

**STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

IN THE MATTER OF:

Docket No.: 23-018664

**Michigan Department of Agriculture and
Rural Development,
Petitioner**

Case No.: 0005580

Agency: MDARD

v

**Case Type: MDARD Pesticide
Licensing**

**Hilltop Fruit Trees, LLC,
Respondent**

Filing Type: Appeal

**Issued and entered
this 8th day of January 2024
by: Paul Smith
Administrative Law Judge**

PROPOSAL FOR DECISION

Procedural History

This is a proceeding held under the Insect Pest and Plant Disease Act (IPDDA), MCL 286.201 *et seq.*, in accordance with the Administrative Procedures Act (APA), MCL 24.201 *et seq.* The present matter is before this Tribunal to address whether the Michigan Department of Agriculture and Rural Development (MDARD or Petitioner) may properly withhold the certificate of inspection from Respondent Hilltop Fruit Trees, LLC (Hilltop or Respondent).

On May 3, 2023, MDARD filed a hearing request with the Michigan Office of Administrative Hearings and Rules (MOAHR) and a Statement in Support of Withholding Certificate of Inspection seeking the issuance of “a proposal for decision recommending withholding Respondent’s certificate of inspection.”

A prehearing conference was held on June 16, 2023, at which time a calendar for the proceedings was established. Hilltop filed a motion for summary disposition on August 1, 2023, which was denied by an Opinion and Order issued by the Tribunal on September 18, 2023. Both parties filed prehearing briefs on September 18, 2023. On September 22, 2023, MDARD filed a motion in limine to exclude evidence and strike witnesses. The motion in limine was granted in part in an Opinion and Order issued on September 26, 2023.

An in-person hearing was held on September 27, 2023, at the Ottawa Building in Lansing, Michigan. Administrative Law Judge Paul Smith presided. Assistant Attorney General

Danielle Allison-Yokom represented MDARD. Attorneys Stephen P. Dunn and Christopher J. Worrel of Bodman, PLC represented Hilltop. The hearing was recorded by a court reporter and a copy of the transcript was filed on October 20, 2023.

At the hearing, MDARD called Michael Philip, Elizabeth Dorman, Bryan Webster, Ph.D., and Stefanie Rhodes, Ph.D. to testify on its behalf. Hilltop called Steven Flamm and Mark Webber to testify on its behalf. At the beginning of the hearing, the parties stipulated to the admission of MDARD's exhibits 1-14, and 16-34¹ and Hilltop's exhibits A-ZZ. Hilltop's exhibit AAA was later admitted without objection (Tr., p 130). Respondent's proposed Exhibit BBB (Promega Portal Access Technical Manual) was excluded on Petitioner's relevancy objection (Tr., pp 133-134).

After the hearing, this Tribunal directed the parties to submit written closing arguments to address various legal issues raised by Hilltop. Both parties filed closing briefs and response briefs. The record closed on November 6, 2023, after the briefing was completed.

Issues and Applicable Law

The issue is whether MDARD may withhold a certificate of inspection from Hilltop based on its conclusion that Hilltop's nursery stock and nursery premises were not "apparently free from insect pests and plant diseases."

Under the IPPDA, a person "growing or desiring to sell nursery stock" in Michigan must be licensed. MCL 286.209(1). In addition to being licensed, a person "desiring to sell or give away nursery stock" in Michigan must apply for an inspection "before April 1 of each year." MCL 286.204. Without a certificate of inspection "stating that the nursery stock has been inspected and found apparently free from insect pests and plant diseases," a person may not sell nursery stock in Michigan. MCL 286.217(1).

Inspections of nurseries are governed by Section 6 of the IPPDA, which provides, in pertinent part, as follows:

- (1) The director shall cause to be inspected not less than every other year each nursery located in this state, and each nursery dealer located in this state that receives nursery stock from other states or countries, including any nursery stock found at that nursery or nursery dealer that will

¹ At the beginning of the hearing, this Tribunal stated on the record that Petitioner's "exhibits 1-33" were admitted by stipulation (Tr., p 7). This statement was based on the 33 proposed electronic exhibits that MDARD had submitted to the Tribunal in advance of the hearing. During the hearing, however, it was revealed that MDARD's exhibit book used numbers 16-34 in place of what the Tribunal had identified as exhibits 15-33 (Tr., p 66). Because the witnesses at the hearing referenced the exhibits as they were numbered in the exhibit book, those exhibit numbers will be used for the record in this matter.

be sold, offered for sale, or removed or shipped from the nursery to ascertain whether they are infested with insect pests or infected with plant diseases. Inspections of nurseries that distribute nursery stock interstate shall be conducted annually, provided those nurseries are in compliance with this act. If the director conducts an inspection under this subsection, the director shall assess an inspection fee as provided for in this section.

(2) If upon the inspection of any nursery stock the department determines that the nursery stock or nursery and its premises are apparently free from insect pests and plant diseases, and if the necessary inspection fees have been paid, the director shall give or send to the owner of the nursery or of the nursery stock or to the person in charge of the nursery or nursery stock a certificate executed by the director setting forth the fact of the inspection.

(3) Certificates of inspection are valid from November 1 in 1 year to October 31 of the following year. A nursery owner or nursery dealer may request a second inspection be performed, prior to offering for sale or removing or shipping of nursery stock from a nursery or other premises. The department shall perform the inspection if the nursery owner, nursery dealer, or applicant pays an inspection fee based upon the actual cost to the department in conducting the inspection.

(4) A person shall not sell, offer for sale, or remove or ship from a nursery or other premises any nursery stock until the nursery stock has been officially inspected and a certificate or permit covering it has been granted by the director, except that nursery stock may be shipped to the director without an inspection and certification.

* * *

[MCL 286.206.]

Under the IPPDA, “plant diseases” are defined as “fungi, bacteria, nematodes, and viruses, injurious to plants or plant products, and the pathological condition in plants or plant products caused by fungi, bacteria, nematodes, and viruses.” MCL 286.202(k).

Section 13 of the IPPDA addresses MDARD’s authority to withhold a certificate of inspection and sets forth the process by which the decision may be appealed administratively and, subsequently, in circuit court:

The commissioner of agriculture shall at any time have the power to withhold, suspend or revoke any license or certificate for sufficient cause, including any violation of this act or non-conformity with any rule or regulation promulgated under this act. Before withholding, suspending or

revoking any license or certificate, the commissioner of agriculture shall give written notice to the applicant for or holder of such license or certificate, stating that he contemplates the withholding, suspending or revocation of same and giving his reasons therefor. Said notice shall appoint a time of hearing before said commissioner and shall be mailed by registered mail to the party holding the license or certificate. On the day of hearing, the respondent may present such evidence to the commissioner as he deems fit, and after hearing all the testimony, the commissioner shall decide the question in such manner as to him appears just and right. The respondent, if he feels aggrieved at the decision of the commissioner, may appeal from said decision within 10 days to the circuit court of the county where respondent resides, and issue shall be framed in said court and a trial had and its decision shall be final, unless appeal is had to the supreme court, in which event the said appeal shall conform to the court practice of appeals in civil cases.

[MCL 286.213.]

Section 7 of the IPPDA addresses situations where MDARD's director may impose conditions on a certificate and withhold a certificate until a nursery owner accepts the conditions in writing:

If the director finds that part of a nursery is infested or infected with insect pests or plant diseases and that the remainder of it is not so infested or infected, or if he has reason to believe that a nursery is liable, by reason of its proximity to infested or infected premises, to become so infested or infected before the next inspection, he may prescribe in writing such measures of precaution, or may make in writing such conditions as to the use of his certificate as may in his judgment be necessary, and he may withhold a certificate until such conditions have been accepted in writing by the owner of the nursery; and the use of such certificate without taking such measures of precaution or observing such conditions shall subject the owner of said nursery to the penalties prescribed for violation of this act. In any case coming to the attention of the director in which a nurseryman, dealer, plant grower or agent furnishing or selling nursery stock appears to be guilty of fraudulent practice, the director shall have authority to make such investigation as he may deem proper and proceed with such prosecution as may be necessary for the protection of the interests of the buying public, and, in addition, the director may revoke his license.

[MCL 286.207.]

Exhibits

Petitioner offered the following exhibits, which were admitted in accordance with the parties' stipulation:

- Ex. 1:** Inspection Report for September and October 2022 Inspection.
- Ex. 2:** Inspection Photos from Fall 2022 Inspection.
- Ex. 3:** September 2022 Sampling Results.
- Ex. 4:** October 2022 Sampling Results.
- Ex. 5:** Map of October 2022 Sampling Locations.
- Ex. 6:** Nursery Sample Submission Procedure.
- Ex. 7:** MDARD Work Instruction: Conventional PCR & RT-PCR assay for plant pest detection.
- Ex. 8:** MDARD Work Instruction: DNA & RNA extraction using Maxwell RSC 48 – AS1600/AS1330 kit.
- Ex. 9:** Product Information: DAS-ELISA: Apple stem grooving virus (ASGV).
- Ex. 10:** Product Information: DAS-ELISA: Apple stem pitting virus (ASPV).
- Ex. 11:** 2017 Hilltop Annual Grower Inspection 2018 Season.
- Ex. 12:** 2018 Hilltop Annual Grower Inspection 2019 Season.
- Ex. 13:** 2019 Hilltop Annual Grower Inspection 2020 Season.
- Ex. 14:** 7.11.2017 Inspection Reports (2).
- Ex. 16:** 9.11.2017 Inspection Report.
- Ex. 17:** Field 1 Michigan Fruit Tree Virus Free Certification Sample Report – 6.13.2017.
- Ex. 18:** 7.30.2018 Inspection Report.
- Ex. 19:** 12.19.2018 Inspection Report.
- Ex. 20:** Michigan Fruit Tree Virus Free Certification Sample Report – 5.9.2018.

- Ex. 21:** 9.20.2019 Inspection Report.
- Ex. 22:** Michigan Fruit Tree Virus-Free Certification Sample Report – 5.14.2019.
- Ex. 23:** MDARD’s 2.27.20 Letter to Hilltop Fruit Trees, LLC.
- Ex. 24:** Hilltop Fruit Trees, LLC’s 3.3.20 Letter to MDARD.
- Ex. 25:** Myrta et al. 2011 ACLSV from Virus and Virus-like Diseases of Pome and Stone Fruits.
- Ex. 26:** Pscheidt J.W. et. al. 2023. Pacific Northwest Plant Disease Management Handbook. Apple (Malus spp.)-Latent virus Diseases.
- Ex. 27:** Spiegel 2006 Evaluation of reverse transcription polymerase chain reaction assays for detecting Apple chlorotic leaf spot virus in certification and quarantine programs.
- Ex. 28:** Hadidi 2011 Virus and Virus-Like Diseases of Pome and Stone Fruits.
- Ex. 29:** Cornell University Bulletin: Apple chlorotic leaf spot virus.
- Ex. 30:** Cornell University Bulletin: Apple stem pitting virus.
- Ex. 31:** Dr. Bryan J. Webster CV.
- Ex. 32:** Map Indicating Sampling Results.
- Ex. 33:** Elizabeth Dorman CV.
- Ex. 34:** Dr. Stefanie Rhodes CV.

Respondent offered the following exhibits, which were admitted in accordance with the parties’ stipulation, unless otherwise noted:

- Ex. A:** MDARD Facebook post dated August 23, 2023, captioned “We love Michigan apples to their core!”
- Ex. B:** Licenses issued to Hilltop Fruit Trees LLC 2004 – 2022.
- Ex. C:** Letter from MDARD to Hilltop dated February 27, 2020, re: Hilltop’s participation in the Michigan Virus-Tested Certification Program for Fruit Trees.
- Ex. D:** Letter from Hilltop to MDARD dated March 3, 2020 re: Hilltop’s voluntary withdrawal from virus-tested certification program.

- Ex. E:** Michigan Department of Agriculture and Rural Development (“MDARD”) Plant Health Inspection Report dated October 5, 2022.
- Ex. F:** Letter from MDARD to Steve Flamm dated October 20, 2022.
- Ex. G:** Test Report, date sampled 10/04/2022-10/06/2022.
- Ex. H:** Test Report, date sampled 10/04/2022-10/05/2022.
- Ex. I:** Test Report, date sampled 09/20/2022.
- Ex. J:** Letter from MDARD to Hilltop dated November 4, 2022.
- Ex. K:** Plant Health Inspection Report (Hilltop) dated October 5, 2022.
- Ex. L:** Plant Health Inspection Report (Hilltop) dated October 5, 2022, Field Photo No. 1.
- Ex. M:** Plant Health Inspection Report (Hilltop) dated October 5, 2022, Field Photo No. 2.
- Ex. N:** Plant Health Inspection Report (Hilltop) dated October 5, 2022, Field Photo No. 3.
- Ex. O:** Plant Health Inspection Report (Hilltop) dated October 5, 2022, Field Photo No. 4.
- Ex. P:** Plant Health Inspection Report (Hilltop) dated October 5, 2022, Field Photo No. 5.
- Ex. Q:** Plant Health Inspection Report (Hilltop) dated October 5, 2022, Field Photo No. 6.
- Ex. R:** MDARD’s Statement in Support of Withholding Certificate of Inspection dated May 3, 2023.
- Ex. S:** Photographs of Hilltop apple trees.
- Ex. T:** Affidavit of Mark Webber.
- Ex. U:** Curriculum Vitae of Mark Webber.
- Ex. V:** 2023 Nursery License Agreement between Hilltop and Midwest Apple Improvement Association (“MAIA”).
- Ex. W:** Treco Rootstock product tags.

- Ex. X:** American Standards Testing of Materials (“ASTM”) E1188-11, Standard Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator.
- Ex. Y:** ASTM E1492-11, Standard Practice for Receiving, Documenting, Storing, and Retrieving Evidence in a Forensic Science Laboratory.
- Ex. Z:** ASTM E1459-13, Standard Guide for Physical Evidence Labeling and Related Documentation.
- Ex. AA:** Map of Sample Set.
- Ex. BB:** Field map of Hilltop 2024 MDA Test.
- Ex. CC:** Israel, Glen, Determining Sample Size, University of Florida (1992).
- Ex. DD:** Marilyn J. Roossinck, The good viruses: viral mutualistic symbioses.
- Ex. EE:** Sinclair, et al, Diseases of Trees and Shrubs (Cornell University, 1987).
- Ex. FF:** Local Climatology Data for September 2022 and October 2022.
- Ex. GG:** Marilyn J. Roossinck, Plant Virus Metagenomics: Biodiversity and Ecology, Annual Review of Genetics, 46:1 (2012).
- Ex. HH:** Marilyn J. Roossinck, Persistent Plant Viruses: Molecular Hitchhikers or Epigenetic Elements?
- Ex. II:** Marilyn J. Roossinck, Plants, viruses and the environment: Ecology and mutualism.
- Ex. JJ:** The University of Massachusetts Amherst’s Best Management Practices (BMPs) for Nursery Crops.
- Ex. KK:** Marilyn J. Roossinck, A new look at plant viruses and their potential beneficial roles in crops 16 MOLECULAR PLANT PATHOLOGY 4, at pp 331-333 (2015).
- Ex. LL:** Rodrigo A. Valverde, Sead Sabanadzovic, and John Hammond, Viruses that Enhance the Aesthetics of Some Ornamental Plants: Beauty or Beast? Plant Disease 2012 96:5, 600-611.
- Ex. MM:** A.J. Hansen, and W.D. Lane, Elimination of Apple Chlorotic Leafspot Virus from Apple Shoot Cultures by Ribavirin, Agriculture Canada.

- Ex. NN:** Plants for Planting Manual, Animal and Plant Health Inspection Service, U.S. Department of Agriculture.
- Ex. OO:** Spiegel, Thompson, Varga, and James, An Apple Chlorotic Leaf Spot Virus Isolate from Ornamental Dwarf Flowering Almond (*Prunus glandulosa* 'Sinensis'): Detection and Characterization, HortScience 40(5):1401-1404. 2005.
- Ex. PP:** W. Jelkmann and S. Paunovic, Apple stem pitting virus.
- Ex. QQ:** International Standards for Phytosanitary Measures, ISPM No. 31, Methodologies for Sampling of Consignments (2008).
- Ex. RR:** Rootstocks, WSU Tree Fruit
- Ex. SS:** Apple latent viruses, Michigan State University.
- Ex. TT:** Apple (*Malus* spp.) – Latent Virus Diseases, Host and Disease Descriptions, Pacific Northwest Pest Management Handbook.
- Ex. UU:** Chlorosis, Focus on Plant Problems, University of Illinois Extension.
- Ex. VV:** Plant Disease, Britannica Online Encyclopedia.
- Ex. WW:** Dictionary definition of “apparently”, Meriam Webster.
- Ex. XX:** Definition, “Pathological Conditions”, MedGen.
- Ex. YY:** What Causes a Tree to Enter and Exit Dormancy? PennState Extension.
- Ex. ZZ:** Hilltop Rootstock Purchase Records
- Ex. AAA:** Maxwell RSC 48 Instrument Operating Manual (admitted without objection).

Witnesses & Summary of Testimony

The relevant testimony of the witnesses is summarized as follows:

Michael Philip: Mr. Philip is the Director of the Pesticide and Plant Pest Management Division within MDARD. He testified about the Nursery Plant Licensing Inspection program, authorized by the IPPDA, pursuant to which MDARD inspectors conduct annual or biannual inspections of nursery stock looking for signs of insect pests and plant diseases. MDARD will issue a certificate of inspection if nursery stock appears to be free of insect pests and plant diseases upon a visual inspection. In situations where symptoms of disease are present, MDARD inspectors collect samples for further laboratory testing.

Tests conducted of samples taken from Hilltop's nursery stock revealed the presence of Apple Chlorotic Leaf Spot Virus (ACLSV), which MDARD deems to be a "plant disease."

MDARD considers ACLSV to be "injurious" to apple trees because it is known to reduce yields over the life of the tree. Mr. Philip was not aware of any person from MDARD specifically notifying Hilltop, before the inspection in question, that MDARD considered ACLSV to be a "plant disease" under the IPPDA. MDARD has not promulgated any rules further defining what constitutes a "plant disease" or which specific conditions are considered to be "injurious" to plants.

Mr. Philip also testified that MDARD administers another program—different from the annual inspection program—pursuant to which a nursery may obtain a "virus-free" certificate. The virus-free certificate program is a voluntary program governed by MDARD Regulation 619, which applies different standards than the regular inspections.

Elizabeth Dorman: Ms. Dorman is the Plant Pathology Laboratory Manager at MDARD. She has a master's degree in plant pathology, which is the study of disease in plants. She also runs the "fruit tree and blueberry virus-tested certification program." Ms. Dorman previously worked as a field inspector, inspecting nurseries for MDARD. She was qualified to offer expert testimony in plant pathology and laboratory diagnostic techniques. Ms. Dorman testified that, to determine whether a particular virus or bacteria constitutes a "plant disease" under the IPPDA, she relies in part on published compendiums, scientific papers, and considers what is regulated by the USDA, the European Union, Australia, and other countries.

Ms. Dorman testified that MDARD's Regulation 619 applies to a voluntary program pursuant to which nurseries could sell stock with a "value-added stamp of Michigan virus tested." To sell nursery stock in some countries, such as Canada, participation in a virus-tested certification program is required. Under the program, MDARD conducts two annual inspections of the "mother block" of trees, which are the source material for nursery stock. If a virus is detected in the mother block, then the tree must be removed and destroyed and cannot be used for future scionwood. (Scionwood is a young stick with buds that is removed from a tree in the mother block and grafted onto rootstock to be sold as a new tree.) Hilltop participated in the "virus-tested certification program" under Regulation 619 in 2018 and 2019 but was not eligible to participate after 2019 because viruses were found in the mother block for two years in a row. Ms. Dorman testified that, contrary to Respondent's argument, MDARD had not changed its position on ACLSV between 2018 and 2022. MDARD instructed Hilltop to remove trees with ACLSV from its mother block in 2018 and 2019.

Referencing Exhibit 25, Ms. Dorman testified that she believes ACLSV is "injurious" to apple trees because of the documented yield loss in trees with the virus present. Oregon and California screen scionwood for ACLSV. The USDA regulates ACLSV from coming into the United States.

Ms. Dorman helped MDARD staff with the inspection of Hilltop in September 2022. She saw prevalent chlorotic leaf spots on the leaves of the apple trees there. Based on her observations, she suggested that samples be collected for testing. The purpose of collecting samples was to verify visual observations indicating the presence of ACLSV, as it was also possible that the spots could have been caused by the weather or by pesticides. She collected three samples in September 2022, all of which tested positive for ACLSV. Based on these findings, MDARD returned to Hilltop in October 2022 to collect more samples for testing.

Ms. Dorman testified that she collaborated on and gave final approval to a document called "Nursery Sample Submission Procedure," which outlined the instructions for how and when to collect samples for testing and how to transfer samples to the laboratory. The document was admitted as Exhibit 6. She identified the tool MDARD used to extract DNA from the samples as a Promega Maxwell RSC48.

Bryan Webster, Ph.D.: Dr. Webster is a Plant Health Inspector for MDARD. He has a doctorate degree in plant pathology from the University of Wisconsin. He was qualified to offer expert testimony in the areas of plant diseases and plant inspections. He testified that a plant disease occurs when a causal agent affects a plant in a negative way. ACLSV is a virus that can reduce fruit yield and quality over time. It can also make a graft union susceptible to other pathogens. Spots on leaves caused by ACLSV can reduce the chlorophyll in the leaf. ACLSV is a latent virus that can be present and asymptomatic for a period of time before later expressing symptoms. Its presence is "injurious" because, under a suitable environment, it will cause injury to the tree.

Dr. Webster was present for the October 2022 inspection of Hilltop. He saw two distinct virus symptoms during his inspection: yellow chlorosis that looked to be apple mosaic virus and greyish white spots indicative of ACLSV. He observed symptoms of ACLSV on trees in every row he walked at Hilltop, which covered at least 75% of the total area. Dr. Webster collected samples for laboratory testing. He did so by removing leaves, bagging them, and labelling the location using a GPS application. The purpose of the sampling and testing was to diagnostically confirm the visual observations. Although MDARD only sampled leaves from 143 of the hundreds of thousands of trees at Hilltop, Dr. Webster explained that it was not necessary for MDARD to sample a statistically significant sample size. MDARD was not trying to generate data for a statistical analysis but instead was only taking samples for the purpose of diagnostically confirming visual symptoms.

Based only on his visual observations, without any laboratory testing, Dr. Webster could not determine that Hilltop's stock and premises were "apparently free of insect pests and plant disease."

Stefanie Rhodes, Ph.D.: Dr. Rhodes is a laboratory scientist working in the plant pathology laboratory for MDARD. In her education and work experience she has extensive experience doing DNA testing, using ELISA (enzyme-linked immunosorbent

assay) and PCR (polymerase chain reaction). She was qualified to testify as an expert in sampling for plant diseases, ELISA and PCR testing, and laboratory procedures. Dr. Rhodes explained the process MDARD's laboratory uses to extract and diagnose DNA from plant material. She explained that if a sample is not preserved appropriately, then it could degrade, meaning that the pathogen would die, which could prevent her from finding anything that would allow for a determination about what might have been causing the symptoms. In other words, waiting too long to perform a test could produce a false negative result. It would not be likely to result in a false positive.

Dr. Rhodes was part of the team that gathered samples from Hilltop in September 2022. She testified that she observed "a lot of leaf spots and chlorotic symptoms" at Hilltop. The process for collecting samples was to pick three leaves, seal them in a ziplock bag, and place the bag in a cooler to be transported back to the MDARD laboratory where they were placed in a refrigerator. Using the PCR testing method, all three samples collected in September 2022 tested positive for ACLSV. Using the same methodology, Dr. Rhodes also conducted the analysis on the 143 samples collected from Hilltop in October 2022. As a result of her analysis, she concluded that ACLSV was present at Hilltop.

Steven Flamm: Mr. Flamm is the owner of Hilltop. Hilltop is licensed by the State of Michigan to sell apple trees. Hilltop raises apple trees for commercial growers on 320 acres near Hartford, Michigan. Every year, approximately 35 acres are used for nursery stock. Hilltop produces its stock by purchasing and planting rootstock and then grafting scionwood onto the rootstock. Hilltop's scionwood is either taken from its scionwood orchard (mother trees) or purchased from other nurseries. In October 2022, Hilltop had over 417,000 apple trees in 20 varieties. MDARD has done a visual inspection of Hilltop every year.

Mr. Flamm testified about Hilltop's management practices and opined that Hilltop is doing all it can do to produce the best apple trees on the market. Based on his many years of experience raising apple trees, Mr. Flamm testified that curling leaves and spotting in the fall is normal and not necessarily an indication of a plant disease.

Relying on Exhibit D, Mr. Flamm testified that Hilltop voluntarily withdrew from MDARD's Virus-Tested Certification Program on March 3, 2020. Hilltop withdrew from the program because it could not meet MDARD's standard for the program due to the presence of ACLSV in its scionwood. He denied ever seeing MDARD's February 27, 2020, letter (Exhibit 23) which stated that Hilltop would no longer be eligible for the program because Hilltop had not removed trees that had tested positive for ACLSV.

Mr. Flamm testified that he did not learn that ACLSV could be a problem until October 2022, after MDARD had done their first inspection and tests. Mr. Philip called him and told him that MDARD was going to have to withhold Hilltop's inspection certificate because of the test results. Until then, Mr. Flamm was not aware that MDARD considered ACLSV to be injurious to apple trees. He testified that, in his view, MDARD absolutely

should have notified Hilltop—before October 2022—that it considered ACLSV to be injurious to apple trees.

Mark Webber: Mr. Webber is an arboriculture and horticulture consultant. He was qualified to testify as an expert on plant diseases. Hilltop engaged Mr. Webber to investigate MDARD's claims against Hilltop. He testified that the viruses MDARD allegedly found in the Hilltop samples were "latent," which means that they do not cause symptoms and they are "not commercially a problem." ACLSV will only affect a plant that is under stress. A tree with ACLSV that is properly cared for may "go on for decades without a problem." Hilltop follows best management horticulture practices. Mr. Webber could not find evidence of any incident in the modern day where the latent viruses identified by MDARD caused a "catastrophic loss of an apple crop." A latent virus is not economically significant if it does not economically damage the crop. Because ACLSV is a latent virus, which will stay dormant while the plant is in good health, the easiest way to manage it is to keep the plant in good health. Mr. Webber could not find any peer-reviewed material showing that latent viruses in the types of apple trees grown at Hilltop reach an "economic threshold" that would prevent them from being sold. He criticized MDARD's conclusion that ACLSV and the other latent viruses are injurious to apple trees as being untested by peer-reviewed science. He opined that MDARD was making a forecast about the life expectancy of trees "without any knowledge of how the tree was managed or cared for" and without considering the varietal differences between different types of apples (all of which may act differently). No peer-reviewed study ever done in the United States has shown that the latent viruses identified by MDARD cause catastrophic loss of apple trees. In sum, ACLSV is harmless to a well-managed apple tree.

Mr. Webber opined that MDARD needed to test samples from at least 400 trees "to have a finding that's scientifically valid." He also questioned whether MDARD maintained an appropriate "chain of custody" from the nursery to the laboratory. Among other things, he explained that the inspectors should have been wearing latex gloves and that they should have frozen the samples immediately to lock in the DNA. He also testified that he had been taught that a failure to flash freeze a sample could result in a false positive. Without photographs documenting how each leaf was collected and who handled what, there is no way to rule out cross contamination. He asserted that MDARD should have presented video evidence of the technicians working in the laboratory to substantiate their testimony about the process. Instead, all we can do is trust MDARD at its word. Cross contamination is a risk because there is no way to know if the inspectors sterilized their cars or the coolers that they used to transport the leaves for testing.

Findings of Fact

Based on the entire record in this matter, including the witness testimony and the admitted exhibits, the following findings of fact are established:

1. Respondent Hilltop, located near Hartford, Michigan, is a nursery licensed under the IPPDA. Hilltop raises apple trees to sell to its customers. (Testimony of Steven Flamm).
2. In October 2022, Hilltop's nursery had over 417,000 apple trees in 20 varieties. (Tr., 247).

2022 Annual Inspection

3. Pursuant to the IPPDA, MDARD conducted an annual inspection of Hilltop on September 20, 2022. Elizabeth Dorman and Thomas Jepsen were part of the MDARD inspection team. (Tr., pp 93, 218; Exhibits 1 & 3).
4. During the September 20, 2022, inspection, the MDARD team observed "several different kinds of virus symptoms" on the apple trees, including yellow mosaic patterns and chlorotic white spots on the leaves. The chlorotic white spots were prevalent. (Tr., p 93).
5. During the September 20, 2022, inspection, Thomas Jepsen collected leaves from three separate apple trees for testing at the MDARD laboratory. Using conventional PCR (polymerase chain reaction) analysis, ACLSV was detected in all three samples. Using ELISA (enzyme-linked immunosorbent assay) test kits, apple mosaic virus and apple stem pitting virus were detected in one sample and apple stem grooving virus was detected in another. (Tr., p 117, 218; Exhibit 3.)
6. Based on the positive test results, MDARD returned to Hilltop to continue the inspection and gather additional samples on October 4-5, 2022. Thomas Jepsen and Bryan Webster were part of the MDARD inspection team for the October inspection. (Tr., pp 157, 221; Exhibits 1 & 4.)
7. During the October 4-5, 2022, inspection, the MDARD team observed yellowish chlorosis in a pattern on leaves that looked like apple mosaic virus and grayish-white spots on leaves that were indicative of ACSLV. Dr. Webster testified credibly that he saw the grayish-white spots on leaves in every row of trees in the field, or approximately 75% of the trees. (Tr., pp 157-158, 161).
8. During the October 4-5, 2022, inspection, MDARD's inspectors looked at each different cultivar block of trees on Hilltop's premises. (Tr., p 182).
9. Based only on his visual inspection of Hilltop on October 4-5, 2022, Dr. Webster could not determine that the nursery stock or premises were "apparently free from insect pests and plant diseases." (Tr., pp 180, 183.)
10. Given the visual indications of plant disease, and the potential that withholding a certificate of inspection from Hilltop would result in monetary loss, MDARD's

inspection team decided to conduct laboratory testing to confirm, diagnostically, the presence of plant disease within Hilltop's nursery stock. (Tr., pp 156, 161, 164, 168, 183).

11. During the October 4-5, 2022, inspection, the MDARD team collected 143 samples for testing from 19 different varieties of apple tree. Pursuant to MDARD's "Nursery Sample Submission Procedure," the team removed leaves, placed them in sealed bags, labelled the bags, used a GPS app to identify the location in the field where the individual samples were taken, and then placed the sealed bags in a cooler for transport back to the MDARD laboratory. (Tr., pp 108-109, 162-163, 207; Exhibits 1, 4, & 6.)
12. Proper preservation of the samples is necessary to prevent them from becoming degraded, which could cause the pathogen to die, or disappear, which would prevent the PCR testing from detecting its presence. While a failure by MDARD in properly preserving the samples for testing might have resulted in a false negative, it would not be likely to result in a false positive. (Tr., pp 111, 197-198, 200-201, 217, 232.)
13. Of the 143 samples collected at Hilltop in October 2022, 85% tested positive for ACLSV based on PCR analysis (including samples from each of the 19 varieties tested) and 15% tested positive for apple stem pitting virus based on ELISA analysis. (Exhibits 1 & 4).
14. The PCR analysis on the samples collected at Hilltop in both September 2022 and October 2022 was conducted by Stefanie Rhodes, Ph.D. (Tr., pp 207-209).
15. Based on Dr. Webster's observations and the results of the laboratory testing, ACLSV was prevalent in the apple trees at Hilltop.
16. ACLSV is a latent virus in apple trees, meaning that it can be present and asymptomatic for a period of time before expressing symptoms when certain conditions or a suitable environment are present. ACLSV is more likely to remain latent and unharmed in an apple tree that is well cared for, or properly managed, and not subjected to stress. (Tr., pp 88-89, 155, 179-180, 308-310; Exhibit T, ¶ 9; Exhibit 26; Exhibit 29.)
17. ACLSV in apple trees has not been shown to result in a catastrophic loss of an apple crop. Over time, however, it may cause yield loss and reduce fruit quality. Up to 30% reduction in yield has been reported for ACLSV in combination with other latent viruses. ACLSV can also cause "top-working disease," and sometimes will "make the graft union susceptible to other pathogens." (Tr., pp 91-92, 154-155, 313, 335; Exhibit 26; Exhibit 28; Exhibit 29.)

18. The Country of Canada restricts the importation of apple trees with ACLSV. (Tr., pp 267-269, 285).
19. On November 2, 2022, Dr. Webster, the lead investigator for MDARD, notified Hilltop by email that “MDARD cannot certify the firm’s nursery stock to be apparently free from insects, pests, and plant diseases.” Dr. Webster further notified Hilltop that, pursuant to its decision not to issue an inspection certificate, Hilltop “may not sell, offer for sale, or ship any nursery stock from the field.” (Exhibit 1).
20. On May 3, 2023, MDARD filed with MOAHR a “Statement in Support of Withholding Certificate of Inspection,” pursuant to which it notified Hilltop of its right to a hearing under the IPPDA to contest MDARD’s decision to withhold a certificate of inspection from Hilltop.

Hilltop’s Prior Participation in Virus-Tested Certification Program

21. Separate and apart from the inspections required under the IPPDA, MDARD also runs a voluntary program called the “Michigan Virus-Tested Certification Program” (MVTC Program) pursuant to which participating apple tree nurseries could advertise their nursery stock as “Michigan Virus-Tested Trees.” (Exhibit 23; Tr., pp 83, 98-99.)
22. Hilltop participated in the MVTC Program from 1979 until March 3, 2020. (Tr., p 274; Exhibit 24).
23. Under the MVTC Program, MDARD inspectors would conduct two annual inspections of the “mother block” of trees. The mother block trees are the trees that remain at the nursery from which the scionwood is grown. Scionwood is bud material that is removed from the mother block tree and grafted onto rootstock to create a new nursery tree for sale. (Tr., pp 78-85.)
24. MDARD employees have administered the MVTC Program according to rules set forth in “Regulation No. 619. Fruit Tree, Scionwood, Understock, and Nursery Stock,” which appears in the Administrative Code at Mich Admin Code, R 285.619.1 *et seq.* (Tr., pp 61, 78-82, 98-99).
25. Under the MVTC Program, one-third of Hilltop’s mother block trees were inspected each year. (Tr., pp 79-80, 82).
26. During an inspection of Hilltop’s mother block trees conducted in 2018, MDARD identified 44 positive results for ACLSV. Under the MVTC Program, the 44 trees found to be infected with ACLSV were supposed to have been cut down and removed from the mother block. The remaining trees in the mother block that did

not test positive for ACLSV could then be used for future scionwood. (Tr. pp 81-82; Exhibits 19 & 20.)

27. During an inspection of Hilltop's mother block trees conducted in 2019, MDARD identified 66 positive results for ACLSV. (Tr. pp 82-83; Exhibits 21 & 22.)

28. On February 27, 2020, MDARD notified Hilltop that it was no longer eligible to participate in the MVTC Program and that its fruit trees could no longer be advertised as "Michigan Virus-Tested Trees." MDARD removed Hilltop from the MVTC Program because (1) ACLSV was found for the second year in a row and (2) positive trees that were identified in the May 2019 inspection still remained in the mother block during the September 2019 inspection. The notification letter from MDARD further advised Hilltop that the virus-positive trees could not be used for scionwood and propagation, and any untested trees "would be subject to routine scionwood inspections for the domestic market." (Tr., pp 82-83; Exhibit 23.)

29. On March 3, 2020, Hilltop sent a letter to MDARD notifying MDARD that Hilltop had decided to "voluntarily withdraw from participation" in the MVTC Program. (Exhibit 24).

30. Between 2018 and 2022, MDARD did not change its position on the question whether ACLSV is a "plant disease" under the IPPDA.

Conclusions of Law

I. Preliminary Legal Issues

In its closing brief, Hilltop made a number of legal arguments challenging MDARD's exercise of power in this matter. These arguments are addressed, in turn, below:

A. *Regulation 619 did not govern the inspection at issue.*

Hilltop argues that MDARD's actions are invalid because it failed to follow the requirements of Regulation 619. MDARD counters that Regulation 619, Mich Admin Code, R 285.619, only applies to the MVTC Program that Hilltop voluntarily withdrew from in 2020.

At the hearing, Mr. Philip and Ms. Dorman both testified that Regulation 619 is understood within MDARD to be applicable only to the separate MVTC Program. Their testimony is consistent with the language of Regulation 619, which expressly applies only to the certification of "scionwood," see Mich Admin Code, R 285.619.1, and which permits a nursery to sell scionwood under a certification that it is "Michigan Certified Virus-Free Scionwood," Mich Admin Code, R 285.619.2(2). Annual inspections under the IPPDA, by contrast, apply to all parts of the tree and to the nursery premises. See MCL 286.202(h) & MCL 286.206(2). If Regulation 619 were meant to apply to all nursery inspections of

apple tree nurseries under the IPPDA, then its terms would not be expressly limited only to “scionwood” (which is the bud material removed from a mother tree to be grafted on to rootstock for sale as a new tree). Additionally, annual inspections under the IPPDA, which determine whether the nursery stock is “apparently free from insect pests and plant diseases,” result only in a certificate allowing for the sale of nursery stock within Michigan (without the additional “virus-fee” certification available under Regulation 619). See MCL 286.206(2) & MCL 286.217(1).

The fact that Michigan Compiled Laws lists Regulation 619 as being among the “administrative rules” noted under Section 6 of the IPPDA, as Respondent points out, does not establish that Regulation 619 was meant to cover all inspections conducted under that section. The reference is merely an annotation and is not meant to be authoritative on the scope of the regulation.

Hilltop also argues that Regulation 619, which was promulgated in 1979, could not have been intended for the MVTC Program because it predates the MVTC Program. This argument is not supported by the record. The evidence at the hearing established that Hilltop participated in the MVTC Program from 1979 until 2020. The fact that the legislature, in 2022, enacted a new statute within the IPPDA applicable to MVTC Program, see MCL 286.217a, does not change the fact that the MVTC Program had already been in place, by rule, since 1979.

B. *MDARD’s actions were authorized by the IPPDA without the need for promulgation of an administrative rule.*

MDARD contends that its authority both to conduct the inspection of Hilltop’s nursery premises and to withhold the certificate of inspection comes directly from the IPPDA itself without the need to be further governed by an administrative rule set. Hilltop argues, on the other hand, that MDARD cannot act under the IPPDA alone without first promulgating administrative rules to establish the substantive standards controlling inspections and certification.

As set forth above in the “Issues and Applicable Law” section, the plain language of the IPPDA clearly gives MDARD the authority to conduct inspections and to withhold certification. Hilltop’s position is that MDARD’s exercise of the broad authority granted by the IPPDA must be further refined by administrative rules informing the public how nursery inspections are to occur and what processes must be followed by MDARD when conducting inspections. Notably, the IPPDA does not mandate that MDARD promulgate rules governing the execution of its duties under the IPPDA. Section 23a of the IPPDA states only that that MDARD “*may* promulgate rules to implement this act...” MCL 286.223a (emphasis added). The word “*may*” is permissive, not mandatory. By contrast, in other instances, the legislature has employed the construction “*shall* promulgate” to require the promulgation of administrative rules. See, e.g., MCL 30.419(2); MCL 32.507;

MCL 52.205a(2); MCL 125.485a(4); MCL 208.1513(2); MCL 324.3508; MCL 333.5747; MCL 445.313(c) (emphasis added).

Administrative agencies “need not always promulgate rules to cover every conceivable situation before enforcing a statute.” *Dep’t of State Compliance and Rules Div v Michigan Educ Ass’n-NEA*, 251 Mich App 110, 121 (2002). Where the statutory language is sufficiently specific to guide the agency’s action, further delineation is not necessary. *Id.* at 121-122. Here, among other things, the statutory language in the IPPDA defines key words (MCL 286.202), describes in detail the scope of MDARD’s authority to inspect (MCL 286.203), explains when a person desiring to sell nursery stock must apply for an inspection (MCL 286.204), sets forth the minimum number of annual inspections (MCL 286.206(1)), sets the standard for the issuance of a certificate of inspection as being “apparently free from insect pests and plant diseases” (MCL 286.206(2)), sets forth the dates for which a certificate of inspection remains valid (MCL 286.206(3)), sets forth the consequences for failing to have a certificate of inspection (MCL 286.206(4) & MCL 286.217), gives the director authority to charge an inspection fee (MCL 286.206(6)), specifies limitations and conditions that the department may put on a certificate of inspection (MCL 286.207), sets forth the appeal rights of a person from whom a certificate of inspection is withheld (MCL 286.213), and prescribes penalties for violations of the act (MCL 286.226). Given the detail set forth in the IPPDA itself, and the lack of mandatory language requiring the promulgation of rules, this Tribunal concludes that no additional administrative rules were necessary to guide MDARD’s implementation of the IPPDA.

Relying on MCL 24.207, which defines “rule” under the APA, Hilltop argues that MDARD’s decisions about how it implements the IPPDA are, in fact, rules that must be promulgated according to the procedures set forth in the APA. These include MDARD’s decision to include laboratory testing in its inspection process and its interpretation of the statutory definition of “plant diseases” to determine which viruses are deemed “injurious” to plants. In the view of the undersigned ALJ, MDARD’s actions taken under the authority of the IPPDA were not rules as defined by the APA and, therefore, did not required promulgation under the APA.

1. MDARD was not required to promulgate a rule allowing it to conduct laboratory tests as part of its inspection process.

The standard for issuing a certificate of inspection is whether the nursery stock and nursery premises are “apparently free from insect pests and plant diseases.” MCL 286.206(2). Dr. Bryan Webster, the lead investigator for MDARD, testified credibly that he saw the grayish-white spots on leaves in every row of trees in the field, or approximately 75% of the trees. Thus, based on his visual inspection of Hilltop on October 4-5, 2022, Dr. Webster could not determine that the nursery stock or premises were “apparently free” from insect pests and plant diseases, as would be required for the issuance of a certificate of inspection. Thus, under the language of the IPPDA, MDARD would have been entitled to withhold the certificate based on its visual inspection alone.

Recognizing the significance of a decision to withhold the certificate of inspection, MDARD took the additional step of laboratory testing to confirm, diagnostically, that a plant disease was indeed the cause of the visual symptoms present on the nursery stock. Nothing in the IPPDA precludes MDARD from using laboratory tests to confirm its conclusions arising from visual observations. In the view of this Tribunal, the fact that MDARD decided to confirm its visual inspection with lab testing—which could only have helped Hilltop by excluding plant disease as the cause of the symptoms observed during the visual inspections—should not render its actions taken pursuant to the statute invalid.

2. MDARD was not required to promulgate a rule clarifying that ACLSV is a “plant disease” under the IPPDA.

With respect to Hilltop’s argument that MDARD was required to promulgate a rule further illuminating its interpretation of the phrase “plant diseases” under the IPPDA, this Tribunal notes that the IPPDA already contains a statutory definition: “Plant diseases” are “fungi, bacteria, nematodes, and viruses” that are “injurious to plants or plant products...” MCL 286.202(k). An agency has the authority to interpret statutes that it enforces. See *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 240 (1993). Thus, MDARD has the authority to interpret the word “injurious” within the definition of “plant diseases,” and use that interpretation to determine which viruses are “plant diseases.” Because the legislature has already described the circumstances under which a virus constitutes a “plant disease,” it would be impractical and unnecessary to require MDARD to promulgate a rule specifically listing every conceivable individual type of fungi, bacteria, nematode, or virus that constitutes a “plant disease.”

C. MDARD did not change its position on ACLSV and, therefore, was not required to notify Hilltop of any change in its position.

Hilltop argues that between 2018 and 2022, MDARD changed its position on whether ACLSV is a “plant disease” under the IPPDA and that it was, therefore, required to notify Hilltop of its new position. Hilltop has failed, however, to demonstrate that MDARD ever changed its position on the question whether ACLSV is a “plant disease” under the IPPDA. To the contrary, the evidence supports a conclusion that MDARD understood ACLSV to be a “plant disease” in both 2018 and 2022.

Hilltop’s argument is based on the facts that (1) MDARD’s inspections under the MVTC Program in 2018 and 2019 identified ACLSV in Hilltop’s mother block trees and (2) despite this knowledge, MDARD did not withhold a certification of inspection from Hilltop in 2018 or 2019. From this apparent discrepancy, Hilltop infers that MDARD must not have considered ACLSV to be a “plant disease” at the time it conducted the 2018 and 2019 inspections under the MVTC Program. Hilltop’s inference is contradicted by the fact that, under the MVTC Program, Hilltop was supposed to have removed the infected trees from the mother block so that they could not be used for future scionwood. When MDARD discovered that trees identified as infected with ACLSV had not been removed from the

mother block as required, MDARD notified Hilltop that it would no longer be eligible to participate in the MVTC Program. These facts demonstrate that MDARD considered ACLSV to be a “plant disease” in 2018 and 2019. Therefore, the record does not support Hilltop’s argument that MDARD’s position on ACLSV changed between 2018 and 2022.

II. Application of Section 6 of the IPPDA

Hilltop argues that ACLSV is not a “plant disease” under the IPPDA, that MDARD’s laboratory tests were not reliable, and that, under the circumstances, nothing in the IPPDA gave MDARD authority to withhold the certificate of inspection.

A. *ACLSV is a “plant disease” under the IPPDA.*

Under the IPPDA, “plant diseases” are defined as “fungi, bacteria, nematodes, and viruses, injurious to plants or plant products, and the pathological condition in plants or plant products caused by fungi, bacteria, nematodes, and viruses.” MCL 286.202(k). The word “injurious” is not defined in the IPPDA. Before the hearing, Hilltop argued in its motion for summary disposition that “injurious” should be interpreted according to its dictionary definition to mean “harmful, hurtful, or detrimental, as in effect.” (Respondent’s Motion for Summary Disposition and Brief in Support, p 15). MDARD does not disagree with this common-sense interpretation of the word.

The record demonstrates that ACLSV is “harmful, hurtful, or detrimental” to apple trees. As set forth above in the Findings of Fact, MDARD’s evidence established that, over time, ACLSV may cause yield loss and reduce fruit quality. Up to 30% reduction in yield has been reported for ACLSV in combination with other latent viruses. ACLSV can also cause “top-working disease,” and sometimes will “make the graft union susceptible to other pathogens.” MDARD also established that Canada restricts the importation of apple trees with ACLSV.

Relying on Mark Webber’s testimony, Hilltop argues that ACLSV remains latent and does not present any economically significant problems (i.e., a “catastrophic loss of an apple crop”) in well-managed trees that are not subjected to stress. Because Hilltop uses best management practices, it argues that the ACLSV present in its apple trees should not be deemed to be “injurious” to those trees. There are two problems with Hilltop’s arguments. First, nothing in the statutory definition of “plant disease” establishes an “economic significance” standard for evaluating whether a virus is “injurious” to a plant. There is no “economic threshold” set forth in the IPPDA. A virus need not cause a “catastrophic loss” or any commercial problem to meet the definition of a “plant disease” under the IPPDA. It only needs to be shown to be “injurious” to the plant. See MCL 286.202(k). Second, because the purpose of an annual certification is to allow nurseries to sell their nursery stock to third-party customers, Hilltop’s specific management practices are not relevant to the question whether ACLSV is “injurious” to apple trees. While the ACLSV may remain latent in apple trees that are well-cared for by Hilltop, it is conceivable that not all of

Hilltop's customers will use best management practices. If the apple trees that Hilltop sells are later subjected to stress, then the harmful consequences of ACLSV could be manifested in those trees. This problem would not exist with virus-free trees.

B. *MDARD's sampling methods and laboratory tests were reasonably reliable.*

Hilltop has made a number of arguments based on alleged defects in MDARD's sampling and testing methodology. As set forth below, Hilltop's arguments against the reliability of MDARD's sampling and testing are not persuasive.

1. MDARD's Use of the Promega Maxwell RSC 48

MDARD used a Promega Maxwell RSC 48 to extract the DNA from the leaf samples taken from Hilltop's premises. The operating manual for the instrument, which was admitted into evidence as Exhibit AAA, states that: "The Maxwell RSC 48 Instrument is for research use only" (Exhibit AAA, p 6). Without offering any further explanation or evidence in the record, Hilltop argues that the disclaimer in the operating manual renders the results unreliable. At the hearing, both Ms. Dorman and Dr. Rhodes testified credibly that the purpose for which the machine is used will not change the results obtained by testing DNA extracted by the machine (Tr., pp 138, 203). Accordingly, MDARD's use of the Promega Maxwell RSC 48 did not render the test results unreliable.

2. MDARD's Sampling & Testing Procedures

Relying on Mr. Webber's affidavit, Hilltop argues that MDARD failed to follow the sampling and testing standards described by the American Standards Testing of Material (ASTM) and that Hilltop's destruction of the samples during testing precluded the possibility of Hilltop conducting its own separate tests on the samples collected by MDARD (Exhibit T, ¶ 21-22). Nothing in the record or the law establishes that MDARD was required to comply with ASTM methodologies. Instead, MDARD followed its own sampling and testing protocol, which was specifically designed by MDARD to instruct its employees how to properly collect, transport, and test samples taken from nurseries (Exhibit 6; Tr., pp 108-109). Moreover, while Hilltop may not have been able to re-test the leaf samples destroyed during MDARD's testing process, nothing precluded Hilltop from testing other leaves taken from the same trees.

Mr. Webber speculated at the hearing that MDARD's failure to flash freeze the samples could have resulted in both false negatives and false positives. He did not explain how the failure to flash freeze would result in a false positive test for ACLSV, but instead merely testified that he had been "trained and told" that false positives are possible (Tr., p 328). On the other hand, Dr. Rhodes testified credibly that a failure to properly preserve samples, causing them to degrade, might result in a false negative, but likely would not result in a false positive (Tr., pp 200-201, 217, 232.)

For these reasons, this Tribunal has no basis to conclude that MDARD's sampling and testing procedures rendered the test results unreliable.

3. Other Possible Causes of Spots on Leaves

In its closing brief, Hilltop has argued that other conditions—apart from ACLSV—could have caused leaves on its nursery stock to develop spots. The possibilities put forth by Hilltop include nutrient deficiencies or Hilltop's application of defoliants to the trees. Based on these other possible causes, Hilltop contends that MDARD's testing would not be able to isolate the cause of any observed spots on the trees. It is not clear, however, how these facts call MDARD's laboratory tests into question. The goal of MDARD's inquiry was not to determine, specifically, what caused spots to develop on the leaves, but instead to confirm the presence of ACLSV. Whether or not ACLSV caused the leaves to develop spots, the laboratory tests confirmed the presence of ACLSV.

4. Sample Size

Relying on Mark Webber's affidavit and testimony, Hilltop argues that MDARD did not test a significantly significant sample size of leaves to conclude that Hilltop's certificate of inspection should be withheld (Exhibit T, ¶ 20). There is no requirement in the IPPDA that *any* samples be laboratory-tested for viruses. Based on its visual inspection of Hilltop's nursery stock, including every cultivar block, which identified symptoms of plant disease on 75% of the trees, MDARD's inspectors could not conclude that the premises was "apparently free from insect pests and plant diseases." MDARD tested 143 samples only to confirm the presence of the virus indicted by its visual observations. Accordingly, Hilltop's argument about the sample size used for laboratory testing is not relevant.

C. MDARD had "sufficient cause" to withhold the certificate of inspection from Hilltop based on the results of its inspection.

Relying on MCL 286.213, Hilltop argues that MDARD lacks authority to withhold a certificate of inspection because MDARD has not alleged a violation of the IPPDA or non-conformity with any rule or regulation promulgated under the IPPDA. Hilltop is correct that MDARD has not alleged a violation of the IPPDA or non-conformity with any rule or regulation (given that no applicable rule or regulation exists). That does not mean, however, that MDARD lacks legal authority to withhold a certificate of inspection. The statute allows MDARD to withhold a certificate of inspection "for sufficient cause, including any violation of this act or non-conformity with any rule or regulation promulgated under this act." See MCL 286.213. The key, then, is the existence of a "sufficient cause." While a violation of the IPPDA would be included as a "sufficient cause," the statute does not state that a violation of the IPPDA or non-conformity with a regulation are the only possible sufficient causes. Rather, they are simply listed as being included within possible sufficient causes.

Based on the plain language of MCL 286.206(1) and (2), the apparent infestation of nursery stock with insect pests or plant diseases also provides a “sufficient cause” for withholding a certificate of inspection. Subsection (1) clarifies that the purpose of an annual inspection is to “ascertain” whether nursery stock intended for sale is “infected with insect pests or infected with plant diseases.” See MCL 286.206(1). Subsection (2) clarifies that a certificate of inspection will be provided only if, upon inspection, “the nursery stock or nursery and its premises are apparently free from insect pests and plant diseases.” See MCL 286.206(2). Pursuant to this language, no violation of the IPPDA is required for MDARD to withhold a certificate. Rather, the certificate of inspection may be withheld unless the nursery stock or nursery and its premises are “apparently free” from “insect pests and plant diseases.” *Id.*

Here, based on MDARD’s two visual inspections of Hilltop’s nursery stock and premises in September and October of 2022, as confirmed by subsequent laboratory testing, ACLSV was prevalent in the nursery stock at Hilltop. Because ACLSV is “injurious” to apple trees, it is a “plant disease” under MCL 286.202(k). Therefore, MDARD had sufficient cause to withhold the certificate of inspection from Hilltop.

Proposed Decision

For the reasons set forth above, the undersigned proposes that the Director of MDARD withhold Hilltop’s 2022 certificate of inspection.



Paul Smith
Administrative Law Judge

Exceptions

The parties may file Exceptions to this Amended Proposal for Decision on Reconsideration within twenty-one (21) days after it is issued and entered. An opposing party may file a Response to Exceptions within fourteen (14) days after initial Exceptions are filed (see computation of filing time at Mich Admin Code, [R 792.10104](#)). For any Exceptions and Responses to Exceptions, a party must:

- 1) State the **case name and docket number** as shown on the first page of this Proposal for Decision;

2) File with the Michigan Office of Administrative Hearings and Rules-General Adjudication, by **e-mail (preferred)**: MOAHR-GA@michigan.gov; **fax**: 517-763-0148; **regular mail**: MOAHR-GA, P.O. Box 30695, Lansing, Michigan 48909-8195; or **overnight carrier delivery (UPS, FedEx, DHL)**: MOAHR-GA, c/o Department of Licensing and Regulatory Affairs, Mail Services, 2407 N. Grand River Avenue, Lansing, Michigan 48906; and

3) **Serve a copy on all parties** to the proceeding at the email/regular mail addresses shown on the attached Proof of Service.

Notice to Agency to Provide MOAHR with Subsequent Agency or Court Orders

The state agency that is a party to this matter, and/or referred this matter to MOAHR, shall serve MOAHR with any subsequent orders entered as a result of this ALJ's decision or proposed decision, including but not limited to the agency's final order, order to remand the matter to MOAHR for further proceedings, or order on appeal, as soon as practicable following entry of the order to:

Michigan Office of Administrative Hearings and Rules, General Adjudication, by **email (preferred)** to: MOAHR-GA@michigan.gov; or **by regular mail** to: MOAHR-GA, P.O. Box 30695, Lansing, Michigan 48909-8195.

See: Mich Admin Code, R 792.10120(2)(i).

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, to their last-known addresses in the manner specified below, this 8th day of January 2024.

S. Reynolds

S. Reynolds
Michigan Office of Administrative
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