

UNITED STATES DEPARTMENT OF AGRICULTURE
Farm Service Agency
100 USDA, Suite 102
Stillwater, OK 74074-2653

For: County Offices

APPEARANCES OF EMPLOYEES AS WITNESSES

Approved by: State Executive Director



1 OVERVIEW

A

Background

Regulations published by the Secretary of Agriculture in the Federal Register of October 19, 1990 (Vol. 55, No. 203, 42347) changed the procedures governing appearances of USDA employees in judicial or administrative proceedings.

B

Purpose

This notice provides procedure and documentation to be used by employees when served a subpoena or summons to appear, produce records or both for judicial or administrative proceedings arising out of their official duties.

DISPOSAL
October 1, 2003

DISTRIBUTION
County Offices

OK NOTICE AO-1039

2 REGULATIONS

A General

Appearance means providing testimony, producing records, preparing affidavit, deposition, interrogatory, or any other written submission arising out of employee's official duties.

No USDA employee may provide testimony or produce documents in a judicial or administrative proceeding unless authorized according to the enclosed regulations. (7 CFR Part 1, Subpart K1.212)

B On Behalf of U. S.

Unless instructed otherwise by the General Counsel, an employee may appear as a witness on behalf of the United States in any judicial or administrative proceeding without the issuance of a summons, subpoena, or other compulsory process. The employee should obtain permission from the State Office prior to any such appearance.

C Not on Behalf of U.S.

When the United States is NOT a party, an employee requested to appear as a witness or served with a valid summons, subpoena, or other compulsory process may appear only if such appearance has been authorized by the State Executive Director with the concurrence of the General Counsel. In such cases, a determination must be made that appearance is in the interest of USDA.

Unless appearance is authorized, the employee shall appear at the stated time and place, produce a copy of 7 CFR, Part 1, Subpart K (Exhibit 1) and respectfully decline to provide any testimony.

D Demand for Records

Subpoenas duces tecum for USDA records when the United States is NOT a party shall be deemed to be requests under the Freedom of Information Act (FOIA). Information requested under FOIA shall be provided according to Handbooks 2-INFO and 3-INFO.

When served with a subpoena duces tecum, an employee shall appear at the stated time and place, provide a copy of 7 CFR, Part 1, Subpart K (Exhibit 1) and respectfully decline to produce the records. The employee shall state that the records demanded shall be released as allowed under FOIA procedures in Handbooks 2-INFO and 3-INFO.

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E Not on Behalf of
U.S. But U.S. is a
Party

An employee served with a valid summons or subpoena demanding appearance or production of records for any party against the United States shall immediately notify the State Office of receipt and nature of the order.

The State Office will consult the Office of General Counsel to determine if USDA will oppose the employee's attendance or production of documents, and if so, whether to seek to quash the summons or subpoena.

F
Travel and Fees

An employee required to appear shall be entitled to travel expense according to Agency Travel Regulations.

When the employee appears on behalf of the United States, no fees may be accepted.

When the employee is required to appear on behalf of a party other than the United States, fees are to be accepted and remitted for deposit to FSA.

G
Penalty

Any employee who testifies or produces records in administrative or judicial proceedings in violation of 7 CFR, Part 1, Subpart K shall be subject to disciplinary action.

OK NOTICE AO-1039

3 EXHIBITS

A Filing Instructions

Exhibits 1 and 2 are to be retained in permanent files. Exhibit 1 is the Federal Register notice of 7 CFR Part 1, Subpart K and is to be provided to any court when an employee must appear but decline request of subpoena for testimony or for production of records.

Exhibit 2 is a memorandum from the Associate Regional Attorney for the Office of General Counsel. The memorandum discusses subpoena of USDA employees and may be given to any private attorney or court judge when subpoena is contemplated or has been issued.

OK NOTICE AO-1039

4 ACTION

A Information Required by STO

Whenever any subpoena or request to appear as a witness or produce documents is received, employees are to immediately contact the Administrative Section in the State Office according to 16-AO (Rev. 2), par. 267, 269 or 270. The following information is to be provided:

- Name and title of employee summoned
- Name of document ordering appearance or production of documents and when received
- Court or Administrative body
- Name of party calling witness
- Whether the United States is a party to the lawsuit
- Time and place of appearance
- Nature of lawsuit or administrative hearing
- Anticipated testimony and/or documents to be produced
- Is the appearance in the interest of USDA

The State Office will consult with the General Counsel and provide instructions to the employee.

Unless appearance is authorized, the State Office will instruct employee to appear at the stated time and place, furnish a copy of Exhibits 1 and 2, and respectfully decline to provide testimony or records.

Instructions may be provided to county offices by telephone or email but will be confirmed by memorandum from the State Office.



United States
Department of
Agriculture

Office of the
General
Counsel

Washington,
D.C.
20250-1400

December 10, 1993

MEMORANDUM FOR UNDER SECRETARIES
ASSISTANT SECRETARIES
AGENCY HEADS

FROM: James S. Gilliland
General Counsel *James S. Gilliland*

SUBJECT: Amendment to Touhy regulations

Attached is a copy of a Federal Register document that amends the USDA Touhy regulations to allow agency heads to delegate their responsibilities under the regulations to lower ranking officials in their agencies. In Washington, the delegation may be to officials no lower than two levels below the agency head. In the field, the delegation may be to no lower than the head of a state office. In Washington, the Chief of the Forest Service may delegate his responsibility to no lower than a Deputy Chief, or to a Regional Forester or Station Chief in the field.

I note that the amendment as printed contains an error in the fifth line of § 1.219(a) that will be corrected by the Federal Register. The word "retirement" should read "requirement."

If you have any questions, you may call Bob Siegler, on 720-6035.

Attachment

Rules and Regulations

Federal Register

Vol. 58, No. 227

Monday, November 29, 1993

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1

Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings; Amendment

AGENCY: Office of the Secretary, USDA.
ACTION: Final rule.

SUMMARY: This document amends the regulations governing the appearance of USDA employees as witnesses in order to testify or produce official documents in judicial or administrative proceedings.

EFFECTIVE DATE: November 29, 1993.

FOR FURTHER INFORMATION CONTACT: Robert L. Siegler, Deputy Assistant General Counsel, Research and Operations Division, Office of the General Counsel, United States Department of Agriculture, Washington, DC 20250-1400, (202) 720-6035.

SUPPLEMENTARY INFORMATION: The regulations governing the appearance of USDA employees as witnesses to testify or produce official documents in judicial or administrative proceedings are amended to provide specific authority for heads of USDA agencies to delegate their responsibilities under the regulations to subordinate officials in their agencies.

This rule relates to internal agency management. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the Federal Register. Further, since this rule relates to internal agency management, it is exempt from the provisions of Executive Order Nos. 12778 and 12866. Finally, this action is not a rule as defined by the Regulatory Flexibility Act, Pub. L. No.

96-354, and, thus, is exempt from the provisions of that Act.

List of Subjects in 7 CFR Part 1

Administrative practice and procedures; Witnesses.

PART 1—ADMINISTRATIVE REGULATIONS

Accordingly, part 1, title 7, Code of Federal Regulations is amended as follows:

1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301, unless otherwise noted.

2. A new § 1.219 is added to subpart K to read as follows:

Subpart K—Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings

§ 1.219 Delegations.

(a) Except as provided in paragraphs (b), (c), or (d) of this section, the head of a USDA agency may delegate his or her responsibilities under this subpart, including the retirement to be notified of the receipt of a subpoena as provided in §§ 1.214(a) and 1.216(a) of this part, to employees of his or her agency as follows:

(1) In the National office of the agency, to a level no lower than two levels below the agency head;

(2) In a field component of an agency, to a level no lower than the official who heads a state office.

(b) Notwithstanding paragraph (a) of this section, the Chief of the Forest Service may delegate his responsibilities under this subpart as follows:

(1) In the National office of the Forest Service, to a level no lower than a Deputy Chief of the Forest Service;

(2) In a field component of the Forest Service, to a level no lower than a Regional Forester or Station Director.

(c) Notwithstanding paragraph (a) of this section, the General Counsel may delegate his responsibilities under this subpart as follows:

(1) In the National office of the Office of the General Counsel, to a level no lower than an Assistant General Counsel;

(2) In the field component of the Office of the General Counsel, to Regional Attorneys who may redelegate

their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys who report to them.
(d) The responsibilities assigned to heads of agencies and to Assistant and Under Secretaries in § 1.214(b)(2) of this part may not be redelegated.

Done this 17th day of November, 1993, at Washington, DC.

Mike Espy,

Secretary.

[FR Doc. 93-29133 Filed 11-25-93; 8:45 am] BILLING CODE 3010-01-M

Soil Conservation Service

7 CFR Part 623

Emergency Wetlands Reserve Program

AGENCY: Soil Conservation Service, USDA.

ACTION: Interim rule.

SUMMARY: The Emergency Supplemental Appropriations for Relief From the Major, Widespread Flooding in the Midwest Act of 1993 authorizes the use of funds appropriated under the Act, which are otherwise available for waterway and watershed repair under the Emergency Watershed Protection Program of the Soil Conservation Service (SCS), to restore cropland, which was inundated by the 1993 Midwest floods, to wetlands for the purposes of the Wetlands Reserve Program (WRP) authorized by title XII of the Food Security Act of 1985, as amended. This rule sets forth the policies, procedures, and requirements of the Emergency Wetlands Reserve Program (EWRP) that have been established to implement the 1993 emergency wetland restoration and conservation provisions. The EWRP will be available only in the following States: Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, South Dakota, and Wisconsin. This rule does not affect the policies, procedures, or requirements of the Wetlands Reserve Program regulations issued by the Agricultural Stabilization and Conservation Services.

DATES: November 26, 1993.

COMMENT DEADLINE: In order to be considered, comments must be submitted in writing by December 27, 1993.

ADDRESSES: Send written comments to Edward G. Riekert, Director, Watershed

Rules and Regulations

Federal Register

Vol. 55, No. 203

Friday, October 19, 1990

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1

Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This document establishes procedures governing the appearance of USDA employees as witnesses in order to testify or produce official documents in judicial or administrative proceedings.

EFFECTIVE DATES: October 19, 1990.

FOR FURTHER INFORMATION CONTACT:

Robert L. Siegler, Deputy Assistant General Counsel, Research and Operations Division, Office of the General Counsel, United States Department of Agriculture, Washington, DC 20250-1400, (202) 447-6035.

SUPPLEMENTARY INFORMATION: At present, USDA has an internal directive (Departmental Regulation 1530-1) that sets forth procedures governing the appearance of USDA employees as witnesses in order to testify or produce official documents in administrative or judicial proceedings. In addition, as part of its regulations relating to the Freedom of Information Act, USDA has a section relating to compulsory process (7 CFR 1.21). Finally, there is currently no regulation that specifically provides the conditions under which USDA will prohibit its employees who have received subpoenas from testifying as to matters that arise out of their employment with USDA, where the United States is not a party to the proceeding. This rule consolidates the provisions contained in 7 CFR 1.21 and in Departmental Regulation 1530-1, and adds provisions that provide the

conditions under which employees may testify in judicial or administrative proceedings where their testimony arises out of their employment with USDA.

This rule relates to internal agency management. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the Federal Register. Further, since this rule relates to internal agency management, it is exempt from the provisions of Executive Order No. 12291. Finally, this action is not a rule as defined by the Regulatory Flexibility Act, Public Law No. 96-354, and, thus, is exempt from the provisions of that Act.

List of Subjects in 7 CFR Part 1

Administrative practice and procedures; Witnesses.

PART 1—ADMINISTRATIVE REGULATIONS

Accordingly, part 1, title 7, Code of Federal Regulations is amended as follows:

1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301, unless otherwise noted.

2. Section 1.21 is removed.

3. A new subpart K is added to read as follows:

Subpart K—Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings.

Sec.

- 1.210 Purpose.
- 1.211 Definitions.
- 1.212 General.
- 1.213 Appearance as a witness on behalf of the United States.
- 1.214 Appearance as a witness on behalf of a party other than the United States where the United States is not a party.
- 1.215 Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is not a party.
- 1.216 Appearance as a witness or production of documents on behalf of a party other than the United States where the United States is a party.
- 1.217 Witness fees and travel expenses.
- 1.218 Penalty.

Authority: 5 U.S.C. 301

§ 1.210 Purpose.

This subpart sets forth procedures governing the appearance of USDA employees as witnesses in order to testify or produce official documents in judicial or administrative proceedings when such appearance is in their official capacity or arises out of or is related to their employment with USDA. These regulations do not apply to appearances by USDA employees as witnesses in judicial or administrative proceedings which are purely personal or do not arise out of or relate to their employment with USDA. This subpart also does not apply to Congressional requests or subpoenas for testimony or documents.

§ 1.211 Definitions.

(a) *Administrative proceeding* means any proceeding pending before any federal, state, or local agency and undertaken for the purpose of the issuance of any regulations, orders, licenses, permits, or other rulings, or the adjudication of any matter, dispute, or controversy.

(b) *Appearance* means testimony or production of documents the request for which arises out of an employee's official duties with USDA or relates to his or her employment with USDA. For the purpose of this subpart, an appearance also includes an affidavit, deposition, interrogatory, or other required written submission.

(c) *Judicial proceeding* means any case or controversy pending before any federal, state, or local court.

(d) *Travel expenses* means the amount of money paid to a witness for reimbursement for transportation, lodging, meals, and other miscellaneous expenses in connection with attendance at a judicial or administrative proceeding.

(e) *USDA* means the United States Department of Agriculture.

(f) *USDA agency* means an organizational unit of USDA whose head reports to an official within the Office of the Secretary of Agriculture.

(g) *Valid summons, subpoena, or other compulsory process* means an order that is served properly and within the legal authority and the jurisdictional boundaries of the court or administrative agency or official that has issued it.

(h) *Witness fees* means the amount of money paid to a witness as

compensation for attendance at a judicial or administrative proceeding.

§ 1.212 General.

No USDA employee may provide testimony or produce documents in a judicial or administrative proceeding unless authorized in accordance with this subpart.

§ 1.213 Appearance as a witness on behalf of the United States.

An employee of USDA may appear as a witness on behalf of the United States in any judicial or administrative proceeding without the issuance of a summons, subpoena, or other compulsory process. Employees should obtain permission for such an appearance from their immediate supervisor unless the USDA agency or General Counsel has issued instructions providing otherwise.

§ 1.214 Appearance as a witness on behalf of a party other than the United States where the United States is not a party.

(a) An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, shall promptly notify the head of his or her USDA agency of the existence and nature of the order compelling his or her appearance, or of the document requesting his or her attendance. He or she shall also specify, if that is known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.

(b)(1) An employee of USDA served with a valid summons, subpoena, or other compulsory process, or requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, may appear only if such appearance has been authorized by the head of his or her USDA agency, with the concurrence of the General Counsel, based upon a determination that such an appearance is in the interest of USDA.

(2) An employee of USDA requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, without the service of a valid summons, subpoena, or other compulsory process, may appear only if such appearance has been authorized by the head of his or her USDA agency and approved by the appropriate Assistant Secretary. Under

Secretary or other general officer, and by the General Counsel, based upon a determination that such an appearance is in the interest of USDA.

(c) Unless an appearance is authorized as provided in paragraphs (b)(1) or (b)(2) of this section, the employee shall appear at the stated time and place (unless advised by the General Counsel or his or her designee that the summons, subpoena, or other process was not validly issued or served), produce a copy of these regulations and respectfully decline to provide any testimony. As appropriate, the General Counsel or his or her designee will request the assistance of the Department of Justice or of a United States Attorney, in the case of a judicial proceeding; or of the official or attorney representing the United States, in the case of an administrative proceeding, to represent the interests of the employee and USDA.

(d) If there is any question regarding the validity of a summons, subpoena, or other compulsory process, an employee shall contact the Office of the General Counsel for advice.

(e)(1) In determining whether the employee's appearance is in the interest of USDA, authorizing officials should consider the following:

- (i) what interest of USDA would be promoted by the employee's testimony;
- (ii) whether an appearance would result in an unnecessary interference with the duties of the USDA employee;
- (iii) whether an employee's testimony would result in the appearance of improperly favoring one litigant over another.

(2) The considerations listed in paragraph (e)(1) of this section are illustrative and not exhaustive.

§ 1.215 Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is not a party.

(a) Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is not a party shall be deemed to be requests for records under the Freedom of Information Act and shall be handled pursuant to the rules governing public disclosure under subpart A of this part.

(b) Whenever a subpoena duces tecum compelling the production of records is served on a USDA employee in a judicial or administrative proceeding in which the United States is not a party, the employee, after consultation with the General Counsel or his or her designee, shall appear in response thereto, respectfully decline to produce the records on the grounds that it is prohibited by this section and state

that the production of the records involved will be handled in accordance with subpart A of this part.

§ 1.216 Appearance as a witness or production of documents on behalf of a party other than the United States where the United States is a party.

(a) An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear or produce documents on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party, shall promptly notify the head of his or her USDA agency and the General Counsel or his or her designee of the existence and nature of the order compelling his or her appearance, or of the document requesting his or her appearance. He or she shall also specify, if that is known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.

(b)(1) Except as provided in paragraph (b)(2) of this section, an employee of USDA only may appear as a witness or produce records on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party if such appearance or production has been ordered by the service on the employee of a valid summons, subpoena, or other compulsory process issued by a court, administrative agency, or other official authorized to compel his or her appearance.

(2) An employee requested to appear as a witness or produce records on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party, without being served a valid summons, subpoena, or other compulsory process, may appear or produce records only if such appearance or production has been authorized by a representative of the Department of Justice, the United States Attorney, or other counsel who is representing the United States in the case of a judicial proceeding; or by the official or attorney representing the United States, in the case of an administrative proceeding.

(c) The head of the USDA agency shall consult with the General Counsel or his or her designee as to whether there are grounds to oppose the employee's attendance or production of documents and, if so, whether to seek to quash the summons, subpoena, compulsory process, or to deny authorization under paragraph (b)(2) of this section.

(d) As appropriate, the General Counsel or his or her designee will request the assistance of the Department of Justice, a United States Attorney, or other counsel representing the United States, in the case of a judicial proceeding; or of the official or attorney representing the United States, in the case of an administrative proceeding, to represent the interest of the employee and USDA.

(e) If there is any question regarding the validity of a summons, subpoena, or other compulsory process, an employee shall contact the Office of the General Counsel for advice.

§ 1.217. Witness fees and travel expenses.

(a) Any employee of USDA who attends a judicial or administrative proceeding as a witness in order to testify or produce official documents on behalf of the United States is entitled to travel expenses in connection with such appearance in accordance with the Agriculture Travel Regulations.

(b) An employee of USDA who attends a judicial or administrative proceeding on behalf of the United States is not entitled to receive fees for such attendance.

(c) An employee of USDA who attends a judicial or administrative proceeding on behalf of a party other than the United States when such appearance is in his or her official capacity or arises out of or relates to his or her employment with USDA is entitled to travel expenses in accordance with the Agriculture Travel Regulations to the extent that such expenses are not paid for by the court, agency, or official compelling his or her appearance or by the party on whose behalf he or she appears.

(d) An employee of USDA who attends a judicial or administrative proceeding on behalf of a party other than the United States when such appearance is in his or her official capacity or arises out of or relates to his or her employment with USDA is required to collect the authorized fees for such service and remit such fees to his or her USDA agency.

§ 1.218. Penalty.

An employee who testifies or produces records in a judicial or administrative proceeding in violation of the provisions of this regulation shall be subject to disciplinary action.

Done this 12th day of October, 1990, at Washington, DC.

Clayton Yeutter,

Secretary of Agriculture.

[FR Doc. 90-24763 Filed 10-18-90; 8:45 am]

BILLING CODE 3410-01-M

Animal and Plant Health Inspection Service

7 CFR Part 319

(Docket No. 89-191)

Apricots, Nectarines, Peaches, and Plums From Chile

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the Fruits and Vegetables regulations to relieve restrictions on the importation of stonefruit (apricots, nectarines, peaches, and plums) from Chile. This change will allow these fruits to be imported under multiple safeguards, including inspection in Chile, but without mandatory treatment. This action is necessary to help ensure that untreated fruits can be imported without significant risk of introducing insect pests into the United States.

EFFECTIVE DATE: November 19, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. Frank Cooper, Senior Operations Officer, Port Operations, PPQ, APHIS, USDA, room 632, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8645.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR 319.56 (the regulations) prohibit or restrict the importation of fruits and vegetables into the United States because of the risk that the fruits or vegetables could introduce insect pests that could damage domestic plants.

Apricots, nectarines, peaches, and plums (referred to below as stonefruit) from Chile present a risk of introducing various insect pests, including *Proeulia* spp., *Leptoglossus chilensis*, *Megalometis chilensis*, *Naupactus xanthographus*, *Listroderes subcinctus*, and *Conoderus rufangulus*. These pests do not normally feed on stonefruit, but may be present in shipments of stonefruit as "hitchhiking" pests.

Under current § 319.56-2m, these fruits may be imported from Chile only after they have undergone an approved methyl bromide treatment to destroy insects known to attack them or to be associated with them as hitchhikers.

We published in the Federal Register on July 13, 1989 (54 FR 29566-29569, Docket No. 88-176), a proposal to amend the regulations by allowing stonefruit from Chile to be imported without mandatory treatment, if the stonefruit is imported in accordance with a preclearance program involving

inspections of the stonefruit in Chile and other requirements designed to ensure the stonefruit is free of insect pests.

Clearance for export to the United States will involve inspection, safeguards, treatments, and other procedures required by the regulations. Clearance activities will be performed under the direction of Animal and Plant Health Inspection Service (APHIS) inspectors in Chile, and will include inspections by APHIS inspectors, or by inspectors of the national plant protection service of Chile in the presence of APHIS inspectors. These activities, to determine the eligibility of the fruit for shipment to the United States, are called preclearance to distinguish them from similar inspections, treatments, and other procedures performed by APHIS inspectors at ports of arrival in the United States.

The proposal solicited comments to be submitted by September 11, 1989. We received a total of 30 written comments during the comment period. Four comments opposed the proposed rule, 7 comments supported the proposed rule as it was written, and 19 comments generally supported the proposed rule but suggested changes to its provisions. Comments received on the proposed rule and our responses to them are discussed below.

We are adopting the provisions of the proposed rule, with certain changes discussed below, for the reasons set forth in the proposal and in this supplementary information section.

Comments and Responses

Comment: The regulations attempt to be too specific in implementing what is essentially a trial program that will need fine-tuning as participants adjust to it. Technical aspects such as minimum lot size, sample sizes and sampling procedures, and administrative details should be negotiated and resolved annually in an operational agreement, rather than specified in the regulations.

Response: No change was made in response to this comment; however, note that minimum lot size requirements have been eliminated in response to another comment discussed below. We believe that the regulations contain specific requirements only to the degree necessary to meet legal requirements and to support enforcement and operational feasibility. If the regulations did not contain specific references to matters such as sample sizes and sampling procedures, the interested public could not analyze and comment on the rule in any meaningful way, operational planning for implementing

To Whom It May Concern:

Memorandum of Law: Subpoenas for testimony or for records from an employee of the Department of Agriculture (USDA)

This is to advise counsel for private litigants and, where appropriate, state court judges, of the restrictions on testimony by employees of USDA and on the production by such employees of official records in their custody.

Pursuant to regulations published by the Secretary of Agriculture in the Federal Register at 55 Fed. Reg. 42347 (Oct. 19, 1990), as amended at 58 Fed. Reg. 62495 (November 29, 1993), and codified at 7 C.F.R. Part 1, Subpart K, employees of the department may not make an appearance or produce records in response to subpoenas in cases in which the United States is not a party, unless specifically authorized to do so by the field head of the specific agency of the department by which they are employed. The term "appearance" as used in these regulations includes an affidavit, deposition, interrogatory, or other required written submission.

It is provided at 5 U.S.C. 301 and antecedent provisions found at 5 U.S.C. 22 that the head of an executive department may prescribe regulations for that department, the conduct of its employees, and the custody, use and preservation of its records, papers, and property.

A subpoena directed to an employee of the United States, in the employee's official capacity, whether or not also commanding production of documents, is an action against the United States and is therefore subject to the sovereign immunity of the United States, except to the extent such immunity has been waived.

The primary case authority for issuance of subpoena regulations is United States ex. rel. Touhy v. Ragen, 340 U.S. 462, 71 S. Ct. 416, 95 L. Ed. 417 (1951). In Touhy, the United States Supreme Court held that an agency has the authority to restrict by regulation the testimony of its employees, and that a federal employee may not be compelled to obey a subpoena contrary to supervisor's instructions issued under valid agency regulations. See also State of Louisiana v. Sparks, 978 F.2d 226 (5th Cir. 1992) for a discussion by the Fifth Circuit of the sovereign immunity principles enunciated in Touhy v. Ragen.

A thorough discussion of these principles--dealing with cases in which the United States is not a party--may be found in Boron Oil Co. v. Downie 873 F.2d 67 (4th Cir. 1989). See also Sharon Lease Co. v. FERC, 691 F. Supp. 381 (D.C. 1988); Marcoux v. Mid-States Livestock, et. al., 66 F.R.D. 573 (W.D. Mo. 1975).

Regulations identical or similar to those of the United States Department of Agriculture have also been published by the Departments of Justice, Labor, Health and Human Services, the Environmental Protection Agency, Nuclear Regulatory Commission, and the Small Business Administration.

In any case in which an employee of the Department of Agriculture is denied authority by the head of the employing agency to appear in response to a subpoena, the employee is prohibited--under penalty of disciplinary action--from making such appearance or providing testimony. (See Sec. 1.218 of the regulations.)

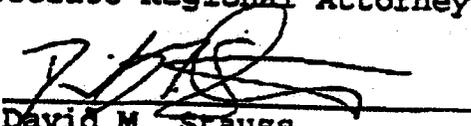
If the subpoena in question also demands the production of records of the Department of Agriculture, that demand for records will be considered under departmental regulations governing production of records under the Freedom of Information Act, and will be produced promptly if permissible under the Act. See 7 CFR 1.1 et. seq. If the records being sought are available under the terms of FOIA, the custodian of those records may, upon request, certify their status as records maintained by the department.

Should you have any questions in regard to these issues, please contact the United States Attorney's Office for the district in which the action is pending, or the Office of General Counsel, USDA, Temple, Texas, (817) 774-1204.

Sincerely yours,

James O. Boyd
Associate Regional Attorney

By


David M. Stauss
Attorney