

10-15-2013

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### Recommended Citation

Peter M. Davenport, *The Department of Agriculture's Rules of Practice: Do They Still Serve Both the Department's and the Public's Needs?*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2013)

Available at: <https://digitalcommons.pepperdine.edu/naalj/vol33/iss2/3>

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## **The Department of Agriculture's Rules of Practice: Do They Still Serve Both the Department's and the Public's Needs?**

**By Peter M. Davenport\***

This article raises the question of whether the Rules of Practice for the U.S. Department of Agriculture<sup>1</sup> (the Department) continue to appropriately serve the interests of both the Department and the public, which the Department is charged with serving. After examining multiple shortcomings of the current provisions, it will be concluded that the current rules of practice at the Department urgently need significant revision.

Administrative law judges at the Department and other federal agencies conduct formal hearings under the Administrative Procedure Act (APA).<sup>2</sup> The proceedings mirror federal civil

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<sup>1</sup> 7 C.F.R. §§ 1.130–1.151 (2013).

<sup>2</sup> 5 U.S.C. §§ 554–557 (1946).

litigation and are governed by applicable rules of evidence and procedure, and the judges are insulated from political influence.<sup>3</sup> An administrative law judge is considered “functionally comparable” to, and acts as the equivalent of, a trial judge.<sup>4</sup>

The types of cases heard by the Department’s administrative law judges involve a full spectrum of complexity, from presiding over rule-making hearings, certifying the record, and simple reviews of administrative records, to lengthy and complex extended trials lasting weeks or even months. The underlying subject matter ranges from fruit flies to elephants; from currants to watermelons; and from specific components of milk and milk-related products to the underlying permit compliance requirements in hydroelectric power or timber cases. Given the variety of cases, it is easily understood why the rules of practice governing the proceedings are essential to a just, speedy, and inexpensive determination in every proceeding. As of December 2012, the Office of Personnel Management reported that there were 1,817 administrative law judges at thirty federal executive agencies.<sup>5</sup> Although many similarities may exist, the rules of practice at the various agencies that have administrative law judges differ considerably, with some having very detailed and lengthy provisions and others with only a very limited number of general provisions.<sup>6</sup>

<sup>3</sup> See *Tennessee v. U.S. Dep’t of Transp.*, 326 F.3d 729, 735–36 (6th Cir. 2003).

<sup>4</sup> *Butz v. Economou*, 438 U.S. 478, 513–14 (1978); see also *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 756–57 (2002).

<sup>5</sup> *Federal Administrative Law Judges by Agency and Level*, U.S. OFFICE OF PERS. MGMT. (Dec. 2012), [http://www.fedscope.opm.gov/datadefn/ae\\_hri\\_sdm.asp](http://www.fedscope.opm.gov/datadefn/ae_hri_sdm.asp).

<sup>6</sup> *Merit Sys. Prot. Bd.*, 5 C.F.R. §§ 1201.121–1201.148 (2013); *Nat’l Fed. Labor Relations Auth.*, 5 C.F.R. §§ 2429.1–2429.18 (2013); *Office of Fin. Inst. Adjudication*, 12 C.F.R. §§ 308.1–308.41 (2013); *Small Bus. Admin.*, 13 C.F.R. §§ 134.201–134.229 (2013); *Commodity Futures Trading Comm’n*, 17 C.F.R. §§ 10.1–10.114 (2013); *Sec. & Exch. Comm’n*, 17 C.F.R. §§ 201.100–201.193 (2013); *Fed. Trade Comm’n*, 16 C.F.R. §§ 3.1–3.83 (2013); *Int’l Trade Comm’n*, 19 C.F.R. §§ 207.2–207.8 (2013); *Soc. Sec. Admin.*, 20 C.F.R. §§ 405.301–405.383 (2013); *Food & Drug Admin. & Drug Enforcement Admin.*, 21 C.F.R. §§ 1316.41–1316.68 (2013); *Housing & Urban Dev.*, 24 C.F.R. §§ 26.1–26.27 (2013) & 31 C.F.R. §§ 285.11–285.13; *Occupational Safety & Health Review Comm’n*, 29 C.F.R. §§ 2200.1–2200.12 (2013); *Fed. Mar. Comm’n*, 46 C.F.R. §§ 502.21–502.605 (2013); *Fed. Energy Regulatory Comm’n*, 18 C.F.R. §§ 385.101–385.1013 (2012); *Dep’t of Labor*, 29 C.F.R. §§ 6.1–6.46 (2012); *Labor Relations Bd.*, 29 C.F.R. §§ 101.31–101.36 (2012); *Fed. Mine Safety & Health Review Comm’n*, 29 C.F.R. §§ 2700.1–

The Department's current *Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary*<sup>7</sup> have remained largely unchanged since their last major revision in 1977.<sup>8</sup> Despite the fact that a number of Acts have since been repealed<sup>9</sup> and other provisions added, the current rules indicate that they are applicable to nearly fifty statutes that require a formal adjudicatory hearing under the APA before an administrative law judge.<sup>10</sup> They are also applicable to “[o]ther adjudicatory

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2700.110 (2012); U.S. Coast Guard, 33 C.F.R. §§ 1.07–1.30 (2012); Dep’t of Educ., 34 C.F.R. §§ 101.1–101.131 (2012); U.S. Postal Serv., 39 C.F.R. §§ 952.1–952.24 (2012); Env’tl. Prot. Agency, 40 C.F.R. §§ 24.01–24.20 (2012); Health & Human Servs., 42 C.F.R. §§ 402.1–402.308 (2012); Dep’t of the Interior, 43 C.F.R. §§ 4.1–4.31, 4.470–4.628, 4.1100–4.1394 (2012); Dep’t of Transp., 49 C.F.R. §§ 31.1–31.47 (2012); Nat’l Transp. Safety Bd., 49 C.F.R. §§ 821.1–821.64 (2012); Fed. Comm’n’s Comm’n, 47 C.F.R. §§ 1.201–1.364 (2003).

<sup>7</sup> 7 C.F.R. §§ 1.130–1.151 (2013).

<sup>8</sup> 42 F.R. 743 (Jan. 4, 1977).

<sup>9</sup> See generally Act of August 20, 1890 § 6, amended by 21 U.S.C. § 104 (repealed 2002); Act of March 3, 1905 § 6, amended by 21 U.S.C. § 127 (repealed 2002); Act of July 2, 1962 § 6(a), amended by 21 U.S.C. § 134(e) (repealed 2002); Act of May 6, 1970 § 2, amended by 21 U.S.C. § 135(a) (repealed 2002); Cattle Contagious Diseases Act of 1903, § 3, amended by 21 U.S.C. § 122 (repealed 2002).

<sup>10</sup> U.S. Cotton Standards Act § 3, supplemented by § 2 of 47 Stat. 1621, 7 U.S.C. § 51b, 53 (2006); U.S. Grain Standards Act §§ 7(g)(3), 9, 10, 17A(d), 7 U.S.C. §§ 79(g)(3), 85, 86, 87f–1(d) (2006); Packers & Stockyards Act of 1921 §§ 203, 312, 401, supplemented by §§ 1, 57 Stat. 422, amended by §§ 4, 90 Stat. 1249, 7 U.S.C. §§ 193, 204, 213, 221 (2002); U.S. Warehouse Act §§ 12, 25, 7 U.S.C. §§ 246, 253 (2006); Poultry Prods. Inspection Act §§ 6, 7, 8(d), 18, 21 U.S.C. §§ 455, 456, 457(d), 467 (2006); Perishable Agric. Commodities Act of 1930 §§ 1(b)(9), 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 8(e), 9, 13(a), 7 U.S.C. §§ 499a(b)(9), 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499h(e), 499i, 499m(a) (2006); Agric. Mktg. Agreement Act of 1937, amended by 7 U.S.C. § 608(c)(14) (2006); Fed. Seed Act § 409, 7 U.S.C. § 1599 (2006); Animal Welfare Act § 19, 7 U.S.C. § 2149 (2006); Title V of Agric. Risk Prot. Act of 2000 § 501(a), 7 U.S.C. § 2279(e) (2006); Potato Research & Promotion Act, amended by 7 U.S.C. § 2621 (2006); Egg Research & Consumer Info. Act, amended by 7 U.S.C. § 2714 (2006); Beef Promotion & Research Act of 1985 § 9, 7 U.S.C. § 2908 (2006); Swine Health Prot. Act §§ 5,6, 7 U.S.C. §§ 3804, 3805 (2006); Honey Research, Promotion, & Consumer Info. Act § 11, 7 U.S.C. § 4610 (2006); Pork Promotion, Research, & Consumer Info. Act of 1985 § 1626, 7 U.S.C. § 4815 (2006); Watermelon Research & Promotion Act § 1651, 7 U.S.C. § 4910 (2006); Pecan Promotion & Research Act of 1990 § 1914, 7 U.S.C. § 6009 (2006); Mushroom Promotion, Research, & Consumer Info. Act of 1990 § 1928, 7 U.S.C. § 6107 (2006); Lime Research, Promotion, & Consumer Info. Act of 1990 § 1958, amended by 7 U.S.C. § 6207

proceedings in which the complaint instituting the proceeding so provides with the concurrence of the [Department's] Assistant Secretary for Administration.”<sup>11</sup> Significantly, although a provision exists in the current rules concerning their scope and applicability,<sup>12</sup> nowhere is there, at present, a mention of their purpose being the just, speedy, and inexpensive determination of every proceeding in the Federal Rules of Civil Procedure (Federal Civil Rules).<sup>13</sup> As will be seen, this is truly a significant omission and one that needs correction.

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(2006); Soybean Promotion, Research, & Consumer Info. Act § 1972, 7 U.S.C. § 6307 (2006); Fluid Milk Promotion Act of 1990 § 1999 (L), 7 U.S.C. § 6411 (2006); Organic Foods Prod. Act of 1990 §§ 2119, 2120, 7 U.S.C. §§ 6519, 6520 (2006); Fresh Cut Flowers & Fresh Cut Greens Promotion & Consumer Info. Act of 1993 § 9, 7 U.S.C. § 6808 (2006); Sheep Promotion, Research, & Info. Act of 1994, 7 U.S.C. § 7107 (2006); Plant Prot. Act § 424, 7 U.S.C. § 7734 (2006); Animal Health Prot. Act § 10414, 7 U.S.C. § 8313 (2006); Agric. Bioterrorism Prot. Act of 2002 § 212(i), 7 U.S.C. § 8401(i) (2006); Horse Prot. Act of 1970 §§ 4(c), 6, 15 U.S.C. §§ 1823(c), 1825 (2006); Forest Res. Conservation & Shortage Relief Act of 1990 § 492, 16 U.S.C. § 620(d) (2006); Endangered Species Act of 1973 § 11(a), *amended by* 16 U.S.C. § 1540(a) (2006); Lacey Act Amendments of 1981 § 4 (a)–(b), 16 U.S.C. § 3373(a)–(b) (2006); Virus-Serum-Toxin Act, 21 U.S.C. § 156 (2006); Fed. Meat Inspection Act §§ 4, 6, 7(e), 8, 401, 21 U.S.C. §§ 604, 606, 607(e), 608, 671 (2006); Egg Prods. Inspection Act § 18, 21 U.S.C. § 1047 (2006); Fed. Land Policy & Mgmt. Act of 1976 § 506, 43 U.S.C. § 1766 (2006). These rules of practice shall also be applicable to the following: (1) adjudicatory proceedings under the regulations promulgated under the Agricultural Marketing Act of 1946, 7 U.S.C. §§ 1621–1632(b), for the denial or withdrawal of inspection, certification, or grading service; (2) adjudicatory proceedings under the regulations promulgated under the Animal Health Protection Act, 7 U.S.C. §§ 8301–8322, for the suspension or revocation of accreditation of veterinarians, 9 C.F.R. §§ 160.1, 161.1–161.7; (3) proceedings for debarment of counsel under § 1.141(d) of this subpart; (4) adjudicatory proceedings under the regulations promulgated under the Animal Welfare Act, 7 U.S.C. §§ 2131–2159, for the denial of an initial license application, 9 C.F.R. § 2.11, or the termination of a license during the license renewal process or at any other time, 9 C.F.R. § 2.12; (5) adjudicatory proceedings under the regulations promulgated under sections 901 through 905 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 1901, pertaining to the commercial transportation of equines to slaughtering facilities, 9 C.F.R. §§ 88.1–88.6; and (6) other adjudicatory proceedings in which the complainant instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration.

<sup>11</sup> 7 C.F.R. § 1.131(b)(6).

<sup>12</sup> *See* § 1.131.

<sup>13</sup> *See* FED R. CIV. P. 1.

The Department's Rules of Practice and Procedure, like those of other executive agencies, are analogous to the Federal Civil Rules used in the U.S. district courts. Congress authorized the U.S. Supreme Court to prescribe rules for the district courts in 1934 under the Rules Enabling Act.<sup>14</sup> The original version of those rules became effective on September 16, 1938.<sup>15</sup> Significant amendments were made to the Federal Civil Rules in 1948, 1963, 1966, 1970, 1980, 1983, 1987, 1993, 2000, 2006, 2007, 2009, and 2010.<sup>16</sup> The procedural rules for the Department have not kept pace with the changes to the Federal Civil Rules. However, adopting procedures that federal district courts have developed and refined over the years would significantly improve the utility of the current Part 1, Subpart H rules.<sup>17</sup>

In comparison to the Federal Civil Rules, even a cursory reading of the Department's provisions reflects that the language in the current Part 1, Subpart H rules could be stated more clearly—something the 2007 style amendments to the Federal Civil Rules highlight.<sup>18</sup> Those style amendments were the first comprehensive overhaul since the Federal Civil Rules were adopted in 1938.<sup>19</sup> Taking more than four years to complete, the style amendments aspired to simplify and clarify federal procedure. The more austere sentence structure used throughout the restyled Federal Civil Rules made them shorter, easier to read, and more clearly articulated. The Restyled Federal Rules of Appellate Procedure took effect in 1998, and the restyled Federal Rules of Criminal Procedure became effective in 2002.<sup>20</sup> Further,

Sources that guided drafting, usage, and style for all three revisions included the Guidelines for Drafting

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<sup>14</sup> 28 U.S.C. § 2072 (2012).

<sup>15</sup> STAFF OF H. COMM. ON THE JUDICIARY, 111TH CONG., FEDERAL RULES OF CIVIL PROCEDURE WITH FORMS vii (2010), available at [www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> 7 C.F.R. §§ 1.130–1.151.

<sup>18</sup> See generally FED R. CIV. P. 1 advisory committee's notes.

<sup>19</sup> STEPHEN C. YEAZELL, FEDERAL RULES OF CIVIL PROCEDURE xii (Vicki Been et al. eds., 8th ed. 2012).

<sup>20</sup> 77 Fed. Reg. 233 (Dec. 4, 2012); see also FED. R. CIV. P. 1 advisory committee's notes to the 2007 amendments.

and Editing Court Rules, which the Standing Committee on Federal Rules of Practice and Procedure of the Judicial Conference of the United States published at 169 F.R.D. 171 (1997), and Bryan A. Garner's *A Dictionary of Modern Legal Usage* (2d ed. 1995).<sup>21</sup>

The purpose of the style revisions was twofold: to make the rules easier to understand and to make style and terminology consistent throughout the rules.<sup>22</sup> The restyled Federal Civil Rules reduced the use of inconsistent, ambiguous, redundant, repetitive, or archaic words. For example, the restyled rules replaced “shall” with “must,” “may,” or “should,” as appropriate.<sup>23</sup> The sole exception was the highly controversial restoration of the “shall” in Rule 56(a) of the Federal Civil Rules on summary judgment, when it was amended in 2010.<sup>24</sup> Any amendments to Part 1, Subpart H certainly should attempt to incorporate and emulate those improvements.

Simplification of regulatory language would appear to be mandated by both Executive Order 12,866, which requires that regulations be “simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation,”<sup>25</sup> and Executive Order 12,988, which requires that regulations be written in “clear language.”<sup>26</sup> The Plain Writing Act of 2010, while not directly applicable to regulations, recognizes the value of plain writing in government documents by requiring clear, concise, and well-organized publications.<sup>27</sup> To further promote the goal of the use of understandable language in regulatory publications, the Office of Management and Budget has published a *Federal Plain Language Guidelines*, which is available on the Internet.<sup>28</sup>

<sup>21</sup> *Id.*

<sup>22</sup> See FED. R. CIV. P. 1 advisory committee’s notes to the 2007 amendments.

<sup>23</sup> *Id.*

<sup>24</sup> See FED. R. CIV. P. 56 advisory committee’s notes to the 2010 amendments.

<sup>25</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

<sup>26</sup> Exec. Order No. 12,988, 61 Fed. Reg. 4,729 (Feb. 5, 1996).

<sup>27</sup> Plain Writing Act of 2010, 5 U.S.C. § 301 (2012).

<sup>28</sup> *Federal Plain Language Guidelines*, PLAINLANGUAGE.GOV (May 1, 2011), available at <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/FederalPLG>

Regular periodic review of regulations by executive agencies is expected under Section 6(a) of Executive Order 13,563, which provides: "To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."<sup>29</sup>

Replacing and revising outmoded and inappropriate rules with more readily understandable versions is accordingly strongly encouraged wherever indicated. Given the rapid and continual changes in technology, opportunities to utilize full advantage of such advances must be carefully examined, options must be explored, and the advances must be implemented in a timely fashion where appropriate. The failure to do so should not be considered acceptable.

The Federal Civil Rules used in all federal courts have proved to be extraordinarily helpful in providing litigants with predictable and familiar rules governing hearing procedure, and they are generally mirrored in the procedural rules of nearly all of the states.<sup>30</sup> Using language similar or identical to an applicable Federal Civil Rules provision would gain the advantage of the broad experience of the federal courts and the well-developed precedent they have created to guide litigants, judges, and reviewing authorities within the Department on procedure. Parties and judges would also acquire the additional advantage of focusing primarily on the substance of the

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uidelines.pdf; see also *Plain Writing Act of 2010: Federal Agency Requirements*, PLAINLANGUAGE.GOV (Apr. 2011), <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/TOC.cfm>.

<sup>29</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

<sup>30</sup> A 2010 study surveyed lawyers who were the attorneys of record in federal civil cases that terminated in the last quarter of 2008 about their satisfaction with the current Federal Rules of Civil Procedure. See EMERY G. LEE III & THOMAS E. WILLGING, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 3, 9 (2010). The sample also included lawyers from the Litigation Section of the American Bar Association and from the National Employment Lawyers Association. *Id.* The survey instrument was developed jointly by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System and found widespread satisfaction and endorsement of the rules. *Id.*



administrative disputes, spending less time on the distraction of litigating about procedure.

Unlike many of the rules of practice of other agencies having administrative law judges—which either incorporate or reference the Federal Civil Rules—the Department has steadfastly and repeatedly resisted even the slightest alignment of its rules with the Federal Civil Rules. All attempts and efforts to incorporate or invoke the Federal Civil Rules in any way have been repeatedly, emphatically, and adamantly rejected.<sup>31</sup>

The reasons for such a serious philosophical disagreement with the otherwise widely accepted use of the Federal Civil Rules at the Department are not clear, particularly when core values governing administrative proceedings require fairness, responsiveness to program goals, cost effectiveness, and acceptability of results to those affected.<sup>32</sup> While a specialized bar thoroughly familiar with the Department's Rules of Practice clearly exists, their number is far exceeded by an overwhelming majority of general practitioners throughout the United States who remain largely, if not totally unfamiliar with some of the more unusual and almost Byzantine provisions found in the current rules. As a result, the typical general practitioners that traditionally represent most of the respondents appearing before the Department's administrative law judges are often at a decided disadvantage, being obligated by ethical considerations to quickly master unfamiliar rules and concepts in order to adequately, ethically, and competently represent their clients. It goes without saying that the learning curve for a *pro se* litigant is even steeper.

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<sup>31</sup> See Arends, No. 11-0147, 2011 WL 5901382 (U.S.D.A. Nov. 15, 2011); Vanishing Species Wildlife, Inc., No. 10-0194, 2010 WL 4663162 (U.S.D.A. Nov. 3, 2010); Tung Wan Co., No. D-06-0019, 2007 WL 1378158 (U.S.D.A. Apr. 25, 2007); Post & Taback, Inc., No. D-01-0026, 2003 WL 22965185 (U.S.D.A. Dec. 16, 2003); Heartland Kennels, Inc., No. 02-0004, 2002 WL 31396960 (U.S.D.A. Oct. 8, 2002); Mitchell, 60 Agric. Dec. 91 (U.S.D.A. 2001); Zeus Serv., S.A. v. L.A. Wroten Co., 60 Agric. Dec. 806 (U.S.D.A. 2001); Fresh Prep, Inc., 58 Agric. Dec. 683 (U.S.D.A. 1999); Noell, 58 Agric. Dec. 130 (U.S.D.A. 1999); Kreider Dairy Farms, Inc., 57 Agric. Dec. 413 (U.S.D.A. 1998); United Foods, Inc., 57 Agric. Dec. 329 (U.S.D.A. 1998); Far W. Meats, 55 Agric. Dec. 1045 (U.S.D.A. 1996).

<sup>32</sup> CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE ix–xi (West Publ'g. Co., 3d ed. 2010).

In addition to containing some unusual provisions, the haphazard, illogical, and almost random organization of the Department's Rules of Practice makes negotiation of the current provisions difficult even for those with some familiarity with their content. One looking for a logical sequence to the current rules will be sadly disappointed and frustrated. As might be expected, rules pertaining to the meaning of words, information about the scope and applicability of the subpart, and definitions are contained at the beginning of each subpart. They are followed by requirements for the content of the complaint and answer. But provisions relating to service<sup>33</sup> are located near the end of the subpart and inexplicably appear after rules dealing with consent decisions,<sup>34</sup> hearing procedures,<sup>35</sup> and appeals to the Judicial Officer.<sup>36</sup> Provisions relating to depositions and issuance of subpoenas also follow those dealing with appeals and petitions for reopening and reconsideration.<sup>37</sup> Some of the other more problematic areas will be discussed in the following paragraphs.

Procedural rules used in federal and nearly all state courts contemplate raising defenses to the bringing of an action by motion.<sup>38</sup> While generally accepted almost everywhere else without exception, such action is specifically not permitted in proceedings before the Department, where section 1.143(b)(1) of the Department's rules provides that "[a]ny motion will be entertained *other than* a motion to dismiss on the pleading."<sup>39</sup> As interpreted by Departmental

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<sup>33</sup> 7 C.F.R. § 1.147 (2013).

<sup>34</sup> § 1.138.

<sup>35</sup> § 1.141.

<sup>36</sup> § 1.145. The index in Subpart H makes these particular references. §§ 1.130–1.151.

<sup>37</sup> § 1.145.

<sup>38</sup> FED. R. CIV. P. 12.

<sup>39</sup> 7 C.F.R. § 1.143(b)(1) (emphasis added); *see, e.g.*, *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607–08 (D.C. Cir. 1987); *GH Dairy*, No. M-10-0283, 2012 WL 1521984 (U.S.D.A. Apr. 24, 2012); *Reece*, No. 11-0213, 2011 WL 5829539 (U.S.D.A. Nov. 4, 2011); *Lion's Gate Ctr., LLC*, No. 09-0069, 2011 WL 5263575 (U.S.D.A. Sept. 8, 2011); *Turner*, No. 09-0128, 2011 WL 767883 (U.S.D.A. Mar. 1, 2011); *Am. Dried Fruit Co.*, No. FV-10-0170, 2010 WL 3457629 (U.S.D.A. Aug. 20, 2010); *Saulsbury Enters.*, 59 Agric. Dec. 49 (U.S.D.A. 2000); *Midway Farms, Inc.*, 58 Agric. Dec. 849 (U.S.D.A. 1999); *Fava & Co., Inc.*, 44 Agric. Dec. 870 (U.S.D.A. 1985). *But see, e.g.*, *Lion*, No. 03-0001, 2006 WL 3691789 (U.S.D.A. Dec. 5, 2006); *Hereford, Tex., Factory*, No. 04-0005, 2006 WL 322355 (U.S.D.A. Feb. 2, 2006).

precedent, this would include any jurisdictional defenses that could commonly be raised under Rule 12(b) of the Federal Civil Rules. At the same time, while invariably continuing to object to any such motion filed by a respondent, the Department routinely requests dismissal of actions in Rule 15(a) cases involving challenges to Marketing Orders<sup>40</sup> for failure to strictly comply with petition content requirements.<sup>41</sup> The non-entertainment provision has obvious, but clearly questionable, advantages for the Department's attorneys, allowing them to avoid addressing even meritorious jurisdictional issues and compelling respondents to raise such issues in their answers.

While many of the adverse results that stem from the current rules could easily be avoided by a liberal approach to interpretation of the rules, when matters are appealed to the Department's Judicial Officer, the language found in the current Department rules is almost invariably strictly construed.<sup>42</sup> One example frequently encountered involves requests for hearing. Although section 1.141(a) of title 7 of the Code of Federal Regulations provides that a request for hearing can be made by including the request in an answer, section 1.137 permits amendment of a complaint, petition for review, answer, or response to a petition for review "[a]t any time prior to the filing of a motion for a hearing."<sup>43</sup> In response to a certified question, the Judicial Officer made it clear that a request for hearing included in a complaint or an answer cannot be considered a motion within the meaning of section 1.137.<sup>44</sup> By way of contrast, when interpretation of the terms favored the Department—even though clearly not denominated as such—an order to show cause was considered a complaint for purposes of the rules, thereby enabling the Department to default the other party because of a minimally late answer which

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<sup>40</sup> "The term *marketing order* means any order or any amendment thereto which may be issued pursuant to section 8c of the act." 7 C.F.R. § 900.51(h).

<sup>41</sup> See *Lion Raisins, Inc.*, 64 Agric. Dec. 27 (U.S.D.A. 2005); *Midway Farms, Inc.*, 58 Agric. Dec. 849 (U.S.D.A. 1999).

<sup>42</sup> Pursuant to the Act of April 4, 1940, as amended in 7 U.S.C. §§ 450c–450g and Reorganization Plan No. 2 of 1953, the Department's Judicial Officer has been delegated as the individual who serves as the final deciding officer for the Department in APA cases and other enumerated cases. 7 C.F.R. § 2.35 (2013); see also 7 U.S.C. §§ 450c–450g (2012); 5 U.S.C. app.1 Reorg. Plan 2 1953 (2012).

<sup>43</sup> 7 C.F.R. § 1.137.

<sup>44</sup> *Meacham*, 47 Agric. Dec. 1708, 1709 (U.S.D.A. 1988).

had been sent to the Department's counsel rather than being filed with the Hearing Clerk.<sup>45</sup>

Section 1.137 is frequently relied on by the Department to amend a complaint as a matter of right.<sup>46</sup> The Department will then move for default when the respondent fails to file an answer to the amended complaint, even though an answer was filed in response to the initial complaint and the amendment may have been minor.<sup>47</sup> Despite the frequently expressed, traditional judicial preference for adjudication on the merits as being considered essential to the fundamental fairness of adjudicatory proceedings, the Department's reliance upon aggressive use of procedural rules to achieve resolution is generally successful, even where the Department's administrative law judges have sought to afford a respondent a hearing on the merits where they believed good cause existed.<sup>48</sup>

In other instances, rather than filing an amended complaint, the Department will file a new action, or in some cases multiple new actions, against a respondent. Although courts have severely condemned commencement of additional actions while a first action is pending as "unfair harassment,"<sup>49</sup> the practice continues routinely. This is particularly true in Animal Welfare Act licensure cases, where the Administrator of the Animal and Plant Health Inspection Service may bring two concurrent actions, with one seeking to terminate a license and the second seeking to revoke the same license.<sup>50</sup>

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<sup>45</sup> Arends, No. 11-0147, 2011 WL 4357280 (U.S.D.A. June 2011).

<sup>46</sup> See 7 C.F.R. § 1.137.

<sup>47</sup> See Hamilton, 64 Agric. Dec. 1659 (U.S.D.A. 2005).

<sup>48</sup> See Chad Way, 64 Agric. Dec. 401 (U.S.D.A. 2005); Lion Raisins, Inc., 63 Agric. Dec. 211 (2004), *rev'd and remanded sub nom.* Lions Raisins, Inc. v. U.S.D.A., 2005 WL 6406066 (E.D. Cal. 2005); see also *McCourt*, 64 Agric. Dec. 223 (U.S.D.A. 2005), *vacated*, 64 Agric. Dec. 654 (U.S.D.A. 2005) (subsequently vacated at Department request). In *McCourt*, the complainant sought a default where opposing counsel's father's death contributed to the filing of a late answer. *McCourt*, 64 Agric. Dec. at 223. Notwithstanding the brief period involved and the underlying circumstances, the Judicial Officer found the Administrative Law Judge's acceptance of the late answer to be error. *Id.*

<sup>49</sup> *Oberstar v. FDIC*, 987 F.2d 494, 504 (8th Cir. 1993).

<sup>50</sup> As an example, the Administrator filed both a complaint and, in a separate action, an order to show cause for why an Animal Welfare Act license should not be terminated on the same day against Lee Marvin Greenly. In the first action, he sought revocation of the license. Greenly, No. 11-0072, 2012 WL

Litigation requires timely filings and actions. The manner in which time is calculated under Rule 6 of the Federal Civil Rules was changed in 2009.<sup>51</sup> The current federal provisions facilitate parties and their lawyers to use a simple, clear, and consistent method of calculating time. Rule 6 counts intervening weekends and holidays for all time periods.<sup>52</sup> Most short periods found throughout the Federal Civil Rules have been extended to offset the shift in the time computation rules and to ensure that each period is reasonable. Five-day periods became seven-day periods and ten-day periods became fourteen-day periods, in effect maintaining the status quo. Time periods in the Federal Civil Rules shorter than thirty days also were revised to multiples of seven days to reduce the likelihood of ending on weekends.<sup>53</sup> Other changes to the Federal Civil Rules time computation affect how to tell when the last day of a period ends and how to compute backward-counted periods that end on a weekend or holiday.<sup>54</sup>

By way of contrast, current Department rules require that Saturdays, Sundays, and Federal holidays are included in the computation of filings, except where the time expires on those dates—in which case the period is extended to the next business day.<sup>55</sup> Adoption of the more prevalent Federal computation provisions would go far to eliminate confusion on the part of non-governmental litigants.

Filing deadlines set forth in the Department's rules are invariably strictly construed, and documents must be actually received by the Hearing Clerk by the required date without regard to the mailing date.<sup>56</sup> Indeed, the Department's Judicial Officer has repeatedly held that he is bound by the Department's procedural rules and lacks authority to depart from its strictures.<sup>57</sup> One resulting

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3877414 (U.S.D.A. Aug. 22, 2012). In the second, he requested termination of the license. Greenly, No. 11-0073, 2012 WL 3877415 (U.S.D.A. Aug. 22, 2012).

<sup>51</sup> FED. R. CIV. P. 6 advisory committee notes.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *See, e.g., id.* at 12, 15.

<sup>54</sup> *Id.* at 6.

<sup>55</sup> 7 C.F.R. § 1.147(e) (2013).

<sup>56</sup> § 1.147(g).

<sup>57</sup> *Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (U.S.D.A. 1997) (cited in *Boghosian Raisin Packing Co.*, 62 Agric. Dec. 154, 158 n.4 (U.S.D.A. 2003)) (stating generally administrative law judges and the Judicial Officer are bound by the Rules of Practice, but they may modify the Rules of Practice to comply with

procedural trap, which continues to perplex many non-governmental litigants as well as the general bar, is the Department's failure to recognize the "mailbox rule."<sup>58</sup> The Department's major departure from the "mailbox rule," observed in the federal and most other court systems, adds a significant burden to non-governmental litigants. This difference has resulted in what most would agree are far too many defaults for "late filing."

Another pitfall is that, although a copy of the Rules of Practice are provided to non-governmental litigants when they are served with a copy of the complaint, many, if not most, are generally unaware of and often fail to add extra delivery time needed for the routine decontamination step (post-September 11, 2001) for all incoming Department mail. Since September 11, the Department screens and irradiates all incoming mail, adding a built-in delay of as many as twelve to fourteen days between receipt at the Department and its delivery to the Hearing Clerk's Office. The use of next-day delivery by a commercial delivery service provider can avoid some delay and is a possible solution. However, that method adds significant additional cost to the non-governmental litigant, particularly for lengthy pleadings and multiple copies. While

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statutory requirements); Jack Stepp, 59 Agric. Dec. 265, 269 n.2 (U.S.D.A. 2000) (cited in *Boghosian Raisin*, 62 Agric. Dec. at 158 n.3) (ruling denying respondents' petition for reconsideration of order lifting stay and stating the Rules of Practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes are binding on the Judicial Officer); Far W. Meats, 55 Agric. Dec. 1033, 1036 n.4 (U.S.D.A. 1996) (cited in *Boghosian Raisin*, 62 Agric. Dec. at 158 n.3) (ruling on certified question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes); Sequoia Orange Co., 41 Agric. Dec. 1062, 1064 (U.S.D.A. 1982) (cited in *Boghosian Raisin*, 62 Agric. Dec. at 158 n.3) (stating the Judicial Officer has no authority to depart from the Rules of Practice); see *Boghosian Raisin Packing Co.*, 62 Agric. Dec. 154, 157-58 (U.S.D.A. 2003) ("The Rules of Practice are binding on administrative law judges and the Judicial Officer."); *Pmd Produce Brokerage Corp.*, 59 Agric. Dec. 351, 361 (U.S.D.A. 2000) ("Moreover, it is well settled that the administrative law judges are bound by the Rules of Practice"); *Kinzua Res., LLC*, 57 Agric. Dec. 1165, 1179-80 (U.S.D.A. 1998) (cited in *Boghosian Raisin*, 62 Agric. Dec. at 158 n.4) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice); *Lindsay Foods, Inc.*, 56 Agric. Dec. 1643 (U.S.D.A. 1997) (stating the judicial officer and the administrative law judges are bound by the Rules of Practice).

<sup>58</sup> See 7 C.F.R. § 1.147(c)(1)-(3).

electronic filing or facsimile transmission could also be potential solutions, those technological advances considerably postdate the promulgation of the existing rules, so it should come as no surprise that there is no provision for their use in the current rules.

Instead of having the flow of pleadings, amendments, answers, motions, briefs, and other documents served upon the parties by the litigants themselves—along with appropriate affidavits of service—the Department’s rules keep the Hearing Clerk busy by requiring the Hearing Clerk to serve those pleadings.<sup>59</sup> Under the current Department rules, contrary to the practice found in most adjudication systems, the burden of serving the complaint and all other filed pleadings rests with the Hearing Clerk,<sup>60</sup> resulting in a built-in delay for preparation of a cover letter and for mailing after the document is filed. Adoption of an electronic filing system by the Department—such as now exists in the Federal Court system<sup>61</sup>—requiring the parties to serve pleadings upon each other and to certify that they have done so, could eliminate that delay, and would make the rules considerably more familiar to and consistent with traditional methods of practice.

Additional due process concerns exist with respect to the current provisions relating to service. Although consistently upheld on judicial review, actual notice of the proceedings commenced against a respondent is not required.<sup>62</sup> Under the current regulatory scheme, the return of certified mail as “unclaimed” or “refused” allows service by regular mail without any further showing that an individual has received notice that an action had been commenced against him or her; and subsequent challenges to service issues are summarily dealt with if the current rules have been followed. This is a particularly significant problem for Animal Welfare Act licensees who may be on the road for extended periods during the year with traveling circuses. The most commonly used method of service, certified mail, is not required to be delivered to the addressee only;

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<sup>59</sup> See § 1.147(b).

<sup>60</sup> *Id.*

<sup>61</sup> In the federal system, in most cases, the Clerk now sends an electronic notification to opposing counsel that a pleading has been filed. The opposing counsel is then able to access and retrieve it electronically through the PACER system.

<sup>62</sup> See § 1.147(e).

any signature is considered acceptable service.<sup>63</sup> Mail delivered to a former or incorrect address occupied by individuals whose interests might be apathetic, hostile, or even antagonistic to a respondent—such as deliveries to an ex-wife or a disgruntled partner or associate—is nonetheless still considered effective service, even though such mail is unlikely to be forwarded. Personal service can be ordered by a judge when deemed necessary and appropriate, but the Department will usually comply with great and obvious reluctance.

The information in certain cases involving trade, proprietary secrets, or certain other sensitive information may need to be sealed or otherwise protected. However, the public is typically given free access to nearly all documents filed in formal Department administrative proceedings. In this age of increasing instances of identity theft, protection of personally sensitive information and personal data identifiers takes on new importance. Although the current rules make no provision for the protection of such information, clearly an urgent need exists for some new provision delineating responsibilities of the parties and specifying what information should or should not be included in a pleading or document filed with the Hearing Clerk. Rule 5.2 of the Federal Civil Rules currently contains usable provisions relating to individuals' social security numbers, taxpayer-identification numbers, birth dates, minors' names, and financial-account numbers, as well as provisions relating to exemptions and waivers that could serve as a useful and appropriate guide for the Department.<sup>64</sup>

Federal and state courts have experienced notable success by requiring parties to exchange basic information early in the dispute, without the need for a formal discovery demand.<sup>65</sup> Specific provisions also require the parties to disclose the opinions of experts and to supplement disclosures and discovery responses.<sup>66</sup> As noted in the Advisory Committee Notes following Rule 26 of the Federal Civil Rules, the purpose of discovery is to provide a mechanism for making relevant information available to the litigants.<sup>67</sup> Indeed, the Supreme Court noted that mutual knowledge of all of the relevant

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<sup>63</sup> § 1.147(e)(1).

<sup>64</sup> FED. R. CIV. P. 5.2.

<sup>65</sup> See FED. R. CIV. P. 26.

<sup>66</sup> See *id.*

<sup>67</sup> *Id.* at 26 advisory committee notes.



facts gathered by both parties is essential to proper litigation.<sup>68</sup> Such exchange of information has been highly successful in facilitating settlement, as the litigants are then properly able to accurately assess the strength or risks of their respective positions in an informed manner before proceeding to a hearing of the case with its accompanying costs.

Many agencies such as U.S. Department of Labor, the National Labor Relations Board, the Federal Labor Relations Board, and the Federal Energy Regulatory Commission have extensive and detailed rules concerning pretrial discovery. However, discovery under the current Department rules is quite limited. Witness and exhibit lists and copies of exhibits intended to be introduced are typically exchanged, but contrary to most procedural rules the exchange is not self-executing and the exchange is required only after entry of an order by the presiding judge.<sup>69</sup>

Even where the discovery process is self-executing, continued and sometimes significant judicial involvement may be required, as the reality is that discovery cannot always operate on a self-regulating basis.<sup>70</sup> While the primary responsibility for conducting discovery may rest with the litigants, the obligations to insure that they act responsibly and to avoid abuse have to be enforced by the presiding judge.

The current minimal exchange of information in Departmental proceedings may prove adequate where the issues are limited and both sides are already well aware of the underlying facts of a particular case, but the limited scope of discovery is less than ideal in more complex cases, particularly where expert testimony may be introduced. The current provisions certainly impose no duty upon either party to disclose matters that might be exculpatory. Provisions concerning disclosures of the underlying factual basis for the testimony of an expert witness are completely absent and pretrial depositions of experts are seldom authorized.

In the current rules, depositions may be allowed under limited and unusual circumstances. However, the rules contain no mention of the use of other discovery methods such as interrogatories or

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<sup>68</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>69</sup> *See* 7 C.F.R. § 1.140 (2013).

<sup>70</sup> *See* PAUL R. CONNOLLY, EDITH A. HOLLEMAN, & MICHAEL J. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY* 77 (Fed. Judicial Ctr., 1978).

requests for admission.<sup>71</sup> The current provisions also have an unusual Jencks Act provision, which requires production of prior statements or parts thereof of a witness—being in the possession of a complainant—that relate to the witness's testimony after the witness has testified on direct examination.<sup>72</sup> This application by importation of a federal criminal statute may well create a chimera of the Department sharing investigative reports. Practically speaking, any such impression is largely illusory as not only are such reports not typically exchanged, but certain parts of the investigative report may qualify as being exempt from disclosure and thus may require significant redaction of major portions of the report.

A motion for summary adjudication carries the potential to dispose of an entire claim or portions of it with finality without a trial,<sup>73</sup> so it plays a key role in litigation. The current Department rules do not specifically provide for either the use of or exclusion of summary judgment. However, the Department's Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance.<sup>74</sup>

While not an exact match, "no factual dispute of substance" may be equated with the "no genuine issue as to any material fact" language found in the Supreme Court's decision construing Rule 56 of the Federal Civil Rules in *Anderson v. Liberty Lobby, Inc.*<sup>75</sup> The use of motions for summary judgment within the Department is far from uniform. While certain Office of General Counsel attorneys routinely move for summary judgment on behalf of the Department in a variety of cases, others will oppose such motions when filed by non-governmental parties relying upon section 1.143(b)(2),<sup>76</sup> asserting that such motions are motions regarding a complaint and may not be filed unless filed within the time allowed for the filing of an answer (twenty days after service of the complaint).<sup>77</sup>

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<sup>71</sup> See 7 C.F.R. § 1.148.

<sup>72</sup> Jencks Act, 18 U.S.C. § 3500 (2012).

<sup>73</sup> See FED. R. CIV. P. 56.

<sup>74</sup> *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *Animals of Mont., Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Kathy Jo Bauck*, 68 Agric. Dec. 853, 858–59 nn.6–7 (U.S.D.A. 2009) (discussing the use of summary judgment in a variety of cases).

<sup>75</sup> 477 U.S. 242, 255 (1986).

<sup>76</sup> 7 C.F.R. § 1.143(b)(2).

<sup>77</sup> See *Complainant's Opposition to Respondent's Motion for Summary Judgment*, Woudenberg, (U.S.D.A. 2012) (No. 12-0538). For further information,

Change always brings challenges. However, since all members of the bar should have studied and utilized the Federal Civil Rules in their practice, it is suggested that the adoption of new procedural rules for the Department would not be an unreasonable or unmanageable burden.

The gains of judicial efficiency by adopting the Federal Civil Rules to the maximum extent possible would be fully realized for all parties and the administrative law judges after only a short transition period following public notice. For non-governmental litigants, standardizing the Department's procedural rules to align to the Federal Civil Rules and making the rules more familiar to the average general practitioner would significantly increase the chances of such litigants acquiring counsel in their cases and would open up a vastly increased quantity of legal counsel willing to undertake representation in such cases (instead of limiting those litigants only to those relatively few members of the bar willing to risk malpractice exposure because of lack of familiarity with the Department's unusual and very specialized rules).<sup>78</sup>

It is strongly urged that modernization of the Department's rules is long overdue and that the time has now come for such change to be effected for the mutual benefit, fairness, and cost effectiveness of all citizens involved in litigation with the Department, as well as for the Department itself.

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the complaint to the *Woudenberg* case can be found on the United States Department of Agriculture website. *Newsroom, USDA ANIMAL & PLANT HEALTH INSPECTION SERV.* (Sept. 2012), [http://www.aphis.usda.gov/newsroom/2012/09/awa\\_sept.shtml](http://www.aphis.usda.gov/newsroom/2012/09/awa_sept.shtml).

<sup>78</sup> It is noted that the Departmental Equal Access to Justice Act fee awards usually does not recognize claims of a U.S.D.A. specialty. *See McDonald v. Vilsack*, No. 09-0177, 2010 WL 5135281 (U.S.D.A. Nov. 10, 2010).