

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) A.Q. Docket No. 05-0004  
)  
Marla Garcia Gonzalez, )  
)  
Respondent ) **Decision and Order**

**PROCEDURAL HISTORY**

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on November 17, 2004. Complainant instituted the proceeding under the Animal Health Protection Act (7 U.S.C. §§ 8301-8320 (Supp. II 2002)); regulations issued under the Animal Health Protection Act (9 C.F.R. pt. 94 (2002)) [hereinafter the Regulations];<sup>1</sup> and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

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<sup>1</sup>The Animal Health Protection Act was enacted on May 13, 2002. Effective June 4, 2002, the Animal and Plant Health Inspection Service, United States Department of Agriculture, revised the authority citation applicable to 9 C.F.R. pt. 94 (2002) to add a reference to the Animal Health Protection Act (67 Fed. Reg. 47,243 (July 18, 2002)).

Complainant alleges that on or about August 13, 2002, Marla Garcia Gonzalez [hereinafter Respondent] violated section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) by importing into the United States approximately 1.5 kilograms of pork from Spain, where classical swine fever is known to exist,<sup>2</sup> without the specified treatment, certificates, processing, or inspection by a representative of the United States Department of Agriculture (Compl. ¶ II).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 23, 2004.<sup>3</sup> Respondent failed to respond to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On December 22, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default

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<sup>2</sup>At all times material to this proceeding, section 94.9 of the Regulations (9 C.F.R. § 94.9 (2002)) regulated the importation of pork and pork products into the United States from regions where hog cholera was known to exist. However, veterinary practitioners in the international community refer to hog cholera as "classical swine fever" and effective April 7, 2003, the term "hog cholera" was removed from section 94.9 of the Regulations (9 C.F.R. § 94.9 (2002)) and the term "classical swine fever" was added in its place. (68 Fed. Reg. 16,922 (Apr. 7, 2003).)

<sup>3</sup>See United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 3663 establishing that the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on November 23, 2004.

Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.<sup>4</sup> Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). On February 4, 2005, the Hearing Clerk sent a letter to Respondent informing her that she failed to file timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and that the file was being referred to an administrative law judge for consideration and decision.<sup>5</sup>

On February 11, 2005, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision and Order] concluding Respondent violated the Animal Health Protection Act and the Regulations as alleged in the Complaint and assessing Respondent a \$500 civil penalty (Initial Decision and Order at 2-3).

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<sup>4</sup>See United States Postal Service Track and Confirm for Article Number 7004 1160 0001 9221 2529 establishing that the Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.

<sup>5</sup>Letter dated February 4, 2005, from Joyce A. Dawson, Hearing Clerk, to Marla Garcia Gonzalez.

On March 30, 2005, Respondent appealed to the Judicial Officer. On April 20, 2005, Complainant filed a response to Respondent's appeal petition. On April 22, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

## **APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

### **TITLE 7—AGRICULTURE**

....

### **CHAPTER 109—ANIMAL HEALTH PROTECTION**

....

#### **§ 8303. Restrictions on importation or entry**

##### **(a) In general**

With notice to the Secretary of the Treasury and public notice as soon as practicable, the Secretary may prohibit or restrict—

- (1) the importation or entry of any animal, article, or means of conveyance, or use of any means of conveyance or facility, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock[.]

....

**(b) Regulations**

**(1) Restrictions on import and entry**

The Secretary may issue such orders and promulgate such regulations as are necessary to carry out subsection (a) of this section.

....

**§ 8313. Penalties**

....

**(b) Civil penalties**

**(1) In general**

Except as provided in section 8309(d) of this title, any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided under this chapter 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 chapter 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) \$500,000 for all violations adjudicated in a single proceeding; or

(B) twice the gross gain or gross loss for any violation or forgery, counterfeiting, or unauthorized use, alteration, defacing or destruction of a certificate, permit, or other document provided under this chapter that results in the person's deriving pecuniary gain or causing pecuniary loss to another person.

**(2) Factors in determining civil penalty**

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 the Secretary considers to be appropriate.

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**(4) Finality of orders**

**(A) Final order**

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28.

**(B) Review**

The validity of the order of the Secretary may not be reviewed in an action to collect the civil penalty.

**(C) Interest**

Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

7 U.S.C. §§ 8303(a)(1), (b)(1), 8313(b)(1)-(2), (4) (Supp. II 2002).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

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

....

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

....

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

....

**§ 94.9 Pork and pork products from regions where hog cholera exists.**

(a) Hog cholera is known to exist in all regions of the world except Australia; Canada; Denmark; England, except for East Anglia (Essex, Norfolk, and Suffolk counties); Fiji; Finland; Iceland; Isle of Man; New Zealand; Northern Ireland; Norway; Republic of Ireland; Scotland; Sweden; Trust Territory of the Pacific Islands; and Wales.

(b) No pork or pork product may be imported into the United States from any region where hog cholera is known to exist unless it complies with the following requirements:

(1) Such pork or pork product has been treated in accordance with one of the following procedures:

(i) Such pork or pork product has been fully cooked by a commercial method in a container hermetically sealed promptly after filling but before such cooking, so that such cooking and sealing produced a fully sterilized product which is shelf-stable without refrigeration;

(ii) Such pork or pork product is in compliance with the following requirements:

(A) All bones were completely removed prior to cooking; and

(B) Such pork or pork product was heated by other than a flash-heating method to an internal temperature of 69 °C. (156 °F.) throughout; or

(iii) Such pork or pork product is in compliance with the following requirements:

(A) All bones have been completely removed in the region of origin, and

(B) The meat has been held in an unfrozen, fresh condition for at least 3 days immediately following the slaughter of the animals from which it was derived, and

(C) The meat has been thoroughly cured and fully dried for a period of not less than 90 days so that the product is shelf stable without refrigeration: *Provided*, That the period of curing and drying shall be 45 days if the pork or pork product is accompanied to the processing establishment by a certificate of an official of the national government of a hog cholera free region which specifies that:

(1) The pork involved originated in that region and the pork or pork product was consigned to a processing establishment in \_\_\_\_\_ (a region not listed in paragraph (a) of this section as free of hog cholera), in a closed container sealed by the national veterinary authorities of the hog cholera free region by seals of a serially numbered type; and

(2) The numbers of the seals used were entered on the meat inspection certificate of the hog cholera free region which accompanied the shipment from such free region: *And provided further*, That the certificate required by paragraph (b)(3) of this section also states that: The container seals specified in paragraph (b)(1)(iii)(C)(1) of this section were found intact and free of any evidence of tampering on arrival at the processing establishment by a national veterinary inspector; and the processing establishment from which the pork or pork product is shipped to the United States does not receive or process any live swine, and uses only pork or pork product which originates in regions listed in paragraph (a) of this section as free of hog cholera and processes all such pork or pork products in accordance with paragraph (b)(1)(i), (ii), or (iii) of this section.

(2) Articles under paragraph (b)(1)(ii) or (iii) of this section were prepared in an inspected establishment that is eligible to have its products imported into the United States under the Federal Meat Inspection Act and § 327.2 of this title; and,

(3) In addition to the foreign meat inspection certificate required by § 327.4 of this title, pork and pork products prepared under paragraph (b)(1)(ii) or (iii) of this section shall be accompanied by a certificate that states that the provisions of paragraph (b)(1)(ii) or (iii) of this section have



been met. This certificate shall be issued by an official of the national government of the region of origin who is authorized to issue the foreign meat inspection certificate required by § 327.4 of this title. Upon arrival of the pork or pork products in the United States, the certificate must be presented to an authorized inspector at the port of arrival.

(4) Small amounts of pork or pork product, subject to the restrictions in this section, may in specific cases be imported for purposes of examination, testing, or analysis if the importer applies for and receives written approval for such importation from the Administrator. Approval will be granted only when the Administrator determines that the articles have been processed by heat in a manner so that such importation will not endanger the livestock of the United States.

(c) Thoroughly cured and fully dried pork and pork products from regions where both hog cholera and swine vesicular disease are known to exist need not comply with paragraph (b)(1)(iii) of this section if they are in compliance with the provisions of § 94.12(b)(1)(iii) of this part.

9 C.F.R. § 94.9 (2002) (footnotes omitted).

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

**Statement of the Case**

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted

as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Respondent is an individual with a mailing address of 8600 SW 101st Avenue, Miami, Florida 33173.
2. On or about August 13, 2002, Respondent violated section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) by importing into the United States approximately 1.5 kilograms of pork from Spain, where classical swine fever is known to exist,<sup>6</sup> without the specified treatment, certificates, processing, or inspection by a representative of the United States Department of Agriculture.

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the Findings of Fact, Respondent has violated the Animal Health Protection Act and the Regulations.

### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Respondent raises one issue in her appeal petition. Respondent admits she imported into the United States pork sausages from Spain on August 13, 2002, but states she previously paid a civil penalty for her violation of the Regulations. Specifically, Respondent asserts she “was . . . given a written citation with instructions to pay a fine of

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<sup>6</sup>See note 2.

\$100 which [she] did within a month.” (Letter dated March 17, 2005, from Respondent to Joyce A. Dawson, Hearing Clerk.) Complainant asserts he has searched his files in a vain attempt to find a record of Respondent’s alleged payment (Complainant’s Response to Respondent’s Letter dated March 17, 2005, at 5).

Respondent’s assertion that she previously paid a \$100 civil penalty for her August 13, 2002, violation of section 94.9(b) of the Regulations (9 C.F.R. § 94.9(b) (2002)) comes far too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived her defense to the assessment of a civil penalty because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk’s service letter on November 23, 2004.<sup>7</sup> Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

**§ 1.136 Answer.**

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be

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<sup>7</sup>See note 3.

deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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

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

**§ 1.141 Procedure for hearing.**

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

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

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

[T]his complaint shall be served upon the respondent. The respondent shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-1400, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an

admission of the allegation. Failure to file an answer within the prescribed time shall constitute an admission of the allegations in this complaint and a waiver of hearing.

Compl. at 2.

Similarly, the Hearing Clerk informed Respondent in the November 17, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice, that the answer must set forth any defense Respondent wishes to assert, and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

November 17, 2004

Ms. Marla Garcia Gonzales  
8600 SW 101st Avenue  
Miami, Florida 33173

Dear Ms. Gonzalez:

Subject: In re: Marla Garcia Gonzalez, Respondent -  
A.Q. Docket No. 05-0004

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

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

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain

each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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

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

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

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

Sincerely,

/s/

Joyce A. Dawson  
Hearing Clerk

Respondent's answer was due no later than December 13, 2004. Respondent's first and only filing in this proceeding is dated March 17, 2005, and was filed March 30, 2005, 3 months 17 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, Respondent is deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint and waived her defense that she previously paid a civil penalty.

On December 22, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on December 27, 2004.<sup>8</sup> Section 1.139 of the Rules of Practice states the time within which objections to a proposed decision and a motion for adoption of the proposed decision must be filed and the consequences of failing to file timely meritorious objections, as follows:

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

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

7 C.F.R. § 1.139.

Moreover, the Hearing Clerk informed Respondent in the December 22, 2004, service letter that Respondent's objections must be filed within 20 days after service of

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<sup>8</sup>See note 4.

Complainant's Motion for Adoption of Proposed Default Decision and Order and  
Complainant's Proposed Default Decision and Order, as follows:

December 22, 2004

Ms. Marla Garcia Gonzales  
8600 SW 101st Avenue  
Miami, Florida 33173

Dear Ms. Gonzalez:

Subject: In re: Marla Garcia Gonzalez, Respondent -  
A.Q. Docket No. 05-0004

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

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

Sincerely,

/s/

Joyce A. Dawson  
Hearing Clerk



Respondent's objections were due no later than January 18, 2005.<sup>9</sup> On February 4, 2005, the Hearing Clerk sent a letter to Respondent informing her that she failed to file timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and that the file was being referred to an administrative law judge for consideration and decision.

Respondent's first and only filing in this proceeding is dated March 17, 2005, and was filed March 30, 2005, 2 months 12 days after Respondent's objections were due.

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<sup>9</sup>Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that objections to a proposed decision and motion for adoption of the proposed decision must be filed within 20 days after service of the proposed decision and motion for adoption of the proposed decision. Twenty days after December 27, 2004, was January 16, 2005. However, January 16, 2005, was a Sunday, and January 17, 2005, was a legal public holiday (5 U.S.C. § 6103(a)). Section 1.147(h) of the Rules of Practice provides that when the time for filing a document or paper expires on a Sunday or legal public holiday, the time for filing shall be extended to the next business day, as follows:

**§ 1.147 Filing; service; extensions of time; and computation of time.**

.....  
(h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Sunday, January 16, 2005, and Monday, January 17, 2005, was Tuesday, January 18, 2005. Therefore, Respondent was required to file her objections to Complainant's Motion for Adoption of Default Decision and Order and Complainant's Proposed Default Decision and Order no later than January 18, 2005.

On February 11, 2005, the ALJ issued the Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default and assessed a \$500 civil penalty against Respondent.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,<sup>10</sup> generally there is no basis for setting aside a default decision that is

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<sup>10</sup>See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After

(continued...)

based upon a respondent's failure to file a timely answer.<sup>11</sup> The Rules of Practice provides that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed 3 months 17 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the

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<sup>10</sup>(...continued)

Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

<sup>11</sup>*See, e.g., In re Salvador Sanchez-Gomez*, 61 Agric. Dec. 99 (2002) (holding the administrative law judge properly issued a default decision where the respondent filed his answer more than 5 months after the Hearing Clerk served him with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating 9 C.F.R. §§ 93.101(a), .104(a), and .105(a), regulations issued under the Act of February 2, 1903, as alleged in the complaint); *In re Daniel E. Murray*, 58 Agric. Dec. 64 (1999) (holding the administrative law judge properly issued a default decision where the respondent filed his answer 9 months 3 days after the Hearing Clerk served him with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating 9 C.F.R. § 78.8(a)(2)(ii), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In Conrad Payne*, 57 Agric. Dec. 921 (1998) (holding the administrative law judge properly issued the default decision where the respondent failed to file a timely answer to the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and 9 C.F.R. § 94.0 *et seq.*, as alleged in the complaint); *In re Eddie Benton*, 50 Agric. Dec. 428 (1991) (adopting the administrative law judge's default decision where the respondent failed to file an answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file an answer, to have admitted violating 9 C.F.R. § 78.9(c)(2)(ii)(B), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In re Daniel Cano*, 50 Agric. Dec. 383 (1991) (adopting the administrative law judge's default decision where the respondent failed to file a timely answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and the regulations promulgated under the Act of February 2, 1903).

Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order.

Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.<sup>12</sup>

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

### **ORDER**

Respondent is assessed a \$500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

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<sup>12</sup>*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0004.

### **RIGHT TO JUDICIAL REVIEW**

The Order assessing Respondent a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.<sup>13</sup> Respondent must seek judicial review within 60 days after entry of the Order.<sup>14</sup> The date of entry of the Order is April 27, 2005.

Done at Washington, DC

April 27, 2005

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William G. Jenson  
Judicial Officer

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<sup>13</sup>7 U.S.C. § 8313(b)(4)(A).

<sup>14</sup>28 U.S.C. § 2344.