

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

In re: ) AWA Docket No. 03-0034  
)  
MARTINE COLETTE, an individual; )  
WILDLIFE WAYSTATION, a California )  
corporation; and ROBERT H. LORSCH, an )  
individual )  
Respondents )

**Decision**

In this consolidated decision I find that Martine Colette did not exhibit during the period that the alleged violations that are the subject of the Second Amended Complaint occurred, and thus would not be liable for civil penalties. I further find that Robert H. Lorsch, while an agent of a regulated party for limited purposes, did not commit, on his own behalf, or as an agent, any violations of the Animal Welfare Act.

**Procedural History**

On August 15, 2003, Peter Fernandez, Administrator, United States Plant and Health Inspection Service (APHIS), issued a complaint charging Martine Colette and Wildlife Waystation (WWS) with numerous violations of the Animal Welfare Act. On September 22, 2003, a First Amended Complaint was issued under the signature of Colleen A. Carroll, Counsel for Complainant, alleging additional allegations against Martine Colette and Wildlife Waystation and additionally naming Robert H. Lorsch as a

respondent as an agent for the other two parties. On March 15, 2004, after the parties had each filed their answers to the First Amended Complaint, Complainant filed a Second Amended Complaint which each Respondent timely answered.

I conducted a hearing in these cases in Los Angeles, California on February 5-9, February 12-16, June 11-15, and June 25-28, 2007. Complainant was represented by Colleen A. Carroll, Esq., Respondent Lorsch was represented by Robert M. Yaspan, Esq., Respondent Martine Colette was represented by Rosemary Lewis, Esq., and Respondent Wildlife Waystation was represented by Sara Pikofsky, Esq. The parties called a total of 29 witnesses, and over 75 exhibits were admitted. On September 14, 2007, I signed a Consent Decision and Order resolving all claims with regard to Respondent Wildlife Waystation. Following the hearing, Complainant submitted separate opening briefs, proposed findings of fact and conclusions of law regarding the other two Respondents; each Respondent filed a brief with their own proposed findings of fact and conclusions of law; Complainant submitted separate reply briefs with regard to each Respondent. The final reply brief was received on March 3, 2008.

### **Statutory and Regulatory Background**

The Animal Welfare Act, 7 U.S.C. § 2131 et seq., (the “Act”) includes among its objectives “to insure that animals intended for use . . . for exhibition purposes . . . are provided real humane care and treatment.” 7 U.S.C. § 2131 (1). In order to be subject to the Act, the animals must be either in or substantially affect interstate commerce.

The Act defines a “person” as including “. . . any individual, partnership, firm, joint stock company, corporation, association trust, estate, or other legal entity. . .” An “exhibitor” is “. . . any person (public or private) exhibiting any animals, which were

purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether for profit or not.”

The Act further extends liability to the agents of an exhibitor. “[T]he act, omission, or failure of any person acting for or employed by . . . exhibitor or a person licensed as . . . an exhibitor . . . shall be deemed the act, omission, or failure of such . . . exhibitor . . . as well as of such person.” 7 U.S.C. § 2139.

The Act also requires the Secretary to “promulgate standards to govern the humane handling, care, treatment, and transportation of animals by . . . exhibitors.” 7 U.S.C. § 2143(a). Compliance with the Act and the underlying regulations is accomplished by an enforcement program which includes inspections and investigations by APHIS personnel. 7 U.S.C. § 2146(a). Where violations are discovered, the Secretary may impose civil penalties of up to \$2750 for each day of each violation, and suspend or revoke an exhibitor’s license, depending on a variety of factors including good faith, gravity of the violation and size of business. Parties cited by the Secretary have the right to a hearing. 7 U.S.C. § 2149.

The Secretary has promulgated extensive regulations spelling out the obligations of exhibitors toward their animals.

### **Facts**

Respondent Martine Colette has a long history of caring and providing for animals. While not formally trained in animal care, she was exposed to and cared for exotic animals from her youth as the daughter of a diplomat. Tr. 4187, 4194. After

moving to the United States, she began caring for unwanted animals when she was living in Hollywood and eventually set up the Wildlife Waystation on property she purchased in the foothills of the San Fernando Valley outside Los Angeles. Tr. 4197. The Waystation has tended to the needs of many thousands of animals since it was created in the mid-1970's, having as many as 1200 animals on the premises at a time. Tr. 4212. They have been a resource for the government, both state and federal, when there has been a need to provide for animals where another facility is being closed down or wild animals are otherwise in need of rescue. Tr. 4191, 4215-4216. At the time of this hearing, there were 250-300 animals on the premises. Tr. 4219.

Respondent Colette has held the exhibitor's license for the Waystation in her name since the license was first issued in 1976. She has held various positions with the Waystation since its inception. Tr. 4183-4185. Her personal residence is on property adjacent to the Waystation, and typically visitors must pass through portions of the Waystation's property to gain access to Ms. Colette's residence. Tr. 4205. The WWS is supported through "memberships, animal sponsor programs, donations, fundraising activities, bequests, donations." Tr. 4207.

Respondent Lorsch is a successful businessman and philanthropist. Tr. 2164-2180. He has been a contributor to the WWS for a number of years, and became more deeply involved with the WWS in an attempt to resolve some complicated intergovernmental compliance issues which will be discussed below. Tr. 2181-2202. He has never been an employee of the WWS, but has served at various times as "best friend," board member, advocate, and in other positions.

While this decision of necessity is confined to whether Respondents committed violations, or are liable for violations, as alleged in the Second Amended Complaint, it is impossible to discuss this matter without looking at some events that preceded the inspections that are the subject of the Second Amended Complaint. Of particular relevance is the Consent Decision as to Wildlife Waystation and Martine Colette, CX 2, signed by Administrative Law Judge Jill S. Clifton on October 31, 2002. This 68 page document resolved numerous charges against the Martine Colette and the Wildlife Waystation for violations of the Animal Welfare Act generally occurring between 1998 and 2002.<sup>1</sup> The Respondents in that matter admitted hundreds (299) of willful violations of the Act and regulations. The Order did not impose any civil penalties. The Order did further suspend the license issued under the name “Martine Colette d/b/a Wildlife Waystation” for thirty days, with the suspension to continue until APHIS determined that Respondents were in compliance. The Order directed that Respondents “shall cease and desist from violating the Act and the Regulations and Standards, and shall not engage in activities for which a license under the Act is required.”<sup>2</sup>

The inspections and other activities that are the subject of this hearing all occurred during the period before the exhibitor’s license was reinstated. Since, during the times that the alleged violations occurred, Respondents would only be regulated parties under the AWA if they were exhibiting without a license (or, more accurately, while under a suspended license), the issue of whether exhibiting was in fact going on is a pivotal

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<sup>1</sup> The complaint was issued in fiscal 2000 but the Consent Decision resolved matters that occurred after the filing of the complaint.

<sup>2</sup> The Order also provided that stipulated penalties of \$50,000 be paid if, after reinstatement of the license, violations occurred within a two-year probation period. However, since the alleged violations that are the subject of the action before me all occurred before the license was reinstated, that stipulated penalty clause was not triggered.

underlying issue to whether there is even a basis to examine many of the alleged violations.

The suspension of the exhibitor's license could not, by the terms of the Consent Decision, be lifted until APHIS made a determination that Martine Colette and the WWS were in compliance with the Act and underlying regulations and standards. Thus, the licensee requested, during the summer of 2003, but not before mid-August, that APHIS visit the facility for the purpose of inspection, so that the suspension of the exhibitor's license could be lifted. Tr. 308-309. This was not a traditional compliance inspection, for which advance notice is not given, but was in conjunction with the Consent Decision. In fact, the computer tracking system used by APHIS did not even have a category for such an inspection. Thus, although the inspection forms indicated that each inspection was a "routine inspection," none of the inspections that are the subject of this decision were in fact "routine" unannounced inspections. Tr. 3535-3536.

Apparently unbeknownst to the facility at the time the request for an inspection was made, APHIS had issued, on August 15, 2003, a new complaint alleging that on numerous unspecified instances between the date the Consent Decision was approved and the date the complaint was issued, Martine Colette and the WWS had exhibited animals without a valid exhibitor's license. The complaint was mailed by USDA's Office of the Hearing Clerk on August 18, 2003, and the certified receipts, on behalf of the WWS and Martine Colette, were each signed on August 23, 2003.

The initial inspection occurred approximately a week after requested, and lasted from August 19-21, 2003. The inspection team, led by Jeanne Lorang and Dr. Kathleen Garland, and including Sylvia Taylor and Dr. Alexandra Andricos, informed WWS

personnel that the WWS was not fully compliant with a variety of regulations and standards, particularly concerning the adequacy of veterinary care, sufficiency of trained personnel, and humane handling of animals. CX 3. Complainant conducted an exit interview with WWS personnel, including Respondent Colette, where the alleged deficiencies were discussed. Tr. 201-202. Also participating in the exit interview, via telephone, was Respondent Lorsch. CX 36, Tr. 3252-3253.

A follow-up inspection was conducted on September 16, 2003. At this inspection, Ms. Lorang and Dr. Garland were generally accompanied by A.J. Durtschi, the facility's operations manager (who signed the inspection report as "operations foreman"). At the close of the inspection, Durtschi insisted that the exit conference include, via telephone, Respondent Lorsch. CX 36, Tr. 250. When Lorang began to explain areas where she and Garland thought there were problems, Lorsch apparently became upset. Tr. 252-253. In particular, when Lorang discussed the condition of a chimpanzee named Sammy, a long-time resident with a long history of self-mutilation whose condition had never been previously mentioned as a basis for finding violations, and which was not mentioned at the prior inspection, Lorsch frequently interrupted, referred to the findings of the inspectors as "stupid," and made a number of sarcastic comments including whether it was necessary to hire a psychiatrist to take care of Sammy. Id. Lorang testified that she never felt intimidated by Lorsch's conduct, but that she considered it abusive anyway. Tr. 676, 681. Garland, who had not spoken during the exit interview, testified that she was most troubled by the condescending tone of Lorsch. Tr. 3592-3593. Making no headway, the inspectors apparently decided to terminate the exit interview.

There is no indication on the September 16 inspection report, CX 4, that the inspectors had any problems with Lorsch. The inspectors testified that they each felt Lorsch was acting in an abusive manner, but neither of them told that to Lorsch or Durtschi. Tr. 680-681, 2627-2628. Lorang testified that she and Garland, on returning to their car, mentioned to each other that they had thought of abruptly stopping the exit interview and leaving the premises. They testified that Durtschi apologized to them and that Lorsch called Ms. Lorang back the next day and apologized to her over the phone. Tr. 251-253. While they testified they discussed Lorsch's conduct at the exit interview with APHIS management personnel (probably Dr. Gibbens), no formal memorandum was written concerning this issue until many months after the event allegedly took place, even though agency guidance required that such a memo be written within 24 hours of alleged abuse.<sup>3</sup>

The following day, September 17, 2003, Counsel for Complainant signed a First Amended Complaint, which was filed with the Hearing Clerk on September 22. In addition to the exhibiting violations that were the subject of the initial complaint, the amended complaint added Lorsch as a Respondent, and included numerous additional allegations based on the inspections of August and September.

Inspector Lorang returned to the facility on October 14 with Dr. Alexandra Andricos. They were accompanied on the inspection by Durtschi. In the inspection report presented to Durtschi, violations were again cited for environmental enhancement, and for lack of sufficient numbers of experienced employees, particularly with regard to the "special needs" of Sammy. Alleged violations found during this inspection were

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<sup>3</sup> Research Facilities Inspection Guide, p. 2.1.1; Exhibitor Inspection Guide, p.2.1.1. These guides appear to define verbal abuse as a form of workplace violence, which must be documented expeditiously.



included in the Second Amended Complaint, which is the operative complaint for this case. A reinspection on November 3, 2003 revealed no new violations and the suspension of the license was subsequently lifted.

### **Exhibiting**

With respect to the overarching question of whether Respondents were exhibiting without a license in violation of the conditions imposed in the 2002 Consent Decision, there was no ambiguity in APHIS's interpretation of the prohibition against exhibiting as expressed by Complainant, particularly through its counsel, Ms. Carroll. The record is replete with documentary and testimonial evidence that Complainant's position was that, in essence, the Consent Decision prohibited press events, most visitors and fund raising events at the facility, as well as the bringing of animals to fund raising events at other sites. At the hearing, Ms. Carroll stated that even the exhibition of animals owned and handled by other exhibitors who had valid licenses, at sites outside the facility, constituted violations by Respondents, as long as the Respondents were the beneficiaries of the fund raising. She also stated that "persons who were not bona fide employees or personnel of the Waystation or legitimate contractors" were not supposed to be on premises to have the animals displayed to them. Tr. 882.

**Visitors to the facility**—While the prohibition against exhibiting did not bar employees and volunteers from entering on the premises of the WWS (and the majority of people working with the animals at the WWS were volunteers), the Consent Decision is unclear on what the facility could do to encourage volunteers or potential donors of money to support the facility. Several witnesses who had been volunteers at the facility testified that they observed tours of the facility during the time of the suspension. While

they were unable to identify who at the WWS was participating in the tours, or who were the people who were being shown around the premises, they testified that the tours were a pretense to circumvent the Consent Decision. Thus, Rose Bertozzi testified, both through an affidavit and at the hearing, that she led several tours, which she classified as “monthly orientation tours.” CX 13. She stated that people who were taking these tours filled out volunteer applications, but that several people on the tours asked her to throw away their volunteer applications after the tour. Tr. 90-91. She did not state how the facility was supposed to realize, before the tour was conducted, which participants were there to seriously consider volunteering, or whether these participants took the tour with the intention of volunteering and decided otherwise after seeing what was required, nor did she state how the facility was supposed to otherwise obtain needed volunteers. She did point out that it was made clear that after the issuance of the Consent Decision the facility informed volunteers and employees that WWS was barred from leading public tours or exhibiting animals to the public. She also stated that “on countless occasions” she had seen Durtschi and Respondent Colette lead tours around the compound, and that volunteers were told to use the term “walk-throughs” rather than “tours” to describe these events. CX 13, p. 2; Tr. 137-139. She was not able to state who these people were or whether she could tell whether these were potential donors or volunteers.

Lari Sheehan, a Los Angeles County employee also testified that potential donors were visiting the premises of WWS, indicating in particular that a company that produced pet food was interesting in seeing the WWS to consider being a donor. Tr. 872. Former employee Angela Adams also reported seeing some tours led during the suspension period. CX 12, p. 2; Tr. 1091-1092. Jennifer Conrad, a veterinarian who worked there,

assumed the visitors were personal friends of Colette who were exempt from the USDA mandate against exhibiting. Tr. 1182. Dr. Conrad indicated that she saw at least three such tours before she left WWS in March, 2003, and that they consisted of between five and eight people. Tr. 1189.

It is clear that numerous people visited the facility during the time the license was suspended. There was even a protocol involving State and county officials under which certain visits were approved as long as they were not for traditional exhibitions. Thus, when the WWS was holding an onsite gathering of prospective donors, they would communicate, usually by email, with Johnny Jee, an assistant fire chief with Los Angeles. CX 17. Because of issues pending with the county, a fire department representative was always supposed to be present for these events, which included dinner parties and other fund-raising and media events. The USDA was not a party to this protocol, and consistently maintained that these visits were inconsistent with the license suspension.

**Off-site events**--It is also clear that numerous events designed to benefit the WWS were held at other sites, and that animals were frequently exhibited at these events. Events such as the Safari Brunch, an annual event held at the Playboy Mansion and the Safari for Life, held at the Sportsman's Lodge, were designed as fund raisers for the WWS. Witnesses testified that while there were animals, including regulated animals, at these events, the regulated animals did not belong to the WWS. Tr. 1523-1524, 1530-1532. Generally, no specific evidence was adduced that would indicate that regulated animals owned or under the control of the WWS were present at these events, nor is there evidence that any WWS personnel handled any regulated animals. However, at one event, on November 3, 2002, the WWS did bring llamas to a fund raiser. Tr. 1529-1530.

### **Background of regulatory problems**

Over the years, the WWS had evolved into an important last resort for a variety of animals that would otherwise likely have been euthanized. There was undisputed testimony that the USDA and other state agencies frequently asked Ms. Colette for assistance. Thus, in September, 1995, the USDA requested that Respondent Colette assist in the retrieval of animals from a closed facility—Liger Town—after a number of animals had escaped that facility and been shot. Tr. 2121-2123. Although the facility was located in Idaho, Ms. Colette acceded to the USDA request to bring equipment and staff to fetch the animals, a number of whom still live at the WWS. *Id.*, 4215-4217. She described receiving other animals from Wyoming Fish and Game, Tr. 2124, the LA County animal control agency, the Michigan Humane Society, and numerous other organizations, both public and private.

In the mid-1990's, when the dismantling of a biomedical lab in New York necessitated the placement of many primates in other facilities, Respondent Colette eventually agreed to have the WWS house approximately 50 chimpanzees. 4039-4042. Dr. Conrad Mahoney, who was the head of the lab that was closing down, initiated the contact with Ms. Colette, and has returned to the facility approximately twice a year since then to conduct physical examinations of the chimps. Tr. 4047-4050. It was evident at the time the chimps were arriving that WWS did not have the proper facilities to take care of them, and they were originally installed in Q1, the original quarantine facility located at WWS, and Q2, an old barn, became the temporary home for 32 or 33 of the chimps. The intention was that the chimps, many of which were not fully grown, would stay in these two structures until a new suitable building could be constructed. Tr. 4109-4121.

Also in the mid 1990's, Respondent Colette and the WWS accepted, from another source, a self-mutilating chimp known as Sammy. Tr. 4897-4900. Ms. Colette accepted Sammy knowing he was self-mutilating because she thought she would be able to provide him proper care and because she felt sorry for him. Tr. 4902-4903. Dr. Mahoney saw Sammy regularly beginning in 1996, and stated that he was the worst self-mutilating chimp he had ever seen. He testified on the difficulty of determining what triggers the self-mutilating behavior; how even finding a trigger does not mean that another trigger will not turn up; that medications, which frequently have to be adjusted, are a critical part of treatment; and that a self-mutilating chimp can never be assumed to be fully cured. Tr. 4070-4073. He felt that the attempts by Colette and the WWS to find the proper therapeutic treatment for Sammy were "robust." Tr. 4089.

The attempts to get the appropriate permits to construct proper housing for the chimps led to a multi-year imbroglio with federal, state, county and city officials. Extensive testimony demonstrated that, for example, the State Fish and Game Commission would not issue certain permits; the county would not consent to building the new enclosure due to zoning issues; and there were issues with water regulations and more. E.g., Tr. 2190-2195. A task force was created in response to a motion of the County Board of Supervisors to find ways to assist the WWS to come into compliance with a variety of county ordinances and regulations, but some meetings of the task force included representatives from other government agencies. Tr. 1372-1374. Finally, Respondent Lorsch offered, after being contacted by Respondent Colette, to try to take a more active role (other than being a donor of funds) in helping the WWS deal with the

various government agencies with whose rules the WWS was attempting to comply. Tr. 2186-2191.

### **Respondent Lorsch's Involvement**

Respondent Robert H. Lorsch unquestionably devoted significant time and expense to the WWS. He performed a number of functions as the “best friend” of the facility. He intended to use his connections and negotiations expertise to attempt to resolve the issues that were plaguing the WWS. Tr. 2181-2202. In his efforts to resolve the regulatory problems of the WWS he liaised with a number of high level city and county officials. He spoke and met at various times with the District Attorney for Los Angeles, the County Sheriff, the County Supervisor, the Fire Chief and others. Tr. 2196-2200. With respect to these officials, he was clearly working as an unpaid representative of the WWS. He devoted many hours to getting officials to work together to create a process where the WWS could take the steps that would get it back into compliance with all the government entities involved.

Lorsch was also involved in fund-raising for the facility. He was a donor for a number of years before he became involved in helping the WWS in ways other than writing checks. He participated in fund raisers, including sending invitations in his name to be a guest/donor at functions. For example, he sent personal invitations to attend the 2003 Safari Brunch.<sup>4</sup> He brought the WWS to the attention of friends, acquaintances and colleagues. He invited potential donors to the WWS to brunches or other events at Martine Colette's house, located on the edge of the WWS property. He occasionally

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<sup>4</sup> Interestingly, the invitation in evidence at CX 49 is the one extended to by Respondent Lorsch to Counsel for Complainant Colleen Carroll.

wrote columns in the WWS magazine, where he referred to himself and was referred to as the WWS “best friend.”

One of Respondent Lorsch’s columns was referenced a number of times in this proceeding. In his “best friend” letter in the spring 2003 Wildlife Waystation Magazine Lorsch announced the WWS’s institution of “Operation Mole.” CX 19, pp. 2-3. Lorsch testified that he was concerned that several present and former WWS employees and volunteers were spreading unfounded stories to a variety of government officials and were slandering the WWS, even though non-disclosure agreements were signed by employees and volunteers. Believing that people who discover problems and go to authorities instead of management are “in the gutter,” Tr. 3180, and reacting to what he believed were threats and harassment, he announced in his letter that “ a Waystation ‘best friend’” would provide a \$100 reward or a \$250 charitable organization for anyone who could identify those who were providing “regulators” “inaccurate information” with the award to be doubled if the individual identified was a current volunteer or employee of the WWS. Apparently there were no takers for this program.

Testimony was overwhelming that Lorsch did not have a role in the day to day operations of the WWS. (e.g., Tr. 2240-2250, 3821-3873). While the figurative altitude varied, Lorsch was described, by himself and others, as someone who operates at 50,000 feet, rather than at ground level, as a “big picture” person, rather than someone who is concerned with details. Tr. 3896-3897. It is clear that he knew very little, if anything, about how to care for animals, what type of staff was necessary to properly operate the facility, how the cages should be constructed, etc. It is clear that he did not know much about the animals at the facility, only that he wanted to help the WWS work out its

differences with the USDA, the State of California, the County of Los Angeles and any other government entities that the WWS was dealing with.

On the other hand, it was made clear that the exit interviews for the August and September inspections could not be conducted unless Lorsch was present via telephone. Tr. 3253. Even though, on the occasions most relevant to this proceeding, Lorsch was not a member of the WWS Board of Directors, and had no official title other than that of “best friend” he played a significant role in some aspects of WWS operations. Inspector Lorang testified that Martine Colette told her during the August inspection that she was only in charge of the animals and that Robert Lorsch was in charge of the facility and its employees, and that was why he had to be present, via telephone at the exit conferences. Tr. 232. Dr. Garland confirmed Inspector Lorang’s observations, noting that she had never seen Ms. Colette defer to anyone in an exit interview to the extent she deferred to Mr. Lorsch. (Tr. 3253-3256).

Other witnesses testified as to their understanding of Respondent Lorsch’s role vis-à-vis the WWS. Dr. Jennifer Conrad testified that over time he changed from being a donor to “being almost a CEO.” Tr. 1186. Roberta Fesler, Senior Assistant Counsel, Los Angeles County, testified that Mr. Lorsch said he was committed to seeing the WWS through resolving its regulatory issues, and that “he was going to personally see to installing a new management at the Wildlife Waystation.” Tr. 931.

Lorsch himself seemed to portray himself as someone in charge, even in his interactions with USDA. Thus, in a letter to Dr. Robert Gibbens, the Western Director of APHIS, Mr. Lorsch represented that the WWS license should be provisionally reinstated. RLX 4. He stated that “Because of all the actions taken by the WayStation under my



guidance,” that most of the violations that led to the license suspension were corrected. Id. (emphasis supplied). He signed the letter as “Volunteer & Best Friend to The Animals.” The WWS web site referred to him in July 2003 as their “‘Best Friend’ or unofficial CEO since early 2002,” CX 40, p. 6, and in December 2003 referred to him as “Chairman of the WayStation. Id., at p. 8.

Although not a member of the WWS board, Lorsch clearly had a significant influence over actions taken by the board. Thus, as an invited guest at a board meeting on June 28, 2002, before the issuance of the Consent Decision, Lorsch suggested that the regulatory issues could be better resolved if the board of directors and the CEO (Ms. Colette) resign and that new appointments be made. During that meeting, a motion was unanimously passed which committed each board member to offer his or her resignation. “Robert Lorsch indicated he would utilize best efforts to secure interested qualified people to serve as directors and further that he would act as chairman. RLX 60, pp. 16-17. In November, 2002, the WWS board agreed to enter into a consulting agreement with Mr. Lorsch and/or RHL Group (his company), and in January, 2003 the board resolved to add Mr. Lorsch as an additional insured under their liability policy. The Operations Manager, A. J. Durtschi, was hired after being recommended by Mr. Lorsch, as were the new operator of the website and the new purveyor of long-distance telephone service.

### **Facts regarding conditions at the WWS during the three inspections**

Complainant contends that both Respondents are liable for alleged violations discovered during the course of the three inspections (although Lorsch is only charged with violations from the September and October inspections). Most of these allegations

hinge on whether the facility was exhibiting during the suspension period, since if I find that the facility was not exhibiting, those allegations concerned with how the facility was operating are no longer viable.

**Personnel issues**—Several of the allegations concerned whether the WWS met the regulatory requirements concerning adequacy of veterinary staff and adequacy of trained personnel in general. Inspector Lorang testified that she wrote Respondents up for failure to have a sufficiently experienced attending veterinarian on duty, stating that the full-time veterinarian at the facility, Adam Gerstein, was newly licensed and did not have the requisite expertise in dealing with exotic animals. Tr. 314-316. The inspection team agreed that while Dr. Rebecca Yates, the WWS's former attending veterinarian was fully qualified, she could not be considered an attending veterinarian because there was not a written "formal arrangement," as required by the regulations. Dr. Yates apparently agreed that Dr. Gerstein was relatively inexperienced, stating that she did not let him work by himself on any complicated matters, but she also stated that he had more experience than she did when she started working at WWS. Tr. 1983, 4757-4758. She worked part-time for the WWS during the time period the inspections at issue took place. Tr. 1926, 1983. In fact, she testified that she believed that she was the veterinarian of record, and that she was always on call during this time. Tr. 1983. In addition, the staff included Silvio Santinello, who was a licensed veterinarian in Mexico, but did not have a U.S. license to practice veterinary medicine. Dr. Yates stated that the facility was well equipped, and that she had the authority to order any drug, that it had outside specialists available, Tr. 4748-4749, and that it provided 24/7 veterinary care. Tr. 4747.

Likewise, Dr. James Mahoney, testified that he believed Yates, Gerstein and Santinello were well-qualified to handle the WWS animals, and that the care provided at the facility was “effective and met “the needs of its animals.” Tr. 4058.

**Environmental enhancement**—Several violations were alleged concerning whether there was sufficient environmental enhancement for the animals at the WWS. While these allegations concerned the lack of proper environmental enhancement in general, they were focused on whether the chimps were receiving adequate enhancement, whether there was a written up-to-date plan, and whether the records of engaging in environmental enhancement activities were too “sketchy.” The September and October inspection reports particularly emphasized, as an alleged violation, the treatment of Sammy, the self-mutilating chimp. During the September inspection, Inspectors Lorang and Garland viewed, and videotaped, Sammy behaving normally, Tr. 752-753 (in fact he was eating a popsicle), but displaying some wounds that were undisputedly the result of self-mutilation. CX 34, 35. They also observed flies around the wounds.

Sammy was self-mutilating on arrival at the facility and the WWS consulted with a specialist as to how to get him to stop this behavior. Throughout his stay at WWS, a variety of medications and therapies were tried, with varying results. Dr. Mahoney thought that the environmental enhancement was adequate. After the inspection, the inspection team recommended that an outside consultant be hired to work with Sammy and establish a more formal environmental enhancement program. As a result, Jennie McNary, the curator at the Los Angeles Zoo, was hired to consult with the WWS and its employees on the handling of the chimp colony. CX 37, Tr. 5034-5036. When she arrived to begin her six-months of consulting, she observed that the chimps appeared to

be in good health overall, both physically and socially. Tr. 5038. However, she felt there was a need for a working plan involving more environmental enhancement. She particularly focused on Sammy in an attempt to find the cause of his self-mutilating episodes. Tr. 5039-5042. Sammy was the most severe self-mutilator she had ever encountered. Tr. 5090. A combination of medication and operant conditioning techniques resulted in significant improvement in Sammy's behavior, to the extent that, when she went back on a follow-up visit a year later, she was "markedly pleased" with Sammy's behavior and condition. Tr. 5043. She also instituted a practice of logging and charting chimp behavior, particularly Sammy's, during the period of her consultancy. Tr. 5044-5046. She never figured out exactly what was triggering Sammy's self-mutilating behavior, Tr. 5058. She stated that an observation of Sammy of from 20-30 minutes would not suffice for a total assessment. Tr. 5088-5089.

### **Discussion**

While my ultimate rulings in these consolidated cases are based on relatively limited findings of fact, I am making several additional findings of fact, and several additional conclusions of law, in the interests of overall judicial economy in the event that my initial decision is overruled—either by the Judicial Officer or by the federal courts. Thus, even though I dismiss most of the violations alleged to have been discovered during the course of the three inspections on the basis that Respondents were not exhibitors, I make additional factual findings, and include some discussion, in the event that it is determined on appeal that exhibiting did take place as alleged.

**1. The instances alleged to constitute exhibiting without a license were not violations of the Consent Decision.**

Since I find that Respondents Colette and Lorsch were not operating as exhibitors, most of the violations alleged in the Second Amended Complaint cannot survive, as the regulations generally apply to exhibitors. The Complainant alleges that on at least 16 different occasions Respondents acted as exhibitors, either by holding fundraisers on or off-site, by allowing potential volunteers to participate in a tour of the facility, or by having potential donors attend a brunch and presentation at Respondent Colette's house. I find that these types of events were not exhibitions as would be prohibited by the Consent Decision, since I hold that the Consent Decision was not intended to bar such basic and necessary activities, essential to the existence of the WWS, as fund-raising and volunteer assistance to care for the animals in its charge. Since Complainant failed to demonstrate, or Respondents successfully refuted, that any of the cited "exhibitions" constituted exhibiting such as would be regulated by the Act, I conclude that there was no exhibiting and that most of the actions for which Respondents have been cited should be dismissed.

As a general rule, it is a serious violation of the Act to exhibit animals without a license. The suspension of a license would appear to prevent any exhibition at a facility. However, it was clearly recognized by the parties at all times, that bringing the WWS into compliance was going to be a costly and time-consuming endeavor. With nearly 300 violations to be corrected, including substantial construction or reconstruction, the Consent Decision provided that the license would be suspended until APHIS determined that the facility was in compliance. It appeared to be the parties understanding that when the WWS believed it was in full compliance, it would call APHIS and request an inspection so that APHIS could determine whether it was in compliance. Dr. Gibbens

testified that when APHIS is conducting a licensing inspection for a facility whose license has been suspended, that normally any violations they find would not be the subject of an enforcement action, and that Respondents were only cited here because they were conducting regulated activities, i.e., exhibitions. Tr. 5215-5216. Interestingly, Complainant apparently issued its initial complaint in this matter, which only contained counts relating to exhibiting without a license, on August 15, 2003. The complaint was mailed out by the Hearing Clerk on August 18 and was not received by the then Respondents (the WWS and Ms. Colette) until after the conclusion of the requested inspection. Thus, while this was a requested inspection, it is safe to assume that the WWS and Ms. Colette were expecting that the only issues the inspection was to resolve was whether the suspension of the exhibitor's license should be lifted.<sup>5</sup>

Constraints against exhibiting were also imposed by California Fish and Game and Los Angeles County. To make sure that they could bring certain visitors, such as potential volunteers and donors, and occasionally members of the media, to the facility, the WWS worked out a protocol with the state and local entities allowing such visits subject to certain constraints. No such agreement was entered into with APHIS, however, and APHIS, through Dr. Gibbens and Colleen Carroll, made it clear that they did not consider the federal government bound by the agreement with the state and county governments. They jointly participated in at least one phone call with Mr. Lorsch to discuss possible ways for the WWS to generate donors or media attention in order to

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<sup>5</sup> Although it is not a factor in my decision, I am struck by the somewhat disingenuous conduct of APHIS with regard to the conduct of these inspections. While the inspections were clearly not routine inspections, for which no notice is given, the WWS and Ms. Colette were unquestionably under the impression, at the time of the August inspections, that this was merely an inspection to determine if they were eligible to have their license renewed, and that they would not be subject to sanctions. It was not until they received the original complaint, several days after the conclusion of the inspection, that they would have had any notion that this was the type of inspection that could lead to civil penalties.

attract funds for the facility. Tr. 5196-5198. Emails were exchanged as well. In one, Ms. Carroll responded to an inquiry by David Krantz, counsel to the WWS, on whether the ban on exhibiting included the media, that it was APHIS's position that reporters were considered members of the public in that context. CX 45, p. 2. Responding to a follow-up email from Mr. Lorsch, Ms. Carroll stated "I am not comfortable responding to inquiries about whether a certain scenario would or would not constitute a violation of the AWA or the regulations" and that the WWS should seek legal advice from its own counsel. *Id.*, at p. 1. It is fair to conclude that APHIS clearly did not approve any of the actions taken by Respondents that resulted in media events, bus tours of potential volunteers, meetings on site with potential donors, and off-site events where animals were displayed, even when those animals were not owned or handled by Respondents or their employees.

However, the fact that APHIS disapproved of these activities and was of the opinion they were a violation of the Consent Decision does not make it so. I find that the cited activities did not violate the terms of the Consent Decision as they did not constitute exhibitions under the Act and the regulations.

The testimony concerning violations allegedly committed by conducting tours of potential volunteers was particularly vague and noncompelling. It is undisputed that the WWS needed significant numbers of volunteers to function properly. APHIS has not demonstrated that a ban on exhibiting precludes the normal recruitment of volunteers for an operation where volunteers are essential. The fact that some of the individuals who signed up for a volunteer tour decide, after the tour, that they are not interested in doing

the work of a volunteer is totally expected, as was people tearing up their applications after seeing the facility and the type of work expected from a volunteer.<sup>6</sup>

I also find that bringing potential donors to visit Ms. Colette, even if seeing the animals was included, is in the same category as bringing potential volunteers on site, and is not a violation of the ban on exhibiting. In order to attempt to garner significant donations necessary to complete repairs and continue to run the facility, it was reasonable for the WWS to expect that they would not receive sizeable contributions without showing the facility to potential donors. These extremely limited groups who were there to meet with Ms. Colette and discuss the operations of the WWS were hardly within the realm of public exhibitions contemplated by the regulations. Even if the WWS was not complying with the protocol with the State and county governments, which did not bind the USDA in any event, I hold that these visits did not constitute exhibiting without a license. That potential donors were on the premises at least fifteen times, according to Complainant's brief, for these purposes, is totally consistent with the universal understanding that donations—substantial donations—would be needed to effectuate the repairs necessary to achieve compliance with the Consent Decision as well as to maintain the organization's normal operations.

Likewise, the holding of off-site fundraisers, where WWS animals were not displayed, did not constitute a violation of the ban on exhibiting without a license. The Safari for Life, held at the Sportsmen's Lodge in Studio City, was clearly for the benefit of the WWS. While regulated animals were present at this function, they were not from

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<sup>6</sup> The 2002 Consent Decision contained numerous findings concerning the insufficient number and inadequate training of employees and volunteers. This recognition of the need for volunteers is inconsistent with any contention that a legitimate volunteer recruitment program is a violation of the Consent Decision.



the WWS.<sup>7</sup> Rather, other holders of exhibitors' licenses brought animals and handled them at the benefit. Complainant raised the theory, both at the hearing and in its brief, that if a fundraiser is held for the benefit of the WWS, that the WWS is responsible for the exhibiting of animals even where the license to exhibit is held by the organization bringing the animals to the fundraiser, and even though WWS did not handle the animals in any way; that as long as the fundraiser was held under the auspices of the WWS, then the WWS was responsible for the animals. Tr. 1545.

Complainant's argument in this area is unconvincing. APHIS has not shown any provision in the 2002 Consent Decision nor any statutory, regulatory or case law holdings that would cause the lawful acts of other persons or organizations to somehow be a basis for finding a violation against Respondents. I find it a real stretch of the Act and regulations to require that a person or organization for which a benefit is being held can be deemed to be responsible, as an exhibitor, for regulated animals that other licensees bring to the benefit, where the animals are not being handled in any way by the beneficiary of the event. This theory would seem to lead to potentially absurd results—could a parent who hired a performer with an animal act at a children's birthday party be liable for exhibiting without a license? Would the beneficiary of any fund raiser be potentially liable as an exhibitor if regulated animals were used in some aspect of the fund raiser? Such results seem beyond the purview of the Act.

The case law likewise does not support Complainant's argument. No case has been cited that would support a finding that an entity could be found to be exhibiting because it was the beneficiary of a fund raiser where animals owned and handled by

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<sup>7</sup> Ms. Colette apparently brought a few animals that were not considered regulated, including a snake, an eagle and some llamas. While Dr. Gibbens stated that llamas were regulated, no evidence in support of this statement was presented.

licensed exhibitors were exhibited. In re Bill Lozier, 60 Agric. Dec. 28 (2000), cited by Complainant, offers no support for this position, as in that case there was no question that bears were exhibited by that respondent to the public for his benefit. In re. Lang, 57 Agric. Dec. 59 (1998), also cited by Complainant, sheds no light, and does not stand for any of the propositions cited in the brief.

With respect to the llamas that were admittedly brought to this event, there was no evidence presented that these llamas were regulated animals. Dr. Gibbens testified that animals could be regulated in some contexts while being unregulated in others, a statement that is reflected in In re Joseph A. Woltering, d/b/a Buckeye Llama Ranch, 46 Agric. Dec. 768, 772, 776 (1987), but there is no testimony which would indicate that the llamas Ms. Colette brought to this function were regulated. Since the burden of proof is on Complainant, I find that they did not demonstrate, by a preponderance of the evidence, that any regulated animals in the control of WWS were exhibited at the Safari for Life function.

I also find that “Chimp Liberation Day” was a newsworthy event that did not constitute exhibiting as defined in the Act and regulations. The opening of the new chimp facilities, after years of effort, did not even involve the exhibition of any animals, as the new chimp house was not actually occupied at the time of the event. The event was held in the form of a press conference, and no witnesses testified that any animals were exhibited.<sup>8</sup> Tr. 1497-1499. Respondent Lorsch characterized the event as “a media conference to show to the news media the progress that the Waystation had made in complying with the construction of new cages for the chimpanzees.” Tr. 4265. Lorsch and others had

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<sup>8</sup> One witness, Jerry Brown, WWS’s publicist, stated that animals were present in the sanctuary in that they were in their cages and were some may have been visible to some of the attendees at the event, but did not specify what the animals were and how proximate they were to the attendees.

participated in a conversation with Colleen Carroll and Dr. Gibbens, as well as with their own counsel, and were basically advised that whether conducting a media event was banned by the Consent Decision was something they should talk to their own attorneys about. Tr. 4268-4270. After consulting with an unspecified number of attorneys, they came to a consensus that holding the press conference would not be a violation<sup>9</sup>, and that the Los Angeles County legal staff found that the WWS had a constitutional right to hold such a press conference.<sup>10</sup>

Rather than treat this as a first amendment issue involving freedom of the press, I find that the viewing of the new chimp **facilities** was not an exhibition of the type that would be prohibited by the Consent Decision. The purpose of the event was to highlight the efforts and accomplishments of the WWS in finally being able to construct a facility suitable for the large number of chimps it had received over the years, particularly the laboratory chimps received via Dr. Mahoney. At this event, only media, government employees and WWS personnel were admitted to the facility. While animals were visible, there is no evidence that there was any exhibit, and there was no evidence that the chimps themselves were even in the new facility at the time of their media unveiling.<sup>11</sup>

Accordingly, I find that the WWS did not exhibit in violation of the 2002 Consent Decision.

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<sup>9</sup> Since Ms. Carroll suggested that Respondents seek the advice of counsel, and since Respondents did in fact act according to their counsels' advice, it is difficult to conjure up a situation that could be any less "willful," yet Respondents are charged with a willful violation of the regulations.

<sup>10</sup> In actuality, the county's sympathetic position was a result of a settlement of a lawsuit filed by the WWS seeking, among many other things, to open the WWS to the media for some purposes. Tr. 4334-4337.

<sup>11</sup> Likewise, I do not find that the private "fact-finding" tour arranged for Senator Brownback was an exhibition of the type for which an exhibitor's license was required. While an elected official may be considered a member of the public, under these circumstances the tour was within the Senator's official duties.

**2. I also find that Respondent Robert Lorsch should not be held liable for cited violations for acting as the agent of Martine Colette and the WWS.** In many ways, the government’s case against Lorsch illustrates the maxim that “no good deed goes unpunished<sup>12</sup>.” Although he played a significant role at the WWS, as a “best friend”, a donor, advocate and fundraiser, and as an intermediary with respect to getting the WWS and the various government entities that the WWS was trying to resolve issues with to reach agreements to allow the WWS to achieve compliance with the various government regulations, his role was not such that he should be required to obtain his own exhibitor’s license, in addition to the one Martine Colette had already obtained for the WWS. By offering to use his connections and high-powered negotiating skills in an attempt to get the WWS through a morass of overlapping and conflicting government regulations, he was trying to help an organization he had supported for some years to be able to continue its worthwhile function of serving as a sanctuary for animals who generally had no other places to go.

There is no question that Lorsch was more than a mere donor, and had an authority in some areas that was well beyond that of a typical philanthropist. It has been well established that employees of the WWS knew that Lorsch’s participation in the exit conference was mandatory for the August inspections to determine if the WWS license suspension would be lifted, as well as the subsequent inspections. As the “best friend” of the WWS, Lorsch had a higher profile than other donors, to the extent that he even had his own column in the WWS newsletter, attended and participated in board meetings even

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<sup>12</sup> Generally attributed to Claire Boothe Luce.

before he was a member of the board, made recommendations to the board concerning the hiring of a webmaster and choosing WWS's phone service provider, informed Durtschi of the operations manager vacancy and suggested that he apply for the job, and had a lead role in managing WWS's attempts to get the suspension of its license lifted. He was the individual most-engaged in communications with APHIS and Ms. Carroll, including asking for the provisional reinstatement of the exhibitor's license. He was clearly the lead orchestrator of the WWS attempts to meet with various government entities to resolve WWS' problems, and represented himself as being in charge of getting the WWS back into operating as a licensed exhibitor. He was added by the WWS Board of Directors "as an additional insured under the directors' and officers' liability policy of insurance". Tr. 2841, RLX 60.

On the other hand, Lorsch basically knew nothing about the day-to-day operations of the WWS, and was not involved in them to any measurable extent. He had no knowledge of animal husbandry and care, did not know the first thing about proper construction of chimp facilities, veterinarian qualifications, environmental enrichment and enhancement, was not involved in the hiring or firing of employees (other than recommending that Durtschi apply for the operations manager vacancy), and did not have an office or a phone on the premises. Tr. 2237-2242. During the suspension period, Respondent Colette was the Director of Animal Services, responsible for "ensur[ing] that animal care happened, that the introduction of different animals, the creation of families, groups, troops, that the animals under our care were treated as needed by veterinarians, by good food, by enrichment, by ensuring that the grounds, the areas they lived in, that type of thing." Tr.

4953. Her duties included overseeing “the facilities of feeding, cleaning, watering, enrichment, consulting with veterinarians about the variety of different animal issues that arise on a daily basis, creating groups, troops, packs, prides and assortment introductions of animals, doing our outreach, oversight on an outreach program and education, working with a certain amount of volunteers . . .” Tr. 4185. It is overwhelmingly clear to me that Lorsch was utterly unknowledgeable about the day-to-day workings of the WWS—indeed there is no specific testimony to refute this notion. The only testimony the government had regarding Lorsch’s role in the actual operations of the WWS was a series of witnesses who relayed general remarks that they had heard Lorsch was in charge. It is abundantly clear from the specific testimony of numerous witnesses that while Lorsch had a significant role vis-à-vis fundraising and as coordinator of WWS efforts to comply with government regulations, he did not attempt and was woefully under qualified to act in any capacity towards the realities of operating the facility.

The evidence establishes that Lorsch’s principal roles at the WWS were essentially two fold: He was one of the principal financial benefactors of and fund raisers for the facility and, with respect to resolving the compliance issues plaguing the WWS, he volunteered to take the lead in interacting with the various government agencies involved. While he used his connections to get the state and county agencies working with WWS, and clearly represented the WWS in negotiations with government entities, that in itself would not put him in the position of someone who is responsible for alleged violations committed by WWS. While Complainant argues that Lorsch was in control of the facility, that simply was not the case. Since Lorsch was coordinating the WWS’s efforts to resolve their

regulatory dilemmas, he would naturally attend the exit conferences for any inspections that were an essential component of the lifting of the license suspension. For me to hold that someone involved in such a representational capacity could be held liable for the violations that WWS allegedly had committed during at the time of these inspections would be a drastic extension of the coverage of the act, exposing board members, attorneys, or other representatives of an exhibitor to potential liability. Such an all-encompassing reach is not supported by the cases cited by Complainant.

Since Martine Colette (d/b/a WWS) was the exhibitor whose license was suspended, Lorsch is only potentially liable for violations for which he is an agent of the exhibitor. Thus, Dr. Gibbens testified that the Agency's case against Lorsch was predicated on his acting as an agent under 7 U.S.C. § 2139, which deems the actions of any person "acting for or employed by" an exhibitor as actions of the exhibitor "as well as of such person." In determining liability based on this statutory agency provision, it is necessary to look at how the alleged agent exercised his actual or apparent authority and what areas it appears that the agent had authority.

Stated simply, it appears to me that, to the extent Lorsch was acting as an agent for the WWS, it was in the area of the two roles described above. To hold that Lorsch was WWS's agent in the area of employee hiring, animal enrichment, veterinarian qualifications, and most of the other areas that were the subject of the Second Amended Complaint would require me to ignore the overwhelming evidence, including the testimony of Lorsch, Martine Colette, A.J. Durtschi, Byron Countryman and numerous others, that Lorsch's primary roles with the WWS were as a financial benefactor and as a representative or

intermediary with government regulators. He had no role in the operational activities of the facility that were supervised by A.J. Durtschi, Martine Colette and others. While he was unquestionably an individual of great influence in the WWS the only areas where he had any authority as an agent, whether actual or apparent, were in those two general areas. Thus, there is little doubt that he had authority in the area of setting up fund raisers, including issuing personal invitations to events, but I have already concluded that those events did not constitute exhibiting under the Act or regulations. His actions in representing WWS during and after the course of APHIS inspections, particularly including the exit conference in September, 2003, and his participation in Operation Mole, will be discussed in more detail later in this decision.

**3. The fact that the WWS signed a Consent Decision does not resolve the action against either Lorsch or Colette.**

The one-satisfaction rule does not apply here. One of the arguments advanced by both Respondents is that the fact that APHIS and the WWS entered into a Consent Decision, signed by me, that resolved all pending claims by APHIS against the WWS, acts to prevent APHIS from recovering against any other party for the same violations. In a related argument, Lorsch contends that a settlement of a matter with the principal prevents the pursuit of an action against the alleged agent.

The one-satisfaction rule is essentially a rule of common law developed to assure that a party would not be enriched as a result of achieving damage recoveries against multiple other parties in excess of the damages actually incurred. It is an equitable doctrine. However, it has no place in actions under the Animal Welfare Act or other remedial statutes



where it is routine for a statute or regulations to allow for multiple responsibility for violations.<sup>13</sup>

While Dr. Gibbens admitted, and the Second Amended Complaint confirms, that Lorsch is only potentially liable for alleged violations because of the agency liability provision in the statute, the statute makes the agent liable for his or her own actions on behalf of the principal, as well as making the principal liable for the actions of its agent. Thus, while there is no longer an issue concerning WWS liability for actions of Lorsch, the Consent Decision does not in itself dispose of issues where the statute deems Lorsch responsible on his own for violations he may have committed as an agent of the WWS.

Lorsch also contends that an adverse decision in this case will subject the WWS to additional financial liability since Lorsch will have an indemnification claim against the WWS. I agree with Complainant that any private arrangement between the parties is not material to my consideration of this case, and find that allowing such a defense would run counter to the notion that multiple parties can be held liable for violations.

The issue of multiple party liability is a little less clear given the relationship between Respondent Colette and the WWS. In a case decided subsequent to the filing of briefs in this case, the Judicial Officer dismissed the complaint against an individual cited for failure to obtain an exhibitor's license, while sustaining a finding that the corporate entity of which the individual was president was required to obtain a license. In re. Daniel J. Hill and Montrose Orchards, Inc., Agric. Dec. (May 18, 2008). That case presented a

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<sup>13</sup> See, e.g., *In re Hank Post*, 47 Agric. Dec. 542, 547 (1988). Also, see, e.g., EPA fuels regulations, where multiple parties, including refiners, distributors, resellers, and retail service stations could be held responsible for violations of unleaded gasoline and other regulations. 40 C.F.R. Part 80.

situation somewhat the opposite of the instant case, since here it is undisputedly the individual who holds the license, while the corporate entity does not. Further, the exhibitor's license is issued to Martine Colette d/b/a Wildlife Waystation, so it appears that APHIS is treating Ms. Colette and the WWS as one entity for the purpose of issuing the exhibitor's license, and two entities for the purpose of pursuing these violations. While it does seem that Complainant is seeking to recover twice from what is essentially the same entity, as opposed to seeking recovery from Respondent Lorsch as an agent, there is no USDA case law that would bar such recovery. Thus, I reluctantly conclude that the Consent Decision I issued with respect to the WWS does not flatly bar the continuing pursuit of the action against Ms. Colette.<sup>14</sup>

**4. The conduct of Robert Lorsch at the September 16, 2003 exit conference was not a violation of the regulations.** Since I have concluded that there was no exhibiting and that therefore the large majority of violations alleged in the Second Amended Complaint (although I will be making provisional findings in the event this conclusion is reversed on appeal to reduce or eliminate the need for a remand) cannot be sustained, the allegations concerning the conduct of Mr. Lorsch at the September exit conference, and the significance of Lorsch's involvement in Operation Mole are not eliminated by the failure of Complainant to prove that unlawful exhibiting was taking place. However, with respect to Mr. Lorsch, his conduct at the exit conference and his sponsorship of Operation Mole are not offered as counts in the complaint against him, but are instead offered as illustrations of bad faith, a factor that is required to be weighed in the penalty assessment process assuming violations

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<sup>14</sup> The point is somewhat moot anyway, as I am finding no violations committed by Ms. Colette, other than those I provisionally find if my initial ruling on the issue of whether exhibiting took place is overturned.

are found. Mr. Lorsch's conduct at the exit interview does, however, constitute one of the counts against Ms. Colette.

There is no doubt that Mr. Lorsch was acting as a representative of the WWS during the exit interview. He was considered to have authority to deal with the USDA on issues relative to the WWS, and was acting in that role when he attended the exit conferences with Ms. Lorang and Dr. Garland via telephone. Evidence concerning whether Lorsch was acting as Martine Colette's agent in this matter is not very specific—Ms. Colette clearly deferred to Mr. Lorsch in terms of the exit interviews, but whether she was deferring to him as her agent rather than the agent of the WWS has not been clearly established. In fact, Ms. Colette contended in her brief that it was the WWS board of directors that delegated its authority to participate in the exit interviews to Mr. Lorsch (Br., p. 23), and that he was there as the WWS agent, rather than as the agent of Ms. Colette. Further, Inspector Lorang testified that A.J. Durtschi was attending the September 16 exit interview as Ms. Colette's representative. Tr. 711. However, since Colette was the exhibitor's license holder, and the purpose of the inspections, at least from Respondents' point of view, was to get the suspension of the license lifted, Ms. Colette's acquiescence in Lorsch's lead role in negotiations with the various government entities, and in particular with the inspectors, is tantamount to approving his agency in that somewhat limited realm.

Mr. Lorsch's conduct over the telephone at the September exit interview was far from ideal, but I do not find it is "abusive" as that term is used in the regulations. The regulations make it illegal for a licensee to ". . . interfere with, threaten, abuse (including verbally abusing) or harass any APHIS official in the course of carrying out his or her

duties.” 9 C.F.R. § 2.4. There is no question that Lorsch frequently interrupted Inspector Lorang (apparently Dr. Garland remained silent throughout the exit interview and Lorsch was unaware of her presence at that time) and that his conduct can objectively be categorized as “rude<sup>15</sup>.” Dr. Garland principally categorized Lorsch as being “condescending,” Inspector Lorang categorized Lorsch’s conduct as being “over the top abuse,” stating that Lorsch indicated they were “stupid,” “ignorant,” were conspiring against the WWS, and that maybe the WWS should just kill Sammy, the self-mutilating chimp. Tr. 255.

On the other hand, Inspector Lorang testified that Lorsch was interrupting everybody (although it appears that only Lorang and Durtschi were doing any of the talking) and that he was “nondiscriminatory” in terms of who he was interrupting. Tr. 632-633. And Dr. Garland testified that none of the negative adjectives—stupid, ignorant—were directed at the inspectors **personally**, but were rather directed at their **findings**. Tr. 3260. Indeed, Dr. Garland testified that the entire basis for her conclusion that she and Inspector Lorang were being subject to verbal abuse was the fact that Lorsch spoke in a condescending tone of voice. Tr. 3592-3593.

Inspector Lorang testified that she was not intimidated by Lorsch, but did feel she was being harassed, notwithstanding the fact that Lorsch was participating only by telephone. She and Dr. Garland never told Lorsch that his comments and interruptions could constitute verbal abuse. Although Inspector Lorang did write a memorandum on Lorsch’s behavior, this memo was written many months after the fact. There were no

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<sup>15</sup> A.J. Durtschi apologized to the inspectors for Lorsch’s conduct, and Lorsch called Inspector Lorang the next day to apologize.

contemporaneous notes offered in evidence by either inspector, nor does the inspection report contain any mention of Lorsch's conduct. Inspector Lorang testified that, after discussing Lorsch's conduct she wrote the memo describing the incident. CX 36. She apparently did not even write the first draft of the memo until December 2003, and indicated that she "didn't get back to it until May." CX 36, p. 2. The actual memo submitted was dated January 25, 2007 but was apparently the May 2004 document that Inspector Lorang is alluding to—although there is no version of the document with that date in the record.

Mr. Lorsch's conduct at the September 16 exit conference did not rise to the level of verbal abuse such as to trigger sanctions under the regulation. It is critical to the working of the Animal Welfare Act, as well as the numerous other acts that rely on inspections to carry out USDA mandates, that inspectors or other agents of the USDA are not subject to harassment, abuse or physical threats. On the other hand, exit interviews are considered to be an exercise in give and take, where a dialogue is not unexpected, and where the parties being informed of possible violations are not required to sit back and accept without question the findings of the inspectors. Undoubtedly, Mr. Lorsch was angered, peeved, and rude during the course of the September 16 interview, but it takes more than that to trigger a violation of the regulations. Some venting is not equivalent to verbal abuse. If the inspectors thought Mr. Lorsch's conduct was verging on abusive, they should have told him that, rather than wait and issue an allegation of violation the following week. Further, as Dr. Gibbens testified when urging that "very severe sanctions" be imposed for this alleged violation, interfering with inspectors impedes the enforcement of the Act because inspectors are prevented from conducting a thorough, detailed inspection, and would be equivalent to

denial of inspection access. Tr. 5331-5335. Since the inspectors had completed an extremely thorough inspection, without any hint of interference, until the unpleasantries at the exit conference, it is very difficult for me to comprehend how a “severe sanction” could possibly be warranted.

Lorsch’s conduct was far less troublesome than that which occurred in S.S. Farms Linn County, 50 Agric. Dec. 476 (1991), cited by Complainant, where an owner of the facility stood within inches of the inspecting veterinarian’s face screaming at him and threatening him. As Judge Palmer found, and the Judicial Officer affirmed, “No government official attempting to perform his duties should ever be subjected to this kind of abuse.” Id., at 491. In affirming, the Court of Appeals also attributed the conduct of the owner’s mother, who screamed and cursed at the same official a few days later, to the owner. Hickey v. USDA, 991 F. 2d 803, 52 Agric. Dec. 121, 125 (1993). In SEMA, Inc., 49 Agric. Dec. 176 (1990), the inspectors were prevented by the respondent from conducting a full inspection, including denying access to some records, preventing the taking of photographs, and were physically prevented from leaving the facility and threatened with arrest. In Frank and Jean Craig d/b/a Frank’s Meats, 66 Agric. Dec. (February, 2007), inspectors were screamed at, threatened, charged at, and interfered with over many occasions, and the owner repeatedly compared his situation with another owner who had earlier murdered two inspectors. Interrupting, speaking in a condescending manner and threatening to talk to supervisory personnel just do not fit into the category of “over the top” verbal abuse that would expose Ms. Colette to a finding of a violation and a possible civil penalty.

**5. Allegations of selective enforcement and the frequent failure of APHIS to follow their own written procedures are not a basis for dismissing the allegations against Respondent Lorsch.** I find that there was no evidence, other than conjecture, of any selective enforcement, and that while APHIS has an alarming tendency to disregard its own guidance documents, that would not in itself be grounds for dismissing an action.

With respect to selective enforcement against Respondent Lorsch, the heart of Lorsch's argument is that the actions of APHIS in issuing an amended complaint six days after the September exit conference (a time period which is inarguably out of the ordinary for the APHIS complaint process<sup>16</sup>), and in not following a variety of other procedures normally associated with a complete investigation, acted to deprive Lorsch of his First Amendment rights—i.e., that he was punished for strongly expressing his disagreement with the findings of the inspectors and his dissatisfaction with the agency in general. He also contended that the fact that he was singled out when numerous other persons could have been named as parties, such as Byron Countryman and A. J. Durtschi, is further evidence of selective enforcement. He also alleges 14<sup>th</sup> Amendment violations by the Agency.

If an agency had to demonstrate, in order to successfully conduct an enforcement action, why it did or did not elect to pursue enforcement actions against any other individual or entity, that would constitute an incredibly difficult burden of proof to overcome. The very nature of enforcement of remedial statutes by government agencies requires an agency to frequently choose who to enforce against in order to best effectuate the statute's remedial purposes. Just as a police officer may stop someone going 80 in a 55 zone, and not stop someone going at 65, so may an agency decide that, with limited resources, it will prosecute

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<sup>16</sup> Even more impressively, the 24 page First Amended Complaint was signed by counsel on September 17, the day after the exit conference.

one alleged violator over another. Selective enforcement, and possible constitutional violations, only come into play where there is some type of invidious selectivity in terms of the factors utilized in enforcing against a person. In re Jerome Schmidt d/b/a Top of the Ozark Auction, Agric. Dec. (2007). Here, other than the fact that Lorsch was named as a Respondent remarkably soon after APHIS learned information that led them to conclude that Lorsch was a responsible party, no such showing has been made.

With respect to APHIS not following its own procedures, it is not a basis for dismissal,<sup>17</sup> although it is one of concern. While APHIS inspectors are required to conduct inspections according to protocols established in various inspection guides, it appears that APHIS inspectors generally feel the guides are not applicable to them if they are “experienced.” Inspector Lorang testified that she felt her years of experience were a sufficient guide for her in the conduct of the inspection. “So I believe I’ve opened the guide one time. And that was kind of because my dog chewed the box of it, and so -- it’s simply these were written for new people. For -- I’m sorry, that’s the way I’ve always looked at it. These are written to assist new people to get the experience that people that have been doing it for 15 years already have. It’s to help them.” Tr. 2337-2338. Her supervisor, Dr. Garland, testified that reading the guides was not a requirement of the job, and that she did not—indeed could not--direct her inspectors to read the inspection guide. Tr. 3611. And Dr. Gibbens testified that the guides were designed for new inspectors even though the guides indicate that they are to be used by all inspectors.

The fact is, however, that there was no real prejudice to either Respondent by the failure of the inspectors to literally follow each step in the inspection guides. The guides do

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<sup>17</sup> Thus, e.g., in In re. John F. Cuneo, 64 Agric. Dec. 1318, 1343 (2005), aff’d 65 Agric. Dec. 87 (2006) (decision as to James G. Zajicek), APHIS “failed to comply with its own rules and guidelines when it failed to provide Mr. Zajicek with a copy of any inspection report at the close of the inspection.”



not indicate that each of their procedures was mandatory—they were intended for use as “guides.” In any event, the failure to follow the procedures as alleged by Lorsch would not alter the fact that violations either were or were not committed. The fact that a correction date was not given when it should have been, or that the inspectors may have mischaracterized the inspections as “routine” when they were in fact not routine, would not alter the existence of the violations.

**6. Provisional findings on alleged violations**—In the event that my finding that no exhibiting occurred, and that therefore most of the alleged violations (other than those concerning the actions of Lorsch at the September inspection) were thus inappropriately cited, is reversed, I include the following provisional findings:

Many of the animals at the WWS were both regulated and in “commerce” or “affecting commerce” as these terms have been interpreted in the context of Animal Welfare Act coverage. Although both Respondents contend that the APHIS did not generally meet their burden of showing coverage, I find that, given the clearly liberal interpretation to which these terms have subjected by the Secretary, that, if there were exhibitions of animals by the WWS, then the regulated and commerce aspects of the statute would have been met by the Complainant.<sup>18</sup>

On the other hand, even if the fundraisers, volunteer and donor tours, and press events were exhibitions, which I have ruled they were not, the question of which animals are covered by the regulations is not that simple. As Complainant vigorously argues in its brief, an animal can be considered subject to the regulations even if it is not

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<sup>18</sup> “The ‘in commerce’ requirements of the Animal Welfare Act are interpreted liberally. . . Congress indicated that it wanted to extend the application of the Animal Welfare Act broadly to cover any activity that ‘affects commerce ( 7 U.S.C. § 2131).” *In re Daniel J. Hill and Montrose Orchards, Inc.* Agric. Dec. (slip op. p. 12)(May 16, 2008). The WWS’ use of the internet, their occasional purchase of animals, and their self-described trips over state lines to rescue animals would be factors mitigating in favor of coverage.

exhibited, as long as it is "intended for use ... for ... exhibition." (Compl. Reply to Lorsch Br., p. 5, quoting 7 U.S.C. § 2132(g); 9 C.F.R. § 1.1. Conversely, if an animal has never been either exhibited or intended for use in an exhibition, it would appear not to be regulatable under the Act or the regulations. Thus, it would appear that Sammy, the self-mutilating chimp, who was clearly never exhibited and who at the time of the inspections, and perhaps to this day, was never intended to be exhibited, would be outside the parameters of the regulations. There is a legitimate question as to whether, at the time of the inspections, the chimps that were contained in Q1 and Q2 were regulated animals under APHIS's own analysis, since there was no evidence showing that the two quarantined areas were ever open to the public.

If the WWS was in fact exhibiting, it did appear to commit several veterinary care violations at the time of the inspections, which Respondent Colette would be responsible for as the license holder. First, the facility did not fully comply with the requirement regarding the establishment of a program for veterinary care. While there was a full-time veterinarian, Adam Gerstein, he did not appear to have "received training or experience in the care and management of the species being attended" nor did he have "direct or delegated authority for activities involving animals at [the] facility" that would allow him to qualify as "attending veterinarian" as required under the definition at 7 C.F.R. §1.1. The regulations require that an attending veterinarian be designated through "formal arrangements," which presumably means in writing, and that there be a written program of veterinary care. 7 C.F.R. § 2.40(1). The attending veterinarian needs to have "appropriate authority to ensure the provision of adequate veterinary care." 7 C.F.R. §

2.40(2). However, the testimony demonstrated that it was not Dr. Gerstein, but rather Dr. Rebecca Yates, who wielded this authority, but in an informal manner.

That is not to say that the WWS's veterinary affairs were not in competent hands, as it is also clear that Dr. Rebecca Yates, while not being officially designated as the part-time attending veterinarian, had previously served in that position, was totally competent in that position, and was on call for any matters where Dr. Gerstein needed assistance or advice. While she was not formally designated in the position of attending veterinarian, she was to a large degree serving in that position, and her testimony was quite clear that Dr. Gerstein was required to call her "and go over anything that was complicated." Tr. 4757-4760. Thus, while there is a violation, the seriousness is greatly mitigated by the competent veterinary assistance at hand.<sup>19</sup>

With respect to the allegation that the WWS employed inadequate personnel, Complainant's brief contains little more than a naked statement that having a single person with the title "Animal Manager" for over 200 animals "is inadequate." The September 16 inspection reports cites the fact that two employees were caring for 10 chimps, concluding "This may not be an adequate number of trained employees to carry out the level of husbandry practiced and care required." CX 4, p. 3. However, there was no testimony that would allow me to make a conclusion as to the number of employees that would be adequate for a place such as the WWS, and the inspectors' conclusion of inadequacy is halfhearted at best. There is no specific requirement establishing the number of supervisory positions required for a particular animal population, and given that the facility employed somewhere between 35-40 full-time staff and were assisted by

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<sup>19</sup> In addition, the WWS staff included Silvio Santinello, who was licensed to practice as a veterinarian in Mexico, but was never so licensed in the United States. Dr. Mahoney considered him a fellow veterinarian, and a "Highly experienced and a good person to work with." Tr. 4052-4053.

hundreds of volunteers,<sup>20</sup> Complainant has failed to meet its burden of proof on this count.

Complainant's contention that there was insufficient documentation concerning the adequacy of written records to support the frequency of observations and opportunities for environmental enrichment with respect to Sammy specifically and other animals generally is supported by a preponderance of the evidence. Daily observation of all animals is required by the regulations, while non-human primates require "an appropriate plan for environmental enhancement adequate to promote the[ir] psychological well-being." Documentation in this area was generally sparse, even with regards to Sammy, for whom only four notations concerning environmental enhancement were noted over a four month long period. While there is no specific requirement for daily entries concerning environmental enhancement, and there was ample testimony that the WWS provided such enhancement regularly, the paucity of the documentation, particularly for an obviously problematic case like Sammy, does not appear to be in compliance with the regulations. Likewise, the fact that after the hiring of Jennie McNary, and the carrying out of her recommendations, the condition of Sammy markedly improved to the point that he is now better than he has ever been is an indication that the previous attempts to treat his self-mutilation were, while reasonably diligent, not the best. Thus, while Dr. Mahoney opined that while Sammy was the worst case of self-mutilation that he had ever witnessed, Tr. 4070; that determining the triggers for self-mutilation is very difficult, Tr. 4071-4072; that continued self-mutilation was not a sign that Sammy was not getting adequate environmental enhancement, Tr. 4082; and that the WWS was doing all it reasonably could to treat his condition, Tr. 4089; the changes that had taken

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<sup>20</sup> Testimony of Martine Colette, Tr. 4209-4210.

place after Jennie McNary's intervention were "thrilling" and "unbelievable." Tr. 4089-4090. Dr. Mahoney agreed that Sammy's condition improved "dramatically" once McNary became involved. Tr. 4136. This would support a conclusion that the diagnoses of McNary related to environmental enhancement and other factors were an indication that the measures provided by the WWS fell short of the regulatory standard. Thus, I conclude that there is a violation of the documentation and implementation of the environmental enhancement provisions, with the understanding that this finding would apply only if my earlier findings as to the lack of exhibiting generally, and my specific findings that the chimps, and particularly Sammy, were never exhibited before or during the periods covered by the inspections, were reversed.

There also was testimony on the violation cited for the failure to have proper equipment to immobilize and/or anesthetize chimps for medical treatment. The alleged violation was for having den boxes in the chimp enclosures that were not suitable for use in sedating or anesthetizing non-human primates. Ms. Colette testified that the den boxes were never used for those purposes, because it was impossible to see adequately into the boxes to enable darting a chimp, and that the boxes were only used by the chimps as a shelter. Tr. 4877-4848. Rather they used catch cages "since the inception of the Wildlife Waystation." Tr. 4879. Dr. Yates also testified as to the use of portable catch cages. Since it seems to be undisputed that the den boxes were not adequate for immobilization or anesthetization, and it is equally undisputed that the den boxes were not used for those purposes, and that other adequate methods were used, this allegation was not proved by Complainant.

Numerous other relatively minor violations were established at the hearing. A pot of uncooked rice was exposed in the kitchen, although there was no documentation as to how long this incident lasted. There were flies on Sammy's open wounds, although there was no indication as to what preventative measures could have prevented the presence of flies, and there is no total ban on insects appearing in a facility. There was some issue concerning the presence of adequate hand washing facilities at portable rest room facilities. A tree branch was growing through a part of an enclosure. At most, these were minor violations.

### **Findings of Fact**

1. Respondent Martine Colette is an individual whose mailing address is 14831 Little Tujunga Canyon Road, Los Angeles, California. During the time period relevant to this proceeding, she was involved in the operation of a zoo, as that term is defined in the Regulations, known as Wildlife Waystation, located at the same address. Respondent Colette holds Animal Welfare Act license number 93-C-0295, issued to "Martine Colette d/b/a Wildlife Waystation."

2. On October 31, 2002, a Consent Decision and Order were issued by Administrative Law Judge Jill S. Clifton in In re Martine Colette and Wildlife Waystation, AWA Docket No. 00-0013. In that decision, Martine Colette as an individual, and the Wildlife Waystation, admitted to the commission of several hundred violations of the Animal Welfare Act. The decision imposed a suspension of the exhibitor's license issued to Martine Colette d/b/a Wildlife Waystation until an APHIS inspection supported the lifting of the suspension.

3. Robert H. Lorsch is a businessman and philanthropist who has been closely involved with the Wildlife Waystation. He has been a substantial financial contributor to the WWS, to the extent that he was recognized as the “best friend” of the WWS. He has held various positions with the WWS, but has never been involved in any aspect of the day-to-day management of the facility. While he had been described as the “unofficial CEO” of the WWS, and unquestionably had some influence in WWS decision making, he was not an official of the WWS during the time period relevant to this decision. He was not a member of the WWS board of directors during the relevant time period.

4. Respondent Lorsch volunteered to act as a representative and advocate for the WWS in their dealings with the federal, state and local governments. This involved utilizing some of his numerous contacts to bring people together to resolve the problems with government agencies plaguing the WWS. In this capacity, Lorsch attended numerous meetings, presented and negotiated various positions to resolve the numerous pending issues, and acted as an agent for those purposes for the WWS.

5. Lorsch also took actions to increase donations to the WWS. In particular, he invited potential donors to a variety of fundraisers, both off-site and at Ms. Colette’s home, which was located at the same address as the WWS.

6. On several off-site fundraisers, regulated animals not owned by the WWS were exhibited by others for the benefit of the WWS. On at least one occasion, the WWS brought an eagle, a snake and a llama to a fundraiser. While under some circumstances a llama may be considered a regulated animal, there was no evidence presented that this llama was regulated.

7. On numerous occasions, potential volunteers were invited to the WWS and taken on bus tours. After the tour, some volunteers withdrew their applications. There is no credible evidence that these volunteer tours were conducted for any other reason than to introduce volunteers to the variety of duties they might undertake. Withdrawal of some applications after the tour would be totally expected and does not indicate any other motivation for the conduct of the tours.

8. In early August, 2003, the WWS requested that APHIS conduct an inspection of their facility to determine whether the license suspension should be lifted. Although such an inspection is not considered routine, and regulatory violations are not customarily cited during an inspection to lift a license suspension, in fact on August 15, apparently a short while after the inspection was requested but before it was actually conducted, a complaint was issued against Martine Colette and the WWS charging that it had violated the Act by exhibiting without a license.

9. Even though Respondents presumed the inspection was simply to determine whether APHIS would lift the license suspension, it appears that APHIS inspectors had already determined that Respondents were exhibiting improperly, and thus, even though the inspection was invitational rather than announced, APHIS inspectors were prepared to cite Ms. Colette and the WWS for any violations they believed existed.

10. At the inspection conducted August 19-21, 2003, the APHIS inspectors found several areas where they believed the facility was not in compliance. The August 15 complaint had not been served on the then Respondents Martine Colette and Wildlife Waystation at the time of this three day inspection. The inspectors discussed the alleged non-compliance areas in an exit conference on August 21. Mr. Lorsch attended the exit



conference via telephone. The inspectors did not inform the WWS, Ms. Colette and Mr. Lorsch that the areas of non-compliance presented the possibility of complaint issuance.

11. A follow-up inspection was conducted on September 16, 2003. At this inspection the inspectors found that a number of the alleged non-compliant areas discussed after the first inspection were still in non-compliance. They also cited a number of alleged non-compliances involving the condition of Sammy, a chimp that had been self-mutilating since before he was moved to the WWS nearly a decade earlier.

12. At the September 16 exit conference, Respondent Lorsch, who was again participating by telephone, became quite angry, was rude, spoke condescendingly and disparagingly about many of the observations of the inspectors, and questioned whether they wanted Sammy to be euthanized. The inspectors did not advise Lorsch that he was being abusive, and Inspector Lorang stated that she did not feel intimidated. Following the exit conference, A.J. Durtschi, the Manager of the facility who attended the exit conference in person, apologized for the conduct of Lorsch. The following day, Lorsch telephoned Inspector Lorang and likewise apologized.

13. Less than a week after the September 16 exit conference, an amended complaint was issued, alleging many violations from the August and September inspections, and for the first time naming Lorsch as a Respondent.

14. On October 14, 2003, an additional follow-up inspection was conducted by APHIS, and additional alleged violations were documented.

15. On November 3, 2003, APHIS reinspected the facility and found no further violations. As a result of this inspection, the suspension of the license issued to Martine Colette d/b/a Wildlife Waystation was lifted.

16. At the August-October inspections, the facility did not meet the regulatory requirements for having an attending veterinarian.

17. At the September inspection, the inspectors observed that the chimp Sammy, who had been a self-mutilator since at least the time he had come to the facility, exhibited a number of open wounds that were the result of self-mutilation. Sammy had never been exhibited nor was there any indication that Sammy would ever be exhibited as defined in the regulations. The facility had undertaken significant efforts to rehabilitate Sammy, but during a four month period prior to the inspection there were only four entries in a log book documenting environmental enhancement methods. Shortly after the September inspection, the facility hired a consultant who worked with Sammy with dramatic positive results.

18. Portable catch cages were used for anesthetizing and/or immobilizing chimps. There was no evidence presented that would support a finding that inadequate den boxes were used for these purposes.

19. There was no meaningful evidence introduced to support an allegation that the facility had an inadequate number of employees to tend to the animals.

### **Conclusions of Law**

1. The various on and off-site activities cited by Complainant, including fund raising, recruitment of volunteers, and invitations to prospective donors to visit the Wildlife Waystation did not constitute “exhibiting” as that term is defined in the Act or the regulations. Accordingly, Complainant failed to demonstrate by a preponderance of the evidence that Respondents Martine Colette and Robert Lorsch exhibited while Ms. Colette’s license was suspended pursuant to the 2002 Consent Decision.

2. Since no unlawful exhibiting took place during the period for which violations were alleged, there are no violations for conditions at the Wildlife Waystation as alleged in the Second Amended Complaint.

3. While Respondent Lorsch was rude, condescending and angry towards Inspector Lorang and Dr. Garland during the September 16, 2003 exit conference, his conduct during the telephone call did not rise to the level which would constitute “abusive” conduct under the Act and the regulations.

4. Robert Lorsch was a limited agent for both the Wildlife Waystation and Martine Colette. His agency extended to the areas of recruiting wealthy donors and hosting fundraising activities, and acting in a representational capacity to take advantage of his connections and liaise with the federal, state and county governments to resolve the numerous regulatory difficulties plaguing the WWS and Ms. Colette. His agency did not extend to day-to-day operations of the WWS or any aspect of animal care and management.

5. If it is found that unlawful exhibiting took place at the facility, I would find that the Complainant did demonstrate violations by Respondent Colette for noncompliance with the attending veterinarian regulations, for adequacy and appropriate documentation of environmental enhancement, and for minor violations involving exposed food, control of insects, structural integrity (a branch growing through a chimp cage), and the presence of hand washing facilities.

### **CONCLUSION AND ORDER**

Complainant has failed to prove that Respondents Martine Colette and Robert Lorsch committed any of the alleged violations of the Animal Welfare Act that were the

subject of the Second Amended Complaint. Accordingly, I rule in favor of Respondents, and order that the case against them be dismissed.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.  
this 4<sup>th</sup> day of August, 2008

Marc R. Hillson  
**MARC R. HILLSON**  
Chief Administrative Law Judge