

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) ACPA Docket No. 12-0040  
)  
Resolute Forest Products, )  
)  
Petitioner ) **Decision and Order**

**PROCEDURAL HISTORY**

On October 28, 2011, Resolute Forest Products [Resolute], formerly AbitibiBowater, Inc., instituted this proceeding by filing a petition in accordance with the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. §§ 7411-7425) [CPRIA]; the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (7 C.F.R. pt. 1217) [Softwood Lumber Order]; 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)-.71, 1200.50-.52). On June 22, 2012, Resolute filed an amended petition,<sup>1</sup> which is the operative pleading in this proceeding.

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<sup>1</sup>Resolute entitles its amended petition “First Amended Petition To Terminate Or Amend USDA’s Softwood Marketing Order Or, In The Alternative, To Exempt Petitioner From USDA’s Softwood Marketing Order” [Amended Petition].

Resolute alleges the Softwood Lumber Order is not established in accordance with law because the Softwood Lumber Order: (1) violates the constitutional separation of powers; (2) unconstitutionally delegates legislative power; and (3) is premised upon an arbitrary and capricious decision to accept the results of a referendum tainted by fraud and bias and incapable of ascertaining true industry preferences.<sup>2</sup> Resolute seeks termination of the Softwood Lumber Order, amendment of the Softwood Lumber Order such that Resolute is not subject to the Softwood Lumber Order, or exemption of Resolute from the Softwood Lumber Order.<sup>3</sup>

On July 3, 2012, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], filed “Respondent’s Answer To Petitioner’s First Amended Petition” in which the Administrator denies the allegations in the Amended Petition and requests denial of the relief sought by Resolute and dismissal of Resolute’s Amended Petition.

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<sup>2</sup>Am. Pet. at 1.

<sup>3</sup>Am. Pet. at 30.

On January 28-31, 2013, Administrative Law Judge Jill S. Clifton [ALJ] conducted a hearing in Washington, DC. Elliot J. Feldman, Andrew Grossman, Erik Raven-Hansen, Michael S. Snarr, and Jennifer Walrath of Baker & Hostetler, LLP, Washington, DC, represented Resolute. Robert A. Ertman, Brian Hill, and Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. The Administrator called one witness and Resolute called three witnesses.<sup>4</sup> Resolute introduced 28 exhibits which were received in evidence and are identified as PX 1-PX 28, and the Administrator introduced 52 exhibits which were received in evidence and are identified as RX 1-RX 52.<sup>5</sup> In addition, the ALJ admitted into evidence three exhibits identified as ALJX 1-ALJX 3.<sup>6</sup>

On April 30, 2014, after the parties submitted post hearing briefs, the ALJ issued a Decision and Order in which the ALJ: (1) found the CPRIA and the Softwood Lumber Order, as written and as administered, are in accordance with law; and (2) concluded, in light of *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *In re Gerawan Farming, Inc.*, 67 Agric. Dec. 45 (2008), Resolute's Amended Petition must be denied.<sup>7</sup>

On June 12, 2014, Resolute filed "Appeal of Administrative Law Judge's April 30, 2014 Decision Denying Petition" [Resolute's Appeal Petition] and, on June 23, 2014, the

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<sup>4</sup>References to the transcript of the January 28-31, 2013, hearing are designated as "Tr." and the page number.

<sup>5</sup>Tr. at 979.

<sup>6</sup>Tr. at 12, 215, 621.

<sup>7</sup>ALJ's Decision and Order ¶¶ 33-34 at 23.

Administrator filed “Respondent’s Brief in Opposition to Petitioner’s Appeal of the ALJ’s Decision and Order.” On June 24, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

## DECISION

### Discussion

Congress identified the purpose of the CPRIA, as follows:

#### § 7411. Findings and purpose

.....

##### (b) Purpose

The purpose of this subchapter is to authorize the establishment, through the exercise by the Secretary of Agriculture of the authority provided in this subchapter, of an orderly program for developing, financing, and carrying out an effective, continuous, and coordinated program of generic promotion, research, and information regarding agricultural commodities designed to—

- (1) strengthen the position of agricultural commodity industries in the marketplace;
- (2) maintain and expand existing domestic and foreign markets and uses for agricultural commodities;
- (3) develop new markets and uses for agricultural commodities; or
- (4) assist producers in meeting their conservation objectives.

7 U.S.C. § 7411(b).

The CPRIA authorizes any association of producers of an agricultural commodity to submit a proposed order to the Secretary of Agriculture.<sup>8</sup> If the Secretary of Agriculture determines that a proposed order is consistent with, and will effectuate the purpose of, the CPRIA, the Secretary of Agriculture must publish the proposed order in the Federal Register and

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<sup>8</sup>7 U.S.C. § 7413(b)(1).

give notice and opportunity for public comment on the proposed order.<sup>9</sup> The Secretary of Agriculture must take comments received into consideration in preparing a final order and must ensure the final order is in conformity with the terms, conditions, and requirements of the CPRIA.<sup>10</sup> If the Secretary of Agriculture determines the final order is consistent with, and will effectuate the purpose of, the CPRIA, the Secretary of Agriculture must issue the final order.<sup>11</sup>

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<sup>9</sup>7 U.S.C. § 7413(b)(2).

<sup>10</sup>7 U.S.C. § 7413(b)(4).

<sup>11</sup>7 U.S.C. § 7413(c).

For the purpose of ascertaining whether persons to be covered by an order favor the order, the order may provide for the Secretary of Agriculture to conduct an initial referendum among persons to be subject to an assessment under 7 U.S.C. § 7416 who, during a representative period, engaged in the production, handling, or importation of the agricultural commodity covered by the order.<sup>12</sup>

In February 2010, the Blue Ribbon Commission<sup>13</sup> submitted a proposed softwood lumber industry research and promotion program to the Secretary of Agriculture.<sup>14</sup> On October 1, 2010, the Agricultural Marketing Service published in the Federal Register a proposed rule inviting comments on a proposed Softwood Lumber Order<sup>15</sup> and a proposed rule inviting comments on procedures for conducting an initial referendum to determine whether issuance of a proposed Softwood Lumber Order is favored by domestic manufacturers and importers of softwood lumber.<sup>16</sup>

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<sup>12</sup>7 U.S.C. § 7417(a)(1).

<sup>13</sup>The Blue Ribbon Commission is a committee of 21 chief executive officers and heads of businesses that domestically manufacture and import softwood lumber (75 Fed. Reg. 61,002 (Oct. 1, 2010); RX 12 at 2).

<sup>14</sup>75 Fed. Reg. 61,005 (Oct. 1, 2010); RX 12 at 5.

<sup>15</sup>75 Fed. Reg. 61,002-25 (Oct. 1, 2010); RX 12.

<sup>16</sup>75 Fed. Reg. 61,025-30 (Oct. 1, 2010); RX 13.

On April 22, 2011, the Agricultural Marketing Service published a proposed rule and referendum order in which the Agricultural Marketing Service addressed the 55 comments received in response to the October 1, 2010, proposed Softwood Lumber Order and announced that the Agricultural Marketing Service would be conducting a referendum from May 23, 2011, through June 10, 2011, to determine whether eligible domestic manufacturers and importers favor implementation of the proposed Softwood Lumber Order.<sup>17</sup> The Agricultural Marketing Service also issued a final rule establishing procedures for conducting the Softwood Lumber Order initial referendum.<sup>18</sup>

On August 2, 2011, after a referendum in which 67 percent of those voting representing 80 percent of the volume of the softwood lumber represented in the referendum favored the implementation of the softwood lumber program, the Agricultural Marketing Service published a final rule establishing the Softwood Lumber Order.<sup>19</sup> Resolute imports softwood lumber into the United States and is subject to the Softwood Lumber Order.<sup>20</sup>

### **Resolute's Appeal Petition**

Resolute raises nine issues in its appeal of the ALJ's Decision and Order denying Resolute's Amended Petition. First, Resolute contends the ALJ erroneously concluded the CPRIA does not violate the Appointments Clause of Article II of the Constitution of the United States (Resolute's Appeal Pet. ¶¶ 9-15 at 4-6).

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<sup>17</sup>76 Fed. Reg. 22,757-84 (Apr. 22, 2011); RX 16.

<sup>18</sup>76 Fed. Reg. 22,752-56 (Apr. 22, 2011); RX 17.

<sup>19</sup>76 Fed. Reg. 46,185-46,202 (Aug. 2, 2011); RX 35.

<sup>20</sup>Tr. at 792.

The Appointments Clause provides that the president shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States.<sup>21</sup> Any person exercising significant authority pursuant to the laws of the United States is an officer of the United States and must be appointed in the manner prescribed by Article II, section 2, clause 2, of the Constitution of the United States.<sup>22</sup> The Secretary of Agriculture, an officer of the United States nominated by the president and confirmed by the Senate, is authorized to administer the CPRIA.<sup>23</sup>

Resolute argues, however, that the CPRIA violates the Appointments Clause because the CPRIA provides non-appointed referendum voters “significant authority belonging to the Executive Branch[.]”<sup>24</sup> Specifically, Resolute cites the requirement in the CPRIA that the Secretary of Agriculture suspend or terminate an order or a provision of an order, if the Secretary of Agriculture determines the order or a provision of an order is not favored by persons voting in a referendum conducted in accordance with 7 U.S.C. § 7417, as follows:

**§ 7421. Suspension or termination**

**(a) Mandatory suspension or termination**

The Secretary shall suspend or terminate an order or a provision of an order if the Secretary finds that an order or a provision of an order obstructs or

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<sup>21</sup>U.S. Const. art. II, § 2, cl. 2.

<sup>22</sup>*Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976); *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337 (D.C. Cir. 2012).

<sup>23</sup>7 U.S.C. § 7411(b).

<sup>24</sup>Resolute’s Appeal Pet. ¶ 9 at 4.



does not tend to effectuate the purpose of this subchapter, or if the Secretary determines that the order or a provision of an order is not favored by persons voting in a referendum conducted under section 7417 of this title.

**(b) Implementation of suspension or termination**

If, as a result of a referendum conducted under section 7417 of this title, the Secretary determines that an order is not approved, the Secretary shall—

- (1) not later than 180 days after making the determination, suspend or terminate, as the case may be, collection of assessments under the order; and
- (2) as soon as practicable, suspend or terminate, as the case may be, activities under the order in an orderly manner.

7 U.S.C. § 7421.

Generally, an administrative agency has no authority to declare unconstitutional a statute that the agency administers.<sup>25</sup> Resolute does not cite and I cannot locate any authority which gives me the power to declare the CPRIA unconstitutional. Therefore, I decline to address Resolute's contention that the CPRIA violates the Appointments Clause of Article II of the Constitution of the United States.

Second, Resolute contends the ALJ erroneously rejected Resolute's claim that the Agricultural Marketing Service unconstitutionally applied the CPRIA by binding the Secretary of Agriculture, without discretion, to implement the Softwood Lumber Order on the basis of the affirmative initial referendum vote. Resolute, relying on testimony by Sonia Jimenez, director

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<sup>25</sup>*Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Pubic Utilities Comm'n of California v. United States*, 355 U.S. 534, 539 (1958); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 599 (2005); *In re Jerry Goetz* (Order Lifting Stay), 61 Agric. Dec. 282, 287 (2002); *In re Otto Berosini*, 54 Agric. Dec. 886, 913 (1995); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342-43 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Craig Lesser*, 52 Agric. Dec. 155, 167-68 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Saulsbury Orchard*, 47 Agric. Dec. 378, 379 (1988); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re David G. Henner*, 30 Agric. Dec. 1151, 1259 (1971).

of the Promotion and Economics Division, Agricultural Marketing Service,<sup>26</sup> and two statements by Mr. Ertman, counsel for the Administrator, asserts the record unmistakably reveals that the Agricultural Marketing Service treated the affirmative initial referendum vote as requiring the Agricultural Marketing Service to implement the Softwood Lumber Order. (Resolute's Appeal Pet. ¶¶ 16-22 at 6-8).

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<sup>26</sup>Tr. at 29.

Ms. Jimenez testified that the Agricultural Marketing Service was required by the CPRIA to issue the Softwood Lumber Order because a majority of those voting in the initial referendum, representing a majority of the volume of softwood lumber voted in the referendum, favored implementation of the Softwood Lumber Order.<sup>27</sup> Mr. Ertman stated, if a referendum conducted under the CPRIA passes, the order which is the subject of that referendum “goes into effect.”<sup>28</sup>

Ms. Jimenez’s and Mr. Ertman’s failure to address the discretion that the Secretary of Agriculture must exercise under the CPRIA does not negate the Secretary of Agriculture’s exercise of discretion both prior to the Softwood Lumber Order initial referendum and after the Softwood Lumber Order initial referendum. The Secretary of Agriculture, prior to publishing any proposed order, must determine that the proposed order is consistent with, and will effectuate the purpose of, the CPRIA, as follows:

**§ 7413. Issuance of orders**

....

**(b) Procedure for issuance**

....

**(2) Consideration of proposed order**

If the Secretary determines that a proposed order is consistent with and will effectuate the purpose of this subchapter, the Secretary shall publish the proposed order in the Federal Register and give due notice and opportunity for public comment on the proposed order.

7 U.S.C. § 7413(b)(2).

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<sup>27</sup>Tr. at 56, 130-31, 287.

<sup>28</sup>Tr. at 865. Resolute also references another purported statement by Mr. Ertman in which Mr. Ertman states a referendum that passes is an “operative event;” however, I find Mr. Ertman’s purported statement is a question Mr. Ertman posed to a witness (Tr. at 852).

Moreover, prior to publication of a final order, the Secretary of Agriculture must determine that the final order is in conformity with the terms, conditions, and requirements of the CPRIA and consistent with, and will effectuate the purpose of, the CPRIA, as follows:

**§ 7413. Issuance of orders**

....

**(b) Procedure for issuance**

....

**(4) Preparation of final order**

After notice and opportunity for public comment under paragraph (2) regarding a proposed order, the Secretary shall take into consideration the comments received in preparing a final order. The Secretary shall ensure that the final order is in conformity with the terms, conditions, and requirements of this subchapter.

**(c) Issuance and effective date**

If the Secretary determines that the final order developed with respect to an agricultural commodity is consistent with and will effectuate the purpose of this subchapter, the Secretary shall issue the final order. . . .

7 U.S.C. § 7413(b)(4), (c). Therefore, as a matter of law, issuance of proposed orders and final orders under the CPRIA is within the discretion of the Secretary of Agriculture.

On October 1, 2010, the Agricultural Marketing Service published in the Federal Register a proposed rule inviting comments on a proposed Softwood Lumber Order.<sup>29</sup> Prior to publication of the October 1, 2010, proposed Softwood Lumber Order, the Secretary of Agriculture determined the proposed Softwood Lumber Order was consistent with, and would

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<sup>29</sup>75 Fed. Reg. 61,002-25 (Oct. 1, 2010); RX 12.

effectuate the purpose of, the CPRIA.<sup>30</sup>

On April 22, 2011, the Agricultural Marketing Service published another proposed Softwood Lumber Order in which the Agricultural Marketing Service addressed the 55 comments received in response to the October 1, 2010, proposed Softwood Lumber Order.<sup>31</sup> Prior to the publication of this second proposed Softwood Lumber Order, the Secretary of Agriculture determined the April 22, 2011, proposed Softwood Lumber Order is consistent with, and would effectuate the purpose of, the CPRIA.<sup>32</sup>

On August 2, 2011, after an affirmative referendum vote, the Agricultural Marketing Service published a final rule establishing the Softwood Lumber Order.<sup>33</sup> As required by 7 U.S.C. § 7413(b)(4)-(c), prior to publication of a final order, the Secretary of Agriculture determined the final order was in conformity with the terms, conditions, and requirements of the CPRIA and consistent with, and effectuated the purpose of, the CPRIA.<sup>34</sup>

Thus, despite Ms. Jimenez's testimony and Mr. Ertman's statement regarding the effect of an affirmative initial referendum vote, the Secretary of Agriculture had complete discretion over the issuance of the October 1, 2010, proposed Softwood Lumber Order, the April 22, 2011,

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<sup>30</sup>See the discussion of the authority for the October 1, 2010, proposed Softwood Lumber Order (75 Fed. Reg. 61,002 (Oct. 1, 2010); RX 12 at 2-3).

<sup>31</sup>76 Fed. Reg. 22,757-84 (Apr. 22, 2011); RX 16.

<sup>32</sup>See the discussion of the authority for the April 22, 2011, proposed Softwood Lumber Order (76 Fed. Reg. 22,757 (Apr. 22, 2011); RX 16 at 1-2).

<sup>33</sup>76 Fed. Reg. 46,185-46,202 (Aug. 2, 2011); RX 35.

<sup>34</sup>See the discussion of the authority for the August 2, 2011, Softwood Lumber Order (76 Fed. Reg. 41,186 (Aug. 2, 2011); RX 35 at 2).

proposed Softwood Lumber Order, and the August 2, 2011, final Softwood Lumber Order.

Further still, if at any time the Secretary of Agriculture determines an order obstructs or does not tend to effectuate the purpose of the CPRIA, the Secretary of Agriculture is required to suspend or terminate the order:

**§ 7421. Suspension or termination**

**(a) Mandatory suspension or termination**

The Secretary shall suspend or terminate an order or a provision of an order if the Secretary finds that an order or a provision of an order obstructs or does not tend to effectuate the purpose of this subchapter, or if the Secretary determines that an order or a provision of an order is not favored by persons voting in a referendum conducted under section 7417 of this title.

7 U.S.C. § 7421(a). Thus, I affirm the ALJ's rejection of Resolute's claim that the Agricultural Marketing Service unconstitutionally applied the CPRIA by binding the Secretary of Agriculture, without discretion, to implement the Softwood Lumber Order on the basis of the affirmative initial referendum vote.

Third, Resolute contends the ALJ erroneously concluded the Softwood Lumber Order was approved by a majority of those persons voting for approval who also represent a majority of the volume of softwood lumber, as provided in 7 U.S.C. § 7417(e)(3). Resolute asserts approval in accordance with 7 U.S.C. § 7417(e)(3) requires the Agricultural Marketing Service to determine the total volume of softwood lumber in the United States market in order to determine whether the persons voting for approval also represent a majority of the total volume of softwood lumber in the United States market. (Resolute's Appeal Pet. ¶¶ 26-30 at 9-11).

The ALJ rejected Resolute's assertion that approval in accordance with 7 U.S.C. § 7417(e)(3) requires the Agricultural Marketing Service to determine the total volume of

softwood lumber in the United States market in order to determine whether the persons voting for approval also represent a majority of the total volume of softwood lumber. Instead, the ALJ concluded a “majority” of persons, as contemplated by the CPRIA, means a majority of persons to be subject to an assessment who voted and a “majority of the volume” of softwood lumber, as contemplated by the CPRIA, means a majority of the volume of softwood lumber to be subject to an assessment that was voted.<sup>35</sup>

The Secretary of Agriculture has discretion under the CPRIA to choose which of three options to use to determine approval of an order, as follows:

**§ 7417. Referenda**

....

**(e) Approval of order**

An order may provide for its approval in a referendum—

- (1) by a majority of those persons voting;
- (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or
- (3) by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.

7 U.S.C. § 7417(e). The Agricultural Marketing Service chose to provide for approval of the Softwood Lumber Order in accordance with 7 U.S.C. § 7417(e)(3), namely, approval by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.<sup>36</sup>

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<sup>35</sup>ALJ’s Decision and Order ¶ 13 at 8.

<sup>36</sup>76 Fed. Reg. 46,185, 46,193 (Aug. 2, 2011); RX 35 at 1, 9; Tr. at 637.

Only persons who would be subject to assessment if the order is approved may vote in an initial referendum.<sup>37</sup> The Softwood Lumber Order provides that domestic manufacturers who ship less than 15 million board feet of softwood lumber within the United States in a fiscal year and importers who import less than 15 million board feet of softwood lumber into the United States in a fiscal year are exempt from assessment under the Softwood Lumber Order.<sup>38</sup> Moreover, no person is required to pay an assessment on the first 15 million board feet of softwood lumber otherwise subject to assessment in a fiscal year.<sup>39</sup> To be eligible to vote in the Softwood Lumber Order initial referendum softwood lumber domestic manufacturers and importers had to have domestically manufactured and/or imported 15 million board feet or more of softwood lumber during the representative period, January 1, 2010, through December 31, 2010.<sup>40</sup> Thus, the total volume of softwood lumber in the United States market is not relevant to the Softwood Lumber Order initial referendum.

Congress specifically addressed the “majority” issue in 7 U.S.C. § 7417(e)(3) by combining the language “by a majority of those persons voting for approval” with the language “who also represent a majority of the volume of the agricultural commodity.” Thus, approval of an order under the option in 7 U.S.C. § 7417(e)(3) is contingent upon approval by a majority of persons voting in the referendum who would be subject to assessment if the order is approved and who also represent a majority of the volume of the agricultural commodity voted in the

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<sup>37</sup>7 U.S.C. § 7417(a)(1).

<sup>38</sup>7 C.F.R. § 1217.53(a)(1)-(a)(2).

<sup>39</sup>7 C.F.R. § 1217.52(b).

<sup>40</sup>76 Fed. Reg. 22,757 (Apr. 22, 2011); RX 16 at 1.



referendum that would be subject to assessment if the order is approved. Therefore, I reject Resolute's contention that approval in accordance with 7 U.S.C. § 7417(e)(3) requires the Agricultural Marketing Service to determine the total volume of softwood lumber in the United States market in order to determine whether the persons voting for approval also represent a majority of the total volume of softwood lumber in the United States market.

Fourth, Resolute contends the ALJ erroneously concluded the Agricultural Marketing Service exempted a de minimis quantity of softwood lumber from the Softwood Lumber Order, as authorized by 7 U.S.C. § 7415(a)(1). Resolute asserts the Agricultural Marketing Service exempted the majority of softwood lumber producers and importers from the Softwood Lumber Order without determining, as required by the CPRIA, that the total volume of softwood lumber exempted from the Softwood Lumber Order was a de minimis quantity of softwood lumber otherwise covered by the Softwood Lumber Order. (Resolute's Appeal Pet. ¶¶ 31-37 at 11-13).

As an initial matter, I reject Resolute's assertion that the Agricultural Marketing Service "exempted the majority of softwood lumber producers and importers from the [Softwood Lumber Order]."<sup>41</sup> Even those domestic manufacturers who ship less than 15 million board feet of softwood lumber within the United States in a fiscal year and those importers who import into the United States less than 15 million board feet of softwood lumber in a fiscal year and are exempt from paying assessments, must comply with the Softwood Lumber Order to obtain the exemption. Specifically, these manufacturers and importers must apply annually to the Softwood Lumber Board for a certificate of exemption from paying assessments under the

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<sup>41</sup>Resolute's Appeal Pet. ¶ 31 at 11.

Softwood Lumber Order.<sup>42</sup>

Moreover, the CPRIA does not require the Secretary of Agriculture to determine that the total volume of softwood lumber exempted from the Softwood Lumber Order is a de minimis quantity of softwood lumber otherwise covered by the Softwood Lumber Order, as Resolute contends. Instead, the CPRIA gives the Secretary of Agriculture complete discretion to exempt any de minimis quantity of an agricultural commodity which would otherwise be covered by an order, as follows:

**§ 7415. Permissive terms in orders**

**(a) Exemptions**

An order issued under this subchapter may contain—

(1) authority for the Secretary to exempt from the order any de minimis quantity of an agricultural commodity otherwise covered by the order[.]

7 U.S.C. § 7415(a)(1). As stated in the April 22, 2011, proposed rule and referendum order, the CPRIA does not define the term “de minimis quantity,” and the Secretary of Agriculture has discretion to determine what constitutes a “de minimis quantity”:

Section 516(a)(1) of the [CPRIA] provides authority for the Secretary to exempt from an order any de minimis quantity of an agricultural commodity otherwise covered by the order. However, the [CPRIA] does not define the term de minimis and USDA is not limited to using the definition of de minimis as specified in another law or agreement. The de minimis quantity is defined for a particular program and industry. The [Blue Ribbon Commission] reviewed various options for the exemption and determined that 15 million board feet would be appropriate because such a level would still provide the Board with resources to have a program that could be successful. USDA concurs with this exemption level because this level would exempt small operations that would otherwise be burdened by the assessment.

76 Fed. Reg. 22,772 (Apr. 22, 2011); RX 16 at 16.

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<sup>42</sup>7 C.F.R. § 1217.53(a)(1)-(a)(2).

Thus, the Secretary of Agriculture has complete discretion to determine the quantity that constitutes a de minimis quantity of softwood lumber and to exempt each domestic manufacturer and each importer from paying assessments on the first 15 million board feet of softwood lumber otherwise subject to assessment. I conclude the Agricultural Marketing Service complied with 7 U.S.C. § 7415(a)(1) when it exempted persons from paying assessments on the first 15 million board feet of softwood lumber otherwise subject to assessment, as follows:

**§ 1217.52 Assessments.**

.....  
 (b) Subject to the exemptions specified in § 1217.53, each manufacturer for the U.S. market shall pay an assessment to the Board at the rate of \$0.35 per thousand board feet of softwood lumber except that no person shall pay an assessment on the first 15 million board feet of softwood lumber otherwise subject to assessment in a fiscal year. Domestic manufacturers shall pay assessments based on the volume of softwood lumber shipped within the United States and importers shall pay assessments based on the volume of softwood lumber imported to the United States.

7 C.F.R. § 1217.52(b).

Fifth, Resolute contends the ALJ erroneously upheld the Agricultural Marketing Service's use of the year 2010 as a representative period to determine who would be subject to an assessment under 7 U.S.C. § 7416 and thus eligible to participate in the Softwood Lumber Order initial referendum (Resolute's Appeal Pet. ¶¶ 38-40 at 13-14).

The Secretary of Agriculture has complete discretion to chose a representative period to determine who may be subject to assessments under an order and thus eligible to participate in an initial referendum, as follows:

**§ 7417. Referenda**

**(a) Initial referendum**

**(1) Optional referendum**

For the purpose of ascertaining whether the persons to be covered by an order favor the order going into effect, the order may provide for the Secretary to conduct an initial referendum among persons to be subject to an assessment under section 7416 of this title who, during a representative period determined by the Secretary, engaged in—

- (A) the production or handling of the agricultural commodity covered by the order; or
- (B) the importation of the agricultural commodity.

7 U.S.C. § 7417(a)(1). Ms. Jimenez explained the reasons for choosing January 1, 2010, through December 31, 2010, as the representative period, as follows:

[BY DR. FELDMAN:]

Now there was also a decision, was there not, about a representative period?

[BY MS. JIMENEZ:]

THE WITNESS: Correct.

Q And who decided the representative period?

A The Department.

Q And what went into determining the representative period?

A We tried to use the most recent year or period of 12 months that we have good information for.

Q So what does “representative” mean in that definition? Does it just mean recent?

A We usually use, right, the most recent 12-month period or any period that would give us a good idea of what the industry looks like, the most recent data possible.

\* \* \*

Q Okay. So by representative period the Department does not mean a period that's normal, is that correct?

A The Department tries to find a period where we can get the best available data that we can for the industry that represents what's going in the industry at the time.

Q . . . . So you've decided that it's representative because you can get data?

A We usually use 12-month period and we try to make it as close as possible to the referendum, so it is as representative of the industry to the time that we are conducting the referendum.

Q At the time you're conducting the referendum?

A Right.

Q So it has no connection to being representative of economic conditions or of the state of the industry, it's only the most recent period prior to the referendum for which you can assemble the data?

A It shows what the industry looks like for that period so it does represent the state of the industry, the most recent state of the industry before the referendum.

Tr. at 142, 146-47. I find the Agricultural Marketing Service's choice of the full calendar year, for which the Agricultural Marketing Service had data, immediately prior to the Softwood Lumber Order initial referendum was reasonable and entirely within the discretion of the Secretary of Agriculture. Therefore, I reject Resolute's contention that the ALJ erroneously upheld the Agricultural Marketing Service's use of the year 2010 as a representative period to determine who would be subject to assessments under 7 U.S.C. § 7416 and thus eligible to participate in the Softwood Lumber Order initial referendum.

Sixth, Resolute contends the ALJ failed to address Resolute's claim that the Agricultural Marketing Service sent referendum ballots to only 311 domestic manufacturers and importers,

instead of the 466 entities the Agricultural Marketing Service determined were eligible to vote in the Softwood Lumber Order initial referendum (Resolute's Appeal Pet. ¶¶ 41-44 at 14-15).

I agree with Resolute that the ALJ failed to address Resolute's claim that the Agricultural Marketing Service sent referendum ballots to only 311 domestic manufacturers and importers instead of the 466 entities the Agricultural Marketing Service purportedly determined were eligible to vote. However, I decline to remand this proceeding to the ALJ to address Resolute's claim. The record establishes the Agricultural Marketing Service determined 311 domestic manufacturers and importers were eligible to vote in the Softwood Lumber Order initial referendum, not 466, as claimed by Resolute.

The Agricultural Marketing Service explained the criterion for eligibility to vote in the Softwood Lumber Order initial referendum, informed the public how ballots would be distributed, and urged each eligible entity not receiving a ballot to request a ballot, as follows:

**DATES:** The voting period is May 23 through June 10, 2011. To be eligible to vote, softwood lumber domestic manufacturers and importers must have domestically manufactured and/or imported 15 million board feet or more of softwood lumber during the representative period from January 1 through December 31, 2010. Ballots will be mailed to all known domestic manufacturers and importers of softwood lumber on or before May 16, 2011. Ballots must be received by the referendum agents no later than the close of business 4:30 p.m. (Eastern Standard Time) on June 10, 2011.

....

**FOR FURTHER INFORMATION CONTACT:** Maureen T. Pello, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 831, Beavercreek, Oregon 97004; telephone: (503) 632-8848; facsimile (503) 632-8852; or electronic mail: *Maureen.Pello@ams.usda.gov*.

....

Maureen T. Pello of the USDA, AMS, Research and Promotion Branch is designated as the referendum agent to conduct the referendum. Prior to the first day of the voting period, the referendum agents will mail the ballots to be cast in the referendum and voting instructions to all eligible voters. Any domestic manufacturer or importer [sic] who does not receive a ballot should contact the

referendum agent cited in the **FOR FURTHER INFORMATION CONTACT** section no later than one week before the end of the voting period.

76 Fed. Reg. 22,757, 22,775 (Apr. 22, 2011); RX 16 at 1, 19 (emphasis in original). Using the criterion explained in this rulemaking document, the Agricultural Marketing Service determined 311 entities were eligible to vote in the Softwood Lumber Order initial referendum. In response to questioning by Resolute's counsel regarding the number of entities eligible to vote, Ms. Jimenez addressed Resolute's claim that 466 entities were eligible to vote in the initial referendum, as follows:

BY DR. FELDMAN:

Q Now of the 466, the 466, we got that number simply by subtracting the number of importers that were estimated as ineligible by virtue of importing fewer than 15 million board feet and subtracting the number of domestic manufacturers who were deemed to be shipping less than 15 million board feet and then adding the two differences, and that gave us 466, is that correct?

[BY MS. JIMENEZ:]

A Correct.

Q Okay. And that 466 number, then, at least on the basis of those data, ought to have been the eligible voting pool, is that correct?

A No, that is not correct.

Q Why is that not correct?

A Because that number comes from the Reg Flex for an average of three years, I said that many times, of data. That was not the same data that we used to actually determine eligibility to vote for the referendum.

Q And by what order or magnitude do you think that number is inaccurate?

A We sent out 311 ballots, which means there were 311 people eligible to vote for the referendum.

Q Based on what data?

A On the data that we collected from Random Lengths, the eight grading agencies, the proponent group, and we made all the calls to determine which of those people were eligible to vote, and by Customs data for 2010.

Tr. at 324-26. The Agricultural Marketing Service notified interested persons of the criterion for determining eligibility to vote and the availability of ballots through Federal Register publications, outreach efforts, and press releases.<sup>43</sup> I find no evidence to support Resolute's claim that 466 entities were eligible to vote in the Softwood Lumber Order initial referendum.

Seventh, Resolute contends the ALJ erroneously rejected Resolute's claim that the Agricultural Marketing Service failed to adopt standards to ensure that the vote in the Softwood Lumber Order initial referendum was free from bias (Resolute's Appeal Pet. ¶¶ 45-47 at 16-17).

The CPRIA sets forth the manner of conducting referenda, as follows:

**§ 7417. Referenda**

....

**(g) Manner of conducting referenda**

**(1) In general**

A referendum conducted under this section shall be conducted in the manner determined by the Secretary to be appropriate.

**(2) Advance registration**

If the Secretary determines that an advance registration of eligible voters in a referendum is necessary before the voting period in order to facilitate the conduct of the referendum, the Secretary may institute the advance registration procedures by mail, or in person through the use of national and local offices of the Department.

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<sup>43</sup>RX 12-RX 13, RX 16-RX 18, RX 20-RX 34.



**(3) Voting**

Eligible voters may vote by mail ballot in the referendum or in person if so prescribed by the Secretary.

**(4) Notice**

Not later than 30 days before a referendum is conducted under this section with respect to an order, the Secretary shall notify the agricultural commodity industry involved, in such manner as determined by the Secretary, of the period during which voting in the referendum will occur. The notice shall explain any registration procedures established under this subsection.

7 U.S.C. § 7417(g).

On October 1, 2010, the Agricultural Marketing Service published a proposed rule inviting comments on procedures for conducting an initial referendum to determine whether the proposed Softwood Lumber Order is favored by domestic manufacturers and importers of softwood lumber.<sup>44</sup> On April 22, 2011, the Agricultural Marketing Service published a proposed rule and referendum order in which the Agricultural Marketing Service announced that the Agricultural Marketing Service would be conducting a referendum from May 23, 2011, through June 10, 2011, to determine whether eligible domestic manufacturers and importers favor implementation of the Softwood Lumber Order, as proposed.<sup>45</sup> The Agricultural Marketing Service also issued a final rule establishing procedures for conducting the referendum.<sup>46</sup> These procedures fully comport with the CPRIA and the evidence establishes that the Agricultural Marketing Service conducted the referendum in accordance with the published

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<sup>44</sup>75 Fed. Reg. 61,025-30 (Oct. 1, 2010); RX 13.

<sup>45</sup>76 Fed. Reg. 22,757-84 (Apr. 22, 2011); RX 16 at 1-28.

<sup>46</sup>76 Fed. Reg. 22,752-56 (Apr. 22, 2011); RX 17.

procedures.

Nonetheless, Resolute contends the ALJ's rejection of Resolute's claim that the Agricultural Marketing Service conducted the referendum in an arbitrary and capricious manner is error because Dr. Anna Greenberg, a witness qualified by the ALJ as an expert in survey and census research methodology,<sup>47</sup> concluded that the Agricultural Marketing Service did not implement standards to ensure a vote free from bias.<sup>48</sup>

As an initial matter, an administrative law judge is not bound by conclusions of a witness whom the administrative law judge qualifies as an expert, and the ALJ was free to reach her own conclusion regarding the adequacy of the Softwood Lumber Order initial referendum. Moreover, Dr. Greenberg's conclusion was based on the premise that the Softwood Lumber Order initial referendum was a census.<sup>49</sup> The ALJ rejected Dr. Greenberg's premise<sup>50</sup> and Dr. Greenberg's conclusion.

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<sup>47</sup>The ALJ accepted Dr. Greenberg as an expert in census survey and voting methodology (Tr. at 802).

<sup>48</sup>Resolute's Appeal Pet. ¶ 45 at 16.

<sup>49</sup>Tr. at 803-04.

<sup>50</sup>ALJ's Decision and Order ¶ 25 at 17.

A census is an official count of people made for the purpose of compiling social and economic data and a referendum is the process of referring an issue for approval by popular vote.<sup>51</sup> The record establishes that the Softwood Lumber Order initial referendum was not conducted for the purpose of compiling social and economic data, but, instead, was a process for referring the proposed Softwood Lumber Order for approval (or disapproval) by popular vote; therefore, I find the ALJ's rejection of Dr. Greenberg's conclusion was not error.

Resolute also contends the Softwood Lumber Order initial referendum was not conducted in accordance with Office of Management and Budget Guidelines related to data collection and the ALJ erroneously failed to address this contention. I agree with Resolute that the ALJ did not address Resolute's contention that the Softwood Lumber Order initial referendum was not conducted in accordance with Office of Management and Budget Guidelines. However, I decline to remand this proceeding to the ALJ to address Resolute's contention. The record establishes that the Office of Management and Budget Guidelines referenced by Resolute relate to data collection, not referenda.<sup>52</sup>

Eighth, Resolute contends the ALJ erroneously rejected Resolute's claim that the Agricultural Marketing Service's endorsement of the Blue Ribbon Commission's misleading statements violates the Administrative Procedure Act (Resolute's Appeal Pet. ¶¶ 48-49 at 17-18).

The ALJ found that promotional materials prepared and distributed by the Blue Ribbon Commission, a proponent of the Softwood Lumber Order, contained statements that are wrong.<sup>53</sup>

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<sup>51</sup>Black's Law Dictionary 253, 1393-94 (9th ed. 2009).

<sup>52</sup>Resolute's Appeal Pet. ¶ 47 at 16-17.

<sup>53</sup>ALJ's Decision and Order ¶ 29 at 20.

The ALJ did not explicitly reject Resolute's contention that the Agricultural Marketing Service wrongfully implemented the Softwood Lumber Order when the Agricultural Marketing Service knew, or should have known, that, during the rulemaking proceeding, the Blue Ribbon Commission disseminated false information to promote the Softwood Lumber Order. However, based on the ALJ's disposition of the proceeding, I agree with Resolute that the ALJ implicitly rejected Resolute's contention.

As an initial matter, Resolute does not cite any evidence supporting its contention that the Agricultural Marketing Service endorsed misleading statements by the Blue Ribbon Commission. Further, Resolute does not cite any provision of the Administrative Procedure Act that requires an agency conducting a rulemaking proceeding to refute misleading statements by proponents or opponents of the rulemaking proceeding.

If the Secretary of Agriculture determines a proposed order is consistent with, and will effectuate the purpose of, the CPRIA, the Secretary of Agriculture must publish the proposed order in the Federal Register and give opportunity for public comment on the proposed order.<sup>54</sup> After notice and opportunity for public comment, the Secretary of Agriculture is required to take into consideration the comments received in preparing a final order.<sup>55</sup> However, the Administrative Procedure Act does not require an administrative agency to consider or to address lobbying efforts by proponents or opponents of a proposed order. Therefore, I conclude the Agricultural Marketing Service was not required by the Administrative Procedure Act to reject misleading statements made by the Blue Ribbon Commission during the rulemaking proceeding,

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<sup>54</sup>7 U.S.C. § 7413(b)(2).

<sup>55</sup>7 U.S.C. § 7413(b)(4).

as Resolute contends.

Ninth, Resolute contends *In re Resolute Forest Products* (Ruling on Certified Question), \_\_\_ Agric. Dec. \_\_\_ (Jan. 22, 2013), is error (Resolute's Appeal Pet. ¶¶ 50-62 at 18-22).

In *In re Resolute Forest Products* (Ruling on Certified Question), \_\_\_ Agric. Dec. \_\_\_ (Jan. 22, 2013), I concluded Resolute's application for a subpoena duces tecum did not show the relevancy of, the materiality of, or the necessity for the production of documents described in Resolute's application, as required by 7 C.F.R. § 900.62(b), and concluded the ALJ must quash the subpoena duces tecum issued pursuant to Resolute's application. For the reasons cited in *In re Resolute Forest Products* (Ruling on Certified Question), \_\_\_ Agric. Dec. \_\_\_ (Jan. 22, 2013), I reject Resolute's contention that the ruling is error, and I decline to vacate *In re Resolute Forest Products* (Ruling on Certified Question), \_\_\_ Agric. Dec. \_\_\_ (Jan. 22, 2013), and remand the proceeding to the ALJ.

### **Findings of Fact**

1. Resolute is a corporation incorporated under the laws of the State of Delaware.
2. Resolute imports softwood lumber into the United States and is subject to the Softwood Lumber Order (Tr. at 792).
3. The Blue Ribbon Commission is a committee of 21 chief executive officers and heads of businesses that domestically manufacture and import softwood lumber (75 Fed. Reg. 61,002 (Oct. 1, 2010); RX 12 at 2).
4. In February 2010, the Blue Ribbon Commission submitted a proposed softwood lumber industry research and promotion program to the Secretary of Agriculture (75 Fed. Reg. 61,005 (Oct. 1, 2010); RX 12 at 5).

5. On October 1, 2010, the Agricultural Marketing Service published in the Federal Register a proposed rule inviting comments on a proposed Softwood Lumber Order and a proposed rule inviting comments on procedures for conducting an initial referendum to determine whether domestic manufacturers and importers of softwood lumber favor implementation of the proposed Softwood Lumber Order (75 Fed. Reg. 61,002-30 (Oct. 1, 2010); RX 12-RX 13).

6. On April 22, 2011, the Agricultural Marketing Service published in the Federal Register a proposed rule and referendum order in which the Agricultural Marketing Service addressed the 55 comments received in response to the October 1, 2010, proposed Softwood Lumber Order referenced in Finding of Fact number 5 and announced that the Agricultural Marketing Service would be conducting an initial referendum from May 23, 2011, through June 10, 2011, to determine whether eligible domestic manufacturers and importers favor implementation of the proposed Softwood Lumber Order (76 Fed. Reg. 22,757-84 (Apr. 22, 2011); RX 16).

7. On April 22, 2011, the Agricultural Marketing Service issued a final rule establishing procedures for conducting the Softwood Lumber Order initial referendum (76 Fed. Reg. 22,752-56 (Apr. 22, 2011); RX 17).

8. On August 2, 2011, after the Softwood Lumber Order initial referendum in which 67 percent of those voting representing 80 percent of the volume of the softwood lumber represented in the referendum approved the implementation of the softwood lumber program, the Agricultural Marketing Service published in the Federal Register a final rule establishing the Softwood Lumber Order (76 Fed. Reg. 46,185-46,202 (Aug. 2, 2011); RX 35).

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction over this matter.
2. The Judicial Officer has no authority to declare the CPRIA unconstitutional.
3. The Agricultural Marketing Service did not bind the Secretary of Agriculture, without discretion, to implement the Softwood Lumber Order on the basis of an affirmative referendum vote.
4. The Softwood Lumber Order was approved by a majority of those persons voting who also represent a majority of the volume of softwood lumber, as provided in 7 U.S.C. § 7417(e)(3).
5. The Agricultural Marketing Service exempted a de minimis quantity of softwood lumber otherwise covered by the Softwood Lumber Order from assessments under the Softwood Lumber Order, as authorized by 7 U.S.C. § 7415(a)(1).
6. The Secretary of Agriculture has complete discretion to chose a “representative period,” as that term is used in 7 U.S.C. § 7417(a)(1), to determine who may be subject to assessment under an order and thus eligible to participate in an initial referendum.
7. The Softwood Lumber Order initial referendum was conducted in accordance with 7 U.S.C. § 7417(g).
8. The Softwood Lumber Order initial referendum was not a census.
9. An administrative law judge is not bound by the conclusions of a witness whom the administrative law judge qualifies as an expert.
10. Office of Management and Budget Guidelines related to data collection are not relevant to the Softwood Lumber Order initial referendum.

11. The Agricultural Marketing Service was not required by the Administrative Procedure Act to refute misleading statements made during the rulemaking proceeding by proponents and opponents of the Softwood Lumber Order.

12. The ruling in *In re Resolute Forest Products* (Ruling on Certified Question), \_\_\_ Agric. Dec. \_\_\_ (Jan. 22, 2013), is correct as a matter of law.

13. The Softwood Lumber Order is in conformity with the terms, conditions, and requirements of the CPRIA, as required by 7 U.S.C. § 7413(b)(4).

14. The Softwood Lumber Order is consistent with, and will effectuate the purpose of, the CPRIA, as required by 7 U.S.C. § 7413(c).

For the foregoing reasons, the following Order is issued.

### **ORDER**

1. The relief requested by Resolute is denied.
2. Resolute's Amended Petition, filed June 22, 2012, is dismissed with prejudice.

This Order shall become effective upon service on Resolute.

### **RIGHT TO JUDICIAL REVIEW**

Resolute has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which district Resolute resides or carries on business. A complaint for the purpose of review of the Order in this Decision and Order must be filed not later than 20 days from the date of entry of the Order.<sup>56</sup> Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the complaint

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<sup>56</sup>7 U.S.C. § 7418(b)(1).



to the Secretary of Agriculture.<sup>57</sup> The date of entry of the Order in this Decision and Order is November 26, 2014.

Done at Washington, DC

November 26, 2014

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William G. Jenson  
Judicial Officer

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<sup>57</sup>7 U.S.C. § 7418(b)(2).