

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) HRPCIA Docket No. 01-0001
)
Walter L. Wilson, d/b/a Buzz 76)
Apiaries; Richard L. Adee, d/b/a)
Adee Honey Farms; Steve E. Park)
Apiaries, a California corporation;))
A.H. Meyer & Sons, Inc., a South)
Dakota corporation; Lyle)
Johnston, d/b/a Johnston Honey)
Farms; Coy's Honey Farm, Inc.,)
an Arkansas corporation; Price)
Apiaries, a South Dakota)
corporation; Jim Robertson, d/b/a)
Robertson Pollination Service;)
and Tubbs Apiaries, Inc., a)
Mississippi corporation,)
)
Petitioners)
)
AND
)
The American Honey Producers)
Association, Inc., an Oklahoma)
corporation,)
)
Interested Party To Which)
No Relief Can Be Granted) **Decision and Order**

PROCEDURAL HISTORY

The American Honey Producers Association, Inc.; Walter L. Wilson; Richard L. Adee; Steve E. Park Apiaries; A.H. Meyer & Sons, Inc.; Lyle Johnston; Coy's Honey Farm, Inc.; Price Apiaries; and Tubbs Apiaries, Inc., instituted this proceeding by filing a Petition¹ on September 28, 2001. Petitioners² filed the Petition pursuant to the Honey

¹Petitioners entitled their Petition "Petition Pursuant To 7 U.S.C. § 4609 Contending That The Honey Research, Promotion, And Consumer Information Legislation And The Assessments Imposed For The Same Violates 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 And A Refund Of Assessments (7 U.S.C. § 4609; 7 C.F.R. § 1209.402 *et seq.*)" [hereinafter Petition].

²On December 27, 2002, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an Order Realigning the Parties and Amending the Caption in which the ALJ: (1) concluded The American Honey Producers Association, Inc., did not have standing to file a petition pursuant to the Honey Research, Promotion, and Consumer Information Act, as amended (7 U.S.C. §§ 4601-4613) [hereinafter the Honey Research, Promotion, and Consumer Information Act]; (2) identified The American Honey Producers Association, Inc., as a party which cannot obtain the relief sought in the Petition; and (3) amended the case caption to reflect the identification of The American Honey Producers Association, Inc., as a party which cannot obtain the relief sought in the Petition. Jim Robertson, d/b/a Robertson Pollination Service, testified in the February 2003 hearing conducted by the ALJ, he was not included as a petitioner in the September 28, 2001, Petition due to inadvertent error (Tr. 134). Following the February 2003 hearing, the ALJ added Jim Robertson, d/b/a Robertson Pollination Service, as a petitioner, and on September 7, 2005, the ALJ approved the amendment of the case caption to include Jim Robertson, d/b/a Robertson Pollination Services, as a petitioner (Tr. 687-91; Notice of Filing of Affidavit-Verification-Declaration of Jim Robertson Doing Business As Jim Robertson Pollination Service, filed March 24, 2003; the ALJ's September 7, 2005, Decision [hereinafter Initial Decision] at 12). I treat Mr. Robertson as if he had been a petitioner beginning September 28, 2001; therefore, all references in this Decision and Order to "Petitioners" include Walter L. Wilson, d/b/a Buzz 76 Apiaries; Richard L. Adee, d/b/a Adee Honey Farms; Steve E. Park Apiaries, a California corporation; A.H. Meyer & Sons, Inc., a South Dakota corporation; Lyle
(continued...)

Research, Promotion, and Consumer Information Act, and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Information Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter the Rules of Practice].

Petitioners: (1) assert assessments collected from Petitioners pursuant to the Honey Research, Promotion, and Consumer Information Act and used for speech-related purposes violate Petitioners' rights to freedom of speech and to freedom of association guaranteed under the First Amendment to the Constitution of the United States; and (2) seek an exemption from paying assessments pursuant to the Honey Research, Promotion, and Consumer Information Act and a refund of assessments paid within the previous 3 years (Pet. ¶¶ 16-19).

On October 25, 2001, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Answer denying the material allegations of the Petition and raising two affirmative defenses: (1) the Petition fails to state a claim upon which relief can be granted; and (2) the Honey Research, Promotion, and Consumer Information Act and the rules and regulations promulgated under the Honey Research, Promotion, and Consumer Information Act (7 C.F.R. pt. 1240) [hereinafter the Honey Order] are in accordance with law.

²(...continued)

Johnston, d/b/a Johnston Honey Farms; Coy's Honey Farm, Inc., an Arkansas corporation; Price Apiaries, a South Dakota corporation; Jim Robertson, d/b/a Robertson Pollination Service; and Tubbs Apiaries, Inc., a Mississippi corporation.

On February 3, 4, and 5, 2003, the ALJ presided over a hearing in Fresno, California. Brian C. Leighton, Law Offices of Brian C. Leighton, Clovis, California, represented Petitioners. James A. Moody, Washington, DC, represented The American Honey Producers Association, Inc. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On May 29, 2003, Petitioners filed Petitioners' Post-Hearing Brief. On June 11, 2003, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On June 26, 2003, Petitioners filed Petitioners' Post-Hearing Reply Brief. On July 11, 2003, Petitioners filed Petitioners' Supplemental Authority Re Petitioners' Post-Hearing Brief; on October 24, 2003, Petitioners filed Petitioners' Citation of Additional Authorities; on November 28, 2003, Petitioners and The American Honey Producers Association, Inc., filed Petitioners' and The American Honey Producers' Association, Inc. Motion to Expedite a Ruling on Petitioners' Challenge Re National Honey Board; and on April 21, 2004, The American Honey Producers Association, Inc., filed a letter enclosing court decisions.

On September 7, 2005, the ALJ issued an Initial Decision: (1) concluding the Honey Research, Promotion, and Consumer Information Act and the Honey Order are in accordance with law, including the First Amendment to the Constitution of the United States; and (2) denying Petitioners' Petition (Initial Decision at 1-2, 27).

On October 7, 2005, Petitioners and The American Honey Producers Association, Inc., appealed to the Judicial Officer. On October 20, 2005, Respondent filed a response

to Petitioners' and The American Honey Producers Association, Inc.'s appeal petition.

On October 28, 2005, 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 ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

Petitioners' exhibits are designated by "PX." Respondent's exhibits are designated by "RX." Transcript references are designated "Tr."

**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 77—HONEY RESEARCH, PROMOTION, AND
CONSUMER INFORMATION**

§ 4601. Findings and purposes

(a) Findings

Congress makes the following findings:

(1) Honey is produced by many individual producers in every State in the United States.

(2) Honey and honey products move in large part in the channels of interstate and foreign commerce, and honey which does not move in such channels directly burdens or affects interstate commerce.

(3) In recent years, large quantities of low-cost, imported honey have been brought into the United States, replacing domestic honey in the normal trade channels.

(4) The maintenance and expansion of existing honey markets and the development of new or improved markets or uses are vital to the welfare of honey producers and those concerned with marketing, using, and processing honey, along with those engaged in general agricultural endeavors requiring bees for pollinating purposes.

(5) The honey production industry within the United States is comprised mainly of small- and medium-sized businesses.

(6) The development and implementation of coordinated programs of research, promotion, consumer education, and industry information necessary for the maintenance of markets and the development of new markets have been inadequate.

(7) Without cooperative action in providing for and financing such programs, honey producers, honey handlers, wholesalers, and retailers are unable to implement programs of research, promotion, consumer education, and industry information necessary to maintain and improve markets for these products.

(8) The ability to develop and maintain purity standards for honey and honey products is critical to maintaining the consumer confidence, safety, and trust that are essential components of any undertaking to maintain and develop markets for honey and honey products.

(9) Research directed at improving the cost effectiveness and efficiency of beekeeping, as well as developing better means of dealing with pest and disease problems, is essential to keeping honey and honey product prices competitive and facilitating market growth as well as maintaining the financial well-being of the honey industry.

(10) Research involving the quality, safety, and image of honey and honey products and how that quality, safety, and image may be affected during the extraction, processing, packaging, marketing, and other stages of the honey and honey product production and distribution process, is highly important to building and maintaining markets for honey and honey products.

(b) Purposes

The purposes of this chapter are—

(1) to authorize the establishment of an orderly procedure for the development and financing, through an adequate assessment, of an effective, continuous, and nationally coordinated program of promotion, research, consumer education, and industry information designed to—

(A) strengthen the position of the honey industry in the marketplace;

(B) maintain, develop, and expand domestic and foreign markets and uses for honey and honey products;

(C) maintain and improve the competitiveness and efficiency of the honey industry; and

(D) sponsor research to develop better means of dealing with pest and disease problems;

(2) to maintain and expand the markets for all honey and honey products in a manner that—

(A) is not designed to maintain or expand any individual producer's, importer's, or handler's share of the market; and

(B) does not compete with or replace individual advertising or promotion efforts designed to promote

individual brand name or trade name honey or honey products; and

(3) to authorize and fund programs that result in government speech promoting government objectives.

....

§ 4603. Honey research, promotion, and consumer information

To effectuate the declared policy of this chapter, the Secretary shall, subject to the provisions of this chapter, issue and, from time to time, amend orders and regulations applicable to persons engaged in the production, sale, or handling of honey and honey products in the United States and the importation of honey and honey products into the United States.

§ 4604. Notice and hearing

(a) Notice and comment

In issuing an order under this chapter, an amendment to an order, or a regulation to carry out this chapter, the Secretary shall comply with section 553 of title 5.

(b) Formal agency action

Sections 556 and 557 of that title shall not apply with respect to the issuance of an order, an amendment to an order, or a regulation under this chapter.

(c) Proposal of an order

A proposal for an order may be submitted to the Secretary by any organization or interested person affected by this chapter.

§ 4605. Findings and issuance of order

After notice and opportunity for comment has been provided in accordance with section 4604(a) of this title, the Secretary shall issue an order, an amendment to an order, or a regulation under this chapter, if the Secretary finds, and specifies in the order, amendment, or regulation, that

the issuance of the order, amendment, or regulation will assist in carrying out the purposes of this chapter.

§ 4606. Required terms of order

(a) Terms and conditions of order

Any order issued by the Secretary under this chapter shall contain the terms and conditions described in this section and, except as provided in section 4607 of this title, no others.

(b) National Honey Nominations Committee; composition; nominations; terms; Chairman; compensation; meetings; voting

(1) Such order shall provide for the establishment and appointment by the Secretary of a National Honey Nominations Committee which shall consist of not more than one member from each State, from nominations submitted by each State association. If a State association does not submit a nomination, the Secretary may provide for nominations from that State to be made in a different manner, except that if a State which is not one of the top twenty honey-producing States in the United States (as determined by the Secretary) does not submit a nomination, such State shall not be represented on the Committee.

(2) Members of the Committee shall serve for three-year terms with no member serving more than two consecutive three-year terms, except that the term of appointments to the Committee may be staggered periodically, as determined by the Secretary.

(3) The Committee shall select its Chairman by a majority vote.

(4) The members of the Committee shall serve without compensation but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Committee.

(5) The Committee shall nominate the members and alternates of the Honey Board and submit such nominations to the Secretary. In making such nominations, the Committee shall meet annually, except that, when determined by the Chairman, the Committee may conduct its business by mail ballot in lieu of an annual meeting. In order to nominate members to the Honey Board, at least 50 percent of the members from the twenty leading honey producing States must vote. A majority of the National Honey Nominations Committee shall constitute a quorum for voting at an annual meeting. In the case of a mail ballot, votes must be received from a majority of the Committee.

(c) Honey Board; membership; terms; alternates; compensation; powers; duties

(1) The order described in subsection (a) of this section shall provide for the establishment and appointment by the Secretary of a Honey Board in accordance with this subsection.

(2) The membership of the Honey Board shall consist of—

(A) 7 members who are honey producers appointed from nominations submitted by the National Honey Nominations Committee, one from each of seven regions of the United States which shall be established by the Secretary on the basis of the production of honey in the different areas of the country;

(B) 2 members who are handlers appointed from nominations submitted by the Committee from recommendations made by qualified national organizations representing handler interests;

(C) if approved in a referendum conducted under this chapter, 2 members who—

(i) are handlers of honey;

(ii) during any 3 of the preceding 5 years, were also importers of record of at least 40,000 pounds of honey; and

(iii) are appointed from nominations submitted by the Committee from recommendations made by—

(I) qualified national organizations representing handler interests or qualified national organizations representing importer interests; or

(II) if the Secretary determines that there is not a qualified national organization representing handler interests or a qualified national organization representing importer interests, individual handlers or importers that have paid assessments to the Honey Board on imported honey or honey products;

(D) 2 members who are importers appointed from nominations submitted by the Committee from recommendations made by—

(i) qualified national organizations representing importer interests; or

(ii) if the Secretary determines that there is not a qualified national organization representing importer interests, individual importers that have paid assessments to the Honey Board on imported honey or honey products; and

(E) 1 member who is an officer, director, or employee of a national honey marketing cooperative appointed from nominations submitted by the Committee from recommendations made by qualified national honey marketing cooperatives.

....

(e) Assessment; collection; rates; exemption; effect of exemption on referendum voting status

(1) IN GENERAL.—The Honey Board shall administer collection of the assessment provided for in this subsection, and may accept voluntary contributions from other sources, to finance the expenses described in subsections (d) and (f) of this section.

(2) RATE.—Except as provided in paragraph (3), the assessment rate shall be \$0.01 per pound (payable in the manner described in section 4608 of this title), with—

(A) in the case of honey produced in the United States, \$0.01 per pound payable by honey producers; and

(B) in the case of honey or honey products imported into the United States, \$0.01 per pound payable by honey importers.

....

§ 4609. Petition and review

(a) Filing of petition; hearing

(1) In general

Subject to paragraph (4), a person subject to an order may file a written petition with the Secretary—

(A) that states that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law; and

(B) that requests—

(i) a modification of the order, provision, or obligation; or

(ii) to be exempted from the order, provision, or obligation.

(2) Hearing

In accordance with regulations issued by the Secretary, the petitioner shall be given an opportunity for a hearing on the petition.

(3) Ruling

After the hearing, the Secretary shall make a ruling on the petition that shall be final, if in accordance with law.

(4) Statute of limitations

A petition filed under this subsection that challenges an order, any provision of the order, or any obligation imposed in connection with the order, shall be filed not later than 2 years after the later of—

(A) the effective date of the order, provision, or obligation challenged in the petition; or

(B) the date on which the petitioner became subject to the order, provision, or obligation challenged in the petition.

(b) District court; jurisdiction; review; rulings

The district courts of the United States in any district in which such person is an inhabitant, or carries on business, are hereby vested with jurisdiction to review such ruling, provided a complaint for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to the Secretary a copy of the complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to subsection (a) of this section shall not impede, hinder, or delay the United States or the Secretary from obtaining relief pursuant to section 4610 of this title.

....

§ 4612. Termination or suspension

....

(b) Authority of Secretary

If the Secretary finds that an order issued under this chapter, or any provision of the order, obstructs or does not tend to effectuate the purposes of this chapter, the Secretary shall terminate or suspend the operation of the order or provision.

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 1240—HONEY RESEARCH, PROMOTION, AND
CONSUMER INFORMATION**

**Subpart A—Honey Research, Promotion, and
Consumer Information Order**

....

HONEY BOARD

§ 1240.30 Establishment and membership.

A Honey Board is established to administer the terms and provisions of this part. The Board shall consist of twelve (12) members, each of whom shall have an alternate. Seven members and seven alternates shall be honey producers; two members and two alternates shall be honey handlers; two members and two alternates shall be honey importers; and one member and one alternate shall be an officer, director, or employee of a national honey marketing cooperative. The Board shall be appointed by the Secretary from nominations submitted by the Committee, pursuant to § 1240.32. Notwithstanding any other provision of this part, at least 50 percent of the members of the Board shall be honey producers.

....

§ 1240.32 Nominations.

All nominations to the Board authorized under § 1240.30 herein shall be made in the following manner.

(a) *Establishment of National Honey Nominations Committee.*

(1) There is established a National Honey Nominations Committee, which shall consist of not more than one member from each State, appointed by the Secretary from nominations submitted by each State beekeeper association. Wherever there is more than one eligible association within a State, the Secretary shall designate the association most representative of the honey producers, handlers, and importers not exempt under § 1240.42 (a) and (b) to make nominations for that State.

(2) If a State Association does not submit a nomination for the Committee, the Secretary may select a member of the honey industry from that State to represent that State on the Committee. However, if a State which is not one of the top twenty honey producing States (as determined by the Secretary) does not submit a nomination, such State shall not be represented on the Committee.

(3) Members of the Committee shall serve for three-year terms, except that the term of appointments to the Committee may be staggered periodically, as determined by the Secretary. No member shall serve more than two consecutive three-year terms. The term of office shall begin on July 1.

(4) The Committee shall select its Chairperson by a majority vote.

(5) The members of the Committee shall serve without compensation, but shall be reimbursed for necessary and reasonable expenses incurred in performing their duties as members of the Committee and approved by the Board. Such expenses shall be paid from funds collected by the Board pursuant to § 1240.41.

(b) *Nominations to the Board.*

(1) The Committee shall nominate the members and alternate members of the Board and submit such nominations promptly to the Secretary for approval.

....

MISCELLANEOUS

. . . .

§ 1240.61 Right of the Secretary.

All fiscal matters, programs or plans, rules or regulations, reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

§ 1240.62 Suspension or termination.

(a) The Secretary shall, whenever the Secretary finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, terminate or suspend the operation of this subpart or such provisions thereof.

(b) Except as otherwise provided in paragraph (c) of this section, five years from the date the Secretary issues an order authorizing the collection of assessments on honey under provisions of this subpart, and every five years thereafter, the Secretary shall conduct a referendum to determine if honey producers and importers favor the termination or suspension of this subpart.

(c) The Secretary shall hold a referendum on the request of the Board, or when petitioned by 10 percent or more of the honey producers and importers subject to assessment under this subpart to determine if the honey producers and importers favor termination or suspension of this subpart. A referendum under this paragraph may not be held more than once every two (2) years. If the Secretary determines, through a referendum conducted pursuant to this paragraph, that continuation of this subpart is approved, any referendum otherwise required to be conducted under paragraph (b) of this section shall not be held less than five (5) years after the date the referendum was conducted under this paragraph.

. . . .

Subpart B—General Rules and Regulations

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§ 1240.123 Right of the Secretary.

All fiscal matters, programs, projects, rules or regulations, reports, or other substantive action proposed and prepared by the Board shall be submitted to the Secretary for approval.

7 C.F.R. §§ 1240.30, .32(a)-(b)(1), .61, .62, .123.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Decision Summary

Based upon *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), I conclude the coordinated programs of research, promotion, consumer education, and industry information authorized by the Honey Research, Promotion, and Consumer Information Act, are government speech not susceptible to First Amendment compelled-subsidy challenge. Consequently, Petitioners' Petition, filed September 28, 2001, in which Petitioners seek exemption from assessments imposed under the Honey Research, Promotion, and Consumer Information Act and used for generic advertising and promotion of honey, must be denied.

Findings of Fact

1. The Secretary of Agriculture administers the Honey Research, Promotion, and Consumer Information Act (7 U.S.C. §§ 4601-4613).

2. The Honey Research, Promotion, and Consumer Information Act establishes the National Honey Board, which, under the Secretary of Agriculture's supervision, administers the program mandated by Congress under the Honey Research, Promotion, and Consumer Information Act (7 U.S.C. § 4606).
3. The National Honey Board includes seven honey producers (at least 50 percent of the National Honey Board are producers), two honey handlers, two honey importers, and one officer, director, or employee of a national honey marketing cooperative (7 U.S.C. § 4606; Tr. 184).
4. The National Honey Board's goal is to increase the demand for honey. The National Honey Board, as part of its effort to increase the demand for honey, promotes honey as a desirable product. (7 U.S.C. § 4601; Tr. 305-06.)
5. The National Honey Board is funded with the assessments paid by honey producers and honey importers (7 U.S.C. § 4606(e); Tr. 21-22, 356).
6. Initially, payment of assessments was voluntary. Thereafter, payment of assessments became mandatory. (Tr. 66, 107.)
7. Assessments are exacted by collecting from honey producers \$0.01 for each pound of honey produced in the United States and by collecting from honey importers \$0.01 for each pound of honey or honey products imported into the United States (7 U.S.C. § 4606(e)).
8. First handlers, bottlers or others who place honey in commerce, collect assessments on honey produced in the United States by deducting the assessments from

the amount paid to the honey producers. These first handlers then forward the assessments to the National Honey Board. (Tr. 22.)

9. The National Honey Board initiates budgets, marketing ideas, and program ideas (Tr. 330-31, 607-08).

10. All National Honey Board budgets, contracts, and projects are submitted to the United States Department of Agriculture for review and approval (RX 1-RX 52; Tr. 330-33, 425-29, 431-32).

11. The National Honey Board is not a government entity, but it is supervised by the Secretary of Agriculture, and, on behalf of the Secretary, by personnel of the United States Department of Agriculture, specifically by the Chief of the Research and Promotion Branch for Fruits and Vegetables, Agricultural Marketing Service (Martha B. Ransom), and her staff (Tr. 330-33, 424-29).

12. The National Honey Board pays for the United States Department of Agriculture's oversight (Tr. 353).

13. The National Honey Board staff are not government employees. The National Honey Board staff salaries are not set by the United States Department of Agriculture. (Tr. 187, 346, 573-75.)

14. The property of the National Honey Board is not government-owned (Tr. 578).

15. The Secretary of Agriculture appoints each member of the National Honey Board, in accordance with the specific directions contained in the Honey Research,

Promotion, and Consumer Information Act, from nominees proposed by the National Honey Nominations Committee (7 U.S.C. § 4606; Tr. 575-76).

16. The Secretary of Agriculture appoints each member of the National Honey Nominations Committee, in accordance with the specific directions contained in the Honey Research, Promotion, and Consumer Information Act, from nominees proposed by state beekeeper associations (7 U.S.C. § 4606; Tr. 576).

17. The United States Department of Agriculture's oversight and control of the National Honey Board includes acting as an advisor to the National Honey Board during the development of promotion, research, education, and information activities (RX 1-RX 52; Tr. 427, 463-529).

18. A representative of the United States Department of Agriculture attends each meeting of the National Honey Board as an active participant (Tr. 427).

19. Representatives of the United States Department of Agriculture who attend meetings of the National Honey Board provide comments or feedback to the Board at the meetings (Tr. 427).

20. The United States Department of Agriculture's oversight of the National Honey Board includes retaining final approval authority over every assessment dollar spent by the Board (Tr. 427, 432-34).

21. The United States Department of Agriculture's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for-word process)

of any material that the National Honey Board prepares for use (RX 1-RX 52; Tr. 330-33, 374-86, 428-29).

22. United States Department of Agriculture review and approval of projects (whether advertising, promotion, research, industry information, or consumer education) include evaluation in accordance with United States Department of Agriculture policy, Agricultural Marketing Service guidelines, Federal Trade Commission advertising laws and regulations, and Food and Drug Administration labeling requirements (RX 60; Tr. 429).

23. The honey locator, on the third website that the National Honey Board operates, is one example of the National Honey Board's marketing to increase demand for honey. The honey locator enables potential purchasers to locate local honey producers and to locate honey producers that have particular varieties of honey. (Tr. 195-96.)

24. The National Honey Board has undertaken research on the antioxidant level in honey, which varies depending on the floral source (Tr. 196-97).

25. The National Honey Board, in cooperation with Pennsylvania State University, has been involved with research using light spectroscopy to detect honey adulterated with high fructose corn syrup or sucrose or other sugars and to thereby help maintain purity of honey products (Tr. 197-98).

26. The National Honey Board funded a study of the honeybees' value as pollinators. About one-third of our diet is dependent on, or benefits from, honeybee

pollination. The toxic impact of pesticides on the honeybees is of great concern. (RX 70; Tr. 198-203.)

27. The Honey Research, Promotion, and Consumer Information Act prescribes the contents of the Honey Order to be issued by the Secretary of Agriculture (7 U.S.C. § 4606).

28. The Honey Research, Promotion, and Consumer Information Act provides for termination or suspension of the Honey Order, including referenda, on request of the National Honey Board or at least 10 percent of those subject to assessment, to determine if persons subject to assessment approve continuation of the Honey Order (7 U.S.C. § 4612).

29. The Honey Research, Promotion, and Consumer Information Act provides for notice and comment rulemaking (7 U.S.C. § 4604).

30. Honey is sold in roughly equal amounts to consumers and to the industrial ingredient market. Floral source determines the honey's flavor, quality, and price. Based on market competitiveness, honey producers may sell directly to consumers, may sell directly to packers, or be part of a cooperative. (Tr. 47-53, 76-79.)

31. The National Honey Board does not regulate the price, quality, sales, importation, or exportation of honey. The National Honey Board does not provide an anti-trust exemption for the honey industry. (Tr. 84-85.)

32. National Honey Board advertisements and publications are not attributed to individual honey producers; they bear a trademark that is the property of the National Honey Board; they do not bear a government symbol (Tr. 346-47).

33. Petitioner Walter L. Wilson, a beekeeper, honey producer, and sole proprietor of Buzz 76 Apiaries, paid assessments to the National Honey Board. Mr. Wilson objects to paying the assessments and seeks a full refund of his assessments. His payments from crop year 1998 through crop year 2002 were: 1998 - \$9,374.84; 1999 - \$12,585.54; 2000 - \$4,853.97; 2001 - \$9,607.78; and 2002 - \$4,631.90. (PX 8.)

34. Petitioner Richard L. Adee, a beekeeper, honey producer, and sole proprietor of Adee Honey Farms, paid assessments to the National Honey Board. Mr. Adee objects to paying the assessments and seeks a full refund of his assessments. His payments from crop year 1998 through crop year 2002 were: 1998 - \$11,921.34; 1999 - \$23,308.19; 2000 - \$48,406.93; 2001 - \$24,506.65; and 2002 - \$18,136.48. (PX 1; Tr. 28.)

35. Petitioner Steve E. Park Apiaries, Inc., a beekeeper and honey producer, represented by shareholder Steve Elwood Park, paid assessments to the National Honey Board. Steve E. Park Apiaries, Inc., objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1996 through crop year 2002 were: 1996 - \$2,948.49; 1997 - \$9,944.36; 1998 - \$5,450.89; 1999 - \$550.17; 2000 - \$8,032.25; 2001 - \$12,019.38; and 2002 - \$6,227.14. (PX 5; Tr. 280.)

36. Petitioner A.H. Meyer & Sons, Inc., a beekeeper and honey producer, represented by Jack Meyer, Jr., a shareholder and vice president, paid assessments to the National Honey Board. A.H. Meyer & Sons, Inc., objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1998 through crop year 2002 were: 1998 - \$11,859.44; 1999 - \$9,163.30; 2000 - \$13,647.40; 2001 - \$7,747.87; and 2002 - \$11,037.21. (PX 10.)

37. Petitioner Lyle Johnston, a beekeeper, honey producer, and sole proprietor of Johnston Honey Farm, also known as Johnston Honey Farms, paid assessments to the National Honey Board. Mr. Johnston objects to paying the assessments and seeks a full refund of his assessments. His payments from crop year 1996 through crop year 2002 were: 1996 - \$2,308.73; 1997 - \$838.41; 1998 - \$1,167.67; 1999 - \$1,216.66; 2000 - \$1,386.33; 2001 - \$953.38; and 2002 - \$2,049.84. (PX 2; Tr. 72-75, 82-83.)

38. Petitioner Coy's Honey Farm, Inc., a beekeeper and honey producer, represented by Bobby Coy, a shareholder and president, paid assessments to the National Honey Board. Coy's Honey Farm, Inc., objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1997 through crop year 2002 were: 1997 - \$5,640.97; 1998 - \$8,345.45; 1999 - \$9,298.05; 2000 - \$11,199.73; 2001 - \$9,875.79; and 2002 - \$4,341.76. (PX 9.)

39. Petitioner Price Apiaries, a beekeeper and honey producer, also known as Price Honey Farms, and as Price Honey, represented by Harvey Price, a shareholder, paid assessments to the National Honey Board. Price Apiaries objects to paying the

assessments and seeks a full refund of its assessments. Its payments from crop year 1996 through crop year 2002 were: 1996 - \$4,945.08; 1997 - \$4,370.46; 1998 - \$5,834.10; 1999 - \$4,027.03; 2000 - \$7,438.99; 2001 - \$3,590.13; and 2002 - \$1,462.86. (PX 3; Tr. 109-11, 113-14.)

40. Petitioner Jim Robertson, a beekeeper and honey producer and sole proprietor of Robertson Pollination Service, paid assessments to the National Honey Board. Mr. Robertson objects to paying the assessments and seeks a full refund of his assessments. His payments from crop year 1997 through crop year 2002 were: 1997 - \$2,638.81; 1998 - \$1,959.88; 1999 - \$657.89; 2000 - \$2,442.45; 2001 - \$987.98; and 2002 - \$727.56. (PX 12; Tr. 131-71.)

41. Petitioner Tubbs Apiaries, Inc., a beekeeper and honey producer, represented by Hubert Tubbs, Jr., a shareholder and president, paid assessments to the National Honey Board. Tubbs Apiaries, Inc., objects to paying the assessments and seeks a full refund of its assessments. Its payments from crop year 1998 through crop year 2002 were: 1998 - \$1,957.41; 1999 - \$1,747.61; 2000 - \$1,268.13; 2001 - \$1,263.87; 2002 (partial only, not all of 2002 had been reported when Hubert Tubbs, Jr., prepared his declaration) - \$408.96. (PX 7.)

Petitioners' Position

The testimony of Richard Adee, who grew up in a beekeeping family and bought his first bee operation in 1957 (Tr. 18), is illustrative of the position of Petitioners.

[BY MR. LEIGHTON:]

Q. Okay. And could you just describe for the record what goes into your beekeeping operation? What do you do?

[BY MR. ADEE:]

A. You want to get out early this afternoon, but we do, we raise bee colonies, and we -- it's what's called a migratory bee operation. We move bees a lot, but we have a queen breeding operation in Mississippi, Woodville, Mississippi where we start like our cow/calf operation. We start raising our colonies of bees there. They go north to the honey producing country of the Dakotas. And then they're there for the summer. In the fall, in October, they're moved from the Dakotas to California to get ready for the pollination season, which is in progress right today. After the pollination is over, we -- the almonds is the big pollination. Then we go from the almonds. Some of them will go up to Washington State to the apples. Some of them will go back to Mississippi to start the process over again for breeding new bees and new queens. And the rest will go back to the Midwest to make honey. So in the summertime, they all eventually wind up back in the Dakotas to produce honey. So they're really kind of a bunch of tourists.

Q. Okay. And I don't know what the proper lingo is, but how many hives do you have?

A. We have 55,000 colonies.

Q. Okay. And is a colony in one box?

A. One colony is the -- they're the queen, the bees, and the box is necessary to produce honey.

Q. And approximately how many bees are there in a colony?

A. Oh, in the summertime, you can have up to 70,000. Going into winter, about 30,000.

Q. Okay.

A. They reduce their colony numbers so that they -- when they're not making honey, they don't eat all of the honey that they have gathered, so by natural attrition, they -- the colony numbers are restricted for the winter months.

Q. Now are there certain kinds of crops that you look for as far as making honey?

A. Crops that we look for?

Q. Yes.

A. Well, we -- yeah, to a degree. We look for the most nectar producing plants, and out in the Midwest, that's alfalfa and sweet clover.

Q. Okay.

A. Here in California would probably be the orange

Q. Okay.

A. . . . crop would be the main -- maybe some sage if they got a little rain.

Q. Okay. And for example, would you make honey out of almonds?

A. No, no. We hope they make enough honey out of the almonds just to replenish what they're eating, but almond honey is not a good tasting honey.

Q. What is the best tasting honey?

A. Well, of course I'm prejudiced to sweet clover.

Q. Okay. And you have a lot of that in the Dakotas?

A. We do

Q. Okay.

A. . . . when we get the right moisture, yes.

Q. And how often do you collect the honey?

A. Well, we start in the latter part of July. And this is -- it's kind of continuing process going through -- hopefully through the end of October, but most of the time, we'll collect it one time from the colony. We -- the ones we start on first we'll put some empty boxes back on. We can go and collect twice on those, but the process -- you could just collect once and save yourself going back twice, but . . .

Q. This sounds like a dumb question, but approximately how much honey could a good honeybee collect for you every year?

A. A good colony of bees?

Q. Yeah.

A. Yeah, that's a good question. We try to set our budgets based on 100 pounds per colony, but during these real dry years, we've been -- like last year, we didn't quite make 40, so it was kind of a bad year. We have made up to 180 or 200 pounds, but our budgets are set on 100 pounds per colony.

Tr. 14-18.

Petitioners object to being compelled to pay the assessments used to pay for generic advertising under the Honey Research, Promotion, and Consumer Information Act. In their view, they are being compelled to subsidize private speech in violation of their First Amendment rights to freedom of speech and to freedom of association. Petitioners seek refunds on assessment payments already made.

Petitioners distinguished their position from that described in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). On cross-examination, Ms. Martha Ransom, Chief of the Research and Promotion Branch, Fruit and Vegetable Programs,

Agricultural Marketing Service, testified regarding the nature of the National Honey Board's statutorily defined authority.

BY MR. LEIGHTON:

Q. Let me ask it a different way. Can the National Honey Board take any action to set honey prices?

[BY MS. RANSOM:]

A. No.

Q. Can they take any action to set any honey prices that packers have to pay producers?

A. No.

Q. Does the National Honey Board have any authority to set prices for which honey can be sold?

A. No.

Q. Does the Honey Board have any authority to control the supply of honey?

A. No.

Q. In fact, Congress actually stated in the Act that there's no such authority, correct?

A. That's correct.

Q. Okay. And is it your understanding that honey producers can produce as much honey as they want?

A. Yes, sir.

Q. That they can sell as much honey as they want?

A. Yes, Mr. Leighton.

Q. That they can export as much honey as they want?

A. Yes.

Q. That they can sell domestically as much honey as they want?

A. Yes.

Q. They can sell it at any price?

A. Yes.

Q. At any time?

A. Yes.

Q. To any consumer or customer they want?

A. Yes.

.....

Q. Do they have any quotas?

A. No.

.....

Q. Okay. Does the National Honey Board enforce any quality restrictions?

A. No, Mr. Leighton.

Tr. 582-85.

Petitioners emphasize the competitive environment in which they operate, again distinguishing their industry from that described in *Wileman Bros.* Richard Adee's testimony is illustrative:

[BY MR. LEIGHTON:]

Q. Okay. Does the National Honey Board regulate your operation?

[BY MR. ADEE:]

A. No.

Q. Okay.

A. No, sir.

Q. Is the only thing they do is collect your assessment?

A. That's correct, sir.

Q. Okay. Is the honey production fully competitive?

A. Yes, sir.

Q. Okay. Is honey marketing fully competitive?

A. Yes, sir.

Q. Does the National Honey Board do anything setting, like, prices?

A. No, sir.

Q. Okay. Do they set the amount of money that honey producers are paid by packers?

A. No, sir.

Q. Okay. Do they limit the amount that you can produce?

A. No, sir.

Q. Do you have any quotas?

A. No, sir.

Q. Are any -- is any honey mandatorily put in to reserves?

A. No, sir.

....

Q. How is it how you determine which packer you are going to use?

A. Basically, it's all based on price. Wherever we can get the best price, that's the market we'll sell to.

Q. Okay. And you have the choice to do that, correct?

A. Yes, sir.

Tr. 36-38.

Petitioners assert the money used to finance the research and promotion aspects of the honey promotion program could be better spent, and they question the overall efficacy of the honey promotion program because the activities have not increased honey prices.

Richard Adee's testimony illustrates the impact of an assessment of \$0.01 for each pound of honey produced:

[BY MR. LEIGHTON:]

Q. Okay. And can you tell us what the significance of the amount of assessments that you pay?

[MR. ADEE:]

A. How much does this add up . . .

Q. Well, no, not how much they add up to, but how much is -- is it a penny a pound?

A. Oh, it's a penny a pound . . .

Q. Okay.

A. . . . yes, sir. Yes, sir.

Q. And is a penny a pound a significant amount of money?

A. A penny a pound for years and years was two percent of our gross, and sometimes it was 100 percent of our profit. We didn't make two percent during those years when the crops are down in the 40 and 50 cent per pound per colony range. And this could be very, very could significant.

Q. The penny a pound could've been your profit?

A. It could've been.

Q. Okay. And were there years that it would've been?

A. There were years that it was -- when the costs -- when we were operating in the red, it was a cost. Yes, definitely.

Tr. 22-23.

Petitioners indicate the honey promotion program has not been effective in raising the price of honey partially because the honey promotion program cannot promote United States honey over imported honey. Petitioners assert imported honey has been a problem, particularly when other countries dump their product on the United States market, an occurrence that honey producers fought and won at the International Trade Commission against China and Argentina. (Tr. 44-45, 81-82, 276-80.)

Discussion

On May 23, 2005, the Supreme Court of the United States issued its third decision in 8 years which considered "whether a federal program that finances generic advertising

to promote an agricultural product violates the First Amendment.” *Johanns v. Livestock Marketing Ass’n*, 125 S. Ct. at 2058. *Livestock Marketing Ass’n* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech. On May 31, 2005, the Supreme Court of the United States remanded to various courts of appeals for further consideration, in light of *Livestock Marketing Ass’n*, cases involving the constitutionality of compelled assessments to pay for generic advertising of pork,³ alligator products,⁴ and milk.⁵

In *Livestock Marketing Ass’n*, the High Court explained that the beef promotion program is government speech because Congress directed the implementation of a “coordinated program” of promotion, “including paid advertising, to advance the image and desirability of beef and beef products.” *Livestock Marketing Ass’n*, 125 S. Ct. at 2063. Here, likewise, the honey promotion program is directed by Congress. The Honey Research, Promotion, and Consumer Information Act authorizes “the establishment of an orderly procedure for the development and financing, through an adequate assessment, of an effective, continuous, and nationally coordinated program of promotion, research, consumer education, and industry information” 7 U.S.C. § 4601(b)(1). The honey

³*Johanns v. Campaign for Family Farms*, 125 S. Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Sixth Circuit).

⁴*Landreneau v. Pelts & Skins, LLC*, 125 S. Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

⁵*Johanns v. Cochran*, 125 S. Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit).

promotion program is designed to “strengthen the position of the honey industry in the marketplace”; “maintain, develop, and expand domestic and foreign markets and uses for honey and honey products”; “maintain and improve the competitiveness and efficiency of the honey industry”; and “sponsor research to develop better means of dealing with pest and disease problems.” 7 U.S.C. § 4601(b)(1).

“‘Compelled support of government’--even those programs of government one does not approve--is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. ‘The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.’ *Southworth*, 529 U.S., at 229.” *Livestock Marketing Ass’n*, 125 S. Ct. at 2062.

In both the beef promotion program and the honey promotion program, the message of the promotional campaigns is effectively controlled by the United States government itself. The degree of governmental control over the message funded by targeted assessments distinguishes these promotional programs from the state bar’s communicative activities which were at issue in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). See *Livestock Marketing Ass’n*, 125 S. Ct. at 2063.

“When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the

government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” *Livestock Marketing Ass’n*, 125 S. Ct. at 2063.

“Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions’ content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements’ content, right down to the wording. [(7 C.F.R. § 1240.61.)] And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.” *Livestock Marketing Ass’n*, 125 S. Ct. at 2064 (footnotes omitted). I conclude the instant case cannot be distinguished from *Livestock Marketing Ass’n*.

Conclusions of Law

1. As Justice Thomas remarked in his concurring opinion in *Livestock Marketing Ass’n*, “the practice of using targeted taxes to fund government operations, such as excise taxes, dates from the founding, see *The Federalist* No. 12, p. 75 (J. Cooke ed. 1961).” Justice Thomas prefaced that observation with “Like the Court, I see no analytical distinction between ‘pure’ government speech funded from general tax revenues and from speech funded from targeted exactions. . . .” *Livestock Marketing Ass’n*, 125 S. Ct. at 2066.

2. The Honey Research, Promotion, and Consumer Information Act specifically authorizes the compelled subsidy of generic advertising of honey and honey products (7 U.S.C. §§ 4601-4613).

3. Congress made the following finding in the Honey Research, Promotion, and Consumer Information Act:

The maintenance and expansion of existing honey markets and the development of new or improved markets or uses are vital to the welfare of honey producers and those concerned with marketing, using, and processing honey, along with those engaged in general agricultural endeavors requiring bees for pollinating purposes.

7 U.S.C. § 4601(a)(4).

4. The Honey Research, Promotion, and Consumer Information Act was passed for a substantial, indeed, a compelling government interest (7 U.S.C. § 4601(a)(4)-(10)).

5. A “nationally coordinated program of promotion, research, consumer education, and industry information” was created by Congress to “strengthen the position of the honey industry in the marketplace” (7 U.S.C. § 4601(b)(1)(A)).

6. “[A]dequate assessment[s]” on honey producers and honey importers are recognized by Congress as necessary to a nationally coordinated program of promotion, research, consumer education, and industry information (7 U.S.C. § 4601(b)(1)).

7. The National Honey Board is appointed by the Secretary of Agriculture, in accordance with the specific directions contained in the Honey Research, Promotion, and Consumer Information Act (7 U.S.C. § 4606; Tr. 575-77).

8. The National Honey Board's projects and budgets (whether advertising, promotion, research, industry information, or consumer education) are reviewed and approved by the Secretary of Agriculture or on the Secretary's behalf by United States Department of Agriculture personnel (RX 60; Tr. 427-30).

9. The National Honey Board, as part of its effort to increase demand for honey, educates chefs, consumers, retailers, and others about the ways in which honey enhances food and nutrition (RX 1-RX 11; Tr. 305-20).

10. The National Honey Board, as part of its effort to increase demand for honey, develops health related messages to promote and advertise honey's health benefits, including anti-microbial properties and antioxidant capability (Tr. 196-97, 257-59, 305-06).

11. The coordinated programs of research, promotion, consumer education, and industry information, including advertising, under the Honey Research, Promotion, and Consumer Information Act, are government speech, in accordance *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005).

12. Petitioners are compelled to pay for government speech with which they do not agree. Petitioners are not actually compelled to speak when they do not wish to speak, because the advertising is not attributed to Petitioners; Petitioners are not identified as the speakers; and Petitioners are not compelled to "utter" the message with which they do not agree.

13. Petitioners have no constitutional right to avoid paying for government speech with which they do not agree. *Livestock Marketing Ass'n*, 125 S. Ct. at 2062.

14. Petitioners have no right to choose the message or the messenger of government speech.

15. “The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object.” *Livestock Marketing Ass'n*, 125 S. Ct. at 2063.

16. The Honey Research, Promotion, and Consumer Information Act provides for termination or suspension of the Honey Order (7 U.S.C. § 4612).

17. The Honey Research, Promotion, and Consumer Information Act and the Honey Order, both as promulgated and as administered, are fully in accordance with law, including the First Amendment to the Constitution of the United States.

18. In light of *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), Petitioners’ Petition, filed September 28, 2001, must be denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners and The American Honey Producers Association, Inc., raise two issues in their Appeal Petition. First, Petitioners and The American Honey Producers

Association, Inc., contend the ALJ erroneously found facts that are not supported by substantial evidence or are contrary to the evidence (Appeal Pet. at 4).

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "[t]he National Honey Board . . . is tightly supervised by the Secretary" (Initial Decision at 3) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. Martha B. Ransom, Chief of the Research and Promotion Branch for Fruits and Vegetables, Agricultural Marketing Service, testified that she supervises a staff of six persons who oversee several national promotion boards, including the National Honey Board (Tr. 424-26). Ms. Ransom's direct testimony provides a detailed description of the extent of the Secretary of Agriculture's supervision of the National Honey Board (Tr. 427-571). Julia Pirnack, the industry services director for the National Honey Board, also testified regarding the extent of the Secretary of Agriculture's supervision of the National Honey Board (Tr. 330-33). I find the ALJ's characterization of the Secretary of Agriculture's supervision of the National Honey Board is supported by Ms. Ransom's and Ms. Pirnack's testimony, and I find no evidence that contradicts Ms. Ransom's and Ms. Pirnack's testimony regarding the extent of the Secretary of Agriculture's supervision of the National Honey Board.

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "USDA's oversight and control of the National Honey Board includes acting as an advisor to the National Honey Board in the developmental process of promotion, research, and information activities" (Initial Decision at 4) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. Ms. Ransom testified that she and her staff acts as advisors in the development of National Honey Board activities, as follows:

[BY MR. MARTIN:]

Q. And, as part of your oversight activities, are you an active advisor in the development process of the activities of the Honey Board?

[BY MS. RANSOM:]

A. Yes, either me or my staff. The day-to-day, most of the contact is by a marketing specialist that's assigned to the program.

Tr. 427. Further, the record contains no evidence that contradicts Ms. Ransom's testimony regarding the United States Department of Agriculture's role in the development of promotion, research, and information activities.

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "USDA's oversight of the National Honey Board includes retaining final approval authority over every assessment dollar spent by the Board" (Initial Decision at 4) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. Ms. Ransom testified that she oversees assessment dollars spent by the National Honey Board, as follows:

[BY MR. MARTIN:]

Q. Do you oversee the Honey Board?

[BY MS. RANSOM:]

A. Yes, we do.

Q. And, as part of your oversight activities, do you retain final approval authority over assessment dollars that the Honey Board spends?

A. That's correct.

....

Q. Now, does the Honey Board submit its budgets to you for review and approval?

A. Yes, it does.

Q. And have you reviewed Honey Board budgets and approved them?

A. Yes, every year.

Q. Okay. Would you just take a look at page 3 of RX-60, please? I see a section there entitled "Contracts." Could you briefly tell us what that provides for?

A. Contract section provides that AMS will review and approve contracts for the development and carrying out of the Board's programs, and say that it has certain criteria also that the have to have. The prohibition of -- on lobbying. Also, that no funds can be expended under

the contract until USDA approval. And that the Boards are required to notify potential contractors of this fact.

Q. Now, does the Honey Board, as well as other research promotion boards that you and your staff supervise, submit all contracts to you for reviewing . . .

A. Yes.

Q. . . . and . . .

A. Yes.

Q. . . . approval? And does your staff review and approve all contracts submitted?

A. Yes, they do.

Q. Okay. Would you please take a look at page 4 of RX-60? And I would refer your attention to the section "Accountability for Financial and Program Progress." Would you tell us what that provides, briefly, please?

A. It basically provides that AMS will review financial statements for each accounting period, and that AMS -- the Boards are supposed to send AMS annual progress reports on their programs.

Q. And are the Boards, in fact, audited on some periodic basis?

A. Yes, the Boards are all required to get an independent auditor to do a financial audit at the end of each fiscal year.

Tr. 427, 432-34. Further, the record contains no evidence that contradicts Ms. Ransom's testimony regarding the United States Department of Agriculture's oversight of the National Honey Board's expenditures of assessment dollars.

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "USDA's oversight includes review and approval (a meticulous,

detail-oriented, sometimes intense, word-for word process) of any materials that the National Honey Board prepares for use” (Initial Decision at 4) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners’ and The American Honey Producers Association, Inc.’s contention that the ALJ’s finding is not supported by the evidence. Ms. Ransom testified that before the National Honey Board can use advertising, promotional, research, industry information, or consumer education material, the material must be reviewed and approved by the United States Department of Agriculture (Tr. 428-29). Similarly, Ms. Pirnack testified that before National Honey Board material can be used, the United States Department of Agriculture must review and approve the material (Tr. 330-33). Further, the record contains no evidence that contradicts Ms. Ransom’s and Ms. Pirnack’s testimony regarding the United States Department of Agriculture’s review and approval of the National Honey Board’s advertising, promotional, research, industry information, and consumer education material, prior to use.

Petitioners and the American Honey Producers Association, Inc., assert the ALJ’s finding that “USDA review and approval of projects (whether advertising, promotion, research, industry information, or consumer education) include evaluation in accordance with USDA policy, AMS guidelines, Federal Trade Commission advertising laws and regulations, and Food and Drug Administration’s labeling requirements” (Initial Decision at 4) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. Ms. Ransom testified about the standards the United States Department of Agriculture uses when reviewing the National Honey Board's advertising, promotional, research, industry information, and consumer education material, as follows:

[BY MR. MARTIN:]

Q. Once the Honey Board approves a project . . .

[BY MS. RANSOM:]

A. Right.

Q. . . . does it submit a proposal to you for approval?

A. Yes.

Q. Okay. And do you review the project?

A. Yes, we do.

Q. And if you have any concerns, do you raise them with the Honey Board?

A. Yes, we do.

Q. Would you approve a project unless the Honey Board addressed any of your concerns that you may have?

A. No, we wouldn't.

Q. Now, do you approve the content of these projects?

A. Yes.

Q. And are these projects usually involve advertising and promotional activities?

A. The advertising, promotion, research, industry information, consumer education.

Q. Now, what standards do you use in reviewing the submissions by these Boards, including the Honey Board?

A. Well, there's USDA policy and AMS guidelines, but then there are also the Federal Trade Commission Advertising Laws and Regulations, and the Food and Drug Administration's labeling laws.

Tr. 428-29.

In addition, Respondent introduced a number of exemplars of United States Department of Agriculture standards used during the United States Department of Agriculture review of material submitted by the National Honey Board (RX 60, RX 62-RX 68). The Standards for Promotional Materials Under Fruit and Vegetable Research and Promotion Programs and Marketing Orders corroborate Ms. Ransom's testimony regarding United States Department of Agriculture standards used when reviewing the National Honey Board's advertising, promotional, research, industry information, and consumer education material, as follows:

All boards, councils, and committees are required to submit all promotional materials (all media, including the Internet) for use in domestic and export markets to AMS prior to their use. AMS will follow the laws, rules, and regulations enforced by the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC); the provisions of statutes, orders, and plans relating to promotional activity; and federal policy.

RX 62 at 1 (footnote omitted). Further, the record contains no evidence that contradicts Ms. Ransom's testimony regarding the United States Department of Agriculture standards

used when reviewing the National Honey Board's advertising, promotional, research, industry information, and consumer education material.

Petitioners and The American Honey Producers Association, Inc., assert the ALJ's finding that "National Honey Board advertisements and publications are not attributed to individual honey producers" (Initial Decision at 6) is not supported by substantial evidence or is contrary to the evidence.

I disagree with Petitioners' and The American Honey Producers Association, Inc.'s contention that the ALJ's finding is not supported by the evidence. The record contains no evidence that National Honey Board material is attributable to an individual honey producer. None of the exemplars of National Honey Board material introduced by Respondent (RX 1-RX 52) is attributable to an individual honey producer.

Second, Petitioners and The American Honey Producers Association, Inc., contend the ALJ erroneously concluded the programs of research, promotion, consumer education, and industry information under the Honey Research, Promotion, and Consumer Information Act are government speech, in accordance with *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005). Petitioners and The American Honey Producers Association, Inc., assert the programs of research, promotion, consumer education, and industry information under the Honey Research, Promotion, and Consumer Information Act are not government speech because the speech is not initiated by the government and United States Department of Agriculture oversight, review, and

approval of the speech only serve as a negative check on the speech, not as an affirmative mechanism for compelling particular content or viewpoints. (Appeal Pet. at 7-10.)

Livestock Marketing Ass'n is dispositive of Petitioners' and The American Honey Producer Association, Inc.'s claim on appeal. The message set forth in the promotional campaign for honey, as for beef in *Livestock Marketing Ass'n*, is the message established and controlled by the United States government and constitutes government speech not susceptible to compelled-subsidy challenge under the First Amendment to the Constitution of the United States.

In *Livestock Marketing Ass'n*, the High Court primarily relied on structural factors that apply equally to the beef promotion program and the honey promotion program. That is, "Congress has directed the implementation of a 'coordinated program' of promotion" of the product, "Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain," and "Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well)." *Livestock Marketing Ass'n*, 125 S. Ct. at 2062-63. These aspects of the program, which demonstrate that the program involves government speech, apply to the honey program as well as the beef program.

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

ORDER

The Petition, filed September 28, 2001, is dismissed. This Order shall become effective on the day after service on Petitioners and The American Honey Producers Association, Inc.

RIGHT TO JUDICIAL REVIEW

Petitioners and The American Honey Producers Association, Inc., have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which district Petitioners and The American Honey Producers Association, Inc., are inhabitants or Petitioners' and The American Honey Producers Association, Inc.'s principal places of business are located. A complaint for the purpose of review of the Order in this Decision and Order must be filed within 20 days from the date of entry of the Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the complaint to the Secretary of Agriculture.⁶ The date of entry of the Order in this Decision and Order is November 28, 2005.

Done at Washington, DC

November 28, 2005

William G. Jenson
Judicial Officer

⁶7 U.S.C. § 4609(b).