THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

THE HONORABLE H.W. FUNDERBURK, JR., ADMINISTRATIVE LAW JUDGE

Opinion No. 5972 (S.C. Ct. App. filed March 1, 2023)

McEntire Produce, Inc.,..... Petitioner,

v.

South Carolina Department of Revenue ..... Respondent.

APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

THE HONORABLE H.W. FUNDERBURK, JR., ADMINISTRATE LAW JUDGE

CASE NO. 17-ALJ-17-0060-CC
APPELLATE CASE NO. 2019-001933

McEntire Produce, Inc., ...Respondent,

v.

South Carolina Department of Revenue, ...Appellant.

RECORD ON APPEAL

VOLUME I

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

McEntire Produce, Inc., Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No.: 17-ALJ-17-0060-CC **FINAL ORDER**

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to a request for a contested case hearing filed by McEntire Produce, Inc. (McEntire or Petitioner) under S.C. Code Ann. § 12-60-460 (Supp. 2017). Petitioner contests the South Carolina Department of Revenue's (Department or Respondent) Determination that certain purchases of supplies are taxable for the period of October 1, 2012 through September 30, 2015 (Audit Period).

Petitioner, which is taxed and classified as a manufacturer, alleges the Department misapplied three manufacturer sales tax exemptions with respect to the audit. First, Petitioner alleges the Department applied the Machine Exemption found in S.C. Code Ann. §12-36-2120(17) too narrowly in light of Petitioner's food produce processing operations. Second, Petitioner contends that the Pollution Control Exemption found in Clause B of § 12-36-2120(17) applies to purchases of coveralls, eyewear, gloves, aprons, and hairnets (hereinafter collectively referred to as "protective clothing")[1] designed to ensure that Petitioner's operations do not spread pollutants onto the finished product and into the facility outflow. Finally, with respect to the purchases of protective clothing during the Audit Period, Petitioner contends the Department failed to recognize the "Clean Room Exemption" available under § 12-36-2120(54) for the Class 100 clean room environment which Petitioner maintains at its manufacturing facility.

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[1]Generally, in addition to these, other items such as overshoes, boot covers, sleeve covers, sanitized smocks, bump caps, and beard covers fall into the category of "protective clothing" in the food processing industry. However, in this case, only five items of protective clothing were specifically listed as being at issue: coveralls, eyewear, gloves, aprons, and hairnets. The Court recognizes that other items fall into the broader category of protective clothing and may be used at Petitioner's facility but, for purposes of this case, "protective clothing" shall only encompass the five items specifically enumerated in Exhibit A of the parties' Stipulations of Fact. *See infra,* p. 4.

A hearing was held before the Court on November 14 and 15, 2018. The parties submitted Stipulations of Fact, including a list of thirty-five (35) items that Petitioner alleges should have been classified as exempt from sales and use tax pursuant to the aforementioned provisions of § 12-36-2120. The parties also stipulated that Petitioner's witness, Dr. David Gombas, is an expert in the area of protective clothing for food safety purposes. Pursuant to Rule 32(a)(3)(B) of the South Carolina Rules of Civil Procedure, Dr. Gombas' deposition transcript was read into the hearing and admitted as Petitioner's Exhibit 25.

At the conclusion of Petitioner's case-in-chief, the Department conceded that McEntire's purchases of two (2) of the items at issue – the refrigerator in the quality assurance lab and lamps that were also used for quality assurance purposes – should be exempt from sales and use tax based on testimony presented. Thus, the Court is charged with determining whether Petitioner's purchases of the remaining thirty-three (33) items are exempt from sales and use tax.

In addition, Petitioner also contends that part of the Department's Proposed Assessment falls outside of the prescribed thirty-six (36) month statute of limitations. As such, the Court must also determine if the Department correctly assessed taxes for the eight (8) month period that Petitioner argues should be barred from consideration in the audit as falling outside of the statute of limitations.

STIPULATIONS OF FACT

At the hearing, the parties entered the following written Stipulations of Fact, which contained Exhibit A entitled "Supplies at Issue," into the Record pursuant to Rule 25(C) of the Rules of Procedure for the Administrative Law Court:

1. Petitioner operates a produce processing facility in Columbia, South Carolina. Petitioner processes lettuce, onions, cabbage, tomatoes, and other vegetables (hereinafter "produce") for sale. Petitioner's produce processing includes, but is not limited to, washing, cutting, mixing, and packaging the finished produce at Petitioner's facility.
2. On September 22, 2015, the Department initiated a sales and use tax audit of Petitioner for tax periods October 1, 2012 through September 30, 2015 (the "Audit Period").

3. During the audit, the Department reviewed Petitioner's purchase invoices and, after discussing questionable items with Petitioner, determined that Petitioner failed to report use tax on its purchases of numerous supplies and protective clothing. Accordingly, on July 19, 2016, the Department mailed to Petitioner a Proposed Assessment showing a total tax due in the amount of $126,912.60. [2]

4. The supplies that remain at issue are attached to these Stipulations as Exhibit A.

5. On August 1, 2016, Petitioner timely protested the Proposed Assessment due to the parties' disagreement as to whether Petitioner's purchase of protective clothing and other supplies (see Exhibit A) are exempt from use tax.

6. While the parties disagree as to the taxability of the items at issue in the Proposed Assessment, the parties agree that the numerical figures and calculations reflected in the Proposed Assessment are accurate. Accordingly, the parties agree that the amount of tax in dispute in $82,305.83 (plus interest).[3]

7. Petitioner contends that tax periods October 1, 2012 through May 31, 2013 are time-barred.

8. Petitioner timely requested a contested case hearing.

9. Dr. David Gombas is an expert in the use of protective clothing for food safety purposes.

10. The parties stipulate that the deposition transcript of Dr. Gombas may be used in these proceedings pursuant to Rule 32(a)(3)(B), SCRP.

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[2] Between the issuance of the Department Determination and the hearing in this matter, the parties were able to agree upon the taxability of some items in dispute. As such, the amount of disputed tax has been reduced from the amount listed in the Department Determination and later submitted to the Court in the Stipulation of Facts. Additionally, Petitioner has paid a portion of the tax due on the items it agrees are taxable. While information regarding the actual amount of tax owed has not been provided to the Court, Petitioner does agree that within thirty (30) days of receiving the Court's Final Order, it will remit payment in the amount due plus interest for items the Court finds taxable. The Department agrees to provide Petitioner with the updated balance along with the amount of interest due when Petitioner informs the Department that it is prepared to submit payment. The parties also agree that if Petitioner prevails on the statute of limitations argument, the amount of tax due, if any, will be reduced based on any period the Court determines falls outside of the statute.

[3] *See above,* n. 2.

11. The parties stipulate to the admissibility of Petitioner's Exhibits 5, 7-8, 10-11, 14, 16-17, and 19-25. These exhibits along with Petitioner's complete Exhibit List are attached to the Stipulations as Exhibit B.

12. The parties stipulate to the admissibility of Respondent's Exhibit 1, which is attached to the Stipulations as Exhibit C.

13. The parties stipulate that if the Court determines that some of the items at issue are subject to tax while other items are exempt, this matter should be remanded to the Department to calculate the tax and interest due on the items deemed taxable by the Court.

The following Exhibit was attached to the Stipulations of Fact (*supra*, p. 3, stipulation 4) and submitted to the Court as follows:

[Exhibit A]

Supplies at Issue

1. Coveralls
2. Eyewear
3. Floor drain covers
4. Warning signs and stickers
5. Gloves
6. Aprons
7. Hairnets
8. Towels
9. Refrigerator in quality assurance lab*
10. Blower fan
11. Lamps*
12. Warehouse racks
13. Stacking containers
14. Forklift batteries
15. Forklift parts
16. Forklift repair parts
17. Forklift rental
18. Pallet jack
19. Pallet flow brakes
20. Generator rental
21. Bar code scanner

22. Black ink aerosol cans
23. Cleaning machines
24. Plastic shelves for maintenance parts room
25. Maintenance tools
26. Utility cart for maintenance tools
27. Oil lubricant for handtrucks and pallets
28. Cut wheel and disc maintenance tools
29. Brooms
30. Floor treatment chemicals
31. Squeegees
32. Mobile computer stand
33. White boards in productions offices
34. Drug test kits
35. Storage water tank

* At the conclusion of Petitioner's case-in-chief, the Department conceded that McEntire's purchases of items (9) and (11) should be exempt from sales and use tax, leaving the Court to consider the remaining 33 items. (*See supra,* p. 2).

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing, and closely passed upon their credibility, and taking into consideration the burden of persuasion upon the parties, the Court makes the following additional Findings of Fact by a preponderance of the evidence:[4]

A. McEntire's Operations

Petitioner operates in the specialized and highly-regulated arena of fresh food processing for its customers. Those customers, primarily large restaurant chains, put the fresh produce on salad bars and into hamburgers, sandwiches, etc. without any additional processing for health purposes, e.g., the produce is not cooked. Initially, McEntire contracts with a grower to harvest the product at a temperature of around 80-85 degrees. Within hours of harvesting, the temperature of the produce must be reduced below 40 degrees in order to slow the natural ripening process in each particular

[4] To the extent that any Findings of Fact set forth herein shall be considered not to be Findings of Fact but Conclusions of Law, they may be deemed as such.

fruit or vegetable. McEntire is required by State and federal regulation, and also through contractual terms with individual customers, to track the produce as soon as it is loaded into the climate-controlled trucks after harvest. At all times, McEntire must be able to demonstrate that the temperature on these trucks remains between 33 and 40 degrees until the produce is unloaded for processing at Petitioner's plant.

Several witnesses for Petitioner described the physical layout of the produce processing plant as well as the operations that take place inside the plant to produce the finished product. During the periods at issue, McEntire's produce production primarily consisted of lettuce, onions, cabbage, tomatoes, and other vegetables. Because the ultimate consumer who eats the fresh produce does not take any preventative steps such as microwaving or cooking the vegetable to eliminate any harmful contaminants, McEntire must, and does, operate in a manner designed to reduce or eliminate those harmful contaminants. Furthermore, as a fresh produce processer, McEntire is regulated by the Food and Drug Administration (FDA), the South Carolina Department of Agriculture (SCDA), and the South Carolina Department of Health and Environmental Control (DHEC).

As soon as the fresh produce is unloaded from refrigerated trucks at Petitioner's plant, it enters one of six raw coolers, which are also maintained between 33-40 degrees. The majority of the plant is divided into two classifications: "low-care" areas and the "high-care" area. The low-care areas, which involve the ripening, sorting, defect removal, repackaging, and temporary storing of the products, are generally reserved for either whole produce that is never cut down by Petitioner, produce that is waiting to be transferred to the high-care area for cutting, or produce that has already been cut and packaged and is awaiting shipment out of the facility. Areas of the plant designated as low-care areas include the receiving area, the raw coolers, the tomato coolers, the raw feed area, the tomato repack room, the pack-out room, the palletizing room, the finished goods storage rooms, and the shipping area. In these areas, no physical cutting of the produce takes place.

The high-care area is reserved for produce that is cut down to a smaller size and packaged based on customer specifications. When McEntire is ready to process the raw produce, it is moved to the raw feed area where employees utilize a bin dumping conveyance system to move the produce into the cutting room, which is in the high-care area. Once in the cutting room, employees sort, inspect, and trim the produce before it moves along the conveyer belt down to an industrial cutter where it

is chopped up according to each customer's specifications. The cutter then discharges into a flume for washing. McEntire's flume is a stainless steel bath that utilizes a water-based product to rinse and sanitize the produce. The produce is washed in this product several times before it moves to the de-watering mechanism, which is essentially an industrial-sized salad spinner. This process of washing and de-watering helps to remove any pollutants or contaminants from the produce.

The physical cutting of the vegetables releases pollutants that are present on the produce at the farm harvesting level, allowing those pollutants to grow, multiply, and spread. Pollutants (chiefly E. coli) can also be brought into the facility by way of pathogens present on the shoes and clothing of employees. To avoid both the introduction and the spread of contaminants, employees in the high-care area are required by State and federal law to wear more protective clothing than that required in the low-care area. High-care area employees must also undergo a specialized sanitation procedure before they enter the area and a specific "dress-down" routine upon leaving the area. These procedures are both designed to prevent the spread of pollution – one to limit the introduction of contamination into the area by way of harmful microbes that may be on an employee and the other to prevent the spread of contamination that may have been present on the produce and dispersed into the air and water and onto exposed surfaces, including the employee's protective clothing, during the cutting process. The overall purpose of the climate control and other environmental controls like protective clothing, employee sanitation, and air filtration procedures is to protect the produce from pollutants transferable through human contact, microbial growth, and surface contact and to prevent the spread of harmful contaminants unearthed during the cutting process into the air and water.

The high-care area is also positive-pressurized to ensure there is an outflow of air to maintain the cleanliness of the environment. Additionally, both the ambient and compressed air that touches the produce is filtered down to 0.1 microns to ensure the finished product is free from harmful microbial growth and meets the exacting standards required by McEntire's customers. While some items of protective clothing are required in the low-care area, before entering the high-care area employees must go through an additional sequence of steps in the high-care hygiene room to

ensure that sanitation standards are maintained. Here, employees are required to put on overshoes, wash their hands, and put on smocks, gloves, and any other protective gear that is required by law.[5]

Once the produce is cut, washed, and dried in the high-care area, it is then metered onto a conveyance system where it is weighed and bagged. Each bag is sealed and run through a metal detector before it is moved into low-care areas to be boxed, labeled, palletized, and stored for a short period of time until employees load the product onto Petitioner's refrigerated trucks for delivery to customers.

At all times, the produce must remain at temperatures between 33-40 degrees. McEntire's customers, the FDA, SCDA, and DHEC can audit any item that comes out of the facility to ensure it has not spent any significant time outside of the temperature "safe zone." Any violations could result in rejection of the product by McEntire's customers and in reprimands, fines, or even plant closure by the regulatory agencies. Temperature, environmental controls, protective clothing, and other safe practices utilized to produce an uncontaminated product and to prevent pollution, as well as devices and mechanisms used to track the produce through the production process, are vital elements necessary to McEntire's operations.

B. Foodborne Illnesses

In the food processing industry, there are three primary foodborne illnesses that cause sickness and could cause death to consumers: (1) Listeria; (2) E. coli; and, (3) Salmonella. Many of the items disputed in the audit relate to Petitioner's efforts to combat these three serious foodborne illnesses caused by microbes that are described as follows:

(1) Listeria monocytogenes is a germ that can cause a serious infection called Listeria, which presents as flu-like symptoms. People usually become ill with Listeriosis after eating contaminated food. The disease primarily affects pregnant women, newborns, older adults, and those with weakened immune systems. Approximately 80% of those with Listeriosis are hospitalized and as many as 18% of those infected die.

[5] Carter McEntire testified that other items of protective gear required by law include bump caps, hairnets, head bands, smocks, plastic arm sleeves, nitrile gloves, and rubber overboots. (Trial Tr., p. 59:9-17). Although he testified that all of these items were deemed taxable by the Department, the only items listed in Exhibit A, to which the parties stipulated, are coveralls, eyewear, gloves, aprons, and hairnets. (*See also supra* at pp. 1, fn. 1).

(2) E. coli are bacteria that can cause diarrhea, urinary tract infections, respiratory illnesses and pneumonia, and other illness. E. coli are pathogenic, meaning they can cause illness outside of the intestinal tract. The types of E. coli that can cause diarrhea can be transmitted through contaminated water or food or through contact with persons or animals.

(3) Salmonella is a bacteria that can cause diarrhea, fever, and abdominal cramps between 12 and 72 hours after infection. The illness usually lasts from four to seven days and in some cases patients must be hospitalized. Salmonella infection may spread from the intestines to the blood stream and on to other sites in the body and, in these cases, Salmonella can cause death unless the person is promptly treated with antibiotics. The elderly, infants, and those with impaired immune systems are more likely to suffer the severe cases of Salmonella.

All three of these microbes grow naturally in South Carolina and are present in farms across the country and in Mexico where Petitioner's produce is harvested. In conducive environments, germs and bacteria can breed in the produce. Petitioner deals with these pollutants in two scenarios: (1) during the manufacturing process, to prevent the spread of contaminants which are present in the produce when it is delivered to the McEntire facility; and, (2) to prevent employees from introducing pollutants into the facility from their own clothing and shoes.

C. Pollution and Federal and State Regulation

As a manufacturer of fresh produce, McEntire is subject to both federal and state regulation with regards to food safety. Dr. David Gombas, McEntire's expert witness in the area of food safety and protective clothing, has counseled over one hundred fresh produce manufacturers on the role of protective clothing and the spread of contaminants as part of his over thirty-year career as a food safety professional, microbiologist, and advisor to the FDA in creating good manufacturing practices codified in federal and state regulations. The contaminants or pollutants specific to this case are in the forms of microorganisms and allergens that can come into the plant either on the fresh produce itself or on the employees and can be spread by contact with other surfaces and by water used in the facility. From there, by way of cross-contamination, Dr. Gombas testified that it is possible for any surface or piece of equipment to serve as a "harborage point" for the pathogenic

bacteria that can then spread throughout the facility, into the water, and on to the public if not properly controlled. (Trial Tr., p. 242:6-15).

Dr. Gombas defines "pollution" as any contaminant that may be injurious to the intended consumer. In the context of food safety, Dr. Gombas testified that the terms "pollution" and "contaminant" are used interchangeably and that "protective clothing is a necessary protection against contamination or pollution ... in any fresh cut or fresh produce handling facility; likewise, any ready-to-eat food processing facility." (Trial Tr., p. 231:21-232:1). "The way protective clothing is used in the food industry is, by definition, clothing that is used to protect the food from contamination. (Trial Tr., p. 232:25-233:2) Moreover, when asked whether the major foodborne illnesses associated with fresh produce (Salmonella, E. coli, and Listeria) constitute "pollution" as defined by Black's Law Dictionary, Wikipedia, and dictionary.com, Dr. Gombas answered in the affirmative and confirmed that all three of the harmful substances meet the various definitions of pollution.

Specifically, Dr. Gombas identified the following functions related to pollution control or abatement that protective clothing serves: (1) to substitute for the employee's street clothing so that the employee is not bringing the pollution into the facility or contacting the produce with that pollution; (2) within the facility, as contamination may occur from the produce itself, the water, or the equipment and exposed surfaces, to minimize the opportunity to spread the contamination on to a broader range of food. (*See* Trial Tr., p. 243:20-244:6).

D. The Supplies at Issue

The Court heard testimony from several witnesses describing the items at issue and how they are used at Petitioner's facility. However, of the thirty-three (33) items the Court must consider, no testimony was given regarding the following items listed in Exhibit A: Towels; Plastic Shelves for the Maintenance Parts Room; Utility Cart(s) for Maintenance Tools; and Drug Test Kits. For purposes of efficiency and clarity, the remaining supplies at issue are grouped, titled, and described as follows and will be referred to under these headings and the corresponding item numbers in this Order:

(1) Bar Code Scanners

Bar code scanners are used to track all produce through the manufacturing process. In the event that contamination is found on any piece of produce, the FDA requires that the product be easily traced back to the farm where it was harvested and forward through the manufacturing process and on to the customer in order to identify the source of the contamination and to prevent its spread. In compliance with federal rules, the produce is scanned at McEntire when it exits the truck, when it enters the cutting area, when leaving the cutting area, and when the finished product is loaded onto a truck for shipment.

(2) Black Ink Aerosol Cans

The ink in these cans is used to label finished goods. Specifically, the ink goes across a jet ink prayer to spray a "use-through code" and a "lot code" onto the finished packaging. The lot codes assist in the FDA trace-back process.

(3) Mobile Computer Stands

Petitioner uses a computer program to track the produce processing operation. The mobile computer stands are used by quality technicians, food safety technicians, and production operators to assist in the scanning and tracking of produce as it moves through the facility. While the stands themselves are not explicitly required by law, the critical care checkpoints at which the stands are used are required.

(4) White Boards in Production Offices

Petitioner uses white boards to track production efficiency and yield. For example, employees receive a bonus depending on how fast they produce sliced tomatoes. The white boards are used to track the employees' progress.

(5) Warning Signs and Stickers

Warning signs and stickers are found throughout the plant to warn of certain hazards and to remind employees of certain procedures. Approximately 80% of these signs and stickers are used in the plant or processing area of the facility while the other 20% are used in the administrative/office area.

(6) Stacking Containers

Stacking containers are used in the "work in progress" section of the facility to separate processed produce until it is combined. For example, the combination of cabbage and carrots makes coleslaw. Once the carrots are cut to specified form, they are held in the stacking containers until the cabbage is processed. The combining of these component pieces into a bag to be sealed, labeled, and palletized completes the manufacturing process with respect to the mixed product.

(7) Warehouse Racks

These racks are specially designed to assist in cooling and maintaining the required temperature of the produce during processing to avoid spoliation and prevent contamination. Since pallets cannot be stacked on top of each other due to cooling limitations, these racks are galvanized to withstand the cold, wet and humid atmosphere inside of the facility and to allow cold air to flow through the rack system and over the individual items of produce so that the temperature does not exceed 40 degrees. Because a temperature of 41 degrees or over means that Petitioner effectively has no product, maintaining the required temperature is essential to Petitioner's manufacturing process.

(8) Pallet Flow Brakes

The pallet flow brakes are used on the racks, which hold thousands of pounds of raw produce and finished product. The racks, which transport the produce into the cutting area, are potentially dangerous without the brakes as the pallets can fall off the racks and injure employees. The brakes allow the 1,600 lb. pallets to rotate and flow though the facility at a safe rate. During the audit period, the pallet flow brakes were used in all three tomato coolers and in the raw cooler area.

(9) Hand Trucks and Pallet Jacks, and Oil Lubricant Used Therein

The majority use of hand trucks and pallet jacks is attributed to moving sliced tomatoes and sack onions from the cold storage area to the high-care area to feed the in-line for the cutting process. As a food manufacturer, Petitioner is required to use food grade oil and grease to maintain both.

(10) Forklift Rental, Forklift Batteries, Forklift Parts, Forklift Repair Parts

Forklifts are used throughout the facility, except in the high-care area. While some may be used outside of the actual building structure, 90% are used within the facility. The forklifts used in the

facility move the produce from place to place. Specifically, they are used to move 800-1,600 lb. bags of raw produce onto the conveyer belt at the beginning of the cutting area.

(11) Blower Fan

Because the temperature in the facility must be maintained between 33-40 degrees, blower fans are used to circulate refrigerated air throughout the facility in both the high-care and low-care areas. Without the blower fans, Petitioner could not maintain the required temperature in the facility. Additionally, blower fans are used to prevent unfiltered air from entering the high-care area where air is filtered to an exact standard to maintain an elevated level of sanitation.

(12) Maintenance Tools

Petitioner uses maintenance tools to maintain, repair, install, and uninstall equipment. In the cold, damp environment of the facility, machinery wears out so quickly that Petitioner has thirty (30) fulltime employees working continuously to repair and maintain equipment.

(13) Cut Wheel and Disc Maintenance Tools

The cut wheel and disc maintenance tools are used specifically on the cut wheels and discs on the produce cutting machines in the high-care area.

(14) Brooms

Petitioner uses brooms throughout the facility, including the administrative/office area, but only seeks to claim an exemption for the brooms used in the plant areas of the facility. In those areas, brooms are used to sweep debris from the floor and off of storage racks in order to sanitize those areas.

(15) Squeegees

Squeegees are used primarily in the high-care area to move debris and water off of the floor and into the drain system. Because the debris in this area is a harbor point for bacteria and pathogens, the squeegees help to sanitize the area. The squeegees used in the high-care area are kept there. Other squeegees are used interchangeably to clean the floors of the facility and to clean the windows of the administrative/office area.

(16) Floor Drain Covers

Stainless steel floor drain covers are used in the high-care area and serve as both a filter and a drain in Petitioner's recycling of fresh water. These higher quality drains must be used because waste material was previously entering the closed water system and causing adulteration of the water. Petitioner uses about 300,000 gallons of water per day and recycles about half of that. When water is sprayed onto the produce in the cutting process, runoff goes onto the floor and mixes with debris. Through the drain system, the water is separated from the debris and some flows back to the plant where it is recycled while the rest goes to the city sewer system.

(17) Floor Treatment Chemicals

The floor treatment chemicals are used primarily in the high-care area to sanitize the floor. The Department previously agreed that an exemption was available for the 70% of the treatment chemicals that were used in the high-care area during the manufacturing process but did not allow the exemption for the remaining 30% used outside of the high-care area.

(18) Storage Water Tanks

Petitioner has two storage water tanks that store water used all over the facility, primarily in the high-care area. One tank is used to mix sanitation chemicals with chilled water. This mixture is pumped into the high-care area to wash the produce during the cutting process. The other tank is used to capture, sanitize, and recirculate some of the runoff water so that it can be reused later in the manufacturing process.

(19) Cleaning Machines

Every night, a specific sanitation shift utilizes cleaning machines, called "foamers," to sanitize the machines and surfaces used in the high-care area. Petitioner's witness testified that these machines are required by the FDA and that 80% of their use occurs in the high-care area.

(20) Generator Rental

Petitioner rents ethylene generators to ripen tomatoes in the tomato cooler area. Tomatoes arrive at the facility in various color stages and Petitioner uses the generators to produce a chemical that helps to change the color of the tomatoes to meet individual customer specifications. The generators are only used for this purpose, but they are rented only during the portions of the year when tomatoes are in season.

(21) Coveralls, Eyewear, Gloves, Aprons, and Hairnets

Collectively referred to as "protective clothing"[6] in this case, these items are used in both the low-care and high-care areas of the plant for health and safety measures integral in the manufacture of fresh produce. Most of the protective clothing items are for single use but items that can be reused must be washed at high temperatures for long periods of time after each use in order to maintain sanitation standards. Petitioner spends roughly $100,000 to $150,000 per year on protective clothing, the exemption for which the Department disallowed.

E. The Audit Period and the Statute of Limitations

Generally, pursuant to S.C. Code Ann. § 12-54-85(A), the Department has thirty-six (36) months from the date a return is filed or due to be filed, whichever is later, to determine and assess taxes. Logan Mitchell, the auditor for the Department, testified that it is routine and customary for the Department to ask the taxpayer to sign consent-to-extend forms when there is a possibility the audit may take longer than the prescribed thirty-six (36) months to avoid any statute of limitations issue. Based on that routine practice, the auditor that was previously assigned to this matter before Mitchell took over entered into three consent-to-extend agreements with Petitioner. (*See* Pet. Ex. 19). The first extension agreement was entered into on November 5, 2015, and the third and last agreement was signed on March 23, 2016, and expired on May 31, 2016. *Id.* In these agreements, Petitioner's CPA and the Department agreed to extend the time for mailing the notice of assessment for any sales and use tax due for the expressly stated period of October 1, 2012 through September 30, 2015. *Id.*

As an exception to the general thirty-six (36) month time period to assess taxes, § 12-54-85(C)(3) provides that taxes may be assessed and determined at any time within seventy-two (72) months from the date a return is filed or due to be filed, whichever is later, when there is a twenty (20) percent understatement of all taxes required to be shown on the return or document. In this case, Petitioner filed three returns for all periods during the Audit Period. For periods ending September 30, 2013, November 30, 2013, and April 30, 2015, Petitioner paid $2.00, $2.00, and $642.00, respectively, in sales and use taxes. Mitchell testified that based on her calculations, the lowest

[6] Petitioner's witness, Carter McEntire, testified that the items McEntire uses as "protective clothing" inside the facility include bump caps, hairnets, head bands, smocks, plastic arm sleeves, gloves, and overboots. (Trial Tr. p. 59:10-14). However, as previously discussed, because the Stipulations of Fact include a list entitled "Supplies at Issue" as Exhibit A, the Court will only consider the items enumerated in that list for purposes of this case.

percentage of understatement for any given period during the Audit Period was 327%, which is significantly greater than 20%. Accordingly, Mitchell concluded she had seventy-two (72) months from the later of the dates the returns were filed or due to be filed to issue the Proposed Assessment so, upon taking over the case, she did not ask Petitioner to sign another consent-to-extend agreement.[7]

Mitchell issued the Proposed Assessment, which covered the agreed to Audit Period of October 1, 2012 through September 30, 2015, on July 19, 2016. The section of the Proposed Assessment entitled "EXCEPTION TO TIME LIMITATION FOR ASSESSMENT OF TAXES" provided that "[p]er S.C. Code Section 12-54-85, the time limitation did not apply to this audit since the taxpayer had a 20% understatement of the total tax required to be shown on all periods under the audit. The taxes in this case may be assessed at any time within 72 months from the date of the first period under the audit." (Pet. Ex. 21, p. 3). Upon email receipt of the Proposed Assessment on July 19, 2016, Petitioner's CPA responded to Mitchell stating that he believed the last agreement to extend the limitation had expired, making a portion of the audit time-barred under the statute of limitations. (*See* Pet. Ex. 17). In an email chain that continued on the same day, Mitchell responded that the agreed upon extension had expired but that the thirty-six (36) month time limitation did not apply because there was more than a 20% understatement which allowed for a seventy-two (72) month assessment period pursuant to § 12-54-85. *Id.* Petitioner's CPA replied and asked her to review the matter and to make adjustments to the Proposed Assessment resulting from her review before they proceeded with the necessary steps to appeal the assessment. *Id.* According to testimony, the Department received no further correspondence from Petitioner regarding the statute of limitations issue. McEntire timely protested the Proposed Assessment on August 1, 2016, but did not raise the statute of limitations issue. On September 23, 2016, Petitioner supplemented that protest letter and again did not raise the statute of limitations issue.

Petitioner contends that the Proposed Assessment includes taxes that are outside the statute of limitations. Specifically, Petitioner alleges that the tax periods from October 1, 2012 through May 31, 2013, should be time-barred because the Department opened that eight-month period for audit

[7] The first return at issue was due on November 20, 2012, and the last return at issue was due on October 20, 2015. Under the seventy-two (72) month statute of limitations, the Department had until November 20, 2018, at the latest, to timely issue the Proposed Assessment for the entire Audit Period. The Department initiated the audit in September 2015 and issued the Proposed Assessment on July 19, 2016, well within seventy-two (72) months from the date the returns at issue were due.

solely pursuant § 12-54-85(C)(3). According to Petitioner, when the Proposed Assessment was appealed and the Department issued its Determination on March 15, 2017, the Determination did not provide a legal justification for utilizing the longer assessment period. Petitioner contends that under § 12-36-30(10), as "the final determination from which a person may request a contested case hearing before the Administrative Law Court," the Department Determination must, by statute, "explain the basis for the department's determination." S.C. Code Ann. §12-60-450(D)(2). Thus, by failing to reference the basis for extending the assessment period in the Department Determination, Petitioner asserts the Department effectively abandoned any argument or leeway it had to utilize the statutory mechanism to extend the assessment period.

Conversely, the Department argues that by including the tax periods at issue in the Determination, the Department implicitly asserted that the entire Audit Period was at issue. Moreover, the Department argues that it cannot address every potential argument a taxpayer may make, nor does the Revenue Procedures Act (RPA) require such. *See* S.C. Code Ann. § 12-60-10 *et. seq.* Rather, the RPA requires that the department determination use the information provided by the taxpayer in its protest to then explain the basis for the department's determination. *Id.* Pursuant to § 12-60-450(B), a taxpayer's protest "must contain . . . (6) a statement outlining the reasons for the appeal, including law or other authority upon which the taxpayer relies ..." Accordingly, the Department argues that because Petitioner did not mention that part of the Audit Period should be time-barred in its initial protest letter or in its supplemental protest letter, the Department was not specifically required to address the statute of limitations in its Determination. The Department also asserts that by failing to raise the statute of limitations issue in its protest, Petitioner waived the right to raise that issue during the hearing in this case.

The Court finds neither of these arguments to be persuasive. Based on the evidence and testimony presented at the hearing, the Court finds that the parties agreed that the Audit Period was going to run from October 1, 2012 through September 30, 2015. While the previous auditor may have found it necessary or wise to ask Petitioner to agree to the extensions, nothing in that agreement prevented Mitchell from later determining that a 20% substantial understatement existed such that she could proceed under the seventy-two (72) month time allotment without the agreement of Petitioner. The fact that the Proposed Assessment was issued by a second auditor fifty-nine (59) days later does not change the fact that Petitioner repeatedly agreed to the Audit Period and had previously agreed to just under seven (7) months of extensions. Only upon learning of the amount owed, did

Petitioner seek to utilize a technicality to object to that which had been mutually established. Moreover, premised on Petitioner's substantial understatement, the Department did not need to ask for another extension. Based upon the evidence and testimony presented at the hearing, the Court finds that the Audit Period in this case should remain as established and agreed upon by the parties from the outset, that is from October 1, 2012 through September 30, 2015.

CONCLUSIONS OF LAW

Based upon the Findings of Fact and the applicable law, along with exhibits and testimony presented at the hearing, the Court makes the following Conclusions of Law:

The ALC has jurisdiction over this case pursuant to S.C. Code Ann. §§ 1-23-600(A) (Supp. 2015) and 12-60-460 (2014). In presiding over this contested case, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters at issue. *Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control,* 358 S.C. 573, 579, 595 S.E.2d 851, 854 (2004). The weight and credibility assigned to evidence presented at a hearing is within the province of the trier of fact. *See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). The Court makes its factual findings based on a preponderance of the evidence. *See Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17 (1998). In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof. *See Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (2000) (citing 2 Am. Jur. 2d Admin. Law §360 (1994)).

In South Carolina, a sales tax is imposed "upon every person engaged or continuing within the State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A) (2014). A use tax is imposed on a taxpayer's "storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State ...." S.C. Code Ann. § 12-36-1310 (2014). Absent an exemption, a taxpayer is responsible for sales and use tax. Moreover, the taxpayer claiming the exemption has the burden to prove the right to the exemption by bringing itself clearly within the conditions imposed by the exemption. *See TNS Mills, Inc., v. S.C. Dept. of Revenue*, 331 S.C. 611, 618, 154 S.E.2d 471, 475 (1981).

At the outset, the Court notes that of the thirty-three (33) items listed in Exhibit A as "Supplies at Issue," no testimony was offered regarding the purpose or use of Towels, Plastic Shelves for the Maintenance Parts Room, the Utility Cart for Maintenance Tools, and Drug Test Kits. (*See supra*, p. 4, Exhibit A entitled "Supplies at Issue"). Since the Court cannot assume the characteristics, purpose, or uses for these items in order to determine whether or not they qualify under one or more of the exemptions found in § 12-36-2120, Petitioner has failed to meet the burden of proof as to these items. Accordingly, with respect to these items, the Department's determination that these supplies are taxable must stand.

A. The Machine Exemption (S.C. Code Ann. § 12-36-2120(17))

S.C. Code Ann. § 12-36-2120(17) exempts from sales tax the sale of "machines used in manufacturing, processing, *agricultural packaging*, recycling, compounding, mining, or quarrying tangible personal property for sale." (emphasis added).[8] "Machines," according to the exemption,

> include the parts of machines, attachments, and replacements used, or manufactured for use, on or in the operation of the machines and which (a) are necessary to the operation of the machines and are customarily so used, or (b) are necessary to comply with the order of an agency of the United States or of this State for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section.
>
> *Id.*

In applying these statutes, "[t]he cardinal rule of statutory interpretation is to determine the intent of the legislature." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (2005). Furthermore, "[t]he legislature's intent should be ascertained primarily from the plain language of the statute." *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004).

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[8] The term "agricultural packaging" was added to S.C. Code Ann. § 12-36-2120(17) on July 1, 2016, after the Audit Period in this case concluded. The Court notes that the definition of "agricultural packaging" and its inclusion in § 12-36–2120(17) in 2016 evidences the legislature's intent that far more than just the sorting, cutting, washing, and packaging of produce be considered as the manufacturing process at issue in a case such as this. Instead, the definition of "agricultural packaging," found in S.C. Code Ann. §12-6-3360(M)(16), which provides a jobs tax credit for manufacturers and agricultural packagers meeting certain requirements, is

> the technology of *enclosing or protecting or preserving* agricultural products *for distribution, storage, sale, and use.* Packaging also refers to the process of design, evaluation, and production of packages used for agricultural products. *Packaging can be described as a coordinated system of preparing agricultural goods for transport, warehousing, logistics, sale, and end use.* (emphasis added).

"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 122, 542 S.E.2d 23, 26 (1972) (internal quotation marks omitted).

The regulations defining "machine" expand the definition beyond traditional notions of the term. S.C. Code Ann. Regs. 117-302 provides that patterns for machinery parts and chemicals used in the manufacturing process qualify for the Machine Exemption. This definition also includes attachments to machines. South Carolina Tax Commission, SC Technical Advice Memorandum #94-3 (Tax) (1994). In Rev. Rul. 13-3, the Department found that the component parts used to construct a manufacturing machine qualified as a "machine" for purposes of the exemption. Additionally, in *Hercules Contractors and Engineers v. S.C. Tax Commission*, the South Carolina Court of Appeals held that vats and basins used in a wastewater treatment facility which performed no processing were exempt. 280 S.C. 426, 313 S.E.2d 300 (1984). "Even its railings, walkways, and ladders are required by state and federal law and are thus necessary to the overall function of the system. *Id.* at 430, 313 S.E.2d at 303.

Recognizing that the definition of "machine" is broad, the key becomes whether the machine is "integral and necessary" to the manufacturing process. S.C. Code Ann. Regs. 117-302.5 provides a three-part test to determine machines that are "integral and necessary" to the manufacturing process:

> (1) The machine is used at a manufacturing facility....
>
> (2) The machine is used in, and serves as an essential and indispensable component part of the manufacturing process, and is used on an ongoing and continuous basis during the manufacturing process. A machine is not part of the manufacturing process merely because it is integral and necessary to the manufacturer.
>
> (3) The machine must be substantially "used in manufacturing ... tangible personal property for sale." The statute does not require that the machine be used exclusively for manufacturing; however, incidental manufacturing use will not qualify for the exemption. For purposes of the exemption, more than one-third of a machine's use in manufacturing is substantial.

Reg. 117-302.5(B)(1). Thus, for purposes of the general sales and use tax portion of the exemption (not the Pollution Control Exemption found in Clause B of § 12-36-2120(17)) a machine is *integral and necessary* to the manufacturing process, and not just to the individual

manufacturer, if: (1) the machine is used at a manufacturing facility; (2) the machine is used in and serves as an essential and indispensable component part of the manufacturing process; (3) the machine is used on an ongoing and continuous basis during the manufacturing process; and (4) the machine is substantially used in manufacturing tangible personal property for sale. The Regulation further clarifies that "more than one-third of a machine's use in manufacturing is substantial." *Id.*

To determine the machines integral and necessary to Petitioner's operations, the Department asserts that the manufacturing process at issue in this case is the processing of produce – the sorting, cutting, washing, and packaging of produce. Based on that assertion, the Department determined that only certain machines involved in the operations inside of the tomato repack room, the pack-out room, and the cutting room, also known as the high-care area, fall within the Machine Exemption as "integral and necessary" to the processing of produce as outlined in Reg. 117-302.5(B)(1). Basically, absent some other specific exemption or relation to the tomato repack or pack-out rooms, the Department contends that the Machine Exemption should be limited to those machines found directly in the production line which, in this case, primarily equates to operations inside of the cutting room/high-care area of the plant.

However, the Court declines to adopt such a restrictive view of the manufacturing process. Generally, states follow one of two distinct lines of authority when determining what qualifies as machinery used in manufacturing: (1) the Integrated Plant Concept or (2) the "Ohio Rule." *See generally* Hellerstein, State Taxation, at § 14.05. The more narrow "Ohio Rule" only allows an exemption for those machines that physically transform raw materials during the manufacturing process. Much like the Department's interpretation, this rule establishes the "used directly" in the manufacturing process requirement. *See The Youngstown Building Material & Fuel Co. v. Bowers, Tax Commr.*, 167 Ohio St. 363, 149 N.E. 2d 1 (1958).

The Integrated Plant Concept, which has been implemented by the ALC in South Carolina in previous cases, is less restrictive. *See Anonymous Corp. v. S.C. Dep't of Rev.*, 99-ALJ-17-0153-CC (1999) (acknowledging South Carolina as an Integrated Plant Concept state); *aff'd, S.C. Dep't of Rev. v. Springs Indus., Inc.*, 2003-UP-029 (Ct. App. 2003) (unpublished opinion affirming that acknowledgment), *cert. denied* (10/8/03). As the name implies, if machinery performs an essential or indispensable function in the taxpayer's manufacturing operations, regardless of whether it actually causes a physical change, it should be eligible for the exemption. The test is derived from

Niagara Mohawk Power Corp. v. Wanamaker, 286 A.D. 446 (N.Y. 1955). The *Niagara* court found that material handling equipment, including equipment used for both coal handling and ash dumping, was an integral part of a steam electric generating plant and determined that this equipment was as essential to the plant's production as the actual generator itself. The material handling equipment was necessary to the functioning of the plant as a whole. Without it, a serious breakdown in operation would quickly stop or impair the taxpayer's manufacturing process, such that one part could not operate without the other. The *Niagara* court held that directness of the activity is not the test. Instead, the test is whether all parts of the plant contribute, continuously and vitally, to production and whether they are all integrated and harmonized.

In adhering to the restrictive production line theory, the Department's audit of McEntire held that the machinery and equipment used before the cutting process and the equipment used to move the fresh produce into the manufacturing process inside the cutting room were not exempt. There is no dispute that most of the machinery used directly in the cutting and processing that occurs inside of the cutting room/high-care area were exempt.

In this case, the Court finds that given McEntire's highly regulated business as a fresh produce processor, the machinery and equipment used both before and after the actual production line processing of the fresh produce are integral and necessary not only to the overall manufacturing process, but also to the health and safety functions imbedded within the manufacturing of fresh produce. Without the processes that occur in the climate-controlled low-care areas of the plant, Petitioner would be unable to safely and efficiently produce a finished product for sale and distribution. These processes contribute continuously and vitally to the plant's overall production and are also integrated and harmonized into the activities that occur directly in the production line, as conceived in the Integrated Plant Concept.[9] In essence, without many of these processes,

[9] While the actual term "agricultural packaging" may not have been included in the Machine Exemption during the Audit Period, the plain language of the statutory definition of the term is evidence that the legislature intended this manufacturing process to be much broader than the production line definition espoused by the Department. The statutory definition of "agricultural packaging" includes the transportation and warehousing of the product before and after packaging. The "coordinated system" of preparation, as termed by the legislature, includes the receipt of the raw produce, its storage in the temperature-controlled climate of the plant, the sorting, preparing, washing, inspection and cutting of the produce, and the packaging, labeling, and storage of the finished product before ultimate delivery to McEntire's customers. Moreover, machines involved in the "enclosing or protecting or preserving" of agricultural products also fall within the definition of agricultural processing as defined by the legislature. S.C. Code Ann. § 12-6-3360(M)(16) (emphasis added). Thus, many of the items at issue in this case clearly fall within the Machine Exemption as it stands today with the inclusion of agricultural packaging.

Petitioner would be unable to produce any type of marketable product and would likely be shut down by State and federal agencies in charge of regulating the fresh produce industry.

Having concluded that McEntire's manufacturing operations consist of more than the simple production line manufacturing occurring in the cutting room as determined by the Department, the Court must determine whether the supplies at issue fall within the definition of "machine" so as to qualify as exempt under § 12-36-2120(17). Some of the items at issue fall within the general sales and use tax portion of the Machine Exemption as integral and necessary to the manufacturing process by virtue of being machines substantially used in the facility on an ongoing and continuous basis while serving as an essential and indispensable component part of the manufacturing process.

The **Cut Wheel and Disc Maintenance Tools (13)** are used on the cutter, an exempt machine, to maintain the integrity of the machine on an ongoing basis and to repair it when needed. Because these items are used on an ongoing and continuous basis to maintain an exempt machine, they qualify as exempt under the Machine Exemption and as exempt maintenance machines under Reg. 117-302.5(B)(6).

Additionally, testimony revealed that Petitioner employs thirty (30) fulltime employees who only work to maintain, repair, install, and uninstall equipment within the facility. Because the processing of fresh produce is regulated by climate control and other environmental controls, the cold and damp conditions inside of the plant cause machinery to constantly require maintenance and repairs. Thus, general **Maintenance Tools (12)** that are used to maintain, repair, install, and uninstall exempt machines inside of the plant are used on an ongoing, continuous basis and therefore fall within the Machine Exemption.

Reg. 117-302.5(B)(4) provides that material handling machinery and their parts are subject to the tax up until the point where the materials go into process and that the machine feeding the first processing machine is exempt. Material handling machinery used for transporting in-process material from one process stage to another also falls within the exemption. *Id.* Testimony revealed that 90% of Petitioner's forklifts are used in the climate-controlled areas of the plant to move 800-2,000 lb. pallets of produce into and out of the rack system and onto the conveyer belt that feeds into the cutting room. In fact, 75-80% of the forklift usage can be attributed to dumping the product

directly onto the conveying system. Because more than 1/3 of the forklifts are used on an ongoing and continuous basis within the facility and constitute an indispensable component part of the manufacturing process, the **Forklift Rental, Forklift Batteries, Forklift Parts, and Forklift Repair Parts (10)** fall within the definition of "machinery" and qualify for the Machine Exemption.

Testimony also revealed that the majority of the use of **Hand Trucks, Pallet Jacks, and Oil Lubricant Used Therein (9)** could be attributed to moving sliced tomatoes and sack onions from the low-care areas to the cutting room/high-care area to feed the in-line for the cutting machine. As a processer of fresh produce, Petitioner is required to use food grade oil and grease to maintain these items. As machines that feed the first processing machine and as material handling machinery used to transport in-process material from one process stage to another within the integrated plant, the Court finds that these items also fall within the parameters of the Machine Exemption.

Petitioner also rents ethylene generators to facilitate the tomato ripening process. Because tomato crops are variable, the generators are rented seasonally when needed to complete the manufacturing process. Thus, the Department determined that while the generators do qualify as machines used in the manufacturing process, the generators are only rented when tomato season dictates their necessity and, therefore, do not meet the "ongoing and continuous basis" standard so as to qualify for the exemption. However, the Court finds that as a manufacturer of seasonal agriculture, the **Generator Rental (20)** during certain seasons to facilitate the manufacture of tomatoes is sufficient to constitute an ongoing and continuous basis so as to qualify for the exemption. In fact, it is the rental of the generators only on an as-needed, seasonal basis that makes their use ongoing and continuous. Otherwise, owning them and letting them sit dormant during the off-season would, under the logic provided by the Department, also disqualify them from the exemption. The seasonal use of equipment to manufacture a variable crop should be considered ongoing and continuous and, as such, the generator rental is integral and necessary to the tomato manufacturing process and falls within the Machine Exemption.

Additionally, the Court finds that other items fall within the Machine Exemption because they are integral and necessary to the manufacturing process by virtue of maintaining the integrity and safety of the finished food product by preventing its contamination. Outside of the considerations of the Pollution Control Exemption of Clause B involving air, noise, or water pollution (to be

discussed *infra)*, State and federal agencies heavily regulate the fresh produce industry and dictate that certain requirements be met so that a product can safely enter the consumer marketplace. As such, while many of the supplies at issue may not be used directly in the production line, they are integral and necessary to the processing of fresh produce under the Integrated Plant Concept and are integrated and harmonized as continuous and vital elements of production within the McEntire plant.

Ever present in Petitioner's manufacturing process is the aspect of safety in producing a noncontaminated product, which is the subject of federal guidelines. According to Section VIII, Part C, Item 3, of the Food and Drug Administration's Guide to Minimize Microbial Food Safety Hazards of Fresh-cut Fruits and Vegetables, fresh-cut produce is recommended to be stored in areas with a temperature less than or equal to 41 degrees. The Food Safety Modernization Act of 20 11, Section 117.93, further mandates that any "*[s]torage and transportation of food* must be under conditions that will protect against allergen cross-contact and against biological, chemical (including radiological), and physical contamination of food, as well as against deterioration of the food and the container." (emphasis added). Additionally, 21 C.F.R. § 110.80(b), under the heading "Manufacturing Operations," provides:

> (1) Equipment and utensils and finished food containers shall be maintained in an acceptable condition through appropriate cleaning and sanitizing, as necessary. Insofar as necessary, equipment shall be taken apart for thorough cleaning.
>
> (2) *All food manufacturing, including packaging and storage, shall be conducted under such conditions and controls as are necessary to minimize the potential for the growth of microorganisms, or for the contamination of food.* One way to comply with this requirement is careful monitoring of physical factors such as time, temperature, humidity, aw, pH, pressure, flow rate, and manufacturing operations such as freezing, dehydration, heat processing, acidification, and refrigeration to ensure that mechanical breakdowns, time delays, temperature fluctuations, and other factors do not contribute to the decomposition or contamination of food.
>
> (3) *Food that can support the rapid growth of undesirable microorganisms, particularly those of public health significance, shall be held in a manner that prevents the food from becoming adulterated within the meaning of the act. Compliance with this requirement may be accomplished by any effective means...* (emphasis added).

In this case, it is evident that temperature and other environmental controls permeate the entire production process, from the time the produce is harvested and delivered from the farms until the

finished product leaves the McEntire plant. In fact, testimony from Carter McEntire revealed that with the help of food safety engineers and experts, the plant and much of the equipment inside of it was specially designed and built to correlate with the climate and other environmental controls that are required to reduce the possibility of food contamination. (Trial Tr., p. 60:1-13).

Specifically, testimony from Petitioner's witnesses showed that **Stacking Containers (6), Warehouse Racks (7), Pallet Flow Brakes (8),** and the **Blower Fan (11)** all work to maintain the proper temperature within the plant and also to hold and transport the produce before and after it is cut so that it cannot become adulterated or spoiled during processing, as outlined above in the FDA's Guide to Minimize Microbial Food Safety Hazards of Fresh-cut Fruits and Vegetables and in 21 C.F.R. § 110.80(b). Absent the climate and environmental controls provided by these machines, temperature inside of the plant and the temperature and integrity of the produce itself could not be maintained, resulting in an increased likelihood of contamination and/or adulteration. Without these machines, contamination occurs and McEntire would effectively have no product, thus making them integral and necessary to the manufacturing process under the general sales and use tax provision of the Machine Exemption. Additionally, in order to comply with the regulations governing the processing of fresh produce, these machines are integral and necessary to Petitioner's manufacturing process. As such, the Court finds that these items fall within the Machine Exemption.

Because federal law also requires Petitioner to track the produce not only back to the harvest point, but also during the manufacturing process and forward to the consumer, the **Bar Code Scanners (1), Black Ink Aerosol Cans (2),** and **Mobile Computer Stands (3)** that are all used in the tracking process are also integral and necessary to McEntire's manufacturing and fall within the Machine Exemption.

Coveralls, Eyewear, Gloves, Aprons, and Hairnets (21), collectively referred to as "protective clothing" in this case, are integral and necessary to the manufacturing of fresh produce in two substantial ways. First, protective clothing substitutes for the employee's street clothing so that the employee does not bring pollution into the facility in the form of harmful microbes that can carry foodborne illnesses like Salmonella, E. coli, and Listeria. Second, when pollution occurs from the contaminated produce brought into the facility and spreads through cross-contamination into the water and onto the equipment and other surfaces that come into contact with harmful microbes,

protective clothing minimizes the spread of contamination onto a broader range of food. Additionally, protective clothing is mandated by the FDA and SCDA and, without it, operations at Petitioner's plant would cease. Thus, protective clothing is integral to the manufacture of fresh produce and necessary, by order of regulatory agencies, to produce a safe and unadulterated product and to, ultimately, remain in business. In that context, the Court finds that protective clothing, to include coveralls, eyewear, gloves, aprons, and hairnets, falls within the Machine Exemption under the Integrated Plant Concept within the scope of Petitioner's manufacture of fresh produce. Additionally, the Court notes that the protective clothing in this case is used for health and safety reasons to protect the product, the consumer, and the general public from foodborne illness. The clothing and gear at issue in this case is not used to protect the employee from hazards incurred during the manufacturing process.

The two **Storage Water Tanks (18)** found in the facility both serve to sanitize the produce as it is being cut and processed in the high-care area and also to maintain cleanliness in other areas of the plant. One tank mixes sanitation chemicals with chilled water that is sprayed on the produce and on the cutting machine in the cutting room/high-care area during the production line part of the manufacturing process. The other tank recirculates some of this captured cleaning water and purifies it to be used again in a later stage of the manufacturing process. These tanks are essential to sanitize the produce and to prevent the spread of food contaminants or pollution during the cutting process by reducing the pathogens that may flow between the cutting machines, the produce and the run-off water. As such, Petitioner's storage water tanks minimize the potential for the growth of microorganisms, prevent the contamination of food, and are integral and necessary to the processing of fresh produce and fall within the Machine Exemption.

Cleaning Machines (19) and **Floor Treatment Chemicals (17)** are both used in the cutting room/high-care area to sanitize the machines and surfaces directly involved in the production line. Petitioner testified that 80% of the cleaning machines or "foamers" are required by the FDA to sanitize surfaces in the cutting room nightly. Therefore, those machines are used on an ongoing and continuous basis and fall under the exemption as integral and necessary to the manufacturing process. The Department previously conceded that the 70% of the floor treatment chemicals used in the high-care area were integral and necessary to the manufacturing process and, thereby, exempt. In concluding that the manufacturing process occurs in other areas of the plant outside of

the high-care area, the Court finds that of the remaining 30% of the floor treatment chemicals disallowed by the Department, any percentage used to clean the actual plant, as opposed to the administrative/office area, should also fall within the Machine Exemption as integral and necessary to the manufacturing process.

Like the floor treatment chemicals used to sanitize the floors, **Floor Drain Covers (16)** used in the cutting room/high-care area to filter waste water and to separate waste water and possibly contaminated material also fall within the Machine Exemption as integral and necessary to the manufacturing process. By separating the possibly contaminated waste material that falls on the floor during the cutting and trimming process, the stainless steel drain covers prevent pollution of the wastewater that is either sent back to the city sewer system or recycled and treated by Petitioner for reuse later in the manufacturing process.

In addition, **Squeegees (15)** used in the cutting room/high-care area to move debris and water off of the floor and into the drainage system also help to sanitize the area and remove the debris that can become a harborage point for bacteria and pathogens. Carter McEntire testified that the squeegees used in the high-care area are kept separate from the other squeegees that are used interchangeably in the administrative/office area and other areas of the plant for cleaning purposes. However, from the testimony provided, the Court cannot determine the purposes of the squeegees found outside of the cutting room/high-care area so as to assess their role in the overall manufacturing process. Therefore, the Court concludes that only the squeegees used and kept inside the cutting room/high-care area should fall within the Machine Exemption as integral and necessary to the manufacturing process to maintain sanitation. However, because no evidence was presented as to the percentage of squeegees used in the high-care area so as to ascertain whether the 1/3 substantial use threshold is me,t and because the burden to prove entitlement to the exemption lies with Petitioner, the Court must conclude that squeegees do not qualify as exempt items for purposes of this Audit Period.

Also, from the testimony provided, the Court cannot determine that **Brooms (14)** used throughout the low-care areas of the plant and in the administrative/office areas are so integral and necessary to the manufacturing process so as to fall within the Machine Exemption. Petitioner testified generally that the brooms used in the actual plant, the only ones for which Petitioner seeks an

exemption, are used for sanitation purposes to sweep the floors of the plant or to knock debris off of the storage racks in order to clean the low-care areas of the plant. However, no evidence was provided as to what percentage of the brooms are used in the plant and what percentage are used in the administrative/office areas of the McEntire facility. Moreover, no testimony was given that the brooms are used on an ongoing and continuous basis within the plant areas of the facility. Accordingly, the Court cannot conclude that Petitioner adequately demonstrated that brooms should fall within the parameters of the Machine Exemption for purposes of the Audit Period.

While there was testimony that **White Boards in Production Offices (4)** are used to track production, unlike the machines necessary to track the produce for health and safety regulations, the purpose of this tracking is to monitor and reward the progress of individual employees. Though this item may be integral to McEntire in the context of its operations, the Court finds that this item is not integral and necessary to the manufacturing of fresh produce in general and, therefore, does not fall within the Machine Exemption.

Finally, **Warning Signs and Stickers (5)** found throughout the plant serve to instruct and remind employees of certain safety procedures. While these signs and stickers may be helpful to McEntire and its employees and may help to produce a safer product, they are not integral and necessary to the manufacturing of fresh produce. Without them, Petitioner may suffer an inconvenience and more human error may occur, but production would continue. Therefore, the Court finds that the white boards in production offices and the warning signs and stickers found in both the plant and administrative areas of McEntire do not fall within the Machine Exemption.

B. The Pollution Control Exemption (S.C. Code Ann. § 12-36-2120(17))

Petitioner also asserts that the Department erred in disallowing protective clothing (**Coveralls, Eyewear, Gloves, Aprons, and Hairnets (21)**) under the second clause of the Machine Exemption. The second clause of the Machine Exemption, referred to as the "Pollution Control Exemption" or "Clause B," exempts machines "necessary to comply with the order of an agency of the United States or of this State for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section." The pollution control regulation, Regulation 117-302.6, states in relevant part:

> Frequently, these machines [that are exempt from sales or use tax under S.C. Code § 12-36-2120(17)] cannot be operated when the same pollute beyond regulated levels and in compliance with orders of agencies of the United States or of this state to abate or prevent pollution caused or threatened by the operation of such machines it is necessary to install other machines that are designed and operated exclusively for the purpose of abating or preventing this pollution. The purpose of this regulation is to classify the machines, their parts or attachments, as machines used in mining, quarrying, compounding, processing or manufacturing of tangible personal property when the same are installed and operated for compliance with an order of an agency of the United States or of this state to prevent or abate pollution caused or threatened by the operation of other machines used in the mining, quarrying, compounding, processing and manufacturing of tangible personal property.

Regulation 117-302.6 further clarifies that:

> The term 'machine' as defined in Section 12-36-2120(17) shall include machines, their parts and attachments, when the same are necessary to comply with the order of an agency of the United States or of this state for the prevention or abatement of pollution that is caused or threatened by any machines used in the mining, quarrying, compounding, processing and manufacturing of tangible personal property.

Thus, as a manufacturer of fresh produce, Petitioner is exempt from taxes on machines which are necessary to comply with the order of a State or federal agency to prevent or abate pollution that is precipitated by other machines used in the manufacturing of fresh produce. To prove that protective clothing should fall within the Pollution Control Exemption of § 12-36-2120(17), Petitioner must show: (1) the operation of at least one machine used in the manufacturing process causes or threatens to cause pollution of air, water, or noise; (2) a State or federal agency requires that the pollution be prevented or abated; and, (3) that the protective clothing is used to prevent or abate the pollution.

1. The operation of at least one machine used in the manufacturing process causes or threatens to cause pollution of air or water.

Petitioner's witnesses went into great detail to describe the manufacturing process. As previously discussed, when the fresh produce is picked and enters the trucks for transport, it may have a contaminant that causes foodborne illness (chiefly E. coli, Listeria, or Salmonella) either inside or on the surface of the produce. When the produce is cut during the manufacturing process, either

by hand or with the cutting machine, those contaminants spread directly onto the cutting equipment and can transfer onto other items of produce. The contaminants may also be transferred onto any other exposed surface where they can subsequently contaminate other produce, as well as reproduce. Additionally, when those same harmful pathogens are exposed during the cutting process, Petitioner's water sprayers and flume systems can cause the pollutants to aerosolize – that is, be transferred into tiny droplets of water that are dispersed into the air. Furthermore, the spread of pollutants also occurs when the produce is dried – both the blowers and the produce dryers, which operate like large salad-spinners, cause potentially polluted water to be sprayed around the high-care area in such a manner that the back-spray settles on the protective gear worn by employees and onto other exposed surfaces. These various forms of transfer are described by the FDA and by Petitioner's expert witness in this case as "cross-contamination."

With respect to the machines used in the manufacturing process, Dr. Gombas testified that is it possible for equipment to serve as a harbor for pathogenic bacteria, which can then spread through the facility if not controlled. Other witnesses for McEntire also testified as to the specific "dress-down" routine required of employees when exiting the high-care area to ensure that the pathogens that may have been transferred onto the employees through cross-contamination are not able to leave that area and spread into other parts of the plant and to the outside. By requiring full dress-down when exiting the high-care area, Petitioner is able to contain the pollutants that may have been released by various machines operating throughout the manufacturing process. As such, the Court finds that Petitioner has established that the protective clothing at issue is used to prevent or abate "pollution" caused by machines through both direct contact with harmful microbes and through cross-contamination.

Since Petitioner has demonstrated that machines used in the manufacturing process cause "pollution," it must also establish that the pollution prevented is that of air, water, or noise. The major crux of the Department's exclusion of protective clothing as an exempt item under the Pollution Control Exemption is that food contamination is, first, not "pollution" and, second, not pollution of air, water, or noise so as to qualify under the exemption.

Although S.C. Code Ann. § 12-36-2120 does not contain a definition of "pollution," there is caselaw throughout the United States which categorizes contamination of food as pollution with respect to commercial insurance policies where the term "pollutant" is specifically defined in the

pollution exclusion sections that are common to such policies. *See Nova Cas. Co. v. Waserstein*, 424 F. Supp 1325, 1334 (S.D. Fla. 2006) (holding that living organisms, microbial populations, airborne and microbial contaminants, and indoor allergens are contaminants and are, therefore, excluded from coverage under the pollution exclusion of an insurance policy).

The Court of Appeals of Wisconsin held that the term "'contaminants' as used in [the] pollution exclusion of [a] commercial property insurance policy, included bacteria, and thus the insurance policy excluded coverage for any losses resulting from bacterial outbreak at insured's food processing facility." *Landshire Fast Foods of Milwaukee, Inc. v. Employers Mut. Cas. Co.*, 269 Wis.2d 775, 783, 676 N.W.2d 528, 532 (Ct. App. 2004). Landshire, a food preparer, delivered sandwiches containing Listeria to a client who, upon discovery of the contamination, returned the polluted food to the company. *Id.* at 778, 676 N.W.2d at 529. After determining that the food contamination occurred on a meat slicer at its facility, Landshire "submitted claims for loss of income, loss of product, sanitizing expenses, and costs related to investigating the source of the bacteria" to its insurance company. *Id.* at 779, 676 N.W.2d at 530. Citing the policy's pollution exclusion, Landshire's insurer refused to pay for loss or damage caused directly or indirectly by the "release or escape of 'pollutants' unless the discharge, dispersal, seepage, migration, release or escape [was] itself caused by any of the 'specified causes of loss' . ." *Id.* at 782, 676 N.W.2d at 531. The policy defined pollutants as "any solid, liquid, gaseous or thermal irritant or **contaminant**, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id.* (emphasis added). The parties in the case disputed the actual scope of the term "contaminant" and, specifically, whether Listeria was a "contaminant." *Id.* at 782-83, 676 N.W.2d at 531.

To settle that dispute, the *Landshire* court looked to *Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.*, which determined that "contamination" connotes a condition of impurity resulting from mixture or contact with a foreign substance, a definition the court found to be consistent with the common understanding as well as dictionary definitions of the term. 201 Wis.2d 161, 548 N. W.2d 127 (Ct. App. 1996). Finding that the term "contaminant" in the insurance contract was not susceptible to multiple interpretations, the *Landshire* court ultimately held that the food contamination caused by Listeria was a pollutant and, as such, was excludable from the claim under the terms of the insurance policy and the policy's pollution exclusion. *Id.* 269 Wis.2d at 785, 676 N.W.2d at 533.

Although not in the context of food safety, in also determining that contamination can be quantified as pollution, South Carolina caselaw follows much the same direction as the caselaw of the courts discussed above. In *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, the Supreme Court of South Carolina held that the pollution exclusion in the plaintiff's policy barred its claims. 357 S.C. 631, 641, 594 S.E.2d 455, 460 (2004). In *Helena*, the Court noted that almost all insurance policies contain an identical pollution exclusion policy. *Id.* The Court went on to state that "pollution arising from ordinary business operations is not covered. But if the damage were caused by a 'sudden and accidental' discharge, release, or escape of pollutants, then the insurers must provide coverage." *Id.* Because the Court held that "the contamination at the various sites was caused by Helena's routine business operations and was, therefore, not unexpected and accidental," plaintiff fell under the pollution exclusion. *Id.* at 642, 594 S.E.2d at 460.

While the word "pollution" is not defined in §12-36-2120(17), "contamination" fits within the ordinary and dictionary definitions of pollution in the context of food. "Pollution" is defined by Black's Law Dictionary as, "[t]he presence of harmful substances (either physical or gaseous), noise or energy (radiation) within a certain area, that causes harm to the surroundings, altering the natural environment around which it has been excreted."[10] Other dictionary definitions are similar. For example, Wikipedia defines "pollution" as "the introduction of contaminants into the natural environment that cause adverse change."[11] Dictionary.com defines "pollution" as "1. the act of polluting or the state of being polluted, 2. the introduction of harmful substances or products into the environment."[12]

The major thrust of the Department Determination was that food contamination and the results of such contamination are not "pollution." Corey Smith, the Department's policy witness, testified that he defines pollution as something that causes a health hazard or has a negative effect on the environment. Although he agreed that foodborne illnesses are caused by contamination and that such contamination does produce harmful effects like illnesses, he does not find pollution and contamination to be synonymous. The Department auditor testified that she did not know what the

[10] Black's Law Dictionary, http://thelawdictionary.org/pollution.
[11] Wikipedia, http://en.wikipedia.org/wiki/Pollution.
[12] Dictionary.com, http://www.dictionary.com/browse/pollution.

definition of "pollution" was under the statute, and did not know enough about E. coli, Listeria, or Salmonella to determine whether they constituted "pollution."[13]

On the other hand, Dr. Gombas, McEntire's expert witness, defines "pollution" as any contaminant that may be injurious to the intended consumer. In the context of food safety, Dr. Gombas testified that the terms "pollution" and "contaminant" are synonymous and are used interchangeably throughout the food manufacturing industry. Dr. Gombas also testified that "protective clothing is a necessary protection against contamination or pollution ... in any fresh cut or fresh produce handling facility; likewise, any ready-to-eat food processing facility." (Trial Tr., p. 231:21-232:1). Moreover, when asked whether the major foodborne illnesses associated with fresh produce (E. coli, Listeria, and Salmonella) constitute "pollution" as defined by Black's Law Dictionary, Wikipedia, and dictionary.com, Dr. Gombas answered in the affirmative and confirmed that all three of the harmful substances meet the various definitions of pollution.

In addition to Dr. Gombas' expert opinion, to ascertain "pollution" within the scope of fresh food production, it is helpful to consider not only the harmful microbes that contaminate food and cause pollution, but also the host or carrier of those microbes. The microbes associated with the foodborne illnesses at issue in this case are typically transmitted through human and animal feces. This means the microbes are being transported when fecal matter lands on or around the produce, and then travels on the produce to the processing facility. Fecal matter can also be transported into the facility on the shoes, clothing, and bodies of employees. Then, through the manufacturing processes occurring inside the plant, fecal pollution can be spread onto the finished product as well as into the air and water. The Environmental Protection Agency recognizes the significant threat of fecal pollution:

> Fecal *pollution of water* from a health point of view *is the contamination of water with disease-causing organisms (pathogens)* that may inhabit the gastrointestinal tract of mammals, but with particular attention to human fecal sources as the most relevant source of human illnesses globally. Ingestion of water contaminated with feces is responsible for a variety of diseases important to humans via what is known as the fecal-oral route of transmission. Food, air, soil, and all types of surfaces can also be important in the transmission of fecal pathogens, and thereby implicated in disease outbreaks.[14] (emphasis added).

[13] This was the auditor's first audit of a fresh food manufacturing facility.

[14] Santo-Domingo, J.W. and N. Ashbolt, Fecal Pollution of Water, extract available at https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=196784.

Additionally, according to the World Health Organization, foodborne illnesses are caused by bacteria, viruses, parasites, or chemical substances that enter the human body through contaminated food (i.e. fruits and vegetables contaminated with feces) or water.[15] Based on the uncontroverted testimony of Dr. Gombas, caselaw that encompasses contamination under the umbrella of pollution, and the various definitions of "pollution" in the context of food safety and foodborne illness, the Court finds that, in this case, contamination of produce equates to pollution and that measures used by Petitioner to prevent contamination are the same as measures used to "prevent or abate pollution."

Furthermore, water is the means by which McEntire is able to deliver sanitizing agents directly onto the produce and throughout the facility to maintain the required sanitation levels. In fact, McEntire uses approximately three-hundred thousand (300,000) gallons of water per day at its facility. As previously discussed, Petitioner's manufacturing process results in significant spray-back from cutters that chop the produce, sprayers and wash flumes that wash the produce, and blowers and spinners that dry the produce. While some of this water is aerosolized and dispersed into the air and onto the surfaces exposed inside of the plant, the remainder of that water flushes into the drainage system designed to capture the runoff. Approximately half of that runoff water is recycled by Petitioner and heavily treated so that it can be reused in other phases of the manufacturing process. The other half of the runoff water makes its way from the floor of the McEntire plant to the local sewage system. If the harmful pathogens on the produce and other surfaces, including the protective clothing worn by employees, are not properly contained, they can contaminate the water supply. Since it is responsible for discharging at least one-hundred fifty thousand (150,000) gallons of water into the municipal sewer system daily, McEntire's use of protective clothing and other safety materials directly abates pollution which could contaminate the air inside of the facility and the water supply at both the plant and in the municipal system and/or rivers. As such, the Court finds that the pollution Petitioner seeks to prevent or abate in this case is that of air and water.

[15] World Health Organization, Food Safety-Key Facts (2017), http://www.who.int/news-room/fact-sheets/detail/food-safety.

2. The use of protective clothing is necessary in order to comply with orders of federal and State agencies to prevent or abate pollution.

In analyzing the Pollution Control Exemption of § 12-36-2120(17), the ALC (in a decision not challenged by the Department) has previously established that an administrative order, including agency regulations issued by an agency of the United States or an agency of South Carolina charged with the duty of preventing or abating pollution, satisfies the requirements of the statute. *See Duke Energy Corp. v. Department of Revenue*, Docket No. 12-ALJ-17-0031-CC (filed April 28, 2017) (exemption applied to purchase of canister system used to comply with regulations of the U.S. Nuclear Regulatory Commission, an "independent United States agency"); *see also* S.C. Code Ann. Regs. 117-302.6 (2012).

Under the Department of Health and Human Services, the FDA is the federal agency primarily charged with the duty of preventing or abating pollution in the context of food production. *See* 21 C.F.R. § 117.3 (defining pathogens that result in foodborne illness caused by contamination during the manufacturing, processing, packing, or holding of food by manufacturers); *see also* Pet. Ex. 25, p. 8:3-6; 34:23-25; 36:18-21 (Dr. Gombas deposition). By first establishing and thereafter continuing to update the Current Good Manufacturing Practices or "CGMP Regulations," the FDA sets out the requirements that food processing facilities such as Petitioner's must adhere to in order to safely process food for consumption in the Unites States. Manufacturers like McEntire are regulated under the FDA's 21 C.F.R. §§ 110 and 117, which establish the requirements of a food safety plan and the performance of hazard analyses and lay out the preventive controls that must be instituted in order to mitigate hazards in food processing. Dr. Gombas testified that if a manufacturer does not abide by these regulations, for example if McEntire could not afford or did not provide protective clothing to prevent contamination, then the manufacturer would be operating in violation of the law. (Pet. Ex. 25, p. 36:7-10).

i. FDA CGMP Regulations

Specifically, 21 C.F.R. § 110.10 requires plant management to take all reasonable measures and precautions regarding the maintenance of a clean facility, including the following:

> (b) *Cleanliness.* All persons working in direct contact with food, food-contact surfaces, and food-packaging materials **shall** conform to

> hygienic practices while on duty to the extent necessary to protect against contamination of food. The methods for maintaining cleanliness include, but are not limited to:
>
> > (1) Wearing outer garments suitable to the operation in a manner that protects against the contamination of food, food-contact surfaces...
> >
> > (3) Washing hands thoroughly (and sanitizing if necessary to protect against contamination with undesirable microorganisms) in an adequate hand-washing facility before starting work, after each absence from the work station, and at any other time when the hands may have become soiled or contaminated.
> >
> > ...
> >
> > (5) Maintaining gloves, if they are used in food handling, in an intact, clean, and sanitary condition. The gloves should be of an impermeable material.
> >
> > (6) Wearing, where appropriate, in an effective manner, hair nets, headbands, caps, beard covers, or other effective hair restraints.

21 C.F.R. § 117.10(b), also describes the measures and precautions that manufacturers such as McEntire must exercise in order to "conform to hygienic practices while on duty to the *extent necessary* to protect *against* allergen cross-contact and against *contamination of food.* The methods for maintaining cleanliness include:

> (1) *[w]earing outer garments* suitable to the operation in a manner that protects against allergen cross-contact and against the *contamination* of food, food contact surfaces, or food-packaged materials. . .
>
> (5) [m]aintaining *gloves*, if they are used in *food handling*, in an intact, clean and sanitary condition,
>
> (6) [w]earing, where appropriate, in an effective manner, *hair nets, headbands, caps, beard covers,* or other effective hair restraints. . .
>
> (9) [t]aking any other necessary precautions to protect against allergen cross-contact and against contamination of food, food contact surfaces, or food-packaging materials with microorganisms or foreign substances. . . ." (emphasis added).

Additionally, other relevant regulations found in 21 C.F.R. § 117.80 state the following:

> (a)(1) [a]ll operations in the manufacturing, processing, packing, and holding of food (including operations directed to receiving, inspecting,

> transporting, and segregating) must be conducted in accordance with adequate sanitation principles.
>
> (2) [a]ppropriate quality control operations must be employed to ensure that food is *suitable* for human consumption and that food-packaging materials are safe and suitable. . .
>
> (c)(2) *[a]ll food manufacturing, processing, packing, and holding must be conducted under such conditions and controls as are necessary to minimize the potential for the growth of microorganisms, allergen cross-contact, contamination of food, and deterioration of food. . .*
>
> (5) [w]ork-in-process and rework *must be handled* in a manner that protects against allergen cross-contact, *contamination, and growth of undesirable microorganisms. . .*
>
> (10) [s]teps such as washing, peeling, trimming, cutting, sorting, inspecting, mashing, dewatering, cooling, shredding, extruding, drying, whipping, defatting, and forming must be performed *so as to protect* against allergen *cross-contact* and *against contamination.* Food must be protected from contaminants that may drip, drain, or be drawn into the food. (emphasis added).

Based on the foregoing, the Court finds that under order of the FDA, an agency of the United States, Petitioner is required to implement specific measures, including the use of protective clothing, during the manufacture of fresh produce in order to prevent or abate pollution.

ii. State Statutes and Regulations

According to the South Carolina Food and Cosmetic Act, specifically S.C. Code Ann. § 39-25-180(H), the State has adopted Parts 110 and 117 of the above-cited federal regulations stating:

> Good manufacturing practice regulations and their amendments now or hereafter adopted pursuant to the authority of the federal Food, Drug, and Cosmetic Act are the good manufacturing regulations of this State. However, the commissioner may adopt a regulation that prescribes conditions under which good manufacturing processes may be used in this State whether or not in accordance with regulations promulgated pursuant to the federal act.

Thus, not only has South Carolina expressly adopted the CGMP by statute, the foregoing also establishes that the Commissioner of the South Carolina Department of Agriculture, a State agency that regulates Petitioner, maintains the authority to promulgate regulations necessary or convenient to carry out the purposes of § 39-25-30 *et. seq.*, entitled "Adulterated Food and

Cosmetics." Accordingly, the Court finds that under the orders of both federal and State agencies, the use of protective clothing is a measure required to prevent or abate pollution in the manufacture of fresh produce.

3. Protective clothing is used to prevent or abate pollution.

Having already concluded that protective clothing does fall within the parameters of Clause A of the Machine Exemption as a "machine" that is "necessary and integral" to Petitioner's manufacturing process, the Court also concludes that in the context of Clause B, the Pollution Control Exemption, protective clothing is used to prevent or abate pollution.

The protective clothing at issue is vital to Petitioner's ability to control and contain pathogens that cause foodborne illnesses. Dr. Gombas identified the following functions related to pollution control or prevention that protective clothing serves: (1) to substitute for the employee's street clothing so that the employee is not bringing the pollution into the facility or contacting the produce with that pollution; (2) within the facility, as contamination may occur from the produce itself, the water, or the equipment and other exposed surfaces through cross-contamination, to minimize the opportunity to spread the contamination on to a broader range of food. (*See* Trial Tr., p. 231:21-232:1. Moreover, protective clothing serves as a barrier to prevent the spread or release of pollution between the high-care area – where pollutants are exposed and dispersed into the air and water and accumulate on employee's protective clothing – and the outside.

The use of protective clothing, climate control, sanitation procedures, and other precautions during the manufacturing process help to ensure that pollution present in the facility from either the employees or the produce itself does not spread during the manufacturing process through cross-contamination.

Of interest is the Department's PLR # 95-8 which notes:

> The [Pollution Control Exemption] regulation does not restrict the exemption to machines that prevent pollution or that reduce the amount of pollution released into the environment. The clear language of the regulation also allows the exemption for machines used to reduce the amount of pollution already in the environment. In other words, machines used to 'clean up' pollution 'caused . . . by the operation of other machines that are used in the mining, quarrying, compounding, processing, or manufacturing of tangible personal property' for sale qualify for the exemption under Code Section 12-36-2120(17).

Based on the foregoing, the Court finds that protective clothing is used to prevent or abate pollution inside of Petitioner's facility and in the manufactured product in order to protect the consumer and public from harm and is so used to comply with the requirements of the FDA, a United States agency, along with the SCDA, an agency of the State of South Carolina.

C. Protective Clothing for Class 100 Facility (S.C. Code Ann. § 12-36-2120(54))

Finally, Petitioner asserts that the Department erred in disallowing the purchase of protective clothing to fall within the exemption provided in S.C. Code Ann. § 12-36-2120(54). Section 12-36-2120(54), referred to as the "Clean Room Exemption," exempts from sales tax "clothing and other attire required for working in a Class 100 or better as defined in Federal Standard 209E clean room environment."[16] "Class 100" describes the number and size of particles permitted per volume of air in "cleanroom" environments. Under the Federal Standard, Class 100 is equivalent to ISO 5 which permits 100 particles of 0.5 microns or greater per cubic foot.

The Department denied the exemption based upon the Department Determination and the testimony at trial for two reasons: (1) the Petitioner did not establish that it met the Class 100 Clean Room requirements; and, (2) that Petitioner did not establish that protective clothing was required to work in the Clean Room.

Carter McEntire testified that, with the help of food safety engineers, the facility was designed so that the high-care area would operate as a Class 100 Clean Room environment or better in accordance with the requirements under State and federal law. (Trial Tr., p. 60:1-13). "The FDA laws require us to maintain a certain level of cleanliness, and those levels of cleanliness meet or exceed Clean 100 standards." (Trial Tr., p. 121:21-25). McEntire also testified that Petitioner is audited by independent organizations, like the British Retail Consortium (BRC), to ensure that the

[16] The parties both acknowledge that Federal Standard 209E was cancelled in 2001 and was replaced by International Standards Organization (ISO) 14644-1. Although the South Carolina General Assembly has not changed the language of the statute, the parties agreed that in order to bring itself clearly within the conditions imposed by the Clean Room Exemption, Petitioner must prove it maintains a Class 100 or better clean room as defined under ISO 14644-1. For purposes of this Order, the Court will use the term "Federal Standard" when referring to ISO 14644-1, formerly Federal Standard 209E.

standard of 0.1 microns, a standard higher than the required 0.5 microns of a Class 100 Clean Room, are met. (Trial Tr., p. 125:12-24).

To prove it met the 0.1 microns standard, Petitioner offered Exhibits 9 and 11 into evidence in addition to the testimony provided by Mr. McEntire. Exhibit 9 consists of several pages purporting to show that air filters in the facility had been properly replaced every few months to ensure that the 0.1 micron standard had been maintained. However, all of the replacement certifications contained in Exhibit 9 are dated in 2018, three years after the conclusion of the Audit Period. Exhibit 11 is the annual BRC audit report of the facility that was concluded on March 12, 2015. While this report does contain statements that Petitioner maintained proper air filtration standards, there are no specific or numeric micron standards mentioned. Based on the time of the Audit Period and the ambiguity contained in these reports, the Court cannot conclude that either of these exhibits provide sufficient evidence that Petitioner can meet the burden of proof to show itself clearly within the Clean Room Exemption for the Audit Period.

Moreover, Petitioner must also establish that protective clothing is required in a Class 100 Clean Room environment. While Petitioner did establish that protective clothing is required by the FDA in a food processing plant, and one may assume that protective clothing would also be required in a Class 100 or better Clean Room environment, the Court cannot make such an assumption based on the limited amount of testimony provided in this case on this matter.

The Court does take note that the auditor for the Department did not know whether protective clothing was required to maintain a Class 100 environment. In addition, she was under the impression that the entire facility had to meet the Class 100 requirement, not just the high-care area where the protective clothing at issue was used. Finally, while it may be incumbent upon the taxpayer to show it maintains a "certified" Class 100 Clean Room in order to claim the exemption, none of the witnesses for the Department were able to articulate or clarify what would constitute this "certification" so that a taxpayer could claim the exemption.

Because of these ambiguities, and because the burden of proof rests with Petitioner, the Court cannot conclude that Petitioner's purchases of protective clothing during the Audit Period should be exempt from tax based on the Class 100 or better Clean Room Exemption.

ORDER

Based on the foregoing, it is the Order of this Court that the following items be exempt from sales and use tax pursuant to the Machine Exemption found in S.C. Code Ann. § 12-36-2120(17): Cut Wheel and Disc Maintenance Tools (13); Maintenance Tools (12); Forklift Rental, Forklift Batteries, Forklift Parts, and Forklift Repair Parts (10); Hand Trucks, Pallet Jacks, and Oil Lubricant Used Therein (9); Generator Rental (20); Stacking Containers (6); Warehouse Racks (7); Pallet Flow Brakes (8); Blower Fan (11); Bar Code Scanners (1); Black Ink Aerosol Cans (2); Mobile Computer Stands (3); Coveralls, Eyewear, Gloves, Aprons, and Hairnets (21); Storage Water Tanks (18); Cleaning Machines (19); Floor Treatment Chemicals (17); and Floor Drain Covers (16). It is also the Order of this Court that Coveralls, Eyewear, Gloves, Aprons, and Hairnets (21), collectively referred to as "protective clothing," be exempt from tax pursuant to the Pollution Control Exemption found in Clause B of S.C. Code Ann. § 12-36-2120(17).

Finally, by agreement of the parties in this matter, because the Court has determined that some of the items at issue are subject to tax while other items are exempt, this matter is hereby remanded to the Department to calculate the tax and interest due on the items deemed taxable by the Court. Any further amounts owed by Petitioner shall be remitted to the Department upon thirty (30) days notice of the balance to Petitioner.

AND IT IS SO ORDERED.

H. W. Funderburk, Jr.
Administrative Law Judge

September 6, 2019
Columbia, South Carolina

FILED
SEP 06 2019
SC ADMIN. LAW COURT

CERTIFICATE OF SERVICE

I, Emily B. Howard, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

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September 6, 2019
Columbia, South Carolina

Emily B. Howard
SCALC Staff Attorney

FILED
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SC ADMIN. LAW COURT

South Carolina Department of Revenue
Litigation & Appeals
OCT 22 2019
Received

FILED
OCT 16 2019
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

McEntire Produce, Inc., Petitioner, v. South Carolina Department of Revenue, Respondent.	Docket No. 17-ALJ-17-0060-CC **ORDER DENYING RESPONDENT'S MOTION TO RECONSIDER, ALTER OR AMEND**

This matter comes before the South Carolina Administrative Law Court (Court) upon the Motion filed by the South Carolina Department of Revenue (Respondent) on September 19, 2019, asking the Court to Reconsider, Alter, or Amend its Final Order of September 6, 2019, which held a number of disputed items as exempt from sales and use tax pursuant to S.C. Code Ann. § 12-36-2120(17) (2014). As of the date of this Order, McEntire Produce, Inc., (Petitioner) has not filed a response to the Motion before the Court.

After considering the issues raised by Respondent, the Court respectfully denies the Motion. The Court's Order issued September 6, 2019, is Final.

IT IS THEREFORE ORDERED that the South Carolina Department of Revenue's Motion to Reconsider, Alter, or Amend is **DENIED**.

AND IT IS SO ORDERED.

October 16, 2019
Columbia, South Carolina

H.W. Funderburk, Jr.
Administrative Law Judge

FILED
OCT 16 2019
SC ADMIN. LAW COURT

Docket No.: 17-ALJ-17-0060-CC

CERTIFICATE OF SERVICE

I, Elizabeth A. Perkins, hereby certify that I have this date served this **Order Denying Respondent's Motion to Reconsider, Alter or Amend** upon all parties to this case by depositing a copy hereof, in the United States mail, postage paid, inter-agency, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

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October 16, 2019
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STATE OF SOUTH CAROLINA
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September 19, 2019

VIA HAND DELIVERY
The Honorable H. W. Funderburk, Jr.
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: **McEntire Produce, Inc., vs. South Carolina Department of Revenue**
Docket No.: 17-ALJ-17-0060-CC
Our File Number: 180220

Dear Judge Funderburk:

Enclosed please find the Respondent's Notice of Motion and Motion for Reconsideration, and/or to Alter or Amend in connection with the above referenced matter. Also enclosed is a Proof of Service.

Please do not hesitate to contact me at 803-898-5576 or Elisabeth.Shields@dor.sc.gov should you have any questions.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

Elisabeth W. Shields, Esquire
Counsel for Litigation

EWS/gjm

Enclosures

c: Burnet R. Maybank, III, Esquire
James P. Rourke, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

McEntire Produce, Inc., Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 17-ALJ-17-0060-CC **RESPONDENT'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION, AND/OR TO ALTER OR AMEND**

TO: BURNET R. MAYBANK, III, ESQ. AND JIM ROURKE, ESQ., ATTORNEYS FOR THE PETITIONER MCENTIRE PRODUCE, INC.

PLEASE TAKE NOTICE that the undersigned, as attorneys for Respondent South Carolina Department of Revenue (the "Department"), respectfully moves this Court pursuant to ALC Rules 29(D) and 68 and Rule 59(e), SCRCP for an order reconsidering, altering, and/or amending its Final Order filed on September 6, 2019 ("Final Order"), which held that most of the items in dispute were exempt from sales and use tax pursuant to S.C. Code Ann. § 12-36-2120(17) (2014). The Department received written notice of the entry of the Final Order on September 9, 2019. The basis for the Department's requested relief is as follows:

I. <u>The Court should amend its Final Order because it improperly expanded the "Machine Exemption" found in S.C. Code Ann. § 12-36-2120(17)</u>.

The Court incorrectly concluded that the Department's interpretation of the manufacturing process was too restrictive under S.C. Code Ann. § 12-36-2120(17) (the "Machine Exemption Statute"). When construing the Machine Exemption portion of the Sales and Use Tax Act, this Court must construe the Sales and Use Tax Act in light of "the purpose of the whole statute" and "the policy of the law." *Enos v. Doe*, 380 S.C. 295, 305, 669 S.E.2d 619, 623 (Ct. App. 2008). Thus, to properly construe the Machine Exemption Statute and apply the law to the facts at hand,

the Machine Exemption Statute and the corresponding regulation, Regulation 117-302.5 (the "Machine Exemption Regulation"), must be read in conjunction.[1] Further, the relevant statute and regulation must be strictly construed against the claimed exemption. *Carealliance Health Servs. v. S.C. Dep't of Revenue*, 416 S.C. 484, 787 S.E.2d 475 (2016) (citing *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998)). South Carolina has adopted a limited integrated plant theory—namely, an integrated plant theory that is qualified and limited by the Machine Exemption Regulation. Thus, the Court erred by relying on New York's version of the integrated plant theory and by applying a broader version of this theory to the facts in this case.

A. South Carolina utilizes a limited integrated plant theory.

The Court correctly noted in its Final Order that South Carolina abandoned the strict production line theory and adopted an integrated plant theory as it relates to the Machine Exemption. South Carolina Courts have recognized that South Carolina uses an integrated plant theory for the purpose of applying the Machine Exemption. *See Springs Industries, Inc. v. SCDOR* (99-ALJ-17-0153-CC), *aff'd S.C. Dept. of Rev. v. Springs Indus., Inc.*, 2003-UP-029 (Ct. App. 2003) and *Anonymous Taxpayer v. SCDOR* (02-ALJ-17-0350-CC). In response to these decisions, the Department issued Revenue Ruling #04-7 and proposed amendments to the Machine Exemption Regulation, which the General Assembly ultimately adopted. Thus, the Machine Exemption Regulation as it applied during the audit period set forth the integrated plant theory and corresponding law adopted *in South Carolina*. Accordingly, any reliance by the Court on New York's integrated plant theory, which is broader than South Carolina's law, or any other integrated plant theory is misplaced. Further, the Court erred by broadly construing the Machine Exemption because sales and use tax exemptions must be strictly construed against the exemption. *See*

[1]Throughout this motion, the Machine Exemption Statute and the Machine Exemption Regulation will be referred to collectively as the "Machine Exemption."

Carealliance Health Servs., 416 S.C. 484, 787 S.E.2d 475. As such, this Court should amend its Final Order to remove any reliance on New York's integrated plant theory, which is inapplicable to the interpretation of South Carolina's Machine Exemption.

B. <u>The Final Order incorrectly broadens the meaning of the term "machine" as used in the Machine Exemption</u>.

The Court incorrectly broadened the meaning of the term "machine" when construing the Machine Exemption Statute. Specifically, the Court erred in holding items such as protective clothing, aerosol cans, squeegees, and floor drain covers were machines. For purposes of the Machine Exemption Statute, a machine is "every mechanical device or combination of mechanical powers, parts, attachments and devices to perform some function and produce a certain effect or result . . . ." Regulation 117-302.5(B)(1). Items such as protective clothing, aerosol cans, squeegees, and floor drain covers are not mechanical devices and therefore cannot qualify as "machines." By granting the Machine Exemption to these items, the Court improperly broadened the definition of "machine."

The Machine Exemption Statute does not require moving parts for an item to qualify as a machine. *See Hercules Contractors and Engineers v. S.C. Tax Commission* decision. 280 S.C. 426, 313 S.E.2d 300 (1984). However, for such an item to constitute a "machine" under the statute, it must be an integral part of the manufacturing process. *Id.* Under *Hercules*, the "integral and necessary" test should only be applied "to parts that are contained within some other item, where that other item has already been classified as a machine under the statute." Peter E. Farr, South Carolina's Multimillion Dollar Tax Problem: An Examination of the Manufacturer's Machine Exemption in the South Carolina Sales Tax System, 55 S.C. L. Rev. 665, 671–72 (2004). In *Hercules*, the Court found that the entire waste treatment facility was a machine, and thus the vats, basins, tanks, pumps, etc., which had no use apart from the machine (the waste treatment facility)

of which they were in, were exempt as parts of that machine. 280 S.C. at 431, 313 S.E.2d at 304. That is not the case here. The McEntire plant as a whole is not a machine. The plant has various areas—administrative, storage, processing, etc. While the parties disagree in which parts of the plant processing occurs, they agree that processing does not occur in the entire plant. For example, it is undisputed that no processing occurs in the administrative office area. Thus, because the entire plant is not a machine like the waste treatment facility in *Hercules*, the question is not whether the protective clothing, for example, is integral to the operation of the McEntire plant as a whole, but whether the protective clothing is an integral part of an exempt machine. Accordingly, the Court should amend its Final Order to apply the appropriate definition of machine.

C. The Final Order incorrectly broadens what it means to be "used in processing".

The Court incorrectly broadened the meaning of the phrase "used in manufacturing, processing, recycling, compounding, mining, or quarrying" when construing the Machine Exemption. During the audit period in this case,[2] the Machine Exemption Statute exempted "machines used in manufacturing, processing, recycling, compounding, mining, or quarrying tangible personal property for sale." S.C. Code Ann. § 12-36-2120 (2014).[3] Thus, to be an exempt machine the items in dispute must (1) be a mechanical device or combination of mechanical powers, parts, attachments and devices that perform some function and produce a certain effect or result (2) that is integral and necessary (3) to processing tangible personal property for sale. In evaluating the statute, the Court failed to recognize that for a machine to be exempt it must be used in processing tangible personal property for sale. Thus, while a cutter could be a machine, it must

[2]October 1, 2012 through September 30, 2015.

[3]For the sake of brevity, the term "processing" will be used throughout this motion in place of the various uses listed in the statute—manufacturing, processing, recycling, compounding, mining, or quarrying.

be used in processing tangible personal property for sale to be exempt. In the McEntire plant, a cutter used to cut paper is not used in processing while a cutter used to cut produce is used in processing. This demonstrates the importance of determining during which activities a machine is used, as only those machines used in processing could be exempt.

Here, the Court seemed to acknowledge that the Petitioner is in the business of processing fresh produce. The Court disagreed that "processing" in this context involved only sorting, cutting, washing, and packaging produce. Rather, the Court appears to have defined "processing" as everything that happens inside the plant, excluding the administrative area, that contributes continuously and vitally to the *plant's* overall production. Based on that broad definition of processing, the Court concluded that everything used in the plant that contributed to the plant's overall production was exempt. As will be discussed in more detail below, such a construction of "used in processing" is impermissibly broad.

McEntire Produce, Inc. ("McEntire" or "Petitioner") is in the business of processing produce, namely turning raw produce into cut or shredded produce and sorting and repackaging whole tomatoes. Thus, the processing must begin when the Petitioner performs some act on the produce that is intended to result in packaged cut produce or packaged sorted tomatoes and end when the produce is packaged for sale. The activities necessary to turn raw produce into cut produce are sorting, cutting, washing, and packaging said produce. Similarly, the activities necessary to sort and repackage whole tomatoes are sorting and packaging. This definition of processing conforms with the Machine Exemption Regulation. The Machine Exemption Regulation specifically states that "[a] machine is not a part of the manufacturing process merely because it is integral and necessary to the manufacturer. For example, **machines used for warehouse, distribution, or administrative purposes are integral and necessary to the**

manufacturer, but not part of the manufacturing process." Regulation 117-302.5(B)(1)(b) (emphasis added). Additionally, the regulation explains that generally conveyances/material handling machines,[4] chemicals, maintenance machines, storage machines, administrative machines, and protective clothing are not integral and necessary to processing tangible personal property for sale. *See* Regulation 117-302.5(B). Thus, "processing" generally does not involve moving raw or finished product, cleaning the processing area, maintenance, storage, or administrative activities.

The Machine Exemption Regulation narrows the meaning of processing even further when it explains that "[r]acks and tanks used to store a finished product while it cures" are not integral and necessary to processing. Regulation 117-302.5(B)(7)(c). While one would assume that every machine used up until the point a product becomes marketable is integral and necessary, the Machine Exemption Regulation makes it clear this is not the case. The logical inference to be drawn from this example in the Machine Exemption Regulation is that while an item is sitting on a storage rack waiting to become marketable that item is not being processed and, thus, the storage rack is not being used in processing. The Machine Exemption Regulation demonstrates that in this case "processing" occurs while the produce is being sorted, cut, washed, and packaged, not while it is being stored or transported throughout the storage areas of the plant.

Other states support the above analysis of what it means to be "used in processing tangible personal property for sale" as well. All of the terms used in the Machine Exemption Statute apply in industrial settings, and they each exempt specific activities of various industries. When

[4]An exemption specific to material handling machines used in the operation of a manufacturing facility, as opposed to in processing tangible personal property for sale, can be found in S.C. Code Ann. § 12-36-2120(51). The existence of and the language used in subsection (51) demonstrates there is a difference between a machine being *used in the operation of a manufacturing facility* to support the overall manufacturing process and a machine being *used in manufacturing tangible personal property for sale.*

construing a statute like the Machine Exemption Statute, no portion of the statute should be read in isolation but should be read in the context of the entire statute, harmonizing all provisions. *See Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo., 2012). Further, the Court's interpretation should be guided by the maxim of *noscitur a sociis*—a word is known by the company it keeps. *Id.* at 5; *see also Southern Mut. Church Ins. Co. v. South Carolina Windstorm and Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991) and *Cooksey v. Wachovia Bank*, Opinion No. 2006-UP-399 (S.C. App. Dec. 7, 2006).

In *Aquila*, the Supreme Court of Missouri analyzed a statute that exempted the purchase of electricity used for processing activities and noted that the term "processing" was listed along with the terms "'manufacturing,' 'compounding,' 'mining,' and 'producing.'" 362 S.W.3d at 5. These terms are similar to the terms listed in the Machine Exemption Statute. The *Aquila* Court then explained that "[t]he industrial connotations of those terms in section 144.054.2 indicate that the legislature did not intend 'processing' to include food preparation for retail consumption." *Id.* The court reached this conclusion even though the statute defined the term "processing" broadly as "any mode of treatment, act, or series of acts performed upon materials to transform or reduce them to a different state or thing, including treatment necessary to maintain or preserve such processing by the producer at the production facility...." *Id.* At 6. Similarly here, the industrial connotations of the terms in the Machine Exemption Statute, along with the explanations and examples set forth in the Machine Exemption Regulation, indicate that the legislature did not intend for the term "processing" to include things like preparatory activities or storage.

South Carolina has not defined "processing" in its statute. South Carolina Courts have held that "[w]hen faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." *Strother v. Lexington County Recreation*, 332 S.C. 54, 62,

504 S.E.2d 117 (1998); *see also Hughes v. Western Carolina Sewer Auth.*, 689 S.E.2d 638, 386 S.C. 641 (S.C. App., 2009). In doing so, our Supreme Court has looked to the dictionary definition of the undefined term. *See Murphy v. South Carolina Dep't of Health & Envt'l Control*, 396 S.C. 633, 641, 723 S.E.2d 191, 195 (2012). Other states with similar undefined terms have relied on dictionary definitions and provide guidance here. In *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue* the Supreme Court of Wisconsin analyzed a statute that imposed a tax "for the 'processing' of river sediments into waste sludge, reusable sand, and water." 914 N.W.2d 21, 28 (Wis., 2018). Like the Supreme Court of Missouri, the Wisconsin Supreme Court explained that "[t]he *noscitur a sociis* canon of construction (literally, 'it is known from its associates') instructs that '[w]hen two or more words or phrases are listed together, the general terms ... may be defined by the other words and understood in the same general sense.'" *Tetra Tech EC, Inc.*, 914 N.W.2d at 60. The other words listed with "processing" were fabricating, printing, and producing. In relying on the aforesaid maxim and the definition of processing from the Oxford Dictionary, the Wisconsin Court determined the proper meaning of the term "processing" encompasses "the performance of a mechanical or chemical operation on tangible personal property, a task that can be completed without transforming the property into a new product, or adding anything to it that was not already there." *Id.* at 61.

When reading the Oxford Dictionary definition of processing along with the Machine Exemption Regulation, it becomes clear that the Machine Exemption Statute exempts purchases of the following:

> (1) Every machine, which is a mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result, or machine part,

(2) That is used in, serves as an essential and indispensable component part of, is used on an ongoing and continuous basis during, and is substantially used in,

(3) The performance of some mechanical or chemical operation on tangible personal property to be sold. *See* Regulation 117-302.5(B)(1).

Thus, once all machines, as defined in the Machine Exemption Regulation, are identified, the issue becomes which of those machines are integral and necessary to the performance of some mechanical or chemical operation on tangible personal property to be sold. *See* Regulation 117-302.5(B)(1)(b).

As previously explained, the Petitioner is in the business of processing produce, namely turning raw produce into cut or shredded produce and sorting and repackaging whole tomatoes. The mechanical or chemical operation on tangible personal property conducted at the McEntire plant is the sorting, cutting, washing, and packaging of produce. Accordingly, not every activity that occurs inside the McEntire plant is considered processing. It follows then that not every machine in the plant (1) is used in processing produce to be sold, (2) serves as an essential and indispensable component part of processing produce to be sold, (3) is used on an ongoing and continuous basis during the produce processing, *and* (4) is substantially used in processing produce.

Based on the above analysis of the Machine Exemption, the Court erred when it found that "the machinery and equipment used both before and after the actual production line processing of the fresh produce are integral and necessary . . . to the overall manufacturing process" because it broadened the meaning of "used in processing." The Court found that the supplies at issue were integral and necessary to the plant as a whole not that they were integral and necessary to turning raw produce into cut and packaged or sorted and packaged produce. While the Court is correct in

stating that a machine does not have to be used directly in the production line to be exempt, the machine must be integral and necessary to processing produce as defined above, not to the operation of the entire McEntire plant. Accordingly, the Court should amend its Final Order to apply the above test to the facts in this case, which requires an analysis of whether the supplies at issue are integral and necessary to turning raw produce into cut and packaged or sorted and packaged produce.

D. <u>The Court should amend the Final Order because it incorrectly relied on the addition of "agricultural packaging" to the Machine Exemption Statute as evidence of legislative intent</u>.

The Court erred in relying on the addition of the term "agricultural packaging" when determining legislative intent. As stated previously, the audit period in this case was October 1, 2012 through September 30, 2015. In 2016, the General Assembly added the term "agricultural packaging" to the Machine Exemption Statute, resulting in the exempt uses being manufacturing, processing, *agricultural packaging*, recycling, compounding, mining, or quarrying. The Court incorrectly interpreted this addition to mean that "the legislature intended this manufacturing process to be much broader than the production line definition espoused by the Department." Again, the Department did not utilize a production line theory but rather a limited integrated plant theory, said limitations coming directly from the Machine Exemption Regulation.

Moreover, the fact the legislature added "agricultural packaging" as an exempt use indicates that those activities were not exempt prior to 2016. Generally, "[w]hen a statute is amended, there is a presumption that the legislature intended to change the existing law." *Duvall . S.C. Budget & Control Bd.*, 377 S.C. 67, 80-81, 716 S.E.2d 877, 884 (2011). Sometimes the General Assembly will indicate whether it intended an amendment to clarify its original intent in the enacting legislation. *See Hock RH, LLC v. S.C. Dep't of Revenue*, 423 S.C. 208, 215, 813

S.E.2d 540, 544 (Ct. App. 2018) (noting "Act 208 is titled, 'An act to amend section 59-40-140 . . . so as to clarify that property of charter schools exempt from such taxation includes owned or leased property'" and finding "by its own words, the General Assembly's stated purpose for the 2014 amendment was to clarify rather than broaden the exemption already afforded"). It may also be appropriate to look to the enacting legislation to determine legislative intent. *Hock RH, LLC*, 423 S.C. at 214, 813 S.E.2d at 543.

Here, when the General Assembly amended the Machine Exemption Statute to include agricultural packaging as an exempt use, it stated in the enacting legislation that this was "[a]n act . . . to amend [the Machine Exemption Statute], as amended, relating to exemptions from the state sales tax, *so as to exempt machines used in agricultural packaging*." 2016 S.C. Acts No. 256 § 427 (effective June 8, 2016). Contrary to the purpose of the act referenced in *Hock RH, LLC*, the purpose of the amendment to the Machine Exemption Statute, by the General Assembly's own statement, was to include agricultural packaging as an exempt use not to clarify any legislative intent on the exempt uses previously codified. Thus, if agricultural packaging was already an exempt use based on the terms contained in the statute during the audit period, the addition of the term would be superfluous and unnecessary.

Finally, contrary to the Court's assertion, the addition of the term agricultural packaging does not mean that the terms manufacturing or processing are to be construed broadly. The addition simply means that now exempt machines include those machines that are integral and necessary to agricultural packaging. Further, the addition of the term "agricultural packaging" does not change the meaning of manufacturing and processing (or any of the other terms in the statute), nor does the fact that the General Assembly chose to define "agricultural packaging" for purposes of a tax credit change the definition of the terms manufacturing or processing as used in

the Machine Exemption Statute. Accordingly, the Court should amend its Final Order to find that the addition of agricultural packaging as an exempt use in the Machine Exemption Statute does not impact the meaning of the other exempt uses.

II. The Court should amend its Final Order because it incorrectly concludes that that items necessary to comply with State or federal agencies are integral and necessary renders the Pollution Control Exemption superfluous.

The Court's Final Order creates a new rule that anything legally required for a manufacturing facility to operate is integral and necessary to manufacturing tangible personal property for sale and, therefore, is exempt pursuant to the Machine Exemption. However, if the general Machine Exemption already exempted anything legally required for a plant to operate, the Pollution Control Machine Exemption would be unnecessary. The Pollution Control Machine Exemption, found within § 12-36-2120(17), provides that the term "'machines' include the parts of machines, attachments, and replacements used, or manufactured for use, on or in the operation of the machines and which ... (b) are necessary to comply with the order of an agency of the United States or of this State for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section." Said differently, machine parts and attachments used in the operation of machines that are legally required by the State or Federal government to prevent or abate certain types of pollution are exempt.

Using the Court's reading of the Machine Exemption Statute, pollution control machines are integral and necessary to the functioning of the plant as a whole because they are legally required and, therefore, would be exempt *without* the Pollution Control Machine Exemption found in subpart (b). Thus, if the Machine Exemption was supposed to be applied so broadly, the Pollution Control Machine Exemption would be rendered superfluous and unnecessary. Statutes are not to be construed in a manner that renders any portion superfluous. *See Duvall v. S.C. Budget*

& Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act."); *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))). Because the Court's interpretation of the Machine Exemption Statute to mean that any machine legally required for the operation of a manufacturing facility is integral and necessary renders the Pollution Control Machine Exemption superfluous, the Court should amend its decision and find that the fact a machine may be legally required is not sufficient to render a machine integral and necessary.

III. The Court should amend its Final Order because it grants the exemption for items that the Machine Exemption Regulation specifically identifies as taxable.

As explained above, South Carolina utilizes an integrated plant theory that is limited by the Machine Exemption Regulation. Despite the regulation's explicit exclusion of certain items from the Machine Exemption, this Court concluded the exemption applied almost across the board. Because several of the items at issue are deemed taxable pursuant to the Machine Exemption Regulation the Court should amend its Final Order to find those items are not exempt.

A. The Court should amend its Final Order because the maintenance tools at issue are not exempt under the Machine Exemption Regulation.

The Court erred in finding that the supplies that fall into the general category of maintenance tools are exempt.[5] Generally, maintenance machines are not exempt from sales and use tax. For a maintenance machine to be exempt, it must be used to maintain an exempt machine on an ongoing and continuous basis. *See* Regulation 117-302.5(B)(6). In other words, a maintenance machine used on an exempt machine on an ongoing and continuous basis serves as

[5]This category of supplies includes Cut Wheel and Disc Maintenance Tools and Maintenance Tools.

an essential and indispensable component part of processing produce to be sold because the exempt machine would not work without the maintenance machine. The fact that a maintenance machine is integral and necessary to the operation of the plant as whole is irrelevant—i.e. the maintenance machine is necessary for the plant to operate when a machine in the plant breaks down. The evidence demonstrates that the Petitioner uses its maintenance tools as needed. "As needed" does not equate to ongoing and continuous. Further, if a machine is only used "as needed" it logically cannot serve as an essential and indispensable component part of processing produce to be sold since the machine being maintained by the maintenance machine obviously works without the maintenance machine. As such, the Court should alter or amend its Final Order and hold the maintenance tools taxable.

B. <u>The Court should amend its Final Order because the conveyances at issue are not exempt under the Machine Exemption Regulation</u>.

The Court foundered in finding that the various conveyances (material handling machines) used by the Petitioner were exempt pursuant to Regulation 117-302.5(B)(4)(a).[6] For a conveyance to be exempt, it first must serve as an essential and indispensable component part of processing produce. Regulation 117-302.5(B)(4)(a) provides that the following conveyances serve as an essential and indispensable component part of processing: (1) conveyance machines feeding the first processing machine, (2) conveyance machines moving in-process material, or (3) conveyance machines discharging the finished product from the last processing machine. This regulation makes sense in light of the four-part test to determine if a machine is integral and necessary to processing. The processing machines could not perform their intended function without machines that feed materials into the processing machines, move in-process materials from one processing

[6]This category of supplies includes Forklift Rentals, Forklift Batteries, Forklift Parts, Forklift Repair Parts, Hand Trucks, Pallet Jacks, and Oil Lubricant Used On Hand Trucks and Pallet Jacks.

machine to another, and discharge the finished product. The processing machines could perform their intended functions without machines that move materials around a storage area. Further, the conveyances must be substantially used in processing (as opposed to storage, for example) and must be used on an ongoing and continuous basis (not as needed).

The first processing machine in the McEntire plant is in the high-care area where the produce is sorted, inspected, trimmed, and placed onto a conveyor belt leading to the cutter. Carter McEntire explained that "once we take the lettuce out of the raw product area, we dump it through a bin dumping conveyance system, and it enters the high-care area. **In that first step**, we sort it, trim it, and remove any defects. And then it continues conveying up to a cutting area." (emphasis added). Thus, the bin dumping conveyance system is the conveyance feeding the first processing machine. The forklifts feed the bin dumping conveyance system and, therefore, do not feed the first processing machine. As such, the forklifts are not exempt.

Further, the evidence demonstrates that the remaining conveyance machines are used in the "palletizing, shipping, finished storage, raw storage, tomato repack area, and receiving dock." Hr'g. Tr. 78:4-6. Thus, no conveyance machines are used to feed the first machine or move in process material. Some conveyance machines appear to be used to discharge the finished product in the palletizing area or move in process material within the tomato repack area, but the Petitioner presented no evidence that would allow the Court to determine whether more than one third of the conveyance machines were used for those exempt purposes. Therefore, the Court should alter or amend its Final Order and conclude the conveyance machines are taxable.

C. The Court should amend its Final Order because the items used for temperature control are not exempt under the Machine Exemption Regulation.

The Court erred in finding that because food safety requires the plant be kept at a specific temperature, temperature control throughout the entire plant was integral and necessary to

processing produce and, thus, any items used for temperature control are exempt.[7] Notably, Regulation 117-302.5(B)(24) provides that "[m]achines used to condition air (including humidification systems) for quality control **during the manufacturing process of tangible personal property** made from natural fibers and synthetic materials" are exempt. Thus, any machines used to control the temperature where the produce is being processed would be exempt, but machines outside of the manufacturing process would be taxable. The logic here is the same as for the items discussed above—the *processing* machines cannot perform their intended function without the temperature control machines because the product would be compromised during the processing. Thus, an item used to control temperature to ensure the functioning of a processing machine would be considered an integral part of the processing machine. Importantly, if the temperature control item is being used during storage as opposed to during processing, the temperature control item cannot be an integral part of a processing machine. In further support of this analysis, Regulation 117-302.5(B)(7) specifically provides that "[m]achines used at a manufacturing facility for storage are not exempt from the tax as a machine used in manufacturing tangible personal property for sale." Thus, any machines used for storage, regardless of whether they also provide temperature control to maintain the quality of the product, are taxable because such machines are not being used during processing.

There is no evidence in the record from which the Court could conclude that the temperature control items at issue are used during processing. As such, the Court should amend its Final Order and find the temperature control items taxable.

[7]This category of supplies includes Stacking Containers, Warehouse Racks, Pallet Flow Brakes, and the Blower Fan.

D. <u>The Court should amend its Final Order because the storage water tanks are not exempt under the Machine Exemption Regulation</u>.

The Court incorrectly found that the storage water tanks used by the Petitioner to store water are exempt. The storage water tanks merely store water that is later used in processing and, thus, are not exempt from tax. The Petitioner failed to present any evidence that such tanks are used during processing. The *water* from the tanks may be used during processing, but the tanks themselves merely serve as storage tanks and, thus, are taxable. Carter McEntire conceded that the Petitioner does "mix sanitation chemicals there [in the storage tank] **before** it's delivered to the processing area." Hr'g Tr. 117:25 – 118:2 (emphasis added). As explained above, Regulation 117-302.5(7) provides that machines used for storage are taxable. Further, Regulation 117-302.5(4) provides that "(iii) Piping leading to and from storage tanks [and] (iv) Piping, pumps, and well connections installed for use by a manufacturer **to supply the manufacturing plant with water necessary for the manufacture of tangible personal property**" are taxable. (emphasis added). The tanks that store the necessary water and the pipes that supply the water to a plant are not used during processing and do not serve as an essential and indispensable component part of processing tangible personal property to be sold. Certainly, if the pipes that take the water from the tank to the processing area are taxable because they are outside of the manufacturing process, then the tanks that are another step removed from the manufacturing process must be taxable. In sum, while the storage water tanks maybe be integral and necessary to the Petitioner, they are not integral and necessary to processing produce for sale. As such, the Court should amend its Final Order and hold the storage water tanks taxable.

E. <u>The Court should amend its Final Order because recordkeeping items used for tracking the produce are not exempt under the Machine Exemption Regulation</u>.

The Court incorrectly found that the items Petitioner used to track the produce as required

by law were exempt from tax.[8] As explained above, the fact that an item is required by law does not make the item integral and necessary to processing tangible personal property for sale. In fact, items used for tracking are not used during processing, but rather before and after processing. Moreover, they do not serve as an essential and indispensable component part *of processing produce* to be sold. Further, Regulation 117-302.5(B)(9) specifically provides that administrative items such as items used for recordkeeping are not machines used in processing tangible personal property for sale. An item used merely to track the produce is used for recordkeeping. While recordkeeping may be legally required (much like all taxpayers are legally required to keep certain records for tax purposes), that does not transform the items used for recordkeeping into exempt machines. Accordingly, the Court should alter or amend its Final Order and conclude the items used for tracking are taxable.

F. <u>The Court should amend its Final Order because floor treatment chemicals are not exempt under the Machine Exemption Regulation</u>.

The Court incorrectly held the floor treatment chemicals purchased by the Petitioner exempt. It appears the Court determined the chemicals at issue, which were floor treatment chemicals, were exempt based on the assumption that the chemicals were used on exempt machines outside of the high-care area. However, the evidence does not support this conclusion.[9]

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[8]This category of supplies includes Bar Code Scanners, Black Ink Aerosol Cans, and Mobile Computer Stands.

[9]The Department's audit of chemical purchases included more than floor treatment chemicals, as noted on p. 8 of the Department's Determination wherein the Department discusses chemicals generally and explains the chemicals at issue in the Determination were used to clean floors, walls, and other parts of the facility. At trial, the only chemicals still at issue were floor treatment chemicals. *See* Stipulations of Fact Exhibit A, Supplies at Issue. To the extent the Court was confused by the line of questioning that suggested the Department agreed a portion of the same floor treatment chemicals as the ones at issue were exempt, the Court should amend its Final Order to reflect that (1) the audit included chemicals generally and only floor treatment chemicals were before the Court at the time of trial and (2) how the Department treated other chemicals is irrelevant as sufficient information does not exist for the Court to determine the similarities and

For a chemical to be exempt, it must be used in an exempt machine on an ongoing and continuous basis and be essential to the functioning of the exempt machine. *See* Regulation 117-302.5(B)(5). When testifying about the chemicals at issue, Carter McEntire stated these chemicals were used "in the area of the plant where food is present." He did not testify that these chemicals were used on exempt machines. He also testified that these chemicals serve no other purpose than to sanitize the facility. Hr'g Tr. 117:4 – 10. As such, the Petitioner presented no evidence that the chemicals at issue were used on exempt machines. Therefore, the Court should amend its Final Order and hold the chemicals taxable.

G. The Court should amend its Final Order because floor drain covers are not exempt under the Machine Exemption Regulation.

The Court found that the floor drain covers were integral and necessary to processing produce because they prevent pollution of the waste water. Thus, it appears the Court found the floor drain covers were pollution control machines. However, the Petitioner failed to present sufficient evidence to prove the floor drain covers (or any of its supplies) are exempt as pollution control machines. Thus, the Court should amend its Final Order to hold that floor drain covers are not pollution control machines and, therefore, are subject to tax.

If, however, the Court determined that floor drain covers may be exempt under the Machine Exemption, this determination is not supported by the facts in this case. The evidence suggests

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differences between the chemicals at issue and the chemicals the Department exempted. Such is supported by Carter McEntire's testimony where in response to the question of whether the Department agreed 70% of floor treatment chemicals were exempt and only 30% were at issue, Mr. McEntire stated he "believes" so and that "sounds right," but he clearly was unsure. Hr'g Tr. 84:19 – 85:1. Further, the fact Mr. McEntire agreed that the brooms, squeegees, and floor treatment chemicals at issue served no other purpose than to sanitize the facility, combined with the Department's application of the Machine Exemption Regulation demonstrates that the chemicals the Department agreed were exempt were different from the chemicals at issue at the trial in this case. As such, the Court should amend its Final Order to exclude any reliance on how the Department may have treated other potentially similar chemicals used in a different area of the plant.

the floor drain covers, which prevent waste material from entering the plant's floor drain system, are integral and necessary to the plant. The floor drain system allows the Petitioner to recapture and recycle the water it uses in the plant in order to reduce its sewer outflow. Hr'g Tr. 98:8 – 18. Carter McEntire testified that "we consider[s] that a part of our process because we're recapturing that water. And it's important to recapture that water so we can reuse it to wash produce later . . . ." Hr'g Tr. 98:18-22. Mr. McEntire's testimony does not support a finding that the floor drain covers are used during processing. If tanks that store water prior to processing and pipes that move necessary water into a plant to be used in processing are taxable, it follows that items used to filter the water *after* processing are also taxable. Further, while recapturing water may be cost effective for the Petitioner, it is not necessary. The Petitioner could simply use "new" water. Thus, filtering water cannot be an essential and indispensable component part of processing produce. As such, the Court should amend its Final Order and hold the floor drain covers taxable.

IV. The Court should amend its Final Order because protective clothing are not machines and are not exempt under the Machine Exemption Regulation.

The Court incorrectly concluded that the protective clothing at issue in this case were machines.[10] As a threshold matter, in order to be exempt under the Machine Exemption or the Pollution Control Machine Exemption the protective clothing must be a machine. *See supra* section I.B. Regulation 117-302.5(B)(10) states that "**[p]rotective clothing** worn by an employee working in the area in which the manufacturing process occurs **does not qualify as a machine** and is not exempt from the tax as a machine used in manufacturing tangible personal property for sale under Section 12-36-2120(17)." (emphasis added). Thus, protective clothing can never be exempt as a machine used in processing or a pollution control machine because it is not a machine.

The Court distinguished the protective clothing in this case from the regulation by finding

[10]Protective Clothing includes Coveralls, Eyewear, Gloves, Aprons, and Hairnets.

that the clothing is "not used to protect the employee from hazards incurred during the manufacturing process." However, the regulation is not limited to protective clothing used to protect the employees. Rather, the regulation provides that protective clothing in general is taxable unless it falls under the clean room exemption. "The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein." *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1966). To get to the result reached by the Court here, one would have to go beyond the plain ordinary meaning of the words in the regulation and add language such that the regulation would read "clothing worn to **protect** an employee working in the area in which the manufacturing process occurs." Such a reading would violate the plain meaning rule and, thus, is improper. The Court should amend its Final Order and conclude that protective clothing are not machines and therefore cannot be exempt pursuant to the Machine Exemption or the Pollution Control Machine Exemption.

V. The Court should amend its Final Order because the Petitioner failed to meet its burden of proving the protective clothing are exempt pursuant to the Pollution Control Machine Exemption.

The Court incorrectly determined that the Petitioner proved its purchases of protective clothing were exempt pursuant to the Pollution Control Machine Exemption. Section 12-36-2120(17) provides an exemption from sales and use tax for machines parts and attachments that "are necessary to comply with the order of an agency of the United States or of this State for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section." S.C. Code Ann. Regs. 117-302.6 explains that a machine constitutes an exempt pollution control machine if such machine is "installed and operated for compliance with an order of an agency of the United States or of this state to prevent or abate pollution caused or threatened by the operation of other machines used in the . . .

manufacturing of tangible personal property." Accordingly, the Petitioner had to prove that (1) the operation of at least one of its machines used in processing causes or threatens to cause pollution of air, water, or noise, (2) a State or Federal agency requires that the pollution be prevented or abated, and (3) the machine for which an exemption is sought is installed and/or operated to prevent or abate the pollution caused or threatened to be caused by one of its machines used in processing.

The Court concluded that food contamination constitutes pollution of air and water because the bacteria that contaminates the food "could contaminate the air inside the facility and the water supply both at the plant and in the municipal water system and/or rivers." Assuming food contamination constitutes pollution of the air and/or water, that means the Petitioner only satisfied part of the first element.[11] The Petitioner failed to prove that any machine it uses in the performance of some mechanical or chemical operation on tangible personal property to be sold causes or threatens to cause pollution of the air or water. Thus, the Petitioner failed to meet its burden of proof.

The Court seemed to rely on the fact that cutting produce may release contaminates already present in the produce meant the cutting machine caused or threatened to cause pollution. If this

[11]The Department does not agree that food contamination constitutes pollution. While bacteria could become a pollutant, food poisoning, for example, is not pollution. Moreover, the Court's reliance on the definition of pollution as used in commercial insurance policies is misplaced. It is well-settled under South Carolina law that courts construe insurance contracts "against the party who prepares them and liberally in favor of the insured." *S.C. State Budget & Control Bd. v. Prince*, 304 S.C. 241, 245–246, 403 S.E.2d 643, 646 (1991). Exemption statutes, as previously stated, are to be construed strictly against the exemption. *See Carealliance Health Servs.*, 416 S.C. 484, 787 S.E.2d 475. Thus, the term pollution when used in an insurance contract must be liberally construed in favor if the insured while the same term when used in a tax exemption must be strictly construed against the exemption. Clearly these two rules of statutory construction conflict. Because a court will construe the term pollution more broadly in insurance cases, reliance on such cases when construing the term pollution in a tax exemption statute is misplaced.

were true, then any processing machine that could cut an employee causing him to bleed would arguably cause or threaten pollution of the air or water. Clearly, the legislature did not intend for the phrase "cause or threaten to cause" to be construed so broadly, especially since exemption statutes are to be strictly construed against the exemption. Rather, the Pollution Control Machine Exemption should be construed such that a processing machine has to create or result in pollution or threaten to do so. Here, the cutting machine (or any other processing machine) does not create or result in bacteria contaminating food. If the cutting machine releases contamination, that means the produce was already contaminated. Thus, the produce itself causes or threatens to cause contamination, not the machine. Further, the other sources of contamination, namely the employees, are not caused by the cutting machine, nor does the cutting machine threaten to cause such contamination—the employees cause or threaten to cause the contamination. Accordingly, because the Petitioner failed to prove that a processing machine causes or threatens to cause pollution of the air or water, the Court should amend its Final Order and hold that the Petitioner failed to prove protective clothing is exempt as a pollution control machine.

Assuming the Court finds that the Petitioner proved that a processing machine causes or threatens to cause pollution of the air or water, the Petitioner failed to prove that a State or Federal agency required that the pollution be prevented or abated. In its Final Order, the Court found that State and Federal regulations required the Petitioner to use protective clothing to prevent or abate pollution. While the Petitioner may be required to use protective clothing for food safety purposes, it does not require the Petitioner to prevent or abate *pollution of the air or water*. In fact, the regulations relied on by the Petitioner and cited in the Final Order are wholly unrelated to the prevention or abatement of air or water pollution. None of the regulations cited even mention air or water pollution. Rather, the regulations pertain to the prevention of food contamination. As

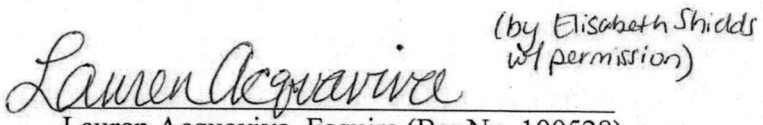
such, assuming a processing machine causes or threatens to cause air or water pollution, the Petitioner failed to prove that it is required by a State or Federal agency to prevent or abate air or water pollution. Accordingly, the Court should amend its Final Order and conclude that the Petitioner failed to meet its burden of proving that its purchases of protective clothing are exempt as Pollution Control Machines.

CONCLUSION

On the above grounds, the Department respectfully requests that this Court reconsider, alter, and/or amend its Final Order pursuant to ALC Rules 29(D) and 68 and Rule 59(e), SCRCP. Specifically, the Court should amend its Final Order to properly address all the elements required for an item to be exempt. First, the Court must determine whether each item at issue is a machine, which is a mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. If the Court concludes that any of the items are machines, the Court must then determine whether those items are used in the performance of some mechanical or chemical operation on tangible personal property to be sold. Finally, the Court must determine if any of the machines used in processing serve as an essential and indispensable component part of, are used on an ongoing and continuous basis during, and are substantially used in processing. Further, the Court must examine the items at issue in light of the Machine Exemption Regulation and the limited integrated plant theory established by the Regulation. Such an analysis will demonstrate that the evidence in the record does not support the conclusion that the items the Court found exempt from tax satisfy all the above-mentioned requirements. Thus, the Court should reconsider, alter, and/or amend its Final Order to find that the items at issue are subject to tax.

[Signature on following page]

Respectfully submitted,



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Attorneys for Respondent

Columbia, South Carolina
September 19, 2019

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

McEntire Produce, Inc.,	)	
	)	**Docket No. 17-ALJ-17-0060-CC**
Petitioner,	)	
	)	
vs.	)	**PROOF OF SERVICE**
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
	)	

I, the undersigned employee of the South Carolina Department of Revenue, Office of General Counsel, do hereby certify that I have served the Respondent's Notice of Motion and Motion for Reconsideration, and/or to Alter or Amend in connection with the above-captioned matter by causing a copy of the same to be deposited in the United States Mail on the below date, postage prepaid to the following parties at their address of record:

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Columbia, South Carolina
September 19, 2019

NEXSEN|PRUET

Jim Rourke, J.D., LL.M (Tax)
Member

November 13, 2018

VIA HAND DELIVERY
The Honorable H.W. Funderburk, Jr.
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: McEntire Produce, Inc. v. South Carolina Department of Revenue
Docket No. 17-ALJ-17-0060-CC

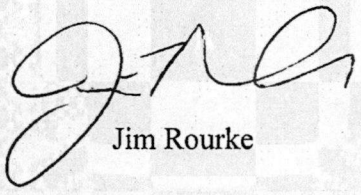
Dear Judge Funderburk:

In anticipation of tomorrow's scheduled hearing, enclosed please find Petitioner's Pre-Trial Brief in the above-referenced matter. Also enclosed is a Certificate of Service.

Please return a clocked copy to our courier.

Thank you for your attention to this matter.

Sincerely,



Jim Rourke

JR/mw

Enclosure – Petitioner's Pre-Trial Brief

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

McEntire Produce, Inc., Petitioner, vs. South Carolina Department of Revenue, Respondents.	Docket No.: 17-ALJ-0060-CC **PETITIONER'S PRETRIAL BRIEF**

I. INTRODUCTION

This case arises from a sales and use tax audit of Petitioner McEntire Produce, Inc. ("Petitioner" or "Taxpayer") by Respondent, the South Carolina Department of Revenue ("Department" or "Respondent"). After audit, Respondent issued a Proposed Assessment in the amount of $126,912.90 in sales and use tax.

As detailed below, many of the items at dispute in this audit relate to Petitioner's attempt to combat three potentially serious foodborne microbes – Listeria monocytogenes, E. coli and salmonella. The remainder relate to the machine exemption. (Petitioner is taxed as a manufacturer.) The microbes are described as follows:

- **Listeria monocytogenes** is a germ that can cause a serious infection called Listeriosis, which presents as flu-like symptoms. People usually become ill with listeriosis after eating contaminated food. The disease primarily affects pregnant women, newborns, older adults, and people with weakened immune systems. Approximately 80% of those with Listeriosis go into the hospital, and as many as 18% of those infected die.
- **Escherichia coli** (abbreviated as E. coli) are bacteria that can cause diarrhea, urinary tract infections, respiratory illness and pneumonia, and other illnesses. E. coli are

pathogenic, meaning they can cause illness, either diarrhea or illness outside of the intestinal tract. The types of E. coli that can cause diarrhea can be transmitted through contaminated water or food, or through contact with animals or persons.

- **Salmonella** is a bacteria that can cause diarrhea, fever, and abdominal cramps between 12 and 72 hours after infection. The illness usually lasts 4 to 7 days. In some cases, diarrhea may be so severe that the patient needs to be hospitalized. In these patients, the Salmonella infection may spread from the intestines to the blood stream, and then to other body sites. In these cases, Salmonella can cause death unless the person is treated promptly with antibiotics. The elderly, infants, and those with impaired immune systems are more likely to have a severe illness.

All descriptions derived from The Centers for Disease Control and Prevention website, available at www.cdc.gov.

All three microbes grow naturally in South Carolina and are present in farms across the country where Petitioner's produce is harvested. The germ and bacteria can breed in produce if the environment is conducive to that growth. Petitioner deals with these pollutants in two scenarios: (1) to prevent the spread of contaminants which are in produce delivered to its facilities; and (2) to prevent employees from introducing such illnesses into the facility from their own clothing and shoes.

In addition, as stated above, Petitioner is taxed and classified as a manufacturer. Petitioner believes the Department misapplied three manufacturer sales tax exemptions with respect to the audit. First, Petitioner believes the Department applied the machine exemption found in S.C. Code Ann. § 12-36-21210(17) too narrowly in light of the specialized, climate-controlled, and highly regulated nature of Petitioner's food produce processing operations. Second, Petitioner believes

the Department has failed to recognize the sales tax exemption available under § 12-36-2120(54) for the "clean room environment" Petitioner keeps in its production facility. Finally, Petitioner believes the pollution control exemption also found in 12-36-2120(17) must apply to purchases of the gear designed to ensure that Petitioner's operations do not spread harmful contaminants like E. coli, salmonella, and listeria onto both the finished product and facility outflow.

II. FACTS

The parties have entered into Stipulations of Fact, which are incorporated herein by reference. The following section provides an overview of Petitioner's operations, as well as a summary of the procedural history.

A. Petitioner's Operations

Petitioner operates in the specialized and highly-regulated arena of fresh food processing. During the periods at issue, Petitioner production primarily involved lettuce, onions, cabbage, tomatoes, and other vegetables.

Petitioner's "processing" includes receiving, storing, washing, cutting, mixing, and then packaging the produce at its facility. Petitioner will call several witnesses to describe its fresh food processing in depth. However, the following is provided in an effort to summarize the production process. This production process is critical to reduce or eliminate harmful contaminants because the ultimate customer who eats the fresh produce rarely takes any preventive steps such as microwaving or cooking the produce to the extent necessary to kill or eliminate the contaminants.

Petitioner's process begins prior to the raw agricultural commodity even entering the facility. Petitioner contracts with a grower to harvest the product when it is about 80-85 degrees, so the first step in the process it to pull the heat from the produce, so that the temperature of the

produce is reduced to below 40 degrees within no more than four hours from the time of harvest. This cooling step is essential to Petitioner's process because it slows the respiration rate of the produce, thereby slowing the natural chemical process of ripening in the fruit and/or vegetable. It also minimizes microbiological growth rate. If the produce is not cooled immediately, it risks turning brown, soggy, slimy, and inedible. Petitioner is required by state and federal regulation, as well as customer requirements to track the produce as soon as it is loaded into its climate-controlled trucks. Petitioner must be able to demonstrate that the temperature on those trucks was between 33 and 40 degrees. Petitioner's customers (primarily large restaurant chains) have extensive contractual requirements in this regard.

As soon as the product is unloaded, it enters one of six raw coolers, which also are controlled at 33-40 degrees. Soon thereafter, the produce goes through the Ready to Eat ("RTE") process, where it is sorted, physically inspected, trimmed by hand to remove imperfections or browning, and then conveyed to an industrial cutter that discharges into a flume for washing. Petitioner's flume is a stainless steel bath that utilizes a water-based product to rinse and sanitize the product. The produce is washed a number of times before it moves to the next step. After washing, the produce goes through a "de-watering" step, which is essentially an industrial-sized salad spinner. This process of washing and de-watering is done in an effort to remove any pollutants or contaminants, which were in the produce at the time of delivery to Petitioner.

The low care area is generally is reserved for whole produce, for example whole tomatoes, and involves their ripening, sorting, defect removal, and repackaging. The physical cutting of produce releases pollutants, which are present on the produce at the farm level, and allows them to grow, multiply and spread which is the reason for the high care area.

The high care area is reserved for produce that is cut down to a smaller size. In the high care area, employees are required by state and federal law to wear overshoes, boot covers, a sanitized smock, gloves, a bump cap, hairnets, beard covers, aprons, and other protective clothing (collectively, "protective clothing"). They also must go through a specialized sanitization procedure to limit the introduction of microbes to the high care area. The room is also positive-pressurized to ensure there is an outflow, as opposed to an inflow, of air. That pressurization, as well as filters used to filter the air down to 0.1 microns, help maintain the cleanliness of the environment. The overall purpose of these procedures are to protect the produce from human contact and microbial loads. This protective clothing is required by state and federal law to prevent employees from accidentally bringing pollutants (chiefly E. coli) from their clothing into the high care area.

In the high care area, the produce is de-watered in a centrifugal dryer and moved on a conveyor belt to a scale, weighed and bagged, and then boxed and labeled for shipping. In the area, Petitioner is required by state and federal law and customer contractual requirements to meet exacting cleanliness standards to ensure the finished product is both free from harmful microbial growth and meets the stringent standards of its many customers. Once bagged, boxed, and labeled, the produce is stored for an extremely short period of time in a refrigerated cooler, given the fresh nature of its cut produce, and is then shipped on climate-controlled trucks to its customers. Petitioner's customers are primarily large restaurant chains who put the fresh produce on salad bars and into hamburgers, sandwiches, etc. without any additional processing for health purposes. Petitioner's customers also can track the extent to which the produce was kept in a climate-controlled area. For example, if the produce is stored for a period of time above 40 degrees, then the customer can simply reject shipment. Further, to the extent the Food and Drug Administration

(or a customer) on audit determined that the produce spent a period of time outside the temperature "safe zone," Petitioner could be subject to reprimand, fines, or even plant closure, based on the severity of the violation. This means temperature and environmental controls permeate the entire production process, from the time the produce is delivered from the farm until the finished product leaves Petitioner's facility.

As stated below, this production process is designed to prevent foodborne illnesses. Some of the worst outbreaks of such illnesses have occurred in the past few years.

B. Procedural History

After audit, the Department issued its Proposed Assessment on July 19, 2016 (Petitioner's Exhibit 21). Petitioner first appealed the Proposed Assessment with a letter from its accountant on July 26, 2016 (Petitioner's Exhibit 22). Counsel for Petitioner supplemented that protest with a position statement dated September 23, 2016 (Petitioner's Exhibit 23). After review, the Department issued its Department Determination, which the Petitioner received on February 7, 2017 (Petitioner's Exhibit 24). The Petitioner timely appealed the Determination to this Court on March 27, 2017 (Petitioner's Exhibit 25).

III. LAW

As described above, Petitioner believes the Department misapplied three sales tax exemptions applicable to manufacturers in its audit.

A. Machine Exemption (12-36-2120(17))

1. All machines used within the temperature-controlled portion of the facility are exempt as machines used in the manufacturing process.

S.C. Code Ann. § 12-36-2120(17) exempts from sales tax the sale of "machines used in manufacturing, *processing, agricultural packaging*, recycling, compounding, mining, or quarrying tangible personal property for sale" (emphasis added). "Machines," according to the

exemption, "include the parts of machines, attachments, and replacements used, or manufactured for use, on or in the operation of the machines and which ... are necessary to the operation of the machines and are customarily so used."

The definition of "agricultural packaging" is found in § 12-6-3360, which provides a jobs tax credit for manufacturers and agricultural packagers meeting certain requirements. Section 12-6-3360(M)(16) defines "agricultural packaging" as

> the technology of enclosing or protecting or preserving agricultural products for distribution, storage, sale, and use. Packaging also refers to the process of design, evaluation, and production of packages used for agricultural products. Packaging can be described as a *coordinated system of preparing agricultural goods for transport, warehousing, logistics, sale, and end use*." (emphasis added).

Here the statute clearly envisions a more expansive concept of "agricultural packaging," to include the transportation and warehousing both before and after the literal packaging. This definition surely would include the receipt of raw produce and placement of the produce on cooling racks, as well as the offloading of the finished packaging to storage and ultimate delivery to customers.

The regulations defining "machine" greatly expand the definition beyond traditional notions of the term. For example, S.C. Code Ann. Regs. 117-302 provides that *patterns* for machinery parts and *chemicals* used in the manufacturing process qualify for the Machine Exemption. S.C. Code Ann. Regs. 117-302 (2013). This definition also includes *attachments* to machines. South Carolina Tax Commission, SC Technical Advice Memorandum #94-3 (Tax) (1994). Further, in Rev. Rul. 13-3, the Department found that even the component parts used to construct a manufacturing machine qualified as a "machine" for purposes of the exemption. Additionally, in *Hercules Contractors & Engineers, Inc. v. S.C. Tax Commission*, the Court of Appeals held that even connected ladders and walkways could qualify as a "machine." 280 S.C. 426, 313 S.E.2d 300 (Ct. App. 1984).

So while the definition of a "machine" is exceptionally broad, the key becomes whether the purchases are "*integral and necessary* to the manufacturing process," such that "the product being manufactured is being manufactured 'for sale'" (emphasis added). S.C. Regs. 117-302.5 provides a three-part test to determine whether a machine is "integral and necessary" to the manufacturing process:

> (1) The machine is used at a manufacturing facility. . . . It does not apply to machines used at a facility whose purpose is retailing, wholesaling, distributing, or some other non-manufacturing purposes.
> (2) The machine is used in, and serves as an essential and indispensable component part of the manufacturing process, and is used on an ongoing and continuous basis during the manufacturing process. A machine is not part of the manufacturing process merely because it is integral and necessary to the manufacturer.
> (3) The machine must be substantially "used in manufacturing . . . tangible personal property for sale." The statute does not required that the machine be used exclusively for manufacturing; however, incidental manufacturing use will not qualify for the exemption. For purposes of the exemption, more than one-third of a machine's use in manufacturing is substantial.

S.C. Regs. § 117.302.5(B)(1). Importantly, the machine exemption applies so long as 1/3 of the machine's use is devoted to manufacturing purposes. This means that a piece of machinery like a forklift can serve many purposes within a manufacturing facility and still be eligible for the exemption, so long as the taxpayer can establish that 1/3 of its use is for manufacturing.

Generally, states follow one of two distinct lines of authority when determining what qualifies as machinery used in manufacturing: (1) the Integrated Plant Concept or (2) the "Ohio Rule". *See generally* Hellerstein, State Taxation, at § 14.05. The more restrictive Ohio Rule defines "manufacturing" as "essentially a transformation or conversion of material or things into a different state or form from that in which they originally existed." *Nat'l Tube Co. v. Glander*, 105 N.E.2d 648, 650 (Ohio 1952). Only those assets which physically transform raw materials during the manufacturing process into a different form are eligible for the exemption. In other

words, "the test is not whether the property is essential to the operation of the plant but whether it is an actual part of the process of manufacture." *Hawes v. Custom Canners, Inc.*, 173 S.E.2d 40 (Ga. Ct. App. 1970).

On the other hand, the Integrated Plant Concept is far less restrictive. As the name implies, machinery shall be eligible for the exemption if it performs an essential or indispensable function in the taxpayer's manufacturing operations, regardless of whether it actually causes a physical change. This test is derived from *Niagara Mohawk Power Corp. v. Wanamaker*, 286 A.D. 446 (N.Y. 1955). In finding that now material handling equipment including both coal handling and ash disposal equipment fell within the exemption (including the cranes and car dumper that unloaded incoming coal; conveyor belts that moved the coal to the boiler; crushers and sprayers that processed the coal; and slag lines that carried ash from the boiler), the *Niagara* court determined the relevant questions to be:

> (1) Is the disputed item necessary to production?
> (2) How close, physically and causally, is the disputed item to the finished product?
> (3) Does the disputed item operate harmoniously with the admittedly exempt machinery to make an integrated and synchronized system?

The court found that the crane and car dumper were as essential to production as the generator itself, since a serious breakdown in operation would quickly stop or impair the output of electricity. The court also noted that while some structures may not play as active a role as other parts, "activity is not the test of directness." Instead, "[t]he important thing is that all parts of the plant contribute, continuously and vitally, to production, and they are all integrated and harmonized."

In *Spring Industries, Inc. v. Department of Revenue*, 99-ALJ-17-0153-CC (1999) Chief Judge Kittrell acknowledged that Professor Walter Hellerstein, author of the above-cited treatise on state taxation, testified that South Carolina is classified as an "integrated plant theory state." In

an unpublished opinion, the court of appeals affirmed the finding. It noted that although the Department urged the court to "interpret the term 'machines used in manufacturing' to include only items that are part of a production line," this position was "inconsistent with the result in [*Hercules Contractors and Engineers, Inc. v. South Carolina Tax Commission*, 280 S.C. 426, 313 S.E.2d 300 (1984)] and the language in [§ 12-36-2120(17)] that only requires a machine to be 'used in manufacturing,' rather than 'used directly in manufacturing,' as the [Department] suggests." *S.C. Dep't of Rev. v. Springs Indus., Inc.*, 2003-UP-029 (Ct. App. 2003). Thus, South Carolina law provides that so long as the equipment in question performs an essential function in the taxpayer's manufacturing operations, it will qualify for the machine exemption to the sales tax. To reiterate: In *Hercules*, even purchases of ladders, walkways, and scaffolding were found to be exempt from sales tax under this machine exemption.

The DOR audit holds that the machinery and equipment used to move the fresh produce into the manufacturing process were not exempt. There is no dispute that the machinery used in the cutting and processing was exempt.

In this case, given Petitioner's highly regulated business as a fresh food processor, the tools and equipment used immediately before and after the actual processing of the fresh produce is absolutely integral to the overall processing/manufacturing process, as well as the health and safety functions. Without the process that occurs in these climate-controlled areas, it would seriously impair the ability of the taxpayer to efficiently and safely prepare a finished product for sale and distribution. The refrigeration itself, as well as the tools and equipment used therein, contributes, both "continuously and vitally, to production" and the assembly line production is surely "integrated and harmonized," as described in the Integrated Plant concept above.

Moreover, federal guidelines mandate all aspects of the refrigeration. According to Section VIII, Part C, Item 3, of the Food and Drug Administration's Guide to Minimize Microbial Food Safety Hazards of Fresh-cut Fruits and Vegetables (provided as an attachment to Petitioner's Exhibit 23), fresh–cut produce is recommended to be stored in areas with a temperature of less than or equal to 41 degrees Fahrenheit. The Food Safety Modernization Act of 2011, Section 117.93, provides even further and mandates that any "Storage and transportation of food must be under conditions that will protect against allergen cross-contact and against biological, chemical (including radiological), and physical contamination of food, as well as against deterioration of the food and the container". Additionally, 21 C.F.R. § 110.80(b) provides:

> (b) Manufacturing operations. (1) Equipment and utensils and finished food containers shall be maintained in an acceptable condition through appropriate cleaning and sanitizing, as necessary. Insofar as necessary, equipment shall be taken apart for thorough cleaning.
>
> (2) *All food manufacturing, including packaging and storage, shall be conducted under such conditions and controls as are necessary to minimize the potential for the growth of microorganisms*, or for the contamination of food. One way to comply with this requirement is careful monitoring of physical factors such as time, temperature, humidity, aw, pH, pressure, flow rate, and manufacturing operations such as freezing, dehydration, heat processing, acidification, and refrigeration to ensure that mechanical breakdowns, time delays, temperature fluctuations, and other factors do not contribute to the decomposition or contamination of food.
>
> (3) Food that can support the rapid growth of undesirable microorganisms, particularly those of public health significance, shall be held in a manner that prevents the food from becoming adulterated within the meaning of the act. Compliance with this requirement may be accomplished by any effective means, including:
>
> > (i) Maintaining refrigerated foods at 45 deg. F (7.2 deg. C) or below as appropriate for the particular food involved. (Emp added.).

Since keeping the temperature of this product at or below 41 degrees must be done to prevent contamination of our product, and must be stored (by Congressional Act) in certain areas of plant to prevent cross-contamination (storage racks are the only viable option) then it is considered continuous, on-going and integral to the manufacturing process and therefore exempt. Even once the product is loaded onto our trucks, the 41 degree requirement must be met until it is ready to be sold inside a restaurant. Temperature recorders are required for refrigerated trucks to ensure that the product never went above this requirement at any time while in transit. In addition to federal law, customer contractual requirements are equally as stringent.

Based on the foregoing, Petitioner believes the Department improperly limited the exemption to only those items used in the cutting process. The highly specialized and highly-regulated nature of the food processing industry mandates a more expansive view of the manufacturing process to include activities both before and after the literal processing of the produce. Purchases of these items should be exempt from tax under the Machine Exemption (§ 12-36-2120(17)) using the integrated plant theory, which has been adopted by the South Carolina Court of Appeals.

Stated another way: what might be considered material handling equipment for Duke or Nucor is actually part of Petitioner's manufacturing process, as Duke has no requirement to protect coal, natural gas or water and Nucor has no duty to protect new steel ingots or other new materials, whereas Petitioner is under strict state, federal and contractual provisions to safely handle and protect its new ingredients both prior to and after the actual cutting.

2. Specifically, hairnets, gloves, aprons, towels, and other items related to maintaining the physical environment of the processing areas also are Exempt under the Machine Exemption

At first blush, protective clothing does not seem to fit the definition of machinery and equipment (any more than the ladders, walkways, and scaffolding in the *Hercules* case). The Department itself acknowledges, however, that protective clothing fits within the machinery and equipment ambit. The Department's published guidance provides that "[p]rotective clothing worn by an employee working in the area in which the manufacturing process occurs does not qualify as a machine and is not exempt from the tax as a machine used in manufacturing tangible personal property for sale under Section 12-36-2120(17)." However, that guidance is intended to apply to protect the worker's own clothing from dirt, paint, oils, etc. which are given off in the manufacturing process. On the other hand, the clothing worn by Petitioner's workers serves a substantively different purpose. Petitioner's gear protects *the produce* from the worker. The gear puts a barrier between the end product – the chopped vegetable – and the workers entering the high care area. The gear is absolutely vital and is thus required by state and federal law to maintain the physical environment necessary to produce Petitioner's finished produce in a safe and unadulterated manner. The gear creates a physical barrier that maintains the integrity and purity of Petitioner's manufacturing process, and thus as described above, must be considered an integral part of that process.

3. The remaining purchases at issue are exempt from tax under the Machine Exemption

Representatives of the Petitioner will testify regarding the remaining purchases at issue in this case. The following summarizes the remaining purchases at issue, along with a brief description placing the purchase within the manufacturing process. The reference numbers relate the Department's work papers found in Petitioner's Exhibit 27.

(1) **Bar Code Scanner (Ref. # 526).** These scanners are used to track all produce through the manufacturing process. Per Petitioner's procedures and to comply with federal guidelines, the produce is scanned (1) when the produce exits the truck; (2) when it enters the cutting area; (3) when it leaves the cutting area; and (4) when the finished goods enters the truck.

(2) **Forklift and Forklift Batteries (Ref. # 1100, 15839, 16012, 16670, 16743, 15744, 16725, 16817).** Forklifts are used through the cutting process to move 800 lbs. to 1,600 lbs. bags of raw produce onto the conveyor belt at the beginning of the cutting area. While some of these forklifts are used temporarily in other areas of Petitioner's operations, at least 1/3 of the use is related to moving produce to the cutting area.

(3) **Racks (Ref. # 399).** These racks are specially designed to assist in cooling and maintaining the temperature of the raw produce and finished product. Pallets cannot be stacked on top of each other due to cooling limitations of the produce. The racks are galvanized, to withstand the cold, wet, and humid area.

(4) **Cut Wheels, Discs and Nylon Slings (Ref. # 743/1135).** Cutting wheels are used on Petitioner's hand angle grinders to cut stainless steel materials for either fabrication or removing equipment. They wear out as metal is cut, so must be replaced frequently. Nylon slings are straps used to secure equipment to forklifts to either raise or otherwise relocate product and some machinery from one area to another.

(5) **Pallet Flow Brakes (Ref. # 11126 and 11334).** These brakes are used on the racks, which hold thousands of pounds of raw produce and finished product. The racks are potentially dangerous without the brakes.

(6) **Water Tanks (Ref. # 11158).** The water tanks are part of the produce wash process, which occurs in the middle of the cutting process. The tanks are part of a self-contained wash process.

(7) **Generator Rentals for Fruit Ripening Purposes (Ref. # 1442).** During the audit period, Petitioner rented generators to power machines used to ripen the tomatoes to a color acceptable to its customers.

(8) **Hand Trucks and Pallet Jacks, and Oil Lubricants Used Therein (Ref. # 16893 and 17833).** The majority of the use of the hand trucks and pallet jacks are to move sliced tomatoes and sack onions from the cold storage area to the high care in-feed line for the cutting process.

(9) **Black Ink for Aerosol Cans (Ref. # 16808).** The ink is used in the ink jet printers which print "Sell By" dates on the finished produce packaging.

(10) **Floor Drain Covers (Ref. # 20502).** Stainless steel floor drain covers are used in the high care area and serve as both a filter and drain. Petitioner utilizes these higher-quality drains in its recycling of the wash water. These drains were selected because material previously was entering the closed wash water system, causing adulteration of the water.

(11) **Refrigerator for Shelf Life Processing (Ref. # 18740).** The refrigerator is used for research and development. Petitioner would test its produce to failure to better understand shelf life limitations.

(12) **Plastic Shelves Used in the Lab/Retained Sample Room (Ref. # 18705).** Petitioner holds back at least one bag of each production run and places it on the plastic shelves of the refrigerated area. In the event a customer claimed their product did not last, Petitioner utilized the withheld produce as a control.

(13) **Floor Treatment Chemicals, Brooms, Squeegees, Cleaning Machines (Ref. # 19235).** The floor treatment chemicals inhibits growth of dangerous microbes, and the brooms and squeegees are used specifically in those areas to inhibit such growth. Respondent agreed 70% of the floor treatment chemicals and other products were used in the manufacturing process, but

agreed 30% was not. Petitioner will establish that the vast majority of the floor treatment chemicals, brooms, and squeegees were used in the manufacturing process.

B. Protective Clothing for Class 100 Facility (12-26-2120(54))

The Proposed Assessment also assessed use tax on hairnets, gloves, aprons, towels, and other items related to maintaining the physical environment of the processing areas. The taxpayer believes these purchases should be exempt from tax based on the pollution control exemption as well as the Class 100 facility exemption discussed below.

S.C. Code Ann. § 12-36-2120(54) exempts from sales tax "clothing and other attire required for working in a Class 100 or better as defined in Federal Standard 209E clean room *environment*." (emphasis added.) Note that the exemption specifically includes the term "environment". In other words, the exemption does not expressly track the Federal Standard 209E, which uses the term "cleanroom." Therefore, we believe the intent of the statute is to provide a more expansive exemption for environments which have qualities of the Federal Standard 209E, but may not necessarily be designated as a Federal Standard 209E "cleanroom." The parties agree that Federal Standard 209E was cancelled in 2001 (see Notice of Cancellation filed by U.S. General Services Administration (GSA) enclosed as part of Petitioner's Exhibit 23), and ISO 14644-1 was adopted in its place.

"Class 100" describes the number and size of particles permitted per volume of air in "cleanroom" environments. Class 100 under Federal Standard 209E, which is equivalent to ISO 5, permits 100 particles of 0.5 microns or greater per cubic foot. As described in Section VII, Part B, Item 3 (provided as an attachment to Petitioner's Exhibit 23), the FDA recommends filtering compressed air that comes into contact with produce to be 0.3 microns. Thus, a fresh food producer

like the Petitioner would meet the Class 100 standard when it satisfies the FDA-recommended filtration level.

ISO industry specialists reference providers of clothing and other supplies which are required to ensure ISO integrity and compliance. According to Jan Eudy[1] of Controlled Environments Magazine, the following chart is illustrative of the garment configurations for each ISO class of air cleanliness.

Garment system configurations for different classes of air cleanliness

Apparel Type	Air Cleanliness Classes of ISO 14644-1:1999[1]							
	ISO Class 8	ISO Class 7	ISO Class 6	ISO Class 5	ISO Class 5 Aseptic	ISO Class 4	ISO Class 3	ISO Class 1, ISO Class 2
Inner Suit	AS	AS	AS	R	AS	R	R	R
Hair Cover (Bouffant)	R	R	R	R	R	R	R	AS
Woven Gloves	AS	AS	AS	AS	NR	NR	NR	NR
Barrier Gloves	AS	AS	AS	AS	R	R	R	R
Facial Cover	AS	AS	AS	R	R	R	R	AS
Hood	AS	AS	AS	R	R	R	R	AS
Powered Headgear	AS	AS	AS	AS	AS	AS	AS	R
Frock	R	R	AS	AS	NR	NR	NR	NR
Coverall	AS	AS	R	R	R	R	R	R
Two-Piece Suit	AS	AS	AS	AS	NR	NR	NR	NR
Shoe Cover	R	R	AS	AS	NR	NR	NR	NR
Boot	AS	AS	R	R	R	R	R	R
Special Footwear	AS	AS	AS	AS	AS	AS	AS	AS
Suggested Frequency of Change[2]	2x/week	2x/week	3x/week	1x/day	Per Entry	Per Entry	Per Entry	Per Entry

[1] For correlation of ISO air cleanliness classes to the former FED-STD-209 classes, refer to Table 1 in this document.
[2] Consideration should be given to the effects of seasonal conditions in some geographical areas. Note that the suggestions made are not based on scientific data but instead reflect the collective experience offered by the working group. Individual requirements for change frequency should be determined on a case-by-case basis.
R = Recommended
NR = Not Recommended
AS = Application Specific

[2]

Table 1: IEST-RP-CC003 gowning configurations chart.

[1] *See* https://www.cemag.us/article/2015/04/professional-profile-jan-eudy

[2] Jan Eudy, *Cleanroom Garment Selection*, CONTROLLED ENVIRONMENTS (Apr. 14, 2014), https://www.cemag.us/article/2014/04/cleanroom-garment-selection. *See also* BERNER INTERNATIONAL, https://www.berner-safety.de/recommended_cleanroom_clothing_per_cleanroom_classes_en_1415.html (last visited November 12, 2018).

Under Class 5 of ISO (formerly FS209E), this chart specifically demonstrates that there is no garment configuration which is "NR," (not required). All of the protective clothing at issue in this audit is either required (R) or application specific (AS). As stated below, federal health and safety law requires all of the protective clothing at issue in this audit, and is thus Application Specific. (emphasis added).

Although the FDA-recommended environment should be filtered to 0.3 microns, the taxpayer filters its air to 0.1 microns. BRC Global Standards, an industry-leading safety and quality certification program, conducts an annual audit regarding the quality, safety and operational manufacturing standards. From its 2015 annual audit (Petitioner's Exhibit 11), BRC Global Standards concluded that the taxpayer's "[c]ompressed air used directly in contact with the product contact surfaces is filtered by a series of two filters (first filter 1 micron, second filter 0.1 micron)." This means any compressed air used by the taxpayer meets, and in fact exceeds, the "Class 100 or better" recommendation described by the exemption. The taxpayer's fresh-cut produce is handled in an environment that is applicable to a Class 100 environment, and thus all protective clothing used in that environment should be exempt under § 12-36-2120(54). Taxpayer cannot achieve the required airborne particulate requirement cleanliness as required by ISO 14644-1 (formerly FS209E) without the use of protective safety attire as discussed herein. For the above mentioned reasons, Taxpayer's clean room meets the definition of a "Class 100 or better" clean room as required under S.C. Code Ann. § 12-36-2120(54). Taxpayer is entitled to a sales tax emption on the clothing or other supplies used in conjunction with its clean room.

C. Pollution Control Exemption (§ 12-36-2120(17))

Finally, to the extent the protective clothing is not exempt under the Class 100 exemption described above, the purchases deemed taxable in the Proposed Assessment are exempt under the

Pollution Control Exemption provided in § 12-36-2120(17), which exempts machines "necessary to comply with the order of an agency of the United States or of this State for the *prevention or abatement of pollution* of air, water, or noise that is *caused or threatened by any machine used* as provided in this section." The following summarizes the applicable requirements.

1. Purchases at issue prevent or abates pollution "caused or threatened by" machines used in the manufacturing process

i. E. Coli, Salmonella, and Listeria are all "pollution."

The Department Determination states that food contamination and diseases are not "pollution." Section 12-36-2120(17) does not define the word "pollution." Pollution is defined by Black's Law Dictionary as, "[t]he presence of *harmful substances* (*either physical or gaseous*), noise or energy (radiation) within a certain area, that *causes harm* to the surroundings, altering the natural environment around which it has been excreted."[3] Other dictionary definitions are similar. For example, Wikipedia defines "pollution" as "the introduction of *contaminants* into the natural environment that cause adverse change." Wikipedia, *https://en.wikipedia.org/wiki/Pollution* (last visited November 12, 2018) (emphasis added). Dictionary.com defines "pollution" as "1. the act of polluting or the state of being polluted, 2. the introduction of *harmful substances* or *products* into the environment." http://www.dictionary.com/browse/pollution (last visited November 12, 2018) (emphasis added).

When determining the "pollution" Petitioner is controlling in this case, it is important to consider not only the harmful microbe at issue (i.e., Listeria, E. coli, salmonella), but also the host/carrier of those microbes. These microbes are typically transmitted through human and animal feces. This means the microbes are being transported when fecal matter lands on or around the produce, and then travels on the produce to the processing facility. All of Petitioner's control

[3] Black's Law Dictionary, https://thelawdictionary.org/pollution/ (last visited May 29, 2018) (emphasis added).

efforts are focused on the prevention or abatement of fecal pollution into the water or air. The Environmental Protection Agency recognizes the significant threat of fecal pollution:

> *Fecal pollution of water from a health point of view is the contamination of water with disease-causing organisms (pathogens) that may inhabit the gastrointestinal tract of mammals, but with particular attention to human fecal sources as the most relevant source of human illnesses globally.* Ingestion of water contaminated with feces is responsible for a variety of diseases important to humans via what is known as the fecal-oral route of transmission. Food, air, soil, and all types of surfaces can also be important in the transmission of fecal pathogens, and thereby implicated in disease outbreaks. Most fecal microorganisms, however, are not pathogenic. Indeed, some are considered beneficial to the host as they can outcompete pathogens for space and nutrients, complement the biochemical potential of the host's gastrointestinal tract, and help in the development of the host immune system. Nonetheless, animal feces can also carry a number of important frank and opportunistic pathogens, capable of inflicting debilitating illnesses and, in some cases, death. In 1998, it was estimated that 2.2 million deaths were associated with diarrhea each year, a good percentage of them due to fecal pollution of water, with the vast majority of victims being children in poor countries (WHO, 2000). This should not be a surprise as it has been estimated that more than 1 billion people worldwide lack access to safe drinking water, and more than 2 billion lack sanitation. Sadly, very little progress has been made in the last 20 years to ameliorate these problems, particularly due to the rapidly increasing global population. *On the contrary, problems associated with fecal pollution of water are likely to worsen in coming decades*, as more people are moving to coastal areas, most people now live in urban centers, many of which have out of control growth rates, and demands for animal meat products are increasing due to current trends in dietary regimes. *Considering that per capita water availability and quantity are diminishing worldwide, it is reasonable to assume that fecal pollution of water is one of the most important and difficult challenges for future generations.*

Santo-Domingo, J.W. and N. Ashbolt, Fecal Pollution of Water, extract available at https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=196784 (emphasis added).

Moreover, there is a large amount of case law throughout the United States which categorizes contamination of food as a pollutant with respect to a commercial insurance policy

where the term "pollutant" is specifically defined in the *exclusion section* of such policies. The Court of Appeals of Wisconsin held that the term " 'contaminants' as used in [the] pollution exclusion of [a] commercial property insurance policy, included bacteria, and thus the insurance policy excluded coverage *for any losses resulting from bacterial outbreak at insured's food processing facility.*" *Landshire Fast Foods of Milwaukee, Inc. v. Employers Mut. Cas. Co.*, 269 Wis.2d 775, 783, 676 N.W.2d 528, 532 (Ct. App. 2004) (emphasis added). In this case, Landshire, a food preparer, delivered sandwiches containing listeria to its client, Great Lakes Naval Training Station commissary. *Id.* At 778, 676 N.W.2d at 529. Once the contamination was discovered, Great Lakes returned all of the contaminated food to Landshire. *Id.* Landshire determined that the food contamination occurred on a meat slicer at their facility. *Id.* At 779, 676 N.W.2d at 529. After this contaminated food incident, Landshire "submitted claims for loss of income, loss of product, sanitizing expenses, and costs related to investigating the source of the bacteria" to their insurance company. *Id.* At 779, 676 N.W.2d at 530. Landshire's insurance policy contained what is commonly referred to as a pollution exclusion. *Id.* At 782, 676 N.W.2d at 531. Landshire's insurance policy specifically stated, "[w]e will *not pay for loss or damage* caused directly or indirectly by any of the following . . . Discharge, dispersal, seepage, migration, release or escape of '**pollutants**' unless the discharge, dispersal, seepage, migration, release or escape is itself caused by . . . .". *Id* (emphasis added). Furthermore, the policy defined pollutants as " 'any solid, liquid, gaseous or thermal irritant or **contaminant**, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id* (emphasis added). The parties in this case disputed the actual scope of the term "contaminant," and specifically whether listeria was a "contaminant." *Id.* at 782-83, 676 N.W.2d at 531. To answer this question, the court looked to *Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.*, which held that:

> [C]ontamination 'connotes a condition of impurity resulting from mixture or contact with a foreign substance,' that that it means 'to make inferior or impure by mixture; and impairment of impurity; loss of purity resulting from mixture or contact,' a definition the court found consistent with common understand and WEBSTERS NEW INTERNATIONAL DICTIONARY. . . .

201 Wis.2d 161,169-70, 548 N.W.2d 127, 169 (Ct. App. 1996) (quoting *American Casualty Co. of Reading, P.A. v. Myrick*, 304 F.2d 179, 183 (5th Cir. 1962)) (emphasis in original). The court ultimately held that the term "contaminant" in an insurance contract such as the one in dispute in the case is not susceptible to multiple interpretations. *Landshire,* 269 Wis.2d at 785, 676 N.W.2d at 533. Therefore, the food contamination caused by listeria was a pollutant and was thus excludable from an insurance claim by Landshire. *Id.*

South Carolina case law is nearly identical to the states discussed above. For example, in *Helena Chemical Co. v. Allianz Underwriters Ins. Co.*, the Supreme Court of South Carolina held that the pollution exclusion in the plaintiff's policy barred its claims. 357 S.C. 631, 641, 594 S.E.2d 455, 460 (2004). In *Helena*, the Court noted that almost all insurance policies contain an identical pollution exclusion policy. *Id.* The Court went on to state that "pollution arising from ordinary business operations is not covered. *But* if the damage were caused by a 'sudden and accidental' discharge, release, or escape of pollutants, *then the insurers must provide coverage*." *Id* (emphasis added). Because the Court held that "the *contamination* at the various sites was caused by Helena's routine business operations and was, therefore, not unexpected and accidental," plaintiff fell under the pollution exclusion. *Id.* at 642, 594 S.E.2d at 460.

Here, with Taxpayer's case, even though S.C. Code Ann. § 12-36-2120 *does not* contain a definition of "pollutant," insurance policies throughout the entire country repeatedly and continuously consider contaminants such as bacteria on foods to be a "pollutant" due to its "contaminating" nature. *See also Nova Cas. Co. v. Waserstein*, 424 F.Supp 1325, 1334 (S. D. Fla.

2006) (holding that "living organisms," "microbial populations," "airborne and microbial contaminants," and "indoor allergens" are contaminants and are excluded from coverage under the insurance policies pollution exclusion). Therefore, the use of such safety attire as referred to throughout this memorandum protects against pollution through the contamination of food.

Taxpayer's primary reason for using such safety attire is to prevent an outbreak of a foodborne illness. An example of the type of outbreak for which Taxpayer is trying to prevent can be illustrated by a recent multi-state outbreak of Listeriosis in packaged salads manufactured by Dole at a processing facility in Springfield, Ohio[4] (The Taxpayer in this matter packages salads). In this Springfield, Ohio outbreak, "[e]pidemiologic and laboratory evidence indicated that packaged salads produced at the Dole processing facility in Springfield, Ohio. . .were the likely source of this outbreak."[5] According to the FDA, "[their] inspection report. . .showed that Dole's tests of surfaces at the plant came back *positive* for Listeria on *nine* separate occasions in 2014 and 2015."[6] This outbreak of Listeria led to the hospitalization of twelve individuals, as well as one *death*.[7] In another instance, "a family-owned farm in Colorado [Jensen Farms] became the focal point of the largest foodborne illness outbreak in the US in 25 years."[8] This outbreak, which was caused by Listeria in cantaloupe, "sickened 146 people in 28 states, killed 30 and caused one pregnant woman to miscarry, according to the Centers for Disease Control and Prevention (CDC)."[9] The Food and Drug Administration determined that this entire outbreak could have been

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[4] Centers for Disease Control and Prevention, https://www.cdc.gov/listeria/outbreaks/bagged-salads-01-16/index.html (last visited May 30, 2018).
[5] *Id.*
[6] NBC News, https://www.nbcnews.com/business/business-news/dole-under-federal-investigation-after-deadly-listeria-outbreak-n565196 (last visited May 30, 2018) (emphasis added).
[7] Reuters, https://www.reuters.com/article/us-usa-listeria-dole/listeria-contaminated-salad-from-dole-food-kills-one-cdc-idUSKCN0V02CE (last visited May 30, 2018) (emphasis added).
[8] Chris Wiant, *The Jensen Farms Cantaloupe Outbreak: How to Avoid Repeating A Tragedy*, Water Quality & Health Council (Jan. 20, 2012), https://waterandhealth.org/disinfect/food_safety/jensen-farms-cantaloupe-outbreak-avoid-repeating-tragedy/.
[9] *Id.*

prevented if "Jensen Farms had *maintained its facilities in accordance with existing [then] voluntary FDA guidance."*[10] (FDA rules are no longer voluntary.) Outbreaks of foodborne illness are extremely deadly to individuals of all ages. Preventing pollution from leaching onto/attaching to the food product at Taxpayer's facility is of the utmost importance.

In the food processing industry, there are three primary foodborne illnesses which cause a majority of sickness and death to consumers: 1. Listeria Monocytogenes, 2. E. coli O157:H7, and 3. Salmonella. According to the CDC, "[l]isteriosis is a serious infection caused by the germ *Listeria Monocytogenes."*[11] The CDC has a webpage specifically dedicated to "Selected Multistate Outbreaks" where the CDC was the lead public health agency.[12] In Taxpayer's industry, E. coli O157:H7 is most commonly transmitted via the transfer of feces.[13] In addition to required hand washing and cleanliness, safety attire such as gloves and shoe/foot covers severely minimize the transfer of such a pollutant from employees to Taxpayer's produce. Lastly, with respect to Salmonella, such dangers of contamination are similar to E. coli O157:H7 (transfer of human or animal feces). The safety attire purchased and used by Taxpayer prevents the pollution of produce at is facility and is a primary reason for Taxpayer's strong food safety record.

Since Taxpayer has demonstrated that the safety attire protects against "pollution," it must also establish that the pollution for which it protects against consists of air, water, or noise. According to the World Health Organization:

> Foodborne illnesses are usually infectious or toxic in nature and caused by bacteria, viruses, parasites or chemical substances entering the body through *contaminated food* or water.

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[10] *Id* (emphasis added). Furthermore, note that this FDA Guidance is no longer voluntary, *see* 21 C.F.R. § 117.
[11] Centers for Disease Control and Prevention, https://www.cdc.gov/listeria/faq.html (last visited May 30, 2018) (emphasis in original).
[12] *See* Centers for Disease Control and Prevention, https://www.cdc.gov/listeria/outbreaks/index.html (last visited May 30, 2018).
[13] *See also* Foodsafety.gov, *https://www.foodsafety.gov/poisoning/causes/bacteriaviruses/ecoli/index.html (last visited May 30, 2018).*

> *Foodborne pathogens* can cause severe diarrhoea [sic] or debilitating infections including meningitis.
>
> Chemical contamination can lead to acute poisoning or long-term diseases, such as cancer. Foodborne diseases may lead to long-lasting disability and death. Examples of unsafe food include uncooked foods of animal origin, *fruits and vegetables* contaminated with faeces [sic], and raw shellfish containing marine biotoxins.[14]

Such contaminated food, if not disposed of properly, can contaminate the water supply. Taxpayer is the manufacturer in a very large and diverse supply chain. Once product leaves Taxpayer's facility, within a short period of time, due to the spoilage nature of produce, it is disseminated to thousands of businesses throughout the Southeast. If Taxpayer did not prevent the pollution as described above, the ultimate and immediate affects to the water supply of communities throughout the Southeastern United States could be substantial if such pathogen contaminated food is not disposed of properly.

Furthermore, Taxpayer uses **three-hundred thousand (300,000) gallons of water per day** at its facility, and discharges at least 150,000 gallons into the municipal sewer system daily. Water is the means by which the Petitioner is able to deliver its sanitizing agents to the produce and the facility. Approximately half of that water is recycled, and the other half of the water makes its way through the local sewage system. Taxpayer's use of safety materials directly prevents pollution which could contaminate the water supply at Taxpayer's facility and subsequently enter the counties water supply and/or rivers. After a recent Listeria outbreak in Arizona, the Food and Drug Administration determined that that the root cause was water found in a nearby stream. See Cynthia Hubert, *Heading to the American River this Week? Here's where E. Coli Levels are High*, Sacramento Bee, available at https://www.sacbee.com/news/article214295669.html; Sandee

[14] World Health Organization, Food Safety-Key Facts (2017), http://www.who.int/news-room/fact-sheets/detail/food-safety (emphasis added).

LaMotte, *Deadly E. Coli Outbreak in Lettuce Traced to Contaminated Water*, available at https://www.cnn.com/2018/06/29/health/e-coli-romaine-lettuce-outbreak-cause/index.html; AP, *Source of Romaine Lettuce E. Coli Outbreak Identified,* https://www.cbsnews.com/news/source-of-romaine-lettuce-e-coli-outbreak-identified/; Maggie Fox, *Dirty Canal Water May Have Tainted Romaine Lettuce with E. Coli*, available at https://www.nbcnews.com/health/health-news/dirty-canal-water-may-have-tainted-romaine-lettuce-e-coli-n887606; Julia Jacobs, *Officials Identify a Source in the Romaine Lettuce E. Coli Outbreak,* available at https://www.nytimes.com/2018/07/01/us/romaine-lettuce-e-coli-nyt.html. The after an extensive investigation, the Food and Drug Administration concluded that:

> [t]hree samples of irrigation canal water collected by the team were found to contain Ecoli O157:H7 with the same rare molecular fingerprint (using whole genome sequencing (WGS)) as the strain that produced human illnesses (the outbreak strain). These samples were collected from an approximate 3.5-mile stretch of an irrigation canal in the Wellton area of Yuma County that delivers water to several of the farms identified in the traceback investigation as shipping romaine lettuce that was potentially contaminated with the outbreak strain. *This recent news story demonstrates the threat of* ***pollution*** *to area waterways is a significant issue that affects the entire community.*

See October 24, 2018 Memorandum to the File on the Environmental Assessment; Yuma 2018 E. coli O157:H7 Outbreak Associated with Romaine Lettuce, available at https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-orgs/documents/document/ucm624633.pdf (also attached as **Tab 1**).

For the aforementioned reasons, Taxpayer meets the requirements set forth in S.C. Code Ann. § 12-36-2120(17). Taxpayer is entitled to a sales tax emption on the clothing or other supplies which are necessary to prevent the pollution of water and air located within the facility.

ii. The pollution described above is "caused or threatened by any machine" used in Petitioner's manufacturing process.

Petitioner's witnesses will go into great detail to describe the manufacturing process. In short, when the fresh produce is picked and enters the trucks for transport, it may have one of the contaminants described above either inside or on the surface of the produce. When the produce is cut during the manufacturing process, either by hand or with its mechanized choppers, those contaminants can be released into the air or water, and can essentially transfer to an exposed surface, where it can subsequently contaminate other produce as well as reproduce. Additionally, when those pollutants are exposed during the cutting process, Petitioner's water sprayers and flume systems can cause the pollutants to aerosolize – that is, be transferred into tiny droplets of water that are dispersed into the air. The spread of the pollutants also occurs when the produce is dried – both the blowers and the produce dryers (think large salad-spinners) cause potentially polluted water to aerosolize. Use of the uniforms, cleaning chemicals, and other precautions during the manufacturing process helps to ensure that the pollution, which is exacerbated and disturbed from its state while on the produce, does not spread, generally referred to as cross-contamination or cross-contact.

iii. The purchases at issue "prevent or abate" the pollution caused by the cutters, sprayers, blowers and other machinery.

The protective clothing at issue is vital to Petitioner's the control and containment of the pollutants described above. Most importantly, the protective clothing serves as a barrier between the high care area – where those pollutants are exposed and dispersed in the air and water – and the outside. Witnesses for Petitioner will testify as to the rigorous processes for entering and exiting the high care area. All are designed to ensure that none of the dangerous microbes leave that area. Without the control, Petitioner could spread those microbes outside the facility. By

requiring full dress-down when exiting the clean room, Petitioner is able to contain the pollutants that may have been released from the produce during the manufacturing process.

The protective clothing serves the additional purpose of ensuring those pollutants are not introduced into the clean room environment by Petitioner's employees. Petitioner's manufacturing process results in significant spray-back, as cutters chop the produce, sprayers and wash flumes wash down the produce, and blowers and spinners dry the produce. Through this process, a significant amount of water becomes airborne. Pollutants brought into the room from an unsanitary employee could be released into the air or introduced to water used in Petitioner's manufacturing process.

2. Necessary to Comply with the Order of an Agency

In this case, the purchases at issue are required by the both federal and state regulation and statutes. Prior case law of this Court (which was not challenged by the Department) has established that federal agency regulations satisfy this requirement. *See Duke Energy Corp. v. Department of Revenue*, Docket No. 12-ALJ-17-0031-CC (filed April 28, 2017) (exemption applied to purchase of canister system used to comply with regulations of the U.S. Nuclear Regulatory Commission, an "independent United States agency").

The FDA has established extensive regulations to combat "environmental pathogens," which are those pathogens

> capable of surviving and persisting within the manufacturing, processing, packing, or holding environment such that food may be contaminated and may result in foodborne illness if that food is consumed without treatment to significantly minimize the environmental pathogen.
>
> Examples of environmental pathogens for the purposes of this part include *Listeria monocytogenes and Salmonella spp.* but do not include the spores of pathogenic sporeforming bacteria.

21 CFR § 117.3 (emphasis added). The following summarizes the state and federal agency guidelines requiring the use of the gear at issue.

i. FDA GMP Regulations

Specifically, 21 C.F.R. § 110.10 requires plant management to take all reasonable measures and precautions regarding the maintenance of a clean facility, including the following:

> (b) *Cleanliness.* All persons working in direct contact with food, food-contact surfaces, and food-packaging materials **shall** conform to hygienic practices while on duty to the extent necessary to protect against contamination of food. The methods for maintaining cleanliness include, but are not limited to:
>
> > (1) Wearing outer garments suitable to the operation in a manner that protects against the contamination of food, food-contact surfaces…
> > (3) Washing hands thoroughly (and sanitizing if necessary to protect against contamination with undesirable microorganisms) in an adequate hand-washing facility before starting work, after each absence from the work station, and at any other time when the hands may have become soiled or contaminated.
> > …
> > (5) Maintaining gloves, if they are used in food handling, in an intact, clean, and sanitary condition. The gloves should be of an impermeable material.
> > (6) Wearing, where appropriate, in an effective manner, hair nets, headbands, caps, beard covers, or other effective hair restraints.

Furthermore, 21 C.F.R. § 117.10(b), which is effective November 16, 2015 and derived from the Food Safety Modernization Act passed in 2011, describes the measures and precautions that firms such as Taxpayer must exercise in order to:

> conform to hygienic practices while on duty to the *extent necessary* to protect *against* allergen cross-contact and against *contamination of food.* The methods for maintaining cleanliness include: (1) *[w]earing outer garments* suitable to the operation in a manner that protects against allergen cross contact and against the *contamination* of food, food contact surfaces, or food-packaged materials. . . (5) [m]aintaining *gloves*, if they are used in *food handling*, in an intact, clean and sanitary condition, (6) [w]earing, where appropriate, in an effective manner, *hair*

> *nets, headbands, caps, beard covers,* or other effective hair restraints. . . (9) [t]aking any other necessary precautions to protect against allergen cross-contact and against contamination of food, food contact surfaces, or food-packaging materials with microorganisms or foreign substances. . . ."

(emphasis added). Additionally, 21 C.F.R. § 117.80(a)(1) states that:

> [a]ll operations in the manufacturing, processing, packing, and holding of food (including operations directed to receiving, inspecting, transporting, and segregating) must be conducted in accordance with adequate sanitation principles. (2) [a]ppropriate quality control operations must be employed to ensure that food is *suitable* for human consumption and that food-packaging materials are safe and suitable. . . (c)(2) [a]ll food manufacturing, processing, packing, and holding must be conducted under such conditions and controls as are necessary to *minimize* the potential for the growth of *microorganisms, allergen cross-contact, contamination of food,* and deterioration of food. . . (5) [w]ork-in-process and rework *must be handled* in a manner that protects against allergen cross-contact, *contamination, and growth of undesirable microorganisms*. . . (10) [s]teps such as washing, peeling, trimming, cutting, sorting, inspecting, mashing, dewatering, cooling, shredding, extruding, drying, whipping, defatting, and forming must be performed *so as to protect* against allergen *cross-contact* and *against contamination.* Food must be protected from contaminants that may drip, drain, or be drawn into the food.

Finally, according to 21 C.F.R. § 117.37:

> Each plant must be equipped with adequate sanitary facilities and accommodations including:
>
> (a) Water supply. The water supply must be adequate for the operations intended and must be derived from an adequate source. Any water that contacts food, food-contact surfaces, or food-packaging materials must be safe and of adequate sanitary quality. Running water at a suitable temperature, and under pressure as needed, must be provided in all areas where required for the processing of food, for the cleaning of equipment, utensils, and food-packaging materials, or for employee sanitary facilities.

(emphasis added). Based on the foregoing, federal law explicitly requires all clothing at issue in this case.

ii. DHEC Statutes and Regulations

According to S.C. Code Ann. § 39-25-180(H) 39-25-180 (H)

> Good manufacturing practice regulations and their amendments now or hereafter adopted pursuant to the authority of the federal Food, Drug, and Cosmetic Act are the good manufacturing regulations of this State. However, the commissioner may adopt a regulation that prescribes conditions under which good manufacturing processes may be used in this State whether or not in accordance with regulations promulgated pursuant to the federal act.

DHEC has accordingly adopted the Part 110 and Part 117 guidelines stated above which require protective clothing.

Moreover, DHEC also has promulgated Regulation 61-25, which also provides rules and regulations for entities engaged in food production. Produce manufacturers like Petitioner comply with such regulations.

These regulations require the use of gloves, hair nets, and other protective clothing to reduce or eliminate opportunities for cross-contamination, and place responsibility for use on food protection managers. *See* S.C. Regs. 61-25, 2-103.11 (person in charge "shall ensure that ... (L) employees are preventing cross-contamination of ready-to-eat food with bare hands by properly using suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment"). Section 3-301.11(B) prohibits food employees from contacting exposed, ready-to-eat food with bare hands, and requires use of gloves. Under 2-402.11(B) food employees must wear hair restraints, including hats, hair covering and nets, beard restraints, and clothing that covers body hair. Those restraints must be both designed and worn to effectively keep hair from contacting exposed food, clean equipment, utensils, and linens. *Id.* Accordingly, state law requires all the clothing at issue in this matter.

D. Substantial Understatement

Generally, the Department has three years from the date the return is filed to audit and assess sales tax. However, § 12-54-85(C)(3) allows the Department to utilize a six-year statute of limitations if there is a substantial understatement of the total tax required to be shown on the return of at least 20%.

In this case, the Department issued its Proposed Assessment on July 19, 2016, which covered the period beginning October 1, 2012 and ending September 30, 2015. Petitioner appealed the proposed assessment, and the Department issued its Department Determination on March 15, 2017. The Department Determination utilized the longer assessment period, but did not provide its legal justification for that period. The general statute of limitations would have provided for an assessment period of June 2013-September 2015. This means there are eight months which the Department opened for audit solely pursuant to § 12-54-85(C)(3).[15]

As "the final determination within the department from which a person may request a contested case hearing before the Administrative Law Court," § 12-60-30(10), the Department Determination by statute must "explain the basis for the department's determination." § 12-60-450(D)(2). Thus, the Department should be barred from utilizing a statutory mechanism to extend the assessment period when it fails to reference the basis in the Department Determination. The Department's abandonment of that argument in its Department Determination should limit the audit period at issue to June 2013-September 2015.

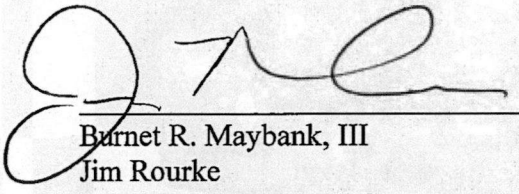
Moreover, while the statute focuses on "all taxes required to be shown on the return," the amount required to be shown on the return, this analysis fails to take into account the significant

[15] Throughout the course of the audit, Petitioner agreed to extend the statute of limitations to October 1, 2012 on a number of occasions. *See* Petitioner's Exhibit 19. Its last extension was signed March 23, 2016 and expired May 31, 2016. The Department auditor acknowledged in an email that the extension did, in fact, expire. *See* Petitioner's Exhibit 17.

sales taxes Petitioner has paid directly to vendors (and which was remitted to the Department) on clearly taxable transactions. For example, for those taxable transactions where the vendor has South Carolina nexus, the vendor would have collected sales tax from Petitioner and remitted it to the Department. If those sales taxes paid were included in the calculation, Petitioner very clearly would be under the 20% threshold.

Of course, to the extent this Court rules for the Petitioner in part, the Petitioner requests the Court require the Department to re-determine the extent to which the amount required to be shown on the returns exceeds that which was returned by more than 20%.

Respectfully submitted,



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(803) 771-8900

Date: November 13, 2018

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

McEntire Produce, Inc. Petitioner, vs. South Carolina Department of Revenue, Respondent.	Docket No. 17-ALJ-17-0060-CC **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Petitioner's PreTrial Brief** was served upon counsel of record for the Respondent via electronic mail and U.S. Mail as shown below this 13th day of November 2018:

Lauren Acquaviva, Esq.
Chillico & Associates, LLC
3850 Bessemer Road
Suite 120
Mount Pleasant, SC 29466

Elisabeth Shields
SC Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979

Melinda White



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U.S. FOOD & DRUG ADMINISTRATION

Memorandum

To: Gerald Bromley, Director, Division of Domestic Human and Animal Food Operations
From: Kevin Gerrity, Consumer Safety Officer
Date: October 24, 2018

Subject: Memorandum to the File on the Environmental Assessment; Yuma 2018 *E. coli* O157:H7 Outbreak Associated with Romaine Lettuce

SUMMARY

This Environmental Assessment (EA) was conducted as a multi-agency mission led by the FDA Office of Regulatory Affairs (ORA) Human and Animal Food Operations – West (HAFO-W) and the Centers for Disease Control and Prevention (CDC), at the request and with the assistance of the FDA Center for Food Safety and Applied Nutrition (CFSAN)/Coordinated Outbreak Response Evaluation (CORE) team, in response to an *E. coli* O157:H7 outbreak associated with the consumption of romaine lettuce sourced from the winter growing areas in and around Yuma County, Arizona, and Imperial County, California (referred to in this report as the Yuma growing region). The EA was conducted to identify factors that potentially contributed to the introduction and spread of the outbreak strain of *E. coli* O157:H7 that contaminated the romaine lettuce associated with this outbreak.

During this EA, three samples of irrigation canal water collected by the team were found to contain *E coli* O157:H7 with the same rare molecular fingerprint (using whole genome sequencing (WGS)) as the strain that produced human illnesses (the outbreak strain). These samples were collected from an approximate 3.5-mile stretch of an irrigation canal in the Wellton area of Yuma County that delivers water to several of the farms identified in the traceback investigation as shipping romaine lettuce that was potentially contaminated with the outbreak strain. The outbreak strain was not identified in any of the other samples collected during this EA, although other pathogens of public health significance were detected.

ENDORSEMENT

Date: October 24, 2018
From: Gerald Bromley, Director, Division of Domestic Human and Animal Food Operations
To: DEN-DO Files

The memo of this Environmental Assessment regarding the *E. coli* O157:H7 multistate outbreak is completed and forwarded to the Denver District Files.

ORIG: To DEN-DO Files (FEI: Not Applicable)

Gerald D. Bromley Jr -S Digitally signed by Gerald D. Bromley Jr -S DN: c=US, o=U.S. Government, ou=HHS, ou=FDA, ou=People, 0.9.2342.19200300.100.1.1=13001378 1, cn=Gerald D. Bromley Jr -S Date: 2018.10.24 11:55:23 -05'00'

10/24/2018

Gerald Bromley
Director
Division of Domestic Human and Animal Food Operations

Date

ENVIRONMENTAL ASSESSMENT COMPLETE NARRATIVE REPORT

INTRODUCTION

This Environmental Assessment (EA) was conducted as a multi-agency effort led by the FDA Office of Regulatory Affairs (ORA) Human and Animal Food Operations – West (HAFO-W) and the Centers for Disease Control and Prevention (CDC), at the request and with the assistance of the FDA Center for Food Safety and Applied Nutrition (CFSAN)/Coordinated Outbreak Response Evaluation (CORE) team. The EA was conducted in response to an *E. coli* O157:H7 outbreak associated with the consumption of romaine lettuce sourced from the winter growing areas in and around Yuma County, Arizona, and Imperial County, California (referred to in this report as the Yuma growing region) in order to identify factors that potentially contributed to the introduction and spread of the outbreak strain.

The traceback investigation identified a total of 36 growing fields on 23 farms in Arizona and California as potential sources of contaminated lettuce consumed during the outbreak. (See Attachment A.) A total of seven intermediate shippers received the romaine lettuce from these 23 farms, and all but one of these intermediate shippers commingled romaine lettuce from multiple farms upon receipt. The exception was an intermediate shipper that received romaine lettuce associated with the outbreak from only one farm. Whole-head romaine lettuce was traced from this one farm through the intermediate shipper to a correctional facility in Alaska where exposed inmates became infected with the outbreak strain.

Based on the period when the outbreak occurred, the romaine lettuce consumed by ill individuals was likely harvested from early March through mid-April 2018. The EA team conducted its initial on-site activities from June 4-7, 2018. At the time of the EA, no romaine lettuce was being grown, harvested, packed or held from the Yuma growing region.

During site visits by the EA team, mobile task force teams were deployed daily in the Yuma growing region to conduct various environmental assessment tasks. Activities focused on potential sources of *E. coli* O157:H7 in the environment that could have led to contamination of the romaine lettuce, including water and wild and domesticated ruminant animals. The EA team assessed the Colorado River, Yuma growing region irrigation canals, wildlife corridors, and concentrated animal feeding operations (CAFOs) in areas around farms identified in the traceback. The team interviewed growers representing 21 of the 23 traceback-related farms, gathering information on romaine lettuce growing practices and conditions, including:

- agricultural water;
- agricultural chemical spray applications;
- soil amendments;
- harvesting;
- animal intrusion;
- adjacent land use; and
- employee health and hygiene practices.

The EA team collected a variety of environmental samples. Because the Yuma region's growing season had concluded weeks before the EA started, no leafy greens were available for sampling and testing by the team.

The EA team also assessed aerial spraying operations since the pesticides they use are diluted with water that comes in contact with crops. From July 10-13, 2018, team members returned to the Yuma region to collect ground water samples from two Wellton-area Arizona Department of Agriculture (AZDA) groundwater pesticide monitoring wells and from a section of salt water drain canal downstream of the Wellton-Mohawk Irrigation and Drainage District (WMIDD) area of responsibility.

During the week of August 6, 2018, additional environmental samples were collected by EA team members in cooperation with the WMIDD, AZDA, and the Arizona Department of Environmental Quality (ADEQ), including ground water and WMIDD irrigation canal water samples.

ENVIRONMENTAL ASSESSMENT TEAM

The Lead Investigator for the EA was Kevin Gerrity, FDA National Food Expert from the Office of Regulatory Affairs. Office of Human and Animal Food Operations—West.

The other EA team members were as follows:

Travis Brown, ORISE Fellow
CDC

Angela Fields, Consumer Safety Officer
FDA/CFSAN

Vince Hill, Environmental Engineer
CDC

David Ingram, Consumer Safety Officer
FDA/CFSAN

Amy Kahler, Microbiologist
CDC

Theresa Klaman, Consumer Safety Officer
FDA/CFSAN

Manuel Moreno, Consumer Safety Officer
FDA/ORA

Diane Ducharme, Staff Fellow
FDA/CFSAN

Daniel Gorski, Consumer Safety Officer
FDA/ORA

Erin Holliman, Consumer Safety Officer
FDA/ORA

Richard Jensen, Consumer Safety Officer
FDA/ORA

Michael Kawalek, Microbiologist
FDA/ORA

Mia Mattioli, Environmental Engineer
CDC

Kurt Nolte, Staff Fellow
FDA/CFSAN

Garrad Poole, Consumer Safety Officer
FDA/ORA

Jacob Reynolds, Consumer Safety Officer
FDA/ORA

Linda Stewart, Consumer Safety Officer
FDA/ORA

Socrates Trujillo, Consumer Safety Officer
FDA/CFSAN

Daniel Velasquez, Microbiologist
FDA/ORA

J. Christopher Yee, Program Manager
FDA/ORA

Two AZDA representatives also attended multiple EA team field operations as observers.

IRRIGATION CANAL WATER FINDING

Through ultrafiltration sampling of irrigation water conducted during the initial site visit in June, *E. coli* O157:H7 was detected in three places along a 3.5-mile section of the Wellton irrigation canal that is operated by the WMIDD. The locations of the three samples were approximately one mile upstream of a CAFO, adjacent to the CAFO, and approximately one mile downstream of the CAFO (Figure 1). Genetic analyses of these isolates using pulsed field gel electrophoresis (PFGE) and WGS determined that the *E. coli* O157:H7 found in these three Wellton irrigation canal water samples is the same strain that caused the outbreak. Some of the EA activities described in this report were conducted throughout the Yuma growing region before the EA team was aware of this significant finding. Once the EA team became aware of the positive findings, certain activities were focused on areas around the section of the irrigation canal where these positive water samples were obtained.



Figure 1. *Wellton Irrigation Canal. This Google Earth view depicts a section of the Wellton main canal adjacent to a CAFO and locations of three outbreak-pathogen-positive irrigation water samples. The sample locations are upstream, adjacent to, and downstream of the Wellton-area CAFO. Also noted are unlined irrigation canal sections and a CAFO retention pond. Water in the canal flows from west (left) to east (right)in the figure above. The CAFO at the bottom center of Figure 1. See Figure 2 for an enlarged image of the CAFO.*

GROWER INTERVIEWS

On its initial visit, the EA team gathered information on 21 of the 23 farms, covering 34 of the 36 growing fields identified by the traceback. The team conducted interviews, using a standardized questionnaire, with 13 growers who operated a total of 19 farms, and used information from the initial outbreak investigation for one grower who operated two farms identified by traceback. The EA team made several unsuccessful attempts to contact the grower(s) for the two farms for which interviews were not performed.

The interviewed growers reported that their irrigation water was delivered by one of four irrigation districts:

1. Imperial Irrigation District (IID), which includes the Vail, Spruce, Moorehead, and Ash, and Highline canals;
2. Yuma County Water Users Association (YCWUA);
3. Yuma Irrigation District (YID); and
4. WMIDD, which includes the Wellton, Mohawk, and Texas Hill canals.

The growers reported the following common elements:

- The romaine lettuce crops that were identified in the traceback as possibly being contaminated with the outbreak strain were grown under conventional agricultural practices. No organic crops were grown on farms identified by the traceback.
- For most of the growing fields, no biological soil amendments of animal origin were used. Only two of the 34 growing fields were pre-treated with composted manure as a soil amendment.
- Colorado River water, delivered via open irrigation canal, was used to irrigate romaine lettuce on all 21 of the reporting farms. One farm reporting using well water in addition to canal water to irrigate crops.
- Overhead sprinkler irrigation was used during the germination of romaine lettuce on all 21 of the reporting farms, with germination periods ranging from 5 to 12 days.
- Furrow irrigation was used after germination on 19 of the 21 reporting farms. Two farms in Imperial County used overhead sprinkler irrigation throughout the growing season.
- Irrigation canal water was used to dilute agricultural chemicals that were applied directly onto romaine lettuce crops on 17 of the 21 reporting farms in Arizona and California.

Table 1. Summary of Grower Information

Traceback Shipper Leg	Grower ID # of Farms	Growing Fields: *Previous Crops* / Adjacent Crops	Irrigation Water *Source*/ Method (Post Germination)	Primary Water Source for Chemical App.	Chemical Application Post 2-21 freeze (Y or N)	Biological Soil Amendments (Y or N)	Animal Intrusion (Y or N)	Weather Events (Y or N)
Shipper A	Grower 1 3 Farms	*Sudan grass* Unknown	*IID* Canals: (b) (4), (b) (6) Post-Germination: • Furrow	Canal	N	N	N	N
Shipper B	Grower 2 3 Farms	*Sudan grass, Wheat, Cotton* Romaine	*WMIDD* Canals: (b) (4), (b) (6) Post-Germination: • Furrow	Well	N	N	Y Birds, coyotes, deer	N
Shipper B	Grower 3 2 Farms	*Sudan grass, Wheat, Cotton* Iceberg, Onion Seed, Spinach, Date Palms	*WMIDD* Canals: (b) (4), (b) (6) Post-Germination: • Furrow	Well	N	Y Composted manure	N	N
Shipper B	Grower 4 1 Farm	*Wheat* Fennel, Romaine	*YCWUA* Canal: (b) (4), (b) (6) Post-Germination: • Furrow	Well and Canal	N	N	N	Y Frost late Feb.-early Mar.

Traceback Shipper Leg	Grower ID # of Farms	Growing Fields: *Previous Crops* / Adjacent Crops	Irrigation Water *Source*/ Method (Post Germination)	Primary Water Source for Chemical App.	Chemical Application Post 2-21 freeze (Y or N)	Biological Soil Amendments (Y or N)	Animal Intrusion (Y or N)	Weather Events (Y or N)
Shipper B	Grower 5 2 Farms	*Wheat, Cotton* Onion, Mustard, Radish	*WMIDD* Canal: (b) (4), (b) (6) Post-Germination: • Furrow	Canal	Y 2 fields	N	N	N
Shippers C & D	Grower 6 2 Farms	*Wheat, Cotton* Iceberg, Romaine	*WMIDD* Canals: (b) (4), (b) (6) Post-Germination: • Furrow	Canal	Y	N	N	Y 30 MPH winds in Feb.
Shipper E	Grower 7 1 Farm	*Cantaloupe* Iceberg, Spinach	*WMIDD* Canal: (b) (4), (b) (6) Post-Germination: • Furrow	Well and Canal	Y	N	Y Coyote	N
Shipper F	Grower 8 1 Farm	*Sudan grass* Unknown	*IID* Canal: (b) (4), (b) (6) Post-Germination: • Sprinkler	Canal	N	N	N	N
Shipper F	Grower 9 1 Farm	*Sudan grass* Celery, Iceberg	*IID* Canal: (b) (4), (b) (6) Post-Germination: • Furrow	Canal	N	N	N	N

Traceback Shipper Leg	Grower ID # of Farms	Growing Fields: *Previous Crops* / Adjacent Crops	Irrigation Water *Source*/ Method (Post Germination)	Primary Water Source for Chemical App.	Chemical Application Post 2-21 freeze (Y or N)	Biological Soil Amendments (Y or N)	Animal Intrusion (Y or N)	Weather Events (Y or N)
Shipper F	Grower 10 1 Farm	*Sudan grass* Iceberg, Sunflower, Alfalfa	*IID* Canal: (b) (4), (b) (6) Post Germination: Sprinkler	Canal	N	N	Y Burrowing Owls	Y ~2/20 freeze caused blistering
Shipper G	Grower 11 1 Farm	*Unknown* Iceberg, Red Cabbage	*WMIDD* Canal: (b) (4), (b) (6) Post-Germination: • Furrow	Canal	Y	Y Composted Manure pre-season	N	Y Mid-Feb. freeze caused leaf peeling; high winds followed
Shipper G	Grower 12 1 Farm	*Wheat* Iceberg, Broccoli seed	*WMIDD* Canal: (b) (4), (b) (6) Post-Germination: • Furrow	Well	N	N	N	N
Shipper G	Grower 13 1 Farm	*Wheat* Romaine	*WMIDD* Canal: (b) (4), (b) (6) Post-Germination: • Furrow	Canal	Y	N	N	N

Traceback Shipper Leg	Grower ID # of Farms	Growing Fields: *Previous Crops* / Adjacent Crops	Irrigation Water *Source*/ Method (Post Germination)	Primary Water Source for Chemical App.	Chemical Application Post 2-21 freeze (Y or N)	Biological Soil Amendments (Y or N)	Animal Intrusion (Y or N)	Weather Events (Y or N)
Shipper G	Grower 14 1 Farm	*Fallow* Spinach, Cabbage, Romaine	*YID* Canal: (b) (4); (b) (6) Post-Germination: • Furrow	Well and Canal	N	N	N	N

IID = Imperial Irrigation District
WMIDD = Wellton-Mohawk Irrigation and Drainage District
YCWUA = Yuma County Water Users Association
YID = Yuma Irrigation District
Y or N = Yes or No

Note: Table 1 is organized by shipper and contains data from the 13 interviewed growers. One grower operated multiple farms and sold product to two shippers; thus, the grower appears in two rows of Table 1, each with its own grower number due to differences in information.

AGRICULTURAL CHEMICAL APPLICATIONS

Because many growers reported the use of irrigation canal water to dilute agricultural chemicals that came into direct contact with the crop, the EA team assessed the sources of water used for this purpose. For example, the EA team received agricultural chemical spray information from grower interviews and through mandatory reports of pesticide applications filed with the AZDA by two licensed chemical applicators who serve farms irrigated by the WMIDD. The WMIDD irrigation canal system was cited as the sole source of agricultural chemical dilution water for either ground-based or aerial applications on six of the 13 reporting farms. Well water was reportedly the sole source of water for agricultural chemical dilution on six other farms irrigated by the WMIDD irrigation canal system. On one of the 13 farms, both WMIDD irrigation canal water and well water were cited as agricultural chemical dilution water sources.

Growers served by the WMIDD reported chemical spray applications ranging from one ground application combined with three aerial applications over the entire growing season to three ground applications combined with four aerial applications over the entire growing season. For six of the farms that reported using WMIDD irrigation canal water (solely or partially) to dilute agricultural chemicals, growers indicated that agricultural chemicals were applied to romaine lettuce crops after a freeze event

on February 21, 2018. This freeze event likely led to damage of some portion of the romaine lettuce crop, which may have rendered it more susceptible to microbial contamination.

The EA team met with both chemical applicators and reviewed records provided by one applicator.

Chemical Applicator A: This applicator primarily uses (b) (4), (b) (6) wells for chemical dilution water; (b) (4), (b) (6) is at the firm's primary business location on a (b) (4), (b) (6) and the (b) (4), (b) (6) located at a Wellton Valley growing area (b) (4), (b) (6) The firm's wells (b) (4), (b) (6) feet deep. Applicator A reported that his (b) (4), (b) (6) can use irrigation canal water to dilute chemicals but indicated that this not a normal practice. Applicator A further reported that the firm's (b) (4), (b) (6)

Applicator A reported that the firm's aerial spray tanks are (b) (4), (b) (6) is used in the spray tanks as an oxidizer to ensure that no chemical residues remain in the spray tanks. The applicator offered the EA team spray records for review. Applicator A also allowed the team to sample its (b) (4), (b) (6) well; neither generic E. coli nor E. coli O157:H7 were detected in this water sample. Grower information and AZDA records identify Applicator A as the contract sprayer for six of the 13 reporting farms served by the WMIDD.

Chemical Applicator B: This applicator primarily uses WMIDD irrigation canal water to dilute chemicals for aerial applications made in the Wellton area. During an initial discussion, Applicator B stated that the firm's aircraft generally obtain chemical dilution water from the WMIDD irrigation canal nearest to the field to be sprayed, or from the firm's Wellton Valley growing area (b) (4), (b) (6) water tank, which is sourced with WMIDD canal water. Grower information and AZDA records identify Applicator B as the contract sprayer for five of the 13 reporting farms irrigated by the WMIDD.

Of the remainder, one farm reported using both Chemical Applicators A and B, and one farm did not report any aerial spraying of romaine lettuce crops.

GROWING SEASON WEATHER EVENTS

The EA team assessed weather events as potential contributing factors, such as contamination occurring through windborne transmission of contaminated dust to romaine lettuce crops. The team also considered the potential for leaf damage from a freeze and for the condensation of atmospheric moisture on the romaine leaves to create conditions favorable for windborne pathogen capture and survival.

The EA team contacted the University of Arizona Extension Service Biometeorology Specialists, who provided an analysis of weather data from a Roll, AZ, monitoring station that showed that on February 21, 2018, area crops were subjected to approximately 7.25 hours of temperatures below freezing.

After the freeze event, the Roll, AZ, monitoring station recorded wind speeds exceeding 10 miles per hour (MPH) on three days:

02/23/2018: 16 MPH winds from the west-northwest.

03/04/2018: 11.2 MPH winds from the northwest.

03/14/2018: 13 MPH winds from the west.

CAFO ASSESSMENTS

In the initial site visit by the EA team in June, CAFOs in Yuma and Imperial Counties were assessed as potential sources for the outbreak strain. There are three animal feedlots in Yuma County, including one that is adjacent to the 3.5-mile stretch of the Wellton irrigation canal where the outbreak strain of *E. coli* O157:H7 was found. The other Yuma County CAFOs are in other parts of the county.

Wellton-Area CAFO

CAFO Operations

The Wellton-area CAFO (Figure 2) is a large operation, with a permitted capacity of (b)(4), (b)(6) head of cattle. Approximately (b)(4), (b)(6) head of steer were present during on-site EA activities.

Steers (mostly Holsteins) are typically brought into the operation before they reach maturity and are sold after several months of growth at the CAFO. The steer pen flooring material comprises native sand and organic material (manure) that has been compacted over time. There has been no change in the type of material used for, or operation of, the pen flooring material over the decades that the CAFO has been in operation. The managers of this facility told the EA team that the potential for nutrient permeability (as well as microbiological pathogen transport) down through the pen flooring to the ground under the pen and into groundwater is very low. In September 2018, the CAFO managers provided soil permeability analyses for soil samples collected from cattle pens in that month to support that assertion. The groundwater depth under the CAFO was estimated to be approximately 70 feet as of January 2018, according to a U.S. Department of Interior Bureau of Reclamation map.

Each pen on the CAFO is cleaned out via mechanical scraping at least (b)(4), (b)(6) per year using front-end loaders (dedicated for this purpose), which push/scrape the manure into central collection corridors. (b)(4), (b)(6) pens are cleaned out/scraped (b)(4), (b)(6) Each pen yields approximately (b)(4), (b)(6) loads of manure, depending on the size of the steers.

When critical mass is achieved in the central collection corridors, the manure is loaded into side-dump trucks (dedicated for this purpose) for transport to one of two composting facilities (one to the north, and

the other to the west) that are owned and operated by the CAFO. Animal carcasses are separately taken to a regional landfill.

The EA team observed operations to move the manure from the CAFO to the north composting facility. During the on-site activities, the EA team observed dump trucks operating approximately every (b)(4), (b)(6) minutes between the CAFO and the north composting facility. The trucks use a different route when hauling manure to the west composting facility.

The CAFO has several wells, an irrigation canal, and two cattle pen drainage retention ponds to use as water sources. The two retention ponds are designed to contain runoff from the feedlot during rain events, where excess water from the feedlot is directed into dedicated channels along the pens and gravity-transported through dedicated conveyance piping into each retention pond to mitigate the risk of contaminating either ground water or the irrigation canal. The CAFO is licensed to pump the retention pond water for designated uses--such as application to agronomic crops--and may also use this water for dust abatement purposes. During on-site activities, the EA team observed that the water level in the west retention pond was very low (approximately 6 inches deep), due to the lack of recent rain. Both retention ponds contain (b)(4), (b)(6) iner to reduce the potential for contamination of the groundwater due to leakage.

The feedlot's operation is permitted by ADEQ under the Arizona Pollutant Discharge Elimination System program, which regulates the discharge of pollutants under the Clean Water Act and includes requirements for capacity and seepage. Measures implemented to prevent contamination of the irrigation canal from the feedlot include the construction of diversion ditches and soil berms adjacent to the CAFO and uphill from the canal, as well as levelling the topography of the feedlot pens to prevent any potential runoff during storm events from entering the irrigation canal. The EA team observed some soil erosion in the soil berms adjacent to the feedlot, but the intact berms coupled with surface topography and drainage system suggest runoff would be prevented from entering the canal.
Well water is used for animal watering (both drinking and cooling when necessary via convection spray and sprinklers). The pens all contained sun shielding (heavy mesh tarp) that ran along the top of the pens to help protect the steers from UV exposure and heat.

As noted above, water from the retention ponds may be used for dust abatement purposes. The irrigation canal water is also available for use as dust abatement and is typically used for the composting operations.

CAFO Composting

Raw manure is transported directly from central collection corridors, adjacent to animal pens, to the composting pad in dedicated side-dump trucks. The EA team noted raw manure dropped from a truck during transport to the north composting facility. The team collected samples of the dropped manure. These samples were negative for *E. coli* O157:H7.

At the north and west composting facilities, the manure is dumped in the formation of windrows. It takes about [redacted] dump truck loads of manure to make a single windrow. The EA team estimated that each row is approximately 750 feet long by 20 feet wide, using toolset analysis on GeoWeb.
The records the CAFO managers provided to the EA team for a lot of stabilized compost indicated that the facility has a scientifically-validated treatment process for biological soil amendments of animal origin that meets an appropriate microbiological standard.

Growers operating under the Arizona Leafy Greens Marketing Agreement (AZ LGMA) and the California Leafy Greens Marketing Agreement (CA LGMA) are required to have their compost tested for pathogens. Therefore, the CAFO sends samples of each lot of stabilized compost to an independent laboratory for pathogen testing and chemical/metal composition analysis, for stabilized compost sold to these growers. The compost can be transported from the compost facility only after the analytical results are received and the facility confirms that the compost meets all requirements of the growers. The CAFO provides all of the analytical information to the grower that receives the compost.

The EA team was provided with redacted copies of the types of records that the growers require for Good Agricultural Practices (GAP) or LGMA purposes, including time/temperature, pathogen testing and chemical/metal composition. The managers also provided records for the compost that the EA team sampled.

All finished (treated and documented) compost that is sold to growers is loaded and transported by a single trucking company that specializes in hauling fertilizer. This trucking company is under contract with the CAFO and uses its own front-loaders at the composting operation, loading its trucks directly from the compost pad. The windrows stay in place – from start to finish – during the entire composting process, until sold and removed by the trucking company. The trucking company transports the compost directly to the growers.

The EA team found no obvious potential for cross-contamination between raw manure and finished compost, as the trucks used to transport finished compost are dedicated for this purpose and use different roads than the dump trucks dedicated to hauling raw manure to the composting facilities.

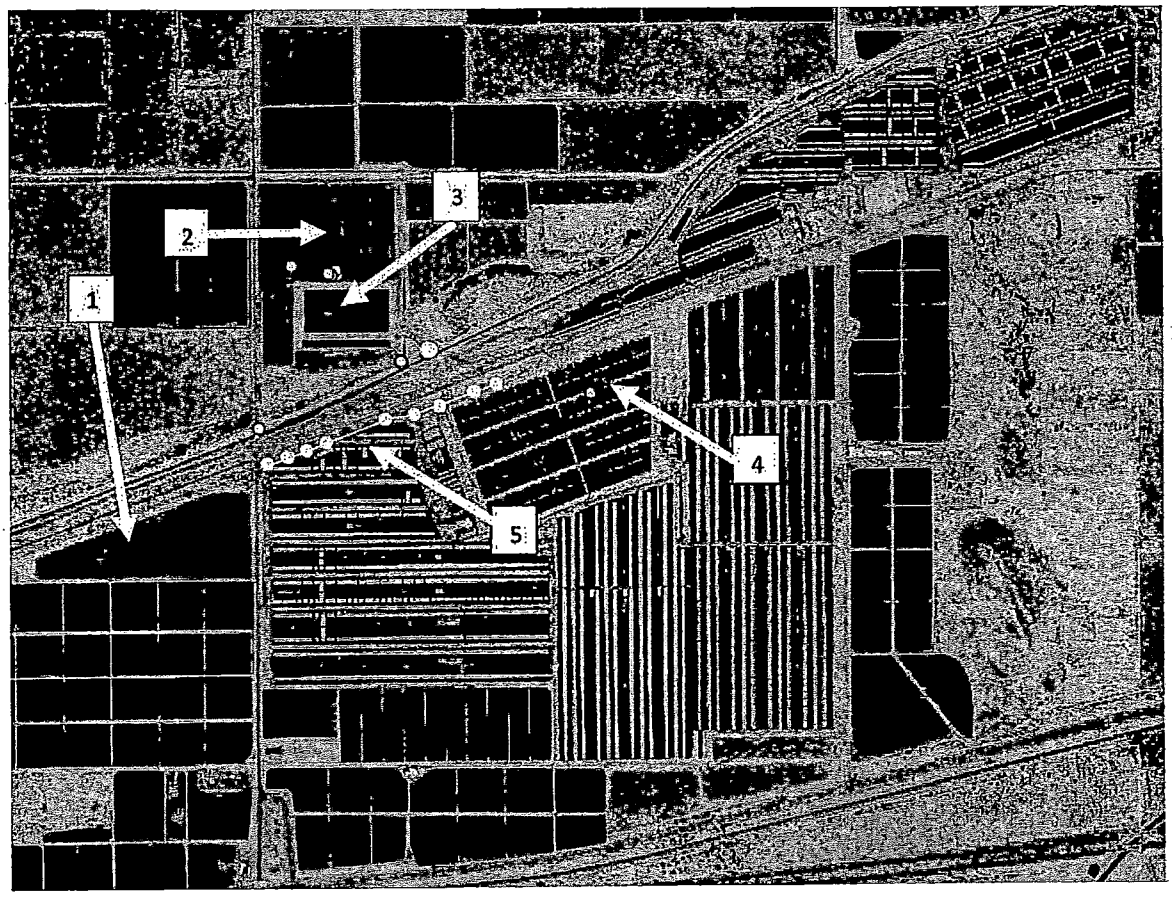


Figure 2. Overview of Wellton area CAFO and adjacent canal property, Including West (1) and North (2) Composting Facilities, North retention pond (3), fresh manure sampling location of steer feeding pens (4), Drag Swabs and soil samples along feedlot perimeter fence-line (5). Circles represent EA team sampling locations (compost and manure). Red circles indicate samples that were positive for STECs. No samples were positive for the outbreak strain.

The EA team collected a total of six samples from the Wellton-area CAFO, consisting of composted manure, dry manure, fresh manure, spilled fresh manure, well water, and feedlot drainage water from the north retention pond. The outbreak strain was not detected in any of these samples. However, the Wellton-area CAFO is a very large facility with a high turnover of steers. This limited sampling was performed after the outbreak had occurred and before the results of the irrigation canal testing were known. Since the sampling was limited, it is not possible to draw statistically valid conclusions regarding the presence or absence of the outbreak strain on this facility based on the number of samples collected and when they were collected relative to the outbreak.

Imperial County CAFOs

The EA team also collected composting manure from a CAFO located near Imperial County farms identified by traceback. The outbreak strain was not detected, although a non-O157 STEC was found in the in-process compost from the Imperial Valley CAFO.

The EA team collected samples of surface water from a public pond immediately adjacent to another Imperial County CAFO near the farms identified in the traceback. The team also sampled three canals located near additional CAFOs that provide water to these farms. The outbreak strain was not detected in any samples of surface water or irrigation water from Imperial County.

The EA team interviewed the management of an Imperial County CAFO to determine whether there is a source of animals in common with the Wellton-area CAFO and found that these operations source their steers from different states.

WILDLIFE/ANIMAL INTRUSION ASSESSMENT

The 2017-2018 winter desert season in the region was dry. Monthly rainfall totals (in inches) include October (0.00), November (0.05), December (0.00), January (0.07). February (0.01), March (0.01) and April (0.00). With little rain and an abnormally warm fall and winter, desert habitats were exceptionally dry likely resulting in less natural vegetation and water to support native animal species. The EA team assessed wild animal activities, through collection of scat in and around the Gila River corridor in Yuma County, along irrigation canal banks and production fields, from various areas of the Colorado River environmental assessment area, and through interviews with growers.

The EA team noted that the area surrounding several fields in and around the Gila River wildlife corridor experienced a wildfire during the growing season (March 19 – 21, 2018). The fire was extinguished by the WMIDD using fire breaks; no chemical or water applications were used in fighting the fire. None of the farms noted any significant increase in wildlife activity resulting from the wildfire. In addition, *E. coli* O157:H7 illnesses confirmed to be part of the outbreak occurred before this date, meaning contamination likely preceded the occurrence of the wildfire. The EA team collected scat samples from within areas of the Gila River bed and associated fields which did not yield the outbreak strain; however, sampling was limited so it is not possible to draw statistically valid conclusions regarding the presence or absence of the outbreak strain in Yuma County wildlife.

No wildlife corridors were identified adjacent to any of the Imperial County farms identified in the traceback.

COLORADO RIVER WATER ASSESSMENT

The 23 farms identified by traceback share a common source of irrigation water in the Colorado River. Because of this commonality, the EA team assessed Colorado River water as a potential source for the outbreak pathogen.

Colorado River water is delivered to farms in the Yuma growing region via managed canal systems that take Colorado River water at the Imperial Dam. Therefore, the EA team identified the Imperial Dam and upstream areas north of the dam as the area of interest in the Colorado River assessment.

The Palo Verde Valley growing area is located approximately 95 river miles upstream of the Imperial Dam, near Blythe, California. Winter crops in the Palo Verde Valley include romaine lettuce. No romaine lettuce or other crops from the Palo Verde Valley growing region were associated with this outbreak. Therefore, the EA team identified the Colorado River take-out for the Palo Verde Valley irrigation canal system at the Palo Verde Dam as the northern endpoint of the area of interest in the Colorado River assessment.

The approximate 95-mile stretch of the Colorado River between the Imperial Dam and the Palo Verde Dam is sparsely populated. This section of the river contains approximately 12 isolated seasonal resort communities, two wildlife preserves, and concentrated agricultural use in the Palo Verde Valley area. The California Army National Guard provided the EA team with helicopter support to scout this section of the Colorado River for potential outbreak strain sources. The helicopter scouting mission covered the Colorado River from the Imperial dam north to the Palo Verde dam, and included portions of the Palo Verde valley growing area on the southbound return trip. No potential sources for the outbreak strain were observed along the Colorado River or within the Palo Verde valley growing area.

The EA team collected water samples from the Palo Verde take-out at the Palo Verde Dam, the Palo Verde outfall canal, the California and Arizona take-outs at the Imperial Dam, the All-American Canal (California) de-silting ponds, and the Arizona side canal adjacent to a dam-front resort community.

E. coli O157:H7 was not detected in any sample of Colorado River water.

WMIDD GROUND WATER ASSESSMENT

WMIDD operates two canal systems: an irrigation water canal system that delivers water from the Colorado River Imperial dam to Wellton-area farms, and a salt water canal system that is utilized to discharge saline ground water from the Wellton valley to the Colorado River. Multiple shallow-well pumps operated by the WMIDD draw saline ground water to depths below the root zone so that Wellton valley land can be used for growing produce. This saline ground water is delivered to the Colorado River at a point downstream of the Imperial Dam. The EA team found that shallow ground water is directly pumped into WMIDD irrigation canals at two locations. The outbreak strain was detected in a WMIDD irrigation canal sample that was collected immediately downstream of one of these shallow

ground water discharges into the Wellton irrigation canal. The team also found an area where ground water may be seeping directly into unlined sections of the Wellton irrigation canal; this potential ground water seepage area is within the approximate 3.5-mile section of the Wellton irrigation canal where the outbreak strain was detected.

The EA team identified two potential routes of contamination of ground water from the Wellton-area CAFO. Contamination could occur via direct percolation through the sandy soil of the CAFO feedlot into the shallow ground water. However, as noted previously, CAFO management provided soil permeability analysis results for soil samples collected from cattle pens which demonstrate very low permeability and thus low likelihood of pathogen transport through the pen flooring and into the ground under the pens. The second potential route may be groundwater contamination through one or more of (b) (4), (b) (6) and possibly (b) (4), (b) (6) onsite wells at the CAFO. (b) (4), (b) (6) wells are listed for this CAFO in publicly available information on the Arizona Department of Water Resources (ADWR) website. (b) (4), (b) (6) active wells are listed under the current CAFO operator's name, and (b) (4), (b) (6) wells are registered under the (b) (4), (b) (6) The ADWR provided the EA team with copies of registrations for (b) (4), (b) (6) wells on the CAFO property, including a farm well that was constructed in (b) (4), (b) (6) for which the current status is unknown:

(b) (4), (b) (6)

(b) (4), (b) (6)

(b) (4), (b) (6)

Based upon Bureau of Reclamation hydrologic data, including a Bureau of Reclamation Wellton Area Groundwater Map, the EA team determined that ground water under the Wellton-area CAFO most likely flows from the southeast towards the northwest. This roughly aligns with groundwater flowing from the CAFO area towards the unlined sections of the Wellton irrigation canal that are upstream of the CAFO in terms of irrigation canal flow. (See Figure 1.) The Bureau of Reclamation indicated that these sections of the Wellton irrigation canal are currently unlined because ground water upwelling damaged the previous cement lining.

WATER SAMPLING

Yuma County

As noted previously, *E. coli* O157:H7 was detected in three places along an approximate 3.5-mile section of the WMIDD Wellton irrigation canal. The locations of the three samples were approximately one mile upstream of a CAFO, adjacent to a CAFO, and approximately one mile downstream of the CAFO (Figure 1). Genetic analyses of these isolates using PFGE and WGS determined that the *E. coli* O157:H7 found in the Wellton irrigation canal water in all three locations was the same strain that caused the outbreak. In June, water samples were also collected from one CAFO well serving the feedlot (approx. 150 ft. deep) and retention pond located on the feedlot property. The well sample was collected after the water passed through a plumbed sand filtration system that was not feasible to bypass for sampling. *E. coli* O157:H7 was not detected in either sample.

In July, water samples were collected from two State of Arizona pesticide ground water monitoring wells (Figure 3), as well as from the salt drainage canal downstream of the WMIDD area of responsibility (Figure 4). *E. coli* O157:H7 was not detected in either the ground water monitoring wells or the salt drainage canal.

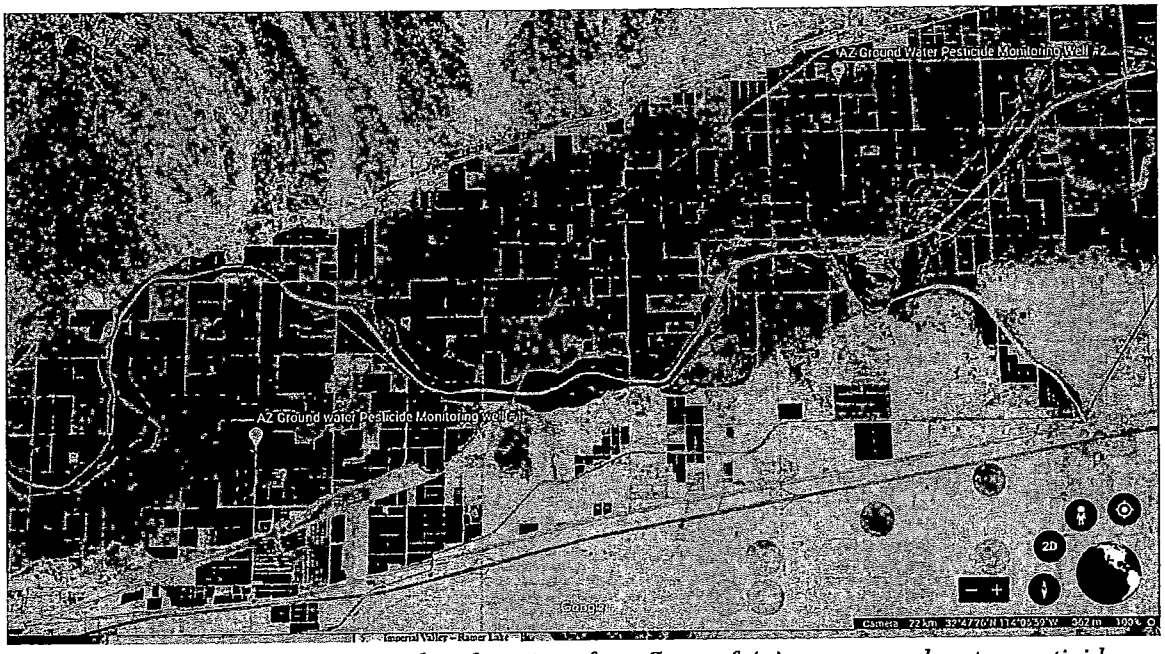


Figure 3. *Map of July water sampling locations from State of Arizona ground water pesticide monitoring wells.*

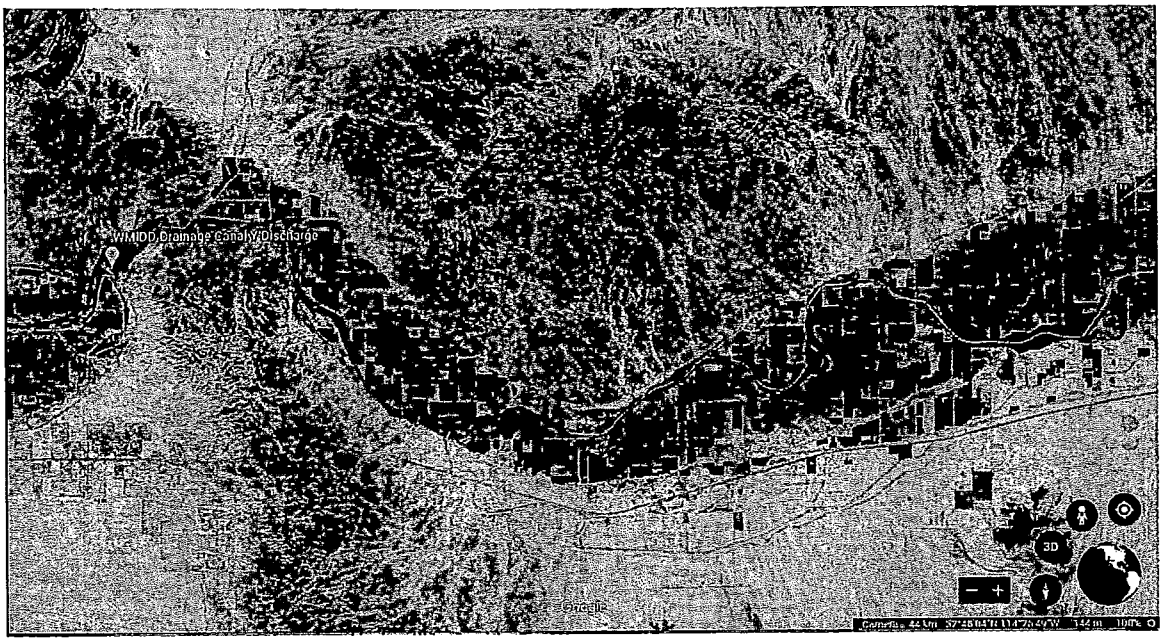


***Figure 4**. Map of July sampling location in salt water drain canal downstream of the WMIDD area of responsibility.*

In August 2018 additional ground and irrigation canal water samples were collected in Yuma County. The sampling sites included the three Wellton irrigation canal sites that tested positive in June 2018 sampling, the irrigation canal before the Wellton-Mohawk canal split, within the Mohawk canal, the termination point of both the Wellton and Mohawk irrigation canals, and the Wellton-Mohawk drainage canal; none of the samples collected in August were positive for the outbreak pathogen.

Colorado River

Water samples were collected from the Palo Verde (PV) valley and Imperial Dam area (Figures 5 & 6).

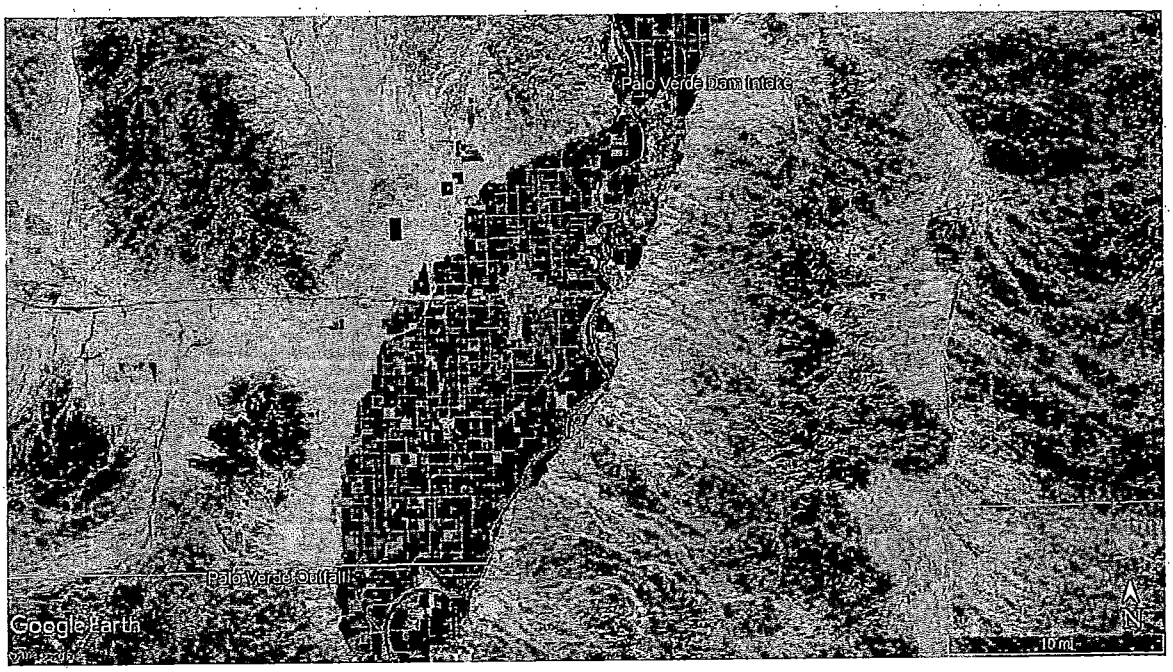


Figure 5. *Map of June sampling locations at PV Dam and PV Irrigation Canal discharge into the river.*



Figure 6. *Map of June sampling locations at Imperial Dam and All American and AZ irrigation canals.*

Imperial County

In June, the EA team collected samples of surface water from a public pond (Figure 7) immediately adjacent to an Imperial County CAFO near Imperial County farms identified by traceback and from irrigation canal drainage into the Salton Sea (Figure 8). The outbreak strain was not detected.

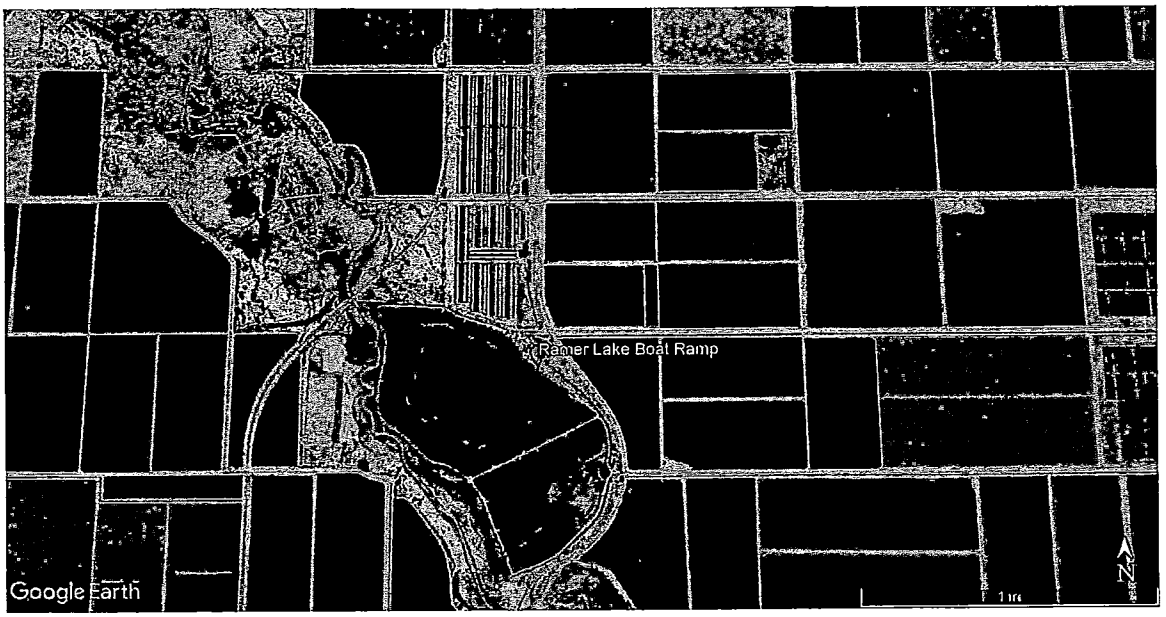


Figure 7. *Map of June water sampling location in Imperial Valley at Ramer Lake adjacent to cattle feedlot*

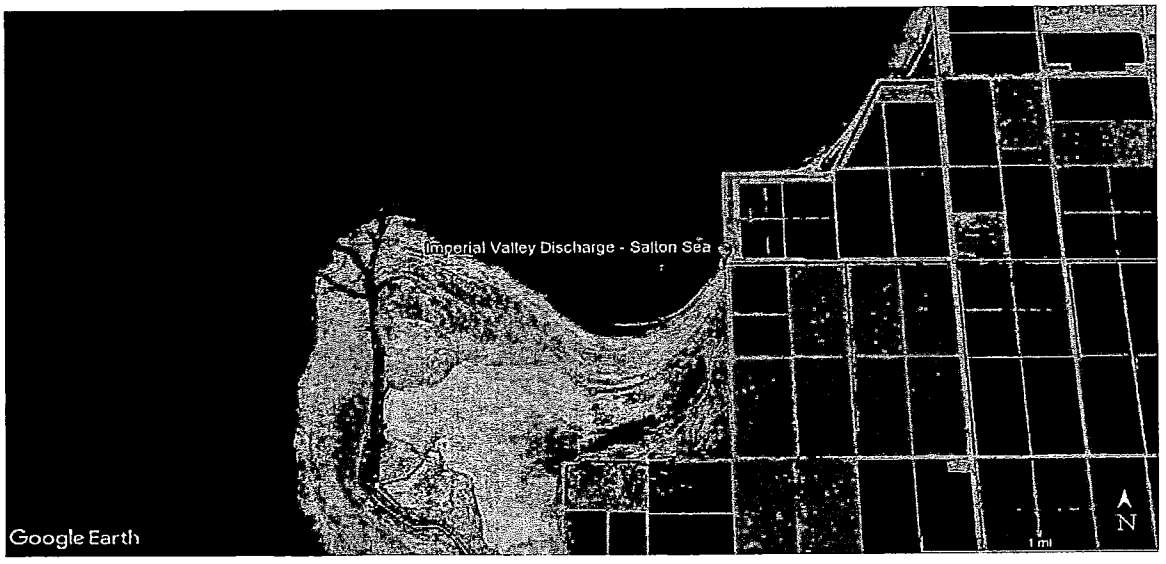


Figure 8. *Map of June water sampling location at Imperial Valley drainage canal discharge into Salton Sea.*

In July, the team also collected irrigation water from three Imperial County irrigation canals that provide water to Imperial County farms identified by traceback (Figure 9); all three of these irrigation canals have CAFOs near them. Six strains of *E. coli* O157:H7, each genetically distinct from each other, were detected at one canal water site (Spruce Main Delivery 49/50) in Imperial Valley, although none match the outbreak strain. (See Table 3.)

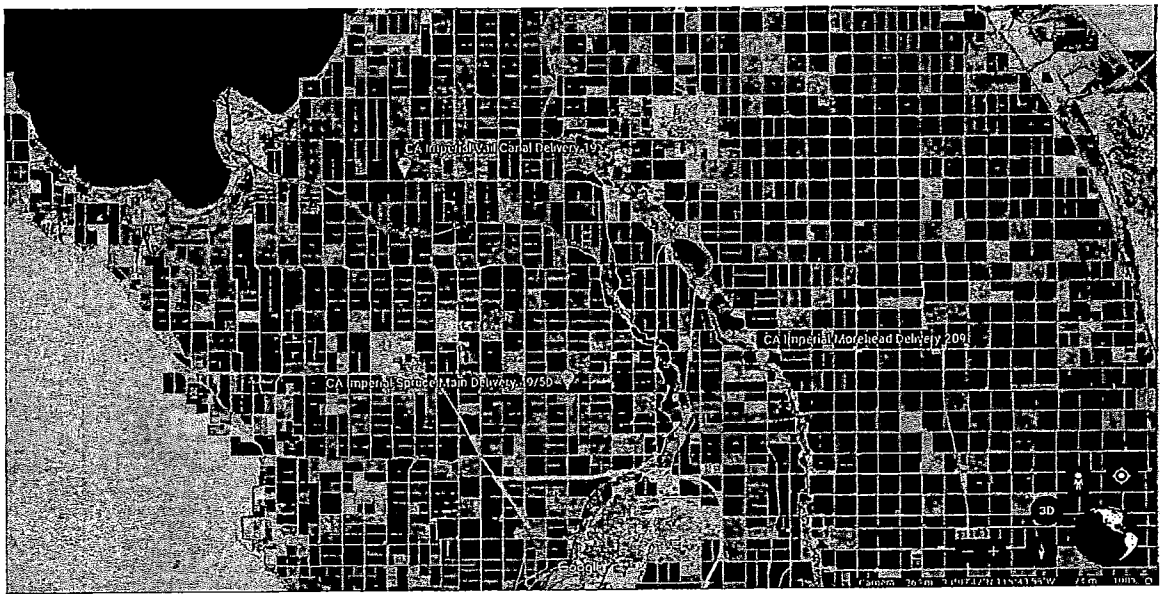


Figure 9. *Map of July water sampling locations in CA Imperial Drainage District canals.*

Table 2. Results of June Water Sampling

Site Description	Physical Water Quality Parameters[1]	Total coliforms (MPN/100 mL)	*E. coli* (MPN/100 mL)	Enterococci (MPN/100 mL)	Results: *E. coli* O157:H7, Other STECs, *Salmonella spp.*
Palo Verde Outfall	Temp: 24.5 pH: 7.96 Turbidity: 15.6 Conductivity: 1604 TDS: 926 Salinity: 688	>2419.6	71.7	866.4	Not detected
Palo Verde Dam Intake	Temp: 25.1 pH: 8.28 Turbidity: 1.59 Conductivity: 922 TDS: 665 Salinity: 446	1553.1	16.8	24.3	Not detected
Ag. Chemical Applicator's Well	Temp: NT[2] pH: NT Turbidity: 0.17 Conductivity: NT TDS: NT Salinity: NT	71.7	<1	1	Not detected
(b) (6) – Imperial Dam	Temp: 27.4 pH: 8.26 Turbidity: 4.03 Conductivity: 1014 TDS: 718 Salinity: 499	>2419.6	11.0	33.2	Not detected
Hidden Shores Beach	Temp: 27.8 pH: 8.29 Turbidity: 7.15 Conductivity: 1010 TDS: 719 Salinity: 499	>2419.6	24.3	62.7	Not detected
Wellton Irrigation Canal Downstream of CAFO	Temp: 26.6 pH: 8.26 Turbidity: 1.79 Conductivity: 1365 TDS: 966 Salinity: 536	>2419.6	83.9	48.2	Detected[3]
Wellton Irrigation Canal Adjacent to CAFO	Temp: 26.9 pH: 8.44 Turbidity: 2.9 Conductivity: 1179 TDS: 836 Salinity: 583	>2419.6	84.2	35.5	Detected[3]
Wellton Irrigation Canal Upstream of CAFO	Temp: 27.5 pH: 8.33 Turbidity: 1.65 Conductivity: 1125 TDS: 794 Salinity: 534	>2419.6	4.1	9.5	Detected[4]

Site Description	Physical Water Quality Parameters[1]	Total coliforms (MPN/100 mL)	*E. coli* (MPN/100 mL)	Enterococci (MPN/100 mL)	Results: *E. coli* O157:H7, Other STECs, *Salmonella spp.*
CAFO Well #1	Temp: 25.4 pH: 7.08 Turbidity: 0.12 Conductivity: 2490 TDS: 1790 Salinity: 1270	<1	<1	<1	Not detected
CAFO Drain Ditch	Temp: 31.4 pH: 9.12 Turbidity: 413 Conductivity: OR[5] TDS: OR Salinity: OR	163000	<1	<1000	Not detected
All American Canal Intake	Temp: 25.9 pH: 8.26 Turbidity: 4.24 Conductivity: 1025 TDS: 727 Salinity: 506	>2419.6	13.4	26.9	Not detected
Ramer Lake Boat Ramp	Temp: 30.4 pH: 8.73 Turbidity: 62.0 Conductivity: 3580 TDS: 2530 Salinity: 1880	>2419.6	25.9	16.0	Not detected
Imperial Valley Discharge – Salton Sea	Temp: 31.8 pH: 8.12 Turbidity: 49.0 Conductivity: 5540 TDS: 3910 Salinity: 2980	8664000	110	1000	Not detected
CA Sediment Imperial Discharge	Temp: 25.8 pH: 8.38 Turbidity: 11.7 Conductivity: 1013 TDS: 722 Salinity: 506	>2419.6	14.8	41.9	Not detected

[1] Water temperature (°C), Turbidity (NTU), Conductivity (µS/com), Total dissolved solids (TDS, ppm), Salinity (ppm)
[2] Not tested
[3] Two unique E. coli O157:H7 strains detected matching the outbreak
[4] One E. coli O157:H7 strain detected matching the outbreak
[5] Over range

Table 3. Results of July Water Sampling

Site Description	Physical Water Quality Parameters[1]	Total coliforms (MPN/100 mL)	*E. coli* (MPN/100 mL)	Enterococci (MPN/100 mL)	Results: *E. coli* O157:H7, Other STECs, *Salmonella spp.*
Salt Canal Y Discharge	Temp: 30.7 pH: 8.09 Turbidity: 32.4 Conductivity: 3500 TDS: 2500 Salinity: 1850	>2419.6	161.6	1203.3	Not detected
AZ Groundwater Well near CAFO	Temp: 27.2 pH: 7.41 Turbidity: 41.5 Conductivity: 2500 TDS: 1760 Salinity: 1270	2.0	<1	<1	Not detected
CA Imperial Moorehead Delivery 209 Irrigation Canal	Temp: 29 pH: 8.3 Turbidity: 7.45 Conductivity: 1083 TDS: 778 Salinity: 536	>2419.6	59.1	227.9	Not detected: O157:H7 Detected: O178:H19
CA Imperial Spruce Main Deliver 49/50 #1 Irrigation Canal	Temp: 30.5 pH 8.45 Turbidity 56.5 Conductivity: 1111 TDS: 787 Salinity: 549	>2419.6	313	>2419.6	Detected:[2] O157:H7, O6:H34, O181:H49, O153:H25; non-STEC O175:H16; *Salmonella Agona*
CA Imperial Vail Canal Delivery 19 Irrigation	Temp: 31.5 pH: 8.35 Turbidity: 82.5 Conductivity: 1077 TDS: 762 Salinity: 536	>2419.6	90.9	1413.6	Not detected: O157:H7 Detected: *Salmonella Synhymenium*; non-STEC O175:H16
AZDA Pesticide Monitoring Well #3	Temp: 27.1 pH: 7.51 Turbidity: 34.6 Conductivity: 2970 TDS: 2120 Salinity: 1510	4.1	<1	15.6	Not detected

[1] Water temperature (°C), Turbidity (NTU), Conductivity (µS/cm), Total dissolved solids (TDS, ppm), Salinity (ppm)

[2] Six unique E. coli O157:H7 strains detected, none matched outbreak strain.

Table 4. Results of August Water Sampling

Site Description	Physical Water Quality Parameters[1]	Total coliforms (MPN/100 mL)	*E. coli* (MPN/100 mL)	Enterococci (MPN/100 mL)	Results: *E. coli* O157:H7, Other STECs, *Salmonella spp.*
Wellton Canal downstream of CAFO	Temp: 31.8 pH: 7.07 Turbidity: 1.64 Conductivity: 1080 TDS: No data Salinity: No data	>2419.6	151.5	69.5	Not detected
Wellton Canal downstream of CAFO; Well Head	Temp: 26.5 pH: 6.85 Turbidity: 0.41 Conductivity: 2640 TDS: No data Salinity: No data	<1	<1	<1	Not detected
Wellton Canal next to CAFO	Temp: 32.7 pH: 8.04 Turbidity: 1.47 Conductivity: 1109 TDS: No data Salinity: No data	>2419.6	78.9	21.1	Not detected
Well Head (b) (4), (b) (6)	Temp: 27.1 pH: 6.97 Turbidity: 0.18 Conductivity: 2500 TDS: No data Salinity: No data	3.1	<1	<1	Not detected
Mohawk Canal terminus	Temp: 29.7 pH: 8.45 Turbidity: 4.50 Conductivity: 1093 TDS: 775 Salinity: 538	>2419.6	12.2	26.6	Not detected
Wellton Canal terminus	Temp: 31.4 pH: 8.21 Turbidity: 0.94 Conductivity: 1118 TDS: 792 Salinity: 550	>2419.6	40.8	40	Detected: O157:H45
Drainage Well-GW Input	Temp: 27 pH: 7.52 Turbidity: 0.22 Conductivity: 3340 TDS: 2340 Salinity: 1720	7.5	<1	2	Not detected
Drainage Well-downstream of GW Input	Temp: 31.1 pH: 7.82 Turbidity: 1.56 Conductivity: 4000 TDS: 2780 Salinity: 1970	>2419.6	365.4	980.4	Not detected

Site Description	Physical Water Quality Parameters[1]	Total coliforms (MPN/100 mL)	*E. coli* (MPN/100 mL)	Enterococci (MPN/100 mL)	Results: *E. coli* O157:H7, Other STECs, *Salmonella spp.*
Mohawk Canal south of CAFO	Temp: 30.2 pH: 7.95 Turbidity: 28.7 Conductivity: 1110 TDS: No data Salinity: No data	>2419.6	3.1	14.4	Not detected
Wellton Canal upstream of CAFO	Temp: 30.8 pH: 7.8 Turbidity: 6.17 Conductivity: 1091 TDS: No data Salinity: No data	>2419.6	2	18.1	Not detected
Well Head by CAFO	Temp: 28.7 pH: 6.8 Turbidity: 0.08 Conductivity: 2530 TDS: No data Salinity: No data	<1	<1	<1	Not detected
Wellton Canal	Temp: 30.3 pH: 8.15 Turbidity: 7.23 Conductivity: 1138 TDS: 792 Salinity: 558	>2419.6	4.1	20.9	Not detected
Wellton Canal—Head	Temp: 32 pH: 8.13 Turbidity: 21.1 Conductivity: 1098 TDS: 763 Salinity: 533	>2419.6	2	12.4	Not detected

[1] *Water temperature (°C), Turbidity (NTU), Conductivity (µS/com), Total dissolved solids (TDS, ppm), Salinity (ppm)*

SUMMARY OF OUTBREAK STRAIN POSITIVE RESULTS

Table 5. Wellton Irrigation Canal Water Sampling– Positive for Outbreak Pathogen

Site Description	Date of Collection	Phenotypic Testing Results	Virulence Profile				PFGE Pattern	
			stx1	stx2	eae	ehxA	PFGE Results XbaI	PFGE Results BlnI
Irrigation Canal - Wellton Field (downstream of CAFO)	6/5/2018	*E. coli* O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.1486	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.1486	EXHA26.0626
Irrigation Canal - CAFO (adjacent)	6/5/2018	*E. coli* O157:H7	-	+	+	+	EXHX01.2951	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.1486	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.2951	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.2951	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.2951	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.2951	EXHA26.0626
Irrigation Canal - upstream of CAFO	6/5/2018	*E. coli* O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626
		E. coli O157:H7	-	+	+	+	EXHX01.0047	EXHA26.0626

Other Potential Pathogen Findings

Some of the EA samples were tested for pathogens other than *E. coli* O157:H7. Table 6 below provides details regarding EA sample results that were found to be positive for *Salmonella* spp. and other STECs.

Table 6. Soil, Compost, Manure, and Scat Sampling—Positive Results

Site Description	STECs	*Salmonella*
Wellton CAFO -West Composting Facility – Finished Compost	O103:H11 STEC (stx1a/eae positive)	Negative
Wellton CAFO - Dried Manure – approx. 6-month-old – Collected from North Composting Facility	O unknown:H2 STEC (stx1a positive/eae negative) O171:H2 STEC (stx1a positive/eae negative)	Negative
Wellton CAFO - Fresh Manure from 15-16-month-old Steer (b) (4), (b) (6)	O130:H9 (stx1a positive/eae negative) O unknown:H12 (stx1c positive/eae negative)	Negative
Wellton CAFO - Drag Swab along Feedlot Perimeter Fence-line	O3:H12 (stx1a positive/eae negative)	Negative
Wellton CAFO - Soil Samples along Feedlot Perimeter Fence-line	O103:H11 STEC (stx1a positive/eae positive) O3:H12 (stx1a positive/eae negative)	Negative
Water/Sediment on farm	Stx2 positive/eae negative– No Serotyping	
Coyote Scat	Stx1 Positive/eae negative – No Serotyping	
Slime/Sediment	O132:H18 stx2 positive/eae negative	
Scat	O9:H9 (stx1a positive/eae negative) O23:H16 (stx1a positive/eae negative)	
Canal swab downstream of ground water discharge pipe	Unknown Serotype (stx2d positive/eae negative)	
In-Process Compost	0160:H12 (stx1c positive/eae negative)	
CA Imperial Moorehead Delivery 209 Irrigation Canal	O178:H19	
CA Imperial Spruce Main Delivery 49/50 #1 Irrigation Canal	O157:H7;[1] O6:H34, O181:H49, O153:H25; non-STEC O175:H16	*Salmonella Agona*
CA Imperial Vail Canal Delivery 19 Irrigation	Negative	*Salmonella Typhimurium*

[1] *Not the outbreak strain of E. coli O157:H7.*

Whole genome sequencing of STEC isolates was used to identify the presence of virulence factors associated with pathogenicity, including Shiga toxins and intestinal adherence factor (eae).

E. coli O130:H11 was found in finished compost on the Wellton-area CAFO and in soil from the CAFO perimeter; these strains were determined by WGS to be a match to each other.

Some STEC isolates are reported above as O unknown because they were too complex to be typed into one of the approximately 180 O types; other STEC isolates could not be serotyped and are reported as unknown. All of these O unknowns and unknown serotypes were eae negative, meaning they lack the attachment factor which is associated with more severe human infections.

CONCLUSION

This memo of investigation summarizes the activities of the Environmental Assessment team along with the environmental and laboratory findings. The interpretation of these findings and recommendations arising from the investigation are contained in a separate Environmental Assessment document.

Kevin T. Gerrity -S

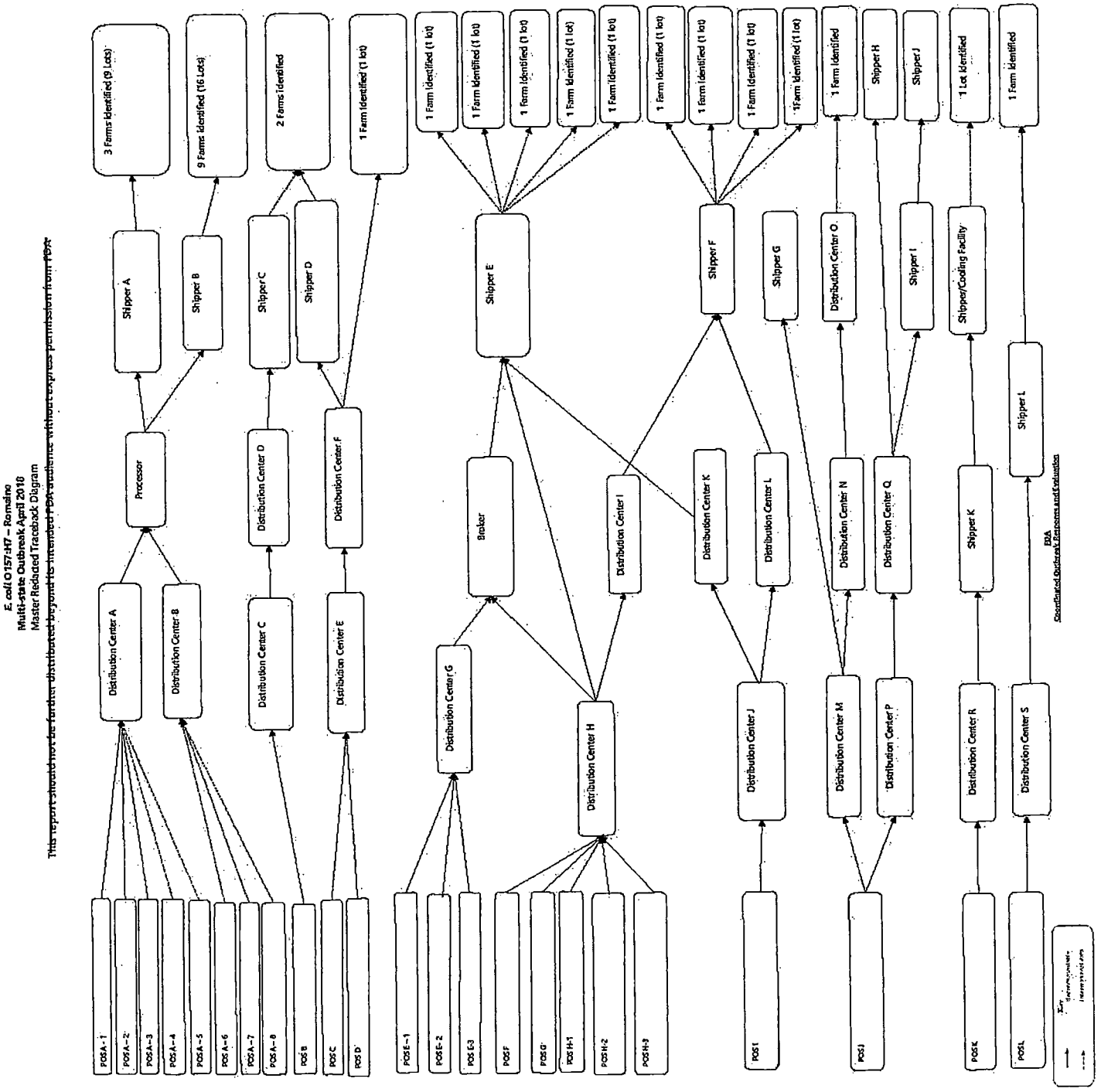
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Date: 2018.10.24 09:50:09 -07'00'

10/24/2018

Date

Kevin Gerrity
Consumer Safety Officer
National Food Expert

ATTACHMENT A – MASTER TRACEBACK DIAGRAM



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
Docket No. 17-ALJ-17-0060-CC

McEntire Produce, Inc.,	)
	)
Petitioner,	)
	)
v.	)
	)
South Carolina Department of Revenue,	)
	)
Respondent.	)
	)

ADMINISTRATIVE HEARING

****

Wednesday, November 14, 2018
9:58 a.m. - 4:21 p.m.

&

Thursday, November 15, 2018
10:02 a.m. - 12:00 p.m.

The administrative hearing before the Honorable Harold W. Funderburk, Jr., was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 14th and 15th days of November 2018, before Cortney N. Glover, Court Reporter and Notary Public in and for the State of South Carolina.

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(The original exhibits were retained by The Court.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.

DAY ONE - WEDNESDAY, NOVEMBER 14, 2018

(Petitioner's Exhibit Numbers 5, 7, 8, 10, 11, 14, 16, 17, 19, 21, 22, 23, 24, and 25 were marked prior to the hearing.)

CALL TO ORDER:

THE COURT: All right. We're on the record in Case Number 17-ALJ-17-0060. This is a contested case in the matter of McEntire Produce, Incorporated, petitioner, versus South Carolina Department of Revenue, respondent. Petitioner represented by Jim Rourke and Burnie Maybank or just Jim?

MR. ROURKE: Both.

THE COURT: Okay. All right. The Department is represented by Lauren Acquaviva and Elisabeth Shields.

MS. ACQUAVIVA: Good morning, Your Honor.

THE COURT: Good morning. And this is a petition for a contested case hearing challenging the assessment of certain sales and use taxes that petitioner claims are exempt under South Carolina Code Annotated 12-36-2120 I think Subs 17 and 19; is that right?

MR. MAYBANK: I believe so.

MS. ACQUAVIVA: It's 17 and 54, your Honor.

THE COURT: Yeah. 17 and 54. All right. Thank you for that correction.

We'll begin with a opening statement by Petitioner followed by an opening statement by Respondent. Following the opening statements we'll have witnesses and exhibits presented subject to cross-examination. Before we start, any preliminary matters or stipulations, motions, or anything of that sort before we begin?

MR. MAYBANK: We do have a stipulation, and we have jointly introduced a variety of exhibits. If we could go ahead and, I guess, formally put the -- we have one or two exhibits that are opposed, but we've given a stack of exhibits that are not opposed, if we could go and introduce those into evidence.

MS. ACQUAVIVA: And ---

MR. MAYBANK: And we have a stipulation.

MS. ACQUAVIVA: You'll see, when you look through the stipulations, that some issues have been resolved. That's why Subsection 19 is no longer at issue.

THE COURT: All right. So this is -- how many stipulations do we have.

MR. MAYBANK: One.

THE COURT: Just one big one, huh?

MR. MAYBANK: Right.

MS. ACQUAVIVA: Well, there's paragraphs with -- there's stipulations of fact.

THE COURT: Right.

MS. ACQUAVIVA: Several of them on the first page, first three pages, I guess. And then those are the stipulated exhibits attached.

THE COURT: So without objection, those stipulations are entered into the record.

(Petitioner's Exhibit Numbers 5, 7, 8, 10, 11, 14, 16, 17, 19, 21, 22, 23, 24, and 25 were admitted into evidence.)

(Court's Exhibit Number 1 was marked for identification purposes and admitted into evidence.)

MR. MAYBANK: As well as a number of exhibits.

THE COURT: What are the exhibits.

MS. ACQUAVIVA: They're Petitioner's Exhibit Numbers 5, 7, 8, 10, 11, 14, 16, 17, 19, 21 through 25. And Respondent's Exhibit 1.

Did you all give her that exhibit as well to mark?

MR. MAYBANK: Yeah.

MR. ROURKE: We didn't give Respondent's Exhibit 1.

THE COURT: You want to go ahead and do that now?

MS. ACQUAVIVA: Yeah.

MR. ROURKE: Oh, actually, you know what? I'm sorry. It is on the -- I think it's Exhibit C to the stipulation of facts -- or it's Attachment C.

MS. ACQUAVIVA: We can add it separately.

COURT REPORTER: I have -- these are individual, correct?

MR. MAYBANK: Correct.

COURT REPORTER: Okay.

MS. ACQUAVIVA: We've just added Respondent's 1.

(Respondent's Exhibit Number 1 was marked for identification purposes and admitted into evidence.)

THE COURT: Okay.

OPENING STATEMENT BY THE PETITIONER:

MR. MAYBANK: Thank you, your Honor. I'm Bernie Maybank here on behalf of McEntire Produce. McEntire -- and by the way, we -- I think both sides submitted pretrial briefs. I think y'all were on holiday. But it did come in via e-mail, and I think both of us entered -- have filed with the court a lengthy pretrial brief. I know we have. So that would be something to look at. Did we actually bring a hard copy

here?

MR. ROURKE: I've got a hard copy to submit to the Court, if that's needed.

MR. MAYBANK: Why don't we -- if we've got a hard copy ---

THE COURT: I've got a brief from McEntire Produce.

MR. MAYBANK: Right.

THE COURT: I do not have one from ---

MS. ACQUAVIVA: The Department did not submit a brief, just our Department determination.

THE COURT: Okay.

MS. ACQUAVIVA: And, your Honor, I did e-mail the Court yesterday regarding the Petitioner's pretrial brief. But there's a memo attached to it that we would ask the Court to disregard, as it's not in evidence and would be inappropriate to attach to a pretrial brief.

THE COURT: We'll take that when we get to it.

MR. MAYBANK: So McEntire is a closely held South Carolina corporation owned by two South Carolinians, two residents of Columbia. And they manufacture fresh produce. They have one facility here in Columbia. It's actually a quite large facility. They've got almost 600 employees out there. And so they take produce

from farms and turn it into produce that they sell primarily to restaurants, McDonald's and things of that nature. And so they're like an OEM of produce. Their name's not on it. Typically, they're name's not on it. Their customers' names are on it.

This case is purely a sales tax case, and it covers two issues, certain machinery and equipment, but primarily protective clothing. So the machinery and equipment issue we'll cover fairly briefly. We have -- we contend that six or seven pieces of machinery equipment are used in the manufacturing process and are therefore exempt from sales tax. The Department says they're not used in the manufacturing process, and so they assess sales or use taxes on the machinery and equipment.

We -- the major issue in dispute today, however, is protective clothing. And McEntire buys a large amount of protective clothing each year. And so the issue is whether that protective clothing is subject to use tax. McEntire bought it with their manufacture sales tax exemption certificate, so they didn't pay sales tax on it when they bought it. The

Department contends they're liable for it. And we contend the two exemptions that cover the protective clothing. One is the Class 100 Cleanroom Exemption, and McEntire will testify federal law. State law requires there be a Class 100 Cleanroom at the facility when there is, and a protective clothing is required by federal law to use in a Class 100 Cleanroom. The second exception we contend that applies to protective clothing is the Pollution Control Exemption. And you'll hear in the course of case there is a surprising amount of State and federal law regarding cutting fresh-cut produce. Not nearly as much law regarding farms and even not nearly much law regarding restaurants. But when you fresh-cut produce, there are a number of issues regarding it, and so there's extensive federal regulation. There's State regulation that basically tracks the federal regulation. And there are a number of certifications that do it as well. So that's the major issue today is whether protective clothing is exempt from sales tax. We contain it is exempt under the Class 100 Cleanroom and the Pollution Control Exception.

There's also a dispute over whether the statute of limitations has run for five or six months. We contend that the proposed assessment contains a couple of months that are barred by the statute of limitations, and so there'll be a bit of testimony regarding that.

We'll have three witnesses and, we'll be publishing the deposition of Dr. Gombas, an expert witness. Thank you, your Honor.

THE COURT: Okay.

MS. ACQUAVIVA: Your Honor, if I may just put this on the overhead before I get started?

THE COURT: Sure.

OPENING STATEMENT BY THE RESPONDENT:

MS. ACQUAVIVA: Thank you. May it please the Court. Good morning. My name is Lauren Acquaviva, and I'm here today on behalf of the Department of Revenue. As you can see from the list on the screen, we're here about 35 different supplies that McEntire uses at its food processing plant to determine whether they're exempt from sales and use tax. We expect that the evidence today will show that the petitioner will not be able to prove that any of these items are exempt pursuant to 12-36-2120, 17, or 54.

Specifically, many of these items they'll be unable to prove that these items serve as an essential and indispensable component part of the manufacturing process, that they're used on an ongoing and continuous basis during the manufacturing process, or that they're used substantially in manufacturing tangible personal property for sale.

Regarding the protective clothing, which is coveralls, eye wear, gloves, aprons, and hair nets. So five of the 35 items Petitioner is claiming that they are either pollution control machines, or they're clothing required to be worn in a Class 100 or better cleanroom. We, again, expect the evidence to show that these supplies are not machines specifically pursuant to Regulation 117-302.5 subsection (B)10, protective clothing, is not a machine by regulation.

Even if the Court were to find that these protective clothing items were machines, the Petitioner -- we expect the Petitioner will be unable to prove that these items are not necessary to comply with an order of a State or federal agency for the prevention or abatement

of pollution of air, water, or noise, or that exempt machines are creating air, water, or noise pollution that needs to be prevented. We also don't expect the petitioner to be able to prove that these items are required for working in a Class 100 or better cleanroom as defined by federal standard 209(E), nor will they be able to prove that the plant has a cleanroom. Therefore, there would be no place for required clothing to be worn.

In sum, we'd like to remind the Court that the language of tax exemption statutes must be given their plain and ordinary meaning and must be strictly construed against exempting the tax. You'll hear today that the Petitioner is going to ask the Court to broaden the exemptions. And we would, again, just ask the Court, as provided by the Supreme Court TMS Mills that the exemption be narrowly construed against exempting these items from tax. Thank you.

THE COURT: All right.

MR. MAYBANK: Now we'll Carter McEntire.

CARTER McENTIRE, having been duly sworn, testifies as follows:

MR. McENTIRE - DIRECT EXAMINATION BY MR. MAYBANK:

Q: If you'll state your full name for the record?
A: Carter Harrison McEntire.
Q: And where are you from?
A: Columbia, South Carolina.
Q: And what's your education?
A: Undergrad from Hampton City College in Virginia. Graduated in 1992 and got my masters in administration from the University of South Carolina here in 1998.
Q: Okay. And where do you currently work?
A: McEntire Produce.
Q: And how long have you worked there?
A: Altogether, 20 years.
Q: And when did you start?
A: In '93.
Q: Okay. And what jobs have you held there?
A: Many. Originally a computer administrator. I then was a buyer. Then I was in sales. Then I was essentially in administration. I designed a new facility and went through the process of finding a contractor and had the new facility built. And since then, I've become CEO and president of the organization.
Q: Okay. And who started McEntire Produce?

A: My great-grandfather in 1938.
Q: 1938. And does your dad work there as well?
A: He is retired. He's, as I believe -- I'm gonna get him. He does still draw a paycheck and does -- and he is included on major decisions. But he is essentially separated from day-to-day operations.
Q: Okay. And what's your current position?
A: I am president and CEO of the company.
Q: All right. And what are your current duties?
A: Primarily risk management, investment decisions, and people management.
Q: All right. And what's the legal name of McEntire?
A: McEntire Produce, Incorporated.
Q: All right. And where are you located?
A: 2040 American Italian Way in Columbia ---
Q: Is that in Richland County?
A: It is Richland County.
Q: Okay.
A: ZIP Code 29209.
Q: All right. And is this your only facility in South Carolina?
A: It is.
Q: All right. And what's the current nature of

your business?

A: We are a fresh-cut produce provider. The best way the describe our company is a private-label manufacturer. We take a raw agricultural commodity like lettuce, and we convert it into a finished product per customer specification. And then we put the customer's label on the finished product.

Q: Okay. And when was McEntire started, if you could give us a brief history?

A: It started in 1938. My grandfather was in the tomato repack business for a number of years. My father bought him out in 1973 and grew the business into what's called full-line produce. We got into the fresh-cut part of the business in the late '70s. And from that point forward, the fresh-cut part of the business grew more and more to where it's now a majority of our business, taking up 75 or 80 percent of our total business.

Q: Okay. Do you have any major competitors here in South Carolina?

A: Not in South Carolina. We're really a regional processor. Our competitors are in Georgia, Tennessee, Florida, Virginia.

Q: Okay. And how many full-time employees do you have?
A: We average 600. It is a seasonal business, so it's, you know, 50 to 100 plus during the high season, which is the summer season and 50 to -- or so less during the winter season.
Q: Okay. Is the average around 600?
A: Correct.
Q: All right. And briefly describe your physical facilities.
A: It's about a hundred ---
Q: One building, multiple buildings?
A: Yes, sir. 163,000 square feet of what I would call the primary building. It's mostly refrigerated to 33- to 40-degree temperature range. We only have two other buildings. Once's a guard house, and one is a trucking maintenance facility.
Q: Okay. And what was the capital investment in the -- in your major building?
A: Total with equipment and building, about $20 million.
Q: Okay. And when did you move to this particular location?
A: We got our certificate of occupancy in August

of '06, so we were fully moved to the new facility by November of '06.

Q: Okay. And who owns the company?

A: My father and I do.

Q: Okay. And then briefly if you could, what do y'all do for a living? How do y'all make a buck?

A: Okay. We contract a raw agricultural commodity, and we truck it to our facility from the growing area. Once we receive the raw agricultural commodity, we -- that really is the beginning of the process because we have to maintain a certain temperature, and we have to manufacture that product in a certain amount of time. We take that raw ag commodity. We cut it, wash it, dry it, and bag it, and put it in a box, label it, pelletize it. And then we ship it per customer's order to anywhere in the Southeast within about a 600-mile radius.

Q: Okay. And who are your -- and what fresh products do you sell?

A: Many -- primarily lettuce, onions, tomatoes, and cabbage. But we also have some other commodities like carrots, cucumbers, and others. Grand total, I believe we have a

little over 100 active SKUs. SKU stands for stock keeping unit.

Q: So you sell over 100 types of vegetables?

A: No.

Q: Fruit?

A: There are probably about 20 or so different commodities but a hundred different ways to cut them and mix them and weigh them. So cut -- each customer has a different specification in terms of cut and mix and amount of weight per bag and amount of weight in a -- net weight in a case.

Q: Okay. And does every vegetable you buy get cut, or some of them don't?

A: Not all of them get cut. We -- a small portion of our business is what's called wholesale where we buy a commodity in a box, a master case. And we sell that same master case to a customer. And we also have what we call a repacked category where we'll buy a raw ag commodity like a whole tomato, and we'll repack that according to the customer's specification to color, size and weight in a box. So that tomato remains whole. We don't cut it. And then, again, the majority of our business is in

the fresh-cut category where we take a raw ag commodity and we actually cut it into smaller pea sizes, wash it ---

Q: Okay.

A: --- dry it, bag it, and box it.

Q: All right. And the vegetable you don't cut, would that be primarily tomatoes?

A: Yes. That is the largest uncut commodity.

Q: Okay.

A: In terms of volume.

Q: And who are your major customers in the last couple of years?

A: We -- our customer base is in the quick-service restaurant category. Primary customers are McDonald's, Burger King, Subway, Taco Bell -- recently Taco Bell and recently Kentucky Fried Chicken.

Q: Okay. And how about Burger King.

A: I'm sorry. Burger King also.

Q: And Bojangles'?

A: And smaller chicken regional chains like Bojangles' and Zaxby's.

Q: Okay. And what do they actually -- these restaurants actually receive, bags of produce? Or what do they actually receive?

A: Right. So the best example would be, for example, McDonald's has a Big Mac, and they put shredded lettuce on the Big Mac, so we're really a component provider to that build of that burger. So McDonald's restaurant would receive a box. It would be four five-pound bags of quarter-inch shredded lettuce in a master case that weighs 20 pounds.

Q: Okay. Do they tell you how they want you to shred the lettuce?

A: Yes. They give us specifications that are very detailed and the procedures that we use and the environment that we have to maintain to produce that product.

Q: Okay. And so like Subway might give you a different just requirement for lettuce?

A: Yes. And probably a better example would be Burger King would take that same iceberg raw ag commodity and chop it into a one-by-one chop versus a quarter-inch shred.

Q: Okay. And do you sell to supermarkets where you see salad bags out?

A: We do. We have a retail product called ChefBuddys Southern Slaw. It's a diced cabbage and carrots. And there's another SKU. It's a

diced cabbage, peppers, and onions. We also copack an organic salad for a brand that we do not own.

Q: Okay. All right. And so your customers, what do they primarily do for a living?

A: Primarily restaurants. They sell either sandwiches or cheeseburgers or chicken sandwiches or salads that would include one of the components that we make for them or -- excuse me -- or grocery chains that would sell a retail bag of cabbage, slaw or a retail organic salad.

Q: Okay. And so would you -- and where are, let's say McDonald's, for example.

A: Uh-huh.

Q: Where are your customer restaurants located typically?

A: Our footprint is the Southeast. So if I call states, would be Florida, Georgia, Alabama, South Carolina, Tennessee, Virginia, parts of Kentucky, parts of Maryland.

Q: Okay. All right. And where do you -- switching gears to your vendors, where do you buy your fresh produce from?

A: Our vendors range all over the United States

from California to Arizona to Florida to Georgia, parts of South Carolina during the season, eastern shore of Virginia on up into Michigan, Kentucky, Ohio. And we source some of our product from Mexico.

Q: Okay. And do y'all actually grow any crops yourself?

A: We do not grow the crop ourselves. We contract with a grower. The term in the industry is "grower-shipper." We contract a certain amount of pounds for a certain price over a certain period of time.

Q: Okay. And do you contract directly with the farm or through brokers or both?

A: Actually a third party, so it's actually both. So some grower-shippers own the land and farm it themselves. Some grower-shippers hire farmers that own the land and farm it for them. And then there's also a situation where a grower-shipper can both own land and farm it and also hire other farmers that own land to farm the crops we contract.

Q: Okay. And roughly how many vendors do you have in a given year?

A: In the neighborhood of 30 to 40.

Q: Okay. All right. How does the DOR categorize your business for tax purposes, as a manufacturer or a service?
A: Manufacturer.
Q: Okay. And they issued you a manufacturer's resale exemption certificate?
A: Yes, they have.
Q: Okay. And do you know when they issued it to you?
A: Many years ago.
Q: Okay. Are your fresh-produce operations subject to federal regulation?
A: Yes, they are.
Q: By whom?
A: The FDA.
Q: And what do they regulate?
A: They regulate the safe production of fresh-cut produce.
Q: Okay. Does the FDA reg 21 CFR 110 apply to your facility?
A: Yes.
Q: Is it mandatory?
A: Yes.
Q: Okay. Does 21 CFR 117 apply to your facility?
A: Yes.

Q: Is it mandatory?
A: Yes.
Q: Okay. Are you regulated by State government?
A: Yes.
Q: By who in State government?
A: Agricultural Department and DHEC.
Q: All right. And what do they regulate?
A: Essentially safe -- the same thing, safe production of produce. And they oftentimes rely on federal law.
Q: Okay. Is it -- is the State regulation mandatory or an optional thing?
A: Mandatory.
Q: All right. Are you a member of any trade groups?
A: Yes.
Q: And what are those?
A: United Fresh Produce Association and Produce Marketing Association.
Q: Okay. And just very high level, what is United Fresh Produce Association?
A: It is an association of industry companies, both grower-shippers and fresh cut manufacturers and food safety experts. It is the smaller of the two organizations. They

really provide most value around legislation and food safety like the FISMA Act that was passed, I believe, back in 2011.

Q: Okay. And who's the Produce Marketing Association?

A: Produce Marketing Association is the larger, in fact, international organization, and it primarily facilitates the marketing of produce across many commodities and many markets.

Q: Okay. Do they have the -- does United Fresh Produce have a best practices relating to health and safety?

A: Yes.

Q: Okay. Are you a member of that?

A: Yes.

Q: All right. Does Produce Marketing Association have a best practices?

A: Yes.

Q: Okay. And are you a member of that?

A: Yes.

Q: And strictly speaking, could you be a member without agreeing to either of those best practices, or is that, part and parcel, the same thing?

A: You can be a member, but you likely would not

be a member unless you agreed to this.

Q: Okay. So would it be fair to say you're a signatory to their best practices?

A: Yes.

Q: Okay. All right. And very briefly, describe their best practices related to health and safety.

A: During -- probably the best way to answer this is there are best practices regarding sanitation and good manufacturing practices and good agricultural practices and good harvesting practices. They're shared amongst the groups. The area where we spend the most time is good manufacturing practices, which include things like personal protective gear, how to maintain equipment, how to maintain wash water, sanitation levels, things of this nature. On the growing side, good agricultural practices handle things like preharvest pathogen testing; animal intrusion; how to go through a preharvest checklist; in fact, a preplant checklist; making sure that the growing area is clean and secure as possible; and good harvesting practices, which entail things like how to -- the harvesting crew, what type of

garb they'll -- they wear, hair nets, gloves, et cetera, and that they have facilities close by if they need to use the restroom and wash their hands before they come back in the field to harvest crops.

Q: Okay. And do your customers have contractual requirements they impose on you in processing their fresh produce?

A: Certainly do.

Q: Okay. And we'll go back in gruesome detail, but just to yes or no, does 21 CFR 110 require a Class 100 Cleanroom in a fresh cut produce?

A: Yes.

Q: Okay. Does 21 CFR 117 require a Class 100 Cleanroom in a fresh cut facility?

A: Yes.

Q: All right. Do the -- does the -- DHEC and the Department of Agriculture require a clean room environment?

A: Yes via the federal law.

Q: Okay. And does United Fresh Produce require a clean room is there -- in part of their best practices?

A: Yes, indeed.

Q: All right. How about the Produce Marketing

Association?
A: Yes.
Q: All right. Does 21 CFR 110 require protective clothing in the clean room?
A: Yes.
Q: All right. Does 21 CFR 117 require protective clothing in the clean room?
A: Yes.
Q: Does the State of South Carolina require a clean room -- protective clothing in a clean room?
A: Yes, via federal law.
Q: Does United Fresh Produce require protective clothing?
A: Yes in their guidelines.
Q: All right. And how about the Produce Marketing Association?
A: Yes.
Q: All right. Do your customers require clean rooms?
A: Yes.
Q: All right. Do all of your customers have customer requirements for health and safety?
A: Yes.
Q: Okay. And very briefly, why would they all

have it?

A: To protect against pollution or contaminants entering their food.

Q: Okay. And have they had incidents where that's happened?

A: Yes, indeed.

Q: Okay. All right. Let's -- why don't we just, real quickly, go through a couple of them and tell us about Petitioner's Exhibit 26, what -- and we redacted the name of the customers or, you know, McDonald's and Wendy's -- not to want the customer requirements to get out. So just in a very high level, what are some of their customer requirements? We don't need much detail at all.

A: Okay.

MS. ACQUAVIVA: Your Honor, I would object to this line of questioning, as a customer's requirements have nothing to do with whether or not the supplies used by the manufacturing plant are exempt from sales tax.

MR. MAYBANK: It applies because there -- the issue here today is whether or not it's part of manufacturing, whether or not it's part of the pollution control, and whether or not it's part

of a Class 100 Cleanroom. If the customer requires a Class 100 Cleanroom or the customer requires protective clothing, then it obviously would fall within the exemption in itself. Their -- they contend we don't have a Class 100 Cleanroom. Well, if the customer says you got to have one, then obviously that is of relevance, via their assertion, we don't have one. They said we don't have to use protective clothing, and we say we do, and we've got a customer requirement that requires protective clothing. So for that purpose, we feel it is relevant.

MS. ACQUAVIVA: Your Honor ---

THE COURT: Any rebuttal, Ms. Acquaviva?

MS. ACQUAVIVA: Regarding the cleanroom, the statute specified required by a federal standard, not required by a customer. So, again, I don't think anything that a customer requires is relevant to whether these are machines used in processing, whether they're pollution control machines per the statute, or whether they're items required to be worn for working in a Class 100 Cleanroom as defined in Federal Standard 209(E).

THE COURT: Okay.

MR. MAYBANK: This -- it's not an important point, your Honor. We'll move on.

THE COURT: Go ahead an move on then.

MR. MAYBANK: All right.

Q: You sell lettuce, carrots, tomatoes, and onions, you know, fairly common items. Why on earth all the State and federal regulation in the contractual requirements regarding lettuce?

A: Yes. Primarily to ensure that we are producing this lettuce product in a sanitary environment and that we're not polluting the lettuce with any contaminants, particularly pathogens that would make a human severely sick or perhaps kill them.

Q: Okay. And what are some of the diseases or contamination or pollution the FDA's concerned about?

A: Primarily salmonella, listeria monocytogenes, E. coli O157:H7 and other EHECs or STECs.

Q: Okay. And listeria?

A: Yeah, listeria monocytogenes.

Q: Right.

A: Uh-huh.

Q: All right. And just for -- we'll have other

testimony later, but very briefly describe salmonella.

A: Yep. Salmonella is a bacteria that can be spread via fecal material. It generally comes in on raw product. And if we don't do a good job of washing and sanitizing that product, it can exacerbate or proliferate within the product that we're making. And if we don't keep the room, you know, under control, it can actually spread throughout the room.

Q: Okay. And briefly describe E. coli.

A: So E. coli O157:H7, again, is a human -- is a pathogen that is dangerous to humans. It is also transferred via fecal material. It can come in via raw product, and it can be spread throughout the facility if we don't do a good job maintaining control.

Q: Can it come in through your employees?

A: It certainly can. Both salmonella, E. coli, and listeria can come in via employees. We are required to use personal protective gear to protect the food from the employees, hands and feet, and other parts of their garb.

Q: And then just back to the disease itself, what is listeria?

A: Listeria monocytogenes is another bacteria that is dangerous to humans. Both can make them severely ill or perhaps kill them.
Q: Okay. So Salmonella, E. coli, and listeria are the three major pathogens that y'all are on -- you have concerns about?
A: Yes.
Q: And that the feds regulate?
A: Yes.
Q: Okay. Why -- are there more onerous regulations for fresh produce than cooked or frozen food?
A: Yes. Because we do not have a kill step. We do not have a pasteurization step. So really the only means we have for preserving the produce is keeping a very closely controlled temperature range of 33 to 40 degrees. And once we cut the product, washing it in a -- essentially a water bath that maintains a certain level of sanitizing.
Q: Right. So if you -- if you were selling prepared food and it was cooked or frozen, would that reduce the incidents of salmonella?
A: Yes.
Q: Would it reduce the incidents of E. coli?

A: Yes.
Q: Would it reduce the incidents of listeria?
A: Yes.
Q: All right. And so the fact that you don't cook it or freeze it; it's fresh produce, is that the major reason for all the FDA requirements?
A: Yes.
Q: All right. Let's turn to your raw materials. Where are they -- your produce that's sold to you, where do they come from?
A: I'll use lettuce as an example. Our leafy greens emanate from California Salinas Valley of California, also the Yuma, Arizona, area; Guanajuato, Mexico area; and Belle Glade, Florida, area. Moving on to tomatoes, in the wintertime, is produced in the Mockley -- primarily the Mockley area also in the central part of Florida. Also in the season on the coast of South Carolina and then on up into the eastern shore of Virginia, in Ohio River Valley ---
Q: Okay.
A: --- on up into Michigan.
Q: Is listeria potentially present in all of those locations you just mentioned?

A: Yes. So listeria is a soil-borne bacteria. So it's -- listeria is all around our environment ---

Q: Okay.

A: --- in all growing areas.

Q: How about -- is E. coli potentially present in all of the states you just mentioned?

A: Yes.

Q: Okay. And how about listeria?

A: Listeria, yes.

Q: Right. So are some states too cold to have those, for example, like the mighty fire ant can only go so far north?

A: Right. The produce is grown during the season, and the seasonal temperatures allow for things like listeria and E. coli, and salmonella too remain viable and, indeed, sometimes grow very aggressively.

Q: Okay. All right. Do you impose any contractual requirements with your vendors relating to health and safely?

A: Yes.

Q: All right. What would be -- just very quickly, what would some of those be?

MS. ACQUAVIVA: Again, your Honor, I'm gonna object

to relevance.

THE COURT: Restate your question.

MR. MAYBANK: Does his vendors -- does he -- I'm sorry. Does he impose any contractual requirements on his vendors, the farmers and the brokers for health and safety purposes?

THE COURT: Tell me why that's not a problem.

MS. ACQUAVIVA: Your Honor, the requirements that the plant may impose on its customers have no relation to whether these supplies that we're discussing today fall within either of the two or three exemptions we're looking at.

MR. MAYBANK: Their whole defense is A, listeria, salmonella, and E. coli is not pollution. And then they contend we don't need -- basically we're not -- don't need or are not required to have protective clothing or a cleanroom. And so what we're trying to portray is the entire health and safety aspect of this business to show that we're not idly doing it; we're doing it 'cause the law requires, and we push those requirements down on your vendors. And ---

THE COURT: Well, okay. Let me say this then: Your question is: What you do? And I'm gon' allow him to testify to what he does. Now, why you

do it is another question altogether.

MS. ACQUAVIVA: Thank you, your Honor.

Q: All right. And so do you impose any contractual requirements on your vendors regarding health and safety?

A: Yes.

Q: Okay. And give some examples of those.

A: For example, we require that they do preharvest pathogen testing to ensure that the raw product that's provided to us is not adulterated or polluted with the pathogens we mentioned earlier, salmonella, listeria, and E. coli. We also require harvesting crews to wear protective gear on hands and hair nets and this type of garb to protect, again, the crop from the human hand vector and foot vector.

Q: Okay. And are these vendor-contractual requirements sometimes required by your customers?

A: Yes.

Q: All right. All right. And let's go to -- let's turn to Petitioner's Exhibit 8. What is this? Let me hand it to you. And why don't we try to put that on the screen. And what is that of? What is this, Petitioner's Exhibit 8?

(Petitioner's Exhibit Number 8 was introduced into the record at this time.)

A: Okay.

Q: And what is that of? What is this, Petitioner's Exhibit 8?

A: That is at a diagram of our facility.

Q: Okay. And how does produce arrive at your facility?

A: If you look at the bottom left-hand corner, you'll see a receiving dock.

Q: And I think you can -- could you put your hand on the screen? Does that show up?

A: No.

Q: Okay.

MR. MAYBANK: Jim, do you know it well enough to put your finger on the screen.

MR. ROURKE: Yes.

MR. MAYBANK: Okay.

Q: Are the trucks owned by vendors or McEntire?

A: For in-bound, all produce we use both common carriers. They're not owned by McEntire. And we do haul some raw product on our own tractor-trailers.

Q: Okay. So where does the produce arrive at McEntire?

MR. MAYBANK: Jim, if you'll point that ---

A: If you'll tell us?

MR. MAYBANK: And Jim, you point it out.

A: That is correct. That is the receiving dock.

Q: Okay. And if you'll go ahead and describe the entire McEntire facility, I guess, using that chart. And Jim can point it out.

A: Okay. As you can see, the facility as broken up into separate rooms.

MR. MAYBANK: So we'll -- actually, get -- in a minute, get you to describe the product going through.

A: Okay.

Q: If you can just kind of describe the schematic?

A: Okay. So you can see it's a flow-through style facility where produce is received on the receiving dock. Then we have six raw coolers. They're actually three tomato coolers. And that's Raw Cooler 1. Then you see Raw Cooler Number 2 in the middle there. And then raw -- further to your left, further to your left, right there. So that's -- yeah. That's the third raw cooler. And then you see three tomato coolers, one, two, and three.

And then you also see -- so that is all in

what's called the low-care area. The low-care area is highlighted in blue. You can see all -- yeah, all that is low care. And then you see portions ---

Q: Why is it considered low care?

A: Because the product remains whole. It is not cut and exposed to the elements, to the environment.

Q: All right.

A: And the gray area of the facility, those are our two main production rooms. You can see there's -- they're actually designated P-1, P-2, and P-4. All that is in an area of the facility called the high-care area.

MR. MAYBANK: And, Jim, can you put your finger on that?

A: Uh-huh. Within the high-care area, you can see, for example, he has his finger on P-1 RTE. That is a lower risk area of the high-care area. And then further up, you see PH -- excuse me -- P-1 HH which stands for high-hygiene area. That is the highest risk area of the processing floor. Once produce has been in this area, cut, washed, dried, bagged, and boxed, you can see packout is where we

pelletize the product. And then it actually transfers over to the finished goods storage area. You see in the center of the facility on the shipping dock.

And then from there it transfers on to an outbound refrigerated tractor-trailer. That is primarily what we're gon' be discussing today. But just for your knowledge, you can see the tomato repack room, far middle left. That is -- again, that is a low-care area. That is where we take a raw ag commodity like tomatoes and we sort it for color, and for size, and we take out defects and rotten tomatoes and put them in a finished case. That is also stored in finished goods and shipped out on refrigerated tractor-trailers.

Q: Are employees required to wear full protective clothing in the blue areas?

A: They're not required to wear PPG. They are required to wear certain items like hair nets.

Q: Okay.

A: In the high-care area, the gray area, they're required to wear all the PPG required by federal law.

Q: Okay. And what does "PPG" stand for?

A: Personal protective gear. And, again, it's really to protect the food from the human, not to protect the human from the food.
Q: Okay. And where is the cleanroom environment, Class 100 Cleanroom environment?
A: All of the gray area, so all the high-care area is Class 100.
Q: So the green areas?
A: It's gonna be the gray. Yeah, it's green on this screen. It's gray on the paper.
Q: Okay. All right. And let's happen when -- let's turn to what happens when fresh produce arrives at McEntire.
A: Okay.
Q: What is this?
A: So when it's received, the first thing we do is we inspect it really the beginning of our process because we have to maintain -- we have to receive it within a certain temperature range, 33 to 40. It has to meet all customer requirements and McEntire requirements in terms of color, size, type. And then we take it off of the tractor, refrigerated tractor-trailer, through the receiving dock. And we store it in the raw cooler area in a rack system that's

specially designed to allow air flow over the raw produce so it does not gain temperature above 40 degrees. Does that answer your question?

Q: It does.

A: Okay.

Q: And let's turn to Exhibit 7.

(Petitioner's Exhibit Number 7 was introduced into the record at this time.)

MR. MAYBANK: Jim, if you could grab Exhibit 7.

Q: If you could identify that for us? What is -- identify Exhibit 7.

A: This is a HACCP plan.

THE WITNESS: And I believe the more appropriate one, Jim, is a page or two back.

MR. MAYBANK: Why don't you hand it to -- let him pick the one out.

Q: What's a HACCP plan, while you're looking ---

A: HACCP stands for hazard analysis and critical control plan.

Q: Is that document prepared by you?

A: Yes.

Q: All right. And are you required to have that document?

A: Yes.

Q: All right. Required by whom?
A: A HACCP plan is required by customers.
Q: Is it required by federal law?
A: Yes.
Q: All right.
MR. MAYBANK: And then, Jim, do we have one to give the judge to look at?
Judge, do you have that exhibit?
THE COURT: I can see it here.
MR. MAYBANK: All right.
Q: And what is a HACCP plan?
A: Again, it's a hazard analysis and critical control. And in this, you see we have two main critical control points. And I'll walk you through. You see raw material inspecting/receiving, we just discussed that. We discussed where it's stored in the raw product storage area at 33 to 40 degrees.
Q: Let me interrupt you for ---
A: Uh-huh.
Q: When did you prepare this document, and do you update it?
A: Many years ago. And it's updated every time as our process is improved.
Q: Okay. So it wasn't prepared for the purposes

of today?
A: No, no. It's been around for many years.
Q: Okay. And is this document itself ever audited?
A: Yes.
Q: All right. So the auditor comes in and asks to see this document?
A: Yes.
Q: All right. And just -- and which auditor would that be?
A: It would be both a customer-based audit or auditor. And we also have a -- an auditor, what's called Global Food Safety Initiative that is a more broad, international-style audit. And it is audited to the standard of British retail consortium, abbreviated BRC. And it is a much more stringent audit.
Q: Okay. So if you'll go through the diagram here.
A: Okay.
Q: Would it make it easier if we picked a particular vegetable such as lettuce?
A: Sure. If I give you example, I would suggest an iceberg lettuce that we would convert into a quarter-inch shredded lettuce for a customer.

That's an industry standard.

So that lettuce would be received, stored in the raw product storage area. Those bins weigh anywhere from 800 to 1,000 pounds. Basically it's a large cardboard bin with a large plastic bag. Within that plastic bag, that is an environment that we actually flush it with nitrogen to take the oxygen out of the bag. And that helps lower the respiration rate of the lettuce so it will last longer before it spoils.

Okay. So once we take the lettuce out of the raw product area, we dump it through a bin dumping conveyance system, and its enters the high-care area. In that first step, we sort it, trim it, remove any defects. And then it continues conveying up to a cutting area. And that cutter has an optional spray feature where we actually spray water on the lettuce as it exits the cutter. This helps reduce something called exudate. Exudate is something that's created whenever you cut a vegetable.

Then it enters flume 1-A, and that is our first critical control point. What we're controlling for there is, as you can see, free Cl_2 greater

than or equal to 1 part per million. That is the sanitizer. Technical term is sodium hypochlorite. Layman's terms is chlorine. And we have to maintain pH of greater than 6.5 in this HACCP plan.

Then it goes across a deordering shaker. And we enter Flume 1-B. That's the another critical control point. It's still Critical Control Point 1. We're still measuring from the same critical controls of 1ppm free chlorine and greater than or equal to 6.5 pH. Then we cross another deordering shaker. And the final rinse is a fresh-water rinse, and it discharges into a dryer basket. And the best way to describe this is if you have a salad spinner at home, this is an industrial-size salad spinner. It's a stainless steel basket that can hold 300 pounds. It goes through a centrifugal dryer. Basically we spin the water off of it a certain amount of time at a certain RPM.

Then once that product is dry, we have an option there. If it's called for a salad mix, we could add color whether it's carrots or red cabbage. In this example of shredded lettuce,

we would not do that. Then it goes into a metering belt and it's conveyed up to a vibratory conveyor that goes across a weighing scale that weighing scale in this case would weigh 5 pounds at a time.

We actually make the bag. We take a roll of film. We make the bag. And in that bag, we are able to backflush it with nitrogen if that is needed. We also code the bag with certain information including the raw lot and what date we ran it on, et cetera. This is where once the bag is made and the product is sealed into the bag, it goes through the second critical control point, which is metal detecting. We test this critical control point at 2 and a half millimeters of ferrous metal, 3.0 millimeters of nonferrrous, and 3.5 of stainless steel, 316 grade. The reason we do this is, as you can see, as it travels across many parts of equipment, if some part of the equipment, a nut or a bolt comes loose and enters the product stream, we want to capture that and remove it from the final product.

Once it goes through the second critical control point, it goes through a wall and exits

the high-care area. And this is where we box it, label the box, and pelletize it. And from there it goes to the finished-product storage, again, still at 33 to 40. We still consider this part of the process because if do not maintain that temperature, we lose that product. And then from there, it is picked for order and loaded onto a route truck, a refrigerated tractor-trailer and shipped to our customer anywhere in the Southeast.

Q: Okay. Where does the refrigeration step actually begin?

A: It begins all the way in this case ---

MR. MAYBANK: Why don't you put the prior exhibit back up of the plant?

A: Okay. So it actually starts all the way at the harvest step. So once, in this case, iceberg lettuce is harvested, our requirement is that it is cooled to 33 to 40 degrees within four hours of harvest. And then we maintain that temperature from harvest through shipping. For example, from Salinas, California, is 2600 miles in a refrigerated trailer to Columbia, South Carolina, where our receiving dock is also refrigerated. And it is stored in that

same temperature range, the raw cooler of 33 to 40 degrees. And then we maintain it through processing. The entire high-care area is 33 to 40 degrees. And the entire finished-goods section is 33 to 40 degrees. The entire shipping section is 33 to 40 degrees. And I left out packout and pelletizing. Those are also 33 to 40 degrees. So we have to maintain that temperature range all the way from four hours after harvest, all way through shipment, and final delivery into the distribution center.

Q: All right. And where is the actual cutting?

A: All right. The cutting occurs in this gram you see where it says P-1 RTE and P-2 RTE. P-4 RTE is actually an organic section, and that product is not cut, just for your information. So all of the cutting that we're speaking about today in this example happens in, you know, P-2 RTE or P-1 RTE.

Q: Okay. And what is the high-care hygiene room?

A: All right. The high-care hygiene room is where our employees come to finish their garb. So they actually put hair nets on in the hallway before they enter the low-care area. But when

they enter the high-care area, they actually go through a sequence of steps where they put on their overshoes; they wash their hands; they put on their smocks, their gloves, any other PPG that's required, and enter the high-care area.

Q: Okay. And then briefly, what happens to the lettuce before it gets into the cutting room? I know you've discussed it a little bit. If you can tell us the sequence of the lettuce?

A: So what happens to the lettuce before it enters the cutting room, is it is stored in the raw cooler in a rack system. And that rack system is specially designed to keep the product separated enough to allow air to flow across the storage container that it is in. We make sure that we are first in, first out. This is a -- you know, this product is still alive. Once it's harvested, it only has about 14 or 15 days before it degrades to a level where it's inedible. So we have to receive it, rotate it, keep it at temperature. And then when it's ready to go into process, we'll take one of those 800,000-pound bins out of the rack. We'll open the top. We'll open the plastic

bag, and we'll prepare it for dumping onto the conveyance system.

Q: Okay. Well, once it goes on the conveyor system, what happens next?

A: The next thing that happens is it goes through -- if needed, it goes through a trimming section and a sorting section. And then it is conveyed to a cutter. And at that cutter, again, we take a whole head of iceberg lettuce and we chop it into a certain size, in this example, a quarter-inch shredded lettuce. And then it enters Washroom 1, deorders, Washroom 2, deorders, fresh -- the water oversprayed, and it goes into a drying basket. And it's centrifuging -- basically goes through a spin-drying step. Then it is conveyed across a scale into a bag, coded. The bag is coded. Then it is packed into a box. The box is labeled and coded. Then it's pelletized.

Q: The steps you've just described, is that in the Class 100 Cleanroom environment?

A: From the time it goes through the wall into the trimming section of RTE P-1 and RTE P-2 all the way to the other side ---

THE WITNESS: If you'll pull that down a little bit,

Jim.

A: --- to where it exits P-1 high hygiene and P-2 high hygiene, enters the packout area and, indeed, the same is with the organic there. It goes from P-4 RTE through P-4 HH and into the packout area.

Q: Okay. And so the -- and where is the actual packaging done?

A: The packaging is done in P-1 HH. So we make the bags and fill the bags at the end basically where right where Jim's finger is.

Q: Okay. And are employees required to wear protective clothing in that entire area?

A: Yes.

Q: Okay. All right. And why don't we turn then to the audit itself. Just very briefly, when and where were you audited?

A: The audit took place, I believe, it started in September of 2015. And I believe it ended in May of 2016. And it began at our facility. We were visited by the auditor. And then it -- the audit was actually performed at our CPA's office. And our CPA is Darryl Knight.

Q: Okay. And was the auditor Wes Butler?

A: Yes.

Q: Okay. And did you provide all the books and records he requested?
A: Yes.
Q: Did he discuss -- did the auditor discuss the Pollution Control Exemption with you?
A: No.
Q: Did he ask why your employees were wearing protective clothing?
A: No.
Q: Prior to denying exemption, did he ask if State or federal law required protective clothing?
A: No.
Q: Did he discuss salmonella, listeria, or E. coli?
A: No.
Q: Did he discuss the health and safety issues regarding protective clothing?
A: No.
Q: Did he ask you about a Class 100 Cleanroom environment?
A: No.
Q: Did y'all discuss the health and safety issues in the cleanroom?
A: No.
Q: And the audit was completed by Logan Mitchell;

is that accurate?
A: Yes.
Q: Did she discuss any of those questions with you?
A: No.
Q: All right. Who do you buy protective clothing from?
A: We have many vendors.
Q: Okay. And what's your annual budget roughly for protective clothing?
A: 100,000 to $150,000 a year.
Q: Okay. How long does the protective clothing last. Does it wear out pretty quick or ---
A: Most of it's single use. So gloves and hairnets are single use. We do -- smocks and overshoes, we do wash and reuse.
Q: Okay. And where do you wash them and how do you wash them?
A: In house. We have our own washing machine. And this is important, that we have to run the washing machines at a high enough temperature and long enough time to sanitize all the garments.
Q: Okay. And how often are protective clothing washed?

A: Every day.
Q: Okay. So after every use?
A: After every use.
Q: All right. Did you pay sales tax to the vendors when you purchase protective clothing?
A: No.
Q: And why not?
A: 'Cause we feel it's part of the process.
Q: Okay. Do you feel it was covered by the Pollution Control Exemption?
A: Yes.
Q: And the Class 100 Cleanroom Exemption?
A: Yes.
Q: All right. So you extended your manufacturer's sales tax exemption certificate to those vendors?
A: Yes, we do.
Q: All right. Does the DOR-proposed assessment include protective clothing?
A: Yes.
Q: Okay. Does it include all the protective clothing, meaning do they allow some protective clothing and disallow others, or they disallow it all?
A: They disallow it all.

Q: All right. So the DOR contended in a proposed assessment that all your clothing is taxable?
A: Yes.
Q: All right. So let's quickly go through the -- very quickly go through the -- what is the actual list of protective clothing you buy? You've kind of hit on it, but if you could tell us exactly what items are protective clothing?
A: PPG, personal protective gear, I'll start at the top and work down. So the bump cap; hairnet; some cases, head bands; smocks; arm sleeves, plastic arm sleeves; nitrile, nitrile gloves -- depends on how you want to pronounce it; and overboots, rubber overboots.
Q: Okay. And are all of those required by federal law?
A: Yes.
Q: All right. And the DOR contended that all of those were taxable, correct?
A: Correct.
Q: All right. Very briefly, does your facility have -- we briefly mentioned this, but does your facility have a Class 100 Cleanroom environment?
A: Yes.

Q: All right. How is your facility designed? Were any food safety engineers involved?
A: Yes.
Q: All right. And was it originally designed with a Class 100 Cleanroom environment?
A: Yes.
Q: Okay. And at the time you designed it in 2006 or '7, did federal law require it -- that at that time?
A: Yes.
Q: Okay. And did State law require it at that time?
A: Yes.
Q: All right. So let's switch gears to the substantial understatement issue. Did McEntire Produce consent to extending the statute of limitations ---
A: Yes, we ---
Q: --- during the audit?
A: Yes, we did.
Q: And let me introduce Exhibit 19. Who signed the consent forms on McEntire's behalf?
A: Darryl Knight, our CPA.
Q: Okay. And why did you agree to extend the statute of limitations? Let me just get you to

identify these three documents?

A: Yup. The first document is the consent to extend time to assess tax. This looks like the third of the three that extends until May 31st of 2016. Basically the Department of Revenue requested more time, and we were happy to allow it.

Q: Okay. And why did you agree to extend it?

A: Because they asked for it.

Q: Okay. And y'all were happy to grant it to them?

A: We were happy to grant it to them.

Q: All right. How many consents did McEntire sign?

A: Three.

Q: And when was the last one extending the deadline for filing the proposed assessment?

A: The last one went until May 31st of 2016.

Q: Okay. So if we look at Petitioner's Exhibit 21, proposed assessment, it's dated July 19, 2016. Let me ask you -- let me get you just to read the day of the proposed assessments right there at the top.

(Petitioner's Exhibit Number 21 was introduced into the record at this time.)

A: So proposed assessment, date issued July 19th, 2016.
Q: Okay. And the last -- when did the -- let me look on here. When did it expire? And so when did the last consent to extend the time to assess tax expire?
A: Yes. May 31st, 2016.
Q: All right. And you didn't extend the statute any further than May 31st, 2016, correct?
A: That's correct.
Q: All right. So the proposed assessment delayed it July 19th, 2016, and obviously would be after the last consent time extended?
A: Correct.
Q: All right. Did you -- did McEntire raise this issue with Logan that she was including in the audit period is expired from the statute of limitations?
A: Yes, we did.
Q: Okay. And let me show you Exhibit 17. And so did Logan reply that she was extending the statute of limitations because of the substantial understatement?
A: Yes.
Q: Okay. And why did you raise the issue with

Logan? Did you think the statute had run?
A: Because we thought that the statute had run, in fact, a couple months past the deadline.
Q: Okay. All right. I'm gon' show you Petitioner's Exhibit 24, which is the official Department determination after the audit. Does this document cite or refer to a substantial understatement statute, to your knowledge?
A: To my knowledge, no.
Q: Okay. So Logan said that the statute of limitations is open because of the substantial understatement, correct?
A: Yes.
Q: But the Department's determination doesn't reference the substantial understatement, does it?
A: That's correct.
Q: All right. Let's turn now to the first part of the case today, which is the machinery and equipment. So we've kind of already hit over a little bit protective clothing. We're gonna go through the machinery and equipment now. So they -- the DOR gave you a proposed assessment for a variety of M&E, and McEntire's resolved a good number of them with the Department,

correct?

A: Yes.

Q: Okay. So let's discuss the ones that are at issue.

A: Okay.

Q: What -- at a high level, why did the DOR disallow these items?

A: Because they didn't feel it was part of the process or made the pollution exemption or the Class 100 exemption.

Q: Okay. Or used directly in the manufacturing process?

A: Or used directly in the manufacturing process.

Q: All right. So let's discuss the first one, bar code scanner.

MR. MAYBANK: And let's get -- put the Exhibit 8 -- or that's Exhibit 8 there -- back on the screen.

Q: So the first one is the bar code scanner. If you could briefly describe the bar code scanner?

A: Sure. This is a hand-held device that has a screen and buttons in a mechanism that reads bar codes. And by federal law, we have to be able to trace back one step to our

grower-shipper and trace forward one step to our customer's distribution center. And the way we do that is by using the bar code scanner to actually scan raw product into our facility. We scan it -- actually scan it four times from receiving into raw, from raw into processing, from processing into finished goods, from finished goods onto the refrigerator delivery trailer.

Q: Okay. And you say federal law requires it. Why does federal law require it?

A: In case of a need for a trace-back. If there's a food-borne illness that results in people being sick or death, they can require you to do what's called a trace-back where, again, you're required by law to be able to trace back one step and trace forward one step.

Q: Okay. So if there was a food poisoning at a Taco Bell, they would know, first of all, what farm you got it from because you'd have to trace it back?

A: We would have to show grower-shipper from whom we received the product. And then they would go to that grower-shipper who would trace down the farm.

Q: Okay. All right. And where is it actually used? If you could show Jim where to point it out?

A: So the receiving dock is the first place. You know, we have many of these. Probably have 20 or 30 of these hand-held scanners. They're used in the receiving area to introduce the raw product from receiving into the raw cooler.

THE WITNESS: And, Jim, can we move to the raw cooler?

A: The second place is from the raw cooler into the, for example, the P-1 HH area. That's where we scan it into processing. And then once it finishes the processing route and crosses over to the pack-out area, that's where we label the box. Okay. And then we scan that into finished goods. That's the third scan. And then from -- yeah -- from finished goods, you -- to your left do you see finished goods storage?

Then once the produce is picked for order, we scan it onto the refrigerated trailer. So right there where it says shipping, that's the fourth area where we scan. So it's very important for us to track our produce all the

way through the system.
Q: And you consider that used in the manufacturing process?
A: Absolutely.
Q: Okay. I think you've done a good job of describing it, but is there anything else you'd want to add how this is used in the manufacturing process you haven't already said?
A: No.
Q: I've covered it all?
A: We've covered it.
Q: Okay. All right. Let's discuss the second one, forklift and forklift batteries. If you could briefly describe those?
A: Yeah. So we are in the material-handling business, so we -- you know, men can't lift 800 to 1600 up to 2,000-pound pallets of produce, so we have to use machinery to do that. Again, we consider it part of our process because we have to receive all this in 33- to 40-degree temperatures. And once you have it in the rack system, you have to be able to rotate it and pull it out of the rack and ---
Q: Yeah. If I can interrupt, if you could first just tell us how do you use it.

A: Okay. I'm sorry. To essentially move product from place to place within a facility.
Q: Okay. And so, for example, where would it actually be used in the facility?
A: All over. So literally everywhere but the high-care area. So forklifts are able to be used in this schematic anywhere where you see the blue on the screen. That's the low-care area. That answers that.
Q: Okay. You say are able to be used. Are they actually used?
A: Yes, they are.
Q: Okay. And they're actually used because the produce is heavy?
A: Yes.
Q: All right. And is it ever used outside the facility, either on the incoming or outside, either taking stuff from trucks or putting stuff into trucks?
A: It is but seldom. So outside forklifts are primarily for handling things like recycled cardboard and packaging.
Q: Okay. So what percentage of use inside the blue area would you use the forklift?
A: What percentage of our forklift fleet?

Q: Yeah.
A: 90 percent.
Q: Okay. All right. And forklifts do dump product directly onto the conveying system?
A: Yes, they do.
Q: All right. And what percentage of their use would that be, a high percentage, low percentage?
A: Yes. A high percentage. Again, you know, 75 or 80 percent.
Q: Okay. All right. Let's discuss the third: The racks.
A: Yes.
Q: If you could just first describe the racks?
A: There are two primary types of racks we use. The first is a flow-through rack where we put the product, pelletized raw product on one side, and it flows through to the other. Same thing with our second type of rack system called pushback rack system where we enter both raw and finished goods onto a carriage. And it's pushed back two or three spaces. We're able to go up two or three tiers. It is more efficient to go up and go out. So we like rack systems both for efficiency, and it also keeps

the product separated so it can maintain temperature.

Q: Okay. And where are the racks used?

A: In this schematic, in the raw cooler.

THE WITNESS: Yup. And the next raw cooler to your left, Jim. Right there.

A: And then in all three tomato coolers and the -- what's called the drive-through raw cooler right there in the center of the tomato coolers. We also have racks in the finished goods storage cooler.

THE WITNESS: Go up sort of center of the facility, Jim. Little further down. Little further down. Right -- one more. One more. Right there. So there you go.

A: So there's rack systems there. And then on the finished goods and shipping dock, there's rack systems right there also.

Q: All right. And do you consider the racks used in the manufacturing process?

A: Yes.

Q: Okay. And why do you consider them used in the manufacturing process?

A: Again, we -- this is a sensitive product, a temperature-sensitive product, so we have to

maintain temperature. If we don't maintain temperature, we lose the product. So maintaining temperature at 33 to 40 degrees is required in the manufacturing process. And the rack system enables us to maintain that temperature.

Q: Okay. And very briefly, I think you've already -- how does a rack actually help you maintain the temperature?

A: By separating the containers of produce to such a degree that it allows the cold air to flow across and over the containers to keep the containers maintained at that 33- to 40-degree temperature range.

Q: Okay. The next one -- I'm -- so the next one then is pallet flow brakes. What is a palette flow brake?

A: So if you can imagine, if you look at the tomato cooler, any of those three tomato coolers, the flow-through rack is 20 palette positions long. And if you put a 1600-pound pallet on one end and it runs essentially 45 feet or so without a brake system, that's gon' be traveling at 25 or 30 miles an hour by the time it gets to the other end. And it will

essentially fly off into the rack system and can endanger an employee or potentially hurt or cause death.

Q: Okay. And so how heavy are the palettes?

A: In this instance, they're 1600 pounds a piece.

Q: Okay. And they're that heavy 'cause they're full of vegetables?

A: They're full of, in this case, tomatoes, uh-huh.

Q: Okay. And so what are the palette flow breaks? What do they actually do?

A: They slow the pallet's down as they travel down the flow-through palette system.

Q: Okay. And are they activated automatically, or does an employee push a button, so to speak?

A: They're activated automatically as a pallet crosses over the top of it.

Q: Okay. And where are they used? I think you've already pointed that out.

A: All three -- during the audit period, they were in all three tomato coolers and in the bottom right raw cooler area. Okay.

Q: Okay. And in your opinion, is that used directly in the manufacturing process?

A: Yes.

Q: And why do you feel that it is?
A: Again, for temperature sensitivity, you know, we're maintaining that 33- to 40-degree temperature range and also keeping the product in rotation, because it's such a short shelf life.
Q: So we're talking about pallet flow brakes?
A: I'm sorry. Pallet flow brakes.
Q: Right.
A: So pallet flow brakes, again, part of manufacturing process is because it allows us to maintain a flow through the rack system at a safe rate. So we can maintain rotation and through-put.
Q: Okay. All right. And how about water tanks? If you'll describe the water tanks?
A: Yeah. So water tanks are used throughout the facility but particularly in the high-care area where we wash produce. We have to have water tanks that essentially hold water that we use for flume water and for sprays.
Q: Okay. So those are actually used in the facility?
A: Yes.
Q: Can you get Jim to show us where they are used?

A: Yeah. And PP RTE. So PP-1 -- excuse me -- P-1 RTE and P-2 RTE.

Q: Okay. So there are tanks ---

A: And P-4. And P-4 RTE.

Q: So those tanks are actually in the high-care area, as opposed to some huge tank outside of the building?

A: We actually -- we do have large tanks outside the building also to storage the water.

Q: Okay.

A: When I say outside the building, they're in a -- in this schematic ---

THE WITNESS: If you'll push it up just a little bit, Jim? Other way up. I'm sorry. Thank you.

So, Jim, if you see where the raw cooler in the bottom right-hand side is? You see where the white part of the schematic is? Further to your left. Further to your left. One more. Right there.

A: There are two 10,000-gallon storage tanks in that room.

Q: Okay. And is the water in itself used directly in the manufacturing process?

A: Yes. It's used to wash the produce and

sanitize the produce. The water is the conveyance system, and it also is used to dilute the sanitizer within the water. And that sanitizer, in this case, chlorine is used to desanitize the produce.

Q: Okay. All right. And do you consider that used directly in the manufacturing process?

A: Yes.

Q: Okay. And briefly again, why do you consider it used in the manufacturing process?

A: Because it's used to wash and sanitize the produce.

Q: Okay. All right. How about generator rentals? What are the generator rentals?

A: Yeah. So this is in the tomato cooler area. Tomatoes come in in a certain color stage, and we rent ethylene generators to help turn the produce, in this case, tomatoes from a certain color stage to a darker color stage to a ---

Q: Okay.

A: So in this case, customers specify they want to receive the tomatoes at a color stage Red 5 instead of a color stage, for example, Pink 3 or even a Green 2. So we have to control the ripening of that product.

Q: Okay. And so the customer actually tells you how red they want the tomato?
A: Yes.
Q: Okay. And did you use -- is it like the -- you see like the Pantene where you have ten stages of red, or is that just ---
A: There are five -- it's -- yeah. There are six color stages.
Q: Six color stages of red? And so you actually will turn a tomato, I guess by definition, always redder than when it comes in?
A: Correct.
Q: Okay. And so the customer tells you how red they want it?
A: Correct.
Q: And how do you turn the tomato red?
A: By using an ethylene generator.
Q: By using a what? I'm sorry.
A: A generator that we rent.
Q: Okay. And what does the generator do to turn it red?
A: Through a process it creates ethylene. And ethylene is a naturally occurring chemical that helps the tomato turn color.
Q: Okay. All right. So you consider it used

directly in the manufacturing process?
A: Yes.
Q: And any other reason other than you've said why you consider it used in the manufacturing process?
A: No.
Q: All right. How about hand trucks, pallet jacks, and oil lubricants? If you could tell us, first of all, what are those?
A: Yes. So ---
Q: We all know what a hand truck is. What's a pallet jack?
A: A pallet jack is essentially is an electric hand truck. It's assisted with an electrical motor that both lifts the palette and helps it travel. We consider it for use in the manufacturing process because it helps deliver raw product to certain lines, and it helps move, for example --
THE WITNESS: Jim, if you'll pull the schematic down a little bit?
A: You see the pelletizing area? Right there you could use a hand truck to move a pallet from that area into the finished goods storage area or, you know, a hand truck or a pallet jack.

Q: All right. And where is it used, just real briefly?
A: It's used all over the facility in the blue area. Okay. Primarily in the pelletizing, shipping, finished storage, raw storage, tomato repack area, and receiving dock.
Q: Okay. Is it moving smaller items, these pallet truck?
A: It can. It's used to generally move one palette at a time.
Q: Okay.
A: Where a forklift can move more than one pallet at a time.
Q: Is it ever used to bring the goods directly into the production line?
A: In certain cases, yes.
Q: All right. And so you consider it used in the production process?
A: Yes.
Q: And what is the oil lubricants. What does it lubricate?
A: So we use a food-grade oil and a food-grade grease. We're required to do that because we're a food manufacturer. And it's used essentially to maintain the hand trucks and

palette jacks in good, working order.
Q: Okay. What -- how about black ink for aerosol cans? First of all, what's an aerosol can, and how is it used?
A: Right. In the schematic in the pack-out area primarily and in the repack area, a finished case is labeled. Again, that's required.
Q: Required by who?
A: Well, by law, by FDA, and also required by our customer specifications. So when we mark a box, we mark it with, in this case, the aerosol cans contain black ink. That ink goes across what's called a jet ink sprayer. And it is a technology that allows us to spray on a use-through code and a lot code onto the corrugate box.
Q: Okay.
A: So it's part of our labeling.
Q: And where is that -- where actually do you do that?
A: Primarily in the pack-out area and the tomato repack area.
Q: Okay. And you say federal law requires that?
A: Yes.
Q: And why does federal law require that?

A: Because we have to be able to trace forward and trace back ---
Q: Okay.
A: --- one step.
Q: So the black aerosol can, part of what they are spraying, is that information?
A: Yes. That information typically includes -- in the lot information, we can trace it to the raw lot. And from the raw lot, from the what grower-shipper it came from.
Q: Right.
A: And also when we go to load it, we track the lot that went on the truck to deliver to the customer so we can trace it forward one step also.
Q: Okay. All right. And do you consider it used directly in the manufacturing process?
A: Yes.
Q: And any other reason other than what you mentioned?
A: No.
Q: All right. How about refrigerator for shelf life processing. What refrigerator is that?
A: Yes. So this particular refrigerator is used in the QA lab. Primarily for shelf life

testing research and development, if we have a customer who wants a new product, they require us to do shelf life -- to establish a shelf life, and we do that through shelf-life testing to failure. So we have a refrigerator -- we actually have a couple of refrigerators that are designated specifically for that task.

Q: Okay. And what is shelf-life testing? Give us an example of shelf-life testing.

A: For example, if a customer said I would like a five-pound bag of cut kumquats, we would put a five-pound bag of cut kumquats in the refrigerator to see if they lasted ten days if that was the requirement. If they failed before ten days, we would say, sorry, Mr. Customer, we're unable to provide you this ---

Q: Right.

A: --- for a ten-day shelf life.

Q: Okay. So the shelf life is how long the fruit or vegetable is still, viable, sellable?

A: Correct.

Q: Okay. And is there anything special about that refrigerator or is it just ---

A: Just that it maintains that temperature range

of 33 to 40 degrees.

Q: Okay. And you consider that used directly in the manufacturing process?

A: Yes.

Q: All right. How about the plastic shelves used in the lab and retained sample rooms?

A: Yes.

Q: What are those?

A: So each production run, we take at least one bag of sample product from that production run and we hold it in a room on a plastic shelf at temperature, again, that 33- to 40-degree temperature range, as primarily to ensure that we are able to maintain the shelf life that the customer has specified. It's essentially part of our warranty program. We warranty that that product will last.

In the case of this example, we've been using a shredded lettuce. It's production plus ten days. So if the customer has an issue in the field, they say -- if they were to call us and say, McEntire Produce, the bag of lettuce that you've sold us has failed before ten days or through, we would go and check that retained sample and see if we have a similar failure.

And if we don't or we do, we have something to discuss with our customer.

Q: Right. Okay. All right. And you consider that part of the manufacturing process?

A: Yes.

Q: All right. How about floor treatment chemicals? What are those?

A: Yes. Primarily this is used in the high-care area. We do use it in certain low-care areas in certain situations. Basically it's used to sanitize the floor and keep the floor clean and clean of debris and also clean of any type of bacteria.

Q: And are these special chemicals or something you could buy at the store?

A: These are special chemicals.

Q: Okay. And are they specifically FDA approved or FDA-required floor treatment chemicals?

A: They don't specify the chemical, but they do specify we need to keep a sanitary environment.

Q: Okay.

A: Sanitary floor.

Q: All right. And so where is it used then? You may have already answered that.

A: Yeah. Primarily in the high-care area, which

is the gray area. But it's also used in certain areas in the low-care. It's -- low care has a lower frequency of use. High care has a higher frequency of use.

Q: So how often would you actually use them, every night?

A: In the high-care area, it would be every night.

Q: All right.

A: And the low-care areas, depending on where it is. Some parts like tomato repack, it could be used every night. And other parts, coolers, would be used less frequently, a few times a month.

Q: Do you ever use it like in employees' bathrooms or ---

A: Certainly.

Q: --- their lockers or anything like that?

A: Certainly, sir.

Q: Okay. Now, did DOR -- did the DOR disallow all of the floor treatment chemicals or just a portion of them?

A: I believe a portion of them.

Q: Okay. So that -- would it refresh your recollection they allowed 70 percent and disallow 30; does that sound right?

A: That sounds right.
Q: All right. And so we're arguing about the 30 then?
A: Yes.
Q: You disagree that the other 30 was -- you contend the other 30 was used in the manufacturing process?
A: Yes.
Q: Okay. And why do you disagree?
A: We use it in the area of the plant where food is present. We do not use that type of floor chemical on the carpets in the offices.
Q: Okay. Is that because it's expensive and powerful?
A: No. It's just not the right application.
Q: Okay. All right.
A: But, yes, it is expensive.
Q: So would it be fair to say it's a lot more expensive than what you would buy at Lowe's or a grocery store to clean an office?
A: Certainly.
Q: Okay. And does it have a smell?
A: It has -- I would call it a cleaner smell.
Q: Okay. Would it be a smell that wouldn't be appropriate in the office ---

A: It probably -- I agree. Yes. It would probably be perceived as not normal to smell that type of floor chemical in an office area.
Q: Okay. All right. And go over some final items where you and the DOR agree that some of purchases be taxable but some should be exempt. So the first issue is Squeegees. Tell us, when do you use Squeegees?
A: Squeegees are primarily used in the high-care area but also used in the raw cooler area. They're used to move debris and water off of the floor into drains. Basically our job is to keep the floors free of debris. Debris tends to be a harborage point for pathogens and bacteria, so we want to keep the floor as clean as possible.
Q: Okay. And do you use Squeegees outside of the manufacturing process, cleaning the windows, for example?
A: In certain cases, yes.
Q: Okay. Did you pay taxes on those items?
A: I do not believe so.
Q: Okay. And is any Squeegee dedicated to nonmanufacturing use, or do Squeegees sort of go back and forth between the manufacturing and

the nonmanufacturing area?
A: They can be interchangeable in our process. Once it enters the high-care area, it stays in the high-care area and is only used in the high-care area. You cannot take a Squeegee that's used in a high-care area and go to low care and then come back to high care.
Q: Okay. So what percentage of the Squeegee's use would be in a manufacturing area?
A: I'd say a hundred percent.
Q: Okay. All right. Brooms, how do you use brooms?
A: Again, to sweep debris off the floor and perhaps off the racks.
Q: Okay. And would these be the same brooms that you would buy, for example, in the office area?
A: Yes.
Q: All right. Are they interchangeable? Would you use a broom in the office area and a high -- for example, high-care area?
A: We would not allow a broom in a high-care area. We would allow brooms in low-care areas. And in that case, it could be interchangeable but typically would not be. But to rephrase it, the same broom we buy for an office area would

be the same broom we would buy for a low-care area.

Q: Okay. All right. And a broom used in an office area would be taxable. Would a -- are you contending that those brooms should not be taxable, used in an office area? Or you separate them out so you know where the brooms are used?

A: We do separate them out.

Q: So you're just -- are you just claiming exemptions for the brooms in the manufacturing area?

A: Yes.

Q: All right. Cleaning machines: What are -- what's a foamer?

A: Right. So during our sanitation step, which is primarily in the grayed-out area of the schematic, that's the high-care area. We have an entire shift of sanitation where our sanitation technicians use this machine to take cleaning chemicals and both foam and sanitize the processing equipment.

Q: Okay. And is that required by federal law? I know that specific machine is not, but is cleaning them required by federal law?

A: Yes.
Q: All right. And how about your good manufacturing process, is it also required?
A: Yes.
Q: Does BRC require a cleaning machine?
A: BRC doesn't require it, but they audit against it. So they make sure that we have a sanitation process that maintains a certain level of cleanliness.
Q: Okay. Are these cleaning machines ever used out -- and where are the cleaning machines actually used? If you get Jim to ---
A: In the gray area of the schematic, which is the high-care area.
Q: Okay. So they're only used in the high-care area?
A: Primarily. We can use them in the raw area.
Q: Okay.
A: So you see that -- where it says raw feed, bottom right. Yeah. We can use them there also.
Q: But what percentage would be used in the high-care area?
A: 80 percent in the high-care area.
Q: Okay.

A: Maybe more.
Q: Warning lot signs and stickers?
A: Uh-huh.
Q: Where are warning signs and stickers placed?
A: Throughout the facility. And they're really to warn employees of certain hazards and also to remind employees, for example, the sequence of garbing up to go into high-care areas, the sequence of how to wash their hands, the sequence of if you go to the restroom, you must wash your hands before you return to a processing area. Also warns against cut risks like don't stick your hand into an industrial cutter. Don't put your hand inside of a closing box, tape machine, these types of warnings.
Q: Okay. So they're not outside in a parking lot showing people where to park or be careful?
A: They are there also, outside in the parking lot.
Q: What percentage of them are in the manufacturing area?
A: Probably 80 percent inside and 20 percent outside.
Q: Okay. All right. Blower fan.

A: Uh-huh.
Q: Used to move cold air through the manufacturing process. How do you use a blower fan?
A: So within the entire refrigerated part of the facility, we have what are called evaporators. They're part of the refrigeration system that help maintain that temperature range we've been speaking of, 33 to 40 degrees. And they actually pull air across the refrigerator coils and through a filter. We consider that part of the manufacturing process because we have to maintain that temperature range of 33 to 40 all the way through from receiving to raw storage to processing to finished goods storage to shipping.
Q: All right. And where would you use the blower fan?
A: In every room that you see that is in blue or gray -- or green, depending on your color. Here on this schematic. There's refrigeration in every single one of those rooms.
Q: And you consider that part of the manufacturing process?
A: Yes.
Q: All right. How about lamps? Where do you use

the lamps that are disallowed in the audit?

A: Primarily in the receiving area. For quality assurance technicians to receive the product, they have to be able to view it to make sure it's the right color, the right size, and there are no defects. So they use those lamps to ensure we're meeting the right quality standards.

Q: And you occasionally get defective produce?

A: Yes.

Q: Okay. Are they used also actually in the green area, the high-care area?

A: Yes, they are. They're used -- there are certain QA stations within the high-care area where QA technicians actually look at product that is in the process to make sure it meets customer specifications.

Q: Okay. And so you consider that part of the manufacturing process?

A: Yes, we do.

Q: All right. How about stacking containers used in the work-in-process section? How do you use them?

A: Yes. Certain SKUs require more than one component, for example, a cabbage made cut into

a coleslaw that has a separate bag of carrots that goes into a master case. So in that example, we would make this separate bag of carrots. We would store that in a stackable container. That container has to be made a certain way so that it is -- it can maintain a certain level of sanitation. You can sanitize it after use. We store those bags of, in this example, carrots until the master case of cabbage is made. And we take the bags of carrots out of that stackable container and put it into the master case, seal that case, label it, and pelletize it, and store it in finished goods.

Q: Okay. So that would be used directly in the manufacturing process then?

A: Yes.

Q: All right. Maintenance tools used to repair the machines within the processing floor. Where are those maintenance tools used -- well, first of all, how are they used?

A: So we have, as you can tell from the descriptions, a lot of equipment, a lot of conveyor belts, a lot of cutters, a lot of scales, dryers. A lot of equipment has motors

that -- and gear boxes that move.

Q: And how many employees do you actually have who do nothing but fix machines?

A: In our maintenance department it's about 20 individuals. We also have a facilities department, it's about ten. So a grand total of around 30. So 30 of the 600 people who do nothing but keep machines and equipment like refrigeration equipment running. So that -- those tools are used to maintain and repair and install, and in some cases, uninstall equipment.

Q: Okay. And where is it actually used?

A: Anywhere on the schematic, in all areas.

Q: Okay. And I guess when it's used is when a machine breaks?

A: Yes.

Q: Or it requires care?

A: When it breaks, requires care, or requires installation, or requires a unit to be uninstalled.

Q: Okay. And with all that water and air in the facility, the machines wear out pretty quickly in your facility?

A: Yes. We have a -- the type of environment we

run in is cold, wet, and loud. And machinery is not, especially machinery that has electrical components, does not like water present. So we have a fair amount of break-downs due to water intrusion. And many other issues occur when you have that much water present in a machinery environment.

Q: Okay. And so those tools are used to repair those machines?

A: Yes.

Q: Okay. And then do you have to -- what sort of turnover do you have in machines? Are you installing new machinery every year?

A: Yes. We -- every year our capital expenditure budget runs anywhere from 1 million to $2 million, and most of that is equipment that's used within the facility to either maintain temperature, rack systems, forklifts, material handling, or actual processing, or packaging equipment.

Q: Okay. Mobile computer stand?

A: Yes.

Q: What's a mobile computer stand?

A: So that -- in this case, we have a program that we use to help us track the manufacturing

process. And we like to have those mobile computer stands on the processing floor, in this case in the gray portion of this schematic in the high-care area. We also use it in the raw cooler area and in the pack-out and pelletizing area. Basically it's used -- in the tomato repack area. Basically it's used to track the process as the produce flows through the facility.

Q: Is that partially required by federal law, tracking the progress?

A: It's -- so federal law doesn't require us to track the process. There are components of the process like maintaining critical control points that are required that we do track on that computer system.

Q: Okay. And so who actually uses these computers? Like, what level of employees use them?

A: Quality assurance techs, food safety techs, and supervisors, and line leads.

Q: How about production operators?

A: Yes. Production operations, in terms of both pack-out and supervisors and line leads, are production operators.

Q: All right. White boards in production offices, what are they used for?

A: So the white board in production offices, and we actually have white boards on the floor in the production area to help track production efficiency and production yield, you know, to maintain through-put so we hit our cost targets.

Q: Okay. And so give me some examples of actually how you would use a white board.

A: Okay. One of our processes is sliced tomatoes. And the employees are paid essentially a bonus depending on how fast they produce. So they want to know if they're producing five trays a minute or six tray a minute. And that's tracked on a white board on the processing line.

Q: Okay. Another example?

A: Certainly white boards can be used to track through-put of bags per minute on a production line. If a certain production line is trying to hit a through-put target, they can track that on a white board and see if they've maintained or exceeding or not meeting that target.

Q: Okay. I may be through. Let me look quickly ---

MR. MAYBANK: Your Honor, if I could quickly look at my notes?

Jim, if you'll come here real quick?

Q: How about floor drain covers? Where are they used?

A: Yeah. So we have a very extensive stainless steel floor drain system that goes throughout the high-care area. It is an expensive floor drain because it's custom made. It is -- it's designed to separate both debris and product that has been trimmed, which essentially becomes byproduct, to keep it from entering the floor drain system. We maintain that system because we actually recapture the water that's spilled, and we recycle that water to help reduce our sewer outflow. And we consider that a part of our process because we're recapturing that water. And it's important to recapture that water so we can reuse it to wash produce later after it's gone through a very extensive filtering system that filters it all the way down to purified water.

Q: Okay. And what's the floor drain cover made

out of?
A: Stainless steel.
Q: That's obviously very expensive then?
A: Yes.
Q: Why do you need such an expensive drain cover?
A: Because we have to be able to sanitize it. And the caustic chemicals that we use to sanitize are very aggressive. If we used mild steel, it would rust. And plastic in this case wouldn't hold up. So stainless steel in the best option.
Q: Okay. And what is -- again, what does it drain?
A: Water primarily. And it separates debris and vegetable byproduct from the water.
Q: Okay. All right. Okay. Is the forklift used to dump raw material into the production process?
A: Yes. In terms of it, it takes the bin of raw product and enters it into the conveyance system. The conveyance system is a bin dumping a conveyor belt.
Q: Okay. And what is raw material dumping? Where is that in the production process?
A: It's -- in the schematic is where you see raw

feed.

Q: Okay. And is the dumper part of the conveyor belt?

A: Yes, it is.

Q: And is the conveyor belt directly within the manufacturing process?

A: Absolutely.

Q: And so would the produce that's placed on the conveyor belt, this is where it enters the high-care area?

A: Correct.

Q: All right. I think that may be ... and just out of abundance of caution? Where does flume -- what happens after cutting, flume washing?

A: In this case, yes.

Q: All right. And describe flume washing.

A: Right. So you see where it says cutter with optional spray? So once -- let's use the head of iceberg lettuce again going through a shredder. Once it is discharged through the cutter, it enters the first washing flume. The washing flume is best described as a stainless steel bath. It is somewhat of a circuit S-pattern, approximately 18 to 24 inches wide

and 18 to 24 inches deep, depending on where in the circuit it is. So it travels that circuit. It takes a certain amount of time. You can see on the schematic it says flume washing minimum 25-second immersion. Uh-huh. And then it's dewatered, which means it just separates the product from the water. That water is captured in one of the water tanks we spoke of earlier and recirculated back to the beginning of the wash flume.

Q: Okay. And then when is it transferred to the spinner basket and spin dried?

A: All right. So it goes through that first flume and dewatering shaker and enters the second flume. You see Flume A and Flume B? And, again, that washes for 25 seconds. It goes across the second dewatering shaker. It also passes underneath a fresh-water rinse. And once it's discharged from that shaker, it goes into a dryer basket.

Q: Okay.

A: Uh-huh.

Q: And what happens in the dryer basket?

A: The dryer basket is taken to a centrifugal spin-drying mechanism. Basically we spin that

300-pound basket of lettuce for a certain amount of time at a certain RPM. And it spins the water off of the product. So it is dried. And then from the dryer basket, it is metered onto a conveyor system. It goes up to a scale. And the scale weighs, in this example, five pounds at a time. Then it goes into a bag that's made by a vertical form filled seal machine. And that bag is sealed, and it goes through the metal detector. And once it's through that metal detector, it goes into the boxing, labeling, and pelletizing area.

Q: Okay. And then lastly, in a high level, what would be the water usage? You know, pollution has to be found in water under the statute.

A: Uh-huh.

Q: First of all, how does water come into the plant? Is it -- tell us about your water capabilities.

A: Okay. There -- we have two main sources of water. One is a well source, and the second is a Columbia water source. And the total system uses about 300,000 gallons a day. We recycle about half of that, about 150,000 gallons a day. That helps us, again, to reduce our sewer

bill, our sewer usage. It's introduced primarily at the first, in this example, cutter where you see optional spray. That's the first place water is introduced. And then at the flume, both Flume A and Flume B in this example. And either of these cases, you know, that is where water is introduced.

Q: Okay. So the cutting, when it cuts it, it actually sprays water at the same time?

A: If it is on, yeah. So typically when we shred lettuce, we introduce a spray head at that moment in time. And then it discharges into the flume system.

Q: Okay. So it goes from the -- being sprayed with water. And the cutting to a bath, so to speak? Would you consider a flume to be a bath?

A: Yes.

Q: Okay.

A: Uh-huh.

Q: All right. And so at -- when the water is sprayed in the cutting system, where does it go?

A: It both goes into the flume system. It can also aerosol, turn into essentially water

droplets, that go into the air.
Q: Okay. Is it -- is there a system on the floor where it's drained into?
A: From the cutter it can go onto the floor, and it can also go onto the flume system.
Q: Okay.
A: Uh-huh.
Q: All right. And then after the -- so it goes through the cutter. It goes through the flume. What happens to the water after that?
A: It is recirculated within the flume system, but also some falls onto the floor.
Q: Okay. But there's a -- is it then shipped out, so to speak or pumped out?
A: So the water, once it hits the floor, goes into the stainless steel drain system. It goes out to what's called a screening room where if there's any product in the water or waste product in the water, it's separated. And then it can either go to the sewer system, or it can go to the water recycling system.
Q: Okay. And the sewer system, is it dumped into the river or does it go into the sewer?
A: So it's going to the sewer, which goes to a municipal sewer facility. And then it's

discharged into the river, is my understanding.
Q: Okay. And do you have a permit, a water permit?
A: Yes, we do.
Q: And who do you have that from?
A: The City of Columbia.
Q: Okay. All right. So when it's recycled, the process just starts over?
A: Correct.
Q: All right.
MR. MAYBANK: We have nothing further, your Honor.
THE COURT: All right. Ms. Acquaviva?
MS. ACQUAVIVA: Your Honor, would be mind if we took a quick five-minute recess?
THE COURT: Well, I'm wonder how quickly our recess would be. We're right around noon. How do you feel about having the lunch break before you cross-examine.
MS. ACQUAVIVA: That's fine, your Honor.
THE COURT: Okay. So let's -- if it's all right with you, then let's take about an hour for lunch. It's 11:51, according to my impeccably accurate timepiece here, which is connected to the phone system. Be back here about 1:00. And does that give everybody enough time to

take for it? All right.

Mr. McEntire, we'll relieve you for an hour. You'll be back on the stand when we come back.

THE WITNESS: Thank you, sir.

(A recess was taken.)

THE COURT: We're back on the record in Case Number 17-ALJ-17-0060.

And, Mr. McEntire, you are on the stand, and you're still under oath, sir.

Ms. Acquaviva?

MS. ACQUAVIVA: Thank you, your Honor.

MR. McENTIRE - CROSS-EXAMINATION BY MS. ACQUAVIVA:

Q: Good afternoon, Mr. McEntire.

A: Good afternoon.

Q: I thought I would have gotten to say good morning to you, but it's -- we went right through the morning. If you could see on the screen here -- I guess you can see the one in front of you ---

A: Uh-huh.

Q: --- and it lists 35 supplies. Are you aware that the parties stipulated that these are the only supplies at issue?

A: Uh-huh.

Q: And is that list accurate?

A: Uh-huh.
Q: Okay.
A: Yes.
Q: During your direct testimony, you mentioned, let's see, plastic shelves for quality control, I believe it was.
A: There was a refrigerator in the quality control lab. And there are plastic shelves used in what's called a shelf life room.
Q: Okay. Do you see those type of plastic shelves listed anywhere in the list of 35 items?
A: The plastic shelves?
Q: Yes. Used for shelf-life testing.
A: So they're not for shelf-life testing. They're for what's called retained samples.
Q: Okay.
A: I'm looking. Give me a minute.
Q: Sure.
A: So Number 24, plastic shelves for maintenance, parts room, that same type of shelving is used in both the maintenance part room and the retaining sample room. It's just a simple plastic shelf.
Q: Okay. But you would agree the only shelves at issue in this case are the ones used in the

maintenance part room, not the ---

A: I would agree to with that.

Q: Okay. Just wanted to make sure we weren't missing something. As quickly as possible, I'd like to go back through some of the supplies with you.

A: Uh-huh.

Q: And I tried to group them into categories for ease of discussion.

A: Okay.

Q: If we look at gloves, aprons, and hairnets ---

A: Uh-huh.

Q: --- those supplies are used to prevent the food from contamination or the produce from contamination; is that correct?

A: Restate your question, please?

Q: Is it true that the gloves, aprons, and hairnets, their purpose, the reason the employees wear them is to prevent the produce or your product from being contaminated by pathogens; is that accurate?

A: Yes.

Q: Okay. The -- would it be fair to characterize the blower fans as -- you stated that the blower fans keep cool air circulated throughout

the plant, correct?
A: Yes.
Q: So would it be fair to characterize the blower fans' purpose then as a quality-control item?
A: That would be correct but incomplete.
Q: Okay. Could you complete?
A: Yes.
Q: Thank you.
A: So they are used to maintain the temperature level, but they also have a filtration system that the blower fans actually pull air through a filter and across our refrigerated mechanism that cools the air and separates water and then blows that cold, dry air throughout the -- the dual purpose is filtration and to keep cold air blowing throughout the room.
Q: And the filtration and the air temperature are to ensure the quality of the product, correct?
A: Again, correct but incomplete.
Q: Okay.
A: The quality of the product and to filter out any potential pollution or contaminants that are in the air.
Q: And what is the purpose of filtering out any pollutants in the air?

A: So if any of the previously mentioned pathogens become airborne or aerosolized via water, we want to keep and minimize that -- those pathogens from being spread throughout the room and potentially come in contact with the product that we're making before it's packaged.
Q: Okay. So would you say then that the ultimate goal of the air filtration is similar to the protective clothing and that it's to protect the produce and your product from any type of contamination.
A: Yes.
Q: And is there any other purpose for wanting to keep pathogens out of the air or any other purpose that you take action to keep pathogens out of the air?
A: From this blower fan standpoint, no.
Q: Okay. You use lamps to inspect the produce, correct?
A: Yes.
Q: How often are those lamps used?
A: Continuously throughout the day. I mean, really we don't run without them. Receiving time starts as early as 1:00 a.m. and run all the way into the late evening hours. And

production starts around 8:00 a.m. and runs all the way into 2:00 or 3:00 a.m. the next morning.

Q: Okay. Perfect. The bar code scanner and black ink aerosol cans, those are both used as part of a tracing back and forward process, correct?

A: Yes.

Q: You mentioned a bin-dumping conveyance system?

A: Yes.

Q: Can you describe that system and kind of how it works?

A: Sure. The bin-dumping conveyance system is essentially one unit. Think of a big stainless steel frame. We have what's called a dual cradle bin dump conveyance system, so you can actually put two bins anywhere from 800 pounds up to 1600 or 2,000 pounds each. That mechanism essentially lifts the bins up into the air and turns them over. And then the raw product essentially falls onto a conveyance system that conveys the raw product through a wall into the high-care area.

Q: And so I believe you testified that you use forklifts to put the raw product, raw produce into that bin-dumping conveyance system?

A: Yes.
Q: Can you describe how that transfer takes place between the forklift and the bin-dumping conveyance system?
A: Sure. The forklift has a pair of metal forks that are designed in such a way to enter the pallet from the side. And then once underneath the pallet, it lifts it mechanically up into the air. And some of our bin-dump systems go as far up in the air as eight or ten feet. And then they put the bin and lower it onto the cradle, and then they can back out of the palette that is holding the bin of raw product and lower the forks back to receive another pallet.
Q: Just so I -- and I think I understand this correctly. You actually put the palette of product onto the conveyance system?
A: In this example, yes. And recent history, in fact, during the audit period of time, we were running a peeled-onion operation where we actually had, instead of a pallet, it was called a supersack. Supersack -- a forklift's forks go through two loops and they pick up a 1600-pound bag of raw onions. And then someone

actually pulls a ripcord from the bottom of the supersack, and that unloads the onions onto a conveyance system. So the forklift is actually used to transfer raw product onto the -- onto a conveyor. It can be used -- it's interchangeable. You could use it either way.

Q: And are palette jacks used for the same purpose as forklifts?

A: Similar but not exactly the same. The palette jack cannot lift it into the air, but it can move it from one part of the facility to another part. We have used palette jacks in the past to deliver things like raw boxes of tomatoes to a sliced tomato line and a diced tomato line. So in this case it isn't a 1600-pound bin; it's a 25-pound case. So a human being can pick that case up and dump it himself or herself. And the same thing on the finished product side, that palette jack can lift up to 2,000 pounds of finished product and move it along the floor but not raise it up onto the air.

Q: So is it accurate to say then that palette jacks are not used to transfer product to a conveying -- another conveying mechanism like

the forklift is used?
A: Technically, yes, that's true.
Q: Okay. And are economy palette trucks used for the same type of purpose as the forklifts and palette jacks?
A: More similar to palette jacks.
Q: Okay. And you agreed that the economy palette trucks were taxable, correct?
A: I don't recall that but ...
Q: Okay. Do you see economy palette trucks of the list of supplies at issue?
A: I see palette jacks. I did not see economy palette jacks.
Q: I believe you also testified that both the forklifts and palette jacks, in addition to what we just talked about, are used throughout the plant; is that correct?
A: That is correct. The only important line of distinction is forklifts are not allowed into the high-care area.
Q: Do these -- do the forklifts and palette jacks kind of roam freely throughout the plant, or do you have -- these are the forklifts that are used in the tomato cooler? These are the forklifts that are used by the window where the

dumping occurs?
A: Uh-huh. The answer I'll give you is that they have an area where they spend most of their time in, but they are interchangeable. So a forklift that is in the raw area can easily be exchanged for a forklift that's in the shipping area. They're essentially the same lift. Depending on the greatest demand, the warehouse manager will allocate our resources as needed.
Q: Okay. And what percentage of forklifts would you say are used to transfer product onto a conveying system?
A: So to make sure I understand the question, are you asking what percentage of forklifts are used in the manufacturing process or specifically to put into a conveyance system?
Q: Specifically to put into a conveyance system.
A: Roughly 25 percent.
Q: And do you have a method of tracking the use of your forklifts?
A: No.
Q: Okay. So we would have to just rely on your best estimate?
A: It's based on the amount of forklifts we have and how many I know we use in the raw-product

area and how many lines we have to feed. So if I can answer that more clearly, we have basically in the neighborhood of 30 forklifts, and we have about 12 lines. Okay. So it takes anywhere from 8 to 12 forklifts to keep those lines fed. So that's where my number 25 percent comes from.

Q: You also testified about a generator that you rent for ripening purposes. Why do you rent the generator, as opposed to having purchased one?

A: Because it's not needed year round.

Q: How to you determine when the generator is needed?

A: When our tomato repack manager tells me he needs one.

Q: And what is that based off of?

A: The color of the crop.

Q: So you only use the ripener when you don't have enough fully ripened tomatoes ---

A: Correct.

Q: --- to package?

A: Correct. If I can answer that more fully, tomato crops are variable. In fact, all of our crops are variable. So we have to react and

adjust the manufacturing process based on the raw product that's available at the time of manufacturing.

Q: Okay. Would it be fair to categorize brooms, Squeegees, and floor-treatment chemicals as items used to sanitize the facility?

A: Yes.

Q: Okay. And do they have any purpose other than sanitizing the facility?

A: No.

Q: Okay. You have storage water tanks just outside the facility under a covering, correct?

A: We have water storage tanks both inside and outside the facility.

Q: Right. So one area is right outside under that covering?

A: One area -- it's still under the roof of our facility ---

Q: Right.

A: --- but it's not in the refrigerated portions.

Q: But that does store chilled water, correct?

A: Correct.

Q: And does it do anything other than store the water?

A: It mixes certain sanitation chemicals. We do

mix sanitation chemicals there before it's delivered to the processing area.

Q: And the water from the outside tanks, what part of the processing area are they -- is that water delivered to?

A: They're delivered to the high-care area where we cut and wash produce.

Q: But you also have water tanks in the high-care area, right?

A: Correct. And that's for recirculation of cleaning water.

Q: So that's the different purpose?

A: They're both used to contain water that's used for washing. One is what I would call a initial charge. And the second is more for recirculation.

Q: Okay. When you say recirculation, what -- the outside tanks, you said a chemical mixing takes place?

A: Correct.

Q: Does that same process happen on the tank in the high-care area, or is it just a recirculating of water?

A: It's just a recirculating of water.

Q: Okay.

A: In the high-care area.
Q: Okay.
A: And if I may add more fully that chlorine my be added in the flume section also. So, I mean, both tanks technically, you know, can mix sanitation chemicals. One, again, is a -- is an initial charge, and a second is a recirculation.
Q: Perfect. You mentioned on direct that no one from the Department asked you about pollution-control equipment or attire worn in a cleanroom; is that correct?
A: Yes.
Q: Okay. I am going to show you I think should be Exhibit 23.
MR. MAYBANK: What exhibit number is that?
MS. ACQUAVIVA: 23, Petitioner's 23. It's 22. I'm sorry.
(Petitioner's Exhibit Number 22 was introduced into the record at this time.)
Q: Is that the -- is Petitioner's 22 the protest letter submitted on your behalf in response to the proposed assessment?
A: It appears to be.
Q: Do you see pollution control mentioned anywhere

in that protest letter?

MR. MAYBANK: I couldn't hear you.

MS. ACQUAVIVA: I asked if he saw the term "pollution control" in the protest letter.

MR. MAYBANK: Oh.

A: You have to give me a minute to read it.

Q: Sure.

A: So ask your question again, please?

Q: Did you see the term "pollution control" mentioned in that letter?

A: I do not see it.

Q: Did you see the term "cleanroom" in that letter?

MR. MAYBANK: The term what?

MS. ACQUAVIVA: "Cleanroom."

A: I do not see it.

Q: Is it fair then to say that the basis of the protest was a disagreement as to whether items are part of the manufacturing process?

A: So although the document doesn't state "cleanroom," it does state cleanliness of workers and the facility. And through the FDA standards, we essentially meet the cleanroom standard. So I think -- may I ask you to ask your question again? I'm not sure exactly what

you're asking me.
Q: And I'll ask it a little differently.
A: Okay.
Q: Did you or anyone on your behalf ever tell the Department that you believed you were exempt or some of these items were exempt because of 12-36-2120, Subsection 54, protective clothing required to be worn in a cleanroom?
A: I'd say yes.
Q: You did raise that with the Department?
A: So in the third paragraph here it does state -- e-mail references FDA standards. I'm not sure about the particular number that you're citing, but we cite that the necessity of cleanliness of workers in a facility which involves wearing gloves, hairnets, aprons, et cetera.
Q: But the protest letter doesn't say this facility has a cleanroom that satisfies the Federal 209 E Standard as a Class 100 Cleanroom or better?
A: So Class 100 is a very old term, a very old standard. The FDA laws require us to maintain a certain level of cleanliness, and those levels of cleanliness meet or exceed Clean 100 standards. It doesn't actually call out

cleanroom 100, but that essentially meets.
Q: Okay. So you're saying that federal regulations require that you have a cleanroom but don't actually use that term?
A: Correct.
Q: Okay. And your basis for that conclusion is because the federal regulations require a certain level of cleanliness?
A: Yes.
Q: So if this courtroom met that level of cleanliness, it would become a Class 100 Cleanroom?
A: If you chose to call it that.
Q: Okay. You talked about salmonella, E. coli, and listeria. And I'm sure there are others that you didn't talk about. But generally you'd consider those pathogens, correct?
A: Those are the three major pathogens. There are other pathogens that are harmful to humans, can make a human sick, or bring on a potential death. But those are the three main ones.
Q: And so for purposes of these questions, I'm just gonna use the term "pathogens," so I'm not specific to any one, any type of pathogen that would be at issue.

A: Okay.
Q: 'Cause I know it's not just these three.
A: Okay.
Q: The purpose of the protective clothing -- so based on what's at issue, the gloves, aprons, and hairnets is to prevent contamination of the produce, correct?
A: Yes. Again, I would call that correct but incomplete. It protects the food from the human. It also helps minimize cross contamination or spreading of pathogens that may be present on the product itself.
Q: Okay. And would you agree that the primary goal of your food safety program is to protect the food, the produce, the product ---
A: Uh-huh.
Q: --- from contaminants of a pathogenic nature?
A: That's a major part of it. Not all of it. Of course, there are other items, foreign materials, dirt, debris, field trash that we try to sort out from product.
Q: Is it fair to say that you use the term "cleanroom" interchangeably with the terms "high-care room" or "high-hygiene room"?
A: So let's be careful that -- in the processing

area, the entire gray area that was mentioned earlier on the schematic is high care.

Q: Let me go ahead and put that back up for you.

MS. ACQUAVIVA: I think it's Exhibit 8. Actually, let me put that back in here.

Q: You got one?

A: Uh-huh.

Q: Okay. So I believe you were talking about this ---

A: Yes.

Q: --- shaded area?

A: Correct. So that entire area is considered high care. And that entire area meets Class 100 and is audited -- we have audited against that. And so we have confirmation of meeting that standard.

Q: But so it is fair to say then that you use the term "cleanroom" and "high-care hygiene room" interchangeably?

A: We use "high-care" and "cleanroom" interchangeably, not -- high hygiene is an area within that room.

Q: Okay.

A: I mean a very specific room.

Q: Okay. So this is high care (indicating)?

A: Correct.
Q: Just this half is high hygiene, right (indicating)?
A: Correct. It's divided in terms of risk. The RTE section is a lower risk section. A high hygiene is a high-risk section because in that section the cut produce is most vulnerable to pollutants or contaminants. And if it gets contaminated or polluted, there are no other opportunities to wash and sanitize that before it is bagged, packaged, and pelletized.
Q: Okay. And you just mentioned that when you're audited, they verify that the high-care room/cleanroom meets their requirements of a federal 209 E Class 100 or better cleanroom, right?
A: Yes.
Q: And ...
A: They're already against the standard of .1 micron for this particular audit standard.
Q: Okay.
A: And I believe that meets Class 100. I don't know if they look at the Class 100 measure against that.
Q: Is the only requirement for being a Class 100

or better cleanroom filtering the air to .1 microns?

A: To my knowledge.

Q: Okay. So I'll ask you again. If this courtroom were to have its air filtered to .1 microns, it would be a Class 100 or better cleanroom?

A: I am unsure and can't answer that exactly. You know, the way I would answer it is: There are many things that are required for a cleanroom. Garb is one; environmental control is another. And the Class 100 standard is old enough that I am unfamiliar with it and hadn't looked at it in quite a long time.

Q: But so just so I'm clear, the audit that you have done only looks at the air filtering piece of the requirement, correct?

A: To my knowledge.

Q: So the audit says that you filtered your air to .1 microns?

A: That is correct.

Q: Do you know where it states that in the audit?

A: The audit has many different sections. There will be one section that deals with the environment in the processing area, in this

case, in the high-care area. And they were measuring against that.

Q: Okay. And as far as you can recall, the audit report will specify .1 microns?

A: To my knowledge, yes. And what I'll tell you is that Wayne Bailey, our -- your next witness, will have more knowledge on that part.

Q: Okay. Let's see. I think on your direct you talked about the department's determination did not discuss this statute of limitations, correct?

A: We discussed the statute of limitations. We thought that it had run out on a few months. But the person who we were discussing with replied that since it was -- and I forget the term -- substantially underestimated, something of this nature, that those months were still open.

Q: Okay. And did you or anyone on your behalf respond to that?

A: We just assumed that the DOR had dropped the issue.

Q: After DOR explained the reason that it fell within statute was because of the substantial understatement?

A: That's right.
Q: So you thought when the Department explained it's assessment that it was dropping the issue?
A: So when they explained it, we offered that it was past the statute of limitation. In the case, I think the date was May 31st, 2016. And the response was that's included because of the substantial underestimation. Give me a second.
Q: Sure. I'm just looking. I'll give you the e-mail to see if it helps, Petitioner's 17. Actually just gonna stick this this way.
(Petitioner's Exhibit Number 17 was introduced into the record at this time.)
A: Okay.
Q: Petitioner's 17 is the e-mail chain regarding the statute of limitations issue.
A: All right. So that's -- those are the e-mails from July 19th from Logan Mitchell to Darryl Knight, our CPA.
Q: Correct.
A: Where she is explaining the period did expire on May 31st, 2016.
Q: And that explanation came in response to Mr. Knight's question as to why those periods were included in the proposed assessment,

right?
A: It appears so.
Q: Okay. And after the Department in Logan's July 19th, 2016, 9:51 a.m. e-mail, it explained why those periods were included. Mr. Knight didn't respond, did he?
A: I don't have any other response on this that shows that.
Q: Other than eventually sending the protest letter, right?
A: Yes.
Q: Okay. And so we'll take you back to the protest letter. Can you show me in here where Mr. Knight raised the statute of limitations issue?
A: I do not see it. But, again, we just assumed that DOR chose not to pursue it any further.
Q: Okay.
A: So we understood, to my knowledge, that after May 31st, we didn't get the letter from Logan until July 19th, and that would have eliminated a few months of the assessment.
Q: Okay. So is it fair to say that you, the taxpayer, and the Department had a misunderstanding regarding the statute of

limitations issue?

A: It appears so.

Q: Okay. But you didn't specifically raise that issue in your protest letter, did you?

A: No.

Q: Okay. And I'm gonna hand you Petitioner's Exhibit 23. This is a supplement to the protest letter submitted on behalf of the taxpayer. Can you tell me if the statute of limitations issue is raised in that document?

A: Would you like me to read all 100 pages of this as we sit here, or would you like to highlight it for me?

Q: I haven't been able to find where statute of limitations is referenced. To narrow it down, do you see a heading? If you just look at the bolded headings, do you see any that reference a statute of limitations issue?

A: I do not.

MS. ACQUAVIVA: I have no further questions. If I may just clean back up the exhibits. I messed them up.

MR. MAYBANK: I just have a few, your Honor.

MR. McENTIRE - REDIRECT EXAMINATION BY MR. MAYBANK:

Q: Ms. Acquaviva -- Lauren quizzed you on two

exhibits, somewhat implying that you had come up with the Class 100 and the pollution control, you know, on the eve of trial. So let me show you the first exhibit she put into the record was your accountant's letter dated July 26, 2016, to Ms. Lauren [sic] Mitchell.

A: Uh-huh.

Q: And if you'll read that paragraph there into the record?

A: Okay. I have enclosed here with an e-mail thread sent to you on July 19th and previously sent to Wes Butler or May 3rd, 2016. The E-mail references a link to FDA standards and are also directed to Mr. Butler's attention to certain paragraphs pertaining to the necessity of the cleanliness of workers in the facility, which involves the wearing of gloves, hairnets, aprons, et cetera, to protect against the contamination of the produce while it is being processed. Mr. Butler never acknowledged or responded to this information that we have provided.

Q: Okay. And then turning to the second page, if you'll read that language?

A: The highlight or the ---

Q: Right, the highlighted.
A: In my previous discussions with Mr. Butler, he only presented me with facts and circumstances of court cases involving SC Department of Revenue manufacturing processes that have little relevance to the facts and circumstances of the manufacturing process involving fresh-cut produce.
Q: Okay. And then Lauren mentioned the protest didn't specifically mention Class 100 or pollution control. So let me show you -- she introduced Exhibit 23. And this is a letter dated September 23rd, 2016, in which we supplemented the protest you just read, which is dated July 26th, 2016.
A: Uh-huh.
Q: And in that protest, does the protest cite Class 100?
A: Yes. This heading number two, protective clothing for Class 100 facility.
Q: Okay. And that -- so it goes on, you know, you certainly don't need to read it, but does it go on to three paragraphs discussing class 100?
A: Indeed, it does.
Q: Okay. And then right below it, what does it

discuss?
A: Pollution control exemption.
Q: Okay. So that one goes on for basically two -- basically would it be fair to say two pages discussing the pollution control exemption?
A: Yes.
Q: And that letter is dated, what, four weeks after the letters she put into evidence, five weeks after the letter she put into evidence?
A: Yes.
Q: September 23rd?
A: Uh-huh.
MR. MAYBANK: That's all we have, your Honor.
THE COURT: Nothing further, Mr. McEntire, you can return to your place of origin here.
THE WITNESS: Thank you.
(Witness excused.)
MR. MAYBANK: Our next witness is Wayne Bailey.
WAYNE BAILEY, having been duly sworn, testifies as follows:
MR. BAILEY - DIRECT EXAMINATION BY MR. MAYBANK:
Q: All right. Mr. Bailey, I'm gon' go over three -- sort of separated them out -- three areas with you. The first is diseases. The second, protective clothing. And the third is

the pollution control. So before we get started, if you'll give your full name for the record?

A: Wayne Samuel Bailey.

Q: And where are you from?

A: Augusta, Georgia.

Q: August, Georgia. What's your education?

A: I have a BBA in management and marketing. I also have an emphasis in computer science. I have a two-year course in sanitation, a two-year course in food production, as well as advanced training in HACCP design. And it goes on.

Q: Okay. And have you ever -- you've ever -- say you've taken courses in diseases ---

A: Yes.

Q: Salmonella ---

A: Through microbac labs.

Q: And have you gone to seminars?

A: Yes.

Q: Okay. Have you actually published yourself in the area?

A: No. But I've been in the business, food safety quality assurance for 27 years.

Q: Okay.

A: And worked in more than just produce in those 27 years.
Q: Right. And did -- where did you work -- how long have you worked for McEntire?
A: Over two years.
Q: All right. And so you started in, what, 2016?
A: Yes.
Q: Okay. And what jobs have you held at McEntire?
A: Food safety manager and then food safety director.
Q: All right. And what's your current position?
A: Food safety director.
Q: And what are your current duties?
A: It is my responsibility to watch over the food safety lab, which does principal testing; the sanitation team; housekeeping team; and general food safety hygienic design in the facility.
Q: Okay. And where did you work prior to McEntire?
A: I have worked with ARYTZA, which was a sweet goods, bread company. Before that you may know it as Otis Spunkmeyer.
Q: Right.
A: And before that, Keebler Kellogg's.
Q: All right. And what did you do for those

companies?

A: Started as a food -- as a quality supervisor/line tech when I started in the business. Moved to a quality manager. Then I moved to a corporate quality manager. Then to a -- higher levels within the corporate structure. The last position I had before I moved over to McEntire was a divisional vice president of food safety and quality assurance.

Q: Okay. For which company?

A: ARYTZA.

Q: Okay. And what food-borne illnesses are you predominantly concerned with at McEntire?

A: As stated earlier, it's listeria monocytogenes, not listeria in general. Listeria monocytogenes is the pathogen; salmonella, basically of all types; and E. coli, principally the six pathotypes -- make that seven counting O157:H7.

Q: Okay.

A: That make people sick.

Q: And could you briefly describe the -- describe listeria, the kind that you're concerned about? We don't need much of a biology lesson. But if you could just briefly describe it?

A: Sure. It is a bacteria that when introduced and -- as listeria monocytogenes -- into food, it will survive in produce through our processes possibly. We try to eliminate as much as possible. But if it makes it to the consumer, it mimics flu symptoms very closely. But if that person is immunocompromised or even people that aren't immunocompromised and react poorly to that bacterium being in their body, it can cause much worse symptoms and death.

Q: Okay. So listeria could be a potential health hazard?

A: Absolutely.

Q: Okay. And just give us sort of the specifics of the health-hazard side of it.

A: The health ---

Q: And keep it a little bit cumulative, if you could.

A: Sure. The health hazard of listeria monocytogenes being in food is if anyone eats it, even if they're not immunocompromised, they could find themselves hospitalized. They could find themselves having to be in the hospital for a long stretch of time, or it could be death.

Q: Okay.
A: And those highly compromised individuals are some that we definitely want to take care of, the children, pregnant women, immunocompromised, strictly speaking, that have immune diseases like HIV. Those are the ones most likely to succumb to listeriosis.
Q: Okay. So in terms of the seriousness of it, it could be quite serious if not fatal?
A: Absolutely.
Q: Okay. Then E. coli, I'm gon' ask you the same thing. So if I could first get to you describe it. And then tell us if it's a health hazard. And then tell us how serious the health hazard. So first, if you could just give us a little description of E. coli.
A: Again, E. coli is -- there's many different types of E. coli. Principally, we're looking at seven pathotypes. One of them, the best known is O157:H7. And when it is ingested, it can cause similar symptoms to listeria monocytogenes. It can even target kidneys, actually destroying the kidneys. It can take other manifestations in lungs. It can move from one system to another within the body,

depending on the person.
Q: Okay. And describe the health hazard of it.
A: The health hazard is ultimately could be death, at the very least, hospitalization or extreme sickness for a long period of time at home.
Q: Okay. And so it does lead to some fatalities?
A: Yes.
Q: Okay.
A: Approximately 500 a year.
Q: 500 a year? Okay. And then -- and would it be 500 a year from E. coli in food or across the board kind of thing?
A: Food.
Q: Food? Okay. All right. And then is -- describe salmonella then.
A: Salmonella, again, across the board, that one is -- you do not want in food. It can cause similar flu-like symptoms that attack the intestinal tract. It can move beyond that just as E. coli can, causing greater damage to the body. And ultimately it can cause deaths. And it does -- it's about 500 a year as well.
Q: Okay. All right. And is listeria present in South Carolina or in the farms of other states of which you buy produce?

A: It's not only present there, it's present everywhere.
Q: Okay. And where do you find listeria?
A: Listeria is typically two places: Soil and feces.
Q: Okay. All right. And is it potentially present in the crops delivered to McEntire?
A: Potentially.
Q: Okay. All right. And then is E. coli present in South Carolina in the farms of which you buy produce?
A: Same answer as before: Yes, it is.
Q: Okay. So it doesn't have -- again, like the mighty red ant, it's not cut off by cold weather in places in the U.S.?
A: No. It gets plenty warm enough anywhere in the U.S. for it to survive. And even when it gets cold, it can survive. It may not multiply, but it can survive.
Q: Right. Is it potentially in fresh produce delivered to McEntire?
A: Yes.
Q: All right. And how about salmonella? Is it present in South Carolina and farms in the other states?

A: Yes, it is.
Q: Okay. And could it potentially get in the produce delivered to your facility?
A: It could.
Q: Okay. How are the ways -- sort of starting over a little bit, how could E. coli potentially get in your plant? What is -- what would be the sources of it?
A: Two main sources would be produce and people.
Q: Okay. And how about listeria?
A: The same, produce and people.
Q: All right. And how about salmonella?
A: The same again, produce and people.
Q: All right. And so could you give us some specific examples of how they could come into your produce? And is it easier to pick one of them just so we could speed it up a bit? Would listeria be a good example, as opposed to E. coli or ---
MS. ACQUAVIVA: Your Honor, I'm gonna object to relevance as to how any of the pathogens get into the produce from outside, what that has anything to do with whether this applies at issue are exempt machines.
MR. MAYBANK: Well, they have -- well, first of all,

they deny these are pollution. And second of all, they deny that we treat them with -- you know, we try to keep the pollution out. So I think it's relevant out of -- you know, what is pollution? How does it get in? I agree it's not the case that we could rise or fall on that, but I think your Honor needs to know what we're dealing with.

THE COURT: All right. I'm gon' allow you a little bit of latitude there.

Q: So give us a -- I mentioned just to speed it up a bit so I don't have to go over -- separately go over listeria, E. coli, and salmonella. Would listeria be a good one of the three to go with?

A: Yes.

Q: Okay. So tell us how listeria could potentially come in through produce.

A: Listeria could be in the produce or on the produce. Even though it's tested, we don't test 100 percent.

Q: Right.

A: So there should be a small pocket that gets into the facility.

Q: Is listeria something you could actually see?

A: No.
Q: Okay. So it would be a invisible pathogen inside the -- is it more commonly on the outside or the inside or a combination?
A: Yeah, a combination.
Q: Okay. And give us some examples how they could come in through employees?
A: With employees, it could be tracked in on shoes if they were not protected. It could be tracked in from hands from mishandling when fecal matter is present, human or otherwise. It could be brought in potentially by touching animals, particularly warm-blooded animal.
Q: Dog or the cat?
A: Dog or a cat. If you came in and didn't wash your hands or take appropriate steps before going into high-care areas where produce is flowing and processing, you could introduce it to the line. A person could introduce it to the line or to the area.
Q: Okay. Can listeria cause harm in a restaurant if y'all don't properly treat it? You send the goods to McDonald's or one of your other customers?
A: Absolutely. If you think about how many people

are in McDonald's and the fact that the lettuce -- we'll take that as an example -- is put on sandwiches, how many hands touch that, how many times do they have to -- they're not changing their gloves between every single sandwich. So it could spread through a small restaurant like that rather quickly.

Q: Okay. And how about E. coli? That's -- same response?

A: Same response.

Q: Okay. And salmonella?

A: The same response.

Q: Have these three diseases caused illness in packaging plants across the country?

A: They have.

MS. ACQUAVIVA: I'm gonna object to that, your Honor, as to the relevance of other processing plants.

THE COURT: I sustain that objection.

Q: Okay. So can listeria make lettuce impure or inferior?

A: Yes.

Q: All right. What is cross contamination?

A: Cross contamination is if you are running an item and another source ---

MR. MAYBANK: In fact, your Honor, if I could respond to that? In her deposition, the DOR witness denied that listeria, salmonella, or E. coli were pollution. And so I think the fact that listeria, E. coli, and pollution [sic] have caused serious illnesses and identical plants of theirs across the nation is of relevance. If they had stipulated that listeria, E. coli, or salmonella were a pollution, then I think the objection should be sustained. But they have denied that they are, quote, pollution, end quote. And so the fact they cause serious injury and deaths at sister plants across the country, I think has some relevance.

THE COURT: I understand what you're getting at, Mr. Maybank. But the objection was specifically whether that is relevant to this particular business, and that's what we're talking about.

MR. MAYBANK: Right.

THE COURT: And I'm gonna -- let's keep to what we're doing here.

MR. MAYBANK: Okay. All right.

THE COURT: Now, if you want to use him when -- as a

reference to when the DOR witness says ---

MR. MAYBANK: Right.

THE COURT: --- they're not, then that's a different question.

MR. MAYBANK: All right.

Q: So getting back to it, what is -- before we get into the cutting room, what is cross contamination?

A: Cross contamination is introducing into, typically a product flow, something that you do not want to get into that flow. It could be a cross-contamination of pathogen. It could be a cross contamination of general filth or another type of produce that shouldn't be on that line. So there's different levels of cross contamination.

Q: Okay. And it's cross contamination of what to what? What does the "cross" quantify as?

A: It can be from one line to another. It can be from people into produce. It can -- it has different methods of transmission.

Q: Okay. Is McEntire subject to 21 CFR 110.8?

A: Yes, sir.

Q: Is it subject to 21 CFR 117.10?

A: Yes.

Q: All right. So let's cut to the cutting room. Discuss what happens in the cutting room. First of all, just take -- tell us what happens, the mechanical process of the cutting room.

A: Using lettuce as an example, when it goes into cutter, it will hit a cutting blade. And inside the cutting blade area, the housing, are spray nozzles that deliver water that has sanitizing agent in it. That's the first step of the process after dumping it on, grading it, and getting it to that point of the process.

Q: Okay. Now, we mentioned it's possible listeria would be in that lettuce?

A: It is possible.

Q: Okay. And salmonella and E. coli?

A: It is possible.

Q: All right. And if they were there, what happens to, for example, listeria in the cutting room if they're there?

A: If they're there, because of the nature of the spray nozzles and the cutting action, as much as possible, we contain the water so that it goes to the floor and runs down the drain. But some is aerosolized, and it can get into the

air. So as much as we can, we try to control cross contamination ---

Q: Okay.

A: --- with protective equipment and the design of the equipment itself.

Q: Does the mere cutting of the lettuce expose the listeria to the cutting room?

A: It can, yes. Earlier, you heard exudate coming off of the cutting process.

Q: Right.

A: Which essentially is organic matter.

Q: Okay.

A: When it's cut, that organic matter can carry the pathogen, whatever one you want to pick. And it can be aerosoled in the air.

Q: All right. And can listeria spread in the water in the cutting room?

A: It potentially could.

Q: Okay. And how about spread in the air?

A: Yes.

Q: All right. And the cutting area is cold and wet. Is that something bad to listeria or not?

A: For listeria, it only slows it down a bit. It's still actively reproducing at those temperatures, 33 to 40 degrees.

Q: Okay. All right. How much water does the plant use in a year?
A: Millions of gallons.
Q: Okay. And how is the water used in the facility for produce?
A: Principally it is a delivery mechanism for the sanitizer. It also, as mentioned earlier, washes away exudate.
Q: Okay. And is there water actually in the cutting blades?
A: Water is not in the blades, but it is spraying onto the cutting blades.
Q: Okay. And where does it go after it's spraying?
A: Principally either straight down into a flume, as mentioned earlier, or straight down onto a belt that leads to a washing system.
Q: Okay. So the cutting would expose the listeria?
A: Potentially, yes.
Q: Okay. And then in turn, the water could then spread it.
A: Yes.
Q: All right. And then could it possibly go into the air?

A: It could, being aerosoled.
Q: All right. And what exactly is aerosoled?
A: It's very small droplets that are small enough to float a distance before they land on either the floor or a piece of equipment or a person.
Q: Okay. So I think you answered this, but when the water's sprayed in the cutting room, where does it go?
A: Any water that's sprayed in the cutting area?
Q: Yeah. Is it gathered up and go in one central spot or where ---
A: As mentioned earlier, it would go down the drain system.
Q: Right.
A: About 50 percent is reclaimed through the water filtration system. 50 percent of it would go straight out to the sewer.
Q: Okay. And without your treatment controls, is it possible that salmonella, listeria, and E. coli could get into the water?
A: Yes.
Q: Okay. And how would it -- you've already been over it, but how would it get into the water. If it was already there, how would it get into the water?

A: If it was already present and you had enough listeria present in the produce or freed up by the cutting action, it could be carried by the water across the floor into any niches that may be in the facility. It has that potential.

Q: Okay. And could it be possibly then be discharged into the river?

A: Yes, it could be.

Q: All right. And I'd like to get your two cents. We discussed earlier, it seems odd it would -- seems that fresh-fruit producers would have a lot less regulation than a restaurant or something making, you know, meat or pies. Why all the regulation of fresh-fruit producers who all they're doing is cutting?

MS. ACQUAVIVA: Objection, your Honor. I don't think this witness can answer as to why the federal government is regulating this industry.

MR. MAYBANK: I think that's what he spent his whole career on is learning why they regulate the industry.

How about if I rephrase the question?

THE COURT: Rephrase the question. Let's try that.

Q: Is fresh fruit -- fresh produce producers subject to more regulation than restaurants and

producers who cook food?
A: We are looked at more closely because there is no kill step, a true kill step. All we can do is minimize from farm to fork and by keeping temperatures steady by keeping the room as clean as possible, by doing our due diligence when we're cutting, the design of equipment, cleaning of equipment. That is the means that we reduce the level of pathogen. Or at best, we eliminate it but ---
Q: Well, what's the difference ---
A: --- but we can't eliminate all.
Q: In a restaurant when they cook the food, that helps eliminate the pathogens?
A: Yes. They -- it can kill it off.
Q: Okay. Whereas y'all don't do that?
A: We have no means to do that.
Q: Right. And the vast majority of your customers don't do that either after they buy it, correct?
A: Correct.
Q: All right. Well, let's turn to protective clothing then. Does McEntire purchase protective clothing?
A: Yes.

Q: All right. And how about give us the -- identify the protective clothing for us.

A: And just for ease of describing, I will follow the procedure as though I'm dressing out myself. I'm not gonna put it on but ---

Q: Right.

A: As I'm coming towards the double doors before I go into the processing area ---

Q: Why don't we put the site on and ---

A: Yeah, you can put it up.

MS. ACQUAVIVA: And, your Honor, I would object to the explanation of how the clothing is put on or why it's put on that way. That has nothing to do with whether the clothing satisfies either of the exemptions. What the clothing is is one thing, but how it's put on doesn't make it a machine. And how it's put on doesn't make it required for being worn in a Class 100 Cleanroom.

MR. MAYBANK: It -- you've got to see the relevance to it. I mean, the -- they haven't conceded that listeria is pollution. They haven't conceded that protective clothing does anything. But that's what we're fighting about in the case. And so I think your Honor will

need all the background you can, considering that's what the case is all about.

THE COURT: Ms. Acquaviva, I'm gonna allow this demonstration to educate the Court. Apparently, I need the education. And I certainly don't dispute my need for education. So I'm gonna allow this and overrule the objection.

MS. ACQUAVIVA: Could I just ask that the Court bear in mind that only three of these items are on the list of supplies at issue in this case?

THE COURT: I understand that. I think that's five, six, and seven. I don't have the list in front of me but ...

MS. ACQUAVIVA: Yes, you are correct.

MR. MAYBANK: Why don't we just do five, six, and seven then? What are the names of five, six, and seven?

MS. ACQUAVIVA: Gloves, aprons, and hairnets.

MR. MAYBANK: All right.

A: Those are the nitrile gloves that each team member would put on when they enter the high-care hygiene room after washing their hands and after having put on their smock. They do it in that order for a reason. We want

clean hands to put on clean nitrile gloves. What was the next after gloves?

Q: Smock? Aprons and hairnets.

A: Okay. Aprons would be put on very much like this apron to protect the front of the smock area. And this is for anyone that is handling the produce. If the smock happened to pull apart, this is an extra level of protection to make sure that their personal clothing doesn't come into contact with food-contact surfaces or the produce itself.

And as far as hairnets go -- and hairnets and this style of hairnet, which also covers any facial hair, this is a full -- they call them snoods. That would protect against hair or anything from the head area falling into the flow of the process.

Q: Okay. Does McEntire require workers to wear protective clothing? And we'll -- just briefly 'cause we'll get into more of that later.

A: Yes.

Q: Okay. And let me show you Petitioner's Exhibit 18, good manufacturing practices. What are your good manufacturing practices? Let me get you to identify this document.

(Petitioner's Exhibit Number 18 was introduced into the record at this time.)

A: That's our internal list of GMPs.

Q: Okay. Good manufacturing practices?

A: Yes.

Q: All right. And does it reference clothing?

A: It does under clothing and apparel on page 1.

Q: And just -- if you'll -- so we'll ---

A: And it moves on to page 2 to cover it all.

Q: All right. And so if you could tell me again very briefly what does your drug manufacturing practices require?

A: It requires that the wearing of appropriate apparel so that the person in street clothes and street shoes will not or should not come into contact with food-contact surfaces or the produce. And in so doing, we're protecting the produce from anything that would come from outside.

Q: Okay.

A: Or from someone's home or from their pet, those type of sources.

Q: Okay. So we're only fighting today over three items of the protective clothing, the three that you just briefly described. When are the

employees required to put those on?
A: The hairnet and snood would be put on just before you put on your hard hat before going through the double doors that go out into the larger low-care area before you ---
Q: Okay.
A: --- go and get to high-care hygiene.
Q: Okay.
A: And then once you get in to high-care hygiene, as I mentioned just a moment ago, you would put on your boot covers, wash your hands, then go from washing your hands, put on your smock. Then your gloves go on. Sleeves go on over your arms, and aprons go on over the smock. And then you would walk in to high-care hygiene either side of it, as you see on the picture that's on the screen. And before walking in, you would walk through footbaths of alkaline peroxide, which is a sanitizer powder. And you would sanitize the gloves you just put on. As you walk through just a few feet in, that's your next thing to do before going to the line.
Q: Okay.
A: So we try to have redundancies built in place so that nothing gets brought in from outside.

Q: All right. And let me show you Exhibit 14. And what is Exhibit 14 then?

(Petitioner's Exhibit Number 14 was introduced into the record at this time.)

A: Then this is part of the training given to all new hires. And we also have annual refresher training.

Q: Okay. And what does it say about protective clothing?

A: Is short, it is stating what I just went through that list are required to work in high-care areas. Even low-care areas require certain apparel: Gloves, aprons, hairnets.

Q: All right. And why do you require your employees to wear protective clothing?

A: The idea is to protect the consumer from adulteration or any sort of pathogen from getting into the food, keep the food safe. And it is mandated by the FDA.

Q: Okay. So it's required by federal law?

A: It is.

Q: Is it also required by State law?

A: It is.

Q: Okay. And is it required for the safety of your employees or your customers?

A: Customers.
Q: Okay. And was protective clothing required by federal law during the audit period?
A: Yes.
Q: And what federal law was that?
A: That would be 110 that you mentioned earlier or Title 21, Section 110.
Q: Okay. And now Part 117?
A: And now 117.
Q: Okay. Was it required by State law during the audit period?
A: Yes.
Q: And what State law was that?
A: They take their base direction from the federal expectations. So it would still be Title 21, Section 110.
Q: Okay. We previously mentioned you are a member of United Fresh Associated Produce Manufacturing Trade Groups; is that correct?
A: That's correct.
Q: Is -- are protective clothing required by their best practices?
A: Yes, it is.
Q: Okay. By both of them?
A: Yes.

Q: All right. What is the global standard for food safety?
A: GFSI was developed many years back by large retailers and in conjunction with federal authorities. But it's not from one country. That's a global standard to set a baseline for food safety. We happen to be audited under the BRC scheme, which is approved by GFSI, the home body.
Q: Okay. And what does BRC stand for?
A: British Retail Consortium.
Q: Okay. And so they come in and audit you?
A: They do.
Q: How often do they come in and audit?
A: Every year.
Q: All right. And what are the some of the things that they audit?
A: They will start with basics like management, commitment to food safety and quality, moving on to HACCP, moving on to general design of the facility, making sure that the facility's kept up properly, is cleaned properly, that people are trained correctly ---
Q: Do they audit protective clothing?
A: They do.

Q: Okay.
A: They do.
Q: All right. And you've been audited a number of times by BRC?
A: Oh, yes.
Q: Have you ever been written up for lack of protective clothing?
A: Not to my knowledge.
Q: All right. Does protective clothing prevent or abate E. coli in the air of the cutting room or water in the cutting room?
A: Protective clothing helps more with cross contamination. You can easily change it out, and we're cleaning them every day. Or they're thrown away more often than every day.
Q: Okay.
A: Which helps with cross contamination.
Q: Okay. And I'm sorry to jump right into it. If you'll tell us, basically why does the FDA require protective clothing in the cutting room?
A: The idea is very basic, that it protects the consumer against contamination of produce.
Q: Okay.
A: We don't -- what they don't want is the

introduction of the an outside pathogen or filth, for that matter, into the food.

Q: Okay.

A: By wearing the protective clothing, there's a visible means to stop that. And as I said before, some of the things that we require our people to wear are redundant.

Q: Right.

A: It's one layer on another layer.

Q: Okay.

A: So it's the best means we have of keeping things out of the high-care hygiene areas, and which you don't want to get listeria or any of the other organisms in a niche growing. Because then you can introduce it to the produce, and then it would go to the consumer.

Q: Okay. Do the employees get wet during the -- and what actually -- to back up, what is the employee doing in the cutting room in the cutting process? What's his or her role?

A: They could be assisting in feeding the produce. They could be making sure that the piece of equipment -- and would be making sure that the piece of equipment is working correctly.

Q: Uh-huh.

A: That it is aligned properly with the line, and that there's no mechanical issues with it.
Q: Okay. Do that get wet during that process ---
A: Usually to a degree they do.
Q: Okay. And does the protective -- if they had E. coli on their shoes, does the protective clothing prevent the E. coli from going into the water at McEntire?
A: From their personal shoes?
Q: Right.
A: Yes, it would. They're -- as deep as they are ---
Q: Right.
A: --- it keeps it from coming off of their shoes directly into our environment.
Q: Okay. And there's a considerable air flow in the cutting room, is there?
A: Yes.
Q: All right. Does the protective clothing -- if there was E. coli on someone's pants, would that -- it -- would the protective clothing help prevent it from going into the cutting room because of the positive air flow?
A: Well, positive air flow keeps anything that's in the surrounding area outside from coming in.

Q: Right.
A: Anything that's in the room airborne could potentially move outwards, but it would probably settle inside the room.
Q: Okay. My point is is that because of the positive air flow, if you had dirt or E. coli on your pants, would the positive air flow cause it come off into the room or not really?
A: No. I wouldn't think so.
Q: Okay. All right. Hang on. All right. Is all the protective clothing reusable, or is it a single use?
A: No. Some is single use; some, such as the smocks and the boot covers, are washed. And they're washed every shift.
Q: All right. And so they're washed every day, I guess.
A: Yes. More than once usually.
Q: And so some of it is single use, and some of it is reusable?
A: Yes.
Q: Do you competitors use protective clothing?
A: They do.
Q: All right. I'm gon' turn them to the pollution control exemption then. And some of this will

be a little repetitive. But let's turn back to the -- I'm finishing up here. So let's turn back to the cutting room. Can the mere cutting of fresh produce release or expose listeria?

A: It can.

Q: Okay. And how about E. coli?

A: It could.

Q: And how about salmonella?

A: It could.

Q: All right. And describe how the mere cutting can do that?

A: Cutting it opens up the produce and releases exudate from, let's say, lettuce. And by releasing organic material, the pathogen -- let's just group them all together -- could be released into the flow and potentially into the air through aerosolization.

Q: Okay. All right. And so it could release it into the air and also into the water, did you say earlier?

A: It could.

Q: All right. Can the water system in the cutting room spread the E. coli, salmonella, listeria throughout the room?

A: It very likely wouldn't be the entire room but

the immediate area around it ---

Q: Right.

A: --- would be -- easily it could settle in that area.

Q: Okay.

MR. MAYBANK: I may be through, your Honor, if I could just quickly confab here a minute.

Q: I think you testified to this earlier, but just to be safe, in 2015 you had a BRC audit?

A: Yes.

Q: That's correct? One of those things they audited was whether or not you have protective clothing?

A: Yes. That's part of it.

Q: Okay. And you -- let me show you -- it's a lengthy audit report. Looks like it's 50 or 60 pages there.

A: Uh-huh.

Q: And so again just very briefly, who is BRC, and why do they audit you?

A: They are British Retail Consortium. And most of our customers require this.

Q: Right.

A: We also want it ourselves just as a check on our systems.

Q: Right.
A: Because it is a deep dive into all of our systems. And principally the driver is food safety.
Q: Okay. And so they audit your use of protective clothing?
A: Yes.
Q: And they audit your -- that you're, in fact, a Class 100 Cleanroom?
A: They don't call out Class 100. But what we are doing, to the best of my knowledge, would equal a Class 100.
Q: Right. Okay.
MR. MAYBANK: All right. That's all I have, your Honor.
THE COURT: Ms. Acquaviva?
MS. ACQUAVIVA: Thank you, your Honor.
MR. BAILEY - CROSS-EXAMINATION BY MS. ACQUAVIVA:
Q: Good afternoon, Mr. Bailey.
A: Hi.
Q: I hope to be fairly brief. To stick with the BRC audit ---
A: Uh-huh.
Q: --- you mentioned that part of the audit involves protective clothing?

A: Uh-huh.
Q: What exactly is it about the protective clothing that's being audited?
A: The fact, one, is it there? There are certain things that they expect to see.
Q: Who expects?
A: BRC.
Q: Okay.
A: The standard. Again, it is based on -- it goes back into the United States, the FDA expectation. Much of the GFSI was based on not only the U.S. but international expectations and their version of GMPs.
So when they come in, they are looking to see if we are protecting our produce from our people and what they may bring in. If we don't have those hurdles, as we call them, then we could introduce more pathogens into the environment, which is the last thing we want to do.
Q: The BRC doesn't do any type of audit to certify that you have a Class 100 Cleanroom, does it?
A: They don't use the term "Class 100." They're auditing other aspects that would apply to a Class 100.

Q: And what are the aspects? What are the requirements to be a Class 100 or better cleanroom ---

A: I'll have to tell you, I'm not an expert in a Class 100. I can tell you that they are looking for records of filtration. They're looking for records of changing out filters on a regular basis. They're looking for records of GNP compliance. They're looking for records that hurdles are in place to protect the area that you see is high care. If those are not in place, we would be called out on it, and we'd have to have corrective actions submitted.

Q: Are the things that they're looking for, like the GNP standards, are they specific to food manufacturing?

A: They are. That's the purpose of this particular type of BRC audit.

Q: But cleanrooms can be in any type of facility, right?

A: Potentially.

Q: So wouldn't the standard for determining whether a cleanroom exists not focus solely on food manufacturing?

A: Well, I think what we find, if I could clarify,

I think we find ourselves in the situation where we have a cleanroom. We're not looking to call it by a certain name, an older name. It happens to meet the requirements, as best I understand them, to be a cleanroom.

Q: In what documentation establishes that the cleanroom -- the federal standard cleanroom requirements are met?

A: Again, to the best of my knowledge, the filtration that we have is sufficient and small enough.

Q: Uh-huh.

A: And I do not believe that it calls out clothing, but other standards do call out clothing. But, of course, GMPS call out clothing at its base level to protect the food.

Q: Is it fair to say that common place you would see a cleanroom be in a pharmaceutical plant?

A: You might see one there, only because they're more likely to call it that. But as stated, the environment that we have set up has positive air pressure, has filtration and other hurdles to make certain that that room stays as clean as possible and we keep out pathogens and foreign material. That's the purpose.

Q: So is it then McEntire's position that if you call it a cleanroom, it is a cleanroom?
A: No. There's certain -- there are certain things that we do that let it fall into cleanroom category, filtration being one of them.
Q: But you don't know all of the requirements for having a cleanroom ---
A: The best of my knowledge, the filtration of the air is the basic requirement for a cleanroom.
Q: And I'm gonna ask you the same question I asked Mr. McEntire: If this courtroom were to filter the air to .1 microns, would it qualify as a Class 100 or better cleanroom under the federal standard?
A: The thing is, you can't take that in and of itself. This is not -- we're not having food passed through here. So in our facility with the things we're doing and the steps we're talking, it would be considered a cleanroom. Now, in here strictly speaking, you may say that it's a cleanroom, but it's -- doesn't involve food.
Q: So to be a cleanroom, the air has to be filtered to a certain level and food has to be

involved?
A: To the best of my knowledge.
Q: So ---
A: Food or something you ingest.
Q: Okay. So it's limited to food or something you ingest?
A: As far as I know.
Q: Okay. And that knowledge is based off of what?
A: Years of experience and actually recent history and in dealing with an older term, to be honest with you.
Q: You are aware that the exemption statute at issue uses the federal standard ---
A: Uh-huh.
Q: 209 cleanroom definition?
A: Yes.
Q: But those aren't the standards that McEntire uses because it's on older term, correct?
A: We're still meeting the standards in 2090 though. To the best of my knowledge, we are.
Q: But there is no document that states that McEntire is meeting that standard, correct?
A: We have no stand-alone document, but we have already spoken more than once about steps that we're taking to control the environment, not

just the water but the air as well and people and produce.

Q: The purpose of the protective clothing is to keep anything from outside the plant, whether it's -- you know, from the farms to the produce, as a source -- or the employees -- from increasing the microload anywhere in the processing area; is that accurate?

A: That's accurate.

Q: So to simplify that, the protective clothing's purpose is to prevent your final product from being contaminated?

A: Yes.

Q: Okay.

MS. ACQUAVIVA: I have no further questions.

MR. MAYBANK: We have no further questions of this witness, your Honor.

THE COURT: Mr. Bailey, you may return to your seat as well.

(Witness excused.)

MR. MAYBANK: And we have just one last witness, and then we're gon' publish a short deposition. Call Mr. Lovelace to the stand.

GEORGE LOVELACE, having been duly sworn, testifies as follows:

MR. LOVELACE - DIRECT EXAMINATION BY MR. MAYBANK:

Q: And where are you -- if you'll state your full name for the record?

A: George Thomas Lovelace.

Q: And where are you from?

A: Columbia, South Carolina.

Q: Good. And where is -- what's your education?

A: College educated.

Q: Okay. Whatabouts from?

A: Old Dominion University in Norfolk, Virginia.

Q: All righty. And where do you currently work?

A: For McEntire Produce.

Q: And how long have you worked for McEntire?

A: Since 2004.

Q: All right. And what jobs have you held there?

A: I'm the executive VP for the company.

Q: Currently today?

A: Currently today and since I came in 2004.

Q: All right. And are you VP of a particular area or VP period?

A: My primary responsibilities are supply chain.

Q: Uh-huh.

A: I handle all the food safety requirements for everything outside of the four walls that Mr. Bailey covers.

Q: Right.
A: I also work with industry groups on food-safety-related matters. I've collaborated in the development and updating of the commodity-specific guidance for leafy greens and tomatoes. And I'm a former past chairman of United Fresh Produce Association.
Q: Okay. And where did you work prior to McEntire?
A: I worked for Performance Food Group, which was a publically held company that had a produce division. And I managed that division.
Q: Okay. And did they have a -- sell any things that we would commonly know of, food items?
A: We did the exact same function that McEntire ---
Q: Uh-huh.
A: --- does in different geographical areas in the country.
Q: Okay. Good. All right. And then describe your full -- you've already mostly hit it, but give us your full experience with food safety.
A: I've been full time in produce since 1986. Prior to that, I worked in the restaurant business with one of our customers, current

customers. But I've been involved in the development of many of the industry standards. I'm a preventive controls qualified individual that's certified by the Produce Safety Alliance. I'm a qualified individual to enforce the produce safety rule. I am certified under the Foreign Supplier Verification Certification program by FDA. And, again, I'm responsible for all food safety of all of our suppliers outside of the four walls of the building.

Q: Okay. During the audit period, was McEntire subject to CFR Part 110?

A: It was.

Q: And how about Part 117?

A: Subsequently Part 117; yes.

Q: And are farms subject to 117?

A: No, they're not.

Q: And then why is McEntire?

A: McEntire because we are a manufacturer. And we transform raw agricultural commodities into a processed food, makes us subject to Part 110 and subsequently Part 117.

Q: Is McEntire subject to an FDA food safety plan?

A: Yes.

Q: And let me show you this and get you to identify it for us.
A: This is McEntire's food safety plan that complies with Part 117, the FDA code.
Q: All right. And so why did you write a food safety plan?
A: Technically under Part 117, a written food safety plan is now required. Prior to Part 117, we were required to have written HACCP plans and process flows and hazard analysis of our products, but we weren't required to have a consolidated document that provided particular focus on all areas of their food safety plan that's a new requirement under Part 117.
Q: Okay. Does this food safety plan basically describe what you had in effect during the audit period?
A: Yes.
Q: All right. And so tell us what does your food safety plan say about protective clothing?
A: The food safety plan ---
Q: Well, actually, let me -- I'll come back to that. Does the food safety plan require risk assessment?

A: It requires a hazard analysis of all of our production; yes.
Q: Okay.
A: Risk assessment and hazard analysis are interchangeable.
Q: Okay. And who prepares that -- the risk assessment?
A: Under Mr. Bailey's direction as a PC-qualified individual and with my assistance and oversight.
Q: Okay. And does the risk assessment cover water?
A: It does.
Q: Okay. Does it cover air?
A: It does.
Q: Does McEntire have preventable controls?
A: Yes, we have preventive controls.
Q: And y'all wrote those preventive controls?
A: We did.
Q: All right. And are they required by -- are preventive controls required by the FDA?
A: When a hazard is present that an absence of control can result in a serious adverse health effect to people or animals, we're required to institute preventive controls that

significantly reduce or eliminate the hazard.
Q: All right. Do you consider listeria to be pollution?
A: Yes.
Q: How about E. coli?
A: Yes.
Q: And how about salmonella?
A: Yes.
Q: What pollution or contamination due to validated controls cover, those three?
A: Those hazards and others that exist in our operation. Those are three that we do have preventive controls to significantly reduce or eliminate their presence in the operation.
Q: Okay. And what are the preventive controls in place for listeria.
A: Predominantly sanitation controls are in place to control listeria.
Q: And what are those sanitation controls?
A: They consist of many items. Some -- the most prevalent are a series of master sanitation schedules where equipment is cleaned to a certain level every day. We have periodic deep cleaning of equipment, which essentially completely disassembles the product down to its

frame, does a real deep cleaning, reassembles it, sanitizes it, and puts it back together. There -- so those are the sanitary controls that we use to control listeria.

Q: Okay. And how about for E. coli? The same thing or something different?

A: In addition to sanitation controls, you have process controls and supplier controls to help control both salmonella and E. coli.

Q: Okay. And the same with listeria?

A: Listeria's predominantly sanitation controls.

Q: Right.

A: Not as much supplier controls and processing controls. There are some but predominantly sanitation controls.

Q: All right. And was does your food safety plan have in reference to protective clothing?

A: It requires the use of protective clothing for all of our employees at different levels of use depending on their function within the business.

Q: Okay. Do you -- in your opinion, is protective clothing legally required by the FDA in the high-care area?

MS. ACQUAVIVA: Objection, your Honor. Being

improper. Lay opinion.
Q: Well, does McEntire consider it it has to legally use protective clothing in the high-care area?
A: The statute is very clear, both Part 110 and Part 117, that protective clothing is required, written on its face.
Q: Okay.
A: Lay opinion or not.
Q: All right. And so does the food safety plan reference the filtered air in a Class 100 we've been discussing?
A: It references the air. It does not reference the term "Class 100."
Q: Okay. And what does it say regards to air?
A: Air must be filtered to .03 microns in the high-care area and .1 micron in the compressed air that's used in the packaging on -- of the produce.
Q: Okay. So .1 where the produce is actually packaged, correct?
A: Correct.
Q: And what is the -- I know it's been repealed, but our statute represents ISO. And what's the micron level does that requires?

A: .3.
Q: Okay. Was it .5 or .3?
A: It is .5. Excuse me.
Q: Right. All right. And so ---
A: We are filtering to .3.
Q: Right. So you're filtering to a greater degree than the Class 100 Cleanroom, correct?
A: Yes.
Q: All right. I know we're being repetitive, but we've got to sort of match all this up. So McEntire's obviously subject to pollution or contamination for E. coli and listeria and salmonella?
A: Yes.
Q: And you have -- you've heard the other witnesses. Do you have any other gloss on how those diseases can come in through employees?
A: Nothing in addition to add to what's already been stated.
Q: Okay. And would the same be true with produce?
A: Nothing in addition to what's already been described.
Q: Okay. And so how -- what impact does the cutting machines have on produce with listeria, E. coli, or salmonella?

A: It has the opportunity to release it and magnify or proliferate it to areas outside of that individual piece of produce itself.
Q: Okay. And does it have the potential to impact the air system?
A: It does because it can aerosolize into the air.
Q: Okay. Does it have the potential to impact the water system?
A: I does because it can get into the wash water that ends up into the drains and part of which is discharged.
Q: Okay. And do you have any gloss on whether -- what impact wearing protective clothing in the cutting room impacts the diseases? We've heard testimony, but do you have your own gloss?
A: The use of the protective equipment and attire reduces the likelihood that any contaminants on our employees will get transferred across contaminating to the food or introduced to the food-contact surfaces.
Q: Okay. All right. So does preventive clothing prevent E. coli, salmonella, or listeria from coming into the cutting area?
A: No. It does in the terms of the people.
Q: Right.

A: It does not prevent the E. coli or salmonella or listeria that may come in on the product itself.
Q: Right. Okay. So is preventive clothing required by the FDA in the cutting room?
A: It is.
Q: All right. Does McEntire have a water permit?
A: We do.
Q: And the -- who issued the water permit?
A: DHEC, I believe.
Q: And does McEntire discharge water into the City of Columbia Water System?
A: We do.
Q: All right. And do you know roughly how many gallons a day or a year?
A: About half of our water is recycled. We can -- we use about 300,000 gallons a day, so roughly 150,000 gallons per day would be discharged into the water system.
Q: All right. And does DHEC's water permit have certain controls over putting pollution into their water?
A: It does. It requires us to measure whole suspended solids and BOD as well.
Q: Okay. And how does McEntire comply with the

DHEC water permit?
A: Water is filtered to the extent that we can. We screen out solids, and that's how we control what we discharge into the city.
Q: Okay. Does preventive clothing help you comply with the DHEC permit?
A: To the extent that it helps us reduce potential contamination transfer from our employees to the water that is discharged; yes.
Q: Okay. All right. And does CFR Part 117 apply the entire plane or just the high-care area?
A: The entire building.
Q: All right. And what would happen if there was no preventive clothing in the high-care area?
A: Besides being in violation of the law, the opportunity to increase the likelihood of pathogen transmission would increase.
Q: Okay. All right. And so we've already said it's possible for listeria and E. coli and salmonella to become airborne?
A: Yes.
Q: All right. And does the cleanroom -- and does McEntire have a cleanroom environment in the high-care areas?
A: Yes.

Q: And describe that cleanroom environment to us in terms of -- for example, why don't we start with the number of area machines, air pressure machines or air filtration machines?

A: Each of the air handling units has filtering that filters air to .3 microns. The compressed air that's used to help package the product is filtered to .1 microns. It's my understanding that the Class 100 has since been repealed and has been replaced with ISO 5. And ISO 5, in addition to requiring the air filtration, also requires the use of some protective clothing.

Q: Okay. And we'll get to that. So to get to filter the air, obviously you have to have air machines sucking it in; correct?

A: Air comes in one side, is forced a filter, and comes -- is discharged out the other.

Q: And can you show us where on the map here. Are these huge machines or just big machines?

A: Well, I wouldn't call them huge. They're certainly large, and there's a large number. And quite frankly, I don't know the exact number.

Q: Right.

A: That's not something that I routinely do ---

Q: Would that machine be as tall as me, for example?
A: No. In -- they're -- in most cases they're 4 to 6 feet tall and 8 to 10 feet wide.
Q: Right.
A: And they're suspended from the ceiling in most cases.
Q: Right.
A: And there's multiple units in every room in the facility.
Q: Okay. All right. And they suck the air in, correct?
A: Yes.
Q: And then they filter the air, correct?
A: And force it out into the remainder of the environment; yes.
Q: Okay. And how -- does it -- can you tell us a little bit about the filtration system that's used, the buffalo filter, one filter?
A: There's a group of filters that act as a block that are used in the machines themselves.
Q: Okay. And are those filters routinely cleaned, I guess.
A: They are routinely inspected and replaced as needed by our facilities and maintenance team.

Q: Okay. And does -- were the FD -- we've heard testimony the FDA comes in once a year or so?
A: Yes.
Q: And do they check that filtration system?
A: They check our procedures to make sure that our records indicate that we're property maintaining them with the equipment.
Q: Okay. All right. And does -- and we've heard reference to pressurized air in the cleanroom environment. Can you explain that?
A: Positive air pressure -- so we're pumping more air into the room so that imagine we're expanding the room, for lack of a better term. So when doors are open, air is forced out of the room so that air is not, for lack of a better term, sucked into the room from a different area where the air may not be treated as high.
Q: Right.
A: So positive air pressure -- so that we're not sucking in contaminants from the outside.
Q: Okay. And does the cleanroom -- and you say you have been certified that you meet the .1 and .3 requirements?
A: As part of the audit requirements, we have to

demonstrate that the equipment is capable of hitting that level and that we're maintaining it according to manufacturing levels. And BRC certifies that we're meeting that standard.

Q: Okay. And so which BRC --

MR. MAYBANK: I want to go ahead and ---

MR. ROURKE: 2011.

MR. MAYBANK: I'm sorry?

MR. ROURKE: This is ---

MR. MAYBANK: 10?

MR. ROURKE: This is Petitioner's Exhibit 11.

MR. MAYBANK: Okay.

MR. ROURKE: This is 11 also.

MR. MAYBANK: Okay. I'll just do what ---

Q: If you could identify this document?

(Petitioner's Exhibit Number 11 was introduced into the record at this time.)

A: This is the BRC audit report that Mr. Bailey and his team worked with very closely.

Q: Okay. And I think that's the same as this. So how often does the BRC audit you?

A: They come in once a year.

Q: Okay. And what are some of the things that they measure? It looks to me like a 40- or 50-page report. So they obviously look at

quite a few things?
A: They're looking at management systems. They're looking at compliance to federal statute. They were looking at requirements related to the quality of the product, the food safety of the product, the personal hygiene of the employees, the training of the employees; do we actually produce product in a sanitary manner.
Q: Okay. And how often do they come in, once a year or once every other year?
A: No. They're coming in every year.
Q: Okay. And so during the audit period, did they -- they came in every year, one of the things that looked at was your pressure -- your cleanroom environment?
A: Yes.
Q: Okay. And on occasion, they would write up where you had nonconforming -- where you had to correct measures?
A: Certainly.
Q: Okay. And do they ever write up the cleanroom environment though?
A: Not to my knowledge, no.
Q: Okay. All right. So, again, just to be crystal clear, BRC came in every year during

the audit period and did an audit of your food safety, correct?

A: That's correct.

Q: Okay. Add every year they looked at your cleanroom environment?

A: That's correct.

Q: And as far as you know, you were certified you had a cleanroom environment every single year?

A: I know we were certified every year that we met the BRC standard.

Q: Right. Okay. All right. And how does a cleanroom environment and the pressurized air help with airborne E. coli, the positive air pressure?

A: Ask that again? I'm sorry.

Q: How does the cleanroom environment and the pressurized air help with airborne E. coli?

A: So the cleanroom environment helps reduce the proliferation of E. coli if it's present in the product or if it comes in contact with food-contact surfaces.

Q: Right.

A: The cleanroom environment helps maintain -- not -- doesn't allow it to proliferate and magnify and spread to other areas.

Q: Okay. Would the same be true with listeria and salmonella?
A: It would be.
Q: All right. How about your -- we earlier on mentioned your preventive-control rules. What do the preventive-control rules require in terms of the cleanroom environment? For example, do they require inspection of their handling units?
A: So the preventive controls require the mitigation or reduction of hazards that are identified in the business. Listeria, E. coli, and salmonella are recognized hazards in the fresh-produce industry.
Q: Right.
A: So we have to institute preventive controls to reduce or eliminate those hazards. Among those are protective equipment on employees, clean air, clean equipment, properly grown and harvested produce, equipment that does not cross contaminate, water that is clean. There are many, many parts of the food safety plan that contribute to making sure that we are not selling adulterated produce. The risk prevention is critical because our product is

not treated prior to consumption that would reduce pathogens if they existed. People don't cook a salad before they eat it.

Q: Right.

A: So we have to prevent the introduction of those microbes onto the product. And if they are present, we have to make sure that we don't allow them to grow and get to higher levels that can make people sick.

Q: Okay. Our state statute unfortunately mentions ISO Class 100. That's actually been long, long ago replaced; is that correct?

A: It is. So long ago that it's a term that I was totally unfamiliar with until we started these discussions.

Q: Okay. And it was replaced by ISO Standard 5?

A: That's correct.

Q: Okay. And you're familiar with that standard?

A: I am.

Q: All right. And those standards permit a hundred particles of 0.5 microns per cubic foot or less?

A: That's correct.

Q: All right. And does McEntire filter its air for this ---

A: We do.
Q: --- produce to that level?
A: We actually exceed that level.
Q: Okay. And do your competitors do the same?
A: Yes.
Q: Okay. And would it be fair to say the entire industry does?
A: Anybody that's operating in compliance with the law is doing it; yes.
Q: Okay. So the reason I stress that, there's some insinuation that we came up with this notion right prior to trial. So it would be fair to say that the entire industry does this, correct?
A: The entire industry operates a cleanroom environment.
Q: Right. Okay. So where does the process -- the cleanroom process start and end?
A: For us, it really starts at the point where the product is introduced into the cutting room itself. And it ends as the product is packaged for the diagram that we've all been looking at all day long. It's the gray area on the diagram.
Q: Okay. And where does it end?

A: At the -- once product is packaged and it goes through the wall into the pack-out area, we consider the high-care area to have ended.
Q: Okay. Now, these air compressors obviously use filters?
A: They do.
Q: All right. Let me show you this exhibit.
MR. MAYBANK: What number exhibit is that?
MR. ROURKE: 9.
Q: 9, Exhibit 9. So these are -- what is it that Exhibit 9 describes?
(Petitioner's Exhibit Number 9 was introduced into the record at this time.)
A: Exhibit 9 is describing the filter that is used in the units, and it's also showing our air filter replacement SOP for how we maintain those filters.
Q: All right. And what does it say? What is it filtered to?
A: It is filtered to .03 microns.
Q: Okay. And the -- are dryer filters -- if there's an outlet from a dryer, how much is it filtered to?
A: 0.1 for the air compressors.
Q: Okay. And what's the difference between those

two just to a layman? Is there any?

A: The air compressor is blowing air into the package as the package is formed and the product is being put into the film. You recall earlier today, Mr. McEntire talked about how the bag was formed from a roll of film. Part of that process is air being injected into that process. So it's coming in direct contact with the food, so filtering to a finer level is required and appropriate.

Q: Okay. And so we were using these filters during the audit period?

A: We were.

Q: All right. And so I know we've heard it several times, but does the FDA actually requiring -- require filtered compressed air when it comes in contact with the produce?

A: If we're using compressed air, it requires it to be filtered, yes.

Q: Okay. And are you using compressed air?

A: We are using compressed air.

Q: All right. And to what level does the FDA require?

A: Point -- 0.3, I believe.

Q: Okay. And but you actually filter it down to

0.1?

A: That's correct.

Q: All right. Does anybody else audit you other than BRC for this?

A: So we're audited by a number of firms, both customers as well as regulators, that confirm that we're complying with applicable statutes, customer specifications, and good manufacturing practices.

Q: All right. Let me -- we kind of jumped over it. Let me -- the air drier filters, if you'll identify that. You've already identified it once?

A: Yes.

MR. MAYBANK: I don't believe we've introduced that into evidence. Do y'all have any objection to that?

MS. ACQUAVIVA: At this time, I would objection to lack of foundation and authentication. Some of these documents, I know where they came from, who made them.

MR. MAYBANK: I'm happy to go into even more detail.

THE COURT: What are we talking about here? Is this ---

MR. MAYBANK: It's the air filters. It's the

technical specifications for their air filters.

THE COURT: This is what you've referred to as Exhibit 9?

MR. MAYBANK: Correct.

THE COURT: That's not one of the agreed-on exhibits. So, yes, sir, how about help us out with that.

MR. MAYBANK: Okay.

Q: So tell us what Exhibit 9 is then.

A: So Exhibit 9 is a technical diagram published by the manufacturer of the filter, which is a technical description of its function and what it's used for and its typical applications.

Q: Okay. So the first couple of pages of this, these are in your files at McEntire? You bought these filters, correct?

A: That's correct.

Q: But these are just technical specs from the manufacturer?

A: That's correct.

Q: And then the second page is air filter replacement for HDXAU Units, correct?

A: Yes. That's our internal document verifying that we actually performed the maintenance.

Q: Okay. So it's really a maintenance document,

correct?
A: It is.
Q: All right. And it goes into things as the filter's been changed as unit serviceable, correct?
A: Right. And it's showing 1977. It's showing multiyears where we actually maintained the equipment to the manufacture's specification.
Q: Right. All right.
A: It's not enough to talk about the procedure. We have to prove that we did it and that we did it effectively.
Q: Right. And you're actually required -- so it's basically a maintenance guide to prove that you are looking at the filters, correct?
A: Correct.
Q: And I know you actually -- who requires you to keep a maintenance guide? You're doing that just 'cause it makes good sense or somebody actually require it?
A: We have to be able to prove that we maintain the equipment. The easiest way to do that is with a checklist ---
Q: Right.
A: --- when maintenance is performed.

Q: And who do you have to prove that to?
A: So when part of the recordkeeping requirements of Part 117 and, previous to that, part of that Part 110 is to have records to prove that the equipment that you're using to produce the food is properly maintenanced.
Q: Okay. So is this -- so this is required by the FDA, correct?
A: Yes.
Q: Okay. And are these documents done by McEntire in the regular routine course of their business?
A: Yes.
Q: Okay.
MR. MAYBANK: Your Honor, we would move to put them into evidence.
MS. ACQUAVIVA: As to the first page of this exhibit, my objection would be the same. It just looks like a Word document that someone typed up.
MR. MAYBANK: Okay.
MS. ACQUAVIVA: The ---
THE COURT: Okay. So -- okay. As to this page?
MS. ACQUAVIVA: Yes, your Honor.
THE COURT: What about the rest of it?

MS. ACQUAVIVA: The second page with the specs and the following pages, I would object on the basis of relevance. Again, I don't see how this establishes that they have pollution control machines or that it's a cleanroom. This is just showing a filter that they use and that they maintain that filter.

MR. MAYBANK: Well, why don't I connect it up then. We'll drag this out as long as she likes.

Q: All right. So you've already testified we have a cleanroom, right?

A: Yes.

Q: And then you've testified that in order to have a cleanroom, you've got to have machines sucking air through filters, correct?

A: The air has to be filtered, yes.

Q: And what is these -- what is this document here? I don't want to put words in your mouth. How does that relate, this document relate to the cleanroom?

A: This document shows the filter that is used in the machines that are moving air inside of the cleanroom, and the documents show that we are properly maintaining those filters through routine inspection and replacement.

Q: Okay. All right. And those are the -- just to be a thousand percent on point, those are the filters for the cleanroom machines, correct?

A: For the cleanroom-air-handling units, yes.

Q: Right. Okay.

MR. MAYBANK: All right. That's, I think, good enough, your Honor?

MS. ACQUAVIVA: I still haven't heard testimony about the first page. But while I still don't believe that the rest isn't relevant, I would allow the remainder of the document to be put into the evidence.

THE COURT: So this is the page you continue objecting to?

MR. MAYBANK: Correct. Yes, yes.

THE COURT: Which is to say where does it ---

MR. MAYBANK: Yeah. Let me ---

Q: And do you know where this particular, the -- just the first page came from?

A: It was prepared by our maintenance people to describe the pieces of filters that we are using within the building.

Q: Okay. And I think what Lauren is driving at is did we prepare this just for this hearing, or was this prepared as part of your maintenance

file?
A: It's part of our maintenance file.
Q: Okay. And the reason they prepared this is so somebody could take a, I guess, a quick glance and see what you have there?
A: To see what the requirements would be.
Q: Right.
A: And for either purchasing additional filters or looking at different requirements for the different pieces of equipment.
Q: Okay. So this page came from the same file, so to speak, as the remaining pages?
A: It did.
Q: Okay.
MS. ACQUAVIVA: No more objection to authentication. I'll address it on cross.
THE COURT: All right. So with some extensive discussion, Petitioner's Exhibit 9 is admitted.
(Petitioner's Exhibit Number 9 was marked for identification purposes and admitted into evidence.)
Q: All right. And who is GFSI?
A: Global Food Safety Initiative.
Q: Okay. And BRI?
A: BRC.
Q: BRC.

A: BRC.
Q: All right. And we've already been over that?
A: Yes.
Q: Do your customers ever look at your BRC audit? Your customers ever demand to see it?
A: In fact, it's provided to them automatically by BRC. It's sent to them.
Q: So you're required to tell BRC who your major customers were?
A: Yes.
Q: Okay.
A: And in most cases, our customers have specific questions that get added by the -- get asked by the BRC auditor, and those results are forwarded directly to our customer.
Q: All right.
A: The law does not require us to be GFSI certified.
Q: Right.
A: The law requires us to comply to Part 117. The GFSI process is one audit recognized by all. That if you are certified under the GFSI auditing scheme, you are deemed to be properly running your business from a food safety perspective.

Q: Okay. And so kind of winding up here. Did the DOR audit, to your knowledge, did they ever deny the sales tax exemption for the compressed air machines?
A: I don't believe they did.
Q: Okay. And to your knowledge, they never have for the machines?
A: To my knowledge, no.
Q: Okay. But they did deny the exemption for protective clothing?
A: I'm aware of that, yes.
Q: All right. And is protective clothing necessary for a cleanroom environment?
A: Yes.
Q: And why is it necessary?
A: It's necessary to provide the cleanroom environment factors. But also under ISO 5, protective equipment is required, and ISO 5 and Class 100 are essentially equivalent now.
Q: Okay. And so it assists the cleanroom, but it's actually required; is that your testimony?
A: I'm sorry. Ask me again, please?
Q: It's -- we all agree protective clothing assists the cleanroom environment, but is it actually required?

A: It is required by statute.
Q: Okay. And so it's required by the FDA even though they only use the term "ISO 5." The FDA does require protective clothing?
A: Yes.
Q: Okay. And does the state of South Carolina require protecting clothing?
A: It does.
Q: All right. And does ISO require protective clothing?
A: It does.
Q: All right. And is the protective clothing at issue in our audit required by ISO?
A: Nearly all of it is. There are some that are application specific, which our application would require it. But there's some pieces that there's absolutely no question that to be an ISO 5-compliant room, you would have to have protective clothing, much of which is in contention here.
Q: Okay. And so to your knowledge, everything in dispute in this audit is required by ISO?
A: Yes. The best of my knowledge, yes.
Q: Okay. And I'd like to bring up some audits that the Department of Revenue has objected to

and get you to identify them and then before I attempt to move them into evidence. All right. So this is a BRC audit report. If you'll identify it and the date.

A: This is the audit report dated July 2015.

MR. MAYBANK: All right. And what is the exhibit number for that, Jim?

MR. ROURKE: That's 12.

MR. MAYBANK: Exhibit 12.

MR. ROURKE: Yeah.

Q: All right. And so -- and tell us what that BRC audit is then.

(Petitioner's Exhibit Number 12 was introduced into the record at this time.)

A: It's the same audit process that we've been talking through. It was conducted in March of 2015. The report was issued in July of 2015. It's the same annual audit ---

Q: Okay.

A: --- that we get every year.

Q: All right. And did it certify that you've met the ISO requirements that you filtered it to .5 or less?

A: It certified that we were operating a cleanroom environment.

Q: Okay. All right. And was that particular audit done by BRC essentially the same each year?

A: Essentially the same, yes.

Q: Okay.

A: There have been some revisions to the BRC standard over the years, but it's essentially the same.

Q: Right. All right. And what is it -- let me just show you this kind of to speed it up here. What does it say in that sentence right there?

A: The one at the bottom?

Q: Yeah.

MS. ACQUAVIVA: Objection, your Honor. That would be hearsay.

MR. MAYBANK: Well, it's a business report.

MS. ACQUAVIVA: The document's not in evidence.

THE COURT: It's a document -- yeah. You've got to put that into evidence.

MR. MAYBANK: Well, I was gon' get him to explain it to lay the foundation for it and then attempt to put it into evidence. We have the earlier BRC report into evidence. We don't -- and they're done pretty much the same.

THE COURT: Which one is this one? This is

July 2015?

MR. MAYBANK: Right.

THE COURT: And what -- which one has come in already?

MR. ROURKE: I believe Exhibit 12. What you're looking now is the 2016 report.

THE COURT: 2016?

MR. ROURKE: Right. If you look at the audit date in the middle of the page, I think it shows.

MR. MAYBANK: Well, the one we're looking at is dated '15, July 2015.

A: Okay. So this is -- frankly, it's a little confusing to me. The issue date is July 2015, but the audit finish date is March 3rd of 2016.

Q: Okay.

A: So I -- it appears to ---

Q: Right.

A: --- me that this is ---

Q: Typo maybe.

A: --- the 2016 audit.

Q: Okay. All right. And what does the 2016 audit say about your cleanroom environment?

MS. ACQUAVIVA: Objection, your Honor. 2016 audit is outside of the sales tax audit period. So what happened at the plant in 2016 is not

relevant to the condition of the plant back between October 2012 through September of 2015.

MR. MAYBANK: Well, the audit was going on -- according to this paperwork, the audit was going on -- the BRC audit was going on during the time of the DOR's audit. It was just issued after that. But now where -- didn't we say the audit -- didn't you say the audits are basically the same each year? They look at the same thing each year?

A: They do.

Q: But sometimes the results are different, but they're looking at the same thing?

A: That's correct.

Q: Okay.

MR. MAYBANK: Your Honor, we would move that the fact that it's a couple months after the auditor. Six months after the DOR audit's irrelevant because their audit was going on at the same time as the DOR's audit.

MS. ACQUAVIVA: I would maintain the same objection, and I would add, based on Mr. Maybank's clarification, that they would be cumulative to the 2015 audit that's already in evidence if they say essentially the same thing.

MR. MAYBANK: It is largely cumulative. And if we could just get them to stipulate it's a cleanroom environment, we wouldn't be putting up with any of this.

THE COURT: Well, you've got one in. What does that one say?

MR. MAYBANK: It's largely the same.

MR. ROURKE: The testing for Petitioner's Exhibit 12 shows 0.1 microns, and this one says 0.5. So it's a little bit more of a stricter ---

MR. MAYBANK: So it's more directly on point, which I guess is why she's objecting to it.

THE COURT: What's your -- what's the dates of the audit?

MS. ACQUAVIVA: The audit are -- the audit period is October 1st, 2012, through January -- not January. Excuse me -- September 30th, 2015. That was the basis the Department consenting to the 2015 audit because it was auditing the conditions of the plant that fell within the sales tax audit period.

MR. MAYBANK: And this one was also -- it was issued in '16, but the audit itself naturally took place in '15. You always audit a time period well before the issue [inaudible].

THE COURT: So your audit, Ms. Acquaviva ends September of 2015?

MS. ACQUAVIVA: Correct, your Honor.

THE COURT: The previous audit, which you have allowed ---

Q: Correct.

THE COURT: --- to be entered and agreed to be -- have entered was March of 2015?

MS. ACQUAVIVA: Yes.

THE COURT: This one, apparently completed in March of 2016?

MS. ACQUAVIVA: It was actually only conducted in March of 2016.

THE COURT: So that's the ---

MS. ACQUAVIVA: It says it was a three-day audit that took place on March 1st, 2nd, and 3rd. And it says that on page 4 of 37. So this audit relates to the conditions of the plant on March 1st, 2nd, and 3rd of 2016 which was after ---

THE COURT: So after the audit?

MS. ACQUAVIVA: And that's the supplies and the use of the supplies at issue in this case were from that time period, not having may have changed practices after the sales tax audit period?

THE COURT: I see. All right. Okay. That's a problem.

MR. MAYBANK: I don't think it's a problem at all.

THE COURT: Okay. Well, in that case, I'm gonna sustain the objection. That -- this is outside of the audit period, and it apparently was done in three days in March of 2016. You've got one in for three days of March in 2015.

MR. MAYBANK: Right.

THE COURT: That's the one you're gonna have to rely on.

MR. MAYBANK: Okay.

Q: All right. And I'm about finishing up here. Do your customers require a cleanroom environment?

A: They require us to be in compliance with FDA standard and in -- be in compliant with the FDA standard, we operate a cleanroom environment.

Q: Okay. What would happen to an employee that didn't wear protective clothing in the cleanroom, the high area?

A: Be subject to discipline and ultimately termination if they refuse to ---

Q: Okay.

A: --- to wear ---

Q: Is this explained to employees?
A: It's part of the orientation and training process ---
Q: Okay.
A: --- when you're hired and reviewed annually with all employees.
Q: Would you operate the cleanroom if you ran out of protective clothing?
A: No.
Q: Okay.
MR. MAYBANK: That's all we have, your Honor.
THE COURT: Okay.
MS. ACQUAVIVA: Thank you, your Honor.
THE COURT: Cross-examination.
MR. LOVELACE - CROSS-EXAMINATION BY MS. ACQUAVIVA:
Q: Good afternoon, Mr. Lovelace.
A: Good afternoon.
Q: I understand that the FDA regulation states that protective clothing has to be worn in a food processing facility, right?
A: Yes.
Q: Does the regulation state the purpose for that requirement?
A: The regulation, the preamble to the rule, as well as much of the language in the rule, talks

about the prevention of adding or producing adulterated food and that we're required not to produce adulterated food. And it lists a number of hazards that exist that could result in adulteration. Employee hygiene is one of those hazards, and protective equipment being worn to protect against that hazard is required. So does it say directly why? No. It says you have to wear projective clothing to prevent the hazard from the employee hygiene. And if you didn't, if you would have adulterated food.

Q: So is it fair then to infer that the purpose of the protective-clothing requirement is to prevent adulterated food?

A: Yes.

Q: And it's simple math?

A: Yes. I would agree with that. Yes, ma'am.

Q: Okay. You discussed that -- and I may have misheard, so I just want to make sure I understand. Was it that the air, the compressed air used for the bagging is filtered to .1 microns?

A: That's correct.

Q: Okay. But the air in the plant itself it not

filtered to .1 microns?
A: No. It's filtered to .3.
Q: .3. And how do you know that the air is filters to .3. microns?
A: The equipment has been certified to operate at .3 micron, and we manage the equipment in compliance with the manufacturer's direction.
Q: Do you test the air?
A: To my knowledge, no.
Q: Does the BRC auditor test the air.
A: There's some reference to air, but I don't know -- I don't have personal knowledge that they do or not.
Q: Do you know where in the audit report there's a -- the reference to air?
A: I do not.
Q: If I let you look through it, would you know?
A: I would have to read the entire audit. I don't routinely ---
Q: Okay.
A: --- manage the BRC audit process. Mr. Bailey does.
Q: Would you agree that in order to process a food item, so turn a raw produce into a finished product, you have to transform the product in

some way?
A: That's what the statute actually calls for.
Q: Okay. So an example would be if you cut lettuce, it becomes processed lettuce; is that fair?
A: As opposed to the whole original head with the core in, yes.
Q: Okay. But if you picked up a head of lettuce and tossed it to me and I put it in a bag, no processing would have taken place?
A: That's correct. We didn't change its original state or form.
Q: And now I believe you said you are not familiar with Federal Standard 209E, correct?
A: That's not a term that I'm familiar with; no.
Q: And as far as you know, the requirements for having a Class 100 or better cleanroom is based on air filtration?
A: As I -- to the best of my knowledge, the Class 100 has been replaced with ISO 5. ISO 5 requires air and protective equipment. If there's other things that it requires, I don't have any knowledge of those items. But I do know that it requires air filtration, and it requires the use of certain protective

equipment.

Q: But the BRC when they do their audit, they don't audit to see that you're satisfying the ISO standards, do they?

A: No. They're certifying that we're meeting the standard of the GFSI audit scheme, which if we're following that, we are meeting FDA law.

Q: Okay. And to go back to the protective clothing, the protective clothing does not -- it prevents contaminants such as the different bacterial pathogens we talked about from getting into your finished product, correct? That's its purpose?

A: It's a physical barrier to prevent transmission to the food or food-contact surfaces.

Q: The purpose of that clothing isn't to prevent, you know, an airborne outbreak of listeria, is it?

A: It prevents getting listeria that may have been on the person's clothing or on their body from getting onto food-contact surfaces where it could be blown into the environment or in a room where we're operating or getting rinsed off in the water and ending up in the water supply.

Q: So it's a few steps removed from directly preventing the contaminants from getting into the air or water?
A: I'm not ---
Q: Sure.
A: I'm not sure ---
Q: To ask it a different way ---
A: Yeah. If you would, please?
Q: The protective clothing prevents pathogens on the employee from getting onto the produce, correct?
A: Or a food-contact surface.
Q: Right. So ---
A: Yes.
Q: The produce would be one?
A: Yes.
Q: And it also prevents it from getting on food-contact surfaces?
A: Yes.
Q: And then the protective clothing also -- so these pathogens can come in on the produce, correct?
A: Yes.
Q: And so the protective clothing, does it also prevent cross contamination? So from -- if one

head of lettuce had bacteria and the other one didn't, it -- if I'm protected so I'm not -- if it got on me and I changed my protective clothing, it wouldn't get on other lettuce? Or is that not its purpose?

A: The protective clothing doesn't perform the function of preventing the spread of pathogens that may be in the produce to other produce items or to food-contact surfaces. The purpose of the protective clothing is to prevent any pathogens that may be on the people from getting into the food or onto the food-contact surfaces where they could be magnified or blown elsewhere in the facility.

Q: And there was discussion of the air pressure and how it was higher in the high-care area; is that right?

A: The -- yes. The entire gray area has positive air, so we're putting more air into the room, so that if a door opens, air is expelled instead of brought into the environment.

Q: And the air is expelled to where?

A: To the surrounding areas like the raw receiving dock or outside the building.

Q: Okay. So if you were to open a garage door

where the trucks come in on the receiving section, the air would go out that door?

A: In your principle, yes. Because we open the doors to the trucks in our particular facility inside the cold room, that's not a valid comparison. But if you were to open the garage door, air would force out instead of bringing the outside air in.

Q: Well, to look then at the diagram itself, the air is forced out of this area, correct?

A: The air pressure in there is higher than the air pressure in the surrounding part of the facility; yes.

Q: So the air is going to move from this section to this section if there's an opening?

A: Yes, ma'am.

Q: And that it is inevitably going to get out of the plant?

A: Yes.

Q: And that air could be contaminated with pathogens, correct?

A: It's certainly possible if we have -- if it came in on the produce and we didn't exercise these measures to contain them, yes, it could.

Q: Okay. And is -- are gloves, apron, and

hairnets worn outside of the high-care area?

A: There are -- there's some protective equipment that's required to be outside of the high care. There's different levels. So I'm -- you know, aprons, hairnets, arm covers are particularly in high care, but you're required to have a hairnet on if you're anywhere inside the processing facility.

Q: Okay. So under McEntire's classification as -- of the high-care area as the cleanroom, is it fair to say that the hairnets worn in the blue area are not being used in the cleanroom environment under McEntire's explanation of what a cleanroom is?

A: It is the same type of hair covering. But employees that are using them in the blue area do not wear them in the gray area.

Q: And do you have any documentation that shows the percentage of hairnets used in one area versus another?

A: I don't have personal knowledge of that. And there's a number of employees that work in one area versus another. It would be fairly easy to calculate an approximate percentage just based on the number of employees that are being

employed in the different areas of the facility.

Q: To your knowledge, no such document has been ---

A: No.

Q: --- introduced to here today?

A: No. Not to my knowledge. No, ma'am.

MS. ACQUAVIVA: I don't have any further questions.

THE COURT: Okay.

MR. MAYBANK: We didn't have anything further, your Honor.

THE COURT: All right. Mr. Lovelace, you may ---

THE WITNESS: Thank you.

THE COURT: --- retire to your seat.

(Witness excused.)

MR. MAYBANK: So our last is to publish a deposition. And then we're all through.

THE COURT: All right.

PUBLICATION OF DEPOSITION TESTIMONY OF DR. GOMBAS, Ph.D.:

MR. MAYBANK: It's a short -- a relatively short bio, and we didn't edit it down much. And I might go ---

Where is his bio?

His bio was attached to the deposition. I'll

just hand it up, your Honor. So why don't we start to, to speed it up ---

MS. ACQUAVIVA: Your Honor, I don't believe that that document was part of the deposition.

MR. MAYBANK: How did we get it? It wasn't attached to his deposition?

MR. ROURKE: It was a disputed exhibit.

MR. MAYBANK: It was what?

MR. ROURKE: It was an exhibit that the Department didn't stipulate to. We've identified it as Petitioner's Exhibit 3.

MR. MAYBANK: Where did we come up though? Did he give it to the -- did he give it to us in his deposition?

MR. ROURKE: Right. It was produced in discovery. He didn't give it to us during the deposition, but it was produced in discovery.

MR. MAYBANK: Okay. All right. Well, why don't we go through the deposition, and we can come back to the bio then. All right. So we'll start -- exactly Ms. Acquaviva's question, we'll start on page 5. And I'm gon' skip around a little bit. Are you Dr. Gombas?

MR. ROURKE: Yeah, Dr. Gombas.

MR. MAYBANK: Dr. Gombas -- Dr. David Gombas this

afternoon. Also present with me is Elisabeth Shields.

Let me -- I might skip through a little bit here and go -- all right. Why don't we go to page -- all right. Why don't we go to page 9 and line 12.

(The deposition testimony of Dr. David Gombas was published with Mr. Maybank reading the questions and Mr. Rourke reading the answers.)

Q: Dr. Gombas, how did you become familiar with McEntire Produce?

A: McEntire produce was a member of the Trade Association I worked for since 2005.

Q: Have you done any work with McEntire Produce in the past?

A: Only in terms of my work at the Trade Association.

Q: Okay. What did your work in the Trade Association entail?

A: I was the food safety expert for the fresh-produce industry.

Q: Okay. And what -- could you describe what your duties were, kind of like being an expert, what services you provided and things of that nature?

A: Primarily guidance to the industry, working with FDA on regulations and guidance, food safety guidance.

Q: Okay. For the record, can you tell me a little bit about your educational background?

A: I had -- I got a bachelors in food science at Rutgers University, my masters in food science at Massachusetts Institute of Technology, and my Ph.D. at the University of Massachusetts in forest -- I'm sorry -- in food microbiology.

Q: All right. I'm going to ask you about your work experience. But first -- let me see. What did McEntire Produce hire you to do in this case?

A: To be an expert witness in regards to food safety related to protective clothing.

Q: How about much how are you being paid to be an expert witness?

A: Honestly, I don't know. I do not give them a price. I told them I would be willing to do this pro bono.

Q: Okay. And what is your understanding of what you're being asked to do? What is it that McEntire's looking from you beyond just a general being an expert in food safety --

related to protective clothing, if anything?

A: I'm not sure that there is anything else. It's to provide my experience as an expert, to serve as an expert witness in this matter.

Q: All right. Okay. So then limited to your current or previous job or experience, can you tell me -- essentially go through your resume but just limit it to your experience related to food safety and protective clothing specifically.

A: Okay. I've been working in the processed and fresh-produce industry since -- well, actually since 1982. My first training course related to protective clothing was in 1989 when I've worked for the National Food Processors Association. I continued working in food safety, particularly in good manufacturing practices. From that point on through the current time, I worked with the FDA on their HACCP regulations (HACCP). I've worked with FDA on their revision of the good manufacturing practices regulations. I've worked with the processed and fresh produce industries and training on goods -- manufacturing practices.

Q: Okay. Do you have any familiarity with

South Carolina law?
A: Not specifically. Not specifically other than what I read this morning looking at the South Carolina Food Code.
Q: Have you testified as an expert previously in food safety as it relates to protective clothing?
A: No.
Q: Have you testified previously as an expert at all?
A: Yes.
Q: Okay. What areas -- area or areas, if more than one, are you qualified as an expert -- have you been qualified as an expert?
A: I'm not sure that qualified is -- that I've ever been qualified, per se. But I was asked to be an expert witness in a suit against Kraft Foods back in 1993.
Q: Okay. Did you testify in court?
A: No. That was a deposition.
Q: I'm sorry. Could you repeat that?
A: That was a deposition. That was not in court.
Q: All right. Just a deposition. Okay. Have you testified in court at all as an expert?
A: Not in the last 40 years.

Q: Okay. Let's see. Do you have any background experience with pollution control?
A: I'm not sure I understand the question.
Q: In your experience with food safety, have you had occasion to deal with or encounter controlling pollution in a processing facility?
A: Can you define pollution?
Q: Pollution would be anything that, for this case specifically, it would contaminate air, water, or noise pollution as another example. But I would say dealing with something that's a contaminant. You think of smog coming from coal plants as polluting the air, things of that nature.
A: Well, under the definition of pollution as a contaminant, yes.
Q: All right. And can you elaborate on that -- your experience in that?
A: Yes. As a food safety professional and a microbiologist, much of my advice in the industry related to my work with FDA has to do with microbiological contaminants affecting food, both processed food and fresh produce.
Q: Okay. In your experience, is the word "pollution" used, or is the word "contaminant"

used or both?
A: Both can be used.
Q: In your experience, how do you define "pollution"?
A: Any contaminant that may be injurious to the intended audience, to the intended consumer.
Q: And how in your experience -- and, again, all my questions are gonna go to food safety -- do you define "contaminants"?
A: Pretty much the same.
Q: Okay. So in your world, so to speak with food safety, pollution and contaminants are synonymous; is that accurate?
A: Let me modify my definition of both.
Q: All right.
A: I said harmful. It's not -- neither one is necessarily harmful. They're perceived as being -- what's the right word? -- objectable.
Q: Okay. Both would be defined -- both the terms "pollution" and "contaminant" would be defined the same way in your field?
A: They can be; yes.
Q: You said they can be, which suggests to me there are other ways that the terms can be defined. Can you go through some of the other

ways?

A: In terms of food safety, no, not really. In other aspects nonfood safety, I'm sure there are. But we're limiting this to food safety.

Q: Okay. Would you be able to define the term "pollution" generally outside of food safety?

A: Well, I'm just a food safety expert, so my definition of "pollution" outside of food safety would be pretty much what the general public would say.

Q: Okay. So in other words, your expertise is going to be limited to just food safety?

A: I would say that's accurate.

Q: Have you read the sales tax exemption that's at issue in the case?

A: No, I have not.

Q: Okay. Have you had to opportunity to form an expert opinion in this case?

A: Yes.

Q: And what's your expert opinion?

A: That protective clothing is a necessary protection against contamination or pollution, in the definition that we've been talking about, in any fresh cut or fresh produce handling facility. Likewise, any ready-to-eat

food processing facility.

Q: Okay. Do you know the specific protective clothing that's at issue in this case?

A: I do not.

Q: Okay. So far as a broad category of protective clothing is what we're talking about, correct?

A: Yes. This would be clothing that would protect the food from contamination from the worker or the worker environment.

Q: And when you think -- since you've not been told what the clothing is case-wise, when you talk about protective clothing, what types of items come to mind? What type of things are you talking about or you deal with often in the food safety world?

A: It would be outer clothing, aprons, sleeves, hairnets, caps, gloves, and in some cases, shoes.

Q: Okay. And you said that the protective clothing protects the food from contamination, correct?

A: Yes.

Q: Does it do anything else, or is it used for any other purpose, again, in this context?

A: The way protective clothing is used in the food

industry is, by definition, clothing that is used to protect the food from contamination.

Q: Okay.

A: That is its primary purpose. If there is a secondary purpose, that would be facility specific.

Q: All right. And I think I know the answer to this next question. I'm going to ask it just so I'm clear. And I'm going off of a little bit of what I've learned from the depositions of McEntire employees. One protective -- can protective clothing ever be used to protect the employee?

A: That's a common misperception by the -- well, actually, no. Protective clothing can be used to protect the employee in situations when they are at hazard from the environment or equipment. For example, stainless steel gloves might protect a worker who is working with cutting machinery.

Q: Okay. And what example -- I'm gonna give you what came up was protective eyewear. When workers would wear them cutting onions -- because I know onions make me cry -- and so apparently it does the same for most of the

workers. Is that in your experience a common use of protective clothing or protective eyewear?

A: It can be, yes, but not for food safety.

Q: Can protective eyewear be used for food safety, or is that not a typical item?

A: I would say -- I have to say that is not a typical item.

Q: Okay. It sounds to me -- and correct me if I'm wrong in the food safety context -- protective clothing is limited more to gloves; anything that would cover hair, the hairnet, cape, beard net; and anything else that would cover an employee's clothes much [sic] as boots or apron?

A: And gloves.

Q: And gloves. Is that a general fair representation of protective clothing as used in food safety context?

A: Generally, yes.

Q: Okay.

A: Different ---

Q: I'm going to try to understand where your answers are coming from in relation to some of the items at issue.

A: Okay.
Q: Let me -- since you stated that have not seen the exemptions that we're talking about, let me read it to you. And then I'm gonna paraphrase parts of it because it's long. So I'm gonna read the portion that's relevant to the case. I'll read as slowly as I can. If you need me to repeat it or any part of it afterwards because you didn't catch it, just let me know, okay?
A: Okay.
Q: So essentially McEntire's asserting that this protective clothing falls under the following exemption, which is machines used in processing that are necessary to comply with the order of an agency of the United States of this state, which would be South Carolina, for the prevention of abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section. Did you absorb most of that, if not all of it?
A: Yeah. What is the definition of "machine" in this context?
Q: There's no black-and-white definition of "machine" in this context. One of my

questions ---

A: Yeah. In that case, I interpret "machine" to be, in this context, protective clothing.

Q: Okay. Can you elaborate as to how protective clothing could constitute a machine? How do you define "machine" without using the term "protective clothing"?

A: That's outside of my expertise. I'm just -- since you said there's no definition of "machine," I interpret it as including protective clothing.

Q: Okay.

A: If one were to substitute protective clothing for machine, in what you just read me, that's perfectly reasonable.

Q: Okay. So I'm going to kind of -- I've broken down -- the exemption down into some, what I consider, key components. And I'd like to go over these individually with you so that I can understand. And I think we did go over this, but I'm going to start with premise because it'll kind of follow through the rest of the questions on this issue. What is the pollution at issue in this case?

A: In this case, it would be harmful bacteria or

allergens.
Q: Harmful bacteria or allergens?
A: Yes. Harmful microorganisms or allergens.
Q: Okay. And from my understanding, why did you make that correction? What's the difference between bacteria and microorganisms?
A: Typically, the bacteria we worry about are listeria, salmonella, and pathogenic E. coli. But there can also be viruses, which are not bacteria.
Q: So does the term "microorganism" then include bacteria and viruses?
A: Yes.
Q: It's broader?
A: Yes.
Q: Okay. I just want to understand why we went from bacteria to microorganisms. That makes sense. Okay. And, again, I understand that you do not know the specifics of the McEntire plant; is that correct?
A: I have been in the plant, but it's been a long time.
Q: Okay. I mean, you understood how the plant works generally?
A: Generally, yes.

Q: Okay. And if it's helpful to you, do you have Respondent's Exhibit 1 and 2? They're for you to use as necessary. Respondent's Exhibit 1 is a site plan diagram of the McEntire Produce facility, and Respondent's Exhibit 2 -- and you probably could explain generally what this -- better than I can. But from memory, it's one of the HACCP flowcharts. They have several of these for different products. This is the one that McEntire chose to use in the example explaining the process to me, so that is the one I'm providing to you. As we're going through Respondent's Exhibit 2, McEntire used cut lettuce as the example finished product that we are creating.

A: Understood.

Q: Okay. If you can answer this question, please do so. If not, then just say you don't have sufficient information. You said the pollution at issue is harmful microorganisms or allergens. What machine or machine in the plant, processing machines, cause or threaten to cause harmful microorganisms or allergens?

A: Again, without a definition of "machine," it's difficult to answer the question. But the

source of the pollution that we're describing here is the incoming produce, the workers and the water that's used in the facility. As such, any piece of equipment that comes in contact with any of those could be a source of contamination of the produce. Likewise, employees' clothing could be a source of contamination of the produce. Does that answer your question?

Q: It'd just be a good start to answering my question and some places to follow up. You use the word "equipment." And, again, if we look at Respondent's Exhibit 2, when you look through the flowchart, you can see some of the equipment that McEntire uses. So they have cutters, which looks like the first little oval if you go down from the pentagon that says raw materials. You see that oval that says cutting with optional spray?

A: Yes.

Q: So they have a cutting machine, which would be a piece of equipment. Do you agree that would be a piece of equipment?

A: Yes.

Q: They have a flume. They have kind of a shaking

device. They have another device like a large industrial salad spinner for drying, and they have a metal detector. So that's some of the equipment that they use. And then there's all conveyance equipment, whether it's a conveyor belt or flume which apparently conveys the water, which also washes the material. Now from all, would any of these pieces of equipment cause or create harmful microorganisms or allergens?

A: Any food contact equipment can be a source of contamination. So all the ones you described there, except for the metal detector. And, again, depending on where the metal detector is situated, all of the food-contact surfaces that you talked about can be sources of contamination if not properly controlled.

Q: Okay. And can you explain how they could be a source of contamination?

A: Well, as I described earlier, the type of pollution we're describing here, the microorganisms, the allergens can be coming in on the fresh produce or from the water that is used in the facility. If not properly controlled, those things can contaminate,

pollute the equipment, which in turn, can pollute a greater range in food.

Q: Okay. When you say -- I'm going to use this as an example -- that harmful microorganisms can come to into the plant on incoming produce, how does the microorganism get on the produce to begin with?

A: It is a contaminant, pollutant, if you will, that occurs -- generally occurs in the field. It can come from a number of sources. Animals, people, or water are the primary vehicles that FDA has identified.

Q: Okay. Generally where do harmful microorganisms come from or how are they created?

A: They can come from other humans. They can come from animals, or they can be in the soil itself.

Q: Okay. Absent contaminated produce, contaminated workers, or contaminated water, how could the machines used at McEntire's plant cause microorganisms to grow?

A: It is possible for equipment to serve as a harborage for pathogenic bacteria which can then spread through the facility if not

controlled?

Q: Can you explain little bit more or elaborate on how a piece of equipment could -- you need to use word "harborage" -- could be harborage for bacteria?

A: Uh-huh. The source of bacteria retains the same, from the produce, from the water, from the workers. It comes into the facility. It is spread in the event of inadequate good manufacturing practices. It comes in contact with a niche in the equipment where it has adequate water and nutrients to grow. That's what I refer to as harborage. From the harborage point, it can then be spread through cross contamination.

Q: Okay. Again, talking about the microorganisms or allergens and following along with the statutory exemption, what machines prevent or abate the pollution at issue?

A: There are a number of tools that a facility has at its disposal to prevent contamination and to prevent harborage in the facility. Some of those are chemicals; others are clothing.

Q: Okay. Are there any additional clothing from which you mentioned earlier that would be used

to prevent or abate the type of pollution we're talking about, the microorganisms?

A: There may be. But on a routine day-to-day basis, the ones I described earlier are the ones most commonly used to prevent spread of the pollution.

Q: Okay. I'd like to go through each of the examples that you gave. So you had gloves, smocks, aprons, shoe coverings. And then I think you said cape or hair coverings and beard coverage. If you could go through each of those, and if the answer is the same for all of them, for the sake of time, that's fine too. And if you want to group any together however -- what's easiest for you to answer, tell me exactly how the specific pieces of protective clothing prevent or abate the microorganisms.

A: The answer will be the same for all of them.

Q: All right. That makes it easy.

A: The first role of protective clothing is to substitute for the worker's street clothing so that the worker is not bringing the pollution into the facility on their clothes and so not contacting the food with that pollution.

Within the facility, as contamination may occur from the produce, the water, or the equipment, that they aren't -- by using clean clothing and protective clothing, it minimizes the opportunity to spread the contamination onto a broader range of food.

Q: Okay. And what South Carolina agency orders, if any, requires the prevention or abatement of microorganisms?

A: Well, certainly the South Carolina Food Code. I'm not sure what the proper term of that is. But South Carolina has a regulation that pertains to protective -- that includes a provision for the use of protective clothing to prevent contamination of food. That regulation is based on the FDA's Food Code 2017.

Q: So do you know the regulation number?

A: Not offhand.

Q: Okay. What federal agency requires the prevention or abatement of microorganisms?

A: The most relevant regulation is FDA's 21 CFR Part 117 Subpart B, which describes good manufacturing practices for U.S. food facilities or for facilities that process food for consumption in the U.S.

Q: And does that regulation specifically state that microorganisms must be prevented or abated?

A: I don't know the specific language, but the Food, Drug, and Cosmetic Act says specifically that food shall not be adulterated. And the Part 117 Subpart B provides requirements to processing facilities on how to comply with that law.

Q: All right. And in your experience says the FDA -- you were given a certified statement saying that protective clothing is necessary to prevent or abate pollution that's caused or threatened by the operation of other machines used in processing a tangible personal property?

A: I'm not aware of the FDA putting out a document like you've just described; however, the FDA, on numerous occasions each year, cites facilities for inadequate protective clothing to protect food from contamination. Those can be searched by looking for FDA's 483s or warning letters.

Q: You said FDA 483s?

A: Yes. That's their report of violations -- too

strong for a word -- of conditions that need to be corrected in a facility in order to comply with the law.

Q: Okay. Do you consider the FDA to be an agency that's primarily charged with the duty of preventing or abating pollution?

A: In the context of which we're speaking, yes.

Q: Okay. I apologize. I'm just going through my notes to see if there's anything I need to follow up on. I don't think. I have any additional questions for you. I'll turn it over to Mr. Maybank for any cross-examination he may have.

MR. MAYBANK: Examination by Maybank.

Q: What are the primary food-borne contaminants that cause the majority of sickness or death to consumers?

A: In the context of fresh produce, there are three bacteria: Listeria, salmonella, pathogenic E. coli. And there are a couple of virus, norovirus and hepatitis A. There are also parasites, cyclospora, cryptosporidium being two of the more common contaminants causing food-borne illness.

Q: Okay. And for just ten seconds or so, can you

tell us your experience with E. coli going back from your days in college and masters and Ph.D.?

A: I did extensive food -- extensive research on pathogenic E. coli, listeria, and salmonella in terms of ways of preventing their growth and killing them in food processing.

Q: Okay. Just to it speed up a bit, did you study E. coli in your masters or Ph.D. degrees?

A: No. Those were studied afterwards during my work experience.

Q: Okay. And how about listeria and salmonella? Would that be the same thing?

A: Yes.

Q: Okay. So in your work experience, just briefly -- and you may have already done this -- tell us your work experience study in E. coli, listeria, and salmonella.

A: I served as lead or primary researcher on a number of papers that discussed mechanisms preventing survival of those organisms in juice and in fresh produce.

Q: And how many years have you studied this?

A: I think my first paper on salmonella was in the early 1990s.

Q: Okay. And did you study it or review it for today?
A: I'm sorry. Say that again?
Q: Did you study or review materials on through it today?
A: Yes. Okay. So Black's Law ---
MS. ACQUAVIVA: And, your Honor, at this point, I have an objection to lines -- page 29, line 17 through page 31, line 3 on the basis that it's an improper opinion under Rule 702. We only stipulated, and Dr. Gombas conceded during the deposition, he's only an expert in food safety. And later in the deposition, he specify states he has no experience with pollution and pollution control. And the opinions that follow in that section go to his opinion about whether something is pollution -- or different things are pollution.
MR. MAYBANK: He's basically just taking the very elementary Black's Law Dictionary and saying whether or not listeria and salmonella and E. coli are pollution under Wikipedia's definition, which is very elementary. I think a guy with a masters and a Ph.D. could tell you if listeria meet Wikipedia's definition.

THE COURT: Ms. Acquaviva, how far did you go down? From where to where?

MS. ACQUAVIVA: Page 29, line 17.

THE COURT: So from the Black's Law Dictionary to ---

MS. ACQUAVIVA: Through to page 31, line 3.

THE COURT: Okay. So page 31, line 3?

MS. ACQUAVIVA: Yes. And all those questions are, in your opinion, does such-and-such meet the definition of pollution. And this expert was not qualified in that area. He's qualified in food safety and the use of protective clothing.

THE COURT: All right. Help me out here. He's qualified in the area of food safety?

MS. ACQUAVIVA: Correct.

THE COURT: How does that not allow him to testify about the nature of listeria, salmonella, and E. coli?

MS. ACQUAVIVA: Well, whether or not those things are pollution under the sales tax statute are for the Court to determine. And if you look on page 40, Dr. Gombas, when he was asked if air or water inside the facility gets contaminated and gets out, would it be polluting the outside air and water? His answer is: Honestly, I

have no experience in that matter.

So and earlier the parts that have already been read in, he specifically limits to food safety and says he does not have any experience with pollution. So I don't think he can give his opinion as to whether something is pollution for purposes of this case. He can describe what the -- you know what E. coli is and describe the nature of it, but he can't give that legal opinion.

MR. MAYBANK: Well, he's got a bachelors in food science. He's got a masters in food science and a Ph.D. in food microbiology and he's worked his entire career in it. We did not ask him if it was pollution in terms of the sales tax exemption. I agree with Lauren on that. We asked him if it was pollution in terms of Black's Law Dictionary and Wikipedia's definition.

THE COURT: Okay. Back on page 13. The question: Is the word "pollution" used, or is the word "contaminant" used or both?

Both can be used.

In your experience, how do you define "pollution"?

Any contaminant that may be injurious to the intended audience, to the intended consumer.

MS. ACQUAVIVA: Correct. That is his definition of a term. And remember, this is a discovery deposition, so I was exploring his understanding. When you look at his testimony as a whole through the deposition, he concedes he does not have any experience with pollution.

THE COURT: Well, he's just defined it on page 13. And insofar as -- and where are we again? -- 29, 17, Black's defines "pollution" as a presence of a harmful substance. That's seems to be not inconsistent with what he has said back on page 13. I will -- if your objection is to ...

MS. ACQUAVIVA: It's my objection is that the opinion is outside the scope of his area of expertise that we stipulated to, which is the use of protective clothing for food safety purposes. So the testimony regarding how protective clothing protects the food is perfectly fine, but his opinion as to whether these pathogens are pollution seems to be outside the scope of his area of expertise. Because "pollution" is a key term in the

exemption statute that this Court has to determine.

THE COURT: Well, okay. Insofar as it's my problem to define "pollution" under the exemption statute, all he's saying is, back on page 13, is a food, in terms of food safety, a pollution or a contaminant is something that's injurious to the intended consumer insofar as that's what he's doing on pages 29, 30, and 31. I don't see the difference.

MS. ACQUAVIVA: So essentially reading it in light of: Is E. coli injurious to the consumer?

THE COURT: Yeah.

MS. ACQUAVIVA: That's fine, your Honor.

THE COURT: Yeah. And I don't grant any special ---

MS. ACQUAVIVA: I would agree that listeria and E. coli are injurious to the consumer.

THE COURT: And I think that's what he's saying. And I understand what you're getting at here. Black's Law Dictionary sometimes rises up to some appearance of standing in legal matters, which it probably deserves about as much as Wikipedia. But insofar as what he's talking about is his understanding in his opinion, listeria, E. coli., and salmonella are

injurious. If that's what he thinks is pollution or contamination, I'm gon' let -- I would let him say that.

MS. ACQUAVIVA: Okay. And I would say for the sake of time, since that is what those pages say, I don't know that it all needs to be read.

MR. MAYBANK: We just go through it real quickly. We're almost finished actually, I believe.

THE COURT: Yeah. I think we're very close.

MR. MAYBANK: All right. Where ---

THE COURT: Pick up ---

MS. ACQUAVIVA: Line 17.

THE COURT: I'm afraid you're gonna have to pick up with line 17 on page 29.

MR. MAYBANK: All right.

Q: Okay. So Black's Law Dictionary, which is a lawyer dictionary, it defines "pollution" as presence of a harmless substance either physical or gaseous but in a certain area that causes harm to their surroundings, altering the natural environment upon which is then excreted. In our opinion given that definition, is E. coli a pollution?

A: It is a physical contaminant that would fit within that definition.

Q: Okay. So it's a harmful substance?
A: Yes.
Q: Does listeria meet that definition of "pollution"?
A: Yes.
Q: And how about salmonella?
A: Yes.
Q: All right. And let me give you a dictionary definition. This is actually Wikipedia. Wikipedia defines "pollution" as an introduction of contaminants into the natural environment that causes adverse change. In your opinion, does E. coli meet that definition of "pollution"?
A: Yes.
Q: How about listeria?
A: Yes.
Q: How about salmonella?
A: Yes.
Q: And then Dictionary.com defines "pollution" as an introduction of harmful substances or products into the environment. In your opinion, does E. coli, meet that definition of pollution?
A: Yes.

Q: Does listeria?
A: Yes.
Q: Does salmonella?
A: Yes.
Q: Does E. coli, listeria, and salmonella, are they sometimes transmitted through the air?
A: They can be but rarely.
Q: Okay. And how about water?
A: Yes.
Q: All right. And then we want to focus for a minute or two just on the cutting function. It says -- let me back up a little bit. Does fresh produce occasionally have E. coli inside of it?
A: Yes.
Q: Does fresh produce occasionally have listeria inside of it?
A: Yes.
Q: Does fresh produce occasionally have salmonella inside of it?
A: Yes.
Q: And does the cutting of fresh produce in a facility like McEntire, does it produce, create, or release of E. coli, can it?
A: It can if not properly controlled. The

organisms you describe can be spread to noncontaminated produce, either directly through the water or through other food-contact surfaces.

Q: Okay. And what about listeria? Does cutting a fresh produce that has listeria inside of it, can it also create a release of listeria?

A: Yes. And in the same manner.

Q: How about salmonella?

A: Yes. In the same manner.

Q: Okay. And does protective clothing help prevent the spread of E. coli into the cutting room and inside the fresh -- I'm sorry -- does protective clothing prevent the spread of E. coli into the cutting room? And I express into the cutting room, as opposed to the cutting room itself.

A: Yes. By replacing the street clothing of the workers, it prevents the contamination entering the cutting room from the outside.

Q: Okay. And just very quickly -- we don't need a lengthy explanation -- but how does -- how would E. coli happen to come into the cutting room but for protective clothing?

A: E. coli can come into the cutting room from the

street clothing of the workers, on their shoes, or their outer -- on their outer clothing, on their hands.

Q: Okay. Give us some examples. How would it get onto their shoes, for example?

A: Well, pathogenic E. coli can be present -- it can be present in the parking lot. It can be present on other surfaces that the workers can come in contact with in their normal routine outside. And if they bring that in on their street clothing, it can then contaminate the equipment. It can contaminate the food. It can contaminate the water within the facility. That's why protective clothing, as we've described, is used in the facilities to replace the street clothing that workers have or to cover the street clothing that workers have. So any contamination on that clothing will not contaminate surfaces or the food or the water within the facility.

Q: Okay. I've heard of E. coli. I've never heard of listeria. How does one come into contact with listeria?

A: Listeria is a natural contaminant present in the soil. So it grows in the soil. So anyone

who is walking through a field or just walking along the street can come in contact with listeria. In most cases, that's not a harmful exposure. But when it comes in contact with the food, the food can then serve as a growth medium for the listeria, and if consumed by people, can cause illness or death.

Q: Okay. And the same question with regards to salmonella: How would workers outside the plant come into contact with salmonella?

A: Salmonella is more of an animal-mediated organism. It doesn't grow in the soil, per se. But once the salmonella's present in the soil, on the produce, or in the water, any contact with that can then serve as a carriage.

Q: Okay. And switching gears to the cutting room itself. Does protective clothing help prevent the spreading of E. coli which was already in the cutting room from getting -- I'll say that again. Does protective clothing help prevent the spread of E coli which is already in the cutting room, for example, by being in a head of lettuce?

A: It can. The clothing itself is not antimicrobial. But if the clothing is changed

when it becomes dirty, then, yes. Any contamination that has gotten onto the clothing from the cutting room would then be removed from the cutting room when the worker changes their protective clothing.

Q: Okay. Is protective clothing required my federal law in the cutting room?

A: Part 117 requires a facility to take whatever measure necessary to prevent contamination of food. And one of the provisions in that regulation specifies the use of clean clothing in the facility.

Q: Okay. A number of states have State regulations regarding protective clothing in restaurants. Would that same regulation apply to protective clothing in a fresh-produce facility?

A: It has been used in that way. While the food code specifically applies to retail operations, food service, it had -- that same requirement has been applied to ready-to-eat processing facilities.

Q: Okay. And you mention you've counseled industry on how to comply with FDA rules and regs?

A: Yes.
Q: How many years have you done that?
A: Since the 1980s and most recently last week.
Q: Okay. And just real roughly, how many different industries have you counseled, more than a hundred?
A: Well, well over a hundred processing facilities and several dozen -- no. Over a hundred fresh-cut operations as well -- sorry, fresh-produce operations.
Q: Okay. And have you written on E. coli, listeria, and salmonella?
A: Yes.
Q: And have you written anything specific on protective clothing?
A: I'm thinking, but I don't recall anything specific on protective clothing.
Q: Okay. But you've counseled over a hundred businesses on the role of protective clothing and the spread of E. coli?
A: Yes. As part of my guidance on the application of good manufacturing practices.
Q: Okay. And what would happen if McEntire couldn't afford the sales tax and didn't buy the protective clothing. Would that be against

the law?
A: It would be a violation of Part 117.
Q: Okay. That's all I have.
MR. MAYBANK: Further examination Ms. Acquaviva.
Q: You stated -- and please correct me if I'm wrong, I believe -- that Part 117 addresses the use of protective clothing to prevent the contamination of food; is that correct?
A: Part 117, I think, and Subpart 10 addresses protective clothing for the purposes of preventing contamination of food. It's not in those words, but that is the interpretation of it.
Q: Do you know what section, whether it's Part 117 or otherwise that talks about preventing the contamination of the air?
A: I don't recall.
Q: Okay. And do you know if there's a section or regulation that talks about the prevention of contamination of water?
A: Yes.
Q: And do you know what section that is?
A: It would be in Subpart B along the same subpart as the clothing. It's not 10 specifically but within Subpart B of 117. FDA has requirements

regarding the handling and treatment of water.
Q: And can you elaborate a little bit more on that, what those requirements look like?
A: They're specifically on the source of the water and on the plumbing used to distribute the water in the facility.
Q: Okay. Can you tell me, assuming there is some type of microbiologic contamination already in the facility inside the plant, how would a plant prevent that microorganism from getting into the air if at all possible?
A: Well the primary approach to controlling harmful microorganisms that are already in the facility are through proper cleaning and sanitation procedures. Those tend to be focused on the equipment and the processing environment. If those procedures are not adequate, there is the opportunity for microorganisms in the facility to become aerosolized either through poor cleaning procedures or via the air handling system.
Q: So just so I understand correctly, that is the only way to prevent that would be proper cleaning of the equipment?
A: That is the primary way of doing it. But all

the other things we've talked about are likewise necessary to prevent cross contamination. There is no one treatment that is solely responsible. It is the combination of all of the above to prevent harborage of the organism within the facility or cross contamination of the food on organisms that are introduced to the facility either through the food, the workers, water, or the environment.

Q: Okay. So protective clothing alone could not prevent contaminants from getting into the air, contaminants that are already inside the facility. Is that -- am I understanding that correctly?

A: Protective clothing is the -- is one tool necessary to prevent contamination coming into the facility or spreading within the facility.

Q: What typically is used to prevent microorganisms from getting into the water? When I say getting into the water, I mean the waste water, water that would be leaving the plant. How do facilities typically prevent that?

A: Preventing harmful microorganisms from leaving the facility?

Q: Yeah. From getting -- from basically having a negative impact on the water outside the facility?

A: There are ways. The use of chemicals to destroy microorganisms that are in the water. But I'm not aware if or how many operations actually do that because the focus is on making sure that the water is not a source of contamination in the facility or when it's in contact with the food.

Q: So are you saying it focuses on preventing the water inside from being contaminated?

A: Yes. And preventing the water from being a source of contamination in the facility when it is in contact with the food.

Q: Okay. And, again, assuming there are already -- there's already some type of contamination inside the facility, how does protective clothing prevent that contamination from polluting the air or water or spreading into the air or water? And, again, that would be air or water outside the facility. We're looking at impact on the environment.

A: I'm sorry. I'm missing your point. Are you asking how does protective clothing in the

facility protect the air or water outside the facility?

Q: Would you agree that air and water inside the facility's eventually going to leave the facility?

A: Yes.

Q: So if air and water inside the facility gets contaminated and gets out, that would then be polluting the outside air and water; is that fair to say?

A: Honestly, I have no experience in that matter.

Q: Okay. Do you know if processing plants like McEntire take any steps or any steps that can be used to prevent contaminated air or water in the facility from escaping?

A: That's never been my focus. So I don't know.

Q: Okay. So is it typical then that with your focus, you're looking at preventing the air and water in the facility from being contaminated?

A: Yes.

Q: Okay. So then just looking at -- in the facility, how does -- again, there's already -- we're assuming there's already some type of contaminations inside, you know, on a piece of equipment. How does protective clothing

prevent the microorganisms from getting into the air or water?

A: As I said earlier, the protective clothing is not antimicrobial, per se. But if the clothing is changed/replaced as needed to prevent whenever it becomes contaminated, that reduces the risk of the contamination spreading to the food, other equipment, the water, and I guess to the air.

Q: Okay. And, again, going back to Respondent's Exhibit 2, do you see how they -- McEntire uses water to move the produce and use it as a conveyance? They also use water, chlorinated water to wash the produce?

A: Yes.

Q: According to McEntire, that water can splash and spill over and then it gets on the floor and then goes into the drain?

A: Yes.

Q: If produce is already contaminated and it's going through this processing system, it's going through the flume and being cut, water splashing all over the place, how does protective clothing prevent the spread of contamination?

A: Again, the primary purpose of protective clothing is to minimize the risk of contamination coming from outside the facility into the facility on the workers. Secondarily, in the event that there was contamination in the facility, if it gets onto the workers' protective clothing, changing that clothing is necessary whenever it becomes contaminated is an opportunity to reduce the risk of further spread of the contamination. Whether that contamination came from the produce, the water, other equipment, et cetera.

Q: Is there anything else that a facility like this would use to prevent further contamination of water or air?

A: Generally, chemicals, cleaning procedures, and protective clothing.

Q: Okay. And when you say chemicals, can you explain how that would work, how that would prevent a contaminant that's already kind of already on the machines, on the conveyors in the processing section; how that would work; how they would use a chemical to prevent further contaminant?

A: In the same way you would use chemicals in your

kitchen. You have chemicals for cleaning procedures, and you have chemicals for sanitizing procedures. Each is intended to remove the pollutants and prevent them from becoming a source of contamination.

Q: And when would this cleaning or treating with chemicals take place typically?

A: Generally, a facility has a time between days or other -- at a frequency they define when the equipment is shut down. The processes are shut down, and cleaning and sanitation occurs.

Q: So it wouldn't occur any time during -- while the actual processing is taking place?

A: It can on demand and depending on the procedures that a facility has. So that's facility specific.

Q: All right.

MR. MAYBANK: Further examination by Maybank.

Q: We mentioned several times best practices. Is there a bible or FDA definition of best practices or that's something people just concentrate on and do on their own?

A: The current good manufacturing practices is codified in Part 117 Subpart B.

MR. MAYBANK: All right. And I think that's it,

your Honor.

THE COURT: Okay.

MR. MAYBANK: So we are -- we assume that Ms. Mitchell will be called tomorrow. And so we are basically finished. If Logan is not gonna be called tomorrow, we would call her as an adverse witness, hostile witness.

But if y'all are calling her tomorrow, then we're finished.

MS. ACQUAVIVA: At this point, we do intend to call Ms. Mitchell. We would ask to be able to refer on some of the testimony that we heard and speak with counsel, as we may be able to resolve some of the 35 items before proceeding into our case in chief.

THE COURT: Okay.

MS. ACQUAVIVA: And also I do have the sealed transcript of Dr. Gombas' deposition, if you would prefer to have that copy. I think they just printed the regular one.

THE COURT: That's up to you.

MS. ACQUAVIVA: Also I don't want to carry it around anymore so ...

THE COURT: You want to -- if you want to provide the sealed copy to the court reporter?

Now, we have one minimal matter here, which is Mr. Gombas' curriculum vitae and a brief bio.

MS. ACQUAVIVA: I have no objection to the CV 'cause that -- I knew he had created that. And when I spoke to Jim and Bernie beforehand, my issue with the bio was was it something they wrote to give to me, or that was -- I mean, and the deposition covers his background. He went through it so ...

MR. ROURKE: It was something that was provided to us by Dr. Gombas. But we'd be happy to take it off if you just chose to proceed ...

MS. ACQUAVIVA: Trust me; it's fine.

THE COURT: You're fine with it?

MS. ACQUAVIVA: Yeah. That's fine.

THE COURT: Okay. All right. So what you want to do is you want me to quit today and let y'all iron this out?

MR. MAYBANK: Might iron a few things out.

THE COURT: Is that correct?

MS. ACQUAVIVA: Yeah. I mean, we can -- well, since it is 20 after 4:00. Yeah.

THE COURT: Yes. It is 20 after 4:00.

MS. ACQUAVIVA: Because it will take us a little bit to go through everything.

THE COURT: Okay. Than fine.

And Ms. Mitchell, is it?

MS. ACQUAVIVA: Yes. Those are my only two witnesses.

THE COURT: You have to come back tomorrow because they want to put you on the stand, if you can for your -- a number of other things. Okay. So we'll stand adjourned until tomorrow morning at 10:00 o'clock, if that's ---

MR. MAYBANK: Sounds great.

(There being nothing further, the administrative hearing concluded at 4:21 p.m. and resumed November 15, 2018, at 10:02 a.m.)

DAY TWO - THURSDAY, NOVEMBER 15, 2018

THE COURT: We're back on the record this morning in Case Number 17-ALJ-17-0060, McEntire Produce versus the Department of Revenue. And we finished one side yesterday, and we'll start the other side today.

Ms. Acquaviva?

MS. ACQUAVIVA: Thank you, your Honor. Before calling my first witness, I would -- wanted to inform the Court that when the Department discussed yesterday's testimony, we now concede that 2 of the 35 items do appear to be exempt.

Those are the Number 9 and -- Numbers 9 and 11 the refrigerator and quality assurance lab and the lamps that were used to detect defects. So those two items the Department is now conceding are exempt.

THE COURT: So Items 9 and 11. Anything other than that?

MS. ACQUAVIVA: That ---

THE COURT: Any portions of things other than that?

MS. ACQUAVIVA: That was it.

THE COURT: Okay. All right.

MS. ACQUAVIVA: So with that, the Department would call Corey Smith to the stand.

COREY SMITH, having been duly sworn, testifies as follows:

MR. SMITH - DIRECT EXAMINATION BY MS. ACQUAVIVA:

Q: Good morning, Corey. Could you please state and spell your name for the record?

A: Corey Ty Landon Smith, C-O-R-E-Y T-Y L-A-N-D-O-N S-M-I-T-H.

Q: And, Mr. Smith, where are you currently employed?

A: At the South Carolina Department of Revenue.

Q: In what capacity are you employed there?

A: I'm senior State tax attorney.

Q: How long have you been a senior State tax attorney?
A: In that title, since about September 17th, I believe, of this year.
Q: And in what section or division of the Department do you work?
A: In the policy.
Q: How long have you worked in the policy?
A: Since December 17th of 2015.
Q: And what is your role as a State tax attorney for the Department? What are your general duties?
A: General duties, I work with sales and use tax. I also work with some miscellaneous tax areas. I'm working on formal to informal advice for taxpayers in their form of advisory opinions or informal advice and also working with Department personnel and different questions that may come up.
MR. MAYBANK: Could we ask him to talk a little louder?
THE WITNESS: Oh, yeah.
MR. MAYBANK: I can't hear him.
THE WITNESS: Sure.
Q: In dealing with sales and use tax, are you

familiar with the exemptions that we are discussing in court yesterday and today?

A: Yes, I am.

Q: Okay. If you could, as simply as possible, tell the Court what the Department's policy is regarding a determination as to whether a machine is exempt pursuant to 12-36-2120 Subsection 17 and for purposes of this question, not the pollution control portion of Subsection 17, just the general manufacturing machine exemption.

MR. MAYBANK: If we could, your Honor, he was not an employee at the Department during the audit period. Normally I'm not being a big deal, but you have steadfastly upheld that objection at every turn. So he's testifying to things that he was not an employee during the audit period.

MS. ACQUAVIVA: Your Honor, he'll be testifying to the Department's policy, which has not changed. This was the policy during the audit period. He is the representative of the policy division for purposes of this case. And the main reason that it's Mr. Smith testifying and not Mr. McCormick is Mr. McCormick was supposed to retire before this case was called, and so

Mr. Smith was the one working with the litigation and audit in regards to some of the issues in this case and in determining, you know, for example, last night when we determined to concede those two.

MR. MAYBANK: She said the policy hadn't changed. He wouldn't know that. He's not there. We said on our audit, our audit for -- had not changed whatsoever. The witness actually testified it hadn't changed, and she successfully kept the audit out because it didn't occur during -- the BRC audit didn't occur during audit period. This employee, under the -- hoisted under the Petard theory, this employee was not there during the audit period. And under the Acquaviva doctrine, he cannot testify today.

MS. ACQUAVIVA: If I ---

THE COURT: Well, there's a little difference, I think.

Ms. Acquaviva, you want to respond to that before I do?

MS. ACQUAVIVA: I was just gonna say if I may, I don't believe the witness yesterday testified that anything changed. I do recall hearing

that there was a difference between the 2015 and 2016 audit report regarding the size of the microns. It went from .3 to .1 or .5 to .3. So actually I think there was a difference. And, again, what the plant was doing during the audit period and what the Department's policy is regarding a sales tax exemption, that's been the same exemption since before the audit period. I think those are kind of two different issues.

THE COURT: I agree. I think these are two different issues. And I think Mr. Smith is gonna testify about Department policy and ---

MR. MAYBANK: I just had to make the objection.

THE COURT: I understand. And I'm just gonna overrule that objection. We're gonna go on and listen to Mr. Smith. He may say something to help you. You never know.

Q: And, Mr. Smith, before you answer that question, let's back up. When you first started at the Department in 2015 you said?

A: Uh-huh.

Q: How did you learn -- from who did you learn about the Department's sales tax policies.

A: John McCormick.

Q: And how long had John McCormick been working in sales an use tax at the Department?
A: To my knowledge, he had been working in the policy section since 1987.
Q: And when you are discussing policies, is it typical for you to discuss whether the -- whether policies have changed over time?
A: Yes.
Q: And have the Department's policies that we're gonna be discussing today changed between 2012 and the present?
A: No, not to my knowledge.
Q: Okay. And if you could, still try and speak up just a little bit more?
A: Sure.
MS. ACQUAVIVA: And if it will help you, I can back up so you can see him. Will that help you?
MR. MAYBANK: Yeah. That might. Thank you. He is very soft spoken, however.
MS. ACQUAVIVA: I'll stand over here. That way you can see him.
THE WITNESS: I'll try to speak up.
Q: So I'll ask you again: Can you briefly kind of outline the Department's policy in regarding how to determine whether a machine is exempt

under Subsection 17, not the pollution control portion?

A: Yes. The policy section looks at court cases and the regulation and also the statute. And through the years, revenue ruling 04-7 was put out in regards to the machine exemption, and subsequently the regulation was updated incorporating the provisions of 04-7 and approved by the general assembly. And so what we look at in determining whether something qualifies for the machine exemption is whether -- first of all, first requirement is that it's used in a manufacturing facility. So it cannot be a facility that's the purpose is for retailing or for wholesaling or for another nonmanufacturing purpose.

Second, we would look to see whether or not the machine is -- and this is all in determining whether something is integral and necessary to the manufacturing process. I should have started with that. So first it has to be used in a manufacturing facility.

Second, it has to be used -- has to be an essential and indispensable component part of the manufacturing process. And what's -- but

that doesn't mean that -- it can't be something that's just integral and necessary to the manufacturer themselves such as administrative equipment, computer equipment that may be used in accounting or something along those sorts. And then it has to be used on an ongoing and continuous basis as well.

And then the final requirement is it has to be substantially used in the manufacturing process. And by that, is greater than one-third of the use must be used in the manufacturing process to qualify for the exemption.

Q: Okay. And just to help the Court understand how the Department looks at something being substantially used, use -- let's stay there's, as an example, a material-handling item that can have multiple uses, one of which is part of acting as a conveyance, I guess, during the process. Can you describe what the Department looks at or kind of, you know, the questions it may ask to determine the use of that item?

A: The general rule for material-handling equipment or conveyance equipment is that it's taxable up until the point to where materials

enter the process. And by that, we mean that the first material-handling machine or conveying system that's feeding the materials into the process would be exempt. And then also the last machine would be exempt would be that that puts out the product for the last processing machine. So anywhere inside of that process would qualify.

Q: Okay. And so to make it a little more straightforward, let's say we have a machine that is used to transport the product from one processing machine to the next processing machine?

A: Uh-huh.

Q: And that same machine is also used in the warehouse?

A: Uh-huh.

Q: What does the Department look at to determine whether that specific machine that has multiple uses would be exempt?

A: We look at whether or not it's used more than a third of the time for the manufacturing purposes. So if it's used more than a third being used to move -- with your example, as in processing material from one stage of the

process to next, then it was more than that threshold, then it would qualify for the exemption.

Q: Next -- and you touched a little bit on it with the conveyances -- can you explain, just outline what the Department's policy is in determining where the manufacturing process begins and where it ends?

A: So the manufacturing process is when it began where materials are -- enter into the processing and if the last point where the machine puts out the final product. So once that processing takes place, once that process begins -- and it includes the material-handling equipment and conveyances that feed that first processing machine. So from that point forward to the end of where the product is dispersed from the final processing machine, is included in the end process.

Q: And I will start with you on the output side.

A: Uh-huh.

Q: Does it end with, you know, in this example, the chopped lettuce? Or does it finish with the sealed, bagged, and boxed chopped lettuce?

A: With the sealed, bagged, and boxed. So

packaging is included within that exemption.
Q: And on the front end, how does the Department determine when manufacturing begins? Because you were in the courtroom yesterday?
A: Uh-huh.
Q: And did you hear that there is a lot involved from essentially farm to table in this -- in McEntire's plant, correct?
A: Right.
Q: Okay. So how does the Department determine where that line is, where it goes from manufacturing from not manufacturing?
A: Right. And it depends on the process. But it can be when it's entered into a machine that begins the process of cutting something up or processing the material, whatever it is, sorting. And washing can also begin that process as well. So it just depends on the process that you're looking at, but that can start the process right there. But as far as material coming into a facility and being held, we don't look at storage itself as being part of the process. But when it's actually put into that first part of processing, which -- and since we're washing, sorting, or

transformation or something along those lines is when it would start.

Q: Okay. What is the Department's policy -- and I'll go to the second part of the Subsection 17 -- in determining whether a machine is a pollution-control machine?

A: Okay. A machine can qualify as a pollution-control machine under 12-36-21-2017 if it's a machine that used to abate or prevent pollution that's caused or threatened by an exempt machine. And in doing so, it satisfies an order of an agency of either the -- a federal agency or State agency for the prevention or abatement of that pollution.

Q: Okay. The -- to be exempt, does the pollution control machine have to be used in the manufacturing process, for example, to say it a little differently, does it have to be chopping the lettuce, or can it exempt without being a processing machine?

A: Yes, it can.

Q: Okay.

A: Uh-huh.

Q: So a pollution-control machine doesn't have to be processing to be exempt, right?

A: Correct.
Q: Okay. And when the Department looks at whether there's an agency order, what types of things would the Department consider?
A: I think a regulation is sufficient there and not necessarily a formal order but a regulation.
Q: Okay. And does the Department require any type of record to satisfy or determine, establish that something is a pollution-control machine?
A: We don't require a certification, per say, for something to be exempt. But in order if someone were -- for example, filing for a refund, we would need a statement of some sort stating as such.
Q: And just to get you to clarify that a little bit, the Department -- is it fair to say the Department doesn't use a certified statement to determine whether a taxpayer qualifies for the exemption?
A: That's correct.
Q: But does the Department need that certification to actually give the exemption?
A: Yes.
Q: Okay. So it's more of a procedural rather than

substantive requirement?
A: That's correct.
Q: Okay. Whereas the order of an agency would be a substantive requirement?
A: Yes.
Q: Okay. I don't think I have any additional questions.
MR. MAYBANK: I just have just a very few.
MR. SMITH - CROSS-EXAMINATION BY MR. MAYBANK:
Q: Where the manufacturing process begins and ends, can occasionally be influenced by State and federal law requirements, can't it?
A: I'm not sure.
Q: Okay. So, for example, if federal law required Duke Energy to have a certain machine, part of their nuclear process, would -- that would have some influence on where the manufacturing process began because Duke Energy had to have that machine there?
A: Some of it. I'm not familiar with the whole process of where it would start and end.
Q: Okay.
A: I would think that machine would be part of the process ---
Q: Sure.

A: --- if they answers your question.
Q: Okay. And you mentioned sorting and washing can be part of the manufacturing process but not storage, correct?
A: Correct.
Q: Okay. And the statute, the pollution abatement statute, you say a regulation can satisfy the requirement that it has to be done subject to an order of a State of federal agency?
A: Yes, sir.
Q: Okay. So if a regulation satisfies it, obviously a statute satisfies it?
A: Yes. I would say so.
MR. MAYBANK: Okay. I think that's all I have, your Honor.
MS. ACQUAVIVA: Just one follow-up if I may.
MR. SMITH - REDIRECT EXAMINATION BY MS. ACQUAVIVA:
Q: To kind of expand on Mr. Maybank's question regarding if federal or even State law were to require -- let's say, that there was a federal regulation that said this ingredient has to be stored for 24 hours before you can use it in your processing activities. Would that regulation override the tax regulation regarding storage?

A: No. I don't believe so because it goes to the tax ability of whether something's used in the process. And I don't think that storing it before the processing changes anything as far as the tax ability of that.

Q: And the fact that the storage is required by law still wouldn't change that it's not processing?

A: No, I don't believe so.

Q: Okay. I have no further questions.

MR. MAYBANK: I have none, your Honor.

MR. SMITH - EXAMINATION BY THE COURT

THE COURT: Okay. I do. Sorry. Mr. Smith, I'm a little bit confused. I may be a lot confused. What is your understanding of the term "pollution" as you've -- as it's been tossed up for you to knock out of the park.

A: Generally in my personal opinion, I think of pollution as something that affects the environment in a negative way. It could cause a health hazard or some negative effect on the environment.

THE COURT: Okay. So how would that affect our understanding of what happens to produce in this particular process?

A: Well, I'm not sure -- it would sit in my thought, the way I understand what happens here in the produce facility and also in looking at whether something qualifies, it has to prevent or abate air, water, or noise pollution. And so the way I would look at that is whether that does that to the environment. And from what I understand, for example, when there was discussion about listeria being aerosolized into the air, from what my understanding, it doesn't go beyond the facility there and with the way -- and just not too far from that environment. So I'm not sure that the way that the plant operates now that there's necessarily pollution in the term -- in the sense that the pollution term is used in the regulation.

THE COURT: Okay.

MS. ACQUAVIVA: May I ask a brief follow-up just to add some steps?

THE COURT: Sure maybe you can clarify that for me.

MR. SMITH - REDIRECT EXAMINATION BY MS. ACQUAVIVA:

Q: If we're going to use, for purposes of this case and what's going on at the taxpayer's plant, use the word "contaminate" and "pollute" synonymously, what is your understanding of

what they're preventing from being contaminated or polluted?

A: Right. For the machine exception, it has to be pollution that's caused by the machine. And one part of the pollution exemption is addressed by the regulation speaks to the fact that protective clothing is not considered equipment -- is not considered a machine. And so -- and by that, we believe that is -- cannot be considered a machine to qualify for the machine exemption. It's not -- from my understanding, the pollution that's discussed in the case is pollution that -- at least in this particular circumstance, comes from the individuals wearing the protective clothing and not from machine itself.

Q: And what is the thing that McEntire is preventing from being contaminated with bacteria?

A: Right. The produce that comes in. And that contamination, as I understand it, coming from the individuals and -- that come into the plant, the workers.

Q: Based on your understanding of the produce and the product that McEntire produces, is that

air?

A: No.

Q: Is it water?

A: No.

Q: Is it noise?

A: No.

Q: Okay.

MS. ACQUAVIVA: I have no further questions.

MR. SMITH - RECROSS-EXAMINATION BY MR. MAYBANK:

Q: You said the statute says that the machine has to cause the pollution, correct? You just said it. And that's not what the statute says, is it? The statute says the machine has to cause or threaten it?

A: Right, cause or threaten.

Q: But it doesn't say cause it, as you just testified, does it?

A: You're correct. It does say cause or threaten; yes.

Q: Ignoring the statute, you said pollution is something that's a hazard. So obviously something that can kill you would be considered a hazard?

A: Yes.

Q: Okay. So something that can kill you would

typically be considered pollution, would it not?

A: Yes. I believe it could be.

Q: If something cause miscarriage in a pregnant female?

A: Yes.

Q: And generally something that would send you to the hospital?

A: Yes. It could go -- it could fall ---

Q: You were here all day yesterday. Is there any doubt in your mind that E. coli is pollution?

A: I believe it can be. But in this context it's think it's ---

Q: Well, it can be. What if it kills you? Is it pollution then?

A: Well, I think of contamination and pollution -- if I got sick from food poisoning, I wouldn't think of my food being polluted, per se. I would think of contamination in that sense, but certainly a negative result either way you look at it.

Q: Uh-huh. And so you don't view E. coli as a pollution even though it can kill you?

A: I think it can be a source of pollution. I do. But ---

Q: Well, what's the nuance? You say a source of pollution?
A: Uh-huh.
Q: So E. coli comes inside on an employee's shoes. It gets on the produce. We don't treat it. It's sold to a customer. The customer eats it and dies. Why isn't that E. coli pollution? Why are you drawing subtle distinctions?
A: Well ---
Q: Is it pollution or not?
A: I don't think of it polluting the food, in my personal thought. I don't think of it that way. But in this circumstance, again, if we're looking at protective clothing, it's not considered a machine ---
Q: Well, that's not question though. My question is the E. coli goes onto the food because we don't wear protective clothing. It's sold to a customer. The customer eats it. She's a pregnant female. She has a miscarriage. That's not pollution in your book?
A: I think it's, at the very least, contaminating food.
Q: Right.
A: Right.

Q: So you don't think contamination of food is pollution?

A: I don't -- I don't think it's necessarily not pollution. But, again, it's -- it's not pollution caused by machine, and it's not air or water or noise pollution, in my opinion.

Q: Well, I didn't ask you that though. Can you start answering my questions? My question is: Is it pollution?

MS. ACQUAVIVA: Your Honor, that would be asked and answered. I do believe Mr. Smith said that it would be, and qualified as answered.

MR. MAYBANK: Well, if he said it would be pollution, I'll move on.

THE COURT: You know, I think that's why I asked the question. I think there's -- we're having a little misunderstanding about pollution and contamination. And it does is seem that pollution is -- perhaps the Department's understanding is different.

And, Maybank, I'm not sure that you're gonna get the answer you want here.

MR. MAYBANK: I'm just trying to put it in the record though, your Honor.

THE COURT: But I think you have put it in the

record. And we have -- we've talked a little bit yesterday in terms of pollution and contamination being synonymous. We're looking at this as if it's a distinction.

MR. MAYBANK: Well, can I ask him if he agrees with Black's Law Dictionary's definition of "pollution"? I mean, he -- you broke the ice there.

THE COURT: You can take a shot at that one. But I don't know that that -- I'm not real -- go -- you can go ahead.

MR. MAYBANK: Okay.

THE COURT: I'm not sure that that's gonna move this puck ---

MR. MAYBANK: Okay.

THE COURT: --- over the blue line.

Q: All right. Do you agree with Black's Law Dictionary's definition of "pollution," the harmful addition of a substance or thing into an environment, especially the introduction of man-made products, waste products into a natural area?

A: Sure.

Q: Okay. And you agree with -- that Black's Law Dictionary of water pollution, the

contamination of a body of water by direct or indirectly discharging into it substances that were inadequately treated to remove harmful materials?

A: Yes.

Q: Okay. And do you agree with the Oxford Dictionary: Pollute, to contaminate water, the air, et cetera, with harmful or poisonous substances. And they gave an example, explosion, polluted a town with dioxine. Do you agree with that definition?

A: Sure.

Q: And Oxford further describes it as the presence in or introduction into the environment of a substance which has a harmful or poisonous effect. Do you agree with that?

A: Yes.

Q: Okay. You were here all day yesterday? Does Listerine -- does listeria have a harmful or poisonous effect?

A: Yes.

Q: Does E. coli have a harmful or poisonous effect?

A: Yes.

Q: And does salmonella have a harmful or poisonous

effect?

A: Yes.

MR. MAYBANK: That's all I have, your Honor.

MS. ACQUAVIVA: I have one follow-up on Mr. Maybank's questions.

MR. SMITH - REDIRECT EXAMINATION BY MS. ACQUAVIVA:

Q: Mr. Maybank asked you if you considered listeria to be pollution if it caused a pregnant woman to have a miscarriage. Do you recall him asking you that?

A: I do.

Q: Okay. If a pregnant woman got in a car accident and had a miscarriage, would you consider the car to be pollution?

A: No, I would not.

MS. ACQUAVIVA: I have no further questions.

MR. MAYBANK: None, your Honor.

THE COURT: And I have none. Mr. Smith, thank you, sir.

THE WITNESS: Thank you.

(Witness excused.)

MS. ACQUAVIVA: The Department would call second and final witness to the stand, Ms. Logan Mitchell.

LOGAN MITCHELL, having been duly sworn, testifies as follows:

MS. MITCHELL - DIRECT EXAMINATION BY MS. ACQUAVIVA:

Q: Good morning, Ms. Mitchell.

A: Good morning.

Q: Could you please state and spell your name for the record?

A: Yes. My full name is Logan Wright Mitchell, L-O-G-A-N W-R-I-G-H-T M-I-T-C-H-E-L-L.

Q: And, Ms. Mitchell, what is your -- briefly, what is your educational background?

A: I have a four-year degree from Clemson University in business management.

Q: Where are you currently employed?

A: The South Carolina Department of Revenue.

Q: How long have you been employed with the Department of Revenue?

A: Almost seven years.

Q: What's your current position at the Department?

A: I'm an audit supervisor.

Q: How long have you been an audit supervisor?

A: Since March of this year.

Q: What was your position prior to becoming a supervisor?

A: Sales and use tax auditor.

Q: And how long were you a sales and use tax auditor?

A: Approximately six and half years.
Q: And generally, can you describe or give examples of some of the sales and use tax audits you've been involved with, what industries?
A: Sure. Yes. I have done sales and use tax audits of restaurants, manufacturing facilities, some individual income tax, some miscellaneous tax, and occasionally retail locations.
Q: How did you become involved with the audit that we're here about today of McEntire Produce?
A: The auditor who did the majority of the audit was leaving the agency, so I took over to complete the audit for him.
Q: Okay. And when you took over, what stage was the audit in?
A: The audit was almost complete, the Excel file, which was provided by the taxpayer. The invoices had already been reviewed. And it was a matter of familiarizing myself with the audit and issuing the assessment.
Q: How did you familiarize yourself with the audit to get yourself caught up?
A: I met with the auditor Wes, and we reviewed the

Excel schedules along with some of the invoice copies he had.

Q: Okay. Once Mr. Butler left the Department, what did you do to finish up the audit?

A: I went ahead and submitted the audit for approval to my supervisor, completed all of the letters which go along with the actual assessment and then send it to the taxpayer.

Q: What other contact did you have with the taxpayer, other than sending the proposed assessment?

A: I had contact with the taxpayer after that fact but was not part of the initial audit.

Q: Okay. Have you been to McEntire's's plant?

A: I have. I did receive a tour of the facility.

Q: And how did you come to tour the facility?

A: My supervisor and I at the time after there were questions about some of the items that were held in the audit as subject to use tax, we went to tour the facility and meet with the taxpayer to get additional explanation.

Q: Okay. What were the issues that the taxpayer raised regarding the audit? What did the taxpayer not agree with?

A: I think it would have been the items that are

on the list in question. I think there was some question as far as the percentage of electricity that was initially held as subject to use tax and a question of maybe us making sure we had a good understanding of how the items were used specifically by the taxpayer.

Q: Did the taxpayer or their agent ask you any other questions when you were discussing the proposed assessment?

A: We did receive an e-mail from the CPA with a question as to the statute of limitations for the assessment.

Q: And what did you explain to the CPA regarding -- well, take a step back.

What did Mr. Butler do during the audit regarding the statute of limitations?

A: Mr. Butler had the taxpayer sign several consent-to-extend forms.

Q: And is that something the Department normally does?

A: Yes. If we see to where we're going to potentially leave statute, depending on how long the audit itself is going to take, we do routinely have the taxpayer sign those forms.

Q: Typically, how long does the Department have to

do an audit and issue a proposed assessment?
A: The statute of limitations on the -- I guess, beginning period under audit, we would have 36 months from that date.
Q: So when you inherited the audit from Mr. Butler, why didn't you ask the taxpayer to sign another extension?
A: Because I reviewed the taxpayer's filing history and saw that the taxpayer had, for the majority of the audit period, filed no use tax on their returns. And being that we had at least a percentage of electricity subject to use tax for each period under audit. There was no need to have that additional form signed because we had at least 20 percent understatement for every period.
Q: And just for clarification, the electricity issue has -- is not an issue today, correct?
A: That's correct.
Q: I'm gonna show you what's been admitted as Petitioner -- or Respondent's Exhibit 1. Do you recognize that document?
A: I do.
Q: And who created that document?
A: I did.

Q: Can you explain to the court -- I'm gonna have you explain what some of these columns are reflecting. What does the filing period column show?
A: That's the month that was covered by that return filed by the taxpayer.
Q: And why is this broken down by month?
A: Because the taxpayer has a monthly filing requirement.
Q: For sales and use tax?
A: For sales and use tax purposes.
Q: Now, we'll just use the first filing period as an example, which is 10/31/2012. When is the sales and use tax return due for that filing period?
A: It would be due the 20th of the following month, assuming it's not a weekend.
Q: So that would be November 20th of 2012?
A: Yes.
Q: What does the column entitled Proposed Notice of Assessment show?
A: That shows the tax due for that given period based on the review of the taxpayer's invoices and anything we found use tax to be due on.
Q: So this column shows what the Department

believes the taxpayer owes, correct?
A: Correct.
Q: And that's not a final assessment? That is just what the Department is -- that's their position at this time?
A: Yes.
Q: The next column is entitled Tax Paid on Filed Returns. What does that column reflect?
A: That column reflects the amount of use tax that the taxpayer would have accrued and paid.
Q: Okay. And what did the taxpayer report in pay and use tax for the majority of the periods at issue?
A: Zero.
Q: And can you tell me there how many periods they reported and paid more than zero?
A: Three periods during the 36-month audit.
Q: And can you tell the Court what those periods were and the amount that was paid in each period by period?
A: Yes. That would have been the period ending 9/30/2013, $2; 11/30/2013, $2; and a period ending 4/30/2015, $642.
Q: The next column is entitled percent of understatement. What does that column reflect?

A: That column reflects the -- based on amount that we found due during the audit. It compares that to the amount of tax that the taxpayer reported on their return.
Q: Okay. And what is the lowest percentage of understatement for any given period?
A: 327 percent.
Q: And is 327 greater than 20?
A: Yes.
Q: The next column is entitled Interest. What does this column reflect?
A: This represents the amount of interest due for that given period based on the amount of tax we say should have been on the return.
Q: And when is that interest calculated through?
A: That interest would have been calculated 30 days out from the date of our proposed notice of assessment.
Q: Okay. Is the amount of interest reflected in the interest column reflective of the interest that would be due if calculated through today's date?
A: No.
Q: I'm going to show you some of the petitioner's exhibits -- let's see what I need to grab.

I'll give you these ones to look at if helps you to look at them more closely. So the first document is Petitioner's Exhibit 7. Do you recall seeing this document yesterday?

A: Yes, I do.

Q: Okay. Based on your understanding of the taxpayer's operations and the Department's policy in determining where the manufacturing process begins and ends, in this audit, using just this example process -- we've used lettuce as an example -- where did the Department determine that the process started?

A: The determined -- the Department determined that it started with the -- basically this high-care area, this dumping on to the conveyer.

Q: And which step would that be on the flowchart? Is it this (indicating)?

A: Yes, it's that step.

Q: So the raw material dumping and conveying?

A: Uh-huh.

Q: And what was the basis for the Department drawing the line there?

A: The Department takes the position that the exemption starts with the machine which feeds

the first manufacturing machine.

Q: And so is it fair to say that based on your tour and your understanding of the taxpayer's operations that there were no manufacturing or processing machines used before this raw-material dumping?

A: That's correct.

Q: So the Department doesn't consider the storage racks in the cooler to be part of the process?

A: No.

Q: Okay. And where did the department determine that the process ended?

A: The Department determined that the process ended once the finished product was discharged from the last manufacturing machine and it was packaged for sale.

Q: And which step would that be on the flowchart?

A: That would probably be after the metal detecting after the boxing, labeling, and pelletizing.

Q: So boxing, labeling, and pelletizing would be the last step included in processing?

A: Yes. Because that finished product, the packaging materials and the packaging machines fall within the exemptions.

Q: And I'd like you to take a look at Petitioner's Exhibit 8. Based on your understanding and kind of applying what we just discussed in the flowcharts, where in the facility do you understand or it's the Department's position that the actual processing of the produce takes place?

A: The area above where you see that raw feed. So where that product is introduced into, again -- I think yesterday it was called that high-care area.

Q: This area (indicating)?

A: And then the RTE. Yes, that green block.

Q: Anywhere else?

A: The tomato repack area.

Q: Over here (indicating)?

A: Yes.

Q: Is there any other places?

A: No.

Q: What about where they do packing?

A: As far as packout? Is that what you're referring to?

Q: Would you consider -- well, you stated before that the boxing, labeling, and pelletizing would be part of the process, right?

A: Yes.
Q: And is it your understanding that the boxing, labeling, and pelletizing occurs in the packout area?
A: Yes.
Q: So would that area be used for processing then?
A: Yes.
Q: And what about the pelletizing area?
A: I think if it's still part of preparing that product for sale to your customer, then it would fall within the exemption.
Q: What would make it not fall within the exemption?
A: The receiving areas, the storage of raw materials, or the storage of finished goods.
Q: Okay. When you're doing an audit of a taxpayer, how do issues typically come up?
A: Most of the time in a case similar to this where a taxpayer provides us with an Excel schedule of all of their purchases, we would either do some sort of an account selection to look at accounts where they may be items subject to use tax, or we could do some sort of a statistical sampling, which would still be based on accounts where we would typically find

use tax to be due. In this case, we would have gotten a purchase file from the taxpayer. And the way Mr. Butler conducted the audit was he asked for several invoices for either each vendor or each account.

Q: And what was the goal of the audit? What was Mr. Butler looking for?

A: Mr. Butler was looking for purchases subject to use tax that either tax was not paid directly to the vendor or that those items had not been accrued on.

Q: When -- how can a taxpayer not be liable for a sales or use tax?

A: If they have not extended their exemption certificate to an in-state vendor who has a responsibility to collect sales tax.

Q: Let me ask the question a different way: Legally, what does it take for a taxable item -- for a taxpayer to otherwise not have to pay tax on a ---

A: There has to be an exemption for that particular item.

Q: And approximately how many sales and use tax exemptions are there? And you can give me a over ---

A: Maybe 75 or 76. In the 12-36-2120.
Q: And when doing an audit, does the Department go through every single exemption to determine whether the items it believes are taxable are, in fact, exempt?
A: No. Typically for a manufacturer, we either issue what we consider a limited exemption certificate or a direct pay exemption certificate.
Q: But during an audit like the audit in this one, did Mr. Butler -- or would it have been typical for him to have analyzed the supplies at issue against every single potential exemption?
A: No.
Q: So how did it come that certain exemptions were looked at?
A: The taxpayer has an exemption certificate.
Q: And what does the taxpayer have an exemption certificate for?
A: I believe this taxpayer is the holder of a limited exemption certificate which specifically exempts items such as fuel or electricity, raw materials, packaging materials, and machines from tax.
Q: When did the pollution control exemption first

come up?

A: I believe it would have been during the protest.

Q: So as far as you can recall, Mr. Butler didn't mention that issue being raised during the audit while he was reviewing invoices?

A: No.

Q: Why did the Department ultimately determine or disagree with the taxpayer's position that some items were exempt as pollution-control machines?

A: The items in question, for purposes of this audit, as pollution abatement machines were clothing. And I believe there's a regulation which states that clothing cannot be a machine.

MR. MAYBANK: Your Honor, the Department's determination says nothing about what she just testified to. So she testified that protective clothing can't be a machine. The Department determination does not say that whatsoever. So we would ask that her testimony be struck and that she be limited from testifying in that manner. We have two documents. We went to trial. One was a proposed assessment, and one was the Department's determination. Neither of

those documents say that protective clothing can't be a machine. So she is bringing up a new area in testimony today. The Department had never taken that position before. And we would ask that she not be allowed to testify any further in that regards and that her testimony be struck.

MS. ACQUAVIVA: Two responses to that. The law says that protective clothing is not a machine. It's in a regulation. And Department determinations are issued based on the facts presented at the time, not the facts that have since been learned through discovery. I don't think that legal -- that the Department is limited to the legal analysis made in its determination.

And finally if we can only discuss what's in the Department determination at the hearing, then the petitioner would be barred from discussing any statute of limitations issues, as those are not in the determination. So I don't think that that is the intent of when the -- I think it's the APA or the RPA talks about you can appeal from the Department's determination. I don't think it is strictly

you can only appeal from what's in the four corners of that document. It's the -- they're appealing a DD that addresses why the Department is upholding it's proposed assessment. And the basis of the Department's determination here was that these items are not exempt.

MR. MAYBANK: And just briefly just trial by ambush 'cause they bring out the facts that an employee of the plant was convicted of a felony and therefore the exemption shouldn't comply. I mean, that's an absurd example. I don't think they can bring up things that are neither in the Department determination nor the proposed assessment. With reference to her mention of the statute of limitations, we totally agree. We take the position the statute of limitations has run because it's not in the Department's determination.

THE COURT: All right. What Ms. Mitchell testified to, I think, was that the -- that this was in the reg. And I think that's ---

MS. ACQUAVIVA: Yes.

THE COURT: And I think that's a question of law that's -- so I don't think we can restrict her

testimony on that basis.

MR. MAYBANK: I certainly think they can argue it in their briefs any statute, but testifying is a different matter. I mean, they never raised this issue before, before today. I mean, it's classic trial by ambush.

MS. ACQUAVIVA: And, your Honor, Ms. Mitchell was deposed. I don't believe she was asked this specifically what she looked at or what was looked in making the determination. All I'm asking from a factual standpoint is why the Department determined these items weren't exempt. We could be completely wrong. But as far as the Court's understanding of what we did and why we did it, that is really what I am eliciting from her.

THE COURT: And I agree. I think that's legitimate. So I would deny that objection.

Q: So you stated that one factor you looked at with pollution control was the regulation regarding protective clothing not being a machine. What else did the Department look at in making its decision regarding whether the protective clothing were exempt as pollution-control machines?

A: I don't necessarily know that we looked at anything else with the clothing as far as the pollution abatement machines. But typically when we have clothing as an issue in an audit, because the Code sections are specific about protective clothing and what it takes to qualify to make your clothing purchases tax free, we do look to see if they qualify under that Class 100 Cleanroom.

Q: Okay. And we will get into that. So there was nothing else that the Department took into consideration when determining whether it was -- whether the protective clothing were pollution-control machines?

A: No. I don't think so.

Q: Did the taxpayer provide you with anything to review to support its claim that they should be exempt as pollution-control machines?

A: No. The taxpayer did provide documents about food safety. But I think that was separate.

Q: So you didn't believe that the food safety documentation was going towards a pollution-control argument?

A: No.

Q: Did the taxpayer give you a certified statement

from any State or federal agency regarding the abatement of any type of pollution?

A: No, they did not.

Q: If they had given you a certified statement, what would the Department require -- what information would it need to see in that certified statement in order to grant the exemption?

A: The documents I've seen in the past which have allowed machines to be purchased as pollution-abatement machinery tax free have included the name of the agency that's requiring it and the type of pollution that's it's abating.

Q: And were you provided with any statement similar to the one you just described?

A: No.

Q: Now, you mentioned because it was protective clothing or protective clothing was something at issue, you looked at whether it could meet the cleanroom exemption; is that correct?

A: Yes.

Q: Okay. And why did you determine that the protective clothing was not exempt pursuant to Subsection 54, the Cleanroom Exemption?

A: The taxpayer didn't provide anything showing that they did, indeed, operate something equivalent to a Class 100 or better cleanroom.

Q: How many taxpayers, to your knowledge, have Class 100 or better cleanroom that gets them a sales and use tax exemption?

A: One in this state.

Q: Was there anything other than the fact that the taxpayer didn't prove to you and your supervisor that they didn't have a cleanroom that the Department looked in deciding that it wasn't exempt?

A: No.

Q: When you toured the facility, did they take you somewhere and say this is our cleanroom?

A: No.

MS. ACQUAVIVA: I have no further questions.

MR. MAYBANK: Thank you, your Honor.

MS. MITCHELL - CROSS-EXAMINATION BY MR. MAYBANK:

Q: And just real quickly before I get into it, the -- you said that typically when you've given a pollution control exception, you provided -- you've been provided with the name of the State or federal agency requiring it and the type of pollution?

A: Yes, sir.
Q: Okay. And if you'd been given those two things in this case, you would have granted a pollution-control exemption?
A: Yes.
Q: All right. And then you said the taxpayer is denied a Class 100 because the taxpayer didn't provide you with adequate evidence they had a Class 100 Cleanroom, correct?
A: Correct.
Q: Okay. All right. And then just another matter of just kind of housekeeping, just to see if our numbers jibe or our dates jibe, so we contend the statute of -- but for the substantial understatement the statute of limitation expired on May 31st, 2016, or our consent to extend the statute of limitation expired on May 31st, 2016. Does that jibe with what you know?
A: Yes.
Q: Okay. And so but for the substantial understatement, October 2012 through May 2013 would be outside the normal 30-month statute of limitations?
A: Yes.

Q: Okay. So you completed the audit?
A: I did.
Q: And you are currently the audit supervisor with the DOR?
A: Yes.
Q: All right. And you graduated with a degree of business management from Clemson?
A: Yes, sir.
Q: But you don't have any degrees or certifications or taken any classes in environmental science?
A: No.
Q: And you have no classes or certifications, degrees in food quality?
A: No.
Q: All right. And McEntire's classified as a manufacturer for sale tax purposes?
A: Yes, they are.
Q: And you prepared the actually proposed assessment, correct.
A: Yes.
Q: And you reviewed the Department's determination?
A: I did.
Q: And so the Department denied the sales tax

exemption for Class 100 Cleanrooms for two reasons: The taxpayer hasn't established that either the Class 100 or better cleanroom. And, two, the safety -- and that safety equipment was required to work in the cleanroom; is that correct?

A: Yes.

Q: Okay. And those are the only two reasons you could think of? You couldn't think of any other reasons why a Class 100 was denied, correct?

A: Yes.

Q: Okay. This is actually your first audit of a Class 100 Cleanroom, wasn't it?

A: Yes.

Q: And the DOR has a lot of wonderful training and a lot of training for manufacturers, but they don't have any training on Class 100 Cleanrooms, do they?

A: No.

Q: All right. And so the first requirement is the taxpayer has established it's a Class 100 or better cleanroom environment. And that means it filters -- the air has to be filtered to 0.5 microns, correct?

A: I think that may be part of the requirement --
Q: Okay.
A: --- Class 100 or better cleanroom.
Q: Right. And that's like I said would be the first part of the requirement, correct?
A: Yes.
Q: All right. And you felt the Class 100 exemption didn't apply in part because you thought the entire plant had to be Class 100 and not just a particular room, correct?
A: Yes.
Q: All right. And so you denied the exemption because the offices and the storage areas were not Class 100 environment, obviously?
A: Yes.
Q: Okay. And lastly, you denied it because you hadn't seen a certification the plant was Class 100?
A: Yes.
Q: All right. Now, the second requirement or reason you turned it down was because you were of the belief that subject protective clothing was not required, correct?
A: Yes.
Q: All right. And at the time you entered the

proposed assessment, we had not brought to your attention and you had not reviewed the CFR legal requirements regarding the FDA's requirements for protective clothing, correct?

A: Yes.

Q: All right. And you're not aware that the FDA actually requires protective clothing at new produce processing facilities?

A: I think that was some of the discussion that was had here yesterday.

Q: Right. I mean, at the time of the proposed ---

A: That's correct.

Q: --- assessment, correct? And if it -- McEntire was able to establish yesterday that the protective clothing is required by federal law to work in a Class 100 Cleanroom, would that satisfy you in this regards?

A: Yes.

Q: Okay. And that you weren't aware at the time of the proposed assessment that the FDA actually requires a Class 100 environment in a fresh-foods processing facility, were you?

A: No.

Q: All right. And if you'd known this and known that McEntire had complied with the federal

requirement, would you have granted the exemption for the protective clothing?

A: It would have been something to consider.

Q: Okay. What else would you have needed to consider? The federal law requires Class 100 -- the federal law requires protective clothing, and McEntire had a certification for the Class 100. What else would you have needed in order to grant the exemption?

A: I have seen certifications from other taxpayers where an independent agency does come in and perform some sort of testing and actually rates their cleanroom on a scale.

Q: Okay.

A: Whether it's a, I guess, a Class 100, a thousand, 10,000 and through the scale.

Q: Okay. All right. So if -- but if McEntire had shown you their evidence that they met the federal -- the ISO cleanroom environment and that federal law required it and federal law required the clothing, what else would you have needed to grant the exemption?

A: I'd probably have to familiarize myself better with the Class 100, other requirements.

Q: Okay. And so you sent us a bill for $120,000.

Should you have done that before you sent us a bill?

A: I think the burden of proof is on the taxpayer ---

Q: Right.

A: --- to prove to us that they meet that requirement.

Q: Okay. Well, you've heard the testimony yesterday. You got a bill sitting out there. You heard the testimony yesterday that federal law requires Class 100; federal law requires the clothing and that they met the requirements for Class 100. Why aren't they entitled to the cleanroom exemption?

A: I'm still -- again, I'd have to familiarize myself better with that and to get additional documentation to from the taxpayer ---

Q: Okay.

A: --- to review to consider that.

Q: But it's not satisfactory to you that federal law requires a Class 100 Cleanroom; federal law requires protective clothing. We did both. You're still not willing to grant the exemption notwithstanding that? You require more, correct?

A: Yes.
Q: Okay. But you don't know what -- and can you tell what that more is?
A: I don't think anybody here yesterday was able to tell us what the other requirements were even though they're claiming they have a cleanroom.
Q: Okay. So we're certified by a certifier that we've met it. That's not enough for you?
A: Again, I'd have -- I haven't seen that documentation until it was mentioned yesterday.
Q: Okay. All right. Well, let's move on to the pollution-control exemption. In your opinion, the taxpayer failed to meet the pollution-control exemption because the taxpayer provided no evidence that its safety attire prevents or abates any air or water pollution, correct?
A: Correct.
Q: All right. And secondly, a significant part of your basis for denying exemption was that food contamination in a food-processing manufacturing facility does not constitute air or water pollution, correct?
A: Correct.

Q: Okay. And those are the only two reasons you denied the exemption in the proposed assessment: The taxpayer provided no evidence that its safety attire prevents or abates air or water pollution and that food contamination doesn't constitute air or water pollution, correct?

A: Yes.

Q: Okay. And so you denied exemption part because you don't consider E. coli to be pollution in a food-processing plant, correct?

A: Correct.

Q: And you don't consider salmonella to be pollution?

A: No.

Q: All right. And you didn't consider listeria to be pollution?

A: No.

Q: Now, at the time you issued a proposed assessment, you didn't consider E. coli as pollution because you didn't know enough about it, correct?

A: Correct.

Q: All right. And that was the same basis for not considering salmonella as pollution as well?

A: Yes.
Q: All right. And the same basis for not considering listeria as pollution?
A: Correct.
Q: All right. And at the time of the proposed assessment, you weren't aware E. coli could be transmitted through the air?
A: Correct.
Q: And you weren't aware that E. coli could be transmitted through the water?
A: That's right.
Q: And at the time of the proposed assessment, you didn't have a definition of "pollution"?
A: No, I did not.
Q: All right. In fact, you didn't know what the definition of "pollution" was under this statute?
A: Correct.
Q: And you didn't have a definition of "pollution" even at the time of your deposition?
A: That's right.
Q: All right. But you agreed with the Black's Law definition of "pollution"?
A: Yes.
Q: Okay. And you agreed with the Oxford

definition of "pollution," which we read a few minutes ago?

A: Yes.

Q: And you agreed with the Oxford's second definition of "pollution," which we read a few minutes ago?

A: Yes.

Q: Okay. And you don't disagree with Wikipedia's definition of "E. coli"?

A: Correct.

Q: And Wikipedia goes on to state most E. coli strains do not cause disease, but the virulent strains can cause gastroenteritis, urinary tract infections, neonatal meningitis, hemorrhagic colitis, and crohn's disease? Common signs and symptoms include severe volatile cramps, diarrhea, hemorrhagic colitis, vomiting and sometimes fever. Healthy individuals of all ages are at risk to the severe consequences that may arise as a result of being infected with E. coli.

And so you don't have a -- we had both agreed at the deposition to that definition, correct?

A: Yes.

Q: Okay. And you don't agree -- you didn't

disagree with Wikipedia's definition of "listeria"? Listeria's a serious disease for humans ---

MS. ACQUAVIVA: Your Honor, if I may, I think it is improper to read from a deposition transcript when Ms. Mitchell hasn't denied saying anything or said something contradictory to what she said in her deposition. Now, I think she can be asked if she agrees with the definition, and if she says no, then reading from the deposition transcript would be appropriate.

MR. MAYBANK: Your Honor, I'm not impeaching her. I'm reading definitions.

THE COURT: From her deposition?

MR. MAYBANK: They're -- I could find that copy in a different document. It's a whole lot easier to take it out of the deposition.

MS. ACQUAVIVA: And I don't have a problem with him reading a definition. The phrasing of the question was: During your deposition, X, Y, and Z.

MR. MAYBANK: All right. I'll withdraw. I'll withdraw that.

THE COURT: Okay.

Q: And so just again just to start over, you agree

with -- you don't disagree with Wikipedia's definition of "listeria." Listeria is usually the causative agent of the relatively rare bacterial disease listeritis [sic] an infection caused by eating food contaminated with the bacteria, listerisis [sic] can cause severe illness in pregnant women, newborns, adults with weakened immune systems and elderly and may cause gastroenteritis and others who have been severely infected.

By the way, we'll give you the -- ma'am, we'll give you what you're reading from afterwards for those spellings. Listeriosis is a serious disease for humans. The overt form of the disease has a case fatality of around 20 percent.

So you don't disagree with that definition of Listerine [sic]?

A: No.

Q: Okay. But you still don't feel it's pollution?

A: I do not.

Q: Okay. Wikipedia also says listeria can be found in soil, which can lead to vegetable contamination. Listeria's responsible for listeritis, a rare but potentially lethal

food-borne illness. The case fatality rate for the those with the severe form of the infection may approach 25 percent.

You don't disagree with that definition?

A: No.

Q: Okay. But it still doesn't change your opinion that listeria -- we went over E. coli. You still don't think listeria is contamination?

A: I don't think it's pollution.

Q: Okay. How about contamination?

A: Possibly.

Q: Okay. All right. Let's turn to -- and when you say possibly, why -- what is the gradient or why the -- what would it need to be contamination? Or stated better, you say possibly contamination. When is it contamination, and when it's not -- when is it not?

A: Do you have an example of when it's contamination?

Q: Yeah. When it's in salad which is then sent to a McDonald's and a customer puts it -- and the employee puts it in the hamburger and the customer eats it and gets listeria?

A: I think that would be food contamination but

not necessarily pollution.

Q: Okay. So it would be contamination but not pollution?

A: Yes.

Q: Okay. And what's the distinction between contamination and pollution?

A: I think pollution, for purposes of the exemption, deals with pollution caused by machines. And it's air, water, or noise pollution ---

Q: Okay.

A: --- not specifically food.

Q: Okay. So it's not -- so you feel it's not -- it's -- food contamination is different than food pollution, I guess?

A: Yes.

Q: Okay. All right. Then let's turn to salmonella then. Salmonella, according to -- and let me see if you disagree with Wikipedia's discussion of salmonella. Salmonella species are intracellular pathogens. Certain stereotypes cause illness. Nontyphoidal serotypes can be transferred from human and animal, to human -- from human to animal to human and from human to human.

Typhoidal serotypes can also be transferred from human to human and can cause salmonella food poisoning, typhoid fever, and paratyphoid fever. Typhoid fever occurs when salmonella invades the bloodstream or in addition spreads throughout the body, invades organs, secretes endotoxins to septic form this can lead to life-threatening hypovolemic shock and septic shock and requires intensive care including antibiotics.

Now, that -- you agree with that definition of it?

A: Yes.

Q: Okay. But you don't think that is pollution?

A: No.

Q: And you don't think it's pollution even when it comes in to the lettuce through food or air?

A: No.

Q: All right. At the time of the proposed assessment, you weren't aware that McEntire spent all that money on protective clothing because they were dealing with E. coli and listeria and salmonella?

A: I think that was some of the information that was provided to us when we toured the facility

and had a meeting with the taxpayer.

Q: Okay. And you weren't aware at the time of the proposed assessment that the FDA actually requires all that protective clothing?

A: No.

Q: All right. And in your opinion, irrelevant that the FDA requires protective clothing to prevent E. coli, salmonella, and listeria from being introduced into the food packaging area?

A: Yes.

Q: Okay. And this is the -- and this is your first audit of a food manufacturing facility?

A: Yes.

Q: Okay.

MR. MAYBANK: That's all we have, your Honor.

MS. ACQUAVIVA: Redirect? Thank you.

MS. MITCHELL - REDIRECT EXAMINATION BY MS. ACQUAVIVA:

Q: Do you recall hearing yesterday or do you know from your own reading whether the FDA regulations that McEntire follows uses the word "cleanroom"?

A: I don't know.

Q: Did you hear anyone say that yesterday?

A: Yes. They use -- I think the term was "cleanroom environment."

Q: That the FDA regulations use the term "cleanroom environment"?
A: No. I don't remember hearing anything that specifically said that the FDA requirement uses that language.
Q: Okay. So if the FDA regulations pertain to protective clothing for food safety but don't specify a cleanroom, how would the Department use that regulation in determining whether this taxpayer had a cleanroom?
A: I think if it doesn't specify the information about the cleanroom, the protective equipment worn by the employees would still be subject to tax.
Q: Is it sufficient for the cleanroom exemption that the FDA requires protective clothing to be worn in a food-processing plant?
A: No.
Q: Could a taxpayer get the cleanroom exemption if they used clothing required to be worn in a cleanroom but didn't actually have a cleanroom where that clothing was worn?
A: No.
Q: And can you restate the reason that you believe the taxpayer does not have a cleanroom?

A: The taxpayer hasn't provided any sort of certification or documentation to us stating that they have that cleanroom.

Q: And let's say the taxpayer did provide documentation or was able to convince this Court that if you look at the site diagram. Let's pretend the area that's boxed in P-1 HH, if that was an enclosed room and the taxpayer established that that was, in fact, a Class 100 or better cleanroom, as defined in the Federal Standard 209E and they wore the required protective clothing in that room, would they then qualify for exemption on that particular clothing?

A: For the particular clothing worn in that area; yes.

Q: So I think on your -- on Mr. Maybank's cross -- and this is what I wanted you to clarify -- you stated that to qualify for the exemption your understanding was the -- that the entire plant had to be a cleanroom?

A: I think in order to want all of the protective clothing and to be able to purchase all of it tax exempt, then the areas that that clothing is worn in would have to be a cleanroom.

Q: So is your testimony that because the taxpayer is requesting that all their protective clothing be exempt, that that is why the entire plant would have to be a cleanroom?

A: Yes, it would.

Q: But they still could establish that some of the items are exempt because they are, in fact, used in a certified cleanroom?

A: Yes.

Q: And did you hear or see anything yesterday that shows the taxpayer has a certified Class 100 or better, as defined by Federal Standard 209E Cleanroom?

A: No.

MS. ACQUAVIVA: I have no further questions.

MR. MAYBANK: I'll check my notes here. I have nothing further, your Honor.

THE COURT: Okay. All right.

MS. ACQUAVIVA: Can Ms. Mitchell step down?

THE COURT: Before she does, tell me, when you began questioning her about the process flow diagram?

MS. ACQUAVIVA: Yes, your Honor.

THE COURT: And you were referring to this -- the green area -- it's green to me too. Y'all call it gray but ...

MR. MAYBANK: It's green to me.

MS. ACQUAVIVA: I think the copy is a black-and-white copy and it's shaded. This is a color copy, but everyone else has a black-and-white copy.

THE COURT: I'm looking at that, at the color copy. Am I correct in my understanding of the testimony that, Ms. Mitchell, as to the characterization of the high-care area, the tomato repack, the packout, and palletizing areas as part of what you call the manufacturing process?

MS. ACQUAVIVA: Yes. That ---

THE COURT: That would be ---

MS. ACQUAVIVA: She's testified that's where the Department considers processing activities to take place.

THE COURT: Now, are you saying that those are activities that would be tax exempt?

MS. ACQUAVIVA: Yes. So the manufacturing or the processing occurs in those rooms. So the ---

THE COURT: So ---

MS. ACQUAVIVA: --- receiving of the raw product, which happens down here isn't processing (indicating). But as soon as it goes into

room, gets chopped through when it's bagged and boxed, that's processing.

THE COURT: Plus the tomato repack?

MS. ACQUAVIVA: Right. That's a -- so that's a separate operation where produce would still come through the same area, go through a cooler; it's sorted, I believe, sometimes ripened, and then repackaged. Once it's packaged, the process ends, and then it goes out into finished goods storage.

THE COURT: And you would concede that those processes would be tax exempt?

MS. ACQUAVIVA: Tax exempt, yes.

THE COURT: And ---

MS. ACQUAVIVA: Any machines used ---

THE COURT: --- materials used in those processes would be tax exempt?

MS. ACQUAVIVA: If it meets the -- if it's integral and necessary, ongoing and continuous. So, for example, the generator used for ripening, I believe, Mr. McEntire testified was only used as needed, not -- it was not something used regularly, so the Department's position is it's not ongoing and continuous use as required by the regulation.

THE COURT: Okay. And my understanding of that particular item was that it's rented?

MS. ACQUAVIVA: Yes.

THE COURT: So it's only rented when ---

MS. ACQUAVIVA: It's needed.

THE COURT: When it's needed and used.

MS. ACQUAVIVA: And it's -- if it was rented, I don't know about here, but at the Department, the copy machines are leased. They're rented. But they're used continuously. If they -- they could still get a sales and use tax exemption on a rental item if they use it once a week, every -- you know, on whatever the court determines is ongoing and continuous. But because the testimony was as needed, it's not a regular part of the process.

THE COURT: Well, but it's only rented when it's needed.

MS. ACQUAVIVA: Right.

THE COURT: So it would only be tax exempt when it's needed.

MS. ACQUAVIVA: That's not ongoing and continuous in the process.

THE COURT: But you said -- but you just said that rented, it would be ---

MS. ACQUAVIVA: It could be if it was -- if the process -- the ripening is ongoing and continuous. Not -- so let's say they rented a -- the cutting machine instead of owning the cutting machine and they only used it once a quarter, that's not ongoing, continuous in the process.

THE COURT: I see. I understand that. I'm just saying here where something is only used for a particular time frame.

MS. ACQUAVIVA: Well, ripening is always occurring, from my understanding. That's what happens in the coolers. This is, you know, when they get some not fully ripe tomatoes. They rent the generator when they need to speed up the ripening process.

THE COURT: Or when the tomatoes don't show up ripe?

MS. ACQUAVIVA: Right.

THE COURT: Okay.

MS. ACQUAVIVA: Seasonally, I guess.

THE COURT: But that's my -- the conclusion from that is ---

MS. ACQUAVIVA: And the generator, I believe they testified, is in the tomato cooler, not in the tomato repack room. So to go back to Logan's

testimony, it's the Department thinks processing occurs in those three areas.

THE COURT: Okay. So how much of the tax exemption has materialized out of that original assessment or dematerialized out of the original assessment?

MS. ACQUAVIVA: I don't believe of the supplies that were looked at in this audit that they established any were exempt.

THE COURT: Although you admit that some of these processes are exempt?

MS. ACQUAVIVA: Right. Just some of the supplies that they've purchased are not used in the process or they're not used substantially or they're not used ongoing and continuously or they're not integral and necessary to the process. They might be integral and necessary to McEntire so, you know. McEntire needs lighting to run its operation, but you don't need lighting to chop lettuce. So that's kind of the distinction, and that's where ---

THE COURT: But substantially used -- I think this is Mr. Smith's testimony -- is a third?

MS. ACQUAVIVA: Correct. So that item has to be used at least one-third of the time. And the

taxpayer had no documentation, no evidence of how often anything was used where. That's -- so a lot of this was a substantiation issue, which is why as litigation proceeded we were able to agree on some things because we now had more information.

THE COURT: Okay. All right. I'll stop bothering you now.

Ms. Mitchell, I think she wants to let you off the hook. Well, I'll let you -- let her let you off the hook.

THE WITNESS: Thank you.

(Witness excused.)

MS. ACQUAVIVA: And the Department has no additional witnesses. So we rest.

And I would appreciate a quick restroom break if -- well, I can wait and see if they're gonna have a rebuttal case.

MR. MAYBANK: No. We don't have any rebuttal.

THE COURT: All right. Let's we'll take about 15.

MS. ACQUAVIVA: That would be great.

(A break was taken.)

THE COURT: We're back on the record. Case Number 17-ALJ-17-0060. Now, we have come, I think, to the end of the fun part.

MS. ACQUAVIVA: I think we have. If that was supposed to be the fun part, then yes.

THE COURT: Normally at this time, I would offer you opportunity for closing arguments. But I've also thought about offering you the opportunity to submit proposed orders. Would you like closing arguments and -- closing arguments and proposed orders, or would you be satisfied with proposed orders?

MS. ACQUAVIVA: The Department is fine either way. We would be satisfied with proposed orders. It would take a long time, I think, for both sides to talk about 35 different item -- or 33 now. But we're happy either way but would be fine with just the proposed orders.

MR. MAYBANK: That's fine with us, your Honor.

THE COURT: What would be a time frame for that? Normally it would be 30 days.

MR. MAYBANK: Yeah. I think we always need a hard date rather than just 30 days, which we have to calculate out. If somebody has their -- I think 30 days would be great if somebody has their -- oh, yeah. Christmas too.

MS. ACQUAVIVA: Do you want to wait until we receive the transcript?

MR. MAYBANK: I don't -- we don't need the transcript.

MS. ACQUAVIVA: I think we would need the transcript just to make sure that we don't misstate anything that the petitioner's witness testified to.

THE COURT: Well, what we ...

MS. ACQUAVIVA: So December 16th?

THE COURT: Well, she wants the transcript so ---

MR. MAYBANK: Okay.

COURT REPORTER: 15 -- 29th is two ---

MS. ACQUAVIVA: Sometime in January.

COURT REPORTER: Okay. That would be -- I can definitely have it by then. I was looking at the end of November. But okay. Let's not push it. That would be great.

THE COURT: So ---

COURT REPORTER: We can do -- what was the date?

MS. ACQUAVIVA: I guess it would be sometime in January. Could you have it by the end of November?

COURT REPORTER: Yes. I can have it -- well, give me an extra week. 'Cause that was two full days.

MS. ACQUAVIVA: Second week in January?

COURT REPORTER: One, two, three. Yes. I can have it by December 6 to you.

THE COURT: So the 30 days after the December 6th.

MS. ACQUAVIVA: So that's January 7th. That's the Monday.

THE COURT: So the 7th, that's a Monday?

MR. MAYBANK: January 7th works for us.

THE COURT: All right. Ms. Acquaviva, is that gonna be all right with you, ma'am, for your private practice?

MS. ACQUAVIVA: Yes, it would be perfectly fine. The Department is currently my only personal client, so everything else's are the firm's clients.

THE COURT: I don't want to ask what you're charging.

MS. ACQUAVIVA: What the attorney general will allow me to charge, which is less than they now charge other people.

MR. MAYBANK: That ain't much at all.

MS. ACQUAVIVA: Yeah.

THE COURT: All right then. We'll do that. And I'll expect proposed orders by January 7th. And otherwise, thank you for your patience and tolerance of me this week. And we'll see you

then. I hope everyone has a good holiday season. And postholiday season, I will get back to work on this case. And we're adjourned.

(There being nothing further, the administrative hearing concluded at 12:00 p.m.)

McEntire Produce

Conventional Product Receiving
Standard Operating Procedure 6.6

Approval			
Dept Mgr	Admin	QA Dir	Effective Date 7/31/09
Date	Date	Date	Author Steve Hoffert

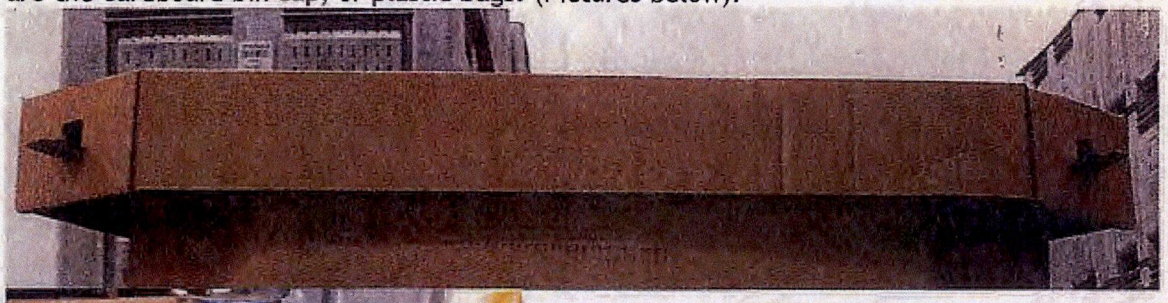
Purpose: To describe the receiving and storage process for all raw produce to be processed, repacked or shipped whole case.

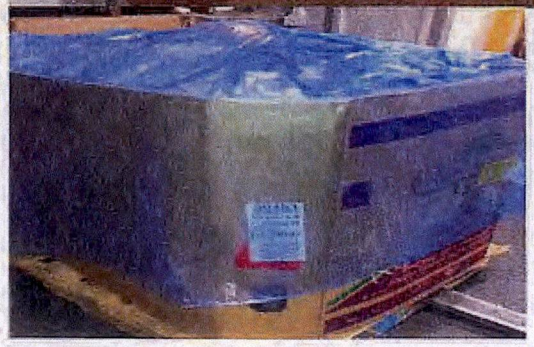
Scope: Receiving personnel will secure bill of ladings and check product as it is unloaded. After receiving they will also be responsible for proper storage.

Remarks: Receivers will need pens to fill out forklift checklists and put temp recorder information on each temp recorder (if no PO # is on the temp recorder from the supplier)

Procedure: The procedure will be as follows:

1. When the truck arrives at the gate they will be assigned a dock door by receiving.
2. The receiver will lock the trailer to the dock using the Pitt Bull system. The dispatchers will the get a Bill of Lading from the driver listing the goods to be received.
3. The dispatcher will stamp the BOL with the receiving stamp.
4. Labels will be printed by the dispatcher based off the BOL. Labels will have the PO # harvest and receive dates, weight, and country of origin, Lot # and pallet # on each label. Labels will be placed on the side of the pallet depending on which side of the rack the pallet is racked in.
5. Each bin to be stored in the racks must have an approved bin cap to protect the product from foreign material falling into it. The only approved bin caps at this time are the cardboard bin cap, or plastic bags. (Pictures below).





PETITIONER'S EXHIBIT 5
11/14/18
PENGAD 800-631-6989

McEntire Produce

Conventional Product Receiving
Standard Operating Procedure 6.6

6. The receiver will then transfer the pallets to the designated store areas only after bin covers are in place.
7. All receiving BOL's will be turned in to the purchasing department.

Training: Upon initial orientation, as needed and on an annual basis thereafter.

Records: Training Records are kept in the HR office.
Reference(s): none

Revision Log				
Date	**Rev**	**Changes**	**Justification**	**Author**
2/22/2017	8	Procedure #4	Review	Mark Pappas
2/18/16	7	Remarks and Procedure #7	Review	Mark Pappas
3/09/2015	6	None	Review	Mike Sexton
3/28/14	5	Procedure	Review	Mark Pappas
3/27/2014	4	None	Review	Mike Sexton
3/27/2013	3	Bin caps	New req.	Mike Sexton
10/22/12	2	None	Review	Mike Sexton
10/21/2011	1	Names	review	Mike Sexton
7/31/09				Steve Hoffert