hazards. (9 C.F.R. §§ 2.100(a), 3.125(d)).

- c. On February 25, 2003 and February 26, 2003, respondent failed to comply with sections 2.100(a) and 3.127(d) of the Regulations and Standards by failing to construct a perimeter fence that restricts animals and unauthorized persons from going through or under it and having contact with the animals in the facility, and that acts as a secondary containment system for animals in the facility. (9 C.F.R. §§ 2.100(a), 3.127(d)).
- d. On or about February 6, 2003 and May 26, 2004, respondent failed to comply with sections 2.100(a) and 3.129(a) of the Regulations and Standards by failing to provide animals with food that is wholesome, palatable, free from contamination and of sufficient quantity and nutritive value to maintain good animal health, that is prepared with consideration for the age, species, condition, size, and type of animal, and that is located so as to be accessible to all animals in the enclosure and placed so as to minimize contamination. (9 C.F.R. §§ 2.100(a), 3.129(a)).
- e. On or about February 6, 2003, respondent failed to comply with sections 2.100(a) and 3.130 of the Regulations and Standards by failing to make potable water accessible to the animals at all times, or as often as necessary for the animals' health and comfort, and to keep water receptacles clean and sanitary. (9 C.F.R. §§ 2.100(a), 3.130).
- f. On or about February 6, 2003, February 25, 2003, and February 26, 2003, respondent failed to comply with sections 2.100(a) and 3.131(a) of the Regulations and Standards by failing to remove excreta from primary enclosures as often as necessary to prevent contamination of animals, minimize disease hazards, and reduce odors. (9 C.F.R. §§ 2.100(a), 3.131(a)).
- g. On or about February 6, 2003, February 25, 2003, and February 26, 2003, respondent failed to comply with sections 2.100(a), 3.85 and 3.132 of the Regulations and Standards by failing to utilize a sufficient number of adequately-trained employees to maintain the professionally acceptable level of husbandry practices, under the supervisor who as a background in animal care. (9 C.F.R. §§ 2.100(a), 3.85, 3.132).

ORDER

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.
2. Respondent is assessed a civil penalty of \$16,280. The civil penalty shall be paid by certified check or money order made payable to

the Treasurer of the United States and sent to:
Bernadette R. Juarez
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, Bernadette R. Juarez within 60 days after service of this order on Respondent. Respondent shall state on her certified check or money order that the payment is in reference to AWA Docket No. 05-0032.

3. Animal Welfare Act license numbers 74-C-0406 and 74-B-0530 are hereby revoked.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

In re: MARJORIE AND HAROLD WALKER, d/b/a LINN CREEK KENNEL.
AWA Docket No. 04-0021.
Default Decision and Order.
Filed May 25, 2006.

AWA – Default.
Sharlene Deskins for Complainant.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

**DECISION AND ORDER UPON ADMISSION
OF FACTS BY REASON OF DEFAULT**

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by

the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondents willfully violated the Act and the regulations 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 Respondents by certified mail on July 26, 2004. 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 to the Complaint 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 and conclusions of law.

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

Findings of Fact and Conclusions of Law

I

A. Marjorie Walker and Harold Walker, hereinafter referred to as Respondents, are individuals doing business as Linn Creek Kennel whose address is P. O. Box 107, Gentry, Missouri 64453.

B. The Respondents, at all times material hereto, were licensed and operating as a dealer as defined in the Act and the regulations.

II

A. On or about March 5, 2001, the Respondents transported puppies in interstate commerce without valid health certificates, in willful violation of section 2.78(a) and (c) of the regulations (9 C.F.R. § 2.78(a) and (c)).

III

A. On July 9, 2001, APHIS inspected Respondents' premises and records and found that Respondents transported puppies in interstate commerce without valid health certificates, in willful violation of section 2.78(a) of the regulations (9 C.F.R. § 2.78(a)).

IV

A. On November 5, 2001, the Respondents transported puppies in interstate commerce that were not eight weeks of age, in willful violation of section 2.130 of the regulations (9 C.F.R. § 2.130).

V

A. On November 15, 2001, APHIS inspected Respondents' premises and records and found that the Respondents failed to identify dogs, in willful violation of section 2.50(a)(1) of the regulations (9 C.F.R. § 2.50(a)(1)).

B. On November 15, 2001, APHIS inspected Respondents' premises and records and found that the Respondents failed to make and maintain records which correctly disclosed required information for dogs held at the facility, in willful violation of section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

C. On November 15, 2001, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondents failed to provide housing facilities for dogs that were in good repair and which protected the dogs from injury (9 C.F.R. § 3.1(a)); and

2. Respondents failed to adequately clean and sanitize water receptacles (9 C.F.R. § 3.10).

VI

A. On November 27, 2001, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondents failed to position primary enclosures for puppies and kittens in a manner that allowed the puppies and kittens to be easily

and quickly removed in the case of an emergency (9 C.F.R. § 3.15(f)).

VII

A. On January 16, 2002, APHIS inspected Respondents' premises and records and found that Respondents had failed to identify dogs, in willful violation of section 2.50(a)(1) of the regulations (9 C.F.R. § 2.50(a)(1)).

B. On January 16, 2002, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondents failed to provide clean, dry bedding for dogs that were wet when the temperature was in the upper 20 Fahrenheit range (9 C.F.R. § 3.4(b)(4)); and
2. Respondents failed to remove excreta from primary enclosures on a daily basis (9 C.F.R. § 3.11(a)).

VIII

A. On March 18, 2002, the Respondents transported puppies in interstate commerce that were not eight weeks of age, in willful violation of section 2.130 of the regulations (9 C.F.R. § 2.130).

IX

A. On April 1, 2002, the Respondents transported puppies in interstate commerce that were not eight weeks of age, in willful violation of section 2.130 of the regulations (9 C.F.R. § 2.130).

B. On April 1, 2002, APHIS inspected Respondents' premises and records and found that Respondents transported seventy-seven puppies in interstate commerce without valid health certificates, since the health certificates were not dated in willful violation of section 2.78(a) of the regulations (9 C.F.R. § 2.78(a)).

X

A. On July 18, 2002, APHIS inspected Respondents' premises and records and found that Respondents had failed to provide adequate veterinary care, in willful violation of section 2.40(b) of the regulations (9 C.F.R. § 2.40(b)).

B. On July 18, 2002, APHIS inspected Respondents' premises and records and found that Respondents had failed to identify dogs, in willful violation of section 2.50(a)(3) and (b)(1) of the regulations (9 C.F.R. § 2.50(a)(3) and (b)(1)).

C. On July 18, 2002, APHIS inspected Respondents' premises and records and found that Respondents had failed to make and maintain records which correctly disclosed required information for dogs held at the facility, in willful violation of section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

D. On July 18, 2002, APHIS inspected the Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Respondents failed to provide housing facilities that were structurally sound and maintained to secure the dogs and protect them from injury (9 C.F.R. § 3.1(a));

2. Respondents failed to provide outdoor housing that provided shelter from the elements for all dogs located outside (9 C.F.R. § 3.4(b));

3. Respondents failed to provide dog enclosures that had coated wire floors or were more than 1/8 of an inch in diameter (9 C.F.R. § 3.6(a)(2)(xii));

4. Respondents failed to remove excreta and food waste from primary enclosures on a daily basis (9 C.F.R. § 3.11(a)); and

5. Respondents failed to properly clean and sanitize water and food receptacles and primary enclosures (9 C.F.R. § 3.11(b)(2)).

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 willfully violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. 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 issued thereunder, and in

particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, in a manner that minimizes contamination and disease risks;

(c) Failing to construct and maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(d) Failing to provide animals with adequate shelter from the elements;

(e) Failing to keep food and water receptacles clean and sanitized;

(f) 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;

Failing to individually identify animals, as required;

(h) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required;

(i) Transporting animals in interstate commerce without valid health certificates;

(j) Transporting animals in interstate commerce that are not eight weeks of age;

(k) Failing to transport animals in primary enclosures that allowed the animals to be quickly removed in an emergency;

(l) Failing to provide clean, dry bedding for animals; and

(m) Failing to provide dog enclosures that have coated wire floors or that are more than an 1/8 inch in diameter.

2. The Respondents are jointly and severally assessed a civil penalty of \$13,500, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The Respondents' license is suspended for 30 days and continuing thereafter until the Respondents demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein. When the Respondents demonstrate to the Animal and Plant Health Inspection Service that they

have satisfied this condition and paid the civil penalty in full, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

The provisions of this Order shall become effective on the first day after service of this decision on the Respondents.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in 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.

DEFAULT DECISIONS

PLANT QUARANTINE ACT

In re: JOHN M. BRUCE, d/b/a ST. JOHN GROUP
P.Q. Docket No. 04-0015.
Decision and Order.
Filed April 17, 2006.

P.Q. – Default.

James Booth for Complainant.
Respondent, Pro se.
Decision and Order by Administration Law Judge Peter M. Davenport.

DECISION and ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of the importation of fresh limes into the United States (7 C.F.R. § 319.56 *et seq.* and § 330.105 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service on September 17, 2004, alleging that the respondent violated the Act and regulations promulgated under the Acts (7 C.F.R. § 319.56 *et seq.* and § 330.105 *et seq.*).

The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734). This complaint specifically alleged that the respondent imported a truck load (approximately 37,000 lbs) of fresh limes from Mexico into the United States at Laredo, Texas, and upon arrival at the port of first arrival failed to notify USDA of the permit for the shipment of fresh limes and other required information regarding the shipment; failed to offer the shipment of fresh limes for entry into the United States; failed to have the shipment of fresh limes inspected at the port of first arrival; failed to have the shipment properly release by a USDA inspector; and removed the shipment of fresh limes from the port of first arrival before the shipment had been inspected and released for movement by a USDA inspector.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). In fact, the respondent has not filed any answer whatsoever. 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. John M. Bruce, d.b.a St. John Group, hereinafter referred to as the respondent, is an individual whose mailing address is 711 Timber Lane, Laredo, Texas, 78045.
2. On or about June 30, 2000, the respondent imported a truck load (approximately 37,000 lbs) of fresh limes from Mexico into the United States at Laredo, Texas, and upon arrival at the port of first arrival (Laredo, TX) failed to notify USDA of the permit for the shipment of fresh limes (U.S. Customs entry # AY1-0001746-8) and other required information regarding the shipment in violation of 7 C.F.R. § 319.56-5(a); and failed to offer the shipment of fresh limes for entry into the United States in violation of 7 C.F.R. § 319.56-6(b).
3. On or about June 30, 2000, the respondent imported a truck load (approximately 37,000 lbs) of fresh limes from Mexico into the United States at Laredo, Texas, without having the shipment of fresh limes inspected at the port of first arrival in violation of 7 C.F.R. § 319.56-6(a); and failed to have the shipment properly release by a USDA inspector at the port of first arrival in violation of 7 C.F.R. § 330.105(a).
4. On or about June 30, 2000, the respondent imported a truck load (approximately 37,000 lbs) of fresh limes from Mexico into the United States at Laredo, Texas, and removed the shipment of fresh limes from the port of first arrival before the shipment had been inspected and released for movement by a USDA inspector in violation of 7 C.F.R. § 319.56-6(d).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent, John M. Bruce, d.b.a St. John Group, is assessed a civil penalty of three thousand dollars (\$3,000.00). The respondent shall pay three thousand dollars (\$3,000.00) as a civil penalty. This civil 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. 04-0015

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

In re: FONONGA LELENOA.
P.Q. Docket No. 06-0003.
Decision and Order.
Filed April 20, 2006.

P.Q. – Default.

Krishna G. Ramaraju for Complainant
Respondent, Pro se.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of flowers from Hawaii into the Continental United States (7 C.F.R. §§ 318.13 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701 *et seq.*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on October 19, 2005, alleging that respondent Fononga Lelenoa violated the Act and regulations promulgated under the Acts (7 C.F.R. §§ 318.13 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about May 1, 2003, at Honolulu, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 0.40 pounds of fresh tuberoses flowers (*polianthes tuberosa*) (1 jade-colored *lei*) for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

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. Fononga Lelenoa, hereinafter referred to as respondent, is an individual with a mailing address of 1527 Pohaku Street, Honolulu, Hawaii 96817.
2. On or about May 1, 2003, at Honolulu, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service,

approximately 0.40 pounds of fresh tuberose flowers (*polianthes tuberosa*) (1 jade-colored *lei*) for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 318.13 *et seq.*). Therefore, the following Order is issued.

Order

Respondent Fononga Lelena is assessed a civil penalty of five hundred dollars (\$500). This civil 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. 06-0003.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

In re: EMILYN QUIMOYOG.
P.Q. Docket No. 06-0002.
Decision and Order.
Filed April 21, 2006.

P.Q. – Default.

Krishna G. Ramaraju for Complainant.

Respondent, Pro se.

Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

DECISION and ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of vegetables from Hawaii into the Continental United States (7 C.F.R. §§ 318.13 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq.*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on October 19, 2005, alleging that respondent Emilyn Quimoyog violated the Act and regulations promulgated under the Acts (7 C.F.R. § 318.13 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about August 21, 2003, at Waianae, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 1.8 pounds of fresh moringa pods (*Moringa sp.*) for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. 318.13(b) and 318.13-2(a).

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. Emilyn Quimoyog, hereinafter referred to as respondent, is an individual with a mailing address of 84-1005 Kaulaili Road, Waianae, Hawaii 96792.

2. On or about August 21, 2003, at Waianae, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately 1.8 pounds of fresh moringa pods (*Moringa sp.*) for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 318.13 *et seq.*). Therefore, the following Order is issued.

Order

Respondent Emilyn Quimoyog is assessed a civil penalty of five hundred dollars (\$500). This civil 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. 06-0002.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

In re: LOUIS A. BARRERA.
P.Q. Docket No. 06-0010.
Decision and Order.
Filed April 21, 2006.

P.Q. – Default.

Carylne S. Cockrum for Complainant.
Respondent, Pro se.

Decision and Order by Administrative Law Judge Peter M. Davenport

Default Decision and Order

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 *et seq.*)(the Act), 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 by a complaint filed on December 12, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture and served by certified mail on respondent Luis A. Barrera on December 20, 2005. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent Luis A. Barrera was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent's answer thus was due no later than January 9, 2006, twenty days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent Luis A. Barrera never filed an answer to the complaint and the Hearing Clerk's Office mailed him a No Answer Letter on February 14, 2006.

Therefore, respondent Luis A. Barrera failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise respond to the allegations of the complaint. 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) or to deny or otherwise respond to the allegations of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent's failure to answer is likewise deemed a waiver of hearing. 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. Luis A. Barrera, herein referred to as respondent, is an individual with an address of 1784 5th Avenue, BXC 46, Bayshore, NY 11706.

2. On or about March 2, 2004, the respondent, in violation of Section 412 (a) of the Act (7 U.S.C. § 7712 (a)) and Section 319.56 of the Code of Federal Regulations (7 C.F.R. § 319.56), imported one kilogram of mangoes from El Salvador.

Conclusion

By reason of the Findings of Fact set forth above, Luis A. Barrera has violated the Act. Therefore, the following Order is issued.

Order

Respondent Luis A. Barrera 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 Luis A. Barrera shall indicate that payment is in reference to P.Q. Docket No. 06-0010.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent Luis A. Barrera 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).

In re: CYNTHIA E. LAIDLEY
P.Q. Docket No. 06-0011.
Default Decision.
Filed May 11, 2006.

P.Q. – Default.

Carlyne S. Cockrum for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson

DECISION

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 *et seq.*)(the Act), 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 by a complaint filed on December 12, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture and served by certified mail on respondent Cynthia E. Laidley on December 15, 2005. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), respondent Cynthia E. Laidley was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent's answer thus was due no later than January 4, 2006, twenty days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent Cynthia E. Laidley never filed an answer to the complaint and the Hearing Clerk's Office mailed her a No Answer Letter on January 11, 2006.

Thereafter, on January 26, 2006, Complainant filed a Motion for Adoption of Proposed Default Decision and Order together with the Proposed Default Decision and Order. Subsequently, on February 6, 2006, Ms. Laidley filed with the Hearing Clerk's Office a letter along with a check for one hundred dollars (\$100.00). The letter did not clearly admit, deny, or explain the specific allegations of the complaint, as required section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). Therefore, respondent Cynthia E. Laidley failed to file an answer as 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

denying or otherwise responding to the allegations of the complaint shall be deemed an admission of the allegations in the complaint. Furthermore, since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, respondent's failure to answer is likewise deemed a waiver of hearing. 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. Cynthia E. Laidley, herein referred to as respondent, is an individual with an address of 4025 Murdock Avenue, Bronx, NY 10466.
2. On or about August 1, 2002, the respondent, in violation of Section 412 (a) of the Act (7 U.S.C. § 7712 (a)) and Section 319.56 of the Code of Federal Regulations (7 C.F.R. § 319.56), imported twelve (12) mangoes, ten (10) sweet sop, and two (2) bags of fresh thyme from Jamaica.

Conclusion

By reason of the Findings of Fact set forth above, Cynthia E. Laidley has violated the Act. Therefore, the following Order is issued.

Order

Respondent Cynthia E. Laidley is hereby assessed a civil penalty of one hundred dollars (\$100.00). 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 Cynthia E. Laidley 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).

In re: WENDY MILLER.
P.Q. Docket No. 05-0024
Decision and Order.
Filed May 15, 2006.

P.Q. – Default.

James Booth for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Judge Marc R. Hillson.

DECISION and ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the prohibition of the importation of avocados and fresh fruit from Hawaii into the continental United States (7 C.F.R. § 318.13 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772)(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service on May 27, 2005, alleging that the respondent violated the Act and regulations promulgated under the Acts (7 C.F.R. § 319.56 *et seq.*). The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734).

The complaint alleged that the respondent illegally shipped approximately one pound of fresh avocados and one half of a pound of fresh passion fruit for shipment from Hawaii to the continental United States.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). In fact, the respondent has not filed any answer. 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. Wendy Miller, hereinafter referred to as the respondent, is an individual whose mailing address is 5111 Hanawai Street, Apt. F, Lahaina, Hawaii 96761B9144.
2. On or about January 11, 2001, at Haiku, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, approximately one pound of fresh avocados and one half of a pound of fresh passion fruit for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a)(1), because movement of these items into or through the continental United States is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. § 318.13 *et seq*). Therefore, the following Order is issued.

Order

The respondent, Wendy Miller, is assessed a civil penalty of five hundred dollars (\$500.00). The respondent shall pay five hundred dollars (\$500.00) as a civil penalty. This civil 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. 05-0024

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.

CONSENT DECISIONS**AGRICULTURAL MARKETING AGREEMENT ACT**

Jose Luis Torres and Fernando Torres. AMAA Docket No. 04-0003.
4/7/06.

Navarette Produce Co., LLC. AMAA Docket No 06-0002. 6/07/06.

ANIMAL QUARANTINE ACT

My Van Nguyen. AQ Docket 06-0005. 2/10/06.

John R. Malouff d/b/a M & M Livestock. A.Q. Docket No 06-0001.
5/15/06.

ANIMAL WELFARE ACT

Jeannine L. Peter d/b/a LoBraDira Lovin Pups. AWA Docket No. 04-
0025. 1/24/06.

Joe Schreibvogel and G.W. Exotic Animal Memorial Foundation. AWA
Docket 05-0014. 1/26/06

Ronald Armitage, Arbuckle & Ozarks Development Company d/b/a
Animal
Paradise. AWA Docket No. 05-0033. 1/30/06.

Sandra L. Smith, Kenneth R. Smith and Wesa-A-Geh-Ya Zoo. AWA
Docket No. 05- 0004. 3/1/06.

Diana R. McCourt, a/k/a Diana R. Cziraky, Siberian Tiger Conservation.
AWA
Docket No. 05-0003. 3/21/06.

Cynthia Palm, Michael Evers, and M & C Exotics. AWA Docket No.
04-0030.
4/17/06.

378

Craig A. Perry, et al, Consent as to American Furniture Warehouse, Inc.
AWA
Docket No. 05-0026. 4/21/06.

Carolyn D. Atchison. AWA Docket No. 05-0015. 5/22/06.

Ben Korn. AWA Docket No 04-0033. 5/25/06.

Mary Amborn d/b/a Greenspace Kennel. AWA Docket No 05-0031.
6/02/06.

Lightening Ranch and Wildlife Preserve, Inc, Lance Williams, Staci
Williams. AWA Docket No. 05-0022. 6/12/06.

Richard and Donna Wilcox d/b/a R & D Kennels. AWA Docket No. 05-
0010. 6/27/06.

Larry Paris d/b/a Circle P. Kennels. AWA Docket No. 05-0012. 6/30/06.

FEDERAL CROP INSURANCE ACT

Jackson, Cris A.d/b/a Double J Farms. FCIA Docket No. 04-0004.
1/4/06.

William D. Smith, et al. FCIA Docket No. 05-0009. 4/20/06.

Steve Maurer. FCIA Docket No 06-0005. 5/19/06.

Arthur Dagemjian. FCIA Docket No 05-0010. 5/24/06.

Robert Plueger. FCIA Docket No 06-0004. 5/26/06.

FEDERAL MEAT INSPECTION ACT

Billings Meats and Processing Plant and Terry R. Billings. FMIA
Docket No. 06-0004. 4/12/06.

Champlain Beef Company, Inc. FMIA Docket No 06-0003. 5/09/06.

Chegade Sabbouh, Washington Lamb, Inc. FMIA Docket No. 06-0005/
PPIA Docket No. 06-0003. 6/09/06.

HORSE PROTECTION ACT

Grandy Tuck, Burl J. Dale, Charles Dale, Barbara Dale, and Spring Dale Farms, Inc. HPA Docket No. 03-0003. 1/27/06.

Grandy Tuck. HPA Docket No 03-0003. 1/27/06.

Edward Rains and Janie Rains. HPA 05-0005. 2/1/06.

Mark Arnold Williams . HPA Docket No. 06-0005. 3/23/06.

Mark Arnold Williams. HPA Docket No. 06-0005. 4/06/06.

Sand Creek Farm, Inc. & Billy A. Gray. HPA Docket No. 01-0030. 4/25/06.

Sand Creek Farm, Inc. HPA Docket No. 01-C022. 4/25/06.

Mae Nettleship, Anderson Nettleship, Floyd Posenke. HPA Docket No. 06-0006. 6/05/06.

Chad Way, Chad Way Stables, Inc. HPA Docket No. 03-0005. 6/30/06.

PLANT QUARANTINE ACT

"R" Best Products, Inc. PQ Docket No 05-0002. 2/1/06.

Chazz Cox d/b/a Gateway Gardens. PQ Docket No. 06-0004. 2/15/06.

United Air Lines, Inc. PQ Docket No 04-0010. 4/24/06.

Inman A. Dahhan. PQ Docket No 05-0027. 6/12/06.

Maersk Sealand. PQ Docket No. 05-0001. 6/12/06.

POULTRY PRODUCTS INSPECTION ACT

House of Raeford Farms of Louisiana, LLC. PPIA Docket No. 05-0002. 2/17/06.

380

PLANT QUARANTINE ACT

VETERINARIAN ACCREDITATION

Michael J. Chovanes. D.V.M. V.A. Docket No. 05-0001. 4/11/06.