

MARKETING ORDERS AND THE ADMINISTRATIVE PROCESS: FITTING ROUND FRUIT INTO SQUARE BASKETS

*Barry Pineles**

INTRODUCTION

The American farmer is the icon of the United States. From the days in which the Pilgrims cultivated the land with maize, to the settlement of the frontier, to modern efforts involved in turning deserts to fertile plains, the American farmer has been an undying symbol of fortitude under adverse conditions and the fabric which holds this nation together. This romanticized view results in a significant amount of public largesse and sympathy aimed at the farmer. Illustrative are the marketing orders for fruits and vegetables which first arose as voluntary arrangements in the 1920's and then were legislated by Congress in the early 1930's. The statutory basis for marketing orders has remained unchanged since that time despite significant modification to the system for developing federal policy due to the enactment of the Administrative Procedure Act (APA).¹ Marketing orders for fruits and vegetables essentially permit industry groups to organize cartels which restrict, in one manner or another, the amount of product that can be shipped to the fresh market. The orders regulate the gamut of fruits, vegetables, and nuts, from avocados grown in Florida to walnuts produced in California. Almost five billion dollars of American agricultural products are subject to the marketing orders.²

* J.D., University of Iowa Law School, 1982. Mr. Pineles is Assistant Chief Counsel for Market Competition, Office of Advocacy, United States Small Business Administration (SBA).

The views expressed in this article are those of the author and do not necessarily reflect the views of the Office of Advocacy. The author has been involved in a number of the proceedings addressed in this article.

¹ Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

² U.S. GEN. ACCT. OFF., THE ROLE OF MARKETING ORDERS IN ESTABLISHING

This article examines the operation of marketing orders and attempts to place the decision-making process in its proper administrative and legal context. It will examine implementation problems identified by courts and outside parties in dealing with the United States Department of Agriculture (USDA). The article will conclude with an examination of remedies to the administrative process including the elimination of the statutorily-mandated requirement necessitating the litigation of informal rulemaking challenges before the USDA.

I. MARKETING ORDERS

A. *Rural Conditions Before the Depression*

Concerns about the financial health of farmers did not begin with the Great Depression.³ Life on the farm had always been hard⁴ and farmers represented a powerful political bloc several years before the Depression began. In the 1880's, crises on the farm led to the establishment of the Interstate Commerce Commission in order to protect farmers against railroad monopolies and the rates charged for the shipment of crops.

The agricultural sector recovered from the difficulties of the 1880's, and by the earliest part of the twentieth century, agriculture prospered.⁵ Farmers, given the good conditions and rising income, decided to expand holdings and increase production—often through the use of credit. But this reliance on credit, expanding output, and falling prices created grave difficulties for farmers after World War I.⁶

As a result, President Harding convened a National Conference on Agriculture to examine possible solutions to the farm problem.⁷ Con-

AND MAINTAINING ORDERLY MARKETING CONDITIONS 1-10 (1985).

While marketing orders regulate the shipment of milk in many parts of the country, milk marketing orders are beyond the scope of this article.

³ Concerns about the financial health of farmers were bolstered, in part, by the worldwide slump in output and prices, and greatly increased levels of unemployment between 1929 and 1934. CHAMBERS DICTIONARY OF WORLD HISTORY 376 (1993).

⁴ See W. CATHER, *MY ANTONIA* (1913).

⁵ To this day, agricultural programs are measured against their success in attaining "parity prices" which, if attained, would provide the equivalent of the buying power farmers had from 1910-14. 7 U.S.C. § 1301(a)(1) (1994).

⁶ ANTITRUST IMMUNITIES TASK FORCE, U.S. DEP'T OF JUSTICE, *EFFECTS OF GOVERNMENTAL REGULATION OF THE DAIRY INDUSTRY* 33 (1976) [hereinafter TASK FORCE].

⁷ REPORT OF THE NATIONAL AGRICULTURAL CONFERENCE, H.R. DOC. NO. 115, 67th Cong., 2d Sess. 3-4 (1922).

gress itself also studied the problems of farmers.⁸ Testimony revealed that farm income was decreasing while the margins for wholesalers and retailers of select agricultural commodities was increasing.⁹ The legislators believed that the disparity was the result of oligopsony.¹⁰ To solve the problem, Congress investigated mechanisms to increase the bargaining power of farmers leading to the enactment of the Capper-Volstead Act.¹¹

Agricultural cooperatives¹² were viewed as the most appropriate mechanism for rectifying the imbalance in bargaining power. Many legislators believed that farmers were wary of joining cooperatives, however, because of potential liability under the Sherman Anti-Trust Act.¹³ Congress decided that an unambiguous exemption to the Sher-

⁸ REPORT OF THE JOINT COMMISSION OF AGRICULTURAL INQUIRY, H.R. REP. NO. 408, 67th Cong., 1st Sess. (1921).

⁹ TASK FORCE, *supra* note 6, at 36.

¹⁰ TASK FORCE, *supra* note 6, at 36-37. An oligopsony is a market in which many sellers face only a few buyers. The market power of the purchasers enables them to extract lower prices from the sellers than would occur in a competitive free market. F.M. SCHERER, INDUSTRIAL ORGANIZATION (1980).

¹¹ Act of Feb. 15, 1922, ch. 57, 42 Stat. 388 (codified as amended at 7 U.S.C. §§ 291-92 (1994)).

¹² An agricultural cooperative is basically "a group of farmers who reside in the same vicinity acting together for their mutual benefit in the cultivating, harvesting, and marketing of their agricultural products." *Industrial Comm'n v. United Fruit Growers Ass'n*, 103 P.2d 15, 17 (Colo. 1940); *accord* *United States v. Rock-Royal Coop.*, 307 U.S. 533, 563-65 (1939); *Cache Valley Turkey Growers Ass'n v. Industrial Comm'n*, 144 P.2d 537, 539 (Utah 1943). For purposes of the Capper-Volstead Act (*see infra* notes 13-15 and accompanying text), agricultural cooperatives are associations of agricultural producers which act together for processing, preparing for market, or marketing the production of members. 7 U.S.C. § 291; *see also* *Case-Swayne Co. v. Sunkist Growers, Inc.*, 355 F. Supp. 408, 409-11 (C.D. Cal. 1971).

Cooperatives began forming in earnest in the early 1900's. The California Walnut Growers Association was formed in 1912. John A. Jamison, *Marketing Orders and Public Policy for the Fruit and Vegetable Industries*, in 10 FOOD RESEARCH INSTITUTE STUDIES 229, 263 (1971). The prosecution of the California Raisin Growers Association was mentioned in the debates concerning the need for an antitrust exemption. 62 CONG. REC. 2122 (1922) (remarks of Sen. Walsh). The National Agricultural Conference also noted the limited success of associations dedicated to the marketing of a single fruit, such as prunes or peaches, prior to the passage of the Capper-Volstead Act. REPORT OF THE NATIONAL AGRICULTURAL CONFERENCE, *supra* note 7, at 79.

¹³ TASK FORCE, *supra* note 6, at 49. Senator Walsh noted that the opponents of cooperatives would "circulate a rumor to the effect that organizations of that character are violative of the Sherman Act and prosecutions are likely to be instituted if they are organized." 62 CONG. REC. 2123 (1922).

Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1994), provides:

Every contract, combination in the form of trust or otherwise, or conspir-

man Anti-Trust Act was needed.¹⁴ Congress enacted the Capper-Volstead Act with the expectation that it would promote the development of agricultural cooperatives and improve the economic status of farmers by reducing the barriers to vertical integration of agricultural producers into marketing and distribution.¹⁵

The Act permits farmers, planters, ranchers, or milk producers to act together in an association for the collective processing, market preparation, handling, and marketing in interstate or foreign commerce of agricultural products without violating the restraint of trade prohibition in the Sherman Act.¹⁶ The exemption applies to the typical cooperative which collectively produces and markets agricultural products.¹⁷

acy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal

The Sherman Act was enacted to preserve free competition with the expectation that competitive forces would lead to the optimal allocation of resources. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978); *Northern Pac. R.R. v. United States*, 356 U.S. 1, 4 (1958). Any combination of agricultural producers would restrict competition and putatively fall within the prohibition of section 1. *Cf. Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1039 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1980) (agricultural cooperatives violate principle of Sherman Act but are exempt under Capper-Volstead Act).

¹⁴ Congress attempted to clarify the applicability of the Sherman Act to agricultural associations in the Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1994)). Section 6 of the Act appeared to permit agricultural organizations to form and restrain the activities of individual members. *Id.* at 731 (codified as amended at 15 U.S.C. § 17). The Act also prohibited cooperatives from owning capital stock, which prevented many normal types of business dealings. *See* 59 CONG. REC. 8025 (1920) (remarks of Rep. Hersman); *id.* at 8022-23 (remarks of Rep. Swope). Many legislators believed that the Clayton Act was ambiguous, restrictive, and failed to remove uncertainties regarding the liability of cooperatives under the Sherman Act. TASK FORCE, *supra* note 6, at 51.

¹⁵ TASK FORCE, *supra* note 6, at 54.

¹⁶ 7 U.S.C. § 291 (1994).

¹⁷ *Maryland & Va. Milk Prod. Ass'n v. United States*, 362 U.S. 458, 465 (1960). The exemption also applies to bargaining associations whose sole purpose is to negotiate prices and other contract terms with prospective purchasers of the association's products. *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 214-16 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974). The Capper-Volstead Act also covers marketing agencies which are combinations of cooperatives for the purpose of marketing the products of the cooperatives. *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037, 1039-40 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981). A more detailed discussion of the exemptions under the Capper-Volstead Act can be found in Stephen D. Hawke, Note, *Antitrust Implications of Agricultural Cooperatives*, 73 Ky. L.J. 1033 (1986); Note, *Trustbusting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 Va. L. Rev. 341 (1975).

Cooperatives began to exercise their newfound powers in the 1920's by developing clearinghouses which coordinated the marketing of agricultural products.¹⁸ Some cooperatives went even further and instituted market control mechanisms for their members.¹⁹

Despite the efforts of cooperatives to use their new freedom to restrict production or otherwise band together to control the market, the prices received by farmers continued to decline. Farmers who did not join the cooperatives or otherwise participate in efforts to hold down prices benefitted all the same from the reduced production of cooperatives. Farmers then began to abandon the cooperatives and the efforts to control production failed.²⁰ The economic condition was further exacerbated as the country spiralled deep into the Great Depression. Cries for solution echoed throughout the land as President Roosevelt and a heavily Democratic Congress took office in 1933.

¹⁸ AGRICULTURAL MKTG. SERV., U.S. DEP'T OF AGRIC., A REVIEW OF FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, AND SPECIALTY CROPS 4 (1981).

¹⁹ *Id.* The California Fruit Growers Exchange attempted to rectify the extremely low prices for lemons resulting from an unusually large crop in 1923-24. The Exchange established distribution committees to determine the amount of lemons that could be shipped to market by its members. Jamison, *supra* note 12, at 256. By the early 1930's, the voluntary program grew to include navel and Valencia oranges. U.S. Dep't of Agric., 1985-86 MARKETING POLICY FOR CALIFORNIA-ARIZONA VALENCIA ORANGES 3-4 (1985). This market control program provided the foundation for regulation under federal marketing orders for California-Arizona citrus fruit.

Cooperatives involved with other commodities also attempted, with varying degrees of success, to regulate the marketing of agricultural products. A number of dairy cooperatives, in association with milk dealers, attempted to restrict production or otherwise maintain the price of milk despite increasing production and stable demand. TASK FORCE, *supra* note 6, at 77-79; *see also* Jamison, *supra* note 12, at 250 (California Bartlett pear industry voluntarily attempted to restrict shipments of pears).

²⁰ AGRICULTURAL MKTG. SERV., *supra* note 18, at 4. The problem faced by farmers who joined cooperatives is known as the "free-rider" problem. In economic terms, a free-rider is an economic entity that benefits from another entity's production function, and the market is unable to prevent the benefitting party from internalizing the externally generated benefit. For example, a large department store spends money to advertise a new videocassette recorder. A discount house may benefit from the advertising through increased awareness and demand for the videocassette recorder, but the discount house did not have to pay for the advertising. *See* Saul Levmore, *Rescuing Some Antitrust Law: An Essay on Vertical Restrictions and Consumer Information*, 67 Iowa L. Rev. 981, 982 (1982).

B. *The Agricultural Marketing Agreement Act of 1937*²¹

The Agricultural Marketing Agreement Act of 1937 (AMAA) was designed to remove the chaos that surrounded the failure of voluntary efforts by cooperatives to regulate production of agricultural commodities.²² The statute has two primary goals: to maintain orderly marketing which will establish parity prices and protect the interests of consumers.²³ The statute attempts to accomplish these goals through marketing orders. The orders are established at the behest of growers and impose restrictions on the sale of commodities by handlers²⁴ who sell the goods for resale.²⁵

The Act, with subsequent amendments, specifies the commodities eligible for the implementation of the order.²⁶ The Act also enumerates

²¹ Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

²² *Zuber v. Allen*, 396 U.S. 168, 174 (1969).

²³ 7 U.S.C. § 602(1)-(2) (1994). While the protection of consumers is mentioned in the Act, the Supreme Court determined that such interests do not give rise to a sufficient stake in the process to enable consumers to institute an administrative challenge to the Act. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984). Since consumers have no way to challenge an order, the protection of their interests is left to the "goodwill" of the Secretary of Agriculture [hereinafter "Secretary"].

²⁴ The Act defines handlers as those processors, associations of producers, or others who handle agricultural commodities specified in the Act. 7 U.S.C. § 608c(1) (1994). Handling is not defined in the Act, but the USDA's regulations usually define handling as the placement of a commodity in the stream of commerce through sale or consignment. *See, e.g.*, 7 C.F.R. §§ 916.11, 918.7 (1994). Generally, such placement requires that the product be shipped from a point in the state or production area to a point outside the state or production area. *See id.* However, some orders define handling to encompass transportation or sale within the production area. *E.g., id.* §§ 915.10, 922.13.

²⁵ The imposition of regulation on handlers and not producers is a direct result of the decision in *United States v. Butler*, 297 U.S. 1 (1936). The Court determined that the regulation of agricultural production was purely a local matter beyond the scope of authority delegated by the Constitution to the Congress. *Id.* at 64, 74. Since uncertainty existed concerning the ability of Congress to regulate farm production under its commerce clause power, the legislation adopted a process for regulating commerce that unquestionably was in the stream of interstate commerce. As subsequent cases pointed out, congressional authority extends to regulation of local agricultural production because of the effect of such production on interstate commerce. *Katzenbach v. McClung*, 379 U.S. 294, 300-02 (1964); *Wickard v. Filburn*, 317 U.S. 111, 125, 127-28 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942). Thus, the basis for regulating handlers as an indirect means of regulating production no longer exists and a number of programs aimed at promoting agricultural consumption require direct payments by producers.

²⁶ 7 U.S.C. § 608c(2) (1994). In certain circumstances, orders are not permitted for

the terms and conditions of the orders.²⁷ The terms can be roughly categorized as those that control quantity, those that control quality, and those that provide for assessment to pay for production research and promotion. Nothing in the Act limits an order to any particular term or condition and, in fact, most orders contain multiple provisions for regulating the handling of commodities.

The promotion and research provisions of marketing orders are designed to "assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product."²⁸ While all types of research efforts may be funded under the Act, only specific commodities are entitled to use paid advertising.²⁹ Funding for all research and promotion efforts comes from assessments collected under the order. The assessments are based on a monetary amount per measure for each commodity.³⁰ The Act authorizes that handlers of certain commodities may be given credits against their assessments for promotion that the handlers undertook.³¹

Quality control measures for marketing orders regulate the size, maturity, or grade of a crop and are designed to ensure that quality fruit and vegetables reach the market. Size standards are normally based upon the amount of produce that can be packaged in a standard container for that type of fruit or vegetable.³² Maturity standards bar

commodities used for certain purposes, such as canning, but are permitted for all other purposes.

²⁷ *Id.* § 608c(6).

²⁸ *Id.* § 608c(6)(I).

²⁹ *Id.* Those commodities, not all of which have established orders, are: almonds, filberts, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, and tomatoes. Other commodities are limited, in the type of promotion available under the orders, to such things as point-of-purchase displays and sending information to food editors of magazines. *See, e.g.*, Strawberries Grown in Florida, 53 Fed. Reg. 7,194, 7,195 (Mar. 7, 1988) (proposed strawberry order for Florida limits advertising to point-of-sale and other types of non-paid advertising).

³⁰ *E.g.*, 7 C.F.R. § 920.41 (1994) (assessment for kiwifruit limited to a maximum of 3.5 cents per flat of kiwifruit); *id.* § 982.61 (Secretary will fix assessments per pound of filberts handled).

³¹ These commodities are: almonds, filberts, raisins, walnuts, olives and Florida Indian River grapefruits. The crediting of assessments, particularly with respect to the marketing order for almonds, is extremely controversial for both administrative and constitutional reasons. The constitutional basis for the objections is beyond the scope of this article.

³² The marketing order regulating the shipment of plums grown in California, 7 C.F.R. §§ 917.1-.103, .116, .140-.150, .177, .454, .460 (1994) (repealed after a continuation referendum failed to produce sufficient support by plum producers), authorized

immature or unripened produce from reaching the market and generally apply to tree fruits such as nectarines or peaches.³³ Finally, grade standards prohibit handlers from shipping produce that fails to satisfy grade standards.³⁴ Since the Act permits shipment of only those fruits and vegetables which meet these quality standards, a portion of a crop which fails to meet these standards will not be marketable. Thus, quality controls indirectly act as quantity controls.

Quantity controls are designed to solve the typical problem of American agriculture—overproduction. An individual farmer maximizes revenue and profit by producing as much as possible. Since each farmer reacts similarly and the demand for most agricultural commodities over the short run is inelastic,³⁵ the income of farmers drops. This reduction in income forces farmers to produce even more, creating a vicious spiral of ever increasing production accompanying continually reduced income. One method for overcoming this problem is to force farmers to act collectively in reducing the amount of produce that reaches the market. Quantity controls in marketing orders attempt to accomplish that without actually regulating the amount produced by a farmer.

the Secretary to set the size or capacity of the pack or container. Size standards were set by the arrangement of plums in the top layer of a four-basket crate. By modifying the arrangement in the top layer, the handler could change the size of plums shipped to the market. The Secretary could, although he did not choose to, assign four-basket crate equivalents for each variety of plum and thus designate the size of plums that could be handled under the order.

³³ The marketing order for nectarines grown in California, 7 C.F.R. §§ 916.1-356 (1994), requires that fruit be U.S. No. 1 grade and well-matured. The determination of well-matured is made on a comparison of the fruit with color guides used by federal and state inspectors. The use of color chips in the regulation of tree fruit grown in California has generated some controversy. See *Wileman Bros. & Elliot, Inc., v. Gianini*, 909 F.2d 332, 333-34 (9th Cir. 1990).

³⁴ The marketing order for walnuts grown in California, 7 C.F.R. §§ 984.1-.90 (1994), requires handlers to have inspection certificates demonstrating that the walnuts meet United States standards for walnuts. The standards for walnuts and other commodities are developed by the USDA's Agricultural Marketing Service (AMS) and can be found at 7 C.F.R. pt. 51 (1994).

³⁵ Some evidence exists that the assumption concerning inelasticity may not be appropriate for all agricultural commodities. A study of the California-Arizona lemon industry reveals that total revenue increased as the price and quantity of lemons dropped. See Hoy F. Carman & Daniel H. Pick, *Marketing California-Arizona Lemons Without Marketing Order Shipment Controls*, 4 *AGRIBUSINESS* 245, 248-49 (1988). This is supported by total revenue increases for growers while the price dropped after suspension of volume controls for navel oranges in 1992. Increases in total revenue combined with decreases in price are emblematic of an elastic market. However, a complete analysis of the economic arguments, both for and against marketing orders, is beyond the scope of this article.

Marketing orders employ three types of quantity controls: allotments, market flow regulations, and market allocations. Allotments restrict quantity by limiting the number of producers from which handlers are legally allowed to purchase the commodity.³⁶ Market flow regulations attempt to enhance returns by regulating the amount sold during a given period. Market flow regulations are implemented through prorate³⁷ and shipping holidays.³⁸ Market allocation schemes control quantity by diverting sales from normal retail channels or de-

³⁶ Individual allotments are based on the amount of production by each grower within the area covered by the order in some base year or period, such as the allotment for spearmint oil which is based on the amount of oil sold from 1977 to 1979. 7 C.F.R. § 985.53(a) (1994). If the Secretary determines that restrictions on the sale of oil are necessary, an individual producer's total permissible sales to a handler is determined by multiplying the allotment base by the producer's allotment percentage. *Id.* §§ 985.54(b), 985.55(d). Excess production is diverted into a reserve pool for later disposition. Thus, by one theory, the allotments do not restrict the actual production of a grower. Similar programs exist for cranberries, *id.* § 929.49, and celery grown in Florida, *id.* §§ 967.36-37.

³⁷ Prorate authorizes the Secretary to apportion the amount of a crop that can be shipped to the domestic fresh market. Under a typical prorate scheme used for navel oranges grown in California and Arizona, a determination is made of the total number of navel oranges produced. 7 C.F.R. pt. 907 (1994). Estimates are then made of the amount which should be shipped to the fresh domestic market to maximize returns to growers and produce orderly marketing. The ratio of these two numbers constitutes the equity factor. *Id.* § 907.110(a). The equity factor is then applied to the total tree crop in each of the four producing districts and represents the total amount of tree crop which should be sold to the domestic fresh market each year from each district. *Id.* This total is then apportioned weekly over the season. The amount any handler can ship—the prorate—is the percentage of the total tree crop that a handler has available for shipment. *Id.* § 907.54. This percentage is then multiplied against the total amount which should be shipped that week from the district. For example, if a handler controls 50% of the tree crop—the prorate base—in a district, and the shipments from that district for the week should be 10,000 cartons, the handler's prorate would be 5,000 cartons. It is important to note that the determination of the equity factor does not affect the prorate base of the handler but does affect the amount of oranges which can be shipped to the domestic fresh market.

The regulations and the underlying marketing orders for lemons, and navel and Valencia oranges grown in Arizona and California were terminated by the Secretary. 59 Fed. Reg. 44,020 (Aug. 26, 1994). However, the AMAA still authorizes the use of prorate-type controls for any listed commodity.

³⁸ Shipping holidays prohibit all commercial shipments of a commodity, and the orders specify the length of such holidays. RICHARD HEIFNER ET AL., AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., A REVIEW OF FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, AND SPECIALTY CROPS: ECONOMIC EFFICIENCY AND WELFARE IMPLICATIONS 28 (Nov. 1981). Shipping holidays are authorized for use in ten marketing orders but are used infrequently. U.S. GEN. ACCT. OFF., *supra* note 2, at 22-23.

laying the sale of the crop.³⁹ Quantity controls are controversial and their ability to counteract the forces that lead to overproduction is an open question.⁴⁰

II. THE ADMINISTRATIVE PROCEDURE ACT

Prior to 1946, government agencies often utilized a welter of inconsistent and ad hoc rules for executing their statutory mandates. While this situation had existed for some time, the growth of government programs during the Great Depression exacerbated the problem.⁴¹ After examination by a special committee, Congress responded by enacting the APA.

The APA introduced standardized procedures throughout government and provided a framework for distinguishing among the various quasi-legislative, executive, and judicial functions of federal agencies.⁴² The Act ensures that administrative policies affecting individuals' rights will be promulgated to stated procedures in order to avoid unpublished, ad hoc determinations.⁴³

The Act establishes procedures for issuing rules.⁴⁴ Rules may be issued informally in accordance with the procedures of section 553 of the Act or formally in compliance with the procedures of sections 554, 556 and 557. Both processes require that rulemaking be on the record.⁴⁵

³⁹ The allocation schemes assign free and restricted or reserve percentages. The free percentages can be sold in any market, while the restricted percentages can only be sold in noncompetitive markets. *See, e.g.*, 7 C.F.R. § 981.66(c) (1994) (almonds not freely marketable may be disposed of immediately in noncompeting markets for animal feed or almond butter). In some orders, the restricted percentages are held in so-called reserve pools for disposition from the pool when market prices improve. *See, e.g., id.* § 989.54 (release 65% to 85% of raisins at beginning of crop year for unlimited sale while remainder enters reserve awaiting better market conditions).

⁴⁰ Compare HAZELNUT MKTG. BD., 1987-88 MARKETING POLICY FOR HAZELNUTS GROWN IN OREGON AND WASHINGTON 4-6 (1987) and NAVEL ORANGE ADMIN. COMM., 1988-89 MARKETING POLICY FOR NAVEL ORANGES GROWN IN ARIZONA AND DESIGNATED PARTS OF CALIFORNIA 13 (1988) with Jamison, *supra* note 12, at 348-50 and Lawrence Shepard, *Cartelization of the California-Arizona Orange Industry, 1934-1981*, 29 J.L. & ECON. 83, 120-22 (1986).

⁴¹ *See* 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4 (1994).

⁴² *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). This distinction, which was not conceived by Congress when it passed the AMAA, is crucial to the legal problems associated with the management of the marketing order programs.

⁴³ *See* *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

⁴⁴ 5 U.S.C. § 551(12) (1994).

⁴⁵ *See* 1 DAVIS & PIERCE, *supra* note 41, §§ 6.4, 7.2.

Formal rules are based on evidence adduced during a hearing made on the record and presided over by an administrative law judge (ALJ). Informal rules are usually developed⁴⁶ through the filing of comments after notice of a proposed rule has been given in the *Federal Register*.

The APA also authorizes agencies to issue orders which resolve disputed facts or law in a particular case between two parties.⁴⁷ While the definitions in the APA recognize that some adjudications may be informal, the typical adjudication is formal and requires that a hearing be held before an ALJ pursuant to sections 554, 556 and 557 of the Act.⁴⁸

To determine the type of proceeding that should be employed, the agency must look to the statute it is charged with implementing. If the statute specifies that a hearing must be held, the agency must follow the adjudication procedures in the APA subject to provisions in the statute that mandate the hearing;⁴⁹ otherwise the agency can determine the most appropriate type of proceeding.⁵⁰ The USDA utilizes formal rulemakings, informal rulemakings, and formal adjudications to implement the AMAA.

III. THE INTERSECTION OF THE APA AND AMAA—IMPLEMENTATION

A. *Establishing the Order—Formal Rulemaking*

The establishment of a marketing order commences with submission of a petition to the USDA by any person, usually a grower or group of growers.⁵¹ The USDA then conducts a preliminary investigation to determine whether the proposed order might effectuate the purposes of

⁴⁶ Section 553 provides a number of exemptions to the notice and comment procedures normally required. Rules covering military or foreign affairs—or matters relating to agency management, personnel, public property, loans, benefits, or contracts—are not subject to the informal rulemaking procedures. 5 U.S.C. § 553(a) (1994). Notice and comment also need not be given if the agency pronouncement is an interpretative rule, general statement of policy, or rules of agency organization, procedure, or practice. *Id.* § 553(b)(A). If the agency finds it impracticable, unnecessary, or contrary to the public interest to use notice and comment rulemaking, it may forgo those procedures as long as it explains the reasons for doing so. *Id.* § 553(b)(B).

⁴⁷ See *United States v. Florida East Coast Rail Co.*, 410 U.S. 224, 245 (1973); *Patagonia Corp. v. Board of Governors of Fed. Reserve Sys.*, 517 F.2d 803, 816 (9th Cir. 1975).

⁴⁸ See 1 DAVIS & PIERCE, *supra* note 41, §§ 7.2-.3.

⁴⁹ 5 U.S.C. § 556(b).

⁵⁰ *Chemical Leaman Tank Lines v. United States*, 368 F. Supp. 925, 936 (D. Del. 1973).

⁵¹ 7 C.F.R. § 900.3 (1994).

the AMAA. The USDA has not published any rules or issued internal guidance which delineate the process for conducting the preliminary investigation or making a finding that a hearing should be held. If a hearing is to be held, the Secretary issues a notice of hearing which is published in the *Federal Register*.⁵²

The hearing is conducted before an ALJ in accordance with sections 554, 556 and 557 of the APA.⁵³ Any interested person is allowed to participate in the formal hearing, and neither the AMAA nor USDA regulations limit such participation to growers or handlers. Testimony is taken, witnesses are cross-examined, documents are placed on the record, and final briefs are submitted. This record is then transmitted to the Administrator of the AMS.

A preliminary decision whether the proposed order would tend to effectuate the purposes of the AMAA is made by the Administrator. The decision is published in the *Federal Register* with a request for comments or exceptions to the proposed determination.⁵⁴ The preliminary decision, comments and exceptions are then transmitted to the Secretary for a final determination as to whether to implement the order. The Secretary is required to make a determination, after considering the comments and other information, whether the proposed order would tend to effectuate the purposes of the AMAA.⁵⁵

The Secretary's finding that the proposed order would tend to effectuate the purposes of the AMAA⁵⁶ is not the final determinative for implementing the order, however. The Act requires that the proposed order be put to a vote of the growers to determine whether they support the implementation of the order.⁵⁷ If the growers approve the order, the

⁵² *E.g.*, Proposed Seedless European Cucumber Marketing Agreement and Order: Hearing, 53 Fed. Reg. 24,070 (June 27, 1988).

⁵³ *See* 7 C.F.R. §§ 900.4-.11.

⁵⁴ *E.g.*, Strawberries Grown in Florida, 53 Fed. Reg. 7,194, 7,194 (Mar. 7, 1988). The Office of Advocacy of the SBA filed comments in that proceeding opposing the institution of a federal marketing order. *See* letter by Frank Swain to J. Patrick Boyle (Apr. 6, 1988).

⁵⁵ *See* Sequoia Orange Co. v. Yeutter, 973 F.2d 752, 758, *modified*, 985 F.2d 1479 (9th Cir. 1992).

⁵⁶ *E.g.*, Navel Oranges Grown in California-Arizona: Decision and Referendum Order on Proposed Marketing Agreement and Order, 18 Fed. Reg. 4,708 (1953) (codified at 7 C.F.R. pt. 907 (1994)). The majority of orders which have given rise to the most voluminous litigation were established in the 1950's.

⁵⁷ The AMAA provides "[f]or the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers . . . and in the case of an order other than an amendatory order shall do so." 7

Secretary then issues it through publication in the *Federal Register* or direct notice to the affected handlers.

B. *Implementing the Order—Informal Rulemaking*

1. The Tendency Finding

Most orders are not self-implementing. Due to the perishable nature of the commodities and yearly fluctuations in supply and quality, the orders only authorize⁵⁸ the Secretary to impose restrictions on quantity or quality, or to modify assessments for advertising and research. Thus, the orders are subject to annual action by the Secretary. Annual implementation rests on the Secretary's determination that the particular rule will tend to effectuate the purposes of the AMAA—the tendency finding.

The Secretary is assisted in gathering the necessary information to make a tendency finding by administrative committees.⁵⁹ The committees are selected by the Secretary after nominations are made by the growers and handlers. The nominations are usually divided into groups in which the groups with the greatest production nominate the most members.⁶⁰ Each committee's duties include acting as an intermediary

U.S.C. § 608c(19) (1994). An order will not issue unless at least two-thirds of the producers or producers who have produced two-thirds of the commodity crop approve of the order. *Id.* § 608c(8)-(9).

⁵⁸ *E.g.*, 7 C.F.R. § 907.52 (if the Secretary finds volume regulation for navel oranges will tend to effectuate the purposes of the AMAA, regulation issues); *id.* § 948.22 (the Secretary can limit handling of Irish potatoes grown in Colorado if restriction will tend to effectuate the purposes of the AMAA).

⁵⁹ The committees operate only with respect to orders for fruits and vegetables. USDA officials, referred to as market administrators, oversee the operation of milk marketing orders. 7 C.F.R. § 1000.3. Market administrators, as employees of the United States cannot take actions which violate the antitrust laws. No such immunity exists for certain actions of the administrative committees. *Wileman Bros. & Elliot, Inc. v. Giannini*, 909 F.2d 332, 336-37 (9th Cir. 1990). The full impact of the *Wileman Bros. & Elliot, Inc.* decision on antitrust laws and the delegation doctrine under *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), are beyond the scope of this article.

⁶⁰ In some circumstances, the nomination of members is based on the marketing order's production-area subareas which produce the greatest percentage of the commodity. For example, the order that regulated plums grown in California established a Plum Commodity Committee of 12 members. 7 C.F.R. § 917.23 (repealed after a continuation referendum failed to produce sufficient support by plum producers). Six members of the committee were chosen from nominees of growers from Fresno County—the largest production subarea of plums covered by the California order.

Other commodities have a more complicated nominating structure based on the amount of production controlled by handlers. For example, the Almond Board of Cali-

between the Secretary and the industry, investigating violations of provisions of the order, and providing the Secretary with information on the economic conditions of the industry.⁶¹

The provision of information to the Secretary invariably takes the form of a marketing policy statement. Each order requires that the administrative committee submit to the Secretary, before the beginning of the marketing season, a policy statement containing information on the size of the crop, its quality, expected demand, and recommendations, if any, for use in the order's regulatory provisions.⁶²

Until November 9, 1984, the USDA never notified the public that it received marketing policy statements. In that year, the USDA published a summary of the marketing policy for navel oranges but never requested comment. The following year the USDA began to request comments on the marketing policy.⁶³ The USDA still does not publish receipt of any other marketing policy statements or request comment on their recommendations. This process prevents the Secretary from obtaining information from the public at large concerning the tendency finding.

After the tendency finding, the policy statement is sent for analysis to various parts of the AMS. An independent evaluation of the policy is performed, often using unspecified data, and then included in a position

ifornia consists of 10 members. *Id.* § 981.30. The order assigns four nominations to cooperative handlers and growers who use those cooperative handlers; four nominations to handlers and growers who are not members of cooperatives; and two nominations—one grower and one handler—from the cooperative handler, group of cooperative handlers, or group of independent handlers that handled more than 50% of the almonds produced in the year. *Id.* § 981.32. Within each group there may be more nominees than are needed to submit to the Secretary. Growers each receive one vote and handlers' votes are weighted according to the amount of almonds they handle. *Id.* Growers who market through a cooperative are required to vote through the cooperative, with the vote being weighted by the number of growers in the cooperative. *Id.* Thus, a cooperative that handles more than 50% of the almonds in any year is guaranteed control of the Almond Board of California. A similar arrangement gave the largest central marketing organization (cooperative) the greatest plurality of seats on the administrative committees for each of the marketing orders for California-Arizona citrus fruit. *See id.* §§ 907.102, 908.102, 910.122 (orders terminated by Secretary, 59 Fed. Reg. 44,020 (Aug. 26, 1994)).

⁶¹ *E.g., id.*, §§ 982.44, 989.36.

⁶² *E.g., id.*, §§ 920.51(b), 921.51(b).

⁶³ *In re Sequoia Orange Co.*, AMA Docket No. F&V 907-6, slip op. at 72-73 (Jan. 29, 1988), *rev'd in part and aff'd in part on other grounds*, *Riverbend Farms, Inc., v. Madigan*, 958 F.2d 1479 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992). The USDA also published notices of receipt of marketing policy statements for lemons and Valencia oranges grown in California and Arizona.

paper.⁶⁴ The position paper or marketing policy statement and accompanying analysis is then transmitted to various offices for comment. Although no written policy exists, it appears that final signature⁶⁵ on the paper or marketing policy is made by the Director of the Fruit and Vegetable Division of the AMS or the Assistant Secretary for Marketing.

Approval of the marketing policy statement, if it can be called that, does not end the implementation process. At some point, either contemporaneous with submission of the marketing policy or at sometime thereafter, the administrative committee makes a revised recommendation for regulation based on the most current data for regulation under the order. Generally, only one or two recommendations are made during the marketing season to implement the order.⁶⁶ However, in the case of lemons, and navel and Valencia oranges grown in California, the prorated system of volume controls required weekly recommendations.⁶⁷

The Secretary, using available, often unspecified material,⁶⁸ determines whether the recommendations of the committee would tend to effectuate the purposes of the AMAA. The Secretary occasionally will issue a proposed rule to elicit industry opinion on the preliminary conclusion that regulation will tend to effectuate the purposes of the Act.⁶⁹

⁶⁴ *Id.* at 71-72. No evidence exists that a different procedure is followed with other marketing orders except to the extent that other orders substitute the marketing policy statement and accompanying analysis for a formal position paper. No USDA guidelines exist for determining whether a formal position paper should be prepared.

⁶⁵ It is unclear whether the signatures constitute approval. The USDA has argued that no official need even read the marketing policies much less prepare position papers or approve them. Respondent's Appeal Petition at 36, *In re Sequoia Orange Co.*, AMA Docket No. F&V 907-6. Thus, it is unclear what the signature of an official of the USDA connotes. Of course, if the USDA's position is taken at face value, one wonders how the USDA can make any finding concerning tendency.

⁶⁶ *E.g.*, 7 C.F.R. §§ 981.45-.66 (almond order requires recommendation for reserve percentage by August 1 of each year but allows committee to modify percentage at later date); *id.* §§ 982.40-.41 (filbert order authorizes administrative committee to establish interim and final reserve percentages).

⁶⁷ *Id.* §§ 907.51, 908.51, 910.51.

⁶⁸ *E.g.*, Raisins Produced from Grapes Grown in California: Final Free and Reserve Percentages for the 1987-88 Crop Year for Certain Varietal Types, 53 Fed. Reg. 19,880, 19,881 (June 1, 1988); Lemons Grown in California and Arizona: Limitation of Handling, 53 Fed. Reg. 4,956, 4,956 (Feb. 19, 1988).

⁶⁹ *E.g.*, Fresh Pears, Plums, and Peaches Grown in California: Decrease in Size Requirements and Revision of Marketing Regulations for Plums, 53 Fed. Reg. 19,218, 19,219 (May 27, 1988); Walnuts Grown in California: Free, Reserve, and Export Percentages for the 1987-88 Marketing Year, 53 Fed. Reg. 9,595, 9,595 (Mar. 24, 1988).

More generally, the Secretary would issue an interim final rule with request for comments when the recommendations were submitted after the marketing season began or the regulations needed to be in place as soon as the marketing season began.⁷⁰ Finally, the Secretary publishes final rules for implementing prorate regulation without notice or comment.⁷¹

2. The Regulatory Flexibility Act⁷²

In 1980, Congress enacted the Regulatory Flexibility Act (RFA). The Act requires all agencies that issue rules subject to the notice and comment procedures of the APA or any other law to consider the impact of their regulations on small businesses and, if the impact is significant on a substantial number, consider alternatives that are less burdensome.⁷³ If the impact is not significant or a substantial number of small businesses are not affected, the agency may so certify and alternatives need not be examined.⁷⁴

The RFA imposes an additional requirement on the Secretary when implementing the AMAA. The Secretary must obtain sufficient information to consider the impact of regulations on small businesses in addition to making the tendency finding. However, the language of the RFA does not prevent the Secretary from adopting a regulation that tends to effectuate the purposes of the AMAA even if it will be burdensome on small business. The RFA simply requires the Secretary to identify those burdens and analyze alternatives.

The RFA can best be viewed as an adjunct and enhancement to the reasoned decision-making process mandated by the APA. The authors of the RFA expected that when faced with two options to achieve the purposes of a particular statute, federal agencies would select the one that is less burdensome to small businesses.⁷⁵

⁷⁰ *E.g.*, Raisins Produced From Grapes Grown in California: Final Free and Reserve Percentages for the 1987-88 Crop Year for Certain Varietal Types of Raisins, 53 Fed. Reg. 9,427, 9,428 (Mar. 23, 1988).

⁷¹ *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1483 (9th Cir. 1992); *cert. denied* 113 S. Ct. 598 (1992).

⁷² Act of Sept. 19, 1980, Pub. L. No. 96-354, 1980 U.S.C.C.A.N. (94 Stat.) 1164 (codified as amended at 5 U.S.C. §§ 601-12 (1994)).

⁷³ 5 U.S.C. §§ 603-604 (1994).

⁷⁴ *Id.* § 605.

⁷⁵ See Doris S. Freedman et al., *The Regulatory Flexibility Act: Orienting Federal Regulations to Small Business*, 93 DICK. L. REV. 439, 443 (1989).

C. *Modifying the Order—Informal or Formal Rulemaking*

Modifications to an order are made in a manner similar to the establishment of an order with two important distinctions.⁷⁶ Unlike the procedures governing the establishment of an order, no statutory requirement exists requiring the Secretary to conduct a formal rulemaking to modify an order. The Secretary may modify the order through informal rulemaking or may decide that formal rulemaking is the appropriate course of action.⁷⁷ Second, the process for voting on the order is different. In establishing an order, the growers vote either for the entire order with all its provisions or against the order. In amending the order, a vote is not required by statute.⁷⁸ The Secretary can simply determine that a proposal will tend to effectuate the purposes of the Act and issue the necessary amendments.⁷⁹ On the other hand, the Secretary might decide to put modifications to a vote such as in the case of navel and Valencia oranges grown in California and Arizona.⁸⁰ Neither the Act nor the regulations specify how issues are to be presented on the ballot or whether the Secretary can require a vote to approve or disapprove all proposals as a block or conduct the referendum on a line-item approach.

D. *Challenging the Order—Formal Rulemaking*

The predecessor statute to the AMAA, the Agricultural Adjustment Act (AAA), gave unbridled discretion to the Secretary to revoke licenses issued pursuant to that act. No administrative or judicial process was established to review decisions by the Secretary to revoke a license. In the 1935 amendments to the AAA, provisions were added to include a formal review process at both the executive and the judicial levels.⁸¹

⁷⁶ See 7 C.F.R. § 900.4(a) (1994).

⁷⁷ As has been noted previously, this course of action is left to the discretion of the Secretary. However, once a particular rulemaking procedure has been chosen, the Secretary must comply with the requirements mandated by the APA. *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752 (9th Cir. 1992), *modified*, 985 F.2d 1419 (1993).

⁷⁸ Section 19 of the AMAA provides that the "Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so." 7 U.S.C. § 608c(19) (1994).

⁷⁹ *E.g.*, *Nectarines Grown in California: Size Requirements and Maturity Regulations*, 53 Fed. Reg. 19,226 (May 27, 1988); *Tomatoes Grown in Florida: Change in Size Requirements*, 52 Fed. Reg. 46,345 (Dec. 7, 1987).

⁸⁰ *Sequoia Orange Co.*, 973 F.2d at 758.

⁸¹ The legislative history is most unenlightening on the subject. The conference reports simply paraphrase the statutory language without explaining the need for such provisions. See S. REP. NO. 1011, 74th Cong., 1st Sess. 14 (1935); H.R. REP. NO.

These provisions were substantially reenacted in the AMAA.

Section 15(A) of the Act provides in part:

[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition⁸²

The proceeding applies to both attacks on the order itself and to implementation of the order through the informal rulemaking process. After a petition is filed with the USDA, an ALJ is appointed to conduct the hearing which is formal and complies with sections 554, 556 and 557 of the APA.⁸³ The rules permit submission of motions, discovery, and cross-examination. At the end of the hearing, the ALJ makes a determination which is final unless one of the parties appeals to the Chief Judicial Officer.

An unappealed decision of the ALJ or a decision of the Chief Judicial Officer constitutes final agency action required before the order can be challenged in court.⁸⁴ Section 15(B) of the AMAA provides for filing a judicial appeal in a court of equity within 20 days of the final decision by the USDA.⁸⁵ If the judge determines that the ruling of the USDA was not in accordance with the law, the court has wide discretion to formulate the appropriate course of action including remanding the case for further consideration by the USDA.⁸⁶

E. Terminating the Order—Informal Rulemaking

The AMAA provides two methods for terminating the order. First, the Secretary may determine that the order or a particular provision of the order no longer tends to effectuate the purposes of the AMAA.⁸⁷

1241, 74th Cong., 1st Sess. 14 (1935). This provision was not mentioned in the floor debates. In its analysis of the AMAA hearing provisions, the USDA concluded that the section "would afford an administrative remedy to aid in fair and equitable administration." SOLICITOR, U.S. DEP'T OF AGRIC., AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 36 (1939).

⁸² 7 U.S.C. § 608c(15)(A).

⁸³ 7 C.F.R. §§ 900.50-71 (1994).

⁸⁴ See *United States v. Ruzicka*, 329 U.S. 287, 294-95 (1946); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983).

⁸⁵ 7 U.S.C. § 608c(15)(B).

⁸⁶ *Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990).

⁸⁷ 7 U.S.C. § 608c(16)(A). This authority has been used very infrequently, but was

Second, the Secretary is authorized to conduct a referendum of growers and terminate the order if a simple majority of the growers vote to terminate and their vote represents more than 50% of the production covered by the order.⁸⁸

All orders include some type of termination provision. In some cases, the orders simply reiterate the statute in enabling the Secretary to terminate an order with a majority vote.⁸⁹ Other orders require the Secretary to conduct referenda at regular intervals.⁹⁰ Finally, some orders establish a procedure through which growers can submit termination petitions to the administrative committee which will then make recommendations to the Secretary whether to commence a referendum.⁹¹ In such requests, either the order or the committee can recommend that support for the order be demonstrated by more than a simple majority.⁹²

IV. NONCOMPLIANCE WITH THE TENETS OF THE APA AND RFA—THE USDA IN SEARCH OF A RATIONALE

The statute establishing marketing orders originated during the depths of the Great Depression. Legal and constitutional concepts that are taken for granted today, such as a broad reading of the Congress' ability to regulate using the Commerce Clause, were at best in an embryonic stage of development. Other legal advances, such as the development of the APA, had not even reached conception. While the legal environment has steadily advanced to address real problems faced by a rapidly industrialized and often fractionated society, the legal structure of marketing orders has remained essentially unchanged since inception.

Moreover, as federal agencies have been forced by statute and court decree to be more open, responsible, and answerable in their rulemaking, the USDA appears to be travelling back in time to when emperors, by fiat, could dictate what should be harvested and to whom it could be

used by the Secretary in terminating the marketing orders for lemons and navel and Valencia oranges grown in California and Arizona.

⁸⁸ *Id.* § 608c(16)(B).

⁸⁹ *E.g.*, 7 C.F.R. § 921.64 (1994) (peaches grown in Washington); *id.* § 946.63 (Irish potatoes grown Washington); *id.* § 966.84 (tomatoes grown in Florida).

⁹⁰ *E.g.*, *id.* § 929.69(d) (referendum every four years regarding cranberry order); *id.* § 961.64(e) (referendum every four years concerning nectarines grown in California).

⁹¹ *E.g.*, *id.* § 920.63(d) (kiwifruit); *id.* § 917.61(d) (pears and peaches grown in California).

⁹² *E.g.*, Grapefruit Grown in the Indian River District in Florida: Termination Order, 52 Fed. Reg. 21,241, 21,242 (June 5, 1987).

sold. The USDA's efforts to comply with the reasoned decision-making process of the APA evidence a siege mentality in which the USDA can do no wrong and is not answerable to anyone, its decisions are unreviewable, and its processes should be shrouded in more mystery than the surface of Jupiter. Fortunately, the courts have not taken that approach and are forcing the USDA into the twentieth century. Nevertheless, some key reforms are needed to ensure that a workable and rational approach to reasoned decision-making occurs.

A. *The Notice and Comment Process*

The crux of the informal rulemaking procedure is the notice and comment process. It provides an avenue for the agency to receive input on its decision, ventilates a variety of concerns about potential policy options, and educates the agency with respect to the consequences of proposed actions.⁹³ As we have seen, the USDA has sought to shroud its decision-making process to an extent unprecedented since 1946, when the APA was enacted.

The USDA utilizes three avenues for reducing input by the public. First and foremost, it issues interim regulations with immediate effectiveness and only seeks comments before finalizing the regulations.⁹⁴ Second, it issues proposed rules with very short comment periods—too short to allow full and fair opportunity for participation.⁹⁵ Finally, it has issued regulations (with some regularity) utilizing the good cause exception to notice and comment rulemaking.⁹⁶

Of the three procedures, only the last has been challenged in court. In *Riverbend Farms, Inc. v. Madigan*,⁹⁷ the Ninth Circuit was faced with determining whether the USDA correctly utilized the good cause exception to notice and comment rulemaking in the issuance of weekly prorate regulations for navel oranges. The USDA argued that interested parties knew about weekly meetings of the administrative committee which made recommendations to the Secretary. The USDA also

⁹³ See *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

⁹⁴ *E.g.*, *Oranges, Grapefruit, Tangerines and Tangelos Grown in Florida: Repacked Citrus Fruit Shipment Exemption Procedures*, 59 Fed. Reg. 48,870 (Sept. 23, 1994).

⁹⁵ *E.g.*, *Almonds Grown in California: Proposed Salable, Reserve, and Export Percentages for the 1994-95 Crop Year*, 59 Fed. Reg. 46,203 (Sept. 7, 1994).

⁹⁶ See *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1483 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992).

⁹⁷ 958 F.2d at 1479.

argued that comments about restrictions were made at these open meetings.

The USDA's first contention is tantamount to determining that only certain parties, i.e., handlers and growers, are interested in the issuance of volume control regulations. Under the USDA's hypothesis, food retailers and consumers would have no opportunity to comment even though one of the statutory goals of the AMAA is to avoid undue price increases for consumers.⁹⁸ While this limitation might fit the USDA's parochial view of its mission,⁹⁹ the APA does not permit that constrained view. The court correctly rejected the notion and held that the Secretary cannot use the good cause exception to limit the potential number or types of commenters on proposed prorated restrictions.¹⁰⁰

The court also criticized the USDA for failing to publish the proposed level of prorated for the week. The court wasted little time in noting that a basic requirement for notice and comment rulemaking is the existence of a proposed rule upon which to comment. That failure, according to the court, also violated the APA.¹⁰¹

The court was even more troubled by the USDA's insistence that oral comments were the equivalent of written comments. The court plumbed the depths of the USDA's argument and could find no reason why the USDA did not accept written comments. The court held that the failure to accept written comments also violated the APA.¹⁰²

The Ninth Circuit's ruling did not go far enough. The USDA could assume, correctly, that if it could do notice and comment rulemaking on a weekly basis, then it has the implicit blessing of the Ninth Circuit to shorten comment periods. In addition, the Ninth Circuit also approved of the USDA's forgoing the 30-day delay in the effectiveness of its regulations.¹⁰³ Even though the court criticized the USDA's implementation of the APA, the Ninth Circuit's opinion is sufficiently broad to

⁹⁸ 7 U.S.C. § 602(2) (1994). *Cf.* *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984) (consumers have generalized interest in implementation of the AMAA).

⁹⁹ *See In re Sequoia Orange Co.*, AMA Docket No. F&V 907-6, slip op. at 141 (Jan. 29, 1988), *rev'd in part and aff'd in part on other grounds*, *Riverbend Farms, Inc., v. Madigan*, 958 F.2d 1479 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992) (Secretary cannot terminate program because he must protect best interest of producers).

¹⁰⁰ *Riverbend Farms, Inc.*, 958 F.2d at 1486.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1485-86. The APA requires that all final rules have a 30-day delay in their effectiveness unless the agency finds, for good cause, that to do so would not be in the public interest.

permit the USDA to severely limit public input on the implementation of marketing orders.

The discretion afforded the USDA by the Riverbend Farms court is particularly appalling when one considers that the USDA's utilization of short comment periods and interim rules is generally the result of its own ability to proceed with celerity when it chooses. For example, the USDA issued a notice of proposed rulemaking for establishing the reserve percentages for almonds on September 7, 1994.¹⁰⁴ The USDA provided a 15-day comment period because "reserve percentages are recommended to be established for almonds received during the 1994-95 crop year, which began on July 1, 1994."¹⁰⁵ According to the marketing order for almonds, a reserve percentage for the upcoming year must be recommended by May 15 of the prior year, in this instance May 15, 1994. Yet, the administrative committee did not meet to make recommendations until July 7, 1994, one week after the commencement of the marketing season.¹⁰⁶ The USDA then took two months to prepare a notice of proposed rulemaking. Thus, the need for shortened comment period was created, not by the necessity of meeting a weekly deadline as with the prorata program for navel oranges, but by the USDA's own internal management failures. Had the administrative committee complied with the dictates of the order and had the USDA operated with dispatch from the beginning, there would have been no need for a shortened comment period.¹⁰⁷

Nor can the USDA be heard to argue that it needs the time to analyze the data from the committee. The USDA asserted, in *Riverbend Farms*, that it conducts a full analysis of the record data.¹⁰⁸ The USDA cannot maintain, on the one hand, that it needs time to analyze data and, on the other, that it provides a thorough analysis in less than two days. The only logical explanation is that the USDA adopts the procedure that best limits outside input and adopts the appropriate length of time to conduct an analysis to meet that goal.

Nothing in the APA prohibits an agency from selecting a relatively short comment period. However, agencies are strictly forbidden from

¹⁰⁴ Almonds Grown in California: Proposec. Salable, Reserve, and Export Percentages for the 1994-95 Crop Year, 59 Fed. Reg. 46,203 (Sept. 7, 1994).

¹⁰⁵ *Id.* at 46,205.

¹⁰⁶ Almonds Grown in California: Salable, Reserve, and Export Percentages for the 1994-95 Crop Year, 59 Fed. Reg. 63,693, 63,694 (Dec. 9, 1994).

¹⁰⁷ See *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 441 (9th Cir. 1993).

¹⁰⁸ *Riverbend Farms, Inc., v. Madigan*, 958 F.2d 1479, 1483 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992).

using the good cause exception to notice and comment rulemaking if the need to meet some deadline is due to the agency's own inaction.¹⁰⁹ Enforcement of a similar prohibition on shortened comment periods will ensure that the USDA fully airs the issues surrounding the implementation of marketing orders. Of course, the USDA may not wish to receive this ventilation because it will be required to respond in writing to diverse viewpoints and explain why its chosen course of action is rational.

B. Rational vs. Rationale Rulemaking

1. The Statement of Basis and Purpose

An open notice and comment process is not an end in itself. Rather, the notice and comment process is critical to the end sought by the APA—rational agency decision-making. Rational agency decision-making is based on the premise that an agency has identified a problem, sought input on potential solutions, considered the alternatives, and adopted a sound method of fixing the previously identified problem.

On the other hand, if the agency has closed its "collective conscience" to alternatives other than the one noticed in the proposed rule, then the agency is not conducting rational decision-making. Rather, it is utilizing the APA to find a rationale to support its foregone conclusion. The USDA, to the extent that it conducts open notice and comment rulemaking, uses the process to find a rationale for supporting the decision in the proposed rule and ignores all other relevant information.

After 1984, the USDA would notify the interested public that a marketing policy statement had been received for the upcoming navel orange marketing season and request comment. When 37 comments in opposition (from consumer groups, to growers, to other federal agencies) were received for the 1990-91 season, the USDA never responded to any of them. It simply issued its weekly prorate rules through the good cause exception. Then, when the USDA sought to terminate prorate restrictions for the balance of the 1992-93 season after first authorizing such use, it cited diverse comments in opposition to support its conclusion that termination was appropriate.¹¹⁰ Thus, the USDA chose

¹⁰⁹ *National Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980); *Texas Food Ind. Ass'n v. United States Dep't of Agric.*, 842 F. Supp. 254, 260 (W.D. Tex. 1993).

¹¹⁰ The issue of termination was raised in litigation brought by Sunkist in federal district court in Washington, D.C. *Leavens v. Madigan*, No. 92-2832 (D.C.C. Dec. 29, 1992). Sunkist sought injunctive relief prohibiting the Secretary from terminating prorate. Sunkist, in essence, argued that the decision of the Secretary was arbitrary and

to utilize comments when it felt they were appropriate to its ends while ignoring those comments when they did not fit the regulatory objectives of the USDA.

To be sure, some case law exists to suggest that the USDA's failure to deal with those comments was appropriate under the APA or, if it was not, then it was harmless error.¹¹¹ The apparent judicial approval (particularly in the Ninth Circuit)¹¹² of the USDA's actions defeats the spirit of the APA. It is impossible for an agency to develop a rational rule if it can ignore, when it wants to, relevant comments. In other words, the USDA, rather than seeking a rational solution to the problem of orderly marketing in a given crop, simply is in search of a rationale to support a predetermined course of action.¹¹³ This conclusion

capricious. Although Sunkist lost the litigation and did not obtain an injunction, its underlying thesis was quite accurate. Essentially, Sunkist argued that the USDA's decision to terminate prorate was arbitrary. Sunkist was probably correct in that assertion. However, Sunkist cannot be heard to complain about arbitrary *termination* of prorate regulation when it was the most vociferous supporter of arbitrary *imposition* of prorate.

¹¹¹ See *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 442 (9th Cir. 1993); *Arlington Oil Mills, Inc. v. Knebel*, 543 F.2d 1092, 1101 (5th Cir. 1976).

¹¹² See *Cal-Almond, Inc.*, 14 F.3d at 442; *Riverbend Farms, Inc.*, 958 F.2d at 1489; *United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669, 687 (E.D. Cal. 1994).

¹¹³ The decision by the Ninth Circuit in *Cal-Almond* does not lead to a different result. The court upheld the regulations implementing reserve requirements for the 1988-89 and 1990-91 marketing seasons. *Cal-Almond, Inc.*, 14 F.3d at 444-45. The court concluded that the statement of basis and purpose met the requirements of the APA. True, the statement succinctly summarized the reasons for adoption of the reserve percentage. However, the statement of basis and purpose proffered by the USDA could have been written for any year (with a simple change of the percentage) that reserve percentages were implemented. The statement of basis and purpose reveals no evidence that the agency, in considering the comments, kept an open mind as Congress desired when it enacted the APA. *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978). Thus, the USDA satisfied the letter of the APA by finding a rationale without conducting a rulemaking in the spirit of the APA—by determining through a rational process whether the reserve percentage, if any, was an appropriate method for achieving the objective of the USDA in implementing the AMAA.

Further evidence of this conclusory treatment and close-mindedness of the USDA can be found in the most recent regulations establishing reserve percentages for almonds. In response to one comment concerned about the disparate impact on small business, the USDA simply stated that the "Administrator of AMS has made a determination which is set forth in this final rule." *Almonds Grown in California: Salable, Reserve, and Export Percentages for the 1994-95 Crop Year*, 59 Fed. Reg. 63,693, 63,395 (Dec. 9, 1994). The USDA's statement fails to address the issues raised by the commenter; instead, it shows a department that will not be swayed, like the postal deliverers, from its appointed rounds.

is further supported by the USDA's apparent lack of compliance with the RFA.

2. The RFA Certification

The USDA not only ignores the basic analytical tools of the APA but treats with an equally cavalier attitude the consideration of small business impacts required by the RFA. Since 1986,¹¹⁴ the USDA has utilized essentially the same boilerplate certification language in every rule issued to implement a fruit and vegetable marketing order. The language is as follows:

The purpose of the RFA is to fit the regulatory actions to the scale of the business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act [AMAA], and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.¹¹⁵

The USDA then conducts a cursory examination of the number of handlers, cites the SBA's size standards, and finds that the majority of producers and handlers may be classified as small businesses.¹¹⁶ The USDA then usually concludes its brief analysis with the following:

Based on these considerations, the Administrator of AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.¹¹⁷

This boilerplate analysis fails to succinctly state the reasons for the USDA reaching the conclusion it did or what economic information was utilized in the certification. The USDA simply complies with the letter of the RFA to find further support for the course of action that it

¹¹⁴ Prior to 1986, it was unclear whether the implementing rules for marketing orders were subject to the RFA. See *Implementation of the Regulatory Flexibility Act: Hearings Before the Subcomm. on Export Opportunities and Small Business Problems of the House Comm. on Small Business*, 99th Cong., 2d Sess. 301 (1986) (statement of James Handley, Administrator, AMS).

¹¹⁵ E.g., Almonds Grown in California: Proposed Salable, Reserve, and Export Percentages for the 1994-95 Crop Year, 59 Fed. Reg. 46,203, 46,203 (Sept. 7, 1994); Olives Grown in California: Expenses and Assessment Rate for 1994 Fiscal Year, 59 Fed. Reg. 30,783, 30,784 (June 16, 1994); Navel Oranges Grown in Arizona and Designated Parts of California: Proposed Weekly Levels of Volume Regulation for the 1992-93 Season, 57 Fed. Reg. 48,340, 48,340 (Oct. 23, 1992).

¹¹⁶ See *supra* note 113 and authorities cited therein.

¹¹⁷ See *supra* note 113 and authorities cited therein.

intended to take without regard to any countervailing data.¹¹⁸ Thus, the USDA uses yet another important regulatory, analytical tool to conduct rationale rulemaking rather than rational rulemaking.

C. *The Failure of the USDA's Rulemaking*

None of the concerns so far expressed in this article would be problematic if the result were rational rules and proper agency decision-making. However, the controversy surrounding the use of marketing orders, particularly for crops grown in California, evidences a breakdown in the agency decision-making process. Emblematic of this failure is the USDA's ongoing effort to salvage the marketing order for almonds.¹¹⁹

In 1987, a number of almond handlers instituted a section 15(A) proceeding challenging a number of the provisions of the marketing order regulating almonds. After nearly six years of litigation, the issue reached the Ninth Circuit. In *Cal-Almond, Inc. v. United States Department of Agriculture*,¹²⁰ the court held that the marketing order violated the First Amendment rights of handlers.¹²¹ In particular, the court noted that because the "USDA has failed to present sufficient evidence to satisfy the requirements of the *Central Hudson* test, the Almond Marketing Program violates appellant's First Amendment rights."¹²² The type of evidence the court was searching for was whether the advertising restrictions were the least burdensome alternative on the handlers and still accomplished the objective of increasing sales. Had the USDA actually conducted rulemaking in the spirit of both the APA and RFA, it would have identified which portions of the advertising program benefitted various sectors of the almond industry and potentially could have crafted a program that would have with-

¹¹⁸ The problems with the USDA's certification, such as the aggregation of all firms into the small business category or the failure to quantify the costs of a particular regulation, are beyond the scope of this article.

¹¹⁹ Similar arguments could have been made for the USDA's efforts to resuscitate the marketing orders for lemons and navel and Valencia oranges grown in Arizona and California. The USDA, at least with respect to formal rulemakings associated with the establishment of an order, is beginning to understand the need for a well-documented record. See Proposed Tart Cherry Marketing Agreement and Order: Reopening the Promulgation Hearing, 59 Fed. Reg. 63,273, 63,274 (Dec. 8, 1994) (USDA requested more information on economic impact of proposed order on small handlers in different geographic regions).

¹²⁰ 14 F.3d 429 (9th Cir. 1993).

¹²¹ *Id.* at 440.

¹²² *Id.*

stood judicial scrutiny.

The USDA, in response to the *Cal-Almond* decision, issued new regulations implementing the advertising program.¹²³ The USDA apparently had not learned its lesson. Even though the Ninth Circuit noted that the advertising regulations were designed to benefit one large handler at the expense of small handlers,¹²⁴ the USDA in its new regulations simply rejected the comments filed by the SBA concerning the impact of those regulations on small businesses. It also dismissed the comments of other parties about whether the advertising program would increase sales and went on to quote studies about the benefits of the advertising program without actually discussing the criticisms raised by the commenters. Thus, the USDA continues to issue regulations based on its own predetermined course of action and the APA and RFA be damned.

V. THE VALUE OF THE SECTION 15(A) PROCESS IN AN APA WORLD

Unlike any other federal regulatory program, the implementation of marketing orders by informal rulemaking does not result in direct court challenges to the agency regulations. Rather, someone challenging the regulations must file a petition pursuant to section 15(A) and conduct a formal adjudication to overturn the informal rulemaking decision. While that may have made sense in a pre-APA era, it is an anachronism in modern government.

To be sure, the USDA appreciates the second look it gets at its own regulations. It then can use the formal adjudication to build a record that a reviewing court might use to uphold a regulation. Such a process is currently taking place with respect to the new advertising regulations in the almond marketing order. Unfortunately, that enables the USDA to cavalierly dismiss the requirements of the APA and RFA, including the requirement for reasoned decision-making. Furthermore, the USDA recognizes that, absent dedicated foes, an aggrieved handler is not likely to challenge the regulations due to the time involved in getting a decision.¹²⁵ Finally, the USDA's comfort level is further height-

¹²³ Almonds Grown in California: Final Revision of Administrative Rules and Regulations Concerning Creditable Promotion and Advertising Requirements, 59 Fed. Reg. 35,222 (July 11, 1994).

¹²⁴ *Cal-Almond, Inc.*, 14 F.3d at 440.

¹²⁵ See *Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990) (district court required to issue an order mandating completion of § 15(A) proceeding due to interminable delay). In addition, the § 15(A) proceedings

ened by the fact that only once has the Secretary's informal rulemaking decision been overturned by the Chief Judicial Officer in a section 15(A) proceeding.

The most prevalent answer given by the courts to the rationale behind the section 15(A) process is the need for the USDA to use its own expertise in reviewing these complex programs.¹²⁶ However, as Judge Higginbotham noted in a challenge to a milk marketing order, "it is difficult to imagine a case intertwined with greater confusion and delay on a problem which, but for the administrative process, was not extremely complex."¹²⁷ While the institution of complex regulatory regimes was something relatively new when the AMAA was passed, the number of complex government regulatory programs that are implemented without the agency obtaining a second review of its own rulemaking are too numerous to mention. However, one program in particular is worth examining because of the similarities between it and marketing orders.

The National Marine Fisheries Service (NMFS) of the United States Department of Commerce is responsible for the management of fishery resources within American waters. Pursuant to the Magnuson Fishery Conservation and Management Act,¹²⁸ eight regional fishery management councils were established. The councils develop a framework management plan for each region and type of fishery which lays out basic procedures and a specific timetable to guide NMFS, the councils, and the regulated public. Specific management measures are recommended for implementation each year depending on the health and quality of the fishery.

The recommendations of the councils are transmitted to the NMFS for approval after informal rulemaking. In this respect, the councils are similar to the administrative committees. However, once a regulation is published, any party subject to the regulation may challenge the rule in

that led to much of this litigation were commenced in the mid-1980's. Thus, final resolution often took anywhere from five to seven years, if not longer.

The proceedings surrounding the California citrus orders were equally lengthy. The original § 15(A) proceedings were commenced in 1985. The decision in *United States v. Sunny Cove Citrus Ass'n.*, 854 F. Supp. 669 (E.D. Cal. 1994), which led to termination of the orders, was issued nearly a decade later.

¹²⁶ See *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984); *United States v. Ruzicka*, 329 U.S. 287, 292 (1946).

¹²⁷ *Abbotts Dairies Div. of Fairmont Foods, Inc. v. Butz*, 584 F.2d 12, 15 (3d Cir. 1978).

¹²⁸ Act of Apr. 13, 1976, Pub. L. No. 94-265, 1976 U.S.C.C.A.N. (90 Stat.) 331 (codified as amended at 16 U.S.C. §§ 1801-82 (1994)) [hereinafter *Magnuson Act*].

federal district court if a petition for review is filed within thirty days.¹²⁹

Unlike regulations issued pursuant to marketing orders, NMFS does not get a second crack at establishing the validity of its regulations. They either stand or fall based on the administrative record at the time of promulgation. If a federal agency does not get a second bite at the apple in managing fishery resources, no reason exists why it should get one for regulations implementing marketing orders.¹³⁰

The best solution to the USDA's lack of compliance with the spirit of the RFA and the APA is to repeal the formal adjudicatory proceeding needed to challenge the implementation of marketing orders. This would have a number of salutary benefits. First, it would remove the administrative crutch from the USDA's rulemakings. Regulations implementing marketing orders would be subject to the same scrutiny that all other federal regulations undergo.¹³¹ The USDA would have to establish a record based on the informal rulemaking and its use of the RFA. Failure to do so would likely doom the USDA because the court would view any explanation as a post hoc rationalization. Finally, the cost and effort that is devoted to defending the USDA in a section 15(A) proceeding could be better spent in developing more sound implementing regulations. In sum, the repeal of the section 15(A) requirement would be a major step into the APA world for the USDA, would improve its rulemaking, and would ensure that handlers obtain relief within a reasonable period of time, not long after their products have turned to compost.

CONCLUSION

Round fruit can fit in a square basket but rather poorly. A similar analogy holds for the USDA's efforts to implement the AMAA in an APA world. Yes, the USDA complies, albeit barely, with the letter of

¹²⁹ *Id.* § 1855(d).

¹³⁰ A cursory examination of any amendment to a fishery management plan will demonstrate without caviling that fishery management is more complex than implementing marketing orders. See MID-ATLANTIC FISHERY COUNCIL, DRAFT AMENDMENT 5 TO THE FISHERY MANAGEMENT PLAN FOR THE ATLANTIC MACKEREL, SQUID AND BUTTERFISH FISHERIES (1994).

¹³¹ The possibility that many of these challenges could be brought in federal court in the District of Columbia Circuit is most problematic for the USDA. The case law in the District of Columbia Circuit is much more demanding when it comes to a review of an agency's statement of basis and purpose. Compare *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) with *United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669, 687 (E.D. Cal. 1994).

the APA and the RFA, but it does not comply with the spirit. The USDA cannot fill up the square basket with round fruit because its procedures are not designed to obtain the most efficient method of packaging the implementation of marketing orders. The best way to fill the basket is by forcing the USDA to use a round basket by repealing its administrative crutch—the time-consuming and fruitless effort to bolster its regulatory record through the section 15(A) process.