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Book Two

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In re: SWEENY S. GILLETTE.
Docket No. 16-0024.
Decision and Order.
Filed December 2, 2016.

AHPA.

Thomas Bolick, Esq. for Complainant.
Brian Zanotelli, Esq. for Respondent.
Initial Decision and Order entered by Bobbie J. McCartney, Chief Administrative Law Judge.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. § 8301 *et seq.*) [AHPA or Act] by a complaint filed by the Administrator, Animal and Plant Health Inspection Service [APHIS], United States Department of Agriculture [USDA] [hereinafter APHIS or Complainant] on November 20, 2015, alleging that Respondent Sweeny S. Gillette [Respondent], willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. §§ 71.1 *et seq.* and 78.1-78.14) [the Regulations] by the Secretary of Agriculture [the Secretary]. Respondent filed an answer admitting that he currently resides in [redacted]* and that he owned and operated Gillette Livestock, Inc., located in Ontario, Oregon, from 2010-2011, but denying all the other allegations set forth in the Complaint. However, the documents that Complainant has submitted in support of its motion for summary judgment filed on February 5, 2016 demonstrate that there is no dispute of material fact with respect to either the Secretary's jurisdiction over Respondent or the violations set forth in the Complaint. Therefore, for the reasons discussed more fully herein below, Summary Judgment, is appropriate in this case.

* Redacted by the editor to protect personal privacy.

II. Procedural History

The Complaint was filed with the USDA Hearing Clerk on November 20, 2015. It alleged that Respondent and his father-in-law, Richard "Ric" D. Hoyt, were the co-owners of Morgan Avenue Feeders, L.L.C. [MAF], located at 4455 Hwy 201, Ontario, Oregon 97914, and that Respondent also owned and operated Gillette Livestock, Inc., located at 4312 S. Grandview Lane, Ontario, Oregon 97914 [Gillette Livestock], and G 7 Livestock, L.L.C., located at 849 Morgan Avenue, Ontario, Oregon 97914. The Complaint further alleged that Respondent had moved cattle that were test-eligible for brucellosis in interstate commerce without the documentation required by federal regulations. Specifically, it alleged that on or about December 3, 2010, Respondent purchased seventy-eight (78) head of cattle that were test-eligible for brucellosis at Cattleman's Livestock Auction, Inc., d/b/a Treasure Valley Livestock Auction in Caldwell, Idaho, and moved at least twenty-nine (29) head to MAF in Oregon without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii). The Complaint likewise alleged that on or about December 20, 2010, Respondent purchased seventy (70) head of cattle that were test-eligible for brucellosis at the same livestock auction and again moved at least nineteen (19) head to MAF in Oregon without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii). The Complaint also alleged that, on or about December 27, 2010, Respondent moved thirty-four (34) head of cattle that were two (2) years of age or older from MAF in Oregon to XL Four Star Beef, Inc., a commercial slaughter plant located in Nampa, Idaho [XL Four Star], accompanied by five (5) State of Oregon Brand Inspection Certificates that matched only seven (7) of the animals in the shipment and which had expired prior to the date of movement. Accordingly, the Complaint alleged that Respondent moved the animals in interstate commerce without any documents stating the point from which the cattle moved, their destination, the number of cattle being moved, the name and address of their owner at the time of the movement, the name and address of any previous owner(s) who might have owned the cattle within four (4) months prior to the movement, the name and address of the shipper, and the back tag numbers or other approved identification applied to the cattle, in violation of 9 C.F.R. § 71.18(a)(1)(i). Finally, the Complaint alleged that on or about January 8, 2011, Respondent sold 132 head of cattle that were test-eligible for brucellosis to Ron Yribarren of Bishop, California and moved or

arranged the movement of the cattle from MAF in Oregon to Mr. Yribarren's ranch in Bishop. The Complaint alleged that the paperwork that accompanied this movement consisted of a Certificate of Veterinary Inspection (CVI) from the Oregon Department of Agriculture, # 92-79146, and an attached brucellosis test record, but the latter listed only seventy-two (72) head of cattle. Accordingly, the complaint alleged that Respondent moved well over 100 brucellosis test-eligible cattle in interstate commerce without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

The USDA Hearing Clerk mailed copies of the Complaint to Respondent at his [redacted]* addresses by both certified mail, return receipt requested, and regular mail on or about the same day that it was filed. In accordance with section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent's answer was due within twenty (20) days from the date on which he was served with the Complaint. All of the copies of the Complaint that were mailed by certified mail were returned to the USDA Hearing Clerk marked by the U.S Postal Service as unclaimed[1] or unable to forward, and three (3) of the copies that were mailed by regular mail also were returned marked unable to forward, but the copy that was mailed to Respondent at his [redacted]* address by regular mail was not returned. Therefore, Respondent was served with the Complaint at his [redacted]* address via regular mail, but Complainant was unable to determine the date on which Respondent was served and unable to compute the date on which Respondent's answer was due.

On December 10, 2015, Respondent, acting by and through his attorney of record, Mr. Brian Zanotelli, Esq., filed an answer and request for oral hearing with the USDA Hearing Clerk.[2] As previously noted, the Answer

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* Redacted by the editor to protect personal privacy.

[1] The copy of the Complaint that was mailed to Respondent's [redacted] address by certified mail was the only one that was returned to the USDA Hearing Clerk marked unclaimed. All of the other copies that were returned to the Hearing Clerk were marked unable to forward, whether mailed by certified mail or regular mail.

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[2] Because Complainant was and is unable to determine the date on which service was effected and unable to compute the date on which Respondent's answer was due, the Answer to the Complaint is presumed to have been timely filed.

admitted Respondent's [redacted][*] mailing address and his ownership of Gillette Livestock as set forth in paragraph I of the Complaint but denied all of the remaining allegations set forth in the Complaint. The Answer raised two affirmative defenses; specifically, it claimed that the Complaint was time barred and that it was vindictive and retaliatory. Finally, the Answer requested the scheduling of an oral hearing.

III. Points and Authorities

A. The Act and Regulations

The Animal Health Protection Act (7 U.S.C. §§ 8301-8316) authorizes the Secretary of Agriculture to promulgate regulations to protect human and animal health, the economic interests associated therewith, and the environment by, among other things, detecting certain animal pests and diseases and preventing their entry into or movement through the United States. *See generally* Section 10402 of the Act (7 U.S.C. § 8301). Section 10406 of the Act (7 U.S.C. § 8305) authorizes the Secretary to "prohibit or restrict the movement in interstate commerce of any animal, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock." Pursuant to this authority, the Secretary has promulgated regulations to detect, control, and eradicate bovine brucellosis, a highly contagious bacterial disease that causes aborted pregnancies and impaired fertility in cattle and bison.[3] The bovine brucellosis regulations are found in 9 C.F.R. Part 78.

APHIS Veterinary Services had designated multiple states, including the states of Oregon, Idaho, and California, as Class Free[4] with respect to

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[*] Redacted by the editor to protect personal privacy.

[3] For information about the epidemiology of brucellosis, its potential impacts on animal health, public health, and the U.S. livestock industry, and USDA's Brucellosis Eradication Program, see the Brucellosis Fact Sheet that can be found on-line at https://www.aphis.usda.gov/animal_health/animal_diseases/brucellosis/downloads/bruc-facts.pdf.

[4] Section 78.1 of the brucellosis regulations contained a definition of the term "Class Free" and set out the standards for attaining and maintaining such status. Both the definition and the standards can be summarized as follows: a Class Free State or area is one that has eliminated or controlled brucellosis within its borders for at least twelve (12) consecutive months by conducting brucellosis ring tests of all herds of domestic livestock within its

brucellosis in 2010 and 2011,[5] but the interstate movement of cattle in those states was still subject to the regulatory requirements found in 9 C.F.R. § 78.9(a)(3)(iii), which governed the interstate movement of cattle that were from herds not known to be affected by brucellosis in order to facilitate the detection of any outbreak of the disease in such cattle and to trace the outbreak back to its source. At the time of the violations alleged in the Complaint, 9 C.F.R. § 78.9(a)(3)(iii) stated, in pertinent part, the following:

> Test-eligible cattle[6] which originate in Class Free States or areas, are not bru-cellosis exposed, and are from a herd not known to be affected may be moved interstate from Class Free States or areas only as specified below: . . . (3) Such cattle may be moved interstate other than in accordance with paragraphs (a)(1) [governing movement

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borders; slaughtering or quarantining any animals that tested positive for the disease; and, with respect to the quarantined animals, has retested those animals and obtained negative results such that they were released from any State or Federal quarantine. The definition of and standards for attaining and maintaining Class Free status did not change from 2010 to 2011.

[5] *See* 9 C.F.R. § 78.41(a) as set forth in the January 1, 2010, and January 1, 2011, editions of Title 9, Code of Federal Regulations, Parts 1 to 99.

[6] Section 78.1 of the brucellosis regulations defined "test eligible" as

> (a) cattle and bison which are not official vaccinates and which have lost their first pair of temporary incisors (18 months of age or over), except steers and spayed heifers; (b) official calfhood vaccinates 18 months of age or over which are parturient or postparturient; (c) official calfhood vaccinates of beef breeds or bison with the first pair of permanent incisors fully erupted (2 years of age and over); and (d) official calfhood vaccinates of dairy breeds with partial eruption of the first pair of permanent incisors (20 months of age or over).

Section 78.1 further defined the term "official vaccinate" as an adult animal or calf that has been vaccinated by an accredited veterinarian, State representative, or APHIS representative, and for which the person performing the vaccination completed an official vaccination certificate for that animal and forwarded said certificate to state animal-health officials in the state in which the animal was vaccinated. Section 78.1 also defined the terms "postparturient" and "parturient" as animals that had given birth or were within two (2) weeks of doing so, respectively. In summary, these definitions mean that a test-eligible animal is any cow over eighteen (18) months old that has not been vaccinated for brucellosis; any cow that was vaccinated as a calf and has given or is about to give birth; any animal of a dairy or beef breed of cattle that was vaccinated as a calf and is at least twenty (20) months old or twenty-four (24) months old, respectively; and any bison that was vaccinated as a calf and is at least twenty-four (24) months old. These definitions did not change from 2010 to 2011.

> to recognized slaughtering establishments] and (2) [governing movement to quarantined feedlots] of this section only if . . . (iii) Such cattle are moved interstate accompanied by a certificate which states . . . that the cattle originated in a Class Free State or area.[7]

Section 78.1(a) of the Regulations (9 C.F.R. §78.1(a)) defined the term "certificate" as follows:

> An official document issued by an APHIS representative, state representative, or accredited veterinarian at the point of origin of an interstate movement of animals. The certificate must show the official eartag number, individual animal registered breed association registration tattoo, . . . brand, . . . registration number, or similar individual identification of each animal to be moved; the number of animals covered by the certificate; the purpose for which the animals are to be moved; the points of origin and destination; the consignor; and the consignee.

Section 78.1(a) required the identifying information listed in the definition of the term "certificate" to be typed or handwritten on the certificate. In lieu of placing this information on the certificate itself, section 78.1(b) and (c) also permitted the information to be listed on an official brand inspection certificate or another state or APHIS form requiring individual identification of animals, provided that a legible copy of the brand inspection certificate or other state or APHIS form listing the information was attached to the original and each copy of the certificate. The Secretary also has promulgated more generalized rules governing the interstate movement of animals and animal products in 9 C.F.R. part 71, including § 71.18, which establishes identification requirements for any cattle that are two (2) years of age or older and moving in interstate commerce. At the time of the violations alleged in the Complaint, section 71.18(a)(1)(i) stated the following:

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[7] A copy of the 2010 version of 9 C.F.R. §§ 78.1-78.10 was attached to Complainant's Motion for Summary Judgment as Attachment I. There was no change in this regulation from 2010 to 2011.

> No cattle 2 years of age or over, except steers and spayed heifers and cattle of any age which are being moved interstate during the course of normal ranching operations without change of ownership to another premises owned, leased, or rented by the same individual . . ., shall be moved in interstate commerce other than in accordance with the requirements of this section. . . . [C]attle subject to this section may be moved in interstate commerce from any point to any destination, if such cattle, when moved, . . . are accompanied by a statement signed by the owner or shipper of the cattle, or other document stating: (A) the point from which the animals are moved interstate; (B) the destination of the animals; (C) the number of animals covered by the statement, or other document; (D) the name and address of the owner at the time of the movement; (E) the name and address of the previous owner if ownership changed within four months prior to the movement of the cattle; (F) the name and address of the shipper; and (G) the identifying numbers of the backtags or other approved identification applied; *Provided*, that identification numbers are not required to be recorded on such statement or document for cattle moved from a stock-yard posted under the provisions of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*) directly to a recognized slaughtering establishment as defined in § 78.1 of this chapter.[8]

Section 71.18(a)(2) stated:

> The owner's or shipper's statement or other document . . . required by this section for cattle moved under paragraph (a)(1)(i) . . . of this section shall be delivered to the management of the stockyard or slaughtering establishment at the time of delivery of the cattle." A footnote further stated that the "other document" that may accompany the cattle in lieu of a signed owner's or shipper's statement "means a shipping permit, an official

[8] A copy of the 2010 version of 9 C.F.R. §§ 71.1-71.18 was attached to Complainant's Motion for Summary Judgment as Attachment II.

> health certificate, an official brand inspection certificate, a bill of lading, a waybill, or an invoice on which is listed the required information.

The sanctions that are available for violations of the regulations in 9 C.F.R. Parts 78 and 71 are governed by section 10414(b) of the AHPA (7 U.S.C. § 8313(b)). Section 10414(b)) sets civil penalties for violations of the Act and its accompanying regulations and states in pertinent part:

> [A]ny person that violates this subtitle . . . may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of (A)(i) $50,000 in the case of any individual, except that the civil penalty may not exceed $1,000 in the case of an initial violation of this subtitle by an individual moving regulated articles not for monetary gain; (ii) $250,000 in the case of any other person for each violation; and (iii) for all violations adjudicated in a single proceeding—(I) $500,000 if the violations do not included a willful violation; or (II) $1,000,000 if the violations include 1 or more willful violations. . . .[9] [10]

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[9] The statute does not expressly say that the $50,000 civil penalty for any individual and the $1,000 civil penalty for an individual who has committed an initial violation involving the movement of regulated articles not for monetary gain are the maximum penalties permitted per violation. However, these penalties must be the maximum penalties permitted for individuals on a per violation basis rather than the maximum that is permitted for all violations committed by an individual because the statute further provides for a $500,000.00 cap on all non-willful violations adjudicated in a single proceeding and a $1,000,000.00 cap on all willful violations adjudicated in a single proceeding. There would be no way for a proceeding involving an individual to reach these statutory caps if the caps were already set at $50,000 for any individual and $1,000 for an individual committing an initial violation not for monetary gain.

[10] The Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note, Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701 note, section 31001 of Pub. L. No. 104-134, 110 Stat. 1321), requires the Secretary to adjust for inflation the civil penalties that are available under the various statutes that he enforces at least once every four (4) years. The Secretary's adjustments of the civil penalties for violations of the AHPA are promulgated in 7 C.F.R. § 3.91(b)(2)(vi). In 2010, section 3.91(b)(2)(vi) was amended to increase the civil penalties for violations of the AHPA to $60,000 in the case of any individual whose violation was not an initial violation involving the movement of a regulated article and was not for monetary gain.

> In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator (A) the ability to pay; (B) the effect on ability to continue to do business; (C) any history of prior violations; (D) the degree of culpability; and (E) such other factors as the Secretary considers to be appropriate.

B. This Action Is Not Time-Barred

As previously noted, Respondent's Answer asserts that this administrative action is time-barred. This claim has no merit. In *Bargery*, 61 Agric. Dec. 772 (U.S.D.A. 2002), the Administrative Law Judge stated:

> 28 U.S.C. § 2642 states in relevant part:
>
> > [A]n action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . .
>
> Section 2462 applies to administrative penalty proceedings as well as judicial actions and the three circuits that have considered the issue have held that the five years in which an administrative enforcement proceeding must be instituted starts with the date the alleged violation occurred.

Bargery, 61 Agric. Dec. 772, 773 (U.S.D.A. 2002) (citations omitted).

In the present matter, the first violation alleged in the Complaint occurred on or about December 3, 2010, so this matter had to be initiated by the filing of an administrative complaint no later than December 3,

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This increase applied only to those violations occurring after May 7, 2010. *See* Department of Agriculture Civil Monetary Penalties Adjustment, 75 Fed. Reg. 17555 (Apr. 7, 2010).

2015. As previously noted, the complaint was filed on November 20, 2015. Therefore, this action was timely initiated and is not time-barred.

IV. There Are No Issues of Material Fact in Dispute

As noted above, Respondent's answer to the Complaint denied all of the violations set forth in the Complaint. However, during APHIS' investigation of Respondent's activities, APHIS investigators contacted a livestock auction, a commercial slaughter plant, and a rancher who did business with Respondent and collected or otherwise obtained invoices, shipping documents, cancelled checks, and other records of his transactions with them in December 2010 and January 2011. The investigators also contacted Oregon and Idaho State Brand Inspectors, a local veterinarian, and a local Sheriff's Office to obtain additional documents concerning Respondent's business activities involving the interstate movement of cattle. These records and documents are summarized below and in Attachments III-V of Complainant's Motion for Summary Judgement and are attached thereto as Attachment VI, Complainant's Exhibits (CX) 1-42 in Support of Complainant's Motion for Summary Judgment.[11] These records and documents fully demonstrate that, notwithstanding Respondent's denials in his Answer, there is no dispute of material fact with respect to any of the allegations set forth in the Complaint. Therefore, an order of Summary Judgment is appropriate.

ON OR ABOUT DECEMBER 3, 2010, RESPONDENT MOVED CATTLE THAT WERE TEST-ELIGIBLE FOR BRUCELLOSIS FROM A LIVESTOCK AUCTION IN IDAHO TO A FEED LOT IN OREGON WITHOUT OBTAINING A VALID CERTIFICATE FOR SAID MOVEMENT, IN VIOLATION OF 9 C.F.R. § 78.9(a)(3)(iii).

[11] Attachments III-V of Complainant's Motion For Summary Judgement are declarations by the APHIS investigators who conducted the agency's investigation of Respondent and collected the records and documents that comprise Complainant's Exhibits 1-42 in Support of Complainant's Motion for Summary Judgment. CX-1 through CX-41 are evidentiary exhibits, while CX-42 is a declaration providing sanctions testimony by Complainant's sanctions witness.

The documents that APHIS investigators obtained during the course of their investigation clearly prove that on or about December 3, 2010, Respondent moved cattle that were test-eligible for brucellosis from Idaho to Oregon without obtaining a valid certificate for this movement. APHIS investigators obtained invoices from Cattleman's Livestock Auction, Inc. d/b/a Treasure Valley Livestock in Caldwell, Idaho [TVLA] showing that Respondent purchased seventy-eight (78) head of livestock, including seventy (70) cows, on or about December 3, 2010. CX-4. The investigators also obtained copies of purchase order #s 319311 and 319312, both dated December 3, 2010 (CX-5), which listed the back tag numbers, metal ear tag numbers, vaccination status, and age of many of the animals shown on Respondent's invoices corresponding to orders 11 and 12 (CX-4 at 4 and 2, respectively). Ms. Janice Thurman, TVLA's office manager, provided an affidavit in which she stated, "Our business and industry define [the term cow] as follows: A mature female over the age of two (2) years." CX-3. She further stated:

> On the same date [on which he purchased the 78 head of livestock], Mr. Gillette requested forty-one (41) of the cows be examined by our veterinarian, Dr. Gordon Cooper and Dr. Cooper completed the examinations. . . . Mr. Gillette then had the cattle inspected by State of Idaho Deputy Brand Inspectors and loaded the cattle on trucks.

Id.

Dr. Cooper, the owner and operator of Caldwell Veterinary Hospital in Caldwell, Idaho, also provided an affidavit in which he stated generally that he examined cattle that Respondent purchased at TVLA and "documented the examinations by completing forms including purchase orders, brucellosis test record forms, and Saleyard Release forms." CX-6. Dr. Cooper also stated, "When I use the term cow in my documentation I am referring to an animal over two (2) years of age. The cows I examined from Mr. Gillette were all over two (2) years of age." *Id.* Dr. Cooper further stated:

> Mr. Gillette would purchase cows for buyers in the States of Idaho, Oregon, Washington, California, Wyoming, and Nevada. He would also purchase cattle for himself. After

> purchasing the cattle Mr. Gillette would load them on trucks and transport them interstate to Morgan Avenue Feeders in Ontario, OR. Prior to 2011, Mr. Gillette rarely asked me to issue Saleyard Releases/Certificates of Veterinary Inspection for cattle he purchased at TVLA.

Id.

In a subsequent interview with an APHIS investigator, Dr. Cooper reiterated that he had examined cattle purchased by Respondent at TVLA for several years and that he documented his examination results on purchase orders, brucellosis test-record forms, and Saleyard Release forms. CX-7. He explained that he documented his examination results by listing the animals' three (3) digit backtag numbers in one column and the alphanumeric numbers on their metal ear tags in the next column. *Id.* He stated that he indicated a given animal's vaccination status in a third column by writing "NV" if the animal wasn't vaccinated and writing "V" if it was, followed by a numeral indicating the year of vaccination, if known. *Id.* Finally, he stated that he inspected the mouth of each animal and noted its age by writing "S" for animals that are four (4) to eight (8) years old, "WS" for animals that are nine (9) or ten (10) years old, "BM" for animals that are ten (10) to twelve (12) years old, and "G" for animals that are over twelve (12) years old. *Id.* Based on Dr. Cooper's explanation of his nomenclature, almost all of the animals that he examined for Respondent on December 3, 2010, and which were listed on purchase order #s 319311 and 319312 (CX-5) were cows that had been vaccinated for brucellosis and were well over two (2) years old.

Ms. Celina C. Wright, a Deputy State Brand Inspector for the Idaho Department of Brand Inspection, Idaho State Police, provided an affidavit in which she stated that Idaho State Brand Inspectors inspected cattle sold to Respondent at TVLA on December 3, 2010. CX-8. She further stated:

> During the inspection process, Mr. Gillette represented to Deputy State Brand Inspectors that . . . thirty-three (33) [head of cattle] were destined to Morgan Avenue Feeders in Ontario, OR. . . . On each of the State of Idaho Brand Certificates Deputy Brand [sic] State Brand Inspectors documented the sex, back tag number, brand, location of

> the brand, and color of each animal. Deputy State Brand Inspectors then provided copies of the inspection documents to Mr. Gillette and retained a copy for our file. Deputy State Brand Inspectors define the terms used on the State of Idaho Brand Certificates as follows: Cow: A mature female over the age of two (2) years.

Id.

APHIS investigators obtained copies of State of Idaho Livestock Brand Inspection certificate #s CA 445195, CA 445304, CA 445188, CA 445097, CA 445080, and CA 445153, which had been prepared at TVLA on December 3, 2010, and these certificates listed Respondent as the new owner of at least nineteen (19) head of cattle, including at least fifteen (15) cows, that were destined for Ontario, Oregon. CX-9. All of the cows that were listed on certificate # CA 445080 also were listed on Respondent's TVLA invoice, order 11, dated December 3, 2010 (*see* CX-4 at 4) and on purchase order #s 319311 and 319312 (CX-5),[12] showing that Respondent had purchased these cows at TVLA on December 3, 2010 and that Dr. Cooper had inspected them for him on that date. The investigators also obtained a copy of a Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of November 29, 2010, showing that twenty-nine (29) head of cattle were moved from Caldwell, Idaho, to MAF in Ontario, Oregon, on Friday, December 3, 2010. CX-10.

Finally, Ms. Denise Walters, an administrative assistant for the State of Idaho Department of Agriculture, provided an affidavit stating that she searched "State of Idaho records for Saleyard Releases and/or Certificates of Veterinary Inspection issued to Sweeney Gillette for cattle movements on 12/3/10 . . . [and] found twelve (12) . . . issued by Dr. Gordon Cooper at Treasure Valley Livestock, but none listing Sweeny Gillette as the shipper." CX-11.

The TVLA invoices in CX-4 and Ms. Thurman's affidavit in CX-3 prove that Respondent purchased cattle at TVLA on December 3, 2010. Ms. Thurman's affidavit, Ms. Wright's affidavit (CX-8), Dr. Gordon's

[12] The two (2) cows that were listed on CA 455188 and CA 445153 as destined for Ontario, Oregon also were listed on Respondent's TVLA invoice (*see* CX-4 at 5 and 10, respectively).

affidavit (CX-6) and subsequent statement to an APHIS investigator (CX-7), and purchase order #s 319311 and 319312 (CX-5) prove that the cows that Respondent purchased at TVLA on December 3 were over two (2) years of age and thus were test-eligible for brucellosis as defined by 9 C.F.R. § 78.1. Ms. Wright's affidavit and the six (6) State of Idaho Livestock Brand Inspection certificates that were prepared at TVLA on December 3, 2010 (CX-9) further prove that Respondent represented to Idaho State Brand Inspectors that he intended to move at least some of the cattle that he purchased at TVLA to MAF in Oregon, and the Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of November 29, 2010 (CX-10), proves that cattle did in fact move interstate from Idaho to Oregon on December 3. Ms. Thurman's affidavit (CX-3), Dr. Cooper's affidavit (CX-6), and Ms. Wright's affidavit (CX-8) provide additional proof that Respondent either moved the cattle interstate on December 3, 2010, or caused said movement. If even one cow in this movement were over two (2) years of age and thus test-eligible for brucellosis, that animal had to be accompanied by a valid certificate for interstate movement, as defined by 9 C.F.R. § 78.1 and required by 9 C.F.R. § 78.9(a)(3)(iii). However, Dr. Cooper's affidavit (CX-6) and Ms. Walters' affidavit (CX-11) demonstrate that Respondent failed to obtain a valid certificate for the interstate movement of the cattle that he purchased at TVLA on December 3, 2010. Therefore, there is no dispute of material fact that on or about December 3, 2010, Respondent moved a shipment of cattle that were test eligible for brucellosis from Caldwell, Idaho, to Ontario, Oregon, without obtaining a valid certificate for their movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

ON OR ABOUT DECEMBER 10, 2010, RESPONDENT MOVED CATTLE THAT WERE TEST-ELIGIBLE FOR BRUCELLOSIS FROM A LIVESTOCK AUCTION IN IDAHO TO A FEED LOT IN OREGON WITHOUT OBTAINING A VALID CERTIFICATE FOR SAID MOVEMENT, IN VIOLATION OF 9 C.F.R. § 78.9(a)(3)(iii).

The documents that APHIS investigators obtained during the course of their investigation clearly prove that on or about December 10, 2010, Respondent again moved cattle that were test-eligible for brucellosis from Idaho to Oregon without obtaining a valid certificate for this movement.

APHIS investigators obtained additional invoices from TVLA showing that Respondent purchased seventy (70) head of livestock, including fifty-nine (59) cows, on or about December 10, 2010. CX-13. The investigators also obtained copies of purchase order #s 319332, 319333, and 319334, all dated December 10, 2010 (CX-14), which listed the back tag numbers, metal ear tag numbers, vaccination status, and age of many of the animals shown on Respondent's invoices corresponding to orders 11, 13, and 22 (CX-13, pages 3, 4, and 5, respectively). Ms. Janice Thurman provided another affidavit in which she confirmed that Respondent purchased cattle at TVLA on December 10.[13] CX-12. She stated that Respondent once again asked Dr. Cooper to examine thirty-one (31) of the cows,[14] had an unspecified number of the cattle inspected by Idaho State Deputy Brand Inspectors, and loaded the animals onto trucks. *Id.* She also reiterated that the term "cow" had a specific meaning within her business and the industry, namely, a mature female over the age of two (2) years. *Id.*

Ms. Celina Wright also provided another affidavit in which she stated that Respondent told Idaho State Brand Inspectors that he was sending 18 head of cattle to MAF and that the Brand Inspectors inspected his cattle and prepared State of Idaho Brand Certificates following the same procedures that she outlined in her first affidavit.[15] CX-15. APHIS investigators obtained copies of State of Idaho Livestock Brand Inspection certificate #s CA 445316, CA 445342, CA 445379, and CA 445396, which had been prepared at TVLA on December 10, 2010, and listed Respondent as both the buyer and the new owner of at least seven (7) head of cattle, including one (1) cow, that were destined for Ontario, Oregon (CX-16, pages 1-4). The investigators also obtained a copy of State of Idaho Livestock Brand Inspection certificate # CA445318, which also had been

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[13] Ms. Thurman's second affidavit erroneously states that Respondent purchased "fifty-two (61) [sic] cows" on December 10, 2010, but the invoices in CX-13 show that he purchased 50 cows and that his partner, Ric Hoyt, purchased nine (9) cows on December 10, for a total of 59 head. .

[14] As previously noted, Dr. Cooper stated in his affidavit that he examined the cattle that Respondent purchased at TVLA, that all of them were over two (2) years of age, and that Respondent subsequently loaded them onto trucks for transportation to MAF but rarely requested the issuance of Saleyard Releases/Certificates of Veterinary Inspection for his cattle prior to 2011. CX-6.

[15] Ms. Wright also reiterated that the Brand Inspectors use the term "cow" to refer to a mature female more than two years old. CX-15.

prepared at TVLA on December 10, 2010,[16] and listed Respondent as the buyer and Mr. Rick Hoyt as the new owner of at least eleven more (11) head of cattle, including nine (9) cows, that also were destined for Ontario, Oregon. CX-16, page 5. Two (2) of the cows that were listed on certificate # CA 445318, tag #s 597 and 743, also were listed on Respondent's TVLA invoice, order 20, dated December 10, 2010 (see CX-13, page 1), and on purchase order #s 319332 and 319333 (CX-14), showing that Respondent had purchased these cows at TVLA on December 10 and that Dr. Cooper had inspected them for him on that date. Six (6) other cows that were listed on certificate # CA 455318 (tag #s 638, 640, 286, 378, 546, 923, and 346) and the cow that was listed on certificate # CA 445396 also were listed on Respondent's TVLA invoice, orders 20[17] and STKC (see CX-13, pages 1 and 10, respectively).

Ms. Wright also told APHIS investigators that Respondent informed the Idaho State Brand Inspectors that he was sending some of the cattle that he purchased at TVLA on December 10 to XL Four Star and that the Brand inspectors prepared State of Idaho Brand Certificates reflecting this movement. CX-15. She gave the investigators one such certificate, CA 445326 (CX-25), which listed Respondent as the buyer and new owner of nine (9) cows that were destined for Nampa and also were listed on Respondent's invoice corresponding to order STRT (CX-13 at 11). Other Idaho State Brand Inspectors subsequently observed one of Respondent's trucks delivering at least six (6) of the animals listed on CA 445326 (back

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[16] Certificate # CA 445318 was signed by Ms. Charlene Hanners of the Idaho State Brand Office-TVLA. CX-16, page 5.

[17] There is a slight discrepancy in these documents concerning who was the buyer of these cows. As noted above, eight (8) cows (tag #s 638, 640, 286, 378, 546, 923, 346, 597, and 743) are listed on certificate # CA 455318, which lists Respondent as the buyer and Ric Hoyt as the new owner of these cows (CX-16, page 5). However, the same eight (8) cows are listed on Respondent's invoice corresponding to order 20, which names Ric Hoyt of Ontario, Oregon, as the buyer (CX-13, page 1). It ultimately does not matter whether Respondent or Mr. Hoyt purchased these cows, as they were business partners in the MAF feed lot (*see* p. 21, fn. 22, and p. 23, fn. 25, of Complainant's Motion for Summary Judgment). This business arrangement is corroborated by the fact that purchase order #s 319332 and 319333 (CX-14, pages 1 and 2) show that Dr. Cooper inspected the two cows with tag #s 597 and 743 during his inspection of a large number of cattle that Respondent purchased on December 10, 2010, even though those two cattle were listed on the invoice corresponding to order 20 for Ric Hoyt (compare the cows listed on purchase order #s 319322 and 319333 (CX-14, pages 1 and 2) to those listed on Respondent's invoices corresponding to orders 11, 13, and 22 (CX-13, pages 3-5)).

tag #s 505, 316, 717, 903, 902, and 036) to the XL Four Star on December 27, 2010, more than two weeks after Mr. Gillette purchased them at TVLA. *See* CX-20 and CX-22. Based on the foregoing, they concluded that Respondent moved these six (6) cows from TVLA to MAF on or about December 10 before moving them back across the border to XL Four Star on December 27.[18] CX-20.

The APHIS investigators obtained a copy of another Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of December 6, 2010, showing that nineteen (19) head of cattle were moved from Caldwell, Idaho, to Morgan Avenue Feeders in Ontario, Oregon, on Friday, December 10, 2010. CX-17. Finally, Ms. Denise Walters provided a second affidavit stating that she searched "State of Idaho records for Saleyard Releases and/or Certificates of Veterinary Inspection issued to Sweeney Gillette for cattle movements on 12/10/10 . . . [and] found thirteen (13) . . . issued by Dr. Gordon Cooper at Treasure Valley Livestock, but none listing Sweeny Gillette as the shipper." CX-18.

Here again the TVLA invoices in CX-13 and Ms. Thurman's second affidavit in CX-12 prove that Respondent purchased cattle at TVLA on December 10, 2010. Ms. Thurman's second affidavit, Ms. Wright's second affidavit (CX-15), Dr. Gordon's affidavit (CX-6) and subsequent statement to an APHIS investigator (CX-7), and purchase order #s 319332, 319333, and 319334 (CX-14) likewise prove that the cows that Respondent purchased at TVLA on December 10 were over two (2) years of age and thus were test-eligible for brucellosis as defined by 9 C.F.R. § 78.1. Ms. Wright's second affidavit and five (5) State of Idaho Livestock Brand Inspection certificates that were prepared at TVLA on December 10, 2010 (CX-16) prove that Respondent represented to Idaho State Brand Inspectors that he intended to move at least some of the cattle that he purchased at TVLA to MAF and the Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of December 10, 2010 (CX-17), proves that cattle did in fact move interstate from Idaho to Oregon on December 10. The fact that at least six (6) of the cows listed on State of Idaho Livestock Brand Inspection certificate # CA 445326 as being destined for XL Four Star in Nampa (CX-25) did not arrive in Nampa until December 27 (CX-20 and CX-22) proves that some of the cows that Respondent said that he

[18] *See also* pages 20-25, *infra*.

was keeping in Idaho were in fact initially diverted to Oregon on or about December 10. Ms. Thurman's second affidavit (CX-12), Dr. Cooper's affidavit (CX-6), and Ms. Wright's second affidavit (CX-15) offer additional proof that Respondent either moved the cattle interstate on December 10, 2010, or caused said movement. Once again, any cow in this movement that was over two (2) years of age and thus test-eligible for brucellosis had to be accompanied by a valid certificate for interstate movement, as defined by 9 C.F.R. § 78.1 and required by 9 C.F.R. § 78.9(a)(3)(iii), yet Dr. Cooper's affidavit (CX-6) and Ms. Walters' second affidavit (CX-18) demonstrate that Respondent failed to obtain a valid certificate for the interstate movement of the cattle that he purchased at TVLA on December 10. Therefore, there is no dispute of material fact that on or about December 10, 2010, Respondent moved a second shipment of cattle that were test eligible for brucellosis from Caldwell, Idaho, to Ontario, Oregon, without obtaining a valid certificate for their movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

ON OR ABOUT DECEMBER 27, 2010, RESPONDENT MOVED 34 HEAD OF CATTLE THAT WERE TWO YEARS OF AGE OR OLDER FROM A FEED LOT IN OREGON TO A COMMERCIAL SLAUGHTER PLANT IN IDAHO WITHOUT DOCUMENTS THAT ACCURATELY STATED THE POINT FROM WHICH THE CATTLE MOVED, THEIR DESTINATION, THE NUMBER OF CATTLE BEING MOVED, THE NAME AND ADDRESS OF THEIR OWNER AT THE TIME OF THE MOVEMENT, THE NAME AND ADDRESS OF ANY PREVIOUS OWNER(S) WHO MIGHT HAVE OWNED THE CATTLE WITHIN FOUR (4) MONTHS PRIOR TO THE MOVEMENT, THE NAME AND ADDRESS OF THE SHIPPER, AND THE BACK TAG NUMBERS OR OTHER APPROVED IDENTIFICATION APPLIED TO THE CATTLE, IN VIOLATION OF 9 C.F.R. § 71.18(a)(1)(i).

The documents that APHIS investigators obtained during the course of their investigation clearly prove that on or about December 27, 2010, Respondent moved cattle that were two (2) years of age or older from MAF to XL Four Star in Nampa, Idaho, without current documentation that accurately stated the point from which the cattle moved, their

destination, the number of cattle being moved, the name and address of their owner at the time of the movement, the name and address of any previous owner(s) who might have owned the cattle within four (4) months prior to the movement, the name and address of the shipper, and the back tag numbers or other approved identification applied to the cattle. Mr. Ron Scott, a Deputy State Brand Inspector for the Idaho Department of Brand Inspection, Idaho State Police, provided an affidavit (CX-20)[19] in which he stated:

> [O]n 12/27/10, I inspected thirty (32) [sic] cows and two (2) bulls delivered to XL Four Star Beef, Inc., by a truck owned by Sweeny Gillette. The driver provided several Livestock Brand Certificates from . . . the State of Oregon, but did not present any other documents.[20] I believe the cattle came from Morgan Avenue Feeders, L.L.C., a feedlot near Ontario, OR. Mr. Gillette owns the Morgan Avenue Feeder [sic], L.L.C., feedlot[21] and based on my past experience generally sends his slaughter cattle from the feedlot in Ontario, OR to XL Four Star Beef, Inc., in Nampa, ID. . . . The driver . . . presented five (5) Oregon

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[19] This affidavit is dated March 27, 2014. Mr. Scott also provided an earlier affidavit dated January 14, 2011, which is referenced in his 2014 affidavit and is offered into evidence as CX-19. The March 27, 2014 affidavit is a clarification of the one dated January 14, 2011.

[20] Deputy Brand Inspector Scott stated that the driver also presented four (4) State of Idaho Livestock Brand Certificates that had been issued by Idaho Livestock Brand Inspectors at the Nampa Livestock Auction in Nampa, Idaho, on December 11, 2010, and December 18, 2010. CX-20. He noted that State of Idaho Livestock Brand Certificates are automatically cancelled and void 96 hours after they are issued and that the Idaho certificates presented with this shipment thus had expired prior to the date of this shipment. *Id.*; *see also* CX-9, CX-16, and CX-25.

[21] The Complaint alleges that Respondent and Mr. "Ric" Hoyt co-owned and operated MAF, but Respondent's answer denies this allegation. However, on March 9, 2009, Respondent provided an affidavit in which he stated, "I own and operate Morgan Ave. Feedlot, 845 Morgan Ave., Ontario, OR 97914. . . . I buy cattle for my own account. Most are fed for slaughter." CX-1. In April, 2011, the Malheur County Sheriff's Office in Vale, Oregon, initiated an investigation of Respondent's livestock activities that included, but was not limited to, "alleged violations of Federal regulations including the interstate movement of cattle without proper identification." CX-2. The investigators determined that Respondent owned Morgan Avenue Feeders, L.L.C., Gillette Livestock, L.L.C., and G 7 Livestock, L.L.C. *Id.* They also determined that Respondent's father-in-law, Mr. Richard "Ric" Hoyt, was Respondent's partner in the feedlot and an unspecified trucking company. *Id.*

> Livestock Brand Certificates issued by Livestock Brand Inspectors at Producers Livestock Auction in Vale, OR. The certificates numbered 92_001_0006323_Pro, 92_001_0006326_Pro, 92_001_0006321_Pro were issued on 12/22/10 and certificate numbers 92_001_0006328_Pro and 92_001_0006427_Pro were issued on 12/16/2010. State of Oregon Livestock Brand Certificates for the movement of livestock are only valid for eight (8) days therefore the two (2) Livestock Brand Certificates issued on 12/16/10 were expired and the three (3) Livestock Brand Certificates issued on 12/22/10 were five (5) days old. I inspected the cattle and discovered there were very few cows that matched the Livestock Brand Certificates Mr. Gillette presented.[22] With the help of Idaho State Police, Department of Brand Inspection, Deputy State Brand Inspector Skyler Flint, I ran the cattle through a chute at XL Four Star Beef, Inc., and individually inspected each animal. . . . When we inspected the thirty-two (32) cows we found five (5) animals that matched the identifying information on the State of Oregon Livestock Brand Certificates presented by the truck driver representing Mr. Gillette. . . . Livestock Brand Inspector Flint and I documented the cattle on State of Idaho Brand Inspector's Tally sheets numbered No. B187981 and B187982. . . . Based on my experience with livestock, the cows SG delivered on

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[22] Mr. Leonard Oltman, the stockyard supervisor at XL Four Star from August, 2007, through June, 2011 provided an affidavit in which he stated:

> During my employment at XL Four Star Beef, Inc. we accepted cattle from Sweeny Gillette. The cattle were delivered mostly by trucks from Morgan Avenue Feeders in Ontario, OR. When trucks arrived carrying Mr. Gillette [sic] cattle, they generally arrived with combinations of both State of Idaho and Oregon Brand Certificates. I don't remember any other documents accompanying the cattle. Occasionally, Mr. Gillette would deliver cattle to XL Four Star Beef, Inc. that failed to match the identifying information on the State Brand Certificates I [sic] would hold his cattle and we would contact the State Brand Office. On a few occasions, Mr. Gillette got very upset with me because I was holding his cattle.

CX-26.

> 1/27/10 to XL Four Star Beef, Inc., were all over two (2) years of age. . . . [APHIS] Investigator Soberanes asked me to compare USDA back tag numbers, brand information, and breed/color information listed on State of Idaho Brand Inspector's Tally sheets [No. B 187981 and B 187982] for . . . thirteen (13) cows moved interstate on 12/27/10 with the USDA back tag numbers, brand information, and breed/color information listed for cows on Idaho Livestock Brand Inspection Certificate number CA445326 dated 12/10/10. Investigator Soberanes noted seven (7) cows bearing USDA back tag numbers 505, 316, 717, 839, 903, 902, and 036 to [sic] appear on both documents and requested I confirm they were the same animals. I compared the USDA official identification backtag [sic] numbers, the physical description of the animals along with the brands recorded by the State Livestock Brand Inspectors and believe six (6) of the cows listed on both documents are the same animals. I'm not sure about number 839. . . . I noted on the Idaho Livestock Brand Inspections Certificates that at the time of the inspection at TVLA, Mr. Gillette destined all seven (7) of these cows to XL Four Star Beef, Inc. I believe that Mr. Gillette instead moved the cows on or about12/10/10 . . . interstate to Morgan Avenue Feeders, L.LC. in Ontario, OR. . . . Mr. Gillette then moved the cows interstate on 12/27/10 without proper identification to XL Four Star Beef, Inc. in Nampa, ID.[23]

CX-20.

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[23] As previously noted, Idaho State brand certificates for the movement of livestock, including certificate # CA 445326, state that they "shall be automatically cancelled and void 96 hours after time of issuance." *See* CX-9, CX-16, and CX-25. Certificate # CA 445326 (CX-25) was issued on December 10, 2010, so Respondent had to send the cows listed on this certificate to the slaughter plant no later than December 15, 2010, in order for this certificate to remain valid for said movement. However, the Idaho State Brand Inspectors at XL Four Star observed at least six (6) of these animals (back tag #s 505, 316, 717, 903, 902, and 036) being delivered to the slaughter plant on December 27, 2010, nearly two weeks after this certificate expired. *See* CX-20 and CX-22.

APHIS investigators obtained an XL Four Star Beef Inc. delivery sheet showing that thirty-two (32) cows and two (2) bulls were delivered to XL Four Star on December 27, 2010.[24] CX-21. They also obtained the Idaho State Police Brand Inspector's Tally sheets, nos. B 187981 and B187982, that Mr. Scott and Deputy State Brand Inspector Flynt prepared for the cattle sold by Respondent to XL Four Star on December 27, 2010. CX-22. These documents listed Respondent as the seller of the cattle that arrived at XL Four Star on December 27. Id. The investigators also obtained the five (5) State of Oregon Livestock Brand Inspection certificates that Mr. Scott referenced in his affidavit, and these documents also listed Respondent as the primary owner of the cattle that were delivered to XL Four Star on December 27, 2010. CX-23. Mr. Scott had noted on the certificates the five (5) cows listed on these certificates that he was able to match to animals in Respondent's December 27 shipment,[25] and four (4) of these cows were listed on certificate # 92_001-0006328_Pro, which was issued on December 16, 2012, and thus had expired prior to the date of Respondent's shipment. CX-23 at 3. The fifth cow that Mr. Scott had been able to match to one of the certificates was listed on certificate # 92_001_0006321_Pro, which had been issued on December 22, 2010. CX-23 at 2. Therefore, this certificate was the only one accompanying this shipment that both was still current on the date of the shipment and could be matched to a cow in the shipment. Finally, APHIS inspectors obtained another Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of December 27, 2010, showing that 33 head of cattle moved from the feedlot to XL Four Star on Monday, December 27. CX-24.

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[24] This sheet appeared to list Mr. Ken Schwabauer as the trucker, so APHIS investigators interviewed Mr. Schwabauer at the Law Offices of Brian Zanotelli on May 19, 2014. Mr. Schwabauer's answers were generally evasive, but he did admit that "he thought that he had been driving for Mr. [Rick] Hoyt for approximately 10 years," that "the truck he drives belongs to Mr. Gillette and that Gillette and Mr. Hoyt are partners." CX-39 and CX-40. Mr. Schwabauer also "confirmed that he had hauled cows from Treasure Valley Livestock Auction to Morgan Avenue Feeders on multiple occasions" and that "he would load all the cattle that he had to pick up at TVLA into the trailer and then haul them to Morgan Avenue Feeders where he would unload them into the pens." CX-39 and CX-40. APHIS investigators also obtained a copy of Mr. Schwabauer's 2010 Form1099-MISC showing that he worked for Morgan Avenue Feeders in 2010. CX-41.

[25] Mr. Scott also was able to match the two (2) bulls listed on certificate # 92_001_0006247_Pro to the two bulls in the December 27 shipment. CX-23 at 5. However, this certificate was issued on December 16, 2010, and thus was expired on the date of the shipment. *Id.*

The Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of December 27, 2010 (CX-24), the XL Four Star delivery sheet dated December 27, 2010 (CX-21), Mr. Scott's affidavit (CX-20), and the record of the APHIS investigators' interview with Mr. Schwabauer (CX-39 and CX-40) prove that Respondent moved thirty-two (32) cows that were two (2) years of age or older interstate from Oregon to Idaho on December 27, 2010. Mr. Scott's affidavit, which is supported by Mr. Oltman's affidavit (CX-26), further proves that the only documentation that accompanied this shipment was five (5) State of Oregon Livestock Brand Inspection certificates that matched only five (5) cows in the shipment and four (4) State of Idaho Livestock Brand Inspection certificates that were no longer valid on the date of movement. Furthermore, the Oregon livestock brand certificates were valid for only eight (8) days after they were issued, and the one that listed four (4) of the five (5) matching cows in the shipment was issued on December 16, 2010, so it was invalid on the date of movement. CX-23 at 3. The certificate that listed the other matching cow in the shipment was the only certificate accompanying this shipment that could be matched to an animal in the shipment and was still current on the date of the movement. CX-23 at 2. Therefore, there is no dispute of material fact that on or about December 27, 2010, Respondent moved cattle that were two (2) years of age or older interstate from Oregon to Idaho without current documentation that accurately stated the point from which the cattle moved, their destination, the number of cattle being moved, the name and address of their owner at the time of the movement, the name and address of any previous owner(s) who might have owned the cattle within four (4) months prior to the movement, the name and address of the shipper, and the back tag numbers or other approved identification applied to the cattle, in violation of C.F.R. § 9 C.F.R. § 71.18(a)(1)(i).

ON OR ABOUT JANUARY 8, 2011, RESPONDENT MOVED OR ARRANGED THE MOVEMENT OF OVER 100 HEAD OF CATTLE FROM A FEED LOT IN OREGON TO A RANCH IN CALIFORNIA WITHOUT A VALID CERTIFICATE FOR THEIR MOVEMENT, IN VIOLATION OF 9 C.F.R. § 78.9(a)(3)(iii).

The documents that APHIS investigators obtained during the course of their investigation clearly prove that on or about January 8, 2011, Respondent moved cattle that were test-eligible for brucellosis from Oregon to California without obtaining a valid certificate for this movement.

On May 1, 2014, Mr. Ronny Yribarren, a family rancher who operates a cow calf ranch and stocker steer operation near Bishop, California, gave an APHIS investigator an affidavit in which he described a cattle purchase from Respondent that occurred in January, 2011. CX-27. Specifically, Mr. Yribarren stated that he purchased cattle from Respondent on January 6, 2011, after seeing Respondent's advertisement "in the Capital Ag press." *Id.* He stated that he travelled "to the Eastern Oregon and Western Idaho area" on January 6 to meet Respondent and look at the cattle, which he said were being advertised as "young bred spring calving cattle." *Id.* Mr. Yribarren stated that he arranged to purchase three (3) truckloads of cattle for $1,125.00 per head and that Respondent was going to arrange the trucking but that he would pay the freight charges for the trucking. *Id.* He also stated that Respondent was going "to obtain and pay for both the Certificate of Veterinary Inspection for the cattle and the brand inspections for the cattle" and ship the cattle to him on January 8. *Id.*

Mr. Yribarren stated that the cattle arrived at his ranch on January 8, 2011, and were transported in three (3) different trucks, one of which belonged to Respondent. CX-27. He also stated that he prepared check # 2413, made payable to Morgan Avenue Feeders, in the amount of $1,829.00 in freight charges for the load of cattle that was transported in Respondent's truck. *Id.* With respect to this load, APHIS investigators obtained copies of Morgan Avenue Feeders freight invoice # 6587 (CX-28) and a Morgan Avenue Feeders, LLC, Cattle Movement sheet for the week of January 3, 2011 (CX-30), both of which show that MAF transported 44 cows from its feedlot in Ontario, Oregon, to Bishop, California, on January 8, 2011. The former also shows that MAF charged Mr. Yribarren $1,829.00 for this load, and APHIS investigators obtained a copy of check #2413 made payable to MAF in that amount. CX-29. APHIS investigators also obtained a copy of Morgan Avenue Feeders bill of lading (BOL) # 5761 (CX-31), which lists MAF as the point of origin for a load of 44 cows destined for Bishop, lists Respondent as the shipper

and Mr. Yribarren as the receiver, and lists Mr. Ken Schwabauer as the driver.[26]

Mr. Yribarren also stated that he prepared check # 2448, made payable to JVLX Livestock, in the amount of $3,676.60 for the transportation of the other two loads of cattle that he bought from Respondent. CX-27. He was not able to provide APHIS investigators with a copy of this check, but he did give them a copy of JVLX Livestock Transport, Inc. (hereinafter, JVLX), shipping invoice # 673 showing that JVLX had shipped two (2) loads of cows from Ontario, Oregon, to Bishop, California, on January 8, 2011, and had charged $1,838.30 per load for a total of $3,676.60. CX-32. On May 21, 2014, the investigators interviewed the company's owner, Mr. John VanLith, and showed him the shipping invoice. CX-33. Mr. VanLith told the investigators that he brokered these loads for Respondent and he provided copies of two BOLs from Blessinger Co., L.L.C., of Caldwell, Idaho, for the loads. Id. One of the BOLs, #236, was dated January 9, 2011, and listed Respondent as the shipper, Mr. Yribarren as the consignee, and "Nysa OR (Morgan Feeder)" as the point of origin for 44 unspecified animals. CX-34. The other, #280, was dated January 8, 2011, and also appeared to list Respondent as the shipper, Mr. Yribarren as the consignee, and Bishop, California, as the point of origin for 44 cows. CX-35. Both documents referenced a brand inspection document, # C346658,[27] and both had been signed by Mr. Yribarren as the receiver of the respective loads. CX-34 and CX-35.

Mr. Yribarren stated that he paid Respondent for a total of 132 head of cattle and that he made this payment by wire transfer, but he was unable to find the exact amount in his records. CX-27. However, he provided APHIS investigators with a copy of Gillette Livestock bill of sale #7414 showing that on January 8, 2011, Respondent sold Mr. Yribarren 132 head of cattle at $1,125.00 per head for a total purchase price of $148,500.00 and that payment was to be wired to Respondent. CX-36.

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[26] When APHIS investigators interviewed Mr. Schwabauer at the Law Offices of Brian Zanotelli on May 19, 2014, they asked him if he drove this load of cattle. CX-39 and CX-40. Mr. Schwabauer was evasive in his answers, but he admitted that he filled out the Morgan Avenue Feeders Cattle Movement sheet for the week of January 3, 2011 (CX-30) and kept that document "in the truck to track which loads he hauled so that he could get paid." CX-39 and CX-40.

[27] The brand inspection document number listed on BOL #236 (CX-34) is illegible but presumably is the same one that is listed on BOL # 280 (CX-35).

Mr. Yribarren stated that the three loads of cattle were accompanied by Oregon CVI # 92-79146, "an accompanying sheet that listed all the cattle's individual identification numbers," Respondent's invoice for 132 head of cattle, and State of Oregon Brand Inspection Certificate #s C 346658 and C 346659, and he gave copies of these documents to the APHIS investigators. CX-37, CX-36, and CX-38. The CVI had been prepared by Dr. Robert Derby, D.V.M., and listed Respondent as the shipper and Mr. Yribarren as the receiver of 132 cows, all of which were more than two (2) years old and bore legible tattoos showing that they had been vaccinated for brucellosis. CX-37. Accordingly, the interstate movement of even one of these cows had to be accompanied by a valid certificate for said movement, as required by 9 C.F.R. § 78.9(a)(3)(iii). The CVI had a note saying "see attached paperwork" and was accompanied by three (3) brucellosis test record continuation sheets, each of which bore Respondent's last name at the top and listed the back tag numbers, alphanumeric ear tag numbers, and the brucellosis vaccination status for animals in the shipment. *Id.* at 2-4. Some of the animals that were listed on these three sheets had been crossed off, and it is unclear if the animals that were crossed off had been or were supposed to have been in the three loads. *Id.* Assuming that they were, the sheets listed the back tag and ear tag numbers for only seventy (70) of the cattle in the shipment; if they were not, then the sheets listed the tag numbers for only 60 of the cattle.[28] *Id.* The two brand inspection certificates were dated January 8, 2011; listed Respondent as the owner/seller of the cattle, Mr. Yribarren as the purchaser, and Bishop, California, as the destination of the cattle in these shipments; and indicated that the cattle had been inspected in Ontario, Oregon. CX-38. Finally, certificate # C 346658 had been prepared for 44 cows and certificate # C 346659 had been prepared for 88 cows. *Id.*

Mr. Yribarren's affidavit (CX-27), the Gillette Livestock bill of sale #7414 dated January 8, 2011(CX-36), and the copies of Oregon CVI # 92-79146 (CX-37) and Oregon Brand Inspection Certificate #s C 346658 and C 346659 (CX-38) clearly prove that Respondent sold Mr. Yribarren 132

[28] One of the brucellosis test record continuation sheets that was attached to the CVI accompanying this shipment listed the vaccination status of 19 animals in the shipment as "NV", meaning that these animals had not been vaccinated for brucellosis at the time of their interstate movement, contrary to what the CVI seemed to indicate. *Compare* CX-37 at 4 *to* CX-37 at 1.

head of cattle on or about January 6, 2011. The CVI also proves that the cattle were over two (2) years of age and brucellosis test eligible at the time of this sale. Mr. Yribarron's affidavit and the copies of Morgan Avenue Feeders freight invoice # 6587 (CX-28), the cattle movement sheet for the week of January 3, 2011 (CX-30), Morgan Avenue Feeders BOL # 5761 (CX-31), Mr. Yribarren's check # 2413 (CX-29), and Oregon Brand Inspection Certificate # C 346658 (CX-38) prove that Respondent moved 44 cows from MAF in Ontario, Oregon, to Mr. Yribarren's ranch in Bishop, California, on or about January 8, 2011. Mr. Yribarren's affidavit, the APHIS investigator's record of his interview with Mr. VanLith (CX-33), and the copies of JVLX shipping invoice # 673 (CX-32), the two Blessinger Co. BOLs (CX-34 and CX-35), and Oregon Brand Inspection Certificate # C 346659 (CX-38) prove that Respondent arranged the movement of 88 more cows from MAF to Mr. Yribarren's ranch on January 8, 2011. All 132 cows in this movement had to be accompanied by a valid certificate for interstate movement, as defined by 9 C.F.R. § 78.1 and required by 9 C.F.R. § 78.9(a)(3)(iii), because they were over two (2) years of age and test eligible for brucellosis, and they were accompanied by a CVI and attached brucellosis continuation sheets that listed the required identification information for the cattle. CX-37. However, the brucellosis continuation sheets that were attached to the certificate of veterinary inspection did not list and identify nearly half of the cows that Respondent sold to Mr. Yribarren and transported to his ranch. *Id.* Therefore, there is no dispute of material fact that on or about January 8, 2011, Respondent moved a shipment of cattle that were test eligible for brucellosis from Ontario, Oregon, to Bishop, California, without obtaining a valid certificate for their movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

V. Respondent's Response to Complainant's Motion for Summary Judgement Is Insufficient

On February 5, 2016, Complainant filed the subject Motion for Summary Judgment. During a conference call convened by Administrative Law Judge Janice Bullard on February 24, 2016, Respondent's counsel, Mr. Brian Zanotelli, Esq., acknowledged that he had been served with Complainant's motion on February 22, 2016. On March 11, 2016, Respondent, acting by and through Mr. Zanotelli, filed Respondent's Response to Motion for Summary Judgment and

Affidavit of Kendra Gillette in reply to Complainant's Motion for Summary Judgment (Response and Affidavit, respectively). On March 15, 2016, Complainant filed Complainant's Request for Leave to File a Reply to Respondent's Response to Motion for Summary Judgment and a proposed reply (Reply). On October 20, 2016, Complainant filed a Supplemental Reply to Respondent's Response (Suppl. Reply).

In the Response and Affidavit, Respondent opposed Complainant's motion for summary judgment on the ground, *inter alia,* that many of the documents that Complainant proffered as evidence in support of its motion for summary judgment were obtained during a police raid of Respondent's home and feedlot that allegedly violated Respondent's rights against unreasonable search and seizure as set forth in the Fourth Amendment of the U.S. Constitution and argued that they should be deemed inadmissible. The Response and Affidavit noted that Respondent was suing state and federal officials (including two of Complainant's potential witnesses in this matter, retired APHIS Investigator Kirk Miller and APHIS Investigator Kenneth Hoover) in the U.S. District Court for the District of Oregon over these alleged violations. Respondent's lawsuit is captioned *Sweeney Gillette, et al. v. Malheur County, et al.*, case # 2: 14-CV-O1542-SU.

On May 3, 2016, the U.S. District Court for the District of Oregon issued a Decision dismissing Respondent's federal claims *with prejudice* because Respondent failed to state a claim for relief [Decision]. (*See* Decision at 30 and 34, footnote 15, a copy of which is attached to Complainant's Reply as Attachment I and incorporated herein by reference for all purposes). The Court also declined to exercise supplemental jurisdiction over his state law tort claims and dismissed them without prejudice. (*See* Decision at 34-36). I hereby take judicial notice of the subject Decision and direct that it be included in the official record of this case for all purposes including, but not limited to, support for the findings of fact and conclusion of law set forth in this Decision and Order.

Respondent filed a Notice of Appeal in the U.S Court of Appeals for the Ninth Circuit on June 22, 2016, and his opening brief in support of his appeal was due on October 31, 2016. Appellees' answering brief was due on November 30, 2016, and Respondent's optional reply brief

is due fourteen (14) days from the date of service of the answering brief. However, the Assistant U.S. Attorney who represented the federal defendants in Respondent's lawsuit has advised counsel for the Complainant that the Appellate Court could take eighteen (18) to twenty-four (24) months to render a decision on Respondent's appeal. Until such time as the District Court's Decision is reversed, remanded, or otherwise modified by the Appellate Court, it is the law of the case and entitled to full deference as such.

In any event, regardless of the outcome of Respondent's appeal, Complainant's evidence is fully admissible in the present proceeding and will not be excluded because, as previously noted in the Complainant's Reply, only eight (8) of Complainant's exhibits in support of its Motion for Summary Judgment were obtained pursuant to the search warrant that Respondent disputes, specifically, these exhibits are the four MAF cattle movement sheets in CX-10, CX-17, CX-24, and CX-30, the XL Four Star delivery sheet in CX-21, the MAF freight invoice in CX-28, the MAF bill of lading in CX-31, and the 1099-MISC for Respondent's driver, Mr. Kenneth Schwabauer, in CX- 41. All but one of these documents are documents that Respondent prepared and used in the ordinary course of his business and they simply corroborate and are corroborated by the rest of Complainant's evidence, such that there would be no undue prejudice in admitting them into the record of this remedial administrative enforcement action even *assuming arguendo* that the subject warrant is ultimately set aside on appeal.

Based on the foregoing, Respondent's Response and Ms. Gillette's supporting affidavit fail to make "reference to depositions, documents, electronically-stored information, affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials" that prove the existence of a "factual dispute of substance" regarding the material complaint allegations, as required by the standard set forth by the Judicial Officer in *Knaust*, 73 Agric. Dec. 92, 98 (U.S.D.A. 2014).

VI. Sanctions

In light of the foregoing, there are no material issues of fact in dispute with respect to any of the allegations set forth in the complaint; therefore, an order of Summary Judgment is appropriate.

Complainant requests, pursuant to section 10414(b) of the Act, that Respondent be assessed a civil penalty of forty thousand dollars ($40,000.00). As previously noted, section 10414(b)(1)(A) of the Act, as modified by 7 C.F.R. § 3.91(b)(2)(vi) in 2010, permitted the Secretary to impose a civil penalty of up to $60,000.00 per violation committed by any individual except when the individual has committed an initial violation involving the movement of regulated articles not for monetary gain. In the present matter, Respondent is an individual who committed an initial violation of the brucellosis regulations in 9 C.F.R. Parts 71 and 78 but, as demonstrated by CX-1 through CX-41, he clearly moved cattle in violation of the regulations for monetary gain, so the sanctions available to the Secretary are not capped at $1,000.00 per violation for the purposes of this proceeding. Therefore, the Secretary may impose a civil penalty of up to $60,000.00 per violation for Respondent's violations, provided that the Secretary has considered the statutory factors set forth in section 10414(b)(2). As previously noted, this section obligates the Secretary to consider the nature, circumstance, extent, and gravity of the Respondent's violations and gives him the discretion to consider the Respondent's ability to pay the civil penalty, the penalty's effect on his ability to continue to do business, any history of prior violations, and the Respondent's degree of culpability, as well as any other factors that the Secretary deems appropriate. An examination of these factors demonstrates that the proposed civil penalty of $40,000.00 is fully warranted by application of the law to the facts and circumstances of this case.

The documents in CX-1 through CX-41 clearly show that on three occasions in December, 2010, and January, 2011, Respondent moved or caused the movement, in interstate commerce, of cows that were more than two (2) years old and thus were test-eligible for brucellosis without obtaining a valid certificate for said movement, thereby violating the requirements for the interstate movement of such cows as set forth in 9 C.F.R. § 78.9(a)(3)(iii). The same documents also clearly show that in December, 2010, Respondent also moved or caused the movement of a shipment of cows that were more than two (2) years old from his feedlot

in Oregon to a commercial slaughter plant in Idaho without obtaining the owner's or shipper's statement or other equivalent documentation, in violation of the more general requirements for the interstate movement of cows that are set forth in 9 C.F.R. § 71.18(a)(1)(i).

These violations are very serious because they pose a grave threat to the health of U.S. livestock, the economic vitality of the U.S. livestock industry, and even the health of the American public. CX-42. Prior to the creation of USDA's Brucellosis Eradication Program in the 1950s, brucellosis was widespread in the United States and caused the U.S. livestock and dairy industries to suffer losses in excess of $400 million per year. CX-42. APHIS has carried out the Brucellosis Eradication Program for the last sixty years to eliminate the scourge of brucellosis in the United States by rigorously vaccinating calves, testing adult animals, and slaughtering infected animals, and it has been highly successful, such that all fifty States and some U.S. territories are now classified as Class Free with respect to brucellosis. CX-42.; *see also* the Brucellosis Fact Sheet referenced on page 7, footnote 4, of Complainant's Motor for Summary Judgment. The eradication of brucellosis in the United States has reduced the livestock and dairy industries' annual losses stemming from this disease to less $1 million today. CX-42; *see* Brucellosis Fact Sheet. However, the continuing eradication of this disease and the realization of the animal health, public health, and economic benefits resulting therefrom are contingent upon the creation of, and compliance with, an effective, nationwide identification, surveillance, and trace-back system. The regulations in sections 78.9 and 71.18 establish such a system, but Respondent's violations of these regulations frustrate the Brucellosis Eradication Program's ability to monitor for, detect, contain, and trace back any outbreaks of brucellosis that might occur and thus threaten to undermine the objectives set and undo the gains made by the program. CX-42.

Although the complaint lists only four (4) shipments whereby Respondent violated the regulations, these shipments occurred in the span of a month and at least one of them, the January, 2011, shipment from Ontario, Oregon, to Bishop, California, involved a significant number of cows that were rendered effectively untraceable by Respondent's blatant disregard for the regulations. CX-42. Furthermore, the four (4) violations listed in the complaint likely do not reflect the full extent of Respondent's

violations of the regulations. Dr. Gordon Cooper told APHIS investigators, "*Over the years*, I have seen [Respondent] *intentionally* do things that fail to properly identify cattle and potentially put the State of Idaho and other States at risk for the spread of animal disease" (emphasis added). CX-6. He further stated, "Based on my experience with Mr. Gillette, I have no doubt that *between 2010 and 2012* he was transporting cattle interstate without proper identification" (emphasis added). CX-6. Mr. Leonard Oltman likewise indicated that Respondent's December 27, 2010, shipment to XL Four Star was not the first and only one in which he moved cattle interstate to the slaughter plant with documents that did not match the animals in the shipment. CX-26.

Respondent also is highly culpable for his violations of the regulations because the Complainant's evidence demonstrates that he was fully aware of the regulatory requirements for the interstate movement of cattle but violated them anyway. CX-42. Dr. Cooper told APHIS investigators, "To my knowledge Mr. Gillette was aware of . . . USDA . . . requirements for the movement of cattle, but chooses to ignore the rules." CX-6. As noted above, Dr. Cooper also told APHIS investigators that Respondent's regulatory violations were intentional. CX-6. These statements are corroborated by the fact that Respondent asked Dr. Cooper to inspect the cattle that he purchased at TVLA on December 3, 2010, and December 10, 2010 (CX-3, CX-5, CX-12, CX-14) but did not ask Dr. Cooper to issue certificates for their release, as demonstrated by Dr. Cooper's statement that Respondent rarely asked him to issue such certificates prior to 2011 (CX-6) and the fact that the custodian of the State of Idaho Department of Agriculture's records related to cattle movement in that State could find no record of Dr. Cooper having done so for those shipments (CX-11 and CX-18). Dr. Cooper's statements that Respondent knew but intentionally ignored the regulations are further corroborated by the fact that Respondent did obtain a CVI for the 132 cows that he moved from MAF to Bishop, California, on January 8, 2011, and that the CVI and its attached documentation listed approximately half of the animals in the shipment. CX-27 and CX-37. Finally, his statements receive further corroboration from Mr. Oltman's statement that Respondent's shipments to XL Four Star "generally arrived with combinations of State of Idaho and Oregon Brand Certificates" that occasionally did not match the animals in the shipments. CX-26. Respondent's actions clearly demonstrate that he was aware that certain types of documents needed to accompany his interstate

cattle shipments but that he did not make every effort to obtain those documents or to make certain that the documents that accompanied his shipments accurately reflected the animals in those shipments. CX-42.

The nature, extent, and gravity of Respondent's violations, coupled with his high degree of culpability, warrant a severe penalty in order to deter Respondent and similarly-situated others from committing the same or similar violations in the future. CX-42. "It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or are regarded by the Department and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the Respondents, but also to other potential violators." *Hennessey*, 48 Agric. Dec. 320, 326 (U.S.D.A. 1989). Per section 10414(b) of the Act as modified by the Federal Civil Penalties Inflation Adjustment Act and 7 C.F.R. § 3.91(b)(2)(vi), APHIS is entitled to seek a maximum civil penalty of sixty thousand dollars ($60,000.00) for each of Respondent's violations, for a total of two hundred and forty thousand dollars ($240,000.00) for all of the violations that are being adjudicated in this proceeding. CX-42. However, after due consideration of both the factors referenced above and the Department's severe sanctions policy, APHIS has determined that the facts and circumstances of this case warrant a civil penalty of fifteen thousand dollars ($15,000.00) for each of Respondent's violations, for a total civil penalty of sixty thousand dollars ($60,000.00) for all of the violations adjudicated in this proceeding. CX-42.

Complainant's determination of the appropriate civil penalty has been further informed by consideration of Respondent's ability to continue in business if the proposed penalty is imposed. CX-42. The three (3) businesses in Ontario, Oregon, that Respondent owned when he committed the violations set forth in the complaint have been dissolved, and Complainant believes that he currently owns only one (1) business, Gillette Livestock, L.L.C. CX-42. Therefore, in consideration of Respondent's ability to continue to continue in business either as an individual or as his new business, Complainant has mitigated the recommended civil penalty referenced above by ten thousand dollars ($10,000.00). CX-42. Respondent has no prior history of adjudicated violations of the regulations governing the interstate movement of cattle, so Complainant has mitigated the recommended civil penalty by another

ten thousand dollars ($10,000.00). CX-42. Complainant thus has mitigated the recommended civil penalty by a total of twenty thousand dollars ($20,000.00), for a final recommended civil penalty of forty thousand dollars ($40,000.00). CX-42. APHIS believes that this civil penalty is sufficiently severe to deter Respondent and like-minded others from committing violations of the regulations in the future while striking an appropriate balance between the nature, gravity, and extent of Respondent's violations, his culpability for the same, his ability to continue in business, and his lack of prior adjudicated violations.

VII. Findings of Fact and Conclusions of Law

In accordance with the evidence of record in this docket, the following findings of fact and conclusions of law are hereby adopted:

1.

(a) Respondent is an individual who resides in the state of Oklahoma and has a mailing address of 447954 E. Highway 60, Vinita, Oklahoma 74301.

(b) At all times material herein, Respondent and his father-in-law, Richard "Ric" D. Hoyt, were the co-owners of Morgan Avenue Feeders, L.L.C. (hereinafter, MAF), located at 4455 Hwy 201, Ontario, Oregon 97914.

(c) At all times material herein, Respondent also owned and operated Gillette Livestock, Inc., located at 4312 S. Grandview Lane, Ontario, Oregon 97914, and G 7 Livestock, L.L.C., located at 849 Morgan Avenue, Ontario, Oregon 97914.

2. On or about December 3, 2010, Respondent purchased 78 head of cattle that were test- eligible for brucellosis at Treasure Valley Livestock Auction in Caldwell, Idaho, and moved at least 29 head to MAF in Oregon without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

3. On or about December 10, 2010, Respondent purchased 70 head of cattle that were test- eligible for brucellosis at Treasure Valley Livestock Auction in Idaho and moved at least 19 head to Morgan Avenue Feeders

in Oregon without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

4. On or about December 27, 2010, Respondent moved 34 head of cattle (32 cows and 2 bulls) that were two years of age or older from Morgan Avenue Feeders in Oregon to XL Four Star Beef, Inc., a commercial slaughter plant located in Nampa, Idaho. The paperwork that accompanied this movement consisted of five (5) State of Oregon Brand Inspection Certificates but only five (5) cows and the two (2) bulls in the shipment could be matched to the certificates. In addition, the Brand Inspection Certificates that listed four (4) of the five (5) matching cows and the two (2) bulls were issued on December 16, 2010, and were valid for only eight (8) days from the date of issuance, so they had expired prior to the date of the movement. Respondent thus moved cattle that were two years of age or older in interstate commerce without any documents stating the point from which the cattle moved, their destination, the number of cattle being moved, the name and address of their owner at the time of the movement, the name and address of any previous owner(s) who might have owned the cattle within four (4) months prior to the movement, the name and address of the shipper, and the back tag numbers or other approved identification applied to the cattle, in violation of 9 C.F.R. § 71.18(a)(1)(i).

5. On or about January 8, 2011, Respondent sold 132 head of cattle that were test-eligible for brucellosis to Ron Yribarren of Bishop, California, and moved or arranged the movement of the cattle from MAF in Oregon to Mr. Yribarren's ranch in Bishop. The paperwork that accompanied this movement consisted of a Certificate of Veterinary Inspection from the Oregon Department of Agriculture, # 92-79146 and an attached brucellosis test record, but the latter listed at most only 70 head of cattle. Respondent thus moved well over 100 brucellosis test-eligible cattle in interstate commerce without obtaining a valid certificate for said movement, in violation of 9 C.F.R. § 78.9(a)(3)(iii).

ORDER

In accordance with 10414(b) of the Act (7 U.S.C. § 8312(b)), Respondent Sweeny S. Gillette is assessed a civil penalty in the amount of forty thousand dollars ($40,000.00). Respondent shall send a certified

check or money order for forty thousand dollars ($40,000.00), payable to the U.S. Department of Agriculture, to USDA GIPSA, P. O. Box 790335, St. Louis, Missouri 63179-0335 within thirty (30) days from the effective date of this Order. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 16-0024.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision and Order will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision and Order shall be served upon parties.

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Errata

The Editor regrets having overlooked the timely inclusion of a federal court's Memorandum Opinion in Volume 75, Book 1 (January-June 2016), specifically:

> United States v. Horton, No. 5:15-cv-2553, 2016 WL 3555451 (N.D. Ohio June 30, 2016).

The Memorandum Opinion follows this page.

* * *

[ERRATA]

ANIMAL WELFARE ACT

COURT DECISION

UNITED STATES v. HORTON.
Case No. 5:15-cv-2553.
Memorandum Opinion of the Court.
Filed June 30, 2016.

AWA – Civil penalty – Inability to pay – Summary judgment.

[Cite as: No. 5:15-cv-2553, 2016 WL 3555451 (N.D. Ohio June 30, 2016)].

The Court granted USDA's unopposed motion for summary judgment, affirming USDA's "administrative determination" and the Judicial Officer's increase in civil penalty against the defendant. The Court found that the defendant's sole defense—that he could not afford the fine—was not supported by the record and emphasized that inability to pay a civil penalty is not a valid defense. The Court also ruled that although USDA requested "costs of suit and "other such relief," this request was "amorphous, unspecified, and unsupported" and therefore did not warrant additional relief.

United States District Court,
Northern District of Ohio,
Eastern Division.

MEMORANDUM OPINION

HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

Before the Court is plaintiff's motion for summary judgment. (Doc. No. 8.) Defendant, though served with the motion, has neither filed any opposition nor sought an extension of the April 15, 2016 deadline. For the reasons set forth herein, the motion is granted.

I. Discussion

A. Background

The factual and procedural background set forth by plaintiff in the motion for summary judgment is unopposed and, therefore, undisputed.

On December 10, 2015, plaintiff filed this action to reduce to judgment an administrative determination and fine by the United States Department of Agriculture's ("USDA") Administrator of the Animal and Plant Health Inspection Service ("APHIS") against defendant. (Complaint & Ex. A.)

An Administrative Law Judge ("ALJ") found defendant in violation of the Animal Welfare Act ("AWA" or "the Act"), 7 U.S.C. §§ 2131–2159, for his operation of Horton's Pups, a business located in Virginia, where defendant also lived. The business is currently in Millersburg, Ohio. Between about November 9, 2006 and September 30, 2009, defendant sold dogs for use as pets to various licensed businesses. Defendant operated his business without the requisite license, although he had been timely warned against doing so by the APHIS.

Administrative proceedings were commenced against defendant. The ALJ issued an order directing defendant to cease and desist violating the Act and to pay $14,430 in civil penalties. Cross-appeals were taken, and the judicial officer ("JO") acting for the USDA adopted most of the ALJ's findings. However, the JO increased the civil penalty to $191,200. Defendant appealed to the Sixth Circuit, which affirmed the JO's decision. *See Horton v. U.S. Dep't of Agriculture*, 559 Fed.Appx. 527 (6th Cir.2014).

Plaintiff now demands judgment against defendant in the principal sum of $191,200, plus costs of suit, and such other relief as this Court may deem just.

B. Summary Judgment Standard

When a party files a motion for summary judgment, it must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of

materials in the record...; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

C. Analysis

Defendant has not opposed, or in any way refuted, the factual and procedural allegations. Defendant's sole defense, submitted as a letter to the Court that the Clerk filed as an answer, is that he cannot afford the fine. There is nothing in the record to support this assertion and, on summary judgment, a party is not entitled to rely solely on the pleadings. In any event, inability to pay the civil penalty imposed under 7 U.S.C. § 2149(b) is not a valid defense. *See, e.g.*, *In re: Tracey Harrington*, AWA Docket No. 07–0036, 2007 WL 7278316 at *1 (U.S.D.A. Aug. 28, 2007) (inability to pay is not one of the statutory factors that must be considered when determining the amount of civil penalty); *In re: Marjorie Walker, d/b/a Linn Creek Kennel*, AWA Docket No. 04–0021, 2006 WL 2439003 at *22 (U.S.D.A. Aug. 10, 2006) (rejecting inability to pay as a valid basis for reducing the civil penalty).

The affirmance by the Sixth Circuit of the administrative decision by the APHIS and the USDA is case dispositive. There being no opposition offered by defendant, and the record, in fact, supporting plaintiff's position, plaintiff is entitled to judgment as a matter of law.

II. Conclusion

For the reasons set forth herein, this Court hereby reduces to judgment the administrative determination and fine against defendant, Lanzie Carroll Horton, Jr. Although plaintiff requested both "costs of suit[,] and such other relief ... as may [be] deemed just[,]" the Court further determines that this amorphous, unspecified, and unsupported request does not warrant any additional relief.

IT IS SO ORDERED.

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ANIMAL WELFARE ACT

COURT DECISIONS

PETA v. USDA.
No. 5:15-CV-429-D.
Order of the Court.
Filed July 12, 2016.

AWA – Administrative Procedure Act – *Chevron* deference – Exhibitor – Hearing, notice and opportunity for – Issue, definition of – License, application for – License, renewal of – License, revocation of – License, suspension of – License, termination of – Renewal requirements – "Rubber stamping" of agency decisions.

[Cite as: No. 5:15-CV-429-D, 2016 WL 3902745 (E.D. N.C. July 12, 2016)].

The Court granted USDA's motion for judgment on the pleadings, holding that the AWA does not prohibit USDA's administrative process for renewing exhibitor licenses and that USDA had discretion to promulgate the challenged renewal regulations. The Court ruled that USDA did not act arbitrarily or capriciously, abuse its discretion, exceed its statutory jurisdiction, authority, or limitations, or otherwise violate the Administrative Procedure Act by granting exhibitor-license renewals to exhibitors who had been recently cited for violating animal-treatment standards. The Court applied *Chevron* deference to USDA's interpretation of the AWA on the basis that (1) the AWA is silent with regard to exhibitor-license renewals and (2) USDA's renewal regulation were "based on a permissible construction" of the AWA.

United States District Court,
Eastern District of North Carolina,
Western Division.

ORDER

JAMES C. DENVER, III, CHIEF UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

On August 26, 2015, People for the Ethical Treatment of Animals, Inc. ("PETA" or "plaintiff") filed a complaint against the United States Department of Agriculture ("USDA") and Tom Vilsack, Secretary of the

USDA, in his official capacity (collectively, "defendants") [D.E. l].[1] PETA alleges that the USDA license-renewal process for animal exhibitions violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-08. On October 30, 2015, the USDA answered [D.E. 7] and moved for judgment on the pleadings [D.E. 8, 9]. PETA responded in opposition [D.E. 16], and the USDA replied [D.E. 17]. As discussed below, the court grants defendants' motion for judgment on the pleadings.

I.

The USDA regulates the treatment of animals in zoos and other exhibits. *See* Compl. [D.E. 1] ¶¶ 10, 17, 19-21. It licenses animal exhibitors, inspects their facilities, and issues citations to exhibitors whose facilities fail to meet the USDA's animal-treatment standards. *See*, *e.g.*, *id.* ¶¶ 1, 17, 20-21, 32-47, 56, 59, 62, 69, 71-72, 75, 91, 93-95. The USDA also accepts complaints from third parties who accuse exhibitors of violating animal-treatment standards. *See*, *e.g.*, *id.* ¶¶ 76-82.

USDA exhibitor licenses expire after one year. *Id.* ¶ 23. Exhibitors must renew licenses annually by submitting a signed application form, an annual fee, and a report of the animals owned, held, or exhibited during the previous year. *Id.* ¶¶ 23-25. By signing the renewal form, an exhibitor certifies compliance with the applicable regulations and standards. *Id.* ¶ 26. If an exhibitor completes each of these requirements, the USDA renews the license, even if the USDA recently cited the exhibitor for violating animal-treatment standards. *Id.* ¶¶ 28, 48-50; *see*, *e.g.*, *id.* ¶¶ 54-62, 65-68, 71-75, 91-103, 110, 115, 118-22, 124, 144-46, 148, 152, 154, 156, 158.

PETA is a non-profit organization "dedicated to protecting animals from abuse, neglect, and cruelty." *Id.* ¶ 9. PETA's complaint alleges that the USDA has a "policy, pattern, and practice" of issuing renewals to noncompliant exhibitors, and it gives five specific examples of exhibitors

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[1] An official-capacity suit is, in fact, an action against the government entity that the official represents. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Brandon v. Holt*, 469 U.S. 464, 471–72, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Thus, the court refers to the defendants collectively as "the USDA."

whose licenses were renewed despite recent complaints or citations. *Id.* ¶¶ 48, 51-167. This policy directly frustrates PETA's mission and causes it to divert resources away from its other activities. *See id.* ¶¶ 9-16. PETA seeks declaratory and injunctive relief.

II.

Federal Rule of Civil Procedure 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). A court should grant a motion for judgment on the pleadings only if "the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." *Park Univ. Enters. v. Am. Cas. Co. of Reading*, 442 F.3d 1239, 1244 (10th Cir.2006) (quotation omitted), *abrogation on other grounds recognized by Magnus, Inc. v. Diamond State Ins. Co.*, 545 Fed.Appx. 750 (10th Cir.2013) (unpublished); *see Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 375 (4th Cir.2012); *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir.2002).

A court ruling on a Rule 12(c) motion for judgment on the pleadings applies the same standard as in a Rule 12(b)(6) motion to dismiss. *See*, *e.g.*, *Mayfield*, 674 F.3d at 375; *Burbach Broad. Co. of Del.*, 278 F.3d at 405–06. A motion under either rule tests the legal and factual sufficiency of the claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677–80, 684, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–63, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir.2008). To withstand a Rule 12(c) motion, a pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quotation omitted); *see Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; *Giarratano*, 521 F.3d at 302. In considering the motion, the court must construe the facts and reasonable inferences in the "light most favorable to the [nonmoving party]." *Massey v. Ojaniit*, 759 F.3d 343, 347, 352–53 (4th Cir.2014) (quotation omitted); *see Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir.2013); *Burbach Broad. Co. of Del.*, 278 F.3d at 406. A court need not accept a pleading's legal conclusions. *Iqbal,* 556 U.S. at 678–79, 129 S.Ct. 1937; *Giarratano*, 521 F.3d at 302. Nor must it "accept as true unwarranted inferences,

unreasonable conclusions, or arguments." *Giarratano*, 521 F.3d at 302 (quotation omitted). Rather, plaintiffs' allegations must "nudge[ ] their claims," *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955, beyond the realm of "mere possibility" into "plausib[ility]." *Iqbal*, 556 U.S. at 678–79, 129 S.Ct. 1937.

When evaluating a Rule 12 motion, a court considers the pleadings and any materials "attached or incorporated into the complaint." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir.2011); *see* Fed. R. Civ. P. 10(c); *Thompson v. Greene*, 427 F.3d 263, 268 (4th Cir.2005); *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir.1991). A court also may take judicial notice of public records such as court documents. *See*, *e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir.2009). In APA cases, however, a court need not wait for an administrative record to be compiled to decide a pure question of law. *See*, *e.g.*, *Animal Legal Def. Fund v. USDA*, 789 F.3d 1206, 1224 n. 13 (11th Cir.2015). Rather, a court may decide a Rule 12(c) motion before discovery begins. *See Teachers' Ret. Sys. of L a. v. Hunter*, 477 F.3d 162, 170 (4th Cir.2007).

III.

PETA alleges that the USDA's "policy, pattern, and practice of rubber-stamping" exhibitor license renewals and its renewal of five specific exhibitor licenses violates the APA. Compl. ¶¶ 168-79.[2] Under the APA, courts must "hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C); *see Defs. of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 393 (4th Cir.2014); *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769–70 (9th Cir.1985); *Ohio Valley Envtl. Coal. v. Hurst*, 604 F.Supp.2d 860, 879 (S.D.W.Va.2009). Plaintiff has the burden of proof. *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir.1995). In reviewing an agency action, the court must "consider whether the decision was based on a consideration of the relevant factors and whether

[2] PETA has sufficiently alleged injury to support standing to sue. *Compare* Compl. ¶¶ 9-16*, with Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–67, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) *and White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 458–59 (4th Cir.2005).

there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (quotation omitted); *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1335 (4th Cir.1995). The "inquiry into the facts is to be searching and careful," but "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Babbitt*, 66 F.3d at 1335 (quotation omitted).[3] Courts, however, "must not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 647 F.3d 514, 517 (4th Cir.2011) (quotation and alteration omitted).

Although courts will not "rubber stamp" agency decisions, they give deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to certain statutory interpretations by agencies. When Congress delegates to an agency the authority to implement a statute, Congress implicitly delegates the authority to interpret it. *Id.* at 865–66, 104 S.Ct. 2778. *Chevron* deference is a judicial "tool of statutory construction whereby courts are instructed to defer to the reasonable interpretations of expert agencies charged by Congress to fill any gap left, implicitly or explicitly, in the statutes they administer." *Am. Online, Inc. v. AT & T Corp.*, 243 F.3d 812, 817 (4th Cir.2001) (emphasis and quotation omitted). *Chevron* deference applies when (1) "the statutory language is silent or ambiguous with respect to the question posed" and (2) "the agency's answer is based on a permissible construction of the statute." *Id.* (quotation omitted).

PETA challenges the USDA's renewal of licenses for exhibitors and cites recent, documented violations of USDA regulations. To determine whether to apply *Chevron* deference, the court initially analyzes (1) the statutory authority granted to the USDA and (2) the USDA's interpretation

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[3] When an agency has discretion to act, its decision *not* to exercise its discretionary authority is not subject to judicial review. *See* 5 U.S.C. § 701(a)(2). For example, a court cannot "substitute its judgment for that of the agency" and second-guess an agency's exercise of discretion not to initiate an enforcement action. *See Heckler v. Chaney*, 470 U.S. 821, 837–38, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

of that statutory authority as manifested in its licensing and enforcement regulations. *See Animal Legal Def. Fund*, 789 F.3d at 1215–20.

A.

In 1966, Congress passed the Animal Welfare Act, 7 U.S.C. §§ 2131-2159 ("AWA") to regulate the transportation, handling, and treatment of animals. Animal Welfare Act of 1966, Pub. L. No. 89–544, § 1, 80 Stat. 350, 350 (codified as amended at 7 U.S.C. § 2131). The AWA delegates to the USDA authority to regulate the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors. *See* 7 U.S.C. §§ 2140, 2143; *see also id.* § 2132(b) (defining "secretary"). Standards for humane handling, care, treatment, and transportation must include minimum requirements for "handling, housing, feeding, watering, sanitation, ventilation, shelter[,] ... veterinary care, and separation by species." *See id.* § 2143(a)(2)(A).

Carnivals, circuses, zoos, and other entities that "exhibit[ ] ... animals ... to the public for compensation" constitute "exhibitors" under the AWA, and the AWA imposes statutory obligations upon them. *Id.* § 2132(h); *see, e.g.*, *id.* §§ 2131(1) (listing "humane care and treatment" of exhibit animals as a purpose of the AWA), 2133 (providing for USDA licensure of exhibitors), 2134 (requiring that exhibitors be licensed), 2136 (requiring that any exhibitors exempt under section 2133 register with the USDA), 2140 (granting the USDA authority to regulate exhibitors' recordkeeping), 2141 (granting the USDA authority to regulate the marking and identification of animals purchased, transported, or sold by exhibitors), 2143 (providing for regulation of animal treatment by exhibitors).

To exhibit animals, an exhibitor must "obtain[ ] a license from the [USDA]." *Id.* § 2134. The USDA "shall issue licenses to ... exhibitors upon application therefor" and has authority to prescribe the "form and manner" of the application and establish a fee. *Id.* § 2133. The license shall not issue until the exhibitor "demonstrate [s] that his facilities comply with standards promulgated by the [USDA regarding the humane handling, care, treatment, and transportation of animals]." *Id.*; *see id.* § 2143.

The AWA grants the USDA discretion to "make such investigations or inspections as [it] deems necessary to determine whether any ... exhibitor

... has violated or is violating any provision of [the AWA] or any regulation or standard issued thereunder." *Id.* § 2146(a); *see id.* §§ 2147, 2151; *see also id.* § 2146(c). The USDA must inspect licensed animal research facilities at least annually, but the AWA imposes no such requirement regarding licensed exhibitors. *Id.* § 2146(a). "If the [USDA] has reason to believe that any person licensed as ... [an] exhibitor ... has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the [USDA] hereunder, [it] may suspend such person's license temporarily, but not to exceed 21 days." *Id.* § 2149(a). The USDA must then give the exhibitor notice and opportunity for hearing. *Id.* If after this process the USDA determines that a violation occurred, it may continue to suspend or revoke the exhibitor's license. *Id.* An exhibitor may not exhibit animals with a suspended or revoked license. *Id.* § 2134.

B.

In 1967, after notice and comment, the USDA promulgated regulations under the AWA, including licensing regulations. *See* Laboratory Animal Welfare, 32 Fed. Reg. 3270, 3270-71 (Feb. 24, 1967) (codified as amended at 9 C.F.R. §§ 2.1-2.12).[4] Since promulgating AWA licensing regulations, the USDA has distinguished "[a]pplication[s] for initial license" from "[a]pplication[s] for license renewal." *See* 9 C.F.R. §§ 2.2-2.4; Laboratory Animal Welfare, 32 Fed. Reg. at 3271 (outlining different procedures for initial-license applications (Sections 2.1-2.4), license renewals (Section 2.8(a)), and "reinstatement[s]" of recently-expired licenses (Section 2.8(b)); *Animal Legal Def. Fund*, 789 F.3d at 1220 (discussing the constancy of this distinction notwithstanding intervening regulatory changes).

Applicants for initial licenses must follow procedures prescribed in 9 C.F.R. §§ 2.1(a) and 2.6(a), acknowledge receipt of a copy of the applicable regulations and standards, *see* 9 C.F.R. § 2.2(a), and submit to an initial inspection to demonstrate compliance with USDA standards and regulations. *See id.* § 2.3(b); *see also id.* § 2.11(a) (listing persons

[4] At the time, the AWA provided only for the regulation of research facilities. In 1970, Congress extended the USDA's regulatory power to exhibitors. *See* Animal Welfare Act of 1970, Pub. L. No. 91–579, § 2, 84 Stat. 1560, 1560.

disqualified from seeking initial licenses). An applicant who fails initial inspection "will have two additional chances to demonstrate his or her compliance with the regulations and standards." *Id.* § 2.3(b).

Different requirements apply to renewal applicants. License renewal applicants must, "within 30 days prior to the expiration date of his or her license, ... file ... an application for license renewal and annual report." *Id.* § 2.7(a). The renewal applicant must meet three requirements. First, the renewal applicant must report "the number of animals owned, held, or exhibited by him or her... during the previous year or at the time [of renewal], whichever is greater." *Id.* § 2.7(d); *see N.C. Network for Animals, Inc. v. USDA*, 924 F.2d 1052 n. 1 (4th Cir.1991) (per curiam) (unpublished table decision) (discussing the applicability of the annual reporting requirement to dealers). Second, the applicant must pay a fee. *See* 9 C.F.R. §§ 2.1(d)(1), 2.5(a)–(b), 2.6. Third, the applicant must also "certif[y] by signing the application form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply." *Id.* § 2.2(b).[5] A licensed

[5] Defendants suggest that 9 C.F.R. § 2.2(b) forbids the USDA from considering any evidence, such as disciplinary actions, when issuing a renewal. *See* [D.E. 9] 8. Section 2.2's statement that "[the USDA] will renew a license after the applicant ... sign[s] the application form," however, does not make the renewal active upon signature of the form. Likewise, the regulation's use of the word "will" does not require mandatory renewal of any signed application form. For example, a signed form unaccompanied by a fee or annual report would not preserve an expiring license. *See* 9 C.F.R. §§ 2.1(d)(1), 2.5(b). Instead, the distinction between initial license applications and renewals in section 2.2(a) and (b) merely narrows the paperwork required for a renewal. Until 2004, both initial license applicants and renewal applicants received copies of the applicable regulations and standards each year and were required to acknowledge receipt of the regulations and agree to comply with them by signing the renewal application form. 9 C.F.R. § 2.3 (2004). In 2004, the USDA amended the acknowledgment requirement, eliminating the annual mailing of the regulations to each licensee during renewal. *See* Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42089, 42091 (July 14, 2004); 9 C.F.R. § 2.2(b). Nonetheless, section 2.5 effectively constrains the USDA to considering only the three components of the renewal application: the annual report, fee, and signature certifying compliance. Specifically, section 2.5 states that "[a] license shall be valid and effective unless" it is (1) revoked or suspended pursuant to the AWA, (2) voluntarily terminated, (3) has expired or been terminated pursuant to the regulatory scheme, or (4) the licensee fails to pay the annual fee. 9 C.F.R. § 2.5(a). Termination under either the AWA or the regulatory scheme requires notice and a hearing. 7 U.S.C. § 2149(a); 9 C.F.R. § 2.12. Expiration occurs when a licensee fails to submit an annual report, certification of compliance, and an annual fee before the expiration date of the license. 9 C.F.R. § 2.5. Thus, a license that is not voluntarily terminated or terminated after notice and a hearing

exhibitor must satisfy all three requirements for renewal on or before the expiration date of the license, or the exhibitor's license will automatically terminate. *Id.* § 2.5(b); *see id.* § 2.1(d)(1). But *see Benigni v. Maas*, 12 F.3d 1102 (8th Cir.1993) (unpublished table decision) (holding that a license did not expire immediately upon the expiration date because the licensee had not received "*written* notice and an opportunity to [cure his deficient application by paying the renewal fee]"). If an exhibitor fails to complete the renewal process, he or she "must follow the procedure applicable to new applicants." 9 C.F.R. § 2.5(c). If the exhibitor completes the renewal process before the expiration date, the exhibitor's original license, unless otherwise terminated, continues to "be valid and effective." *Id.* § 2.5(a).

The USDA may inspect licensed exhibitors. *See* 7 U.S.C. § 2146; 9 C.F.R. § 2.3(a); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 322 n. 19, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *cf. Hodgins v. USDA*, 238 F.3d 421 (6th Cir.2000) (unpublished table decision) (upholding a series of eight inspections of a facility subject to the regulation and holding that the inspectors did not violate the Fourth Amendment); *Benigni*, 12 F.3d at 1102 (holding that the AWA permits warrantless administrative searches). Additionally, any interested person may complain to the USDA if they suspect that a licensed exhibitor has violated the AWA. *See* 9 C.F.R. § 4.10; 7 C.F.R. §§ 1.131(a), 1.133(a)(1). Upon receiving a complaint, the USDA may initiate whatever investigation it deems appropriate. 7 C.F.R. § 1.133(a)(3). The "person submitting the information shall not be a party" to any subsequent proceeding. *Id.* § 1.131(a)(1), (4).

The USDA may terminate a license at any time for noncompliance with the applicable regulations, but the licensee is entitled to a hearing. 9 C.F.R. § 2.12; *see* 7 U.S.C. § 2146; 9 C.F.R. § 2.11 (a)(2), (b); *see also*, *e.g.*, *Hodgins*, 238 F.3d at 421 (analyzing due process afforded at a license revocation hearing and criticizing the Administrative Law Judge's evidentiary rulings); *Hickey v. Dep't of Agric.*, 878 F.2d 385 (9th

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"shall be valid and effective" unless the renewal application lacks an annual report, certification, or fee. Moreover, when determining whether to issue a renewal, the USDA may consider only these three requirements. Pending complaints against a licensee and even known regulatory violations may lead to termination of a license pursuant to 7 U.S.C. § 2149(a) and 9 C.F.R. § 2.12, but they do not affect renewal.

Cir.1989) (unpublished table decision) (analyzing due process protections and affirming license suspension based on numerous violations, including falsification of annual report during license renewal process). Even when repeated inspections over the course of years show ongoing failure to comply with the regulations, the USDA must afford due process to licensees. *E.g.*, *Hickey*, 878 F.2d at 385 (reviewing due process provided and ultimately affirming license revocation).

Here, the court must determine whether the USDA's animal exhibitor license renewal process is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). The USDA's interpretation of the AWA in its regulations is entitled to *Chevron* deference if (1) "the statutory language is silent or ambiguous with respect to the question posed" and (2) "the agency's answer is based on a permissible construction of the statute." *Am. Online, Inc.*, 243 F.3d at 817 (quotation omitted).

C.

To determine whether *Chevron* deference applies, the court first determines whether the AWA's statutory language "is silent or ambiguous with respect to the question posed." *Am. Online, Inc.*, 243 F.3d at 817 (quotation omitted). Namely, "may the USDA renew the license of an exhibitor who has recent, documented violations of USDA regulations?"

PETA argues that 7 U.S.C. § 2133 forbids such a renewal. *See* [D.E. 16] 4-7, 11-19. In support, PETA cites 7 U.S.C. § 2133's declaration that "no [exhibitor] license shall be issued [by the USDA] until the ... exhibitor shall have demonstrated that his facilities comply with [USDA] standards." *See* 7 U.S.C. § 2133.

The court rejects PETA's argument. First, the text of 7 U.S.C. § 2133 does not refer to license renewals. *See id.*; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("[In a statutory construction case,] we begin with the language of the statute.... The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (quotation omitted)); *Sebelius v. Cloer*, —— U.S. ——, 133 S.Ct. 1886, 1895, 185 L.Ed.2d 1003 (2013). Moreover, the

relevant language in 7 U.S.C. § 2133 has not changed since Congress enacted the AWA. *Compare* 7 U.S.C. § 2133, *with* Animal Welfare Act of 1966 § 3. Then, as now, to "issue" a license meant to "giv[e] out" that license. *Compare Issue*, WEBSTER'S NEW RIVERSIDE UNIV. DICTIONARY (2d. ed. 1988), *with* Animal Welfare Act of 1966 § 3. A modification to an existing license, such as an extension of the term length, does not constitute "giving out" a license. Thus, renewing a license through the USDA's administrative renewal process does not constitute "issuance" of a new license. *See Animal Legal Def. Fund*, 789 F.3d at 1223.

Second, the context of the AWA supports this construction. The AWA grants the USDA discretion to prescribe the "form and manner" of any license application. 7 U.S.C. § 2133. Additionally, the AWA grants the USDA broad discretion to "promulgate such rules, regulations, and orders as [it] may deem necessary in order to effectuate the purposes of [the AWA]." *Id.* § 2151. Thus, reading the phrase "issue ... licences" in 7 U.S.C. § 2133 to not apply to renewal of licenses comports with the AWA's general grant of discretion to the USDA to specify the form, terms, and other details of licensure.

Third, the limitations on the USDA's enforcement authority in 7 U.S.C. § 2149 also support the court's construction of 7 U.S.C. § 2133. Section 2149 imposes due process requirements before revoking an existing license. Section 2149 entitles a licensee to "notice and opportunity for hearing" if the USDA seeks to suspend a license for more than 21 days or revoke it. *See id.* § 2149. PETA's proposed construction of 7 U.S.C. § 2133 would eviscerate this protection. To avoid the cumbersome process of investigating an alleged violation and presenting evidence at a hearing, the USDA could simply cite the licensee for a violation shortly before the renewal date and refuse to issue the renewal. Such a result would render 7 U.S.C. § 2149 superfluous. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quotations omitted)).

In opposing this conclusion, PETA asks this court to look beyond the text of the statute and to the USDA's fee-collection practices under 7 U.S.C. § 2153. *See* [D.E. 16] 5, 14-15. According to PETA, section 2153

authorizes the USDA to collect "reasonable fees for licenses issued." *See* 7 U.S.C. § 2153. PETA then argues that the USDA relies upon 7 U.S.C. § 2153 to collect renewal fees, and that the USDA's interpretation of "issue" in section 2153 conflicts with its interpretation of "issue" in section 2133. Although PETA's argument might implicitly challenge the USDA's statutory authority to collect renewal fees, the argument does not address whether the plain text of section 2133 applies only to the issuance of new licenses. The court need not opine on the USDA's authority to collect renewal fees under section 2153. The text of 7 U.S.C. § 2133 plainly does not apply to renewals, and the analysis stops there. *See Sebelius*, 133 S.Ct. at 1895; *Barnhart*, 534 U.S. at 450, 122 S.Ct. 941; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

No other section of the AWA addresses the challenged renewal process. Indeed, the AWA itself does not prescribe procedures for renewal, minimum requirements for renewal, or a maximum license duration. The statute does not even require that the licenses expire at all. *See* 7 U.S.C. §§ 2133, 2151 (granting the USDA broad discretion to "issue licenses" and to "promulgate such rules, regulations, and orders as [it] may deem necessary in order to effectuate the purposes of [the AWA]"); *cf. Animal Legal Def. Fund*, 789 F.3d at 1217–19 (contrasting the AWA with other statutes that specify license terms and renewal procedures and requirements). With regard to exhibitor license renewals, the AWA is silent. Thus, the court proceeds to *Chevron*'s second step.

D.

The second step of *Chevron* does not invite a court to inject its own opinion about how an agency *should* construe the statute. Rather, the court must next determine whether the USDA's renewal process "is based on a permissible construction of the statute." *Am. Online, Inc.*, 243 F.3d at 817 (quotation omitted). Moreover, the court must defer under *Chevron* so long as the agency interpretation is "permissible," and "permissible" does not mean "the best." *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 980, 125 S.Ct. 2688. *Chevron* deference restrains judges from indulging the tempting "prospect of making public policy by prescribing the meaning of

ambiguous statutory commands." *City of Arlington v. FCC*, ——U.S. ——, 133 S.Ct. 1863, 1873, —— L.Ed.2d —— (2013).

The USDA's renewal regulations permissibly construe its authority under the AWA. As discussed, the AWA reasonably supports the conclusion that the USDA has discretion over the length and terms of licenses issued under the statute. *See* 7 U.S.C. §§ 2133, 2151, 2153. Conversely, PETA's proposed construction would unreasonably render superfluous the AWA's statutory due-process protections for licensees. *Cf. id.* § 2149.

The USDA properly considered alternative licensing and enforcement structures during the notice and comment periods of earlier iterations of the renewal regulations. *See, e.g.*, Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42089-01, 42091-92 (July 14, 2004); Animal Welfare; Licensing and Records, 60 Fed. Reg. 13893-901, 13894 (Mar. 15, 1995). The USDA faced competing concerns, including effective use of its own limited resources to protect animal welfare and procedural protections for licensees. The promulgated regulations reflect the agency's chosen balance between these policy concerns. This court will not "substitut[e] [its] own interstitial lawmaking for that of [the] agency." *City of Arlington*, 133 S.Ct. at 1873. The regulations permissibly construe the AWA. *See Animal Legal Def. Fund*, 789 F.3d at 1224; *Animal Legal Def. Fund v. Vilsack*, Civil Action No. 14–1462, —— F.Supp.3d ——, —— – ——, 2016 WL 1048761, at *10–11 (D.D.C. Mar. 14, 2016) (unpublished).

In sum, the AWA does not prohibit the USDA's administrative renewal process for exhibitor licenses. Rather, the USDA had discretion to promulgate the renewal regulations challenged here. The USDA did not act "arbitrar[ily] [or] capricious[ly]," "abuse [its] discretion," "exce[ed its] statutory jurisdiction, authority, or limitations," or otherwise violate the APA when it granted exhibitor license renewals in accordance with those regulations. 5 U.S.C. § 706(2)(A), (C); *see Animal Legal Def. Fund*, 789 F.3d at 1224 (holding that the renewal regulations "are entitled to Chevron deference, and USDA therefore did not act arbitrarily or capriciously by renewing [an exhibitor's] license"); *Animal Legal Def. Fund*, —— F.Supp.3d at —— – ——, 2016 WL 1048761, at *10–11 (same). Thus, the court rejects PETA's challenge to the individual renewals and the

policy of granting such renewals.

IV.

In sum, the court GRANTS defendants' motion for judgment on the pleadings [D.E. 8] and DENIES plaintiff's motion to strike [D.E. 20]. Defendants may file a motion for costs in accordance with the Federal Rules of Civil Procedure and this court's local rules. The clerk shall close the case.

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KOLLMAN v. VILSACK.
Case No. 8:14-cv-1123-T-23TGW.
Order of the Court.
Filed September 8, 2016.

AWA – Animal welfare – Exhibit, definition of – Exhibit, distinguished from "exhibitor" – Exhibitor, definition of – License, revocation of – Person, definition of – Present.

[Cite as: No. 8:14-cv-1123-T-23TGW, 2016 WL 4702426 (M.D. Fla. Sept. 8, 2016)].

The Court granted the Secretary's motion for summary judgment against the plaintiff, holding that Section 2.10(c) of the AWA regulations prohibits an individual from exhibiting an animal where that individual's AWA license has been revoked. In so holding, the Court emphasized that Section 2.10(c) expressly applies not only to exhibitors with revoked licenses but to any person whose license has been revoked. The Court found that the "statutory and regulatory definition of 'exhibitor' is narrower than the dictionary definition of 'exhibit'" and, consequently, "every person who is an exhibitor exhibits but not every person who exhibits is an exhibitor." Additionally, the Court declined to determine whether the Secretary's interpretation of Section 2.10(c) was entitled to deference because it found that the language of Section 2.10(c) was not ambiguous.

United States District Court,
Middle District of Florida,
Tampa Divison.

ORDER

STEVEN D. MERRYDAY, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

Lancelot Kollman, an exotic-animal trainer, sues (Doc. 34) Thomas J. Vilsack, the United States Secretary of Agriculture, and Chester A. Gipson, a "deputy administrator of animal care" for the Animal and Plant Health Inspection Service (APHIS).[1] Under the Secretary of Agriculture's regulations implementing the Animal Welfare Act (AWA), Kollman sues for a declaration that, at a circus maintained by his employer, Hawthorn Corporation, he may publicly perform — with a tiger — a "tiger act." The defendants move (Doc. 39) for summary judgment.

Background

A. Statutory and Regulatory Framework

The AWA (7 U.S.C. §§ 2131–2159) regulates the housing, sale, transport, treatment, and exhibition of animals. Captured at Section 2131, Congress's purpose for enacting the AWA includes ensuring that animals intended "for exhibition... are provided humane care and treatment" and ensuring that animals are treated humanely "during transportation in commerce." Section 2134 requires that an exhibitor of an animal possess a license. Section 2132(h) defines "exhibitor" as a "person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation." Section 2132(a) defines "person" as an "individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity."

Section 2143 directs the Secretary to enforce minimum requirements for "the humane handling, care, treatment, and transportation of animals" by an exhibitor. If an exhibitor violates the AWA or the implementing regulations, Section 2149 authorizes the Secretary to fine the exhibitor, to suspend the exhibitor's license, and after notice and opportunity for a hearing to revoke the exhibitor's license.

Section 2151 authorizes the Secretary to promulgate regulations (9 C.F.R. §§ 2.1–2.153) implementing the AWA. Section 2.10(c) states that a "person whose license has been suspended or revoked shall not buy, sell,

[1] APHIS is an agency within the United States Department of Agriculture (USDA). This order denominates APHIS and the USDA collectively as the USDA.

transport, exhibit, or deliver for transportation, any animal during the period of suspension or revocation." Similar to the statute, the regulations include a definitions section (9 C.F.R. § 1.1). The definitions for "exhibitor" and "person" in Section 1.1 are identical to the definitions in the AWA.[2] Similar to the statute, the regulations contain no definition for the verb "exhibit." However, Section 1.1 provides that "[w]ords undefined in [Section 1.1] shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary."

B. Factual Background

Before 2009, the Secretary licensed Kollman as an exhibitor under the AWA. (Doc. 34 ¶ 10) After the death of two lions and after Kollman failed to contest charges against him, the Secretary revoked Kollman's license. *See Kollman Ramos v. USDA*, 322 Fed. Appx. 814, 818 (11th Cir. 2009) (Cohill, J.) (describing the events in detail and upholding the revocation).

After the Secretary revoked Kollman's license, Hawthorn, a company that holds an exhibitor license, hired Kollman to train a "tiger act" for performance at circuses throughout the United States. (Doc. 34 ¶ 21) Hawthorn originally intended that Kollman would train the tigers and that another Hawthorn employee would perform the tiger act at the circuses. (Doc. 49 at 2) But, because Hawthorn "was unable to find" another employee, Hawthorn asked Kollman to travel with the tigers and perform the tiger act. (Doc. 49 at 3) In March 2012, Kollman began to perform the tiger act on behalf of Hawthorn. (Doc. 49 at 3)

In October 2012, Hawthorn contracted to perform the tiger act at the "Universoul Circus." (Doc. 49 at 4) Around this time, a director of People for the Ethical Treatment of Animals (PETA) observed Hawthorn's tiger act. (Doc. 49 at 4) Upset about Kollman's participation in the tiger act, the PETA director sent Robert Gibbens, a "western regional director" in the USDA, an e-mail insisting that the USDA "shut down this illegal exhibit

[2] Although the statutory definition and the regulatory definition of "exhibitor" are identical, the definitions include an illustrative list of examples that qualify as an "exhibitor" and an illustrative list of examples that fail to qualify as an "exhibitor." A comparison reveals that the regulatory definition adds examples not included in statutory definition.

immediately and immediately suspend Hawthorn's license." (Doc. 42 at 49)

In response to the e-mail from the PETA director, Gibbens opened an investigation into Kollman's participation in Hawthorn's tiger act. In October 2012, Gibbens believed that the AWA and the Secretary's regulations permitted Kollman to exhibit tigers as a Hawthorn employee. (Doc. 42 at 11) Gibbens explained to the PETA director that "having his license revoked doesn't prevent [Kollman] from being a bona fide employee of another licensee." (Doc. 42 at 51) In December 2012, after a USDA investigator confirmed Kollman's employment with Hawthorn, Gibbens sent to other USDA employees an e-mail concluding that "the matter can be closed with no further action at this time." (Doc. 42 at 124)

Despite Gibbens' e-mail, the USDA continued to receive complaints about Kollman and Hawthorn.[3] After receiving the additional complaints, the USDA re-opened the investigation into Kollman's participation in Hawthorn's tiger act. As a result of this investigation, the USDA determined that the Secretary's regulations prohibit Kollman from exhibiting animals as an employee of Hawthorn.

In a January 2013 letter to Kollman and Hawthorn, Gipson explained that the "exhibition of...animals by a person whose license has been revoked would constitute a violation of section 2.10(c)." (Doc. 43 at 40) Gipson warned that a licensed exhibitor employing Kollman to engage in actions prohibited by Section 2.10(c) "risks being subject to an administrative action to terminate his or her Animal Welfare Act license." (Doc. 43 at 40)

Discussion

The complaint seeks a declaration that under Section 2.10(c) Kollman may present the tiger act as an employee of Hawthorn, a licensed exhibitor. (Doc. 34 ¶¶ 50–62) Specifically, Kollman argues that Section 2.10(c) does not apply to him because he is not an exhibitor.

[3] The USDA received complaints from PETA; from In Defense of Animals; and from others. A PETA "legal fellow" sent the USDA an e-mail asserting that, while he performed the tiger act on behalf of Hawthorn, Kollman beat two tigers. (Doc. 44 at 158)

A. Kollman is barred from presenting animals on behalf of Hawthorn.

The parties agree that an employee who exhibits an animal on behalf of an employer that is a licensed exhibitor is not an exhibitor under the statute and the regulations. (Doc. 34 ¶ 52; Doc. 39 at 11) Pragmatic reasons support this conclusion. As noted by the defendants, the statute and the regulations (1) require that an exhibitor of an animal possess a license (*See* 7 U.S.C. §§ 2133, 2134) and (2) subject the exhibitor to burdens, including requirements for record creation and retention (*See, e.g.*, 7 U.S.C. § 2140), which "are not designed to fall on a... contracted employee." (Doc. 39 at 13) Therefore, although a company that contracts to exhibit a tiger act at a circus is an exhibitor, the company's employee who performs the tiger act at the circus is not an exhibitor and needs no license under the statute and the regulations.[4]

Kollman argues that, because as a general matter an employee of a licensed exhibitor may exhibit an animal on behalf of his employer, Kollman may exhibit the tiger act on behalf of Hawthorn. (Doc. 49 at 15) Kollman's argument fails because a more restrictive regulation, Section 2.10, applies to "[l]icensees whose licenses have been suspended or revoked." Under Section 2.10(c), "any person whose license has been suspended or revoked" may not "buy, sell, transport, exhibit, or deliver for transportation, any animal during the period of suspension or revocation." Section 2.10(c) expressly applies not only to an exhibitor with a revoked license but, more broadly, to "[a]ny person" with a revoked license. The statute and the regulations define "person" as an "individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other

[4] Although the defendants agree that this employee exception exists, the defendants fail to identify in the text of the AWA or the regulations a basis for the exception. In contrast, Kollman asserts that the employee exception is found in the definition of "exhibitor." (Doc. 49 at 13–15) The statute and the regulations define "exhibitor" as a person who exhibits to "the public for compensation" an animal that is "purchased in commerce." Kollman asserts that he is not an exhibitor because he neither owns the tigers in the tiger act (Hawthorn owns the tigers) nor receives for exhibiting the tiger act payment directly from "the public" (Hawthorn pays Kollman). (Doc. 34 ¶¶ 51–52) Stated differently, under Kollman's interpretation, the definition of exhibitor contains two implied elements — the exhibitor (i) must exhibit his own animal and (ii) must receive from the public compensation for exhibiting.

legal entity." Regardless of his status as a Hawthorn employee, Section 2.10(c) clearly prohibits Kollman, an individual with a revoked license, from exhibiting an animal.

Attempting to avoid Section 2.10(c), Kollman invents a distinction between the verb "exhibit," which is included in Section 2.10(c), and the verb "present," which is not included in the relevant sections of the statute or the regulations. (*See* Doc. 49 at 13–14) Kollman argues that "exhibit," which the statute and the regulations leave undefined, incorporates the definition of "exhibitor." Thus, according to Kollman, to exhibit an animal, a person (1) must own the animal and (2) must receive compensation directly from the public in return for exhibiting the animal. (Doc. 32 ¶¶ 51–56; Doc. 49 at 13–14) Kollman argues that, if either element is absent, the statute and regulations identify the person's conduct not as exhibiting but rather as presenting, an act not prohibited by Section 2.10(c).

Kollman's argument fails because no basis for Kollman's distinction appears in the statute or the regulations. Rather, Section 2.10(c) states that a person — an "individual" — with a revoked license may not exhibit an animal. Although the regulations fail to define the verb "exhibit," Section 1.1 provides that an undefined word retains "the meaning attributed to [the word] in general usage as reflected by definitions in a standard dictionary." According to the *American Heritage Dictionary* (5th ed. 2016), "exhibit" means "to present for others to see." Thus, under Section 2.10(c), if an "individual," including an employee of a licensed exhibitor, has a revoked license, the person may not "present for others to see" an animal "during the period of...revocation." Accordingly, Kollman may not "present" the tiger act at circuses on Hawthorn's behalf. In other words, the statute and the regulations define "exhibitor" as a person who exhibits to "the public for compensation" an animal that is "purchased in commerce." The statutory and regulatory definition of "exhibitor" is narrower than the dictionary definition of "exhibit." As a result, every person who is an exhibitor exhibits but not every person who exhibits is an exhibitor.

Kollman incorrectly argues that "interpreting [Section 2.10(c)] to allow [Kollman] to train and handle animals behind the scenes while preventing him from showing them to crowds of people" is "inconsistent with the purpose of the AWA." (Doc. 34 ¶ 59; Doc. 49 at 14) Section 2.10(c)

includes nothing about "training" an animal or "handling" an animal, and Kollman fails to explain why Section 2.10(c) or the other regulations must prohibit a person with a revoked license from engaging in those actions. Instead, Section 2.10(c) prohibits a person with a revoked license from buying, selling, transporting, delivering for transportation, and exhibiting an animal. Prohibiting a person with a revoked license from these actions is consistent with the AWA's directive to the Secretary to promulgate regulations enforcing the statute and with the AWA's stated purpose of ensuring the "humane treatment" of an animal that is "intended for exhibition" and in ensuring the "humane treatment" of an animal "during transportation in commerce." *See* 7 U.S.C. §§ 2131, 2149, 2151.

B. Agency deference is unnecessary.

As a general rule, an agency's interpretation of the agency's regulation is entitled to deference unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Zhou Hua Zhu v. U.S. Atty. Gen.*, 703 F.3d 1303, 1309 (11th Cir. 2013) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Kollman argues that the Secretary's interpretation of Section 2.10(c) is entitled to no deference because, between December 2012 and January 2013, the Secretary's interpretation changed as a result of pressure from PETA and other interest groups. (Doc. 49 at 11) However, deference to an agency's interpretation of the agency's regulation is necessary "only when the language of the regulation is ambiguous." *Zhou Hua Zhu*, 703 F.3d at 1309; *accord Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292, 1303 n.12 (11th Cir. 2001). Section 2.10(c) presents neither an ambiguity nor, consequently, an occasion to resolve whether the Secretary's interpretation of Section 2.10(c) warrants deference.

Conclusion

Accordingly, the defendants' motion (Doc. 39) for summary judgment is **GRANTED**. The clerk is directed (1) to enter a judgment for the defendants and against Kollman, (2) to terminate any pending motion, and (3) to close the case.

ORDERED in Tampa, Florida, on September 8, 2016.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: TIMOTHY L. STARK, an individual.
Docket No. 15-0080.
Decision and Order.
Filed July 15, 2016.

AWA – Endangered Species Act – Animal welfare – Harm to animals – License, denial of application for – License, fitness to hold – License, issuance of – License, renewal of – License, termination of – Purpose of AWA – Violation of animal welfare law.

Colleen A. Carroll, Esq. for Complainant.
David E. Mosley, Esq. for Respondent.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On February 26, 2015, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this adjudicatory proceeding by filing an Order to Show Cause Why Animal Welfare Act License 32-C-0204 Should Not Be Terminated [Order to Show Cause]. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.153) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges: (1) Mr. Stark was convicted in *United States v. Stark*, Case No. 4:07CR00013-001 (S.D. Ind. Jan. 17, 2008), of violating the Endangered Species Act (16 U.S.C. § 1538(a)(1)(E));[1] and

[1] Order to Show Cause ¶ 3 at 2.

(2) permitting Mr. Stark to continue to hold an Animal Welfare Act license would be contrary to the Animal Welfare Act's purpose of ensuring humane treatment of animals because Mr. Stark has been found to have harmed the animals in his custody.[2] The Administrator seeks an order terminating Mr. Stark's Animal Welfare Act license.[3]

On March 23, 2015, Mr. Stark filed an Answer to Order to Show Cause Why Animal Welfare Act License 32-C-00204 [sic] Should Not Be Terminated [Answer] in which Mr. Stark: (1) admits he was convicted in *United States v. Stark*, Case No. 4:07CR00013-001 (S.D. Ind. Jan. 17, 2008), of violating 16 U.S.C. § 1538(a)(1)(E), as alleged in the Order to Show Cause; (2) denies he has been found to have harmed an animal in his custody; and (3) denies his continuing to hold an Animal Welfare Act license would be contrary to the Animal Welfare Act's purpose of ensuring humane treatment of animals.[4] Mr. Stark asserts the Administrator is barred by estoppel and laches from seeking termination of Mr. Stark's Animal Welfare Act license based upon Mr. Stark's conviction of violating 16 U.S.C. § 1538(a)(1)(E).[5]

On March 25, 2015, Mr. Stark filed a motion to dismiss the Order to Show Cause,[6] and, on April 15, 2015, the Administrator filed a response in opposition to Mr. Stark's Motion to Dismiss.[7] On April 21, 2015, Administrative Law Judge Janice K. Bullard [ALJ] issued an Order denying Mr. Stark's Motion to Dismiss based upon the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading.[8]

On June 3, 2015, the Administrator filed Complainant's Motion for Summary Judgment [Administrator's Motion for Summary Judgment]

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[2] Order to Show Cause ¶ 4 at 2.
[3] Order to Show Cause at 2-3.
[4] Answer ¶¶ 2-3 at the first unnumbered page.
[5] Answer ¶¶ 4-5 at the first through the third unnumbered pages. Mr. Stark's Answer contains two paragraphs designated "5." Mr. Stark raises estoppel as a defense in the first paragraph designated "5" and raises laches as a defense in the second paragraph designated "5."
[6] Motion to Dismiss.
[7] Complainant's Response to Motion to Dismiss.
[8] ALJ's Order Denying Respondent's Motion to Dismiss and Setting Date for Submissions.

and, on July 28, 2015, Mr. Stark filed a Response to Complainant's Motion for Summary Judgment and a Memorandum in Support of Respondent's Response to Complainant's Motion for Summary Judgment. On July 28, 2015, Mr. Stark also filed Respondent's Motion for Summary Judgment [Mr. Stark's Motion for Summary Judgment] and Memorandum in Support of Stark's Motion for Summary Judgment on the Pleadings and Submitted Evidence.

On January 11, 2016, the ALJ issued a Decision and Order Denying and Granting Summary Judgment [Decision and Order] in which the ALJ: (1) found Mr. Stark transferred possession of one ocelot to an individual in Texas in October 2004 in violation of the Endangered Species Act; (2) found Mr. Stark pled guilty in August 2007 to violating the Endangered Species Act; (3) found no evidence that Mr. Stark's transfer of possession of one ocelot in October 2004 harmed the ocelot or any other animal; (4) found the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], routinely renewed Mr. Stark's Animal Welfare Act license after Mr. Stark's conviction of violating the Endangered Species Act; (5) concluded the Administrator failed to establish how Mr. Stark could be determined to be unfit to hold an Animal Welfare Act license based upon "an old conviction, which did not prevent APHIS from repeatedly thereafter issuing [Mr. Stark] the [Animal Welfare Act] license which the [Administrator] seeks to terminate"; (6) denied the Administrator's Motion for Summary Judgment; (7) granted Mr. Stark's Motion for Summary Judgment; and (8) ordered APHIS to issue Mr. Stark's Animal Welfare Act license if Mr. Stark timely submits the license for renewal and pays all fees.[9]

On February 11, 2016, the Administrator filed Complainant's Petition for Appeal and Supporting Brief [Appeal Petition], and on February 29, 2016, Mr. Stark filed Respondent Stark's Response in Opposition to Complainant's Appeal. On March 1, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision.

[9] ALJ's Decision and Order at 7-8.

The Administrator requests either that I issue a final decision reversing the ALJ's Decision and Order or that I vacate the ALJ's Decision and Order and remand this proceeding to the ALJ for issuance of a decision and order in conformance with the Regulations, United States Department of Agriculture precedent, and relevant case law (Appeal Pet. ¶ III at the eleventh unnumbered page). Based upon a careful review of the record, I affirm the ALJ's Decision and Order denying the Administrator's Motion for Summary Judgment and granting Mr. Stark's Motion for Summary Judgment, and I dismiss the Order to Show Cause.

Decision

A. Discussion

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133). The power to require and to issue licenses under the Animal Welfare Act includes the power to terminate licenses and to disqualify persons from becoming licensed.[10] The Regulations specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). The Regulations provide an initial application for an Animal Welfare Act license will be denied if the applicant is unfit to be licensed and the Administrator determines the issuance of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, as follows:

> **§ 2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
>
> . . . .

[10] Greenly, AWA Docket No. 11-0073, 2013 WL 8213613, at *2 (U.S.D.A. July 2, 2013), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014); Vanishing Species Wildlife, Inc., 69 Agric. Dec. 1068, 1070 (U.S.D.A. 2010); Animals of Mont., Inc., 68 Agric. Dec. 92, 94 (U.S.D.A. 2009); Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 81 (U.S.D.A. 2009); Vigne, 67 Agric. Dec. 1060, 1062 (U.S.D.A. 2008); Bradshaw, AWA, 50 Agric. Dec. 499, 507 (U.S.D.A. 1991).

> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6).

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

> **§ 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.

7 U.S.C. § 2131.

The Administrator alleges and Mr. Stark admits that, on January 17, 2008, Mr. Stark was convicted of violating 16 U.S.C. § 1538(a)(1)(E) in October 2004 by unlawfully receiving, transporting, and shipping in interstate commerce, in the course of a commercial activity, one ocelot.[11] The Administrator alleges but Mr. Stark denies that permitting Mr. Stark to continue to hold an Animal Welfare Act license would be contrary to the Animal Welfare Act's purpose of ensuring humane treatment of animals because Mr. Stark has been found to have harmed the animals in his custody.[12]

1. The Administrator's Appeal Petition

The Administrator raises seven issues in his Appeal Petition. First the Administrator contends the ALJ erroneously found Mr. Stark was convicted in 2007 of violating the Endangered Species Act (Appeal Pet. ¶ IIA at the third unnumbered page).

The ALJ found Mr. Stark was convicted in 2007 of violating the Endangered Species Act (ALJ's Decision and Order at 7). The record establishes that, on January 17, 2008, Mr. Stark was convicted in the United States District Court for the Southern District of Indiana of violating 16 U.S.C. § 1538(a)(1)(E) (Order to Show Cause Attach. CX 2 at 18). Therefore, I conclude the ALJ's finding that Mr. Stark was convicted in 2007 of violating the Endangered Species Act, is error; however, I conclude the ALJ's error is harmless.

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[11] Order to Show Cause ¶ 3 at 2; Answer ¶ 2 at the first unnumbered page.
[12] Order to Show Cause ¶ 4 at 2; Answer ¶ 3 at the first unnumbered page.

Second, the Administrator asserts Mr. Stark's receipt, transportation, and shipment of one ocelot in October 2004 did not trigger the ability of the Administrator to institute this Animal Welfare Act license termination proceeding (Appeal Pet. ¶ IIA at the third and the fourth unnumbered pages). I infer the Administrator contends the ALJ erroneously found the Administrator instituted this proceeding based upon Mr. Stark's October 2004 violation of the Endangered Species Act rather than based on Mr. Stark's January 17, 2008, conviction of violating the Endangered Species Act.

The Regulations provide that an Animal Welfare Act license may be terminated when an Animal Welfare Act licensee "has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals[.]"[13] The plain language of 9 C.F.R. § 2.11(a)(6) establishes that a violation of law by itself is not a sufficient basis for the institution of an action to terminate an Animal Welfare Act license. Instead, in order to institute an action to terminate an Animal Welfare Act license pursuant to 9 C.F.R. § 2.11(a)(6), an Animal Welfare Act licensee must have pled no contest to a charge that the licensee has violated a law or regulation pertaining to the transportation, ownership, neglect, or welfare of animals or must have been found to have violated a law or regulation pertaining to the transportation, ownership, neglect, or welfare of animals. Thus, Mr. Stark's January 17, 2008, conviction of violating the Endangered Species Act, not Mr. Stark's October 2004 violation of the Endangered Species Act, triggered the ability of the Administrator to institute this Animal Welfare Act license termination proceeding pursuant to 9 C.F.R. §§ 2.11(a)(6) and 2.12.[14]

The ALJ found the instant action to terminate Mr. Stark's Animal Welfare Act license rests on Mr. Stark's "conviction" and concluded the

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[13] 9 C.F.R. § 2.11(a)(6).

[14] *See* Greenly, AWA Docket No. 11-0073, 2013 WL 8213613, at *6 (U.S.D.A. July 2, 2013) (stating the "claim" in this proceeding first accrued on March 14, 2007, when Mr. Greenly was convicted of violating the Lacey Act, not in September and October 2005, when Mr. Greenly violated the Lacey Act), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014); Animals of Mont., Inc., 68 Agric. Dec. 92, 109 (U.S.D.A. 2009) (holding conviction triggers the Secretary of Agriculture's ability to terminate an Animal Welfare Act license pursuant to 9 C.F.R. §§ 2.11(a)(6) and 2.12; not the date of the underlying criminal activities).

Administrator has failed to establish how Mr. Stark could be determined unfit to hold an Animal Welfare Act license based upon an old "conviction."[15] Therefore, I reject the Administrator's contention that the ALJ erroneously found that the basis for this proceeding is Mr. Stark's October 2004 violation of the Endangered Species Act. Instead, I conclude the ALJ correctly found the instant action to terminate Mr. Stark's Animal Welfare Act license rests on Mr. Stark's January 17, 2008, conviction of violating the Endangered Species Act.

Third, the Administrator contends the ALJ's statement that the Administrator did not allege or present evidence that Mr. Stark failed to report his conviction, is irrelevant (Appeal Pet. ¶ IIA at the fourth unnumbered page).

The ALJ states "[t]here has been no allegation made, and no evidence presented, that [Mr. Stark] failed to report his conviction" (ALJ's Decision and Order at 6). The Regulations do not require the Administrator to establish that a respondent failed to report a conviction in order to terminate that respondent's Animal Welfare Act license based upon that conviction. Therefore, I agree with the Administrator's contention that the ALJ's statement regarding the lack of evidence to establish that Mr. Stark failed to report his conviction, is irrelevant. I note, however, that the ALJ's irrelevant statement is factually correct. Moreover, the ALJ's statement is not part of the basis for the ALJ's disposition of this proceeding.

Fourth, the Administrator contends the ALJ failed to cite a statute of limitations which bars the Administrator from instituting this Animal Welfare Act license termination proceeding (Appeal Pet. ¶ IIA at the fourth through the sixth unnumbered pages).

The ALJ did not conclude that the Administrator is barred by a statute of limitations from instituting this Animal Welfare Act license termination proceeding. Therefore, I reject the Administrator's suggestion that the ALJ's failure to cite a statute of limitations which bars the Administrator from instituting this proceeding, is error.[16]

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[15] ALJ's Decision and Order at 7-8.

[16] The parties do not cite, and I cannot locate, a statute of limitations that bars the Administrator from instituting this Animal Welfare Act license termination proceeding. I have concluded in previous proceedings instituted under 9 C.F.R. §§ 2.11 and 2.12 that the

While the ALJ did not conclude that the Administrator is barred by a statute of limitations from instituting this proceeding, the ALJ characterized Mr. Stark's conviction of violating the Endangered Species Act as an "old" conviction and concluded the Administrator failed to establish how Mr. Stark could be determined to be unfit to hold an Animal Welfare Act license based upon that old conviction (ALJ's Decision and Order at 8).

Mr. Stark was convicted on January 17, 2008, of violating the Endangered Species Act (Order to Show Cause Attach. CX 2 at 18). The Administrator did not file the Order to Show Cause initiating this Animal Welfare Act license termination proceeding until February 26, 2015, seven years one month nine days after Mr. Stark's conviction. Each of the previous Animal Welfare Act license termination proceedings based upon a respondent's conviction of violating a law or regulation pertaining to the transportation, ownership, neglect, or welfare of animals, which have come before me, have been instituted by the Administrator within four years following the conviction.[17] Therefore, at least in the context of an Animal Welfare Act license termination proceeding, I do not disagree with the ALJ's characterization of Mr. Stark's conviction as an "old"

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statute of limitations in 18 U.S.C. § 3282(a) and the statute of limitations in 28 U.S.C. § 2462 are not applicable to Animal Welfare Act license termination proceedings. *See* Greenly, AWA Docket No. 11-0073, 2013 WL 8213613, at *5-6 (U.S.D.A. July 2, 2013), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014); Vigne, 67 Agric. Dec. 1060, 1067-68 (U.S.D.A. 2008).

[17] *See* Greenly, AWA Docket No. 11-0073, 2013 WL 8213613 (U.S.D.A. July 2, 2013) (the Administrator instituted the Animal Welfare Act license termination proceeding on November 29, 2010, based upon a March 14, 2007, conviction of violating the Lacey Act), *aff'd per curiam*, 576 F. App'x 649 (8th Cir. 2014); Ash, 71 Agric. Dec. 900 (U.S.D.A. 2012) (the Administrator instituted the Animal Welfare Act license termination proceeding on August 31, 2011, based upon an April 29, 2011, conviction of violating New York Penal Law § 120.20); Bauck, 68 Agric. Dec. 853 (U.S.D.A. 2009) (the Administrator instituted the Animal Welfare Act license termination proceeding on June 22, 2009, based upon a March 24, 2009, conviction of violating Minnesota Statute § 343.21 and a May 19, 2008, conviction of violating Minnesota Statute § 156.10), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); Amarillo Wildlife Refuge, Inc.,68 Agric. Dec. 77 (U.S.D.A. 2009) (the Administrator instituted the Animal Welfare Act license termination proceeding on March 6, 2007, based upon a July 21, 2006, conviction of violating the Endangered Species Act); Vigne, 67 Agric. Dec. 1060 (U.S.D.A. 2008) (the Administrator instituted the Animal Welfare Act license termination proceeding on August 21, 2007, based upon a January 4, 2007, conviction of violating the Endangered Species Act).

conviction. Moreover, based upon the facts in this proceeding and particularly the more than seven-year period between Mr. Stark's conviction and the Administrator's institution of this proceeding, I am reluctant to disturb the ALJ's January 11, 2016, Decision and Order denying the Administrator's Motion for Summary Judgment and granting Mr. Stark's Motion for Summary Judgment.

Fifth, the Administrator contends the ALJ erroneously equated issuance of an Animal Welfare Act license with renewal of an existing, valid Animal Welfare Act license (Appeal Pet. ¶ IIB at the sixth through the eighth unnumbered pages).

The Regulations applicable to licensing under the Animal Welfare Act (9 C.F.R. §§ 2.1-2.12) distinguish between issuance of an Animal Welfare Act license and renewal of an existing Animal Welfare Act license. The Administrator alleges and Mr. Stark admits Mr. Stark holds Animal Welfare Act license number 32-C-0204.[18] The ultimate issue in this proceeding conducted pursuant to 9 C.F.R. § 2.12 is whether Mr. Stark's existing Animal Welfare Act license should be terminated.

Throughout the ALJ's Decision and Order, the ALJ interchangeably refers to "issuance" and "renewal" of an Animal Welfare Act license.[19] Therefore, I agree with the Administrator's contention that the ALJ erroneously equated issuance of an Animal Welfare Act license with renewal of an existing, valid Animal Welfare Act license.

Sixth, the Administrator contends the ALJ erroneously concluded APHIS' renewal of Mr. Stark's Animal Welfare Act license reflects APHIS' determination that Mr. Stark was fit to hold an Animal Welfare Act license (Appeal Pet. ¶ IIC at the eighth through the tenth unnumbered pages).

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[18] Order to Show Cause ¶ 1 at 1; Answer ¶ 1 at the first unnumbered page.

[19] *See*, *e.g.*, the ALJ statement that "[t]he evidence fails to establish that the Administrator of APHIS determined that the issuance of a license to Respondent would be contrary to the purposes of the Act. In fact, APHIS has renewed Respondent's AWA license following his conviction, most recently in November, 2014." (ALJ's Decision and Order at 6 (footnote omitted)).

The ALJ found APHIS annually renewed Mr. Stark's Animal Welfare Act license after Mr. Stark's conviction of violating the Endangered Species Act. The ALJ further found each annual renewal reflects APHIS' determinations that Mr. Stark was fit to hold an Animal Welfare Act license and that Mr. Stark's continuing to hold an Animal Welfare Act license was consistent with the purposes of the Animal Welfare Act (ALJ's Decision and Order at 6, 8). Moreover, the ALJ's finding regarding the import of APHIS' annual renewal of Mr. Stark's Animal Welfare Act license forms part of the basis for the ALJ's denial of the Administrator's Motion for Summary Judgment:

> 3. The denial of summary judgment to Complainant USDA is appropriate, as USDA has failed to establish how Respondent could be determined unfit to hold an AWA license for an old conviction, which did not prevent APHIS from repeatedly thereafter issuing him the license which USDA seeks to terminate.

ALJ's Decision and Order at 8.

The ALJ's finding that APHIS' renewal of Mr. Stark's Animal Welfare Act license reflects APHIS' determinations that Mr. Stark was fit to hold an Animal Welfare Act license and that Mr. Stark's continuing to hold an Animal Welfare Act license was consistent with the purposes of the Animal Welfare Act, is error. The Regulations require that APHIS annually renew each Animal Welfare Act license upon the Animal Welfare Act licensee's payment of an Animal Welfare Act license fee (9 C.F.R. § 2.6) and filing an annual report and an application for license renewal with the AC Regional Director of APHIS (9 C.F.R. § 2.7(a)). As long as the Animal Welfare Act licensee meets these three requirements, APHIS must renew the licensee's Animal Welfare Act license.[20]

Seventh, the ALJ found the evidence fails to support the Administrator's allegation that Mr. Stark has been found to have harmed the animals in his custody (ALJ's Decision and Order at 6). The Administrator contends termination of Mr. Stark's Animal Welfare Act

[20] Animal Legal Defense Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1211 (11th Cir. 2015).

license is not dependent on the Administrator's establishing that Mr. Stark harmed animals (Appeal Pet. ¶ IID at the tenth through the eleventh unnumbered pages).

The Regulations provide that an Animal Welfare Act license may be terminated if an Animal Welfare Act licensee has been found to have violated any law or regulation pertaining to the transportation, ownership, neglect, or welfare of animals and the Administrator determines the licensee's retention of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act.[21] The Administrator bases his determination that Mr. Stark's retention of his Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act on Mr. Stark's having been found to have harmed the animals in his custody (Order to Show Cause ¶ 4 at 2). Therefore, I reject the Administrator's contention that termination of Mr. Stark's Animal Welfare Act license is not dependent on the Administrator's establishing that Mr. Stark harmed animals.

The Administrator contends the allegation that Mr. Stark has been found to have harmed the animals in his custody is supported by Mr. Stark's conviction of violating the Endangered Species Act. Specifically, the Administrator contends, when Mr. Stark violated the Endangered Species Act, he harmed ocelots by taking and selling an ocelot, interfering with that particular ocelot's normal behavioral activities, and interfering with the welfare of the ocelot species as a whole (Appeal Pet. ¶ IID at the tenth and the eleventh unnumbered pages).

Mr. Stark was convicted of violating 16 U.S.C. § 1538(a)(1)(E) (Order to Show Cause Attach. CX 2 at 18). The elements of Mr. Stark's October 2004 violation of 16 U.S.C. § 1538(a)(1)(E) are that Mr. Stark (1) did knowingly, intentionally, and unlawfully receive, transport, and ship, (2) in interstate commerce, (3) an endangered species (one ocelot), (4) in the course of a commercial activity (Order to Show Cause Attach. CX 2 at 9-10). The elements of Mr. Stark's violation of 16 U.S.C. § 1538(a)(1)(E) do not include Mr. Stark's taking and selling an ocelot, Mr. Stark's interference with the normal behavioral activities of an ocelot, or Mr. Stark's interference with the welfare of the ocelot species as a whole,

[21] 9 C.F.R. §§ 2.11(a)(6) and 2.12.

as the Administrator contends. Therefore, I reject the Administrator's contention that his allegation that Mr. Stark has been found to have harmed the animals in his custody is supported by Mr. Stark's conviction of violating 16 U.S.C. § 1538(a)(1)(E).

Based upon my review of the record, I agree with the ALJ's conclusion that termination of Mr. Stark's Animal Welfare Act license based upon Mr. Stark's January 17, 2008, conviction of violating 16 U.S.C. § 1538(a)(1)(E) would be arbitrary and capricious. While the Administrator is not barred by a statute of limitations from instituting this Animal Welfare Act license termination proceeding, the Administrator instituted this proceeding more than seven years after Mr. Stark was convicted of violating 16 U.S.C. § 1538(a)(1)(E). The delay between Mr. Stark's conviction and the institution of this Animal Welfare Act license termination proceeding implicates the necessity for termination of Mr. Stark's Animal Welfare Act license in order to carry out the purposes of the Animal Welfare Act. Further, the Administrator alleges that permitting Mr. Stark to continue to hold an Animal Welfare Act license would be contrary to the Animal Welfare Act's purpose of ensuring humane treatment of animals because Mr. Stark has been found to have harmed the animals in his custody. However, the record is devoid of any evidence that Mr. Stark has been found to have harmed the animals in his custody.

I note the Order in the ALJ's January 11, 2016, Decision and Order requires APHIS to "issue" Mr. Stark's Animal Welfare Act license, "if it has been timely submitted for renewal and if all fees have been paid."[22] I do not adopt this provision of the ALJ's Order because the Administrator's compliance with the Animal Welfare Act license renewal provisions of the Regulations is not at issue in this proceeding, the ALJ's Order conflates renewal of an Animal Welfare Act license and issuance of an Animal Welfare Act license, the ALJ's Order requires the submission of Mr. Stark's Animal Welfare Act license for renewal rather than the filing of an application for license renewal as required by 9 C.F.R. § 2.7(a), and the ALJ's Order does not require that Mr. Stark file an annual report as required by 9 C.F.R. § 2.7(a).

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[22] ALJ's Decision and Order at 8.

ANIMAL WELFARE ACT

Findings of Fact

1. Mr. Stark is an individual whose mailing address is in the State of Indiana (Order to Show Cause ¶ 1 at 1; Answer ¶ 1 at the first unnumbered page).

2. Mr. Stark holds Animal Welfare Act license number 32-C-0204 (Order to Show Cause ¶ 1 at 1; Answer ¶ 1 at the first unnumbered page).

3. In October 2004, Mr. Stark received, transported, and shipped one ocelot in interstate commerce in a commercial activity (Order to Show Cause ¶ 3 at 2, Attach. CX 2; Answer ¶ 2 at the first unnumbered page).

4. Based on Mr. Stark's activity described in Finding of Fact number three, Mr. Stark was convicted on January 17, 2008, in the United States District Court for the Southern District of Indiana of violating 16 U.S.C. § 1538(a)(1)(E) (Order to Show Cause ¶ 3 at 2, Attach. CX 2; Answer ¶ 2 at the first unnumbered page).

5. On February 26, 2015, the Administrator instituted this Animal Welfare Act license termination proceeding, seven years one month nine days after Mr. Stark was convicted of violating 16 U.S.C. § 1538(a)(1)(E) (Order to Show Cause at 1).

6. The record is devoid of any evidence that Mr. Stark was found to have harmed the animals in his custody.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. This Animal Welfare Act license termination proceeding is not time barred by an applicable statute of limitations.

3. The Administrator did not establish that Mr. Stark was unfit to hold an Animal Welfare Act license.

4. The Administrator did not establish that allowing Mr. Stark to hold an Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act.

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's Decision and Order, filed January 11, 2016, denying the Administrator's June 3, 2015, Motion for Summary Judgment and granting Mr. Stark's July 28, 2015, Motion for Summary Judgment, is affirmed.

2. The Administrator's Order to Show Cause, filed February 26, 2015, is dismissed.

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In re: DOUGLAS KEITH TERRANOVA, an individual; and TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058, 15-0059, 16-0037, 16-0038.
Decision and Order.
Filed September 27, 2016.

AWA.

Colleen A. Carroll, Esq., and Samuel D. Jockel, Esq., for Complainant.
William J. Cook, Esq., for Respondents.
Initial Decision and Order entered by Erin M. Wirth, Administrative Law Judge.

DECISION AND ORDER

I. Introduction

The above-captioned matters involve administrative enforcement proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service [APHIS], an agency of the United States Department of Agriculture [USDA or Complainant], against Douglas Terranova and Terranova Enterprises, Inc. [Respondents]. Complainant alleges that Respondents violated the Animal Welfare Act [Act or AWA], as amended (7 U.S.C. §§ 2131- 2159); the regulations [regulations] issued under the

Act (9 C.F.R. §§ 1.1-3.142); and the standards [standards] found at part 3 of the regulations (9 C.F.R. §§ 3.1-3.142).

A prior proceeding between these parties resulted in a December 20, 2011, decision finding a number of violations of the Act and imposing a cease and desist order, civil penalty, and license renewal conditions. *Terranova Enterprises, Inc.*, AWA Docket No. 10-0418, 70 Agric. Dec. 925 (U.S.D.A. 2011) (Decision and Order as to Terranova Enterprises, Inc. d/b/a Animal Encounters Inc. and Douglas Keith Terranova)[1] [referred to herein as Terranova 2009/2010 Cases].

Respondent Douglas Terranova, who started working with animals at age eleven when he volunteered at a zoo, owns Respondent Terranova Enterprises, Inc., which provides animals for movies, circuses, television shows, live performances, and commercials. Tr. 374, 394.[2] These cases primarily focus on the escape of a tiger at a April 20, 2013, circus performance but also allege over twenty violations of the regulations and standards both at the Terranova property in Texas and while travelling with his animals. As discussed more fully below, three willful violations are found: August 2, 2010, unable to access facility; April 20, 2013, animal escape; and November 14-19, 2015, itinerary not filed.

A. Issues Presented

This proceeding raises the issues of whether Complainant has demonstrated that the Respondents violated the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations. The Respondents did not specifically allege selective enforcement or bias. However, they imply that they were unfairly targeted. Claims of selective enforcement or bias would not be successful under these facts. Given the timing of some of the inspections and circumstances of the violations, however, it is understandable that Respondents feel unfairly targeted. As explained during the hearing, this decision is limited to addressing the

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[1] *Available at* https://www.oaljdecisions.dm.usda.gov/sites/default/files/111220_10-0418_DO_AWA_Terranova%20Enterprises%20and%20Douglas%20Terranova.pdf (last visited Mar. 30, 2017).

[2] In this decision, exhibits are identified as follows: Complainant's as "CX #" and Respondents' as "RX #." References to the transcript of the hearing are identified as "Tr. [page #]."

violations of the Animal Welfare Act alleged in the complaint and whether the Complainant produced evidence to establish those allegations.

B. Procedural History

In a complaint filed on January 16, 2015, Complainant alleged that the Respondents willfully violated the Act and the regulations on multiple occasions between August 2010 and September 2013. *Douglas Keith Terranova and Terranova Enterprises, Inc.*, AWA Dockets 15-0058 and 15-0059 (the 2015 cases). On February 19, 2015, Respondents filed an answer denying the material allegations of the 2015 Complaint.

On January 29, 2016, Complainant filed a second complaint against Respondents alleging additional violations in 2015. *Douglas Keith Terranova and Terranova Enterprises, Inc.*, AWA Dockets 16-0037 and 16-0038 (the 2016 cases). On February 22, 2016, Respondents filed an answer denying the material allegations of the 2016 Complaint.

On February 5, 2016, an order was issued consolidating the two proceedings and scheduling the oral hearing. Due to an issue with the availability of a witness, the hearing was held in two parts. The events involving allegations that occurred away from the Terranova Respondents' property in Texas were addressed in a hearing that commenced on March 21, 2016, through March 23, 2016, held in person in Washington, D.C. Events involving allegations occurring on the Terranova Respondents' property were addressed when the hearing resumed on April 18, 2016, and April 19, 2016, in Riverdale, Maryland, through audio-visual equipment located in Dallas, Texas, and Palmetto, Florida.

Complainant is represented by Colleen A. Carroll, Esq., and Samuel D. Jockel, Esq., Office of the General Counsel, Washington, D.C. Respondents are represented by William J. Cook, Esq., of Tampa, Florida.

On June 13, 2016, Complainant submitted Complainant's proposed corrections to the transcript of the oral hearing. Respondents did not object to the proposed corrections. The transcript corrections proposed by Complainant on June 13, 2016, are hereby adopted.

On June 10, 2016, Complainant filed its proposed findings of fact, conclusions of law, and order, and brief in support thereof [Complainant's Brief]. On July 15, 2016, Respondents filed their post-hearing brief and proposed findings of fact and conclusions of law [Respondents' Opposition Brief]. On July 29, 2016, Complainant filed its reply brief [Complainant's Reply Brief].

C. Evidence

Under the Administrative Procedure Act [APA], an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This decision is based upon consideration of the record evidence; the pleadings, arguments, and explanations of the parties; and controlling law.

This decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaints or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

This decision provides a discussion of the law and regulations and analysis of each allegation; specific findings of fact and conclusions of law; and the Order.

II. Discussion

A. Law and Regulations

The purpose of the Animal Welfare Act as it relates to exhibited animals is to ensure that they are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Act requires exhibitors to be licensed. 7 U.S.C. §§ 2133, 2134. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the regulations are being followed. 7 U.S.C. §§ 2143, 2143(a)(1) and (2), 2146(a).

Violations of the Act by licensees may result in the assessment of civil penalties and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation is $10,000. 7 U.S.C. § 2149(b).

Regulations promulgated to implement the Act provide requirements for licensing, record keeping, and veterinary care, as well as specifications for the humane handling, care, treatment, and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The standards set forth specific instructions regarding the size and environmental specifications of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people.

To prevail in a proceeding brought to enforce the Act, a complainant has the burden of proving by a preponderance of the evidence that the respondents violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *Davenport*, 57 Agri. Dec. 189 (U.S.D.A. 1998). "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion must lose." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

For a revocation of license to be authorized, only one of the violations need be willful. *Cox v. U.S. Dep't. of Agric.*, 925 F.2d 1102, 1105 (8th Cir.

1991); *Big Bear Farm, Inc.*, 55 Agric. Dec. 1107 (U.S.D.A. 1996); *Browning*, 52 Agric. Dec. 129 (U.S.D.A. 1993). The Administrative Procedure Act provides in relevant part:

> 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.

5 U.S.C. § 558(c). Willfulness under the Act has been defined as "'an act done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.'" *Ramos v. U.S. Dep't. of Agriculture*, 322 Fed. Appx. 814, 823 (11th Cir. 2009) (quoting *Coosemans Specialties, Inc. v. U.S. Dept. of Agric.*, 482 F.3d 560, 567 (D.C. Cir. 2007)); *Potato Sales Co., Inc. v. U.S. Dep't. of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996). Willfulness is not required for a cease and desist order or for a monetary fine.

B. Analysis

The Respondents are charged with violations of the Act that fall within several general categories: access to facilities; handling and supervision; maintaining sufficient barriers; handling and care of animals; providing a veterinary plan of care; providing itineraries; and maintenance of facilities based on inspections or attempted inspections of Respondents' facility, records, and animals on seven dates: August 2, 2010; March 10, 2011; September 28, 2012; September 25, 2013; January 8, 2015; May 13, 2015; and November 19, 2015. The allegations and evidence are summarized below in the roughly chronological order alleged in the complaint.

1. <u>Access to Facilities</u>

The 2015 Complaint alleges that on August 2, 2010, and September 28, 2012, Respondents willfully violated the Act and regulations by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals, and records during normal business hours. 2015 Complaint at 5, ¶ 6.

The Act provides that the Secretary "shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale." 7 U.S.C. § 2146(a). The regulations provide:

> (a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
>
> (1) To enter its place of business;
>
> (2) To examine records required to be kept by the Act and the regulations in this part;
>
> (3) To make copies of the records;
>
> (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
>
> (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

9 C.F.R. § 2.126(a).

Complainant alleges that Respondents willfully violated the access requirements on August 2, 2010, and September 28, 2012. Complainant's Brief at 2-5. The Respondents do not contest that the inspectors were not able to see the property, stating:

> On August 2, 2010, APHIS inspector Donnovan Fox attempted to conduct an inspection. Respondent Douglas Terranova was in court at the time on a personal matter. Tr. 695. On September 28, 2012, Terranova had designated Carlos Quinones as a responsible person to be present for the inspection but apparently the gate had been closed inadvertently when Fox arrived for the inspection. Tr. 696-698. Terranova arranged for Fox to return and inspect within the month. Tr. 698. Given the number of successful inspections, these incidents are isolated and non-willful violations. CX 14.

Respondents' Opposition Brief at 2.

There is no dispute that ACI Fox attempted to inspect Respondents' facility during normal business hours on two occasions and was unable to do so. On August 2, 2010, Mr. Terranova was in court on a personal matter and he does not contest this allegation. Tr. 696-697. ACI Fox documented his attempt to inspect in an inspection report. CX 3. Respondents were aware that they are required to have an adult present and available to permit access to facilities, as they were found in violation of this section in the prior case. Terranova 2009/2010 Cases at 23-24. Complainant established that this violation occurred and that it was willful.

On September 28, 2012, Mr. Terranova had designated Carlos "Niche" Quinones as a responsible person to be present for the inspection but apparently the gate had been closed inadvertently before ACI Fox arrived for the inspection. Tr. 697-699. Mr. Terranova arranged for ACI Fox to return and inspect within the month. Tr. 699. Mr. Terranova's testimony is credited, particularly as he was forthcoming about the 2010 violation. Respondents do not contest that ACI Fox was unable to inspect the facility on this date. Accordingly, the evidence establishes that on September 28, 2012, a violation occurred but the violation was not willful and no additional penalty is imposed from this violation.

2. <u>Handling and Supervision (Tiger Escape)</u>

The 2015 Complaint alleges that on April 20, 2013, Respondents willfully violated the regulations (1) "by failing to handle an animal as

carefully as possible in a manner that would not cause physical harm or unnecessary discomfort," (2) "by failing, during public exhibition, to handle an animal with sufficient distance and/or barriers between the animal and the public," and (3) "by failing, during public exhibition, to have a dangerous animal under the direct control and supervision of a knowledgeable and experienced animal handler." 2015 Complaint at 5, ¶ 7. Specifically, the complaint alleges that Respondents "exhibited a tiger (Leah) in a circus in Salina, Kansas, and upon the conclusion of the performance, the tiger was not secured in an enclosure, but was loose and out of the Respondents' control and supervision in the performance area, and thereafter entered the women's restroom in the public concourse area." 2015 Complaint at 5, ¶ 7.

The tiger escape is alleged to violate three sections of the regulations. The regulations provide (1) "[h]andling 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) "[d]uring public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public;" and (3) "[d]uring public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler." 9 C.F.R. §§ 2.131(b)(1); 2.131(c)(1); 2.131(d)(3).

Complainant asserts that Mr. Terranova worked with Mr. Quinones, the tiger trainer and presenter; Richard Curtis, the prop boss and ringmaster; Jesse Plunkett, part of the crew; and, Cody Ives, a performer from a motorcycle act who voluntarily assisted with transferring the tigers. Complainant's Brief at 16; Tr. 308, 310. Complainant contends that "Mr. Ives, who transferred Respondents' tigers during at least two shows, was untrained, inexperienced, and lacked handling knowledge;" Respondent Terranova's assertion that he was unaware of Mr. Ives's presence is "not credible;" and Respondents are "responsible for complying with the handling Regulations, and for ensuring that their animals are handled carefully, that there are sufficient barriers, and that they employ a sufficient number of qualified personnel." Complainant's Brief at 16-17. Complainant argues that Respondents' handling methods, actions, and

omissions constitute serious violations of the handling regulations. Complainant's Reply Brief at 4.

Respondents assert that Complainant failed to prove a violation; Respondents were not understaffed; Respondents had a USDA-approved protocol in place in the event of an escape which was reviewed with the crew before the show; the tiger remained separated from the crowd; the tiger suffered no trauma; the tiger did not escape due to inadequate staffing or training; and "after the tiger escaped, Respondents professionally handled the tiger to keep it and the public separated and from harm. If anything, the evidence shows that Respondents should be commended for how expertly they handled the tiger in response to a human error." Respondents' Opposition Brief at 12-13.

The evidence shows that on April 20, 2013, at the 7 p.m. performance, Respondents exhibited their tigers to the public as part of the Tarzan Zerbini Circus at the Salina Bicentennial Center in Salina, Kansas. CX 8; CX 11. Upon the conclusion of the performance, one of the tigers (Leah) was not placed in an enclosure, but escaped and ran out into the arena's concourse. CX 8; CX 10; CX 11; CX 12; CX 13. The tiger was loose from approximately 7:25 p.m. to 7:32 p.m. and was secured in the women's restroom for part of that time. CX 11 at 1.

Before the shows, Mr. Terranova went over the process with the crew supplied by Labor Ready to push the tiger cages. Tr. 317-318, 439. It was the same process he used with the tigers without incident for 35 years. Tr. 439, 443, 445. Mr. Plunkett, part of the crew supplied by the circus, had worked the tiger cages for Mr. Terranova before and had opened and closed the tiger cage doors many times. Tr. 438-439.

In accordance with Respondents' usual procedure, that night Mr. Terranova worked the performance cage door and Jesse Plunkett opened and closed the cage doors. Tr. 443. Mr. Plunkett's job was to shut the doors and say "clear" or "go" once the tiger was secured in the cage. Tr. 443. Nobody was supposed to pull a pin and separate a cage from the train of cages attached to the arena until Mr. Plunkett said the door was locked. Tr. 443.

Mr. Terranova's role was to watch Mr. Quinones and the other tigers during the performance and make sure that Mr. Quinones was okay, watching his back so to speak. Tr. 445. "Tigers come in the door that I open. Mr. Quinones lets them out, tells them to go to the house. I open the door, they run down to the last cage that's wherever the door's closed. It depends on how many have come out. The person back there, in this case Jesse Plunkett, shuts both doors, locks them." Tr. 521. In addition to having a set procedure for transferring the tigers from the arena, Mr. Terranova had a USDA-approved protocol in place in the event of an escape. Tr. 445.

On the night at issue, Mr. Terranova was at the front door listening for Mr. Plunkett. It was dark and everyone was wearing black. Tr. 303, 446. At the end of the act, Mr. Terranova looked at Mr. Quinones in the arena and heard Mr. Plunkett say, "oh no" so he turned and saw the tiger named Leah outside her cage. The tiger actually was trying to get in the cage, but the door had jammed shut. Tr. 447-448. Cody Ives, who was part of the motorcycle act, was assisting Mr. Plunkett. Tr. 448-449, 519. Apparently Mr. Ives had left a cage door open that allowed the tiger to escape, and then he could not open an empty cage door to allow the tiger into the proper cage. Tr. 449-450.

It is not entirely clear why Mr. Ives was helping. According to ringmaster Richard Curtis, Mr. Terranova had hired four laborers to assist with moving the tiger cages, but he had to fire one of them prior to the first show. Tr. 316-317. Investigator Toni Christensen's report conflicts with the recorded conversation and is given little weight. *Compare* CX 14 *with* RX 19 *and* CX 24 at 49-51.

After the tiger escaped, she started following the cage in front of her. Tr. 451. Mr. Terranova screamed to shut the back door to the outside, and to close all of the doors. Tr. 451-452. The building staff moved people away from the concourse and Mr. Curtis, the ringmaster, instructed patrons to stay in their seats and remain calm. CX 11 at 5; Tr. 377-378, 461.

The tiger turned and went back into the arena, first going to the large performance cage where she had been performing. Tr. 452. The tiger then walked around the arena, which was separated from the seating area by elevated walls. Tr. 298, 453-462; CX 8, video 3. Mr. Terranova and the

tiger trainer, Mr. Quinones, ran after the tiger and tried to stay between her and the audience as she walked around the perimeter of the arena. Tr. 453-456. Mr. Quinones was able to observe and talk to the tiger; he could tell that she was listening because she was walking slowly and not growling. Tr. 363-366, 375.

The tiger entered the concourse area, where food stands and restrooms are located, and entered the women's restroom. CX 8, video 3. The restroom is at an angle with an entrance and exit on opposite sides which are not visible from each other from either inside or outside. CX 9; CX 11; Tr. 247; Tr. 85. Mr. Terranova and Mr. Quinones thought that the restroom was empty. Tr. 368. The building management reported that they "removed patron simultaneously as handler pushed tiger into restroom." CX 11 at 5. Mr. Terranova heard the security guard yell at someone to get back in the women's restroom. Tr. 463-464. Mr. Terranova told two or three women to wait and asked if anyone else was in the women's room. Once the tiger entered the women's room from the entrance, Mr. Terranova entered from the exit. Mr. Terranova yelled "is anybody in there," looked under the stalls, and confirmed that Mr. Quinones was okay. Tr. 466-467.

Mr. Quinones went into the bathroom with the tiger while a cage was moved into place. Tr. 369, 467. Once the cage was in place, he said "Leah, house" and she jumped in the cage. Tr. 370. When the tiger went into the bathroom, Mr. Quinones was right behind her. Mr. Quinones did not see anyone in the bathroom other than Mr. Terranova. Tr. 372, 376-377.

Jenna Krehbiel, who was at the circus that evening with her family, testified that she went into the women's restroom on the south side of the concourse, which has both an entrance and an exit. Tr. 247; Tr. 85; CX 9; CX 10; CX 11. When Ms. Krehbiel attempted to exit, she was instructed by a staff person to go back into the restroom. Tr. 239; CX 10. She testified that she turned around and went back into the restroom (through the exit door) as instructed, and a tiger was inside the restroom walking towards her. Tr. 240; CX 10. She turned around and walked back out the same exit door and the staff person told her to get out because there was a tiger in the restroom. CX 10; Tr. 240. It is not clear exactly how close Ms. Krehbiel was from the tiger. CX 10; Tr. 251, 246, 471.

The tiger suffered no trauma. Mr. Quinones, who had trained Leah for seven years, sat with the tiger and determined that she was ok. Tr. 372. He did not notice any problems in her next performance. Tr. 378. A veterinarian examined the tiger after the incident and reported that Leah appeared to be "emotionally, neurologically, and physically healthy." Tr. 388; RX 2.

Ms. Krehbiel's testimony at the hearing was credible. The evidence shows that she was initially told to go back into the restroom, while the tiger was in the concourse, and when the tiger entered the restroom she was told to leave due to the tiger in the restroom. It is not clear exactly how far the tiger was from her. She was not injured.

Mr. Terranova and Respondents' witnesses, who care for these tigers on a daily basis, were also credible in their testimony. This was a stressful situation which unfolded quickly. It appears that Ms. Krehbiel was leaving the restroom from the exit as the tiger was entering from the other end and she likely is the patron who building management describes as being removed from the restroom simultaneously as the handler pushed the tiger into the restroom. Given the design of the restroom, it is not possible to see the exit from the entrance from either the inside or the outside. It is credible that Mr. Terranova and Mr. Quinones thought from their vantage points that no one was in the restroom. In addition, given the available options, the restroom was the best way to contain the tiger, protecting both the tiger and the public.

Respondents contend that Cody Ives was not an employee of Respondents and his actions or inactions should not be imputed to Respondents. However, Respondents are responsible for properly staffing and training those working with the tigers.

The evidence does not show that Complainant established that Respondents failed to handle their tigers "as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort." The tiger did not exhibit signs of trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort that were documented in the record. Accordingly, Complainant has not established that Respondents violated 9 C.F.R. § 2.131(b)(1).

The evidence shows that Complainant established that during a public exhibition, the tiger was not "handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public." While Mr. Terranova's training and quick thinking prevented direct contact between the tiger and the public and resulted in a safe recapture, there would seem to be little question that having a tiger walking through an arena filled with spectators and out onto a public concourse constitutes a failure to provide sufficient distance and barriers between the animal and the general viewing public. While the tiger moved through the arena and concourse, she was in close proximity to the public and building staff. In this case, a member of the general public was in a restroom, albeit very briefly, with the tiger. Accordingly, under these facts, Complainant has established that Respondents violated regulation 9 C.F.R. § 2.131(c)(1).

In addition, the evidence shows that Complainant established that during a public exhibition, the tiger Leah was not "under the direct control and supervision of a knowledgeable and experienced animal handler." The tiger was not under the control and supervision of a knowledgeable and experienced animal handler when she escaped. Regardless of how Mr. Ives became involved, the evidence is clear that he was not qualified to work with the tigers. While Mr. Terranova and Mr. Quinones could observe the tiger and followed and talked to her, this does not demonstrate direct control and supervision. Mr. Quinones did not initially know which tiger escaped and called her by the wrong name. Tr. 364; CX 8, video 3. Mr. Terranova had a few ideas about places to contain the tiger which did not work, prior to containing her in the restroom. Tr. 454-456. This demonstrates that while the tiger was being observed, she was not under the direct control and supervision while loose in the arena and on the concourse. Accordingly, under these facts, Complainant has established that regulation 9 C.F.R. § 2.131(d)(3) was violated.

Respondents previously have been found to have insufficient trained personnel available to work with their animals. Terranova 2009/2010 Cases at 57. Respondents knew or should have known who was working with the tigers. The failure to have the tiger Leah under the direct control and supervision of a knowledgeable and experienced animal handler while

she was being put into her cage and while she was loose in the arena and concourse without sufficient barriers to protect the public constitutes a violation. This is not, however, an exhibition where the public is invited or authorized to be in direct contact with the tigers or where Respondents planned to not have a sufficient barrier between any of their tigers and the public. Respondents were previously warned about the consequences of not having sufficient trained personnel and willfully proceeded with the exhibition without a sufficient number or sufficiently trained staff. Accordingly, the evidence compels a finding that Complainant has established that this was a willful violation.

3. Tiger Enclosure Height

The 2015 Complaint alleges that on March 10, 2011, Respondents willfully violated the regulations "by failing to handle animals as carefully as possible, and by failing, during public exhibition, to handle animals with sufficient distance and/or barriers between the animals and the public," and specifically alleges that Respondents "exhibited six tigers in a 12-foot high circular wire enclosure in which respondents placed 31-inch high pedestals, which effectively reduced [the] height of the barrier between the tigers and the public, and offered a potential means for a tiger or tigers to exit the enclosure." 2015 Complaint at 5-6, ¶8.

The regulations provide that "[h]andling 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." 9 C.F.R. § 2.131(b)(1). "Handling" means "petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working, and moving, or any similar activity with respect to any animal." 9 C.F.R. § 1.1.

The Complainant asserts that on March 10, 2011, ACI Carrie Bongard conducted an unannounced inspection of Respondents' facilities, animals, and records at a traveling circus at the DeltaPlex Arena & Conference Center in Grand Rapids, Michigan. ACI Bongard observed that Respondents exhibited six tigers in a 12-foot high circular wire enclosure, the enclosure had no top, and there were 31-inch high pedestals inside the enclosure adjacent to the sides of the enclosure. Complainant asserts that

the "height and location of the pedestals effectively reduced the height of the enclosure itself, and offered the tigers a potential means to exit the enclosure" and that "ACI Bongard's contemporaneous photographs, as well as her declaration and affidavit, corroborate the inspection report." Complainant's Brief at 12.

Respondents reply that prior to and after March 10, 2011, a 12 foot high enclosure was the standard and approved height for a tiger enclosure; "Terranova had been using the cage for years and then suddenly one inspector in consultation with Dr. Gage decided that it was a citable offense" (Tr. 402; RX 5); Mr. Terranova testified he had never seen a trained tiger climb out of a cage, possibly wild zoo tigers, but not a trained circus tiger (Tr. 414); and Respondents introduced evidence of other tiger acts in which tigers were exhibited in similar arenas with elevated pedestals and one where the tiger walked a tightrope at the top of the arena (RX 4, 5; Tr. 404). Respondents' Opposition at 4-5.

The evidence shows that ACI Carrie Bongard responded to a request from her supervisor to inspect Respondents while they were travelling. CX 6 at 1. This is the only inspection she ever conducted of Respondents. CX 6 at 3. This inspection occurred while the hearing in Respondents' prior case was being conducted and prior to the 2013 tiger escape. Tr. 400. Prior to the inspection, ACI Bongard spoke with Respondents' home inspector, ACI Fox, about a recent escape at a zoo in California and whether Respondents' enclosure was 8, 10, or 12 feet. Tr. 125-126.

On March 10, 2011, ACI Bongard watched the 11 a.m. performance and then went behind the scenes to continue the inspection in Grand Rapids, MI. CX 4; CX 6. ACI Bongard asked the trainer, Mr. Quinones, about the dimensions of the performance cage where he did his act and he responded it was 12' in height. CX 6. ACI Bongard told Mr. Quinones that she would go to her office to write the inspection report and return with it. CX 6 at 1; Tr. 132-133.

After returning to her office, she "called the field specialist for large felids, Dr. Laurie Gage, and discussed the arena height with her. [Dr. Gage] felt confident that it was a citable non-compliance for height." CX 6 at 1, 3; Tr. 400-401. ACI Bongard completed her report after speaking with Dr. Gage.

On March 28, 2011, Mr. Terranova wrote a letter contesting the inspection report, stating:

> I can find no specifications in the AWA that can substantiate her findings. I have either performed in, or owned tiger acts since 1978, and the arena has never been taller than 12'. I can't begin to count the number of inspections that have been performed by USDA of these acts and never has this been written as a violation.
>
> If this is a new regulation I would ask that you please point out the statute to me so that I can meet the requirements that are set forth. If this is a recommendation, I will also strive to comply, once I can clearly understand what is being requested.

Tr. 402; CX 5.

The agency responded to Mr. Terranova's letter, stating that neither of the cited standards are new and stating:

> As regards your request for "written guidelines, including dimensions" to modify your tiger exhibit enclosure, please know, first, that the cited provisions are not engineering standards, but are rather performance-based standards. It is the exhibitor's responsibility to ensure that his animals are handled in compliance with all of the applicable regulations. The agency does not provide structural designs (and, in fact, not all deficiencies require design modification).

CX 5 at 5-6. When Mr. Terranova received this response he was confused. "I ask if they've got a new change . . . did you change anything? No. Well, what do you want me to do to fix it? Well we're not going to tell you how to fix it." Tr. 413.

Dr. Gage testified that the agency has, since 2011, produced guidance and letters to licensees regarding the height of fencing that should contain

the animals, Tr. 201, although it is not clear whether this new guidance requires tiger cages to be over 12 feet high.

Following the March 10, 2011, inspection, Respondents placed a net over the top of the arena. The agency did not return to re-inspect and circus producers repeatedly complained about the extra work and set up time, particularly as no other tiger acts were using the net. Consequently, after about a year, Respondents stopped using the net. Tr. 415. Since then, Respondents have passed at least five inspections with the same set up cited in 2011. RX 1 at 1; RX 3; Tr. 418-424.

The evidence demonstrates that this inspector was asked to inspect Respondents while their prior case was pending. Even after discussing the cage height with the home inspector prior to the visit, and upon seeing it and being told it was 12', she did not know whether it was citable until speaking with Dr. Gage. If the agency's own inspectors are not sure whether something is a violation, it seems unreasonable to expect that an exhibitor would know. The lack of clear guidance to exhibitors who want to follow the rules and run their businesses without citations fails to provide licensees with sufficient notice of what is prohibited and creates a real challenge for these businesses. And, it is understandable that the Respondents would find the timing of this inspection suspicious. The evidence does not support this violation.

4. Standards for Handling, Care, Treatment, and Transportation

The 2015 Complaint alleges that on seven times on two dates, March 10, 2011, and September 25, 2013, APHIS inspectors documented noncompliance by Respondents with the standards. Section 2.100(a) of the regulations provides that each exhibitor "shall comply in all respects with the regulations set forth in part 2 of this subchapter and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, and transportation of animals. 9 C.F.R. § 2.100(a). This regulation applies to all of the alleged noncompliance with the standards promulgated under the Act.

(a) *March 10, 2011 (Cables)*

The 2015 Complaint alleges that on March 10, 2011, Respondents failed to meet the minimum standards with respect to the structural strength, containment, and space requirements for tigers. Specifically, the complaint alleges that Respondents' exhibit and exercise enclosure was in disrepair. 2015 Complaint at 6 ¶9(a).

Section 3.125(a) of the standards provides that the "facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." 9 C.F.R. § 3.125(a).

Complainant contends that Respondents' performance and exercise arena for tigers was in disrepair (Tr. 103, 106, 112, 114) and ACI Bongard testified that the disrepair potentially allowed for tigers to put a paw or a head through the enclosure, potentially creating a hole for an escape, or injuring the animals (Tr. 114, 117-119, 139). Complainant's Brief at 12-13.

Respondents contend that the inspector took no measurements, was unable to say how many areas of the cage were in disrepair, and many of the photographs she took appear to be of the same area of the cage taken from different angles. Tr. 144. The inspector could only say that a tiger could fit its paw through an area of disrepair. She could not opine that a tiger actually could escape. Tr. 146. Dr. Gage could only opine that she had a "concern" and speculate that other cables might break loose in some way. Tr. 179, 182. She expressed no opinion regarding whether a tiger actually could escape. Tr. 183-184 ("Whether it could push it enough to get its head or its leg through, I can't tell from the photograph."). Respondents' Opposition Brief at 5-6.

The evidence is not sufficient to find that the tiger cages were not structurally sound or maintained in good repair to protect the animals from injury and to contain the animals. The evidence shows that there were a few broken or loose cables that were fixed. CX 24 at 108-109; Tr. 427. Mr. Terranova's testimony is credited that the cage is constructed of inch and a half square metal tubing with cables strung vertically and horizontally and that the tubing is the strength of the cage frame with the wiring like a net to contain the animals. Tr. 425. Mr. Terranova does not

like the wires tight because loose wires would be more difficult for a tiger to climb. Tr. 425-426. The broken wires were not in a place that was going to allow a tiger to get loose and it was not possible to determine how many of the wires were loose. Tr. 426, 428-432. There is no evidence that this exhibition permitted audience members to be close enough to the cages that a paw could reach them. In a cage that is being used regularly, there may be cables that become loose or break. The evidence does not show that Respondents were unwilling or unable to repair the cage, nor that the loose or broken cables impacted the structural integrity. The evidence did not show that loose wires would injure a tiger and no such injuries of the tigers were reported. Tr. 430. Accordingly, there is not sufficient evidence to find this violation.

(b) *March 10, 2011 (Transport enclosures)*

The 2015 Complaint alleges that on March 20, 2011, Respondents "utilized transport enclosures as primary enclosures for six tigers, and the enclosures did not offer the tigers sufficient space to make normal postural and social adjustments." 2015 Complaint at 6, ¶9(b).

Section 3.128 of the standards provides that enclosures "shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns." 9 C.F.R. § 3.128.

Complainant asserts that Respondents used "transport" enclosures as primary enclosures for their tigers and the enclosures were too small to allow proper space for normal postural and social adjustments. Complainant's Brief at 22-23.

Respondents contend that the transport cages had been used for many years, some of them from when Mr. Terranova originally had joined the circus; they provided more than sufficient space for the tigers to turn around and make normal postural adjustments; the tigers did not contort their bodies; there were no health issues such as back or hip problems or wear marks that might be evidence of contorting; the tigers were exercised daily outside of the transport cages; and the same cages subsequently

passed inspection with four different inspectors (Tr. 433-434; *see* RX 1). Respondents' Opposition Brief at 6-7.

The agency cited Respondents for violating the rule governing space requirements for facilities, which requires that enclosures allow animals to "make normal postural and social adjustments with adequate freedom of movement." 9 C.F.R. § 3.128. These were transport cages, however, and the applicable rule governing transport cages states that animals must have enough space merely "to turn about freely and to make normal postural adjustments." 9 C.F.R. § 3.137(c).

The evidence does not establish that the transport cages were too small for the tigers to turn freely and to make normal postural adjustments or to make normal postural and social adjustments with adequate freedom of movement. There was no evidence of contorting such as wear marks or health issues. The tigers were exercised outside of the transport cages every day and the transport cages were used for transport to shows. Respondents could reasonably have thought the size of the transport cages was acceptable given the length of time the cages had been used and the number of inspectors who had not objected to them. Accordingly, there is not sufficient evidence to find this violation.

(c) *September 25, 2013 (Lighting)*

The 2015 Complaint alleges that on September 25, 2013, Respondents "failed to provide areas housing nonhuman primates with a regular diurnal lighting cycle." Complaint at 6, ¶9(c).

Section 3.76(c) of the standards provides:

> Indoor housing facilities must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the

> animals. Primary enclosures must be placed in the housing facility so as to protect the nonhuman primates from excessive light.

9 C.F.R. § 3.76(c).

Complainant asserts that on September 25, 2013, Respondents housed two nonhuman primates (spider monkeys) in a barn that had inadequate lighting, specifically diurnal lighting. Complainant's Brief at 24. Complainant contends that diurnal lighting provides for the well-being of these non-human primates and makes the assessment of the health and well-being of the animals and inspection and husbandry practices easier. Complainant's Brief at 24-25.

Respondents contend that Mr. Terranova had followed his inspector's earlier instructions to install lighting, but had not understood that the inspector wanted the lights to be off at night and on in the day; he thought the lights were needed for cleaning; the monkeys did receive natural light through two 14' x 20' barn doors; and Respondents changed the lighting well before the inspector's November 25 deadline and built an outside enclosure connected by a tunnel. Respondents' Opposition Brief at 13-14.

Respondents' spider monkey housing facility was lighted well enough to permit routine inspection and cleaning of the facility and observation of the nonhuman primates and there is no allegation that the lighting failed to provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, and adequate inspection of animals. Mr. Terranova installed lights as requested by the inspector, and once he understood the need for diurnal lighting, put the lights on a timer and also built an outside enclosure connected by a tunnel. Tr. 719-721. The spider monkeys had access to natural light from the two barn doors. Accordingly, the evidence is not sufficient to find a violation.

(d) *September 25, 2013 (Roof panels)*

The 2015 Complaint alleges that on September 25, 2013, roof panels on the top of the covered portion of the tiger exercise yard had become unfastened from the top rails of the enclosure. 2015 Complaint 6-7, ¶ 9(d).

Section 3.125(a) of the standards requires that animal facilities be constructed of such material and of such strength as appropriate for the animals involved. 9 C.F.R. § 3.125(a).

Complainant contends that Respondents' tiger exercise yard and enclosures were in disrepair and structurally compromised. Specifically, the roof panels on the top of the covered portion of the tiger exercise yard had become unfastened from the top rails of the enclosure. In his inspection report, ACI Fox wrote that there were areas along the top where "the heavy gauge panels attached to the top rails of the enclosure had become unfastened. These roof panels need to be re-fastened along the top rail to make this structure structurally sound and to keep it in good repair as well as make certain the animals are contained." CX 16 at 1; Tr. 561.

Respondents assert that Mr. Terranova was in the process of welding the roof panels in the tiger enclosure and ACI Fox admitted that the panels on the tiger structure were not in danger of imminent collapse, "it simply presented itself as a possibility." Respondents' Opposition Brief at 14 (quoting Tr. 638).

There is no evidence that the sections of panels which were loose posed any danger to the animals nor that any animals were injured by them. In addition, the panels were in the process of being repaired. Accordingly, this violation is not established.

(e) *September 25, 2013 (Unused building materials)*

The 2015 Complaint alleges that on September 25, 2013, Respondents "failed to remove from an area adjacent to the tiger facility an accumulation of unused building materials." 2015 Complaint at 7, ¶ 9(e).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant asserts that although the standard specifically refers to trash, the Secretary has found noncompliance based on accumulations of other items; that ACI Fox observed an accumulation of unused building materials, including livestock panels and old lumber, and other miscellaneous items not used for animal husbandry adjacent to the tiger enclosures. Complainant's Brief at 26.

Respondents assert that the conditions in the barn were no different from ACI Fox's earlier inspections; the supposed accumulation of building materials, old lumber, and other odds and ends was in an unused area that would not interfere with the animals; and the APHIS inspectors did not take photographs of the alleged deficiencies. Respondents' Opposition Brief at 15.

The alleged accumulation of unused building materials, old lumber, and other odds and ends was in an unused area that would not interfere with the animals. Tr. 709. The evidence is not sufficient to find that the condition of the grounds would endanger the animals or husbandry practices. Accordingly, this violation is not established.

(f) *September 25, 2013 (Weeds and grass)*

The 2015 Complaint alleges that on September 25, 2013, there were "weeds and grasses growing in and around the premises and animal areas that offered harborage to rodents and other animals and pests." 2015 Complaint at 7, ¶ 9(f).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant asserts that there were weeds and grass that have grown up and need to be cut down to a manageable height so that rodents, pests, and snakes which could cause health and disease risks to these animals are not afforded an area to hide and make a home for themselves. Complainant's Brief at 27.

Respondents contend that inspectors had no problems with grass inside the tiger enclosure, as the high grass is considered enrichment, or tall grass and weeds on the adjacent property, but he still wanted it mowed outside the enclosures. Respondents' Opposition Brief at 14-15.
It is not clear the height of the grass or weeds or whether there was any evidence of rodents or pests. Mr. Terranova had the grass in the front and sides cut before returning but planned to get to the back, an unused area on the backside of the facility, when they returned home. Tr. 706. The evidence is not sufficient to find that weeds and grass were sufficient to find that the facility was not in good repair sufficient to protect the animals from injury and to facilitate the prescribed husbandry practices. Accordingly, there is not sufficient evidence to find a violation.

(g) *September 25, 2013 (Unused chain link pens)*

The 2015 Complaint alleges that on September 25, 2013, Respondents "maintained unused chain link pens containing wooden structures that were in disrepair, and had weeds growing inside of them that could provide harborage for pests." 2015 Complaint at 7, ¶ 9(g).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant contends that "Respondents maintained unused chain link pens containing wooden structures that were in disrepair and also had weeds growing inside of them that could provide harborage for pests." Complainant's Brief at 27.

Respondents assert that this was a simple maintenance issue that would not interfere with the animals. Respondents' Opposition Brief at 14-15. There is no evidence of any rodents or pests in these unused pens. Tr. 710. The evidence is not sufficient to find that unused chain link pens or other debris were sufficient to find that the facility was not in good repair

sufficient to protect the animals from injury and to facilitate the prescribed husbandry practices. Accordingly, this violation is not established.

5. Veterinary Care Regulations (2015)

The 2016 Complaint alleges that between February 11, 2015, and May 13, 2015, Respondents "willfully violated the Regulations by failing to employ an attending veterinarian under formal arrangements that included a written program of veterinary care" and specifically that Respondents' "written program of veterinary care was incomplete with respect to vaccinations of Respondents' animals." 2016 Complaint at 5, ¶ 7.

The regulations provide:

> 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.

9 C.F.R. § 2.40(a).

Complainant asserts that during a compliance inspection on May 13, 2015, Respondents produced a program of veterinary care ("PVC") that "did not set forth a vaccination schedule for dogs in Respondents' custody" and Respondents were "unable to locate an original or complete PVC." Complainant's Brief at 9.

Respondents contend that Complainant has spent "an inordinate amount of time and effort trying to overcome the obtuseness of the APHIS inspectors and prove that a simple photocopying error amounts to a violation of the veterinary care regulations;" Respondents at all times had a program of veterinary care; and it is undisputed that the dogs had been vaccinated. Respondents' Opposition Brief at 3.

The evidence shows that on May 13, 2015, Respondents' agent, Michelle Wallace, provided ACI Fox and VMO DiGesualdo a form dated 2/11/15, and identified it as Respondents' current PVC. Section II.A. of the PVC form contains a space for the schedule and frequency of vaccinations for dogs and cats. VMO DiGesualdo took a photograph of the PVC provided by Ms. Wallace. CX 20. It appears that the document provided to the inspectors was a photocopy that did not contain the entirety of Section II.A. In his inspection report, ACI Fox wrote that the "PVC was updated on 2/11/15 but the vaccination section was left blank." CX 19. Actually, the form had hash marks on each portion of the vaccination section and was not blank. RX 7. This is a standard form and it should have been immediately obvious that this was a photocopying error which could have been resolved on-site if the inspectors had inquired further. *Compare* RX 7 *with* CX 20. VMO DiGesualdo did not ask about whether the dogs actually had been vaccinated. Tr. 685. Ms. Wallace provided an entire folder on each dog that had all of their vaccinations in there. Tr. 826. Respondents at all times had a program of veterinary care, and it is undisputed that their dogs had been vaccinated. Tr. 735-739, 825-826; RX 7.

This photocopying error is nothing like the violations found in *Tri-State Zoological Park of Western Maryland, Inc.*, 72 Agric. Dec. 128, (U.S.D.A. 2013) (refusal to keep records on-site) or *Pearson*, 68 Agric. Dec. 685, 698 (U.S.D.A. 2009) (program of veterinary care did not include multiple animals). The evidence shows that Respondents had a complete written program of veterinary care on-site. Accordingly, Complainant has not established this violation.

6. Itinerary Requirements

The 2016 Complaint alleges that on May 13, 2015, and between November 14-19, 2015, Respondents "willfully violated the Regulations by exhibiting animals at a location other than Respondents' facility, and housing those animals overnight at that location, without having timely submitted a complete and accurate itinerary to APHIS." 2016 Complaint at 5, ¶¶8, 9.

The regulations provide:

> (c) Any person who is subject to the Animal Welfare regulations and who intends to exhibit any animal at any location other than the person's approved site (including, but not limited to, circuses, traveling educational exhibits, animal acts, and petting zoos), except for travel that does not extend overnight, shall submit a written itinerary to the AC Regional Director. The itinerary shall be received by the AC Regional Director no fewer than 2 days in advance of any travel and shall contain complete and accurate information concerning the whereabouts of any animal intended for exhibition at any location other than the person's approved site. If the exhibitor accepts an engagement for which travel will begin with less than 48 hours' notice, the exhibitor shall immediately contact the AC Regional Director in writing with the required information. APHIS expects such situations to occur infrequently, and exhibitors who repeatedly provide less than 48 hours' notice will, after notice by APHIS, be subject to increased scrutiny under the Act.

9 C.F.R. § 2.126(c)

Complainant alleges that on or about May 13, 2015, and November 14-19, 2015, Respondents willfully violated the itinerary regulations by failing to submit to APHIS a timely, complete, and accurate itinerary in advance of overnight travel to a location other than Respondents' facility for the purpose of exhibition. Complainant's Brief at 6-7.

On May 13, 2015, Complainant alleges that inspectors noted that two groups of animals were not present, and determined that they were performing in traveling exhibits even though the itinerary represented that all animals would be at Respondents' facility and that although Respondents insisted that they had submitted an itinerary, they produced no documentary evidence to support that claim other than "Terranova's vague and self-serving testimony." Complainant's Brief at 6-7.

On November 19, 2015, Complainant contends that inspectors found that five tigers were off site at a travelling location and that Respondents

deliberately decided to not advise APHIS of their traveling status or exhibition locations. Complainant's Brief at 7-8.

Respondents contend that Mr. Terranova submitted an itinerary prior to May 13, 2015, via e-mail but he could not find a copy, Tr. 738-739; RX 1; CX 23. Respondents' Opposition Brief at 2. Respondents additionally assert:

> Terranova did not submit an itinerary for his traveling tigers at the time of the November 2015 inspection. In May, the inspectors came when he was not home and cited him for eight violations, which Terranova believed to be outright lies, and were verbally abusive to his employee. In subsequent discussions with Fox, Terranova got the strong impression that they were waiting until he was gone before they conducted another inspection. Tr. 492-493. He therefore did not fill out another itinerary in hopes that the inspectors would catch him at home so [] he could do the inspection. Tr. 493. As it happened, Terranova was correct. He left on the 18th for San Antonio and the inspectors showed up on the 19th. Tr. 493.

Respondents' Opposition Brief at 2-3 (footnote omitted).

Respondents' argument that the agency must have had the itinerary, because it conducted a road inspection on May 14, 2015, is not persuasive as the agency does not rely solely on itineraries to inspect on-the-road licensees, and so the lack of an itinerary does not prevent the agency from inspecting. *See* Tr. 650.

Although Mr. Terranova could not produce a copy of the itinerary he provided regarding the May 13, 2015, travel, his testimony is credited, particularly in light of his admission that he did not provide an itinerary in November. Accordingly, the May 13, 2015, itinerary violation is not established.

Mr. Terranova admitted he did not provide the itinerary as required from November 14 to 19, 2015. Accordingly, this violation, which was a willful violation, is established by the evidence.

7. Minimum Standards (2016 Complaint)

(a) *January 8, 2015 (Tiger shelter)*

The 2016 Complaint alleges that on January 8, 2015, Respondents' enclosures for five[3] tigers lacked adequate shelter from inclement weather. 2016 Complaint at 6, ¶ 10(a).

Section 3.127(b) of the standards provides that "[n]atural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals." 9 C.F.R. § 3.127(b).

Complainant contends that Respondents' enclosures contained a single shelter for five tigers. In his inspection report, ACI Fox wrote:

> At time of inspection the enclosures housing the 5 tiger cubs at the facility had only one housing structure which was completed and allowed protection and comfort from the elements. We are currently experiencing temperatures and wind chills into the high teens and 20 degree range with the chance for a winter mix being possible. There is construction that has been started on additional housing structures that once completed will provide the tigers protection and will help to prevent discomfort to the animals during periods of inclement weather.

CX 18 at 1; Tr. 569.

Respondents contend that most of the tigers were about 40 pounds, ACI Fox was not aware that there was a door between each enclosure that would allow the tigers to roam freely among the enclosures, the tigers had

[3] At the hearing, Complainant amended the allegation from six to five tigers. Tr. 22.

access to all of the houses, and there was hay in the two houses that could have sheltered the tigers. Respondents' Opposition Brief at 15-16.

The evidence shows that there are several enclosures next to each other and that ACI Fox was not aware that there were doors between the enclosures. Tr. 642-643; Tr. 731. There was hay in the two houses that could have sheltered the tigers. Tr. 731. ACI Fox also testified that he was not able to observe all of the tigers within the housing structure to determine if they actually could fit comfortably inside, nor did he see whether one "low man on the totem pole" tiger had been excluded due to lack of room. Tr. 643-644. Accordingly, the evidence is not sufficient to find a violation.

(b) *May 13, 2015 (Clutter in spider monkey area)*

The 2016 Complaint alleges that on May 13, 2015, Respondents housed nonhuman primates in housing facilities that were not kept free of clutter. 2016 Complaint at 6, ¶ 10(b).

Section 3.75(b) of the standards provides that animal areas "inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, or stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures and equipment for proper husbandry practices." 9 C.F.R. § 3.75(b).

Complainant contends that Respondents' housing facilities for nonhuman primates were not kept neat and free of clutter, with items such as a tractor, hay, pipe, 55 gallon barrel, horse equipment, etc. as documented in the inspection report written by ACI Fox (CX 19 at 2); ACI Fox testified that this led to "the inability to take and perform the proper husbandry required of that building" (Tr. at 583); photographs taken on the date of the inspection corroborate ACI Fox's inspection report, further showing additional items including hay, a freezer unit, an old cage on top of the primate enclosure, plywood, and other various items (CX 20 at 13); the accumulation of materials in the building served to limit the ability to perform the proper husbandry required of that building, as well as to allow for "various types of rodents, reptiles, insect…that could come into the proximity of the non-human primates," and potentially threaten their health and well-being (Tr. at 585). Complainant's Brief at 29-30.

Respondents assert that the monkeys were kept in a barn that was used as such, and things had been stored there for years. The tractor had been there for sixteen years, and ACI Fox had seen the barn on multiple prior inspections. Tr. 740, 749. ACI Fox had inspected Mr. Terranova's facility about twenty times. Tr. 545. Included in the "clutter" was a non-working freezer used to store feed that ACI Fox himself had recommended. Tr. 745. Mr. Terranova had never seen ACI Fox have a problem moving around the barn. Tr. 749-750. In addition, two days prior to the inspection, there had been a tornado and bad flooding and the wind had "blown a lot of stuff around." Tr. 741. Respondents were cleaning it up. Tr. 747. For example, there was a piece of plywood that had blown onto the top of the walkway next to the monkey cage. It had been there a day and was not obscuring the view of the monkeys. Tr. 743, 829; CX 20 at 14. Respondents' Opposition Brief at 17.

There is no evidence of illness or injury to the spider monkeys. There is no evidence of rodents or other pests. The barn where the spider monkeys were housed was also used as a storage area. There had been recent weather issues and routine maintenance was required, although, the evidence does not establish that the clutter rises to the level of a violation. Accordingly, this violation is not established.

(c) *May 13, 2015 (Spider monkey cage rust)*

The 2016 Complaint alleges that on May 13, 2015, Respondents housed nonhuman primates in enclosures that were not free of excessive rust. 2016 Complaint at 6, ¶10(c).

The standards provide:

> General requirements. The surfaces of housing facilities—including perches, shelves, swings, boxes, houses, dens, and other furniture-type fixtures or 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. Furniture-type fixtures or objects must be sturdily constructed and must be strong enough to provide for the

> safe activity and welfare of nonhuman primates. Floors may be made of dirt, absorbent bedding, sand, gravel, grass, or other similar material that can be readily cleaned, or can be removed or replaced whenever cleaning does not eliminate odors, diseases, pests, insects, or vermin. Any surfaces that come in contact with nonhuman primates must:
>
> > (i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface.

9 C.F.R. § 3.75(c)(1)(i).

Complainant contends that ACI Fox's inspection report, photographs, and testimony show that on May 13, 2015, Respondents housed nonhuman primates in enclosures that were not free of excessive rust, and could not be cleaned and sanitized as required, as alleged in the complaint. Specifically, Complainant asserts that the nonhuman primates' cages, which housed two animals, had many areas where the metal had become rusted, and photographs taken on the day of the inspection show an enclosure with a badly rusted door, which ACI Fox testified was flaking off and coming into contact with the animals. Complainant's Brief at 30-31.

Respondents contend that there was about eight inches of rust on a monkey cage which was not affecting the integrity of the structure. Respondents' Opposition Brief at 17.

There is some surface rust visible on the photos. CX 20 at 15. The rust does not affect the integrity of the structure. CX 20; Tr. 742. The evidence does not support a finding that the rust was excessive or that it prevented the required cleaning and sanitation or that it affected the structural strength of the surface. Accordingly, this violation is not established.

(d) *May 13, 2015 (Spider monkey area lighting)*

ANIMAL WELFARE ACT

The 2016 Complaint alleges that on May 13, 2015, Respondents failed to provide sheltered areas housing nonhuman primates with adequate lighting to permit inspection and cleaning." 2016 Complaint at 6, ¶10(d).

Section 3.77(c) of the standards provides that:

> The sheltered part of sheltered housing facilities must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed in the housing facility so as to protect the nonhuman primates from excessive light.

9 C.F.R. § 3.77(c).

Complainant asserts that lighting of the indoor area of the sheltered housing facility for the nonhuman primates failed to provide enough light to permit routine inspection and cleaning of the facility, as well as observation of the non-human primates. In his testimony, ACI Fox noted that the lighting was the same issue as discovered in the September 2013 inspection; that the lighting was inadequate; materials in the barn blocked natural light; and there was an inability to assess the overall health and well-being of the primates as well as to assess the husbandry practices within the enclosure. Complainant's Brief at 31.

Respondents contend that not only were the inspectors able to see the monkeys, they spoke with them; the barn had so much light that Michelle Wallace did not believe that ACI Fox used a flash to take photographs of the interior; and, the inspectors photographed the monkeys while they were outside, in more than sufficient light for inspection and their well-being. Respondents' Opposition Brief at 17.

Both the natural light and the lighting fixture over the cage are clearly visible in the photos. CX 20 at 14, 20. ACI Fox's testimony that it was so dark that he could not see the monkeys and conduct a proper inspection is not credible. The inspectors were able to see the monkeys and speak with them. Tr. 827. The inspectors photographed the monkeys while they were outside, in more than sufficient light for inspection and their well-being. CX 20 at 16-17. Accordingly, the evidence does not support a violation.

(e) *May 13, 2015 (Enrichment plan)*

The 2016 Complaint alleges that on May 13, 2015, Respondents failed to make their plan for environmental enrichment for nonhuman primates available for review by APHIS. 2016 Complaint at 6, ¶ 10(e).

Section 3.81 of the standards provides, in part:

> Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian. This plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency.

9 C.F.R. § 3.81

The Complainant alleges that Respondents failed to make their plan for environmental enrichment for nonhuman primates available for review by APHIS and that despite Respondents' claims that they had a primate enrichment plan, ACI Fox testified that the facility representative did not present the plan to the APHIS inspectors for review and the facility representative did not know where it was kept. Complainant's Brief at 32-33.

Respondents contend that they had an environmental enhancement plan and that the inspectors simply did not look at it because they did not wish to return to the barn where it was located. Respondents' Opposition Brief at 18.

The testimony shows that when the inspectors asked to see the enhancement plan, they were told that it was not in the book that was there but was most likely in the barn and the inspectors did not ask to go see it. Tr. 831. This issue could have been resolved by the inspectors while they were on-site. It is undisputed that the monkeys had enhancement. Tr. 657-659. Accordingly, this violation is not established.

(f) *May 13, 2015 (Tiger enclosures roof and floors)*

The 2016 Complaint alleges that on May 13, 2015, Respondents failed to maintain their housing facilities for tigers in good repair so as to protect the animals from injury, specifically plywood and pallets covering the floors were rotted and in disrepair and the roof of one of the tiger housing facilities was damaged. 2016 Complaint at 6, ¶ 10(f).

Section 3.125(a) of the standards provides that the "facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." 9 C.F.R. § 3.125(a).

Complainant contends that plywood and pallets covering the floors of Respondents' housing facilities for tigers were rotted and in disrepair; multiple tiger units had floors that were rotted to the point that portions of the plywood was missing; the effect of the disrepair of the flooring was a potential for injury to the tigers; and that the wet and decaying hay could potentially cause disease as decaying hay turns into mold, which allows for bacteria organisms to grow. Complainant's Brief at 34. Complainant also claims that the roof of one of Respondents' housing facilities for tigers was damaged and in need of replacement, with material on the roof separating and splintering. Complainant's Brief at 34.

Respondents assert that these enclosures were not in use; that the tiger depicted in one of the photographs of the enclosure had come into the

enclosure through a guillotine door that Michelle Wallace, Respondents' agent, had opened at the inspector's request; and the tiger was removed after the inspection. Respondents' Opposition Brief at 18.

The evidence shows that these enclosures were not in use and that they did not pose a risk of injury to or escape of the animals. Accordingly, the evidence does not establish a violation.

(g) *May 13, 2015 (Tiger enclosure structures)*

The 2016 Complaint alleges that on May 13, 2015, Respondents failed to maintain their housing facilities for tigers in good repair so as to contain them, specifically the tiger enclosure was not constructed in a structurally sound manner; contained climbing structures that could provide opportunities for escape; and were rusted, which could reduce structural integrity. 2016 Complaint at 6-7, ¶ 10(g).

Section 3.125(a) of the standards provides that the "facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." 9 C.F.R. § 3.125(a).

Complainant asserts that Respondents' tiger enclosure was not constructed in a structurally sound manner, and specifically, the panels on the east side of the roof were not attached to the structure's framework and support pipe. Complainant's Brief at 35. Respondents contend that the panels were not clamped because they had been welded. Respondents' Opposition Brief at 18.

Complainant asserts that the tiger enclosure had various climbing structures which allow for the potential of escape; and all sections of the roof need to be attached properly to all wall sections, roof support pipes, and one panel to the other to minimize the potential for escape from the enclosure. Complainant's Brief at 35-36. Respondents contend that the panels were not clamped because they had been welded and therefore the climbing structures were not an issue. Respondents' Opposition Brief at 18.

Complainant asserts that various metals used in the tiger enclosure were observed to be rusted, and photographs taken on the date of the inspection show rust on the entire door structure and the supports on the sides and top, which could allow for the potential for disease organisms and bacteria to have a foundation to begin, which potentially affects animal health. Complainant's Brief at 36. Respondents contend that the rusted doors depicted in the photographs taken during the inspection had never been painted during their twelve to fourteen year existence; they were made from very thick drill-stem pipe; and the surface rust was not going to affect their integrity. Respondents' Opposition Brief at 18.

The evidence does not support a finding that the tiger enclosure was not structurally sound. The evidence does not show that the roof panels were unsecured or that climbing structures posed a risk of escape. The evidence also does not support a finding that the rust was excessive or that it prevented the required cleaning and sanitation or that it affected the structural strength of the surface. Accordingly, this violation is not established.

(h) *May 13, 2015 (Weeds and grass)*

The 2016 Complaint alleges that on May 13, 2015, there were weeds and grass growing in and around the premises and animal areas that offered harborage to rodents and other animals and pests. 2016 Complaint at 7, ¶ 10(h).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant alleges that grass was growing up through a used pile of bricks in the immediate area of the tiger housing and enclosures. Photographs taken during the date of the inspection show that grass was overgrown inside the tiger compound, and ACI Fox testified that the overgrown grass, "would allow insects, rodents, and reptiles to gain refuge

and proximity to the animals and potentially cause injury." Complainant's Brief at 33.

There is no evidence of the height of the weeds and grass and no evidence of rodents or pests. There is no evidence that these items were a danger to the animals or that the property was not being kept up. In fact, the record includes a photo of the finished walkway made from these bricks. Accordingly, there is not sufficient evidence to find a violation.

(i) *May 13, 2015 (Trash)*

The 2016 Complaint alleges that on May 13, 2015, Respondents housed tigers in housing facilities that were not kept clean and free of trash, and specifically, that the tiger facilities contained used bricks, pipes, broken table, roofing material, and a dog house. 2016 Complaint at 7, ¶ 10(i).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant alleges that Respondents housed tigers in housing facilities that were not kept clean and free of trash, including a pile of used brick, metal roofing material, assorted pipe, a two legged wooden table, an unused dog house, and other miscellaneous items. Complainant's Brief at 33-34. Respondents contend that the metal roofing had blown off from the storm a few days before the inspection and there was no tiger in the vicinity; the bricks had been put down to make a walkway, but the job could not be completed until after the rains subsided; and the table was a pedestal that Respondents used for training. Respondents' Opposition Brief at 19.

This is a working farm and it is reasonable that equipment necessary to complete a project, such as the brick walkway, would be in the area and it is also reasonable that after a storm, some items may be in disarray. There is no evidence that these items were a danger to the animals or that the

property was not being kept up. In fact, the record includes a photo of the finished walkway. RX 9. Respondents should not be penalized by their partially completed efforts to improve the property. Accordingly, there is not sufficient evidence to find a violation.

C. Sanctions

1. Arguments of the Parties

Complainant asserts:

> The license held by Respondent Terranova Enterprises (74-C-0199) should be revoked. This is the second administrative enforcement action against this licensee. Notwithstanding the previous findings of violations, the licensee has continued to mishandle dangerous animals, putting both people and animals at risk of harm. The licensee again has failed to apprehend the need for careful planning and preventive measures, adequate husbandry practices, a sufficient number of competent and trained employees, and scrupulous attention to prudent handling procedures. Instead, this licensee has continued to demonstrate carelessness in handling and caring for the animals in his custody and a disregard for the danger that his practices pose to the animals and the public. This licensee has also shown a disregard for the administrative enforcement process and the decisions of the Secretary, having failed to adhere to the orders issued in the licensee's previous enforcement cases.

Complainant's Brief at 37.

Respondents contend:

> As discussed above, none of the violations involved any allegation of harm to an animal or person. Most of the violations involve paperwork and minor maintenance issues that the agency gave ample time to correct. The only potentially grave violation would be the escaped

> tiger, but as discussed above, Complainant failed to show that the tiger escaped through any negligence on the part of Respondents or that such Respondents willfully failed to exercise due care. Thus, the alleged violations here fall far short of the violations that have resulted in license revocations. *See In Re: Gus White, a/k/a Gustave L. White, III, d/b/a Collins Exotic Animal Orphanage, Respondent*, AWA Docket No. 12-0277, 2014 WL 4311058 (May 13, 2014) (revoking license due to multiple violations including failure to develop and follow a plan for veterinary care that led to multiple deaths of animals); *In Re: Lorenza Pearson, d/b/a L & L Exotic Animal Farm in Re: Lorenza Pearson*, AWA Docket No. 02-0020., 2009 WL 2134028 (July 13, 2009) (revocation warranted for 281 violations and animals kept in "appalling conditions").

Respondents' Opposition Brief at 20-21.

2. License Revocation

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *Zimmerman*, 56 Agric. Dec. 433 (U.S.D.A. 1997). The Secretary may revoke or suspend the license of an exhibitor for violations of the Act. 7 U.S.C. § 2149(a). APHIS has recommended that Respondents' license be revoked, relying in large part upon the serious lapses that led to the escape of a tiger.

The recommendation of a sanction by an administrative officer charged with enforcing statutory purposes is entitled to weight, but not controlling weight, and circumstances may support a different outcome. *Hansen*, 57 Agric. Dec. 1072 (1998); *Shephard*, 57 Agric. Dec. 242 (U.S.D.A. 1998). APHIS' recommendation has been given significant weight; however, the majority of the allegations were not proven, which justifies a reduction from the proposed sanction.

The cases cited by Complainant in support of license revocation involve more serious violations than found here. For example, in *ZooCats, Inc. v. U.S. Dep't. of Agric.*, 417 F. App'x 378, 382 (5th Cir. 2011), on

numerous occasions ZooCats exhibited lions and tigers for photography shoots with children without any barrier between the animals and the public resulting in injury to several members of the public and ZooCats physically abused the animals and failed to provide them with a proper diet. Similarly, in *The International Siberian Tiger Foundation, Inc*., 61 Agric. Dec. 53, 90 (U.S.D.A. 2002), on multiple occasions while their license was suspended, the respondents allowed the public, including children, to have "close encounters" where they touched and pet lions and tigers resulting in numerous injuries to the public. In *Palazzo*, 69 Agric. Dec. 173 (U.S.D.A. 2010), juvenile tigers were photographed with members of the public, including small children, having direct contact with the tigers without distance and/or barriers between the public and the tigers and there were multiple material discrepancies in the records. This record was not considered sufficient to revoke the license and a lengthy suspension was ordered instead.

In contrast, Respondents' exhibition is designed to keep the public at a safe distance from the tigers and to ensure barriers between the public and the animals. While on one occasion Respondents willfully failed to have sufficient trained staff loading the tigers into the cages leading to an escape, they did not intend to place the public in close proximity to the animals, as was done in both *ZooCats* and the *International Siberian Tiger Foundation*. The gravity of this violation is significantly less than the violations in both *ZooCats* and the *International Siberian Tiger Foundation*. License revocation is not appropriate under these facts.

Respondents have, however, previously been found in violation of the Animal Welfare Act. In the prior case, the Judge found that "Mr. Terranova's laissez-faire supervision led to camels being left unattended and the series of poor decisions that led to Kamba's escape and injury in Enid, Oklahoma" and that "[i]t is clear to me that additional trained personnel and more attention to decision making could have averted or mitigated some of the unfortunate events that led to two elephant escapes." *Terranova* 2009/2010 Cases at 57. While the escape *sub judice* did not result in injury to the tiger and there is no evidence of a laissez-faire attitude, the problem of insufficient supervision and human error again contributed to the escape. The prior decision imposed a fine of $25,000, all or most of which has not been paid by Respondents. Accordingly, a

short thirty day suspension of Respondents' AWA license 74-C-0199 is appropriate in this proceeding.

3. Civil Money Penalties

Pursuant to 7 U.S.C. § 2149(b), an exhibitor that violates the AWA, regulations, or standards may be assessed a civil penalty of not more than $10,000 per violation. 7 U.S.C. § 2149(b); 7 C.F.R. § 3.91(b)(2)(ii). The Act requires that the Secretary, in assessing a civil penalty, "give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." 7 U.S.C. § 2149(b); *Lee Roach & Pool Laboratories*, 51 Agric. Dec. 252 (U.S.D.A. 1992).

The record reflects that Respondents operate a moderately-sized animal exhibition business, reporting custody of some twenty animals in 2011 and 2012. Stipulations at 2 ¶ I.C. One of the violations is grave, involving the escape of a tiger in Selina, Kansas. The other violations are all minor, involving access to the facilities and filing an itinerary. While three occurrences of these violations, constituting seven days of violations, are willful, there is no evidence that Respondents acted in bad faith. Respondents have a history of previous violations of the Act.

In consideration of the gravity and number of offenses, the size of the business, the absence of bad faith, and the determination that a brief license suspension is appropriate, APHIS' recommendation of civil money penalties in the amount of $35,000 for 22 violations should be reduced to $10,000 for the three violations (seven days) established. In addition, a penalty of $1,650 for each knowing failure to obey the Secretary's cease and desist order is appropriate (7 U.S.C. § 2149(b); 7 C.F.R. § 3.91(b)(2)(ii)), for a total of $11,550 for seven days of violation of the cease and desist order. Thus, the total penalty is $21,550.00.

4. Cease and Desist

The Secretary may also make an order that such person shall cease and desist from continuing such violation. 7 U.S.C. § 2149(b). Such an order is appropriate in these circumstances to protect the public and the animals.

ANIMAL WELFARE ACT

IV. Findings and Conclusions

A. Findings of Fact

1. Respondent Douglas Keith Terranova is an individual whose mailing address is 6962 S. FM 148, Kaufman, Texas 75142. At all times material hereto, Respondent Terranova was (1) operating as an exhibitor, as that term is defined in the Act and the regulations, and/or (2) acting for or employed by an exhibitor or exhibitors (Respondent Terranova Enterprises, Inc.), and any acts, omissions or failures within the scope of his employment or office are, pursuant to section 2139 of the Act (7 U.S.C. § 2139), deemed to be his own acts, omissions, or failures, as well as the acts, omissions, or failures of Respondent Terranova Enterprises, Inc. Answer (2015 Cases) at 2 ¶ A.1.; CX 1; Stipulations as to Facts, Witnesses, and Exhibits (Stipulations) at 1 ¶ I.A.

2. Respondent Terranova Enterprises, Inc., is a Texas corporation (0159995901) whose president and registered agent for service of process is Respondent Terranova, 6962 S. FM 148, Kaufman, Texas 75142. Respondents Terranova and Terranova Enterprises, Inc., do business as Terranova Wild Animal Act. At all times material hereto, Terranova Enterprises, Inc., was operating as an exhibitor, as that term is defined in the Act and the regulations, and held AWA license number 74-C-0199. Answer (2015 Cases) at 2 ¶ A.2.; CX 1; Stipulations at 2 ¶ I.B.

3. Respondents exhibit domestic, wild, and exotic animals. Respondents represented to APHIS that they held 21 animals in 2010, 20 animals in 2011, and 20 animals in 2012. Answer (2015 Cases) at 2 ¶ B.3.; CX 1; Stipulations at 2 ¶ I.C.

4. APHIS conducted inspections or attempted inspections of Respondents' facility, records, and animals on seven dates: August 2, 2010; March 10, 2011; September 28, 2012; September 25, 2013; January 8, 2015; May 13, 2015; and November 19, 2015. CX 3; CX 4; CX 7; CX 16; CX 18; CX 19; CX 22.

5. Respondents have a history of previous violations**.** On December 20, 2011, an Administrative Law Judge (Judge) issued a decision and order in two administrative proceedings finding that on multiple occasions, the Respondents violated the regulations, including the regulations governing the careful handling of tigers and elephants. Terranova 2009/2010 Cases. Respondents did not seek review of the decision and order in those cases, and the decision and order became final and unappealable on January 31, 2012. Terranova 2009/2010 Cases; Stipulations at 2 ¶ I.D.; Answer at B.4.

a. As of April 15, 2016, neither Respondent had paid any part of the $25,000 civil penalty that the Judge assessed. Answer (2015 Cases) at 2 ¶A.1.; Transcript, 848.

b. Respondents did not provide APHIS "with an affidavit describing the number of personnel hired for each exhibit, and the training and experience of animal handlers" as required by the prior order. CX 2; Transcript, 70.

Access to facilities – August 2, 2010

6. On August 2, 2010, APHIS Animal Care Inspector (ACI) Donnovan Fox attempted to conduct an inspection of Respondents' premises, animals, and records, but no one was present to accompany him on his inspection. CX 3; CX 14 at 3; Answer at ¶ D.6. Mr. Terranova was in court at the time on a personal matter. Tr. 696-697. ACI Fox documented his attempt to inspect in an inspection report. CX 3.

Tiger enclosure (height/cables) and transport cages – March 10, 2011

7. ACI Carrie Bongard responded to a request from her supervisor to inspect Respondents while they were travelling. CX 6 at 1. This is the only inspection she ever conducted of Respondents. CX 6 at 3.

8. This inspection occurred while the hearing in Respondents' prior case was being conducted. Tr. 400.

9. Prior to the inspection, ACI Bongard spoke with Respondents' home inspector, ACI Fox, about a recent incident at a zoo in California and whether Respondents' enclosure was 8, 10, or 12 feet. Tr. 125-126.

10. On March 10, 2011, ACI Bongard watched the 11 a.m. performance and then went behind the scenes to continue the inspection in Grand Rapids, MI. CX 4; CX 6.

11. ACI Bongard asked the trainer, Mr. Quinones, about the dimensions of the arena where he did his act in and he responded it was 12' in height. CX 6.

12. ACI Bongard told Mr. Quinones that she would return to her office to write the inspection report and come back with it. CX 6 at 1; Tr. 132-133.

13. After returning to her office, she "called the field specialist for large felids, Dr. Laurie Gage, and discussed the arena height with her. [Dr. Gage] felt confident that it was a citable non-compliance for height." CX 6 at 1, 3; Tr. 400-401.

14. On March 28, 2011, Mr. Terranova wrote a letter contesting the inspection report, stating:

> I can find no specifications in the AWA that can substantiate her findings. I have either performed in, or owned tiger acts since 1978, and the arena has never been taller than 12'. I can't begin to count the number of inspections that have been performed by USDA of these acts and never has this been written as a violation.
>
> If this is a new regulation I would ask that you please point out the statute to me so that I can meet the requirements that are set forth. If this is a

> recommendation, I will also strive to comply, once I can clearly understand what is being requested.

Tr. 402; CX 5.

15. The agency responded to Mr. Terranova's letter, stating that neither of the cited standards are new and stating:

> As regards your request for "written guidelines, including dimensions" to modify your tiger exhibit enclosure, please know, first, that the cited provisions are not engineering standards, but are rather performance-based standards. It is the exhibitor's responsibility to ensure that his animals are handled in compliance with all of the applicable regulations. The agency does not provide structural designs (and, in fact, not all deficiencies require design modification).

CX 5 at 5-6.

16. When Mr. Terranova received this response he was confused. "I ask if they've got a new change . . . did you change anything? No. Well, what do you want me to do to fix it? Well we're not going to tell you how to fix it." Tr. 413.

17. Dr. Gage testified that the agency has, since 2011, produced guidance and letters to licensees regarding the height of fencing that should contain the animals. Tr. 201.

18. Following the March 10, 2011, inspection, Respondents placed a net over the top of the arena. The agency did not return to re-inspect and circus producers repeatedly complained about the extra work and set up time, particularly as no other tiger acts were using the net. Consequently, after about a year, Respondents stopped using the net. Tr. 415. Since then, Respondents have passed at least five inspections with the same set up cited in 2011. *See* RX 1 at 1; RX 3; Tr. 418-424.

19. ACI Bongard thought that Respondents' tiger enclosure was in disrepair, with loose or detached wires that left gaps in the sides of the enclosure. CX 4.

20. The inspector could only say that a tiger could fit its paw through an area of disrepair. She could not opine that a tiger actually could escape. Tr. 146. Dr. Gage opined that she had a "concern" and speculated that other cables might break loose in some way. Tr. 171-182. She expressed no opinion on whether a tiger actually could escape. Tr. 176 ("Whether it could push it enough to get its head or its leg through, I can't tell from the photograph.").

21. The cage is constructed of inch and a half square metal tubing with cables strung vertically and horizontally. Tr. 425. The tubing is the strength of the cage frame with the wiring like a net to contain the animals. Tr. 425-426. Mr. Terranova does not like the horizontal wires tight because loose wires would be more difficult for a tiger to climb. Tr. 425-426. The loose wires also would not injure a tiger, as the wires were cable which moved, like a wire rope. Tr. 430-431.

22. During her March 10, 2011, inspection, ACI Bongard also cited Respondents for transport cages that Respondents had been using for many years, some of them from when Mr. Terranova originally had joined the circus, and they had repeatedly passed inspection. CX 4; Tr. 403; Tr. 433.

23. After the March 10, 2011, inspection, the same cages passed inspection with four different inspectors. *See* RX 1 (no non-compliant items at traveling inspections on 4/19/2012, 3/19/2013, 5/14/2015, 8/18/2015).

24. The cages provided sufficient space for the tigers to turn around and make normal postural adjustments. The tigers did not contort their bodies, and there were no health issues such as back or hip problems or wear marks that might be evidence of contorting. Tr. 433-435.

25. Dr. Gage testified that once tigers are no longer being moved, they must have the ability to exercise at least an hour outside their transport cages. Tr. 163-164.

26. Unless the tigers had three shows, Mr. Quinones would put them in the arena and play with them while he had his coffee. After the third show or the second show and playtime, the tigers were pretty tired. Tr. 435-436.

Access to facilities – September 28, 2012

27. On September 28, 2012, ACI Fox attempted to conduct an inspection of Respondents' premises, animals, and records and documented his attempt to inspect in an inspection report. CX 7; CX 14 at 3-4; Answer (2015 Cases) at ¶ D.6

28. On September 28, 2012, Mr. Terranova had designated Mr. Quinones as a responsible person to be present for the inspection but apparently the gate had been closed inadvertently when ACI Fox arrived for the inspection. Tr. 697-699. Mr. Terranova arranged for ACI Fox to return and inspect within the month. Tr. 699.

Tiger escape – April 20, 2013

29. On April 20, 2013, at the 7 p.m. performance, Respondents exhibited their tigers to the public as part of the Tarzan Zerbini Circus at the Salina Bicentennial Center in Salina, Kansas. CX 8; CX 11.

30. Upon the conclusion of the performance, one of the tigers (Leah) was not placed in an enclosure, but escaped and ran out into the arena's concourse. CX 8; CX 10; CX 11; CX 12; CX 13.

31. Before the shows, Mr. Terranova went over the process with the crew supplied by Labor Ready to push the tiger cages. Tr. 317-318,439. It was the same process he used with the tigers without incident for 35 years. Tr. 439, 443, 445.

32. Mr. Plunkett, part of the crew supplied by the circus, had worked the tiger cages for Mr. Terranova before and had opened and closed the doors many times. Tr. 438-439.

33. In accordance with Respondents' usual procedure, that night Mr. Terranova worked the front door and Jesse Plunkett opened and closed the cage doors. Tr. 443.

34. Mr. Plunkett's job was to shut the doors and say "clear" or "go" once the tiger was secured in the cage. Tr. 443. Nobody was supposed to pull a pin and separate a cage from the train of cages attached to the arena until Mr. Plunkett said the door was locked. Tr. 443.

35. Mr. Terranova's role was to watch Mr. Quinones and the other tigers during the performance and make sure that Mr. Quinones was ok, watching his back so to speak. Tr. 445.

36. "Tigers come in the door that I open. Mr. Quinones lets them out, tells them to go to the house. I open the door, they run down to the last cage that's wherever the door's closed. It depends on how many have come out. The person back there, in this case Jesse Plunkett, shuts both doors, locks them." Tr. 521.

37. In addition to having a set procedure for transferring the tigers from the arena, Mr. Terranova had a USDA-approved protocol in place in the event of an escape. Tr. 445.

38. On the night of the event, Mr. Terranova was at the front door listening for Mr. Plunkett. It was dark and everyone was wearing black. Tr. 303, 446.

39. At the end of the act, Mr. Terranova looked at Mr. Quinones in the arena and heard Mr. Plunkett say, "oh no" so he turned and saw the tiger named Leah on the floor. The tiger actually was trying to get in the cage, but the door had jammed shut. Tr. 447-448.

40. Cody Ives, who was part of the motorcycle act, was assisting Mr. Plunkett. Tr. 448-449, 519.

41. Apparently Mr. Ives had left a cage door open that allowed the tiger to escape, and then he could not open an empty cage door to allow the tiger into the proper cage. Tr. 449-450.

42. According to Mr. Curtis, Mr. Terranova had hired four laborers to assist with moving the tiger cages, but he had to fire one of them prior to the first show. Tr. 316-317.

43. After the tiger escaped, she started following the cage in front of her. Tr. 451. Mr. Terranova screamed to shut the back door to the outside, and to close all of the doors. Tr. 451-452.

44. The building staff moved people away from the concourse and Mr. Curtis, the ringmaster, instructed patrons to stay in their seats and remain calm. CX 11 at 5; Tr. 377-378, 461.

45. The tiger turned and went back into the arena, first going to the large performance cage where she had been performing. Tr. 452.

46. The tiger then walked around the arena, which was separated from the seating area by elevated walls. Tr. 298, 453-462.

47. Mr. Terranova and Mr. Quinones ran after the tiger and tried to stay between her and the audience as she walked around the perimeter of the arena. Tr. 453-456.

48. Mr. Quinones then was able to observe and talk to the tiger. He could tell that she was listening because she was walking slowly and not growling. Tr. 363-366, 375.

49. The tiger entered the concourse area, with food stands and restrooms, and entered the women's restroom. CX 8, video 3. The restroom is at an angle with an entrance and exit on opposite sides which are not visible from each other from either inside or outside. CX 9; CX 11; Tr. 247; Tr. 85. Mr. Terranova and Mr. Quinones thought that the restroom was empty. Tr. 368.

50. The building management reported that they "removed patron simultaneously as handler pushed tiger into restroom." CX 11 at 5. Mr. Terranova heard the security guard yell at someone to get back in the women's restroom. Tr. 463-464.

51. Mr. Terranova told two or three women to wait and asked if anyone else was in the women's room. Once the tiger entered the women's room from the entrance, Mr. Terranova entered from the exit. Mr. Terranova yelled "is anybody in there," looked under the stalls, and confirmed that Mr. Quinones was okay. Tr. 466-467.

52. Mr. Quinones went into the bathroom with the tiger while a cage was moved into place. Tr. 369, 467. Once the cage was in place, he said "Leah, house" and she jumped in the cage. Tr. 370. When the tiger went into the bathroom, Mr. Quinones was right behind her. Mr. Quinones did not see anyone in the bathroom other than Mr. Terranova. Tr. 372, 376-377.

53. Jenna Krehbiel, who was at the circus that evening with her family, testified that she went into the women's restroom on the south side of the concourse, which has both an entrance and an exit. Tr. 247; Tr. 85; CX 9; CX 10; CX 11. When Ms. Krehbiel attempted to exit, she was instructed by a staff person to go back into the restroom. CX 10; Tr. 239. She testified that she turned around and went back into the restroom (through the exit door) as instructed, and a tiger was inside the restroom walking towards her. CX 10; Tr. 240. She turned around and walked back out the same exit door and the staff said to get out because there was a tiger in the restroom. CX 10; Tr. 240. It is not clear exactly how close Krehbiel was from the tiger. CX 10; Tr. 251, 246, 471.

54. The tiger was loose from approximately 7:25 p.m. to 7:32 p.m. and was secured in the women's restroom for part of that time. CX 11 at 1.

55. The tiger suffered no trauma. Mr. Quinones, who had trained Leah for seven years, sat with the tiger and determined that she

was ok. Tr. 372. He did not notice any problems in her next performance. Tr. 378. A veterinarian examined the tiger after the incident and reported that Leah appeared to be "emotionally, neurologically, and physically healthy." RX 2; Tr. 388.

Lighting for monkeys, tiger housing, housekeeping – September 25, 2013

56. Prior to this inspection, Mr. Terranova had a very cordial relationship with ACI Fox, and they often shared ideas on how to address an issue. Tr. 699-700. Usually ACI Fox conducted the inspection by himself. Tr. 700.

57. Respondents had been on the road all summer and they had just returned the evening before the inspection. Tr. 701-702. Mr. Terranova believed the agency timed their inspection to coincide with Mr. Terranova's return when his facility would most likely be in need of some repair. Tr. 700. Mr. Terranova hadn't been back long enough to get to all of the housekeeping and maintenance issues. CX 14 at 4.

58. Mr. Terranova was present for the entire inspection. Tr. 704.

59. On September 25, 2013, ACI Fox conducted an inspection of Respondents' facility, equipment, and animals, and wrote that Respondents failed to provide areas housing nonhuman primates with a regular diurnal lighting cycle. CX 16; CX 17.

60. Mr. Terranova had followed his inspector's earlier instructions to install lighting, but had not understood that the inspector wanted the lights to be off at night and on in the day. Tr. 716-718; CX 20 at 20. In the earlier inspection, ACI Fox had told Mr. Terranova that lights needed to be installed for cleaning, but he said nothing about diurnal lighting. Tr. 718, 720, 799.

61. The monkeys received natural light through two 14' x 20' barn doors. Tr. 718-719; CX 20 at 14.

62. Respondents changed the lighting well before the inspector's November 25 deadline and built an outside enclosure connected by a tunnel. Tr. 719-721.

63. ACI Fox did not see any evidence of rat infestation. Tr. 636-638. ACI Fox was able to inspect the animals. Tr. 638.

64. During the September 25, 2013 inspection, ACI Fox wrote that the roof panels on the top of the covered portion of the tiger exercise yard had become unfastened from the top rails of the enclosure. CX 14 at 4; CX 16; CX 17.

65. Mr. Terranova was in the process of welding the roof panels in the tiger enclosure, and ACI Fox admitted at the hearing that the panels on the tiger structure were not in danger of imminent collapse, "it simply presented itself as a possibility." Tr. 638-640.

66. During his September 25, 2013, inspection, ACI Fox wrote that Respondents failed to remove from an area adjacent to the tiger facility an accumulation of unused building materials, including livestock panels and old lumber, and other miscellaneous items not used for animal husbandry, and that Respondents maintained unused chain link pens containing wood structures that were in disrepair, and had weeds growing inside of them that could provide harborage for pests. CX 14 at 4; CX 16; CX 17.

67. The alleged accumulation of unused building materials, old lumber and other odds and ends was in an unused area that would not interfere with the animals. Tr. 709. The chain link area was no longer in use. Tr. 710.

68. ACI Fox testified that overgrown weeds and grass outside the enclosures would cause potential injury to tigers from snakes, rats, and insects. Tr. 565. The weeds were on the backside of the facility in an unused area of the yard. Tr. 706. The inspectors had no problems with grass inside the tiger enclosure, as the high grass is considered enrichment. Tr. 705; *See* CX 20 at 5.

69. Mr. Terranova had the grass in the front and sides cut before returning but planned to get to the back when they returned home. Tr. 706.

70. The APHIS inspectors did not take photographs of the alleged deficiencies on September 25, 2013. Tr. 553; Tr. 704.

Tiger shelter – January 8, 2015

71. On January 8, 2015, ACI Fox inspected Respondents' facility and thought that the enclosure housing five tigers had a single housing structure that did not accommodate all five tigers. CX 18.

72. ACI Fox cited Respondents because he believed that Mr. Terranova was housing five tiger cubs in a facility with only one complete housing structure during cold weather. CX 18. According to ACI Fox, the primary purpose of the structure was to house the tigers when they were sleeping. Tr. 569-570. He opined that the housing was too small, and unless there was heavy bedding they would have no means to maintain their body temperature except for piling on top of each other, "which they have that choice to do." Tr. 569.

73. ACI Fox was referring to a structure with three enclosures separated by a chain link fence with an open door. Tr. 728; CX 20 at 7; RX 8. Within each enclosure was a cinder block house. Cinder blocks are hollow and the air inside them can become warm from the tigers' body heat. Tr. 728-729. The first house was completely finished when the cubs arrived, the second house was finished except for a strip of about a foot over the front edge, and the third house had no top. Tr. 729.

74. ACI Fox was not aware that there was a door between each enclosure that would allow the tigers to roam freely among the enclosures and the tigers had access to all of the houses. Tr. 641-642, 729.

75. There was hay in the two houses that could have sheltered the tigers. Tr. 731. ACI Fox acknowledged at the hearing that there

may well have been bedding. Tr. 644. When Mr. Terranova went to see the tigers in the mornings, he found them all in the house together. Tr. 732.

76. ACI Fox was not able to observe all of the tigers within the housing structure to determine if they actually could fit comfortably inside, nor did he see whether one "low man on the totem pole" tiger had been excluded due to lack of room. Tr. 644.

Veterinary care regulations – May 13, 2015

77. On May 13, 2015, Respondents' agent, Michelle Wallace, provided ACI Fox and VMO DiGesualdo a form dated 2/11/15, and identified it as Respondents' current PVC. VMO DiGesualdo took a photograph of the PVC provided by Ms. Wallace. CX 20.

78. Section II.A. of the form PVC contains a space for the schedule and frequency of vaccinations for dogs and cats. It appears that the document provided to the inspectors was a photocopy that did not contain the entirety of Section II.A. CX 20; RX 7.

79. In his inspection report, ACI Fox wrote that the "PVC was updated on 2/11/15 but the vaccination section was left blank." CX 19; Tr. 684. Actually, the form had hash marks on each portion of the vaccination section and was not blank. RX 7.

80. The PVC is a standard form and it should have been immediately obvious that this was a photocopying error which could have been resolved on-site if the inspectors had inquired further. *Compare* RX 7 *with* CX 20.

81. VMO DiGesualdo did not ask about whether the dogs actually had been vaccinated. Tr. 685.

82. Ms. Wallace provided an entire folder on each dog that had all of their vaccinations in there. Tr. 826.

83. Respondents at all times had a program of veterinary care, and it is undisputed that their dogs had been vaccinated. Tr. 735-739, 825-826; RX 7.

Itinerary requirements – May 13, 2015

84. On May 13, 2015, ACI Fox and VMO DiGesualdo determined that two groups of animals were not present at Respondents' facility, but were "out on exhibit," and Respondents' March 18, 2015, itinerary represented that all animals would be returned to the facility by April 2015. CX 19 at 1.

85. Mr. Terranova testified that he did submit an itinerary prior to May 13, 2015, via e-mail but he could not find a copy. Tr. 740-741.

86. The agency does not rely solely on itineraries to inspect on-the-road licensees, and so the lack of an itinerary does not prevent the agency from inspecting. *See* Tr. 650-651.

Housekeeping – May 13, 2015

(a) *Clutter in building with spider monkeys*

87. The monkeys were kept in a barn that was used as such, and things had been stored there for years. The tractor had been there for sixteen years, and ACI Fox had seen the barn on multiple prior inspections. Tr. 743-744. Mr. Terranova had never seen ACI Fox have a problem moving around the barn. Tr. 749-750.

88. Two days prior to the inspection, there had been a tornado and bad flooding and the wind had "blown a lot of stuff around," and Respondents were cleaning it up. Tr. 749-750, 827-829. For example, there was a piece of plywood that had blown onto the top of the walkway next to the monkey cage. It had been there a day and was not obscuring the view of the monkeys. Tr. 745-746, 829; CX 20 at 14.

89. ACI Fox had inspected Mr. Terranova's facility about twenty times. Tr. 545. Included in the "clutter" was a non-working freezer used to store feed that ACI Fox himself had recommended. Tr. 745.

(b) *Spider monkey cage rust*

90. There was about eight inches of rust on a monkey cage. CX 20; Tr. 742. The rust was not affecting the integrity of the structure. Tr. 742.

(c) *Spider monkey area lighting*

91. Both the natural light and the lighting fixture over the cage are clearly visible in the photos. CX 20 at 14, 20. The inspectors were able to see the monkeys and speak with them. Tr. 827. If ACI Fox had wanted something moved, Respondents would have assisted. Tr. 748-750.

92. The inspectors photographed the monkeys while they were outside, in more than sufficient light for inspection and their well-being. CX 20 at 16-17.

(d) *Enrichment plan*

93. Respondents had an environmental enhancement plan. The inspectors were told that it was not in the book that was there but was most likely in the barn and the inspectors did not ask to go see it. Tr. 831. It is undisputed that the monkeys had enhancement. *See* Tr. 658-659.

(e) *Tiger enclosures (Roof and floors)*

94. On May 13, 2015, ACI Fox and VMO DiGesualdo thought that Respondents housed tigers in facilities containing shelters that were in disrepair, with rotted plywood and pallets covering the floors and the roof of one of the shelters was damaged. CX 19; CX 20 at 9-12.

95. The enclosures alleged to have rotting plywood floors and damaged roof were not in use. Tr. 771.

96. The tiger depicted in one of the photographs of the enclosure had come into the enclosure through a guillotine door that Michelle Wallace had opened at the inspector's request. The tiger was removed after the inspection. CX 20 at 9-12; Tr. 771-772, 830.

97. The metal roof panels were not clamped because they had been welded. RX 9 at 3-4; Tr. 756-757.

(f) *Tiger enclosures (Structures)*

98. The rusted doors depicted in the photographs taken during the inspection had never been painted during their twelve to fourteen year existence. They were made from very thick drill-stem pipe, and the surface rust was not going to affect their integrity. Tr. 758-759. The other side of one of the doors was painted, so the animal would not come into contact with the rust. Tr. 756-757, 763.

99. Mr. Terranova photographed the facility on July 12, 2015, two months after the inspection. RX 14.

(g) *Tiger enclosures (Weeds and grass)*

100. On May 13, 2015, ACI Fox and VMO DiGesualdo reported that there were weeds and grass growing in and around the premises and animal areas that could have offered harborage to rodents and other animals and pests. The size of the weeds and grass is not reported and there was not a report of rodents or other pests. CX 19; CX 20 at 7, 8.

(h) *Tiger enclosures (Trash)*

101. The inspection report noted things like used brick, metal roofing, and a wooden table that the inspector thought were not in use and should have been stored away from the animals. The metal roofing had blown off from the storm a few days before the

inspection and there was no tiger in the vicinity. Tr. 767. The bricks had been put down to make a walkway, but the job could not be completed until after the rains subsided. Tr. 768-769; RX 9 at 2. The table was a pedestal that Mr. Terranova used for training. Tr. 769-770.

Itinerary Requirements – November 14-19, 2015

102. On November 19, 2015, VMOs Mary Moore and Elizabeth Pannill conducted an inspection of Respondents' records and determined that five of Respondents' tigers were off-site, and had been for at least five days and nights, but Respondents' most recent itinerary did not include that information, and represented that all of Respondents' animals would be at Respondents' facility after September 2015. CX 22.

103. Mr. Terranova did not submit an itinerary for his traveling tigers at the time of the November 2015 inspection. Tr. 492-495.

B. Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondents are exhibitors within the meaning of the Animal Welfare Act.

3. On August 2, 2010, Respondents willfully violated the Act and regulations by failing to have a responsible person available to provide access to APHIS officials to conduct compliance inspections. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).

4. On September 8, 2012, Respondents failed to provide access to allow APHIS officials access to their place of business to conduct an inspection, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) and (b). This violation, however, was not willful.

5. On or about April 20, 2013, Respondents willfully violated the regulations by failing, during public exhibition, to handle an adult tiger with sufficient distance and/or barriers between the tiger and

the public, and to have the tiger under the direct control and supervision of a knowledgeable and experienced animal handler. 9 C.F.R. §§ 2.131(b)(1), 2.131(c)(1), 2.131(d)(3).

6. From November 14-19, 2015, Respondents willfully violated the regulations, 9 C.F.R. § 2.126(c), by failing to timely submit an accurate travel itinerary.

7. Complainant failed to meet the burden of proving the following violations brought against the Terranova Respondents by the preponderance of the evidence, and they are therefore dismissed:

   a. On March 10, 2011, allegation of a violation of the regulations, 9 C.F.R. § 2.100(a), by housing six tigers in an enclosure that was not structurally sound and maintained in good repair (9 C.F.R. § 3.125(a)); and housing six tigers in transport enclosures that did not provide sufficient space for the tigers to make normal postural and social adjustments (9 C.F.R. § 3.128).

   b. On March 10, 2011, allegation of a violation of the regulations, 9 C.F.R. §§ 2.131(b)(1), 2.131(c)(1), by failing to handle animals as carefully as possible, and by failing, during public exhibition, to handle animals with sufficient distance and/or barriers between the animals and the public.

   c. On September 25, 2013, allegation of a violation of the regulations, 9 C.F.R. § 2.100(a), by:

      i. Housing nonhuman primates in enclosures without a regular diurnal lighting cycle. 9 C.F.R. § 3.76(c);

      ii. Housing tigers in an enclosure that was in disrepair. 9 C.F.R. § 3.125(a);

      iii. Failing to keep the area adjacent to the tiger enclosure free of accumulations of discarded items and building materials. 9 C.F.R. § 3.131(c);

iv. Failing to remove weeds and grass in and around the premises and animal areas that offered harborage to rodents and other animals and pests. 9 C.F.R. § 3.131(c); and

v. Failing to maintain the premises clean and free of miscellaneous and discarded items and weeds that could provide harborage for pests. 9 C.F.R. § 3.131(c).

d. On January 8, 2015, allegation of a violation of the regulations 9 C.F.R. § 2.100(a), by failing to meet the minimum standards, by housing five tigers in an enclosure that lacked adequate shelter from inclement weather for all of the animals. 9 C.F.R. § 3.127(b).

e. On May 13, 2015, allegation of a violation of the regulations, 9 C.F.R. § 2.100(a), by failing to meet the minimum standards, by:

i. Housing nonhuman primates in housing facilities that were not kept free of clutter. 9 C.F.R. § 3.75(b);

ii. Housing nonhuman primates in enclosures that were not free of excessive rust, and could not be cleaned and sanitized as required. 9 C.F.R. § 3.75(c)(1)(i);

iii. Failing to provide sheltered areas housing nonhuman primates with adequate lighting to permit inspection and cleaning. 9 C.F.R. § 3.77(c);

iv. Failing to make their plan for environmental enrichment for nonhuman primates available for review by APHIS. 9 C.F.R. § 3.81;

v. Failing to maintain their housing facilities for tigers in good repair so as to protect the animals from injury, 9 C.F.R. § 3.125(a), and specifically failing to repair the rotted plywood and pallets covering the floors, and to replace the roof of one of the structures;

vi. Failing to maintain their housing facilities for tigers in good repair so as to contain them, 9 C.F.R. § 3.125(a), and specifically having detached panels on the east side of the roof, structures that could permit the animals to escape, and rusting enclosures;

vii. Failing to remove weeds and grass in and around the premises and animal areas. 9 C.F.R. § 3.131(c); and

viii. Housing tigers in facilities that were not kept clean and free of trash. 9 C.F.R. § 3.131(c).

f. Between February 11, 2015, and May 13, 2015, allegation of a violation of the regulations, 9 C.F.R. § 2.40(a)(1), by failing to maintain an accurate and complete written program of veterinary care.

g. On or about May 13, 2015, allegation of a violation of the regulations, 9 C.F.R. § 2.126(c), by failing to timely submit an accurate itinerary, as required.

8. No sanction need be imposed for the one technical violation of the Act, on September 8, 2012 (access to facilities), to promote the Act's remedial purposes.

9. The Administrator's recommendation that Respondents' AWA license should be revoked is not warranted, although in consideration of the gravity and history of violations, a suspension of thirty (30) days is imposed.

10. The Administrator's proposed civil money penalty of $35,000 for 22 alleged offenses is reduced to $10,000, considering the number of offenses established, the size of Respondents' business, the absence of bad faith, and the determination that license suspension is appropriate.

11. Respondents knowingly failed to obey a cease and desist order made by the Secretary under section 2149(b) of the Act (7 U.S.C.

§ 2149(b)) on three instances: August 2, 2010 (access to facilities); April 20, 2013 (tiger escape); and November 14-19, 2015 (five days/itinerary). Pursuant to 7 U.S.C. § 2149(b) and 7 C.F.R. § 3.91(b)(2)(ii), Respondents are subject to a civil penalty of $1,650 for each knowing failure to obey the Secretary's cease and desist order for a total of $11,550 for seven days.

ORDER

1. The Terranova Respondents, their agents, employees, successors and assigns, directly or indirectly through any corporate or other device are ORDERED to cease and desist from further violations of the Act and controlling regulations.

2. AWA license number 74-C-0199 is suspended for a period of thirty (30) days.

3. Terranova Enterprises, Inc. and Douglas Keith Terranova are jointly and severally assessed a civil money penalty of $10,000 for the violations established herein.

4. In addition, Respondents Terranova Enterprises, Inc. and Douglas Keith Terranova are jointly and severally assessed a civil penalty of $1,650 for each knowing failure to obey the Secretary's cease and desist order for a total of $11,550.

5. Within thirty (30) days from the effective date of this Order, Respondents shall send a check for the total penalty amount of $21,550 made payable to the Treasurer of the United States and remitted either by U.S. Mail addressed to USDA, APHIS, Miscellaneous, P.O. Box 979043, St. Louis, MO 63197-9000, or by overnight delivery addressed to US Bank, Attn: Govt Lockbox 979043, 1005 Convention Plaza, St. Louis, MO 63101.

6. Pursuant to the Rules of Practice, this Decision and Order will become effective and final thirty-five (35) days this decision is served upon the Respondents, unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

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

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CIVIL RIGHTS

COURT DECISIONS

PIGFORD v. VILSACK.
Civil Action Nos. 97-1978 (PLF), 98-1693 (PLF).
Opinion of the Court.
Filed September 15, 2016.

CIVIL RIGHTS – Consent decree – Jurisdiction – Moot – *Res judicata*.

[Cite as: Nos. 97-1978 (PLF), 98-1693 (PLF), 2016 WL 4921378 (D.C. Cir. Sept. 15, 2016)].

The Court denied the plaintiffs' motions seeking: (1) production of the plaintiffs' written statements opting-out of the *Pigford* class; (2) a hearing before USDA on the merits of their discrimination claim; (3) a preliminary injunction barring foreclosure of their farm pending the Court's resolution of their motions; and (4) declaration that they are members of the *Pigford* class, holding that the motion seeking relief from foreclosure of property was moot and that the remaining three motions failed on the basis of *res judicata*. The Court concluded that an earlier Consent Decree had left the Court with jurisdiction solely to enforce the terms of that Consent Decree and, consequently, the various requested forms of relief were beyond the scope of the Court's jurisdiction.

United States District Court,
District of Columbia.

OPINION

PAUL L. FRIEDMAN, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

Before the Court are eight motions and one "objection" filed by four sets of *pro se* parties, three of whom are individuals or groups of individuals who either filed unsuccessful Track A claims, unsuccessfully attempted to late-file Track A claims, or opted-out of the plaintiff class: (1) Eddie and Dorothy Wise (collectively, "the Wises"); (2) Theodore F.B. Bates, Ava L. Bates, Karla K. Bates, Terrie L. Bates, Theodore B. Bates, Jr., Theodore F.B. Bates, Sr., and Ada C. and Kerry F. Bates (collectively, "the Bateses"); and (3) Carl Parker on behalf of the Estate of Robert J. Parker ("Parker"). The fourth party is Corey Lea, a representative of the Cowtown Foundation, Inc. ("Cowtown"), who appears to have no prior

connection to this case. The defendant — the United States Department of Agriculture ("USDA") — opposes the motions and has supplied a declaration by Bob Etheridge, North Carolina Executive Director of the USDA's Farm Service Agency, with respect to the Wises' motions. The motions seek various forms of relief, discussed in further detail below, but generally ask for further hearings under the Consent Decree in this case.

The Court has previously considered similar motions — including some by these same *pro se* parties — raising the same arguments on which the movants now base the present motions. *See*, *e.g.*, *Pigford v. Vilsack*, 78 F. Supp. 3d 247 (D.D.C. 2015), *appeal dismissed* (July 20, 2015); *Pigford v. Vilsack*, No. 97-1978, 2014 WL 6886607 (D.D.C. Dec. 8, 2014); Memorandum Opinion and Order (Jan. 29, 2013) [Dkt. 1873]. The Court at that time concluded that it had no authority to entertain these arguments, which were clearly foreclosed by the terms of the Consent Decree. The same conclusion holds true today — indeed, even more so in light of the Wind-down Stipulation and Order rendered on November 2, 2015 [Dkt. 2008]. Where not foreclosed on jurisdictional grounds, the *pro se* motions are barred by the doctrine of *res judicata*. The Court therefore will deny the *pro se* motions and objection.[1]

I. Factual and Procedural Background

In this action, a class of African-American farmers sued the USDA for

[1] The papers considered in connection with the pending motions include: Consent Decree [Dkt. 167]; Wises' Letter [Dkt. 177]; Wises' Motion to Compel Written Consent to Opt Out [Dkt. 2002]; Wises' Motion for Contempt and to Enforce the Pigford Consent Decree [Dkt. 2003]; Wises' Emergency Motion for Preliminary Injunction Against Foreclosure [Dkt. 2006]; Wind-down Stipulation and Order [Dkt. 2008]; Defendant's Opposition to Wises' Motions [Dkt. 2010]; Wises' Reply in Support of Three Initial Motions [Dkt. 2013]; Bateses' Motion [Dkt. 2017]; Bateses' Objection [Dkt. 2018]; Defendant's Response to Bateses' Motion and Objection [Dkt. 2019]; Bateses' Reply [Dkt. 2027]; Wises' Emergency Motion for an Order on Dkt. 2003 [Dkt. 2031]; Defendant's Opposition to Wises' Emergency Motion for an Order [Dkt. 2033]; Wises' Reply in Support of Emergency Motion for an Order [Dkt. 2036]; Wises' Motion for a Declaratory Judgment [Dkt. 2037]; Defendant's Opposition to Wises' Motion for a Declaratory Judgment [Dkt. 2039]; Parker's Motion for a Declaratory Judgment [Dkt. 2040]; Wises' Reply in Support of Motion for a Declaratory Judgment [Dkt. 2041]; Defendant's Opposition to Parker Motion for a Declaratory Judgment [Dkt. 2044]; Parker Reply [Dkt. 2045]; and Cowtown's Motion to Intervene and Freeze the Remaining Funds [Dkt. 2048].

discriminating against them in the provision of farming credit and benefits. In April 1999, this Court approved a Consent Decree that settled the plaintiffs' claims and created a mechanism for resolving individual claims of class members outside the traditional litigation process. *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999). Class members could choose between two claims procedures, known as Track A and Track B. *Pigford v. Schafer*, 536 F. Supp. 2d 1, 4 (D.D.C. 2008). Track A claims were decided by a third-party neutral known as an adjudicator, and claimants who were able to meet a minimal burden of proof were awarded $50,000 in monetary damages, debt relief, tax relief, and injunctive relief. *Id.* Track B imposed no cap on damages and also provided for debt relief and injunctive relief; but claimants who chose Track B were required to prove their claims by a preponderance of the evidence in one-day mini-trials before a third-party neutral known as an arbitrator. *Id.* Decisions of the adjudicator and the arbitrator were final and not subject to review in any judicial forum, except that the Monitor, a court-appointed third-party neutral, could — on a petition filed within 120 days of the decision — direct the adjudicator and the arbitrator to reexamine claims if the Monitor determined that "a clear and manifest error ha[d] occurred" that was "likely to result in a fundamental miscarriage of justice." *Id.* (citing Consent Decree ¶¶ 9(a)(v), 9(b)(v), 10(i), 12(b)(iii) (April 14, 1999) [Dkt 167]); *see also Pigford v. Johanns*, 416 F.3d 12, 14 (D.C. Cir. 2005).

Potential class members in 1999 were not required to participate in that alternative claims resolution process; those African-American farmers who wished to pursue their individual claims against the USDA in court were permitted to opt out of the *Pigford* plaintiffs' class by submitting an opt-out request within 120 days of the entry of the Consent Decree. Consent Decree ¶¶ 2(b), 18; *Pigford v. Glickman*, 185 F.R.D. at 95-96. The Court entered the Consent Decree on April 14, 1999 and, by its terms, it extinguished the claims against the USDA of all members of the *Pigford* plaintiffs' class who did not opt out of the Consent Decree in a timely fashion. Consent Decree ¶¶ 2(b), 18; *Pigford v. Veneman*, 208 F.R.D. 21, 23 (D.D.C. 2002).

By the end of the claims resolution process, nearly 23,000 claimants had been found eligible to participate, and the federal government had provided more than $1 billion in total relief to prevailing claimants. *See* Monitor's Final Report on Good Faith Implementation of the Consent

Decree and Recommendations for Status Conference at 1 (Apr. 1, 2012) [Dkt. 1812]. In addition, Congress enacted in the Food, Conservation, and Energy Act of 2008 a provision that potentially would subsequently resurrect the claims of more than 60,000 potential claimants who were unable to participate in this case because they had not submitted timely claims. *In re Black Farmers Discrimination Litig.*, 856 F.Supp.2d 1, 11-12 (D.D.C. 2011). On May 13, 2011, after "extensive negotiations," the Court preliminarily approved a class-wide Settlement Agreement between those plaintiffs and the USDA, *id.* at 14, 22-23, which led to the implementation of another non-judicial claims resolution process with a potential total payout of more than $1 billion in relief. *Id.* at 22-23 (explaining the claims resolution process of "expedited" Track A versus "actual damages" Track B); *see also* Claims Resolution Act of 2010, PUB. L. 111-291 § 201(b), 124 Stat. 3064 (2010) (appropriating funds for the claims resolution process). In fact, the claims process in that case is now completed, and over $1 billion have been paid out to successful claimants.

On November 2, 2015, the Court entered a Wind-down Stipulation and Order in this case, which "which "execute[d] an orderly wind-down of all obligations imposed on the parties by the Consent Decree" in this action, and "forever discharged and released" Class Counsel, the Neutrals, and Defendant from "all duties under or related to the Consent Decree." Dkt. 2008 at 3, 7. Subsequent to the entry of the Wind-down Stipulation and Order, the Court "retain[s] jurisdiction solely to enforce the terms of this Wind-down Stipulation and Order," as well as for certain other limited aspects of the Consent Decree that are not relevant to the *pro se* motions under consideration here. *Id.* at 7.

II. Discussion

The Court will discuss the background of each of the four sets of *pro se* parties separately and separately analyze the merits of their respective motions and objection.

A. The Wises

On April 15, 1999 — one day after the Court entered the Consent Decree — a letter to the Court from Eddie and Dorothy Wise was entered

on the public docket in this case. Wises' Letter [Dkt. 177].[2] In it the Wises wrote that "the Consent Decree is very unfair" and asked to "go to trial or declare the Consent Decree null and void." *Id.* at 1. If this letter was intended to be a formal opt out, as other courts have concluded it was, *see infra* at 6, it was timely filed. *See supra* at 3-4. The docket in this case indicates that the Wises did not participate further in this litigation until October 9, 2015, when they filed the instant motions to compel and for contempt, Dkts. 2002 and 2003.

In the interim, the Wises filed a class action suit against the USDA, with the assistance of counsel, in the United States District Court for the Eastern District of North Carolina, alleging identical discrimination claims to those contained in the complaint in this case. *Wise v. Vilsack*, 496 Fed.Appx. 283, 284 (4th Cir. 2012) (per curiam). In that case, the Wises explained to the district court that they "chose to opt out of the *Pigford v. Veneman* class action lawsuit and become lead plaintiffs in a new class action lawsuit." Dkt. 2010-1 at 4; *see also United States v. Wise*, No. 14-0844, 2015 WL 5918027, at *4 (E.D.N.C. Oct. 9, 2015) ("The evidence of record conclusively establishes the fact that [the Wises] opted out of the *Pigford* settlement."), *reconsideration denied*, No. 14-0844, 2015 WL 7302245 (E.D.N.C. Nov. 18, 2015), *aff'd*, 639 Fed.Appx. 193 (4th Cir. 2016), *and aff'd*, 639 Fed.Appx. 193 (4th Cir. 2016); *Wise v. Glickman*, 257 F. Supp. 2d 123, 129 (D.D.C. 2003) ("Eddie Wise[and] Dorothy Monroe-Wise ... opted out of the *Pigford* class."). The Eastern District of North Carolina ultimately dismissed the Wises' putative class action in 2011 under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to plead any facts comparing their treatment to the treatment of non-minority farmers. *Wise v. Vilsack*, No. 10-0197, 2011 WL 381765, at *4 (E.D.N.C. Feb. 2, 2011), *aff'd sub nom.* 496 Fed.Appx. 283.[3]

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[2] The letter is dated March 27, 1999. *See* Dkt. 177.

[3] Since 2011, the Wises have engaged in varied efforts before federal courts and the USDA to seek the same relief as that in their failed class action in the U.S. District Court for the Eastern District of North Carolina. *See Wise v. United States*, No. 15-01331, 2015 WL 8024002 (D.D.C. Dec. 4, 2015), *aff'd*, No. 16-5019, 2016 WL 3049544 (D.C. Cir. May 17, 2016); *Wise v. U.S. Dep't of Agric.*, No. 13-0234, 2014 WL 5460606 (E.D.N.C. Oct. 27, 2014), *aff'd*, 592 Fed.Appx. 203 (4th Cir. 2015); *In Re: Eddie Wise & Dorothy Wise, Complainant*, No. 16-0002, 2015 WL 9241444 (U.S.D.A. Nov. 17, 2015*); In Re: Eddie Wise, Petitioner*, No. 13-0325, 2013 WL 6075751 (U.S.D.A. Oct. 29, 2013).

In November 2014, the USDA brought a foreclosure proceeding against the Wises in the U.S. District Court for the Eastern District of North Carolina in order to collect on defaulted USDA loans and, in October 2015, the court granted summary judgment in favor of USDA. *United States v. Wise*, 2015 WL 5918027, at *6; *see also United States v. Wise*, No. 14-0844, 2016 WL 755627 (E.D.N.C. Feb. 25, 2016) (denying stay), *reconsideration denied*, No. 14-0844, 2016 WL 1448641 (E.D.N.C. Apr. 12, 2016). "On April 4, 2016, the United States Marshal for the Eastern District of North Carolina sold at public auction approximately 105 acres of land owned by [the Wises] ... in accordance with" that judgment. Declaration of Bob Etheridge at 1 (Apr. 28, 2016) [Dkt. 2039-1].

In their five present motions, the Wises seek: (1) production of their written statements opting-out of the *Pigford* class, Dkt. 2002; (2) a hearing before the USDA on the merits of their discrimination claim, Dkt. 2003; (3) a preliminary injunction barring the foreclosure of their farm pending the Court's resolution of their motions, Dkts. 2006 and 2031; and (4) a declaration that they are members of the *Pigford* class. Dkt. 2037. The government opposes the motions as either barred by *res judicata* or as moot. Dkt. 2010 at 9-10; Dkt. 2039 at 5-6.

The Court will deny all of the Wises' motions. As an initial matter, the government is correct that the Wises' motions for injunctive relief to prevent the foreclosure of their property, Dkt. 2006 and 2031, are moot. The government provided the declaration of Bob Etheridge, North Carolina Executive Director of the USDA's Farm Service Agency, which indicates that the foreclosure sale of the Wises' property occurred on April 4, 2016. Dkt. 2039-1 at 1. The Wises' reply brief did not rebut Etheridge's statement, arguing only that the USDA perpetrated a "fraud upon the court." Dkt. 2041 at 1. Even if the Court were inclined to agree with the Wises' fraud argument — which it is not — federal courts are courts of limited jurisdiction that, under Article III's case or controversy requirement, may only decide "real and substantial controvers [ies]." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). Federal courts have no jurisdiction over moot cases, *see Worth v. Jackson*, 451 F.3d 854, 861 (D.C. Cir. 2006), and such cases must be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil

Procedure. The Court therefore will deny the Wises' motions seeking relief from foreclosure of their property, Dkt. 2006 and 2031, as moot because they present no ongoing controversy in light of the completed foreclosure sale.

The Wises' remaining motions seek (1) production of their written statements opting-out of the *Pigford* class, Dkt. 2002, (2) a hearing before the USDA on the merits of their discrimination claim, Dkt. 2003, and (3) a declaration that they are members of the *Pigford* class. Dkt. 2037. All of these motions fail on the basis of *res judicata*. Judge Colleen Kollar-Kotelly of this Court recently held as much when she dismissed the Wises' 2015 civil action seeking very similar relief. *See Wise v. United States*, 2015 WL 8024002, at *6; *see also Wise v. United States*, 128 F. Supp. 3d 311, 318-19 (D.D.C. 2015) (denying a motion for preliminary injunction and remarking that all of the Wises' claims "are likely barred by *res judicata*").

The doctrine of *res judicata* "'preclud[es] parties from contesting matters that they have had a full and fair opportunity to litigate' " and thereby "protect[s] against 'the expense and vexation attending multiple lawsuits, conserv[es] judicial resources, and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). There is no doubt that *res judicata* bars the relief that the Wises seek in Dkts. 2002, 2003, and 2037 because they had a full and fair opportunity to litigate those issues in the U.S. District Court for the Eastern District of North Carolina. That court dismissed the Wises' putative class action discrimination claim because the Wises "fail[ed] to sufficiently allege that other similarly-situated applicants, outside Plaintiffs' protected class, were treated more favorably by the USDA in the provision of credit or in the provision of services or assistance." *Wise v. Vilsack*, 2011 WL 381765, at *4, *aff'd sub nom.* 496 Fed.Appx. 283. In addition, in the course of the foreclosure proceeding, that court found that the Wises are not members of the *Pigford* class because "[t]he evidence of record conclusively establishes the fact that [they] opted out of the *Pigford* settlement." *United States v. Wise*, 2015 WL 5918027, at *4.[4]

[4] Judge James Robertson of this Court previously noted in another putative class action brought by the Wises that "Eddie Wise[and] Dorothy Monroe-Wise ... opted out of the *Pigford* class." *Wise v. Glickman*, 257 F. Supp. 2d at 129; *see also Wise v. United States*,

Even if the Court did not give these prior rulings the preclusive effect to which they are entitled, the government also attached to its opposition a filing in the Wises' putative class action in the U.S. District Court for the Eastern District of North Carolina in which they explained how they "chose to opt out of the *Pigford v. Veneman* class action lawsuit and become lead plaintiffs in a new class action lawsuit." Dkt. 2010-1 at 4. What is more, on April 15, 1999, the Court placed on the public docket in this case a letter from the Wises, which stated their position at the time that "the Consent Decree is very unfair" and their request to "go to trial or declare the Consent Decree null and void." Wises' Letter at 1 [Dkt. 177]. This is further evidence that the Wises intended to opt out of the *Pigford* class.

The Wises' motions also ask this Court to act beyond the scope of its present jurisdiction in this case. Pursuant to the Consent Decree, the Court dismissed this case with prejudice in 1999. Consent Decree ¶ 17; *see also Pigford v. Glickman*, 185 F.R.D. 82. The Consent Decree left the Court with jurisdiction over this matter solely to enforce the terms of the Consent Decree. *Pigford v. Glickman*, 185 F.R.D. at 110. In November 2015, the Court's entry of the Wind-down Stipulation and Order further narrowed its jurisdiction "solely to enforce the terms of this wind-down Stipulation and Order," as well as for certain other limited aspects of the Consent Decree that are not relevant to the *pro se* motions under consideration here. Dkt. 2008 at 7. The Wind-down Stipulation and Order does not contemplate any further hearings on the merits of discrimination claims for anyone besides Maurice McGinnis, *id.* at 4-5, let alone persons like the Wises who opted-out of the *Pigford* class and elected to pursue individual claims. The Court therefore will deny the Wises' motions seeking various forms of relief, Dkts. 2002, 2003, and 2037, as barred by the doctrine of *res judicata* and beyond the scope of the Court's jurisdiction.

B. The Bateses

The Bateses elected to pursue their claims under Track A. Order at 1 (Jan. 16, 2001) [Dkt. 391]. Of the seven Bateses named in the present

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128 F. Supp. 3d at 318-19; *United States v. Wise*, No. 14-0844, 2015 WL 5918027, at *4; *Wise v. United States*, 2015 WL 8024002, at *6.

motion and objection, the Adjudicator denied the claims of four persons and the Arbitrator denied the petitions to file late claims of three others. Declaration of James F. Radintz ¶¶ 3-11 [Dkt. 1851-1]. "In October 2012, [the Bateses] filed a motion that sought to reverse the denials of four Track A claims filed by [Theodore F.B. Bates] and three family members, and which also sought to permit four other family members — whose petitions to file late claims pursuant to paragraph 5(g) of the Consent Decree were denied by the Arbitrator — to have their claims adjudicated on the merits." *Pigford v. Vilsack*, 2014 WL 6886607, at *1. This Court denied that earlier motion, as well as several related motions, concluding that it lacked jurisdiction to grant the requested relief. Memorandum Opinion and Order (Jan. 29, 2013) [Dkt. 1873]; *see also* Order (Mar. 13, 2013) [Dkt. 1883] (denying Bateses' motion for reconsideration). In December 2014, the Court again denied an "objection and notice" filed by the Bateses seeking identical relief. *Pigford v. Vilsack*, 2014 WL 6886607, at *1-2.

The Bateses' present motion and objection ask the Court to hear "evidence" of the Bateses' claims of racial discrimination, "uphold" the Bateses' rights, and "[r]eopen the case." Dkt. 2017 at 2, 4; Dkt. 2018 at 2. The government opposes the motion and objection on the ground that the Court lacks jurisdiction to grant such relief under both the Consent Decree and the Wind-down Stipulation and Order. Dkt. 2019 at 2-3.

The Court has no authority to address claims that the Adjudicator or Arbitrator erred because "[n]othing in the Consent Decree authorizes the Court to grant [vacatur of the Adjudicator's decisions and resurrection of the claimants' Track A claims]." *Abrams v. Vilsack*, 655 F. Supp. 2d 48, 52 & nn. 4-5 (D.D.C. 2009). The Consent Decree provides that decisions of the Adjudicator are final (except that the parties may petition the Monitor for review), and that those who seek relief under Track A "forever waive their right to seek review in any court or before any tribunal of the decision of the arbitrator with respect to any claim that is, or could have been decided, by the [A]djudicator." Consent Decree ¶¶ 9(a)(v), 9(b)(v) (concerning assertion of only non-credit claims under a USDA benefit program). This provision regarding the finality of the Adjudicator's decisions, set forth in Paragraph 9(b)(v) of the Consent Decree, mirrors a virtually identical provision establishing the finality of the Arbitrator's decisions on claimants' Track B claims. *Id.* ¶ 10(i). Thus, with respect to decisions of the Adjudicator on Track A claims and decisions of the

Arbitrator on Track B claims, the parties to the Consent Decree agreed that these decisions would be final and not subject to judicial review "in any court or before any tribunal." *Id.* ¶¶ 9(a)(v), 9(b)(v), 10(i).

The sole exception to this robust finality was provided in Paragraph 12(b)(iii), under which the Monitor was empowered to "[d]irect the ... adjudicator[ ] or arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the ... adjudication[ ] or arbitration of the claim and has resulted or is likely to result in a fundamental miscarriage of justice." Consent Decree ¶ 12(b)(iii). It appears from the record that none of the members of the Bates family who filed timely Track A claims elected to exercise their right to review by the Monitor of the Adjudicator's denial or dismissal of their claims. It was not until they filed a motion in October 2012 that those members of the Bates family who were unsuccessful Track A claimants sought review of the Adjudicator's decision. Memorandum Opinion and Order (Jan. 29, 2013) [Dkt. 1873].

The terms of the Consent Decree provide unequivocally that decisions of the Adjudicator on Track A claims are final, and are not subject to review or vacatur by this Court. Those members of the Bates family who submitted timely Track A claims are not the first parties to this action whose requests for judicial review of decisions made by the neutrals have been denied, as this Court has consistently upheld the provisions of the Consent Decree concerning the finality of all such decisions. *See*, *e.g.*, *Pigford v. Vilsack*, 78 F. Supp. 3d at 251-52 (denying motions seeking vacatur of Track B decisions made by Arbitrator, citing Paragraphs 10(i) and 12(b)(iii) of Consent Decree); Memorandum Opinion and Order (May 21, 2012) [Dkt. 1824] (same). For the reason explained above and in those earlier decisions, the Court concludes that it lacks the authority to reverse the denials of the claims of members of the Bates family who submitted timely Track A claims.

Nor is any relief available to the three members of the Bates family whose petitions to file late claims pursuant to paragraph 5(g) of the Consent Decree were denied by the Arbitrator. As this Court previously has explained, it "delegated the authority to decide these petitions — completely and finally — to [Arbitrator] Michael Lewis." Memorandum Opinion and Order at 3 (Nov. 26, 2001) [Dkt. 560]; *see also* Order at 2

(Sept. 13, 2004) [Dkt. 994] ("The court will not consider any [¶ 5(g)] petition, either at the first instance or following denial and/or reconsideration by the Arbitrator."). Moreover, Congress afforded relief to unsuccessful paragraph 5(g) petition-filers by enacting Section 14012 of the Food, Conservation, and Energy Act of 2008, PUB. L. NO. 110-246, § 14012(b), 122 Stat. 1651 (2008). The four plaintiffs whose paragraph 5(g) petitions to late file were denied by the Arbitrator thus had the opportunity to file a claim pursuant to that statutory authority but failed to take advantage of the opportunity Congress provided. The Court therefore will deny the Bateses' motion and objection because it lacks jurisdiction to review the Adjudicator's decision to deny Track A claims or to revive late-filed claims.

C. Parker

Robert J. Parker elected to pursue his claim under Track A. Decision of Adjudicator at 2 (May 16, 2001) [Dkt. 2044-1]. The Adjudicator denied Parker's claim for failing to offer the requisite evidentiary proof of discrimination, *id.*, and the record does not reflect that Parker ever petitioned the Monitor for review. Parker's motion seeks a declaration that he is a member of the *Pigford* class and is entitled to a "formal hearing before [the] USDA's Administrative Law Judge." Dkt. 2040 at 4-5. The government opposes the motion on the ground that the Court lacks jurisdiction to grant such relief under both the Consent Decree and the Wind-down Stipulation and Order. Dkt. 2044 at 2-3.

Again, the Court lacks jurisdiction to issue the relief Parker requests. Just as the Court explained with respect to the members of the Bates family who filed timely Track A claims, *see supra* § II(B), the plain language of the Consent Decree forecloses the Court's review of the merits of the Adjudicator's decision to deny Parker's Track A claim. The Court therefore will deny Parker's motion because it lacks jurisdiction to review the Adjudicator's decision denying Parker's Track A claim.

D. Cowtown Foundation

Neither the Cowtown Foundation nor its representative, Corey Lea, appear to have any prior connection to this case whatsoever. The Court sees that in 2008, Cowtown attempted "to obtain funding for the

identification and education of '[s]ocially [d]isadvanatged [f]armers,' " so its interests appear to align closely with the plaintiff class in this case. *The Cowtown Found., Inc. v. Beshear*, No. 09-0056, 2010 WL 3340831, at *1 (W.D. Ky. Aug. 20, 2010). Cowtown's motion represents that it speaks "on the behalf of Track '[A]' and track '[B]' *Pigford* litigants" and asks the Court "to freeze the remaining judgment fund" while Cowtown represents "farmers before the USDA's Administrative Law Judge." Dkt. 2048 at 1-2.

Cowtown's motion lacks merit. As an initial matter, Cowtown does not allege that Lea or any of the farmers he purports to represent are class members in this case; rather, it suggests that they "have not received [a] hearing on the merits" of their discrimination claims. Dkt. 2048 at 3. Cowtown's motion therefore "does not allege that" Lea or any of the farmers he purports to represent were "member[s] of either [the *Pigford* or the *In re Black Farmers*] class of plaintiffs [or] that [they were] personally prejudiced by the Consent Decree [ ], and so lacks standing [ ] to object to the terms of th[is] agreement[ ]." *See White v. Vilsack,* 80 F. Supp. 3d 123, 127 (D.D.C. 2015), *aff'd*, No. 15-5108, 2015 WL 5210421 (D.C. Cir. Aug. 6, 2015); *see also Rahman v. Vilsack*, 673 F. Supp. 2d 15, 18-19 (D.D.C. 2009) (persons who are not members of class do not have standing to challenge settlement terms, unless they can show that settlement prejudiced them). Even assuming Cowtown would have standing to raise objections to the terms of the Consent Decree — and construing Cowtown's motion "to freeze the remaining judgment fund" as such an objection or motion for reconsideration — the Court finds no reason to reconsider its determination, made after a fairness hearing where all those who objected had a full opportunity to express their views, that the terms of the Consent Decree were fair. *See Pigford v. Glickman*, 185 F.R.D. at 100-01, 107-08, 113.

Moreover, Cowtown's motion seeks "a hearing before the [ALJ] for the *continued abuse* by the Dept. of Agriculture." Dkt. 2048 at 3 (emphasis added). The plaintiff class in this case only includes farmers who "filed administrative complaints between January 1, 1981, and July 1, 1997, for acts of discrimination occurring between January 1, 1981, and December 31, 1996." *Pigford v. Veneman*, 355 F. Supp. 2d 148, 151 (D.D.C. 2005). The Court therefore will deny Cowtown's motion both because Cowton lacks standing to challenge the Consent Decree and because Cowton seeks

relief for discrimination that is not cognizable under the Consent Decree entered in this case.

III. CONCLUSION

For the reasons explained in this Opinion, the Court will deny all of the pending motions. An Order consistent with this Opinion shall issue this same day.

SO ORDERED.

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CIVIL RIGHTS

DEPARTMENTAL DECISIONS

In re: PLEZY NELSON, SR.
Docket No. 16-0156.
Decision and Order.
Filed October 27, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 24, 2016, Plezy Nelson, Sr., instituted this proceeding by filing a "Request for a Formal Hearing before the Administrative Law Judge" [Request for Hearing]. Mr. Nelson, Sr., alleges the United States Department of Agriculture [USDA] denied him emergency loans, disaster loans, farm-operating loans, and farm-ownership loans. Mr. Nelson, Sr., cites as the jurisdictional bases for this proceeding the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f); section 741(b)(1) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999;[1] section 14012 of the Food Energy and Conservation Act; and 7 C.F.R. pt. 15f. (Req. for Hr'g at 1.) Mr. Nelson, Sr., seeks a copy of the "running" record[2] and a hearing before

[1] Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, was enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277 (7 C.F.R. § 15f.4).

[2] Mr. Nelson, Sr., does not indicate what he means by a "running" record. The record before me consists of documents filed by Mr. Nelson, Sr., and the Assistant Secretary for Civil Rights [ASCR]. Mr. Nelson, Sr., should have a copy of all of the documents he filed

an administrative law judge. Mr. Nelson, Sr., states that, within twenty--one days after receipt of a copy of the running record, he will "present his complaint with causes of action." (Req. for Hr'g at 1, 3.)

On September 13, 2016, the ASCR filed an "Agency Response" in which the ASCR contends Mr. Nelson, Sr., failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Mr. Nelson, Sr.'s Request for Hearing. Administrative Law Judge Jill S. Clifton [ALJ] issued *Nelson, Sr.*, Docket Nos. 16-0156 and 16-0157, 2016 WL 6235788 (U.S.D.A. Sept. 19, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response filed September 13, 2016[.]"

On September 21, 2016, Mr. Nelson, Sr., filed "Petitioner's Appeal to the Judicial Officer" [Appeal Petition]. On October 11, 2016, the ASCR filed an "Agency Response," and, on October 13, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with USDA prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31, 1996.[3] The regulations also require the filing of a "Section 741 Complaint Request"[4] prior to October 21, 2000.[5] USDA has no authority to accept a Section 741 Complaint Request unless the Section 741 Complaint Request has already been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or

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and the record establishes that the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], served Mr. Nelson, Sr., with a copy of each document filed by the ASCR.

[3] 7 C.F.R. §§ 15f.1-.2.

[4] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.

[5] 7 C.F.R. § 15f.5(c).

unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[6]

The time for filing Mr. Nelson, Sr.'s complaint expired on July 1, 1997, and the time for filing Mr. Nelson, Sr.'s Section 741 Complaint Request expired on October 21, 2000. Mr. Nelson, Sr.'s first filing in this proceeding, Mr. Nelson, Sr.'s Request for Hearing, was filed with the Hearing Clerk on August 24, 2016, nineteen years, one month, twenty-three days after Mr. Nelson, Sr.'s complaint was required to be filed and fifteen years, ten months, three days after Mr. Nelson, Sr.'s Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon Mr. Nelson, Sr.'s filing a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights,[7] and I find nothing in the record indicating that Mr. Nelson, Sr., has filed a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights. Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Mr. Nelson, Sr., requests.

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's dismissal of this proceeding, filed September 19, 2016, is affirmed.

2. Mr. Nelson, Sr.'s Appeal Petition, filed September 21, 2016, is dismissed.

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[6] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[7] 7 C.F.R. § 15f.5.

CIVIL RIGHTS

In re: MUHAMMAD ROBBALAA.
Docket No. 16-0154.
Decision and Order.
Filed November 1, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 24, 2016, Muhammad Robbalaa instituted this proceeding by filing a "Request for a Formal Hearing before the Administrative Law Judge" [Request for Hearing]. Mr. Robbalaa alleges that the United States Department of Agriculture [USDA] denied him emergency loans, disaster loans, farm-operating loans, and farm-ownership loans. Mr. Robbalaa cites as the jurisdictional bases for this proceeding the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f); section 741(b)(1) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999;[1] section 14012 of the Food Energy and Conservation Act; and 7 C.F.R. pt. 15f. (Req. for Hr'g at 1.) Mr. Robbalaa seeks a copy of the "running records"[2] and a hearing before

[1] Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, was enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277 (7 C.F.R. § 15f.4).

[2] Mr. Robbalaa does not indicate what he means by "running records." The record before me consists of documents filed by Mr. Robbalaa and the Assistant Secretary for Civil Rights [ASCR] and a dismissal filed by Administrative Law Judge Jill S. Clifton [ALJ]. Mr. Robbalaa should have a copy of all the documents he filed, and the record establishes that the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], served Mr. Robbalaa with a copy of each document filed by the ASCR and the dismissal filed by the ALJ.

an administrative law judge. Mr. Robbalaa states that, within twenty-one days after receipt of a copy of the running records, he will "present his complaint with causes of action." (Req. for Hr'g at 1, 3).

On September 13, 2016, the ASCR filed an "Agency Response" in which the ASCR contends that Mr. Robbalaa failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Mr. Robbalaa's Request for Hearing. On September 20, 2016, Mr. Robbalaa filed "Petitioner's Response to Agency's Motion to Dismiss" in which Mr. Robbalaa asserts that he "has the right to have a hearing before the administrative law judge on the merits" and that the ASCR "failed to produce any statutory or rulemaking to supersede a clear mandate from Congress in its effort to provide relief for the black farmer" (Petitioner's Resp. to Agency's Mot. to Dismiss at 6). The ALJ issued *Robbalaa*, Docket No. 16-0154, 2016 WL 6235790 (U.S.D.A. Sept. 21, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response."

On September 22, 2016, Mr. Robbalaa filed "Petitioner's Appeal to Judicial Officer" [Appeal Petition].[3] On October 11, 2016, the ASCR filed an "Agency Response to Appeal to Judicial Officer," and, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with USDA prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31, 1996.[4] The regulations also require the filing of a "Section 741 Complaint

[3] Mr. Robbalaa asserts that he brings this proceeding through his representative, Corey Lea (Req. for Hr'g at 1); however, Mr. Lea signed Mr. Robbalaa's Appeal Petition as "Corey Lea Representative for Bernice Atchison[.]" Nonetheless, I treat the September 22, 2016 filing as an Appeal Petition filed by Mr. Lea on behalf of Mr. Robbalaa.
[4] 7 C.F.R. §§ 15f.1-.2.

Request"[5] prior to October 21, 2000.[6] USDA has no authority to accept a Section 741 Complaint Request unless the Section 741 Complaint Request has already been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[7]

The time for filing Mr. Robbalaa's complaint expired on July 1, 1997, and the time for filing Mr. Robbalaa's Section 741 Complaint Request expired on October 21, 2000. Mr. Robbalaa's first filing in this proceeding, Mr. Robbalaa's Request for Hearing, was filed with the Hearing Clerk on August 24, 2016, nineteen years, one month, twenty-three days after Mr. Robbalaa's complaint was required to be filed and fifteen years, ten months, three days after Mr. Robbalaa's Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon Mr. Robbalaa's filing a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights,[8] and I find nothing in the record indicating that Mr. Robbalaa has filed a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights. Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Mr. Robbalaa requests.

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's dismissal of this proceeding, filed September 21, 2016, is affirmed.

2. Mr. Robbalaa's Appeal Petition, filed September 22, 2016, is dismissed.

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[5] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.
[6] 7 C.F.R. § 15f.5(c).
[7] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[8] 7 C.F.R. § 15f.5.

In re: ROBERT BINION.
Docket No. 16-0155.
Decision and Order.
Filed November 2, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 24, 2016, Robert Binion instituted this proceeding by filing a "Request for a Formal Hearing before the Administrative Law Judge" [Request for Hearing]. Mr. Binion alleges that the United States Department of Agriculture [USDA] denied him emergency loans, disaster loans, farm-operating loans, and farm-ownership loans. Mr. Binion cites as the jurisdictional bases for this proceeding the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f); section 741(b)(1) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999;[1] section 14012 of the Food Energy and Conservation Act; and 7 C.F.R. pt. 15f. (Req. for Hr'g at 1.) Mr. Binion seeks a copy of the "running records"[2] and a hearing before an

[1] Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, was enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277 (7 C.F.R. § 15f.4).

[2] Mr. Binion does not indicate what he means by "running records." The record before me consists of documents filed by Mr. Binion and the Assistant Secretary for Civil Rights [ASCR] and a dismissal filed by Administrative Law Judge Jill S. Clifton [ALJ]. Mr. Binion should have a copy of all the documents he filed, and the record establishes that the Hearing Clerk, Office of Administrative Law Judges, USDA [Hearing Clerk], served Mr. Binion with a copy of each document filed by the ASCR and the dismissal filed by the ALJ.

administrative law judge. Mr. Binion states that, within twenty-one days after receipt of a copy of the running records, he will "present his complaint with causes of action." (Req. for Hr'g at 1, 3).

On September 15, 2016, the ASCR filed an "Agency Response" in which the ASCR contends that Mr. Binion failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Mr. Binion's Request for Hearing. On September 20, 2016, Mr. Binion filed "Petitioner's Response to Agency's Motion to Dismiss" in which Mr. Binion asserts that he "has the right to have a hearing before the administrative law judge on the merits" and that the ASCR "failed to produce any statutory or rulemaking to supersede a clear mandate from Congress in its effort to provide relief for the black farmer" (Petitioner's Resp. to Agency's Mot. to Dismiss at 6). The ALJ issued *Binion*, Docket No. 16-0155, 2016 WL 6235791 (U.S.D.A. Sept. 22, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response." On September 23, 2016, Mr. Binion filed "Petitioner's Appeal to the Judicial Officer" [Appeal Petition].[3] On October 11, 2016, the ASCR filed an "Agency Response to Appeal to Judicial Officer," and, on October 27, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with USDA prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31, 1996.[4] The regulations also require the filing of a "Section 741 Complaint Request"[5] prior to October 21, 2000.[6] USDA has no authority to accept a

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[3] Mr. Binion asserts that he brings this proceeding through his representative, Corey Lea (Req. for Hr'g at 1); however, Mr. Lea signed Mr. Binion's Appeal Petition as "Corey Lea Representative for Bernice Atchison[.]" Nonetheless, I treat the September 23, 2016 filing as an Appeal Petition filed by Mr. Lea on behalf of Mr. Binion.

[4] 7 C.F.R. §§ 15f.1-.2.

[5] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.

[6] 7 C.F.R. § 15f.5(c).

Section 741 Complaint Request unless the Section 741 Complaint Request has already been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[7]

The time for filing Mr. Binion's complaint expired on July 1, 1997, and the time for filing Mr. Binion's Section 741 Complaint Request expired on October 21, 2000. Mr. Binion's first filing in this proceeding, Mr. Binion's Request for Hearing, was filed with the Hearing Clerk on August 24, 2016, nineteen years, one month, twenty-three days after Mr. Binion's complaint was required to be filed and fifteen years, ten months, three days after Mr. Binion's Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon Mr. Binion's filing a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights,[8] and I find nothing in the record indicating that Mr. Binion has filed a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights. Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Mr. Binion requests.

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's dismissal of this proceeding, filed September 22, 2016, is affirmed.

2. Mr. Binion's Appeal Petition, filed September 23, 2016, is dismissed.

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[7] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[8] 7 C.F.R. § 15f.5.

CIVIL RIGHTS

In re: ROY DAY.
Docket No. 16-0160.
Decision and Order.
Filed November 3, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 24, 2016, Roy Day instituted this proceeding by filing a "Request for a Formal Hearing before the Administrative Law Judge Immediate Injunction of Offsets of Wrongfully Taken in Violation of the Pigford Consent Decree" [sic] [Request for Hearing]. Mr. Day alleges that the United States Department of Agriculture [USDA] failed to pay him "$12,500 in taxes as ordered by stipulation" and that USDA denied him loans. Mr. Day cites as the jurisdictional bases for this proceeding the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f); section 741(b)(1) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999;[1] the Pigford Remedy Act of 2007; section 14012 of the Food Energy and Conservation Act; and 7 C.F.R. pt. 15f. (Req. for Hr'g at 1.) Mr. Day requests "an injunction against the offsets and reimbursement for money that has been wrongfully offset against him" as well as "further damages due to the fact that he has been denied for loans." (Req. for Hr'g at 1-2.) Mr. Day also seeks a copy of the "running records"[2] and a hearing before

[1] Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, was enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277 (7 C.F.R. § 15f.4).

[2] Mr. Day does not indicate what he means by "running records." The record before me consists of documents filed by Mr. Day and the Assistant Secretary for Civil Rights

an administrative law judge. Mr. Day states that, within twenty-one days after receipt of a copy of the running records, he will "present his complaint with causes of action." (Req. for Hr'g at 1, 3.)

On September 13, 2016, the ASCR filed an "Agency Response" in which the ASCR contends that Mr. Day failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Mr. Day's Request for Hearing. On September 21, 2016, Mr. Day filed "Petitioner's Response to Agency's Motion to Dismiss" in which Mr. Day asserts that he "has the right to have a hearing before the administrative law judge on the merits" and that the ASCR "failed to produce any statutory or rulemaking to supersede a clear mandate from Congress in its effort to provide relief for the black farmer." (Petitioner's Resp. to Agency Mot. to Dismiss at 6.) The ALJ issued *Day*, Docket No. 16-0160, 2016 WL 6235794 (U.S.D.A. Sept. 22, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response."

On September 22, 2016, Mr. Day filed "Petitioner's Appeal to Judicial Officer" [Appeal Petition].[3] On October 11, 2016, the ASCR filed an "Agency Response to Appeal to Judicial Officer," and the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with USDA prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31,

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[ASCR] and a dismissal filed by Administrative Law Judge Jill S. Clifton [ALJ]. Mr. Day should have a copy of all the documents he filed, and the record establishes that the Hearing Clerk, Office of Administrative Law Judges, USDA [Hearing Clerk], served Mr. Day with a copy of each document filed by the ASCR and the dismissal filed by the ALJ.

[3] Mr. Day asserts that he brings this proceeding through his representative, Corey Lea (Req. for Hr'g at 1); however, Mr. Lea signed Mr. Day's Appeal Petition as "Corey Lea Representative for Bernice Atchison[.]" Nonetheless, I treat the September 22, 2016 filing as an Appeal Petition filed by Mr. Lea on behalf of Mr. Day.

1996.[4] The regulations also require the filing of a "Section 741 Complaint Request"[5] prior to October 21, 2000.[6] USDA has no authority to accept a Section 741 Complaint Request unless the Section 741 Complaint Request has already been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[7]

The time for filing Mr. Day's complaint expired on July 1, 1997, and the time for filing Mr. Day's Section 741 Complaint Request expired on October 21, 2000. Mr. Day's first filing in this proceeding, Mr. Day's Request for Hearing, was filed with the Hearing Clerk on August 24, 2016, nineteen years, one month, twenty-three days after Mr. Day's complaint was required to be filed and fifteen years, ten months, three days after Mr. Day's Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon Mr. Day's filing a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights,[8] and I find nothing in the record indicating that Mr. Day has filed a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights. Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Mr. Day requests.

For the foregoing reasons, the following Order is issued.

ORDER

3. The ALJ's dismissal of this proceeding, filed September 22, 2016, is affirmed.

4. Mr. Day's Appeal Petition, filed September 22, 2016, is dismissed.

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[4] 7 C.F.R. §§ 15f.1-.2.
[5] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.
[6] 7 C.F.R. § 15f.5(c).
[7] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[8] 7 C.F.R. § 15f.5.

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In re: PLEZY NELSON, JR.
Docket No. 16-0157.
Decision and Order.
Filed November 3, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 24, 2016, Plezy Nelson, Jr., instituted this proceeding by filing a "Request for a Formal Hearing before the Administrative Law Judge" [Request for Hearing]. Mr. Nelson, Jr., alleges the United States Department of Agriculture [USDA] denied him emergency loans, disaster loans, farm-operating loans, and farm-ownership loans. Mr. Nelson, Jr., cites as the jurisdictional bases for this proceeding the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f); section 741(b)(1) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999;[1] section 14012 of the Food Energy and Conservation Act; and 7 C.F.R. pt. 15f. (Req. for Hr'g at 1.) Mr. Nelson, Jr., seeks a copy of the "running records"[2] and a hearing

[1] Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, was enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277 (7 C.F.R. § 15f.4).

[2] Mr. Nelson, Jr., does not indicate what he means by "running records." The record before me consists of documents filed by Mr. Nelson, Jr., and the Assistant Secretary for Civil Rights [ASCR] and a dismissal filed by Administrative Law Judge Jill S. Clifton [ALJ]. Mr. Nelson, Jr., should have a copy of all the documents he filed, and the record establishes

before an administrative law judge. Mr. Nelson, Jr., states that, within twenty-one days after receipt of a copy of the running records, he will "present his complaint with causes of action." (Req. for Hr'g at 1, 3.)

On September 13, 2016, the ASCR filed an "Agency Response" in which the ASCR contends Mr. Nelson, Jr., failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Mr. Nelson, Jr.'s Request for Hearing. The ALJ issued *Nelson, Jr.*, Docket Nos. 16-0156 and 16-0157, 2016 WL 6235788 (U.S.D.A. Sept. 19, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response filed September 13, 2016[.]"

On September 21, 2016, Mr. Nelson, Jr., filed "Petitioner's Appeal to the Judicial Officer" [Appeal Petition].[3] On October 11, 2016, the ASCR filed an "Agency Response," and, on October 13, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with USDA prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31, 1996.[4] The regulations also require the filing of a "Section 741 Complaint Request"[5] prior to October 21, 2000.[6] USDA has no authority to accept a Section 741 Complaint Request unless the Section 741 Complaint Request

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that the Hearing Clerk, Office of Administrative Law Judges, USDA [Hearing Clerk], served Mr. Nelson, Jr., with a copy of each document filed by the ASCR and the dismissal filed by the ALJ.

[3] Mr. Nelson, Jr., asserts that he brings this proceeding through his representative, Corey Lea (Req. for Hr'g at 1); however, Mr. Lea signed Mr. Nelson, Jr.'s Appeal Petition as "Corey Lea Representative for Bernice Atchison[.]" Nonetheless, I treat the September 21, 2016 filing as an Appeal Petition filed by Mr. Lea on behalf of Mr. Nelson, Jr.

[4] 7 C.F.R. §§ 15f.1-.2.

[5] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.

[6] 7 C.F.R. § 15f.5(c).

has already been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[7]

The time for filing Mr. Nelson, Jr.'s complaint expired on July 1, 1997, and the time for filing Mr. Nelson, Jr.'s Section 741 Complaint Request expired on October 21, 2000. Mr. Nelson, Jr.'s first filing in this proceeding, Mr. Nelson, Jr.'s Request for Hearing, was filed with the Hearing Clerk on August 24, 2016, nineteen years, one month, twenty-three days after Mr. Nelson, Jr.'s complaint was required to be filed and fifteen years, ten months, three days after Mr. Nelson, Jr.'s Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon Mr. Nelson, Jr.'s filing a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights,[8] and I find nothing in the record indicating that Mr. Nelson, Jr., has filed a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights. Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Mr. Nelson, Jr., requests.

For the foregoing reasons, the following Order is issued.

ORDER

5. The ALJ's dismissal of this proceeding, filed September 19, 2016, is affirmed.

6. Mr. Nelson, Jr.'s Appeal Petition, filed September 21, 2016, is dismissed.

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[7] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[8] 7 C.F.R. § 15f.5.

CIVIL RIGHTS

In re: JOHN A. WRIGHT.
Docket No. 16-0159.
Decision and Order.
Filed November 3, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 24, 2016, John A. Wright instituted this proceeding by filing a "Request for a Formal Hearing before the Administrative Law Judge" [Request for Hearing]. Mr. Wright alleges that the United States Department of Agriculture [USDA] denied him emergency loans, disaster loans, farm-operating loans, and farm-ownership loans. Mr. Wright cites as the jurisdictional bases for this proceeding the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f); section 741(b)(1) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999;[1] section 14012 of the Food Energy and Conservation Act; and 7 C.F.R. pt. 15f. (Req. for Hr'g at 1.) Mr. Wright seeks a copy of the "running records"[2] and a hearing before an

[1] Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, was enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277 (7 C.F.R. § 15f.4).

[2] Mr. Wright does not indicate what he means by "running records." The record before me consists of documents filed by Mr. Wright and the Assistant Secretary for Civil Rights [ASCR] and a dismissal filed by Administrative Law Judge Jill S. Clifton [ALJ]. Mr. Wright should have a copy of all the documents he filed, and the record establishes that the Hearing Clerk, Office of Administrative Law Judges, USDA [Hearing Clerk], served Mr. Wright with a copy of each document filed by the ASCR and the dismissal filed by the ALJ.

administrative law judge. Mr. Wright states that, within twenty-one days after receipt of a copy of the running records, he will "present his complaint with causes of action." (Req. for Hr'g at 1, 3.)

On September 13, 2016, the ASCR filed an "Agency Response" in which the ASCR contends that Mr. Wright failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Mr. Wright's Request for Hearing. On September 20, 2016, Mr. Wright filed "Petitioner's Response to Agency's Motion to Dismiss" in which Mr. Wright asserts that he "has the right to have a hearing before the administrative law judge on the merits" and that the ASCR "failed to produce any statutory or rulemaking to supersede a clear mandate from Congress in its effort to provide relief for the black farmer" (Petitioner's Resp. to Agency Mot. to Dismiss at 6). The ALJ issued *Wright*, Docket No. 16-0159, 2016 WL 6235793 (U.S.D.A. Sept. 22, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response."

On September 22, 2016, Mr. Wright filed "Petitioner's Response Appeal to Judicial Officer" [Appeal Petition].[3] On October 11, 2016, the ASCR filed an "Agency Response to Appeal to Judicial Officer," and, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with USDA prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31, 1996.[4] The regulations also require the filing of a "Section 741 Complaint

[3] Mr. Wright asserts that he brings this proceeding through his representative, Corey Lea (Req. for Hr'g at 1); however, Mr. Lea signed Mr. Wright's Appeal Petition as "Corey Lea Representative for Bernice Atchison[.]" Nonetheless, I treat the September 22, 2016 filing as an Appeal Petition filed by Mr. Lea on behalf of Mr. Wright.
[4] 7 C.F.R. §§ 15f.1-.2.

Request"[5] prior to October 21, 2000.[6] USDA has no authority to accept a Section 741 Complaint Request unless the Section 741 Complaint Request has already been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[7]

The time for filing Mr. Wright's complaint expired on July 1, 1997, and the time for filing Mr. Wright's Section 741 Complaint Request expired on October 21, 2000. Mr. Wright's first filing in this proceeding, Mr. Wright's Request for Hearing, was filed with the Hearing Clerk on August 24, 2016, nineteen years, one month, twenty-three days after Mr. Wright's complaint was required to be filed and fifteen years, ten months, three days after Mr. Wright's Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon Mr. Wright's filing a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights,[8] and I find nothing in the record indicating that Mr. Wright has filed a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights. Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Mr. Wright requests.

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's dismissal of this proceeding, filed September 22, 2016, is affirmed.

2. Mr. Wright's Appeal Petition, filed September 22, 2016, is dismissed.

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[5] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.
[6] 7 C.F.R. § 15f.5(c).
[7] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[8] 7 C.F.R. § 15f.5.

In re: FERRELL ODEN.
Docket No. 16-0167.
Decision and Order.
Filed November 14, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 25, 2016, Ferrell Oden instituted this proceeding by filing a "Petition for Review and Formal Hearing on the Merits" [Petition for Review]. Mr. Oden seeks a decision by an administrative law judge on the merits regarding "issue[s] 2 and 3 of the attached finding of discrimination." Mr. Oden failed to attach the referenced "finding of discrimination" to his Petition for Review; however, subsequent filings in this proceeding reveal that Mr. Oden's reference to the nonexistent attachment is a reference to *Oden v. Vilsack*, FAD No. 09-2094, issued by the Assistant Secretary for Civil Rights, United States Department of Agriculture [ASCR], on November 19, 2010. Mr. Oden cites "7 C.F.R. 15 Part D" as the jurisdictional basis for this proceeding. The Code of Federal Regulations does not include regulations identified as "7 C.F.R. 15 Part D"; however, the ASCR issued *Oden v. Vilsack*, FAD No. 09-2094 (Nov. 19, 2010), in accordance with 7 C.F.R. pt. 15d. I, therefore, infer that Mr. Oden filed his Petition to Review of *Oden v. Vilsack*, FAD No. 09-2094 (Nov. 19, 2010), pursuant to 7 C.F.R. pt. 15d.

On September 15, 2016, the ASCR filed an "Agency Response" in which the ASCR contends that Mr. Oden failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and that, even if the Office of Administrative Law Judges had

jurisdiction to entertain this proceeding, the doctrine of *res judicata* would preclude review by the Office of Administrative Law Judges. On September 28, 2016, Mr. Oden filed "Petitioner's Response to Agency's Motion to Dismiss" in which Mr. Oden asserts "[t]he agency failed to provide the petitioner with his right to appeal to the administrative law judge when it gave a partial finding of discrimination" and "[t]he law does not permit res judicata when only a single issue was presented and accepted by both parties."

Administrative Law Judge Jill S. Clifton [ALJ] issued *Oden*, Docket No. 16-0167, 2016 WL 6235799 (U.S.D.A. Sept. 30, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response" and the doctrine of *res judicata* precludes consideration of Mr. Oden's Petition for Review.

On October 13, 2016, Mr. Oden filed "Petitioner's Appeal to the Judicial Officer" [Appeal Petition], and, on November 1, 2016, the ASCR filed an "Agency Response to Appeal to Judicial Officer." On November 3, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15d set forth the nondiscrimination policy of the United States Department of Agriculture [USDA] in programs and activities conducted by USDA.[1] Any person who believes that he or she has been subjected to practices prohibited by 7 C.F.R. pt. 15d may file a written complaint with the Office of the Assistant Secretary for Civil Rights, which office will investigate the complaint.[2] The ASCR will then make a final determination as to the merits of any complaint under 7 C.F.R. pt. 15d and as to the corrective actions required to resolve the complaint.[3] The regulations in 7 C.F.R. pt. 15d do not provide for review of the ASCR's final determination by the Office of Administrative

[1] 7 C.F.R. § 15d.1.
[2] 7 C.F.R. § 15d.5(a)-(b).
[3] 7 C.F.R. § 15d.5(b).

Law Judges. Moreover, the Secretary of Agriculture has not delegated authority to the Office of Administrative Law Judges to review the ASCR's final determinations issued under 7 C.F.R. pt. 15d.[1] Therefore, I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Mr. Oden requests.

Further, even if I were to conclude that the Office of Administrative Law Judge's has authority to review final determinations issued by the ASCR under 7 C.F.R. pt. 15d (which I do not so conclude), I would dismiss this proceeding based upon the doctrine of *res judicata*. Mr. Oden seeks review of *Oden v. Vilsack*, FAD No. 09-2094 (Nov. 19, 2010); however, the record before me indicates that *Oden v. Vilsack*, FAD No. 09-2094 (Nov. 19, 2010), was the subject of litigation in the United States Court of Appeals for the Eleventh Circuit and dismissed with prejudice pursuant to a settlement agreement.[2]

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's dismissal of this proceeding, filed September 30, 2016, is affirmed.

2. Mr. Oden's Appeal Petition, filed October 13, 2016, is dismissed.

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In re: EDDIE WISE & DOROTHY WISE.
Docket Nos. 16-0161, 16-0162.
Decision and Order.
Filed November 15, 2016.

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[1] *See* 7 C.F.R. § 2.27, which sets forth the authority delegated by the Secretary of Agriculture to the Office of Administrative Law Judges.

[2] *See* the ASCR's September 28, 2016 filing, which includes a copy of an Order filed in *Oden v. U.S. Dep't Agric.*, Case No. 13-14129-EE (11th Cir. July 21, 2015) (stating "the parties filed in this Court a 'Stipulation of Dismissal with Prejudice,' which is construed as a joint motion to dismiss this appeal with prejudice" and "[w]e hereby . . . GRANT the joint motion to dismiss this appeal with prejudice").

CIVIL RIGHTS

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioners.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 24, 2016, Eddie Wise and Dorothy Wise [Wises] instituted this proceeding by filing a "Complaint Expedited Formal Hearing on Ther [sic] Merits and Temporary Injunction" [Complaint]. The Wises allege that the United States Department of Agriculture [USDA]: (1) terminated financial assistance to the Wises; (2) discriminated against the Wises; (3) foreclosed on the Wises; (3) offset the Wises' retirement; (4) seeks to take more money from the Wises by way of offset; (5) changed the Wises' 2010 farm plan in order to deny the Wises a farm-operating loan; and (6) sold the Wises' farm without a determination by an arbitrator or a formal hearing on the merits by an administrative law judge (Compl. at 1, 3-5). The Wises seek a copy of the "running record,"[1] damages, and a hearing before an administrative law judge pursuant to 7 C.F.R. pt. 15f (Compl. at 5).

On September 13, 2016, the ASCR filed an "Agency Response" in which the ASCR contends that the Wises failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and that, even if the Office of Administrative Law Judges has jurisdiction to entertain this proceeding, the doctrine of *res judicata* would preclude review by the Office of Administrative Law Judges. On September 16, 2016, the Wises filed "Petitioner's [sic] Response to

[1] The Wises do not indicate what they mean by the "running record." The record before me consists of documents filed by the Wises and the Assistant Secretary for Civil Rights [ASCR] and a dismissal filed by Administrative Law Judge Jill S. Clifton [ALJ]. The Wises should have a copy of all the documents they filed, and the record establishes that the Hearing Clerk, Office of Administrative Law Judges, USDA [Hearing Clerk], served the Wises with a copy of each document filed by the ASCR and the dismissal filed by the ALJ.

Agency Motion to Dismiss"[2] in which the Wises assert they have a right to a formal hearing before an administrative law judge pursuant to 7 C.F.R. pt. 15f.

The ALJ issued *Wise*, Docket Nos. 16-0161 and 16-0162, 2016 WL 6235795 (U.S.D.A. Sept. 22, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response" and the doctrine of *res judicata* precludes consideration of the Wises' Complaint.

On September 23, 2016, the Wises filed "Petitioner's [sic] Appeal to Judicial Officer" [Appeal Petition].[3] On October 11, 2016, the ASCR filed an "Agency Response to Appeal to Judicial Officer," and, on October 13, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with USDA prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31, 1996.[4] The regulations also require the filing of a "Section 741 Complaint Request"[5] prior to October 21, 2000.[6] USDA has no authority to accept a Section 741 Complaint Request unless the Section 741 Complaint Request has already been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or

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[2] The Wises assert that they bring this proceeding through their representative, Corey Lea (Compl. at 1); however, Mr. Lea signed "Petitioner's [sic] Response to Agency Motion to Dismiss" as "Corey Lea, Plaintiff" (Petitioner's [sic] Resp. to Agency Mot. To Dismiss at third unnumbered page). Nonetheless, I treat the "Petitioner's [sic] Response to Agency Motion to Dismiss" as having been filed by Mr. Lea on behalf of the Wises.

[3] The Wises assert that they bring this proceeding through their representative, Corey Lea (Compl. at 1); however, Mr. Lea signed the Wises' Appeal Petition as "Corey Lea Representative for Bernice Atchison" (Appeal Pet. at 6). Nonetheless, I treat the September 23, 2016 filing as an Appeal Petition filed by Mr. Lea on behalf of the Wises.

[4] 7 C.F.R. §§ 15f.1-.2.

[5] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.

[6] 7 C.F.R. § 15f.5(c).

unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[7]

The time for filing the Wises' Complaint expired on July 1, 1997, and the time for filing the Wises' Section 741 Complaint Request expired on October 21, 2000. The Wises' first filing in this proceeding, the Wises' Complaint, was filed with the Hearing Clerk on August 24, 2016, nineteen years, one month, twenty-three days after the Wises' Complaint was required to be filed and fifteen years, ten months, three days after the Wises' Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon the Wises' filing a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights,[8] and I find nothing in the record indicating that the Wises' have filed a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights. Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief the Wises request.

The ASCR argued and the ALJ found that the doctrine of *res judicata* precludes USDA's consideration of the Wises' Complaint. The Wises' Complaint so lacks specificity that I cannot reach a conclusion regarding whether the doctrine of *res judicata* precludes consideration of the Wises' Complaint. However, as discussed above, the USDA has no authority to entertain this proceeding; therefore, a conclusion regarding the applicability of the doctrine of *res judicata* is not necessary for the proper disposition of this proceeding.

For the foregoing reasons, the following Order is issued.

ORDER

3. The ALJ's dismissal of this proceeding, filed September 22, 2016, is affirmed.

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[7] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[8] 7 C.F.R. § 15f.5.

4. The Wises' Appeal Petition, filed September 23, 2016, is dismissed.

In re: WILLIE JOE DANIELS.
Docket No. 16-0171.
Decision and Order.
Filed November 16, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Complaint, time for filing – Discrimination, non-employment related – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On September 6, 2016, Willie Joe Daniels instituted this proceeding by filing a "Request for a Formal Hearing before the Administrative Law Judge" [Request for Hearing]. Mr. Daniels alleges the United States Department of Agriculture [USDA] denied him emergency loans, disaster loans, farm-operating loans, and farm-ownership loans. Mr. Daniels cites as the jurisdictional bases for this proceeding the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f); section 741(b)(1) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999;[1] section 14012 of the Food Energy and Conservation Act; and 7 C.F.R. pt. 15f. (Req. for Hr'g at 1.) Mr. Daniels seeks a copy of the "running records"[2] and a hearing before an

[1] Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, was enacted in Division A, section 101(a) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277 (7 C.F.R. § 15f.4).

[2] Mr. Daniels does not indicate what he means by the "running records." The record before me consists of documents filed by Mr. Daniels and the Assistant Secretary for Civil Rights [ASCR] and a dismissal filed by Administrative Law Judge Jill S. Clifton [ALJ]. Mr. Daniels should have a copy of all of the documents he filed and the record establishes that the Hearing Clerk, Office of Administrative Law Judges, United States Department of

administrative law judge. Mr. Daniels states that, within twenty-one days after receipt of a copy of the records, he will "present his complaint with causes of action." (Req. for Hr'g at 1, 3.)

On September 27, 2016, the ASCR filed an "Agency Response" in which the ASCR contends Mr. Daniels failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Mr. Daniels' Request for Hearing.

The ALJ issued *Daniels*, Docket No. 16-0171, 2016 WL _____ (U.S.D.A. Oct. 4, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response." On October 4, 2016, Mr. Daniels filed "Petitioner's Appeal to the Judicial Officer" [Appeal Petition].[3] On October 11, 2016, the ASCR filed an "Agency Response to Appeal to Judicial Officer," and the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with USDA prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31, 1996.[4] The regulations also require the filing of a "Section 741 Complaint Request"[5] prior to October 21, 2000.[6] USDA has no authority to accept a Section 741 Complaint Request unless the Section 741 Complaint Request has already been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or

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Agriculture [Hearing Clerk], served Mr. Daniels with a copy of each document filed by the ASCR and the dismissal filed by the ALJ.

[3] Mr. Daniels asserts that he brings this proceeding through his representative, Corey Lea (Req. for Hr'g at 1); however, Mr. Lea signed Mr. Daniels' Appeal Petition as "Corey Lea Representative for Bernice Atchison[.]" Nonetheless, I treat the October 4, 2016, filing as an Appeal Petition filed by Mr. Lea on behalf of Mr. Daniels.

[4] 7 C.F.R. §§ 15f.1-.2.

[5] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.

[6] 7 C.F.R. § 15f.5(c).

unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[1]

The time for filing Mr. Daniels' complaint expired on July 1, 1997, and the time for filing Mr. Daniels' Section 741 Complaint Request expired on October 21, 2000. Mr. Daniels' first filing in this proceeding, Mr. Daniels' Request for Hearing, was filed with the Hearing Clerk on September 6, 2016, nineteen years, two months, five days after Mr. Daniels' complaint was required to be filed and fifteen years, ten months, sixteen days after Mr. Daniels' Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon Mr. Daniels' filing a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights,[2] and I find nothing in the record indicating that Mr. Daniels has filed a Section 741 Complaint Request with the Docketing Clerk in USDA's Office of Civil Rights. Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Mr. Daniels requests.

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's dismissal of this proceeding, filed October 4, 2016, is affirmed.

2. Mr. Daniels' Appeal Petition, filed October 4, 2016, is dismissed.

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In re: BERNICE ATCHISON.
Docket No. 16-0144.
Decision and Order.
Filed November 23, 2016.

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[1] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[2] 7 C.F.R. § 15f.5.

CIVIL RIGHTS

CIVIL RIGHTS – Administrative Procedure Act – Equal Crdit Opportuntiy Act – Appeal petition – Complaint, time for filing – Discrimination, non-employment related – Due process – Hearing, request for – Jurisdiction of Office of Administrative Law Judges – Petition for review – Relief, authority to grant – Section 741 Complaint Request.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On July 29, 2016, Bernice Atchison instituted this proceeding by filing a "Petition for Review" in which Ms. Atchison requests a copy of the running record and a hearing before an administrative law judge pursuant to 7 C.F.R. pt. 15f and the "2007 Pigford Remedy Act."[1] On August 16, 2016, the Assistant Secretary for Civil Rights, United States Department of Agriculture [ASCR], filed an "Agency Response" in which the ASCR contends Ms. Atchison failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Ms. Atchison's Petition for Review.

Administrative Law Judge Jill S. Clifton [ALJ] issued *Atchison*, Docket No. 16-0144, 2016 WL _____ (U.S.D.A. Aug. 17, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response filed August 16, 2016[.]"

On August 19, 2016, Ms. Atchison filed an "Appeal To Judicial Officer." On September 7, 2016, the ASCR filed an "Agency Opposition To Appeal to Judicial Officer," and, on September 8, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for consideration of Ms. Atchison's August 19, 2016 Appeal To Judicial Officer and issuance of a decision. On September 8,

[1] Ms. Atchison does not provide a citation to the "2007 Pigford Remedy Act" referenced in her Petition for Review (Pet. for Review at 2), and I cannot locate any such act.

2016, after the Hearing Clerk transmitted the record to the Office of the Judicial Officer, Ms. Atchison filed a "Reply to Agency Opposition to Have a Hearing on the Merits."

I issued *Atchison*, Docket No. 16-0144, 2016 WL 5887703 (U.S.D.A. Sept. 9, 2016) (Order Dismissing Purported Appeal Petition), in which I dismissed Ms. Atchison's August 19, 2016 Appeal To Judicial Officer because it did not remotely conform to the requirements for an appeal under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice]. Subsequently, I vacated the September 9, 2016 Order Dismissing Purported Appeal Petition because I erroneously based the Order Dismissing Purported Appeal Petition on the requirements for an appeal under the Rules of Practice, which are not applicable to this proceeding.[2]

On September 21, 2016, Ms. Atchison filed an "Appeal to the Judicial Officer Pursuant to § 1.145" [Appeal Petition]. The ASCR failed to file a response to Ms. Atchison's September 21, 2016 Appeal Petition, and, on October 14, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of Ms. Atchison's September 21, 2016 Appeal Petition and the issuance of a decision.

Discussion

The regulations in 7 C.F.R. pt. 15f set forth procedures for processing non-employment-related discrimination complaints that were filed with the United States Department of Agriculture [USDA] prior to July 1, 1997 and that allege discrimination by USDA during the period beginning January 1, 1981 and ending December 31, 1996.[3] The regulations also require the filing of a "Section 741 Complaint Request"[4] prior to October 21, 2000.[5] USDA has no authority to accept a Section 741 Complaint Request unless the Section 741 Complaint Request has already

[2] Atchison, Docket No. 16-0144, 2016 WL _____ (U.S.D.A. Nov. 22, 2016) (Order Vacating Order Dismissing Purported Appeal Pet.).
[3] 7 C.F.R. §§ 15f.1-.2.
[4] 7 C.F.R. § 15f.4 defines the term "Section 741 Complaint Request" as a request by a complainant to consider the complainant's complaint under 7 C.F.R. pt. 15f.
[5] 7 C.F.R. § 15f.5(c).

been docketed by USDA pursuant to 7 C.F.R. § 15f.5(a) or unless the Section 741 Complaint Request was filed with USDA prior to October 21, 2000.[6]

The time for filing Ms. Atchison's complaint expired on July 1, 1997, and the time for filing Ms. Atchison's Section 741 Complaint Request expired on October 21, 2000. Ms. Atchison's first filing in this proceeding, Ms. Atchison's Petition for Review, was filed with the Hearing Clerk on July 29, 2016, nineteen years, twenty-eight days after Ms. Atchison's complaint was required to be filed and fifteen years, nine months, eight days after Ms. Atchison's Section 741 Complaint Request was required to be filed. Moreover, under 7 C.F.R. pt. 15f, the right to a hearing before an administrative law judge is dependent upon Ms. Atchison's filing a Section 741 Complaint Request with the Docketing Clerk, Office of Civil Rights, USDA [Docketing Clerk],[7] and I find nothing in the record indicating that Ms. Atchison has filed a Section 741 Complaint Request with the Docketing Clerk.

Ms. Atchison raises no issues in her August 19, 2016 Appeal To Judicial Officer.[8] Ms. Atchison raises three issues in her September 21, 2016 Appeal Petition. First, Ms. Atchison contends the ALJ's dismissal of her Petition for Review violates well-settled case law (Sept. 21, 2016 Appeal Pet. at 4). Ms. Atchison cites *Pigford v. Vilsack*, 777 F.3d 509 (D.C. Cir. 2015); *Benoit v. United States Dep't of Agric.*, 608 F.3d 17 (D.C. Cir. 2010); and *McDonald*, 69 Agric. Dec. A (U.S.D.A. July 8, 2010) as support for her contention that the ALJ's dismissal of her Petition for Review violates well-settled case law (Sept. 21, 2016 Appeal Pet. at 1-4). None of the cases cited by Ms. Atchison has any relevance to the issue in this proceeding: the Office of Administrative Law Judges' jurisdiction to grant the relief requested by Ms. Atchison.

Second, Ms. Atchison contends the ALJ's dismissal of her Petition for Review violates the due process clause of the Fourteenth Amendment to the Constitution of the United States (Sept. 21, 2016 Appeal Pet. at 3-4).

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[6] 7 C.F.R. § 15f.5(c); *see also* 68 Fed. Reg. 7411 (Feb. 14, 2003).
[7] 7 C.F.R. § 15f.5.
[8] Ms. Atchison's August 19, 2016 Appeal to Judicial Officer states in its entirety: "Please acknowledge email upon receipt."

The due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[9] it is not a state. Therefore, as a matter of law, the ALJ could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as Ms. Atchison contends.[10]

Third, Ms. Atchison contends the ALJ's dismissal of her Petition for Review violates the Administrative Procedure Act and other applicable statutes (Sept. 21, 2016 Appeal Pet. at 3-4). Ms. Atchison does not identify the provisions of the Administrative Procedure Act or the "other applicable statutes" that the ALJ's dismissal purportedly violates, and I cannot locate any statutory provisions which the ALJ's dismissal violates.

Therefore, I conclude USDA has no authority to entertain this proceeding, and I affirm the ALJ's dismissal of this proceeding based upon the ALJ's lack of jurisdiction to grant the relief Ms. Atchison requests.

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's dismissal of this proceeding, filed August 17, 2016, is affirmed.

2. Ms. Atchison's Appeal To Judicial Officer, filed August 19, 2016, is dismissed.

3. Ms. Atchison's Appeal Petition, filed September 21, 2016, is dismissed.

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[9] *See* 5 U.S.C. §§ 101, 551(1).
[10] *See Bauck*, 68 Agric. Dec. 853, 864 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *Mealman*, 64 Agric. Dec. 1987, 1990 (U.S.D.A. 2005) (Order Den. Pet. to Reconsider); *Knapp*, 64 Agric. Dec. 253, 303-04 (U.S.D.A. 2005).

CIVIL RIGHTS

In re: COREY LEA.
Docket Nos. 11-0180, 11-0252.
Decision and Order.
Filed December 1, 2016.

CIVIL RIGHTS – Equal Credit Opportunity Act – Assistant Secretary for Civil Rights – Complaint, time for filing – Discrimination, non-employment related – Federal assistance – Hearing, right to – Jurisdiction of Office of Administrative Law Judges – Relief, authority to grant – Section 741 Complaint Request.

Petitioner, pro se.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On August 29, 2016, Corey Lea filed an "Amended Petition for Review and Expedited Formal Request For a Hearing Before the Administrative Law Judge" [Amended Petition][1] seeking a hearing before the Office of Administrative Law Judges, United States Department of Agriculture [OALJ], and a copy of the "running record."[2] On September 21, 2016, the Assistant Secretary for Civil Rights, United States Department of Agriculture [ASCR], filed an "Agency Response," and, on September 23, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration of Mr. Lea's Amended Petition and issuance of a decision. On October 14, 2016, Mr. Lea filed "Petitioners [sic] Response to Agency Motion to Dismiss."

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[1] Mr. Lea captions his Amended Petition: "Corey Lea For Dissolved Corporations Corey Lea Inc. Start Your Dreams Inc. and Cowtown Foundation Inc." Administrative Law Judge Janice K. Bullard [ALJ] captioned Docket Nos. 11-0180 and 11-0252: "Corey Lea, Corey Lea Inc., Start Your Dream Inc., and Cowtown Foundation, Inc." (*See* Lea, Docket Nos. 11-0180 & 11-0252, 2011 WL 2854039 (U.S.D.A. June 2011) (Order Den. "Motion to Review and Reconsider" and Redirecting Pet'r's Mot. to Office of Assistant Secretary for Civil Rights). I have captioned Docket Nos. 11-0180 and 11-0252 "Corey Lea" because Mr. Lea filed the Amended Petition on his own behalf only and because I infer, based on Mr. Lea's Amended Petition, the corporate charters for Corey Lea, Inc., Start Your Dream, Inc., and Cowtown Foundation, Inc., have terminated.

[2] Mr. Lea does not indicate what he means by the "running record."

Discussion

Mr. Lea asserts two bases for granting his request for a hearing before the OALJ. First, Mr. Lea contends 7 C.F.R. § 2.25(a)(1)(i) authorizes the ASCR to refer this proceeding to an administrative law judge (Am. Pet. at 1). However, 7 C.F.R. § 2.25(a)(1)(i), by its terms, delegates authority from the Secretary of Agriculture to the ASCR and does not relate in any way to the OALJ:

> **§ 2.25 Assistant Secretary for Civil Rights.**
>
> (a) The following delegations of authority are made by the Secretary to the Assistant Secretary for Civil Rights:
>
> (1) Provide overall leadership, coordination, and direction for the Department's programs of civil rights, including program delivery, compliance, and equal employment opportunity, with emphasis on the following:
>
> (i) Actions to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, prohibiting discrimination in federally assisted programs.

7 C.F.R. § 2.25(a)(1)(i). Therefore, I reject Mr. Lea's contention that 7 C.F.R. § 2.25(a)(1)(i) authorizes the ASCR to refer this proceeding to the OALJ.

Second, Mr. Lea, citing the ALJ's May 26, 2011 Decision and Order Dismissing Petition,[3] contends that termination of federal assistance automatically triggers a hearing before an administrative law judge under "7 C.F.R. §§ 15.8(c), 10(f), 10(g), and Subpart C" (Am. Pet. at 1; Petitioners [sic] Resp. to Agency Mot. to Dismiss ¶ 1 at 1).[4] However,

[3] Lea, 70 Agric. Dec. 385 (U.S.D.A. 2011) (Decision and Order Dismissing Pet.).
[4] The ASCR correctly notes that neither 7 C.F.R. § 10(f), nor 7 C.F.R. § 10(g), nor 7 C.F.R. § Subpart C exists. *See* Sept. 21, 2016 Agency Resp. at 1 n.1. However, based on Mr. Lea's filings, I find Mr. Lea intended to reference provisions within 7 C.F.R. pt. 15, namely, 7 C.F.R. § 15.10(f), 7 C.F.R. § 15.10(g), and 7 C.F.R. pt. 15, subpart C.

Mr. Lea misreads the ALJ's May 26, 2011 Decision and Order Dismissing Petition, in which the ALJ states that the rules that apply to discrimination in federal-assistance programs do not automatically provide Mr. Lea with the right to a hearing and that Mr. Lea has no right to a hearing before OALJ:

> *7 C.F.R. Part 15 Subparts A and C*
>
> Some of Petitioners' allegations may be construed to fall within the auspices of USDA's regulations implementing title VI of the Civil Rights Act of 1964 …, as the complaints ostensibly involve guaranteed loans. Part 15 Subpart A prohibits discrimination against a participant in a USDA-assisted program or activity. 7 C.F.R. § 15.3. However, the rules that apply to discrimination in federal financial assistance programs do not automatically provide Petitioners with the right to a hearing. The regulations authorize the OASCR to determine the manner in which complaints under this Subpart shall be investigated, and whether remedial action is warranted. 7 C.F.R. § 15.6. The regulations specifically allow applicants or recipients to request a hearing before OALJ if the applicant or recipient is adversely affected by an Order of the Secretary suspending, terminating, or refusing to continue Federal financial assistance; and the Secretary subsequently denies a request to restore eligibility for the assistance. 7 C.F.R. §§ 15.8(c); 10(f); 10(g); Subpart C. There is no evidence of a specific Order by the Secretary suspending or terminating Federal financial assistance to Petitioners, or an Order by the Secretary refusing to continue or grant the same. Similarly, there is no evidence that Petitioners requested the Secretary to restore their eligibility for assistance, which is the event that triggers the right to a hearing. Accordingly, Petitioners are not entitled to a hearing under [7 C.F.R.] §§ 15.[]9 and 15.10.
>
> *Authority of Secretary to Delegate Responsibility for Final Determination*

> In addition, the regulations empower the Secretary to assign responsibilities to other agencies to effectuate the purposes of [title VI of the Civil Rights Act of 1964]. 7 C.F.R. § 15.2(c). As OASCR has moved for dismissal of Petitioners' complaints with OALJ, it is axiomatic that the complaints were not referred to OALJ for a hearing and Petitioners have no right to a hearing pursuant to [7 C.F.R.] § 15.12(c).

Lea, 70 Agric. Dec. 385, 390-91 (U.S.D.A. 2011) (Decision and Order Dismissing Pet.) (footnotes omitted). I agree with the ALJ's discussion regarding Mr. Lea's right to a hearing before OALJ. Therefore, I reject Mr. Lea's contention that he is entitled to a hearing before OALJ pursuant to 7 C.F.R. pt. 15.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Lea's Amended Petition, filed August 29, 2016, is dismissed.

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COMMODITY PROMOTION, RESEARCH, AND INFORMATION ACT

COMMODITY PROMOTION, RESEARCH, AND INFORMATION ACT

COURT DECISIONS

RESOLUTE FOREST PRODUCTS, INC. v. USDA.*
Civil Action No. 14-2103 (JEB).
Memorandum Opinion of the Court.
Filed November 30, 2016.

CPRIA – Administrative Procedure Act – Assessments – *De minimis* exemption – Equity – Refund – Relief, statutory authority for – Softwood Lumber Board – Softwood Lumber Checkoff Program – Sovereign immunity.

[Cite as: No. 14-2103, 2016 WL 7008991 (D.D.C. Nov. 30, 2016)].

The Court held that Plaintiff was entitled to a full refund for all spent and unspent funds that had been collected by USDA under the Softwood Lumber Checkoff Order. The Court ultimately ruled that: (1) sovereign immunity did not bar monetary relief as a remedy; and (2) because the Department "offered no viable way for the Court to split the refund," a full refund was appropriate. In so holding, the Court found that Section 702 of the Administrative Procedure Act provides an umbrella sovereign-immunity waiver and that Plaintiff was seeking an equitable remedy. The Court found that a remedy constitutes relief other than money damages when the suit seeks "to enforce the statutory mandate itself, which happens to be one for the payment of money" and that such a statutory entitlement existed in the present case (specifically, the Softwood Lumber Board had a duty to collect only lawful, requisite assessments, and industry members were entitled to sums they should not have been required to pay). The Court remanded the case and directed the Secretary to issue Plaintiff a full refund of its assessments under the Softwood Lumber Checkoff Order.

United States District Court,
District of Columbia.

MEMORANDUM OPINION

JAMES E. BOASBERG, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

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* This is the fourth Opinion issued by the United States District Court, District of Columbia, in the matter of *Resolute Forest Products, Inc. v. USDA*. The three earlier Opinions appear in chronological order in the Appendix to this book.

After three Opinions, the Court has finally chopped this case all the way down to its stump. All that remains is the determination of a remedy. Yet just as the roots of the tree are often tricky to yank out, such is the predicament here. This dispute involves Defendant U.S. Department of Agriculture's so-called Softwood Lumber Checkoff Order, which authorized its Softwood Lumber Board to collect assessments from lumber companies and then to spend those funds on marketing efforts on behalf of the softwood-lumber industry as a whole. Plaintiff Resolute Forest Products, Inc., which was assessed some $1.1 million since the Order went into effect in 2011, challenged the Department's Order as unlawfully promulgated. This Court ultimately agreed. *See Resolute Forest Prods., Inc. v. U.S. Dep't of Agric. (Resolute III)*, ——F.Supp.3d ——, 2016 WL 2885869 (D.D.C. 2016).

Resolute now asks for its money back. That simple request, however, is laden with complicated questions of sovereign immunity, the statutory authority for relief, and considerations of equity. Following a status hearing, submissions on the remedies question, and supplemental Court–ordered briefing, the Court ultimately determines that a full refund of the illegal assessments is indeed due.

I. Background

Prior Opinions have mostly set the backdrop for the latest spat between Resolute and the Department of Agriculture as well as its Secretary, Tom Vilsack (the two of which the Court will refer to jointly as Defendant). *See Resolute III*, —— F.Supp.3d at —— – ——, 2016 WL 2885869, at *1–3; *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric. (Resolute II)*, No. 14–2103, 2016 WL 1714312, at *1 (D.D.C. Feb. 2, 2016); *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric. (Resolute I)*, 130 F.Supp.3d 81, 86–88 (D.D.C. 2015). Even so, because none of those dispositions focused on remedial issues, the Court sketches in a few added details.

A. The CPRIA and Softwood Lumber Checkoff Program

"Congress has long regulated the promotion and sale of agricultural commodities by enabling the federal government to coordinate with industries to advance such promotional efforts." *Resolute I*, 130 F.Supp.3d at 86. Everything from kiwifruit to popcorn is subject to federal marketing

orders. *See* 7 U.S.C. §§ 7461–7491.

At issue here is softwood lumber. For that product, the Commodity Promotion, Research, and Information Act of 1996 (CPRIA), *id.* §§ 7411–7425, empowers the Secretary to issue an order that creates an industry-led board and allows that board to collect assessments from lumber companies so that it can engage in marketing campaigns for the industry as a whole. *See id.* §§ 7413(a), 7414(b), (c)(1); *Resolute I*, 130 F.Supp.3d at 87. To protect small-volume lumber distributors and minimize administrative costs, the Secretary may specify in that order that a "de minimis quantity of an agricultural commodity" produced annually by each company is exempt from these fees. *See* 7 U.S.C. § 7415(a)(1).

In the present case, the Secretary's Softwood Lumber Checkoff Order—promulgated in 2011 following notice-and-comment rulemaking—did precisely these things. First, the Checkoff Order established the Softwood Lumber Board to carry out lumber-promotion activities. *See Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order*, 76 Fed. Reg. 46,185 (Aug. 2, 2011). Next, to fund those activities, the Checkoff Order required industry members that trafficked in more than a *de minimis* quantity of softwood lumber—specifically, 15 million board feet (15mmbf) per fiscal year—to pay assessments to the Board. *See Resolute I*, 130 F.Supp.3d at 87; *see also* 7 U.S.C. § 7415(a)(1). Those members producing less are exempt from such fees.

As certain as taxes are, few are keen to pay the toll. Suspecting as much, the CPRIA provides a legal mechanism for companies to object to a checkoff order. Relevant here, the Act allows disgruntled members to bring administrative, and then judicial, challenges to an order. The statute provides, first, for administrative relief:

> A person subject to an order issued under this subchapter may file with the Secretary a petition—
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> **(A)** stating that the order, any provision of the order, or any obligation imposed in connection with the order, is not established in accordance with law; and

> **(B)** requesting a modification of the order or an exemption from the order.

Id. § 7418(a)(1). Once the Secretary rules on the petition, federal district courts then have "jurisdiction to review the final ruling on the petition of the person." *Id.* § 7418(b)(1). If the order is unlawful, however, courts have a choice of remedies:

> If the court determines that the ruling is not in accordance with law, the court shall remand the matter to the Secretary with directions—
>
> **(A)** to make such ruling as the court determines to be in accordance with law; or
>
> **(B)** to take such further action as, in the opinion of the court, the law requires.

Id. § 7418(b)(3).

B. Resolute's Challenge

After following this trail of statutory breadcrumbs, here Resolute is. Once the Softwood Lumber Checkoff Order was approved, the company filed its petition with the Secretary to review that Order. That petition was twice rejected, however, first by an Administrative Law Judge and then by a Judicial Officer acting on behalf of the Secretary. *See In re Resolute Forest Prods.*, No. 12–40, 2014 WL 1993757 (U.S.D.A. Apr. 30, 2014); *In re Resolute Forest Prods.*, No. 12–40, 2014 WL 7534275 (U.S.D.A. Nov. 26, 2014).

In December 2014, Plaintiff sought judicial review through this lawsuit, enumerating a number of constitutional and administrative objections to the Checkoff Order. Part of its Complaint challenged the 15mmbf *de minimis* exemption as an arbitrarily selected threshold. *See* ECF No. 1 (Complaint), ¶¶ 111, 116, 151–55. As relief, Resolute requested "an order instructing USDA to cease the collection of Softwood Lumber Order assessments and refund all *unspent* funds collected from Plaintiff" and "an order requiring USDA to make restitution for all *spent*

funds collected from Plaintiff." *Id.* at 40 (emphases added). In short, Resolute wanted all of its money back.

In three Opinions this past year, this Court dealt with the substance of Plaintiff's suit. *Resolute I* concluded that the Department's setting of the *de minimis* exemption did not pass administrative-review muster and so "remanded without vacatur to the Department of Agriculture for a reasoned and coherent treatment of [its] decision." 130 F.Supp.3d at 105; *see* 7 U.S.C. § 7418(b)(3)(A). The Department fared no better on remand, as this Court, in *Resolute II*, still was not assured that the agency had relied on "some verifiable source of data [that] accurately depicted the softwood-lumber market and supported the selection of 15 million board feet as the appropriate *de minimis* quantity." 2016 WL 1714312, at *3. The Court then ordered the Secretary to provide supplemental information to bolster that threshold. *Id.* at *4.

Only after the Department's third unsuccessful explanatory attempt did the Court fell the Checkoff Order. In *Resolute III*, it concluded that the Department's selection of the "*de minimis* quantity was arbitrary and capricious and that, accordingly, the Checkoff Order was promulgated unlawfully." 2016 WL 2885869, at *19. The Court then ordered the parties to attend a hearing "to discuss the appropriate next steps concerning the remedies sought by Plaintiff." *Id.*

The resulting issue of whether Resolute is entitled to a refund—as it had asked for in its Complaint—has proved rather complex. After a hearing, the Court initially enjoined the Department and the Board from collecting *further* assessments from Plaintiff and from maintaining a balance of less than $1.1 million, in the event a refund was appropriate. *See* 6/1/16 Minute Order.

In that same Order, the Court asked the parties to address the remedies question, which resulted in additional briefing along with supplemental authorities. *See* ECF Nos. 42 (Defendant's Remedies Memorandum), 45 (Plaintiff's Remedies Response), 47 (Defendant's Remedies Reply), 48 (Plaintiff's Notice of Supplemental Authority), 49 (Defendant's Response to Notice of Supplemental Authority). While the Department argued that the refund should be reduced to zero (or some other partial sum) because of various benefits that Resolute has gained from the Board's marketing

and promotion efforts, *see* Mem. at 3–5, Resolute (unsurprisingly) retorted that its refund should not be subject to any offset. *See* Resp. at 5–7.

These memoranda opened another can of worms. In a footnote in its Reply, Defendant mentioned that "[t]he focus of Resolute's brief on the nature of the award seems to present the unanswered question [of] whether the relief it seeks would fit within the waiver of sovereign immunity." Reply at 6 n.1. The Department went on to concede that it would "not raise[ ] that potential bar here" but would "reserve[ ] the right to raise this argument in future cases." *Id.* The Court, sensing that this issue was jurisdictional in nature, nonetheless ordered the parties to discuss the sovereign-immunity bar. *See* ECF No. 50.

That additional briefing is now complete, and the Court at last turns to the question of what remedy to award Resolute.

II. Analysis

The parties here start at opposite poles. Where the Department would prefer to refund none of Resolute's dues paid under the unlawful Checkoff Order, the company asks for its entire $1.1 million back. To put it plainly, because that money rightfully belonged to Resolute and not the Board, Plaintiff wants that sum returned.

That seems fair enough. After all, casebooks introduce the general theory that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). Even if these words are sometimes true, the finer mechanics of *what* remedy is due are no doubt hidden in some latter-page, small-font-size footnotes. *See generally Cal–Almond, Inc. v. Dep't of Agric.*, 67 F.3d 874, 879 (9th Cir. 1995), *vacated on other grounds*, 521 U.S. 1113, 117 S.Ct. 2501, 138 L.Ed.2d 1007 (1997) (explaining that "[d]espite the celebrated dictum in *Marbury* ..., not every right comes equipped with a guarantee of individual remediation for every violation of that right").

Because Resolute demands money from the federal fisc, two questions must be examined: first, whether the United States' sovereign immunity bars that monetary relief as a remedy, and second, to what extent a court

may (or should) trim the potential refund. This Court turns to each separately.

A. Sovereign Immunity

Much academic ink has been spilled over the "confusing doctrine of sovereign immunity." *The Presbyterian Church v. United States*, 870 F.2d 518, 524 (9th Cir. 1989) (quotation omitted). Broadly speaking, that doctrine starts with a baseline rule: "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). That statement extends to remedies as well, as the United States must also "[c]onsent to a particular remedy." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005).

Such a consented-to waiver of sovereign immunity must be "unequivocally expressed" in a congressional statute. *Hubbard v. EPA*, 982 F.2d 531, 532 (D.C. Cir. 1992) (*en banc*) (quoting *U. S. v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980)). Because immunity is a jurisdictional determination made by Congress, no waiver exists simply because a federal agency declines to press the defense in court. *See Settles*, 429 F.3d at 1105 ("Sovereign immunity may not be waived by federal agencies."); *Dep't of Army v. Fed. Labor Relations Auth.*, 56 F.3d 273, 275 (D.C. Cir. 1995) ("[O]fficers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision of Congress.") (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660, 67 S.Ct. 601, 91 L.Ed. 577 (1947)). And so, despite the Department's initial litigating position (or lack thereof), *see* Reply at 6 n.1, the Court must address the immunity bar here. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 888, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (discussing immunity despite agency's earlier decision "not to press the defense of lack of jurisdiction in this action").

For the purposes of this case, the relevant waiver is found in the Administrative Procedure Act. *See* 5 U.S.C. § 702. Section 702 authorizes—from federal agencies or its officers—"relief other than money damages." *See Clark v. Library of Congress*, 750 F.2d 89, 102

(D.C. Cir. 1984) (commenting that § 702 "eliminate[s] the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity"). Although the present suit arises under the CPRIA's judicial-review provision, and not under the APA, § 702's "waiver of sovereign immunity applies to any suit whether under the APA or not." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996); *see Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) (observing "nothing in the language of the second sentence of § 702 that restricts its waiver to suits brought under the APA").

If Resolute is asking for specific relief—*i.e.*, "relief other than money damages"—then its suit may find cover under § 702's umbrella waiver. Although that may initially seem unlikely, given that Plaintiff wants over $1 million, Resolute contends that such a refund qualifies not as "money damages," but rather as "specific relief, an equitable remedy"—namely, the remedy of "specific restitution." ECF No. 53 (Plaintiff's Supplemental Brief) at 3; Resp. at 6. In so arguing, it relies in principal part on *Bowen*, where the Supreme Court explained the distinction drawn in § 702:

> Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with backpay, or for "the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant office's actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949) (emphasis added).

487 U.S. at 893, 108 S.Ct. 2722. In line with this passage, Resolute characterizes its refund as nothing more than the recovery of specific monies unlawfully assessed.

Yet this sentence alone cannot propel Resolute to the finish line. In *Hubbard*, 982 F.2d at 536–37, an *en banc* D.C. Circuit discussed the weight of this very passage in considering whether "back pay" qualified

as specific relief. Although the *Bowen* quotation above mentioned that § 702's waiver covered reinstatement with back pay, *see* 487 U.S. at 893, 108 S.Ct. 2722, this Circuit labeled that language as "dicta." *Hubbard*, 982 F.2d at 537. The *Hubbard* court elaborated that it could not "rest a general waiver of sovereign immunity as to back pay for federal employees on a single, ambiguous phrase in a background, descriptive portion of the *Bowen* opinion." *Id.* The D.C. Circuit then concluded that, *contra Bowen*, back pay did *not* qualify as relief other than money damages for § 702's purposes. *Id.* at 539.

In reaching that conclusion, *Hubbard* addressed arguments that back pay constituted specific relief because it was "restitutionary" in giving back money that belonged to the plaintiff in the first place. *Id.* at 538–39. This discussion is particularly pertinent here, as Plaintiff likewise posits that a refund would be "an equitable remedy" or "specific restitution." Pl.'s Suppl. Br. at 3; Resp. at 6. Those descriptors, however, are not dispositive. As *Hubbard* held, "Whether we or someone else call a remedy restitutionary, equitable or anything else, it fits within § 702's waiver only if it gives the plaintiff the specific thing to which he was *originally entitled*." 982 F.2d at 538 (emphasis added); *see Bowen*, 487 U.S. at 895, 108 S.Ct. 2722. In that case, the D.C. Circuit concluded that although the plaintiff's victory on a First Amendment refusal-to-hire claim entitled him to the job itself—*i.e.*, reinstatement—no statute had further authorized the incidental relief of back pay as well. *See Hubbard*, 982 F.2d at 539.

Instead of relying on Resolute's characterizations, the Court must thus search for what the company was *entitled* to originally. In this inquiry, questions of sovereign immunity and statutory interpretation often blend together. That is, a remedy constitutes "relief other than money damages" when the suit is "seeking to enforce the *statutory mandate* itself, which happens to be one for the payment of money." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999) (quoting *Bowen*, 487 U.S. at 900, 108 S.Ct. 2722). Put another way, "[w]here a plaintiff seeks an award of funds to which it claims *entitlement under a statute*, the plaintiff seeks specific relief, not damages." *America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 829 (D.C. Cir. 2000) (emphasis added); *see Hubbard*, 982 F.2d at 536, 538 (describing money relief as appropriate in a "suit to enforce a statutory *entitlement*" or where litigants are "statutorily entitled" to certain costs); *Md. Dep't of Human Resources v.*

Dep't of Health & Human Servs., 763 F.2d 1441, 1446 (D.C. Cir. 1985) (drawing distinction that plaintiff was "seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses").

In assessing whether such a statutory entitlement exists here, the Court addresses first some relevant examples, then the language and structure of the CPRIA, and finally the Department's statutory counterargument.

To begin, a few examples show what sort of statutory language triggers § 702's waiver. For instance, *Bowen* concerned the federal government's advance Medicaid payments to individual states and Massachusetts's claim that some of those sums were wrongfully withheld. In that case, although Massachusetts sought monetary relief, it was nonetheless able to recover because the Medicaid Act explicitly provided that the Secretary of the Department of Health and Human Services "*shall* pay" the appropriate sums. *Bowen*, 487 U.S. at 900, 108 S.Ct. 2722 (emphasis added) (quoting 42 U.S.C. § 1396b(a)). Likewise, in *America's Community Bankers*, the D.C. Circuit permitted a case for monetary relief to proceed because the plaintiffs maintained that the "statutory scheme ... *required* the [agency] to provide for a[n] ... assessment refund." 200 F.3d at 829 (emphasis added). The statute there provided that the agency's assessments "shall not exceed the amount authorized" under another section; that other section then allowed assessments "when necessary, and *only to the extent necessary*," implying an entitlement to a refund of unnecessary payments. *Id.* at 825 (emphasis added) (quoting then-applicable versions of 12 U.S.C. §§ 1441(f)(2), 1817(b)(2)(A)(i)).

The language of the CPRIA creates a similar entitlement. The Act first authorizes the Softwood Lumber Board "to administer the order in accordance with its terms and conditions and to collect assessments." 7 U.S.C. § 7414(c)(1). In carrying out this duty, there is a limit to what may be collected—namely, "[a]ssessments *required* under an order shall be remitted to the board." *Id.* § 7416(b) (emphasis added). By logical extension, if a checkoff order is unlawful, then it cannot be fairly said that any assessments would actually be *required* under that order. That is, the Board has a duty to collect only lawful, requisite assessments, and, conversely, industry members are *entitled* to the sums that they need not have paid. *See America's Cmty. Bankers*, 200 F.3d at 825, 829 (construing statute that requires assessments "only to the extent necessary" as a

statutory entitlement for payers).

Telling, too, are the Act's review procedures. Any person subject to an order may lodge a challenge with the Secretary not only to the lawfulness of the order itself but also to "any obligation imposed in connection with the order." 7 U.S.C. § 7418(a)(1)(A). This ability to challenge a specific "obligation" already imposed strongly implies that the CPRIA contemplates a procedure to recover any assessments later found unlawful. Judicial review of these administrative proceedings is then broad, as the Act authorizes a district court to direct the Secretary to fulfill any statutory duties—*e.g.*, to keep only "required" assessments. *Id.* § 7416(b); *see id.* § 7418(b)(3) (authorizing court to direct Secretary to "take further action as, in the opinion of the court, the law requires"). Indeed, Resolute's challenge began with such a petition, filed in 2011 and challenging the lawfulness of the Checkoff Order under the CPRIA. *See* Compl., ¶¶ 81–82.

Finally, specific features of the CPRIA's structure support the conclusion that companies are entitled to a refund of unlawful assessments. The Supreme Court has once addressed the framework of the similar Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, which also contemplates promotional "projects to be paid from funds collected *pursuant* to the marketing order" and permits administrative petitions challenging "any obligation imposed in connection therewith is not in accordance with law." *Id.* § 608c(6)(I), (15)(A) (emphasis added); *see United States v. Ruzicka*, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946); *see also* ECF No. 52 (Defendant's Supplemental Brief) at 3 n.1. Under that Act, the Secretary, through marketing orders, can likewise require companies to pay assessments to industry boards to fund advertising campaigns. *Ruzicka* held that if a person did *not* pay because she believed the order to be unlawful, the Secretary could immediately enforce the order by seeking assessments in district court. *See* 329 U.S. at 289–90, 67 S.Ct. 207. But in those enforcement proceedings, *Ruzicka* concluded, the individual could not raise the defense that the order was unlawful; instead, her only route would be to submit a *separate* petition for administrative (and, ultimately, judicial) relief. *Id.* at 291–94, 67 S.Ct. 207.

Underneath the surface of this enforcement/petition structural counterpoint is an assumption about refunds. Companies would need to

pay assessments (or risk enforcement) until they succeeded in their petition. *See id.* at 293, 67 S.Ct. 207 ("To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find.*"); Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983). Although the *Ruzicka* Court could have been disturbed by this pay-to-litigate structure, it was not. Instead, it presumed that upfront-payment inequities would be fixed: "Congress explicitly gave to [that] aggrieved handler an appropriate opportunity for the *correction of errors* or abuses by the agency charged with the intricate business of milk control." 329 U.S. at 292, 67 S.Ct. 207 (emphasis added). In other words, if the petitioner won in the end, the unlawful assessments could be undone. *See Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 559 n.7 (9th Cir. 1988).

Other Agricultural Marketing Agreement Act decisions (outside the narrow realm of milk marketing) confirm this interpretation. In a line of cases addressing First Amendment challenges to marketing orders, the Ninth Circuit has held that the marketing statute indeed contemplates a refund. That Circuit first held that "a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due." *Cal–Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 448 (9th Cir. 1993). Later cases then confirmed that such refund constituted specific relief not barred by sovereign immunity. *See Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1386 (9th Cir. 1995); *see also Cal–Almond*, 67 F.3d at 878 n.1 ("The USDA does not, and indeed could not, contend that refund of assessments paid to the Board would be damages and therefore barred by sovereign immunity."). So long as this monetary relief was truly a refund from the board—and not a reimbursement for money spent elsewhere—plaintiffs could obtain money as a remedy. *See Cal–Almond*, 67 F.3d at 879 ("[I]t matters a great deal whether the recovery would require the USDA to reimburse the handlers for money they paid to third parties because of the doctrine of sovereign immunity.").

The CPRIA shares a similar structure. If a company does not pay, the Secretary may seek to enforce the assessments in district court. *See* 7

U.S.C. § 7419(a). At the same time, that company may proceed separately to obtain administrative (and then judicial) relief for its marketing-order obligations. *See id.* § 7418(a)-(b). As with the Agricultural Marketing Agreement Act, however, a petition to review an assessment would not halt any enforcement proceedings—industry members would still need to pay under protest. *See id.* § 7418(c) ("The pendency of a petition ... shall not operate as a stay of any action ... to enforce this subchapter ...."). Implied in the CPRIA's analogous framework, then, must be the same assumption that if a company succeeds, all will be made right in the end, as it would be entitled to a refund. *See Ruzicka*, 329 U.S. at 292, 67 S.Ct. 207 ("Congress explicitly gave to [that] aggrieved handler an appropriate opportunity for the correction of errors or abuses by the agency ....").

The Department's sole argument in opposition rests on an exception to the § 702 waiver. In certain statutory schemes, the waiver is ineffective because the law at issue "expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Defendant here concedes that a long line of cases has found that the Agricultural Marketing Agreement Act is not one of those statutes and does not in any way forbid a refund. *See* Def.'s Suppl. Br. at 9. Yet, the agency contends, the CPRIA is different because its judicial-review provision does not mention refunds and only vaguely empowers district courts to direct the Secretary "to take such further action as, in the opinion of the court, the law requires." 7 U.S.C. § 7418(b)(3)(B). This supposed distinction, however, is unpersuasive. Closer inspection reveals that the Agricultural Marketing Agreement Act is substantively the same, as it, too, permits courts to direct the Secretary "to take such further proceedings as, in its opinion, the law requires." *Id.* § 608c(15)(B).

As there appears to be no way to distinguish this refund case from the plethora of others relating to marketing orders, the Court concludes that sovereign immunity does not bar a refund, as that relief falls within the scope of § 702's waiver.

B. Refund Amount

In addition to the question of whether the Court *may* direct a refund, the parties also dispute *what* refund is due. To remind the reader, the CPRIA outlines the Court's authority here:

> If the court determines that the ruling is not in accordance with law, the court shall remand the matter to the Secretary with directions—
>
> **(A)** to make such ruling as the court determines to be in accordance with law; or
>
> **(B)** to take such further action as, in the opinion of the court, the law requires.

7 U.S.C. § 7418(b)(3).

Resolute asks the Court to direct the Secretary to issue a full refund. *See id*. § 7418(b)(3)(B). In this vein, because the Act demands that only assessments "*required* under an order" should be paid, *id.* § 7416(b) (emphasis added), it creates entitlement to a refund of any unlawful ones. Resolute warns, however, that any deductions would turn its request for the return of specific assessments into a demand for partial compensation, which would be barred by sovereign immunity as simply money damages. *See* Resp. at 6; *see also Cal–Almond*, 67 F.3d at 879. In response, the Department argues that the Act specifically contemplates that the Court may wield its equitable discretion to deduct or erase any sums owed. *See* 7 U.S.C. § 7418(b)(3)(B) (permitting "such further action as, in the *opinion* of the court, the law requires") (emphasis added).

The Court finds Defendant's position unconvincing. First off, it is not clear that equity would grant such broad power at all. With equity, there is a "'flexibility' inherent in 'equitable procedure' [that] enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices.'" *Holland v. Florida*, 560 U.S. 631, 650, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30, 64 S.Ct. 587, 88 L.Ed. 754 (1944). Yet some courts have suggested that when a party asks for specific relief in the form of a refund, the Court cannot, even in equity, order something "other than the specific return of funds." *Cobell v. Kempthorne*, 569 F.Supp.2d 223, 245 (D.D.C. 2008), *vacated on other grounds sub nom.*, *Cobell v. Salazar*, 573

F.3d 808 (D.C. Cir. 2009).

In any event, even assuming the Court *can* equitably modify the refund, it will not. While Defendant offers four principal reasons why the refund amount should be discounted or reduced to zero, none is persuasive.

The Department first points to a number of specific research and promotion programs funded by the assessments that allegedly have benefited Resolute. *See* Mem. at 6–8. No doubt these initiatives appear to have furthered the softwood-lumber industry in a general sense. *See* ECF No. 42–4 (2015 Annual Report). Yet the Department points to no evidence that these benefits have specifically redounded to *Resolute*'s favor. In fact, the company's President and CEO informed the Court that Resolute instead "pursues its own marketing strategies" and had "no plans to spend money" on the Checkoff Order's types of promotions in the future, as that spending appeared unnecessary under Resolute's specific business circumstances. *See* ECF No. 45–1 (Declaration of Richard Garneau), ¶¶ 3, 7–8.

In related fashion, Defendant next offers data on company profits. It logs that lumber companies have experienced $15.55 of additional sales (resulting in $6.73 of additional investor profit) for each $1 spent by the Board. *See* ECF No. 42–6 (Declaration of Douglas Adams), ¶ 20. These galactic gains have purportedly been the result of bolstered demand due to the Board's efforts. *Id.* But when something sounds too good to be true, read the fine print. Although the Department reports that architects and engineers with significant interactions with the Board's promotional programs purchased significantly more softwood lumber from industry members, it also mentions that those persons or firms with "minimal involvement" actually bought *less. Id.*, ¶ 19. Defendant does not suggest, however, that *Plaintiff's* clients could or did have any involvement with any specific programs.

Third, the Department presses that Resolute should not be permitted to be a free rider on the Board's programs. *See* Mem. at 10. It first bears noting that this free-rider problem is a limited one, as the time period for challenging an assessment under the Checkoff Order has long passed, and no other companies appear to have asked for a refund. *See* 7 U.S.C. § 7418(a)(4). The only potential free rider, consequently, is Resolute, who,

as mentioned above, does not consider itself to have benefited from the Order at all. In addition, very little about this process has been "free" to Plaintiff: The Board has held onto Resolute's annual payments for a number of years, and Resolute has expended significant resources litigating this matter to its completion. Considered in a broad sense, moreover, there are any number of "free riders" on programs that benefit the lumber industry. With buildings built and timber sawn, insulation, paint, and termite-control companies all must derive some benefit. This argument is thus not one that gains traction for the Government.

Defendant last contends that the proper refund (if any) should be doled out after it promulgates a new Checkoff Order establishing revised assessment rates, which it is now "in the process" of doing. *See* Mem. at 10–11; *see also* ECF No. 49 (reporting that the Department is "diligently working on [its] economic analysis"). That is, the Department would refund only the difference between what Resolute *did* pay and what it *should have* paid were the soon-to-be-established lawful order retroactively applied. Alas, this Rubicon has been crossed. In fact, Caesar has long since been crowned. This Court has already twice permitted Defendant to "try, try, try again." *Resolute III,* 2016 WL 2885869, at *19 (citing *Resolute II*, 2016 WL 1714312, at *3); *see Resolute I*, 130 F.Supp.3d 81. To no avail. After two exercises in futility, this Court's third, most recent Opinion held decisively that the Checkoff Order was promulgated unlawfully. *See Resolute III*, 2016 WL 2885869, at *19. The chance to formulate a lawful Checkoff Order is long gone.

Defendant's wait-and-see solution, albeit creative, is also not feasible. Although the promise of a new order sounds enticing, will it be approved by lumber producers, will it be correct this time, and how many more rounds of challenges will be necessary? The Court is not in a position to continue to monitor the administration of softwood-lumber programs for years to come. *Cf. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 67, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) ("The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA."). And for Plaintiff to wait and wait is by no means a satisfying solution. Resolute's challenge to the Checkoff Order has already spanned half a decade. By now, the Court is ready to call game, set, match.

All told, the Department simply has offered no viable way for the Court to split the refund on the chopping block, and so a full one shall issue.

III. Conclusion

For these reasons, the Court will remand the case and direct the Secretary to issue Plaintiff a full refund of its assessments under the Softwood Lumber Checkoff Order. A separate Order so stating will issue this day.

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PLANT PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: REDLAND NURSERY, INC. & JOHN C. DeMOTT.
Docket Nos. 15-0104, 15-0105.
Decision and Order.
Filed October 20, 2016.

PPA.

Elizabeth M. Kruman, Esq. for Complainant.
Susan E. Trench, Esq. for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted by a complaint filed on April 28, 2015 by the Administrator of the Animal and Plant Health Inspection Service [APHIS], United States Department of Agriculture [Complainant], alleging that Respondents, Redland Nursery, Inc. and John C. DeMott [Respondents] violated the Act and regulations. Complainant seeks civil penalties against Respondents for violations of the Plant Protection Act, as amended and supplemented (7 U.S.C. § 7701 *et seq.*) [Act] and regulations promulgated thereunder, in accordance with the applicable rules of practice (7 C.F.R. § 380.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*).

I. Procedural History

The Complaint instituting this proceeding alleges that Respondents engaged in the business of growing, handling, or moving regulated articles interstate without a compliance agreement with the USDA APHIS for the interstate movement of regulated articles pursuant to 7 C.F.R. § 301.81 *et seq*., in violation of 7 C.F.R. § 301.81 *et seq*., and in violation of Consent Decision and Order P.Q. Docket No. 10-0331, effective October 11, 2011. CX-6.

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In a previous USDA APHIS enforcement action filed on June 14, 2010, APHIS charged Respondents with seventy-one (71) counts of moving regulated articles interstate in violation of a domestic quarantine to prevent the dissemination of a plant pest, imported fire ants. (7 C.F.R. § 301.81). The case was resolved by the Consent Decision in which the Respondents consented, signed, and stipulated to and (*In re Redland Nursery, Inc., and John C. DeMott*, P.Q. Docket No. 10-0331) that became effective October 11, 2011. CX-6.

The Order jointly and severally assessed the Respondents a civil penalty of $50,000, payment of which was held in abeyance provided Respondents did not violate 7 C.F.R. § 301.81, related to the interstate movement of regulated articles, for a three year period, beginning from the effective date of the Order. CX-6. The Order further cancelled Respondents' compliance agreement entered into with APHIS on April 17, 2006 to move imported articles regulated pursuant to 7 C.F.R. § 301.81 *et seq*. CX-6. Pursuant to the Order, the rubber stamp associated with Respondents' compliance agreement was actually confiscated by Lucita Aguilera of the Florida Department of Agriculture and Consumer Services, Division of Plant Industries on October 17, 2011. CX-7. A Redland Nursery representative signed the Special Inspection Certificate Receipt providing the stamp to Ms. Aguilera. CX-7. The Respondents were prohibited from entering into a new compliance agreement with APHIS for one year, beginning from the effective date of the Order. CX-6. The Consent Order became effective October 11, 2011. CX-6.

On April 28, 2015, in the instant action, the Hearing Clerk mailed a letter of service, the Complaint, and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.) [Rules of Practice] to Respondents by certified mail, return receipt requested. The letter of service, Complaint, and copy of the Rules of Practice were delivered to Respondents on May 4, 2015. By operation of the Rules of Practice, the Complaint was served as of that date. Respondents filed an Answer on May 26, 2015 admitting most of the jurisdictional facts, admitting the procedural history, and denying the factual allegations.

The Complaint alleges that while subject to Consent Order P.Q. Docket No. 10-0331, Respondents operated without a compliance agreement, in

violation of the Act and Regulations, and in violation of the Consent Order. Furthermore, one of the four shipments made in violation of the Act and Regulations was actually infested with imported fire ants. At all times material herein, Respondent DeMott was the Registered Agent, President, and a Director of Redland Nursery, Inc. CX-1. He was also the Registered Agent, a Director, Secretary, and Treasurer of To Be Farms. CX-2. The Complaint alleges that while under Consent Order P.Q. Docket No. 10-0331, Respondent continued shipping regulated articles from Redland Nursery but used the To Be Farms, Inc. compliance agreement and associated stamp to move the regulated articles outside of the quarantined area.

The Complaint was served on Respondents on May 4, 2015. In accordance with section 1.136 (7 C.F.R. § 1.136) of the Rules of Practice, Respondents' Answer was due within twenty (20) days from the date of service. Respondents answered the complaint on May 26, 2015. Respondents admitted all of the jurisdictional facts set forth in Section I, paragraph (d) sections 4 – 6 of the Complaint that Respondent DeMott was:

> 4. Knowledgeable that the subject plants or plant products were subject to a federal quarantine as regulated articles.
>
> 5. Operating without a compliance agreement with the USDA APHIS for the interstate movement of articles regulated pursuant to 7 C.F.R. § 301.81 *et seq*.
>
> 6. Selling regulated articles in non-quarantine states.

The Answer did not deny the same for Respondent Redland Nursery. Respondents additionally admitted to the summary of Consent P.Q. Docket No. 10-0331 in Section II and the allegation in Section III, paragraph 2 that Respondents shipped regulated articles to non-quarantined areas using the To Be Farms compliance agreement and associated stamp, in accordance with 7 C.F.R. § 301.81-6. The Respondents otherwise denied all of the violations of the Act and Regulations set forth in Section III of the Complaint. The Answer did not raise any affirmative defenses but claimed that more information was needed to respond to the allegations.

On May 27, 2015, Judge Bullard ordered the parties to file a list of exhibits and witnesses and exchange copies of the exhibits and list of witnesses with Respondents. Complainant filed a list of exhibits and witnesses by the September 25, 2015 deadline set in the May 27 Order. Complainant sent copies of the exhibits and list of witnesses via UPS the same day. Respondents filed their list of exhibits and witnesses on December 10, 2015, after the November 27, 2015 deadline set in the May 27 Order.

A. Notice of Hearing

A pre-hearing conference call was held on February 26, 2016 with Administrative Law Judge Bullard, attorney for Complainant Elizabeth Kruman, and Respondent Mr. John DeMott. All parties agreed that the hearing would be conducted on Tuesday, July 12, 2016 in Dade County, Florida. The location of the hearing was selected to be close to the Respondents' place of domicile. Following the conference call, on March 2, 2016, Judge Bullard issued an "Order Setting Hearing" documenting the conference call held on February 26, confirming the July 12, 2016 date for hearing, and setting the hearing for 9:00 a.m. in Dade County, Florida. In that Order, the Judge stated that "I shall notify the parties of the manner and site of the hearing under separate Order issued close in time to the date of the scheduled hearing." (March 2, 2016 Order Setting Hearing).

On Thursday, June 9, 2016, I personally held a second pre-hearing conference call with Elizabeth Kruman and John DeMott after I was assigned the case following Judge Bullard's retirement. On that conference call, I reconfirmed that the hearing would be held in Dade County, Florida on Tuesday July 12, 2016. On Thursday July 7, 2016, a Notice of Hearing was filed again reconfirming the date of the hearing as starting on July 12, 2016 at 9:00 a.m. and further providing that the hearing would be held at the Claude Pepper Federal Building, 51 S.W. 1st Avenue, Miami, FL 33130, the same location that had previously been communicated to the Respondents via email. (Notice of Hearing, July 7, 2016). The Certificate of Service indicated that the Respondents were served by regular mail and email. (Notice of Hearing, July 7, 2016; *See also* July 14 Order Denying Respondents' Request for Rescheduled

Hearing and August 2 Order Denying Respondents' Petition for Rehearing).

B. Failure to Appear for Duly Noticed Hearing

As duly noticed, the oral hearing was held as scheduled on Tuesday July 12, 2016 in Miami, Florida at the U.S. Tax Court, Claude Pepper Federal Building, 51 S.W. 1st Avenue. Respondents failed to appear at the hearing. Tr. at 4-5. I deemed the Respondents' failure to appear without good cause after having been duly noticed a waiver of objection. (Tr. at 4, line 17; 7 C.F.R. § 1.141(e)). On July 14, 2016, Respondents filed email correspondence with this office regarding their failure to appear for the scheduled hearing, which I construed as a request for a rescheduled hearing. (Email Correspondence to Chief Judge, July 14, 2016). On July 14, 2016, I issued an Order Denying Respondents' Request for Rescheduled Hearing finding that Respondents had been duly notified of the hearing, failed to appear without good cause, and were deemed to have waived the right to an oral hearing. (July 14 Order Denying Respondents' Request for Rescheduled Hearing). Further, all facts presented at hearing were deemed admitted and all material allegations contained in the Complaint were deemed admitted in accordance with the Rules of Practice. (7 C.F.R. § 1.141(e); *see also* Tr. at 10, line 21-22; Tr. at 11, line 1; Order Denying Respondents' Request for Rescheduled Hearing) .

Respondents subsequently filed a Petition for Rehearing. Complainant responded with an Opposition to Respondents' Petition for Rehearing on July 20, 2106. After full consideration of the Respondents' Petition for Rehearing and Complainant's Response in Opposition, I determined that the Petition for Rehearing was not supported by good cause and I issued an Order Denying Respondents' Petition for Rehearing on August 2, 2016. Further, I found that "[g]iven the above recited procedural history of this case, and the fact that the record is replete with numerous pleadings and emails providing detailed contact information for OALJ/HCO as well as for Counsel for the Complainant, Respondents' contentions that they were unaware of how to contact anyone at USDA for assistance is simply not credible." (August 2 Order Denying Respondents' Petition for Rehearing). Respondents were duly notified of the time, place, and manner of the hearing in accordance with the Rules of Practice, 7 C.F.R. § 1.141(b).

PLANT PROTECTION ACT

II. Summary of Applicable Law

A. Respondents were afforded ample notice of the scheduled hearing and their failure to appear entitles Complainant to a default decision, or in the alternative a favorable decision on the record.

"[U]nder the Administrative Procedure Act, parties subject to adjudications before an agency are entitled to a hearing and decision on notice. . . . To pass constitutional muster, notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *United States v. Korn*, No. 1:09-CV-537-CWD, 2010 WL 5110048, at *5 (D. Idaho Dec. 6, 2010) (citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 94 L.Ed. 865 (1950)). The procedural history of this case amply demonstrates that Respondents were apprised of the scheduled hearing on several different occasions and in a number of different ways as detailed in the Order Denying Respondents' Request for Rescheduled Hearing, July 14, 2016 and Order Denying Respondents' Petition for Rehearing, August, 2, 2016. Respondents' failed to appear for the hearing without good cause after being duly notified of the time, place, and manner of the hearing and as such are deemed to have admitted all facts presented at the hearing. (7 C.F.R. § 1.141(e)(1); Tr. at 4). Further, "[s]uch failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint." (7 C.F.R. § 1.141(e)(1)).

Despite their failure to appear for the hearing, Respondents have not waived "their right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in §1.145." (7 C.F.R. § 1.141(e)(1)).

B. Imported fire ants are subject to a Federal quarantine.

USDA APHIS has established a quarantine program to prevent the spread of imported fire ants (or "fire ants") throughout the United States given the significant harm they can cause to agricultural operations and human health. 7 C.F.R. § 301.81 *et seq*. Fire ants are easily spread through the transport of articles that can harbor the noxious pest, also referred to as regulated articles. Fire ants can cause harm to cropping systems,

interfere with the harvesting of crops, international agriculture, and in urban settings can be particularly harmful. Tr. at 19-20. Children and the elderly are particularly susceptible to the harm caused by fire ants. Tr. at 20. Mr. Ronald Weeks, National Operations Manager at USDA APHIS for the Imported Fire Ant Program described fire ants in the following way: "[t]hey have an aggressive and nasty sting, and have medical implications . . . they attack in masse" Tr. at 20-21. Given the harm that fire ants present, USDA APHIS' quarantine program aims to prevent the spread of this noxious pest beyond the areas where it is already present. Once an infestation is established in a new location, controlling and eradicating the fire ants is difficult and requires complete eradication of the entire colony to be successful. Tr. at 21. Further, Mr. Weeks testified to the following regarding the difficulty of controlling the spread of fire ants as they establish in new locations:

> JUDGE McCARTNEY: So, in your experience then, has this particular pest been relatively intractable in terms of trying to contain it once infestation has occurred?
>
> THE WITNESS: Yes, Your Honor. This pest is one of USDA's largest -- one of our most long-lived programs and one of our largest, unfortunately, failed eradication programs. That is the reason the federal quarantine now only looks at the human assisted movement because they are so entrenched and so biologically adept to be evasive.
>
> JUDGE McCARTNEY: Is that why it is all the more important to adhere to the quarantine rules and regulations?
>
> THE WITNESS: Yes, Your Honor. We have prediction models that we don't believe the fire ant has reached its entire potential range, and we are trying to buy as much time as possible before they creep their way into there if they can, and human assisted movement is, by far, the biggest movement from our experience and research. The biggest vehicle for their expansion, in other words.

Tr. at 22-23. Control of the human-assisted movement of fire ants is essential to ensuring that fire ants do not spread beyond their current range. Tr. at 23. This "aggressive and noxious plant pest" is unable to spread naturally to new areas of the country without human assistance. Tr. at 23, lines 10-12; at 24, lines 1-2.

C. It is a violation of the Plant Protection Act and regulations to move regulated articles outside of the imported fire ant quarantine through and into an area outside of the quarantine without a limited permit or compliance agreement.

The Plant Protection Act, as amended and supplemented, gives USDA APHIS the authority to regulate the movement of certain articles and establish domestic quarantines to prevent the dissemination of plant pests within the United States. 7 U.S.C. § 7712, 7 C.F.R. § 301.81. The Secretary is authorized to issue regulations requiring that an article moved in interstate commerce be "accompanied by a certificate of inspection issued (in a manner and form required by the Secretary) by appropriate officials of the . . . State from which the plant, plant product, biological control organism, noxious weed, article, or means of conveyance is to be moved." 7 U.S.C. § 7712(c). Pursuant to this authority, section 301.81-3 *et seq*. of the regulations establishes quarantines in States or portions of States that are infested with imported fire ants. Respondents' place of business is located in Homestead, Florida. The entire State of Florida is quarantined. 7 C.F.R. § 301.81-3; Tr. at p. 27 lines 20-21. The southeastern United States, where imported fire ants are particularly prevalent, has been quarantined since approximately the 1970s. Tr. at 28, lines 2-4. APHIS established a quarantine for imported fire ants to help ensure that the noxious plant pest did not spread beyond the range in which it was already established, but simultaneously allow for continued trade and support the growth of related industries. Tr. at 25.

Information about the quarantine and how to comply with the restrictions of the quarantine is readily available to the public. Tr. at 28-33; CX-45. At the time the shipments of nursery stock that are the subject of the complaint in this matter were made, the program aide, "Imported Fire Ant 2007: Quarantine Treatments for Nursery Stock and Other Regulated Articles" was available to the Respondents, specifically, and the general public. Tr. at 29; CX-45. This program aide was collaboratively

developed by APHIS with input from industry and state partners who assist in determining the most effective and most feasible treatment methods. Tr. at 29, lines 6-14. This program aide and subsequent updates are available to assist "producers of sod, nursery stock, industry dealers, and growers." Tr. at 30, lines 9-10. It is standard practice for the State of Florida Division of Plant Industry to provide the link to the electronic version of the the program aide when they receive their compliance agreement.

The quarantine for imported fire ants prohibits the movement of regulated articles unless movement is made in compliance with the regulations. 7 C.F.R. § 301.81. Regulated articles can only be moved from an area that is quarantined into or through an area that is not quarantined with a "certificate or limited permit issued and attached in accordance with §§ 301.81–5 and 301.81–9 of [7 C.F.R. § 301.81]." 7 C.F.R. § 301.81-4(a); Tr. at 25. When moving regulated articles interstate, the certificate or limited permit issued to authorize such movement must be attached to the container the regulated article is in, attached to the article if it is not in a container, or attached to the waybill, "[p]rovided, that the descriptions of the regulated article on the certificate or limited permit, and on the waybill, are sufficient to identify the regulated article." 7 C.F.R. § 301.81-9. The carrier moving the regulated article must "furnish the certificate or limited permit authorizing interstate movement of a regulated article to the consignee at the shipment's destination." 7 C.F.R. § 301.81-9.

Without a compliance agreement or limited permit, the regulated article can be moved from a quarantined area to a non-quarantined area only if the regulated article came into the quarantined area from an area that was not quarantined, the point of origin is on the waybill that is attached to the regulated article, and

> [t]he regulated article is moved through the quarantined area (without stopping except for refueling, or for traffic conditions, such as traffic lights or stop signs), or has been stored, packed, or parked in locations inaccessible to the imported fire ant, or in locations that have been treated in accordance with part 305 of this chapter, while in or moving through any quarantined area; and (iv) The article

> has not been combined or commingled with other articles so as to lose its individual identity . . .

7 C.F.R. § 301.81-4(a)(2).

A limited permit requires inspection and possibly treatment of the regulated articles in order to move the articles outside of the quarantine. Tr. at 33, lines 11-17. Limited permits are issued on a per shipment basis and require that a State inspector personally inspect and certify each shipment of regulated articles to be sent outside of the quarantine. Tr. at 43, lines 5-15; CX-46, p. 83. The issuance of a limited permit requires an individual inspector to verify that the shipment is free of imported fire ants, provide the shipper instructions on how to handle the shipment, and provide certification that the shipment can move outside of the quarantine. Tr. at 43, lines 5-15.

Certification to move regulated articles outside of the quarantine area can also be provided through a compliance agreement. "A compliance agreement is an agreement to allow [movement of] regulated articles following certain stipulations or protocols or measures that are agreed upon based on the federal regulations . . . to move regulated materials outside of the quarantined area." Tr. at 33, lines 11-17. Compliance agreements are issued by the State to entities moving regulated articles outside of the quarantine. Compliance agreements are specific to the regulated article being moved. Tr. at 35-36; CX-48, pp. 59-81. The compliance agreement provides the appropriate treatment method for the specific regulated article. Tr. at 35. The treatment methods vary based on the regulated article and thus a single entity may have multiple compliance agreements for the different kinds of regulated articles they are moving. Tr. at 36-37. Compliance agreements are issued to an entity after the State has conducted an inspection, reviewed treatment protocols, and observed the entity's handling of the regulated articles. Tr. at 37, lines 12-16. To obtain a compliance agreement, a person must "review with an inspector each stipulation of the compliance agreement, have facilities and equipment to carry out disinfestation procedures or application of chemical materials in accordance with part 305 of this chapter, and meet applicable State training and certification standards as authorized by the Federal Insecticide, Fungicide, and Rodenticide Act." 7 C.F.R. § 301.81-

6. Further, entering into a compliance agreement requires compliance with 7 C.F.R. § 301.81 *et seq*. 7 C.F.R. § 301.81-6.

Compliance agreements are not transferable between entities. Tr. at 37. A producer moving regulated articles outside of the quarantine must "have a compliance agreement to move anything out or a limited permit to move anything out of the quarantine." Tr. at 44, lines 2-4. Regardless of whether another nursery has treated and certified the regulated articles, the producer actually moving the regulated articles must "have a compliance agreement to move anything out or a limited permit to move anything out of the quarantine" to show "the ability to handle, process, and follow certain protocols while you're facilitating that movement." Tr. at 44, lines 2-9.

Compliance agreements are renewed annually. Tr. at 37, line 19. The unique identifier associated with a specific compliance agreement remains the same upon subsequent renewal. Tr. at 40, lines 9-15. Further, Mr. Weeks testified as follows:

> JUDGE McCARTNEY: The renewal process you said after inspection, so this is to ensure full compliance with the provisions of the agreement?
>
> THE WITNESS: Yes, Your Honor, and the business practice hasn't changed or if there's been a change in the treatments that they're communicated.

Tr. at 37-28.

Having a compliance agreement allows the person holding the compliance agreement to certify shipments of regulated articles outside of the quarantine, rather than having a State inspector inspect each individual shipment. When a compliance agreement is issued, the person or entity entering into the compliance agreement is also issued a rubber stamp that is used to indicate certification of the shipment per the terms of the compliance agreement. Tr. at 38. Each stamp contains a "unique identifier" that is specific to the State issuing the compliance agreement and specific to the entity. Tr. at 39. Once a producer has entered into a compliance agreement, they retain possession and control of the stamp. Tr.

at 40, lines 3-8. A single unique identifier is provided by the State to a producer, regardless of how many different compliance agreements they have. Tr. at 41-42. A person operating under a compliance agreement must make the following determinations about a regulated article being moved outside of the quarantine prior to moving it:

> (1) Is eligible for unrestricted movement under all other applicable Federal domestic plant quarantines and regulations;
>
> (2) Is to be moved interstate in compliance with any additional conditions deemed necessary under section 414 of the Plant Protection Act (7 U.S.C. 7714) to prevent the spread of the imported fire ant; and
>
> (3)(i) Is free of an imported fire ant infestation, based on his or her visual examination of the article; (ii) Has been grown, produced, manufactured, stored, or handled in a manner that would prevent infestation or destroy all life stages of the imported fire ant; (iii) Has been treated in accordance with part 305 of this chapter; or (iv) If the article is containerized nursery stock, it has been produced in accordance with § 301.81–11.

7 C.F.R. § 301.81-5(a). If a person operating under a compliance agreement determines that the above listed requirements have been met, the stamp with the entity-specific unique identifier is applied to the bill of lading. The stamp indicates that "those regulated articles on the bill of lading…originated where that stamp unique identifier is...and that they meet all the applicable regulations and certification for their transport" Tr. at 40, lines 20-22, at 41, lines 2-3. The unique identifier serves the important purpose of indicating the origin of the regulated articles in the event that there is an infestation found so that the source of the infestation can be identified. Tr. at 41, lines 4-16.

It is beneficial to both the government and producers to enter into compliance agreements rather than having an inspection conducted for each individual shipment of regulated articles outside of the quarantine.

Tr. at 42. Once entered into, compliance agreements can be cancelled. 7 C.F.R. § 301.81-7.

III. Findings of Fact

Respondents are deemed to have waived the right to an oral hearing and are deemed to have admitted all facts presented at hearing. (7 C.F.R. § 1.141(e)(1)). Complainant elected to present evidence in the form of affidavits and oral witness testimony at the hearing at the scheduled time and place. (7 C.F.R. § 1.141(e)). Accordingly, the following findings of fact are hereby **ADOPTED**:

1. Redland Nursery, Inc. (Corporate Respondent) is a corporation, incorporated under the laws of the State of Florida, with its principal place of business and business mailing address at 18455 S.W. 264th Street, Homestead, Florida 33031. Redland Nursery was incorporated on April 6, 1978. CX-1; CX-48.

2. To Be Farms, Inc. is a corporation, incorporated under the laws of the State of Florida, with its principal business address at 15200 S.W. 264th Street, Homestead, Florida, 33031. To Be Farms was incorporated on June 21, 1985. CX-2; CX-49.

3. Redland Nursery, Inc. (Corporate Respondent) is a corporation, incorporated under the laws of the State of Florida, with its principal place of business and business mailing address at 18455 S.W. 264th Street, Homestead, Florida 33031. Redland Nursery was incorporated on April 6, 1978. CX-1; CX-48.

4. Respondent John C. Demott (Respondent Demott) is an individual with a business mailing address of 18455 S.W. 264th Street, Homestead, Florida 33031. He is a Registered Agent, President and Director of Redland Nursery, Inc. and Registered Agent, a Director, Secretary, and Treasurer of To Be Farms. CX-48; CX-49.

5. Redland Nursery is a plant nursery engaged in the business of buying and selling plant products.

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6. In April and May 2012, Redland Nursery and John DeMott were operating pursuant to Consent Decision and Order, P.Q. Docket No. 10-0331, effective on October 11, 2011. CX-6; Tr. at 69-71.

7. Respondent DeMott has been engaged in the ornamental plant industry for many years and is an experienced businessman, knowledgeable about plants, plant products, and the Imported Fire Ant quarantine in place regulating the movement of certain regulated articles. CX-6.

8. Redland Nursery had a valid compliance agreement until October, 2011 with the unique identifier FL-0034 assigned to the nursery. CX-4; CX-6; Tr. at 70.

9. On October 17, 2011 the rubber stamp associated with Redland Nursery was collected by Lucita Aguilera of the Florida Department of Agriculture and Consumer Services, Division of Plant Industry. CX-5; Tr. at 70.

10. Redland Nursery and John C. DeMott did not have a compliance agreement with the United States Department of Agriculture (USDA), Animal Plant Health Inspection Service (APHIS), for the interstate movement of articles regulated pursuant to 7 C.F.R. § 301.81 *et seq*. from October, 2011 through at least October, 2012. CX-6; CX-7; Tr. at 71.

11. To Be Farms, Inc. had a valid compliance agreement as of March 28, 2012 with the unique identifier FL-1531 assigned to the nursery. CX-5.

12. Respondents made at least four (4) shipments of regulated articles in April and May, 2012 from Redland Nursery in Homestead, Florida to buyers in Maryland and Delaware, outside of the imported fire ant quarantine. CX-9 – CX-44.

13. On April 17, 2012, Respondents shipped regulated articles from Redland Nursery in Homestead, Florida, within the imported fire ant quarantine, to Fager's Island in Ocean City, Maryland, outside of the imported fire ant quarantine. CX-9 – CX-15.

14. The April 17 shipment was billed to Fager's Island on a Redland Nursery invoice. CX-9; Tr. at 72, lines 10-13.

15. The bill of lading for the April 17 shipment indicates Redland Nursery as the location the plants were shipped from. CX-10; Tr. at 73.

16. The To Be Farms, Inc. imported fire ant stamp appears on the back of the bill of lading for the April 17 shipment. CX-10; Tr. at 74-5.

17. Fager's Island paid Redland Nursery for the regulated articles in the April 17 shipment. CX- 11; CX-13; Tr. at 75-6.

18. On May 2, 2012, Redland Nursery shipped regulated articles from Redland Nursery in Homestead, Florida, within the imported fire ant quarantine, to Dead Freddies Island Grill in Ocean City, Maryland, outside of the imported fire ant quarantine. CX-16; CX-17.

19. The May 2 shipment was billed to Dead Freddies Island Grill on a Redland Nursery invoice. CX-17; Tr. at 79-80.

20. The bill of lading for the May 2 shipment indicates Redland Nursery as the location the plants were shipped from. CX-17; Tr. at 80; 82.

21. The To Be Farms, Inc. imported fire ant stamp appears on the back of the bill of lading for the May 2 shipment. CX-17; Tr. at 81.

22. Redland Nursery arranged for the transport of the regulated articles delivered to Dead Freddies Island Grill on May 2. CX-18; Tr. at 81.

23. Dead Freddies Island Grill paid the transporter, Mercer Transportation, for the delivery of regulated articles on May 2. CX-20; Tr. at 82-3.

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24. On May 11, 2012, Redland Nursery shipped regulated articles from Redland Nursery in Homestead, Florida, within the imported fire ant quarantine, to the Sea Shell Shop in Rehoboth, Delaware, outside of the imported fire ant quarantine. CX-23 – CX-25.

25. The load sheet for the May 11 shipment is from Redland Nursery and indicates that the regulated articles shipped to the Sea Shell Shop were picked up at two locations, Redland Nursery and 3 D's. CX-23; Tr. at 86-7.

26. The bill of lading for the May 11 shipment indicates Redland Nursery as the location the plants were shipped from. CX-25; Tr. at 89.

27. The To Be Farms, Inc. imported fire ant stamp appears on the back of the bill of lading for the May 2 shipment. CX-25; Tr. at 88.

28. The Sea Shell Shop paid Redland Nursery for the shipment of regulated articles delivered on May 11. CX-26; Tr. at 89-90.

29. To fill the May 11 order, Redland Nursery purchased some plants from 3 D's in Miami, Florida, within the imported fire ant quarantine. CX-28; Tr. at 99.

30. To fulfill the order from Redland Nursery, 3 D purchased plants from L&S Krome in Miami, Florida, within the imported fire ant quarantine. CX-27; CX-41; Tr. at 98-9.

31. 3 D's treated the plants sold to Redland Nursery but did not have the appropriate compliance agreement to do so. CX-39; CX-40; Tr. at 49-50; 99-100.

32. Imported fire ants were actually found when the May 11 shipment from Redland Nursery to the Sea Shell Shop was unloaded. CX-30 – CX-34; Tr. at 104-05; 107-08.

33. The root ball of the infested plant was sprayed with insecticide at the time of unloading. CX-32; Tr. at 105. Additional insecticide treatment was later applied as well. CX-33; CX-34; Tr. at 107-08.

34. On May 23, Respondents shipped regulated articles from Redland Nursery in Homestead, Florida, within the imported fire ant quarantine, to Fager's Island in Ocean City, Maryland, outside of the imported fire ant quarantine. CX-42 – CX-44.

35. The May 23 shipment was billed to Fager's Island on a Redland Nursery invoice. CX-42; Tr. at 109.

36. The bill of lading for the May 23 shipment indicates Redland Nursery as the location the plants were shipped from. CX-43; Tr. at 110-11.

37. The To Be Farms, Inc. imported fire ant stamp appears on the back of the bill of lading for the April 17 shipment. CX-43; Tr. at 110-11.

38. Fager's Island paid Redland Nursery for the regulated articles in the April 17 shipment. CX-44; Tr. at 111-12.

39. Respondent DeMott failed to appear for the hearing held on July 12, 2016 in Miami, Florida. Tr. at 4.

IV. Conclusions of Law

The record evidence and the testimony presented at hearing, summarized herein above, fully supports a finding that the Respondents' actions in regards to the shipments identified in the Complaint were in flagrant violation of the Act, regulations, and signed Consent Decision and Order. Their reckless disregard for a Federal quarantine in place to prevent the human-assisted spread of a noxious plant pest resulted in exactly the kind of harm that the quarantine is intended to prevent – the spread of the pest. During USDA APHIS's investigation into Respondents' activities, investigators met with purchasers of plants from Redland Nursery, drivers who moved the plants from Florida to Delaware and Maryland, and obtained records from Redland Nursery directly. These records, CX-1 through 49 – excluding CX-15, CX-19, CX-24, and CX-38 which were not moved into evidence at the hearing – were admitted into evidence without objection. Tr. at 10-11. The record evidence and the testimony

presented at hearing demonstrate that, notwithstanding Respondents' denials in their Answer, there are no factual contentions and therefore no dispute of material facts and Complainant is entitled to a favorable decision. In addition, because the Respondents failed to appear, Complainant is entitled to a default decision.

A. Respondents violated Consent Decision and Order, P.Q. Docket No. 10-0331 by making shipments of regulated articles to buyers outside of the Imported Fire Ant quarantine when operating without a compliance agreement.

Respondents entered into Consent Decision and Order, P.Q. Docket No. 10-0331, effective October 11, 2011. CX-6; Tr. at 69-71. From April through June 2006, when the events giving rise to the Complaint that resulted in the 2011 Consent Decision took place, Redland Nursery had a valid compliance agreement. CX-5. The Consent Decision is signed by John C. DeMott in his individual capacity, and on behalf of Redland Nursery, Inc. CX-6. In the Consent, Respondents admitted to the jurisdictional facts and agreed to a civil penalty of $50,000, held entirely in abeyance, "provided respondents do not violate 7 C.F.R. § 301.81, related to the interstate movement of imported fire ant regulated articles, for a three-year period beginning from the effective date of this Consent Decision and Order." CX-6; Tr. at 70. The Consent also cancelled the Respondents' compliance agreement with APHIS to move regulated articles pursuant to 7 C.F.R. § 301.81-6 for one year from the effective date of the Consent. CX-6. Inspector Lucita Aguilera picked up Redland Nursery's imported fire ant stamp on October 17, 2011 and a representative from Redland Nursery signed the form indicating that the stamp associated with the compliance agreement had been collected by the State of Florida. CX-7; Tr. at 70. Respondents were required to wait one year, until October, 2012, to apply for a new compliance agreement with the State of Florida. CX-6. Respondents did not have a valid compliance agreement allowing them to move regulated articles outside of the quarantine area from October 2011 through October 2012. Redland Nursery did not enter into a new compliance agreement until April 2013. Tr. at 71, lines 19-22. The uncontroverted facts set forth in Section II demonstrate a violation of the Consent Decision.

B. Respondents violated the Plant Protection Act and regulations by moving regulated articles outside of the imported fire ant quarantine, through and into areas outside of the quarantine, without a limited permit or compliance agreement and fraudulently used the compliance agreement of another entity to move the regulated articles.

A person operating under a compliance agreement can issue the certificate that will allow for the interstate movement of a regulated article. 7 C.F.R. § 301.81-5. Persons who grow, handle, or move regulated articles interstate may enter into a compliance agreement, so long as they have "facilities and equipment to carryout disinfestation procedures or application of chemical materials in accordance with 7 C.F.R. Part 305 and meet the applicable State training and certification standards . . ." 7 C.F.R. § 3018.81-6. Once a person is operating under a compliance agreement, they must agree to comply with the provisions of 7 C.F.R. § 301.81 *et seq*. and any additional conditions imposed. 7 C.F.R. § 301.81-6.

Compliance agreements are entity specific and are non-transferable. CX-4; Tr. at 37. A compliance agreement allows a person or business to certify that they have properly treated the regulated article to prevent the spread of fire ants. By entering into a compliance agreement with APHIS, an entity agrees to "handle, process, move regulated articles in accordance with the provision of applicable plant quarantines." CX-4; CX-5. Once a person or entity has entered into a compliance agreement with APHIS, they are given a stamp with a "unique identifier" that is specific to that entity. CX-3. The stamp serves as a certificate to be used when moving regulated articles outside of the quarantined area. 7 C.F.R. § 301.81-6. A person operating under a compliance agreement also must certify that the regulated article is free of imported fire ant infestation, "has been grown, produced, manufactured, stored, or handled in a manner that would prevent infestation or destroy all life stages of the imported fire ant," and has been treated in accordance with 7 C.F.R. Part 305 before moving a regulated article interstate. 7 C.F.R. § 301.81-5(a).

The certificate that authorizes interstate movement of regulated articles must be attached to the container the regulated article is in, attached to the article itself, or attached to the waybill. 7 C.F.R. § 301.81-9. If the certificate is attached to the waybill, the waybill must provide a description

of the regulated article that sufficiently identifies the regulated article. 7 C.F.R. § 301.81-9.

All shipments of regulated articles outside of the quarantine area made by Redland Nursery in April and May of 2012 include an imported fire ant compliance agreement stamp on the back of the bill of lading that accompanied the shipment; however, it was the stamp of another nursery. In an attempt to continue to ship regulated articles from the quarantined area into a non-quarantined area, the Respondents used the stamp of another nursery, To Be Farms, Inc. while their compliance agreement was cancelled. The two corporations are wholly separate and distinct entities. CX-48; CX-49. Redland Nursery is located in Homestead, Florida and is a producer and distributor of tropical foliage and other plants. Redland Nursery was first organized as a for-profit corporation in the State of Florida in 1978 and remains in active status. CX-1; CX-48; Tr. at 63. To Be Farms was organized as a corporation in the State of Florida in 1985, with a different principal address, and also remains an active corporation. CX-49; Tr. at 63-4. At all times material to this matter, Respondent DeMott was the President and Director of Redland Nursery. CX-1; Tr. at 61-2. The two nurseries, Redland Nursery and To Be Farms, separately enter into compliance agreements with the State. CX-3; CX-4; CX-5. Upon entering into their compliance agreements, each entity received a corresponding stamp with its entity-specific unique identifier – Redland Nursery has the unique identifier FL-0034 and To Be Farms has the unique identifier FL-1531. Tr. at 68; CX-4; CX-5. At all times material to the allegations in the Complaint, To Be Farms had a single compliance agreement for containerized nursery stock. CX-5; Tr. at 68.

Respondent Redland did not have a compliance agreement with APHIS at all times material to this matter. CX7-. However, as stated above, a stamp associated with a compliance agreement for imported fire ants appears on the back of all waybills for the transactions identified in the complaint. The stamp that appears on the back of the waybills is associated with To Be Farms, Inc. with imported fire ant number FL-1531. To Be Farms, Inc. entered into a compliance agreement with APHIS on March 28, 2012, CX-5, when Redland Nursery, Inc. did not have a compliance agreement or associated stamp because of the terms of the 2011 Consent. CX-6. Respondent Redland was not permitted to enter into a new compliance agreement until October, 2012, and therefore, not permitted to

ship regulated articles outside of the quarantine without a limited permit.

Respondents made at least four shipments of regulated articles in April and May, 2012 from Redland Nursery when they were operating without a compliance agreement to buyers in Maryland and Delaware. CX-9 – CX-44; 7 C.F.R. § 301.81-2. One shipment from Redland Nursery actually contained imported fire ants. CX- 23 – 41. Each of the transactions identified in the Complaint was subject to the Secretary's jurisdiction under the Act.

1. *Shipment #1 to Fager's Island – Ocean City, Maryland*

On April 17, 2012, Respondent Redland shipped 198 "Beach Trees" to Fager's Island in Ocean City, Maryland from Homestead, Florida, Redland Nursery's physical location. CX-9 – CX-15. An invoice from Redland Nursery accompanied the shipment. CX-9; Tr. at 72, lines 10-13. The bill of lading that accompanied the shipment from Florida to Maryland identifies Redland Nursery, Inc. in Homestead, Florida as the location the plants were shipped from. CX-10; Tr. at 73. Seven stamps appear on the back of the bill of lading: five are associated with Redland Nursery and two are associated with To Be Farms. CX-10; Tr. at 74-75. The bill of lading includes certifications from Redland Nursery for General Nursery Stock Inspection, Reniform Nematode, Texas Certificate, Burrowing Nematode, and North Carolina Tropical Spiderwort. Certifications belonging to To Be Farms are included for General Nursery Stock Inspection and Imported Fire Ants. CX-10. The front of the bill of lading identifies Redland Nursery, Inc. as the only location plants were shipped from. CX-10. Fager's Island Administrative Assistant Barbara Corbett provided an affidavit stating that Fager's Island owner placed an order for plants with John DeMott and payment was made to Redland Nursery for the plants. CX-11; CX-14. Ms Corbett further stated that Fager's Island has "never done business with To Be Farms." CX-14; Tr. at 77-8. Further, she provided that "[t]hey order [their plants] directly from Redland." CX-14; Tr. at 78, lines 19-20. TQL is the broker company that arranged for the movement of plants from Florida to Maryland. CX-12; CX-15; Tr at 73-4. Sho Tyme X-press Trucking LLC actually moved the plants and stated in an affidavit that plants were picked up from Redland Nursery. CX-15. Redland Nursery was paid by Fager's Island for the shipment. CX-11; CX-13; Tr. at 75-6. Despite the fact that Respondent Redland did not have a

valid compliance agreement at the time of the shipment, they continued to move regulated articles outside of the quarantine area to non-quarantined destinations and unlawfully used the imported fire ant compliance agreement stamp associated with another entity in violation of the Act, regulations, and 2011 Consent decision.

2. *Shipment #2 to Dead Freddies Island Grill – Ocean City, Maryland*

On May 2, 2012, Respondent Redland shipped fifty-five (55) live plants from Redland Nursery, Inc. in Homestead, Florida to Dead Freddies Island Grill in Ocean City, Maryland. CX-16; CX-17. An invoice from Redland accompanied the shipment. CX-16; Tr. at 79. The bill of lading also accompanying the shipment had seven rubber stamp images, five belonging to Redland Nursery and two belonging to To Be Farms, Inc. CX-17; Tr. at 79-80. The bill of lading includes certifications from Redland Nursery for General Nursery Stock Inspection, Reniform Nematode, Texas Certificate, Burrowing Nematode, and North Carolina Tropical Spiderwort. Certifications belonging to To Be Farms are included for General Nursery Stock Inspection and Imported Fire Ants. CX-17; Tr. at 81. The front of the bill of lading identifies Redland Nursery as the only location where the plants shipped from. CX-17; Tr. at 80; 82. Redland Nursery arranged the transport of plants from Redland to Dead Freddies with Mercer Transportation. CX-18; Tr. at 82. Dead Freddies paid Mercer Transportation for the shipment. CX-20; Tr. at 82-3.

In a signed affidavit, Mr. Stephen Carullo, owner of Dead Freddies Island Grill, stated that he ordered the plants directly from John DeMott at Redland Nursery. CX-21; Tr. at 83-4. Mr. DeMott provided plant recommendations for Mr. Carullo. Tr. at 84, lines 2-8. Mr. Carullo further stated that he has "never done business with To Be Farms, Inc., 2B, 3D, or Triple D." CX-21; Tr. at 84. The shipment of plants to Dead Freddies was delivered by Terrance Payne. CX-22; Tr. at 85. In a conversation with the APHIS investigator, Mr. Payne "indicated that the entire shipment was picked up [at] Redland Nursery, Inc. in Homestead, Florida, and delivered directly to [Dead Freddies]." Tr. at 85, lines 11-14; CX-22. The plants were picked up from a single location and the only identified source of the plants is Redland Nursery, Inc. CX-22; Tr. at 85. Despite the fact that Respondent Redland did not have a valid compliance agreement at the

time of the shipment, Respondents continued to move regulated articles outside of the quarantine area to non-quarantined destinations and unlawfully used the imported fire ant compliance agreement stamp associated with another entity in violation of the Act, regulations, and 2011 Consent Decision.

3. *Shipment #3 to Sea Shell Shop – Rehoboth, Delaware*

On May 11, 2012, Respondent Redland shipped forty-eight (48) live plants from Redland Nursery in Homestead, Florida to the Sea Shell Shop in Rehoboth, Delaware, outside of the imported fire ant quarantine. CX-23 – 25. The load sheet included with the order indicates what plants were contained in the shipment and where the shipment came from. CX-23; Tr. at 86. The load sheet was generated by Redland Nursery. CX-23. Tr. at 86. The plants to fulfill this order were loaded at two locations, Redland and 3 D's. CX-23. Tr. at 86-7. The back of the bill of lading has seven stamps, five belonging Redland Nursery and two belonging to To Be Farms, Inc. CX-25. The bill of lading includes certifications from Redland Nursery for General Nursery Stock Inspection, Reniform Nematode, Texas Certificate, Burrowing Nematode, and North Carolina Tropical Spiderwort. Certifications belonging to To Be Farms are included for General Nursery Stock Inspection and Imported Fire Ants. CX-25; Tr. at 88. The plants were shipped from Redland Nursery. CX-25; Tr. at 89, lines 12-14 ("Q: Based on this Bill of Lading, can you tell where the plants in the shipment came from? A: Shipped from Redland Nursery, Inc."). Further, the Sea Shell Shop paid Redland Nursery for the plants purchased. CX-26; Tr. at 89-90. Sea Shell Shop co-owner James Derrick provided that "[w]e [Sea Shell Shop] have been ordering live plants including palm trees from Redland Nurseries, Inc. for approximately 10 years." CX-35 p.3.; Tr. at 91-3.

A portion of the plants in the May 11 order delivered to Sea Shell Shop were purchased by Redland from another nursery to fulfill the order. CX-27 – 28. However, Redland Nursery was ultimately responsible for moving the regulated articles outside of the quarantine. CX-23 – 25. Twenty plants were purchased by Redland Nursery from 3 D's Nursery. CX-28; Tr. at 99, lines 2-6. To fill the Redland order, 3 D's purchased plants from L&S Krome Property, Inc. CX-27; CX-41. Both 3 D's and L&S Krome are Florida corporations selling and moving regulated articles

within the quarantine. The invoice for the sale from L&S Krome to 3 D's has "Joyner Transportation" written on it with the DOT number, indicating that Joyner Transport had picked up that order and delivered it to John Derrick, whose signature also appears on the invoice. CX-27; Tr. at 98-9. 3 D's and L&S Krome are two separate businesses. CX-39; Tr. at 49-50. In a signed affidavit, Mr. de la Cruz, the foreman at 3 D's Nursery, stated that 3 D's Nursery did sell 20 Queen Palm trees to Respondent Redland and that the trees were treated with insecticide talstar 15% X 1000 gallons (Bifentrin) Orthene HD X 100. CX-39; Tr. at 49-50. Joyner Transportation was responsible for moving this order from Homestead, Florida to Rehoboth, Delaware. CX-29.

Redland Nursery purchased regulated articles from 3 D's Nursery to fulfill an order that was ultimately being sent outside of the quarantine. The twenty queen palms that Redland Nursery purchased were balled-and-burlapped plants, not containerized nursery stock. Tr. at 100, lines 10. 3 D Nursery's compliance agreement is only for containerized nursery stock. CX-40; Tr. at 99-100. Due to the fact that the treatment protocols vary based on the kind of regulated article, the plants sold from 3 D's Nursery to Redland were not properly treated in accordance with the requirements of a compliance agreement for balled-and-burlapped articles. Tr. at 101, lines 1 – 5 ("JUDGE: [] . . . is the reason that it has to be specific to the regulated item because the protocols for ensuring the safe transport [are] different for the regulated items? A: Correct. So the type of insecticides those would be different. JUDGE: Very different depending on what the item is? A: Correct."). Furthermore, even if 3 D's had the appropriate compliance agreement to move the twenty (20) queen palms outside of the quarantine, Redland Nursery actually moved the regulated articles outside of the quarantine and thus was the entity required to have the appropriate compliance agreement to do so. Tr. at 102. At the time of the shipment to the Sea Shell Shop, Redland Nursery's compliance agreement had been revoked. CX-6. Additionally, the bill of lading for the shipment to Sea Shell Shop does not include the imported fire ant compliance agreement stamp belonging to 3 D's Nursery or L&S Krome, so the origin of the plants contained in the shipment is not easily determined. CX-25; Tr. at 101-02. Despite the fact that Respondent Redland did not have a valid compliance agreement at the time of the shipment, they continued to move regulated articles outside of the quarantine area to non-quarantined destinations and unlawfully used the imported fire ant compliance

agreement stamp associated with another entity in violation of the Act, regulations, and 2011 Consent Decision.

4. *Shipment #4 to Fager's Island – Ocean City, Maryland*

On May 23, 2012, Respondent Redland Nursery shipped sixteen (16) plants from Homestead, Florida to Fager's Island in Ocean City, Maryland. CX-42 – 44. Included in the shipment to Fager's Island was a Redland Nursery invoice for the purchase. CX-42; Tr. at 109. The bill of lading that accompanied the shipment from Florida to Maryland identifies Redland Nursery, Inc. in Homestead, Florida as the location the plants were shipped from. CX-43; Tr. at 110-11. The back of the bill of lading has seven stamps, five Redland Nursery stamps and two To Be Farms stamps. CX-43; Tr. at 110-11. The bill of lading includes certifications from Redland Nursery for General Nursery Stock Inspection, Reniform Nematode, Texas Certificate, Burrowing Nematode, and North Carolina Tropical Spiderwort. Certifications belonging to To Be Farms are included for General Nursery Stock Inspection and Imported Fire Ants. CX-43. Tr. at 111. The front of the bill of lading identifies Redland Nursery, Inc. as the only location plants were shipped from. CX-43; Tr. at 110, lines, 12-17. Fager's Island paid Redland Nursery directly for the shipment of plants. CX-44; Tr. at 111-12. Fager's Island Administrative Assistant Barbara Corbett provided an affidavit stating that Fager's Island owner placed an order for plants with John DeMott and payment was made to Redland Nursery for the plants. CX-14. Ms. Corbett further stated that Fager's Island has "never done business with To Be Farms." CX-14.

For all shipments from Redland Nursery, the bill of lading has the To Be Farms, Inc. imported fire ant compliance agreement stamp. The stamp is not transferable, CX-5. Redland Nursery was not permitted to unlawfully stamp the bill of lading with the To Be Farms, Inc. stamp in order to move the regulated articles outside of the quarantine. Despite the fact that Respondent Redland did not have a valid compliance agreement at the time of the shipment, they continued to move regulated articles outside of the quarantine area to non-quarantined destinations using the imported fire ant compliance agreement stamp associated with another entity in violation of the Act, regulations, and 2011 Consent Decision.

C. <u>Respondents actually shipped imported fire ants to a non-quarantined area.</u>

The regulated articles shipped to the Sea Shell Shop on May 11, 2012 were actually infested with imported fire ants upon arrival in Rehoboth, Delaware. CX-30; CX-32. When the plants were delivered, Delaware Department of Agriculture employees Jimmy Kroon, State Survey Coordinator, and Entomologist Heather Harmon Disque were present at Sea Shell Shop. CX-32. As the plants were being unloaded, they observed "ants crawling into and out of the root ball of a Queen Palm Tree" and suspected that some of the ants could be imported fire ants. CX-32; Tr. at 104-05. Mr. Kroon informed co-owner John Derrick of the Sea Shell Shop that there were possibly imported fire ants among the observed ants. CX-32; Tr. at 103-05. In an effort to mitigate any harm, the Sea Shell Shop co-owner, Mr. John Derrick "sprayed the root ball with Carbaryl insecticide while it was on the concrete." CX-32; Tr. at 105. The tree with ants observed in the root ball was planted into a "pre-dug hole in the ground in the middle of an island at the entrance of the parking lot to prevent spread if possible. The Sea Shell Shop employee sprayed the root ball again once it was in the ground." CX-32; Tr. at 105. Although action was taken at the time of discovery of the pest, Mr. Kroon further instructed the Sea Shell Shop that additional insecticide should be applied to the plants. CX-32; Tr. at 105, lines 10 – 17.

Samples of ants were taken and tested and positively identified as *Solenopsis invicta*, imported fire ants. CX-30; CX-32; Tr. at 105-06. The Sea Shell Shop had the plants at their place of business treated for imported fire ants after the initial treatment. CX-33; CX-34; Tr. at 107-08.

V. Sanction and Order

Pursuant to the terms of Consent Decision and Order P.Q. Docket No. 10-0331, upon violation, the fifty-thousand dollar ($50,000) civil penalty shall be jointly and severally assessed and due and payable. CX-6. Complainant's request, pursuant to section 424 of the Act, that an additional civil penalty of eighty-thousand dollars ($80,000) be jointly and severally assessed (7 U.S.C. § 7734) is fully supported by the record evidence and witness testimony provided at hearing and is hereby **GRANTED**. (Tr. at 117, lines 13-18). The civil penalty requested herein is well within the statutorily authorized civil penalty range in light of the

violations by the Respondents. The requested civil penalty is consistent with civil penalties assessed under the Department's regulatory statutes. Section 424 of the Act authorizes the Secretary to assess a civil penalty not to exceed $500,000 for all violations adjudicated in a single proceeding. 7 U.S.C. § 7734(b)(1); Tr. at 118, lines 1-7. In recommending a sanction, APHIS considers what sanction would be appropriate to encourage compliance with the Act and regulations. Tr. at 118-19. The Secretary must consider the nature, circumstance, extent, and gravity of the violation or violations in determining the appropriate sanction to recommend. 7 U.S.C. § 7734(b)(2). Respondent DeMott is operating a for-profit business and has done so for many years. Tr. at 119. He is knowledgeable of the Act and regulations related to the imported fire ant quarantine and entered into a Consent with the Department which he "willfully and repeatedly violated." Tr. at 120, lines 6-7. The Secretary may also consider the ability of the Respondent to pay, the effect of the sanction on the ability of the Respondent to remain in business, any history of prior violations, the degree to which the Respondent is culpable, and any other factors the Secretary considers appropriate. 7 U.S.C. § 7734(b)(2).

APHIS found the Respondents to be highly culpable. Tr. at 132. The evidence in CX-1 through CX-49 – excluding CX-15, CX-19, CX-24, and CX-38 which were not moved into evidence at the hearing – clearly show that the Respondents were repeatedly willfully shipping regulated articles outside of a quarantined area to non-quarantined areas in flagrant violation of the Act and 7 C.F.R. § 301.81 *et seq*. Respondents used the certification stamp belonging to another entity in order to make such shipments because their certification stamp was withdrawn as a result of a prior Consent Decision to resolve a complaint filed for similar violations. Additionally, Respondents actually shipped imported fire ants from the quarantined area to a location in the non-quarantined area. Such flagrant violation of domestic quarantines in place to prevent the spread of plant pests and diseases constitute grave violations of the Act and regulations. As the APHIS Sanction Witness, Natalie Popovic testified "[o]ur goal, overall, is to bring him into compliance with the Plant Protection Act, [yet] enable him to continue operating in business." Tr. at 119, lines 1-4.

PLANT PROTECTION ACT

ORDER

Respondents are jointly and severally assessed a civil penalty of eighty-thousand dollars ($80,000) for the violations of the Plant Protection Act proven at hearing. This civil penalty is in addition to the fifty-thousand dollar ($50,000) civil penalty held in abeyance pursuant to Consent Decision and Order P.Q. Docket No. 10-0331 which is now immediately due and payable. The Respondents shall send a certified check or money order for one-hundred thirty-thousand dollars ($130,000), payable to the Treasurer of the United States, to:

United States Department of Agriculture
APHIS, U.S. Bank
P.O. Box 979043
St. Louis, MO 63197-9000

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket numbers of this proceeding.

This Order shall be final and effective thirty-five (35) days after the date of service of this Order on the Respondents unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.142).

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

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SOYBEAN PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

DEPARTMENTAL DECISIONS

In re: JOHN R. SHOUP, d/b/a DINSDALE ELEVATOR.
Docket No. 15-0018.
Decision and Order.
Filed December 2, 2016.

SPRICA.

Rupa Chilukuri, Esq. and Sharlene A. Deskins, Esq. for Complainant.
Abby S. Wessel, Esq. and Kristin R. Schiller, Esq. for Responent.
Initial Decision and Order entered by Bobbie J. McCartney, Chief Administrative Law Judge.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT

Procedural History

On July 6, 2015, Complainant, the Agricultural Marketing Service [AMS] filed a motion for summary judgment in the case captioned above. The Motion was proffered pursuant to section 1.143(b) (7 C.F.R. § 1.143(b)) of the rules of practice that govern administrative proceedings arising under the Soybean Promotion, Research and Consumer Information Act (7 U.S.C. §§ 6301-6311) [Act] and the Order (7 U.S.C. §§ 1220.101 to 1220.257) [Order] and the Rules and Regulations issued pursuant to the Act (7 C.F.R. §§ 1260.301-1260.314) [Regulations]. The Motion was based on all of the pleadings and papers filed in this matter and the memorandum in support attached to the Motion.

The Complainant's October 30, 2014 Complaint and July 6, 2015 Motion for Summary Judgment averred that the Respondent failed to pay assessments on soybeans he purchased from producers from November 1, 2009 through August 16, 2013 and, further, that the Respondent failed to file reports as required by the Act and Regulations on soybeans he

purchased on six separate occasions from December of 2011 to July of 2013.

On November 24, 2014, the Respondent filed an answer to the Complaint that denied in general the violations in the Complaint. Subsequently, Administrative Law Judge Bullard issued an order providing for the exchange of exhibits. The parties exchanged exhibits pursuant to that order.

On July 6, 2015, Complainant filed a motion for summary judgment, and on July 20, 2015, Respondent filed a response in opposition to the Motion for Summary Judgment. A hearing date was initially set for July 14, 2015; however, during a conference call with Judge Bullard and the parties, the Respondent asserted that another entity is the collecting person and therefore that he was not responsible for paying the late fees. On October 21, 2015 Judge Bullard issued an order directing the parties to "file with the Hearing Clerk for OALJ any and all evidence that supports each party's position on that issue, together with written argument that includes precedent and statutory legislative guidance by not later than December 4, 2015."

Complainant filed a timely response to that Order on December 4, 2015, which provided full support for its position that the Respondent was responsible for paying the subject late fees and renewing its Motion for Summary Judgment on the underlying substantive issues as charged in Complainant's October 30, 2014 Complaint and July 6, 2015 Motion for Summary Judgment. Respondent failed to file a response to the Order.

By order issued on August 23, 2016, following Judge Bullard's retirement from Federal Service, the above-titled case was reassigned to the docket of Chief Administrative Law Judge Bobbie J. McCartney.

The Act

The Soybean Promotion, Research and Consumer Information Act (7 U.S.C. §§ 6301-6311) [Act] provides that it is in the "public interest to authorize the establishment, through the exercise of the powers provided in this subtitle, of an orderly procedure for developing, financing through assessments on domestically-produced soybeans, and

implementing a program of promotion, research , consumer information, and industry information designed to strengthen the soybean industry 's position in the marketplace . . . .” 7 U.S.C. § 6301. The Act and the regulations issued pursuant to the Act require that the first purchaser of soybeans collect an assessment from soybean producers. The assessment collected by the first purchaser is then submitted in a timely manner along with a report to a qualified state soybean board in order to finance soybean research and promotion programs. *See* 7 C.F.R. §§ 1220.233, 1220.311, and 1220.312.

The Act provides that a civil penalty of not more than $1,000 may be assessed for each violation. The Act further provides that in a case of willful failure to pay, collect, or remit an assessment an additional penalty equal to the amount of such assessment will apply. *See* 7 U.S .C. § 6307 (c)(1)(B). The Act provides that a cease and desist order may be issued requiring a person to cease from further violations. *See* 7 U.S.C. § 6307 (c) (2).

The Violations

The Respondent in his Answer denied in general the allegations in the Complaint. However, the exhibits attached to the Complainant’s July 6, 2015 Motion for Summary Judgment, including exhibits which contained the signature of the Respondent, establish that the Respondent violated the Act and Order by failing to pay the late fee for paying assessments in an untimely manner and for failing to fail reports with a qualified state soybean boards for the assessments he collected from November 1, 2009 to October 30, 2014. These exhibits are summarized below and are attached to Complainant’s Exhibits in Support of Complainant’s July 6, 2015 Motion for Summary Judgment.

The documents obtained from the Respondent establish that he paid assessments late from November 1, 2009 to August 16, 2013. The Respondent submitted a Form LS-46 (CX-1) to the qualified state soybean board for Iowa which is called the Iowa Soybean Association on or about September 28, 2011. The Respondent noted on the form that the assessments covered a four year time period from 2009 to 2013. Section 1220.223(c)(2) of the Order requires that the amount of the assessments owed by increased by two percent (2%) each month following the month

in which the assessments were due. Thus, the Respondent by failing to assessments purchased from soybeans producers from November 1, 2009 to July 31, 2011 owes a late under Section 1220.223(c)(2). *See* CX-1 and CX-2.

The documents obtained from the Respondent establish that he paid assessments due on soybeans he purchased from producers from February 1, 2013 through July 31, 2013 on or about August 15, 2013. *See* CX-4 and CX-5. The Respondent notes on Form LS-46 that he has not paid the late fee. *See* CX-4.

Accordingly, the Respondent as the first purchaser failed to pay assessments in a timely manner and failed to pay the late fee on assessments he submitted late. Furthermore, the Respondent failed to file reports (Form LS-46) on six occasions from December 2011 to July 2013 for soybeans that he purchased from producers. Specifically, the Respondent failed to file reports (LS-46) in December 2011, January 2012, February 2012, March 2012, July 2012 and July 2013.

No Material Facts in Dispute

Complainant's Exhibits

CX-1 Report and Remittance of Amount Collected

CX-2 Dinsdale Elevator Check #7217

CX-3 Dinsdale Elevator Invoice No. 82492

CX-4 Report and Remittance of Amount Collected 8-15-2013

CX-5 Dinsdale Elevator Check #7757

CX-6 Dissolution of Dinsdale Elevator September 10, 1997

Respondent's Exhibits

RX-1 Page one of 2013 Schedule K-1 for J & M Fam1, LLC

RX-2 Three documents from the Secretary of State showing that J & M Farm, LLC is a separate entity

RX-3 Com Checkoff Compliance Report page one

RX-4 Page one of Accountants Financial Statement as of April 30, 2013 showing the reference to J & M Farm, LLC d/b/a Dinsdale Elevator

RX-5 Copies of Dinsdale Elevator Check Nos. 7217, 7344, 7417, 7477, 7635, 7757, 7853, 8174, 8221

RX-6 Page one of 2012 Schedule K-1 for J & M Farm, LLC

RX-7 Page one of 2011 Schedule K-1 for J & M Farm, LLC

RX-8 Page one of Tama County Assessor's Property Reports for Parcel Numbers 0213327008, 0213330001, 0213329008

RX-9 State of Iowa Grain Dealer License of J & M Farm, L.L.C.

RX-10 Statement of Account from GNB Bank showing that account number 2021862 has a name of "J & M Farm, LLC d/b/a Dinsdale Elevator"

RX-11 2011 Iowa form 1065 for J & M Farm, LLC

RX-12 2011Reviewed Financial Statements with Accountants' Report for J & M Farm, LLC

RX-13 Warehouse Receipt for J & M Farm, LLC d/b/a Dinsdale Elevator

Respondent through his attorney argues that another entity J & M Farm, LLC doing business as Dinsdale Elevator is involved in the collection of assessment pursuant to the Act. Respondent's Exhibits do not support his claim that Respondent is not the entity responsible for collecting assessments.

First, under the Soybean Order, in order for J & M Farm, LLC to be responsible for paying the late fee, J & M Farm would have to be the first purchaser of soybeans. The Respondent presented no evidence to show that J & M Farm was the first purchaser. Indeed, the evidence established that the Respondent was the first purchaser because he paid the assessments. *See* Exhibits CX -1 and CX-3. Further, Respondent identified

himself in the reports he filed with the Iowa Soybean Association as the first purchaser. The checks that the Respondent used to pay the Iowa Soybean Association (CX-2 and CX-5) are signed by Respondent. The checks that Respondent signed list the entity of "Dinsdale Elevator." According to the records of the Iowa Secretary of State, Dinsdale Elevator was dissolved on May 18, 2000. Although, both Respondent and J & M Farm, LLC are using the name "Dinsdale Elevator" apparently neither registered that name as its business name in Iowa. Furthermore, it is not material under the Act as to the activities of other business entities that the Respondent operates or if those other business use a common business name to determine who is the first purchaser of soybeans. The material evidence establishes that Respondent is the first purchaser as defined in the Act and Order. Further, the Respondent indicated he was the first purchaser by submitting Form LS-46.

The exhibits that the Respondent submitted do not support his argument that J & M Farm, LLC is the entity that was the first purchaser of soybeans. First, it is unclear from the exhibits that the Respondent submitted as to that status of J & M Farm. The Respondent's Schedule K-1 (RX-1) lists the Respondent as being a general partner. However, the financial statements for J & M Farm lists the. Respondent with the title of "member." *See* RX-6 at 1.

The use of the term "member" by the Respondent would indicate that J & M Farm was a corporation with shareholder members or a cooperative with members. However, the Schedule K-1 (RX-1) that the Respondent submits for income tax purposes lists the Respondent as being a partner. J & M Farm, LLC lists self as doing business as Dinsdale Elevator. *See* RX-8, RX-7, RX-6, RX-5 and RX-1. However, the business entity filings with the Iowa Secretary of State list J & M Farm, LLC without listing that it is doing business under another name. *See* RX-2 and RX-3. Therefore, the evidence that the Respondent submitted does not support that J & M Farm is the first purchaser of soybeans and therefore subject to the requirements in the Soybean Act and Order.

Assuming arguendo that J & M Farm, LLC is a corporate entity that was responsible for collecting and remitting the assessments, the corporate veil must be pierced to prevent the complete frustration of the operation of Soybean Act and Order. *See Mil-Key, Farm, Inc.*, 54 Agric. Dec. 56, 72

(U.S.D.A. 1995). A court may pierce the corporate veil when an individual or individuals are responsible for the management, direction and control of the activities of the corporation. *See Trenton Livestock, Inc.*, 41 Agric. Dec. 1965 (U.S.D.A. 1982). The Respondent asserts that he is involved with several entities including J & M Farm. The Respondent raises his association with J & M Farm in order to circumvent the regulatory requirements in the Soybean Order. In particular, the Respondent argues that J & M Farm is responsible for paying the assessments due on the soybeans he marketed, failing to remit reports in a timely manner and for paying the late fees for assessments that were repeatedly paid late.

Notably, the only individuals that are involved in J & M Farm according to the Respondent's exhibits, are the Respondent and his son. The Respondent asserts that he is involved with several entities including J & M Farm. The Respondent raises his association with J & M Farm in order to circumvent the regulatory requirements in the Soybean Order. In particular, the Respondent argues that J & M Farm is responsible for paying the assessments on the soybeans he marketed, failing to remit reports in a timely manner and for paying the late fees for assessments that were repeatedly paid late. However, the Respondent paid the assessments due with checks that list "Dinsdale Elevator" and not J & M Farm. *See* CX-2 and CX-5.As the evidence shows, the checks that were used to pay the assessments were not from J & M Farm. The Respondent managed, directed and controlled the activities of J & M Farm since he lists himself as a partner. *See* RX-1. Dinsdale Elevator is a business name that the Respondent uses to operate J & M Farm. However, the corporate entity known as "Dinsdale Elevator" ceased to operate in 1997. CX-6.

Respondent failed to establish that a corporate entity was the first purchaser of soybeans. Indeed, the evidence submitted by the Respondent shows that J & M Farm handles corn and paid assessments under a state program. RX-5, RX-8. The Respondent submitted no evidence to show that J & M Farm or any other corporate entity is the first purchaser of the soybeans that the Respondent purchased and paid assessments on from November 2009 to August 2013.

Assuming arguendo that there is a corporate entity involved with the Respondent, it is appropriate to pierce the corporate veil to prevent the Respondent from circumventing the regulations contained in the Soybean

Act and Order that require the first purchaser to pay late fees for assessments that the first purchaser remits late. In *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1343 (8th Cir. 1971), the Court held:

> The law is well settled that the "corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437, 66 S. Ct. 247, 90 L. Ed. 181 (1945); *United States v. Lehigh Valley R. R.*, 220 U.S. 257, 259, 31 S. Ct. 387, 55 L. Ed. 458 (1911); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 717 (7th Cir. 1965); *Joseph A. Kaplan & Sons, Inc. v. FTC*, 121 U.S. App. D.C. l, 347 F.2d 785, 787 n. 4 (1965). *See also* 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 45 (1963).

In *Corn Products Refining Company v. Benson*, 232 F.2d 554, 565 (C.A. 2), the Court similarly pierced the corporate veil to prevent circumvention of a Federal regulatory program. The Court held:

> The existence of a separate corporate entity should not be permitted to frustrate the purpose of a federal regulatory statute—"corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute." *Alabama Power Co. v. McNinch*, 1937, 68 App. D.C. 132, 94 F.2d 601, 618. *See also Electric Bond & Share Co. v. SEC*, 1938, 303 U.S. 419, 440, 58 S. Ct. 678, 82 L. Ed. 936; Dickey v. N. L. R. B., 6 Cir. 1954, 217 F.2d 652, 653; *United States v. Aycock-Lindsey Corp.*, 5 Cir., 1951, 187 F.2d 117, 118-119.

(Cited in *Mil-Key Farm, Inc.*, 54 Agric. Dec. 26 (U.S.D.A. 1995)).

The Respondent raised the existence of a corporate entity in order to circumvent the payment of late fees at issue this case. The corporate entity can be disregarded if failure to do so would circumvent a statute. In this

matter, assuming arguendo that a corporate entity were the first purchaser, then the Respondent could frustrate the purposes of the Soybean Act and Order merely by identifying the corporate entity as the entity responsible for paying the late fees and thereby avoid the payment of late fees despite the fact the only individuals that are involved in J & M Farm, according to the Respondent's exhibits, are the Respondent and his son.

Sanctions

Complainant requests, pursuant to Section 1972 of the Act (7 U.S.C. § 6307(c)(1)(A) and (B)), that Respondent be ordered to cease and desist from (1) failing to pay assessments in a timely manner and (2) failing to file reports in a timely manner. The Complainant requests that the Respondent be directed to pay the late fees of $2,431.31 due as of April 14, 2015 (a fee of two percent (2%) on the amount of assessments he failed to pay in a timely manner).

The Complainant also requests that pursuant to Section 1972 of the Act that the Respondent be assessed a civil penalty of $5,000 based on the Respondent's refused for several years to pay the assessments he collected from soybean producers.

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (U.S.D.A. 1991) (Decision as to James Joseph Hickey and Shannon Hansen), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along will all relevant circumstances, always giving appropriate weight to the recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose.

In this case the documents establish that Respondent willfully refused to pay assessments he collected from producers in a timely manner. Respondent, during the time he had the assessments, had use of that money

while denying the United Soybean Board the use of the funds for the purposes of promoting soybeans. Once the Respondent paid the assessments, he still refused to pay the two-percent (2%) fee. The purpose of the two-percent (2%) fee is to provide an incentive for first purchasers to pay the assessment in a timely manner. The two-percent (2%) fee takes the financial incentive from first purchasers who collect assessments and then fail to remit the assessments to a qualified state soybean board because the two-percent (2%) fee encourages first purchasers to avoid the fee by paying on time.

The Respondent, by paying late and then willfully refusing to pay the two-percent (2%) fee, circumvented the deterrent impact of having a fee to incentivize prompt payment of assessments from first purchasers. The Respondent's violations were not limited to refusing to pay the two-percent (2%) fee on assessments he willfully refused to pay on time. The Respondent failed to file mandatory reports six times between 2011 and 2013. The purpose of the reports is to allow the United Soybean Board to determine the amount of assessments that a first purchaser must pay and when the payment should be made. The Respondent, by refusing to file mandatory reports undermines the ability of the United Soybean Board to collect assessments that it utilizes to fund programs to promote soybeans and for research on soybeans for the benefit of soybean producers, consumers, and handlers.

Accordingly, the sanctions requested by the complainant are fully supported and are hereby **GRANTED.**

Findings of Fact and Conclusions of Law

The following findings of fact and law are fully supported by the record and are hereby adopted:

1. Respondent John R. Shoup is an individual whose business is located at 1262 Railroad St., Reinbeck, Iowa 50669-9863.

2. Respondent at all times material was the first purchaser, as the term is defined in the Order, of soybeans from a producer.

3. Respondent from November 1, 2009 through October 30, 2014 failed to pay a two-percent (2%) fee on assessments that he collected from soybean producers and then paid late to the Iowa Soybean Association. The total amount that the Respondent must pay to the Iowa Soybean Association totaled $2,431.13 as of April 14, 2015. A check or money order made out to the Iowa Soybean Association to pay the two-percent (2%) fee must be paid within thirty (30) days of the effective date of this Order.

4. Respondent shall cease and desist from (1) failing to pay assessments in a timely manner and (2) failing to file reports in a timely manner.

5. Respondent is hereby assessed a civil penalty of $5,000 payable to the Treasurer of the United States. The check or money order to pay the $5,000 civil penalty shall have written on it "Docket No. 15-0018."

ORDER

This Order as set forth in the findings of fact and conclusions of law adopted herein above shall take effect on the day that this Decision becomes final. Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: https://www.oaljdecisions.dm.usda.gov/misc-current.

AGREEMENTS & ORDERS

In re: RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA; HEARING ON PROPOSED AMENDMENT OF MARKETING ORDER NO. 989.
Docket No. 16-0016.
Order Certifying Transcript.
Filed August 9, 2016.

ANIMAL HEALTH PROTECTION ACT

SWEENEY S. GILLETTE.
Docket No. 16-0024.
Miscellaneous Order.
Filed December 5, 2016.

ANIMAL WELFARE ACT

In re: TIMOTHY L. STARK, an individual.
Docket No. 15-0080.
Miscellaneous Order of Judicial Officer.
Filed July 29, 2016.

In re: TIMOTHY L. STARK, an individual.
Docket No. 15-0080.
Miscellaneous Order.
Filed September 8, 2016.

AWA – Administrative procedure – Conviction of animal-welfare law violation – *De facto* time bar – License, termination of – Petition for reconsideration.

Colleen A. Carroll, Esq. for Complainant.
David E. Mosley, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Procedural History

On August 8, 2016, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Petition for Reconsideration requesting that I reconsider *Stark*, AWA Docket No. 15-0080, 2016 WL 4184323 (U.S.D.A. July 15, 2016). On September 6, 2016, Timothy L. Stark filed Objection to Complainant's Petition for Reconsideration, and on September 7, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Complainant's Petition for Reconsideration.

Discussion

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer. The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law.

The Administrator raises three issues in Complainant's Petition for Reconsideration. First, the Administrator contends I erroneously established a *de facto* time-bar on the institution of proceedings to terminate Animal Welfare Act[2] licenses based upon convictions of

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].
[2] Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159).

violating federal, state, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals (Complainant's Pet. for Recons. ¶ II at the fifth unnumbered page, ¶ IVa at the eighth through tenth unnumbered pages).

The Administrator's contention that my dismissal of the Administrator's February 26, 2015, Order to Show Cause is based upon an application of a *de facto* time-bar has no merit. As I stated in the July 15, 2016, Decision and Order, my dismissal of the Order to Show Cause is based on all of the facts in this proceeding. While the seven-year-one-month-nine-day period between Mr. Stark's conviction and the Administrator's institution of this proceeding was one of many factors that I considered when I dismissed the Order to Show Cause,[3] I did not establish a *de facto* time-bar for the institution of proceedings to terminate Animal Welfare Act licenses based upon convictions of violating federal, state, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals.

Second, the Administrator contends that I erroneously failed to adopt his determination that Mr. Stark's January 17, 2008, conviction of violating the Endangered Species Act renders Mr. Stark's continued licensure contrary to the purposes of the Animal Welfare Act (Complainant's Pet. for Recons. ¶ IVa at the eighth unnumbered page).

The Administrator's determination that Mr. Stark's January 17, 2008, conviction of violating the Endangered Species Act renders Mr. Stark's continued licensure contrary to the purposes of the Animal Welfare Act is not dispositive of this case. The Regulations provide that an Animal Welfare Act license may be terminated after a hearing in accordance with the Rules of Practice.[4] The Rules of Practice provide that, post-hearing, an administrative law judge shall issue a decision which becomes the final decision of the Secretary of Agriculture, unless a party to the proceeding appeals the administrative law judge's decision to the Judicial Officer.[5] If the administrative law judge's decision is appealed to the Judicial Officer, the Judicial Officer issues the final order for the Secretary of Agriculture.[6]

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[3] Stark, AWA Docket No. 15-0080, 2016 WL 4184323, at *5 (U.S.D.A. July 15, 2016).
[4] 9 C.F.R. § 2.12.
[5] 7 C.F.R. § 1.142(c)(4).
[6] 7 C.F.R. § 1.145(i).

While the Judicial Officer may give weight to the Administrator's determination regarding whether a respondent's Animal Welfare Act license should be terminated, the Rules of Practice do not require that the Judicial Officer adopt the Administrator's determination. Therefore, I reject the Administrator's contention that my failure to adopt the Administrator's determination, is error.

Third, the Administrator contends I erroneously concluded, in order to terminate an Animal Welfare Act license pursuant to 9 C.F.R. § 2.12, the Administrator must prove more than the respondent's conviction of violating a federal, state, or local law or regulation pertaining to the transportation, ownership, neglect, or welfare of animals (Complainant's Pet. for Recons. ¶ II at the fifth unnumbered page, ¶ IVb at the eleventh through the nineteenth unnumbered pages).

An Animal Welfare Act license may be terminated for any reason that an initial Animal Welfare Act license application may be denied pursuant to 9 C.F.R. § 2.11.[7] An initial Animal Welfare Act license application may be denied based solely upon an applicant's conviction of violating a federal, state, or local law or regulation pertaining to the transportation, ownership, neglect, or welfare of animals.[8] However, the Administrator did not institute this proceeding based only on Mr. Stark's conviction of violating the Endangered Species Act. Instead, the Administrator's February 26, 2015, Order to Show Cause identifies as a basis for termination of Mr. Stark's Animal Welfare Act license a previous finding that Mr. Stark harmed the animals in his custody.[9] As fully discussed in *Stark*, AWA Docket No. 15-0080, 2016 WL 4184323 (U.S.D.A. July 15, 2016), the record is devoid of any evidence that Mr. Stark has been found to have harmed the animals in his custody.

For the foregoing reasons, the following Order is issued.

ORDER

Complainant's Petition for Reconsideration, filed August 8, 2016, is denied.

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[7] 9 C.F.R. § 2.12.
[8] 9 C.F.R. § 2.11(a)(6).
[9] Order to Show Cause ¶ 4 at 2.

MISCELLANEOUS ORDERS & DISMISSALS

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DOUGLAS KEITH TERRANOVA, an individual, & TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058, 15-0059, 16-0037, 16-0038.
Miscellaneous Order of Judicial Officer.
Filed October 18, 2016.

ELI A. MILLER, d/b/a HILL TOP KENNEL.
Docket No. 16-0027.
Miscellaneous Order.
Filed October 24, 2016.

RON NEASE, d/b/a BRIARWOOD RANCH and BRIARWOOD RANCH SAFARI PARK.
Docket No. 14-0198.
Miscellaneous Order.
Filed November 29, 2016.

DOUGLAS KEITH TERRANOVA, an individual, & TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058, 15-0059, 16-0037, 16-0038.
Miscellaneous Order of Judicial Officer.
Filed November 29, 2016.

DOUGLAS KEITH TERRANOVA, an individual, & TERRANOVA ENTERPRISES, INC., a Texas corporation.
Docket Nos. 15-0058, 15-0059, 16-0037, 16-0038.
Miscellaneous Order of Judicial Officer.
Filed December 14, 2016.

CIVIL RIGHTS

In re: BERNICE ATCHISON.
Docket No. 16-0144.
Miscellaneous Order.
Filed September 9, 2016.

CIVIL RIGHTS – Administrative procedure – Appeal to Judicial Officer – Appeal petition – Dismissal.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DISMISSING PURPORTED APPEAL PETITION

Procedural History

Administrative Law Judge Jill S. Clifton [ALJ] issued *Atchison*, Docket No. 16-0144, 75 Agric. Dec. ___ (U.S.D.A. Aug. 17, 2016) (Dismissal), in which the ALJ found that the Office of Administrative Law Judges has no authority to grant the relief requested by Bernice Atchison and dismissed Ms. Atchison's request for relief with prejudice. On August 19, 2016, Ms. Atchison appealed *Atchison*, Docket No. 16-0144, 75 Agric. Dec. ___ (U.S.D.A. Aug. 17, 2016) (Dismissal), to the Judicial Officer. On September 7, 2016, the Assistant Secretary for Civil Rights, United States Department of Agriculture, filed Agency Opposition to Appeal to Judicial Officer, and, on September 8, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for consideration and decision.

On September 8, 2016, after the Hearing Clerk transmitted the record to the Office of the Judicial Officer, Ms. Atchison filed a reply to the Agency Opposition to Appeal to Judicial Officer. The rules of practice applicable to this proceeding[1] do not provide for filing a reply to a response to an appeal petition, and Ms. Atchison failed to request leave to file a reply to the Agency Opposition to Appeal to Judicial Officer. Therefore, I have not considered Ms. Atchison's reply to the Agency Opposition to Appeal to Judicial Officer.

Discussion

The Rules of Practice set forth requirements for an appeal petition, as follows:

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

> **§ 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.

7 C.F.R. § 1.145(a). Ms. Atchison's August 19, 2016, filing does not identify any error by the ALJ; does not identify any portion of the ALJ's August 17, 2016, Dismissal or any ruling by the ALJ with which Ms. Atchison disagrees; and does not allege any deprivation of rights. In short, Ms. Atchison's August 19, 2016, filing does not remotely conform to the requirements for an appeal petition set forth in 7 C.F.R. § 1.145(a).[2] I have long held that purported appeal petitions that do not remotely conform to the requirements of 7 C.F.R. § 1.145(a) are to be dismissed;[3] therefore, Ms. Atchison's purported appeal petition is dismissed.

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[2] *See* Ms. Atchison's August 19, 2016, filing entitled "Appeal To Judicial Officer In Re: Bernice Atchison," which states in its entirety: "Please acknowledge email upon receipt."

[3] Tierney, OFPA Docket No. 13-0196, 2014 WL 7534276 (U.S.D.A. Dec. 9, 2014) (Order Dismissing Purported Appeal Pet.); Estes, AWA Docket No. 11-0027, 2014 WL 4311065 (U.S.D.A. June 12, 2014) (Order Dismissing Purported Appeal Pet. and Cross-Appeal); Kasmiersky, P. & S. Docket No. 12-0600, 2014 WL 4311063 (U.S.D.A. June 9, 2014) (Order Dismissing Purported Appeal Pet.); Oasis Corp., PACA Docket No. D-12-0423, 2013 WL 8208340 (U.S.D.A. Jan. 25, 2013) (Order Dismissing Purported Appeal Pet.);

For the foregoing reason, the following Order is issued.

ORDER

Ms. Atchison's August 19, 2016, purported appeal petition is dismissed.

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DEXTER DAVIS.
Docket No. 16-0152.
Miscellaneous Order.
Filed September 19, 2016.

PLEZY NELSON, SR.
Docket No. 16-0156.
Miscellaneous Order.
Filed September 19, 2016.

PLEZY NELSON, JR.
Docket No. 16-0157.
Miscellaneous Order.
Filed September 19, 2016.

CARL PARKER.
Docket No. 16-0153.
Miscellaneous Order.
Filed September 21, 2016.

MUHAMMAD ROHBALAA.
Docket No. 16-0154.
Miscellaneous Order.
Filed September 21, 2016.

Gentry, P. & S. Docket No. D-07-0152, 2009 WL 9534126 (U.S.D.A. Mar. 18, 2009) (Order Dismissing Purported Appeal Pet.); Breed, A.Q. Docket No. 89-72, 50 Agric. Dec. 675 (U.S.D.A. Jan. 11, 1991) (Order Dismissing Purported Appeal); Lall, P.Q. Docket No. 88-28, 49 Agric. Dec. 895 (U.S.D.A. July 5, 1990) (Order Dismissing Purported Appeal).

MISCELLANEOUS ORDERS & DISMISSALS

ROBERT BINION.
Docket No. 16-0155.
Miscellaneous Order.
Filed September 22, 2016.

JOHNNY HENDERSON.
Docket No. 16-0158.
Miscellaneous Order.
Filed September 22, 2016.

JOHN A. WRIGHT.
Docket No. 16-0159.
Miscellaneous Order.
Filed September 22, 2016.

ROY DAY.
Docket No. 16-0160.
Miscellaneous Order.
Filed September 22, 2016.

EDDIE WISE.
Docket No. 16-0161.
Miscellaneous Order.
Filed September 22, 2016.

DOROTHY WISE.
Docket No. 16-0162.
Miscellaneous Order.
Filed September 22, 2016.

SARAH McCALPINE.
Docket No. 16-0164.
Miscellaneous Order.
Filed September 23, 2016.

ROBERT WILLIAMS.
Docket No. 16-0165.
Miscellaneous Order.
Filed September 23, 2016.

ANNIE L. WILLIAMS.
Docket No. 16-0156.
Miscellaneous Order.
Filed September 23, 2016.

FERRELL ODEN.
Docket No. 16-0167.
Miscellaneous Order.
Filed September 30, 2016.

MICHAEL STOVALL.
Docket No. 16-0168.
Miscellaneous Order.
Filed October 4, 2016.

WILLIE JOE DANIELS.
Docket No. 16-0171.
Miscellaneous Order.
Filed October 4, 2016.

JACQUELINE WALLACE.
Docket No. 16-0172.
Miscellaneous Order.
Filed October 4, 2016.

JOHN RUTLEDGE.
Docket No. 16-0173.
Miscellaneous Order.
Filed October 5, 2016.

JULIUS LANGHORN, a/k/a JULIUS LANGHORNE.
Docket No. 16-0174.
Miscellaneous Order.
Filed October 5, 2016.

ELIJAH WOODS.
Docket No. 16-0175.
Miscellaneous Order.
Filed October 5, 2016.

MISCELLANEOUS ORDERS & DISMISSALS

DANIEL WOODS.
Docket No. 16-0176.
Miscellaneous Order.
Filed October 5, 2016.

LONNIE DOUGLAS.
Docket No. 16-0177.
Miscellaneous Order.
Filed October 5, 2016.

JOE C. BROWN.
Docket No. 16-0179.
Miscellaneous Order,
Filed October 5, 2016.

INEZ CAMPBELL (deceased), c/o HOLLIS CAMPBELL.
Docket No. 16-0180.
Miscellaneous Order.
Filed October 5, 2016.

JOHNNY HUGHES, a/k/a JOHNNY HUGHE.
Docket No. 16-0181.
Miscellaneous Order.
Filed October 14, 2016.

LEO JACKSON.
Docket No. 17-0003.
Miscellaneous Order.
Filed November 2, 2016.

In re: BERNICE ATCHISON.
Docket No. 16-0144.
Miscellaneous Order.
Filed November 22, 2016.

CIVIL RIGHTS – Administrative procedure – Appeal petition.

Corey Lea for Petitioner.
J. Carlos Alarcon, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

ORDER VACATING ORDER DISMISSING PURPORTED APPEAL PETITION

Procedural History

On July 29, 2016, Bernice Atchison instituted this proceeding by filing a "Petition for Review" in which Ms. Atchison requests a copy of the running record and a hearing before an administrative law judge pursuant to 7 C.F.R. pt. 15f and the "2007 Pigford Remedy Act."[1] On August 16, 2016, the Assistant Secretary for Civil Rights, United States Department of Agriculture [ASCR], filed an "Agency Response" in which the ASCR contends Ms. Atchison failed to assert cognizable jurisdiction for the Office of Administrative Law Judges to entertain this proceeding and requested dismissal of Ms. Atchison's Petition for Review.

Administrative Law Judge Jill S. Clifton [ALJ] issued *Atchison*, Docket No. 16-0144, 2016 WL _____ (U.S.D.A. Aug. 17, 2016) (Dismissal (With Prejudice)), in which the ALJ dismissed this proceeding because "Administrative Law Judges have no authority to grant the relief requested, as stated in the Agency Response filed August 16, 2016[.]" On August 19, 2016, Ms. Atchison appealed *Atchison*, Docket No. 16-0144, 2016 WL _____ (U.S.D.A. Aug. 17, 2016) (Dismissal (With Prejudice)), to the Judicial Officer. Ms. Atchison's August 19, 2016 "Appeal To Judicial Officer" states in its entirety: "Please acknowledge email upon receipt."

I issued *Atchison*, Docket No. 16-0144, 2016 WL 5887703 (U.S.D.A. Sept. 9, 2016) (Order Dismissing Purported Appeal Petition), dismissing Ms. Atchison's August 19, 2016 Appeal To Judicial Officer because it does not remotely conform to the requirements for an appeal petition set forth in the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice]. The Rules of Practice are not applicable to this proceeding which Ms. Atchison instituted pursuant to 7 C.F.R. pt. 15f. Therefore, I vacate *Atchison*, Docket No. 16-0144,

[1] Ms. Atchison does not provide a citation to the "2007 Pigford Remedy Act" referenced in her Petition for Review (Pet. for Review at 2), and I cannot locate any such act.

2016 WL 5887703 (U.S.D.A. Sept. 9, 2016) (Order Dismissing Purported Appeal Petition).

For the foregoing reason, the following Order is issued.

ORDER

Atchison, Docket No. 16-0144, 2016 WL 5887703 (U.S.D.A. Sept. 9, 2016) (Order Dismissing Purported Appeal Petition), is vacated.

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SAMUEL HUNTER.
Docket No. 17-0006.
Miscellaneous Order.
Filed November 25, 2016.

VESTA BOONE WASHINGTON.
Docket No. 17-0008.
Miscellaneous Order.
Filed November 25, 2016.

HORSE PROTECTION ACT

In re: ROCKY ROY McCOY.
Docket No. 16-0026.
Miscellaneous Order.
Filed July 27, 2016.

HPA – Administrative procedure – Stay.

Buren W. Kidd, Esq. for Complainant.
David F. Broderick, Esq. and R. Taylor Broderick, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

STAY ORDER

I issued *McCoy*, HPA Docket No. 16-0026, 2016 WL 3434032 (June 2, 2016), in which I: (1) assessed Mr. McCoy a $2,200 civil penalty; and (2) disqualified Mr. McCoy from showing, exhibiting, or entering any

horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. On July 26, 2016, Mr. McCoy filed Respondent's Motion for Stay Pending Appeal [Motion for Stay] seeking a stay of the Order in *McCoy*, HPA Docket No. 16-0026, 2016 WL 3434032 (June 2, 2016), pending the outcome of proceedings for judicial review. On July 26, 2016, Mr. Buren W. Kidd, counsel for the complainant in this proceeding, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, informed me that the Administrator has no objection to Mr. McCoy's Motion for Stay.

Mr. McCoy's Motion for Stay is therefore granted, and, in accordance with 5 U.S.C. § 705, the Order in *McCoy*, HPA Docket No. 16-0026, 2016 WL 3434032 (June 2, 2016), is stayed.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *McCoy*, HPA Docket No. 16-0026, 2016 WL 3434032 (June 2, 2016), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: TRACY ESSARY.
Docket No. 15-0041.
Miscellaneous Order.
Filed August 29, 2016.

HPA – Administrative procedure – Petition for reconsideration, time to file.

Rupa Chilukuri, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Procedural History

On August 10, 2016, Tracy Essary filed a Petition for Reconsideration requesting that I reconsider *Essary*, HPA Docket No. 15-0041, 2016 WL 3434034 (U.S.D.A. June 15, 2016). On August 26, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed a reply in opposition to Mr. Essary's Petition for Reconsideration,[1] and, on August 29, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for a ruling on Mr. Essary's Petition for Reconsideration.

Conclusion by the Judicial Officer

On July 14, 2016, the Hearing Clerk served Mr. Essary with *Essary*, HPA Docket No. 15-0041, 2016 WL 3434034 (U.S.D.A. June 15, 2016).[2] The rules of practice applicable to this proceeding[3] provide that a petition for reconsideration must be filed within ten days after the date of service of the Judicial Officer's decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

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[1] Complainant's Reply to Resp't's Pet. for Recons.

[2] *See* United States Postal Service Domestic Return Receipt for article number 7013 3020 0001 0700 7757.

[3] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

7 C.F.R. § 1.146(a)(3). Therefore, Mr. Essary was required to file his Petition for Reconsideration no later than July 25, 2016.[4] On August 10, 2016, Mr. Essary filed his Petition for Reconsideration of *Essary*, HPA Docket No. 15-0041, 2016 WL 3434034 (U.S.D.A. June 15, 2016). Mr. Essary's Petition for Reconsideration was not timely filed. Accordingly, Mr. Essary's Petition for Reconsideration is denied.[5]
Moreover, even if I were to find Mr. Essary's Petition for Reconsideration timely filed (which I do not so find), I would deny the Petition for Reconsideration because Mr. Essary failed to identify any matters that I erroneously decided in *Essary*, HPA Docket No. 15-0041, 2016 WL 3434034 (U.S.D.A. June 15, 2016), as required by 7 C.F.R. § 1.146(a)(3).[6]

For the foregoing reasons, the following Order is issued.

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[4] Ten days after the date the Hearing Clerk served Mr. Essary with *Essary*, HPA Docket No. 15-0041, 2016 WL 3434034 (U.S.D.A. June 15, 2016), was Sunday, July 24, 2016. The Rules of Practice provide that when the time for filing a document or paper expires on a Sunday, the time for filing shall be extended to the next business day (7 C.F.R. § 1.147(h)). The next business day after Sunday, July 24, 2016, was Monday, July 25, 2016.

[5] Kriegel, Inc. (Order Den. Pet. to Reconsider), OFPA Docket Nos. 15-0050 and 15-0051, 2015 WL 9500721 (U.S.D.A. Dec. 15, 2015) (denying, as late-filed, the respondents' petition to reconsider filed four days after it was required to be filed); Mitchell (Order Den. Pet. to Reconsider), AWA Docket No. 09-0084, 70 Agric. Dec. 409 (U.S.D.A. Mar. 8, 2011) (denying, as late-filed, the respondent's petition to reconsider filed twenty-four days after the Hearing Clerk served the respondent with the decision and order); Sergojan (Order Den. Pet. to Reconsider), AWA Docket No. 07-0119, 69 Agric. Dec. 1438 (U.S.D.A. Aug. 3, 2010) (denying, as late-filed, the respondent's petition to reconsider filed twenty-two days after the Hearing Clerk served the respondent with the order denying late appeal); Noble (Order Den. Mot. for Recons.), A.Q. Docket No. 09-0033, 69 Agric. Dec. 518 (U.S.D.A. Jan. 20, 2010) (denying, as late-filed, the respondent's motion to reconsider filed nineteen days after the Hearing Clerk served the respondent with the order denying late appeal); Stanley (Order Den. Pet. for Recons.), A.Q. Docket No. 06-0007, 65 Agric. Dec. 1171 (U.S.D.A. Dec. 5, 2006) (denying, as late-filed, a petition to reconsider filed thirteen days after the date the Hearing Clerk served the respondents with the decision and order); Heartland Kennels, Inc. (Order Den. Second Pet. for Recons.), AWA Docket No. 02-0004, 61 Agric. Dec. 562 (U.S.D.A. Dec. 17, 2002) (denying, as late-filed, a petition to reconsider filed fifty days after the date the Hearing Clerk served the respondents with the decision and order); Finch (Order Den. Pet. for Recons.), AWA Docket No. 02-0014, 61 Agric. Dec. 593 (U.S.D.A. Dec. 16, 2002) (denying, as late-filed, a petition to reconsider filed fifteen days after the date the Hearing Clerk served the respondent with the decision and order).

[6] *See* Mr. Essary's Petition for Reconsideration, which states in its entirety: "I Am Filing For A Petition For Reconsideration Please."

MISCELLANEOUS ORDERS & DISMISSALS

ORDER

Mr. Essary's Petition for Reconsideration, filed August 10, 2016, is denied. This Order shall become effective upon service on Mr. Essary.

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EARSIE LEE ALLEN, JR.
Docket No. 15-0098.
Miscellaneous Order of Judicial Officer.
Filed December 21, 2016.

PHILIP TRIMBLE.
Docket No. 15-0097.
Miscellaneous Order.
Filed December 27, 2016.

PLANT PROTECTION ACT

DONALD C.R. HINKEL.
Docket No. 16-0079.
Miscellaneous Order.
Filed July 28, 2016.

REDLAND NURSERY & JOHN DEMOTT.
Docket Nos. 15-0104, 15-0105.
Miscellaneous Order.
Filed August 2, 2016.

REDLAND NURSERY & JOHN DEMOTT.
Docket Nos. 15-0104, 15-0105.
Miscellaneous Order of Judicial Officer.
Filed December 21, 2016.

In re: REDLAND NURSERY, INC. & JOHN C. DeMOTT.
Docket Nos. 15-0104, 15-0105.
Miscellaneous Order.
Filed December 21, 2016.

PPA – Administrative procedure – Motion for leave.

Elizabeth M. Kruman, Esq. for Complainant.
Susan E. Trench, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER GRANTING RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINANT'S OPPOSITION TO RESPONDENTS' APPEAL PETITION

On December 14, 2016, Redland Nursery, Inc., and John C. DeMott [Respondents] filed "Petitioners' Motion for Leave to File a Reply to Complainant's Opposition to Respondents' Appeal Petition" [Motion for Leave to File a Reply] requesting that I grant Respondents twenty days within which to file a reply to Complainant's Opposition to Respondents' Appeal Petition. On December 19, 2016, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed "Complainant's Response to Respondents' Motion for Leave to File a Reply to Complainant's Opposition to Respondents' Appeal Petition." The Administrator does not oppose Respondents' Motion for Leave to File a Reply but requests the opportunity to respond to Respondents' reply to Complainant's Opposition to Respondents' Appeal Petition.

For good reason shown, Respondents' Motion for Leave to File a Reply is granted. Respondents' reply to Complainant's Opposition to Respondents' Appeal Petition must be filed with the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], no later than January 10, 2017. The Administrator may file with the Hearing Clerk a response to Respondents' reply to Complainant's Opposition to Respondents' Appeal Petition no later than January 30, 2017.[1]

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[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, Respondents must ensure that their reply to Complainant's Opposition to Respondents' Appeal Petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, January 10, 2017, and the Administrator must ensure that his response to Respondents' reply to Complainant's Opposition to Respondents' Appeal Petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, January 30, 2017.

MISCELLANEOUS ORDERS & DISMISSALS

SWEENY S. GILLETTE.
Docket No. 16-0024.
Miscellaneous Order of Judicial Officer.
Filed December 21, 2016.

SOYBEAN PROMOTION, RESEARCH, & CONSUMER INFORMATION ACT

JOHN R. SHOUP, d/b/a DINSDALE ELEVATOR.
Docket No. 15-0018.
Miscellaneous Order of Judicial Officer.
Filed December 29, 2016.

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DEFAULT DECISIONS & ORDERS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL WELFARE ACT

BRUCE BRITZ.
Docket No. 15-0006.
Default Decision and Order.
Filed September 26, 2016.

DONALD SCHRAGE, d/b/a RABBIT RIDGE KENNEL.
Docket No. 16-0145.
Default Decision and Order.
Filed November 17, 2016.

FEDERAL MEAT INSPECTION ACT

D&H MEATS, LLC & JARED L. FRY.
Docket No. 16-0005.
Default Decision and Order.
Filed July 14, 2016.

HORSE PROTECTION ACT

JOHN ALLEN.
Docket Nos. 13-0348, 15-0063.
Default Decision for Failure to Appear at Hearing.
Filed December 15, 2016.

DEFAULT DECISIONS & ORDERS

PLANT PROTECTION ACT

JORGE HERNANDEZ, d/b/a JORGE'S LUMBER, d/b/a JORGE'S LUMBER YARD, d/b/a JORGE'S MESQUITE LUMBER YARD.
Docket No. 16-0078.
Default Decision and Order.
Filed November 22, 2016.

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CONSENT DECISIONS

ANIMAL HEALTH PROTECTION ACT

Dennis V. Chavez, LLC and Barrera & Company, LLC.
Docket Nos. 16-0080, 26-0081.
Filed July 6, 2016.

ANIMAL WELFARE ACT

Eli A. Miller, d/b/a Hill Top Kennel.
Docket No. 16-0027.
Filed August 3, 2016.

Wilma Jinson.
Docket No. 16-0114.
Filed August 11, 2016.

City of Independence, Kansas, a municipality d/b/a Ralph Mitchell Zoo.
Docket No. 16-0119.
Filed August 31, 2016.

Keith Ratzlaff & Lila Ratzlaff.
Docket Nos. 16-0094, 16-0095.
Filed September 9, 2016.

Karen Woody, an individual d/b/a Woody's Menagerie; Gregg Woody, an individual d/b/a Woody's Menagerie; and Gregg Woody Karen Woody, an Illinois general partnership d/b/a Woody's Menagerie.
Docket Nos. 15-0147, 15-0148, 15-0149.
Filed October 20, 2016.

Pet Glider, LLC.
Docket No. 16-0007.
Filed November 25, 2016.

CONSENT DECISIONS

Hanneford Circus, Inc., d/b/a Royal Hanneford Circus.
Docket No. 15-0106.
Filed November 30, 2016.

SNBL USA, Ltd.
Docket No. 16-0187.
Filed December 2, 2016.

Briarwood Investments, Inc., d/b/a Briarwood Ranch.
Docket No. 14-0197.
Filed December 8, 2016.

COMMERCIAL TRANSPORTATION OF EQUINES TO SLAUGHTER ACT

Scott Kurtenbach.
Docket No. 16-0096.
Filed September 8, 2016.

FEDERAL MEAT INSPECTION ACT

Zahiba Halal Meats, Inc. & Daniel W. Ault.
Docket No. 15-0127, 15-0128.
Filed September 7, 2016.

California Qi Li's Braised Chicken, LLC.
Docket No. 16-0182.
Filed September 9, 2016.

Valley Meat Packing Corp.
Docket No. 17-0007.
Filed October 31, 2016.

HORSE PROTECTION ACT

Eddie Barclay.
Docket No. 15-0039.
Filed July 12, 2016.

Bobby Morgan.
Docket No. 16-0073.
Filed July 21, 2016.

Danny Hughes.
Docket No. 15-0114.
Filed September 22, 2016.

Justin Harris.
Docket No. 13-0347.
Filed December 12, 2016.

PLANT PROTECTION ACT

Donald C.R. Hinkel.
Docket No. 16-0079.
Filed September 6, 2016.

Felipe Garcia, d/b/a Felipe Garcia Custom House Broker.
Docket No. 16-0004.
Filed November 9, 2016.

POULTRY PRODUCTS INSPECTION ACT

California Qi Li's Braised Chicken, LLC.
Docket No. 16-0182.
Filed September 9, 2016.

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APPENDIX

RESOLUTE FOREST PRODUCTS, INC. v. USDA.
Civil Action No. 14-2103 (JEB).
Court Decision.
Filed September 9, 2015.

CPRIA – Administrative procedure – Checkoff orders – *De minimis*, definition of – Discretion of Secretary – Marketing programs – Notice and comment – Orders, exemption from – Proposed rulemaking – Referendum – Remand – Softwood-lumber industry – Softwood Lumber Checkoff Program – Summary judgment.

[Cite as: 130 F. Supp. 3d 81 (D.D.C. 2015)].

The Court concluded that USDA failed to establish that the exemption threshold (15-million board feet per year) it selected for the Softwood Lumber Checkoff Order constituted a "*de minimis* quantity" under the Commodity Promotion, Research and Information Act [CPRIA]. In so holding, the Court found that although the disparity between the number of eligible voters published in the Federal Register and the number of ballots USDA distributed was "awkward," USDA's actions did not rise to the level of being arbitrary or capricious in violation of the Administrative Procedure Act [APA]. Additionally, the Court found that USDA did not act unlawfully in determining the "representative period" for voter eligibility in the referendum and that, although Plaintiff claimed that the chosen period was one of the worst years for softwood lumber production and importation, the Secretary's explanation—that it was the most recent calendar year—was reasonable. The Court cautioned that its role is not to "second guess" an agency's determination when the agency has provided a reasonable explanation. Finally, the Court held that USDA failed to establish that its 15-million-board-feet-per-year exemption threshold represented a *de minimis* quantity of softwood lumber covered by the Order. The Court found that to establish a proper exemption threshold would require knowledge of the total value of lumber and that, even if the information was legitimately "impossible" to obtain, USDA was nevertheless required to provide a reasonable explanation for its 15-million-baord-feet-per-year calculation. Accordingly, the Court remanded the case without vacatur to USDA to provide a "reasoned and coherent treatment" of its decision to deem 15-million board feet per year as the *de minimis* quantity exemption in accordance with the CPRIA.

United States District Court,
District of Columbia.

MEMORANDUM OPINION

JAMES E. BOASBERG, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

"Out of timber so crooked as that from which man is made, nothing entirely straight can be carved." So said Immanuel Kant about humanity; so claims Plaintiff Resolute Forest Products about the lawfulness of compulsory marketing programs developed by private parties and overseen by the U.S. Department of Agriculture.

In 2010 and 2011, Agricultural Marketing Service (AMS), housed within the USDA, assisted members of the softwood-lumber industry in establishing a budding Softwood Lumber Checkoff Order. Checkoff orders are rooted in our nation's history of government support for commodity producers who seek the benefits of collective marketing and promotion. These orders rake in mandatory assessments from all manufacturers and importers of a given commodity. The Commodity Promotion, Research and Information Act (the CPRIA), 7 U.S.C. §§ 7411–7425, empowers many industries—including the softwood-lumber industry—to work with the USDA to plant the seeds for the cultivation of such collective-marketing programs through the development and issuance of these orders.

In the case of the Softwood Lumber Checkoff Order, however, Resolute believes the rulemaking process was rotten to the core. In a nutshell, it is unhappy with the manner in which assessments have been determined. After protesting the Order before an administrative law judge and appealing that judge's denial, it brought suit before this tribunal. Resolute's Complaint lumbers on at length about problems with the agency's procedures, seemingly having an ax to grind with every step in the promulgation of the Checkoff Order. It raises numerous objections to the notice-and-comment rulemaking process, the agency's deference to the industry's Blue Ribbon Commission that put forward the Order, and the referendum AMS held to obtain industry approval. Plaintiff's claims ultimately branch out into four constitutional challenges to the CPRIA and six allegations of violations of the Administrative Procedure Act. As to the latter category, Plaintiff assails the AMS for mistakes made during the rulemaking process, some of which stem from misstatements in the Federal Register and opaque explanations for its seemingly questionable actions. Both sides have now moved for summary judgment.

Much timber has been felled to produce the administrative record that

grew out of the ALJ's adjudication, including hearing logs, Resolute's administrative appeal, and the parties' briefs before this Court. Given that the parties at times camouflage the issues with unclear briefing, the Court was repeatedly forced to leaf through the administrative record itself to find answers. Having now done so, the Court concludes that Plaintiff has generally barked up the wrong tree. Resolute's wooden understanding of the agency's obligations largely does not mesh with the broad discretion the USDA is granted to construct a permissible checkoff order.

Defendants—and not Plaintiff—are therefore entitled to summary judgment on nearly every APA count. Yet on one issue Resolute hits the nail on the head. Defendants fall short of providing an adequate explanation for the threshold chosen to exempt certain smaller industry players from the Order. While it often goes against the grain to remand without vacatur, in this instance that remedy is appropriate, so as not to prematurely uproot an ongoing checkoff order. On one APA count alone, then, the Court will deny Defendants' Motion for Summary Judgment and remand to the USDA. Such an outcome also obviates the need to rule on the constitutional questions, which must lie dormant for another season.

I. Background

Puns aside, given the complexities of the administrative process—and the often picayune nature of Plaintiff's grievances—a contextual overview is necessary first. The Court thus begins by briefly introducing the parties to this lawsuit and then moves on to a longer explanation of the CPRIA and the process through which the Softwood Lumber Checkoff Order was developed and implemented. Caution, fair reader, for into the administrative-lawmaking thicket we go.

A. *Parties*

Plaintiff Resolute Forest Products, Inc., is an American company incorporated under the laws of Delaware, with significant investments in the production of Canadian softwood lumber, paper, and other forest products. *See* Compl., ¶ 18. Its principal place of business is in Canada, where the majority of its sawmills are located. *See id.* Plaintiff imports softwood lumber into the United States and is thus subject to assessment

under the Softwood Lumber Checkoff Order. *See* Def. MTD/MSJ at 2.

Defendants include the United States Department of Agriculture and its Secretary, Tom Vilsack, who is sued in his official capacity. *See* Compl., ¶ 20. The Secretary is charged with administering checkoff orders under the CPRIA. *See* 7 U.S.C. §§ 7411–25. Most of the Secretary's functions under the CPRIA have been delegated to the Under Secretary of Agriculture for Marketing and Regulatory Programs and then further "sub-delegated" to the Administrator of the Agricultural Marketing Service, which administers, among other things, marketing orders. *See* Def. MTD/MSJ at 5. For readability, the Court will here reference the Secretary, the USDA, and AMS interchangeably.

B. *The CPRIA and the Softwood Lumber Checkoff Program*

Congress has long regulated the promotion and sale of agricultural commodities by enabling the federal government to coordinate with industries to advance such promotional efforts. *See Avocados Plus, Inc., v. Veneman,* 370 F.3d 1243, 1245 (D.C.Cir.2004). For most agricultural commodities, limited product differentiation means that if one producer promotes its commodity product, all producers are likely to benefit, creating free-rider problems. *See* William Connor Eldridge, *United States v. United Foods: United We Stand, Divided We Fall—Arguing the Constitutionality of Commodity Checkoff Programs,* 56 Ark. L.Rev. 147, 159 (2003). The CPRIA thus authorizes the Secretary of Agriculture to establish "checkoff" programs, which impose on domestic manufacturers and foreign importers of an agricultural commodity a mandatory assessment on the sale of that commodity.

Marketing programs funded by these checkoff orders can be famously effective, producing well-known classics of American advertising such as "Beef, it's what's for dinner" and "Milk, it does a body good." *See* Compl., ¶ 2. Among the agricultural commodities covered under the CPRIA are "products of forestry," *see* 7 U.S.C. § 7412(1)(D), including softwood lumber, a term the USDA uses to refer to certain " 'lumber and products' manufactured from 'one of the botanical groups of trees that have needle-like or scale-like leaves, or conifers.' " Def. MTD/MSJ at 1. Softwood lumber is used in the United States primarily in residential home construction. *See* Softwood Lumber Research, Promotion, Consumer

Education and Industry Information Order, 76 Fed.Reg. 46,185, 46,186 (Aug. 2, 2011).

After facing one of the "worst markets in history" in the late aughts, in 2010 members of the softwood-lumber industry sought to benefit from such a campaign. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 75 Fed.Reg. 61,002, 61,005 (Oct. 1, 2010). The CPRIA authorizes the Secretary to issue an order in response to requests by associations representing producers of a particular commodity. *See* 7 U.S.C. § 7413(a)(1)(C). Industry participation is critical: each checkoff order *must* also establish an industry group that will carry out the program. *See id.* § 7414(b)(1). In this case, it was the Blue Ribbon Commission (BRC), composed of 21 softwood-lumber chief-executive officers and business leaders, which submitted the proposed Softwood Lumber Checkoff Order to AMS. *See* Pl. Opp./MSJ at 6; 75 Fed.Reg. at 61,005. AMS modified this proposed Order, then determined it was "consistent with and would effectuate the purposes" of the CPRIA. *See id.* at 61,016. Announcing its intention to implement the Checkoff Order, AMS published a notice of proposed rulemaking in the Federal Register. *See id.* at 61,002. The proposed Order announced an initial assessment rate of $0.35 per thousand board feet of softwood lumber shipped within or imported into the United States. *See id.*

At the core of the dispute between the parties is the fact that the Order does not apply to *all* softwood-lumber manufacturers and importers. Under the CPRIA, the Secretary is authorized "to exempt from the order any de minimis quantity of an agricultural commodity otherwise covered by the order." 7 U.S.C. § 7415(a)(1). To this end, AMS stated that the proposed Order would exempt from assessment all entities that domestically ship or import less than 15 million board feet per fiscal year. *See* 75 Fed.Reg. at 61,002. As we will see, whether the 15 million-board-feet exemption was a "de minimis quantity" under the CPRIA is central to the resolution of the dispute.

Following the well-worn notice-and-comment-rulemaking playbook, AMS invited interested parties to submit comments on the proposed Order. *See id.* at 61,016. In a contemporaneous press release, AMS stated that "[i]f a majority of those commenting favored USDA moving forward" with the proposed Order, "a referendum would need to be held," and a

majority of the voters by both number and volume would need to support the program in order for AMS to implement it. *See* USDA Seeks Comments on Establishing New Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, AMS 189–10 (Oct. 1, 2010) (Administrative Record, AR2105). In response, AMS received 55 comments in total, the majority of which it deemed supportive of the proposed Order. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed.Reg. 22,757, 22,770 (Apr. 22, 2011). Trees were not spared during this process, as AMS responded in great detail to these various comments. *See id.* at 22,770–75. Resolute, nevertheless, argues that AMS's actions related to the notice-and-comment process were in violation of the APA, *see* Compl., ¶¶ 41–53, as discussed in more detail below.

Finding the industry largely in favor of the proposed Order, AMS then announced a referendum among all producers who would be assessed under it. *See* 7 U.S.C. § 7417(a)(1) ("For the purpose of ascertaining whether the persons to be covered by an order favor the order going into effect, the order may provide for the Secretary to conduct an initial referendum among persons to be subject to an assessment...."). AMS announced the procedures and timing of the referendum in the Federal Register, and it noted that every non-exempt softwood-lumber domestic manufacturer or importer was eligible to vote. *See* 76 Fed.Reg. at 22,775. Resolute contests the manner in which AMS conducted the referendum, including its determination of which producers and importers were eligible. *See* Compl., ¶¶ 69–74.

AMS received a total of 173 completed ballots from the referendum, 159 of which it deemed valid. *See* Administrative Law Hearing, Witness Testimony of Sonia Jimenez, Director of the Promotion and Economics Division of the Fruit and Vegetable Program of the AMS at 319 (Jan. 28, 2013) (AR3316) [hereinafter "Testimony of Sonia Jimenez"]. Of those 159 ballots returned, 107 favored the Order, *see id.,* constituting 67 percent of those voting in the referendum and "80 percent of the volume represented in the referendum." 76 Fed.Reg. at 46,185. The results of the referendum encouraged AMS to move forward with the Order, although not without protest from Resolute. AMS published the final Order in the Federal Register in August of 2011. *See id.* at 46,185–46,202.

In response to AMS's implementation of the Order, Resolute filed a petition with the USDA in accordance with the CPRIA on October 28, 2011. *See* Compl., ¶ 81; 7 U.S.C. § 7418(a)(1)(A) ("A person subject to an order ... may file with the Secretary a petition ... stating that the order ... is not established in accordance with law; ..."). Based on its 2010–calendar–year sales, Plaintiff imported less than 15 million board feet during 2010 and was thus ineligible to vote in the referendum. *See In Re: Resolute Forest Products Petitioner,* No. 120040, 2014 WL 1993757, at *5–6 (U.S.D.A. Apr. 30, 2014). Resolute later began to import more than 15 million board feet per year, however, and has been paying assessments on imports above that threshold since January 2012. *See* Pl. Rep. at 7. Resolute ultimately amended its protest, including a litany of constitutional challenges to the CPRIA, and these claims are mirrored in the counts it brings before this Court. *See* First Amended Petition to Terminate or Amend USDA's Softwood Marketing Order (June 22, 2012) (AR0236).

Plaintiff's first two adjudicative bites at the apple met with little success. Administrative Law Judge Jill S. Clifton conducted a four-day hearing on Resolute's petition from January 2831, 2013, at the USDA in Washington, D.C. *See* Compl., ¶ 89. Judge Clifton denied Resolute's petition, affirming both the Softwood Lumber Checkoff Order and the CPRIA. *See In re: Resolute,* 2014 WL 1993757, at *12. Undeterred, Plaintiff then filed a timely appeal to the USDA Judicial Officer on June 12, 2014. *See* Compl., ¶ 118. Judicial Officer William G. Jenson denied Resolute's appeal in a decision dated November 26, 2014. *See In re: Resolute Forest Products, Petitioner,* No. 12–0040, 2014 WL 7534275 (U.S.D.A. Nov. 26, 2014).

Plaintiff now brings its case before this Court, seeking review of the denial of its petition, as the CPRIA allows. *See* 7 U.S.C. § 7418(b)(1) ("The district court of the United States ... shall have jurisdiction to review the final ruling on the petition...."). Among its constitutional claims are that the CPRIA unconstitutionally delegates executive and legislative authority to private parties and violates the due-process rights of producers and importers. As touched on above, Plaintiff also alleges APA violations in nearly every action taken by AMS in the development and application of the Checkoff Order. In response, Defendants have now filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. Plaintiff

responded by filing a Cross–Motion for Summary Judgment.

II. Legal Standard

In the typical case, summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Holcomb v. Powell,* 433 F.3d 889, 895 (D.C.Cir.2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. *See Liberty Lobby,* 477 U.S. at 248, 106 S.Ct. 2505; *Holcomb,* 433 F.3d at 895. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris,* 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Liberty Lobby,* 477 U.S. at 248, 106 S.Ct. 2505; *Holcomb,* 433 F.3d at 895.

Although styled Motions for Summary Judgment, the pleadings in this case more accurately seek the Court's review of an administrative decision. Challenges under the CPRIA proceed under the Administrative Procedure Act's familiar "arbitrary and capricious" standard of review. *See* 7 U.S.C. § 7418(b)(1); 5 U.S.C. § 706(2)(A). Because of the limited role federal courts play in reviewing such administrative decisions, the typical Rule 56 summary-judgment standard does not apply to the parties' dueling motions on Resolute's APA claims. *See Sierra Club v. Mainella,* 459 F.Supp.2d 76, 89–90 (D.D.C.2006). Instead, in APA cases, "the function of the district court is to determine whether or not ... the evidence in the administrative record permitted the agency to make the decision it did." *Id.* (internal citations omitted). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review. *See Bloch v. Powell,* 227 F.Supp.2d 25, 31 (D.D.C.2002) (citing *Richards v. INS,* 554 F.2d 1173, 1177 (D.C.Cir.1977)).

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "narrow" standard of review—which appropriately encourages

courts to defer to the agency's expertise, *see Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)—an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). "In reviewing agency action under that standard, a court is not to substitute its judgment for that of the agency," *GameFly, Inc. v. Postal Regulatory Comm'n,* 704 F.3d 145, 148 (D.C.Cir.2013) (citation and internal quotation marks omitted), nor to "disturb the decision of an agency that has examine[d] the relevant data and articulate [d] ... a rational connection between the facts found and the choice made." *Americans for Safe Access v. DEA,* 706 F.3d 438, 449 (D.C.Cir.2013) (internal quotation marks and citation omitted). On the other hand, where the agency has not provided a reasonable explanation for its actions, "[t]he reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm,* 463 U.S. at 43, 103 S.Ct. 2856 (1983) (citation and internal quotation marks omitted). A court should nevertheless "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* (quoting *Bowman Transp. Inc. v. Arkansas–Best Freight System,* 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

III. Analysis

The Court begins, as it must, with standing. Once satisfied of this jurisdictional prerequisite, it next considers Plaintiff's APA claims. Determining that Resolute prevails on one, the Court thereafter assesses the proper remedy. It concludes with a brief discussion of the fate of the constitutional questions raised herein.

A. *Standing*

As a threshold matter, Resolute must establish standing to pursue its claims, which Defendants argue it cannot do. Article III of the United States Constitution limits the jurisdiction of the federal courts to resolving "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. A party's standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555,

560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To maintain standing, a plaintiff must, at a constitutional minimum, meet the following criteria. First, it "must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical...." *Id.* (citations and internal quotation marks omitted). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Id.* (alterations in original) (citation and internal quotation marks omitted). Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Id.* at 561, 112 S.Ct. 2130 (citation omitted). A "deficiency on any one of the three prongs suffices to defeat standing." *U.S. Ecology, Inc. v. U.S. Dept. of Interior,* 231 F.3d 20, 24 (D.C.Cir.2000). In addition, "a plaintiff must demonstrate standing for each claim he seeks to press...." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). In the present case, Resolute brings four causes of action alleging violations of the Constitution (Counts I–IV), as well as six claims that the USDA violated the Administrative Procedure Act (Counts V–X).

For all its causes of action, Resolute's injury-in-fact is straightforward: it has been paying assessments under the Order, which it claims is unlawful, since January 2012—at this point, for over three and a half years. *See* Pl. Rep. at 7. Plaintiff's redressability threshold is similarly satisfied, since a judgment voiding the Order would alleviate Plaintiff's alleged injury. Defendants, however, raise two central challenges to Plaintiff's satisfaction of the causation factor. First, AMS contends that because the referendum was technically optional—the Secretary was not required to conduct it before implementing the order—it cannot be said to have caused Plaintiff's injury. To similar effect, Defendants relatedly maintain that because the Secretary has discretion to cancel the Checkoff Order at any time, Resolute cannot show that the operation of the *referendum* "caused" its injury. Second, Defendants assert that because Resolute cannot show that the alleged improprieties in the notice-and-comment and referendum procedures "caused" the referendum to be approved, it does not have standing to challenge it. The Court addresses each of these arguments in turn.

1. *The Secretary's Discretion*

USDA's primary challenge to Resolute's standing focuses on the discretion the CPRIA grants the Secretary both to call a referendum and to decide whether to implement a checkoff order. The Secretary may either hold an initial, optional referendum before implementing a proposed order, *see* § 7417(a)(1), or else implement a required referendum within three years of the first assessments collected under an order. *See id.* § 7417(b)(1)–(2). The Secretary also retains the discretion to suspend or terminate an order *at any time* under section 7421(a), and USDA contends that he is also not required to authorize a checkoff order—even when it is approved by a referendum. *See* Def. Opp./Rep. at 4. Since the Secretary can terminate an Order at any time—the relief Resolute seeks—Defendants maintain that Resolute cannot show that the referendum procedures, as opposed to the Secretary's discretion, caused its injury. *See id.* at 3–4.

Plaintiff initially contests whether the Secretary can *in practice* ignore a referendum approving an order, but even if he could, the Court is not persuaded that this freedom defeats Plaintiff's standing. This is because, at bottom, the statutory scheme clearly indicates that Congress required the Secretary to obtain industry approval sooner or later. While he has multiple options under the statute as to *when* to conduct the referendum, he *must* eventually hold one and obtain industry approval.

For example, he can implement an order without seeking approval via referendum. If he takes this approach, however, he must conduct a referendum "not later than 3 years after assessments first begin under the order." 7 U.S.C. § 7417(b)(2). Alternatively, he can bypass the required (b)(2) referendum if he conducts an "[o]ptional referendum" under § 7417(a)(1)—the choice the Secretary made here. The CPRIA makes clear, however, that the Secretary must not continue an order that has been disfavored through a referendum. *See id.* § 7421(a) (The "Secretary shall suspend or terminate an order ... if the Secretary determines that the order ... is not favored by persons voting in a referendum...."). The combined effect of sections 7417 and 7421 is that the Secretary must within three years conduct a referendum and obtain industry approval. If he does not, he must terminate any order that has already been implemented. Given this, if the referendum in question were unlawful, the Secretary's ability

to maintain the Order in the absence of industry approval altogether would be abbreviated at best. Resolute has been paying assessments since January 2012, *see* Pl. Rep. at 7, and more than three years has passed since then, so the Secretary would have to have obtained industry approval via referendum by now. For this reason, the Court is persuaded that Plaintiff has standing to challenge the referendum and Checkoff Order.

2. *But-for Causation of the Referendum*

Defendants' second standing argument is that Resolute cannot demonstrate that, but for the alleged misdeeds of USDA, the referendum participants would have rejected the Order. They claim that Plaintiff has not shown how establishing an incorrect exemption threshold, using an incorrect period to determine eligibility to vote, implementing incorrect procedures during the referendum, permitting the spread of misinformation regarding the terms of the Order, and/or excluding voters from the referendum led to a materially different outcome. *See* Def. MTD/MSJ at 23, 25, 27, 28. According to Defendants, Resolute's failure to state directly that these defects are the "but for" cause of the referendum's result means that Resolute cannot show that the USDA's actions caused its injury. *See* Def. Opp./Rep. at 7. Plaintiff responds that it need not "overcome the impossible task of proving a referendum on remand would produce a different result." Pl. Rep. at 5. It points to 7 U.S.C. § 7418(a), which grants any person subject to an order issued under the CPRIA the right to file a petition with the Secretary stating that an order is not established in accordance with law. *See id.* at 5. And section 7418(b)(1) of the CPRIA grants the district court jurisdiction to review the final ruling on such petitions.

Here, *Sugar Cane Growers Co-op. of Florida v. Veneman,* 289 F.3d 89 (D.C.Cir.2002), is instructive. In that case, the D.C. Circuit held that "[a] plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered." *Id.* at 94. The court reasoned that, otherwise, section 553 of the APA requiring notice-and-comment rulemaking would be "a dead letter," since it would be practically impossible for a plaintiff to show that had she been given the opportunity to submit a comment, a substantively different outcome would have occurred. *See id.* at 95.

Although Plaintiff has not provided evidence that "the results of the referendum would have disfavored the Order if the voters allegedly excluded from participation had been permitted to vote or if a different exemption threshold had been used," Def. Opp./Rep. at 7, neither the case law of this Circuit nor the statutory scheme suggest such evidence is required for standing. Were this not the case, section 7418(b)(1) would similarly be "a dead letter," as few plaintiffs would be able to show that an unlawfully administered referendum would have yielded a different outcome in the absence of the unlawful behavior. As stated above, Congress clearly desired industry approval of mandatory checkoff orders, and it installed the referendum procedure as a means to ensure it. It is enough that Resolute alleges that the implemented order—and the referendum conducted to approve it—were "not established in accordance with law." *See* 7 U.S.C. § 7418(a)(1)(A).

B. *APA Claims*

With this initial brush-clearing exercise completed, the Court now gets to the core of Plaintiff's complaints. There is some discontinuity between the six counts Plaintiff lays out in its Complaint and the six issues it raises in its Motion for Summary Judgment. In essence, Resolute's objections to the Order manifest in what are effectively two categories of alleged violations of the APA: in the first are four claims that AMS acted improperly under the CPRIA, and in the second are two claims in which Resolute contests AMS's interpretation of the Act. The Court follows suit, first separately resolving the four procedural challenges to the rulemaking process, then independently considering Resolute's two interpretive challenges to the terms of the statute itself.

1. *Notice–and–Comment Procedures*

The parties first scuffle over whether AMS's decision to conduct the referendum was reached in improper fashion. Resolute identifies three alleged problems in particular: first, AMS improperly treated notice-and-comment proceedings as a mechanistic vote of commenters instead of substantively engaging with the comments; second, AMS gave too much weight to comments submitted by the Blue Ribbon Commission and affiliated individuals; and third, AMS was complicit in the BRC's

"misinformation campaign." *See* Pl. Opp./MSJ at 33–37. These claims are barely tenable.

First, Resolute charges that AMS unlawfully and mechanistically used notice-and-comment rulemaking "to determine a majority for or against a proposed rule," *id.* at 34, instead of substantively engaging with these comments as required by the APA. To this end, it points to an official press release in which AMS announced that "[i]f the majority of those commenting favored USDA moving forward with a softwood lumber program, prior to final implementation, a referendum would need to be held...." USDA Seeks Comments on Establishing New Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, AMS 189–10 (Oct. 1, 2010) (AR2105). In contrast, the notice in the Federal Register—which also invited comments as part of the notice-and-comment rulemaking—did not reference the need for a majority of comments to be favorable. *See* 75 Fed.Reg. at 61,002–16.

AMS received a total of 55 comments—52 non-duplicative—concerning the proposed Order, and in a subsequent notice, it provided analysis. It deemed 41 supportive of the proposed Order, seven opposed, three not to have taken a position, and one entirely unrelated. *See* 76 Fed.Reg. at 22,770. Of the 41 supportive comments, AMS designated 27 as supporting the proposed Order without changes and 14 as supporting it with recommended changes. *Id.* In typical notice-and-comment fashion, AMS provided lengthy analysis and consideration of all of these comments. *See id.* at 22,770–75.

Given the agency's substantive consideration of the comments it received, it could hardly be said to have treated notice-and-comment rulemaking as "a vote," as Plaintiff contends. *See* Pl. Opp./MSJ at 33. In addition, Defendants rightly note that government press releases are " 'Executive Branch communications that express federal policy but lack the force of law' and thus 'are merely precatory.' " Def. Opp./Rep. at 19 (quoting *Barclays Bank v. Franchise Tax Bd.,* 512 U.S. 298, 330, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994)); *see also CropLife Am. v. E.P.A.,* 329 F.3d 876, 883 (D.C.Cir.2003) (concluding that for press release to be subject to judicial review, it must bind private parties or agency itself with force of law). Neither the agency's formal notice statement, *see* 75 Fed.Reg. at 61,002–16, nor its analysis of the comments, *see* 76 Fed.Reg. at 22,757–

84, in any way announce, suggest, or imply that it treated notice-and-comment rulemaking as a straight up-down "vote." Since both the case law and the agency's practice contravene Plaintiff's stance, the Court concludes that Defendants acted neither arbitrarily nor capriciously in this regard.

Notwithstanding its protest that AMS treated notice and comment as "a vote," Plaintiff also takes issue with the way the Service handled comments from "members of the proponent group" (*i.e.,* the Blue Ribbon Commission), including failing to recognize that some members of the BRC submitted multiple comments under different guises. *See* Pl. Opp./MSJ at 35. Resolute also objects to "USDA officials treat[ing] conditional comments ... as 'neutral' or supporting, notwithstanding that the changes demanded to the proposed rule generally were not made in the final rule...." *Id.* Neither challenge holds water.

To begin, the APA does not require the agency to incorporate every suggestion made during notice and comment into the final rule. Such an exacting obligation would grind the federal government to a halt. "[I]t is settled that 'the agency [is not required] to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking.' " *Pub. Citizen, Inc. v. F.A.A.,* 988 F.2d 186, 197 (D.C.Cir.1993) (quoting *Automotive Parts & Accessories Ass'n v. Boyd,* 407 F.2d 330, 338 (D.C.Cir.1968)) (alterations in original). "The agency need only state the main reasons for its decision and indicate that it has considered the most important objections." *Simpson v. Young,* 854 F.2d 1429, 1435 (D.C.Cir.1988). Nor is it the Court's job to second-guess an agency's determination: "We do not weigh the evidence; we merely examine the record to see if there is evidence, which if accepted by the Secretary, supports the determination of the agency." *Nat'l Soft Drink Ass'n v. Block,* 721 F.2d 1348, 1354 (D.C.Cir.1983). How BRC members submitted their comments, moreover, seems of little moment. At the end of the day, many reams of paper were used as the agency compiled the administrative record, and AMS's published analysis of the comments it received was lengthy and substantial, including its analysis of "Comments Opposed." *See* 76 Fed.Reg. at 22,773–74. Given this, the Court is more than satisfied that AMS adequately fulfilled its statutory obligation.

Finally, Resolute also raises alleged "misinformation" disseminated by

the Blue Ribbon Commission, which it insinuates AMS was "complicit" in propagating. *See* Pl. Opp./MSJ at 3637. This misinformation, it complains, was "false, misleading, and contrary to law." *Id.* Defendants retort that such allegations—given longstanding precedents—fail to state a claim upon which relief can be granted. *See* Def. Opp./Rep. at 28. They cite to *United States v. Rock Royal Co-operative,* 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939), which first established the principle that even if proponents of a marketing order make "widespread public misrepresentations" in connection with the pre-issuance referendum, this alone is not a sufficient basis for relief for parties aggrieved by the Order. *See id.* at 556, 59 S.Ct. 993. Instead, "the validity of the Act and the provisions of the Order must be assumed," absent "evidence that any [voter] misunderstood" what the Order entailed. *See id.* at 558, 59 S.Ct. 993.

Here, AMS mailed to each eligible voter a packet including: "(1) a ballot; (2) voting instructions; (3) a description of applicable terms and definitions; (4) a postage-paid, return-addressed envelope; and (5) a summary of the program." Letter from AMS to Softwood Lumber Domestic Manufacturers and Importers (May 16, 2011) (AR2267). Although Resolute provides evidence of misstatements before the referendum took place, *see* Pl. Opp./MSJ at 36, it provides no evidence that they made their way into the official voter packet, or that they in any way led to a material misunderstanding by voters. As the Judicial Officer who rejected Resolute's administrative appeal noted, "Resolute does not cite any provision of the Administrative Procedure Act that requires an agency conducting a rulemaking proceeding to refute misleading statements by proponents or opponents of the rulemaking proceeding." *In Re: Resolute,* 2014 WL 7534275, at *13. In light of the presumption established by *Rock Royal,* and without evidence that such misstatements materially misled voters, Resolute's claim that AMS acted improperly here fails.

2. *Number of Eligible Referendum Voters*

Resolute's second objection is that the agency publicly misrepresented the number of voters eligible to participate in the referendum. Plaintiff is particularly concerned that AMS twice published in the Federal Register that " 'about 363 domestic manufacturers and 103 importers would pay

assessments under the Order', and thus were eligible to vote,"—466 voters in total. *See* Pl. Opp./MSJ at 28 (quoting 76 Fed.Reg. at 22,757, 22,767 and 76 Fed.Reg. at 46,185, 46,190). Despite these public pronouncements, Resolute later learned—only after resorting to a FOIA request to obtain the information—that, in fact, AMS had "privately determined there were only 311 companies eligible to vote in the referendum." *Id.* (citing Letter from Valerie L. Emmer–Scott, USDA FOIA Officer, to Elliot J. Feldman (July 27, 2011) (AR0999–1004)). This discrepancy, Resolute argues, ***95** is substantial, since the difference "represents almost the total number of all of the valid ballots AMS received in the referendum"—107. *See* Pl. Opp./MSJ at 29. Although Plaintiff does not expressly say so in its briefs, the Court presumes Resolute to suggest that some sort of impropriety is afoot in leaving out over 100 of the announced eligible voters.

Though the Court agrees that this discrepancy in estimates is awkward, ultimately the agency's actions do not rise to the level of an APA violation, as will be explained. Resolute does identify lamentable mistakes that do not paint the agency in a favorable light, and Defendants compound this poor image by not clearly fessing up to the mistake. Defendants are not clear anywhere in their briefing about exactly how these differing figures came to be—instead, they hide the ball by stating simply that "AMS explained why its prediction ... did not match the number ... found eligible to vote in the referendum." Def. Opp./Rep. 27. Resolute is understandably upset by the agency's evasion here, a frustration shared by the Court.

As explained below, the different figures appear to be the result of transposing numbers relating to a different statute—*i.e.,* the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*—which requires federal agencies to estimate the impact of any proposed rule on small businesses. Given the complex regulatory environment that modern federal agencies must navigate, it is understandable that such mistakes can and will happen. But Defendants should be forthright in admitting them, rather than forcing the Court to sift through the lengthy administrative record to figure it out. This is especially so considering that the function of judicial review under the APA is to ensure that agencies can provide reasoned explanations for their rulemaking actions, a task made more difficult by a briefing strategy that obscures the agency's reasoning. *See E. Alabama Med. Ctr. v. Shalala,* 925 F.Supp. 27, 32 (D.D.C.1996) ("The agency must supply a reasoned basis for its action, supported by substantial evidence on the record ....")

(citing *State Farm,* 463 U.S. at 42, 103 S.Ct. 2856).

In light of the opacity of Defendants' explanation, the Court independently consulted the excerpted pages of the administrative record provided in the Joint Appendix. Based on the testimony of Sonia Jimenez—then-director of the Promotion and Economics Division of the Fruit and Vegetable Program of AMS—at the Administrative Hearing, AMS arrived at the estimate of 363 domestic manufacturers and 103 importers by calculating the number of manufacturers and importers who sold less than *25 million* board feet per year. *See* Testimony of Sonia Jimenez at 342–45 (AR3339–42). This higher board-feet-per-year rate—25 million as opposed to the 15 million in the Order—was chosen because a business manufacturing or importing "25 million feet [per year] would approximately be considered a small business" for purposes of the RFA. *See id.* at 342–43 (AR3339–40); *see also* Regulatory Flexibility Act, 5 U.S.C. § 602(a)(1) (describing agency reporting requirements for rules that are "likely to have a significant economic impact on a substantial number of small entities"). After AMS calculated the number of small businesses who manufacture or import 25 million board feet per year or less, it seems the Service mistakenly used this figure to estimate the number of domestic manufacturers and importers that would *not* be exempted under the Order. *See* Testimony of Sonia Jimenez at 343–45 (AR3340–42).

Although mistakes alone do not rise to the level of an APA violation, the Court is nonetheless troubled that AMS used *both* the wrong threshold—25 million board feet per year as opposed to 15 million—and *also transposed the number of companies *not exempted* with the number of companies *exempted.* Despite this, the Court is satisfied that such mistakes did not affect the referendum because AMS fixed the error before it became material. Shortly before the referendum was conducted, "AMS made certain inquiries ... from which it concluded that a total of 311 domestic manufacturers and importers would be eligible to vote in the referendum." Def. Opp./Rep. at 27.

Defendants' briefs, unfortunately, never directly identify how AMS ultimately arrived at the 311 total either. Clearly explaining the source of the error—and how the correct total was ultimately obtained—is especially important because only with the complete factual picture can

the Court determine whether AMS has a reasoned basis for its actions. *See Shalala,* 925 F.Supp. at 32. Instead, the Court was once more forced to make sense of the abbreviated portions of the administrative record excerpted in the Joint Appendix. Based on those excerpts provided, the agency seems to have determined the number of eligible voters by consulting with the industry's trade publication Random Lengths,[1] eight of the grading agencies that inspect softwood lumber for compliance with industry standards, and the BRC, making "calls to determine which of those people were eligible to vote, and by Customs data for 2010." Testimony of Sonia Jimenez at 326 (AR3323).

When all is said and done, the Court does not believe this difference rises to the level of being either arbitrary or capricious, given its ultimately inconsequential nature. In other words, the Court, is satisfied—just as the Judicial Officer was—that the disparity between the estimate published in the Federal Register and the actual number of ballots sent out does not establish that AMS excluded any eligible voters from participation in the referendum, and Plaintiff has provided no evidence to the contrary. Although Defendants were not forthright in the source of the error or in how the correct number was obtained, they nevertheless clear the relatively low bar established by the APA.

3. *Referendum Procedures*

Among the myriad charges Resolute levels at Defendants is that "AMS did not conduct the ... referendum in accordance with fundamental standards generally accepted by professional survey research methodologists." Pl. Opp./ MSJ at 37. Plaintiff yet again raises some genuinely dismaying problems with AMS's conduct during the referendum, but once more, these charges do not rise to the level of an APA violation. The CPRIA clearly states that "[a] referendum conducted under this section shall be conducted in the manner determined by the

[1] In the transcript of Jimenez's testimony at 326 (AR3323), she is reported to have said "random months," rather than "Random Lengths," but this has been corrected in the excerpt provided in the Judicial Officer's decision as "Random Lengths." *See In Re: Resolute*, 2014 WL 7534275, at *11. Random Lengths is the trade publication for the softwood-lumber industry. *See* http://www.randomlengths.com/ (last visited Sept. 8, 2015). Given the correction in the ALJ's ruling, the Court assumes this was merely a transcription error.

Secretary to be appropriate." 7 U.S.C. § 7417(g)(1). Given the broad discretion Congress granted the Secretary, *cf. Freeman v. Hygeia Dairy Co.,* 326 F.2d 271, 273 (5th Cir.1964) ("[T]he details of a [similar checkoff order] referendum, and the manner in which it is conducted, must be left exclusively in the hands of the Secretary."), Resolute fails to identify clearly how he has fallen short of this standard.

Instead, in a novel gambit, it points to *other* regulatory requirements it alleges Defendants unlawfully neglected to comply with and contends that such omissions constitute violations of the APA. Like a square peg in a round hole, Resolute's arguments here do not quite fit. Among them is that AMS's conduct in overseeing the referendum did not comply with purportedly mandatory USDA departmental regulations, one of which establishes rules related to "the collection of information and recordkeeping requirements imposed by USDA agencies on individuals...." USDA Departmental Regulation No. 3410–001 (Information Collection Activities—Collection of Information from the Public, May 6, 2009) at 1 (AR1138). Yet Resolute does not plainly connect the dots as to how AMS fell short of DR 3410–001 and what consequences should follow under the APA or the CPRIA. Instead, it simply raises incidental issues such as the fact that "USDA did not have the ballots [for eligible voters in Québec] translated into French, which is the official language of Québec." Pl. Opp./ MSJ at 41. This would hardly pose an inconvenience to companies that actively participate in U.S. markets by importing millions of feet of softwood lumber per year, and Resolute does not even identify just how this is an action required under DR 3410–001, let alone one whose omission warrants vacating the entire Checkoff Order.

Though the parties never spell it out clearly, to the Court's best understanding, DR 3410001 appears to have been promulgated in furtherance of the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521. The PRA "requires agencies to provide detailed justification and supporting explanations of how the information will be collected and why the information collection is essential to an agency's mission." DR3410–001 at 12 (AR1149). AMS's conduct here, however, was aimed at satisfying the CPRIA's referendum requirement—not to initiate a "set of questions or recordkeeping requirements ... used by Federal agencies to collect information for statistical purposes...." *Id.* Even if the Secretary did somehow violate DR 3410–001 in conducting the referendum—a picture

that Resolute has not colored in with sufficient detail—Resolute also does not elucidate why such violations are so material as to render the entire Checkoff Order void, rather than simply making the USDA susceptible to whatever sanctions may arise under DR 3410–001 or the PRA. *See, e.g., id.* at 5 (AR1142) ("Failure to meet such obligations places the Department at risk of incurring a paperwork violation.").

In a similar vein, Plaintiff argues that AMS was subject to Office of Management and Budget guidelines "as to the manner in which it collects information through a referendum." Pl. Opp./MSJ at 39. In particular, Resolute argues that this means that Defendants are required to turn over the list of eligible voters to whom AMS sent ballots during the referendum. *See* Compl., ¶ 190–91. Defendants disagree, and so does the Court. Resolute states that OMB guidelines apply without articulating why. In contrast, Defendants clearly identify that "OMB Standards apply by their terms to 'statistical survey[s],' i.e., to 'census[es],' 'sample[s] of ... target population[s],' or other 'data collection[s] whose purposes include the description, estimation, or analysis of the characteristics of groups, organizations, segments, activities, or geographic areas.' " Def. Opp./Rep. at 26 (quoting Office of Management Budget Standards and Guidelines for Statistical Surveys 35 (Sept.2006) (AR1206)) (alterations in original). The Court does not understand the purpose of a referendum conducted in furtherance of the CPRIA to be one of "description, estimation, or analysis of the characteristics of" the softwood-lumber industry. *See id.* Neither did the judicial officer reviewing the administrative law judge's denial of Resolute's claims. *See In Re: Resolute,* 2014 WL 7534275, at *15 ("The Softwood Lumber Order initial referendum was not a census ... [, and] Office of Management and Budget Guidelines related to data collection are not relevant to [it]...."). AMS's purpose was to conduct an anonymous thumbs-up, thumbs-down vote on the proposed Checkoff Order. Given the broad discretion the Secretary has to conduct this referendum, as discussed at length above, Resolute's argument here crumbles.

4. *Representative Period for Referendum Voter Eligibility*

Next among Resolute's complaints is that the Department acted unlawfully in determining the "representative period" for referendum voter eligibility. *See* Pl. Opp./MSJ at 3132. It challenges the Secretary's use of the "representative period" of January 1–December 31, 2010, to

determine eligibility for participation in the referendum. Plaintiff argues that because the "representative period" specified—calendar year 2010—was the "worst year of softwood lumber production and importation in, perhaps, 30 years, ... [it] therefore was not a 'representative period' as required by" the CPRIA. *See id.* at 32 (quoting 7 U.S.C. § 7417(a)(1)).

The agency is once more squarely in the right. The CPRIA could not be clearer in delegating broad discretion to the Secretary: "a representative period [as] determined by the Secretary." 7 U.S.C. § 7417(a)(1). The Secretary's explanation for this selection—that "January 1–December 31, 2010, was the most recent calendar year preceding the pre-issuance referendum"—is manifestly reasonable. *See* Def. Opp./Rep. at 24. Although 2010 in retrospect was a peculiar year for the industry, as Plaintiff itself acknowledges, "such uncertainty may always exist in programs spanning years...." Pl. Opp./MSJ at 33. Under APA review, the Court's role is not to second-guess an agency when it has provided a reasonable explanation, *see State Farm,* 463 U.S. at 43, 103 S.Ct. 2856, and so Resolute's argument fails on this count as well.

5. *Certifying Approval of the Referendum*

In addition to the aforementioned four APA challenges, Resolute also raises two issues with AMS's actions that involve its interpretation of the CPRIA. Both challenge the Secretary's interpretation of potentially ambiguous statutory terms. "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, applying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear[,] ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *City of Arlington, Tex. v. FCC,* —— U.S. ——, 133 S.Ct. 1863, 1868, —— L.Ed.2d —— (2013) (quoting *Chevron,* 467 U.S. at 842–43, 104 S.Ct. 2778). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778.

Plaintiff's first interpretive challenge is that AMS did not comply with any of the CPRIA's permitted pathways to obtain industry approval of an order. The statute instructs:

> An order may provide for its approval in a referendum—
> (1) by a majority of those persons voting;
> (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or
> (3) by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.

7 U.S.C. § 7417(e). In reading the three statutory options together, the Court understands option (e)(1) to require a simple numerical majority of those responding in the referendum. In contrast, option (e)(2) appears to enable a numerical minority to approve an order if its controls a majority share of the volume of the commodity. Option (e)(1) thus gives comparatively more power to the referendum's smaller and more numerous manufacturers and importers, while option (e)(2) gives comparatively more power to the largest market participants. Option (e)(3) appears to incorporate aspects of each: both a numerical majority and a majority of the commodity volume must approve the referendum, ensuring that neither numerous small players nor a few large players could approve an Order over the objection of the others. Since the CPRIA potentially applies to checkoff orders for various different agricultural commodities, it makes sense that Congress would grant the Secretary discretion to use different approval thresholds depending on the size and number of market participants of a given commodity.

In announcing the proposed Order, AMS stated that "[a] majority of entities by both number and volume would have to support the program for it to be implemented." 75 Fed.Reg. at 61,013. It later gave notice of the proposed referendum by stating that "[t]he program would be implemented if it is favored by a majority of those voting in the referendum who also represent a majority of the volume of softwood lumber *represented in the referendum."* 76 Fed.Reg. at 22,757 (emphasis added). Resolute contends that this means that AMS effectively selected option (e)(3), and it objects to this choice because "a majority of the

volume of *the agricultural commodity,"* 7 U.S.C. § 7417(e)(3), is meaningfully different from "a majority of the volume of softwood lumber *represented in the referendum,"* the language used in the Federal Register. *See* Pl. Opp./MSJ at 30–31 (emphasis added).

Defendants appear to agree that AMS selected option (e)(3), but argue that because the CPRIA is "silent" on the issue of the definition of "volume of the agricultural commodity," as used in both sections 7417(e)(2) and (e)(3), ambiguity in the meaning of this phrase provides the Secretary with discretion to choose any definition of "volume" that is "based on a permissible construction of the statute." Def. Opp./Rep. at 31. Since "persons voting" need not be "everyone in the United States who produces or imports the commodity to which the Checkoff Order pertains"—but only those who will be assessed under a proposed order—Defendants argue that it is permissible to interpret "volume" in sections 7417(e)(2) and (e)(3) to be "the volume of the commodity *represented in the referendum.*" *Id.* at 31 (emphasis added).

The Court agrees that sufficient ambiguity exists in the meaning of the term "volume" to satisfy *Chevron* step one and entitle the agency to deference at *Chevron* step two. On its face, the term "volume" in sections 7417(e)(2) and (e)(3) does not obviously refer to either the total volume of all manufacturers and importers in the marketplace or merely the volume of those participating in the referendum. And in light of *Chevron* deference due to an agency's construction of an ambiguous statutory term, the Court shares Defendants' view that this is a permissible one, both for the reason just stated, and for another.

Under this reading of section 7417(e), Plaintiff's proposed interpretation of option (e)(3) would set an almost impossibly high floor to achieve approval via referendum, rendering it a nonstarter. This is because the portion of the market volume produced or imported by exempted entities would function as a "no" vote, since these entities could not vote in the referendum. If Plaintiff is right, the exempted volume would become part of the denominator for calculating majority passage under a referendum, but could never be part of the numerator.

One example suffices to demonstrate this problem. If 25 percent of the total volume of softwood lumber were exempted from a proposed order,

the approval percentage by volume among entities participating in the referendum would have to increase substantially. Indeed, approval from entities representing more than *two-thirds* of the volume in the referendum (50 percent of the total volume, but 67 percent of the volume participating in the referendum) would be required to achieve majority approval by total volume. This interpretation seems dubious, as it is unlikely that Congress would desire to effectively give unwitting veto power to those not even assessed under the order or participating in the referendum. It would be bizarre that a majority of voters by number and by volume could approve the referendum but still have the Order rejected. Instead, option (e)(3) appears to incorporate both the protection for numerous small market participants in (e)(1) and the protection for a few large market participants in (e)(2), something Plaintiff's interpretation would thwart by watering down the larger market participants' share of the volume in the referendum.

Given Defendants' eminently reasonable interpretation, this construction of the CPRIA more than satisfies the *Chevron* step-two deference due the agency, and the Court believes AMS acted permissibly by establishing majority approval on the basis of both number and volume of participants *in the referendum.*

6. *15 Million–Board–Feet Exemption*

Given the laundry list of issues Plaintiff has raised with the Checkoff Order, it might appear that its claims founder entirely. Yet on one final issue, Resolute's challenge is more formidable. This is Plaintiff's argument that AMS violated the CPRIA by failing to choose an exemption threshold—in this case, the 15 million-board-feet-per-year exemption—that was "de minimis." *See* Pl. Opp./MSJ at 25. The CPRIA permits the Secretary to "exempt from the order any de minimis quantity of an agricultural commodity otherwise covered by the order." 7 U.S.C. § 7415(a)(1). Resolute notes that AMS has stated that it does not know the quantity of the commodity *exempted* from the order, *see* Testimony of Sonia Jimenez at 421, 503 (AR3418, AR3500); the total quantity of the agricultural commodity *in existence, see id.* at 420–21 (AR3417–18); or the *number* of companies excluded. *See id.* at 376–77 (AR3373–74). On this basis, Resolute contends that AMS does not and cannot know whether the quantity it exempted was a "de minimis quantity." *See* Pl. Opp./MSJ

at 25.

Defendants respond that the agency has stayed within the bounds of its statutory authority by selecting an alternative basis for determining the meaning of a "de minimis quantity." The Secretary asserts that the CPRIA is "silent" as to the definition of the term "de minimis" and thus its meaning is "ambiguous," so he is entitled to choose any permissible definition. *See* Def. Opp./Rep. at 22. Defendants also promote a broader understanding of a reasonable "de minimis quantity" on the basis that the term is preceded by the word "any." According to them, "any" implies that the term "de minimis quantity" clearly may have more than one acceptable definition. *See id.* at 22–23. While the Court agrees with Defendants' position up to this point, their argument is rather facile; the question is not whether "de minimis quantity" might permissibly vary from checkoff order to checkoff order – which it almost surely must. Rather, the question is whether 15 million board feet per year is one such permissible interpretation.

In answer to *this* question, the Court believes that Defendants are either hiding the ball or else are ill informed—neither of which is particularly encouraging for an entity that acts with the force of law. As stated, Defendants claim that it is "impossible for us to know the total volume of softwood lumber," *id.* at 23 (quoting Testimony of Sonia Jimenez at 421 (AR3418)) (internal quotation marks omitted), rendering it equally impossible to calculate a "de minimis quantity" of the total volume in the marketplace. The Court is skeptical that obtaining such information is "impossible," in part because this seems highly unlikely for an industry that is both well regulated and substantial in size. *See, e.g.,* 76 Fed.Reg. 22,758–59 (providing figures for the total U.S. softwood-lumber market in tens of billions of board feet per year for the calendar years 2003 through 2009).

Establishing the proper exemption threshold almost surely *required* knowledge of the total volume of softwood lumber. Defendants justified the 15–million–board–feet exemption on the ground that it would generate sufficient revenue among the remaining manufacturers and importers who would be assessed, an outcome that apparently would be in doubt with an exemption threshold of 20 or 30 million. *See* 75 Fed.Reg. at 61,013. How could the BRC and AMS make these comparative calculations unless they

knew enough about the entire quantity of softwood lumber manufactured or imported so as to divide that total into non-exempted and exempted portions? Either the BRC, AMS, or both must have had at least *some* working estimate of the total volume of softwood lumber.

At least two documents in the Joint Appendix submitted by the parties suggest such figures were obtainable or had been obtained. First, the BRC—in a pamphlet advocating for approval in the referendum—provided data as to why the 15 million-board-feet exemption was neither "too low" nor "too high." *See* 20 Myths and Facts About the Softwood Lumber Checkoff, Blue Ribbon Commission for Check-off at 3 [hereinafter "20 Myths"] (AR0929). Presumably, the BRC could only have made this assessment if it had data on the entire industry's production of softwood lumber in a given year. The BRC noted that an exemption for the first 100 million board feet per year would have eliminated "a total of 18.45 billion feet, and only 58% of shipments would participate in the check-off...." *Id.* Similarly, it observed that an exemption for the first 15 million board feet per year would exempt roughly 11% of annual production and "allow the check-off to capture about 90% of production." *Id.*

Second, AMS's proposed rule establishing the Checkoff Order included an estimate that "[o]f the 595 domestic manufacturers, ... about 232, or 39 percent, ship less than 15 million board feet per year and will thus be exempt from paying assessments under the Order." 76 Fed.Reg. at 46,190. It further estimated that "[o]f the 883 importers ... 780, or 88 percent, import less than 15 million board feet per year and will also be exempt from paying assessments." *Id.* It then calculated that "if $17.5 million were collected in assessments ($0.35 per thousand board feet assessment rate with 50 billion board feet assessed), 25 percent, or about $4 million, will be paid by importers and 75 percent, or about $13 million, will be paid by domestic manufacturers." *Id.* If AMS could estimate the total revenue generated from the non-exempted softwood lumber, and if it knew how much more would be exempted by the 15–million threshold, then how could it *not* know the total quantity manufactured or imported? It is simply not plausible that it is "impossible to know" the total volume of softwood lumber when the chosen exemption threshold was determined on the basis of data that almost surely required knowledge of it. This impossibility claim was made by only one agency representative—Sonia

Jimenez, a department head of the Fruit and Vegetable division of AMS—so it is not even clear whether this view was widely shared by others in AMS or by the BRC.

Even if Defendants are being forthright, and obtaining this information truly is "impossible," they still must provide a reasoned explanation for their interpretation of "de minimis quantity" as being 15 million board feet per year—a quantity sufficient to build approximately 1,000 homes. *See In Re: Resolute,* 2014 WL 1993757, at *6. They propose an entirely different calculus: given Congress's assumed desire for checkoff programs to run successfully, and in light of the agency's broad interpretive leeway to fulfill this ambition, "de minimis quantity" may refer to any quantity that would " '*generate sufficient income* to support an effective promotion program for softwood lumber.' " Def. Opp./Rep. at 23 (quoting 75 Fed.Reg. at 61,013). AMS argues that other contemplated exemption thresholds—such as 20 million or 30 million board feet per year—would not have generated adequate revenue to support the checkoff program, since many more companies would have been exempted from paying assessments under the Order. *See id.* at 23; 75 Fed.Reg. at 61,013. Defendants contend that since "Congress would have favored an effective promotion program for softwood lumber," Def. Opp./Rep. at 23 (internal quotation marks omitted), if 15 million was an exemption threshold that would achieve an effective checkoff order, then this is "based on a permissible construction" of the statute. *Id.*

Defendants' argument is dubious for several reasons. First, their interpretation renders "de minimis" superfluous in the context of the statute. If Congress had really wanted to ensure that the Secretary had the means to effectuate an effective checkoff order at all costs, it could have just granted the Secretary carte blanche to issue *any* exemption threshold he wanted. Since Congress did not—and instead capped permissible exemptions only at "de minimis" quantities—it clearly did not intend the Secretary have such unfettered discretion. Second, while the phrase "de minimis quantity of an agricultural commodity," 7 U.S.C. § 7415(a)(1), is ambiguous with respect to precisely what quantity may reasonably be considered "de minimis," the term "de minimis" is not itself *entirely* ambiguous. "The inquiry here begins 'where all such inquiries must begin: with the language of the statute itself.' " *Loving v. IRS,* 917 F.Supp.2d 67, 74 (D.D.C.2013), *aff'd,* 742 F.3d 1013 (D.C.Cir.2014) (quoting *Caraco*

Pharm. Labs., Ltd. v. Novo Nordisk A/S, ——U.S. ——, 132 S.Ct. 1670, 1680, 182 L.Ed.2d 678 (2012)) (internal citation and quotations omitted). A leading dictionary defines the term "de minimis" to mean "[o]f little importance; insignificant." *See* American Heritage Dictionary (5th ed.2011). So an exemption quantity chosen that is very large would not be "of little importance" or "insignificant." Further, the "de minimis quantity" in question is the "de minimis quantity *of an agricultural commodity,*" 7 U.S.C. § 7415(a)(1) (emphasis added)—not the quantity of *revenue generated.* In other words, what the CPRIA permits is exemptions of quantities of an agricultural commodity that are of numerically "little importance" or "insignificant" in themselves. While Defendants are correct that precisely what quantity may be considered "de minimis" is ambiguous and therefore left to agency discretion to determine, the structure of the sentence makes clear that whatever quantity the agency chooses, it must justify this on the basis that the *quantity* is of little importance or is insignificant.

Given the definitions of "de minimis" provided above, Defendants' interpretive stance strains credulity. In theory, the Defendants' interpretation would permit an exemption high enough to exempt all but the industry's largest players (say, the top 3% of companies by volume), if assessments from those entities alone could generate sufficient revenue for a marketing program. Coupled with an assessment rate high enough to generate sufficient revenue, this exemption threshold would be permitted under Defendants' proposed meaning of "de minimis quantity." Yet it would clearly contravene any plain meaning of "de minimis" if it could exempt nearly the entirety of the quantity of the agricultural commodity.[2]

At bottom, the Court does not believe the explanation provided in the agency's briefs for its interpretation of "de minimis quantity" is a "permissible interpretation" as required by *Chevron*. *See Chevron,* 467 U.S. at 843, 104 S.Ct. 2778 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

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[2] Since only those assessed under a proposed checkoff order are entitled to vote in a referendum, it is questionable whether the hypothetical entities would approve an assessment levied only at them. Nevertheless, from the standpoint of interpreting "de minimis quantity," this is irrelevant.

Although the Court does not find merit with Resolute's many other APA claims, on this one count it has the better of the argument.

C. *Remand Without Vacatur*

The question, then, is how next to proceed. "Given the deficienc[y] ..., the Court must determine the proper remedy: to remand with vacatur, to remand without vacatur, or to vacate with no remand." *Conservation Law Found. v. Pritzker,* 37 F.Supp.3d 254, 270 (D.D.C.2014). Ordinarily, "[w]hen a Court identifies an infirmity in a rule, vacatur and remand is the 'normal' remedy." *Sec. Indus. & Fin. Markets Ass'n v. United States Commodity Futures Trading Comm'n,* 67 F.Supp.3d 373, 434 (D.D.C.2014) (citing *Allina Health Servs. v. Sebelius,* 746 F.3d 1102, 1110 (D.C.Cir.2014)). In the decades since *Chevron* and *State Farm* deference have been articulated, however, this Circuit has recognized that in certain instances, "an inadequately supported rule ... need not necessarily be vacated." *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150 (D.C.Cir.1993); *see also Pritzker,* 37 F.Supp.3d at 271. "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal,* 988 F.2d at 150–51 (citation and internal quotation marks omitted). "Moreover, remand without vacatur is appropriate where 'there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand.' " *Nat'l Parks Conservation Ass'n v. Jewell,* 62 F.Supp.3d 7, 20 (D.D.C.2014) (quoting *Allied–Signal,* 988 F.2d at 151).

Such a possibility seems likely here for several reasons. First, as discussed above, the CPRIA is an unusual statute in that industry representatives—in this case, the Blue Ribbon Commission—participate in a substantial capacity in developing and promulgating a proposed checkoff order. *See* 75 Fed.Reg. at 61,002 ("The proposal was submitted to USDA by the Blue Ribbon Commission (BRC), a committee of 21 chief executive officers and heads of businesses...."); 7 U.S.C. § 7413(b)(1)(B)(i) ("A proposed order with respect to an agricultural commodity may be ... submitted to the Secretary by ... an association of producers of the agricultural commodity; ..."). While the USDA is still responsible for "determin[ing] that a proposed order is consistent with and

will effectuate the purpose of this subchapter," *id.* § 7413(b)(2), it is understandable that the Secretary may not be as familiar with the details of every step in the analytical process along the way. This is particularly so in this case, where Resolute has launched a full frontal assault against the CPRIA and the Checkoff Order on both constitutional and APA grounds. Given the ten counts Resolute brought in its Complaint, Defendants' 38–page Opposition to Plaintiff's Cross–Motion for Summary Judgment was admirable in its concision considering the many issues that it had to address. Indeed, Defendants devoted only two paragraphs to oppose summary judgment on the issue of the "de minimis quantity" interpretation.

Whether remand without vacatur is appropriate turns on "the extent of doubt whether the agency chose correctly...." *Allied–Signal,* 988 F.2d at 150. While the Court finds Defendants' "impossibility" defense unsatisfactory and its proposed interpretation of "de minimis quantity" as any that "would generate sufficient income to support an effective promotion program" not permissible on the basis of the explanation so far provided, *see* Def. Opp./Rep. at 23, the Court suspects other rationales not briefed may turn up a better—and certainly permissible—account of "de minimis quantity."

The Court independently identified information included in the Joint Appendix that seems to point the way toward at least one plausible account of the Secretary's implementation of "de minimis quantity" in the Checkoff Order. In the Blue Ribbon Commission's "20 Myths" pamphlet circulated to softwood-lumber manufacturers and importers ahead of the referendum, the BRC explained that the 15 million-board-feet-per-year exemption was "*de minimis* as far as free riders is concerned." 20 Myths at 3 (AR0929) (emphasis added). The Court speculates that this means that this level of exemption would not exempt so many producers that those remaining—who would *not* be exempted—would perceive the others to be free riding by receiving the benefits without having to pay for them. After all, the free-rider problem is largely what spurred the creation of government-operated (and thus compulsory) checkoff programs in the first place. *See supra* Section I.B. The BRC also noted that this exemption threshold "relieves the administrative burden from 200 of the smallest companies." 20 Myths at 3 (AR0929). Such an explanation—if true and substantiated by the record—seems far more likely to satisfy *Chevron*

step-two review than that provided by the agency in its trim briefs here.

The second consideration in determining whether to remand without vacatur is "the disruptive consequences of an interim change that may itself be changed." *Allied–Signal,* 988 F.2d at 150–51; *see also Pritzker,* 37 F.Supp.3d at 270–71. This factor also weighs in favor of remand without vacatur here. As the entire Background section above indicates, the checkoff program was not developed hastily; to the contrary, it took years between the time of the first discussions about a checkoff program in 2008 and the ultimate Order implemented after a majority of voters approved it in the 2011 referendum. "[C]ases that involve fee collection or payment distribution," moreover, are particularly appropriate for remand without vacatur. *See* Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings,* 80 N.Y.U. L.Rev. 278, 298 (2005). This is especially true in the case of "agency collection of fees," including those involving the Department of Agriculture. *See id.; see also Milk Train, Inc. v. Veneman,* 310 F.3d 747, 756 (D.C.Cir.2002) (remanding without vacatur the Secretary's implementation of a subsidy program for milk producers), *Sugar Cane Growers Cooperative of Florida v. Veneman,* 289 F.3d 89, 98 (D.C.Cir.2002) (remanding without vacatur the Secretary's implementation of a payment-in-kind program for sugar crop).

Here, non-exempted manufacturers and importers have been paying assessments since 2012, and that money has presumably been spent on "research, promotion, consumer education and industry information" in order to "strengthen the position of softwood lumber in the marketplace, maintain and expand markets for softwood lumber, and develop new uses for softwood lumber within the United States." 76 Fed.Reg. at 46,185. Prematurely vacating the Checkoff Order would effectively nullify these efforts and raise questions about whether all participants who paid into it deserve the remedy Resolute here seeks: "restitution for all spent funds collected from Plaintiff through assessments." Pl. Opp./MSJ at 47. While this may ultimately be the appropriate remedy, the Court thinks it prudent not to vacate the Order due to a failure to provide a sufficient explanation of a chosen interpretation of a statutory term, particularly where alternative explanatory accounts seem likely to exist elsewhere in the administrative record, and where the threshold was not determined by the agency alone.

D. *Constitutional Claims*

Having navigated Resolute's throng of APA claims, its constitutional claims remain. These include allegations that the CPRIA unconstitutionally delegates executive authority to referendum participants, that the USDA's application of the CPRIA does the same, that the USDA also unconstitutionally delegates legislative authority to referendum participants, and that it violates the Due Process rights of producers and importers (Counts I–IV). In light of the Court's decision to remand to the agency for further explanation of its decision to implement a 15 million-board-feet-per-year exemption threshold, however, the Court need not address these constitutional questions here. Pursuant to the principle of constitutional avoidance, a court shall "resolve statutory questions at the outset where to do so might obviate the need to consider a constitutional issue." *U.S. v. Wells Fargo Bank,* 485 U.S. 351, 354, 108 S.Ct. 1179, 99 L.Ed.2d 368 (1988); *see also Heller v. Dist. of Columbia,* 670 F.3d 1244, 1250 (D.C.Cir.2011) (same). Resolute's constitutional claims must await another day.

IV. Conclusion

Because most portions of the Checkoff Order and the accompanying rulemaking process clearly satisfy APA review, the Court will grant Defendants' Motion for Summary Judgment in part (as to Counts VI–X) and deny it in part (as to Count V). Count V will be remanded without vacatur to the Department of Agriculture for a reasoned and coherent treatment of the decision to select a 15 million-board-feet-per-year exemption as the "de minimis quantity" exemption in accordance with 7 U.S.C. § 7415(a)(1). Finally, because the Court remands the case with questions outstanding as to whether the Checkoff Order passes muster under APA review, it declines at this time to render judgment on Plaintiff's constitutional claims. A separate Order will so state.

ORDER

As set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Plaintiff's Motion for Summary Judgment is GRANTED IN

PART and DENIED IN PART;

2. Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART;

3. Judgment is entered in favor of Defendants on Counts VI–X; and

4. The case is REMANDED WITHOUT VACATUR to the USDA on Count V.

IT IS SO ORDERED.

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RESOLUTE FOREST PRODUCTS, INC. v. USDA.
Civil Action No. 14-2103 (JEB).
Order of the Court.
Filed February 2, 2016.

CPRIA – APA – De minimis quantity – Domestic manufacturers – Exemption from check-off participation – Lumber Checkoff Order – Softwood-lumber market.

[Cite as: No. 14-2103 (JEB), 2016 WL 1714312 (D.D.C. Feb. 2, 2016)].

Previously the Court ordered the Department to file a memorandum explaining its reasoning for selecting a 15-million-board-feet exemption as the threshold for the Softwood Lumber Checkoff Order; the below Order was issued in response to the Department's memorandum. Noting several numerical discrepancies in the Department's estimates, the Court concluded that it needed further clarification by the Department before it could rule on whether the 15-million-board-feet exemption was an arbitrary and capricious determination violating the Administrative Procedure Act. The Court ultimately ordered the Department to provide additional accounting and verification of estimates in order to confirm the underlying data that was relied upon to select the *de minimis* exemption threshold.

United States District Court,
District of Columbia.

ORDER

JAMES E. BOASBERG, UNITED STATES DISTRICT JUDGE, ENTERED

THE ORDER OF THE COURT.

Plaintiff Resolute Forest Products, Inc. here challenges the U.S. Department of Agriculture's rulemaking process related to its Softwood Lumber Checkoff Order under the Commodity Promotion, Research, and Information Act, alleging violations of both the Administrative Procedure Act and the U.S. Constitution. After both parties filed cross-motions for summary judgment on the administrative record, this Court in its September 9, 2015, Memorandum Opinion and separate Order granted Defendants' motion on all APA counts but one, which it remanded without vacatur to the USDA. *See Resolute Forest Products, Inc. v. U.S. Dep't of Agric.,* No. 14–2103, 2015 WL 5501830 (D.D.C. Sept. 9, 2015). Plaintiff in that count challenged, among other things, the selection of 15 million board feet by the USDA's Agricultural Marketing Service (AMS) as the "de minimis quantity" of softwood lumber to be exempted from the Softwood Lumber Checkoff Order. *See id.* at *14-17; *see also* 7 U.S.C. § 7415(a) ("An order issued under this subchapter may contain—(1) authority for the Secretary to exempt from the order any de minimis quantity of the agricultural commodity otherwise covered by the order....").

In its Opinion, the Court found that the Department's initial summary-judgment pleadings had not adequately provided a reasoned basis for the Secretary's selection of the 15–million–board–feet exemption. Because the Court itself identified evidence in the administrative record that *might* provide a documented basis to support it, however, the Order remanded without vacatur to the USDA to provide a more "reasoned and coherent treatment of the decision...." *Resolute Forest Products,* 2015 WL 5501830, at *19. Complying, the Department provided a Memorandum from Rex A. Barnes, Associate Administrator, AMS. *See* Notice (ECF No. 26), Exh. A (Memorandum re: Additional Explanation for the Exemption Threshold in the Softwood Lumber Checkoff Order) ("Memorandum"). Dissatisfied even with this explanation, however, Plaintiff filed a Reply (ECF No. 28) arguing that the USDA's reasoning for selecting the 15–million–board–feet exemption remains arbitrary and capricious and in violation of the APA.

I. DISCREPANCIES IN ESTIMATES

Having reviewed the parties' latest pleadings and exhibits, the Court notes several numerical discrepancies that it has been unable to resolve on its own. It will thus request clarification from the USDA before ruling on the exemption issue.

One of Resolute's central objections is that the USDA and the Blue Ribbon Commission – the body that proposed the Softwood Lumber Checkoff Order and that now oversees it – provided significantly different estimates of the total number of softwood-lumber producers and importers, as well as the number that would be covered by the 15–million–board–feet exemption. *See* Reply at 8–9. These estimates were important because, according to the USDA, the 15–million–board–feet quantity was selected as "de minimis" on the bases that it would both minimize the "free rider implications" of industry participants who do not pay into the order but reap its benefits and also limit "the impact of program requirements on small businesses." Mem. at 2. If so, then central to satisfying the Department's own stated *de-minimis*-quantity selection criteria are reliable estimates of the total number of market participants exempted, the number of small businesses exempted, and the percentage so exempted.

More specifically, the BRC, when proposing the Checkoff Order, estimated that with a 15–million–board–feet threshold, 257 out of 664 U.S. and Canadian softwood-lumber "companies" (presumably, manufacturers and importers) would be exempt from the Order because their production capacity did not exceed that number. *See* Letter from Jack Jordan, BRC Chairman, to Robert C. Keeney, Deputy Administrator, USDA, AMS (Feb. 16, 2010), Attach. B ("Overview, Justification, and Objectives for a National Research and Promotion Program For Softwood Lumber") at 11 (AR1360). In contrast, the USDA in its April 2011 notice of proposed rulemaking broke out its estimates based on separate measures of U.S. domestic manufacturers and foreign importers. As to the former, it estimated that 232 U.S. manufacturers would be exempt out of a total of 595, while 780 importers would be exempt out of a total of 883. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed.Reg. 22,757, 22,767 (Apr. 22, 2011). Combined, the USDA estimated that 1,012 softwood-lumber companies would be exempted out of 1,478 total. *Id.*

The USDA responds to Plaintiff's objections by stating that the above

disparity is due to estimates that "dealt with different periods of time and [that] were based on difference sources of data." Resp. (ECF No. 29) at 3. It claims that whereas the USDA averaged both Forest Service and Customs and Border Protection annual figures for the years 2007, 2008, and 2009, the BRC used only a 2007 estimate based solely on Forest Service data. *See id.* Yet in attempting on its own to reconcile the disparity between the BRC and USDA estimates through their underlying data sources, the Court believes that both the USDA and the BRC derived at least their *U.S.* estimates from the *same* report, a 2009 joint-USDA-Forest-Service research paper. *See* 76 Fed.Reg. at 22,767 n.14 (citing Henry Spelter, David McKeever & Daniel Toth, *Profile 2009: Softwood Sawmills in the United States and Canada,* FPL–RP–659 (Oct.2009) *("Profile* 2009")); Overview, Justification, and Objectives at 4 (AR1353) (stating that "data and much of the information in this application has been compiled from" *Profile 2009,* referenced there as "Reference D"). The Court now looks at each estimate separately to explain why it has had difficulty reconciling the figures.

A. USDA Estimates

Beginning with the USDA's estimate, the Court believes it has identified what appears to be a misreporting by the agency of the data contained in the *Profile 2009* report. While the USDA estimated in its April 2011 notice of proposed rulemaking that there was "an average of 595 domestic manufacturers of softwood lumber in the United States annually," 76 Fed.Reg. at 22,767, this calculation seems to have confused business entities with *sawmills.* In reporting its estimate of 595 domestic manufacturers, the USDA stated that this "number represents separate business entities [where] ... one business entity may include multiple sawmills." *Id.* Yet for that estimate the USDA cited a page of the USDA/Forest Service report that makes clear that the estimates "show past and current capacity of *sawmills"* – not entities. *See id.* at n.14; *Profile 2009* at 15 ("The following maps and tables show past and current capacity of sawmills and the availability of timber, by county, in the vicinity of these mills....").

To verify this, the Court itself totaled all U.S. *sawmills* specified across 20 tables listed in that report's appendix for the years 2007, 2008, and 2009, which when averaged yielded the same numerical value that the

USDA had cited in its notice for *entities,* not sawmills (approximately 595.33). *Seeinfra* Table 1; *see also Profile 2009,* App. Confusingly, the same approach for calculating Canadian sawmills yielded an annual average of 348.67 sawmills for the years 2007–2009, *id.,* far fewer than the 883 "importers" the USDA had estimated in its April 2011 notice. *See* 76 Fed.Reg. at 22,767. This may be because the Department relied on "Customs data" for the latter figure, *see id.,* but without a citation to that underlying source, the Court was unable to confirm this. Either way, the USDA–Forest Service estimate of Canadian *sawmills* (approximately 348) is far fewer than the 883 importers the USDA estimates. This disparity is disconcerting on its face, since there should be at least as many sawmills as entities, and certainly not fewer. Nor is the disparity likely explained by non-Canadian imports. Elsewhere in its notice of proposed rulemaking, the USDA stated that "imports from Canada ... compris[e] about 94 percent of total imports." *Id.* at 22,759.

B. BRC Estimates

Because the estimates provided by the *agency* in its April 2011 notice of proposed rulemaking do not seem to be substantiated by the underlying data it relied upon, the Court also examined the data provided by the BRC in the softwood-lumber checkoff proposal it sent to the USDA on February 16, 2010. In that proposal, the BRC provided estimates of the total number of companies and the percentage of these companies that would be exempt under the proposed 15–million–board–feet threshold. *See* Overview, Justification, and Objectives (AR1353–64). According to that document, in selecting 15 million board feet as the *de minimis* figure the BRC estimated that 257 out of 664 companies would be exempt. Those exempted entities were estimated to have a combined production capacity of only 1,861 million board feet out of the industry's total capacity of 74,921 million board feet, or 2.5% of total capacity. *See id.* at 11 (AR1360). The BRC also estimated that if the first 15 million board feet were exempted for *all* companies, 11.3% of total production capacity would be exempted. *See id.* (It did not provide the accompanying estimate in total million board feet that would be exempted.)

Once again, however, the Court was unable to verify this estimate on the basis of the joint USDA–Forest Service *Profile 2009* report, which the BRC cited in preparing its own estimates. *Id.* at 4. As stated above, the

BRC's estimate for combined U.S. and Canadian production capacity in 2007 was 74,921 million board feet, *id.* at 10, or approximately 176.8 million cubic meters of lumber, which the Court understands to be the other common unit of measure for softwood lumber. The Court relied onConvert-Me.com, *see* http://www.convert-me.com/en/convert/volume/, to convert estimates between cubic meters and meter board feet because the joint USDA–Forest Service *Profile 2009* Report largely provides its calculations in cubic meters of lumber. The Court was nonetheless unable to locate this number in either unit measure in the *Profile 2009* report that the BRC appears to have relied upon. *See Profile 2009* at 1–14. According to that report, combined U.S. and Canadian production capacity for 2007 was estimated at 188.1 million cubic meters of softwood lumber, or 79,710 million board feet, not 74,921 million board feet as reported by the BRC in its proposal. The Report's estimate for 2008 appears much closer, at 175.5 million cubic meters (or roughly 74,370 million board feet). Nevertheless, the BRC claimed to rely on 2007 estimates. And, because the *Profile 2009* Appendix includes estimates of the number of *sawmills* in the U.S. and Canada but no straightforward estimate of *entities,* the Court was unable to determine whether the USDA–Forest Service estimated total of 976 sawmills in the United States and Canada for 2007 constituted 664 companies with a total estimated production capacity of 74,921 million board feet, as the BRC estimated in its proposal.[3] *See* Overview, Justification, and Objectives at 11 (AR1360). This is to say nothing of the BRC's more specific estimate that 257 companies with 1,861 million board feet of production capacity would be entirely exempt from the checkoff order; nowhere in the *Profile 2009* report could the Court determine how this figure was derived. *See id.*

II. CONCLUSION

To be clear, the Court's concern is not that the USDA and BRC estimates differ, nor does it wish to nitpick the differences between them. Given the complexity of measuring the size and scale of a large and

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[3] The Appendix does specify which entity owns each sawmill, but because many entities appear to own multiple sawmills, and because some entities went by "former name[s]" or do business as another entity, the Court was not confident it could accurately derive a precise number of entities from the list of 976 U.S. and Canadian sawmill entities included in the 40-page appendix. *See infra* Table 1; *Profile 2009*, App I.

dynamic international industry, it is understandable that estimates may vary year to year and source to source. Rather, the Court simply seeks assurance that some verifiable source of data accurately depicted the softwood-lumber market and supported the selection of 15 million board feet as the appropriate *de minimis* quantity. The Court in particular seeks to confirm the estimate that fully exempted companies would produce 2.5% of total production capacity and that the exemption would exclude a total of 11.3% of the production capacity of the U.S. and Canadian softwood-lumber market from the Checkoff Order.

The BRC in its proposal stated that its reliance on the *Profile 2009* report was "supplement[ed] ... with an overview of the economics of softwood lumber, information about imports from other overseas sources which participate in the U.S. market, and information about encroachment on wood markets by competing products." *Id.* at 4 (AR1353). It is possible, then, that the BRC's estimates for "Actual U.S. Consumption 2003–2009" and "Impact of Exemption on Check-off Participation: Capacity Removed from Assessment," *see id.* at 11 (AR1360), may also draw on those other sources. The Court seeks to confirm and verify the underlying data that the BRC and/or the USDA rationally relied upon when selecting the *de minimis* exemption threshold.

The Court, accordingly, ORDERS that by February 16, 2016, the USDA shall provide:

1. An account of the BRC's "Actual U.S. Consumption 2003–2009" estimate on page 11 of its Overview, Justification, and Objectives for a National Research and Promotion Program For Softwood Lumber (AR1360), and verification of this estimate based on its underlying source or sources;

2. An account of the BRC's "Impact of Exemption on Check-off Participation: Capacity Removed from Assessment" estimate on page 11 of the same document, and verification of this estimate based on its underlying source or sources; and

3. Verification via underlying data of the estimates provided in the agency's notice of proposed rulemaking (Softwood Lumber Research, Promotion, Consumer Education and Industry

Information Order, 76 Fed.Reg. 22,757 (Apr. 22, 2011) concerning the number and percentage of softwood-lumber market participants exempted from the checkoff order at the 15–million–board–feet threshold.

IT IS SO ORDERED.

Table 1: Estimated Softwood Lumber Sawmills, U.S. & Canada, 2007–2009 (cited by USDA)

	Region	2007	2008	2009	2007-09 Average
US	Alabama & Mississippi	85	83	82	
C	Alberta	31	30	28	
US	Arizona, Colorado, New Mexico, South Dakota, Utah, Wyoming	24	23	21	
US	Arkansas, Louisiana, Oklahoma, Eastern Texas	68	68	61	
C	British Columbia Coast	35	32	30	
C	British Columbia Interior	87	81	78	
US	Northern California	28	26	26	
US	Florida & Georgia	62	60	57	
US	Idaho & Montana	40	39	35	
US	Maine, New Hampshire, Vermont	55	54	53	
C	Manitoba & Saskatchewan	13	43	12	
C	Maritime	48	42	37	

	Provinces & Newfoundland				
US	Maryland & Virginia	35	34	33	
US	Michigan, Minnesota, Wisconsin	29	29	27	
US	New York	15	15	15	
US	North Carolina & South Carolina	65	62	62	
C	Ontario	36	36	37	
US	Oregon	60	60	56	
C	Quebec	112	105	103	
US	Washington	48	47	44	
	Total	976	939	897	
	Total US	614	600	572	**595.33**
	Total Canada	362	339	325	**348.67**

Source: Spelter, McKeever & Toth, Profile 2009, Appendix I

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RESOLUTE FOREST PRODUCTS, INC. v. USDA.
No. 14-2103 (JEB).
Memorandum Opinion.
Filed May 17, 2016.

CPRIA – Assessments – Blue Ribbon Commission – *De minimis* quantity – Entities – Exemption estimates – Production capacity – Softwood Lumber Checkoff Order – Shipments – Summary judgment.

[Cite as: No. 14-2103 (JEB), 2016 WL 2885869 (D.D.C. May 17, 2016)].

The Court concluded that the Department's selection of 15-million-board-feet as the *de minimis* quantity for exemption under the Softwood Lumber Checkoff Order was arbitrary and capricious and, therefore, the Checkoff Order was promulgated unlawfully. In so finding, the Court emphasized that the Department's explanation for selecting the particular *de minimis* quantity raised numerous concerns; specifically, the record contained "too many misstatements, unsubstantiated (or incorrect) estimates, and statements contradicted by [its] subsequent litigation positions to support the selection of 15mmbf as the de minimis quantity." The Court held that, where an agency relies upon incorrect or inaccurate data or fails to make a reasonable effort to ensure that it relied upon appropriate

data, the agency's decision is arbitrary and capricious and must be overturned.

United States District Court,
District of Columbia.

MEMORANDUM OPINION

JAMES E. BOASBERG, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

For the past several years, Plaintiff Resolute Forest Products, Inc. and the U.S. Department of Agriculture have been locked in a struggle over the latter's Softwood Lumber Checkoff Order. That Order requires any softwood-lumber domestic manufacturer or foreign importer who produces or imports more than 15 million board feet (15mmbf) per year to pay a mandatory assessment on all softwood lumber shipped above that amount. Checkoff orders such as this are a kind of compulsory marketing program developed by private parties and overseen by the Department in accordance with the Commodity Promotion, Research and Information Act (the CPRIA), 7 U.S.C. §§ 7411–7425. Apparently unhappy that it must pay assessments under the Order, Resolute lodged a failed administrative protest before an ALJ and then subsequently brought suit here, raising four constitutional challenges to the Order and six alleged violations of the Administrative Procedure Act.

In its September 9, 2015, Memorandum Opinion, this Court dismissed all but one of Plaintiff's APA challenges. *See Resolute Forest Products, Inc. v. U.S. Dep't of Agric.*, 130 F.Supp.3d 81 (D.D.C.2015). On the sole remaining APA claim (Count V), however, this Court remanded without vacatur to the Department of Agriculture for a reasoned and coherent treatment of its decision to select 15mmbf per year as the threshold amount. Defendants responded with a memorandum and exhibits providing additional explanation for the selection of that figure. *See* ECF No. 26. Although Defendants' second explanation was better than its first, it nonetheless raised as many questions as it answered. Unable to reconcile certain discrepancies within the agency's explanations and the data it presented, the Court remanded again, this time ordering the Department to point to the underlying data sources relied upon in selecting 15mmbf and to explain the discrepancies the Court identified. *See Resolute Forest Products, Inc. v. U.S. Dep't of Agric.*, No. 14–2103, 2016 WL 1714312

(D.D.C. Feb. 2, 2016). The agency responded again with further exhibits and an additional memorandum. *See* ECF No. 33.

After all of the back and forth, the same question remains: was the agency's selection of 15mmbf arbitrary and capricious in violation of the APA? Despite two remand opportunities, Defendants have still not provided a reasonable explanation for selecting that quantity. Nearly every calculation upon which the agency relies has significant mismeasurements or inaccuracies, and many of the agency's explanations across its original rulemaking process, its briefings, and its two responses to the Court's remand orders contradict one another. While APA review does not demand perfection from an agency, the Court here must ineluctably conclude that USDA's promulgation of the Checkoff Order was arbitrary and capricious.

I. BACKGROUND

Because the Court has already addressed many of the substantive and procedural issues of this case in its earlier Opinion, *see Resolute Forest Products*, 130 F.Supp.3d 81, it will focus on those still in contention here.

A. The Softwood Lumber Checkoff Order

The Softwood Lumber Checkoff Order that Plaintiff challenges here grew out of the softwood-lumber industry's struggles during one of the "worst market [s] in history" after the great recession and the collapse of the housing market at the end of the last decade. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order; Proposed Rules, 75 Fed. Reg. 61,002, 61,005 (Oct. 1, 2010). To prop up the struggling industry, a trade association known as the Blue Ribbon Commission (BRC)—comprising 21 softwood-lumber chief-executive officers and business leaders—submitted its incipient proposal to USDA's Agricultural Marketing Service. *Id.* AMS administers marketing orders under the CPRIA, the statute that governs the proposal, approval, and administration of checkoff orders for a variety of commodity products. *See* 7 U.S.C. § 7412–13. When a proposed order is submitted by "an association of producers" (here, the BRC), the statute instructs the Secretary to "determine[ ] that a proposed order is consistent with and will effectuate the purpose" of the CPRIA. *Id.* § 7413(b)(1)–(2). If he so

determines, he then proceeds through the standard notice-and-comment rulemaking process for the proposed order. *Id.* § 7413(b)(2)–(4).

In addition to typical notice-and-comment rulemaking, however, the CPRIA mandates that the Secretary also obtain the approval of "persons subject to assessments" under the order via a referendum. *Id.* § 7413(b)(1). The Secretary may conduct said referendum either before finalizing a proposed checkoff order or else within three years of the first assessments taking place in accordance with it. *Id.* § 7417(b)(2). Crucial to this suit and the present dispute, the Secretary also has the authority to exempt from the order any "de minimis quantity" of the agricultural commodity subject to assessment. *Id.* § 7415(a)(1). And because eligibility to participate in the referendum depends on being "among persons to be subject to an assessment," the de minimis quantity also affects who may vote in a given referendum. *Id.* § 7417(a)(1).

As to the Checkoff Order here, after the Secretary determined that the BRC's proposal would effectuate the purpose of the CPRIA, AMS announced the proposed rule in the Federal Register, providing notice and seeking comment. *See* 75 Fed. Reg. at 61,012. The agency announced that the proposed Order would provide for initial assessments of $0.35 per thousand board feet shipped within or imported to the U.S., although it could eventually be increased up to $0.50. *Id.* The agency also stated that the proposed de minimis quantity exempted from assessment would be 15mmbf per producer or importer per year, with assessments only applying to amounts shipped or imported by a given producer above that threshold in any given year. *Id.* In determining this assessment price and exemption threshold, the agency also explored what portion of the softwood-lumber industry would pay assessments under the Order and considered several different prices and de minimis quantities. *Id.* at 61,012–13.

As support for its proposed de minimis quantity, the agency determined that a 15mmbf exemption and an assessment of $0.35 per thousand board feet would "generate sufficient income to support an effective promotion program for softwood lumber." *Id.* at 61,013. The agency also noted that the BRC had explored various de minimis exemption thresholds—including 15 million, 20 million, and 30 million board feet—and concluded that the 15mmbf exemption ("a quantity sufficient to build

approximately 1,000 homes," *Resolute Forest Products*, 130 F.Supp.3d at 102 (internal citation and quotation marks omitted)) would yield "a deduction of 11.3 percent in assessment income" by reducing the total quantity of softwood lumber to be assessed by that percentage. *See* 75 Fed. Reg. at 61,013. In justifying this exemption quantity, the agency estimated that roughly 61% of domestic manufacturers and about 12% of foreign importers would be subject to the Order. *Id.*

After the agency issued the initial proposed rule, it followed up with a summary of comments received and provided responses to those comments. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed. Reg. 22,757, 22,770–75 (April 22, 2011). As the majority of comments supported the proposed Order, AMS next announced a referendum to approve it, in which all eligible producers and importers could participate. *Id.* at 22,775. Eligibility required manufacturing and shipping of 15mmbf or more between January 1 and December 31, 2010. *Id.* After the May 23–June 10, 2011, referendum was conducted, AMS announced that 67% of those voting, a group that collectively shipped 80% of the volume of softwood lumber represented in the referendum, had voted in favor of the Order. *See* Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed. Reg. 46,185, 46,188, 46,189 (Aug. 2, 2011). Based on this approval, AMS subsequently put the Checkoff Order into effect.

B. <u>Resolute's Challenge</u>

Resolute has opposed the Checkoff Order from the beginning. As Plaintiff imported <u>less</u> than 15 million board feet during 2010, it was ineligible to vote in the referendum, *see In Re: Resolute Forest Products Petitioner*, No. 12–40, 2014 WL 1993757, at *5–6 (U.S.D.A. Apr. 30, 2014), but because it has since begun to import <u>more</u> than that amount, it has had to pay assessments on imports above that threshold since January 2012. *See* Pl. MSJ Reply (ECF No. 21) at 7. Opposing the Checkoff Order, Plaintiff filed a petition with USDA on October 28, 2011, shortly after it went into effect. *See* Compl., ¶ 81. When Resolute did not prevail administratively, it filed suit before this Court in December 2014.

The grist of Plaintiff's challenge is that AMS violated the Administrative Procedure Act in both the rulemaking and referendum process, *id.,* ¶¶ 149–200, and that the CPRIA unconstitutionally delegates executive and legislative authority to private parties and also violates the due-process rights of producers and importers. *Id.*, ¶¶ 123–148. In its September 9, 2015, Opinion, this Court granted summary judgment for the agency on five of Resolute's six APA challenges. *See Resolute Forest Products*, 130 F.Supp.3d at 92–100. Because it remanded without vacatur on the sixth APA claim, the Court, following the doctrine of constitutional avoidance, deferred Resolute's constitutional challenges for a later date. *Id.* at 105.

In its remaining APA challenge (now before the Court), Resolute alleged that the agency acted arbitrarily and capriciously in selecting the 15mmbf "de minimis quantity" under the CPRIA. *See* Pl. Opp./MSJ (ECF No. 15) at 25. Plaintiff especially took issue with the agency's original legal argument that any exemption quantity that would "generate sufficient income to support an effective promotion program" would be a permissible de minimis quantity because it was "impossible for [AMS] to know the total volume" of softwood lumber produced and shipped. *See* Def. MSJ (ECF No. 13) at 24 (citation and internal quotation marks omitted). Resolute argued that AMS lacked discretion to designate any amount whatsoever as the de minimis quantity and asserted that the Service could not substantiate its reasons for selecting 15mmbf as the de minimis quantity. *See* Pl. Opp./MSJ at 26–27. In essence, it concluded, "AMS accepted the 15 million board foot exemption given to it by the BRC because that threshold was calculated by the BRC to hit the revenue targets that the BRC desired." *Id.* at 27.

The Court shared Plaintiff's concern about the agency's argument that it was "impossible" to know the amount of softwood lumber to be assessed, particularly where considerable record evidence suggested that total volumes of softwood lumber produced and shipped were readily available and, indeed, were relied upon in determining the 15mmbf exemption. *See Resolute Forest Products*, 130 F.Supp.3d at 101 ("At least two documents in the Joint Appendix submitted by the parties suggest such figures were obtainable or had been obtained."). The Court, accordingly, remanded without vacatur to the agency to supply additional explanation as to the data that supported a 15mmbf exemption threshold, as well as the

underlying rationale in selecting such a threshold. *Id.* at 103–05. Defendants returned several months later with a memorandum from Rex A. Barnes, AMS Associate Administrator, discussed in greater detail below. *See* First Remand Notice (ECF No. 26), Exh. A.

In the course of examining Barnes's explanation and attached exhibits, the Court was still unable to understand how the sources of data the agency purported to rely upon yielded the estimates it had provided during rulemaking. Heeding the maxim of "if at first you don't succeed, try, try, try again," the Court remanded without vacatur a second time, ordering the agency to provide reassurance that, *inter alia*, "some verifiable source of data accurately depicted the softwood-lumber market and supported the selection of 15 million board feet as the appropriate *de minimis* quantity." *Resolute Forest Products*, 2016 WL 1714312, at *3. The agency responded with a memorandum from Charles W. Parrott, Deputy Administrator of the Specialty Crops Program, as well as additional exhibits. *See* Notice (ECF No. 33), Exh. 1. This, too, proved unsatisfactory to Resolute. *See* Pl. Second Remand Response (ECF No. 35). In any event, with this additional information in hand—the agency's two remand memoranda and attached exhibits—the Court may finally rule on Resolute's remaining APA challenge.

II. LEGAL STANDARD

In the typical case, summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C.Cir.2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. *See Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505; *Holcomb*, 433 F.3d at 895. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505; *Holcomb*, 433 F.3d at 895.

Although styled Motions for Summary Judgment, the pleadings in this case more accurately seek the Court's review of an administrative

decision. Challenges under the CPRIA proceed under the Administrative Procedure Act's familiar "arbitrary and capricious" standard of review. *See* 7 U.S.C. § 7418(b)(1); 5 U.S.C. § 706(2)(A). Because of the limited role federal courts play in reviewing such administrative decisions, the typical Rule 56 summary-judgment standard does not apply to the parties' dueling motions on Resolute's APA claims. *See Sierra Club v. Mainella*, 459 F.Supp.2d 76, 89–90 (D.D.C.2006). Instead, in APA cases, "the function of the district court is to determine whether or not ... the evidence in the administrative record permitted the agency to make the decision it did." *Id.* (internal citations omitted). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review. *See Bloch v. Powell*, 227 F.Supp.2d 25, 31 (D.D.C.2002) (citing *Richards v. INS*, 554 F.2d 1173, 1177 (D.C.Cir.1977)).

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "narrow" standard of review—which appropriately encourages courts to defer to the agency's expertise—an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (citation and internal quotation marks omitted). "In reviewing agency action under that standard, a court is not to substitute its judgment for that of the agency," *GameFly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 148 (D.C.Cir.2013) (citation and internal quotation marks omitted), nor to "disturb the decision of an agency that has examine[d] the relevant data and articulate[d] ... a rational connection between the facts found and the choice made." *Americans for Safe Access v. DEA*, 706 F.3d 438, 449 (D.C.Cir.2013) (internal quotation marks and citation omitted). On the other hand, where the agency has not provided a reasonable explanation for its actions, "[t]he reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (citation and internal quotation marks omitted). A court should nevertheless "uphold a decision of less than ideal clarity if

the agency's path may reasonably be discerned." *Id.* (quoting *Bowman Transp. Inc. v. Arkansas–Best Freight System*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

More specific to Resolute's remaining APA challenge here—a challenge to the Secretary's interpretation of an ambiguous statutory term—"[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, app*lying the ordinary tools of statutory construction, the court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear[,] ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " City of Arlington, Tex. v. FCC, —— U.S. ——, 133 S.Ct. 1863, 1868, —— L.Ed.2d —— (2013) (quoting *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. This latter analysis is colloquially known as "*Chevron* step two." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C.Cir.2011) ("At *Chevron* step two we defer to the agency's permissible interpretation, but only if the agency has offered a reasoned explanation for why it chose that interpretation.").

III. ANALYSIS

The Court now turns to the heart of Resolute's remaining APA challenge: that the agency's selection of 15mmbf as the de minimis quantity exempted was arbitrary and capricious. *See* Pl. Opp./MSJ at 25–26. The first step in considering a challenge such as this is to assess the agency's interpretation of the statute itself. Because the Court has already found the statutory term "de minimis quantity" ambiguous, *see Resolute Forest Products*, 130 F.Supp.3d at 102–103, it resumes its analysis at *Chevron* step two: given the ambiguity in the statute, has the agency offered a permissible construction of "de minimis quantity"?

This question, in turn, implicates two separate issues. The Court must

first assess whether the agency considered appropriate criteria in determining a viable de minimis quantity to be exempted. Satisfied that it did so, the Court next considers the agency's explanation and evidence supporting its selection of 15mmbf as de minimis in light of the agency's identified criteria.

A. Permissible Interpretation of "De Minimis Quantity"

The Court begins by considering the agency's interpretation of "de minimis quantity" under the CPRIA. As a reminder, Defendants' initial summary-judgment pleadings maintained that because it was "impossible" to know the total quantity of softwood lumber produced—despite evidence to the contrary in the agency's own rulemaking notices—the Secretary's selection of "any" de minimis quantity was permissible under the CPRIA. *Compare* Def. Reply at 23 (" '[i]t's impossible for us to know the total volume' of softwood lumber"), *with* 75 Fed. Reg. at 61,003 ("According to USDA's Forest Service, for 2007–2008, total output (production) of softwood lumber by U.S. sawmills averaged about 29.5 billion board feet annually."), *and id.* at 61,004 ("According to U.S. Department of Commerce, Census Bureau, Foreign Trade Statistics data, imports of softwood lumber from 2007 through 2009 averaged about 13 billion board feet annually.") (citation omitted). Given the implausibility of the agency's interpretation—in light of the plain meaning of "de minimis" and the appearance of evidence in its rulemaking notices suggesting it was possible to obtain total quantity estimates—the Court remanded "for a reasoned and coherent treatment of the decision to select a 15 million-board-feet-per-year exemption as the 'de minimis quantity' exemption in accordance with" the CPRIA. *See Resolute Forest Products*, 130 F.Supp.3d at 105.

In response to this Order, Defendant provided a memorandum from Rex A. Barnes, Associate Administrator, AMS. Recognizing the problematic nature of its initial litigation position at summary judgment, the agency's memorandum provides a more thorough account of the general criteria it asserts are appropriate in selecting a "de minimis quantity" in accordance with 7 U.S.C. § 7415(a)(1). The agency has not had a prior occasion to articulate how it determines a "de minimis quantity" to be exempted from a proposed checkoff order, nor has a court previously endorsed a particular interpretive approach, so this is a question

of first impression.

As the agency noted in its rulemaking notice, "[T]he 1996 Act does not define the term de minimis and USDA is not limited to using the definition of de minimis as specified in another law or agreement. The de minimis quantity is defined for a particular program and industry." 76 Fed. Reg. at 22,772. Because the CPRIA "provides no set methodology or formula for computing a de minimis quantity," the Barnes Memorandum explains that USDA considered several factors in selecting a threshold, including (1) an estimate of the total quantity of the particular agricultural commodity (both quantity assessed and quantity exempted); (2) free-rider implications of a particular quantity; (3) the impact of such a limit on small businesses; and (4) the available funding to support a viable program operating at that exemption threshold. See Barnes Mem. at 3.

From the vantage point of *Chevron* step-two analysis, the question is whether the agency's proposed construction of the ambiguous term—"de minimis quantity"—is a permissible interpretation. These general factors were not articulated in quite this fashion in the agency's notice of the proposed rulemaking, its response to comments, and in the final regulation implementing it. Given that *Chevron* deference is owed to "the administrative official and not to appellate counsel," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (citation and internal quotation marks omitted), "we give no deference to agency 'litigating positions' raised for the first time on judicial review." *Vill. of Barrington, Ill.*, 636 F.3d at 660. In this case, however, it was legal counsel's position—that it was impossible to know the total quantity of softwood lumber—that the Court found not credible, and the explanation of considerations regarding the selection of a de minimis quantity come from a member of the agency (Rex A. Barnes of AMS), not from legal counsel.

Consideration of the agency's arguments on the first remand regarding its approach to interpreting the ambiguous term is also perfectly acceptable insofar as courts "frequently remand matters to agencies while leaving open the possibility that the agencies can reach exactly the same result as long as they ... explain themselves better or develop better evidence for their position." *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 30 F.3d 1510, 1514 (D.C.Cir.1994). The agency's more robust

explanation is entirely the product of this Court's first remand order for a fuller account of the 15mmbf-exemption selection criteria, and so the Court may consider these factors in assessing whether the agency's choice of the de minimis quantity was supported by substantial evidence. After all, "the usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand." *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29–30 (D.C.Cir.2005); *see also FEC v. Akins*, 524 U.S. 11, 25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (noting that, after remand, agency "might later, in the exercise of its lawful discretion, reach the same result for a different reason" than one rejected by reviewing court) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943)). "Therefore, the proper focus for this Court's inquiry is whether the [challenged agency action] upon remand is sustainable for the reasons stated in [the agency's] supplemental determination and in light of the administrative record as a whole." *Bean Dredging, LLC v. United States*, 773 F.Supp.2d 63, 79 (D.D.C.2011).

It is also worth noting that many—though not all—of the considerations identified on first remand were already more or less identified in the agency's notices. *See, e.g.*, 75 Fed Reg. at 61,013 (considering "the economic impact of the proposed Order on affected entities"); 76 Fed. Reg. at 22,772 ("15 million board feet would be appropriate because such a level would still provide the Board with resources to have a program that could be successful."); *id.* ("[T]his level would exempt small operations that would otherwise be burdened by the assessment."). Given that the "de minimis quantity is defined for a particular program and industry," *id.*, the Court concludes that this case-by-case, context-specific approach, drawing on the selection criteria identified, is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. The agency's general approach to selecting a de minimis quantity, then, was perfectly permissible.

B. Sufficiency of Evidence

Although the agency's approach to determining a "de minimis quantity" was a plausible interpretation of the statute, Resolute's APA challenge also asserts that the agency's decision to choose 15mmbf was not supported by evidence in the administrative record. In other words,

even if USDA's construction of an ambiguous statutory term is permissible, "the agency must [also] examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

Given the circuitous path this case has traveled—through the original cross-motions for summary judgment and the two remand orders—the Court begins its discussion by identifying precisely what may be considered record evidence relied upon by the agency during the promulgation of the Checkoff Order. It then turns to assessing USDA's explanations in its first-remand response memorandum to determine whether the evidence before the agency—coupled with the criteria it states were considered—provides the minimal support necessary to justify the selection of 15mmbf. This memorandum, while clarifying USDA's reasons for selecting 15mmbf, left the Court with concerns regarding its methodological approach and numerical estimates. It accordingly remanded again, this time ordering the agency to provide specific primary sources and clarification as to the estimates USDA purported to have relied upon. The Court concludes by assessing the agency's second remand memorandum in response to the latter order.

1. Administrative Record Evidence

As the agency included new attachments and exhibits as part of its responses to the Court's two remand orders, the Court must first discuss their admissibility and what documents it will consider in determining whether the agency provided a "rational connection between the facts found and the choice made." *Americans for Safe Access*, 706 F.3d at 449 (internal quotation marks and citation omitted).

In contrast to most federal-agency rulemaking, the CPRIA leaves open the possibility for private-industry groups to come to the agency and propose potential marketing orders. *See* 7 U.S.C. § 7413(b)(1)(B)(i) (A checkoff order "may be ... submitted to the Secretary by ... an association of producers of the agricultural commodity."). As a result, in this instance it was the Blue Ribbon Commission that came to USDA with the proposal for a checkoff order. The Secretary's obligation was then to "determine[ ]

that a proposed order is consistent with and will effectuate the purpose of" the CPRIA. *Id.* § 7413(b)(2). So satisfied, the Secretary then "publish[es] the proposed order in the Federal Register and give[s] due notice and opportunity for public comment ...." *Id.* This the Secretary did, publishing a notice of the proposed rulemaking and seeking comments from concerned parties regarding the Checkoff Order. *See* 75 Fed. Reg. at 61,002. Sixth months later, the Secretary responded to those comments and announced the final Checkoff Order and referendum to ratify it. *See* 76 Fed. Reg. at 22,757–22,775. After ratification of the proposed Order by eligible voters, AMS published a notice announcing its implementation. *See* 76 Fed. Reg. at 46,185.

These notices appear to have relied heavily on the submissions of the BRC—which proposed the Checkoff Order—in particular its report, "BRC Proposal for a National Research and Promotion Program For Softwood Lumber," *see* Letter from Jack Jordan, BRC Chairman, to Robert C. Keeney, Deputy Administrator, USDA, AMS (Feb. 16, 2010), Attach. B ("Overview, Justification, and Objectives for a National Research and Promotion Program For Softwood Lumber") ("BRC Proposal") (AR1353–AR1364), as well as the BRC's "20 Myths and Facts About the Softwood Lumber Check-off" ("20 Myths") (AR0061–AR0065), a pamphlet circulated to softwood-lumber industry participants. While neither of these documents was cited in the agency's notices, they were included in the Joint Appendix and form the core of the agency's administrative record.

In addition to these documents, both the BRC and the agency heavily relied on a 2009 U.S. Forest Service research report. *See* Henry Spelter, David McKeever & Daniel Toth, *Profile 2009: Softwood Sawmills in the United States and Canada*, FPL–RP–659 (Oct. 2009) (ECF No. 33, Exh. A) ("*Profile 2009*")). This *Profile 2009* report was cited both in the BRC's own report, *see* BRC Proposal at 4 (AR1353), and in the agency's notices in the Federal Register. *See, e.g.*, 75 Fed. Reg. at 61,003 nn. 1, 3 & 6; *id.* at 61,004 nn. 7–*8* & 10; *id.* at 61,012 nn. 14 & 16; *id.* at 61,013 n. 17. Because this document contains statistics on the number of sawmills and total softwood-lumber production capacity for all U.S. and Canadian softwood-lumber companies, it was central to both the BRC's proposal and the agency's decisionmaking process, and is thus front and center in the dispute between the parties here. The Court therefore will consider this

document as part of the record.

On top of these documents, as part of its response to the Court's second remand order, Defendants provided additional exhibits to explain the calculations upon which the agency relied during rulemaking. Resolute contends that these documents may not be considered part of the administrative record, for "USDA never requested and was never granted leave to expand or supplement the record, and USDA never provided for the record data to substantiate its conclusions." Pl. Second Remand Resp. (ECF No. 35) at 4. While it is true that these exact materials were not submitted as part of the Joint Appendix, the Court disagrees that it may take no consideration of them whatsoever. Most of the additional exhibits provided by USDA in both remands help to explain the conclusions drawn from the documents that were extensively cited in the agency's Federal Register notices, and where "the raw data itself is at issue and was directly considered, analyzed, or manipulated by the agency in the course of reaching its decision, that raw or underlying data is 'properly considered part of the administrative record.' " *Univ. of Colorado Health at Mem'l Hosp. v. Burwell*, —— F.Supp.3d ——, ——, No. 14–1220, 2015 WL 6911261, at *14 (D.D.C. Nov. 9, 2015) (quoting *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 2007 WL 3049869, at *4 (N.D.Cal. Oct. 18, 2007)). After all, any materials an agency considered "either directly or indirectly" must be considered part of the administrative record. *See Marcum v. Salazar*, 751 F.Supp.2d 74, 78 (D.D.C.2010). As the Court's two remand orders specifically pointed to the BRC's Proposal and the Forest Service's *Profile 2009* and ordered the agency to explain how it used the data contained therein in developing its estimates reported in the Federal Register, the Court will consider exhibits attached to the remand memoranda to the degree they shed light on the agency's underlying rationale. To do otherwise would undermine the very purpose of the Court's two remand orders.

Finally, the agency provided several new documents as exhibits to its two remand memoranda that were not previously part of the administrative record. While the agency can provide additional attachments to explain how it came to the decision it did, the Court nevertheless must still rely only on evidence contained in the extant administrative record that supports the agency's rationale and selection at the time it made the decision. *See Prairie State Generating Co. LLC v. Sec'y of Labor*, 792

F.3d 82, 93–94 (D.C.Cir.2015) ("[T]he 'focal point' in arbitrary-and-capricious review is 'the administrative record already in existence' ") (quoting *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)); *see also_Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 441 (D.C.Cir.2012) ("In evaluating an agency's decisionmaking, our review is fundamentally deferential ... [b]ut we are limited to assessing the record that was actually before the agency.") (citation and internal quotation marks omitted). The Court will, however, consider these documents to the degree that they shed light on how the agency considered evidence elsewhere contained in the extant administrative record.

2. First Remand Explanation

Having addressed questions concerning evidence in the record, the Court now pivots to an assessment of the agency's first remand explanation. As a reminder, the Barnes Memorandum explains that USDA considered several factors in selecting its de minimis threshold, including (1) free-rider implications of a particular quantity; (2) an estimate of the total quantity of the particular agricultural commodity (both quantity assessed and quantity exempted); (3) the impact of such a limit on small businesses; and (4) the available funding to support a viable program operating at that exemption threshold. See Barnes Mem. at 2. The Court will discuss each of these considerations and the evidence Defendants cite to support selecting 15mmbf as the de minimis quantity, as well as Resolute's objections.

a. *Free Riders*

The first—and perhaps most straightforward—claim is that the agency took free riders into consideration when selecting the de minimis quantity. Barnes explains that "[i]n approving the proposed exemption threshold of 15[mmbf], USDA took into consideration the potential impact of free riders on an effective checkoff program for softwood lumber." *Id.* at 5. Rather than pointing to manifest evidence of this in the Federal Register, however, the agency cites only to the BRC's statements in its proposal that " 'free riders within the industry have taken advantage of the voluntary nature of the programs, frustrating enthusiasm and support for fundraising among the paying players.' " *Id.* (quoting BRC Proposal at 10 (AR1359)

(emphasis omitted)). The agency's Barnes Memorandum further emphasizes the free-rider concerns raised in the BRC's "leaflet advocating approval of the checkoff order," which states that the exemption's "impact would be 'de minimis as far as free riders [are] concerned.' " *Id.* at 5 (quoting 20 Myths at 3 (AR0929)). As Resolute rightly points out in response, "USDA does not cite any Federal Register notice to show that USDA considered free riders and agreed with the BRC about the impact of the exemption" as to that consideration. *See* Pl. First Remand Reply (ECF No. 28) at 12 (emphasis added). This is only the first of several problems with Defendants' explanation on remand.

b. *Estimates of Total Quantity Assessed and Exempted*

Defendants' second factor was the total quantity of softwood lumber that would be assessed as well as the portion exempted from assessment as de minimis. As USDA largely points to the BRC's estimates to substantiate this, *id.* at 3–5, the Court begins there. In proposing the Checkoff Order, the Blue Ribbon Commission settled on a 15mmbf "de minimis exemption for all producers and importers." BRC Proposal at 10 (AR1359). To justify this selection, the BRC provided estimates of the percentage of total softwood-lumber production capacity that would be excluded from assessment at this exemption level. Estimating that a total of 664 companies in the United States and Canada had an approximate total production capacity of 74.9 billion board feet of softwood lumber in 2007, the BRC then estimated the share of production capacity it expected would be exempted based on several different de minimis quantities. *Id.* at 11 (AR1360). It concluded that exempting producers whose production capacity was "[u]nder 16mmbf" per year would result in 257 companies representing 2.5% of total capacity being fully exempted. *Id.* Despite the fact that both the BRC and the agency rely on this estimate as a chief justification for the de minimis quantity, the estimate itself is inexplicably listed as "[u]nder 16mmbf" per year, not under 15mmbf. The Court is uncertain whether this is a transcription error, as everywhere else the agency treats these estimates as if they measure an exemption of 15mmbf, not 16mmbf.

This discrepancy aside, the BRC also reported that exempting the first 15mmbf in production capacity for all companies (including those with greater than 15mmbf annual production capacity) would expand the

amount not assessed from 2.5% to 11.3% of total softwood-lumber production capacity. *Id.* The proposal went on to state that "[t]he BRC believes that this proposal will meet both criteria, on the one hand be acceptable to the industry, and on the other mount a program of sufficient size and scope to achieve meaningful results in the marketplace." *Id.* at 10 (AR1359).

Turning now to USDA's decisionmaking process, the Barnes Memorandum states that USDA "[c]oncurr[ed] with the BRC that companies that produced under 15[mmbf] annually equated to about 2.5% of the industry's total assessable volume." Barnes Mem. at 4. On this basis, "USDA concluded that the adoption of the proposed exemption threshold of 15[mmbf] was appropriate because 2.5% of the total assessable volume of softwood lumber is a 'de minimis quantity' of that commodity and because the use of that threshold would not result in a substantial amount of uncollected assessments." *Id.*

As Resolute points out, *see* Pl. First Remand Reply (ECF No. 28) at 3 & n. 2, this is a blatant contradiction of the evidence provided in the administrative record at the time the agency announced the Checkoff Order. As the agency stated in the Federal Register when it issued the notice of proposed rulemaking,

> Regarding exemption levels, the BRC explored projected assessment income at exemption levels of 15, 20, and 30 million board feet. With a 15 million board foot exemption, the BRC projected a deduction of <u>11.3</u> percent in assessment income. Table 4 below shows the BRC's projected income levels at various assessment options in light of the proposed 15 million board foot exemption.

75 Fed Reg. at 61,013 (emphasis added). Resolute is correct that the agency never once cited the 2.5% exemption estimate in its notices in the Federal Register. It is difficult to credit the agency on first remand when it states that it concluded that "2.5% of the total assessable volume of softwood lumber is a 'de minimis quantity' of that commodity ...." Barnes Mem. at 4. If so, why did the agency report that 11.3% of quantity was exempted rather than 2.5%?

Deepening the Court's frustration is the fact that the Barnes Memorandum does not clarify how the agency (or the BRC) arrived at either the 2.5% or the 11.3% estimate. Both statistics are cited without any explanation as to their origin or source. And while both appeared to derive from the BRC's proposal, that proposal was not cited by the agency in its notice of proposed rulemaking, and the BRC proposal itself does not identify its source of these estimates. *See* BRC Proposal at 11 (AR1360). Even after the first remand order the Court was thus still unable to understand precisely what percentage of softwood lumber the agency thought would be exempted from assessment when it promulgated the Checkoff Order. As discussed below, this same methodological problem plagues the agency's estimate of companies exempted from the Checkoff Order, which in turn necessitated a further remand order from the Court.

c. *Impact on Small Companies*

Another factor the agency states it "considered in approving the proposed exemption threshold ... was the impact that the exemption would have on small companies." Barnes Mem. at 5. In part, this is because the agency was "required to examine the impact of the proposed rule on small entities" under the Regulatory Flexibility Act, 5 U.S.C. §§ 601–12. *See* 75 Fed. Reg. at 61,012. As defined by regulations promulgated under the RFA, small softwood-lumber entities are those that "hav[e] annual receipts of no more than $7 million," which the agency roughly translated as meaning manufacturers "who ship[ ] less than 25[mmbf] per year ...." 75 Fed. Reg. at 61,012. Drawing on data from the American Lumber Standard Committee (ALSC), the agency estimated that "363 domestic manufacturers, or about 61 percent [of 595]," were small entities that shipped less than 25mmbf per year. *Id.* at 61,012 & n. 15; *see also* Parrott Mem. at 8–9 ("Data obtained from the [ALSC] provided the ostensible basis for these sentences"). As for the foreign-importer data, the agency stated that it relied on "Customs data" suggesting that "there were about 883 importers of softwood lumber annually. About 798 importers, or about 90 percent, imported less than" 25mmbf per year and were thus small entities as defined by the RFA. *See* 75 Fed. Reg. at 61,012.

While a helpful starting point, this explanation did not actually address the impact of the 15mmbf exemption on these small entities. Although the agency claimed that "USDA has performed this initial RFA analysis

regarding the impact of the proposed rule on small entities," 75 Fed. Reg. at 61,014, it nowhere stated what the impact of the 15mmbf exemption would be on companies shipping less than 25mmbf, such as the number of companies that ship between 15mmbf and 25mmbf per year (and would therefore pay assessments under the Checkoff Order), and how these companies might be affected by the assessments.

Instead, the agency provided estimates of the impact of the 15mmbf exemption on companies shipping less than 15mmbf per year, which it believed numbered 232 out 595 domestic manufacturers. *Id.* Combining these 232 domestic manufacturers with the estimated 780 out of 883 foreign companies that imported less than 15mmbf per year, the agency determined that a total of 1,012 producers out of 1,478 would be exempt from assessments under the proposed Order. *Id.* at 61,015. The agency, however, never justified why 15mmbf was a reasonable proxy for a small company, as opposed to the 25mmbf definition of small entity as defined by the RFA. In response to comments, the agency merely stated that it "concur[red] with this exemption level because this level would exempt small operations that would otherwise be burdened by the assessment," 76 Fed. Reg. at 22,772, never distinguishing between 15mmbf and 25mmbf. As a result, under the agency's own (and only) definition of small entity—the 25mmbf measure used for its RFA analysis—many such small entities would, presumably, be "burdened by the assessment." Yet USDA provided no discussion as to how many such companies would be affected or the extent of the burden.

Even more troubling, prior to the second remand order, the Court also had reason to doubt the integrity of USDA's estimate that 232 out of 595 domestic manufacturers ship less than 15mmbf per year because the denominator for this estimate appeared spurious. As Resolute argues, there is a wide disparity between the estimates provided by the agency in the Federal Register and those offered by the BRC, which USDA purported to rely on. *See* First Remand Reply (ECF No. 28) at 8. The BRC's proposal, which did not offer separate estimates for domestic and foreign entities, suggested that with a 15mmbf exemption, approximately 257 combined domestic and foreign entities would be exempted out of a total of 664. *See* BRC Proposal at 11 (AR1360). These numbers are not even close to the USDA combined estimates of 1,012 out of 1,478. The contrasting figures are puzzling because it appears that both USDA and

the BRC derived their estimates from the same source of data—the Forest Service *Profile 2009* report. *Id.* n. 14 (citing *Profile 2009*); BRC Proposal at 4 (AR1353) (stating that "data and much of the information in this application has been compiled from" Profile 2009).

Even more problematic, the *Profile 2009* report does not measure the number of softwood-lumber entities; it only provides estimates for the number of North American sawmills. Given the confusion over just what USDA was measuring, the Court examined the *Profile 2009* report itself, as it explained in its second remand order. *See Resolute Forest Products*, 2016 WL 1714312, at *2–3. USDA had claimed that its estimate of 595 domestic manufacturers was a "number [that] represents separate business entities; one business entity may include multiple sawmills." 75 Fed. Reg. at 61,012. Yet the agency cited *Profile 2009* as the source of this information, *see id.* at n. 14, and that document makes clear that the estimates measure "past and current capacity of sawmills"—not entities. *See Profile 2009* at 15. To confirm this, the Court itself averaged the number of U.S. sawmills in 20 tables listed in the appendix of the *Profile 2009* report for the years 2007, 2008, and 2009, and arrived at the same number that USDA cited in the Federal Register, 595. The problem, of course, is that Profile 2009 reported 595 as the number of sawmills, whereas the agency reported 595 was the number of entities. *Compare Resolute Forest Products,* 2016 WL 1714312, at *4 tbl. 1, *with* 75 Fed Reg. at 61,012 *and* 76 Fed. Reg. at 22,767.

Prior to the second remand order, then, the agency had provided neither a coherent analysis of the impact of the 15mmbf exemption on "small entities" nor a reliable source of data for its estimates concerning the number of softwood-lumber entities exempted from assessment. The Court will return to this issue after summarizing its second remand order below.

d. *Sufficient Revenue*

The last factor the agency points to in the Barnes Memorandum is "whether a checkoff order that contained [the 15mmbf exemption] threshold would generate enough income to support a viable and effective research and promotion program for softwood lumber." Barnes Mem. at 6. Drawing again on estimates provided by the BRC, *see* BRC Proposal at

10–11 (AR1360–61), the agency "found that 'the [proposed exemption] and the initial $0.35 per thousand board foot assessment rate' would generate 'between $12.4 and almost 19 million [per year] ... with shipment levels ranging from 40 to 60 billion board feet.' " Barnes Mem. at 6 (quoting 76 Fed Reg. at 22,773). The Barnes Memorandum goes on to state that "[a]greeing with the BRC that '$20 million is an ideal threshold for an effective program ...' USDA approved the proposed exemption." *Id.* at 6–7 (quoting 76 Fed. Reg. at 22,767).

Resolute objects to this explanation, arguing that USDA improperly relied not on data for shipments in 2010 but instead on production capacity as of 2007. *See* First Remand Reply (ECF No. 28) at 5. Given the substantial differences between these measurements and the years in question, this could drastically alter the amount of revenue expected to be generated under the Checkoff Order. Plaintiff contends that "USDA was supposed to rely on shipment data from 2010," which was the "representative period" under 7 U.S.C. § 7417(a)(1). *Id.* at 4. It also alleges that the "BRC stated, without justification or explanation, that production capacity was being used in this analysis as a proxy for shipments." *Id.* at 5 (citation and internal quotation marks omitted). Resolute's objection is effectively two challenges: one to the year of measurement (2007 vs. 2010), the other to the type of quantity measured (capacity vs. shipments). The Court tackles each of these grievances in turn.

i. 2007 vs. 2010

The statutory provision concerning the "representative period" provides no instruction as to how to measure that period, stating only that an optional referendum must include as participants those "persons subject to an assessment" who "engaged in" the "production" or "importation" of the commodity "during a representative period determined by the Secretary." 7 U.S.C. § 7417(a)(1)(A)–(B). For the purposes of determining participants in the referendum, that period was calendar year 2010, the most recent year for which data was available. In announcing the referendum on April 22, 2011, USDA stated that eligible participants would include all those who "have domestically manufactured and/or imported 15 million board feet or more of softwood lumber during the representative period from January 1 through December 31, 2010." 76 Fed. Reg. at 22,757. Such a determination appears to be eminently

reasoned and appropriate.

What is left of Resolute's challenge is the lag between the year of data relied upon for the initial proposal and the year used for referendum-eligibility purposes. The Court thus now considers the reasonableness of the delay between the year relied on for developing the estimates (2007) and the referendum "representative period" (2010). Because the agency was required to undergo notice-and-comment rulemaking before implementing the referendum, some delay between the time of the BRC's proposal to USDA and the final implementation of the referendum was all but inevitable. *Cf N. Mariana Islands v. United States*, 686 F.Supp.2d 7, 15–16 (D.D.C.2009) (finding 18 months reasonable period for agency to undergo notice-and-comment rulemaking). After all, notice-and-comment rulemaking was not the first step in the process here; the BRC had to first gather research on the utility and feasibility of the proposed Checkoff Order, engage USDA in getting the Secretary's approval, and assist in the formulation of the proposed rule. The record suggests this time period was lengthy; as of February 2010, the BRC seemed to indicate it had already worked with AMS for the prior two years on the proposed Checkoff Order. *See* Jordan Letter at 2 (AR1351) (expressing appreciation for AMS's assistance "over the past two years"). Some amount of delay is therefore reasonable between the initial data gathering required to develop a proposed rule and the final rule issued after notice-and-comment rulemaking. Nor was the agency ignoring substantially more recent data; when it issued the notice of proposed rulemaking, it appears that the latest year for which complete data was available was 2008. *See* BRC Proposal at 11 (AR1360) (providing only estimated as opposed to actual softwood-lumber consumption data for the year 2009). While Resolute is correct in recognizing that the difference between 2007 and 2010 was probably significant considering the effects the recession had on the softwood-lumber market, if this were the only problem with the agency's data, USDA would likely be on firm footing.

ii. Production Capacity vs. Shipments

Resolute's objection to the time period of the estimates gains traction, however, when considered alongside its complaint about substituting production capacity for shipments in selecting the 15mmbf de minimis quantity. The Court shares Plaintiff's concern about the agency's

unaccounted use of production capacity in place of actual shipments, given the potentially vast differences between these measures. Resolute charges that "[t]he BRC stated, without justification or explanation, that production capacity was being 'used in this analysis as a proxy for shipments.' " Reply at 5 (quoting BRC Proposal at 11 (AR1360)). Technically speaking, the BRC did provide some explanation: "Given current market conditions this table is 'relatively' correct, but doesn't take into account recent temporary and permanent closures, reduced production, and possible omissions or double counting due to subsidiary relationships. Efforts were made to eliminate these." BRC Proposal at 11 (AR1360).

This explanation nevertheless falls far short of a justification for the choice, particularly when the very same page of the BRC Proposal makes clear just how stark the differences were between production capacity and shipments: while in 2009 actual U.S. consumption of softwood lumber was estimated to be only 31.9bbf, the estimates used to justify the 15mmbf exemption measured nearly 75bbf in production capacity in 2007—well over double actual consumption. *Id.* Here, the year in question made a substantial difference: the BRC's data for 2007, 52.7bbf in shipments vs. nearly 75bbf in capacity, shows a far smaller gap between capacity and shipments than in 2010, confirming the significance of Resolute's concern that the pre-recession data was significantly outdated. *Id.* Worse still, while the BRC was at least transparent about the difference between production capacity and actual shipments, nowhere in the agency's notices did USDA make clear that its estimates regarding the 15mmbf exemption were based on production capacity, not actual shipments. It instead merely opaquely referenced—without citation—the BRC's estimates. This measurement is also troubling because it treats all of U.S. and Canadian softwood lumber as a common market. Yet it is conceivable, if not probable, that much of Canadian softwood lumber remains in Canada and is not imported into the United States, which means that some additional portion of that production capacity would never turn into actual shipments to the United States.

3. <u>Second Remand Explanation</u>

Resolute's arguments concerning use of 2007 capacity data vs. 2010 shipment data, confusion over whether 2.5% or 11.3% of softwood lumber

would be exempted from assessment, and discrepancies in the estimates of the number of companies exempted and those that were eligible to participate in the referendum left the Court scratching its head, uncertain as to whether any of the data cited by either the BRC or USDA was likely to have been correct (let alone supportive of the 15mmbf de minimis exemption). While an agency's "decision of less than ideal clarity" does not necessarily constitute one that is arbitrary or capricious, "the agency's path [must nonetheless be] reasonably be discerned," "including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (citation and internal quotation marks omitted). The agency's response to the first remand fell far short of this, with discrepancies implicated in nearly every pertinent estimate the agency provided in its notice of proposed rulemaking. The Court, as a result, was assured neither that the data supported the agency's decision nor that it was accurate. Unable to discern the agency's path, the Court once more remanded the matter, this time specifically ordering that the agency provide:

> 1. An account of the BRC's "Actual U.S. Consumption 2003–2009" estimate on page 11 of its BRC Proposal for a National Research and Promotion Program For Softwood Lumber (AR1360), and verification of this estimate based on its underlying source or sources;
>
> 2. An account of the BRC's "Impact of Exemption on Check-off Participation: Capacity Removed from Assessment" estimate on page 11 of the same document, and verification of this estimate [that 257 companies representing 2.5% of capacity would be exempted] based on its underlying source or sources; and
>
> 3. Verification via underlying data of the estimates provided in the agency's notice of proposed rulemaking (Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order, 76 Fed. Reg. 22,757 (Apr. 22, 2011) concerning the number and percentage of softwood-lumber market participants exempted from the checkoff order at the 15-million-board-feet threshold.

Resolute Forest Products, 2016 WL 1714312, at *4.

Defendants once again responded with a memorandum, this time from Charles W. Parrott, Deputy Administrator of the Specialty Crops Program of AMS. As this document provided responses to the Court's specific requests in its second remand order, the Court will assess the explanations in light of the difficulties identified above.

a. *Actual U.S. Softwood Lumber Consumption*

As to the estimates of actual softwood-lumber consumption, Parrott responds that Stephen M. Lovett, who then worked for the BRC and prepared the estimates in the BRC Proposal, drew on data supplied by Random Lengths, "a firm that 'provides the forest products industry with unbiased, consistent and timely reports of market activity and prices, related trends, issues, and analyses,' " Parrott Mem. at 2 (quoting *id.*, Exh. B (About Random Lengths)), and from Forest Economic Advisors (FEA), which "describes itself as a firm that 'brings modern econometric techniques to the forest products industry.' " *Id.* (quoting *id.*, Exh. C (About Forest Economic Advisors)). Random Lengths, in turn, advised the agency in response to the second remand order that it obtains figures like those drawn on by Lovett from "industry associations, like the Western Wood Products Association, and industry analysts, like FEA." *Id.* (citation and internal quotation marks omitted).

Although Lovett cannot precisely replicate the calculations he made in 2010, USDA provided a similar estimate based on data available to the Court, drawing on the Forest Service's *Profile 2009* report. The agency pointed to "Table 4–United States softwood lumber end-use by market, 2003–2009" of the report, *see Profile 2009* at 3, as a close approximation of the data included in "Actual U.S. Consumption 2003–2009." BRC Proposal at 11 (AR1360). Because the Forest Service's *Profile 2009* measured total end use in cubic meters, the BRC converted this measure into billion board feet for its calculations.[4] Thus for the calendar year 2008,

[4] Throughout this Opinion, the Court uses the ratio of 2.36 cubic meters per 1000 board feet (or 1:423) to convert between these two measures. *See* 75 Fed. Reg. at 61,010 ("One cubic meter is equal to 423.776001 board feet."); *see also* Parrott Mem. at 2–3.

the estimate of 99.0 million cubic meters cited in *Profile 2009* converts to approximately 41.9 billion board feet, slightly off of the 42.7bbf estimated by the BRC in its proposal to AMS in 2010. While the difference between 42.7bbf and 41.95bbf is not zero, given the differences and variations in underlying reporting sources for the softwood-lumber market, a difference of less than 2% is not itself alarming.

Even if this data seems generally reliable, as discussed earlier, the 15mmbf exemption threshold was set not on the basis of data about actual consumption, but on the basis of data bout production capacity. *See* Pl. Second Remand Response at 7 ("USDA relied (if at all) on lumber production capacity data, not on lumber consumption data ...."). And even the BRC's own data recognizes how vast the differences were between production capacity and actual shipments. As noted above, the BRC's proposal stated that actual U.S. consumption of softwood lumber was estimated to be only 31.9bbf in 2009, while the production capacity was estimated at nearly 75bbf, well over twice the consumption figure. *See* BRC Proposal at 11 (AR1360). Such a huge disparity undermines the credibility of either the 2.5% or 11.3% estimate as the actual quantity of shipped softwood lumber that would be exempted from assessment.

b. *Impact of Exemption Estimates*

The Court's second remand order also requested that the agency provide "[a]n account of the BRC's 'Impact of Exemption on Check-off Participation: Capacity Removed from Assessment' estimate ... and verification of this estimate based on its underlying source or sources." *Resolute Forest Products*, 2016 WL 1714312, at *4. In the Parrott Memorandum, the agency explains that "Lovett prepared the impact-of-exemption estimate," relying on an earlier version of the *Profile 2009* report (*see* Second Notice, Exh. E (Henry Spelter, David McKeever & Matthew Alderman, *Profile 2007: Softwood Sawmills in the United States and Canada*, FPL–RP–644 (Oct. 2007))), as well as "a draft of Profile 2009 that Mr. Lovett obtained" from the authors of what would eventually become the final published *Profile 2009* report because "he wanted to use the most recent data available." Parrott Mem. at 4. The agency also explains that "[t]he updates to the data that Mr. Lovett used consisted of information that he obtained ... regarding mill closures and mills not in operation because of the economic downturn that began in 2007." *Id.* This

explanation does not seem to square with Lovett's ultimate estimates included in the BRC's proposal, for we are told that "2007 Capacity [was] used in this analysis as a proxy for 'shipments.' " BRC Proposal at 11 (AR1360). If so, then what happened after 2007 would be irrelevant to these estimates. This is yet another instance in which the agency's explanation is not on all fours with the evidence available in the administrative record.

In part to shore up doubt, the agency states that "[a]t the request of USDA, [Paul] Jannke of FEA has prepared ... two impact-of-exemption estimates using data" from "individual sawmill capacity from Appendix C to *Profile 2007*, adjusted for mills known by FEA to have closed in 2008," as well as an estimate drawing on "data on individual sawmill capacity from the Appendix to *Profile 2009*." Parrott Mem. at 5. Neither of these estimates is particularly helpful, however, as both simply rely on the same data without explaining the BRC's method that converted 897 sawmills identified in the *Profile 2009* report, *see Resolute Forest Products*, 2016 WL 1714312, at *4 tbl. 1, into approximately 629 companies, 254 (or 243) of which supposedly had production capacity of less than 15mmbf. *See* Parrott Mem. at 5; *see also* BRC Proposal at 11 (AR1360). It simply defies logic that the agency has failed on multiple remands to explain precisely how it derived its estimates for the number of companies excluded and included under the Checkoff Order, and it strongly suggests that USDA never actually knew them.

This raises a related problem with another of USDA's stated reasons for selecting 15mmbf as the de minimis quantity: generating sufficient revenue for an effective checkoff order. The substitution of capacity for shipments raises serious doubts as to whether the Checkoff Order would in fact raise the revenue both the BRC and the agency stated it must raise to be successful. In its notice of proposed rulemaking, the agency affirmed the BRC's conclusion that "an exemption threshold of 15[mmbf] was appropriate and would generate sufficient income to support an effective promotion program for softwood lumber." 75 Fed. Reg. at 61,013. This conclusion presumably drew on the BRC's proposal, which stated that "$20 million (from assessments) is the threshold for an effective program that can move the needle." BRC Proposal at 10 (AR1359). The BRC estimated that "an initial assessment rate of $0.35/mbf ... would raise sufficient funds for a $20 million program." *Id.* The BRC's own chart,

however, recognized that with a 15mmbf exemption threshold, the Checkoff Order would either require shipments of 60bbf to yield $21 million at an assessment rate of $0.35/mbf or else necessitate upping the assessment rate to $0.50/mbf to yield $20 million on 40bbf in shipments. *Id.* at 10–11 (AR1359–60). If actual shipments in 2009 were 31.9bbf, however, the Checkoff Order would have yielded far less than the $14 million that was estimated at 40bbf in assessments, *id.* at 10 (AR1359), itself an amount far lower than what the BRC suggested was necessary for an effective marketing campaign. Given these issues with the underlying data, it is difficult to understand how the agency could have concluded that the 15mmbf exemption "would generate enough income to support a viable and effective research and promotion program for softwood lumber." Barnes Mem. at 6. This, of course, is only one of the defects in the data the agency claims supported the 15mmbf exemption.

c. *Estimates of Companies Exempted and Total Companies*

The Court also ordered the agency to clarify seemingly contradictory estimates of the number and percentage of exempted softwood-lumber producers and exporters included in the Federal Register notices to ensure that "some verifiable source of data accurately depicted the softwood-lumber market." *Resolute Forest Products*, 2016 WL 1714312, at *3. Prior to the second remand order, the agency had never been able to provide a coherent account of the estimates used to assess the number of softwood-lumber companies that would be exempt from the Checkoff Order. The Parrott Memorandum, unfortunately, falls short as well. As the Court explained in its second remand order, the 595 domestic "manufacturers" that USDA cited in its notice of proposed rulemaking appears instead to be a three-year average (2007–2009) from *Profile 2009* estimates for the number of sawmills in the U.S. *Id.* at *2–3. Whereas USDA stated that this "number represents separate business entities [where] ... one business entity may include multiple sawmills," 75 Fed. Reg. at 61,012, the *Profile 2009* report on which that estimate was based clearly specifies that its count consists of sawmills, not business entities. *See Profile 2009* at 15 ("The following maps and tables show past and current capacity of sawmills and the availability of timber, by county, in the vicinity of these mills ....").

The agency retorts in the Parrott Memorandum that "[b]ecause the

industry was in a state of flux, USDA considered it reasonable to use the figure 595 .... [but] should have explained, however, that the Forest Service figures were for sawmills ....” Parrott Mem. at 8. It further defends that “USDA had no data on how many sawmills were individual business entities or were part of a group of sawmills making up one business entity .... Therefore, USDA treated each domestic manufacturer (sawmill) as a separate entity in its analysis.” *Id.* This explanation is extraordinary given that the agency expressly characterized the estimate as measuring entities, *see* 75 Fed. Reg. at 61,012 (“This number represents separate business entities; one business entity may include multiple sawmills”), and then relied on that measure to determine the number of companies that would be exempted under the proposed Checkoff Order. *See*, *e.g.*, *id.* at 61,013 (“Of the 595 domestic manufacturers, it is estimated that about 232, or 39 percent, ship less than 15[mmbf] per year and would thus be exempt from paying assessments under the proposed Order.”); 76 Fed. Reg. at 22,772 (“USDA concurs with this exemption level because this level would exempt small operations that would otherwise be burdened by the assessment.”).

The Parrott Memorandum also reveals that the agency never really knew how many companies ship less than 15mmbf: “[25mmbf] per year is the lowest number of board feet for which [the American Lumber Standard Committee] segregated shipment data. Having no individual company shipment data to use for U.S. entities ... USDA referred in these sentences to shipments of 25[mmbf] per year rather than shipments of 15[mmbf] per year.” *Id.* This is incredible considering the agency’s repeated contention that it justified the 15mmbf number on the basis of the number of companies that would be exempted from assessments. In reality, it had no reliable data whatsoever concerning domestic entities shipping less than 15mmbf per year. The agency’s explanation that it lacked such data, furthermore, in no way justifies falsely portraying its estimates as being those of entities rather than sawmills. As Senator Daniel Patrick Moynihan once said, “Everyone is entitled to his own opinion, but not his own facts.”

Even worse, however, the agency then incorrectly transmuted the number of entities shipping less than 25mmbf—363, according to the ALSC—for the number shipping more than 15mmbf. It appears to have subtracted 363 (entities that ship less than 25mmbf) from the 595 (total

sawmills) to conclude—arbitrarily—that "about 232, or 39 percent, ship less than 15[mmbf] per year and would thus be exempted from paying assessments ...." 76 Fed. Reg. at 22,767. The agency has no explanation for this astounding error, instead simply acknowledging it in a footnote on remand. *See* Parrott Mem. at 9 n. 3. In sum, the agency substituted 15mmbf for 25mmbf, sawmills for entities, and production capacity for shipments, without being transparent about any of these substitutions. To garnish this plate of errors, it then got its basic arithmetic backwards.

Defendants' data on foreign importers is hardly more assuring. As a reminder, the agency relied on "Customs data" that suggested that "there were about 883 importers of softwood lumber annually." 75 Fed. Reg. at 61,012. The agency further stated that "[a]bout 798 importers, or about 90 percent, imported" so little softwood lumber as to be considered small entities. *Id.* The notice of proposed rulemaking later stated that 780 out of 883 importers shipped less than 15mmbf, and so only 103 foreign importers would pay assessments under the Order. *Id.* at 61,013. In contrast to most of the other estimates it discussed, the agency provided no citation as to the specific source of that estimate. Yet, despite the Court's express instruction in its second remand order to provide "[v]erification via underlying data of the estimates provided in the agency's notice of proposed rulemaking ... concerning the number and percentage of softwood-lumber market participants exempted from the checkoff order," *Resolute Forest Products*, 2016 WL 1714312, at *4, the agency failed to provide any additional support for the claim. Instead, the Parrott Memorandum merely repeats the agency's conclusory statement in its notice. *Compare* Parrott Mem. at 9 ("These sentences are based on information obtained by USDA from Customs and Border Protection (CBP) for the years 2007–2009. CBP is the sole source of information available to USDA concerning importers of record."), *with* 75 Fed. Reg. at 61,012 ("[A]ccording to Customs data, it is estimated that, between 2007 and 2009, there were about 883 importers ..."). After additional opportunities to substantiate its estimates, that is not good enough.

The absence of the underlying data is especially galling considering that the number of Canadian sawmills derived from the Forest Service's Profile 2009—an average of roughly 349, *see Resolute Forest Products*, 2016 WL 1714312, at *4 tbl. 1—is far smaller than the 883 importers cited by the agency. Because USDA itself stated that "imports from Canada ...

compris[e] about 92 percent of total imports," 75 Fed. Reg. at 61,004, it seems incredible that 883 separate entities import softwood lumber into the U.S. despite the existence of only 349 Canadian softwood-lumber sawmills in total.

Defendants also appear to have introduced new errors in the Parrott Memorandum, in which it is claimed that

> USDA estimated that 335 entities domestically shipped or imported 15[mmbf] or more annually and, therefore, would pay assessments under the program (232 U.S. manufacturers and 103 importers) and 1,143 entities domestically shipped or imported less than 15[mmbf] annually and would be exempt from paying assessments (363 U.S. manufacturers and 780 importers). Given the uncertainty in the industry at the time with mills closing or not operating, USDA's estimate proved to be remarkably accurate. The 335-estimate of assessment payers was very close to the number of entities (311) that were found eligible to vote in the 2011 referendum....

Parrott Mem. at 10. Dismayingly, the agency seems once again to have transmuted its own incorrect figures. Parrott claims that 232 U.S. manufacturers were estimated to pay assessments and 363 would be exempt, but the agency's notice in the Federal Register stated just the opposite. *See* 75 Fed. Reg. at 61,013 ("[I]t is estimated that about 232 ... ship <u>less than</u> 15 [mmbf] per year and would thus be exempt from paying assessments ... [and] about 363 domestic manufacturers ... would pay assessments ....") (emphasis added). The Parrott Memorandum thus should have said that the total number of estimated entities paying in was 466. *See id.* ("Thus, about 363 domestic manufacturers and 103 importers would pay assessments under the Order.") This 466 estimate—which itself is based on completely spurious estimates, as discussed above—is itself not close to 311 at all. The only thing remarkable about the agency's estimates is that, even after two remands, USDA still manages to introduce new basic computational errors into its calculations in an effort to shore up its shoddy data.

In sum, the little data the agency presented in its rulemaking notices

was patently misrepresentative, and after two remands it has not provided a more reliable source. The agency still has not been able to offer a coherent explanation for its estimate that "about 363 domestic manufacturers and 103 importers would pay assessments under the Order." *Id.* No source—the agency, the ALSC, or the Forest Service's *Profile 2009* report—seems to identify how many domestic manufacturers produce less than 15mmbf per year. Lacking reliable data, the Court has no way whatsoever to assess the impact of the 15mmbf exemption on small entities, and it casts doubt on whether the agency even had its eyes on the road as it steered the proposed Checkoff Order through notice and comment.

* * *

As the Court has thoroughly expounded above, the agency's explanation of its selection of 15mmbf as the de minimis quantity exempted raises a litany of problems. Its reliance on production capacity estimates from 2007 for a rule assessing actual shipments and implemented nearly four years later undermines the agency's ability to rely on estimates regarding the percentage of softwood lumber removed from assessment. Given that actual shipments were estimated to be less than half of production capacity during this period, it also strongly calls into question whether the Checkoff Order could produce the revenue both the BRC and USDA stated were necessary to run an effective marketing campaign. Worse still, the agency has gone back and forth as to whether it relied on 2.5% or 11.3% of production capacity as the "de minimis" quantity. Its contradictions suggest the agency is either uncertain about why it made its decision, or else is simply making it up as it goes along.

In all probability, of course, neither estimate is likely to represent the actual quantity of shipments excluded from assessment under the Order. Nor does the Court have any way to verify whether this is true: despite two chances on remand, the agency has not provided an adequate explanation for how it transmuted data from the Forest Service's *Profile 2009* report on production capacities for sawmills into data on shipments by entities. Nor has it provided the underlying U.S. Customs data it purports to have used to estimate the number of foreign importers. The agency's problems do not end there, however. On first remand the Barnes Memorandum states that USDA considered "the impact of program requirements on small

businesses," Barnes Mem. at 2, but essentially all of those data seem faulty, contradictory, or unsubstantiated, and the agency's Parrott Memorandum on second remand could not resolve them. The agency's claim that it considered the "free rider implications" of a 15mmbf exemption is not substantiated by any indication of this whatsoever in its rulemaking notices.

The record, in sum, simply contains too many misstatements, unsubstantiated (or incorrect) estimates, and statements contradicted by the agency's subsequent litigation positions to support the selection of 15mmbf as the de minimis quantity. It is no rejoinder that the BRC had better estimates and a clearer understanding of the measurements in question. While the CPRIA contemplates cooperation between the agency and industry groups in proposing and implement checkoff orders, the Secretary remains obligated under the statute to "determine[ ] that a proposed order is consistent with and will effectuate the purpose" of the CPRIA, 7 U.S.C. § 7413(b)(2), and this must—at a minimum—require an independent verification that there was a "rational connection between the facts found and the choice made." *Americans for Safe Access*, 706 F.3d at 449 (internal quotation marks omitted). Given the record in this case, no reliable evidence suggests the agency verified (or even could verify) a rational connection between the estimates and the BRC's selection of 15mmbf as the de minimis quantity. The agency, furthermore, is required to "give due notice" about the proposed order in the Federal Register, *see* 7 U.S.C. § 7413(b)(2), and "due notice" surely requires reasonably accurate (and certainly not blatantly misleading) data to substantiate its decision and provide interested commentators with the opportunity to assess the proposed rule.

As cited above, "an agency rule [is] arbitrary and capricious if the agency ... offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. None of the relevant evidence provided by USDA during rulemaking could reasonably be relied upon to conclude that 15mmbf would be a de minimis quantity because none of the statistics cited can be reasonably relied upon to measure what they purport. And where an agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data <u>was</u> relied

upon, its decision is arbitrary and capricious and should be overturned. *See, e.g., Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 502–03 (9th Cir.2014) (overturning agency's determination as arbitrary and capricious after finding agency assumptions were made based on contradictory estimates and without rational basis in record); *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 410 (6th Cir.2013) (overturning as arbitrary and capricious agency's permit reauthorization where agency relied on inappropriate estimates to gauge impact of reauthorization); *Sierra Club v. EPA*, 671 F.3d 955, 965–66 (9th Cir.2012) (overturning as arbitrary and capricious agency's action where it failed to consider newer "data [that] told a different story than ... earlier data" that agency had actually relied upon and where agency had failed to provide an adequate explanation for its reliance on outdated data).

In short, "a court must be satisfied from the record that " 'the agency ... examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.' " *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151 (2d Cir.2008) (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856). After all, "[t]he requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result." *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C.Cir.1993). This standard "mandat[es] that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C.Cir.1995) (*quoting Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990)). The Court has given the agency multiple chances to provide that explanation, and it has fallen short each time. Without any reliable data to support the selection of 15mmbf as the de minimis quantity exempted, that decision cannot be characterized as anything other than arbitrary and capricious.

Finally, what of Resolute's constitutional challenges? Because the Court has found the Checkoff Order arbitrary and capricious as promulgated, it need not reach Resolute's constitutional challenges to the CPRIA, both facial and as applied. *See Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable."); *see also*

Resolute Forest Products, 130 F.Supp.3d at 105.

IV. CONCLUSION

On the basis of the contradictory, conflicting, and misstated estimates described above, the Court concludes that the agency's selection of 15mmbf as the de minimis quantity was arbitrary and capricious and that, accordingly, the Checkoff Order was promulgated unlawfully. The Court in the accompanying Order will set a hearing to discuss the appropriate next steps concerning the remedies sought by Plaintiff.

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