UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	SMA Docket No. 03-0001
Southern Minnesota Beet Sugar Cooperative,	)	
Petitioner	)	**Decision and Order**

PROCEDURAL HISTORY

On October 1, 2002, the Commodity Credit Corporation, United States Department of Agriculture [hereinafter the CCC], announced the 2002-crop sugar allotments and allocations. On October 9, 2002, Southern Minnesota Beet Sugar Cooperative [hereinafter Petitioner] requested that the Executive Vice President, CCC [hereinafter the Executive Vice President], reconsider the October 1, 2002, beet sugar marketing allotment allocation for Petitioner. On December 10, 2002, the Executive Vice President denied Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation. On January 23, 2003, Petitioner filed a Petition for Review of the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation. Petitioner filed the Petition for Review pursuant to the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural

Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938]; the Sugar Program regulations (7 C.F.R. pt. 1435); and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice].

On February 13, 2003, the Executive Vice President filed an Answer, a certified copy of the record upon which the Executive Vice President based the December 10, 2002, reconsidered determination, and a list of "affected persons."[1] The Hearing Clerk served the Petition for Review and Answer upon each affected person. Seven affected persons, American Crystal Sugar Company, Imperial Sugars Corporation, Michigan Sugar Company, Minn-Dak Farmers Cooperative, Monitor Sugar Company, Western Sugar Cooperative, and The Amalgamated Sugar Company [hereinafter Intervenors], intervened. On May 21, 2003, Intervenors filed Intervenors' Response to the Petition.

On November 10, 12, and 13, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Washington, DC. Steven A. Adducci and Peter D. LeJeune, Dorsey & Whitney, LLP, Washington, DC, represented

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[1]Beet sugar allocations are a "zero-sum" situation, in that any increase in allocation to any beet sugar processor means a corresponding reduction in allocations of all other beet sugar processors. Rule 2(c) of the Rules of Practice defines an "affected person" as a beet sugar processor, other than the petitioner, affected by the Executive Vice President's reconsidered determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

Petitioner. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, represented the Executive Vice President. Phillip L. Fraas and Karen M. Johnson, Washington, DC, represented Intervenors.

On January 21, 2004, the Executive Vice President filed Post-Hearing Brief of Commodity Credit Corporation and Petitioner filed Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative. On January 22, 2004, Intervenors filed Joint Brief of the Intervenors in Opposition to the Petition for Review. On February 18, 2004, the Executive Vice President filed Post-Hearing Reply Brief of Commodity Credit Corporation. On February 23, 2004, Petitioner filed Post Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative and Intervenors filed Joint Brief of the Intervenors in Response to the Initial Briefs Filed by the Petitioner and the Government. On February 27, 2004, Intervenors filed Corrected Joint Brief of the Intervenors in Opposition to the Petition for Review.

On July 21, 2004, the Chief ALJ filed a Decision [hereinafter Initial Decision]: (1) affirming the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation; and (2) denying Petitioner's January 23, 2003, Petition for Review.

On August 18, 2004, Petitioner appeal to, and requested oral argument before, the Judicial Officer. On September 9, 2004, the Executive Vice President filed a response to Petitioner's appeal petition, and, on September 15, 2004, Intervenors filed a response to

Petitioner's appeal petition. On September 20, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Petitioner's request for oral argument before the Judicial Officer, which, pursuant to Rule 11(d) of the Rules of Practice, the Judicial Officer may grant, refuse, or limit, is refused, because Petitioner, the Executive Vice President, and Intervenors have thoroughly addressed the issues. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's July 21, 2004, Initial Decision. Therefore, except for the Chief ALJ's discussion of the deference he gave to the CCC's interpretation of the Agricultural Adjustment Act of 1938 and minor modifications, I adopt the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's findings and conclusions as restated.

Petitioner's exhibits are designated by "CX." Intervenors exhibits are designated by "IX." Exhibits from the certified copy of the record upon which the Executive Vice President based the December 10, 2002, reconsidered determination are designated by "CR." The transcript is divided into three volumes, one volume for each day of the 3-day hearing. Each volume begins with page 1 and is sequentially numbered. References to "Tr. I" are to the volume of the transcript that relates to the November 10, 2003, segment of the hearing. References to "Tr. II" are to the volume of the transcript that relates to the

November 12, 2003, segment of the hearing. I make no reference to the volume of the transcript that relates to the November 13, 2003, segment of the hearing.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938

. . . .

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

. . . .

§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

. . . .

(2) Beet sugar

(A) In general

Except as otherwise provided in this paragraph and sections 1359cc(g), 1359ee(b), and 1359ff(b) of this title, the Secretary shall make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity

of beet sugar produced by the processors for each of the 1998 through 2000 crop years, as determined under this paragraph.

. . . .

(D) Adjustments

(i) In general

The Secretary shall adjust the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years under subparagraph (C) if the Secretary determines that the processor—

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

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

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

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

(ii) Quantity

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

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

(II) in the case of a processor that closed a sugar beet processing factory, decreased by 1.25 percent of the total of the adjusted

> weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each sugar beet processing factory that is closed by the processor;
>
> (III) in the case of a processor that constructed a molasses desugarization facility, increased by 0.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph) for each molasses desugarization facility that is constructed by the processor; and
>
> (IV) in the case of a processor that suffered substantial quality losses on stored sugar beets, increased by 1.25 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years (without consideration of any adjustment under this subparagraph).

7 U.S.C. § 1359dd(a), (b)(2)(A), (D) (Supp. II 2002).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Decision Summary

I deny Petitioner's January 23, 2003, petition to overturn the decision of the Executive Vice President. I find the Executive Vice President's December 10, 2002, denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation is in accord with the express language of the Agricultural Adjustment Act of 1938. I thus find Petitioner is not entitled to an increase in its beet

sugar marketing allotment allocation either for opening a sugar beet processing factory or for sustaining substantial quality losses on stored sugar beets during the 1999 crop year.

Statutory and Regulatory Background

The United States has regulated sugar beets, along with other commodities, for many years. The degree of regulation has varied widely over time, based on a variety of circumstances. Thus, in 1996, Congress enacted the Agricultural Market Transition Act, also known as the "Freedom to Farm Act," which removed the previous sugar marketing allotments that had limited the sale of beet sugar and other commodities. Then, Congress passed the Farm Security and Rural Investment Act of 2002, which requires the Secretary of Agriculture to establish allotments for the marketing by processors of sugar processed from sugar beets and from domestically-produced sugarcane and to allocate those allotments among the processors covered by the allotment. The allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect are based on the weighted average quantity of beet sugar produced by each beet sugar processor during the 1998 through 2000 crop years. At issue in this proceeding are the provisions allowing for adjustments to these weighted averages for opening a sugar beet processing factory, closing a sugar beet processing factory, and suffering substantial quality losses on stored sugar beets (7 U.S.C. § 1359dd(b)(2)(D)(i)(I)-(II), (IV)).

Neither the Agricultural Adjustment Act of 1938 nor the Sugar Program regulations define what is meant by "opened" or "closed" with respect to a sugar beet

processing factory, nor is there any specific guidance on the implementation of the "substantial quality losses on sugar beets stored during any crop year" provision.

While I base my decision primarily on the unambiguous language of the Agricultural Adjustment Act of 1938, I also discuss below, in the alternative, the legislative history, in the form of a statement by Senator Conrad, which is the sole discussion by Congress respecting the beet sugar allocation adjustment provisions. Senator Conrad, who cosponsored this provision, stated:

> The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the law.
>
> That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.
>
> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000, with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad).

Facts

Petitioner is a beet sugar processing cooperative that was formed in 1972. Petitioner currently consists of 585 farmer/shareholders in Minnesota. The cooperative is located in Renville, Minnesota, and currently employs approximately 275 year-round workers and 450 seasonal workers. (Tr. I at 219-20.)

In 1999, Petitioner borrowed approximately $100,000,000 and engaged in extensive renovations of its sugar beet processing factory (Tr. I at 193-95). At the hearing, Petitioner detailed the scope and magnitude of the construction project, which it termed "Vision 2002" (Tr. I at 32-86; CX 1, 5, 8-10, 12-22, 25, 41). Petitioner states substantial portions of the old sugar beet processing factory were demolished, and, in effect, the extensive nature of renovations is equivalent to the opening of a new sugar beet processing factory, as referred to in the Agricultural Adjustment Act of 1938. As a result of all this construction, Petitioner states its design capacity for processing sugar beets into sugar is more than double the capacity of the sugar beet processing factory as it previously existed on the same site (Post Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative at 22).

Petitioner significantly modernized and increased the capacity of its Renville, Minnesota, sugar beet processing factory. Likewise, the record contains considerable testimony that some Intervenors also undertook significant and highly costly—though not as costly over as short a period as Petitioner—modifications and improvements to their sugar beet processing factories. Thus, Kevin Price, director of governmental affairs,

American Crystal Company, the largest beet sugar processor, testified to two major expansions totaling approximately $134,000,000 during the period from 1996 through 2000 (Tr. II at 32-46). Inder Mathur, president and chief executive officer, Western Sugar Cooperative, testified to a $22.5 million expansion project (Tr. II at 120-23). Victor Krabbenhoft, chairman of the board, Minn-Dak Farmers Cooperative, testified to a $93,000,000 expansion (Tr. II at 170-71, 179).

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

Shortly after regulations were issued implementing the 2002 amendments to the Agricultural Adjustment Act of 1938, the CCC sent out a survey to all beet sugar processors. This Beet Processor Allotment Production History Adjustment Survey (CR 004-005) contained four questions concerning the four bases for adjustments available under the Agricultural Adjustment Act of 1938. While Petitioner did state it had suffered a loss more than 20 percent above normal on stored sugar beets during the 1999 and 2000 crop years, it answered "No" to the question:

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

Petitioner elicited testimony that it did not realize that this survey was official, since the survey was not on a printed form or on letterhead and that Petitioner simply made a mistake in filling out this form. John Richmond, president and chief executive officer of Petitioner, testified that, since the survey's wording did not exactly track the regulations, Petitioner was "unsure of what to do." (Tr. I at 135.)

Mr. Richmond also testified that the sugar beet processing portion of the factory was rebuilt in essentially one off-season, between March and September of 1999. By reconstructing a plant "so that it was now two or three times bigger than it was before, I believe means that we reopened the plant and we constructed a new plant simultaneously." (Tr. I at 140.) "[W]hat we did was demolish the beet end of a factory, and rebuild that factory and add another factory at the same time. We did not permanently terminate the operation at that factory. We essentially rebuilt that factory

and right with it, built another factory at the same time." (Tr. I at 142.) Shortly after this statement that Petitioner essentially had two factories on the same site where it previously had one, apparently as a result of the degree of expansion in processing capacity, Mr. Richmond engaged in this short colloquy with the Executive Vice President's counsel:

> Q. MR. KAHN: . . . And you have never had more than one factory, have you, on that site?
>
> A. MR. RICHMOND: There has only ever been one sugar factory.

Tr. I at 143.

Petitioner also introduced evidence, for comparison purposes, of the reopening of a sugar beet processing factory that had been idle for two decades in Moses Lake, Washington (Tr. I at 95-99). Pacific Northwest Sugar Company, the owner of the Moses Lake, Washington, factory, received an adjustment for opening a sugar beet processing factory. While there was some testimony indicating that portions of the infrastructure from the Moses Lake factory that had sat idle for 20 years still existed in a usable condition, other testimony showed that a significant portion of the factory's equipment had been cannibalized (Tr. II at 236-37).

There was no dispute that the CCC found Petitioner had incurred substantial quality losses on stored sugar beets in crop year 2000 entitling Petitioner to a favorable adjustment in its allocation. At the hearing, a good deal of evidence was presented as to whether Petitioner was entitled to a second such adjustment for substantial losses on

stored sugar beets allegedly suffered during crop year 1999. Petitioner testified that it suffered substantial quality losses on stored sugar beets because of a major boiler failure, which resulted in the work at the factory slowing down. The boiler failure, combined with abnormally warm weather, caused the quality of the sugar beets, and the resulting output of sugar, to significantly deteriorate. (Tr. I at 144-45.) The record contains considerable testimony as to whether losses triggered by an equipment failure even qualify as "substantial quality losses" under the Agricultural Adjustment Act of 1938. The term has not been defined by the CCC through either regulation or other guidance.

Mr. Richmond testified the "straight house" recovery method was an appropriate way to determine the relative performance of sugar beet processing factories and a 20 percent loss in sugar production calculated according to this method was an appropriate measure of substantiality (Tr. I at 117-18). He further testified, in order to establish a baseline to determine the extent of the loss, it was appropriate to use a standard of recovering a minimum of 75 percent of the sugar in the harvested sugar beets. He stated that, applying this methodology, the recovery average for 1999 was well below the 10-year average recovery percentage.

Intervenors strongly contested Petitioner's methodology and results. Intervenors argued that the 75 percent standard for evaluating straight house recovery was inappropriate and unsubstantiated and testified, if it was the appropriate standard, then a number of other companies would have been similarly entitled to an allocation adjustment. (Tr. II at 22-26, 124, 157-58, 204-05, 237; IX 29.) Intervenors also

contended the statutory term “quality losses” was not meant to cover every type of loss that could occur in the processing of sugar beets and equipment problems, such as boiler failure, constitute a “non-quality” loss not intended to be covered by the statutory adjustment of allocation.

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

Discussion

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

I affirm the Executive Vice President's denial of Petitioner's request for an adjustment in its beet sugar marketing allotment allocation for opening a sugar beet processing factory. I find the language in the Agricultural Adjustment Act of 1938 is clear and unambiguous that substantial expansions, modifications, or modernizations of a sugar beet processing factory are not equivalent to the opening of a factory. Further, the legislative history supports the CCC's interpretation of the Agricultural Adjustment Act of 1938. Moreover, I find the CCC's granting Pacific Northwest Sugar Company an adjustment for opening a sugar beet processing factory in Moses Lake, Washington, is not inconsistent with the Executive Vice President's denial of Petitioner's request for reconsideration of the October 1, 2002, beet sugar marketing allotment allocation.

In its request for reconsideration of beet sugar marketing allotment allocation by the Executive Vice President, dated October 9, 2002, Petitioner states:

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

CR 010. Petitioner then refers to this re-building and expansion as an "essentially new factory" (CR 010) and states Petitioner:

> reconstructed and reconfigured its Renville, Minnesota sugar beet processing factory thus creating a new sugar beet processing factory on the

> same site. The new factory increased production capacity and enhanced efficiency and productivity thereby driving down the costs of production.

Brief of Southern Minnesota Beet Sugar Cooperative Concerning Suggested Procedural Matters at 4. Petitioner is thus essentially arguing that by significantly improving efficiency and expanding its capacity, it has "opened" a new sugar beet processing factory.

Congress could have chosen to reward a beet sugar processor for expanding significantly in size. By limiting the allocation increase to beet sugar processors that "opened" a sugar beet processing factory, however, Congress did not make the choice urged by Petitioner. That choice being made, it is not the role of the CCC nor the undersigned to second-guess Congress. That Congress chose a different course after earlier passing the Freedom to Farm Act and that Petitioner might have made business decisions in reliance on the Freedom to Farm Act does not give the CCC any ground to implement the current Agricultural Adjustment Act of 1938 in a manner contrary to its express terms. Moreover, the record indicates that farm bills have a limited life and that those regulated by these bills have learned to expect periodic changes of greater or lesser significance. As I read it, the Agricultural Adjustment Act of 1938 simply does not make any provision for adjusting a beet sugar processor's allocation simply because it has increased its processing capacity, even if the increase was substantial. Indeed, granting allocation adjustments for increasing capacity would, based on the evidence presented by several Intervenors, potentially result in a number of adjustments in allocation, which

would all have to come out of the same total beet sugar allotment. Moreover, imposing a rule that arguably doubling capacity is the equivalent of opening a sugar beet processing factory, while any lesser number would not result in an adjustment, would likely be viewed as arbitrary, particularly given the clear meaning of "opened" in this context. Congress was certainly familiar with the potential for expanding the capacity of a sugar beet processing facility, and Congress appears to have decided to limit the allocation increase to beet sugar processors who "opened" a sugar beet processing factory rather than include those who expanded a presently existing factory.

Alternatively, Petitioner contended that it effectively demolished its old sugar beet processing factory—although Petitioner never ceased operating other than in the normal off-season for this industry—and built two new factories in its place (Tr. I at 139, 162). On the other hand, Petitioner seems to recognize, as Mr. Richmond testified, that just one sugar beet processing factory exits in Renville, Minnesota, albeit a significantly larger and probably more efficient factory than the pre-expansion factory. The legal argument that Petitioner effectively demolished its old sugar beet processing factory and opened two new factories on the same location is less than compelling. Petitioner argues "[t]he entire beet end of the facility was demolished and reconstructed . . ." (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 16-17) and the beet end of a facility is the "factory" (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 21). However, Petitioner also goes on to argue in its Post Hearing Reply Brief of Southern Minnesota Beet Sugar Cooperative that it should not suffer the

downward adjustment that the Agricultural Adjustment Act of 1938 mandates for a beet sugar processor which has "closed" a sugar beet processing factory. Yet, if a factory is demolished, I find it difficult to conceive of the factory not being closed. In fact, Petitioner's approach would logically mandate that the CCC deem a sugar beet processing factory "closed" if a beet sugar processor reduced factory capacity by 50 percent, since that would appear to be the converse of accepting Petitioner's argument that the doubling of capacity is "opening" an additional factory. Contending the "beet end" and the "sugar end" are two different factories and, therefore, now two factories exist where there once was one seems little more than a bootstrap approach to arguing that allegedly doubling the potential capacity to process sugar beets is the same as opening a new factory.

I also find significant, but not controlling, that in response to the Beet Processor Allotment Production History Adjustment Survey conducted by the CCC, Petitioner indicated that it had not opened a new sugar beet processing factory during the time period that would trigger the increased allocation. Although Petitioner, through testimony and argument, indicates that its answer to the survey was a mistake, that the survey form was confusing because the form did not track the language of the Agricultural Adjustment Act of 1938, and that the survey did not appear to be an official survey, I find apparent that, at the time of the survey, Petitioner considered its extensive renovation of its factory just that, a renovation, and not the opening of a new sugar beet processing factory.

Even if I were to find the Agricultural Adjustment Act of 1938 language is ambiguous, which I do not, the legislative history would be of no help to Petitioner. Senator Conrad pointed out that the Farm Security and Rural Investment Act of 2002 was designed to create "a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry." The amorphous standard suggested by Petitioner, which would require the CCC to determine that "opening" a sugar beet processing factory includes expanding a factory's capacity more than an unspecified amount (and suggests that a factory must be found to have "closed" if capacity has diminished by a likewise unspecified amount), provides neither certainty nor predictability and does not comport with the objectives mentioned by Senator Conrad.

Petitioner also contends "[a] conservative and common sense reading" (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 23) of Senator Conrad's statement that the Secretary of Agriculture has the authority to adjust allocations "if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets" means a beet sugar processor who increases processing capacity through improved technology is entitled to an adjustment to its allocation. However, reading Senator Conrad's statement in conjunction with the four bases for adjusting allocations provided in the Agricultural Adjustment Act of 1938, it is evident that the phrase concerning "increased processing capacity through improved technology to extract more sugar from beets" refers not to an increase in beet slicing

capacity or a modernization of technology but rather to the allocation increase for constructing a molasses desugarization facility. Looking at Senator Conrad's comments in context, it is apparent he is making a reference to each of the four bases for adjustments—opening a factory, closing a factory, disaster-related losses, and construction of a molasses desugarization facility. Further, the phrase in question refers to technologies to "extract more sugar from beets." Increasing the capacity of a sugar beet processing factory, as Petitioner did with the Renville, Minnesota, factory, does not increase the amount of sugar Petitioner can extract from beets, but primarily allows Petitioner to process more beets. Thus, Senator Conrad's statement, which constitutes the legislative history for these provisions, does not support Petitioner's position.

Finally, the CCC's adjustment of the Pacific Northwest Sugar Company allocation is not inconsistent with the Agricultural Adjustment Act of 1938 and with CCC's handling of Petitioner's allocation. The Renville, Minnesota, sugar beet processing factory was never closed during the period of its expansion, other than during the normal off-season for the beet end of the factory. The Moses Lake factory for which Pacific Northwest Sugar Company was awarded an adjustment of its allocation for opening a sugar beet processing facility had been closed for 20 years. That it was a closed factory for 20 years is manifest—most of the old equipment had been removed from the site. There had been no sugar beet processing at that location from 1978 until Pacific Northwest Sugar Company opened a sugar beet processing factory at the same site in 1998. (Tr. I at 95-98.) The two situations are simply not analogous.

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

I affirm the Executive Vice President's denial of an adjustment for substantial quality losses on stored sugar beets for the 1999 crop year. I find the clear, unambiguous language of the Agricultural Adjustment Act of 1938 only allows a single adjustment for substantial quality losses on stored sugar beets during the three crop years (1998 through 2000) that are used to calculate each beet sugar processor's allocation and the CCC had already allowed Petitioner such an adjustment for the 2000 crop year. Further, the legislative history offers no help to Petitioner's interpretation.

The Agricultural Adjustment Act of 1938 provides for an adjustment if the Secretary of Agriculture determines the beet sugar processor, "during the 1998 through 2000 crop years, suffered substantial quality losses on sugar beets stored during any such crop year."[2] Petitioner contends it is entitled to a second adjustment for the 1999 crop year, in addition to the quality loss adjustment Petitioner received for the 2000 crop year, while the Executive Vice President contends that it was immaterial and irrelevant whether Petitioner suffered substantial quality losses in the 1999 crop year. The Executive Vice President and Intervenors contend, in order to properly apply the statutory provision, the CCC never had to decide the issue of whether Petitioner had suffered substantial quality losses in the 1999 crop year since suffering substantial quality losses during the 2000 crop

[2]7 U.S.C. § 1359dd(b)(2)(D)(i)(IV).

year was a sufficient basis for the CCC to make the single adjustment permitted under the Agricultural Adjustment Act of 1938.

The CCC interpretation is in accord with the clear and unambiguous language of the Agricultural Adjustment Act of 1938. There are four different bases for adjustments under the Agricultural Adjustment Act of 1938, and three of them—for opening or closing a sugar beet processing factory and for constructing a molasses desugarization facility, apply to each opening, closing, or construction. In contrast, the adjustment for substantial quality losses on sugar beets stored during any crop year from 1998 through 2000 does not specify that the adjustment applies to each such loss. The rules of statutory construction require the presumption that Congress' word choices are intentional and that where Congress uses one word—each—in describing three of the bases for adjustments, while not using that word to apply to the fourth basis for an adjustment, then Congress must have had a purpose in so doing. Where Congress includes particular language in one section of a statute, but omits that language in another section of the statute, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997). Where Congress provided that an adjustment be made for each opening, closing, or construction in 7 U.S.C. § 1359dd(b)(2)(D)(ii)(I)-(III) and chose a different approach in 7 U.S.C. § 1359dd(b)(2)(D)(ii)(IV), the only proper conclusion is that Congress did not want the same standard to apply.

Once again, even if I found that I needed to look to the legislative history, I find nothing that would support Petitioner's interpretation. The legislative history does not address whether Congress intended there to be one, two, or three adjustments based on sustaining substantial quality losses. While all parties agree that the purpose of the adjustment provisions of the Agricultural Adjustment Act of 1938 are to provide a predictable, transparent, and equitable formula, Senator Conrad's statements shed no light, one way or the other, as to how this particular adjustment is to be applied.

A considerable portion of the hearing was devoted to testimony and exhibits as to what Congress meant by "substantial quality losses" on stored sugar beets. Because I affirm the Executive Vice President's determination that the Agricultural Adjustment Act of 1938 only allows for one quality loss adjustment and because the CCC has already awarded Petitioner such an adjustment for the 2000 crop year, I do not find it necessary to make any determination as to whether Petitioner showed it has suffered substantial quality losses on stored sugar beets during the 1999 crop year and what standards would apply to make such a determination.

Petitioner's Due Process, Regulatory Taking, and Significant Impact Claims Provide No Basis for Overturning the Executive Vice President's Decision

Petitioner alleges its due process rights were violated by the Executive Vice President's lack of a "thorough and proper investigation" of Petitioner's request that the Executive Vice President reconsider the CCC's October 1, 2002, beet sugar marketing allotment allocation decision; denying it the requested allocation adjustments would

constitute a regulatory taking; and the impact of a denial of the requested allocation adjustments would be significant and discriminatory (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 13-15).

The Judicial Officer's jurisdiction to rule on constitutional claims is limited. I cannot declare an Act of Congress unconstitutional. "[G]enerally an administrative tribunal has no authority to declare unconstitutional a statute that it administers." *In re Jerry Goetz*, 61 Agric. Dec. 282, 287 (2002). However, I am charged with assuring that parties receive due process.

Petitioner has received ample due process. Petitioner's principal due process contention appears to be that, on reconsideration, the Executive Vice President did not conduct a hearing; however, neither the Agricultural Adjustment Act of 1938 nor the Sugar Program regulations entitles Petitioner to a hearing before the Executive Vice President. Moreover, Petitioner received an in-person hearing before the Chief ALJ and had a full opportunity to adduce the facts that would support Petitioner's claim for an increase in its beet sugar marketing allotment allocation.

Petitioner's regulatory taking and unfair impact arguments are essentially disagreements with Congress' legislative decisions in crafting the Agricultural Adjustment Act of 1938. Since I have sustained the CCC's interpretations as totally consistent with the Agricultural Adjustment Act of 1938 and since I have no authority to alter or overrule the statutory scheme authorized by Congress, I find no basis for reversing the determination of the Executive Vice President.

Findings and Conclusions

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

2. Petitioner's significant modernization and expansion of its sugar beet processing factory in Renville, Minnesota, did not constitute opening a new sugar beet processing factory.

3. Petitioner is not entitled to an increase in its beet sugar marketing allotment allocation for opening a sugar beet processing factory.

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

5. Under the Agricultural Adjustment Act of 1938, no beet sugar processor is entitled to more than one adjustment for substantial quality losses on stored sugar beets during the 1998 through 2000 crop years.

6. Petitioner is not entitled to an increase in its beet sugar marketing allotment allocation for suffering substantial quality losses on stored sugar beets during the 1999 crop year.

7. Petitioner was not denied due process during the course of this proceeding.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises 11 issues in "Southern Minnesota Beet Sugar Cooperative Appeal Petition to the Judicial Officer" [hereinafter Petitioner's Appeal Petition] and "Southern Minnesota Beet Sugar Cooperative Brief in Support of Appeal Petition" [hereinafter Petitioner's Appeal Brief].

First, Petitioner contends the Chief ALJ's finding that the Agricultural Adjustment Act of 1938 is clear and unambiguous, is error. Petitioner contends the word *opened*, as used in the adjustment provisions of the Agricultural Adjustment Act of 1938, is ambiguous because it is not defined in the Agricultural Adjustment Act of 1938 or in the Sugar Program regulations. Petitioner asserts a beet sugar processor that significantly increases sugar beet processing capacity at an existing sugar beet processing factory has *opened a sugar beet processing factory* as that term is used in the Agricultural Adjustment Act of 1938. (Petitioner's Appeal Pet. at 2; Petitioner's Appeal Brief at 15-21.)

As an initial matter, Petitioner cites no authority, and I cannot find authority, for Petitioner's position that words used in a statute that are not defined in that statute are ambiguous *per se*. Instead, it has long been held, when not defined by statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary

intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.[3]

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[3]*Leocal v. Ashcroft*, ___ U.S. ___, 125 S. Ct. 377, 382 (2004) (stating, when interpreting a statute, words must be given their ordinary or natural meaning); *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (stating we give the words of a statute their ordinary, contemporary, common meaning absent an indication Congress intended them to bear some different import); *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997) (stating, in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating, when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating, in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating, in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating, in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation); *Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating the legislature must be presumed to use words in their known and ordinary signification); *De Ganay v. Lederer*, 250 U.S. 376, 381 (1919) (stating, unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating

(continued...)

The common and ordinary meaning of the verb *to open* (as in *opened a sugar beet processing factory*) is "to make available for or active in regular function ([opened] a new store),"[4] "[t]o begin; initiate; commence . . .[t]o commence the operation of."[5] I cannot locate any authority which indicates that the word *opened* in relation to a business, factory, or other establishment would commonly or ordinarily be understood to include the modification of an existing establishment.

Second, Petitioner asserts the word *opened*, as used in the Agricultural Adjustment Act of 1938, when examined in conjunction with the congressional intent to account for a beet sugar processor's addition of sugar beet processing capacity, directly supports Petitioner's entitlement to an allocation adjustment (Petitioner's Appeal Pet. at 2-3; Petitioner's Appeal Brief at 21-25).

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[3](...continued)
the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions).

[4]Merriam-Webster's Collegiate Dictionary 814 (10th ed. 1997).

[5]The American Heritage Dictionary of the English Language 920 (1976).

The legislative history contains only one reference to *capacity*: Senator Conrad, during Senate debate on the Farm Security and Rural Investment Act of 2002, stated, as follows:

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

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad) (emphasis added).

Looking at Senator Conrad's statement in context, it is apparent he is making a reference to each of the four bases for adjustment of the weighted average quantity of beet sugar produced by a beet sugar processor during the 1998 through 2000 crop years—opening a sugar beet processing factory, closing a sugar beet processing factory, disaster-related losses, and construction of a molasses desugarization facility. Further, the phrase in question refers to technologies to "extract more sugar from beets." Increasing the capacity of a sugar beet processing factory, as Petitioner did with the Renville, Minnesota, factory, does not increase the amount of sugar Petitioner can extract from beets, but primarily allows Petitioner to process more beets. Thus, Senator Conrad's statement, which constitutes the legislative history for the adjustment provisions of the Agricultural Adjustment Act of 1938, does not support Petitioner's position that its

modification of the existing Renville, Minnesota, sugar beet processing factory entitles Petitioner to an allocation adjustment.

Third, Petitioner contends an adjustment for an increase in capacity of a sugar beet processing factory is consistent with the purpose of the Agricultural Adjustment Act of 1938. Petitioner states the purpose of the baseline formula and related adjustments is to establish a fair, equitable, and representative allotment allocation for each sugar beet processor. (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 25.)

Again, Petitioner ignores the plain language of the Agricultural Adjustment Act of 1938 which specifically refers to an adjustment of the weighted average quantity of beet sugar produced by a beet sugar processor which, during the 1996 through 2000 crop years, *opened* a sugar beet processing factory (7 U.S.C. § 1359dd(b)(2)(D)(i)(I), (b)(2)(D)(ii)(I)). Moreover, I find no legislative history that supports Petitioner's contention that Congress intended that the Secretary of Agriculture adjust the weighted average quantity of beet sugar produced by a beet sugar processor which, during the 1996 through 2000 crop years, expanded the capacity of an existing sugar beet processing factory.

Petitioner also cites Pacific Northwest Sugar Company as an example of a beet sugar processor that was provided an adjustment for increasing the capacity of a sugar beet processing factory (Petitioner's Appeal Brief at 25). However, Petitioner's assertion is not supported by the record which establishes that the CCC adjusted Pacific Northwest Sugar Company's weighted average quantity of beet sugar based on Pacific Northwest

Sugar Company's opening a sugar beet processing factory. Moreover, Petitioner undermines its contention that Pacific Northwest Sugar Company was provided an adjustment for increasing the capacity of its Moses Lake, Washington, sugar beet processing factory by also asserting that the Pacific Northwest Sugar Company decreased the Moses Lake, Washington, sugar beet processing factory capacity from 10,000 tons of beets per day to 6,000 tons of beets per day (Petitioner's Appeal Brief at 32).

Fourth, Petitioner contends the Beet Processor Production History Adjustment Survey conducted by the CCC is irrelevant to the determination of whether Petitioner is entitled to an adjustment for opening a sugar beet processing factory and the Chief ALJ erroneously placed significant weight on the survey and the mistaken way in which Petitioner completed the survey (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 26-27).

The Chief ALJ found significant, but not controlling, that, in response to the Beet Processor Production History Adjustment Survey conducted by the CCC, Petitioner indicated it had not opened a sugar beet processing factory during the time period that would trigger the increased allocation. The Chief ALJ concluded Petitioner's answer to the Beet Processor Production History Adjustment Survey makes apparent that, at the time of the survey, Petitioner considered its renovation of its Renville, Minnesota, sugar beet processing factory just that, a renovation, and not the opening of a sugar beet processing factory. (Initial Decision at 15.)

I agree with the weight the Chief ALJ placed on Petitioner's response to the Beet Processor Production History Adjustment Survey and the conclusion the Chief ALJ drew from Petitioner's response. Moreover, I find Petitioner's assertion, that it did not understand the significance of an incorrect response to the Beet Processor Production History Adjustment Survey, was belied by the care with which Petitioner explained its affirmative answer to the question regarding substantial quality losses on stored sugar beets during the period October 1, 1998, through September 30, 2001; by Petitioner's entrusting the completion and return of the Beet Processor Production History Adjustment Survey to its comptroller, Ron T. Bailey; and by Petitioner's concern that it return the Beet Processor Production History Adjustment Survey to the CCC before the CCC's deadline for issuing beet sugar marketing allotment allocations.

Fifth, Petitioner contends the Chief ALJ erroneously found credible Intervenors' claims that, if Petitioner is granted an adjustment to its weighted average baseline beet sugar production quantity for opening a sugar beet processing factory, various Intervenors would also be entitled to the same adjustment (Petitioner's Appeal Pet. at 3; Petitioner's Appeal Brief at 27-30).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125,

1128-29 (7th Cir. 1983).[6] The Administrative Procedure Act provides that, on

[6]*See also In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 560 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating while considerable deference is owed to credibility findings by an administrative law judge, the

(continued...)

appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

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[6](...continued)
Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

Appeals and review. . . .

> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[7]

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[7]*In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 Fed. Appx. 718, 2001 WL 401594 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

I have examined the record and find no basis to reverse the Chief ALJ's credibility determinations with respect to Intervenors' claims that they undertook significant and highly costly modifications and improvements to their sugar beet processing factories.

Sixth, Petitioner contends the Chief ALJ erroneously found Petitioner's situation is not analogous to that of Pacific Northwest Sugar Company in which the CCC awarded Pacific Northwest Sugar Company an increase in its beet sugar marketing allocation for opening its Moses Lake, Washington, sugar beet processing factory. Petitioner asserts the undisputed evidence establishes Pacific Northwest Sugar Company built the sugar beet processing factory on the site of an existing, but non-operational, sugar beet processing factory and used existing, used, and new equipment and buildings. Petitioner argues, in awarding an adjustment to Pacific Northwest Sugar Company, the CCC determined that the use of existing, used, and new equipment to create new sugar beet processing capacity on the footprint of a previously-operational sugar beet processing factory constitutes opening a sugar beet processing factory. (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 30-32.)

I agree with the Chief ALJ's finding that Petitioner's situation is not analogous to that of Pacific Northwest Sugar Company. The Chief ALJ very clearly articulates the stark difference between Petitioner's situation and that of Pacific Northwest Sugar Company (Initial Decision at 9-10, 18), and I have adopted, with very minor modifications, the Chief ALJ's discussion in this Decision and Order, *supra*. I find no reason to reiterate that discussion here.

Seventh, Petitioner contends the Chief ALJ erroneously held that no more than one substantial quality loss adjustment may be made under the Agricultural Adjustment Act of 1938. Petitioner contends it is entitled to two adjustments for the two substantial quality losses on stored sugar beets that Petitioner suffered during the 1998 through 2000 crop years—one in crop year 1999, the other, for which Petitioner was given an adjustment, in crop year 2000. Petitioner argues the use of the plural (substantial quality *losses* on stored sugar beets) in the adjustment provisions of the Agricultural Adjustment Act of 1938 means the Secretary of Agriculture must adjust the weighted average quantity of beet sugar produced by a beet sugar processor for each substantial quality loss suffered during any crop year from 1998 through 2000. (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 34-40).

A beet sugar processor can be awarded more than one of each of the first three permissible adjustments in section 359d(b)(2)(D)(i)(I)-(III) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(i)(I)-(III)); however, the language of each of these three bases for adjustment is in the singular so that it conforms to the parallel language in section 359d(b)(2)(D)(ii)(I)-(III) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(D)(ii)(I)-(III)) awarding an adjustment for *each* event. Thus, for instance, the Secretary of Agriculture may make an adjustment if the Secretary determines a beet sugar processor has opened *a* sugar beet processing factory (7 U.S.C. § 1359dd(b)(2)(i)(D)(I)) and the amount of the adjustment is 1.25 percent for *each* sugar

beet processing factory that is opened by the beet sugar processor (7 U.S.C. § 1359dd(b)(2)(ii)(D)(I)).

However, in section 359d(b)(2)(i)(D)(IV) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(i)(D)(IV)), which provides for adjustment based upon substantial quality losses, the singular is not needed because the parallel provision in section 359d(b)(2)(ii)(D)(IV) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(ii)(D)(IV)) does not provide for an adjustment for *each* event.

Congress provided for an adjustment for *each* sugar beet processing factory that is opened by a beet sugar processor, for *each* sugar beet processing factory that is closed by a beet sugar processor, and for *each* molasses desugarization facility that is constructed by a beet sugar processor. Congress did not provide for an adjustment for each substantial quality loss on stored sugar beets suffered by a beet sugar processor; instead, Congress provided for an adjustment in the case of a beet sugar processor that has suffered substantial quality losses on stored sugar beets.

Petitioner, referring to Senator Conrad's statement, argues the legislative history establishes that the Secretary of Agriculture is to make *adjustments* (plural) when a beet sugar processor suffers substantial quality losses on stored sugar beets (Petitioner's Appeal Brief at 39).

Again, I disagree with Petitioner. Senator Conrad states:

> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's

> weighted-average production during the years 1998 through 2000, with authority for the Secretary of Agriculture to make *adjustments* in the formula if an individual processor experienced disaster-related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad) (emphasis added).

I find *adjustments* is plural not because Congress intended multiple adjustments for substantial quality losses on stored sugar beets, but because Senator Conrad is referring to the four bases for adjustments: opening a sugar beet processing factory, closing a sugar beet processing factory, constructing a molasses desugarization facility, and suffering substantial quality losses on stored sugar beets.

Eighth, Petitioner contends the Chief ALJ erroneously failed to find that Petitioner met all the applicable standards for what constitutes substantial quality losses (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 40-43).

The Chief ALJ did not find it necessary to make any determination as to whether Petitioner established that it suffered substantial quality losses on stored sugar beets during the 1999 crop year or to make any determination regarding the standards that would apply to determine whether a sugar beet processor has established that it suffered substantial quality losses on stored sugar beets. The Chief ALJ concluded he was not required to make these determinations because the Agricultural Adjustment Act of 1938 only allows one substantial quality loss adjustment on stored sugar beets suffered during the 1998 through 2000 crop years and the undisputed evidence establishes that Petitioner

had already received an adjustment for substantial quality losses on stored sugar beets suffered during the 2000 crop year (Initial Decision at 20-21). I agree with the Chief ALJ's conclusions and the reasons for his conclusions that it is not necessary to make any determination as to whether Petitioner established that it suffered substantial quality losses on stored sugar beets during the 1999 crop year and what standards would apply to make such a determination.

Ninth, Petitioner contends the Chief ALJ erroneously granted deference to the CCC's interpretation of the Agricultural Adjustment Act of 1938 (Petitioner's Appeal Pet. at 4; Petitioner's Appeal Brief at 43-45).

While the Chief ALJ stated the CCC's interpretation of the Agricultural Adjustment Act of 1938 was entitled to some deference, the Chief ALJ clearly based the Initial Decision on what he independently found to be the plain language of the Agricultural Adjustment Act of 1938. Therefore, even if I agreed with Petitioner that the Chief ALJ's statements regarding the deference to be given the CCC's interpretation of the Agricultural Adjustment Act of 1938 was error, nevertheless, I would find the Chief ALJ's statements harmless error. Moreover, I do not base this Decision and Order on deference to the CCC's interpretation of the Agricultural Adjustment Act of 1938. Instead, I find, without reference to the CCC's interpretation, that Petitioner did not open a sugar beet processing factory within the meaning of the adjustment provisions of the Agricultural Adjustment Act of 1938 and is not entitled under the adjustment provisions

of the Agricultural Adjustment Act of 1938 to two adjustments for substantial quality losses on stored sugar beets during crop years 1998 through 2000.

Tenth, Petitioner asserts the Executive Vice President and Intervenors objected to Petitioner's right to a hearing at which oral and written evidence could be introduced. Petitioner contends these objections resulted in unnecessary delay in the proceeding; forced Petitioner to engage in an academic briefing exercise; and forced Petitioner to suffer for an extended period of time without its proper sugar marketing allotment allocation, while the rest of the industry benefited from an improper increased sugar marketing allotment allocation. Petitioner suggests the Executive Vice President's and Intervenors' challenge to Petitioner's right to a hearing resulted in a denial of due process. (Petitioner's Appeal Pet. at 5; Petitioner's Appeal Brief at 45-46.)

As an initial matter, the record indicates that the Executive Vice President and Intervenors filed briefs regarding the nature and purpose of the hearing in response to a May 14, 2003, request by Administrative Law Judge Jill S. Clifton, who was then assigned to conduct this proceeding (Brief of Southern Minnesota Beet Sugar Cooperative Concerning Suggested Procedural Matter at 1-2; Joint Response of the Intervenors To the Brief of the Petitioner Concerning Suggested Procedural Matter at 1-3; Brief of Commodity Credit Corporation Concerning Suggested Procedural Questions at 1-2). The record does not establish that the Executive Vice President or Intervenors challenged Petitioner's right to a hearing for purposes of delay. Further, the Chief ALJ, after consideration of the Executive Vice President's, Petitioner's, and Intervenors' briefs

on procedural matters determined that an in-person hearing was warranted (Summary of Telephone Conference & Order Requiring Pre-Hearing Exchanges at 1). Subsequently, the Chief ALJ conducted a 3-day in-person hearing at which Petitioner introduced oral and written testimony. Under these circumstances, I reject Petitioner's contention that it was denied due process.

Eleventh, Petitioner contends, if it does not receive the requested adjustments, Petitioner will suffer a regulatory taking (Petitioner's Appeal Pet. at 5; Petitioner's Appeal Brief at 45-48).

The inquiry into whether a taking has occurred is essentially an ad hoc factual inquiry not directed by a set formula. However, the Supreme Court of the United States has identified three factors to be taken into account when determining whether a governmental action has gone beyond regulation and effects a taking: (1) the character of the governmental action; (2) the economic impact of the governmental action; and (3) the governmental action's interference with reasonable investment-backed expectations.[8] A taking may more readily be found when the governmental interference with property can be characterized as a physical invasion by government, than when the interference arises

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[8]*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-96 (1981); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

from a public program adjusting the benefits and burdens of economic life to promote the common good.[9] I do not find the Secretary of Agriculture's denial of Petitioner's request for two adjustments to its weighted average quantity of beet sugar produced during the 1998 through 2000 crop years can be construed as an unconstitutional taking of Petitioner's property. In any event, this forum is not the proper forum for Petitioner's inverse condemnation claim.

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

ORDER

1. The determination made by the Executive Vice President on December 10, 2002, denying Petitioner's request for an increase in its beet sugar marketing allotment allocation under the Agricultural Adjustment Act of 1938 is sustained.

2. Petitioner's Petition for Review is denied.

Done at Washington, DC

May 9, 2005

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William G. Jenson
Judicial Officer

[9] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 n.18 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).