

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	AWA Docket No. 07-0077
	)	
	)	
Amarillo Wildlife Refuge,	)	
Inc., a Texas non-profit corporation,	)	
	)	
Respondent	)	<b>ORDER</b>

On March 6, 2007, Complainant, the Animal and Plant Health Inspection Service (APHIS), filed an “Order to Show Cause as to Why Animal Welfare License 74-C-0486 Should Not Be Terminated”. On April 2, 2007, Charles Azzopardi filed a letter as Respondent’s Answer in which he requested a hearing. Mr. Azzopardi contends that there are mitigating circumstances why the license should not be terminated even though he admits, as the Order to Show Cause alleges, that he was the Respondent’s president, director and agent, and managed and controlled its business when, on July 21, 2006, he pled guilty to and was convicted by a U.S. Magistrate Judge of the misdemeanor of Selling and Transporting in Interstate Commerce an Endangered Species of Wildlife.

APHIS, by its attorney, responded that Mr. Azzopardi’s request for a hearing should be denied since the license termination sought by APHIS is based on a criminal conviction. Attached to the APHIS response were: (1) a copy of the plea agreement, (2) a factual resume signed by Mr. Azzopardi and his attorney, and (3) the Judgment by the United States Magistrate’s Judge; each of which was certified to be a “true copy of an instrument on file” by the Deputy Clerk of the U.S. District Court, Northern Texas. In sum, counsel for APHIS contended that a hearing is unnecessary and would serve no

useful purpose where the agency's action is predicated upon a criminal conviction and the material facts are not in dispute.

On May 8, 2007, Administrative Law Judge Peter M. Davenport, to whom the case was initially assigned, but who I have replaced since he is presently unavailable, entered an Order denying Respondent's request for a hearing and granted APHIS:

leave to amend or supplement the pleadings to conform to the rules for the institution of proceedings, to provide documentation of compliance with 5 U.S.C. § 558 or in lieu thereof, authority for dispensing with the same, and any appropriate dispositive motion in this matter.

Order of May 8, 2007. I agree with the position asserted in the response filed for APHIS to this Order, that under section 1.132 of the rules of practice (7 C.F.R. § 1.132), an "order to show cause" constitutes a valid form of a complaint. I further agree that inasmuch as Mr. Azzopardi admitted in the Court certified true copy of his signed and witnessed "Factual Resume" that he "knowingly and willfully offered for sale, or sold in interstate commerce in the course of commercial activity an endangered species of wildlife", his conduct comes within the "willfulness" exception to the requirement of 5 U.S.C. § 558 that an agency must give a licensee notice and opportunity to achieve compliance before taking action to terminate a license.

The response concluded by requesting that "an order be issued allowing this case to proceed as filed". In other words, to take the action requested in the order to show cause that APHIS initially filed. The action requested was:

1. That unless the respondent fails to file an answer within the time allowed therefor, or files an answer admitting all the material allegations of this order to show cause, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the Act; and
2. That such order or orders be issued as are authorized by the Act and warranted under the circumstances, including an order: (a) Terminating Animal Welfare Act

license number 74-C-0486 ; and (b) disqualifying respondent from obtaining a new license for two years.

Order to Show Cause, at page 5. It is uncertain whether APHIS desires that part of Judge Davenport's order denying Respondent's request for a hearing to be set aside in abandonment of the position it took in its response to Mr. Azzopardi's letter that a hearing is not needed. If APHIS is seeking instead to rely upon its position that an order should be entered to terminate the license without a hearing, it has still not filed an appropriate dispositive motion. Such a motion would be akin to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Though the Federal Rules of Civil Procedure are not applicable in this administrative proceeding, they may provide guidance when applying our Rules of Practice. *See Fresh Prep, Inc.*, 58 Agric. Dec. 683, at 687 (1999).

Rule 56 provides that a party may move for summary judgment with or without supporting affidavits. In this proceeding an affidavit or declaration by an APHIS official would be most helpful in clarifying the policy it seeks to make controlling in this case of first impression.

The certified court documents that have been filed, and Mr. Azzopardi's admissions, establish that Mr. Azzopardi was the Respondent's president, director and agent, and managed and controlled its business when he pled guilty to and was convicted, on July 21, 2006, by a U.S. Magistrate Judge of the misdemeanor of Selling and Transporting in Interstate Commerce an Endangered Species of Wildlife. Counsel for APHIS asserts that these facts constitute a sufficient basis for license termination and that the mitigating facts the licensee has offered to prove are immaterial. In short, counsel for APHIS is asserting that under 9 C.F.R. § 2.11(a)(6) and § 2.12, it is the policy of APHIS

to not issue a license and to terminate a license it has issued to someone convicted of the same crime as Mr. Azzopardi. But the record presently lacks an evidentiary basis for establishing this as controlling APHIS policy and providing the supporting reasons for such policy. Without an affidavit or declaration, my entry of a summary judgment type order would in essence be an attempt to apply and implement controlling and binding APHIS policy based solely on a statement by counsel. This would be inconsistent with the policy often expressed by the Judicial Officer that when adjudicating sanction cases, we should ascertain policies relevant to their disposition from the Department's administrative officials.

Any affidavit or declaration by an APHIS official filed in support of a summary judgment motion would be served upon Mr. Azzopardi who would then have the right to file his own affidavit in opposition. The affidavit or declaration should address why APHIS believes the proposed license termination would further the purposes of the Animal Welfare Act that in respect to the transportation and ownership of animals as set forth in the Congressional statement of policy are:

- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

7 U.S.C. § 2131. Inasmuch as Mr. Azzopardi's misdemeanor conviction did not involve mistreatment of animals during their transportation, or the sale or use of stolen animals, APHIS should explain its reasons for basing a license denial under 9 C.F.R. § 2.11 (6) that then acts as the basis for license termination under 9 C.F.R. § 2.12. If APHIS is actually basing its policy position on the language in 9 C.F.R. § 2.11 (6) by which it may deny a license to an applicant who "is otherwise unfit to be licensed", it

should so explain and give the reasons why it would make this determination against a license applicant who has been found guilty of the crime committed by Mr. Azzopardi.

Dated: \_\_\_\_\_

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Victor W. Palmer  
Administrative Law Judge