



governmentattic.org

"Rummaging in the government's attic"

Description of document: Department of Agriculture (USDA) Agricultural Marketing Service (AMS) Misrepresentation of the Popular Kentucky 31 variety of Tall Fescue Grass Seed 2018-2021

Requested date: 29-July-2021

Release date: 13-September-2021

Posted date: 27-February-2023

Source of document: USDA, Agricultural Marketing Service
FOIA Officer
1400 Independence Avenue, SW
Room 2055-S, Stop 0201
Washington, DC 20250-0201
Tel. (202) 302-0650
Email: AMS.FOIA@usda.gov

The governmentattic.org web site ("the site") is a First Amendment free speech web site and is noncommercial and free to the public. The site and materials made available on the site, such as this file, are for reference only. The governmentattic.org web site and its principals have made every effort to make this information as complete and as accurate as possible, however, there may be mistakes and omissions, both typographical and in content. The governmentattic.org web site and its principals shall have neither liability nor responsibility to any person or entity with respect to any loss or damage caused, or alleged to have been caused, directly or indirectly, by the information provided on the governmentattic.org web site or in this file. The public records published on the site were obtained from government agencies using proper legal channels. Each document is identified as to the source. Any concerns about the contents of the site should be directed to the agency originating the document in question. GovernmentAttic.org is not responsible for the contents of documents published on the website.

September 14, 2021

Delivered via Electronic Mail

Re: Final Response to FOIA Request 2021-AMS-00225-F

This is the final response to your Freedom of Information Act (FOIA) request received by the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) on July 29, 2021. Your request sought access to:

I request a copy of each briefing, white paper, memo and overview relating to the Kentucky 31 variety of tall fescue grass seed. (I am more interested in records about the problem itself than about upgraded testing methods.) You may limit this request to records from 2018 to the present. For context, here is a description: AMS has worked with State cooperators to field test over 500 tall fescue samples collected from across the nation after the seed industry realized in 2018 that the nation's supply of the Kentucky 31 variety of tall fescue was actively being misrepresented in the market. This variety is one of the most popular grass seeds in the United States. The American Seed Trade Organization and several State cooperators asked AMS for assistance.

The AMS FOIA staff works with subject matter experts across the Agency to locate responsive documents. For this request, a search was conducted within the Science & Technology Program (S&T) Seed Regulatory and Testing Division (SRTD). The SRTD administers the Federal Seed Act (FSA) and several fee-for-service programs that facilitate the movement of U.S. seed in domestic and international markets. AMS' search began on July 30, 2021. Our search provided responsive records in AMS' control on that date.

We have processed 18 pages that are responsive to your request. After a thorough review, we have determined that parts of three pages are exempt from disclosure under (b)(5) and (b)(6) of the FOIA, 5 U.S.C. § 552, as amended. The remaining 15 pages are being released in full. Accordingly, this request is granted in part.

Exemption (b)(5) of the FOIA protects Attorney Client Privilege (ACP) which applies to confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice and encompasses opinions given by an attorney to his client based upon those facts. ACP applies to communications between attorneys that reflect confidential client-supplied information and confidential communications between attorneys and their clients, including agency employees. The withheld information in this record

set consists of guidance from the USDA Office of General Counsel to the AMS Administrator reflecting analysis and recommendations on a legal matter.

Exemption 6 of the FOIA permits the government to withhold information regarding individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy” and where such privacy interests outweigh any public interest which would be advanced by the disclosure of their information. The relevant public interest is whether release would shed light on agency activities. Within this record set, AMS is withholding non-public email addresses, a cell phone number and an individual’s signature. The individuals have a strong privacy interest in this information which could be used for unwanted contact or, possibly, identity theft.

This concludes processing of your request. You may appeal our determination within 90 days from the date of this letter. Your appeal should be clearly marked to indicate that it contains a FOIA appeal and include specific reasons why you believe modification of the initial action is warranted. Any such appeal can be sent to ams.foia@usda.gov and should be addressed to:

Bruce Summers
Administrator
Agricultural Marketing Service
1400 Independence Avenue, SW
Stop 0201, Room 3071
Washington, D.C. 20250-0201

If you have any questions about the way this request was handled, please contact Heather Higgs, Government Information Specialist, at (202) 641-8684 or heather.higgs@usda.gov. If you have general questions or concerns regarding AMS’ FOIA procedures or regulations, please contact our FOIA Public Liaison, Bill Allen, at (202) 631-6412 or via email at ams.foia@usda.gov.

Additionally, you may contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at (202) 741-5770; toll-free at 1-(877) 684-6448; or facsimile at (202) 741-5769.

Thank you for your interest in AMS programs and policies.

Sincerely,

Mark R. Brook

Mark R. Brook
FOIA Officer
Agricultural Marketing Service

Enclosure



United States
Department of
Agriculture

Agricultural
Marketing
Service

Science and
Technology
Program

Seed Regulatory and Testing Division
801 Summit Crossing Place, Suite C
Gastonia, NC 28045

2018 USDA AMS Report on Varietal Labeling Activities

Ernest L. Allen, USDA, AMS, SRTD Division Director

Background

The Federal Seed Act (FSA) (7 U.S.C. 1551–1611) is a truth-in-labeling law that regulates agricultural and vegetable seed shipped in interstate commerce. It is directed toward seed for planting purposes that is used in the agricultural production of food, feed, fiber, and turf. The law promotes fair competition between seed dealers by requiring uniform labeling for seed lots shipped in interstate commerce. The law also ensures that consumers of agricultural and vegetable planting seed are able to use labels and advertisements to make informed purchasing choices.

Over the past two years, USDA's Agricultural Marketing Service (AMS) has received numerous inquiries from State seed control officials, seed businesses, and the public regarding enforcement of FSA's varietal labeling provisions related to the Kentucky 31 variety of tall fescue. AMS considers varietal mislabeling of seed a serious violation of the FSA. This policy statement is to make clear that AMS maintains a comprehensive monitoring, testing, and enforcement program designed to ensure that Tall Fescue (Kentucky 31 variety) seed lots, other grasses, and other kinds regulated under the authority of FSA are accurately labeled with correct varietal and quality information.

Administrative processes

A range of options are available for AMS to enforce the varietal labeling provisions of the FSA. The labeling provisions are enforced with the aid of State seed control programs as authorized under cooperative agreements between State departments of agriculture and USDA AMS. Qualified seed inspectors, authorized by the AMS Seed Regulatory and Testing Division (SRTD), draw official seed samples. A portion of the official sample is tested by the State seed laboratory. If test results are out of tolerance with labeled information, the remaining portion of the official sample, sampling documentation, test results, and a copy of the seed label are sent to SRTD. If a subsequent test of the official sample by SRTD confirms the State's test results, an investigation of the seed shipment is undertaken.

Many State seed control laboratories, as well as SRTD, also conduct laboratory tests to determine if seed shipments are labeled with the correct variety name. Official instructions for conducting these tests are contained in the FSA regulations (7 CFR 201.58a). These instructions are strictly adhered to by the SRTD laboratory when conducting tests used to enforce the Act.

Verification and regulatory reviews

Each year SRTD conducts trueness-to-variety (TTV) field tests to determine the accuracy of variety labeling of seed lots shipped in interstate commerce. Varietal identification may be based on seedling, growing plant, or mature plant characteristics (7 CFR 201.58a). The authority for making tests and applying tolerances to determine the accuracy of labeling is contained in section 403 of the FSA (7 U.S.C. 1593). The officially drawn samples, submitted by State seed control programs, are grouped and planted by variety by SRTD staff, a university agronomists, or State department of agriculture personnel through contractual arrangement. Samples may be identified by comparison to check samples or varietal description.



United States
Department of
Agriculture

Agricultural
Marketing
Service

Science and
Technology
Program

Seed Regulatory and Testing Division
801 Summit Crossing Place, Suite C
Gastonia, NC 28045

For 2018, approximately 350 tall fescue samples were received from State cooperators and seed companies for inclusion in the annual TTV field testing program. Other kinds of seed tested in 2018 include field crops, vegetables, forages, and other turf grasses.

AMS also use check samples to determine variety through advanced testing techniques published in the International Seed Testing Association or Association of Official Seed Analysts cultivar purity and research publications. The check samples used for variety verifications are generally obtained from a class of certified seed. The Kentucky 31 tall fescue check sample currently being used by SRTD is Kentucky 31 foundation seed from the Kentucky Foundation Seed Program. The method used in the SRTD Kentucky 31 tall fescue IEF gel electrophoresis comparison tests is published in the USDA 2018 Items of Interest in Seed online journal publication. This method has been reviewed and accepted by a third party consultant that was a key participant in the publication of the International Seed Testing Association Handbook on Variety Testing and identification.

During AMS FSA investigations, all aspects of the interstate shipment are investigated to ensure adherence to the Act. This includes the requirement of interstate seed shippers to keep receiving and shipping records that include the variety name for each lot of seed they ship in interstate commerce (7 CFR 201.7). These records are routinely examined during investigations of other FSA violations to determine if the variety shipped was correctly labeled. Often, AMS finds tall fescue shipments initially labeled as Variety Not Stated being upgraded to Kentucky 31 prior to interstate shipment.

Enforcement authority and actions

AMS views variety violations of the FSA labeling provisions as serious and is committed to vigorous enforcement of the FSA through the full range of available enforcement authorities granted by Congress. Enforcement actions typically involve the assessment of a monetary penalty against seed companies that ship mislabeled seed. The amount of the monetary penalty depends on the severity of the infraction and the number of times the company has been cited in the past. If the violation is considered minor, and the company has not been cited in several years, a letter of warning will be sent to the company. If the violation is considered major or the company has a history of violations, the company will be notified of the charges and given an opportunity to respond. If, after considering the company's response, the evidence still indicates enforcement action is warranted, monetary penalties as provided by section 406 of the FSA (7 U.S.C. 1596) will be assessed. The amount of the penalty for each infraction depends upon a violator's compliance history and the seriousness of the charge. If a company has more than one violation for a single shipment, the charges will stack. For example, misrepresenting the variety, germination percentage, and noxious weed seed content on a single seed lot is considered three serious infractions. At the current penalty amounts the company could be charged up to \$650 for each infraction.

In addition to monetary penalty actions, the FSA provides additional enforcement authorities which AMS will consider in appropriate cases. Section 405 of the FSA (7 U.S.C. 1595) authorizes the Department of Agriculture to bring a proceeding in Federal district court to seize any seed sold or transported in interstate commerce in violation of the FSA. If the court finds in favor of the USDA, the seed can be sold, destroyed, or returned to the owner after payment of all costs and the execution of a bond ensuring that seed will not be sold in violation of the provisions of the FSA.



United States
Department of
Agriculture

Agricultural
Marketing
Service

Science and
Technology
Program

Seed Regulatory and Testing Division
801 Summit Crossing Place, Suite C
Gastonia, NC 28045

Section 409 of the FSA (7 U.S.C. 1599) authorizes the USDA to initiate an administrative proceeding against anyone who violates any FSA provision or regulation, and to issue an order to cease and desist from continuing such violation. In the event the violator does not cease and desist, the order may be enforced in the Federal courts pursuant to section 411 of the FSA (7 U.S.C. 1601).

If a violation is knowingly committed, sections 406(a) (7 U.S.C. 1596(a)) and 407 of the FSA (7 U.S.C. 1957) allow the USDA to initiate criminal charges against such violators. This criminal provision also applies to violations which are the result of gross negligence or the result of the violator's failure to make a reasonable effort to be informed of the pertinent facts. Violators of this provision may be punished by a fine of \$1,000 for the first offense and \$2,000 for each subsequent offense. In addition, civil settlements described in section 406(b) of the FSA (7 U.S.C. 1596(b)) apply to violations that are not deemed to be due to gross negligence. Violators of this provision shall forfeit not less than \$350 or more than \$650 for each violation.

AMS occasionally updates monetary assessments for civil penalties in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990. The last update was announced on May 24, 2005 in the Federal Register. Future updates may be requested by AMS to ensure the deterrent value of civil penalty assessments remain sufficient. Any update to current penalty amounts will be made public by announcement in the Federal Register through regular process.

AMS is committed to enforcement of the labeling provisions of the FSA through its ongoing program of testing and monitoring, and encourages persons with knowledge of FSA violations to report them to: Ernest L. Allen, Director, USDA, AMS, Seed Regulatory and Testing Division; 801 Summit Crossing Place, Suite C, Gastonia, NC 28054; Telephone: (704) 810-8884; E-mail: Ernest.Allen@ams.usda.gov.

Science & Technology Program, Agricultural Marketing Service, USDA
American Seed Trade Association
10:00 a.m.
1701 Duke St., Ste. 275, Alexandria VA 22314
(703) 837-8140

AGENDA

1. Introductions
 - a. New structure
 - b. Personnel
2. Revision of Federal Seed Act Regulations
 - a. ASTA suggestions
 - b. Progress
3. Kentucky 31 Actions
 - a. Update
 - i. We are assisting companies by testing seed lots prior to interstate shipment
 - ii. We are increasing our outreach to seed buyers to ensure that they are aware of the problem and asking that they report any issues that they are aware of.
 - iii. We are working with our State seed control partners to increase sampling and testing on seed lots labeled as Kentucky 31. In order to get a complete view of the market, we asked States to sample and forward tall fescue samples to us for TTV trials.
 1. Heavy Rains in August destroyed our entire crop of approximately 300 samples at a UNC research station plot.
 2. We will replant this spring to expedite results.
 - b. Future actions
 - i. We have several options on how to deal with this issue from a regulatory perspective. Those include monetary penalties, seizures, issuance of cease and desist orders, and criminal prosecutions. For variety violations involving Kentucky 31, that investigations indicate were knowingly committed, we will begin issuing maximum monetary penalties and/or criminal complaints.
 - ii. In addition, we will ensure Kentucky 31 is a part of TTV trials each year for the next 3 years. This will ensure markets are monitored comprehensively and hopefully this focus will;
 1. convince dealers to monitor their suppliers more closely and
 2. deter those individuals or entities prone to knowingly committing violations.

- iii. Consideration is being given to the issuance of formal charge sheets on future Kentucky 31 varietal violations when previously warning letters had been issued. These warning letters were being issued on subsequent interstate shipments by second or third party shippers.
- 4. International Shipments and Illegal Practices
 - a. Collaboration with the EU Commission and the Ministry of Agriculture
 - b. Focus on the marketplace in the Pacific Northwest
- 5. Variety Not Stated
 - a. Industry impacts
 - i. Examples of current misuses related to Variety Not Stated labeling consist of the following: Turf Type tall fescue VNS, Turf tall fescue VNS, Turf fescue VNS, Turf Type tall fescue Variety Not Stated, Turf tall fescue Variety Not Stated, Turf fescue Variety Not Stated, tall fescue VNS.
 - ii. These types of Variety Not Stated mislabeling also apply to other kinds besides tall fescue such as perennial ryegrass, Kentucky bluegrass etc. These types of mislabeling initially result in the issuance of a warning letter advising the industry to correct prior to future shipments.
 - b. Revisions for industry segments
- 6. Noxious Weed Seeds
 - a. Comprehensive report of state process variances
 - b. Federal List format
 - i. We have completed an excel file that will replace the current PDF document on our website. This file should make it easier for company databases to upload the new list and search for specific inquiries. We expect to have this new document on the website by June.
- 7. Lab Uniformity
 - a. Guidance for industry
 - b. Federal Seed Lab involvement

Information from the Science and Technology Program
Ernest L. Allen, Director Seed Regulatory and Testing Division
July 03, 2018

Subject: Mislabeling of the Kentucky 31 variety of Tall Fescue grass seed

Action Needed: None; for information only.

Issue: Kentucky 31 tall fescue is one of the most important cool season grass varieties in the United States. It is widely adapted, easy to establish, durable, and provides ground cover for over 35 million acres. It is versatile and used for a variety of applications which include livestock forage, various turf purposes, and erosion control. Most of the Kentucky 31 produced in the United States is produced in Oregon, Missouri, and Kansas. Since 2013, record breaking droughts and strong winds during harvest has resulted in significantly smaller harvests than previous years. Spring 2018, however, is the first time retailers have noticed the issue as prices have risen due to limited supply. As a result, strong demand for the Kentucky 31 variety has led to increased instances of adulterated seed lots. The industry is now looking to AMS for support in monitoring the markets to ensure a level playing field.

Background: AMS's Science and Technology Program houses the only seed program in the U.S. government concerned primarily with facilitating domestic and international marketing of agricultural and vegetable planting seed. The program's primary mission is enforcing the Federal Seed Act (FSA) which is accomplished through cooperative agreements whereby resources are leveraged with the State departments of agriculture to maximize outreach and enforcement efforts. Approximately one year ago, SRTD began to notice, through its enforcement efforts, higher than average rates of variety mislabeling for Kentucky 31 tall fescue. Our current rate of mislabeling for the variety is 20% which is much higher than the 3-6% the division is accustomed to seeing. Earlier this year, SRTD began receiving complaints from individuals, grass seed companies, and trade organizations such as the American Seed Trade Association (ASTA), inquiring about our efforts to reduce mislabeling.

SRTD has begun working with State seed control officials from Oregon, Missouri, and Kansas, to identify the companies and individuals involved in this issue. Since most States do not have the capability to conduct advanced testing of seed lots for Trueness to Variety, SRTD has offered to conduct this verification testing for them to supplement their enforcement efforts. These steps are in addition to the usual regulatory enforcement work conducted which include issuing financial penalties and public admonishment by publishing the names of bad players on the USDA web site. Later this year, SRTD will place a call to all state cooperators to send in samples for inclusion in our annual Trueness to Variety field trials. We expect to receive over 50 varieties and 200 samples in this nationwide call. These samples will be taken from store shelves, warehouses, and other storage locations to ensure a thorough sampling of the domestic market. All of these efforts are part of the comprehensive compliance program in place to monitor labeling and advertisement of planting seed in the United States. ASTA represents over 700 seed companies in the United States. The organization has agreed to fully support our current enforcement efforts and has even suggested drastic increases to current FSA financial penalties to more forcefully promote truthful labeling and reduce the incentive for false labeling.

Ernest L. Allen, CSA | Director
USDA, AMS, S&T Seed Regulatory and Testing Division
801 Summit Crossing Place, Suite C, Gastonia, NC 28054 USA
Office: 704-810-8884 | Cell: (b) (6) | Fax: 704-852-4189
E-mail: Ernest.Allen@ams.usda.gov | Web site: www.ams.usda.gov/seed



**INFORMATION FOR ASTA REGARDING 2019 KENTUCKY 31
TALL FESCUE TTV PLANTINGS AT THE SANDHILLS
RESEARCH STATION**

There were a total of 284 Kentucky 31 tall fescue samples received from a total of 22 states. There are a total of 200 plots entered in this year's TTV trials. The plants were transplanted on the 23rd thru the 25th of September 2019. The intent is to perform initial evaluations during the last week of October or the first week of November. Also want to determine and evaluate possible encroachment of volunteer ryegrasses. Additional evaluations will be conducted taking into consideration weather related issues. Final evaluations will be conducted in the spring of 2020.

As previously mentioned, there were a total of 284 Kentucky 31 samples received but not all were planted, there were a number of duplications in lot numbers as well as a number of sequential lots originating from the same companies.



United States
Department of
Agriculture

Agricultural
Marketing
Service

Livestock,
Poultry, and
Seed Program

Seed Regulatory and Testing Division
801 Summit Crossing Place, Suite C
Gastonia, NC 28054-2193
704-810-8871, Fax 704 852-4189
www.ams.usda.gov/rules-regulations/fsa

Agency direction on tall fescue trueness-to-variety

The Federal Seed Act (FSA) Section 101(12) states, "The term "variety" means a subdivision of a kind which is characterized by growth, plant, fruit, seed, or other characters by which it can be differentiated from other sorts of the same kind, for example, Marquis wheat, Flat Dutch Cabbage, Manchu soybeans, Oxheart carrot, and so forth." This is interpreted as a variety to be distinct from all other varieties, uniform in growth and appearance, and is stable through many generations.

The Federal Seed Act Section 201 states, "It shall be unlawful for any person to transport or deliver for transportation in interstate commerce", any agricultural seeds unless the container bears a label that states in part, "The name of the kind or kind and variety for each agricultural seed component present in excess of 5 per centum of the whole and the percentage by weight of each:"

The Federal Seed Act (FSA) Regulations section 201.34 (d) states, "*Name of variety.* The name of each variety of agricultural or vegetable seed is the name determined in accordance with the following considerations: (1) the variety name shall represent a subdivision of a kind, which is characterized by growth, plant, fruit, seed, or other characters by which it can be differentiated from other sorts of the same kind."

FSA Regulations, Section 201.58a Indistinguishable seeds, states in part: "When the identification of the kind, variety, or type of seed or determination that seed is hybrid is not possible by seed characteristics, identification may be based upon the seedling, growing plant or mature plant characteristics according to such authentic information as is available."

The Seed Regulatory and Testing Division (SRTD) has received numerous complaints from the seed industry related to possible varietal substitution in regards to the Kentucky 31 variety of tall fescue.

Consequently, the SRTD has initiated a policy to conduct trueness-to-variety (TTV) testing on all seed lots received which are labeled to be the variety Kentucky 31. The method being employed for these tests is Isoelectric Focusing (IEF) protein electrophoresis. This method of testing will produce specific protein banding patterns within a gel medium. The results of these tests are compared to a check sample of Kentucky 31 obtained from the Kentucky Foundation Seed Project.

The Federal Seed Act (FSA) is a truth-in-labeling law that regulates the labeling of seed shipped in interstate commerce. Shipments of mislabeled seed are investigated as potential FSA violations. The Agricultural Marketing Service (AMS) considers violations of the FSA labeling provisions as serious violations of law and is committed to vigorous enforcement of the FSA through the full range of available enforcement authorities.

Changing the name of a variety can be a violation of Section 201.34(d) (2) of the Federal Seed Act (FSA) Regulations which states, in part "...the name of a new variety shall be the name given by the originator or discoverer of the variety, except that in the event the originator or discoverer of a new unnamed variety, at the time seed of the variety is first introduced into channels of commerce of the United States or sale to the public, cannot or chooses not to name the variety, the name of the variety shall be the first name under which the seed is introduced into such commerce..." Additionally, this means that once a variety name is assigned by either method described in Section 201.34(d) (2) that name cannot be changed during the lifetime of the variety.

Reference: Federal Register / Volume 70, No. 99 / Tuesday, May 24, 2005 / Rules and Regulations. Violations of the Federal Seed Act, coded at 7 U.S.C. 1596(b), occurring after June 23, 2005, can incur civil penalties consisting of a minimum of \$37.50 and a maximum of \$650 per violation.

If or when a violation is knowingly committed, sections 406(a) (7 U.S.C. 1596(a) and 407 of the FSA (7 U.S.C. 1957) allow the USDA to initiate criminal charges against such violators. This criminal provision also applies to violations which are the result of the violator's failure to make a reasonable effort to be informed of the pertinent facts. Violators of this provision may be punished by a fine of \$1,000 for the first offense, and \$2,000 for each subsequent offense. Subsequent offences are determined as separate individual interstate shipments.

Example of charge related to agricultural variety false:

Labeling on the containers represented the (kind name) seed to be the variety (XXXX). Information obtained by an agent of the Secretary of Agriculture, did not show the variety name to be XXXX. It appears that at the time of interstate shipment, the seed was incorrectly labeled with respect to the variety name. [Act Section 201(a) (1); regulations under the Act Section 201.10 and 201.34(d) (2)]

Regulatory and Outreach Activities Report

USDA/AMS/S&T/Seed Regulatory and Testing Division

December 2019

- FSA regulations update process— A few months ago, we submitted our rule proposal for updates to the FSA regulations. The proposal has cleared the USDA Office of General Council and is currently in Departmental Clearance. Unless some other change is required, we won't see it again before it goes to the Federal Register. Hopefully, the rule will be published in the coming weeks.
- Kentucky 31 tall fescue samples for our 2020 trueness to variety trials were transplanted from our greenhouse to the experimental station at N.C. State University at the end of November. These samples are replants of last year's trials which were lost due to inclement weather. We expect to final the grow-out in the spring of 2020.
- At the request of the Federal Grain Inspection Service leadership, SRTD has implemented a seed identification program to train and assist FGIS inspectors in the identification of Canada thistle in wheat and soybean. The program was developed in response to Vietnam's decision to halt over \$90 million in U.S. exports of grain if Canadian thistle continues to contaminate shipments. In addition to the development of the identification program, SRTD botanists will now serve as a resource for seeds unable to be identified by FGIS inspectors. FGIS has expressed its satisfaction with the new program.
- Last year SRTD supported the U.S. Department of State, Bureau of East Asian and Pacific Affairs, the USDA Foreign Agricultural Service, APHIS, USAID, and other government organizations in performing capacity building activities for 9 countries in the Lower Mekong. Serving as technical experts for the mission, SRTD provided seed production, testing, and regulatory advice based on the American seed production system, to government officials focused strengthening their seed sectors. Reliable seed production systems in these countries will help them to become valued trade partners with the United States, increasing the number of agricultural and vegetable varieties available to U.S. consumers.
- In the next year, we hope to have images of almost all USDA federal noxious weed seeds posted to the International Seed Morphology Associations website. Seed analysts, farmers, and others will be able to see high resolution photos of these species that could help them make the identifications necessary to help prevent the spread of these weed seeds. In addition to posting the FSA noxious weed seeds, AMS will continue to work closely with this group on other activities that promote adherence to the FSA. The website can be found at www.IDseed.org.
- In addition to ISMA, we are currently working with AOSA and SCST to provide a variety of outreach and awareness projects in the form of informational and educational videos,

publications, and trainings. These projects will spotlight the importance of seed testing which is key to determining value and truthful labeling for seed lots. AMS is constantly looking for ways to partner with the industry to promote uniformity in seed testing and fair competition in the seed industry.

- In FY19, SRTD staff trained over 1200 seed analysts, seed samplers, seed inspectors, and other seed professionals from approximately 40 states. These industry professionals originated from both government and industry. SRTD auditors also audited 9 entities as part of the USDA Accredited Seed Programs. Workshops, webinars, and seed specific accreditation programs are a major part of AMS's outreach efforts to facilitate domestic and international seed trade, promote harmonization between testing rules, and encourage adherence to State and Federal seed laws. For more information on AMS training workshops, accredited seed programs, and testing services available to assist seed businesses, please contact the SRTD Director.
- The 2019 edition of the *Items of Interest in Seed*, a publication produced by the Seed Regulatory and Testing Division, was released in late October. The publication covers SRTD activities, FSA issues, standardization efforts, industry meetings, and industry news. It has been an extremely busy year for SRTD so this issue should be informative. The publication can be downloaded by going to the USDA AMS home page and typing into the search box "Items of Interest" or you can use an internet search engine to conduct a key word search for it. There is also the possibility of subscribing to all SRTD publications through an electronic subscription option on our website, www.ams.usda.gov/seed.

We remain committed to helping to promote State laws and uniformity through enforcement of the Federal Seed Act and its regulations. SRTD's effectiveness is evaluated by USDA and Congress based on the support we provide for facilitating trade within the U.S. seed industry and how well our programs assist the industry in reducing violation of the Federal Seed Act. We are committed to assisting the American seed industry through our seed testing services, workshops, international representation, and other outreach efforts. We look forward to our continued strong relationship with ASTA and other industry organizations.

SRTD Contact Information:

Director: Ernest Allen, 704-810-8884, ernest.allen@ams.usda.gov

U.S. OECD Program Mgr., Dr. Steve Malone, 704-810-8888, stephen.malone@ams.usda.gov

Regulatory Supervisor, Roger Burton, 704-810-7265, roger.burton@ams.usda.gov

Laboratory Supervisor, Todd Erickson, 704-810-8877, todd.erickson@ams.usda.gov

Allen, Ernest - AMS

From: Allen, Ernest - AMS
Sent: Wednesday, February 19, 2020 10:15 AM
To: Dennis Combs
Cc: Burton, Roger - AMS; Malone, Stephen - AMS
Subject: RE: Kentucky 31

Dear Dennis,

It was my pleasure to meet you last week! Thank you for the insightful conversation.

In response to your notes below, and as I mentioned during our meeting, I am unaware of any scheme by the ODA or OST to rid the world of Kentucky 31 and substitute Oregon varieties. To the Contrary, both organizations have expressed an interest in resolving the current contamination issue so that businesses growing and trading the seed will realize the long-term benefits that come from marketing quality seed.

Regarding how the seed is used and grown (production or pasture), the federal seed act makes no distinction. Tall fescue and other kinds covered under the Federal Seed Act that are used for seeding purposes in the agricultural production of food, feed, fiber, or turf must meet variety name labeling requirements. All varieties must be uniform, distinct, and stable, this is not only a Federal Seed Act requirement, it is an internationally recognized definition. While I was previously aware, due to investigations conducted by my office, of Kentucky 31 being grown and harvested in Missouri from pastures, I was interested in hearing the detail you provided of how the process was managed.

Our testing standard comes from breeder seed produced by the Kentucky Foundation Seed Program. The primary reason for our confidence in its trueness to variety is that it came from an official seed certification agency. This is the most reliable source of Kentucky 31 seed that is most closely related to the original release from the University of Kentucky in the 1940s. The United States, like other OECD Seed Schemes participating countries, rely on seed certification agencies whose mission is to ensure varietal identity and purity by maintaining seed stock and ensuring that only high-quality seeds are available to the public.

As I mentioned during our meeting, my primary responsibility is to ensure the Federal Seed Act is followed by all seed dealers so that every grower and seed business in the United States will have a fair playing field. Once we have a level field, my office will work with the industry and individuals within the market to help with seed trade... both in domestic and international markets.

Kindest regards,
Ernest

Ernest L. Allen, CSA | Director
USDA, AMS, S&T Seed Regulatory and Testing Division
801 Summit Crossing Place, Suite C, Gastonia, NC 28054 USA
Office: 704-810-8884 | Cell: (b) (6) | Fax: 704-852-4189
E-mail: Ernest.Allen@usda.gov | Web site: www.ams.usda.gov/seed



From: Dennis Combs <(b) (6)>
Sent: Monday, February 17, 2020 12:30 PM

To: Allen, Ernest - AMS <Ernest.Allen@usda.gov>

Subject: Fw: Kentucky 31

Ernest Please correct if necessary.

This is the situation as I see it.

The Oregon Seed Association Board of Directors decided to rid the world of Kentucky 31 and substitute Oregon varieties.

The Oregon Seed Trade enlisted the Oregon Department of Agriculture to assist them in this endeavor.

I met last night with Ernest Allen the head of the USDA regulatory division.

Here is the what I took away from our discussion. First I want to say that it seems to me that he has no interest in destroying Ky 31 in Missouri but just needs the label to fit the seed.

Ernest was unaware that Ky 31 was harvested from pastures. He assumed that the seed was harvested from seed production fields.

His testing basis comes from the seed stock produced in 2007 by the state of Kentucky and assumes that all Ky 31 comes from that seed stock. The electrophoresis test that is used for ky 31 is being compared with that seed.

It would seem to me that you need to organize your Missouri department of agriculture to stop assisting Oregon and have a rule change so Midwest Ky 31 has an exemption from the testing of Ky 31 using the present method.

If congress can have the banks charge 22% interest on credit cards your congress people should be able to help save your industry.

Dennis Combs

Regulatory and Outreach Activities Report

USDA/AMS/S&T/Seed Regulatory and Testing Division

July 2020

- FSA regulations update process— The Federal Register has cleared the updated Federal Seed Act Regulations. Working with a group of experts from within the industry, the updated regulations will ensure that our enforcement activities support current industry practices and recent update to State laws. The unofficial version was released yesterday on the Federal Register website for viewing. Today, the official version is available.
- Kentucky 31 tall fescue samples for our 2020 trueness to variety trials were transplanted from our greenhouse to the experimental station at N.C. State University at the end of November. We just finished evaluating the final plots last week and we are currently analyzing the data. These trials had two main objectives. The first to determine violations of the Federal Seed Act using the widely accepted grow-out method. Our secondary objective was to determine how well our protein gel electrophoresis tests compare to the grow-outs. Based on initial observations, it appears that out of 50 violations in 2018, 3 of those violations would not have been violations using the grow-out method. Our agronomist and plant physiologist noted, however, that the 3 samples were contaminated but the level of contamination may not have reached our threshold issuance of a penalty.
- Due to the pandemic, State inspectors have been limited in the number of inspections they are able to conduct. As a result, we have been unable to source the number of samples we planned for this years TTV trials. Our original plan was to conduct a second year of Kentucky 31 grow-outs and conduct market monitoring of watermelon, peppers, and lettuce. While we will move forward with the seed received, we expect this years trials to be limited.
- By the end of this year, we hope to have images of almost all USDA federal noxious weed seeds posted to the International Seed Morphology Associations website. Seed analysts, farmers, and others will be able to see high resolution photos of these species that could help them make the identifications necessary to help prevent the spread of these weed seeds. In addition to posting the FSA noxious weed seeds, AMS will continue to work closely with this group on other activities that promote adherence to the FSA. The website can be found at www.IDseed.org.
- In addition to ISMA, we are currently working with AOSA and SCST to provide a variety of outreach and awareness projects in the form of informational and educational videos, publications, and trainings. These projects will spotlight the importance of seed testing which is key to determining value and truthful labeling for seed lots. AMS is constantly looking for ways to partner with the industry to promote uniformity in seed testing and fair competition in the seed industry.

- In FY19, SRTD staff trained over 1200 seed analysts, seed samplers, seed inspectors, and other seed professionals from approximately 40 states. These industry professionals originated from both government and industry. SRTD auditors also audited 9 entities as part of the USDA Accredited Seed Programs. Workshops, webinars, and seed specific accreditation programs are a major part of AMS's outreach efforts to facilitate domestic and international seed trade, promote harmonization between testing rules, and encourage adherence to State and Federal seed laws.

This year due to the cancelation of our Federal Seed Workshops and our inability to participate in industry led events, we expect our outreach numbers to be lower. We are partnering with industry organizations to provide a variety of training and informational sessions through virtual events. For more information on AMS training workshops, accredited seed programs, and testing services available to assist seed businesses, please contact the SRTD Director.

- The 2020 edition of the *Items of Interest in Seed*, a publication produced by the Seed Regulatory and Testing Division, will be released in late October. The publication covers SRTD activities, FSA issues, standardization efforts, industry meetings, and industry news. The publication can be downloaded by going to the USDA AMS home page and typing into the search box "Items of Interest" or you can use an internet search engine to conduct a key word search for it. There is also the possibility of subscribing to all SRTD publications through an electronic subscription option on our website, www.ams.usda.gov/seed.

We remain committed to helping to promote State laws and uniformity through enforcement of the Federal Seed Act and its regulations. SRTD's effectiveness is evaluated by USDA and Congress based on the support we provide for facilitating trade within the U.S. seed industry and how well our programs assist the industry in reducing violation of the Federal Seed Act. We are committed to assisting the American seed industry through our seed testing services, workshops, international representation, and other outreach efforts. We look forward to our continued strong relationship with ASTA and other industry organizations.

SRTD Contact Information:

Director: Ernest Allen, 704-810-8884, ernest.allen@ams.usda.gov

U.S. OECD Program Mgr., Dr. Steve Malone, 704-810-8888, stephen.malone@ams.usda.gov

Regulatory Supervisor, Roger Burton, 704-810-7265, roger.burton@ams.usda.gov

Laboratory Supervisor, Todd Erickson, 704-810-8877, todd.erickson@ams.usda.gov

DECISION MEMORANDUM FOR THE ADMINISTRATOR

THROUGH: Douglas E. Keeler
Acting Deputy Administrator
Science & Technology Program

Douglas E. Keeler Digitally signed by
Douglas E. Keeler
Date: 2021.04.30
11:08:33 -04'00'

FROM: Ernest L. Allen, CSA | Director
Seed Regulatory and Testing Division

SUBJECT: Request for Ernest L. Allen, CSA, Director; Testimony in an Oregon State
Criminal Proceeding

ISSUE / RECOMMENDATION:

On April 20, 2021, Rachel Weisshaar, Assistant Attorney General, Oregon Department of Justice, Natural Resources Section, transmitted a request to Andrea Foster, Regional Counsel, USDA Office of General Counsel (OGC), for the appearance of USDA employee Ernest Allen as a witness for the State. In accordance with 7 CFR 1.214(b) "an employee served with a valid summons, subpoena, or other compulsory process demanding his or her appearance . . . may appear only if such appearance has been authorized by the head of his or her USDA agency . . . based upon a determination that such an appearance is in the interest of the USDA." (accompanied by the concurrence of OGC).

Brian Hill, MRP Attorney with USDA OGC, stated that (b)(5) ACP

Two options have been identified.

Option 1: Deny the request for appearance. Pursuant to 7 C.F.R. § 1.214(b)2, USDA may determine that this appearance is not in the interest of USDA.

Option 2: Authorize the request for appearance. Protecting the interests of the seed industry from unfair, deceptive, and unjustly discriminatory practices is an interest of USDA.

After reviewing the relevant material, Seed Regulatory and Testing Division (SRTD) determined that assisting the State of Oregon in their prosecutorial endeavors is in the interest of USDA to assure the promotion of the seed industry fair trade practices. Key stakeholders are seed organizations, companies, and State Departments of Agriculture.

DECISION MEMORANDUM FOR THE ADMINISTRATOR

Page 2

BACKGROUND:

AMS's Science and Technology Program (S&T) is responsible for enforcement of the Federal Seed Act's truth in labeling laws and seed certification requirements which apply to agricultural and vegetable seed when traded in interstate commerce. In order to accomplish this mission, AMS maintains cooperative agreements with all 50 State Departments of Agriculture. The agreements allow for AMS to leverage its resources, while administering the Federal Seed Act, by using State resources and personnel to collect interstate seed shipments throughout the United States. States, in turn, benefit from AMS's ability to hold companies accountable outside of their jurisdiction.

For the last few years, mislabeling of "Kentucky 31" tall fescue has become a major issue for the seed industry. AMS is actively working with seed industry organizations, companies, and State Departments of Agriculture (through cooperative agreements) to address mislabeling and ensure integrity in the marketplace.

Between 2019 and 2020, several States sent samples marketed by Dynamic Seed Source, LLC, and Mr. Trevor Abbott as Kentucky 31 to S&T's SRTD for investigation. After thorough investigation, SRTD found that Dynamic Seed Source, LLC, and Mr. Trevor Abbott shipped seven seed lots consisting of a total weight of 99,700 lbs. in violation of the Federal Seed Act. A detailed explanation of the charges and a settlement offer was sent to the company. Dynamic Seed accepted the administrative settlement proposal with AMS.

At the conclusion of each investigation, AMS sends case related documentation to State regulatory officials. In late 2020, Oregon Department of Agriculture (ODA) and the Oregon Department of Justice (ODJ) filed charges citing AMS investigative reports as primary evidence. ODA and ODJ are requesting that Ernest Allen testify in the administrative hearing to explain and verify information on documents submitted.

Ernest Allen's appearance is consistent with the interests of USDA. The ODJ and ODA consider Mr. Allen's testimony will be important in discussing the following topics, among others:

- Providing an overview of Federal Seed Act definitions (e.g., "kind," "variety," "mixture") and labeling requirements
- Explaining how the term "Kentucky 31" is commonly used in the seed industry (Dynamic/Abbott have asserted that "Kentucky 31" is commonly accepted as a term for a mixture of tall fescue seed which is not in accordance with the Federal Seed Act.)
- Explaining grower's declarations, grow-out tests, and other ways in which seed is represented/determined to be a particular variety
- Explaining the electrophoresis test for "Kentucky 31"—an overview of the technology, instances in which the test is used, and the test's limitations

DECISION MEMORANDUM FOR THE ADMINISTRATOR

Page 3

- Describing nationwide market conditions for Kentucky 31 and other tall fescue that affected Kentucky 31 prices during 2016-2017
- Describing the enforcement actions that USDA has taken against Dynamic/Abbott and authenticating certain USDA charge sheets and settlement sheets that will be introduced as evidence at the hearing

DECISION BY THE ADMINISTRATOR:

Approve:

BRUCE SUMMERS

Digitally signed by BRUCE
SUMMERS
Date: 2021.04.30 11:13:59 -04'00'

Disapprove:

Discuss with me:
