



# Appendix N

## *Subpoenas Under the Plant Protection Act*

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### Introduction

The Plant Protection Act (Title IV., Pub. L. 106-224, 114 stat. 438.7 U.S.C. 7701-7772), gives PPQ, for the first time, statutory authority to request issuance of a subpoena for documents and other records that can be used in PPQ investigative cases. PPQ can subpoena witnesses to appear at hearings to support our cases.

APHIS has had subpoena authority under other statutes, and therefore, has experience, through Investigative and Enforcement Services (IES) in the correct procedures to request subpoenas, serve subpoenas, and enforce subpoenas.

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### What a Subpoena Is

A subpoena is a written document requested from and signed by the APHIS Administrator that commands a person, company, etc., to produce documents described in the subpoena. The documents must be described specifically (as exactly as possible), and must be in the control or possession of the person who receives the subpoena. The subpoena includes a date and time when the documents must be produced.

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## What a Subpoena Is Not

A subpoena is **not** the same as a court order from a judge. If a subpoena is ignored, then APHIS can request an order from the appropriate court of competent jurisdiction to require the person to comply. It is mandatory to follow the court order, which is enforced by the Department of Justice (usually U.S. Marshals).

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## Definitions

**Document**—Includes writings, drawings, charts, graphs, tables, correspondence, records, notes, film, photographs, audio or videotapes, and any representation of documents stored on a computer, disk, diskette, CD-ROM, magnetic or electronic tape or any other means of electronic storage.

**IES Investigator**—APHIS investigators investigate violations of all APHIS regulations (PPQ, VS, and AC), prepare cases for prosecution and enforce compliance with the regulations. IES Staff investigate violations and coordinate with Headquarters Program staffs and with the Office of the General Counsel.

**OGC**—Office of the General Counsel. OGC attorneys prosecute violation cases for APHIS and give legal advice to the programs (PPQ, VS, and AC).

**Service**—When a legal document is delivered by an authorized person to a person or party who is then officially notified of an action or step that they are commanded to take (in this case, to produce documents).

**SITC**—Safeguarding, Intervention and Trade Compliance Officers are PPQ Officers who concentrate on smuggling and related issues. They work closely with IES Investigators.

**Subpoena duces tecum**—A command to a witness to produce documents.

## Subpoena Application or Request

Applications or requests for a subpoena require the following information before a subpoena can be issued:

- ◆ Written application or request
- ◆ Name, address, and telephone number of the person (or persons) who has the documents in his possession or control
- ◆ Statutory authority for the subpoena must be cited (Plant Protection Act of 2000)
- ◆ Description of documents to be produced (as specific and exact as possible); you must state the following information:
  - ❖ Location of the documents
  - ❖ Beginning and end dates of the documents
  - ❖ Documents are relative to the investigation
  - ❖ Legitimate purpose (legitimate investigation)
  - ❖ Grounds for a subpoena
  - ❖ Reasons why a subpoena is necessary (e.g., previous attempts to obtain documents have been refused, the custodian (of the documents) is reluctant, etc.)
  - ❖ Scope of the request for documents is not overly large or unreasonable for the custodian to meet
  - ❖ Documents are material to the investigation (the content of the documents is the subject of the investigation and the documents have a bearing in the alleged violation)
  - ❖ Date, time, and method for the exchange of the documents

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## Procedures

### Field Operations

A PPQ Officer or a Safeguarding, Intervention and Trade Compliance Officer (SITC) inspects a facility (market, warehouse, business location, distribution center, nursery carrier office, etc.), and finds possibly prohibited material or evidence. The Officer may need business documents to show the distribution of items that need to be recalled because of prohibited contents (fruits, vegetables, meat).

### Step 1

The Officer should call an IES Investigator to initiate the investigation.

### **Step 2**

The IES Investigator will collect evidence and affidavits to obtain the documents related to the case. The IES Investigators consult their Regional Directors to be sure that a subpoena is warranted and that there is valid basis for a subpoena to be issued.

### **Step 3**

If the IES Investigator has reason to believe that records or other document information exists and is being withheld, then the investigator writes a justification to request that a subpoena be issued. The justification contains the information listed in ***Subpoena Application or Request*** on **page N-1-3**. The Investigator includes evidence which shows the documents have reasonable relevance to a violation of the statute. A good justification must accompany the application or request for a subpoena.

### **Step 4**

The IES Investigator faxes the application/request for subpoena to either IES Staff in Riverdale or the IES Regional Office, who refers it to Riverdale.

### **Step 5**

IES Staff review the application/request, and then writes the subpoena, using a template. The subpoena contains the following information:

- ◆ Authority for issuance (Plant Protection Act: Title lv., Pub. L. 106-224, 114 stat. 438, 7 U.S.C. 7701-7772)
- ◆ General description of the scope of the investigation
- ◆ Reasonably specific description of the material to be produced
- ◆ Reasonable manner in which the documents can be produced (includes mailing the documents to an IES Office)

The subpoena indicates a date and time (usually 10 days), for the person subpoenaed to produce the documents.

IES Staff faxes the subpoena and supporting document to the Office of the General Counsel (OGC) for legal review.

### **Step 6**

OGC reviews the subpoena, recommends changes if necessary, and approves it. The subpoena is faxed back and forth between the IES Staff and OGC offices until the subpoena is approved.

### **Step 7**

Once the subpoena original is approved, IES Staff hand carries or sends the subpoena to the Administrator for signature. The subpoena is returned by courier (Special Attention envelope) back to IES Staff in Riverdale.

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## Serving of the Subpoena

Service, or delivery of the subpoena, will be by hand from an IES Investigator. Some subpoenas are served by Certified Mail.

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## Proof of Service

The investigator signs an affidavit certifying that the document was served, to whom, when, and where. Subpoenas sent by Certified Mail have the green card as proof of service. Proof of service and a copy of the subpoena are returned to the IES Staff.

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## Noncompliance by Recipient of Subpoena

APHIS has not yet had an instance where a subpoena was ignored or not followed by the recipient served. If this were to happen, APHIS would request an order from the appropriate court to enforce the subpoena.

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## Quashing a Subpoena

Subpoenas can be modified or canceled if the person who received the subpoena believes it to be unreasonable, overly burdensome, or otherwise objects to it.

To quash a subpoena, the person served needs to write justification. The justification is written to the Administrator within a specified amount of time (usually 7 days), and includes the reason for the person's objection. The recipient may include whatever reason they believe is the basis for an objection.

### EXAMPLE

Some examples of possible reasons recipients may believe is the basis for an objection to a subpoena include the following:

- ◆ Believe it is unduly burdensome to produce these records  
Need more time than is stated on the subpoena
- ◆ Believe the scope of the request is too broad (outside the scope of the Plant Protection Act)
- ◆ Think too many documents he been requested
- ◆ Think the investigation is **not** legitimate
- ◆ Believe the documents are **not** relevant to a violation
- ◆ Believe it will disrupt their business

If the person who was subpoenaed proves that the subpoena is oppressive, unreasonable, unduly burdensome, or has too great a scope, the subpoena may be quashed or modified.

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## **Subpoenas for Witnesses at Administrative Hearings**

The Plant Protection Act also gives PPQ the authority to subpoena witnesses to provide testimony at the hearing to prosecute a violator. The Plant Protection Act allows witnesses to be paid fees and reimbursed for their appearance at Administrative Hearings. These subpoenas are usually issued by the attorney handling a particular case in OGC.

Subpoenas are issued to non-government witnesses, either to allow experts to testify in support of a case, or to compel testimony of people who have information about the violation.