classes of controlled substances listed above.

Dated: August 14, 2000.

John H. King,

Deputy Assistant Administrators, Office of Diversion Control, Drug Enforcement Administration.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket Nos. 98–23, 98–32, 98–33]

January 17, 1998 Shipment of 10,000 Kilograms of Potassium Permanganate, December 16, 1997 Shipment of 20,000 Kilograms of Potassium Permanganate and November 17, 1997 Shipment of 20,000 Kilograms of Potassium Permanganate; Suspension of Shipments

On March 4, 1998, the then-Acting Deputy Administrator of the Drug Enforcement Administration (DEA) issued an Order to Suspend Shipment to Zhaoquing Chemicals Import & Export Company of Guandong, notifying it that pursuant to 21 U.S.C. 971, DEA had ordered the suspension of a shipment of 10,000 kilograms of potassium permanganate that was transshipped through Oakland, California on January 17, 1998, on its way to GMP Productos Quimicos, S.A. (GMP) in Medellin, Colombia. The Order to Suspend Shipment stated that DEA believed that the listed chemical may be diverted based on the failure to notify DEA of the transshipment in violation of 21 CFR 1313.31; associations between GMP and other violating chemical companies in Colombia; and other diversionary practices of GMP. On May 14, 1998, GMP requested a hearing and the matter was docketed before Administrative Law Judge Gail Randall.

At some point this Order to Suspend Shipment was withdrawn and was reissued on May 20, 1998 to Eland Chemical Ltd. (Eland) of Hong Kong. Also on May 20, 1998, the then-Acting Deputy Administrator of DEA issued two other Orders to Suspend Shipment to Eland, notifying it that DEA had ordered the suspension of two shipments of 20,000 kilograms each of potassium permanganate on their way to GMP. One shipment was transshipped through Long Beach, California on November 17, 1997, and the other was transshipped through Oakland, California on December 16, 1997. These Orders to Suspend Shipment asserted the same bases for the suspensions as the order regarding the January 17, 1998 shipment.

On May 29, 1998, Judge Randall issued an order consolidating for hearing purposes only the proceedings involving the suspension by the United States of the three separate shipments of potassium permanganate en route to GMP. Following prehearing procedures, a hearing was held in Miami, Florida on February 8 through 12, 1999, and in Arlington, Virginia, on February 16 through 18, 1999. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law and argument.

On November 4, 1999, Judge Randall issued separate Recommended Rulings, Findings of Fact, Conclusions of Law, and Decisions, regarding each of the three shipments, recommending that the suspended shipments be released to GMP. The Government and GMP both filed exceptions to Judge Randall's Recommended Rulings, Findings of Fact, Conclusion of Law, and Decisions, and on January 27, 2000, Judge Randall transmitted the record of these proceedings to the Deputy Administrator.

The Administrator has considered the record in its entirety, and pursuant to 21 CFR 1313.57, hereby issues his final order regarding the suspension of all three of the shipments based upon findings of fact and conclusion of law as hereinafter set forth. The Administrator is issuing one final order regarding all three of the suspensions since the same findings of fact and conclusions of law apply to all three suspensions. The Administrator adopts the findings of fact and conclusions of law of the Administrator Law Judge except as noted below and rejects the recommended ruling of the Administrative Law Judge.

The Administrator finds that based upon the evidence in the record, Colombia produces between 70–80% of the world's cocaine hydrochloride. Potassium permanganate and hydrochloric acid are List II chemicals that may be used for a variety of legitimate purposes, but are also used in the illicit manufacture of cocaine. Potassium permanganate is not produced in South America and therefore must be imported.

GMP is a company founded in 1938 that distributes chemical products, with four locations throughout Colombia, South America. Its president, Pedro Juan Moreno Villa (Mr. Moreno), has served on the board of directors of other companies in Colombia. In addition, from 1995 through 1997, Mr. Moreno served as the Secretary of the Government of Antioquia. An extensive security investigation of Mr. Moreno was conducted for this position. During his tenure, Mr. Moreno supported the Govenor's goal to fight narcotics traffic. According to Mr. Moreno, his life was endangered because of his duties against drug traffickers and guerillas, resulting in his taking extensive security precautions.

Between 1994 and 1998, GMP was the largest importer of potassium permanganate into Colombia. Since approximately 1994, GMP conducted business with Eland, a Hong Kong company. From 1996 through 1998, Eland's sale of potassium permanganate to GMP had become consistent, with Eland selling GMP in excess of 200 metric tons during that time.

Eland arranged for the sale and shipment of the potassium permanganate that is the subject of these proceedings. Eland purchased the potassium permanganate from two chemical suppliers in China. The first shipment from Eland of 20,000 kilograms of potassium permanganate was en route to GMP in Medellin, Colombia when it transited through the port of Long Beach, California on November 17, 1997. The second shipment of 20,000 kilograms from Hong Kong to GMP Medellin, Colombia transited through the port of Oakland, California on December 16, 1997, and the third shipment of 10,000 kilograms transited the port of Oakland, California on January 17, 1998.

Evidence presented at the hearing indicates that ''transit'' or ''in transit'' means that the vessel ''is just passing through'' a port without unloading cargo, whereas a ''transshipment'' is known within the shipping industry as cargo that goes from the point of origin to someplace other than the ultimate destination and is transferred from one conveyance to another for further transit.

The bill of lading and manifest for these shipments clearly disclosed potassium permanganate as the chemical being shipped. The route of the shipments at issue had scheduled stops at Oakland, California and Long Beach, California, however none of the shipping documents provided advance notice to Eland or to GMP that the potassium permanganate shipments would transit through the United States. The scheduled route did not intend for the chemicals to be unloaded from the carrier ship in the United States. A representative of the shipping company stated that ''[t]he goods at issue in this case were not intended to be discharged in any port in the U.S. or transferred

from one vessel to another or to any other means of conveyance in any U.S. port.'' It is common practice in the international shipping industry for the shipping company to reserve the right to change the route.

GMP maintained the requisite import documentation needed to import the shipments at issue in this proceeding into Colombia. GMP was legally authorized to import the potassium permanganate into Colombia.

However, the United States Customs Service (USCS) seized each of these shipments as they transited the ports in California pursuant to its belief that it had the authority to do so under 18 U.S.C. 545. This action was taken by the USCS since no advance notice was filed with DEA that these shipments would be sent from Hong Kong, through the United States, to Colombia.

Pursuant to 21 U.S.C. 971(a), each regulated person who imports or exports a listed chemical to or from the United States is required to file advance notification of the importation or exportation not later than 15 days before the transaction is to take place. One of the regulations implementing this provision 21 CFR 1313.31, states that a threshold quantity of a listed chemical ''may be imported into the United States for transshipment, or may be transferred or transshipped within the United States for immediate exportation, provided that advance notice is given * * *.''

There is no dispute that no advance notice of these shipments was provided to DEA by GMP or any other party. However, there is a dispute over whether such advance notice was required for these shipments. An expert in freight forwarding testified that in his opinion, since the goods were not to leave the ship at a United States port, then the DEA notification requirements would not apply. The Administrator disagrees and will address this issue in detail later in this order.

On May 20, 1998, DEA issued the Orders to Suspend Shipment to Eland that are the subject of these proceedings. The Orders asserted as a basis for the suspensions that the potassium permanganate may be diverted.

At the time the shipments at issue transited the United States, the President of the United States had decertified the Government of Colombia after determining that the controls utilized by the Government of Colombia to prevent the processing and trafficking of illicit drugs were inadequate. As a result, DEA issued a policy statement that declared that ''regular customer status'' was revoked for all Colombian customers under 21 U.S.C. 971(c)(1), thereby requiring advance notification of all shipments of listed chemicals over the threshold amount. The policy statement further indicated that a heightened review process would be used for shipments of listed chemicals to Colombia. See 61 FR 13,759 (1996).

On February 26, 1998, the President of the United States determined that Colombia did meet the statutory standards for certification ''in the vital national interests of the United States.'' However, DEA's policy statement has not been revoked or amended.

Evidence was presented at the hearing regarding GMP's compliance with Colombian law relating to controlled chemicals. Potassium permanganate and hydrochloric acid are controlled chemicals in Colombia.

The Direccion Nacional de Estupefacientes (DNE) is the Colombia government agency that issues, revokes, and renews chemical permits for individuals or companies that handle controlled chemicals. The DNE also establishes the total quota of controlled chemicals to be imported per month by permit holders. A company may not import more than its quota in any given calendar month without the permission of the DNE.

In general, a DNE permit is required if an individual or company wants to handle in excess of five kilograms or five liters of a controlled chemical per calendar month. Therefore, no permit is required if a person wishes to purchase less than five kilograms or five liters in a calendar month. However, multiple sales to an individual or company of less than five kilogram or liter quantities, that total more than the threshold in a calendar month, would require a permit.

Evidence was presented by both the Government and GMP regarding whether multiple sales of less than five kilograms of a controlled chemical to multiple individuals listing the same address would violate Colombian law. Judge Randall noted that no evidence was presented that cited to a specific law or regulation making such sales illegal. Therefore, Judge Randall concluded, and the Administrator agrees, that a preponderance of the evidence in the record does not support a finding that sales of less than the threshold amount of controlled chemicals to multiple individuals at the same address is a violation of Colombian law.

A Colombian distributor of a controlled chemical must maintain a control log that reflects receipt and distribution of the chemical. One log book must be maintained for each controlled chemical. For each transaction, the log must contain the name of the purchaser, the purchaser's address and identification number, and the purchaser's intended final use of the chemical.

At the hearing, GMP indicated that its salesmen did not go out to sell quantities of listed chemicals below the threshold amount. Instead, buyers seeking to purchase below the threshold amounts would go to GMP's retail outlet facility in Medellin. This facility's security exceeds what is required by local law. In addition, GMP's employees were instructed to copy the identification document, called the cedula, of a buyer and to attach it to one of the copies of the sales invoice.

According to evidence presented by GMP, in Colombia, if the seller of a controlled chemical knows that the buyer's presented identification document is false, then the seller may not lawfully sell controlled chemicals to that buyer. Howerver based upon the record in this proceeding, it does not appear that the buyer is prohibited by Colombian law from using the identification paperwork of another person to buy controlled chemicals. In an official report, a Colombian prosecutor found that GMP was ''not forced to by law to keep a follow up of its purchasers to find out the final destination of its products.''

The Colombian National Police (CNP) is the enforcement entity of the DNE, and is authorized by the DNE to conduct investigations that could result in criminal or administrative penalties. In November 1992, the CNP seized a GMP vehicle which was transporting potassium permanganate from one GMP location to another. The CNP alleged that GMP did not possess the requisite permit to handle such a controlled chemical. However, a Colombian prosecutor chose not to prosecute and ordered the release of the potassium permanganate to GMP.

On June 10, 1997, the CNP inspected one of GMP's facilities finding that on nine occasions between June 3, 1997 and June 6, 1997, GMP had failed to enter required information into its control logs concerning the sale of 2,450 kilograms of potassium permanganate. The CNP also discovered that in October 1997, GMP sold five gallons of hydrochloric acid to a company not registered to handle that amount of the chemical. Further in October 1997, GMP sold two gallons of hydrocholoric acid to a single individual who lacked a permit. Then in November 1997, GMP sold three gallons of hydrochloric acid to a company that was not registered to handle that chemical.

On December 15, 1997, the CNP inspected GMP and found record keeping discrepancies. GMP kept its control log tracking its sales and purchases of controlled chemicals on a computer. GMP was not authorized to maintain its records in this manner. GMP's general manager at that time testified that he was confused by this allegation by the CNP since GMP had been keeping computerized records since 1991, and the company had never been told that this was not authorized. GMP nonetheless stopped maintaining computerized records after receiving the inspection notations from the CNP in 1998.

On January 20, 1998, a follow-up inspection was conducted. The CNP took approximately 55 GMP sales invoices dated from October through December 1997, which reflected sales in less than the threshold quantity of controlled chemicals. During this time period, GMP generated approximately 4,490 invoices with the overall sales of both controlled and non-controlled chemicals of approximately $800,000. The 55 questioned invoices totaled $635.48 in sales and accounted for .08% of GMP's total sales during this time period.

It is in dispute as to whether the copies of the invoices given to the CNP had copies of cedulas attached. The Administrator finds that regardless of what was given to the CNP, GMP had copies of cedulas in the files for most of the invoices. However, in light of findings and conclusions made below, the Administrator does not find that the fact that GMP obtained and maintained copies of cedulas protected against the possible diversion of these chemicals.

After obtaining these invoices, the CNP investigated the addresses and telephone numbers listed on GMP's seized invoices. This investigation revealed discrepancies including addresses that did not exist, telephone numbers that did not match the addresses listed on the invoices, and telephone numbers that did not exist.

In addition, the CNP noted invoices issued on the same date to different named individuals listing the same address and telephone number. The invoices each reflected sales of 4.6 kilograms of potassium permanganate, below the threshold amount. The CNP discovered that the individuals listed on the invoices had not actually purchased the potassium permanganate, but their personal identification cards had been used by their employer to obtain the chemical.

By letter dated January 22, 1998, CNP officials concluded that GMP, ''may be guilty of selling controlled chemical substances, for which purpose it is using fictitious addresses, names of actual persons and is making sales of controlled chemicals in amounts greater than those stipulated by the Office of the National Director of Narcotics without receiving a license from the D.N.E.'' This report was updated on March 5, 1998.

Evidence was represented at the hearing that GMP representatives also investigated the questioned invoices to determine the identity and location of the purchasers listed on the invoices. While GMP representatives were able to locate some of the individuals and companies named on the invoices, many remained unknown. Many contained fictions addresses, and in some instances, no addresses were provided on the invoices.

After reviewing this invoice information, a Columbian prosecutor determined that GMP had not violated Colombian law and that further investigation was not warranted. A DEA investigator testified that he had no information that any of the individuals named on these invoices were involved in the manufacturing of cocaine.

The Administrator finds that evidence was presented regarding allegations by the Government that GMP sold potassium permanganate and hydrochloric acid from September 1997 through June 1998, to an individual whose chemical permit was ''annulled'' or revoked effective July 1997. Evidence was also presented regarding GMP's maintenance of two separate control log books for potassium permanganate. One book covered the period December 3, 1997 to June 17, 1998; and the other covered the period December 3, 1997 to July 10, 1998. Finally, evidence was presented as to whether GMP exceeded its importation quota in July 1998.

It was not until July 1998 that the CNP and DEA discovered the sales to the individual with the revoked permit, the two control logs, and the issue regarding GMP's importation quota, clearly after the suspension of the shipments in March 1998. In light of the Administrator's conclusion below regarding the scope of this proceeding, the Administrator is not reiterating the findings of fact of the Administrative Law Judge regarding these three areas.

Effective August 25, 1998, DNE revoked GMP's chemical permit in Colombia. The DNE's order was affirmed by the Board of Justice and Rights, National Administration of Addictive Drugs on November 23, 1998. The DNE's order was based, to a large extent, on the CNP's investigation of the invoices that are at issue in this proceeding.

As of the hearing in this matter, GMP had appealed this order further, but no decision had been rendered. Therefore based upon the evidence in the record, GMP is unable to handle any controlled chemicals in quantities exceeding five kilograms or five liters. However, GMP was given permission to sell their in-stock controlled chemicals provided that they submit specific information to DNE in advance of the sale. According to GMP representatives, since approximately July 1998, GMP ceased selling controlled chemicals in quantities of less than five kilograms or five liters, choosing only to sell to customers with a chemical permit.

GMP presented evidence from different Colombian government entities that GMP is a law-biding company. Mr. Moreno testified that he was unaware of any GMP controlled chemicals being diverted to the manufacture of cocaine or any other illicit drug.

The issue before the Administrator is whether or not the record as a whole establishes by a preponderance of the evidence that DEA should suspend the three shipments; of potassium permanganate en route from Hong Kong, China, through the United States, to Medellin, Colombia pursuant to 21 U.S.C. 971(c)(1) and 21 CFR 1313.4(a).

As a preliminary matter, GMP argued that the shipment were suspended illegally by the USCS. Specifically, GMP argued that the statutory authority cited by the USCS, 18 U.S.C., does not provide the USCS with the authority to detain shipments and therefore the suspensions were defective and the chemicals should be released.

The Administrator agrees with Judge Randall that this issue is outside the scope of this proceeding. As Judge Randall stated, ''[t]hisi forum is to determine the legality of the DEA's actions, not the actions of USCS officials.''

The first issue to be determined by the Administrator is whether advance notification of the three shipments was required to be filed. Pursuant to 21 U.S.C. 971(a), each regulated person who imports or exports a listed chemical is required to notify DEA of the importation or exportation not later than 15 days before the transaction is to take place. A regulated person is defined in 21 U.S.C. 802(38) as ''a person who manufactures, distributes, imports or exports a listed chemical * * *.'' Further a chemical importer is defined in 21 CFR 1300.02(b)(8) as ''a regulated person who, as the principal party in interest in the import transaction, has the power and responsibility for determining and controlling the bringing in or

introduction of the listed chemical into the United States.''

The Administrator agrees with Judge Randall's conclusion that GMP is a regulated person. In a previous case, the Deputy Administrator determined that ''if the title to the potassium permanganate passed to (the customer) before the chemical entered the United States, then (the customer) is the principal party in interest.'' Yi Heng Enters. Dev. Co., 64 FR 2234 (1999). The invoices for these transactions contained the phrase ''FOB Huangpu,'' which means that the title to the goods passed to GMP as soon as the potassium permanganate was delivered to the carrier. Therefore, since title passed to GMP before the potassium permanganate entered the United States, GMP is considered the importer of the chemicals, and as such is a regulated person.

The next question is whether advance notification is required for the type of shipments at issue in this matter. One of the regulations implementing 21 U.S.C. 971(a) requires that advance notice be filed with DEA if a threshold amount of a listed chemical is ''imported in the United States for transshipment, or * * * transferred to transshipped within the United States for immediate exportation * * *.'' 21 CFR 1313.31.

There is no dispute that no advance notification was provided to DEA for these shipments. The parties also apparently agree that these shipments are considered ''in-transit'' transactions since the chemicals arrived in the United States with no intention of them being removed from the ships before departing the United States. However, the parties disagree as to whether these transactions are considered ''importations'' which require advance notification.

GMP argued that 21 CFR 1313.01 distinguishes between transshipments and in-transit shipments, yet in-transit shipments are not mentioned in 21 CFR 1313.31, the section requiring advance notification. Consequently, GMP argued that no advance notice is required for in-transit shipments.

Judge Randall stated that:

> (a)lthough the Respondent's argument, logically, may be compelling, I do not find that it is consistent with the plain language used in the statute and the implementing regulations. If the statutory provisions are irreconcilable with, even contradictory to, recognized international trade practices, the remedy is with Congress, not with this agency. I conclude that, pursuant to the plain meaning of the statute and its implementing regulations, an in-transit shipment, such as the one in question here, is an import and triggers the advance notice provision of 21 U.S.C. 971(a).

Neither ''transshipment'' nor ''in-transit shipment'' are defined in the statute or regulations. Therefore, in arriving at her conclusion, Judge Randall considered the language contained in 21 U.S.C. 954 relating to the shipment of controlled substances, wherein ''transshipment'' refers to the industry recognized definitions of in-transit shipments and transshipments. The title of this section is ''Transshipment and in-transit shipment of controlled substances,'' and provides in relevant part that:

> (1) A controlled substance in schedule I may—
>
> (A) be imported into the United States for transshipment to another country, or
>
> (B) be transferred or transshipped from one vessel, vehicle, or aircraft to another vessel, vehicle, or aircraft within the United States for immediate exportation. * * *

While 21 U.S.C. 954(1)(B) refers to the transfer of goods from one vessel to another, no such language is found in 954(1)(A). Instead, 954(1)(A) refers to the importation of controlled substances into the United States ''(f)or transshipment to another country.'' Although both subsections use the word ''transshipment'' or ''transshipped,'' they are clearly not intended to describe the same transaction. Unlike 954(1)(B), 954(1)(A) does not specifically refer to transferring of goods from one vessel to another and therefore it is reasonable to conclude that 954(1)(A) describes in-transit shipments, such as the ones at issue, as an importation. This conclusion is further supported by the title of section 954 which explicitly includes in-transit shipments.

Similar language is used in 21 CFR 1313.01 and 1313.31 relating to the importation of listed chemicals. As Judge Randall found,

> Section 1313.01 describes the scope of the regulations under part 1313, ''Importation * * * of Precursors and Essential Chemicals,'' and explicitly states that these procedures apply to the ''importation, exportation, transshipment and in-transit shipment of listed chemicals.'' 21 CFR 1313.01. Next, within Part 1313, the subtitle of the applicable regulations explicitly covers: ''Transshipments, In-Transit Shipments and International Transactions Involving Listed Chemicals.'' Significantly, the language of sections 954(1)(A) and (1)(B) is essentially duplicated in 21 CFR 1313.31(a), which states in relevant part, that a listed chemical ''may be imported into the United States for transshipment, or may be transferred or transshipped within the United States for immediate exportation, provided that advance notice is given to the Administration.''

Accordingly, Judge Randall concluded, and the Administrator agrees, that ''in light of the parallel language of statutory section 954 and regulatory § 1313.31, the most logical conclusion is that the advance notification requirement applies to in-transit shipments.'' As a result, advance notice of these shipments was required to be filed under 21 U.S.C. 971 and 21 CFR 1313.31.

As previously noted, there is no question that GMP did not file advance notice of these shipments. However failure to file, by itself, does not justify the suspension of the shipments. A shipment may be suspended upon a showing that the chemical may be diverted to the clandestine manufacture of a controlled substance. 21 U.S.C. 971(c).

As Judge Randall noted, DEA previously held that failure to notify DEA of a shipment justified suspension of a shipment. See Yi Heng, 64 FR at 2234. But, Judge Randall also correctly noted that this conclusion was based upon the fact that the Respondent in that proceeding conceded that ''the suspension orders can be sustained based on the absence of notice.'' Yi Heng, 64 FR at 2235. However in Yi Heng, the Deputy Administrator did not uphold the suspensions on that basis alone, but made additional findings that the chemicals may be diverted.

In its exceptions to Judge Randall's recommended decision, GMP argued that the fact that a carrier can alter shipping routes without notice ''would expose the innocent shipper to the expense and delay of an administrative proceeding and the possible suspension of his shipment,'' since no advance notice would be filed. However as just noted, DEA would not suspend a shipment solely on the basis that no advance notice was filed. There would need to be evidence that the chemicals may be diverted to the clandestine manufacturer of a controlled substance.

Following the suspension, a regulated person is entitled to a hearing. 21 U.S.C. 971(c)(2). While the statute and legislative history is silent as to what constitutes ''grounds'' to support a finding that the chemicals may be diverted, the Government has the burden of proof, 21 CFR 1313.55. The government must prove by a preponderance of the evidence that the chemical may be diverted, not that it necessarily will be diverted.

Judge Randall concluded that the initial suspensions of the chemicals were supported by the evidence. Judge Randall found that:

> At the time the shipment transited the U.S. port, Colombia had been decertified by the

President and denied ''regular customer'' status by the DEA. * * * Lacking this status, (GMP) was required to provide notice to the DEA when over-the-threshold amounts of potassium permanganate transited a U.S. port; a requirement that (GMP) did not meet. * * * Further, at that time Colombia produced 70–80% of the world's cocaine hydrochloride. * * * and potassium permanganate is essential in this production process. * * * Thus, the preponderance of the evidence supported the DEA's initial suspension decision(s).

However, Judge Randall then concluded that the chemicals should nonetheless be released to GMP in Colombia in light of ''the lawful nature of GMP's extensive and longstanding business activities in Colombia,'' the changes made by GMP regarding its sale of listed chemicals, and the oversight of its sales by the DNE.

Before determining the ultimate outcome of these proceedings, the scope and purpose of the hearing must be determined. Pursuant to 21 CFR 1313.52, the purpose of a hearing regarding suspended shipments if for ''receiving factual evidence regarding the issues involved in the suspension.''

Judge Randall found that while the statute does not reveal the type of remedy that such a hearing may provide, GMP clearly is entitled to due process of law. Judge Randall stated that, ''(m)erely offering (GMP) a post-detention opportunity to present evidence without the possibility of obtaining relief does not fulfill the 'meaningful hearing' requirement of due process. See *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Therefore, I find that the hearing provision in 21 U.S.C. 971(c)(2) allows the Administrator to review the action de novo and to provide a post-hearing remedy to (GMP).'' Consequently, Judge Randall concluded that the purpose of the hearing is to review DEA's initial suspension and to determine whether the continued detention of the chemicals is justified based upon the evidence presented at the hearing.

The Administrator disagrees. Congress gave no specific guidance regarding the scope of a hearing regarding such suspensions. However, Congress clearly intended to treat these hearings differently from hearings regarding the suspension of a DEA registration. Pursuant to 21 U.S.C. 824(d), a DEA registration can be immediately suspended, simultaneous with the institution of proceedings to revoke the registration, upon a finding that there is an imminent danger to the public health and safety. Then, 21 U.S.C. 824(a) gives specific grounds for the revocation fo a registration.

There is no such similar language regarding the suspension of chemical shipments. Congress only stated that a chemical shipment may be suspended if it may be diverted to the clandestine manufacture of a controlled substance. There is no requirement in 21 U.S.C. 971 for the simultaneous intitution of proceedings to determine whether the chemicals should continue to be detained or forfeited based upon evidence adduced at the hearing. Therefore, it is reasonable to conclude that the purpose of a hearing regarding the suspension of a chemical shipment is to determine whether DEA had evidence at the time to support its finding that the chemical may be diverted, thereby warranting the suspension of the shipment.

The Administrative Law Judge noted that for a hearing to be meaningful it must provide the requestor with the possibility of some sort of post-hearing relief. The Administrator concludes that even with a narrow interpretation of the scope of the hearing, a requestor could be entitled to post-hearing relief. If there is a finding that the initial suspension was not warranted, then the chemicals would be released.

The Administrator next must determine whether evidence exists to support DEA's initial suspension based upon a finding that the chemicals may be diverted. Since the focus of these proceedings is whether the initial suspension was justified, the Administrator has confined his review to the evidence available to DEA at the time of the suspensions and to the evidence presented by GMP of its business practicews prior to the suspensions and its reputation as a law-abiding company.

Judge Randall found that the government presented ''extensive evidence concerning what it viewed to be suspicious activity by GMP. * * *'' However, Judge Randall also found that ''the Government has failed to prove that it possessed any of this information prior to the seizure of these goods * * *.'' Judge Randall was concerned that the CNP report that was heavily relied upon by the Government was dated January 22, 1998, well after the seizure of the chemicals.

As previously noted, Judge Randall concluded, and the Administrator agrees, that this proceeding is not to look at the legality of the seizures by the USCS, but rather to look at the actions of DEA. Therefore, the Administrator disagrees with Judge Randall and concludes that what is relevant is what evidence was possessed by DEA prior to the suspensions on May 20, 1998, not prior to the seizures. Further, the Administrator does not share Judge Randall's concern that the CNP's report was generated in close proximity to the suspension orders. The DEA investigator who testified worked closely with the CNP during this investigation, and was most likely aware of the information in the report before the report was actually written.

Consequently, in determining whether the suspensions were justified, the Administrator has considered evidence of allegations that were known to DEA prior to the suspensions, as well as GMP's evidence of its practices prior to that time. Given that these proceedings are to determine whether the initial suspension was justified, the Government cannot conduct an investigation after the suspensions to acquire evidence to justify its actions. The Government cannot have it both ways. It cannot put in evidence discovered after the suspensions yet at the same time try to preclude consideration of GMP's change in practices, since the suspensions, that are designed to prevent diversion.

Therefore, the Administrator has not considered evidence presented regarding the sales to the individual with the revoked permit, the two control logs, and GMP's July 1998 importation quota, since all were discovered well after the May 1998 suspension orders. Likewise, the Administrator has not considered GMP's changes in its practices since the suspensions. The Administrator has considered evidence of GMP's long-standing business activities, as well as evidence available to DEA at the time of the suspensions, to determine whether the suspensions were justified.

The Administrator agrees with Judge Randall that the initial suspension was justified. However, the Administrator relies upon more evidence than Judge Randall did in arriving at the conclusion. Judge Randall found that the initial suspensions were justified based upon the President's decertification of Colombia at the time of the shipments, GMP's failure to file advance notification of the shipments, and the fact that potassium permanganate is essential in the production of cocaine and at that time Colombia produced 70–80% of the world's cocaine hydrochloride. In addition, the Administrator finds that on a number of occasions, GMP made multiple sales to the same address on the same day to individuals without permits for total amounts in excess of five kilograms. GMP also sold total amounts in excess of five kilograms or five liters to individuals or companies without a permit and in some instances

to individuals who presented identifications of other people. Also, evidence was presented that GMP's sales invoices reflected addresses that do not exist, telephone numbers that did not match the addresses listed on the invoices, and telephone numbers that did not exist.

The Administrator recognizes that a Colombia prosecutor found that these practices did not violate Colombian law and no further action would be taken. However, the standard for criminal charges is far greater than what is required in this proceeding. Evidence of a violation of law is not necessary to demonstrate that the suspensions were lawful. The Government needs only to show by a preponderance of the evidence that the chemicals may be diverted. GMP's practice of selling above thresholds amounts to individuals presenting the identifications of others and of making multiple sales to the same address on the same day to individuals without permits, greatly increase the possibility of diversion of the chemicals. These practices circumvent the requirement of a permit for sales under five kilograms or five liters. Also, the invoices containing fraudulent and/or incorrect information are further evidence that the chemicals may be diverted. As a result of these practices, it is difficult, if not impossible, to ascertain the actual final destination of the chemicals sold by GMP.

The Administrator recognizes that GMP is a well-respected company in Colombia and that several Colombian government entities asserted that there was no evidence of wrongdoing by GMP in their files. However, this does not negate the fact that the shipments at issue may be diverted based upon the large scale production of cocaine in Colombia and the sales practices of GMP.

Judge Randall recommended that the chemicals at issue be released based in large part on GMP's subsequent change to its sales procedures where it no longer sells below five kilogram or five liter amounts to unregistered individuals or companies. The Administrator concludes that this evidence is not relevant to a determination as to whether DEA's initial suspension of the chemicals was justified. Such evidence would be relevant regarding any future shipments to GMP, should its Colombian chemical permit be reinstated.

Judge Randall gave great weight to the fact that despite the revocation of GMP's chemical permit, the DNE has allowed it to continue to sell controlled chemicals under heightened review. Again, the Administrator concludes that this is not relevant to a determination as to whether evidence that the chemicals may be diverted existed at that time to justify the suspensions. Even if the Administrator did find it relevant that the DNE has allowed GMP to continue to sell its in-stock chemicals, there are no assurances in the record that this oversight by DNE would apply should these shipments be released to GMP.

It should be noted that the Government argued in its exceptions that DEA is bound by the decision of the DNE revoking GMP's chemical permit. However since the DNE's action occurred in August 1998, the Administrator concludes that this cannot be considered as a basis for the suspension of the shipments in May 1998.

Judge Randall concluded that the ''evidence shows that the suspended chemicals will not likely be used for illicit purposes,'' and recommended that the chemicals be released to GMP. Judge Randall found that ''GMP is a reputable company in business in Colombia for over 60 years. Further, the company's president is knowledgeable of the country's drug producing and trafficking problems from his past government service. He credibly testified about the anti-drug efforts taken by his governmental office, and his commitment to these actions.''

Both parties filed exceptions to Judge Randall's recommended decision. The Administrator has carefully considered these exceptions and concludes that they have been addressed throughout this final order. The Administrator disagrees with Judge Randall that the chemicals should be released to GMP.

In arriving at his decision, the Administrator has considered GMP's stature in the business community and the anti-drug efforts of its president, however the chemicals should nonetheless not be released. The Administrator concludes that there is ample evidence to support DEA's finding at the time the shipments were suspended that the chemicals may be diverted. GMP's sales practices increased the chance of diversion of the chemicals. Some sales invoices contained fraudulent information. Colombia procedure 70–80% of the world's cocaine. The President of the United States had decertified Colombia and all shipments of listed chemicals were subjected to heightened scrutiny. Finally, GMP failed to file advance notification of these shipments. Therefore, the Administrator concludes that the suspensions of the November 17, 1997, December 16, 1997, and January 17, 1998 shipments of potassium permanganate to GMP were proper.

Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 971 and 28 CFR 0.100(b), hereby orders that the suspensions of the above described shipments, be, and they hereby are, sustained, and that these proceedings are hereby concluded. This final order is effective immediately.

Dated: August 3, 2000.

Donnie R. Marshall,

Administrator.

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NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Fellowships Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Fellowships Advisory Panel, Literature section (Creative Writing Fellowships category), to the National Council on the Arts will be held from September 11–14, 2000 in Room M–07 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW, Washington, DC 20506. A portion of this meeting, from 9:00 a.m. to 11:00 a.m. on September 14th, will be open to the public for policy discussion and guidelines review.

The remaining portions of this meeting, from 9:00 a.m. to 5:00 p.m. on September 11th, from 9:00 a.m. to 6:30 p.m. on September 12th and 13th, and from 11:00 a.m. to 5:00 p.m. on September 14th, are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of May 12, 2000, these sessions will be closed to the public pursuant to (c)(4)(6) and (9)(B) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and, if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

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