

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PVPA Docket No. 02-0002  
)  
J.R. Simplot Company, )  
)  
Petitioner ) **Decision and Order**

**PROCEDURAL HISTORY**

In June 2002, J.R. Simplot Company [hereinafter Petitioner] requested revival of an abandoned application for plant variety protection that had previously been filed with the Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Plant Variety Protection Office].<sup>1</sup> The application for plant variety protection that is the subject of Petitioner’s request is for a variety of creeping bentgrass known as “Lofts L-93.” The Plant Variety Protection Office designated the application as “PVP Application No. 9600256.” Petitioner made its request pursuant to the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2582) [hereinafter the Plant Variety Protection Act], and the regulations issued under the Plant Variety Protection Act (7 C.F.R. pt. 97) [hereinafter the

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<sup>1</sup>Letter dated June 28, 2002, from Richard C. Peet, to Paul M. Zankowski, Commissioner, Plant Variety Protection Office [hereinafter the Commissioner].

Regulations]. In July 2002, the Commissioner denied Petitioner's request stating PVP Application No. 9600256 had been abandoned on November 15, 2000, and the 3-month period for revival of abandoned plant variety protection applications, provided in 7 C.F.R. § 97.22, had expired on February 16, 2001.<sup>2</sup>

On September 20, 2002, Petitioner filed a "Petition Under 7 C.F.R. § 97.300 for Revival of PVP Application No. 9600256 in the Name of J.R. Simplot Company" [hereinafter Petition]. Petitioner requests that I: (1) waive the 3-month bar for revival of plant variety protection applications in 7 C.F.R. § 97.22 because the application of the bar under the facts in this proceeding would be unjust and inequitable; (2) grant Petitioner's request for a revival of PVP Application No. 9600256 as a pending application; (3) direct the Commissioner to arrange a schedule with Petitioner's representatives for the completion of the examination of PVP Application No. 9600256; and (4) direct the Commissioner to amend the public record to reflect that PVP Application No. 9600256 is still pending (Pet. at 30-31).

On December 4, 2002, the Commissioner filed an "Answer to Petition for Revival of Abandoned Application" [hereinafter Answer] requesting that I deny the Petition (Answer at 11). On December 10, 2002, Petitioner filed "Simplot's Reply to Commissioner's Answer to Simplot's Petition for Revival of Application No. 9600256."

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<sup>2</sup>Letter dated July 25, 2002, from the Commissioner to Richard C. Peet (Ex. B, attached to Pet.).

Petitioner requested an informal conference pursuant to 7 C.F.R. § 97.300(d). On January 2, 2003, I held an informal conference in connection with the instant proceeding and a related proceeding captioned *In re J.R. Simplot Company*, PVPA Docket No. 02-0001. Richard G. Stoll and Richard C. Peet, Foley & Lardner, Washington, DC, represented Petitioner. Joel Barker and Gray Young also appeared on behalf of Petitioner. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented the Commissioner.

On February 18, 2003, pursuant to 7 U.S.C. § 2443, I requested that the Plant Variety Protection Board provide me with written advice regarding the Petition. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to advise the Judicial Officer on the Petition filed in the instant proceeding and Petitioner's "Petition Under 7 C.F.R. § 97.300 for Recording PVP Application No. 9600256 in the Name of J.R. Simplot Company" filed in *In re J.R. Simplot Company*, PVPA Docket No. 02-0001. Richard G. Stoll and Joel Barker appeared on behalf of Petitioner. Robert A. Ertman appeared on behalf of the Commissioner. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise me that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, and *In re J.R. Simplot Company*, PVPA Docket No. 02-0002, "were fair and consistent with their [sic] handling of PVP applications" and to recommend that PVP Application No. 9600256 "should not be revived" (Transcript of the Plant Variety Protection Board Hearing at 78-80). On April 11,

2003, the Plant Variety Protection Board provided me with a copy of the transcript containing its advice and recommendation.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.

### TITLE 7—AGRICULTURE

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#### CHAPTER 57—PLANT VARIETY PROTECTION

##### SUBCHAPTER I—PLANT VARIETY PROTECTION OFFICE

###### PART A—ORGANIZATION AND PUBLICATIONS

#### **§ 2321. Establishment**

There is hereby established in the Department of Agriculture an office to be known as the Plant Variety Protection Office, which shall have the functions set forth in this chapter.

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#### **§ 2326. Regulations**

The Secretary may establish regulations, not inconsistent with law, for the conduct of proceedings in the Plant Variety Protection Office after consultations with the Plant Variety Protection Board.

#### **§ 2327. Plant Variety Protection Board**

##### **(a) Appointment**

The Secretary shall appoint a Plant Variety Protection Board. The Board shall consist of individuals who are experts in various areas of varietal development covered by this chapter. Membership of the Board shall include farmer representation and shall be drawn approximately equally from the private or seed industry sector and from the sector of government or the

public. The Secretary or the designee of the Secretary shall act as chairperson of the Board without voting rights except in the case of ties.

**(b) Functions of Board**

The functions of the Plant Variety Protection Board shall include:

- (1) Advising the Secretary concerning the adoption of Rules and Regulations to facilitate the proper administration of this chapter;
- (2) Making advisory decisions on all appeals from the examiner. The Board shall determine whether to act as a full Board or by panels it selects; and whether to review advisory decisions made by a panel. For service on such appeals, the Board may select, as temporary members, experts in the area to which the particular appeal relates; and
- (3) Advising the Secretary on all questions under section 2404 of this title.

**(c) Compensation of Board**

The members of the Plant Variety Protection Board shall serve without compensation except for standard government reimbursable expenses.

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SUBCHAPTER II—PROTECTABILITY OF PLANT VARIETIES AND  
CERTIFICATES OF PROTECTION

PART D—PROTECTABILITY OF PLANT VARIETIES

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**§ 2402. Right to plant variety protection; plant varieties protectable****(a) In general**

The breeder of any sexually reproduced or tuber propagated plant variety (other than fungi or bacteria) who has so reproduced the variety, or the successor in interest of the breeder, shall be entitled to plant variety protection for the variety, subject to the conditions and requirements of this chapter, if the variety is—

- (1) new, in the sense that, on the date of filing of the application for plant variety protection, propagating or harvested material of the variety has not been sold or otherwise disposed of to other persons, by or with the consent of the breeder, or the successor in interest of the breeder, for purposes of exploitation of the variety—
  - (A) in the United States, more than 1 year prior to the date of filing; or
  - (B) in any area outside of the United States—
    - (i) more than 4 years prior to the date of filing, except that in the case of a tuber propagated plant variety the Secretary may waive the 4-year limitation for a period ending 1 year after April 4, 1996; or
    - (ii) in the case of a tree or vine, more than 6 years prior to the date of filing;
- (2) distinct, in the sense that the variety is clearly distinguishable from any other variety the existence of which is publicly known or a matter of common knowledge at the time of the filing of the application;
- (3) uniform, in the sense that any variations are describable, predictable, and commercially acceptable; and
- (4) stable, in the sense that the variety, when reproduced, will remain unchanged with regard to the essential and distinctive characteristics of the variety with a reasonable degree of reliability commensurate with that of varieties of the same category in which the same breeding method is employed.

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## PART F—EXAMINATIONS; RESPONSE TIME; INITIAL APPEALS

### **§ 2441. Examination of application**

The Secretary shall cause an examination to be made of the application and if on such examination it is determined that the applicant is entitled to plant variety protection under the law, the Secretary shall issue a notice of allowance of plant variety protection therefore as hereinafter provided.

### **§ 2442. Notice of refusal; reconsideration**

(a) Whenever an application is refused, or any objection or requirement made by the examiner, the Secretary shall notify the applicant thereof, stating the reasons therefore, together with such information and references as may be useful in judging the propriety of continuing the prosecution of the application; and if after receiving such notice the applicant requests reconsideration, with or without amendment, the application shall be reconsidered.

(b) For taking appropriate action after the mailing to an applicant of an action other than allowance, the applicant shall be allowed at least 30 days, and not more than 180 days, or such other time as the Secretary shall set in the refusal, or such time as the Secretary may allow as an extension. Without such extension, action may be taken up to three months late by paying an additional fee to be prescribed by the Secretary.

### **§ 2443. Initial appeal**

When an application for plant variety protection has been refused by the Plant Variety Protection Office, the applicant may appeal to the Secretary. The Secretary shall seek the advice of the Plant Variety Protection Board on all appeals, before deciding the appeal.

## PART G—APPEALS TO COURTS AND OTHER REVIEW

### **§ 2461. Appeals**

From the decisions made under sections 2404, 2443, 2501, and 2568 of this title appeal may, within sixty days or such further times as the Secretary allows, be taken under the Federal Rules of Appellate Procedure.

The United States Court of Appeals for the Federal Circuit shall have jurisdiction of any such appeal.

### **§ 2462. Civil action against Secretary**

An applicant dissatisfied with a decision under section 2443 or 2501 of this title, may, as an alternative to appeal, have remedy by civil action against the Secretary in the United States District Court for the District of Columbia. Such action shall be commenced within sixty days after such decision or within such further time as the Secretary allows. The court may, in the case of review of a decision by the Secretary refusing plant variety protection, adjudge that such applicant is entitled to receive a certificate of plant variety protection for the variety as specified in the application as the facts of the case may appear, on compliance with the requirements of this chapter.

## PART H—CERTIFICATES OF PLANT VARIETY PROTECTION

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### **§ 2483. Contents and term of plant variety protection**

#### **(a) Certificate**

(1) Every certificate of plant variety protection shall certify that the breeder (or the successor in interest of the breeder), has the right, during the term of the plant variety protection, to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter.

(2) If the owner so elects, the certificate shall—

(A) specify that seed of the variety shall be sold in the United States only as a class of certified seed; and

(B) if so specified, conform to the number of generations designated by the owner.

(3) An owner may waive a right provided under this subsection, other than a right that is elected by the owner under paragraph (2)(A).

(4) The Secretary may at the discretion of the Secretary permit such election or waiver to be made after certificating and amend the certificate accordingly, without retroactive effect.

**(b) Term**

**(1) In general**

Except as provided in paragraph (2), the term of plant variety protection shall expire 20 years from the date of issue of the certificate in the United States, except that—

(A) in the case of a tuber propagated plant variety subject to a waiver granted under section 2402(a)(1)(B)(i) of this title, the term of the plant variety protection shall expire 20 years after the date of the original grant of the plant breeder's rights to the variety outside the United States; and

(B) in the case of a tree or vine, the term of the plant variety protection shall expire 25 years from the date of issue of the certificate.

**(2) Exceptions**

If the certificate is not issued within three years from the effective filing date, the Secretary may shorten the term by the amount of delay in the prosecution of the application attributed by the Secretary to the applicant.

**(c) Expiration upon failure to comply with regulations; notice**

The term of plant variety protection shall also expire if the owner fails to comply with regulations, in force at the time of certifying, relating to replenishing seed in a public repository, or requiring the submission of a different name for the variety, except that this expiration shall not occur unless notice is mailed to the last owner recorded as provided in section 2531(d) of this title and the last owner fails, within the time allowed thereafter, not less than three months, to comply with said regulations, paying an additional fee to be prescribed by the Secretary.

7 C.F.R.:

**TITLE 7—AGRICULTURE**

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**SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE  
(STANDARDS, INSPECTIONS, MARKETING PRACTICES),  
DEPARTMENT OF AGRICULTURE**

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**SUBCHAPTER E—COMMODITY LABORATORY TESTING PROGRAMS**

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**PART 97—PLANT VARIETY AND PROTECTION**

SCOPE

**§ 97.1 General.**

Certificates of protection are issued by the Plant Variety Protection office for new, distinct, uniform, and stable varieties of sexually reproduced or tuber propagated plants. Each certificate of plant variety protection certifies that the breeder has the right, during the term of the protection, to prevent others from selling the variety, offering it for sale, reproducing it, importing or exporting it, conditioning it, stocking it, or using it in producing a hybrid or different variety from it, as provided by the Act.

DEFINITIONS

**§ 97.2 Meaning of words.**

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. The definitions of terms contained in the Act shall apply to such terms when used in this part. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be considered to mean:

*Abandoned application.* An application which has not been pursued to completion within the time allowed by the Office or has been voluntarily abandoned.

*Act.* The Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

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*Applicant.* The person who applied for a certificate of plant variety protection.

*Application.* An application for plant variety protection under the Act.

*Assignee.* A person to whom an owner assigns his/her rights in whole or in part.

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*Certificate.* A certificate of plant variety protection issued under the Act by the Office.

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*Commissioner.* The Examiner in Chief of the Office.

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*Examiner.* An employee of the Plant Variety Protection Office who determines whether a certificate is entitled to be issued. The term shall, in all cases, include the Commissioner.

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*Office or Plant Variety Protection Office.* The Plant Variety Protection Office, Science and Technology Division, AMS, USDA.

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*Owner.* A breeder who developed or discovered a variety for which plant variety protection may be applied for under the Act, or a person to whom the rights to such variety have been assigned or transferred.

## ADMINISTRATION

### § 97.3 Plant Variety Protection Board.

(a) The Plant Variety Protection Board shall consist of 14 members appointed for a 2-year term. The Board shall be appointed every 2 years and shall consist of individuals who are experts in various areas of varietal development. The membership of the Board, which shall include farmer representation, shall be drawn approximately equally from the private or seed industry sector and from the government or public sector. No member shall be eligible to act on any matter involving any appeal or questions under section 44 of the Act, in which the member or his or her employer has a direct financial interest.

(b) The functions of the Board are to:

- (1) Advise the Secretary concerning adoption of rules and regulations to facilitate the proper administration of the Act;
  - (2) Make advisory decisions on all appeals from the examiner or Commissioner;
  - (3) Advise the Secretary on the declaration of a protected variety open to use in the public interest; and
  - (4) Advise the Secretary on any other matters under the regulations in this part.
- (c) The proceedings of the Board shall be conducted in accordance with the Federal Advisory Committee Act, Administrative Regulations of the U.S. Department of Agriculture (7 CFR part 25), and such additional operating procedures as are adopted by members of the Board.

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#### THE APPLICATION

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#### **§ 97.20 Abandonment for failure to respond within the time limit.**

(a) Except as otherwise provided in § 97.104, if an applicant fails to advance actively his or her application within 30 days after the date when the last request for action was mailed to the applicant by the Office, or within such longer time as may be fixed by the Commissioner, the application shall be deemed abandoned. The application fee in such cases will not be refunded.

(b) The submission of an amendment to the application, not responsive to the last request by the Office for action, and any proceedings relative thereto, shall not operate to save the application from abandonment.

(c) When the applicant makes a bona fide attempt to advance the application, and is in substantial compliance with the request for action, but has inadvertently failed to comply with some procedural requirement, opportunity to comply with the procedural requirement shall be given to the applicant before the application shall be deemed abandoned. The Commissioner may set a period, not less than 30 days, to correct any deficiency in the application.

#### **§ 97.21 Extension of time for reply.**

The time for reply by an applicant to a request by the Office for certain action, shall be extended by the Commissioner only for good and sufficient cause, and for a specified reasonable time. A request for extension

and appropriate fee shall be filed on or before the specified time for reply. In no case shall the mere filing of a request for extension require the granting of an extension or state the time for reply.

**§ 97.22 Revival of an application abandoned for failure to reply.**

An application abandoned for failure on the part of the applicant to advance actively his or her application to its completion, in accordance with the regulations in this part, may be revived as a pending application within 3 months of such abandonment, upon a finding by the Commissioner that the failure was inadvertent or unavoidable and without fraudulent intent. A request to revive an abandoned application shall be accompanied by a written statement showing the cause of the failure to respond, a response to the last request for action, and by the specified fee.

**§ 97.23 Voluntary withdrawal and abandonment of an application.**

(a) An application may be voluntarily withdrawn or abandoned by submitting to the Office a written request for withdrawal or abandonment, signed by the applicant or his or her attorney of record, if any, or the assignee of record, if any.

(b) An application which has been voluntarily abandoned may be revived within 3 months of such abandonment by the payment of the prescribed fee and a showing that the abandonment occurred without fraudulent intent.

(c) An original application which has been voluntarily withdrawn shall be returned to the applicant and may be reconsidered only by refiling and payment of a new application fee.

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## APPEAL TO THE SECRETARY

### **§ 97.300 Petition to the Secretary.**

(a) Petition may be made to the Secretary from any final action of the Commissioner denying an application or refusing to allow a certificate to be issued, or from any adverse decision of the Commissioner made under §§ 97.18(c), 97.107, 97.201(e), and 97.220.

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(d) Upon request, an opportunity to present data, views, and arguments orally, in an informal manner or in a formal hearing, shall be given to interested persons. If a formal hearing is requested, the proceeding shall be conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under various Statutes set forth in §§ 1.130 through 1.151 of this title.

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### **§ 97.302 Decision by the Secretary.**

(a) The Secretary, after receiving the advice of the Board, may affirm or reverse the decision of the Commissioner, in whole or in part.

(b) Should the decision of the Secretary include an explicit statement that a certificate be allowed, based on an amended application, the applicant shall have the right to amend his or her application in conformity with such statement and such decision shall be binding on the Commissioner.

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## REVIEW OF DECISIONS BY COURT

### **§ 97.500 Appeal to U.S. Courts.**

Any applicant dissatisfied with the decision of the Secretary on appeal may appeal to the U.S. Court of Customs and Patent Appeals or the U.S. Courts of Appeals, or institute a civil action in the U.S. District Court as set forth in the Act. In such cases, the appellant or plaintiff shall give notice to the Secretary, state the reasons for appeal or civil action, and obtain a certified copy of the record. The certified copy of the record shall be forwarded to the Court by the Plant Variety Protection Office on order of, and at the expense of the appellant or plaintiff

7 C.F.R. §§ 97.1-3, .20-23(a)-(c), .300(a), (d), .302, .500.

**PETITIONER'S RIGHT TO APPEAL  
UNDER 7 U.S.C. § 2443 AND 7 C.F.R. § 97.300(a)**

Prior to addressing the merits, Petitioner's right to appeal the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a) and my authority to consider Petitioner's appeal, should be briefly addressed.

Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) provides, when the Plant Variety Protection Office refuses an application for plant variety protection, the applicant may appeal to the Secretary of Agriculture. Effective December 1, 1977, the Secretary of Agriculture delegated to the Judicial Officer authority to exercise the functions of the Secretary of Agriculture where an appeal from a refusal of an application for plant variety protection is filed under 7 U.S.C. § 2443.<sup>3</sup> The Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 is not literally a refusal of an application for plant variety protection. Nonetheless, the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 as a pending application has the same effect as a refusal of an application for plant variety protection. Therefore, while not free from doubt, I conclude: (1) Petitioner properly instituted its appeal of the Commissioner's denial of Petitioner's request for revival under 7 U.S.C. § 2443 and

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<sup>3</sup>68 Fed. Reg. 27,431-50 (May 20, 2003) (to be codified at 7 C.F.R. § 2.35(a)(8)).  
*See also* 42 Fed. Reg. 61,029-30 (Dec. 1, 1977).

7 C.F.R. § 97.300(a); and (2) Petitioner's appeal of the Commissioner's denial of Petitioner's request for revival falls within the authority delegated to the Judicial Officer by the Secretary of Agriculture to hear appeals filed under 7 U.S.C. § 2443.

### **INTRODUCTION**

Section 97.300(d) of the Regulations (7 C.F.R. § 97.300(d)) provides parties to a proceeding instituted under 7 C.F.R. § 97.300(a) the right to present their positions in an informal manner or in a formal hearing conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). Petitioner chose the opportunity to present its position in an informal manner rather than in a formal hearing. Consequently, the record contains no exhibits that have been received into evidence and no testimony given under oath or affirmation and subject to cross-examination. Instead, the record consists of, and my findings of fact are based upon, the filings by Petitioner and the Commissioner and the presentations given by Petitioner and the Commissioner at the January 2, 2003, informal conference and the March 5, 2003, Plant Variety Protection Board hearing. A review of the filings and transcripts of the presentations by Petitioner and the Commissioner reveals that the salient facts are not in dispute. Instead, Petitioner and the Commissioner dispute the conclusions that should be drawn from those facts.

### **FINDINGS OF FACT**

1. Petitioner is an agribusiness headquartered in Boise, Idaho. One of Petitioner's business lines is turf and horticulture. Petitioner's Jacklin Seed Division is a producer and marketer of grass seed for golf course and other uses. (Pet. at 3.)

2. One variety of golf course grass is a creeping bentgrass known as "Lofts L-93." Lofts Seed, Inc., originally developed the Lofts L-93 variety. Dr. Virginia Lehman, a member of the Plant Variety Protection Board, is one of the scientists who developed Lofts L-93 on behalf of Lofts Seed, Inc. On May 8, 1996, Lofts Seed, Inc., filed an application for a certificate of plant variety protection for Lofts L-93 with the Plant Variety Protection Office. The Plant Variety Protection Office designated the application "PVP Application No. 9600256." (Pet. at 3-4.)

3. In a letter dated January 21, 1999, to Dr. Virginia Lehman, the Plant Variety Protection Office requested that Lofts Seed, Inc., provide additional information regarding PVP Application No. 9600256 on or before April 21, 1999, as follows:

All requested information must be in the Plant Variety Protection Office on or before **April 21, 1999**, or this application will be deemed abandoned. A proposal for an extension of time to supply the requested information may be made on or before the deadline specified above. Such a request must be accompanied by a \$50 fee and an explanation of why additional time is necessary, the amount of time required, as well as a detailed plan explaining how the information will be obtained if the extension is granted. See sections 97.20 through 97.23, 97.104, and 97.175 of the Regulations and Rules of Practice under the Plant Variety Protection Act for information on extensions and abandoned applications.

Ex. A, Tab 9 at 2, attached to Pet. (emphasis in original).

4. Dr. Virginia Lehman requested that the Plant Variety Protection Office extend the time for providing the requested additional information to November 15, 2000. The Plant Variety Protection Office extended the time for receipt of the requested additional information to November 1, 2000. Subsequently, the Plant Variety Protection Office extended the time for receipt of the requested additional information to November 15, 2000. (Ex. A, Tabs 10 and 12, attached to Pet.)

5. In 1999, AgriBioTech, Inc., acquired Lofts Seed, Inc., and thereby obtained an ownership interest in Lofts L-93. In December 1999, AgriBioTech, Inc., notified the Plant Variety Protection Office of its interest in Lofts L-93 and PVP Application No. 9600256 and stated Dr. Virginia Lehman was authorized to deal with all of AgriBioTech, Inc.'s Plant Variety Protection Act "grass applications." (Pet. at 4-5; Ex. A, Tabs 2-3, attached to Pet.)

6. On January 25, 2000, AgriBioTech, Inc., filed for bankruptcy protection in the United States Bankruptcy Court for the District of Nevada. Petitioner, Budd Seed, and ProSeeds Marketing, Inc., purchased the majority of AgriBioTech, Inc.'s turf-seed assets, including the rights to Lofts L-93 and the rights to PVP Application No. 9600256. Petitioner, Budd Seed, and ProSeeds Marketing, Inc., split the assets which they purchased out of the AgriBioTech, Inc., bankruptcy, and on July 31, 2000, Petitioner became the sole owner of Lofts L-93. (Pet. at 5; Ex. A at 2, attached to Pet.; Ex. A, Tab 4, attached to Pet.; Transcript of the Informal Conference at 10-12.)

7. In a letter dated December 8, 2000, the Plant Variety Protection Office informed Dr. Virginia Lehman that, as the November 15, 2000, deadline for providing the

Plant Variety Protection Office with additional information had passed, PVP Application

No. 9600256 was considered abandoned, as follows:

We have not received the information requested by the extended deadline of November 15, 2000. Since the information requested was not received within the extended time period, the subject application is considered permanently abandoned as of November 16, 2000.

Ex. A, Tab 12, attached to Pet.

8. Until approximately late March 2001, Petitioner was unaware of the November 15, 2000, deadline for providing the Plant Variety Protection Office with additional information and the abandoned status of PVP Application No. 9600256 that took effect beginning November 16, 2000. The Plant Variety Protection Office website listed the PVP Application No. 9600256 applicant as “AgriBioTech, Inc.,” and the status of PVP Application No. 9600256 as “Application Pending” at least until March 22, 2001. During the period following Petitioner’s acquisition of Lofts L-93, Petitioner used the Plant Variety Protection Office website to track the status of PVP Application No. 9600256. (Pet. at 6; Ex. A at 5, attached to Pet.; Ex. A, Tab 17, attached to Pet.)

9. Petitioner first contacted the Plant Variety Protection Office regarding Lofts L-93 by letter dated March 22, 2001. In that letter, Petitioner requested that the Plant Variety Protection Office record the assignment from AgriBioTech, Inc., to Petitioner of various plant varieties, including Lofts L-93. Dr. A. Douglas Brede, Research Director at Petitioner’s Jacklin Seed Division, learned that the Plant Variety Protection Office considered PVP Application No. 9600256 abandoned, and in a letter dated March 29, 2001,

requested that the Plant Variety Protection Office “lift the abandonment of the ‘L-93’ PVP application.” (Pet. at 6; Ex. A at 7, attached to Pet.; Ex. A, Tabs 4, 19, and 32, attached to Pet.)

10. In a letter dated April 20, 2001, the Plant Variety Protection Office responded to Petitioner’s March 29, 2001, letter stating the Plant Variety Protection Office had declared PVP Application No. 9600256 permanently abandoned, as follows:

On November 16, 2000, in accordance with section 97.20(a) of the Regulations and Rules of Practice under the Plant Variety Protection Act (PVPA), application for [Lofts L-93] was declared abandoned. In accordance with section 97.22, the applicant was given 3 months to revive the abandoned application. This Office, having received no request from the applicant’s representative, declared the application permanently abandoned.

Ex. A, Tab 33, attached to Pet.

11. In a letter dated May 13, 2002, the Commissioner denied Petitioner’s request to record the assignment of Lofts L-93 from AgriBioTech, Inc., to Petitioner. In that letter, the Commissioner states the denial of Petitioner’s request to record the assignment is not a determination of Petitioner’s right to revive PVP Application No. 9600256 as a pending application, as follows:

This is not a determination that Simplot does not possess some residual interest in the abandoned application, including the right to pursue its revival as a pending application. The procedure for the revival of an application abandoned for failure to advance the application is to submit a request to the Commissioner showing the cause of the failure to respond, a response to the last request for action, and the required fee (7 CFR 97.22). Such a request must be timely.

Ex. A, Tab 1, attached to Pet.

12. In June 2002, Petitioner requested revival of PVP Application No. 9600256 (Ex. A, attached to Pet.). The Commissioner denied Petitioner's request for revival of PVP Application No. 9600256 as a pending application in a letter dated July 25, 2002, which states as follows:

Upon reconsideration, the request of J.R. Simplot Company ("Simplot") to revive the abandoned application for 'Lofts L-93' is denied.

The revival of an abandoned application is governed by Section 97.22 of the regulations (7 C.F.R. 97.22), which provides as follows:

97.22 Revival of an application abandoned for failure to reply.

An application abandoned for failure on the part of the applicant to advance actively his or her application to its completion, in accordance with the regulations in this part, may be revived as a pending application within 3 months of such abandonment, upon a finding by the Commissioner that the failure was inadvertent or unavoidable and without fraudulent intent. A request to revive an abandoned application shall be accompanied by a written statement showing the cause of the failure to respond, a response to the last request for action, and by the specified fee.

The Plant Variety Protection Office ("PVPO") recognizes Simplot as the successor in interest to AgriBioTech, Inc., (the successor to the original applicant) and entitled to pursue the revival of the abandoned application.

On March 22, 2001, Simplot wrote to the PVPO, requesting that the assignment of various certificates of protection and applications, including the application at issue, be recorded. This was the first communication from Simplot regarding the application. Within a few days, Simplot was informed that the application had been abandoned and on March 29, 2001, Simplot wrote asking for a waiver of the time limits. It is undisputed that the application was abandoned by Simplot's predecessor on November 15, 2000, by failing to respond to a request for information from the PVPO by that deadline.

Simplot contends that the abandoned application should be revived because the failure to actively advance the certificate is not attributable to Simplot

and because the delay in responding to the communication was inadvertent and without fraudulent intent attributable to Simplot. In particular, Simplot contends that it faced “numerous roadblocks” in its attempt to actively advance the application. These included the negligence of its predecessor (and its predecessor’s agents) in allowing the abandonment, the general disarray of its predecessor’s records and property, and “the unwillingness of the PVPO to allow Simplot access to the property purchased subject to the Bankruptcy Court’s order.” (Petition, p. 3)

In retrospect PVPO should have provided Simplot access to a copy of the abandoned application and related correspondence. Simplot was the successor in interest to the applicant of record and the matter of the recognition of the assignment should have been distinguished from the question of the recordability of an abandoned application. However, this delay played no part in the permanent abandonment of the application. The application was abandoned on November 15, 2000. The time for the possible revival of the application expired three months later, on February 16, 2001, before Simplot’s first communication with the PVPO.

As stated in the letter of May 13, 2002, denying the request that the abandoned application be recorded, any request to revive an abandoned application must be timely. It is unfortunate that the application was not actively advanced by Simplot’s predecessors and was abandoned. Nonetheless, the time for the possible revival of the abandoned certificate expired before Simplot attempted to revive it.

Accordingly, the request to return application no. 9600256 for the variety ‘Lofts L-93’ to pending status must be denied.

Ex. B, attached to Pet.

13. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to advise the Judicial Officer on the Petition. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise the Judicial Officer that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0002, “were fair and

consistent” with its handling of plant variety protection applications and to recommend that PVP Application No. 9600256 “should not be revived.” (Transcript of the Plant Variety Protection Board Hearing at 78-80.)

### CONCLUSIONS OF LAW

Based on the Findings of Fact in this Decision and Order, I conclude:

1. Petitioner properly instituted its appeal of the Commissioner’s denial of its request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a);
2. The Secretary of Agriculture has jurisdiction to hear Petitioner’s appeal from the Commissioner’s denial of its request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a);
3. Petitioner’s appeal of the Commissioner’s denial of its request for revival of PVP Application No. 9600256 falls within the authority delegated to the Judicial Officer by the Secretary of Agriculture to hear appeals filed under 7 U.S.C. § 2443;
4. The failure to advance PVP Application No. 9600256 was not “unavoidable” as that term is used in 7 C.F.R. § 97.22;
5. The failure to advance PVP Application No. 9600256 was “inadvertent” and “without fraudulent intent” as those terms are used in 7 C.F.R. § 97.22;
6. PVP Application No. 9600256 was abandoned effective November 16, 2000;
7. PVP Application No. 9600256 was not revived as a pending application within 3 months following abandonment as required by 7 C.F.R. § 97.22; and

8. The Commissioner's denial of Petitioner's request to revive PVP Application No. 9600256 as a pending application, which Petitioner submitted after the 3-month period for revival provided in 7 C.F.R. § 97.22 had expired, was not error.

## **DISCUSSION**

### **Petitioner's Petition**

Section 97.22 of the Regulations (7 C.F.R. § 97.22) provides that an application abandoned for failure on the part of an applicant to advance the application may be revived as a pending application within 3 months of the abandonment, upon a finding by the Commissioner that the failure to advance the application was inadvertent or unavoidable and without fraudulent intent. The filings and presentations by the parties establish that PVP Application No. 9600256 was not advanced and was abandoned effective November 16, 2000; thus, the 3-month period for revival of PVP Application No. 9600256 as a pending application expired February 16, 2001. Neither the applicant of record, AgriBioTech, Inc., nor Petitioner requested revival of PVP Application No. 9600256 as a pending application during the 3-month period for revival provided in 7 C.F.R. § 97.22. Petitioner first communicated with the Plant Variety Protection Office regarding PVP Application No. 9600256 in a letter dated March 22, 2001, 1 month 6 days after the 3-month period for revival provided in 7 C.F.R. § 97.22 had expired. Petitioner requested revival of PVP Application No. 9600256 in a letter dated June 28, 2002. The Commissioner denied Petitioner's request for revival of PVP Application No. 9600256 because the time for possible revival expired before Petitioner attempted to revive PVP Application

No. 9600256. Petitioner appeals the Commissioner's denial of its request to revive PVP Application No. 9600256 as a pending application.

Petitioner raises seven issues in its Petition. First, Petitioner contends the 3-month period for revival of abandoned applications in 7 C.F.R. § 97.22 is a procedural rule that the United States Department of Agriculture may waive when justice requires. Petitioner argues that justice requires a waiver of the deadline for revival of PVP Application No. 9600256. (Pet. at 13-17.) The Commissioner apparently agrees that 7 C.F.R. § 97.22 is a procedural rule but states: "No case has held that an agency cannot issue procedural rules and then follow them. Procedural rules are rules, not suggestions." (Answer at 8.)

I agree with Petitioner's contention that the 3-month revival period in 7 C.F.R. § 97.22 is a procedural rule. However, once an applicant abandons an application for plant variety protection and the period for reviving the application has expired, the abandoned application is permanently abandoned and the Commissioner then has no application before him. With no application before him, the Commissioner cannot change the status of the application from "permanently abandoned" to "pending."

Moreover, even if I found the Commissioner could have waived the deadline for revival of PVP Application No. 9600256 after February 16, 2001, I would not find that the Commissioner erred by failing to waive the deadline. Petitioner, relying on *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), contends a long-established principle of administrative law permits agencies to waive procedural

regulations when justice requires (Pet. at 13). However, equally well-established is the principle that ordinarily agencies must follow their own regulations.<sup>4</sup>

Petitioner cites three cases in which agencies waived procedural regulations and on judicial review each agency waiver was upheld (Pet. at 13-15).<sup>5</sup> While these cases support Petitioner's general point that an agency may, under limited circumstances, waive procedural rules, the cases are not applicable to the instant proceeding in which the Commissioner did not waive 7 C.F.R. § 97.22 but, instead, followed the regulation.

Petitioner cites one case, *Spitzer Great Lakes Ltd. v. EPA*, 173 F.3d 412 (6th Cir. 1999), in which the Court held the Environmental Protection Agency abused its discretion by refusing to waive a procedural regulation where an appellant in an agency proceeding relied upon and complied with materially misleading information provided by the agency. However, the facts in the instant proceeding are not similar to those in *Spitzer Great Lakes Ltd.* In the instant proceeding, Petitioner first contacted the Commissioner regarding Lofts L-93 in a letter dated March 22, 2001, 1 month 6 days after the period for reviving PVP

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<sup>4</sup>*St. Anthony Hospital v. HHS*, 309 F.3d 680, 709 (10th Cir. 2002); *Nelson v. INS*, 232 F.3d 258, 262 (1st Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir.), *cert. denied*, 530 U.S. 1270 (2000); *Bergamo v. CFTC*, 192 F.3d 78, 79 (2d Cir. 1999); *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997); *Oy v. United States*, 61 F.3d 866, 871 (2d Cir. 1995); *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994); *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

<sup>5</sup>Specifically, Petitioner cites *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *Fried v. Hinson*, 78 F.3d 688 (D.C. Cir. 1996); and *Oy v. United States*, 61 F.3d 899 (Fed. Cir. 1995).

Application No. 9600256 had expired. Therefore, unlike *Spitzer Great Lakes Ltd.*, there was no agency communication to Petitioner that could have caused or contributed to Petitioner's failure to revive PVP Application No. 9600256 prior to the expiration of the revival period. The record establishes the Commissioner did not know and did not have reason to know that Petitioner had any interest in Lofts L-93 or PVP Application No. 9600256 until after the period for revival of the abandoned application had expired. The record also establishes the Commissioner provided accurate information regarding the status of PVP Application No. 9600256 to AgriBioTech, Inc., the applicant of record.

Petitioner asserts a number of facts illustrate the injustice that follows from the Commissioner's refusal to waive the deadline for revival of PVP Application No. 9600256. Petitioner contends AgriBioTech, Inc., only provided Petitioner with limited access to its chaotic and uninformative business records regarding Lofts L-93 and other purchases; AgriBioTech, Inc., and Dr. Virginia Lehman failed to cooperate with Petitioner regarding Lofts L-93 and PVP Application No. 9600256; AgriBioTech, Inc., and Dr. Virginia Lehman allowed PVP Application No. 9600256 to become abandoned; and neither AgriBioTech, Inc., nor Dr. Virginia Lehman informed Petitioner of the status of PVP Application No. 9600256 (Pet. at 15-17). I find the purported lack of communication and cooperation between Petitioner and AgriBioTech, Inc., unfortunate. However, the Commissioner did not cause the lack of communication and cooperation between Petitioner and AgriBioTech, Inc., and prior to the expiration of the revival period, the Commissioner did not know or have reason to know about the lack of communication and cooperation between Petitioner

and AgriBioTech, Inc. I do not find Petitioner's business relationships with AgriBioTech, Inc., and with Dr. Virginia Lehman compel the Commissioner to waive the deadline for revival of PVP Application No. 9600256.

Petitioner also contends the Commissioner's refusal is unjust because of purportedly confusing Plant Variety Protection Office communications provided Petitioner. Petitioner references two letters, one dated April 20, 2001, from the Plant Variety Protection Office to Dr. A. Douglas Brede, the other dated May 13, 2002, from the Commissioner to Gary M. Zinkgraf (Pet. at 17; Ex. A, Tabs 1 and 33, attached to Pet.), which Petitioner found confusing. The Plant Variety Protection Office and the Commissioner sent Petitioner these letters after the period for revival of PVP Application No. 9600256 had expired; thus, the letters could not have caused or contributed to Petitioner's failure to request revival of PVP Application No. 9600256 within the 3-month period provided in 7 C.F.R. § 97.22. Therefore, I do not find the letters dated April 20, 2001, and May 13, 2002, support Petitioner's contention that justice requires that the Commissioner waive the deadline for revival of PVP Application No. 9600256.

Finally, Petitioner asserts the Plant Variety Protection Office website listed PVP Application No. 9600256 as "'pending' well into March of 2001." (Pet. at 16.) I find the Commissioner's inaccurate website troubling. However, the website contains information for the public and the Commissioner also communicates directly with the applicant of record (Transcript of the Informal Conference at 59). The Commissioner communicated with the applicant of record, AgriBioTech, Inc., regarding the status of PVP Application

No. 9600256. The record establishes that the Commissioner accurately informed AgriBioTech, Inc., of the status of PVP Application No. 9600256, the date on which PVP Application No. 9600256 became abandoned, and the date on which the period for revival of PVP Application No. 9600256 as a pending application would expire. Petitioner became sole owner of Lofts L-93 on July 31, 2000, and could have become the applicant of record at any time after July 31, 2000, merely by submitting a request to the Commissioner (Transcript of the Informal Conference at 59). Petitioner did not request to become the applicant of record prior to the expiration of the period for revival of PVP Application No. 9600256, and the Commissioner, as he was required to do, continued to communicate with AgriBioTech, Inc. I do not find, under these circumstances, that the inaccurate Plant Variety Protection Office website supports Petitioner's contention that justice requires that the Commissioner waive the deadline for revival of PVP Application No. 9600256.

Second, Petitioner contends the Plant Variety Protection Act explicitly addresses delay caused by an applicant in a manner directly contrary to the 3-month revival period in 7 C.F.R. § 97.22. Petitioner correctly points out that 7 U.S.C. § 2483(b) limits the term of a certificate of plant variety protection to 20 years from the date of issuance of the certificate in the United States<sup>6</sup> and provides, if the certificate is not issued within 3 years

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<sup>6</sup>In the case of a tuber propagated plant variety subject to a waiver granted under 7 U.S.C. § 2402(a)(1)(B)(i), the term of a certificate of plant variety protection is 20 years after the date of the original grant of the plant breeder's rights to the variety outside the United States. In the case of a tree or vine, the term of a certificate of plant variety protection is 25 years from the date of issuance of the certificate. 7 U.S.C. §

(continued...)

from the effective filing date of the application for the certificate, the Secretary of Agriculture may shorten the term of the certificate by the amount of delay in prosecution of the application attributable to the applicant. Petitioner states, rather than authorizing the Secretary of Agriculture to declare an application abandoned, Congress authorized the Secretary of Agriculture to reduce the period of plant variety protection afforded by a certificate for delay the Secretary of Agriculture determines is attributable to the applicant. (Pet. at 19-20.) The Commissioner did not respond to this issue in his Answer.

I find nothing in the Plant Variety Protection Act to indicate that Congress intended 7 U.S.C. § 2483(b) as a limitation on the Secretary of Agriculture's authority in 7 U.S.C. § 2326 to establish regulations for the conduct of proceedings in the Plant Variety Protection Office or that Congress intended 7 U.S.C. § 2483(b)(2) to be the exclusive mechanism to discourage applicant delay in the prosecution of an application for a certificate of plant variety protection.<sup>7</sup> Therefore, I reject Petitioner's contention that the Secretary of Agriculture is not authorized to promulgate regulations to provide for abandonment of an application when an applicant fails to advance the application and to

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<sup>6</sup>(...continued)  
2483(b)(1)(A), (B).

<sup>7</sup>If 7 U.S.C. § 2483(b)(2) were the exclusive mechanism to discourage applicant delay in the prosecution of an application for a certificate of plant variety protection, an applicant could delay the disposition of an application for years without jeopardizing the applicant's opportunity to obtain plant variety protection albeit for a shorter period than the maximum period provided in 7 U.S.C. § 2483(b)(1).

limit the period during which an abandoned application may be revived as a pending application.

Third, Petitioner contends the 3-month revival deadline is inconsistent with the Plant Variety Protection Act. Citing 7 U.S.C. § 2402(a), Petitioner states Congress established only four criteria for obtaining plant variety protection. The applicant must show the variety that is the subject of the application is: (1) new, (2) distinct, (3) uniform, and (4) stable. Petitioner contends a regulation that cuts off an applicant's right to demonstrate a plant variety meets these four criteria solely because an administrative deadline is missed violates this statutory provision. (Pet. at 18-22, 29-30.) The Commissioner responds that 7 C.F.R. § 97.22 is authorized by the Plant Variety Protection Act and, in particular, by 7 U.S.C. § 2442(b) (Answer at 2-5).

Entitlement to plant variety protection is subject to the conditions and requirements of the Plant Variety Protection Act.<sup>8</sup> The Plant Variety Protection Act does not provide that the only condition for obtaining plant variety protection is the applicant's showing that the variety that is the subject of the application is new, distinct, uniform, and stable. Congress explicitly provided other conditions and requirements necessary to obtain a certificate of plant variety protection. For example, 7 U.S.C. § 2421(a) requires an applicant to file a signed written application accompanied by a fee and 7 U.S.C. § 2481(b) requires the payment of a fee and deposit in a public repository of a viable sample of basic

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<sup>8</sup>7 U.S.C. § 2402(a).

seed necessary for the propagation of the variety, prior to the issuance of a certificate of plant variety protection. As for limitations on the time for applicant action, Congress explicitly authorized the Secretary of Agriculture to establish a time for applicant action after the Secretary of Agriculture mails the applicant notice of an action other than an allowance of plant variety protection.<sup>9</sup> An applicant that fails to take action within the time set by the Secretary of Agriculture has failed to comply with the conditions and requirements of the Plant Variety Protection Act. Moreover, Congress explicitly authorized the Secretary of Agriculture to establish regulations for the conduct of proceedings in the Plant Variety Protection Office.<sup>10</sup> The process for the examination of an application for plant variety protection is a proceeding conducted in the Plant Variety Protection Office, and 7 C.F.R. § 97.22 is a regulation for the conduct of that proceeding. Therefore, I reject Petitioner's contention that the 3-month period for revival of an abandoned application in 7 C.F.R. § 97.22, is inconsistent with the Plant Variety Protection Act.

Fourth, Petitioner asserts the Secretary of Agriculture is only authorized by the Plant Variety Protection Act to issue procedural rules for the conduct of proceedings within the Plant Variety Protection Office. Petitioner contends, as construed by the Commissioner, 7 C.F.R. § 97.22 is an absolute unwaivable bar to revival of an abandoned application and does not operate as a procedural rule; therefore, as construed by the

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<sup>9</sup>7 U.S.C. § 2442(b).

<sup>10</sup>7 U.S.C. § 2326.

Commissioner, the Secretary of Agriculture has no authority to issue 7 C.F.R. § 97.22. (Pet. at 22-23.)

Section 6 of the Plant Variety Protection Act (7 U.S.C. § 2326) authorizes the Secretary of Agriculture to promulgate regulations for the conduct of proceedings in the Plant Variety Protection Office. The process for the examination of an application for plant variety protection is a proceeding conducted in the Plant Variety Protection Office. Section 97.22 of the Regulations (7 C.F.R. § 97.22), which limits the time for revival of abandoned applications for plant variety protection, is a regulation for the conduct of those proceedings; thus, the Secretary of Agriculture is authorized by 7 U.S.C. § 2326 to promulgate 7 C.F.R. § 97.22.

As discussed in this Decision and Order, *supra*, I agree with Petitioner's and the Commissioner's position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, even if I found the Secretary of Agriculture is only authorized to promulgate procedural rules under 7 U.S.C. § 2326, as Petitioner contends, I would not find that 7 C.F.R. § 97.22 is beyond the authority granted to the Secretary of Agriculture.

Petitioner appears to take the position that since 7 C.F.R. § 97.22, as construed by the Commissioner, prohibits Petitioner from obtaining a certificate of plant variety protection for Lofts L-93, 7 C.F.R. § 97.22 is a substantive rule. I disagree. A procedural rule is a rule that itself does not alter the rights or interests of the parties although it may

alter the manner in which the parties present themselves to the agency.<sup>11</sup> A substantive rule, in contrast, puts a stamp of agency approval or disapproval on a given type of behavior.<sup>12</sup> Section 97.22 of the Regulations (7 C.F.R. § 97.22) does not itself alter rights or place a stamp of approval or disapproval on a given type of behavior. Instead, 7 C.F.R. § 97.22 limits the time during which an applicant may request revival of an abandoned application for plant variety protection and requires that the request for revival be accompanied by a fee and a written statement addressing issues pertinent to the abandonment of the application. I find 7 C.F.R. § 97.22 is at the procedural end of the spectrum running from “procedural” to “substantive.” Even unambiguously procedural rules can affect the outcome of an agency proceeding.<sup>13</sup> Section 97.22 of the Regulations (7 C.F.R. § 97.22) is not changed from a

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<sup>11</sup>*Chamber of Commerce of the United States v. United States Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999).

<sup>12</sup>*Chamber of Commerce of the United States v. United States Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999); *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

<sup>13</sup>*See generally Freund v. Nycomed Amersham*, 326 F.3d 1070, 1079 n.9 (9th Cir. 2003) (stating the fact that a procedural rule may affect the outcome of an appeal does not make the rule substantive); *Chamber of Commerce of the United States v. United States Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (stating even a purely procedural rule can affect the substantive outcome of an agency proceeding); *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (citing with approval *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961), in which the court held a rule was procedural even though failure to observe the rule might cause the loss of substantive rights); *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (stating our circuit, in applying the 5 U.S.C. § 553 exemption for procedural rules, has gradually shifted focus from asking whether a given procedure has a substantial impact on the parties to inquiring whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior; the gradual move away from looking solely into the

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procedural rule to a substantive rule merely because the time limit in 7 C.F.R. § 97.22 affects Petitioner's right to obtain a certificate of plant variety protection for Lofts L-93.

Fifth, Petitioner contends 7 C.F.R. § 97.22 is invalid because the United States Department of Agriculture did not explain the rationale for the 3-month deadline for revival of an abandoned application (Pet. at 24-28).

The Administrative Procedure Act requires that general notice of proposed rulemaking include either the terms or substance of the proposed rule or a description of the subjects and issues involved and that the final rulemaking document contain a concise general statement of the basis and purpose of the final rule.<sup>14</sup> However, these rulemaking requirements do not apply to rules of agency organization, procedure, or practice.<sup>15</sup> As discussed in this Decision and Order, *supra*, I agree with Petitioner's and the Commissioner's position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, the United States Department of Agriculture was not required to include in the pertinent rulemaking documents an explanation of the basis and purpose for the 3-month period for revival in 7 C.F.R. § 97.22.

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<sup>13</sup>(...continued)

substantiality of the impact reflects a recognition that even unambiguously procedural measures affect parties to some degree); *Ranger v. FCC*, 294 F.2d 240, 244 (D.C. Cir. 1961) (stating all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one).

<sup>14</sup>5 U.S.C. § 553(b)(3), (c).

<sup>15</sup>5 U.S.C. § 553(b)(A).

Moreover, the United States Department of Agriculture did explain the basis for the 3-month period during which an applicant may revive an application abandoned for failure to advance the application. In April 1972, the United States Department of Agriculture issued a notice of proposed rulemaking in which it proposed regulations to implement the Plant Variety Protection Act.<sup>16</sup> On October 28, 1972, the United States Department of Agriculture published a final rulemaking document adopting the proposed regulations.<sup>17</sup> The October 1972 final rule has separate provisions for revival of applications abandoned for failure to advance the applications to completion and for revival of applications voluntarily abandoned. The final regulation includes a 3-month period for the revival of voluntarily abandoned applications but provides no limitation on the time for the revival of applications abandoned for failure to advance the applications to completion.<sup>18</sup>

The United States Department of Agriculture published a notice of proposed rulemaking in 1976, in which, *inter alia*, it proposed to provide the same 3-month period for revival of applications abandoned for failure to advance the applications to completion as it provided for revival of voluntarily abandoned applications. The preamble in the notice of proposed rulemaking states: in order to make the provisions for revival of an application “consistent, it is proposed that an application abandoned for either reason, if revived, must

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<sup>16</sup>37 Fed. Reg. 7672 (Apr. 18, 1972).

<sup>17</sup>37 Fed. Reg. 23,140 (Oct. 28, 1972). These final regulations were codified in 7 C.F.R. pt. 180. In 1993, the Plant Variety Protection Regulations were codified in 7 C.F.R. pt. 97, where they can currently be found (58 Fed. Reg. 42,435 (Aug. 9, 1993)).

<sup>18</sup>37 Fed. Reg. 23,144 (Oct. 28, 1972); 7 C.F.R. §§ 180.22, .23 (1973).

be revived within 3 months.”<sup>19</sup> The United States Department of Agriculture adopted the proposed regulation and the preamble of the final rulemaking document provides the same reason for the amendment as was previously provided in the notice of proposed rulemaking.<sup>20</sup>

Petitioner contends there is no rational basis for making the two revival provisions consistent. However, the adoption of consistent time limits is important when viewed in light of the Plant Variety Protection Act. Section 62(b) of the Plant Variety Protection Act (7 U.S.C. § 2442(b)) provides time limits for an applicant’s taking “appropriate action” after the Secretary of Agriculture mails a notice of an action other than an allowance. The Plant Variety Protection Act does not provide different time limits for “appropriate action” depending on the applicant’s reasons for failure to take appropriate action.

Sixth, Petitioner contends 7 C.F.R. § 97.22 is invalid because the United States Department of Agriculture failed to reference the legal authority under which it proposed the regulation (Pet. at 28).

The Administrative Procedure Act requires that general notice of proposed rulemaking include reference to the legal authority under which the rule is proposed;<sup>21</sup> however, the requirement that notice of proposed rulemaking reference legal authority under which the rule is proposed does not apply to rules of agency organization, procedure,

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<sup>19</sup>41 Fed. Reg. 54,492 (Dec. 14, 1976).

<sup>20</sup>42 Fed. Reg. 9157 (Feb. 15, 1977).

<sup>21</sup>5 U.S.C. § 553(b)(2).

or practice.<sup>22</sup> As discussed in this Decision and Order, *supra*, I agree with Petitioner's and the Commissioner's position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, the United States Department of Agriculture was not required to reference the legal authority under which 7 C.F.R. § 97.22 was proposed.

Moreover, when the United States Department of Agriculture first proposed the Regulations, including the proposed procedure for reviving an application abandoned for failure to advance the application, the United States Department of Agriculture stated in the notice of proposed rulemaking the "Plant Variety Protection Act (84 Stat. 1542)" is the legal authority under which the rule is proposed.<sup>23</sup> Again, when the United States Department of Agriculture proposed to amend a number of provisions in the Regulations, including the procedure for reviving an application abandoned for failure to advance the application, the United States Department of Agriculture stated in the notice of proposed rulemaking the "Plant Variety Protection Act (7 U.S.C. 2321, et seq.)" is the legal authority under which the rule is proposed.<sup>24</sup>

Petitioner contends the references to the Plant Variety Protection Act in these notices of proposed rulemaking are not sufficiently specific. Petitioner suggests the United States Department of Agriculture should have specifically identified 7 U.S.C. §

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<sup>22</sup>5 U.S.C. § 553(b)(A).

<sup>23</sup>37 Fed. Reg. 7672 (Apr. 18, 1972).

<sup>24</sup>41 Fed. Reg. 54,492 (Dec. 14, 1976).

2326 as the legal authority for the procedure for reviving abandoned applications. (Pet. at 28.)

Even if I were to conclude that 7 C.F.R. § 97.22 is a substantive rule required to be promulgated in accordance with 5 U.S.C. § 553(b)(2), I would reject Petitioner's contention that the references to the Plant Variety Protection Act in the relevant notices of proposed rulemaking were not sufficiently specific. The legislative history applicable to the Administrative Procedure Act and the *Attorney General's Manual on the Administrative Procedure Act* (1947) indicate that the purpose of the requirement that each notice of proposed rulemaking contain reference to the legal authority under which the rule is proposed is to provide interested persons with a fair opportunity to comment on the agency's authority to promulgate the proposed rule.<sup>25</sup> The final rulemaking documents related to the two notices of proposed rulemaking in question discuss the comments received but make no mention of any person who submitted a comment indicating that he or she was denied an opportunity to comment on the notices of proposed rulemaking.<sup>26</sup> I find the references to the legal authority in the two notices of proposed rulemaking in question were sufficiently specific to provide interested parties with a fair opportunity to comment on the Secretary of Agriculture's authority to promulgate procedures an applicant must

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<sup>25</sup>See *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1298 (5th Cir. 1983) (quoting S. Rep. No. 79-752 (1945), H.R. Rep. No. 79-1980 (1945), and the *Attorney General's Manual on the Administrative Procedure Act* at 29 (1947)).

<sup>26</sup>37 Fed. Reg. 23,140 (Oct. 28, 1972); 42 Fed. Reg. 9157 (Feb. 15, 1977).

follow in order to revive a plant variety protection application abandoned for failure to advance the application.

Petitioner cites *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290 (5th Cir. 1983), and *Georgetown University Hospital v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987), in support of its position that the references to the Plant Variety Protection Act in the two notices of proposed rulemaking in question are not sufficiently specific. Neither *Global Van Lines* nor *Georgetown University Hospital* concern a failure to sufficiently specify the legal authority under which a rule was proposed. In each case, the Court set aside the rulemaking proceeding because the agency involved failed to reference the proper legal authority for the rule. In *Global Van Lines*, the Interstate Commerce Commission promulgated a rule which allowed freight forwarders to petition to remove restrictions from their existing certificates without having to complete new licensing procedures. In both the notice of proposed rulemaking and the final rule, the Interstate Commerce Commission referenced provisions of the Interstate Commerce Act which the Court concluded did not provide authority for the rule. Similarly, in *Georgetown University Hospital*, the Secretary of Health and Human Services promulgated a medicare reimbursable cost-limit rule and gave it retroactive effect. The Secretary of Health and Human Services referenced section 223 of the Social Security Amendments of 1972 as the legal authority for the retroactive application of the rule. The Court concluded that section 223 of the Social Security Amendments of 1972 did not authorize retroactive cost-limit rules but, instead, authorized

prospective cost-limit rules. I find *Georgetown University Hospital* and *Global Van Lines* inapposite.

Seventh, Petitioner contends 7 C.F.R. § 97.22 is not clearly written. Petitioner states:

It is totally unclear what is supposed to happen within three months of abandonment: is the applicant under an obligation to file a request for revival within three months, or does the finding of the Commissioner have to occur within three months? The most natural English reading is that the finding of the Commissioner must occur within three months. However, this would be a ludicrous outcome as it would mean that [sic] an applicant who files a revival request within a few days of an initial abandonment is at the mercy of the Commissioner's schedule no matter how meritorious the applicant's position regarding inadvertence and non-fraudulent intent.

Pet. at 27.

The Commissioner did not respond to this issue in his Answer. However, based upon correspondence from the Plant Variety Protection Office to Petitioner, it appears the Commissioner's position is that an applicant must make a request for revival within the 3-month period provided in 7 C.F.R. § 97.22.<sup>27</sup>

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<sup>27</sup>In a letter dated April 21, 2001, from the Plant Variety Protection Office to Dr. A. Douglas Brede, the Plant Variety Protection Office states "[t]his office, *having received no request from the applicant's representative*, declared the application permanently abandoned." (Ex. A, Tab 33 at 1, attached to Pet. (emphasis added).) In a letter dated July 25, 2002, from the Commissioner to Richard C. Peet, the Commissioner states:

The application was abandoned on November 15, 2000. The time for the possible revival of the application expired three months later, on February 16, 2001, before Simplot's first communication with the PVPO.

As stated in the letter of May 13, 2002, denying the request that the

(continued...)

Petitioner suggests there are two possible ways to construe 7 C.F.R. § 97.22:

(1) the applicant is required to request revival within the 3-month period following abandonment or (2) the Commissioner is required to make the required findings within the 3-month period following abandonment (Pet. at 27). But, Petitioner's two suggested constructions do not assist Petitioner. PVP Application No. 9600256 was abandoned effective November 16, 2000, and the 3-month period for revival expired February 16, 2001. Petitioner did not request revival within the 3-month period following the November 16, 2000, abandonment, and the Commissioner did not make the required findings within the 3-month period following the November 16, 2000, abandonment. Therefore, I reject Petitioner's suggestion that the lack of clarity in 7 C.F.R. § 97.22 constitutes a basis for waiving the 3-month time limit for revival.

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<sup>27</sup>(...continued)

abandoned application be recorded, *any request to revive an abandoned application must be timely*. It is unfortunate that the application was not actively advanced by Simplot's predecessors and was abandoned. *Nonetheless, the time for the possible revival of the abandoned certificate expired before Simplot attempted to revive it.*

Ex. B at 2, attached to Pet. (emphasis added).

I agree with the Commissioner's apparent position that an applicant must request revival within the 3-month period provided in 7 C.F.R. § 97.22.

### **Petitioner's March 2003 Letters**

Petitioner also raises two issues in letters dated March 14, 2003, and March 27, 2003, which Petitioner sent to me. On April 17, 2003, the Commissioner filed a response to Petitioner's March 14 and 27, 2003, letters (Response to Petitioner's Letters).

First, Petitioner encourages me to consider the advice provided by the Plant Variety Protection Board regarding the disposition of this proceeding for what it is: purely advisory (Petitioner's letter dated Mar. 14, 2003, at 1-2). Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) requires that I seek the advice of the Plant Variety Protection Board before deciding Petitioner's appeal from the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256. Section 97.302 of the Regulations (7 C.F.R. § 97.302) provides that I may issue a decision after receiving advice from the Plant Variety Protection Board. I agree with Petitioner that the Plant Variety Protection Board's role in this proceeding is merely advisory. While I must consider any advice offered by the Plant Variety Protection Board, I am not required to follow the Plant Variety Protection Board's advice. In this proceeding, I sought and received advice from the Plant Variety Protection Board. I have considered the advice given by the Plant Variety Protection Board. My decision to follow the Plant Variety Protection Board's advice is based upon my agreement with the Plant Variety Protection Board, not upon a belief that I am required to follow the Plant Variety Protection Board's advice.

Second, Petitioner asserts Dr. Virginia Lehman did not recuse herself from the Plant Variety Protection Board's March 5, 2003, hearing, as I suggested she do in a

memorandum I sent to Plant Variety Protection Board members on February 18, 2003 (Petitioner's letter dated Mar. 14, 2003, at 2-4; Petitioner's letter dated Mar. 27, 2003).

The transcript of the March 5, 2003, Plant Variety Protection Board hearing establishes that Dr. Virginia Lehman was present during the Plant Variety Protection Board's hearing and answered questions from other members of the Plant Variety Protection Board (Transcript of the Plant Variety Protection Board Hearing at 1, 65-68).<sup>28</sup> However, Dr. Virginia Lehman abstained from voting on the motion regarding the Petition filed in the instant proceeding and Petitioner's petition filed in *In re J.R. Simplot Company*, PVPA Docket No. 02-0001 (Transcript of the Plant Variety Protection Board Hearing at 80). Recusal is "[r]emoval of oneself as a judge or policy-maker in a particular matter."<sup>29</sup> I find Dr. Virginia Lehman's abstention from voting on the motion regarding the Petition filed in the instant proceeding and Petitioner's petition filed in *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, is a recusal.

### **Petitioner's Right to Judicial Review**

Petitioner has the right to judicial review of this Decision and Order in accordance with 7 U.S.C. § 2461 or, in the alternative, 7 U.S.C. § 2462. Appeal under 7 U.S.C. § 2461 must be taken "within sixty days or such further times as the Secretary [of Agriculture] allows," and civil action under 7 U.S.C. § 2462 must be "commenced within sixty days after

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<sup>28</sup>Dr. Virginia Lehman is identified as "Inventor" on pages 65 through 68 of the transcript of the Plant Variety Protection Board hearing.

<sup>29</sup>Black's Law Dictionary 1281 (7th ed. 1999).

[the Secretary of Agriculture's] decision or within such further time as the Secretary [of Agriculture] allows." On May 30, 2003, I held a conference call with Richard G. Stoll and Robert A. Ertman. During the conference call, Richard G. Stoll requested that I allow Petitioner 120 days for any appeal that it may take under 7 U.S.C. § 2461 or any civil action that it may commence under 7 U.S.C. § 2462. Robert A. Ertman stated the Commissioner had no objection to Petitioner's request. Therefore, any appeal under 7 U.S.C. § 2461 must be taken within 120 days after the date of this Decision and Order and any civil action under 7 U.S.C. § 2462 must be commenced within 120 days after the date of this Decision and Order. The date of this Decision and Order is June 2, 2003.

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

**ORDER**

I affirm the Commissioner's July 25, 2002, determination that PVP Application No. 9600256 cannot be revived as a pending application. This Order shall become effective on the day after service on Petitioner.

Done at Washington, DC

June 2, 2003

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William G. Jenson  
Judicial Officer