

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	2002 AMA Docket No. F&V 1250-1
)	
Foster Enterprises, a California)	
general partnership, and Eggs)	
West, a California corporation,)	
)	
Petitioners)	Decision and Order

PROCEDURAL HISTORY

Foster Enterprises, a California general partnership, and Eggs West, a California corporation [hereinafter Petitioners], instituted this proceeding by filing a Petition¹ on September 27, 2002. Petitioners instituted the proceeding under the Egg Research and Consumer Information Act, as amended (7 U.S.C. §§ 2701-2718) [hereinafter the Egg Research and Consumer Information Act]; the Egg Research and Promotion Order (7 C.F.R. §§ 1250.301-.363) [hereinafter the Egg Order]; and the Rules of Practice

¹Petitioners entitle their Petition “Petition Pursuant to 7 U.S.C. § 2713 Contending That the Egg Research and Consumer Information Legislation, 7 U.S.C. § 2701 *et seq.*, and the Egg Research and Promotion Order of 7 C.F.R. Part 1250, and the Assessments Imposed for the Same Violate Petitioners’ Rights Guaranteed Under the First Amendment of the United States Constitution, and Seeking a Modification of the Order and an Exemption From the Order From Having to Pay Assessments or Supply Records to the American Egg Board or USDA Which Are Used for the Collection of Assessments (7 U.S.C. § 2713; 7 C.F.R. Part 1250; 7 C.F.R. § 1209.402 *et seq.*)” [hereinafter Petition].

Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 1200.50-.52) [hereinafter the Rules of Practice].²

Petitioners contend the Egg Research and Consumer Information Act, the Egg Order, the assessments imposed under the Egg Research and Consumer Information Act and the Egg Order, and the collection of records violate Petitioners' rights to freedom of speech and freedom of association guaranteed under the First Amendment to the Constitution of the United States. Petitioners seek an exemption from, or modification of, the Egg Research and Consumer Information Act and the Egg Order. (Pet. ¶ 14.)

On November 25, 2002, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed "Motion to Dismiss Petition Contending that the Egg Research and Consumer Information Act and Egg Research and Promotion Order are Unconstitutional" [hereinafter Motion to Dismiss] and "Memorandum of Points and Authorities." On December 18, 2002, Petitioners filed "Petitioners' Opposition to Respondent's Motion to Dismiss Petition; Petitioners' Cross-Motion for Summary Judgment" [hereinafter Response to Motion to Dismiss].

²Section 1200.52(d) of the Rules of Practice (7 C.F.R. § 1200.52(d)) provides 7 C.F.R. §§ 900.52(c)(2)-.71 also govern proceedings on petitions to modify or to be exempted from research, promotion, and education programs. Therefore, where appropriate, references to the "Rules of Practice" in this Decision and Order include 7 C.F.R. §§ 900.52(c)(2)-.71.

On February 4, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] dismissed the Petition on the ground that Petitioners do not have standing to file the Petition (Order Dismissing Petition at 2).

On February 26, 2003, Petitioners appealed to the Judicial Officer. On March 24, 2003, Respondent filed “Respondent’s Response to Petitioners’ Appeal of the ALJ’s ‘Order Dismissing Petition’” and “Memorandum of Points and Authorities.” On March 28, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the Chief ALJ’s Order Dismissing Petition as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ’s discussion as restated.

**APPLICABLE CONSTITUTIONAL, STATUTORY,
AND REGULATORY PROVISIONS**

U.S. Const.

Amendment I

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

U.S. Const. amend. I.

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 60—EGG RESEARCH AND CONSUMER INFORMATION

....

§ 2702. Definitions

As used in this chapter—

....

(b) The term “person” means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

....

(t) The term “handler” means any person, specified in the order or the rules and regulations issued thereunder, who receives or otherwise acquires eggs from an egg producer, and processes, prepares for marketing, or markets such eggs, including eggs of his own production.

§ 2713. Administrative review of orders; petition; hearing; judicial review

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

§ 2717. Investigations by Secretary; oaths and affirmations; subpoenas; judicial enforcement; contempt proceedings; service of process

The Secretary may make such investigations as he deems necessary for the effective carrying out of his responsibilities under this chapter or to

determine whether an egg producer, processor, or other seller of commercial eggs or any other person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of this chapter, or of any order, or rule or regulation issued under this chapter. For the purpose of such investigation, the Secretary is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, and documents which are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, including an egg producer, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and such court may issue an order requiring such person to appear before the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

7 U.S.C. §§ 2702(b), (t), 2713(a), 2717.

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

....

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

....

PART 1250—EGG RESEARCH AND PROMOTION

Subpart—Egg Research and Promotion Order

DEFINITIONS

....

§ 1250.304 Egg Board or Board.

Egg Board or *Board* or other designatory term adopted by such Board, with the approval of the Secretary, means the administrative body established pursuant to § 1250.326.

....

§ 1250.307 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

....

§ 1250.309 Handler.

Handler means any person who receives or otherwise acquires eggs from an egg producer, and processes, prepares for marketing, or markets, such eggs, including eggs of his own production.

7 C.F.R. §§ 1250.304, .307, .309.

**CHIEF ADMINISTRATIVE LAW JUDGE'S
ORDER DISMISSING PETITION
(AS RESTATED)**

Petitioners allege:

4. From approximately 1988 to December 1995, Petitioner Eggs West was a handler of eggs and thus arguably subject to the Egg Research and Consumer Information Act (hereinafter the "Act") and arguably subject to the Egg Research and Promotion Order (hereinafter the "Order"). Since December of 1995 Eggs West has not been a handler of eggs. Eggs West submits this petition, on behalf of its self, because apparently USDA believes that Eggs West should be subject to the Order and the Act for activities that occurred prior to December 1995 or thereafter and thus Eggs West submits this petition in order to determine the constitutionality of the Act and the Order.

5. Petitioner Foster Enterprises from December of 1995 until the first part of 2002 was a handler of eggs and arguably subject to the Act and the Order. . . .

6. . . . It is believed that USDA will assert that Foster Enterprises was a handler from 1995 until at least early 2002 and subject to the Act and the Order, and subject to assessments. Foster Enterprises contests the constitutionality of the Act and the Order or the levying of assessments, interest or penalties applicable to Foster Enterprises.

Pet. ¶¶ 4-6.

Respondent filed a Motion to Dismiss on the ground, *inter alia*, that Petitioners lack standing to file the Petition because they do not state they are persons subject to the Egg Order.

Section 14(a) of the Egg Research and Consumer Information Act provides that any person subject to any order may file a petition with the Secretary of Agriculture, as follows:

§ 2713. Administrative review of orders; petition; hearing; judicial review

(a) Any person subject to any order may file a written petition with the Secretary, stating that any such order or any provisions of such order or any obligations imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 2713(a).

Petitioners argue Respondent considered them to be subject to the Egg Research and Consumer Information Act and Egg Order by sending them letters and a subpoena duces tecum (Response to Motion to Dismiss at 3-4). One letter from the Agricultural Marketing Service cautions Petitioners not to destroy, tamper with, or remove any records relating to an audit being conducted by the Agricultural Marketing Service.³ The second letter from the Agricultural Marketing Service states that it had requested a review of the “egg handling records of Eggs West, Inc., and/or Foster Enterprises between August, 1993 and April, 2001, or during this period of time when Eggs West, Inc. or Foster

³See undated letter from G. Neil Blevins, Chief Compliance Officer, Agricultural Marketing Service, Marketing and Regulatory Programs, United States Department of Agriculture, to Jeff Foster, Chief Financial Officer, Foster Enterprises, attached to Petitioners’ Response to Motion to Dismiss.

Enterprises was engaged in handling eggs.”⁴ A third letter refers to records from 1995 to 2000.⁵ The subpoena duces tecum orders Petitioners to produce for inspection and copying documents pertaining to the period January 1, 1995, to December 31, 1999.⁶

Petitioners cite *Midway Farms v. United States Dep’t of Agriculture*, 188 F.3d 1136 (9th Cir. 1999), in support of their Petition. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit held, even though a person does not admit it is a handler, that person has standing to file a petition requesting the modification of, or to be exempted from, a marketing order, when a person with authority to apply the marketing order seeks to apply the marketing order to the petitioner.

However, *Midway Farms* is inapposite. Respondent in this proceeding does not allege Petitioners are handlers or persons subject to the Egg Order. The letters and subpoena duces tecum filed by Petitioners establish that the Agricultural Marketing Service is reviewing records for a period of time prior to Petitioners’ filing the Petition.

⁴See letter dated July 10, 2002, from Maria Martinez-Esguerra, Compliance Officer, Agricultural Marketing Service, Marketing and Regulatory Programs, United States Department of Agriculture, to Dorothy Chu, Foster Enterprises and Eggs West, Inc., attached to Petitioners’ Response to Motion to Dismiss.

⁵See letter dated September 24, 2002, from Kenneth H. Vail, Assistant General Counsel, Marketing Division, Office of the General Counsel, United States Department of Agriculture, to Jeff Foster, Chief Financial Officer, Foster Enterprises, attached to Petitioners’ Response to Motion to Dismiss.

⁶See subpoena duces tecum dated September 25, 2002, issued by A. J. Yates, Administrator, Agricultural Marketing Service, United States Department of Agriculture, to Petitioners and attachment A to the subpoena duces tecum, attached to Petitioners’ Response to Motion to Dismiss.

Further, Petitioners do not assert that they are persons subject to the Egg Order.

Therefore, Petitioners lack standing to file the Petition.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners raise one issue in “Petitioners’ Appeal of the ALJ’s ‘Order Dismissing Petition’” [hereinafter Appeal Petition]. Petitioners contend the Chief ALJ erred “when he claimed that since Petitioners do not allege or admit that they are handlers subject to the order, they have no standing to bring a petition pursuant to Title 7 U.S.C. § 608c(15)(A)” (Appeal Pet. at 1).

As an initial matter, the Chief ALJ did not conclude Petitioners lack standing to file a petition pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), as Petitioners contend. Instead, Petitioners filed the Petition pursuant to section 14 of the Egg Research and Consumer Information Act (7 U.S.C. § 2713) (Pet. at 1), and the Chief ALJ concluded Petitioners do not have standing to file a petition pursuant to section 14 of the Egg Research and Consumer Information Act (7 U.S.C. § 2713) (Initial Decision and Order).

Petitioners rely on *Midway Farms v. United States Dep’t of Agric.*, 188 F.3d 1136 (9th Cir. 1999), as support for their contention that the Chief ALJ’s conclusion that Petitioners lack standing, is error. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit concluded that a processor of off-grade raisins was a handler with

standing to file a petition under 7 U.S.C. § 608c(15)(A)⁷ notwithstanding the processor's claim that it was not a handler, as follows:

The operative statute allows “[a]ny handler subject to an order” to file an administrative petition with the Secretary. 7 U.S.C. § 608c(15)(A). The term “handler” is defined by regulation for purposes of section 608c(15)(A) as “any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable.” 7 C.F.R. § 900.51(i). Neither party contends, for purposes of this action, that Midway is a “person who, by the terms of a marketing order, is subject thereto.” Thus, the sole question is whether Midway is a “person . . . to whom a marketing order is sought to be made applicable.” 7 C.F.R. § 900.51 (i).

....

⁷Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, provides that only a handler may file a petition with the Secretary of Agriculture for modification of, or to be exempted from, a marketing order, as follows:

§ 608c. Orders regulating handling of commodity

....

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

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

7 U.S.C. § 608c(15)(A).

. . . Because it cannot be controverted that the [*Raisin Administrative*] *Committee* did in fact seek to apply the Raisin Marketing Order to Midway, we conclude that Midway is a person to whom a Marketing Order has been sought to be made applicable and is thus a “handler,” if only for purposes of section 608c(15). Accordingly, we hold that Midway has standing to file an administrative petition with the Secretary under section 608c(15)(A).

Midway Farms v. United States Dep’t of Agric., 188 F.3d at 1139-40 (footnotes omitted).

I agree with the Chief ALJ’s conclusion that *Midway Farms* is inapposite. The United States Court of Appeals of the Ninth Circuit’s conclusion that Midway Farms was a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A) turns on the definition of the word *handler* in section 900.51(i) of the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (7 C.F.R. § 900.51(i)), which defines *handler* to include *any person to whom a marketing order is sought to be made applicable*. The United States Court of Appeals for the Ninth Circuit found the Raisin Administrative Committee sought to apply the marketing order entitled “Raisins Produced from Grapes Grown in California” (7 C.F.R. pt. 989) [hereinafter the Raisin Order] to Midway Farms.⁸ The Ninth Circuit concluded that, as Midway Farms met the definition of the word *handler* in 7 C.F.R. § 900.51(i), it had standing to file a petition in accordance with 7 U.S.C. § 608c(15)(A).⁹ Section 900.51(i) of the Rules of

⁸The Ninth Circuit found the Raisin Administrative Committee had the power to administer and apply the Raisin Order. *Midway Farms v. United States Dep’t of Agric.*, 188 F.3d at 1140.

⁹*Midway Farms v. United States Dep’t of Agric.*, 188 F.3d at 1140.

Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (7 C.F.R. § 900.51(i)) is not applicable to the instant proceeding.

Further, I can find nothing in the Egg Research and Consumer Information Act, the Egg Order, or the Rules of Practice, all of which are applicable to the instant proceeding, which confers standing to file a petition under section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)) on *a person to whom an order is sought to be made applicable*. Instead, section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)) and section 1200.52(a) of the Rules of Practice (7 C.F.R. § 1200.52(a)) confers standing only on *persons subject to an order*.

Further still, even if the definition of the word *handler* in 7 C.F.R. § 900.51(i) were applicable to this proceeding, I would not reverse the Chief ALJ. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit found Midway Farms was a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A) because the Raisin Administrative Committee sought to make the Raisin Order applicable to Midway Farms. I find nothing on the record before me to establish that the Agricultural Marketing Service, the Egg Board, or any other person with authority to apply the Egg Order seeks to make Petitioners subject to the Egg Order.

Specifically, I agree with the Chief ALJ that the three letters and the subpoena duces tecum attached to Petitioners' Response to Motion to Dismiss, which Petitioners contend establish that the Agricultural Marketing Service seeks to make Petitioners

subject to the Egg Order, pertain to records of transactions that occurred prior to the time Petitioners filed the Petition. The letters and the subpoena duces tecum are related to an exercise of the Secretary of Agriculture's investigatory authority under section 18 of the Egg Research and Consumer Information Act (7 U.S.C. § 2717), which provides the Secretary of Agriculture with authority to require the production of records from any person, not just from persons subject to the Egg Order. The Secretary of Agriculture's investigation of Petitioners' records pursuant to her authority under section 18 of the Egg Research and Consumer Information Act (7 U.S.C. § 2717) does not make Petitioners persons subject to the Egg Order or confer standing on Petitioners to file a petition under section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)).

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

ORDER

The relief requested by Petitioners is denied. The Petition is dismissed without prejudice.

Done at Washington, DC

April 8, 2003

William G. Jenson
Judicial Officer

