AMERICAN GROWERS INSURANCE COMPANY (Ronald J. Boilini),	)	**AGBCA No. 99-134-F**
Appellant	)	
Representing the Appellant:	)	
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Representing the Government:	)	
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RULING ON GOVERNMENT'S MOTION FOR RECONSIDERATION

May 23, 2000

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate Dissenting Opinion by Administrative Judge HOURY.

WESTBROOK, Administrative Judge.

The Government has filed a timely Motion for Reconsideration of the Board's ruling, American Growers Insurance Company, AGBCA No. 99-134-F, 1999 WL 984394 (Oct. 28, 1999), denying its Motion to Dismiss for lack of jurisdiction. The appeal arose out of a Standard Reinsurance Agreement (SRA) originally executed between City Insurance Company (City Insurance) of New York, New York, and the Federal Crop Insurance Corporation (FCIC). American Growers Insurance Company (Appellant) is the successor-in-interest to City Insurance.

In denying the motion, the majority found the interpretation of 7 C.F.R. § 400.169(b) argued by the Government to be defective. The majority also found the factual record unclear in that neither of the documents issued by FCIC clearly qualified as a final agency determination. This ruling assumes a familiarity with the previous ruling and the findings of fact will not be restated here.

The relevant version of 7 C.F.R. § 400.169(b) read as follows:

> (a) If the company believes that the Corporation has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement or any reinsurance agreement with the FCIC, except compliance issues, it may within 45 days after receipt of such determination, request, in writing, the Director of Insurance Services to make a final administrative determination addressing the disputed issue. The Director of Insurance Services will render the final administrative determination of the Corporation with respect to the applicable issues.
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> (b) If the company believes that the Corporation's compliance review findings are not in accordance with the applicable laws, regulations, custom or practice of the insurance industry, or FCIC approved policy and procedure, it may within 45 days after receipt of such determination, request, in writing, the Director of Compliance to make a final administrative determination addressing the disputed issue. The Director of Compliance will render the final administrative determination of the Corporation with respect to these issues.
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> (c) A company may also request reconsideration by the Director of Insurance Services of a decision of the Corporation rendered under any Corporation bulletin or directive which bulletin or directive does not affect, interpret, explain, or restrict the terms of the reinsurance agreement. The company, if it disputes the Corporation's determination, must request a reconsideration of that determination in writing, within 45 days of the receipt of the determination. The determination of the Director will be final and binding on the company. Such determinations will not be appealable to the Board of Contract Appeals.
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> (d) Appealable final administrative determinations of the Corporation under § 400.169 (a) or (b) may be appealed to the Board of Contract Appeals in accordance with the provisions of part 24 of title 7, subtitle A, of the Code of Federal Regulations, 7 CFR part 24.

The Government's Motion for Reconsideration was filed December 3, 1999. The Government asks the Board to reconsider its decision based on three grounds. First, the Government states the reasons for the denial of its motion as (1) the absence in the record of any evidence for determining whether a letter of January 20, 1998, was intended to be an initial or final determination and (2) the lack of a basis for determining whether "may" versus "must" language created confusion or had historically been applied as a mandatory action. Second, the Government stated that a motion to dismiss

involving the same Appellant and similar issues was pending in another case. In that case, the Board had requested affidavits on "the limited issues involving the Motion to Dismiss." In the other case, the Board stated it would weigh the additional evidence to determine if the regulation has or has not been regularly and historically applied as mandatory and how the Appellant understood a piece of correspondence in that case. Third, to avoid possibility of inconsistent results on similar motions with like issues, the Government asked the Board to permit the parties the opportunity to provide affidavit evidence on the jurisdictional issue as in the similar pending case.

Appellant filed a Resistance to the FCIC's Motion for Reconsideration. Appellant opposed the Motion for Reconsideration on the ground that the majority had interpreted the language of the regulation as permitting, but not requiring a reinsurance company to seek reconsideration of an initial determination within 45 days of receipt thereof. Appellant argued that FCIC's current interpretation of the meaning of the regulation was irrelevant given the plain meaning of the language employed. Thus, argued Appellant the plain meaning of 7 C.F.R. § 400.169(b) permitted but did not require Appellant to seek a final determination from the FCIC within 45 days of the FCIC's compliance review findings, especially on matters not disclosed by the FCIC at the time of its findings, or on matters arising thereafter.

On January 25, 2000, the FCIC published in the Federal Register a revision to the General Administrative Regulations with the intended effect of clarifying the time frame in which all requests for a final agency determination must be submitted. This final rule amended 7 C.F.R. § 400.169(b) as follows:

> (b) With respect to compliance matters, the Compliance Field Office renders an initial finding, permits the company to respond, and then issues a final finding. If the company believes that the Compliance Field Office's final finding is not in accordance with the applicable laws, regulations, custom or practice of the insurance industry, or FCIC approved policy and procedure, it may request, the Deputy Administrator of Compliance to make a final administrative determination addressing the disputed final finding. The Deputy Administrator of Compliance will render the final administrative determination of the Corporation with respect to these issues. All requests for a final administrative determination must (emphasis added) be in writing and submitted within 45 days after receipt of the final finding.

Reconsideration is discretionary with the Board and will not be granted except for compelling reasons. The discovery of new evidence not discoverable during the original proceedings might provide a compelling reason. So might a clear error in the Board's decision. Reargument of positions that were taken, or could have been taken, during the original proceedings are not compelling reasons. Rain and Hail Insurance Service, Inc., AGBCA No. 97-180-R, 97-2 BCA ¶ 29,121 (citations omitted).

The Government has alleged neither newly discovered evidence nor clear error in the Board's decision. What the Government proposes is the submission of affidavit evidence to explain how the

FCIC and reinsurance companies have historically interpreted 7 C.F.R. § 400.169(b) as it existed at the time of the relevant events. The Board sought such evidence in a similar, but not identical case. In this case, similar evidence alone would not foreclose all bases on which the previous motion was denied. Further, if the evidence in the other case is contested, resolution on a motion to dismiss will be inappropriate without a hearing.

Moreover, in the meantime, FCIC has amended and clarified the regulation. Thus, evidence as to the industry understanding of the former version of the regulation would now serve a much more limited purpose.

Finally, the factual inconsistencies in the record as to whether the letters were or were not intended and understood to be initial or final determinations would remain. The inconsistencies in those letters are multiple (Findings of Fact (FF) 11 and 16 of the original ruling) and would require significant after-the-fact reconstruction to explain a matter best dealt with at hearing. Resolution of any factual issues pertaining to the "may" or "must" language of the previous regulation can be dealt with in that proceeding as well. For the reasons stated, the Board does not elect to exercise its discretion to reconsider its ruling.

RULING

The motion is denied.

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ANNE W. WESTBROOK
Administrative Judge

I Concur:

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HOWARD A. POLLACK
Administrative Judge
Issued at Washington, D.C.

Separate Dissenting Opinion by Administrative Judge HOURY.

For the reasons expressed in the dissenting portion of the Board's opinion, American Growers Insurance Company, AGBCA No. 99-134-F, 1999 WL 984394 (Oct. 28, 1999), the majority ruling is clearly erroneous. Thus, reconsideration should be granted and the appeal dismissed.

I would concur with the majority to the extent that the submission of evidence to clarify a pure question of law, the interpretation of a regulation, is unnecessary. However, I fail to see how such submission will clarify the same regulation in one case, but not in this one.

It is also clear that FCIC amended its regulation in response to the majority decision, rather than because clarification was necessary.

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EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.
May 23, 2000