The original documents are located in Box 11, folder "Economy - Inflation Impact Statements (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

March 26, 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: DUDLEY CHAPMAN DC

SUBJECT: Revision of Executive Order on Inflation Impact Statements

When we received the attached memorandum from Cal Collier last summer, I spoke to him by phone and he recommended that we postpone further action until hearing from him. Since then, the Meat Packers case, which had gone against us in the District Court, was reversed by the Court of Appeals, which could eliminate the basis for our concern.

Nino tells me that he believes he has sent a subsequent memorandum and that nothing apparently needs to be done.

521

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

For Judge

July 9, 1975

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: CALVIN J. COLLIER

SUBJECT: Revision of the Executive Order on Inflation Impact Statements

We have reviewed the changes you proposed to the Executive Order requiring Inflation Impact Statements. While we are in complete agreement with the objective of curtailing litigation over this matter, we have some problems with the approach you have taken and some concern over timing of any changes in Executive Order No. 11821.

We are pessimistic about the chance of either the change of name for the initiative, or the enforcement paragraph having any significant effect on litigation. Furthermore, these changes could result in a public impression that the President is no longer supporting the program and a corresponding reaction, and lessening of effort, by Departments and agencies. Given the high visibility that the program has been given, a name change would subject us to ridicule.

I believe it would be a mistake to anticipate that a new name for the program will have a substantial impact on court action. While it is unfortunate that a term was initially used which was so comparable to that used in the environmental statutes, the comparison is likely to remain even if the order is recaptioned.

The new Section 6, while purporting to limit judicial intervention, may have little or no effect on the courts. I doubt that it is sufficient to preclude judicial consideration of an agency's compliance with the order.

In regard to the timing of a change in Executive Order No. 11821, the agencies are just developing experience with the initiative. Any substantive revisions at this time would delay our full implementation schedule and could not reflect any insights which may be gained by continuing as presently structured for another few months.

OMB could have serious problems with the proposed revision of Section 2. This would require copies of all major proposals and their economic analyses to be submitted to OMB. While likely to inundate OMB with paper, the purpose of this submission is not clear and the potential for various interpretations is obvious.

I am enclosing a memorandum prepared by the General Counsel of the Council on Wage and Price Stability, which I think will be of interest to you.

Finally, it is my understanding that Nino Scalia may have some new thoughts on ways to solve the litigation problem without undermining the progress we are making to implement the President's program.

Enclosure

Meat Packers case —
It appeals normal —
strong opinion — no
c/a

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON WAGE AND PRICE STABILITY
726 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20506

July 1, 1975

Jane Finn, Esquire
General Counsel's Office
Office of Management and Budget
Old Executive Office Building
Washington, D.C.

Dear Jane:

Enclosed is a memorandum reflecting my initial thoughts about the proposed new Executive Order. George Eads and Al Rees agree with these views. Further, Al agrees that it would be useful to have a meeting to discuss this sometime soon.

I also understand that the General Counsel's Office at FEA is also considering a proposed amendment, for this same purpose, to the Executive Order. I will get in touch with them to get their proposal.

Since you mentioned Dudley Chapman's interest in this matter, I am also sending him a copy of the memorandum.

Sincerely,

Vaughn

Vaughn C. Williams
General Counsel

cc: Dudley Chapman

July 1, 1975

MEMORANDUM TO: Jane Finn

FROM: Vaughn Williams VW

SUBJECT: Proposed Amendment of the Inflation Impact Program

This is intended to reflect my views about the circulated draft of a new Executive Order to supersede Executive Order 11821. As set forth below, I do not like that proposal. I instead propose that the existing Executive Order 11821 be retained and perhaps amended by the addition of a paragraph like one of the two attached.

A. Reason for the Amendment

The proposed amendment, I understand, results from a concern that the existing Executive Order will generally be interpreted, as the District Court in Nebraska has already interpreted it, */ to create a private cause of action to enjoin agency actions allegedly promulgated without full compliance with the Executive Order. Of course, an Executive Order cannot be determinative of this issue, since (i) the President, unlike Congress, does not have the authority to limit the federal courts' jurisdiction, and (ii) the courts

Like I say: I doesn't matter how you write a contract!

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will subsequently interpret whatever the President signs. Thus, in my view, the more specific purpose of the proposal is to create a "legislative history" reflecting that it was not the President's intention that Executive Order 11821 become the basis for private litigation.

Rather Then change the operative language?

B. The Proposal

The proposal would attempt to accomplish the above purpose by two means. First, it would add a new Section 6 that focuses directly on the issue by stating that no litigation was intended. I agree that the addition of such a paragraph is a useful way to accomplish the purpose, although I have included as Attachment A a paragraph that I think would be a more direct and effective statement.

Second, the proposal would attempt to disassociate the inflation impact program in several ways from the environmental impact program, an analogy that has perhaps been overstated. These changes are listed below. I think that they are only cosmetic changes, with little positive result and probable harmful results.

(1) The proposed new Executive Order would use the term "economic effect assessment" rather than "inflation impact analysis." While the former does sound less like "environmental impact statement", I think it is a distinction without any legal

meaning.*/ While it might have been preferable to have the latter term in the original Executive Order, it would be confusing to change it now.

(2) The new Executive Order would not require the Federal Register publication of a certification that the economic effect of any proposal had been analyzed. I think this would weaken the program by implying that agency analyses would not and should not be subject to public comment, even in the agency's own rulemaking proceeding. In my view these analyses would be assisted by public comment. Public comment would be consistent with the President's various comments about the need to avoid the high costs of regulation.

(3) The proposal would revoke Executive Order 11821 and create a new one, changed as described above. I think that the use of a new Executive Order underscores changes in the program

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*/ As argued in the Justice Department's briefs to date, whether an Executive Order creates a right to litigation depends upon whether it was intended to further a statutory right. (See, for example, Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026 (1972) - "The Executive Order, having been issued and published by the President pursuant to statutory authority is not a mere internal housekeeping arrangement, as asserted by defendants.") I do not think the terminology affects this issue. In the proposed paragraph included as Attachment A I have tried to explain that the Executive Order is not based upon any statute but rather upon the President's "supervisory powers" (whatever that term means).

enough to cause a confused period of transition, during which the agencies can extend their lack of cooperation, noting that the changes will have weakened the program. Given the difficulties in initiating Executive Order 11821, I think this is a very likely reaction by the agencies to the proposal.

C. Alternatives

Generally, I think it is important that any change be promulgated as an amendment to Executive Order 11821 rather than as a new Executive Order. There seem to be the following alternatives.

(1) Await the outcome of the Justice Department's appeal in the Independent Meat Packers Association litigation, at least if that appeal is proceeding quickly. A favorable result here would be more dispositive than a changed Executive Order.

(2) Adopt a paragraph, as you suggested, that says that an agency has fully complied with the Executive Order when it has undertaken certain procedural steps (that is, published a certificate, sent a summary of its analysis to the Council, for example). This alternative would not deny the possibility of judicial review,

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but would attempt to limit it to these procedural requirements and not the quality of an agency's analysis. I have included a draft of such a paragraph as Attachment B.

ATTACHMENT A

Draft Amendment for Executive Order 11821

New Section 6. This Executive Order is issued pursuant to the President's supervisory powers and is not intended to create any remedy for the delay, invalidation or other judicial review of any legislation, rule or regulation proposed by any agency subject to this Order. Enforcement of the requirements of this Executive Order shall be effected exclusively through the supervisory powers of the President and the Office of Management and Budget.

ATTACHMENT B

Draft Amendment for Executive Order 11821

New Section 6. An agency shall be deemed to have fully complied with this Executive Order when it has (i) published a certification of its analysis of the inflation impact of any major proposal as required by Section 1, and (ii) provided any information about its analyses that is requested by the Office of Management and Budget or by any other department or agency, including the Council on Wage and Price Stability, to whom responsibilities under this Executive Order are delegated.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON WAGE AND PRICE STABILITY
726 JACKSON PLACE, N.W.
WASHINGTON, D.C. 20506

July 1, 1975

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For Dudley Chapman

ROUTING AND TRANSMITTAL SLIP

1 TO *(Name, office symbol or location)* Mr. Buchen, White House	INITIALS	ACTION: CIRCULATE
	DATE	COORDINATION
2	INITIALS	FILE
	DATE	INFORMATION
3	INITIALS	NOTE AND RETURN
	DATE 4/16	PER CONVERSATION X
4	INITIALS	SEE ME
	DATE	SIGNATURE

REMARKS

Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions

FROM *(Name, office symbol or location)* Antonin Scalia	DATE 4/16/75
	PHONE

OPTIONAL FORM 41 c48—16—81594-1 552-103 GPO 5041-101
AUGUST 1967
GSA FPMR (41CFR) 100-11.206

AMM:LU:dp

cc: Arms Control &
Disarmament Agency
OLA
Files
Mr. Ulman
Mrs. Gauf

APR 14 1975

Honorable Clement J. Zablocki
Chairman, Subcommittee on National
Policy and Scientific Development
Committee on Foreign Affairs
United States House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

The Office of Management and Budget has asked this Department to advise you of its views concerning the amendment to add section 36 to the Arms Control and Disarmament Act proposed by section 104 of H.R. 1550, a bill to amend that act, and for other purposes. The new section would require any agency proposing an authorization for a program exceeding $250 million or an annual appropriation exceeding $50 million for armaments, ammunition, implements of war or military facilities to prepare and submit to the Director of the Arms Control and Disarmament Agency an impact statement. The statements and ACDA reports thereon would be furnished to the NSC, OMB, and the Congress, and the Director would be required to make recommendations to the Congress with respect to any of the programs covered.

As you are undoubtedly aware, existing statutory requirements for impact statements by Executive branch agencies have given rise to voluminous and protracted litigation by third parties, delaying numerous Federal projects for substantial periods of time. The proposed amendment also threatens to give rise to such litigation, even in the face of legislation authorizing the expenditures. Cf. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 785 (C.A.D.C. 1971). Since we think it unwise to risk substantial and unjustified delay in the execution of programs having important national defense implications, the Department recommends that the amendment be deleted, or modified in such a way that the risk of litigation will be avoided.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the submission of this letter for the consideration of the Congress.

Sincerely,

A. Mitchell McConnell, Jr.
Acting Assistant Attorney General
Office of Legislative Affairs

The Plaintiff, Mitchell B. Garshman, is not entitled to a preliminary injunction enjoining the Defendants from convening, in the absence of his counsel, the University Hearing Board to consider the charges of academic dishonesty against him.

An appropriate order will be entered.

Evelyn DUTIL, Administratrix of the Estate of Raymond Dutil

v.

Marlin M. MAYETTE.

Civ. No. 73-138.

United States District Court,
D. Vermont.
Feb. 4, 1975.

Administratrix of decedent's estate brought wrongful death action. On the defendant's motion to dismiss, the District Court, Holden, Chief Judge, held that an administratrix appointed in a foreign jurisdiction lacked capacity to maintain a wrongful death action in Vermont without the authorization of ancillary letters of administration issued in Vermont.

Motion granted.

Order affirmed, 2 Cir., —— F.2d ——.

Death ⇐31(4)

Administratrix appointed in foreign jurisdiction lacked capacity to maintain wrongful death action in Vermont without authorization of ancillary letters of administration issued in Vermont. 14 V.S.A. §§ 1491, 1492.

Robert D. Rachlin, Downs, Rachlin & Martin, St. Johnsbury, Vt., for plaintiff.

John M. Dinse, Dinse, Allen & Erdmann, Burlington, Vt., for defendant.

MEMORANDUM AND ORDER

HOLDEN, District Judge.

The defendant has moved to dismiss this wrongful death action (14 V.S.A. §§ 1491, 1492) on two grounds: (1) the action is barred by the applicable statute of limitations and (2) the plaintiff, by failing to procure ancillary letters of administration in Vermont, lacks capacity to bring this suit. The Court's finding that the plaintiff does lack capacity to bring this suit makes it unnecessary to reach the statute of limitations issue.

At the hearing on January 3, 1975 on these two affirmative defenses, plaintiff's counsel conceded that the plaintiff administratrix had not procured ancillary letters of administration in Vermont. Without the authorization of ancillary letters of administration issued in Vermont, a plaintiff administratrix appointed in a foreign jurisdiction lacks capacity to maintain a wrongful death action in this state. Accordingly, the complaint must be dismissed. *Weinstein v. Medical Center Hospital of Vermont*, 358 F.Supp. 297 (D.Vt.1972).

By dismissing this complaint for lack of capacity, the Court leaves the novel and unsettled questions of recent Vermont statutory changes attending the limitations of actions to the state courts.[1]

It is ordered:

That the defendant's motion to dismiss is granted.

1. The novel questions of state law include whether this action is deemed "commenced" for purposes of tolling the statute of limitations as of the date of the complaint (see *Jacques v. Jacques*, 128 Vt. 140, 141, 259 A. 2d 275 (1969)) of Civil Procedure, Rule 3, and 12 V.S.A. § 466 require that an action be "commenced" by filing or service. There may be a further question involved in whether actions for wrongful death under 14 V.S.A. §§ 1491 [illegible] without [illegible] the [illegible]

INDEPENDENT MEAT PACKERS ASSOCIATION, an unincorporated association, Plaintiff,

National Association of Meat Purveyors, an unincorporated association, Plaintiff-Intervenor,

National Livestock Feeders Association, Plaintiff-Intervenor,

National Restaurant Association, Plaintiff-Intervenor,

Consumer Federation of America et al., Plaintiffs-Intervenors,

v.

Earl L. BUTZ, Individually and in his capacity as United States Secretary of Agriculture, et al., Defendants,

American National Cattlemen's Association, a corporation, Defendant-Intervenor.

Civ. No. 75-0-105.

United States District Court,
D. Nebraska.
May 29, 1975.

Meat packers association, meat purveyors association, livestock feeders association and restaurant association brought action seeking declaratory and injunctive relief from promulgation and enforcement of Department of Agriculture rules revising grading standards for beef. On plaintiffs' motion for a permanent injunction and for summary judgment, the District Court, Denney, J., held that plaintiffs had standing to maintain action; that Department lacked authority to enact regulation requiring that all quality graded meat be also yield graded; that material and substantial noncompliance with mandate of executive order requiring consideration of inflation related factors executive order required that rules revising grading standards be set aside; and that plaintiffs were entitled to injunction but not to summary judgment since evidence raised issues of fact.

Injunction granted.

Meat packers association, meat purveyors association, livestock feeders association and restaurant association had standing to maintain action seeking declaratory and injunctive relief from promulgation and enforcement of Department of Agriculture rules revising grading standards for beef. 5 U.S.C.A. § 702; 28 U.S.C.A. §§ 1331, 1337.

2. Food ⇐1.7

Enactment of regulation requiring that all quality graded meat be also yield graded, which is a measure of quantity, was beyond authority granted Secretary of Agriculture under statute providing that Secretary is to certify and identify class, quality, quantity and condition of agricultural products to the end that agricultural products be marked to best advantage and that consumers to able to obtain quality product which they desire, except that no person shall be required to use the service authorized by statute. Agricultural Marketing Act of 1946, § 203(h), 7 U.S.C.A. § 1622(h); 5 U.S.C.A. § 706(2)(A).

3. United States ⇐28

Constitutional article that President shall from time to time give to Congress information of state of the union, recommend to their consideration necessary measures and take care that laws be faithfully executed gives the President power to gather information on administration of executive agencies. U.S.C.A. Const. art. 2, § 3.

4. Agriculture ⇐2

Executive order requiring consideration of inflation related factors such as cost impact on consumers, markets or governments, effect on productivity of wage earners, businesses or governments, effect on competition and effect on supplies of products or services is within congressional purpose of Agricultural Marketing Act. Agricultural Marketing Act of 1946, §§ 202, 203(h), 7 U.S.C.A. §§ 1621, 1622(h).

5. Agriculture ⇐2

ing cost impact on consumers, businesses, and governments, effect on productivity of wage earners, businesses or governments, effect on competition and effect on supplies of important products or services is not merely a "housekeeping" order, enforceable only by the President, but falls within judicial review contemplated by statute governing scope of review of agency action, findings and conclusions. 5 U.S.C.A. § 706.

6. Food ⇐1.7

Material and substantial noncompliance with mandate of executive order requires consideration of inflation related factors such as cost impact on consumers, businesses, markets or governments, effect on productivity of wage earners, businesses or governments, effect on competition and effect on supplies of products, required the setting aside of proposed regulations of Department of Agriculture regarding grading standards for beef. 5 U.S.C.A. § 706(2)(A).

7. Injunction ⇐85(2)

Injunctive relief would lie from promulgation and enforcement of Department of Agriculture rules revising grading standards for beef, where Department's action in promulgating regulations was in violation of mandates of executive order and thus arbitrary, capricious, and an abuse of discretion. 5 U.S.C.A. § 706(2)(A).

8. Federal Civil Procedure ⇐2546

Evidence, in action seeking declaratory and injunctive relief from promulgation and enforcement of Department of Agriculture rules revising grading standards for beef, raised material issues of fact, precluding summary judgment.

Frank F. Pospishil, Ben E. Kaslow, Omaha, Neb., for plaintiff.

James T. Gleason, Omaha, Neb., for plaintiff-intervenor National Livestock Feeders Assn.

Vard R. Johnson, Omaha, Neb., and Girardeau Spann, Washington, D. C., for plaintiffs-intervenors Consumer Federation of America, National Consumers League, Americans for Democratic Action, Consumers Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL–CIO), Service Employees International Union (AFL–CIO), American Federation of Teachers (AFL–CIO).

Daniel E. Wherry, U. S. Atty., D. Nebraska, Vincent B. Terlep, Jr., Atty., U. S. Dept. of Justice, Marshall Marcus, Atty., U. S. Dept. of Agriculture, Stephen L. Muehlberg, Asst. U. S. Atty., D. Nebraska, for defendants.

Robert H. Berkshire, Richard J. Wegener, Omaha, Neb., and J. Evan Goulding, Gen. Counsel, Denver, Colo., for defendant-intervenor, American National Cattlemen's Assn.

MEMORANDUM

DENNEY, District Judge.

This matter comes before the Court for decision subsequent to a hearing held from May 12, 1975 to May 23, 1975. Jurisdiction is founded under 7 U.S.C. § 1621 *et seq.*, 28 U.S.C. § 1331, 5 U.S.C. §§ 702 and 706, and 28 U.S.C. § 1337.

In this action, filed April 1, 1975, plaintiffs seek declaratory and injunctive relief from the promulgation and enforcement of Department of Agriculture rules revising the grading standards for beef. After a hearing on plaintiff's motion for a preliminary injunction, the Court, on April 11, 1975, granted interlocutory relief for the reasons stated in the Court's Memorandum dated April 15, 1975, but instructed this Court to conduct:

> . . . a plenary hearing on the request for a permanent injunction and that a final decision of the District Court be rendered within 45 days of this order . . .

In addition, the Eighth Circuit Court of Appeals instructed this Court to reexamine the adequacy of the bond pursuant to F.R.Civ.P. 65. Thereafter, on April 18, 1975, this Court conducted a hearing on the adequacy of the bond and it was ordered increased from $5,000 to $10,000, due to the high costs of "daily copy" and the likelihood of an expedited appeal.

Since these early proceedings, the Court has permitted four groups to intervene as plaintiffs, and one group to intervene as a defendant. No other motions to intervene were filed, although the Court is aware of actions subsequently filed in other Federal District Courts alleging the same general cause of action.

In accordance with F.R.Civ.P. 52, the Court makes the following findings of fact:

1. Grade standards for beef were originally promulgated in 1926, in which marbling (the size and dispersion of flecks of fat within the meat) was recognized as a major factor in evaluating quality. The first major revision of the grades in 1939 established physiological maturity as an important additional factor in evaluating quality. As a very general rule, increases in marbling have a beneficial effect on quality, while increases in maturity have a deleterious effect on quality. Eight grades are currently used to identify these quality differences—prime, choice, good, standard, commercial, utility, cutter and canner. Uniform palatability (a measure of the tenderness, juiciness and flavor in the method is called yield grading and consists of five numerical grades (1 through 5), with 1 indicating beef that will yield a high percentage of retail cuts (e. g., lean cattle having minimal fat deposits).

2. Both quality and yield grading have been optional. For example, a packing house could have some of its carcasses quality graded, others yield graded, and yet others both quality and yield graded. At present, approximately 40% of slaughtered cattle are quality graded. Of these, approximately 70% fall in the choice category, 7–8% fall in the prime category, and 22% fall within the good grade. Although the standards for the lower grades (standard, commercial, etc.) are used in the industry as guidelines, very few such carcasses are officially graded due to the expense of grading. Of cattle that are quality graded, approximately 50% are also yield graded.

3. On September 11, 1974, the Agricultural Marketing Service of the United States Department of Agriculture published a notice and draft of revisions to the grades. 7 C.F.R. §§ 53.100–53.105; 7 C.F.R. §§ 53.201–53.206, 39 Fed.Reg. 32743 (Sept. 11, 1974).

4. The proposed rules differed from the old rules in several aspects.

a. Conformation (the shape of the carcass as compared to an ideal shape) was eliminated as a factor in determining quality grade.

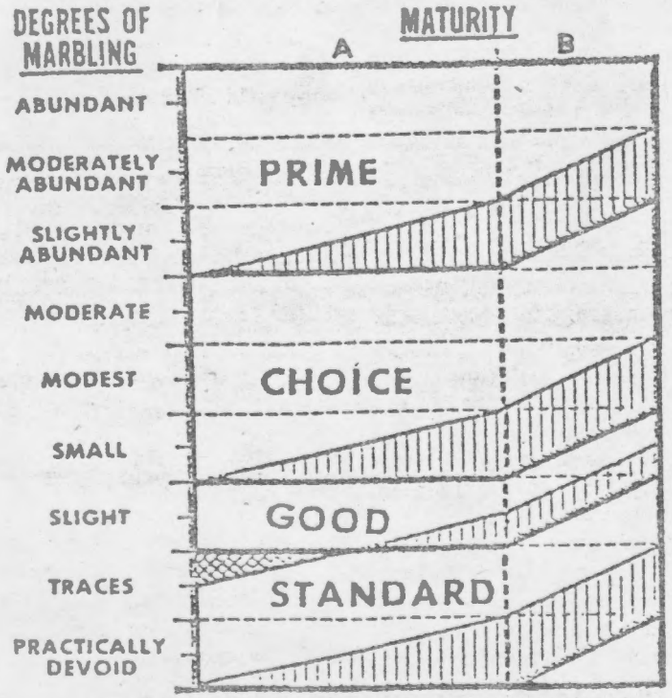
b. When officially graded, all carcasses would be identified for both quality grade and yield grade (except for bull carcasses, which are insignificant in number).

c. In the "A maturity" range (young cattle from 9 to 30 months old in age), maturity was eliminated as a factor in determining quality

age), the marbling requirements were reduced one full "degree of marbling" for prime and choice.

Item "c" above is of particular importance, as it involves two decisions. The elimination of maturity as a factor implies that the old formula was in error. Under the old standards, as the maturity increased, the palatability increased. The bottom line of a grade should, of course, indicate uniform palatability along the line. Once the Department decided to correct the bottom lines of the whether to set the new standard at the lowest palatability acceptable under the old standards, to set the new standard at the higher palatability required of the more mature cattle in the "A" range, or to set the new standard somewhere in between. The department chose to set the new standard at the lowest palatability previously acceptable in that grade. Thus, under the new standards, the consumer will receive "choice" graded meat having a palatability no worse than the minimum palatability possible under the old standards for "choice."

PROPOSED CHANGES IN THE RELATIONSHIP BETWEEN MARBLING, MATURITY, AND QUALITY GRADE



ment in the Statement of Considerations preceding the rules 40 Fed.Reg. 11535:

a. Berry *et al.*, (J. Animal Science 38:507)

b. Romans *et al.*, (J. Animal Science 24:681)

c. Breidenstein, (J. Animal Science 27:1532)

d. McBee and Wiles, (J. Animal Science 26:701)

e. Covington *et al.*, (J. Animal Science 30:191)

f. Norris *et al.*, (J. Food Science 36:440)

These references convince the Court that the Department had substantial evidence upon which to decide to change the maturity-marbling relationship, and to fix that change at the levels reflected in the new rules.

6. The comments received by the Department were very extensive, and in the light most favorable to the defendants were as follows:

a. Approximately 40% of the comments opposed the change in the marbling-maturity requirements.

b. Approximately 25% of the comments opposed the requirement of compulsory yield grading.

c. There was no significant opposition to the elimination of conformation as a factor in quality grading.

7. Executive Order Number 11821, 39 Fed.Reg. 41501, was signed on November 27, 1974.

8. During the earlier proceedings in this Court, all parties represented that Exhibit B to Defendants' Objections to Issuance of a Preliminary Injunction (Filing #4) was the inflationary impact statement required by Executive Order 11821. In the Court's prior Memorandum, the Court stated its doubt that this document was sufficient. The Court has been subsequently informed that our Court recognizes that counsels' error was unintentional and no doubt caused by the speed at which this lawsuit progressed. By way of clarification, there are three documents of interest:

a. An "inflation impact evaluation" which is prepared by the agency before taking "major" action.

b. A "summary" of the inflation impact statement which is prepared by the agency and forwarded to the Office of Management and Budget (See Exhibit #6, ¶ 5(d)).

c. A "certification" that the inflationary impact has been studied, which must accompany the rules. In this case, the certification was included at the end of the rules as promulgated, 40 F.R. 11535.

The "summary" required in (b) above is Exhibit #901, a letter from E. L. Peterson (Administrator, Agricultural Marketing Service) to Don Paarlberg (Director Agricultural Economics) which was received by Mr. Paarlberg on March 6, 1975, and forwarded to the Council on Wage Price Stability. This was the document the Court thought was the impact statement itself.

The Court has not been presented with the "evaluation" itself. However, Exhibit #901 contains the following statement:

> An analysis of the economic impact of the grade change proposal was made by the Commodity Economics Division, Economic Research Service. While the primary thrust of the study was not directed at assessing the inflationary impact of the proposal, its authors found that most of the supportive reasons for the proposal have a foundation in economics and actual practice. Principal inflation-related findings, as reported in a December 1974 Supplement to the Livestock and Meat Situation Report (Exhibit #9)

consideration of the following inflation related factors:

a. Cost impact on consumers, businesses, markets, or Federal, State or Local Government.

b. Effect on productivity of wage earners, businesses or governments at any level.

c. Effect on competition.

d. Effect on supplies of important products or services.

Circular No. A-107 (Exhibit #6) implementing the executive order, required the appointment of a "compliance officer"; such was not done until March 18, 1975. The Court does not view this delay as substantive, but the fact that a compliance officer was not appointed until after the final promulgation of the rules on March 12, 1975, indicates a serious disregard of the requirements of the executive order.

10. Exhibit #3, contains an analysis of the following pertinent factors:

a. The potential of compulsory yield grading to improve pricing accuracy.

b. The probable lowering of price to the consumer of choice grade meat if the supply thereof should "increase dramatically."

c. That retailers will probably have to adjust their buying practices—especially if they had been marketing ungraded "good" meat under a house brand.

d. That packers may find it necessary to be more selective in their buying practices to account for the premium placed on yield grades.

e. That feeders can expect to "feed to choice" in fewer days.

f. That beef production will increase in efficiency.

g. That cattle will be marketed at lower weights, necessitating more [illegible] to meet demand.

feeding for fewer days.

11. Under the old regulations, quality grading was done by official United States Department of Agriculture Graders. For this service, the packing house was charged $14.60/hour. The graders grade approximately 70 carcasses per hour—thus the cost of grading a carcass is approximately $.20 for a typical 600 pound carcass; quality grading costs .033¢ per pound. This cost reflects only the U.S.D.A. fees for the quality grading. In addition to these fees, the packinghouse must employ a "rollerman" who applies the stamps under the direction and control of the official grader. The rollerman is not employed by the U.S.D.A.; rather, he is furnished by the packinghouse to assist the official grader and thereby reduce the time (and fees charged) for the grading. Rollermen typically earn approximately $5.00/hour.

The Court finds that the plaintiffs' grading costs will roughly double under the new regulations. Other packers will experience higher costs, the exact amount depending on the proportion of their output that has been yield graded under the old regulations. While the price per pound is relatively insignificant, the high volume of meat processed results in a significant cost to the packer. (See Exhibit #21).

12. Under the old regulations, quality grade marks were hand stamped on the carcass in four locations. Each grader used a stamp which included his initials. To indicate "good" the grader would place one stamp in each of the four locations. "Choice" was indicated by two hand stamps in each of the four locations. Likewise, "prime" required three stamps in each of the four locations. Once the grader had stamped the carcass, the rollerman would apply the rollermarks to each side of the carcass. The yield grade was hand stamped in four locations on the carcass.

Under the new regulations, there are [illegible] which the carcasses are hung and moved manually to work stations). This method requires that the grader hand stamp for quality in two locations and for yield grade in ten locations. The rollermarkings are applied in the usual manner and indicate only the quality grade.

The second method under the new regulations is designed for packing plants using a "chain" (similar to a "rail", but where the carcasses are moved automatically to the workstations). The grader hand stamps for quality in two locations, and for yield in two locations. This method uses a rollermark containing both quality and yield marks. (See Exhibits #902-905).

Under the old regulations, it was mandatory to rollermark the brisket, while under the new regulations that is optional.

13. The Court finds that the plaintiffs will suffer more than Ten Thousand Dollars ($10,000.00) in increased costs, due to increased grading expense, exclusive of interest and costs, should the regulations in question become effective. (See Exhibit #21).

14. There is evidence before the Court, although not in the administrative record, that consumer preference closely parallels "palatability", as that term is defined by the Department. All of the Department's research was in terms of "palatability" (as determined by trained taste panels and various mechanical tests for shear forces and the like)—*there was no recent research relating to what actual consumers desire.* In sum, the Department hypothesized a consumer whose only desire was palatability—and then tested for palatability. While this is not a totally unreasonable assumption, the Court finds no evidence in support, save Exhibit #25, a test conducted in 1961.

15. Several cities require that all meat sold at the retail level be quality graded. One such city is Chicago.

tive record, the Court was presented with evidence derived from U.S.D.A. publications to the effect that there was a slight increase in retail price following the change in the regulations in June, 1965. In addition, the same data shows a substantial increase in the proportion of meat falling in the "choice" grade. The 1965 changes in the marbling maturity relationship were similar in direction and degree to the proposed regulations in issue in this case. The Court does not give this evidence great weight, due to the complex economic factors which determine retail meat prices. *There is, however, no evidence in the administrative record indicating a factual basis for the Department's conclusion that prices would drop at the retail level.* The Supplement to the Livestock and Meat Situation (December 1974), Exhibit # 3, concluded that:

> The consumer could be indirectly affected by a lower relative price of choice if the supply of choice should increase dramatically due to the change, and by lower prices in general if efficiency of the industry is improved.

The Court finds this conclusion deserving of little weight, as it is based on meager facts, simplistic economic reasoning, and is contradicted by the past experience of the 1965 changes.

17. Immediately after a head of cattle is killed and the hide removed, it is inspected for health and sanitation purposes; *see*, 21 U.S.C. § 601 *et seq.* At this time, the inspector, a U.S.D.A. official, often requires that grubs and bruises be cut out of the exterior fat covering. If more than a minor amount of fat is removed, yield grading is not permitted, as the fat thickness is an important factor in the yield grade equation. For reference, that equation is:

$$Y = 2.5 + 2.5T + .2P + .0038W - .32A$$

where

Y = Yield Grade (Decimal digits

T=Adjusted thickness of fat over ribeye (inches)

P=Percent kidney, pelvic and heart fat

W=Hot carcass weight (lbs.)

A=Area of ribeye (square inches)

Under the old regulations, even if extensive amounts of fat were trimmed, the carcass was eligible for quality grading. The new regulations prohibit any grading in such a situation.

Some packers customarily trim fat while the carcass is on the kill floor. This trimming involves at most 10 lbs/head and is done to improve the appearance of the carcass.

18. Cattle feeders customarily sell to packinghouses on a "live weight basis", meaning that a buyer examines the live cattle and agrees to pay a certain price per pound of live weight. Occasionally, cattle are sold on a "grade and yield basis", whereby the purchase price is dependent on the quality and yield grades of the carcass, as determined after the cattle is slaughtered and dressed. *There is no evidence in the administrative record, or otherwise, that the practice of selling on a live weight basis will change.*

19. Cattle buyers are adept at assessing the yield grade of live cattle, and consider yield grades when arriving at an average price per pound (live weight basis) of a pen of cattle.

20. For carcasses of the same quality grade, there is a price spread between carcasses having different yield grades. This price spread varies, depending on market conditions, and the exact figures are published on a daily basis in readily available market newsletters and the like. (See Exhibit #31).

21. *There is no evidence which directly, or by inference, tends to show that consumer preferences will be reflected back through marketing channels*

CONCLUSIONS OF LAW

In accordance with F.R.Civ.P. 52(a), the Court makes the following conclusions of law. Before the trial of this case, motions for summary judgment were made by Consumer Federation of America, *et al.* (Filing #54); Earl L. Butz, *et al.*, (Filing #57); American National Cattlemens Association (Filing #59); and the Independent Meat Packers (Filing #69). These motions were taken under advisement due to the 45 day limitation imposed on this Court. The decision herein will dispose of the issues raised in the several motions.

[1] The Court finds that it has jurisdiction to hear this matter pursuant to 5 U.S.C. § 702, 28 U.S.C. § 1331, and 28 U.S.C. § 1337. See *Stark v. Wickard*, 321 U.S. 288, 290, 64 S.Ct. 559, 88 L.Ed. 733 (1944). Plaintiffs have adequately alleged "standing" within the teachings of *United States v. S. C. R. A. P.*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

Compulsory Yield Grading

The first substantive issue for consideration pursuant to 5 U.S.C. § 706(2)(A), is whether "compulsory yield grading" falls within the authority delegated by Congress. 7 U.S.C. § 1622(h) states as follows:

> (The Secretary of Agriculture is directed and authorized) . . . to inspect, certify, and identify the class, quality, quantity and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which

thorized by this subsection. . . . (Emphasis added).

The defendants contend that "the service" means the collection of all grading standards authorized by this subsection. They conclude that Section 1622(h) permits a regulation requiring that all quality graded meat be also yield graded, and vice-versa. Both the wording of the statute and its legislative history are unclear. When this section was debated, Congress apparently did not anticipate the possibility of grading for yield. See 46 U.S.Code Cong. Service 1584 (1946); 92 Cong.Rec. 9022–9033 (July 15, 1946).

The Department of Agriculture's own construction of Section 1622(h) is as follows:

> 7 C.F.R. § 53.1(p): *Grading Service.* The service established and conducted under the regulations for the determination and certification or other identification of the class grade or other quality of livestock or products under standards.
>
> 7 C.F.R. § 53.4: *Kind of Service.* Grading service under the regulations shall consist of the determination and certification and other identification, upon request by the applicant, of the class, grade, or other quality of livestock or products under applicable standards . . . .

Under U.S.D.A. definitions, both the quality and yield standards are considered as measures of "quality". See 7 C.F.R. § 53.1(nn) and (mm). Yield grade, which measures the relative proportion of the weight of trimmed retail cuts to the weight of the carcass is more properly a measure of "quantity." Although the Court is aware of the Secretary's definitions to the contrary, and the proper weight to be accorded that definition, the Court finds the Secretary's construction unfounded. The defendants, in their brief, concur in the Court's determination that yield grading is a measure of quantity.

refuse either yield grading or quality grading. Defendants contend that the use of the phrase "the service authorized by this subsection" encompasses all possible grading services—that the Department is permitted to "bundle" the services together and required that an applicant take or refuse the entire "bundle". The Court finds this construction of Section 1622(h) erroneous when considered in light of the Department's own definitional regulations, and the voluntary tone of Section 1622. In addition, the Court finds no necessity for compulsory yield grading, as a substantial proportion of all meat is yield graded under the old regulations and no appreciable benefit will result from compulsion. (See Findings #18–21).

[2] The Court recognizes that there exists an economic compulsion to have choice grade meat graded as such—the certification as "choice" increases the value of the meat. This form of compulsion is not forbidden by Section 1622(h), and is the type of compulsion that makes a voluntary system viable. It is the tying of yield grade to quality grade which the Court finds in excess of statutory authority.

For these reasons, the regulations relating to compulsory yield grading will be set aside pursuant to 5 U.S.C. § 706(2)(A).

Executive Order No. 11821

[3, 4] The second issue for consideration is the adequacy of the Department's actions relative to Executive Order No. 11821. As stated in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 866, 96 L.Ed. 1153 (1952), "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." In this regard, the Court has considered Article II, Section 3, of the United States Constitution, which states as follows:

mend to their Consideration such Measures as he shall judge necessary and expedient . . . (and) . . . he shall take Care that the Laws be faithfully executed . . . .

This section, by necessity, gives the President the power to gather information on the administration of executive agencies. The information and analysis required by Executive Order No. 11821 would also be helpful in recommending new legislation. The Court has, in addition, considered 7 U.S.C. § 1621, the Congressional Declaration of Purpose of the Agricultural Marketing Act of 1946. That section states as follows:

> . . . In order to attain these objectives, it is the intent of Congress to provide for . . . (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed . . . with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner.

This section thus requires much the same analysis of costs and economics as required by the executive order. *Youngstown* is readily distinguishable, as that case involved the seizure of property for public use, an action of magnitude and one in conflict with constitutional principles respecting private property. Here, the executive order is supported by, and not in conflict with, constitutional language, and is within the Congressional purpose of the Agricultural Marketing Act of 1946.

[5] The defendants contend that even if the executive order is valid, it is fendants' proposition, except for the previously stated Congressional purpose. That statutory directive, combined with the substantive nature of the executive order, convinces the Court that the Order is more than a housekeeping order and falls within the judicial review contemplated by 5 U.S.C. § 706. *See, e. g., Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Brookhaven Housing Coalition v. Kunzig*, 341 F.Supp. 1026 (E.D. N.Y.1972).

[6] There is no doubt that the Department's analysis of the inflationary impact did not consider the effect of the new regulations on:

(a) The productivity of wage earners
(b) Competition
(c) Employment
(d) Energy resources
(e) Secondary markets (e. g. grain)

In addition, the Department did not weigh the inflationary impact of the alternative proposals submitted by consumers and others. Nor was there a quantification of those factors the Department did consider. While the Court recognizes that prognostication of inflation is subject to inaccuracies and is at best a difficult task, the Department's conduct falls woefully short of that required by law. In the summary of its analysis, the Department indicated the nature and inadequacies of the analysis with the following language:

> While the primary thrust of the study was not directed at assessing the inflationary impact of the proposal, its authors found that most of the supportive reasons for the proposal have a foundation in economics and actual practice. (See Exhibit # 901).

These facts convince the Court that there was a material and substantial noncompliance with the mandate of Executive Order No. 11821, and that the

[7] In conclusion, the Court finds instances wherein the action of the United States Department of Agriculture, in promulgating revisions to rules found at 7 C.F.R. §§ 53.102, 53.104, 53.105 and 53.203 to 53.206, was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law", entitling plaintiffs to injunctive relief pursuant to 5 U.S.C. § 706(2)(A). See, generally *CPC International v. Train*, 515 F.2d 1032; (8 Cir. May 5, 1975).

[8] Although much of this decision rests on uncontroverted facts, there were material issues of fact precluding summary judgment. In addition, the Court required expert testimony to fully understand the content and scope of the proposed regulations.

For these reasons, plaintiffs' prayer for permanent injunctive relief will be granted, and the previously listed motions for summary judgment will be denied by separate order of the Court.

WEST KEY NUMBER SYSTEM

MOHAWK PETROLEUM CORPORATION, INC., a corporation, Plaintiff,

v.

DEPARTMENT OF the NAVY et al., Defendants.

No. CV 75-3156-AAH.

United States District Court, C. D. California.

May 28, 1975.

Oil refiner brought action for declaratory and injunctive relief with respect to its supply of crude oil from naval petroleum reserves. The District Navy with respect to naval petroleum reserves and supersedes provision of the Armed Forces Act requiring competitive bidding.

Judgment for plaintiff.

1. War and National Emergency ⇐38

The Emergency Petroleum Allocation Act of 1973 granted to the President and his delegates power to allocate all domestically produced crude oil and other petroleum products and to fix the price of the same whether or not such products are produced by a governmental agency or instrumentality, and no exception is provided with respect to naval petroleum reserves. 10 U.S.C.A. §§ 7421 et seq., 7430; Emergency Petroleum Allocation Act of 1973, §§ 2 et seq., 5(a)(1) as amended 15 U.S.C.A. §§ 751 et seq., 754(a)(1); Federal Energy Administration Act of 1974, § 2 et seq., 15 U.S.C.A. § 761 et seq.; Executive Order Dec. 4, 1973, No. 11748; Executive Order No. 11790, 15 U.S.C.A. § 761 note.

2. War and National Emergency ⇐103

Provision of the Armed Forces Act requiring competitive bidding constitutes neither a special statute nor a necessary part of the grant of power to the Secretary of the Navy to conserve and maintain the naval petroleum reserves, and is superseded by the price controls provided by the Emergency Petroleum Allocation Act of 1973 and regulations pursuant thereto. 10 U.S.C.A. §§ 7421 et seq., 7430(b); Emergency Petroleum Allocation Act of 1973, § 2 et seq. as amended 15 U.S.C.A. § 751 et seq.

3. War and National Emergency ⇐38

Crude oil refinery was entitled to injunction requiring the Navy to continue supplying crude oil from a naval petroleum reserve after expiration date of contract between the parties, at a price permissible under Federal Energy Administration regulations, unless and until such regulations were validly modi-

DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20250

March 30, 1976

SUBJECT: Independent Meat Packers Association, et al
v. Earl L. Butz, et al

TO: The Honorable Philip W. Buchen
Counsel to the President

I received a telephone call from a member of your staff requesting the citation for Independent Meat Packers Association, et al, v. Earl L. Butz, et al. Rather than give you just the citation, I thought it might be helpful to furnish the following documents:

(1) The United States District Court Decision rendered by Judge Denney in Omaha, Nebraska.

(2) The Government's Brief for Eighth Circuit.

(3) The United States Court of Appeals Eighth Circuit Decision.

As you are probably aware, the Supreme Court denied certiorari on March 22, 1976. The notation of this denial is found in 44 U. S. Law Week 3531 and listed as #75-995.

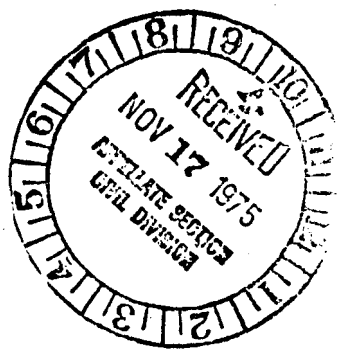
If you have any specific questions, please feel free to give me a call.

JAMES D. KEAST
General Counsel

(Enclosures)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT



No. 75-1486

Independent Meat Packers Association, et al.,

Appellees,

v.

Earl L. Butz, Secretary of Agriculture, et al.,

Appellants.

No. 75-1541

Independent Meat Packers Association, et al.,

Appellees.

v.

American National Cattlemen's Association, etc.,

Appellants.

Appeals from the United States District Court for the District of Nebraska.

Submitted: September 11, 1975

Filed: November 14, 1975

Before MATTHES, Senior Circuit Judge, HEANEY and STEPHENSON, Circuit Judges.

145-8-1003 KOSLOWE:REK GL.

MATTHES, Senior Circuit Judge.

These are appeals from an order of the district court* permanently enjoining the implementation and enforcement of regulations promulgated by the United States Department of Agriculture (USDA) pursuant to § 203 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1622.** The regulations revise official USDA standards for the grades of carcass

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*The Honorable Robert V. Denney.

**The Secretary and other original defendants appealed on July 2, 1975 (No. 75-1486). American National Cattlemen's Association, intervening defendant, see page 3, infra, appealed on July 23, 1975 (No. 75-1541).

beef, 7 C.F.R. §§53.102, 53.104-.105 (1975), and related standards for the grades of slaughter cattle, 7 C.F.R. §§53.203-.206 (1975). Appellee Independent Meat Packers Association (Packers) initiated this action on April 1, 1975 by filing a complaint seeking declaratory and injunctive relief from that part of the revised regulations providing that beef carcasses submitted for quality grading would be automatically graded for yield; in the alternative, the Packers sought declaratory and injunctive relief from the regulations in their entirety. The named defendants were Earl L. Butz, Secretary of Agriculture, Erwin L. Peterson, Administrator of the Agricultural Marketing Service, USDA, and Andrew Rot, Supervisor of the USDA Meat Grading Branch at Omaha, Nebraska (federal defendants). The Packers claimed that the compulsory yield provision of the new regulations,[1] which were to have taken effect on April 14, 1975, was arbitrary, capricious, "not supported by substantial evidence," and "in excess of the power" of the USDA. They further alleged that the revised regulations were issued in violation of Executive Order No. 11821, which requires an evaluation of the inflationary impact of all major legislative proposals, rules, and regulations emanating from the executive branch.[2] The complaint alleged jurisdiction

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[1]40 Fed. Reg. 49 (1974).

[2]Executive Order No. 11821 also directs the Director of the Office of Management and Budget to develop criteria for the identification of major legislative proposals, rules, and regulations having a significant impact upon inflation and to prescribe procedures for their evaluation. Pursuant to this mandate, the Office of Management and Budget on January 28, 1975 sent Circular No. A-107, which prescribes guidelines for compliance with the Order, to the heads of all executive departments.

under 28 U.S.C. §§1331, 1337 and 5 U.S.C. §§702, 706.

After a hearing on the application for a preliminary injunction, the district court, being persuaded that there was a reasonable likelihood of success, issued a preliminary injunction on April 11 enjoining implementation of the revised regulations in their entirety upon the posting of a $5,000 bond.[3] The federal defendants then appealed to this court, which affirmed the district court's order granting the preliminary injunction, but remanded the cause for "a plenary hearing on the request for a permanent injunction" and an expedited decision. Independent Meat Packers Ass'n v. Butz, 514 F.2d 1119, 1120 (8th Cir. 1975) (per curiam). The district court subsequently permitted the American National Cattlemen's Association (ANCA) to intervene as a party-defendant and four groups, the Purveyors, Feeders, Restaurants, and Consumers, to intervene as party-plaintiffs.[4]

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[3]The bond was subsequently ordered increased to $10,000.

[4]The Purveyors, Feeders, and Restaurants were represented by the National Association of Meat Purveyors, National Livestock Feeders Association, and the National Restaurant Association. The Consumers were represented by the Consumer Federation of America, the National Consumers League, Americans for Democratic Action, Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated meat Cutters and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO), and the American Federation of Teachers (AFL-CIO).

The allegations of plaintiff-intervenors were substantially the same, except that the Consumers contested principally the new standards for identifying beef quality.

Prior to trial the Packers, Consumers, and all defendants filed motions for summary judgment. The federal defendants also moved for an order limiting the scope of the court's inquiry to a review of the administrative record.[5] After a full trial,[6] the district court on May 29, 1975, filed a memorandum opinion incorporating its findings of fact and conclusions of law and an order denying all motions for summary judgment and permanently enjoining enforcement of the revised regulations. Independent Meat Packers Ass'n v. Butz, 395 F. Supp. 923 (D.Neb. 1975).

I.

Resolution of the issues raised in this appeal requires a brief review of the history of the beef grading program currently in force. The USDA inaugurated its voluntary beef grading program in May 1927 without express congressional authorization.[7] To promote a scientific approach to the problems of marketing, transporting and distributing agricultural products,[8] Congress in 1946 passed the Agricultural

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[5] The court never formally ruled on the government's motion. When the federal defendants argued their motion for summary judgment, however, they reiterated their request, which was orally denied from the bench. Tr., vol. 1, at 40-41.

6 The ten-day trial generated seventeen volumes of testimony and several hundred exhibits.

[7] United States Department of Agriculture, Agriculture Marketing Service, Official United States Standards for Grades of Carcass Beef 2 (1973).

8 See 1946 U.S. Code Cong. Service 1586.

Marketing Act. Under § 203 of the Act, 7 U.S.C. § 1622(h), the Secretary of Agriculture is authorized to "inspect, certify, and identify the class, quality, quantity, and condition of agricultural products . . ., under such rules and regulations as [he] may prescribe . . . ."[9] Under the beef grading regulations presently in force, 7 C.F.R. §§53.100 et seq., the USDA grades beef carcasses on a voluntary fee-for-service basis. Federal graders evaluate beef carcasses for their quality grade and yield grade, but packers may request either one or both of these services. 7 C.F.R. § 53.102(a). The quality grading system presently in effect combines both quantitative and qualitative factors, which are combined to form a final grade. Eight quality grade designations--Prime, Choice, Good, Standard, Commerical, Utility, Cutter, and Canner--are applicable to steer and heifer carcasses. The degree of marbling of intramuscular fat[10] and the physiological maturity[11] of the slaughtered cattle are the palatability-indicating characteristics of the beef. Conformation involves the proportion of meat to

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[9]The Secretary is authorized to promulgate regulations "to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use [this] service . . ." 7 U.S.C. § 1622(h).

[10]The degrees of marbling in the order of descending quantity are as follows: abundant, moderately abundant, slightly abundant, moderate, modest, small, slight, traces, and practically devoid. 7 C.F.R. § 53.102(q).

[11]The five maturity groups are identified as A, B, C, D, and E, in order of increasing maturity. Id.

and
bone/of high to low value cuts.[12] To some extent, increased marbling compensates for greater physiological maturity, 7 C.F.R. § 53.102(r), and superior conformation compensates for marbling except in the Prime, Choice, and Commercial grades, 7 C.F.R. § 53.102(s).

The yield grade of a beef carcass is determined by considering four factors: the thickness of the external fat, the amount of kidney, pelvic, and heart fat; the area of the ribeye; and the hot carcass weight. 7 C.F.R. § 53.102(u).[13] USDA yield grade designation represents the percentage of the carcass weight that is made up of boneless, closely trimmed

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[12] Superior conformation, which is generally reflected in a carcass with a full, well-rounded appearance, means that there is a high proportion of meat to bone and a high proportion of weight in the more valuable parts of the carcass. 7 C.F.R. § 53.115(b)(2).

[13] The USDA yield grade is determined on the basis of the following equation: yield grade - 2.50 + (2.50 x adjusted fat thickness, inches) + (0.20 x percent kidney, pelvic, and heart fat) + (0.0038 x hot carcass weight, pounds) - (0.32 x area ribeye, square inches). 7 C.F.R. § 53.103(a). Yield grades are designated by the numbers 1 through 5. A carcass typical of its yield provides approximately 2.3 percent more boneless retail cuts from the round, loin, rib, and chuck than the next lower (higher number) yield grade. U. S. Dep't of Agriculture, Economic Research Service, Proposed Changes in the Relationship Between Marbling, Maturity, and Quality Grade 3 (Supp. Livestock - Meat Situation Dec. 1974).

retail cuts from the round, loin, rib, and chuck.[14] When the USDA introduced yield grading on a voluntary basis in 1965, only 3-1/2 percent of beef submitted for quality grading was also yield graded. Under the voluntary program presently in force, approximately 70 percent is graded for yield.[15]

Acting under the rulemaking power vested in the Secretary of Agriculture by § 203 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1622(h), the USDA followed the notice and comment procedure outlined by § 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c), in promulgating the challenged regulations. First, on September 11, 1974, the USDA filed notice in the Federal Register of proposed changes in standards for grades of carcass beef, 7 C.F.R. §§53.102, 53.104-.105, and the standard for slaughter cattle, 7 C.F.R. §§53.201-.206. Interested persons were given an opportunity to present written comments, views, and arguments during a ninety-day period ending December 10, 1974.[16] Over 4,000 comments and five petitions containing 7,618 signatures were received from a wide cross-section of the public. After minor modifications, the final draft accompanied by a Statement of Considerations was published in the Federal Register on March 12, 1975 with an effective date of April 14, 1975. 40 Fed. Reg. 11535 (1975).

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[14] See Cross, Equations for Estimating Boneless Retail Cut Yields from Beef Carcasses, 37 J. Animal Science 1267 (1973).

[15] Approximately 55-60 percent of all beef produced is USDA graded for quality.

[16] Although not required by the Administrative Procedure Act, the Department also conducted regional briefings in five cities.

The revised regulations contained four major changes in the standards for grades of carcass beef. First, conformation was eliminated as a factor for determining quality grade. Secondly, all carcasses submitted for grading would be identified for both quality grade and yield grade. Thirdly, having determined that increasing physiological maturity does not affect palatability within the youngest maturity group (cattle nine through thirty months old), the marbling requirements for this group were set at the lowest level previously acceptable in the Prime, Choice, and Standard grades. For the more mature beef in these grades increased marbling is still required to compensate for advancing age, but the minimum degree of marbling required was lowered by one degree. Lastly, to make the Good grade more uniform and restrictive, the Secretary limited this grade to carcasses in the A and B maturity groups and raised the minimum degree of marbling required by one-half degree.

The changes in the relationship between marbling-maturity and quality grades were opposed by most consumers, representatives of restaurants, institutions, their suppliers, and some feeders. Their opposition was based on the belief that the changes would impair the palatability of Prime and Choice beef and that consumers would have to pay "Choice grade prices for Good grade beef." The requirement that all beef graded be graded for both quality and yield was opposed most strongly by meat packers. They voiced the belief that compulsory yield grading would increase grading costs,[17] impede their ability to market carcasses from which exterior fat had been trimmed,

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[17] The packers are billed $14.60 per hour for work performed by federal graders during the daytime. 7 C.F.R. § 53.29(a).

require a complete restructuring of their buying practices, and preclude the grading of certain carcasses. The packers also questioned the accuracy of the USDA yield grade equation, especially its subjective application by federal graders.

The cattlemen endorsed the objectives and principal provisions of the regulations. Their studies and experience convinced them that it would be possible to produce fed beef more economically, using less grain, and a shorter average period in the feedlot. Combining quality and yield grading would reward producers of high yielding beef with premium prices as it would tend to eliminate the use of averages in marketing cattle.

The district court's memorandum opinion, which was designed to provide the basis for the injunction entered on May 29, considered the major contentions voiced by the opposing groups. First, the court found "substantial evidence" to support the changes in the relationship between marbling-maturity and quality grade. 395 F. Supp. at 927. This disposed of the principal challenge of the consumer group plaintiffs. Secondly, the court held that "compulsory yield grading" falls outside the authority delegated to the Secretary of Agriculture by 7 U.S.C. § 1622(h). The court reasoned that the requirement that all beef submitted for grading be graded for both quality and yield is inconsistent with the voluntary tone of § 1622(h). Id. at 931. The court also stated that there was "no necessity for compulsory yield grading" and that "no appreciable benefit [would] result from compulsion." Id. Lastly, the court considered the adequacy of the Department's actions relative to Executive Order No. 11821. Being persuaded that the adequacy of compliance with

the terms of the executive order was subject to judicial review, id. at 932, the court ruled that the Secretary's inflation impact statement was deficient and that, accordingly, the regulations should be set aside in their entirety.

II.

Inasmuch as the USDA's alleged failure to comply with the mandate of Executive Order No. 11821 was the broadest ground upon which the district court's order enjoining implementation of the new regulations was based, we shall consider this issue first. Executive Order No. 11821, 39 Fed. Reg. 41501 (1974), requires the Director of the Office of Management and Budget (OMB) to consider the following factors in developing criteria for identifying legislative proposals, rules, and regulations having potential impact upon inflation: cost impact on consumers, businesses, markets, and government; effect on productivity of wage earners, businesses, and government; effect on competition; and effect on supplies of important products or services. The implementing document, OMB Circular No. A-107, also requires consideration of the effect on employment and energy supplies or demand. In accordance with Section 5(d) of the OMB circular, the Secretary certified that the Department had evaluated the inflationary impact of the proposed regulations, 40 Fed. Reg. 11535, 11546 (1975), and forwarded a brief summary of the evaluation to the Council on Wage and Price Stability. The district court found this evaluation to be deficient because it did not consider the effect of the new regulations on the productivity of wage earners, competition, employment, energy resources, and secondary markets, weigh the impact of the alternative proposals submitted, or quantify the factors

that were considered. 395 F. Supp. at 932.

Presidential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress. See Gnotta v. United States, 415 F.2d 1271, 1275 (8th Cir. 1969); Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632n.1 (5th Cir. 1967); Farmer v. Philadelphia Electric Co., 329 F.2d 3, 7 (3d Cir. 1964). Executive Order No. 11821, issued by the President on November 27, 1974, cites no specific source of authority other than the "Constitution and laws of the United States." The district court found that the Order was authorized by § 202 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621.[18] We disagree. The broad language of § 202 simply

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[18] Section 202 of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621, reads in pertinent part as follows:

> The Congress declares that a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation. It is further declared to be the policy of Congress to promote . . . a scientific approach to the problems of marketing, transportation, and distribution of agricultural products . . . so that such products capable of being produced in abundance may be marketed in an orderly manner and efficiently distributed. In order to attain these objectives, it is the intent of Congress to provide for . . . (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed . . . with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner.

states the policy objectives of the Act. The district court additionally relied on article II, § 3 of the Constitution, which states that "[the President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; . . . [and] he shall take Care that the Laws be faithfully executed . . . " This provision alone does not give the executive order the force and effect of law. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952) completely refutes the claim that the President may act as a lawmaker in the absence of a delegation of authority or mandate from Congress. Appellees contend that the Order was authorized by § 3(a) of the Council on Wage and Price Stability Act, 12 U.S.C. § 1904,[19] which authorizes the President to establish a

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[19] The Wage and Price Stability Act, 12 U.S.C. § 1904 (Supp. 1975) reads in pertinent part as follows:

> Sec. 3(a) The Council shall-
> (1) review and analyze industrial capacity, demand, supply, and the effect of economic concentration and anticompetitive practices, and supply in various sectors of the economy, working with the industrial groups concerned and appropriate governmental agencies to encourage price restraint;
> (2) work with labor and management in the various sectors of the economy having special economic problems, as well as with appropriate government agencies, to improve the structure of collective bargaining and the performance of those sectors in restraining prices;
> (3) improve wage and price data bases for the various sectors of the economy to improve collective bargaining and encourage price restraint;
> (4) conduct public hearings necessary to provide for public scrutiny of inflationary problems in various sectors of the economy;
> (5) focus attention on the need to increase productivity in both the public and private sectors of the economy;
> (6) monitor the economy as a whole by acquiring as appropriate, reports on wages, costs, pro-

Council on Wage and Price Stability with the power to monitor the economy and to appraise the inflationary impact of federal programs and policies. We need not determine, however, what role Congress contemplated for the President under the Act[20] because, in our view, Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action. See Kuhl v. Hampton, 451 F.2d 340, 342 (8th Cir. 1971) (per curiam); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965). Even if appellees could show that the Order has the force and effect of law, they would still have to demonstrate that it was intended to create a private right of action.[21] See Acevedo v. Nassau County,

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19 (continued)

> ductivity, prices, sales, profits, imports, and exports; and
> (7) review and appraise the various programs, policies, and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation.

[20]The language of the Act is silent with respect to the President's role other than his authority to appoint the members and chairman of the council. The brief legislative history suggests, however, that "[t]he provisions embodied in the . . . Act represent a license by the Congress to the President to exercise his influence to arrest the inflational spiral." 120 Cong. Rec. 15,245 (daily ed. Aug. 19, 1974) (remarks of Senator Tower). See generally id. at 15, 244-57, 15,261-62, 15,266-80, 15,283-87; id. at 8754-56 (daily ed. Aug. 20, 1974).

[21]We have grave doubts as to whether under Executive Order No. 11821 appellees have standing to judicially challenge the adequacy of the impact statement. Under the test enunciated in Association of Data Processing Service

500 F.2d 1078, 1083-84 (2d Cir. 1974); Kuhl v. Hampton, supra at 342; Farkas v. Texas Instrument, Inc., supra at 632-33; Farmer v. Philadelphia Electric Co., supra at 9; see also Gnotta v. United States, supra at 1275.[22] Executive Order No. 11821 does not expressly grant such a right. To infer a private right of action here creates a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies.

In summary, we conclude that the President did not undertake or intend to create any role for the judiciary in the implementation of Executive Order No. 11821. We hold, therefore, that the district court erroneously set aside the revised regulations in their entirety because of alleged deficiencies in the impact statement.

III.

Appellants assert that the district court's conclusion

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21 (continued)

Organizations, Inc. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970), appellees must allege that they have suffered an "injury in fact" and that they seek to protect an interest "arguably within the zone of interests to be practiced or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. Appellees fail to satisfy the "zone of interests" facet of the constitutional test of standing. As we have noted, the purpose of the Executive Order is to help implement the President's personal economic policies. Appellees have not shown that the order was designed for their benefit. Cf. Acevedo v. Nassau County, supra at 1082-83.

22 Contra, Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971).

that the USDA exceeded its statutory authority in promulgating the disputed regulations/ is plainly wrong. Specifically, the court found the compulsory yield provision of the new regulations, 40 Fed. Reg. at 11538, which requires that all beef submitted for grading be graded for both quality and yield, to be inconsistent with the voluntary tone of 7 U.S.C. § 1622(h), 395 F. Supp. at 931. As we have seen, under § 1622(h) the Secretary is directed and authorized to "inspect, certify, and identify the class, quality, quantity, and condition of agricultural products . . . under such rules and regulations as [he] may prescribe." Section 1622(h) specifically provides that no person be required to use the "service authorized by this subsection." The Secretary urges that this language permits him to bundle the Department's grading services together and thus require applicants to either take or refuse the entire bundle.

We turn, then, to an analysis of the statute. In matters of statutory construction, we are guided by "the provisions of the whole law, and . . . its object and policy." State Highway Comm'n v. Volpe, 479 F.2d 1099, 1111-12 (8th Cir. 1973), citing Richards v. United States, 369 U.S. 1, 11 (1962). "The practical inquiry in litigation is usually to determine what a particular provision, clause, or word means," but to answer it one must refer to the "leading idea or purpose of the whole instrument." 2 J. Sutherland, Statutory Construction § 4703, at 336 (3d ed. 1943). The principal purpose of the Agricultural Marketing Act of 1946 was "to promote through research, study, experimentation, and, . . . cooperation among Federal and State agencies, farm organizations, and private industries, a scientific approach to the problems of marketing, transport[ing], and distribut[ing] . . . agricultural products."

1946 U.S. Code Cong. Service 1586. To effectuate the purposes of the Act, Congress in § 1622 delegated a broad range of duties to the Secretary of Agriculture relating to agricultural products.[23] The emphasis the Act places on a scientific approach to solving the problems of the industry suggests that Congress intended the Secretary to freely use his expertise. Consideration of the literal meaning of the words employed sheds additional light on the subject. The key language is "service authorized by this subsection." It is presumed that Congress has used a word in its usual and well-settled sense. See Community Blood Bank v. FTC, 405 F.2d 1011, 1015 (8th Cir. 1969). The use of the term "service" in the singular rather than the plural form supports the Secretary's theory that he can offer the Department's beef grading services as a single "package." For the foregoing reasons, we conclude that the Secretary is authorized to use his expertise to combine the Department's beef grading services so long as the program as a whole facilitates the congressional goals set forth in § 1622(c) and § 1622(h).

IV.

This brings us to an analysis of the substantive merits

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[23] Under §§1622(c) and 1622(h), the following goals are relevant: (1) to develop and improve standards of quality, condition, quantity, and grade to encourage uniformity and consistency in commercial practice; (2) to market agricultural products to the best advantage; (3) to facilitate the trading of agricultural products; and (4) to make available quality products to consumers.

of the new regulations. Appellees contended at trial and assert here that the USDA acted arbitrarily and capriciously in promulgating the revised regulations. They specified three respects in which, in their view, the "compulsory yield" provision was defective. In addition to the issues previously discussed, their complaints focused upon practical problems inherent in compulsory yield grading, its alleged ineffectiveness, inflationary impact, and asserted inaccuracies in the USDA yield grade formula currently used. They also launched a multi-faceted attack on the new quality grade standards, especially its effect on the palatability of beef and the price of Choice graded beef. Finding "substantial evidence" to support the new quality grade standards, the district court resolved this issue favorable to appellants. Because appellees failed to file a cross-appeal, they may not now claim that the new quality grade regulations are without sufficient evidentiary support. See Tiedeman v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 513 F.2d 1267, 1272 (8th Cir. 1975).[24] Consequently, the sole issue for our consideration is whether under the applicable standard of review there was an adequate basis in the administrative record for the revised yield grade regulations.[25] Ordinarily, we would remand this matter to the trial court for con-

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[24]Appellees' citation of Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc., 419 U.S. 281, 284 (1974), holding that agency findings based on substantial evidence may "nonetheless reflect arbitrary and capricious action," is inapposite.

[25]The trial court never reached this question. Its order enjoining implementation of the new regulations was based solely on questions of statutory authority and compliance with the Executive Order. See II and III, supra.

sideration of the alleged arbitrariness of the regulation, but it is not necessary to do so in this case because the complete administrative record and the transcript of the trial court proceedings are before us. See Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 301 (8th Cir. 1972).

Appellees concede that under the guidelines enunciated in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), and Camp v. Pitts, 411 U.S. 138 (1973), the appropriate standard of review for regulations promulgated pursuant to the "notice and comment" procedure of the Administrative Procedure Act, 5 U.S.C. § 553(c) (informal rulemaking) is that specified by 5 U.S.C. § 706(2)(A), which authorizes a reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[26] See National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 700-01 (2d Cir. 1975); National Tire Dealers Ass'n, Inc. v. Brinegar, 491 F.2d 31, 34-35 (D.C. Cir. 1974); Bunny Bear, Inc. v. Peterson, 473 F.2d 1002, 1005 (1st Cir. 1973); Boating Industry Ass'n v. Boyd, 409 F.2d 408 411 (7th Cir. 1969).[27] Under the

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[26] We have already held, under II and III, supra, that the agency action was "otherwise in accordance with law."

[27] See also Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 622n.19 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 749 (1972); contra, Chrysler Corp. v. Department of Transportation, 472 F.2d 659, 669 (6th Cir. 1972) (applying substantial evidence test).

arbitrary and capricious standard of review, the reviewing court is to engage in a substantial inquiry into the facts, but is not empowered to substitute its judgment for that of the expert agency. The court is to consider only whether the disputed regulations were based on "consideration of the relevant factors" or whether there was a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, supra at 416. See CPC International v. Train, 515 F.2d 1032, 1044 (8th Cir. 1975). To have the regulations promulgated pursuant to the notice and comment procedure of § 553(c) set aside, the opponents must prove that the regulations are without rational support in the record. See First Nat'l Bank v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974). The reviewing court's inquiry into the facts is further circumscribed by langauge in Overton Park prohibiting de novo review except when agency action is adjudicatory in nature and agency factfinding procedures are inadequate, or when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. 401 U.S. at 415. The parties agree that neither situation exists here. Their dispute focuses rather on the extent to which a reviewing court in conducting the "plenary review" mandated by Overton Park can go outside the administrative record to hear expert testimony on the merits of the disputed regulations.[28]

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[28] In Overton Park the court stated

> [t]hat [plenary] review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary

Our consideration of the transcript of the trial court proceedings and the District Judge's memorandum opinion convince us that the district court, while sometimes articulating the correct standard of review, nonetheless

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28. (continued)

> for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.
>
> The court may require the administrative officials who participated in the decision to give testimony explaining their action. . . . [W]here there are administrative findings that were made at the same time as the decision, . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.
>
> The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings . . . that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a "post hoc rationalization" and thus must be viewed critically. If the District Court decides that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.

401 U.S. at 420-21 (citations omitted).

exceeded the narrow limits imposed by Overton Park.[29] The district court conducted a ten day evidentiary hearing during which it heard the expert testimony of private individuals and USDA officials on the merits of the regulations and, on the basis of that testimony, independently weighed the evidence and reached its own conclusions. In these

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29 THE COURT: I can tell you right now that I am not going to substitute my judgment for the Secretary, because he has more expertise in this than I do.

All I am going to inquire into is whether he did act within the scope of his authority under the Act and also whether he acted arbitrarily and capriciously.

Tr., vol. 1, at 54.

THE COURT: I don't intend to have a de novo review. . . . I want to know if there is substantial evidence to back up whether or not the Secretary acted arbitrarily and capriciously.

Tr., vol. 1, at 47.

5. The Court has examined the following references . . . . These references convince the Court that the Department had substantial evidence upon which to change the maturity-marbling relationship . . . .

395 F. Supp. at 927.

respects the district court erred.[30] For example, in concluding that the Packers' grading costs would roughly double under the new regulations, 395 F. Supp. at 928, the district court apparently rejected testimony by David Hallett, Chief of the Meat Grading Branch, USDA and Andrew Rot, Supervisor of the Meat Grading Branch at Omaha, Nebraska, that any increase would be immaterial. Addressing itself to the merits of the new yield grade regulations, the district court found "no necessity for compulsory yield grading" and that "no appreciable benefit [would] result from compulsion." 395 F. Supp. at 931. The full administrative record, which included numerous research studies and over 4,000 comments, and the Department's construction of the evidence, were before the district court. The expert testimony heard at trial offered little that was new. In our view, unless an inadequate evidentiary development before the agency can be shown and supplemental information submitted by the agency does not provide an adequate basis for judicial

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[30] Appellees' contention that appellants waived their right to object to the admission of evidence in addition to the material contained in the administrative record is without merit. At the outset appellants requested the trial court to limit the scope of the inquiry. Only after this request was denied did trial counsel, as a precautionary measure, call expert witnesses to testify on the merits of the regulations. Even if we were to assume that appellants did in fact consent to a trial de novo, the result is the same. As we have noted, the district court was not empowered to conduct a de novo review.

review, the court in conducting the plenary review mandated by Overton Park should limit its inquiry to the administrative record already in existence supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature. See Citizens to Preserve Overton Park, Inc. v. Volpe, note 27 supra; National Nutritional Foods Ass'n v. Weinberger, supra at 701; Bradley v. Weinberger, 483 F.2d 410, 415 (1st Cir. 1973).

We proceed to an independent examination of the record to determine whether the Department acted arbitrarily or capriciously in promulgating the regulation. The principal thrust of appellees' argument is that because of alleged inaccuracies in the USDA yield grade equation and its subjective application by USDA graders, compulsory yield grading will not achieve its purpose--to force the wholesale market for beef and cattle to reflect the full retail sales value differences associated with differences in yield. 40 Fed. Reg. at 11536. USDA statistics indicate that for Choice beef carcasses there is between a $5.00 and $6.00 per hundred weight difference in value between adjacent yield grades. Tr., vol. 11, at 1272-73. Under current marketing practices, approximately 75 percent of slaughter cattle is purchased and paid for on a live weight basis. Because the packer-buyer uses a system of averages to bid for a pen of slaughter cattle, producers presently have little incentive to increase the production of high-yielding slaughter cattle. Tr., vol. 13, at 1478-91. It is the Department's view that if the producers were paid a substantial premium for beef carcasses qualifying for yield grades 1 and 2, they would respond by providing leaner beef with less waste. 40 Fed. Reg. at 11536. The administrative

record shows and the Secretary concluded that because cattle being slaughtered today are younger and heavier than those marketed when the original yield grade study was made in the late 1950's,[31] the prediction equation currently used may tend to underestimate actual retail yield in certain carcasses, particularly among the "exotic" breeds. We note, however, that a number of research studies contained in the administrative files indicate that the yield grade system is the most accurate method of estimating retail yield that is both economical and practical for use on a daily basis.[32] Appellees also question the usefulness of compulsory yield grading in light of the fact that, as we

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[31] Murphey, Estimating Yields of Retail Cuts from Beef Carcasses, 19 J. Animal Science 1240 (1960).

[32] See, e.g., Defendant's Exhibit 616 (variables used in the yield grade equation appear to be the most acceptable among those reported when accuracy, speed, and expense are considered; Defendant's Exhibit 662 (prediction equation using the same factors as those used in the USDA equations predicted percent boneless steak and roast meat with a multiple correlation of 0.97); Defendant's Exhibit 666 (equations containing the variables used in the USDA equation resulted in the highest coefficients of multiple determination for percent of boneless steak and roast meat); Defendant's Exhibit 670 (yield grade is most accurate method for predicting carcass composition, percent fat, and protein that can be readily applied by graders in a slaughter facility on large numbers of animals); Defendant's Exhibit 672 (USDA equation, with a simple correlation coefficient of 0.83, is one of the three most useful equations for predicting retail yield).

have noted, cattle are generally purchased on the hoof rather than on a carcass grade and weight basis. The yield grade stamps are not applied until the cattle are slaughtered, skinned, cleaned, and chilled for approximately twenty-four hours. Thus under existing buying practices the full use of yield grading as a pricing mechanism requires that the packer-buyer be able to subjectively evaluate the retail yield of live cattle with a fair degree of accuracy. Studies by Wilson,[33] Gregory,[34] and Crouse,[35] tend to support the Department's position that subjective live appraisal by trained personnel has predictive value. Appellees place great emphasis on the fact that, in practice, federal graders estimate three of the four factors used in the yield grade equation by means of visual observation. We cannot say, however, that the subjective application of the yield grade equation substantially impairs its accuracy. Under USDA regulations the amount of external fat on a carcass is evaluated in terms of the thickness of the fat over the ribeye, but this measurement must be adjusted to reflect uneven deposition of fat on the carcass. 7 C.F.R. § 53.102(v). The regulations permit and provide for the adjustment which, as a practical matter, must be subjective. Id. The fact that no packer or other financially interested party has ever used the Department's appeals procedure to appeal a

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[33]Defendant's Exhibit 601 (concluding that fat thickness, which is the primary factor used in determining yield grade, can be predicted in live animals with moderate accuracy and finding a correlation between live estimated fat thickness and carcass cutability of 0.65).

[34]Defendant's Exhibit 602 (concluding that approximately 25 to 35 percent of the variation in actual cutability can be accounted for on the basis of live estimates of cutability).

[35]Defendant's Exhibit 631 (live animal estimates of carcass yield grades accounted for 51 and 65 percent of the variation in carcass yield and percentage of actual cutability.

yield grade determination[36] convinces us that subjective evaluation of yield grades is not a real problem.

We recognize that a compulsory yield grade program may cause a certain loss in flexibility by limiting packers' ability to merchandise certain kinds of carcasses, especially those that are overfat or damaged, and by precluding those packers who customarily trim exterior fat prior to grading from selling such fat as an edible byproduct. Nevertheless, the disadvantages are to be balanced against the expected beneficial effects of the program, including the creation of price signals that will induce producers to shift their resources to the production of leaner cattle.[37] This is precisely the type of situation that calls for the exercise of administrative expertise. Scientists at Texas A & M University's Agricultural Experiment Station recently compiled the data collection phase of a study designed to evaluate the prediction equation currently in use. If the Department concludes, after thorough analysis of the date, that the yield grade system is no longer suitable, the Secretary, under 7 U.S.C. § 1622(c),[38] should revise the regulations

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[36] Tr., vol. 11, at 1268-69.

[37] Community Economics Division, Economic Research Service, U. S. Dep't of Agriculture, Economics of Beef Grades: Present and Proposed [Preliminary Draft November 27, 1974].

[38] Under 7 U.S.C. § 1622(c), the Secretary is authorized and directed to "develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practice."

accordingly. Appellees argue that the Department acted prematurely in promulgating the new regulations before collection and analysis of the Texas data was complete. Perhaps it would have been more desirable, as a point of procedure, if the Department had waited. We cannot disregard the fact, however, that the research studies previously discussed support the yield grade system currently in force.

V.

We hold that a district court reviewing regulations promulgated pursuant to the notice and comment procedure specified by 5 U.S.C. § 553(c) is not empowered to conduct a de novo hearing. All parties agreed, as did the District Judge, that de novo review was not appropriate. But our examination of the voluminous record of the trial proceedings convinces us that the district court did in fact hold a de novo trial[39] and that the expert evidence relating to the merits of the regulations influenced the District Judge's decision. We have thoroughly reviewed the administrative record with certain explanatory evidence and conclude that the compulsory yield provision of the new regulations cannot be set aside as arbitrary and capricious. For all of the foregoing reasons we dissolve the injunction issued by the district court and remand the case with instructions to enter a judgment declaring that the revised regulations are valid and dismissing the complaints filed by the Independent Meat Packers Association and the intervening plaintiffs.

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[39] Perhaps our earlier remand for "a plenary hearing," 514 F.2d at 1120, motivated the district court to hold a full-scale trial.