ANIMAL WELFARE ACT

COURT DECISIONS

ANIMAL LEGAL DEFENSE FUND v. VILSACK.
No. 16-cv-00914 (CRC).
Court Decision.
Signed February 15, 2017.

AWA – Animal welfare – Enforcement – License.

APA – Administrative procedure – Interested party – Interested person – Intervene, motion to – Intervention – Rules of Practice.

[Cite as: No. 16-cv-00914 (CRC), 2017 WL 627379 (D.C. Cir. Feb. 15, 2017)].

United States District Court,
District of Columbia.

The Court vacated the decision of the Judicial Officer, who had upheld the denial of Animal Legal Defense Fund's (ALDF's) Motion to Intervene in an enforcement action against a zoo on the basis that ALDF's interests were beyond the scope of the proceeding. The Court ruled that, contrary to the Judicial Officer's decision—which did not identify or address those interests—ALDF's stated interests in animal welfare and the health and treatment of the zoo's animals fell within the scope of the proceeding. Additionally, the Court held that the Judicial Officer's determination did not constitute a blanket prohibition on third-party intervention in violation of the Administrative Procedure Act (APA). The Court remanded the case back to USDA for consideration of the Motion to Intervene in light of this opinion and the factors relevant to third-party intervention under the APA.

MEMORANDUM OPINION

CHRISTOPHER R. COOPER, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

The United States Department of Agriculture ("USDA") is in the midst of an administrative enforcement action against a family-owned zoo in Iowa for alleged violations of the Animal Welfare Act. The Animal Legal Defense Fund ("ALDF"), which has long criticized the zoo's care and handling of its animals, sought to intervene in that proceeding but was prevented from doing so by the presiding administrative law judge. After the agency Judicial Officer upheld the ALJ's decision on the grounds that

the ALDF's stated interests were beyond the scope of the proceeding, ALDF challenged the Judicial Officer's ruling in this Court. It principally contends that the Judicial Officer's decision was contrary to Section 555(b) of the Administrative Procedure Act ("APA"), which allows "interested persons" to participate in agency proceedings "so far as the orderly conduct of public business permits." Both sides now move for summary judgment.

The Court finds that ALDF's demonstrated interest in the welfare of the zoo's animals falls squarely within the scope of the USDA enforcement proceeding. The Judicial Officer's finding to the contrary was therefore arbitrary and capricious under the APA. Because the Judicial Officer did not address whether ALDF's participation would otherwise impede "the orderly conduct of public business," there is no basis in the record to uphold the denial of its motion to intervene under APA Section 555(b). The Court will, accordingly, grant ALDF's motion, vacate the Judicial Officer's ruling, and remand the case to the agency for a more thorough consideration of ALDF's motion in light of factors relevant to third-party participation in agency proceedings under Section 555(b).

I. Background

The Animal Welfare Act of 1966 ("AWA"), 7 U.S.C. § 2131 *et seq.*, establishes minimum standards for the humane care and treatment of animals that are exhibited to the public. The USDA, through the Animal and Plant Inspection Service ("APHIS"), licenses animal exhibitors under the AWA and enforces compliance with the Act's care and treatment standards. A.R. 4.

The Cricket Hollow Zoo is a family-owned menagerie in Manchester, Iowa. The zoo has custody of some 200 animals, including lions, tigers, and bears. A.R. 74. Since obtaining its exhibitor license from APHIS in 1994, the zoo has had a checkered history of compliance with the AWA. In 2004, APHIS issued an "Official Warning" to the zoo for failing to maintain adequate shelter and wholesome food supplies for its animals. *Id.* at 81. The zoo subsequently paid two separate monetary penalties to settle alleged AWA violations stemming from periodic APHIS inspections. A.R. 5.

In 2014, ALDF brought separate lawsuits against Cricket Hollow and USDA. The former alleged that the zoo had violated the Endangered Species Act's prohibition on the "taking" of protected animals. *See* Compl., *Kuehl v. Sellner*, 14–cv–2034 (N.D. Iowa June 11, 2014). The suit against USDA challenged AHPIS's continued renewal of Cricket Hollow's exhibitor license in light of the zoo's habitual non-compliance with the AWA. *See* Compl., *ALDF v. Vilsack*, 14–cv–1462 (D.D.C. Aug. 25, 2014). A fellow judge of this Court ultimately resolved that suit in USDA's favor, holding that the agency lawfully adopted and applied a license renewal scheme that does not condition renewal on an exhibitor's compliance with the AWA's animal welfare standards. *See ALDF v. Vilsack*, 169 F.Supp.3d 6, 8 (D.D.C. 2016).[1]

While ALDF's suit against the Department was pending, APHIS initiated the present enforcement action against the zoo. APHIS re-alleged many of the same violations it had previously cited, and further accused the zoo of willfully violating AWA provisions and associated regulations pertaining to veterinary care. A.R. 5. ALDF sought to participate in the enforcement action by offering to provide APHIS attorneys with evidence generated from discovery in ALDF's Endangered Species Act litigation against the zoo. A.R. 121–22. APHIS declined the offer, contending that it was inappropriate given ALDF's pending lawsuit against APHIS over its renewal of Cricket Hollow's license.

Thus rebuffed, ALDF filed a motion to intervene in the enforcement proceeding. A.R. 50. ALDF based its motion on Section 555(b) of the APA, which allows "interested persons" to participate in agency proceedings "so far as the orderly conduct of public business permits." 5 U.S.C. § 555(b). The presiding administrative law judge denied the motion. A.R. 126–27. In a brief opinion, the ALJ noted that the authority to find violations of the AWA and impose appropriate penalties "rests solely with the Secretary [of Agriculture]." *Id.* at 126. Intervention by ALDF, the ALJ continued, "would interfere with that authority." *Id.*

ALDF appealed the ALJ's ruling to USDA's Judicial Officer. In addition to arguing that the ALJ erred in denying intervention under Section 555(b) of the APA, ALDF also maintained that it was entitled to

[1] That ruling is currently on appeal to the D.C. Circuit.

intervene under APA Section 554(c)—which permits "interested parties" to intervene in formal agency adjudications—and under USDA's Rules of Practice Governing Formal Adjudicative Proceedings ("Rules of Practice"). A.R. 132.

The Judicial Officer denied ALDF's administrative appeal. With respect to intervention under Section 555(b), he ruled that, even assuming ALDF was an "interested person," its appearance in the proceeding would disrupt "the orderly conduct of public business." A.R. 216. Echoing the reasoning of the ALJ, the Judicial Officer explained that the purpose of the enforcement proceeding was solely to determine whether the zoo violated the AWA and, if so, what the proper sanction should be. *Id.* ALDF's "stated interests," in his view, were "beyond the scope of this proceeding." *Id.* Moving to intervention under APA § 554(c), the Judicial Officer found that because ALDF was not "entitled as a matter of right to be admitted as a party" to the proceeding, it had not met the APA's definition of "party," *see* APA § 551(3), and therefore was not an "interested party" as required for the intervention under Section 554(c). *Id.* at 215. Finally, the Judicial Officer concluded that USDA's Rules of Practice "do not explicitly provide for intervention by third parties, and the Judicial Officer has long held that [they] do not provide for intervention by third parties." *Id.* at 217. ALDF then filed suit in this Court challenging the Judicial Officer's rulings, and both sides now move for summary judgment.

II. Legal Standards

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it is capable of affecting the outcome of litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*

Summary judgment is the proper stage for determining whether, as a matter of law, an agency action is supported by the administrative record and is consistent with the APA. *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977). The APA provides that "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found

to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law...." 5 U.S.C. § 706(2)(A). Arbitrary and capricious review is "narrow." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L.Ed.2d 136 (1971). The Court is not to "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983). Rather, the Court must determine whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* But even if the agency did not fully explain its decision, the Court may uphold it "if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 285–86, 95 S. Ct. 438, 42 L.Ed.2d 447 (1974). The Court's review is limited to the administrative record, *Holy Land Found. For Relief and Dev. v. Ashcroft*, 333 F.3d 156, 160 (D.C. Cir. 2003), and the party challenging an agency's action bears the burden of proof, *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 271 (D.C. Cir. 2002).

III. Discussion

ALDF's summary judgment motion challenges the Judicial Officer's decision as arbitrary and capricious and contrary to law under Section 706(2) of the APA. The organization advances three primary arguments in support of its motion: First, ALDF maintains that it is an "interested person" under APA § 555(b), and that the Judicial Officer erred in finding that its participation under § 555(b) would disrupt the orderly conduct of public business. Second, it argues that the Judicial Officer incorrectly applied the APA's definition of "party" in concluding that ALDF could not intervene as an "interested party" under APA § 554(c). Finally, it asserts that the Judicial Officer's observation that it "has long held that [USDA's] Rules of Practice do not provide for intervention by third parties" amounted to an impermissible "categorical ban on third party participation" in USDA proceedings. Pl.'s Mem. Supp. Mot. Summ. J. ("MSJ") 4.

A. Section 555(b)

Section 555(b) of the APA is the provision most frequently invoked by

third parties seeking to participate in agency proceedings. *See* Jeffrey D. Litwack, A Guide to Federal Agency Adjudication 73 (2d ed. 2012). It provides that "[s]o far as the orderly conduct of public business permits, an *interested person* may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function." 5 U.S.C. § 555(b) (emphasis added). Section 555(b) applies to "all forms of agency action." *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1220 (10th Cir. 1997); *see also Block v. S.E.C.*, 50 F.3d 1078, 1085 (D.C. Cir. 1995) ("[Section] 555(b) is universally understood to establish the right of an interested person to participate in an on-going agency proceeding.").

The APA does not define the term "interested person." The D.C. Circuit has held that an individual or organization with standing to seek judicial review of an agency's decision "clearly qualifies as an 'interested person' who normally may intervene in the administrative proceeding." *Nichols v. Bd. of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 896 (D.C. Cir. 1987). But Article III standing is not required. "Federal agencies may, and sometimes do, permit persons to intervene in administrative proceedings even though these persons would not have standing to challenge the agency's final action in federal court." *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 74 (D.C. Cir. 1999); *see also id.* ("Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to federal courts. The criteria for establishing 'administrative standing' therefore may permissibly be less demanding than the criteria for 'judicial standing.' ") (citations omitted).

A lower threshold for participation under § 555(b) comports with "the important role played by citizens['] groups in ensuring compliance with the statutory mandate that [agency proceedings] serve the public interest." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 624 n.4 (D.C. Cir. 1978). Indeed, the D.C. Circuit has recognized that intervenors representing the public interest "must not be treated as interlopers." *Id.* (quoting *Office of Communication of the United Church of Christ v. F.C.C.*, 425 F.2d 543, 546 (D.C. Cir. 1969)). Because nearly every agency decision—including those made by the agency in individual adjudications—implicates public policy, broad participation in agency

proceedings, and thus a more expansive interpretation of "interested person" in § 555(b), is often necessary. *See* Charles H. Koch Jr., Administrative Law and Practice § 5.20 (3d ed. 2010).

The Judicial Officer assumed that ALDF was an "interested person" for purposes of his decision, but did not make that finding explicitly. A.R. 216. ALDF refers to itself as "a national non-profit organization dedicated to protecting animals, including animals exhibited by zoos and menageries." A.R. 50 ("ALDF Mot. Intervene"). The organization further contends that it "has a longstanding interest in the problem of captive animal mistreatment at roadside zoos, generally, and specifically at Cricket Hollow Zoo." *Id.* at 55. ALDF also represents that it "has spent extensive time, money, and other resources" on lawsuits against the Cricket Hollow Zoo and the USDA. *Id.* at 55; Compl., *ALDF v. Vilsack*, 14–cv–1462 (D.D.C. Aug. 25, 2014) (alleging that USDA's renewal of the zoo's license violated the AWA); Compl., *Kuehl v. Sellner*, 14–cv–2034 (N.D. Iowa June 11, 2016) (alleging that the zoo's treatment of animals violated the Endangered Species Act). Based on these uncontested representations, the Court easily finds that ALDF qualifies as an "interested person" under § 555(b).

But as the preamble to § 555(b) suggests, agencies have broad discretion to limit the participation of interested individuals and organizations in agency proceedings. Even if ALDF qualifies as an "interested person," it "had a right to intervene only if [its] participation in the administrative process dovetailed with the 'orderly conduct of public business.' " *Nichols*, 835 F.2d at 897 (quoting 5 U.S.C. § 555(b)). Courts have interpreted this qualifying language as "accord[ing] agencies broad discretion in fashioning rules to govern public participation." *Id.* Indeed, many agencies have adopted rules governing third-party intervention. *See, e.g.*, 49 C.F.R. § 1113.7 (Surface Transportation Board rule providing that "[l]eave to intervene will be granted only when the [would-be intervenor] addresses issues reasonably pertinent to the issues already presented and which do not unduly broaden them"). USDA, however, appears not to have promulgated any such rules, and as the Judicial Officer noted, its Rules of Practice are silent on intervention governing formal adjudications. A.R. 217. Thus, ALDF's right to participate here is governed by § 555(b) itself and cases interpreting it, rather than by agency regulations or guidance.

When considering requests to intervene under § 555(b), courts "have for the most part permitted denials [of intervention] ... when, for example, other parties to the proceeding adequately represent the would-be intervenor's viewpoint or intervention would broaden unduly the issues considered, obstruct or overburden the proceedings, or fail to assist the agency's decisionmaking." *Nichols*, 835 F.2d at 897. The D.C. Circuit has cautioned, however, that "[a]s a general rule ... courts will not rubberstamp a challenged denial based merely upon an assertion of justification, especially if the agency contends simply that intervention would prove impermissibly dilatory or burdensome." *Id.* The agency must refrain from employing its discretion "in an unreasonably overbroad or otherwise arbitrary manner." *Id.*

Again, the Judicial Officer found that ALDF's participation in the Cricket Hollow proceeding would "disrupt the orderly conduct of public business." A.R. 216. The sole reason offered for that conclusion was that "[ALDF]'s stated interests ... are beyond the scope of [the] proceeding." *Id.* That a third-party's interests exceed the scope of the relevant proceeding is a valid ground for denying intervention. *See Nichols*, 835 F.2d at 897. The question here, however, is whether the Judicial Officer's finding in that regard is supported by the record that was before him. The Judicial Officer did not identify what ALDF's "stated interests" were in the Cricket Hollow enforcement action. But ALDF's Motion to Intervene revealed at least three.

First, ALDF sought to intervene to compel the agency to rescind the zoo's exhibitor license due to its repeated violations of the AWA's animal welfare standards. A.R. 51–53 ("Mot. Intervene"). As noted above, however, USDA maintained the position that its regulatory scheme for renewing licenses, which does not require a zoo to comply with the AWA, was permissible under the AWA—a view that has since been vindicated by a federal court. *ALDF v. Vilsack*, 169 F.Supp.3d 6, 17 (D.D.C. 2016). The administrative renewal of the zoo's license was thus indeed beyond the scope of the enforcement proceeding.

But ALDF also identified two other interests in the proceeding, namely a general interest in animal welfare and a specific interest in the health and treatment of the animals at the Cricket Hollow Zoo. A.R. 55 ("Mot.

Intervene"). These combined interests, which the agency does not dispute, appear to be squarely implicated by the enforcement proceeding. They would be impaired if APHIS failed to prove the alleged violations or negotiated a settlement that did not provide for the adequate care of the zoo's animals, or if the ALJ imposed a penalty that did not sufficiently sanction the zoo's conduct. The Judicial Officer's failure to identify, let alone consider, this rather obvious alignment of interests was arbitrary and capricious.

Having found that ALDF's interests were beyond the scope of the proceeding, the Judicial Officer had no occasion to analyze whether the organization's participation would otherwise impede "the orderly course of public business." As discussed above, courts and commentators have identified a range of factors that agencies typically consider in making that determination, including: the nature of the contested issues; the prospective intervenor's precise interest; the adequacy of representation provided by the existing parties to the proceeding; the ability of the prospective intervenor to present relevant evidence and argument; the burden that intervention would place on the proceedings; and the effect of intervention on the agency's mandate. *See Nichols*, 835 F.2d at 897; Koch, supra, at § 5.20.

Several of these considerations appear relevant here. As an individualized enforcement action against a single respondent, the nature of the proceeding is more targeted in nature than, say, a formal rulemaking or licensing proceeding that affects a wide range of consumers and competitors. As the ALJ noted, the purpose of such proceedings is simply to determine whether the respondent violated the law and, if so, what remedy should follow. The usefulness of appearances by third parties to weigh in on the broader economic or policy implications of the agency's action is limited. Yet, there may be occasions where a third party can offer relevant evidence as to liability or expertise with respect to appropriate remedies, as ALDF claims is the case here.

Relatedly, agencies themselves are usually best equipped to enforce their own regulations. When that is so, it may be that the agency can adequately represent the interests of would-be intervenors. The Government devotes considerable attention in its briefs before this Court trying to debunk ALDF's contention that APHIS has failed to vigorously

enforce the AWA's animal care standards against the zoo in the past and, therefore, cannot be trusted to do so in the present enforcement proceeding. The Government may be correct. But the ALJ or Judicial Officer should consider that issue in the first instance.

Finally, the agency should consider the extent to which ALDF's participation would assist its decision making. ALDF contends, for example, that it has helpful evidence concerning the nature of the zoo's handling of animals, which agency lawyers rejected, and can provide useful input on fashioning an appropriate remedy for any violations found. ALDF's input might well be original and beneficial. On the other hand, it might be entirely duplicative of the agency's existing evidence and remedial capabilities. But it is not a priori "irrelevant" as the ALJ found in denying ALDF's motion to intervene. A.R. 126–27.

It bears repeating that participation in agency proceedings under Section 555(b) does not necessarily entail full-fledged party intervention. Rather, agencies have ample "authority to shape the manner in which intervenors will participate." *Nichols,* 835 F.2d at 897 n.115. Should the agency here find that some degree of participation by ALDF would be consistent with the "orderly conduct of public business," it may reasonably limit and direct the manner of that participation in consideration of all relevant factors.

Accordingly, the Court will vacate the Judicial Officer's ruling and remand the case to the agency for consideration of ALDF's motion in light of factors relevant to participation under APA § 555(b).

B. APA Section 554(c)

APA Section 554(c), which applies only to formal adjudications, provides:

> The agency shall give all interested parties opportunity for—the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and to the extent that the parties are unable so to determine a controversy by consent,

> hearing and decision on notice and in accordance with sections 556 and 557 of this title.

5 U.S.C. § 554(c). ALDF contends in its summary judgment motion that the Judicial Officer erred in finding that it did not qualify as an "interested party" entitled to intervene under APA § 554(c). Pl.'s MSJ 25–26. Even though APHIS enforcement proceedings have all the hallmarks of formal adjudication, the government takes the position in its cross-motion for summary judgment that Section 554(c) does not apply to enforcement proceedings under the AWA because the statute does not *require* USDA to conduct formal adjudications. Def.'s CMSJ 16–17.[2] Accepting that proposition in its Reply brief, ALDF invites the Court to "decide the intervention issue solely on the basis of section 555(b) and whether ALDF sufficiently qualifies as an 'interested person.'" Pl.'s Reply 13. Accordingly, the Court need not consider the Judicial Officer's determination that ALDF is not an "interested party" under Section 554(c).

C. The Judicial Officer's Interpretation of the USDA Rules of Practice

Finally, ALDF challenges the Judicial Officer's determination that ALDF could not intervene under the USDA Rules of Practice. *See* Pl.'s MSJ 30. ALDF argues that the Judicial Officer's finding constitutes an unlawful blanket prohibition on third-party participation in USDA proceedings, in violation of sections 554(c) and 555(b). Courts have indeed interpreted these provisions to prevent an agency from imposing a "flat ban" on third-party participation in agency proceedings. *See Nichols*, 835 F.2d at 898. But the Judicial Officer's interpretation of the Rules of Practice does no such thing. As USDA observes, the Judicial Officer only addressed the Rules of Practice because ALDF had argued that they provide a separate basis for intervention, *in addition to* sections 554(c) and 555(b) of the APA. A.R. 148–49. The Judicial Officer disagreed, noting that "while the Rules of Practice do not explicitly foreclose intervention, [they] do not explicitly provide for intervention by third parties, and the Judicial Officer has long held that [they] do not provide for intervention by third parties." A.R. 217. Facially, at least, this statement is not an outright ban because it was directed to ALDF's alternative argument that

[2] The Court takes no position on this issue, the resolution of which is not self-evident.

intervention was permitted under the Rules. In other words, even if the Rules of Practice do not allow for third-party intervention, a third party can still participate under sections 554(c) and 555(b) so long as the would-be intervenor meets the requirements of those provisions. In this case, the Judicial Officer appears to have considered each ground for relief separately. *See* A.R. 218 ("[T]he Administrative Procedure Act does not require that the Chief ALJ allow the Animal Legal Defense Fund to intervene in this proceeding and neither the Animal Welfare Act nor the Rules of Practice provide for intervention."). Thus, the Court construes the Judicial Officer's opinion not as a flat ban on third-party participation, but rather as an application of the relevant statutory standards to this specific case. The Court therefore holds that this finding was not arbitrary, capricious, or contrary to law.

IV. Conclusion

For the foregoing reasons, the Court will grant ALDF's Motion for Summary Judgment and deny USDA's Cross–Motion for Summary Judgment. The Court hereby vacates the Judicial Officer's decision, and remands the case back to USDA for further consideration of ALDF's Motion to Intervene consistent with this opinion.

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PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS v. USDA.
No. 16-2029.
Court Opinion.
Decided June 28, 2017.

AWA – Enforcement – Exhibitors – License renewal.
Administrative procedure – *Chevron* deference.

[Cite as: 861 F.3d 502 (4th Cir. 2017)].

United States Court of Appeals,
Fourth Circuit.

The Court affirmed the ruling of the district court, holding that USDA's license renewal process for animal exhibitors—which allows a licensee to renew his or her license despite

noncompliance with the Animal Welfare Act (AWA)—is permissible under the Administrative Procedure Act (APA). The Court found that USDA was entitled to *Chevron* deference and ruled that, because the AWA does not directly address license renewal yet expressly authorizes USDA to promulgate renewal standards, its interpretation of the renewal process was reasonable.

OPINION

STEPHANIE DAWN THACKER, UNITED STATES CIRCUIT JUDGE, WROTE THE OPINION OF THE COURT, IN WHICH JUDGE J. HARVIE WILKINSON AND JUDGE BARBARA MILANO KEENAN JOINED.

People for the Ethical Treatment of Animals ("PETA") challenges the license renewal process for animal exhibitors promulgated by the United States Department of Agriculture ("USDA"), through which the USDA may renew such license despite a licensee's noncompliance with the Animal Welfare Act ("AWA" or "the Act"). PETA argues that such renewal process undermines a key purpose of the Act, that is, ensuring the humane treatment of animals. The district court granted the USDA's Rule 12(c) motion for judgment on the pleadings, concluding that the USDA's interpretation was owed deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Because the AWA does not directly address license renewal but does expressly authorize the USDA to promulgate and implement its own renewal standards, we affirm.

I.

PETA sued the USDA and Tom Vilsack[1] in his official capacity as Secretary of the USDA under the Administrative Procedure Act ("APA"). PETA alleges that the USDA has a "policy, pattern, and practice of rubber-stamping ... license renewal applications" of applicants that the USDA cites for violating the AWA, some only days before renewing their licenses. J.A. 5.[2] Specifically, PETA highlights certain entities and

[1] Tom Vilsack resigned in January 2017 as Secretary of the USDA. Sonny Perdue is the current Secretary of the USDA. The Act authorizes the Secretary of Agriculture, who falls within the USDA, to administer the Act. *See* 7 U.S.C. §§ 2132(b), 2151. For ease of reference, cites to "USDA" herein will encompass both the USDA and the Secretary.
[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

individuals (collectively, "Exhibitors")[3] that obtained license renewals despite violating the AWA.[4]

As part of its mission to protect animals from "abuse, neglect, and cruelty," PETA asserts that it has spent resources (1) sending its members to document animal conditions at Exhibitors' facilities; (2) submitting violation reports to the USDA; and (3) disseminating information about the violations through its website, publications, and other media. J.A. 9. PETA further asserts that by renewing Exhibitors' licenses despite their alleged repeated violations, the USDA "causes PETA to spend additional resources monitoring, documenting, and addressing the unlawful licensing decision and the inhumane conditions at the applicants' facilities." *Id.* As a result, PETA seeks (1) a declaratory judgment that the USDA's renewal policy—both facially and as applied to Exhibitors—violates the APA; (2) a permanent injunction enjoining the USDA from implementing their renewal process; (3) nullification of the Exhibitors' license renewals; and (4) reasonable attorney's fees and costs. *See id.* at 40.

The district court granted the USDA's motion for judgment on the pleadings. *See People for the Ethical Treatment of Animals, Inc. v. United States Dep't of Agric.*, 194 F.Supp.3d 404, 407 (E.D.N.C. 2016). In doing so, the district court first determined that the AWA only addressed license issuance, not license renewal, which is at issue here. *See id.* at 413. The district court next concluded that the USDA's renewal process was based on a permissible construction of the AWA because the AWA itself authorized the USDA to regulate licensing, including renewal. *See id.* at

[3] The Exhibitors are Summer Wind Farm Sanctuary, the Mobile Zoo, Tri-State Zoological Park, Henry Hampton, and Michael Todd. *See* Appellant's Br. 25; *see also* J.A. 6, 17-37.

[4] The descriptions of past violations by other entities—though not the Exhibitors here—are particularly disturbing. For example, a USDA-licensed puppy mill was cited for "having a dog with no teeth, his or her jaw bone partially missing with the bone exposed," and more disturbingly, having "seven dead puppies scattered on the ground at the facility." Brief for The Humane Society of the United States as Amici Curiae Supporting Appellant at 7. Even worse, a dog kennel passed inspection from May 2007 to the present despite having over 100 hundred pages of violations, including "emaciated dogs whose ribs, vertebrae and hip bones were protruding; dogs with wounds and lesions (some of which were red and oozing), dental disease, eye infections (some so severe that the dogs' eyes were matted shut with discharge), and injured limbs; and dogs and puppies living in 100-degree temperatures who exhibited clear signs of heat stress, including total non-responsiveness." *Id.* at 8. In fact, at this same kennel, some of the dogs were so ill that they had to be euthanized. *See id.* at 9.

414–15. PETA timely appealed.

II.

A.

We review de novo the district court's ruling on a motion for judgment on the pleadings under Rule 12(c), *see Butler v. United States*, 702 F.3d 749, 751–52 (4th Cir. 2012), applying the standard for a motion under Rule 12(b)(6)—that is, such a motion should "only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief," *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

B.

This case tasks us with examining an "agency's construction of the statute which it administers." *Chevron*, 467 U.S. at 842, 104 S. Ct. 2778. As a result, we implement the familiar framework established under *Chevron*. *See City of Arlington v. F.C.C.*, —— U.S. ——, 133 S. Ct. 1863, 1868, 185 L.Ed.2d 941 (2013); *Am. Online, Inc. v. AT & T Corp.*, 243 F.3d 812, 817 (4th Cir. 2001). At its core, that framework operates as a tool of statutory construction whereby we give plain and unambiguous statutes their full effect; but, where a statute is either silent or ambiguous, we afford deference "to the reasonable judgments of agencies with regard to the meaning of ambiguous terms [or silence] in statutes that they are charged with administering." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739, 116 S. Ct. 1730, 135 L.Ed.2d 25 (1996). *Chevron* deference provides that "any ensuing regulation" related to the ambiguity or silence "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227, 121 S. Ct. 2164, 150 L.Ed.2d 292 (2001). This deference is rooted in the widely understood notions that the "well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S. Ct. 2196, 141 L.Ed.2d 540 (1998) (internal quotation marks

omitted), as well as the fact that "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington*, 133 S. Ct. at 1868.

Nonetheless, *Chevron* deference is not a given. Indeed, an agency must meet certain threshold procedural requirements before courts may address *Chevron* deference, particularly notice-and-comment rulemaking. *See Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S. Ct. 2117, 2124–2126, 195 L.Ed.2d 382 (2016) ("When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that relatively formal administrative procedure is a very good indicator that Congress intended the regulation to carry the force of law, so *Chevron* should apply.... But *Chevron* deference is not warranted where ... the agency errs by failing to follow the correct procedures in issuing the regulation" (internal quotation marks omitted)). If such procedural requirements are met, then we engage in a two part inquiry to determine whether *Chevron* deference applies. First, we must ascertain whether Congress has "directly spoken to the precise question at issue"; if Congress has done so, that ends the inquiry. *Chevron*, 467 U.S. at 842, 104 S. Ct. 2778; *see Am. Online, Inc.*, 243 F.3d at 817. In assessing whether Congress has spoken to the issue, "we focus purely on statutory construction without according any weight to the agency's position," relying on the plain language of the statute as the "most reliable indicator of Congressional intent." *Sijapati v. Boente*, 848 F.3d 210, 215 (4th Cir. 2017) (internal quotation marks and citation omitted). But, if Congress has not addressed the question, we must then determine "whether the agency's answer is based on a permissible construction of the statute," *id.* at 843, 104 S. Ct. 2778, that is, whether (1) the agency promulgated its interpretation via notice-and-comment rulemaking or formal adjudication, *see Christensen v. Harris Cty.*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L.Ed.2d 621 (2000); and (2) its "interpretation is reasonable," *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 268 F.3d 255, 267 (4th Cir. 2001).

III.

A.

To say, as PETA asserts, that the USDA did not promulgate its interpretation via notice-and-comment, and more generally, did not

adequately consider the issue of renewals is belied by the record. Indeed, the record here demonstrates that the USDA consistently engaged in notice-and-comment rulemaking with regard to issuing and renewing licenses.

For example, in 1995, the USDA engaged in notice-and-comment rulemaking regarding its license renewal process, and one commenter specifically questioned the renewal application's certification of compliance, suggesting that simply certifying compliance "would be ineffective" in ensuring actual compliance by a licensee. Animal Welfare, Licensing and Records, 60 Fed. Reg. 13,893, 13,894 (Mar. 15, 1995). The USDA responded that though licensees certify their compliance during renewal, the certification does not "take the place of inspections" by the USDA. *Id.* And during this same notice-and-comment period, the USDA received additional comments related to altering its renewal process. The USDA considered and responded to each comment. *See id.* at 13,893–13,894.

More recently, in 2000, the USDA began a notice-and-comment period that culminated in a final ruling in 2004. Toward that end, "[the USDA] published in the Federal Register ... a proposal to amend the regulations by revising and clarifying ... the procedures for applying for licenses and renewals." Animal Welfare, Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42,089, 42,089 (July 14, 2004). The USDA "solicited comments concerning [its] proposal for 60 days ending on October 3, 2000," and at "the request of several commenters, [ ] extended the comment period to November 20, 2000," and ultimately received 395 comments. *Id.* During the notice-and-comment period, a commenter questioned the renewal process, suggesting that the USDA should deny renewal unless the subject licensee "was inspected and found compliant just prior to the renewal date." *See id.* at 42,094. The USDA responded to the comment in its 2004 final ruling, stating that it enforces the AWA through "random, unannounced inspections to determine compliance," and that after inspections, "all licensees are given an appropriate amount of time to correct any problems and become compliant." *Id.* Based on its enforcement methods and the nature of citations, the USDA concluded, "[i]t is unrealistic and counterproductive to make license renewal contingent on [the applicant] having [no] citations." *Id.* The USDA thus declined to alter its renewal process. *See id.*

Nonetheless, PETA urges us to discount the USDA's response in its 2004 final ruling, arguing that the response was posted in a final ruling, and so provided an insufficient opportunity for public comment. But this position ignores the full scope of the notice-and-comment proceedings. The 2004 final ruling was based on a notice-and-comment period spanning four years, beginning in 2000. As indicated in the 2004 final ruling, the USDA accepted a wide array of comments, some related to the proposed changes and others unrelated. In fact, the USDA specifically considered the alternative renewal process for which PETA argues today—that renewal should be denied unless a licensee passes inspection at the time of renewal—but determined that the proposed change would be "unrealistic and counterproductive" to its enforcement efforts. Animal Welfare, Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42,089, 42,089 (July 14, 2004).

B.

Chevron: Step One

Because the USDA has properly engaged in notice-and-comment rulemaking, we turn to the first step of *Chevron*, which requires us to determine if Congress has spoken to the issue of whether the USDA may renew a license even though the licensee has violated the Act or the USDA's regulations.

1.

Congress passed the AWA in 1966 to regulate the research, exhibition, and sale of animals, as well as to assure their humane treatment. *See* 7 U.S.C. § 2131. The USDA is authorized to promulgate rules and regulations as to those matters. *See id.* § 2151; *see also* § 2143(a)(1)–(2). An animal exhibitor must obtain a license from the USDA. *See id.* § 2134. Per the AWA, the USDA "shall issue licenses ... in such form and manner as [the USDA] may prescribe and upon payment of such fee," but not until the licensee demonstrates that "his facilities comply with the standards promulgated" by the USDA. *Id.* § 2133. Pursuant to the standards promulgated by the USDA, an initial license requires applicants to (1) be 18 years of age or older, *see* 9 C.F.R. § 2.1(a)(1); (2) apply using a

particular form and file it with the appropriate personnel, *see id.*; (3) pay an application fee, *see id.* § 2.6(a); and (4) acknowledge receipt of and agree to comply with the USDA's regulations and standards, *see id.* § 2.2(a). Applicants for initial licenses must also be inspected and demonstrate compliance before such license will be issued. *See id.* § 2.3(b).

The USDA also has discretion to investigate or inspect a licensee's facilities as it "deems necessary" for violations of the AWA or USDA regulations. 7 U.S.C. § 2146(a). Any interested person may notify the USDA about suspected violations of the AWA as long as he or she is not a party to "any proceeding which may be instituted" as a result of that notification. 7 C.F.R. § 1.133(a)(4); *see id.* § 1.133(a)(1), (3). The USDA has discretion to investigate those suspected violations. *See id.* § 1.133(a)(3). If the USDA believes a licensee has violated the AWA or its regulations, then it may suspend the license for up to 21 days, and may, after notice and an opportunity to be heard, suspend the license for a period greater than 21 days or revoke the license. *See* 7 U.S.C. § 2149(a).

An application to renew a license must be filed within 30 days prior to the license expiration date. *See* 9 C.F.R. § 2.7(a). To achieve renewal, an applicant must satisfy three administrative requirements promulgated by the USDA: (1) file an annual report indicating the number of exhibited animals the applicant owns or leases, *see id.* § 2.7(a), (d); (2) pay an annual license fee, *see id.* § 2.1(d)(1); and (3) certify "by signing the application form that, to the best of the [applicants'] knowledge and belief, [they are] in compliance with the regulations and agree[ ] to continue" to so comply, *id.* § 2.2(b). Of note, proof of actual compliance is not necessary for license renewal. *See id.*

2.

PETA argues that the USDA's interpretation of the AWA to renew licenses despite outstanding violations of the Act at the time of renewal should not receive *Chevron* deference because the term "issue," as used in § 2133, encompasses both license issuance *and* renewal; therefore, Congress has directly addressed whether the USDA may renew a license despite recent violations. If PETA's position is correct, then licensees would have to demonstrate that their facilities "comply with the standards

promulgated" by the USDA not only at the time a license is issued, but also at the time of renewal. 7 U.S.C. § 2133. Thus, PETA argues that because Congress has directly spoken to the issue of renewal, our inquiry should end, and we should conclude that the USDA's renewal of Exhibitors' licenses despite their alleged noncompliance violates § 2133.

3.

PETA's argument cuts against principles of statutory construction. To begin, as a basic principle, we look to the statutory text, and absent a different definition, we interpret statutory terms "in accordance with their ordinary meaning." *Sebelius v. Cloer*, —— U.S. ——, 133 S. Ct. 1886, 1893, 185 L.Ed.2d 1003 (2013). Here, the word "renew" does not appear in the AWA but the word "issue" does, though it is undefined. But the plain meaning of each of these terms leads to the conclusion that the term "issue" does not encompass "renew" as used in the AWA. *See Animal Legal Def. Fund v. United States Dep't of Agric.*, 789 F.3d 1206, 1216 (11th Cir. 2015) (using Webster's Dictionary while examining the AWA to find that "issue" is defined as "to come out, go out" and renew is defined as "to make new again, to restore fullness or sufficiency" (internal quotation marks omitted)).

4.

PETA also looks to the USDA regulatory actions, particularly those promulgated in 1989, to argue that we need not proceed to step two of *Chevron*. In particular, PETA contends that the USDA at one point supported PETA's argument that the term "issue" applies to both license issuance and renewal. Before 1989, 9 C.F.R. § 2.3(a) stated, "Each applicant must demonstrate that his or her premises ... comply with the regulations and standards set forth in parts 2 and 3 of this subchapter *before a license will be issued*" (emphasis supplied). In a proposed rule filing, the USDA stated that it planned to revise § 2.3(a) by removing the words " 'before a license will be issued' from the requirement because it applies to both initial licenses and license renewals." Animal Welfare, 54 Fed. Reg. 10835, 10840 (Mar. 15, 1989). PETA latches onto this language to argue that Congress intended 7 U.S.C. § 2133 of the AWA to apply to both issuance and renewal.

PETA overstates the significance of this point. Critically, the relevant language of 7 U.S.C. § 2133 of the AWA has remained the same since 1966. *See* Pub. L. No. 89-544, § 3, 80 Stat. 350, 351 (1966) (containing the same text without mention of renewal). And nothing in the regulatory activity cited by PETA limits or modifies the broad discretion granted to the USDA in implementing the AWA, thus reinforcing an apparent intent to authorize the USDA to develop appropriate licensing procedures as it sees fit.

C.

Chevron: Step Two

Given the plain language of the AWA, it is clear that it does not specifically address the renewal question at issue here. The Act is not only silent as to renewal, but is also ambiguous as to whether the term "issue" refers to license issuance and renewal. As a result, we move to step two of the *Chevron* analysis—whether the USDA's interpretation of the renewal process is a permissible one.

A permissible interpretation is one that an agency has promulgated through notice-and-comment rulemaking or formal adjudication, and is one that is reasonable. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L.Ed.2d 621 (2000); *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 268 F.3d 255, 267 (4th Cir. 2001). Whether the USDA's interpretation here is reasonable requires us to determine whether the USDA's "understanding" of the AWA "is a sufficiently rational one to preclude a court from substituting its judgment" for that of the agency. *Chem. Mfrs. Ass'n. v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 125, 105 S. Ct. 1102, 84 L.Ed.2d 90 (1985). Critically, we are also mindful that "a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229, 121 S. Ct. 2164, 150 L.Ed.2d 292 (2001).

Reasonable Interpretation

Having determined that the USDA's interpretation of the renewal

process was promulgated via notice-and-comment rulemaking, we turn to whether that interpretation is reasonable. As previously stated, the reasonableness inquiry requires us to determine whether the USDA's "understanding" of the AWA "is a sufficiently rational one to preclude a court from substituting its judgment" for that of the agency. *Chem. Mfrs. Ass'n*, 470 U.S. at 125, 105 S. Ct. 1102. In this regard, we are mindful that, pursuant to § 2151, Congress has expressly delegated the authority to interpret the AWA to the USDA. As a result, we afford the USDA interpretation controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. *See Chevron*, 467 U.S. at 843–44, 104 S. Ct. 2778; *see also Mead Corp.*, 533 U.S. at 229, 121 S. Ct. 2164. Therefore, we examine whether the USDA's construction of the AWA is reasonable given the policies that the AWA commits to the care of the USDA. If they are reasonable, we "should not disturb [the USDA's interpretation] unless it appears from the statute or its legislative history that the [interpretation] is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845, 104 S. Ct. 2778 (quotation marks omitted); *see also Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 158–59 (4th Cir. 2016).

PETA questions the reasonableness of the USDA's interpretation, contending that the licensing regime undermines the purpose of the AWA to ensure the humane treatment of animals. According to PETA, any infraction at the time of renewal should result in license denial, if not revocation. PETA's premise is that renewal must be conditioned upon full compliance. This argument falls short on two fronts.[5]

[5] PETA also argues that we should not defer to this interpretation because the USDA allegedly took inconsistent positions in prior litigation. PETA relies on two prior cases: (1) *Ray v. Vilsack*, No. 5:12-cv-212, 2013 WL 5561255 (E.D.N.C. Oct. 8, 2013); and (2) *Animal Legal Def. Fund*, 789 F.3d at 1221. In *Ray*, while discussing § 2133, PETA claims that the USDA stated the Act was ambiguous as to "how an applicant for renewal may demonstrate compliance with the AWA." Appellant's Br. 14. PETA interprets that statement to mean the USDA conceded that § 2133 applies to both issuance and renewal. *See id.* at 13. However, that statement by the USDA was made in a reply brief supporting its motion to dismiss and in the context of discussing whether the renewal process is subject to judicial review. In *Animal Legal Def. Fund*, PETA claims that a USDA official sent a letter about why the USDA renewed an animal exhibitor's license despite violations. The letter allegedly stated that the USDA renewed the license because it found the animal exhibitor was "in compliance with the regulations and standards, and none of the other criteria for a license denial under [9 C.F.R. §§]2.11 or 2.12 are applicable." *Id.* at 16. PETA believes the USDA "appeared to acknowledge that before renewing a license it

1.

Enforcement of the Act

First, on the enforcement front, PETA's proposed interpretation could actually result in a more inhumane renewal regime. The USDA conducts spot checks of licensees throughout the year. This encourages year round compliance by licensees. If, however, the USDA only inspected at the time of renewal, that could motivate licensees to clean up their act closer to the renewal date while relaxing compliance throughout the rest of the year.

Further, PETA overlooks the fact that under the current USDA regime, though a licensee may falsely certify that it is in compliance when applying for renewal, that does not mean the USDA turns a blind eye to future compliance. As the USDA acknowledges, certifying compliance on a renewal application does not act "as an alternative means of ascertaining compliance or as a substitute for inspections." Animal Welfare, Licensing and Records, 60 Fed. Reg. 13893, 13894 (Mar. 15, 1995). The USDA retains discretion to investigate licensees "as [it] deems necessary," § 2146(a), and renewing a license does not foreclose future suspension or revocation for violations. In fact, the USDA's own regulations permit termination of a license after notice and an opportunity for a hearing "during the license renewal process." 9 C.F.R. § 2.12.

2.

Discretion to the USDA

Whether PETA agrees with the USDA's renewal process or not, the authority to implement the renewal process is a policy decision that Congress has delegated to the USDA. Indeed, the AWA is rife with examples of Congress granting the USDA significant discretion with regard to the issuance of licenses, when and how to determine whether a

must determine that the applicant is in compliance with the regulations and standards." *Id.* (internal quotation marks omitted). The point is that contrary to PETA's assertion, the USDA has consistently asserted that § 2133 license issuance requirements do not apply to renewals.

violation occurred, and how to reprimand violators. *See, e.g.*, 7 U.S.C. §§ 2133 (the USDA issues licenses "in such form and manner as [it] may prescribe"); *id*. § 2146(a) (the USDA "shall make such investigations or inspections as [it] deems necessary" to determine whether a licensee has violated the AWA); *id*. § 2149(a) (the USDA, upon reason to believe a licensee has violated the AWA, "may suspend such person's license temporarily" for up to 21 days, and may suspend for longer and ultimately revoke a license after providing notice and opportunity for a hearing). Ultimately, the AWA establishes a discretionary regime under which the USDA administers the Act with considerable, express authority.

D.

Finally, it is worth noting that this case is almost identical to *Animal Legal Defense Fund v. United States Dep't of Agriculture*, 789 F.3d 1206 (11th Cir. 2015). Though we are not bound by the law of other circuits, we are aware of the "importance of maintaining harmony among the Circuits on issues of law" where feasible, *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 278 (6th Cir. 2010) (internal quotation marks omitted), particularly in cases that could affect long-standing, nationwide regulatory schemes.

In *Animal Legal Defense Fund*, the appellant, as PETA does here, sought declaratory and injunctive relief against the USDA for renewing a license even though the licensee had violated the AWA. *See* 789 F.3d at 1212. In that case, the district court granted summary judgment to the USDA, concluding the USDA's interpretation should be accorded *Chevron* deference. *See id.* at 1212–13. The Eleventh Circuit affirmed. Under step one of *Chevron*, the Eleventh Circuit determined that Congress had not spoken to the issue, relying on a dictionary definition of the terms and the fact that the term "renew" neither appears nor is defined in the AWA. *See id.* at 1216. Turning to step two, the Eleventh Circuit highlighted the fact that Congress expressly delegated authority to the USDA to interpret § 2133. The court further concluded that the USDA's interpretation of the renewal process was reasonable because it soundly balanced the competing goals of animal welfare and due process for licensees, and that the USDA retained the authority, even after renewal, to suspend or a revoke a license. *See id.* at 1224.

Ultimately, the Eleventh Circuit held, the "AWA licensing regulations embody a reasonable accommodation of the conflicting policy interests Congress has delegated to the USDA" and "are entitled to *Chevron* deference." *Id.* We agree.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: PHYLLIS J. BRITZ, an individual d/b/a WINDY RIDGE KENNELS; and BRUCE BRITZ, an individual.
Docket Nos. 15-0005, 15-0006.
Decision and Order.
Filed January 11, 2017.

AWA.

Administrative procedure – Appeal petition – Rules of Practice.

Colleen A. Carroll, Esq., for Complainant.
Respondent Bruce Britz, pro se.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL AS TO BRUCE BRITZ

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on October 9, 2014. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act]; the regulations and standards issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges, on or about March 31, 2010, and July 22, 2010, Phyllis J. Britz and Bruce Britz willfully violated the Animal Welfare Act and the Regulations.[1] The Hearing Clerk, Office of

[1] Compl. ¶¶ 4-10 at 2-8. The proceeding as to Ms. Britz has concluded. *See* Britz, 74 Agric. Dec. 435 (U.S.D.A. 2015) (Decision and Order as to Phyllis J. Britz by Reason of Default).

Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], served Mr. Britz with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on October 16, 2014.[2] Mr. Britz failed to file an answer to the Complaint within twenty days after the Hearing Clerk served Mr. Britz with the Complaint, as required by 7 C.F.R. § 1.136(a).

On July 18, 2016, the Administrator filed a Motion for Adoption of Decision and Order as to Bruce Britz by Reason of Default [Motion for Default Decision] and a proposed Decision and Order as to Bruce Britz by Reason of Default. Mr. Britz failed to file objections to the Administrator's Motion for Default Decision. On September 26, 2016, Administrative Law Judge Jill S. Clifton [ALJ], in accordance with 7 C.F.R. § 1.139, issued a Decision and Order as to Bruce Britz by Reason of Default [Decision and Order as to Bruce Britz]: (1) finding Mr. Britz willfully violated the Animal Welfare Act and the Regulations, as alleged in the Complaint; and (2) ordering Mr. Britz to cease and desist from violating the Animal Welfare Act and the Regulations.[3] On November 1, 2016, the Hearing Clerk, by ordinary mail in accordance with 7 C.F.R. § 1.147(c)(1), served Mr. Britz with the ALJ's Decision and Order as to Bruce Britz and the Hearing Clerk's service letter.[4]

On December 7, 2016, Mr. Britz appealed the ALJ's Decision and Order as to Bruce Britz to the Judicial Officer. On December 12, 2016, the Administrator filed Complainant's Response to Respondent's Petition for Appeal, and the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

The Rules of Practice provide that a party may appeal an administrative law judge's written decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk within thirty days after the Hearing Clerk

[2] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX XXXX 4399.
[3] ALJ's Decision and Order as to Bruce Britz at the second unnumbered page through 13.
[4] Memorandum to the File, dated November 1, 2016, signed by Caroline Hill, Assistant Hearing Clerk, Office of the Hearing Clerk.

serves that party with the written decision.[5] The Hearing Clerk served Mr. Britz with the ALJ's Decision and Order as to Bruce Britz on November 1, 2016;[6] therefore, Mr. Britz was required to file his appeal petition with the Hearing Clerk no later than December 1, 2016. Instead, Mr. Britz filed his appeal petition with the Hearing Clerk on December 7, 2016. Therefore, I find Mr. Britz's appeal petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[7] The ALJ's Decision and Order as to Bruce Britz became

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[5] 7 C.F.R. § 1.145(a).

[6] *See supra* note 4.

[7] *See, e.g.*, Edwards, 75 Agric. Dec. 280 (U.S.D.A. 2016) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed three days after the chief administrative law judge's decision became final); Rosberg, 73 Agric. Dec. 551 (U.S.D.A. 2014) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one day after the administrative law judge's decision became final); Piedmont Livestock, Inc., 72 Agric. Dec. 422 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing Piedmont Livestock, Inc.'s appeal petition filed three days after the chief administrative law judge's decision became final and dismissing Joseph Ray Jones's appeal petition filed one day after the chief administrative law judge's decision became final); Custom Cuts, Inc., 72 Agric. Dec. 484 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one month twenty-seven days after the chief administrative law judge's decision became final); Self, 71 Agric. Dec. 1169 (U.S.D.A. 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed eighteen days after the chief administrative law judge's decision became final); Mays, 69 Agric. Dec. 631 (U.S.D.A. 2010) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one week after the administrative law judge's decision became final); Noble, 68 Agric. Dec. 1060 (U.S.D.A. 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the administrative law judge's decision became final); Edwards, 66 Agric. Dec. 1362 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed six days after the administrative law judge's decision became final); Tung Wan Co., 66 Agric. Dec. 939 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed forty-one days after the chief administrative law judge's decision became final); Gray, 64 Agric. Dec. 1699 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the chief administrative law judge's decision became final); Mokos, 64 Agric. Dec. 1647 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed six days after the chief administrative law judge's decision became final); Blackstock, 63 Agric. Dec. 818 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed two days after the administrative law judge's decision became final); Gilbert, 63 Agric. Dec. 807 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the administrative law

final thirty-five days after the Hearing Clerk served Mr. Britz with the ALJ's Decision and Order as to Bruce Britz.[8] Thus, the ALJ's Decision and Order as to Bruce Britz became final as to Mr. Britz on December 6, 2016. Mr. Britz filed his appeal petition on December 7, 2016. Therefore, I have no jurisdiction to hear Mr. Britz's appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Mr. Britz's filing an appeal petition after the ALJ's Decision and Order as to Bruce Britz became final. Accordingly, Mr. Britz's appeal petition must be denied.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Britz's appeal petition, filed December 7, 2016, is denied.

2. The ALJ's Decision and Order as to Bruce Britz, filed September 26, 2016, is the final decision in this proceeding.

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In re: BODIE S. KNAPP, an individual d/b/a THE WILD SIDE.
Docket No. 09-0175.
Decision and Order on Remand.
Filed January 26, 2017.

AWA – Animals, definition of – Cease and desist – Civil penalty – Farm animals – Intended purpose – Sanctions.
Administrative procedure – Official notice.

judge's decision became final); Nunez, 63 Agric. Dec. 766 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

[8] *See* 7 C.F.R. § 1.139; ALJ's Decision and Order as to Bruce Britz at 13.

ANIMAL WELFARE ACT

Colleen A. Carroll, Esq., for Complainant.
Philip Westergren, Esq., for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge (retired).
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER ON REMAND

PROCEDURAL HISTORY

On June 3, 2013, I issued a Decision and Order: (1) finding Mr. Knapp purchased and sold 235 animals in violation of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act], and the regulations issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-2.153) [Regulations]; (2) assessing Mr. Knapp a $42,800 civil penalty for 214 of Mr. Knapp's 235 violations of the Animal Welfare Act and the Regulations; (3) assessing Mr. Knapp a $353,100 civil penalty for Mr. Knapp's 214 knowing failures to obey the Secretary of Agriculture's cease and desist orders issued in *Coastal Bend Zoological Ass'n*, 65 Agric. Dec. 993 (U.S.D.A. 2006), and *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.); and (4) ordering Mr. Knapp to cease and desist from violating the Animal Welfare Act and the Regulations.[1]

Mr. Knapp filed a petition for review with the United States Court of Appeals for the Fifth Circuit. The Court granted in part and denied in part Mr. Knapp's petition for review and remanded the proceeding to the United States Department of Agriculture, as follows:

CONCLUSION

> While most of Knapp's contentions lack merit, we find that the Judicial Officer did not sufficiently explain his reasons for treating aoudad, alpaca, and miniature donkeys as "animals," and not "farm animals." Nor did he sufficiently explain his conclusion that twenty-two of the sales to Lolli Brothers had a regulated purpose. We therefore GRANT in part and DENY in part the petition for review and REMAND to the agency to set out more

[1] Knapp, 72 Agric. Dec. 189 (U.S.D.A. 2013).

fully the facts and reasons bearing on these two decisions.

Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 468 (5th Cir. 2015).

On October 20, 2015, I conducted a telephone conference with Phillip Westergren, counsel for Mr. Knapp, and Colleen A. Carroll, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], to discuss the manner in which to proceed on remand.[2] Ms. Carroll and Mr. Westergren agreed that remand of this proceeding to the Office of Administrative Law Judges, United States Department of Agriculture, to adduce additional evidence was unnecessary, but each requested the opportunity to file a brief on remand and agreed to a briefing schedule.[3] Ms. Carroll requested four amendments to the briefing schedule. Mr. Westergren did not object to any of Ms. Carroll's requests, and I granted each of the requests to amend the briefing schedule.[4]

On February 1, 2016, the Administrator filed Complainant's Brief on Remand, and, on March 23, 2016, Mr. Knapp filed Respondent's-Petitioner's Brief on Remand [Mr. Knapp's Brief on Remand]. On March 28, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision on remand.

DISCUSSION

The Farm Animal Issue

[2] Sherida Hardy, the legal assistant employed by the Office of the Judicial Officer, United States Department of Agriculture [Office of the Judicial Officer], also participated on the conference call.

[3] Knapp, AWA Docket No. 09-0175, 2015 WL 7687427 (U.S.D.A. Oct. 20, 2015) (Order Setting Schedule for Filing Brs. on Remand).

[4] Knapp, AWA Docket No. 09-0175, 2015 WL 9500720 (U.S.D.A. Nov. 25, 2015) (Order Amending Schedule for Filing Brs. on Remand); Knapp, AWA Docket No. 09-0175, 2016 WL 692533 (U.S.D.A. Jan. 12, 2016) (Order Amending Schedule for Filing Brs. on Remand); Knapp, AWA Docket No. 09-0175, 2016 WL 692534 (U.S.D.A. Jan. 14, 2016) (Order Amending Schedule for Filing Brs. on Remand); Knapp, AWA Docket No. 09-0175, 2016 WL 692535 (U.S.D.A. Jan. 28, 2016) (Fourth Order Amending Schedule for Filing Brs. on Remand).

The United States Court of Appeals for the Fifth Circuit found I did not sufficiently explain my reasons for treating twenty-one alpacas, two aoudads, and twenty-five miniature donkeys as "animals"[5] regulated under the Animal Welfare Act and not "farm animals"[6] excluded from regulation under the Animal Welfare Act.[7]

The Administrator contends I correctly found the twenty-one alpacas, two aoudads, and twenty-five miniature donkeys in question are "animals," as that term is defined in the Animal Welfare Act and the Regulations, and correctly concluded Mr. Knapp violated the Animal Welfare Act and the Regulations when he purchased and sold these forty-eight "animals" without first having obtained an Animal Welfare Act license.8 The Administrator does not base his contentions on the record that was before me when I decided *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), but, instead, bases his contentions on texts and websites that are not part of the record. The Administrator requests that I take official notice of the materials and texts cited in the Complainant's Brief on Remand.[9]

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[5] The term "animal" is defined in 7 U.S.C. § 2132(g) and 9 C.F.R. § 1.1.
[6] The term "farm animal" is defined in 9 C.F.R. § 1.1.
[7] Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 459 (5th Cir. 2015).
[8] I concluded Mr. Knapp violated the Animal Welfare Act and the Regulations when, without an Animal Welfare Act license, Mr. Knapp: (1) bought twenty-five miniature donkeys from or at Lolli Brothers Livestock Market, Inc., on April 12, 2008 (Findings of Fact ¶ 17, Conclusions of Law ¶ 9); (2) sold one alpaca and one aoudad to or at Lolli Brothers Livestock Market, Inc., on July 12, 2008 (Findings of Fact ¶ 19, Conclusions of Law ¶ 11); (3) bought one alpaca from or at Lolli Brothers Livestock Market, Inc., on September 27, 2008 (Findings of Fact ¶ 22, Conclusions of Law ¶ 14); (4) bought four alpacas from or at Lolli Brothers Livestock Market, Inc., on April 10, 2009 (Findings of Fact ¶ 24, Conclusions of Law ¶ 16); (5) bought one aoudad from or at Lolli Brothers Livestock Market, Inc., on July 11, 2009 (Findings of Fact ¶ 26, Conclusions of Law ¶ 18); (6) bought six alpacas from or at Lolli Brothers Livestock Market, Inc., on September 26, 2009 (Findings of Fact ¶ 27, Conclusions of Law ¶ 19); (7) bought three alpacas from or at Lolli Brothers Livestock Market, Inc., on April 10, 2010 (Findings of Fact ¶ 29, Conclusions of Law ¶ 21); and (8) bought six alpacas from or at Lolli Brothers Livestock Market, Inc., on July 10, 2010 (Findings of Fact ¶ 31, Conclusions of Law ¶ 23). *See* Knapp, 72 Agric. Dec. 189, 214-19 (U.S.D.A. 2013).
[9] Complainant's Br. on Remand ¶ IIIA-C at 6-11.

The rules of practice applicable to this proceeding[10] provide that, as part of the procedure for hearing, official notice shall be taken, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence—*
>
> . . . .
>
> (6) *Official notice*. Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

7 C.F.R. § 1.141(h)(6). Mr. Knapp objects to my taking official notice of the materials and texts cited in the Complainant's Brief on Remand because "the parties agreed that there would be no further evidence in the case," the parties agreed that they "would proceed on the record already before the Judicial Officer," and the materials and texts cited by the Administrator "are not reliable" and "not the kind of source upon which reasonable people tend to rely."[11]

I agree with Mr. Knapp's assertion that the parties agreed that on remand they would file briefs based on the record before me when I decided *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013). Therefore, in light of the agreement of the parties during the October 20, 2015, conference call, I decline to take official notice of the materials and texts cited in the Complainant's Brief on Remand.[12] I find my conclusion in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), that the twenty-one alpacas, two aoudads, and twenty-five miniature donkeys in question are

[10] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).
[11] Mr. Knapp's Br. on Remand at 1, 6.
[12] I make no ruling on the reliability of the materials and texts cited in the Complainant's Brief on Remand.

"animals," as that term is defined in the Animal Welfare Act and the Regulations, is error,[13] and I dismiss this case as it relates to the twenty-one alpacas, two aoudads, and twenty-five miniature donkeys in question.

The Intended Purpose Issue

The United States Court of Appeals for the Fifth Circuit also found I did not sufficiently explain my reasons for concluding that Mr. Knapp sold twenty-two animals (one alpaca, one aoudad, two zebras, one wildebeest, two addaxes, seven buffalo, three nilgais, four chinchillas, and one axis deer) to or at Lolli Brothers Livestock Market, Inc., for a regulated purpose notwithstanding Mr. Knapp's argument that his sale of these animals to or at Lolli Brothers Livestock Market, Inc., did not require an Animal Welfare Act license because he did not know the purchasers' intended purpose for the animals.[14]

The Administrator contends I correctly found Mr. Knapp sold the twenty-two animals in question for a regulated purpose and correctly concluded Mr. Knapp violated the Animal Welfare Act and the Regulations when he sold the twenty-two animals in question to or at Lolli Brothers Livestock Market, Inc., without first having obtained an Animal Welfare Act license.[15] Again, the Administrator does not base his contentions on the record that was before me when

[13] I make no finding regarding alpacas, aoudads, and miniature donkeys in general as future cases may contain sufficient evidence on to which base a conclusion that alpacas, aoudads, and miniature donkeys are "animals," as that term is defined in the Animal Welfare Act and the Regulations.

[14] Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 461-62 (5th Cir. 2015).

[15] I concluded Mr. Knapp violated the Animal Welfare Act and the Regulations when, without an Animal Welfare Act license, Mr. Knapp: (1) sold one alpaca and one aoudad to or at Lolli Brothers Livestock Market, Inc., on July 12, 2008 (Findings of Fact ¶ 19, Conclusions of Law ¶ 11); (2) sold two zebras, one wildebeest, and one addax to or at Lolli Brothers Livestock Market, Inc., on September 27, 2008 (Findings of Fact ¶ 21, Conclusions of Law ¶ 13); (3) sold three buffalo, one addax, and three nilgais to or at Lolli Brothers Livestock Market, Inc., on April 10, 2009 (Findings of Fact ¶ 23, Conclusions of Law ¶ 15); (4) sold four chinchillas to or at Lolli Brothers Livestock Market, Inc., on July 11, 2009 (Findings of Fact ¶ 25, Conclusions of Law ¶ 17); (5) sold three buffalo and one axis deer to or at Lolli Brothers Livestock Market, Inc., on April 10, 2010 (Findings of Fact ¶ 28, Conclusions of Law ¶ 20); and (6) sold one buffalo to or at Lolli Brothers Livestock Market, Inc., on July 10, 2010 (Findings of Fact ¶ 30, Conclusions of Law ¶ 22). *See* Knapp, 72 Agric. Dec. 189, 214-19 (U.S.D.A. 2013).

I decided *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), but, instead, the Administrator states he "does not share the [United States Court of Appeals for the Fifth Circuit's] view that the [Animal Welfare Act] requires the agency to establish the specific 'end use' to which animals consigned to another dealer will be – or are intended to be – put."[16] The Administrator argues: (1) aoudads, zebras, wildebeest, addaxes, nilgais, and axis deer are generally used for a regulated purpose, namely, exhibition; (2) although alpacas and chinchillas are used for fiber, given the number of alpacas and chinchillas Mr. Knapp consigned to Lolli Brothers Livestock Market, Inc., it would be reasonable to conclude that the alpacas and chinchillas were intend for use as pets; and (3) although buffalo are used for food, Mr. Knapp's consignment of the buffalo to Lolli Brothers Livestock Market, Inc.'s exotics auction, rather than to Lolli Brothers Livestock Market, Inc.'s regular livestock auction, suggests the buffalo were intended to be used for exhibition.[17]

As an initial matter, the Court did not state that the Animal Welfare Act "requires the agency to establish the specific 'end use' to which animals consigned to another dealer will be – or are intended to be – put" as the Administrator contends.[18] Instead, the Court states I "did not discuss the *likely* intended use of the twenty-two additional animals that Knapp sold to Lolli Brothers."[19]

While the Administrator posits plausible arguments in support of his contention that purchasers of the twenty-two animals in question used or intended to use the animals for a regulated purpose, the Administrator's arguments are not based on any evidence in the record that was before me when I decided *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013). Therefore, I find my conclusion in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), that Mr. Knapp sold the twenty-two animals in question for a regulated purpose, is error, and I dismiss this case as it relates to the twenty-two animals in question.

[16] Complainant's Br. on Remand ¶ IV at 12.
[17] Complainant's Br. on Remand ¶ IV at 12-13.
[18] Complainant's Br. on Remand ¶ IV at 12.
[19] Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 461 (5th Cir. 2015) (emphasis added).

The Sanction on Remand

In *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I found Mr. Knapp purchased or sold 235 animals without the required Animal Welfare Act license and concluded that each purchase and sale constituted a separate violation of the Animal Welfare Act and the Regulations.[20] However, for the reasons fully explained in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I assessed no civil penalty for Mr. Knapp's sale of twenty-one hoof stock and assessed Mr. Knapp a civil penalty for only 214 of his 235 violations of the Animal Welfare Act and the Regulations.[21]

In light of my conclusions in this Decision and Order on Remand that I erroneously treated forty-eight animals as "animals" regulated under the Animal Welfare Act and erroneously concluded Mr. Knapp sold twenty-two animals to or at Lolli Brothers Livestock Market, Inc., for a regulated purpose, on remand I find Mr. Knapp purchased or sold 167 animals without the required Animal Welfare Act license.[22] For the reasons articulated in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I assess no civil penalty for Mr. Knapp's sale of five hoof stock and assess Mr. Knapp a civil penalty for only 162 of his 167 violations of the Animal Welfare Act and the Regulations.23 For the reasons stated in *Knapp*,

[20] Knapp, 72 Agric. Dec. 189, 204 (U.S.D.A. 2013).
[21] *Id.* at 200-01.
[22] Two animals (one alpaca and one aoudad which Mr. Knapp sold to or at Lolli Brothers Livestock Market, Inc., on July 12, 2008) of the twenty-two animals that I erroneously concluded Mr. Knapp sold for a regulated purpose are also included in the forty-eight animals that I erroneously found are "animals," as that term is defined in the Animal Welfare Act and the Regulations. Therefore, I reduced the number of Mr. Knapp's violations that I found in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), by sixty-eight violations from 235 to 167 violations.
[23] In *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I declined to assess a civil penalty for Mr. Knapp's sale, without an Animal Welfare Act license, of twenty-one hoof stock in violation of the Animal Welfare Act and the Regulations. On remand, I find Mr. Knapp's sale of sixteen of these twenty-one hoof stock was not in violation of the Animal Welfare Act or the Regulations: (1) Mr. Knapp's sale of two zebras, one wildebeest, and one addax to or at Lolli Brothers Livestock Market, Inc., on September 27, 2008 (Findings of Fact ¶ 21, Conclusions of Law ¶ 13); (2) Mr. Knapp's sale of three buffalo, one addax, and three nilgais to or at Lolli Brothers Livestock Market, Inc., on April 10, 2009 (Findings of Fact ¶ 23, Conclusions of Law ¶ 15); (3) Mr. Knapp's sale of three buffalo and one axis deer to or at Lolli Brothers Livestock Market, Inc., on April 10, 2010 (Findings of Fact ¶ 28, Conclusions of Law ¶ 20); and (4) Mr. Knapp's sale of one buffalo to or at Lolli Brothers Livestock Market, Inc., on July 10, 2010 (Findings of Fact ¶ 30, Conclusions of Law ¶ 22).

72 Agric. Dec. 189 (U.S.D.A. 2013), I assess Mr. Knapp a civil penalty of $200 for each animal that Mr. Knapp purchased or sold in violation of the Animal Welfare Act and the Regulations (except for five hoof stock), and, therefore, on remand I assess Mr. Knapp a $32,400 civil penalty for 162 of his 167 violations of the Animal Welfare Act and the Regulations.

In *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I also found Mr. Knapp's 214 violations of the Animal Welfare Act and the Regulations constitute knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture in *Coastal Bend Zoological Ass'n*., 65 Agric. Dec. 993 (U.S.D.A. 2006), and *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.), and I assessed Mr. Knapp the $1,650 civil penalty required to be assessed for each of Mr. Knapp's knowing failures to obey the Secretary of Agriculture's cease and desist orders.[24] For the reasons stated in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), the civil penalty required to be assessed for Mr. Knapp's 162 knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture in *Coastal Bend Zoological Ass'n*., 65 Agric. Dec. 993 (U.S.D.A. 2006), and *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.), is $267,300.

For the foregoing reasons, the following Order on Remand is issued.

ORDER ON REMAND

1. Mr. Knapp, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from operating as a dealer without an Animal

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See Knapp, 72 Agric. Dec. 189, 215-16, 217-19 (U.S.D.A. 2013). I decline to assess a civil penalty for Mr. Knapp's sale, without an Animal Welfare Act license, of five hoof stock in violation of the Animal Welfare Act and the Regulations: (1) Mr. Knapp's sale of one blackbuck to or at Huntsville Exotic Sales, Inc., on October 27, 2006 (Finding of Facts ¶ 14, Conclusions of Law ¶ 6); and (2) Mr. Knapp's sale of four addaxes to Victor E. Garrett, in February 2006 (Findings of Fact ¶ 16, Conclusions of Law ¶ 8). *See* Knapp, 72 Agric. Dec. 189, 213-14, 216 (U.S.D.A. 2013).

[24] *See* Knapp, 72 Agric. Dec. 189, 205-07 (U.S.D.A. 2013), wherein I discuss the civil penalty required by 7 U.S.C. § 2149(b) to be assessed for each knowing failure to obey a cease and desist order issued by the Secretary of Agriculture under 7 U.S.C. § 2149. *See also* Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 465-66 (5th Cir. 2015).

Welfare Act license. Paragraph 1 of this Order on Remand shall become effective upon service of this Order on Remand on Mr. Knapp.

2. Mr. Knapp is assessed a $299,700 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

USDA APHIS GENERAL
PO Box 979043
St. Louis, MO 63197-9000

Payment of the civil penalty shall be sent to, and received by, USDA APHIS GENERAL within sixty days after service of this Order on Remand on Mr. Knapp. Mr. Knapp shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0175.

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In re: ARBUCKLE ADVENTURES, LLC, an Oklahoma limited liability company.
Docket No. 16-0003.
Decision and Order.
Filed February 9, 2017.

AWA.

Administrative procedure – Complaint, amendment of – Default decision, motion for – Hearing, request for – Service.

Colleen A. Carroll, Esq., and Samuel D. Jocket, Esq., for Complainant.
Justin R Landgraf, Esq., and Meredith P. Turpin, Esq., for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint

on October 6, 2015. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges in the Complaint that Arbuckle Adventures, LLC [Arbuckle], violated the Animal Welfare Act and the Regulations.[1] On November 3, 2015, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Arbuckle with the Complaint,[2] and, on December 4, 2015, Arbuckle timely filed an answer denying the material allegations of the Complaint and requesting a hearing.[3]

On May 3, 2016, the Administrator filed an Amended Complaint alleging Arbuckle violated the Animal Welfare Act and the Regulations.[4] On May 10, 2016, the Hearing Clerk, by regular mail, served Arbuckle with the Amended Complaint,[5] and, on May 27, 2016, Administrative Law Judge Jill S. Clifton [ALJ] extended to June 30, 2016, the time for Arbuckle's filing an answer to the Amended Complaint.[6]

Arbuckle failed to file an answer in response to the Amended Complaint by June 30, 2016, and, on July 8, 2016, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order by Reason of Default. On July 13, 2016, Arbuckle filed an answer to the Amended Complaint denying the material allegations of the Amended Complaint,[7] and on July 29, 2016, Arbuckle filed "Respondent's

[1] Compl. ¶¶ 3-18 at 2-14.
[2] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX XXXX 9805.
[3] Arbuckle captions its answer to the Complaint "Respondent's Answers to USDA Complaints" [Answer to the Complaint].
[4] Am. Compl. ¶¶ 3-22 at 2-17.
[5] Hearing Clerk's Office Document Distribution Form dated May 10, 2016, signed by Caroline Hill.
[6] ALJ's May 27, 2016 Order captioned "File Answer by 30 June (Thur) 2016."
[7] Arbuckle captions its answer to the Amended Complaint "Answers to the complaint filed

Objection to Motion for Adoption of Decision and Order by Reason of Default."

On August 18, 2016, the ALJ issued an order: (1) denying the Administrator's Motion for Default Decision, (2) authorizing the Administrator to file the Amended Complaint, and (3) canceling and withdrawing the ALJ's May 27, 2016 Order captioned "File Answer by 30 June (Thur) 2016."[8] On September 2, 2016, the Administrator appealed the ALJ's August 18, 2016 Order,[9] and, on September 22, 2016, Arbuckle filed a "Response to Complainant's Petition for Appeal." On September 26, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer, United States Department of Agriculture, for consideration and decision.

DECISION

Arbuckle's Request for Oral Argument

Arbuckle's request for oral argument,[10] which the Judicial Officer may grant, refuse, or limit,[11] is refused because the issues raised in the Administrator's Appeal Petition and addressed in Arbuckle's Response to Complainant's Petition for Appeal are not complex and oral argument would serve no useful purpose.

Discussion

The ALJ denied the Administrator's Motion for Default Decision based upon the ALJ's conclusion that the Administrator prematurely filed the Motion for Default Decision. The ALJ identifies two bases for her conclusion. First, the ALJ states, at the time the Administrator filed the Motion for Default Decision, the ALJ had not authorized amendment of the Complaint, as required by 7 C.F.R. § 1.137(a); therefore, the Amended Complaint was inoperative and the Administrator's Motion for Default

by the USDA" [Answer to the Amended Complaint].
[8] ALJ's "Order Authorizing Amendment; and Ruling Denying APHIS's Motion for a Default Decision" [ALJ's August 18, 2016 Order].
[9] Complainant's Petition for Appeal [Appeal Petition].
[10] Resp. to Complainant's Pet. for Appeal ¶ V at 8-9.
[11] 7 C.F.R. § 1.145(d).

Decision, which was based upon Arbuckle's failure to file an answer to the Amended Complaint, was premature.[12]

The Rules of Practice provide that a complaint may be amended at any time prior to the filing of a motion for a hearing, as follows:

> **§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**
>
> (a) *Amendment*. At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137(a). The ALJ found Arbuckle had included a request for a hearing in its December 4, 2015 Answer to the Complaint[13] and, based upon Arbuckle's having filed a request for a hearing, concluded the Administrator could only amend the Complaint with Arbuckle's consent or as authorized by the ALJ. However, the Rules of Practice distinguish between a request for a hearing and a motion for a hearing, as follows:

> **§ 1.141 Procedure for hearing.**
>
> (a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. . . .
>
> (b) *Time, place, and manner*. (1) If any material issue of fact is joined by the pleadings, the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed,

[12] ALJ's August 18, 2016 Order ¶ 3(a) at 2.
[13] ALJ's August 18, 2016 Order ¶ 1 at 1.

> with due regard for the public interest and the convenience and necessity of the parties. . . .

7 C.F.R. § 1.141(a)-(b)(1). The Judicial Officer has long held that a request for a hearing authorized in 7 C.F.R. § 1.141(a) is not the same as a motion for a hearing referred to in 7 C.F.R. § 1.137(a) and 7 C.F.R. § 1.141(b)(1).[14] I find Arbuckle's request for a hearing in its December 4, 2015 Answer to the Complaint is not a motion for a hearing referred to in 7 C.F.R. § 1.137(a). Therefore, I conclude the Administrator was not required by 7 C.F.R. § 1.137(a) to obtain Arbuckle's consent or authorization from the ALJ prior to amending the Complaint, and I reject the ALJ's conclusion that the Administrator's July 8, 2016 Motion for Default Decision was premature because the Amended Complaint was inoperative and Arbuckle's answer to the Amended Complaint was not yet required to be filed.

Second, the ALJ found the Hearing Clerk failed to properly serve Arbuckle with the Amended Complaint by certified mail, as required by 7 C.F.R. § 1.147(c)(1), and concluded the Administrator's July 8, 2016 Motion for Default Decision was premature because the time for filing Arbuckle's response to the Amended Complaint had not yet begun to run when the Administrator filed the Motion for Default Decision.[15] The Administrator contends the Hearing Clerk properly served Arbuckle with the Amended Complaint by ordinary mail on May 10, 2016, and the time for Arbuckle's filing an answer in response to the Amended Complaint began to run on May 10, 2016, the date the Hearing Clerk mailed the Amended Complaint to Arbuckle; thus, the Administrator did not prematurely file the July 8, 2016 Motion for Default Decision.[16]

The Rules of Practice (7 C.F.R. § 1.147(c)(1)) identify six documents that, if served by certified or registered mail, are deemed to be received on the date of delivery to, among other places, the party's last known principal place of business. The six documents identified in 7 C.F.R. § 1.147(c)(1) include "[a]ny complaint or other document initially served on a person to make that person a party respondent in a proceeding."[17] The

[14] Meacham, 47 Agric. Dec. 1708 (U.S.D.A. 1988) (Ruling on Certified Question).
[15] ALJ's August 18, 2016 Order ¶ 3(b) at 2.
[16] Administrator's Appeal Pet. ¶ III at 5-8.
[17] The other five documents identified in 7 C.F.R. § 1.147(c)(1) are not at issue in this

Rules of Practice provide that any document, other than the six documents identified in 7 C.F.R. § 1.147(c)(1), is deemed to be received by any party to the proceeding on the date of mailing by ordinary mail to the party's last known principal place of business.[18] Arbuckle argues the unambiguous language of 7 C.F.R. § 1.147(c)(1) requires "any complaint" to be served by certified or registered mail; therefore, the Hearing Clerk's purported service of the Amended Complaint on Arbuckle on May 10, 2016, by ordinary mail, was ineffective and Arbuckle's time for filing a response to the Amended Complaint had not yet begun to run when the Administrator filed the Motion for Default Decision on July 8, 2016.[19]

The Hearing Clerk served Arbuckle with the Complaint by certified mail on November 3, 2015.[20] The Hearing Clerk's service of the Complaint on Arbuckle made Arbuckle a party respondent in this proceeding. Therefore, the Amended Complaint is not a "complaint . . . initially served on a person to make that person a party respondent in a proceeding." Instead, the Amended Complaint is a document, other than a document specified in 7 C.F.R. § 1.147(c)(1), and, pursuant to 7 C.F.R. § 1.147(c)(2), the Amended Complaint is deemed to have been received by Arbuckle on May 10, 2016, the date the Hearing Clerk mailed the Amended Complaint by ordinary mail to Arbuckle's last known principal place of business. Therefore, I reject the ALJ's conclusion that the time for filing Arbuckle's response to the Amended Complaint had not begun to run when the Administrator filed the Motion for Default Decision on July 8, 2016. Instead, I find the time for filing Arbuckle's response to the Amended Complaint expired on June 30, 2016,[21] and the Administrator's July 8, 2016 Motion for Default Decision was not premature.

While I reject the ALJ's conclusion that the Administrator prematurely filed the July 8, 2016 Motion for Default Decision, I affirm the ALJ's denial of the Administrator's Motion for Default Decision. A document is deemed to be filed on the date it reaches the Hearing Clerk.[22] Arbuckle was required to file its Answer to the Amended Complaint with the Hearing

proceeding.
[18] 7 C.F.R. § 1.147(c)(2).
[19] Resp. to Appeal Pet. ¶ III at 6.
[20] *See supra* note 2.
[21] *See supra* note 6.
[22] 7 C.F.R. § 1.147(g).

Clerk no later than June 30, 2016. The record establishes that Arbuckle did not file its Answer to the Amended Complaint with the Hearing Clerk until July 13, 2016.[23] However, the record also establishes that, on June 29, 2016, Arbuckle tendered the Answer to the Amended Complaint to FedEx for overnight delivery to the Hearing Clerk. The FedEx "Travel History" related to Arbuckle's June 29, 2016 mailing indicates that, on June 30, 2016, FedEx delivered Arbuckle's Answer to the Amended Complaint to the United States Department of Agriculture building housing the Hearing Clerk's office, but that FedEx was unable to file Arbuckle's Answer to the Amended Complaint with the Hearing Clerk because of a "[r]ecipient location security delay."[24] While not without doubt, I find Arbuckle's failure to file its Answer to the Amended Complaint with Hearing Clerk on June 30, 2016, was caused by United States Department of Agriculture security personnel. Under circumstances in which United States Department of Agriculture personnel cause a respondent's failure to timely file a document with the Hearing Clerk, the Judicial Officer has treated the late-filed document as if the document had been timely filed.[25] Therefore, I treat Arbuckle's Answer to the Amended Complaint as timely filed and affirm the ALJ's denial of the Administrator's July 8, 2016 Motion for Default Decision.

For the foregoing reasons, the following Order is issued.

ORDER

1. The ALJ's August 18, 2016 ruling denying the Administrator's July 8, 2016 Motion for Default Decision is affirmed.

2. This proceeding is remanded to the ALJ for further proceedings in accordance with the Rules of Practice.

___

[23] Resp. to Complainant's Pet. for Appeal ¶ I(8) at 3.
[24] Resp. to Complainant's Pet. for Appeal ¶ I(6) at 2, Ex. 3.
[25] *See generally* Clark, 50 Agric. Dec. 386, 390 (U.S.D.A. 1991) (treating the respondent's late-filed appeal petition as timely filed with the Hearing Clerk based on the receipt of the respondent's appeal petition in the United States Department of Agriculture's mail room ten days before the effective date of the administrative law judge's order).

In re: STEARNS ZOOLOGICAL RESCUE & REHAB CENTER, INC., a Florida corporation d/b/a DADE CITY WILD THINGS.
Docket No. 15-0146.
Decision and Order.
Filed February 15, 2017.

AWA.

Samuel D. Jockel, Esq., for Complainant.
William J. Cook, Esq., for Respondent.
Initial Decision and Order entered by Bobbie J. McCartney, Chief Administrative Law Judge.

DECISION AND ORDER

The Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*) (AWA or Act) regulates the commercial exhibition, transportation, purchase, sale, housing, care, handling, and treatment of "animals," as that term is defined in the Act and in the regulations issued under the Act (9 C.F.R. Part 1, *et seq.*) (Regulations). Congress delegated to the Secretary of Agriculture (USDA) authority to enforce the Act.

On July 17, 2015, Complainant filed a complaint alleging that respondent Stearns Zoological Rescue & Rehab Center, Inc., violated the AWA and the Regulations on multiple occasions between July 27, 2011 and November 21, 2013. On August 5, 2015, Stearns Zoo filed an answer admitting the jurisdictional allegations and denying the material allegations of the complaint. An oral hearing was held before me, Chief Administrative Law Judge Bobbie J. McCartney, on June 27, 28, 29, and 30, 2016 in Tampa, Florida.

I. Identification of Animals

The Regulations provide:

> A class "C" exhibitor shall identify all live dogs and cats under his or her control or on his or her premises, whether held, purchased, or otherwise acquired:

(1) As set forth in paragraph (b)(1) or (b)(3) of this section, or

(2) By identifying each dog or cat with:

(i) An official USDA sequentially numbered tag that is kept on the door of the animal's cage or run;

(ii) A record book containing each animal's tag number, a written description of each animal, the data required by § 2.75(a), and a clear photograph of each animal; and

(iii) A duplicate tag that accompanies each dog or cat whenever it leaves the compound or premises.

9 C.F.R. § 2.50(c).

The Complaint alleges that on November 21, 2013, Stearns Zoo willfully violated the Regulations by failing to identify a dog used for exhibition. (Compl. at 3 ¶ 6). In his inspection report, Dr. Navarro wrote, "[t]he dog used during interaction sessions had no official USDA identification." (CX-19 at 1). Dr. Navarro testified that during the inspection Ms. Stearns represented to him that the dog was being used for interaction sessions:

Q How do you know that the dog was being used for interactive sessions?

A Because Mrs. Stearns told us when we asked her.

Transcript (Vol. 2), 133:19-134:2.

However, Ms. Stearns testified that the dog was *not* used for exhibition, but rather that this was a family pet. (Tr. 4, 21). On balance, the testimony provided at hearing by the responsible party is more probative. Accordingly, an essential element of the subject alleged violation has not been established and is, therefore, not sustained.

II. <u>Access for Inspection</u>

The Act provides:

> (a) … the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale…[1]

The Regulations provide:

> (a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
>
> (1) To enter its place of business;
> (2) To examine records required to be kept by the Act and the regulations in this part;
> (3) To make copies of the records;
> (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
> (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.[2]

The Complaint alleges that on two occasions (January 26, 2012 and September 9, 2013) Stearns Zoo willfully violated the Act and the Regulations by failing to have a responsible person available to provide access to APHIS officials to inspect their facilities, animals, and records during normal business hours. (Compl. at 3 ¶ 7). These allegations are supported by the evidence of record and are therefore sustained.

[1] 7 U.S.C. § 2146(a).
[2] 9 C.F.R. § 2.126(a).

Ms. Stearns admitted that she was not available for the inspection on January 26, 2012. She was at a doctor's appointment. (Tr. 4, 184). She argues that because the inspector never reached her, Complainant cannot say that she denied them access. This position is not supportable. It is well settled that the failure of an exhibitor either to be available to provide access for inspection or to designate a responsible person to do so constitutes a willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). Accordingly, this violation is sustained.[3]

On September 9, 2013, Dr. Brandes was unable to conduct an inspection at Stearns Zoo's facility because no one was available to accompany him. In his inspection report, Dr. Brandes wrote: "A responsible adult was not available to accompany APHIS Officials during the inspection process at 1:00 P.M. on 09/09/2013." (CX 18). At the hearing, Dr. Brandes testified that he rang the bell at the facility and called Ms. Stearns, who told him that the facility was closed on Monday and she was busy. In support of Respondent's position that the attempted inspection was not made during normal "business hours" as required to establish the alleged violation, Ms. Stearn's testified that the Zoo is a public facility that is closed on Mondays. (*See* Tr. (Vol. 4), 215:2-14). However, the Regulations provide: "*Business hours* means a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal holiday, each week of the year, during which inspections by APHIS may be made." 9 C.F.R. § 1.1.

Further, the Judicial Officer has previously rejected a similar argument:

> I reject Mr. Perry and PWR's contention that Dr. Bellin and Mr. Watson did not attempt to conduct an inspection during "business hours," as that term is used in 9 C.F.R. § 2.126, merely because Mr. Perry and PWR's business was not open to the public at the time Dr. Bellin and Mr. Watson attempted to conduct the inspection. The time of the attempted inspection was 10:00 a.m., Thursday, January 20, 2005, which was not a holiday, and Mr. Perry was present loading animals to be moved to La Crosse, Wisconsin, for exhibition…. I find, under these

[3] Tr. (Vol. 2), 164:12-20.

> circumstances, Dr. Bellin and Mr. Watson attempted to conduct an inspection of Mr. Perry and PWR's business during business hours, even though the business was not open to the public at that time. Therefore, I conclude Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a), on January 20, 2005.

Perry, 71 Agric. Dec. 876, 880 (U.S.D.A. 2012).

Accordingly, Respondent's position is not supportable, and this violation must be sustained.

III. Handling

Congress intended for the exhibition of animals to be accomplished in a manner that is safe for both animals and humans. The Regulations provide:

> "Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort." 9 C.F.R. § 2.131(b)(1).
>
> "Physical abuse shall not be used to train, work, or otherwise handle animals." 9 C.F.R. § 2.131(b)(2)(i).
>
> "During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public." 9 C.F.R. § 2.131(c)(1).
>
> "Young or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being." 9 C.F.R. § 2.131(c)(3).
>
> "Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being." 9 C.F.R. § 2.131(d)(1).

The Regulations define "handling" as: "petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working, and moving, or any similar activity with respect to any animal." 9 C.F.R. § 1.1.

A. Respondent's Baby Tiger Swim Program

Despite credible testimony from Respondent that Respondent attempted to develop its baby tiger swim program with care and attention to the well-being of its animals, and despite my finding that Respondent did not use physical abuse to train, work, or otherwise handle its animals; for the reasons discussed more fully herein below, it is my determination that Stearns Zoo's baby tiger swim sessions failed to provide sufficient distance and/or barriers between the animals and the public as required by the applicable regulations at 9 C.F.R. §§ 2.131(b)(1)), 2.131(b)(2)(i), 2.131(c)(1),[4] and, further, that the baby tiger swim program is not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that "(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being."[5] Therefore, this practice must cease and desist.

1. Respondent attempted to develop its baby tiger swim program with care and attention to the well-being of its animals.

Respondent provided credible testimony during the hearing that it attempted to develop its baby tiger swim program with care and attention to the well-being of its animals. Respondent developed the baby tiger swim program over several years as part of its tiger training program as a means to acclimate captive bred tigers to the presence of humans and to build a greater bond with the public in the animal world. (Tr. 3, 19). Kathy Stearns developed her tiger protocols with the assistance of qualified veterinarians. (Tr. 4, 19; RX 14-16). She also limits the tigers' swims to three booking slots a day, the tigers do not swim for more than a couple minutes total, she prohibits visitors from taking pictures that might distract

[4] Compl. ¶¶ 8b, 9a, 10c.
[5] C.F.R. § 2.131(c)(3).

the tigers, and visitors may not restrain the tigers. (Tr. 4, 24-27, 37). Respondent also takes several steps to account for the tiger's needs. (Tr. 4, 39). First, the tigers are checked in the morning to see how they are feeling. They are checked again before the swim. If the tiger is sleeping, Respondent does not wake it up. (Tr. 4, 39-40). Respondent never forces a tiger to swim. (Tr. 4, 49). The trainers have full authority to cancel or change a swim based on the tiger's condition and this sometimes happens. (Tr. 4, 51-52). Although three slots are available, Respondent averages one swim per day. (Tr. 4, 43-44).

Further, Respondent's veterinarian, Dr. Don Woodman, had no concerns about undue stress so long as the protocol was followed. (RX 13).[6] Signs of undue stress would include abnormal stools, abnormal feeding patterns, growling, listlessness, changes in sleep/wake cycles, changes in gross physical appearance such as a dull sheen to the hair coat or dull look to the eyes or other marked changes in physical condition or mentation. (RX 13; Tr. 3, 48-54). It is undisputed that Respondent's tigers are quite healthy and active and have shown no signs of undue stress, abuse or neglect. (Tr. 3, 42-43). Similarly, Vernon Yates, a humane officer who investigates animal abuse and who owns and trains tigers, testified that he has seen how Respondent's tigers are trained and he has not found any instances of animal cruelty. (Tr. 3, 157).

After reviewing a segment of ABC's "Good Morning America" video footage at the hearing, Dr. Gage testified that "[i]t appeared to me to be an animal in the water that does not want to be in the water and was trying to find the easiest place to get out of the water, and that seemed to be the reporter."[7] However, unlike Dr. Gage, who only saw the broadcast video, both Kathy and Randy Stearns were present during the entire interaction. (Tr. 4, 130-135). Contrary to Gage's view that the tiger was in distress and did not want to swim, Kathy Stearns testified that the tiger was not under any distress and just wanted to play. (Tr. 4, 134-135). Randy Stearns also testified that the tiger was not under distress and simply wanted to play and swim. (Tr. 3, 213, 216-217).

[6] In addition to his veterinary qualifications, Dr. Woodman has treated and raised tigers. In raising tigers, he trained them to get used to humans, including by taking them in his pool. (Tr. 3, 40-41).
[7] Tr. (Vol. 2), 206:16-20.

Dr. Gage also noted that there were several occasions in the segment where the trainer pulled or held the smaller cub by the tail while it was in the water.[8] It is undisputed that Respondent's employees are trained to hold the base of the tiger's tail to provide balance and support while the tiger learns to swim. (RX 22; Tr. 4, 151). Although Dr. Gage admitted that she had never trained a tiger to swim, she testified, "If you're supporting it under the base of the tail, it's truly support, and that may be acceptable, but I feel that pulling on the tail is just a rotten thing to do." (Tr. 2, 274, 277). She added, "just support, I don't really see that as being a big issue, but I watched quite a number of these videos and pictures where it looked like the trainer was pulling the animal by the tail." (Tr. 2, 278). She did not specify which videos or pictures depicted pulling the animal by the tail, and she actually only saw two videos prior to her testimony, neither of which showed a tiger being pulled by the tail.

Randy Stearns adamantly denied pulling or yanking a tiger's tail. He testified that he would never do that because he works with these cats throughout their lives, "So I don't want bad blood between a tiger that's going to be five, 600 pounds later. So it's kind of a mutual respect. So we do have a good bond. So I wouldn't want to do anything – you know, especially anything to harm an animal, let alone make it upset." (Tr. 3, 28). Consistent with this testimony, one picture from Seiler's encounter shows Randy Stearns directing a customer not to grab the tiger's tail. (Tr. 3, 199). Randy Stearns explained that in the pictures Ms. Seiler presented, he was not actually pulling the tiger's tail. In the pictures taken on land, he was simply supporting the tiger by its belly with his hand on the tiger's tail to ensure that the animal did not flip over and fall on his head. The cat was not vocalizing when he had his hand on the tail. (Tr. 3, 29). In one of the water photographs, Stearns's hand was on the very tip of the tail. He was moving it away after letting the tiger go to swim on its own. In another picture, Stearns had his hand on the tail as the tiger was getting out of the water to keep the tiger from falling back into the water and going under. At the same time, he was moving his right hand under the tiger to support him. (Tr. 3, 33-34). As for holding a tiger by the neck, this allegation apparently was taken from Seiler's affidavit, which she corrected during the hearing to reflect that the tiger was being held by the scruff of the neck and not strangled. (Tr.1, 85). Dr. Gage testified that scruffing is a common

[8] CX 6 at 2.

practice, and tigers will relax when held by the scruff, as the mother would do. (Tr. 2, 218, 267).

It is my determination that, taken as a whole, the evidence of record does not support a finding that Stearns Zoo violated section 2.131(b)(2)(i) by using physical abuse to work the tigers.

2. Stearns Zoo's baby tiger swim sessions failed to provide sufficient distance and/or barriers between the animals and the public as required by the applicable regulations.

Despite credible testimony from Respondent that Respondent attempted to develop its baby tiger swim program with care and attention to the well-being of its animals, and despite my finding that Respondent did not use physical abuse to train, work, or otherwise handle its animals; for the reasons discussed more fully herein below, it is my determination that Stearns Zoo's baby tiger swim sessions failed to provide sufficient distance and/or barriers between the animals and the public as required by the applicable regulations at 9 C.F.R. §§ 2.131(b)(1)), 2.131(b)(2)(i), 2.131(c)(1),[9] and, further, that the baby tiger swim program is not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that "(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being."[10]

a. *September 30, 2011 (Baby Tiger Swim Session)*

The evidence shows that on September 30, 2011, Barbara Keefe paid for a "tiger swim session" at Stearns Zoo's facility.[11] In a letter to APHIS and an affidavit, Ms. Keefe described in detail what she observed at the facility.[12] She recalled that at least three separate groups participated in three tiger swim sessions that day.[13]

[9] Compl. ¶¶ 8b, 9a, 10c.
[10] 9 C.F.R. § 2.131(c)(3).
[11] CX- 9.
[12] CX-9 at 1.
[13] CX-9 at 2; Tr. (Vol. 2), 17:2-6, 75:3-8, 78:1-14.

While there was quite a bit of testimony from various witnesses opining as to whether the baby tigers were in distress or enjoyed the swim sessions, the dispositive point to be made here is that exhibitions where dangerous animals are potentially or actually in direct contact with the public violate both section 2.131(c)(1) and 2.131(b)(1):

> The evidence demonstrates the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, I find, during the behind-the-scenes exhibitions, such as were observed on June 2, 2008, Tri-State and Mr. Candy violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals so there was minimal risk of harm to the animals and to the public.

Tri-State Zoological Park of Western Maryland, Inc., 72 Agric. Dec 128, 138 (U.S.D.A. 2013). *See also Williams*, 64 Agric. Dec. 1347, 1361 (U.S.D.A. 2005).

b. *October 10, 2012 (Good Morning America Swim Session)*

On October 10, 2012, Stearns Zoo exhibited two tigers at Stearns Zoo's facility on a segment of ABC's "Good Morning America." Video footage of the event shows an ABC reporter directly handling two tigers in the pool.[14] Dr. Laurie Gage testified regarding the younger tiger (Tony) that

> . . . the size of the animal, the age of the animal . . . it's an animal which . . . should be in the nursery . . . They should be fully vaccinated, because people can carry a virus that's very tough in the environment, hard to kill, and

[14] CX-4 at 00:18

> lives for a long time and can be carried on people's clothing and their hands and brought into a situation like this . . . you're putting this animal in an unusual situation for its age."[15] Dr. Gage noted that adding members to the public that are not trained to handle the animal causes an issue as, "[t]hey don't necessarily understand how to respond if it misbehaves, or they're not trained to handle baby tigers.[16]

In her declaration (and in her testimony), Dr. Gage noted that APHIS Animal Care considers news reporters, such as the one in the video, to be members of the public.[17]

Later in the footage, an additional tiger-a large juvenile (Tarzan) was brought into the pool, where the reporter was in direct contact with the juvenile.[18] Dr. Gage testified that ". . . this is a large tiger that should not be anywhere close to a member of the public. This is an animal that's too big and too strong, too fast. It could cause damage not only to his handler, but to a member of the public."[19] She noted that the animal was sixty pounds, if not more.[20] Even Stearns Zoo's attending veterinarian would agree, "[o]ver 40 pounds, at that point, I think that they could start becoming dangerous to the public. They can start causing bites that would be significant or scratches that would be significant."[21]

"Respondents' lions and tigers are simply too large, too strong, too quick, and too unpredictable for a person (or persons) to restrain the animal or for a member of the public in contact with one of the lions or tigers to have the time to move to safety." *International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 78 (U.S.D.A. 2002).

[15] Tr. (6/28/16), 197:7-198:7.
[16] Tr. (6/28/16), 198:19-199:9.
[17] CX-6 at 1.
[18] CX-4 at 02:50.
[19] Tr. (6/28/16), 204:13-18.
[20] Tr. (6/28/16), 211:12.
[21] Tr. (6/28/16), 211:12.

It is well settled that exhibitions where dangerous animals are potentially or actually in direct contact with the public violate both sections 2.131(c)(1) and 2.131(b)(1):

> The evidence demonstrates the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, I find, during the behind-the-scenes exhibitions, such as were observed on June 2, 2008, Tri-State and Mr. Candy violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals so there was minimal risk of harm to the animals and to the public.

Tri-State Zoological Park of Western Maryland, Inc.,72 Agric. Dec 128, 138 (U.S.D.A. 2013). *See also Williams,* 64 Agric. Dec. 1347, 1361 (U.S.D.A. 2005).

c. *October 13, 2012 (Baby Tiger Swim Session)*

The evidence reflects that on October 13, 2012, Ms. Jayanti Seiler participated in a "tiger swim" at Stearns Zoo. Ms. Seiler, along with five to seven other people,[22] were shuttled to the area where the animals were kept. Randy Stearns was the trainer during her session, and the juvenile tiger, Tony was brought out to interact with the customers.[23] While there was quite a bit of testimony from various witnesses opining as to whether the baby tigers were in distress or enjoyed the swim sessions, the dispositive point to be made here is that exhibitions where dangerous animals are potentially or actually in direct contact with the public violate both sections 2.131(c)(1) and 2.131(b)(1):

[22] Tr. (Vol. 1), 35:18-20.
[23] CX-8 at 1.

> The evidence demonstrates the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, I find, during the behind-the-scenes exhibitions, such as were observed on June 2, 2008, Tri-State and Mr. Candy violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals so there was minimal risk of harm to the animals and to the public.

Tri-State Zoological Park of Western Maryland, Inc., 72 Agric. Dec 128, 138 (U.S.D.A. 2013). *See also Williams*, 64 Agric. Dec. 1347, 1361 (U.S.D.A. 2005).

d. *October 18, 2012 (Fox and Friends Swim Session)*

On October 18, 2012, Stearns Zoo exhibited a young tiger, Tony, in a simulated swim encounter staged in New York, which was presented on "Fox and Friends."[24] The video footage shows Randy Stearns handling "Tony" in front of a public crowd pressed in tightly to the makeshift pool in an effort to see the baby tiger.[25] Contrary to Respondent's request, a kiddie pool had been provided, and Tony was unable to swim properly. (Tr. 4, 139). Randy Stearns testified that the tiger made noises indicating that he was excited by the cameras, and that the flimsiness of the pool was a problem for him. (Tr. 4, 140) (Tr. 3, 227). According to Mr. Stearns, the camera was too close to the tiger, and the tiger wanted to play with it. (Tr. 3, 226). He was following the camera until he became distracted by a toy moose. (Tr. 3, 227). The tiger was not under distress or even scared of the

[24] This was the same tiger depicted in the ABC show a week earlier. Tony was ten weeks old and weighed about twenty-two pounds. (Tr. 4, 140).
[25] CX-5.

camera. He wasn't doing anything abnormal. (Tr. 3, 228). After this swim, Mr. Stearns testified that "Tony" was perfectly healthy. (Tr. 4, 141-142).

Based on her observation of the video evidence, Dr. Gage concluded that the baby tiger did not want to swim under those circumstances. (CX 6; Tr. 2, 263). While she admitted that it was possible that the tiger wanted to leave the pool because he was curious about something on the outside, Dr. Gage stated that "the animal did not appear to enjoy being in the water . . . it made numerous and consistent attempts to exit the water but was held in the pool by its handler holding the leash."[26]

Again, the dispositive point to be made here is that exhibitions where dangerous animals are potentially or actually in direct contact with the public violate both section 2.131(c)(1) and 2.131(b)(1):

> The evidence demonstrates the public was extremely close to animals that were controlled solely by two volunteers who are familiar with the animals but have no special training in containing them, preventing their escape, or controlling them in the event of an attack. Given the limited handling training for the volunteers, the number of people in attendance, the close proximity of dangerous animals, the lack of a formal plan to control animals in the event of escape, combined with the potential for people to physically come into contact with the animals, I find, during the behind-the-scenes exhibitions, such as were observed on June 2, 2008, Tri-State and Mr. Candy violated 9 C.F.R. § 2.131(c)(1) by failing to handle animals so there was minimal risk of harm to the animals and to the public.

Tri-State Zoological Park of Western Maryland, Inc., 72 Agric. Dec 128, 138 (U.S.D.A. 2013). *See also Williams*, 64 Agric. Dec. 1347, 1361 (U.S.D.A. 2005).

[26] Tr. 2, 264; CX-6 at 2.

3. The baby tiger swim program is not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that "(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being.

Further, and perhaps more importantly, Stearns Zoo's baby tiger swim program is not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that "(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being."[27]

As referenced *supra,* Dr. Laurie Gage testified regarding the younger tiger (Tony):

> . . . the size of the animal, the age of the animal…it's an animal which…should be in the nursery . . . They should be fully vaccinated, because people can carry a virus that's very tough in the environment, hard to kill, and lives for a long time and can be carried on people's clothing and their hands and brought into a situation like this...you're putting this animal in an unusual situation for its age.[28]

This testimony is equally applicable to all of the baby tiger swim sessions.

B. Macaque Monkey

The Complaint alleges that on or about July 27, 2011, Stearns Zoo willfully violated the Regulations (9 C.F.R. § 2.13(c)(1)) by exhibiting a macaque without sufficient distance and/or barriers between the macaque and the public so as to minimize the risk of harm to the animals and the public.[29] Dr. Navarro testified that he received an incident report dated July 21, 2011 from a representative from State Department of Health with respect to an individual who sought treatment for injuries from a monkey

[27] 9 C.F.R. § 2.131(c)(3).
[28] Tr. (6/28/16), 197:7-198:7.
[29] Compl. ¶ 10a.

bite at Stearns Zoo.[30] According to the report, during an encounter with a monkey, the monkey slapped the victim's face and repeatedly bit the victim's arm, breaking the skin.[31] Dr. Navarro included this information in an inspection report dated July 27, 2011.[32]

The Judicial Officer has observed, "the probative value of a report depends on the extent to which the inspector documents the facts supporting [the inspector's] findings." *Hansen*, 57 Agric. Dec. 1072 (U.S.D.A. 1998). Inspector Navarro did not investigate or verify the facts in the subject report and instead relied on the statement of an unidentified health official who simply reported the bite complaint of an unidentified customer. (CX-14, CX-21). He did not speak to the person claiming to have been bitten or the health official, nor did he show Kathy Stearns the complaint. (Tr. 2, 147-148).

Ms. Stearns testified that she personally handled the monkey and interacted with the customer. She testified that the monkey was on a leash and did not bite the customer. (Tr. 4, 174-175). The FWC also investigated the complaint, and Ms. Stearns provided the agency with photos of the session; however, nothing came of it. She similarly told the USDA inspector that the incident did not happen and offered to show pictures. (Tr. 4, 176-177, 181). Ms. Stearns believed that she appealed the inspection report but she did not keep the paperwork. She felt that the issue had been put to bed since the FWC had found no violation. The first she heard of it again was in this case.[33] (Tr. 4, 183).

The most probative evidence regarding this disputed violation came from Ms. Stearns, who had personal knowledge of the encounter, and who testified that she was personally handled the monkey during the encounter, that the monkey was on a leash, and that the monkey did not bite the customer. (Tr. 4, 174-175). Accordingly, Complainant has failed to meet its burden of proof regarding this alleged violation and this alleged violation is not sustained.

IV. Standards

[30] Tr. (Vol. 2), 119:15-120:1; 120:14-21.
[31] CX-21.
[32] CX-14.
[33] The incident was not included in Respondent's May 31, 2012 official warning. (CX-3).

Section 2.100(a) of the Regulations provides: "Each exhibitor . . . shall comply in all respects with the regulations set forth in part 2 of this subchapter and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, and transportation of animals. . ."[34]

The Complaint alleges that in five separate instances, Stearns Zoo failed to meet the minimum standards with respect to drainage, structural strength, and shelter from inclement weather.

A. May 1, 2013 (Drainage)

Section 3.127(c) of the Standards provides: "Drainage. A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment."[35]

The evidence shows that on May 1, 2013, Stearns Zoo's tiger enclosures had an accumulation of mud and water.[36] In his inspection report, Dr. Navarro wrote:

> A few of the Tiger enclosure[s] had water and mud accumulation due to rainy weather during the night. The owner recognized the problem and started working on it by putting new substrate on the ground inside the enclosure. According to the owner cement is going to be pour[ed] within the next month.[37]

Dr. Navarro testified that more than one enclosure had "a lot of mud, and the tigers were muddy, and there was a drainage issue. . ."[38] His photographs show two separate enclosures: (1) a tiger laying on the ground

[34] 9 C.F.R. § 2.100(a). This Regulation applies to all of the alleged noncompliance with the standards promulgated under the Act (Standards).
[35] 9 C.F.R. § 3.127(c).
[36] Compl. ¶ 12a.
[37] CX-17 at 1.
[38] Tr. (Vol. 2), 129:18-22.

with mud in one enclosure;[39] and (2) another enclosure with muddy ground and drainage issues.[40] The accumulation of water and mud caused mud to get on the tigers because, ". . . I don't see anywhere where they can lay down without being muddy."[41] Dr. Navarro testified that the mud contains bacteria that could create an infection of the skin and intestinal problems if it were consumed.[42]

Stearns Zoo's asserts that, "it was really wet from the bad storms.[43] Inspections of outdoor facilities conducted on rainy days will often reveal pools of water; however, the Standard requires a suitable method to rapidly eliminate excess water.[44] Stearns Zoo had no method to rapidly eliminate excess water on May 1, 2013. Although Stearns Zoo asserts that it corrected the problem after the inspection,[45] again, subsequent correction does not obviate violations.[46] Accordingly, the violation is sustained.

B. September 6, 2012 (lion enclosure)

Section 3.125(a) of the Standards provides: "Structural strength. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals."[47]

As alleged in the Complaint, the evidence shows that on September 6, 2012, Stearns Zoo failed to maintain the lion enclosure in good repair as there was a loose electric wire hanging inside the enclosure.[48] In his

[39] CX-17 at 2, 3; Tr. (Vol. 2), 130:6-10.
[40] CX-17 at 4, 5; Tr. (Vol. 2), 130:15-18.
[41] Tr. (Vol. 2), 131:9-12.
[42] Tr. (Vol. 2), 131:15-19.
[43] Tr. (Vol. 4), 204:20.
[44] White, Docket No. 12-0277, 2014 WL 4311058, at *10 (U.S.D.A. May 13, 2014).
[45] Tr. (Vol. 4), 208:13-209:2.
[46] Pearson, 68 Agric. Dec. 685, 727-28 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); Bond, 65 Agric. Dec. 92, 109 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Drogosch, 63 Agric. Dec. 623, 643 (U.S.D.A. 2004); Parr, 59 Agric. Dec. 601, 644 (U.S,D,A, 2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); DeFrancesco, 59 Agric. Dec. 97, 112 n.12 (U.S.D.A. 2000); Huchital, 58 Agric. Dec. 763, 805 n.6 (U.S.D.A. 1999); Stephens, 58 Agric. Dec. 149, 184-85 (U.S.D.A. 1999).
[47] 9 C.F.R. § 3.125(a).
[48] Compl. ¶ 12b.

inspection report, Dr. Navarro wrote: "The electric wire inside the lion enclosure was hanging lose due to a tree limb that fell and hit the horizontal holding wire clamp."[49]

At the hearing, Dr. Navarro testified that the purpose of the electric wire, which goes around the lion enclosure, was to have a continuous ". . . electrical circuit that it prevents the animals from going over it because they receive like an electrical shock. It has impulses, and that prevents the animals from climbing out of the enclosure."[50] Dr. Navarro's photographs show the clamp facing down, allowing the electric wire to touch the fence.[51] The electric wire was not operating as it was designed to operate because "it was too close to the chain link . . . if an animal decided to climb over it, it could walk over it because it didn't have enough separation from the chain-link fence."[52] Accordingly, the violation is sustained.

C. May 1, 2013 (baboon enclosure)

The evidence shows that on May 1, 2013, Stearns Zoo failed to maintain an enclosure for two baboons in good repair.[53] Section 3.75(a) of the Standards provides:

> Structure: construction. Housing facilities for nonhuman primates must be designed and constructed so that they are structurally sound for the species of nonhuman primates housed in them. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

9 C.F.R. § 3.75(a).

In his inspection report, Dr. Navarro wrote:

[49] CX-16 at 1.
[50] Tr. (Vol. 2), 125:13-16.
[51] CX-16 at 3, 4; Tr. (Vol. 2), 126:18-126:1.
[52] Tr. (Vol. 2), 125:14-18.
[53] Compl. ¶ 12c.

> The enclosure housing the 2 male baboon[s] had a detached welded pole on the side and front panel area of the enclosure in which the primates are exhibited. The constant pushing and pulling on the chain link by the primates on the side and front area of the enclosure may result in a debilitated structure and makes the enclosure vulnerable to escape of the animals.

CX-17 at 1.

Photographs taken during the inspection show detached poles on the side panels of the enclosure, caused by the primates banging on the chain-link fence.[54] Given the strength of the nonhuman primates, Dr. Navarro testified that the issue with the detached poles lay in the danger for escape if the chain-link fence became unattached by the nonhuman primates.[55] The purpose of the enclosure is to protect the animals from injury and to contain them securely.[56] The photographic evidence demonstrates the effect of the baboons' strength,[57] and that the enclosure was structurally compromised due to the detached pole. Accordingly, the violation is sustained.

D. November 21, 2013 (pig enclosure)

The evidence shows that on November 21, 2013, Stearns Zoo failed to maintain an enclosure for a pig so as to protect the animal from injury.[58] Section 3.125(a) of the Standards provides:

> Structural strength. The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.[59]

[54] CX-17 at 6, 7; Tr. (Vol. 2) 128:20-129:3.
[55] Tr. (Vol. 2), 128:6-9.
[56] *See* 9 C.F.R. § 3.75(a).
[57] Tr. (Vol. 2), 128:20-129:3.
[58] Compl. ¶ 12d.
[59] 9 C.F.R. § 3.125(a).

In his inspection report, Dr. Navarro wrote: "The enclosure housing the pig had a rusted pipe with jagged edges."[60] His photographs depict a rusty vertical pipe that was used to close the door of the pig enclosure.[61] The rust's location-at the bottom edges-posed a risk of harm to the pig as, ". . . the jagged edges, along with the rust . . . if he uses his snout, like some of the pigs do, he could cut his snout on the jagged edges."[62] Accordingly, the violation is sustained.

E. November 21, 2013 (shelter for tigers)

The evidence shows that on November 21, 2013, Stearns Zoo failed to provide tigers with adequate shelter from inclement weather.[63] Section 3.127(b) of the Standards provides: "Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. . . ."[64] Exhibitors are required to provide *each* animal housed outdoors with adequate shelter from the elements.

> On a July 28, 1992, inspection of Big Bear Farm, Inc., two APHIS inspectors found that "the petting zoo enclosure housed 1 potbellied pig, 5 sheep and 7 goats was equipped with 2 wood shelter boxes and 1 plastic barrel. There was not enough total shelter space to accomodate [*sic*] all animals housed in this enclosure at the same time.

Big Bear Farm, Inc., 55 Agric. Dec. 107, 122-23 (U.S.D.A. 1996).[65]

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[60] CX-19 at 1.
[61] Tr. (Vol. 2), 134:13-16.
[62] Tr. (Vol. 2), 134:9-12.
[63] Compl. ¶ 12e.
[64] 9 C.F.R. § 3.127(b).
[65] Pearson, 68 Agric. Dec. 685, 709 (U.S.D.A. 2009) ("On or about September 9, 1999, Mr. Pearson housed a bobcat in an enclosure with a damaged roof that did not provide the animal with shelter from inclement weather, in willful violation of section 3.127(b) of the Regulations…."); Parr, 59 Agric. Dec. 601, 613 (U.S.D.A. 2000) ("Mr. Currer testified that he observed a tiger in an enclosure that had a roof but had no protection on its sides from wind or blowing rain….Respondent states that he completed the repairs necessary to comply with 9 C.F.R. § 3.127(b) by April 20, 1997…. I conclude that on April 9, 1997,

In his inspection report, Dr. Navarro wrote: "One tiger enclosure had a shelter that was not tall enough for the tigers to go into it and make normal postural movements."[66] Dr. Navarro's photographs show a shelter that, "was not high or tall enough for the animals to get in there in case there was rain and they wanted to get shelter from the elements."[67] He testified that the opening in the enclosure was two feet by two feet, not sufficient for both of the tigers.[68] Accordingly, the violation is sustained.

Findings of Fact

1. The Secretary of Agriculture has jurisdiction in this AWA administrative enforcement matter. 7 U.S.C. §§ 2149(a), (b).

2. Stearns Zoological Rescue & Rehab Center, Inc. (Stearns Zoo), is a Florida corporation (N07000007224) that does business as Dade City Wild Things, and whose registered agent for service of process is Kathryn P. Stearns, 36909 Blanton Road, Dade City, Florida 33523. (Compl. ¶ 1; Answer at ¶ 1; CX-1; CX-2). Stearns Zoo exhibits domestic, wild, and exotic animals at its Blanton Road facility and off-site. (CX-1, CX-2, CX-5; Stipulations as to Facts, Witnesses and Exhibits (Stipulations) ¶ 1.E).

3. Randall (Randy) Stearns is a director and the President of Stearns Zoo, and Kathryn Stearns is a director and the Secretary of Stearns Zoo. (CX-2).

4. At all times mentioned in the Complaint, Stearns Zoo was an exhibitor, as that term is defined in the Act and the Regulations, and held AWA license number 58-C-0883. (Compl. ¶ 1; Answer ¶ 1; CX-1, CX-2).

5. In 2011, Stearns Zoo represented to APHIS that it held sixty-one animals; in 2012, Stearns Zoo represented that it held ninety-seven

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Respondent willfully violated section 3.127(b) of the Standards…by failing to provide an animal shelter from inclement weather.").
[66] CX-19 at 2.
[67] CX-19 at 6, 7; Tr. (Vol. 2), 135:22-136:4.
[68] Tr. (Vol. 2), 136:13-21.

animals; in 2013, Stearns Zoo represented that it held 126 animals; in 2014, Stearns Zoo represented that it held ninety-eight animals; and in 2015, Stearns Zoo represented that it held 139 animals. (Compl. ¶ 2; CX-1).

6. On May 31, 2012, APHIS issued an Official Warning to Stearns Zoo with respect to noncompliance documented during five inspections: May 4, 2010 (perimeter fence); September 21, 2010 (veterinary care, facilities, drainage); May 17, 2011 (non-human primate enclosure); September 14, 2011 (handling of a tiger); and February 23, 2012 (serval enclosure). (Answer ¶ 4; CX-3; Tr. (Vol. 2), 101:12-116:15 (Navarro); 157:18-163:17 (Brandes); 173:6-179:18 (Gaj)).

7. On November 21, 2013, Veterinary Medical Officer (VMO) Dr. Luis Navarro conducted a compliance inspection of Stearns Zoo's facilities, equipment, and animals, and asserted that Stearns Zoo had failed to identify a dog as required; however, the evidence of record reflects that the dog was *not* used for exhibition, but rather that this was a family pet. (Tr. 4, 21).

8. On January 26, 2012, Dr. Navarro attempted to conduct a compliance inspection at Stearns Zoo's facility, but no one was available to provide access or to accompany him. VMO Navarro prepared a contemporaneous inspection report. (CX-15; Stipulations ¶ I.A; Tr. (Vol. 2), 122:14-124:12).

9. On September 9, 2013, VMO Dr. Robert Brandes attempted to conduct an inspection at Stearns Zoo's facility. No one from Stearns Zoo was available to provide access or to accompany him. He prepared a contemporaneous inspection report. (CX-18; Stipulations ¶ I.B; Tr. (Vol. 2), 163:18-167:6).

10. On July 27, 2011, it was alleged that Stearns Zoo, during exhibition, allowed members of the public to have direct contact with a macaque without any distance and/or barriers between the macaque and the public; however, this alleged violation was based solely on unsubstantiated third-party information that was directly rebutted by

the sworn testimony of Ms. Stearns at hearing based on her personal knowledge. (CX-14, 21; Tr. 2, 147-148; Tr. 4, 174-175).

11. On September 30, 2011 and on October 13, 2012, Stearns Zoo exhibited a young tiger to the public, including Barbara Keefe and Jayanti Seiler, respectively, in a pool, without any distance and/or barriers between the tiger and the public. (CX-9, CX-10, CX-11, CX-12; Tr. (Vol. 2), 25:22-32:2 (Keefe). Tr. (Vol. 1), 38:10-20; 141:1-12 (Seiler)).

12. On October 10, 2012, Stearns Zoo exhibited a young tiger (Tony) in a pool with a member of the public (a television reporter) who was permitted to handle the tiger directly. (CX-4, CX-6; Tr. (Vol. 2), 192:12-194:14, 202:9-203:2, 205:21-208:1 (Gage); Stipulations ¶ D).

13. On October 10, 2012, Stearns Zoo also exhibited a large juvenile tiger (Tarzan) in a pool with a member of the public (a reporter) without any distance and/or barrier between the tiger and the reporter. (CX-4, CX-6; Tr. (Vol. 2), 192:12-206:5, 211:2-18 (Gage); Stipulations ¶ D).

14. On October 18, 2012, Stearns Zoo exhibited a juvenile tiger (Tony) in a pool outdoors in New York City, as part of a television show, without any barrier and scant distance between the tiger and a television reporter. (CX-5, CX-6; Tr. (Vol. 2), 213:18-22, 217:13-219:5 (Gage); Stipulations ¶ E).

15. On May 1, 2013, VMO Navarro conducted a compliance inspection at Stearns Zoo. (CX-17). He observed and documented in an inspection report that there was not a method to rapidly eliminate excess water from tiger enclosures, which had an accumulation of mud and water, and that the enclosure for two baboons had a support pole that had detached from the side and front of the enclosure. (CX-17; Tr. (Vol. 2), 129:130:10 (Navarro); Stipulations at 1 ¶ G).

16. On September 6, 2012, Dr. Navarro conducted a compliance inspection at Stearns Zoo. (CX-16). He observed and documented in an inspection report that there was a loose electrical wire hanging inside the lion enclosure and accessible to the lion. (CX-16; Tr. (Vol. 2), 124:13-127:19 (Navarro); Stipulations at 1-2 ¶ H).

17. On November 21, 2013, Dr. Navarro conducted a compliance inspection at Stearns Zoo. (CX-19). He observed and documented in an inspection report that Stearns Zoo's enclosure for a pig contained a rusted jagged pipe, and that there was inadequate shelter from inclement weather for tigers. (CX-19; Tr. (Vol. 2), 132:16-137:19 (Navarro); Stipulations at 1 ¶ C).

18. On September 30, 2011, October 10, 2012, October 13, 2012, and October 18, 2012, Stearns Zoo's baby tiger swim program was not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) in that young or immature baby tigers were exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being. For example, Dr. Laurie Gage testified regarding the younger tiger (Tony), ". . . the size of the animal, the age of the animal . . . it's an animal which . . . should be in the nursery…They should be fully vaccinated, because people can carry a virus that's very tough in the environment, hard to kill, and lives for a long time and can be carried on people's clothing and their hands and brought into a situation like this . . . you're putting this animal in an unusual situation for its age." (Tr. (6/28/16), 197:7-198:7).

Conclusions of Law

1. On November 21, 2013, Stearns Zoo did not violate the Regulations by failing to identify a dog because the dog was ***not*** used for exhibition but rather was a family pet. (Tr. 4, 21). 9 C.F.R. § 2.50(c).

2. On or about January 26, 2012 and September 9, 2013, Stearns Zoo willfully violated the Act and the Regulations by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals, and records during normal business hours. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).

3. On July 27, 2011, Stearns Zoo did not violate the Regulations, 9 C.F.R. § 2.131(c)(1), by failing to handle a macaque properly during public exhibition.

4. On September 30, 2011, October 10, 2012, October 13, 2012, and October 18, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.131(c)(1), by failing to handle tigers during public exhibition with minimal risk of harm to the animals and the public, and with sufficient distance and/or barriers between the animals and the public.

5. On September 30, 2011, October 10, 2012, October 13, 2012, and October 18, 2012, Stearns Zoo willfully violated the Regulations, 9 C.F.R. §§ 2.131(c)(3) and 2.131(d)(1), by exposing young or immature tigers to rough or excessive handling and/or by exhibiting them for periods of time and/or under conditions that were inconsistent with their good health and well-being.

6. In five instances on the following dates, Stearns Zoo willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the minimum Standards promulgated under the AWA (9 C.F.R. Part 3) (Standards), as follows:

    i. September 6, 2012. Loose electric wire inside lion enclosure. 9 C.F.R. § 3.125(a).

    ii. May 1, 2013. No method to rapidly eliminate excess water from tiger enclosures. 9 C.F.R. § 3.127(c).

    iii. May 1, 2013. Detached support pole for enclosure housing two baboons. 9 C.F.R. § 3.75(a).

    iv. November 21, 2013. Rusted pipe with jagged edges in pig enclosure. 9 C.F.R. § 3.125(a).

    v. November 21, 2013. Inadequate shelter from inclement weather for tigers. 9 C.F.R. § 3.127(b).

V. Sanctions

The evidence establishes that, *inter alia*, Stearns Zoo repeatedly handled animals in a manner that placed the animals (and people) at risk

of harm, and repeatedly failed to provide access for inspection, in willful violation of the Regulations. For these reasons alone, Complainant requests that license 58-C-0883 be revoked. The Complainant also requests that Stearns Zoo be ordered to cease and desist from future violations, and that a civil penalty be assessed. APHIS believes that the evidence supports a finding that Stearns Zoo committed twenty-three violations and seeks the assessment of a civil penalty of $23,000.[69]

The Secretary may revoke an AWA license following a single, willful violation. U.S.C. § 2149(a); *Pearson v. USDA*, 411 F. App'x 866, 872 (6th Cir. 2011) ("An AWA license may be revoked following a single, willful violation of the Animal Welfare Act.") (citing *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991)). A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Ash*, 71 Agric. Dec. 900, 913 (U.S.D.A. 2012); *Bauck*, 68 Agric. Dec. 853, 860-61 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 14, 2010); *D&H Pet Farms Inc.*, 68 Agric. Dec. 798, 812-13 (U.S.D.A. 2009): *Bond*, 65 Agric. Dec 92, 107 (U.S.D.A. 2006), *aff'd per curium*, 275 F. App'x 547 (8th Cir. 2008); *Stephens*, 58 Agric. Dec. 149, 180 (U.S.D.A. 1999); *Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). However, as reflected in *Esposito*, 38 Agric. Dec. 613, 633 (U.S.D.A. 1979), different degrees of seriousness of violations are recognized by the Judicial Officer and, of course, mitigating circumstances are always considered in determining the sanction to be issued and may be grounds for imposing a lesser sanction.

The Act authorizes the Secretary to assess a civil penalty of up to $10,000 for each violation of the Act or the Regulations. When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations. 7 U.S.C. § 2149(b).

[69] The maximum civil penalty that could be assessed under the Act is $230,000.

A. Size of the business

Respondent operates a zoo on twenty-two acres with approximately 300 animals. Respondent has been in business for sixteen years and has grown from nothing to being open six days a week. (Tr. 4, 6-9, 13). Therefore, Stearns Zoo operates a large business exhibiting animals. *Huchital*, 58 Agric. Dec. 763, 816-17 (U.S.D.A. 1999) (finding the respondent, who held approximately eighty rabbits, operated a large business); *Browning*, 52 Agric. Dec. 129, 151 (U.S.D.A. 1993) (finding the respondent, who held seventy-five to eighty animals, operated a moderately large business), *aff'd per curiam*, 15 F.3d 1097 (11th Cir. 1994).

B. Gravity of the violations

The gravity here is great because several of the violations put both people and animals at risk of injury.

C. Respondent's Good Faith

The evidence of record reflects that Kathy Stearns has been working with exotic animals most of her life and that she is devoted to the care and well-being of her animals. She is involved with conferences and compliance training, including first responder training, and she was a member of the Florida Fish and Wildlife Conservation Commission ("FWC") Technical Advisory Group involved with revisions to Florida's captive wildlife regulations. (Tr. 4, 11-12). She is also involved with tiger genome research, and has created an endangered species conservation fund. She has given money to the University of Arizona to buy cameras for identifying cats in South America and has funded other projects. (Tr. 4, 72-73).

Complainant contends that Stearns Zoo has not shown good faith because despite having been issued an Official Warning on May 31, 2012, Stearns Zoo has continued to violate the same Regulations. However, the May 31, 2012 Official Warning is simply a composite of inspection reports, and the Judicial Officer has made clear that inspectors do not determine whether a violation exists:

> It bears repeating that an inspector is only an evidence gatherer. The inspector has no authority to find that anyone violated the Animal Welfare Act or the Regulations and Standards, but merely presents evidence, first to the agency and the agency's counsel, and then before an administrative law judge.

Hansen, 57 Agric. Dec. 1072, 1123 (U.S.D.A. 1998).

Further, a closer look at the May 31, 2012 Official Warning does not support a finding of bad faith. There are seven alleged violations listed on the official warning. (CX 3). Complainant presented evidence on five of them.[70]

- September 21, 2010 – splintered resting surface – This allegation is unrelated and different from other alleged violations, and there is no suggestion that the resting surface was not repaired. (Tr. 4, 160-161).

- September 21, 2010 - drainage – Stearns testified that only two enclosures had drainage issues and Respondent installed concrete floors. (Tr. 4, 208).

- May 17, 2011 - non-human primate enclosure – The inspector found a welded pole that had become detached from the roof of a macaque enclosure. Again, there is no suggestion that this alleged violation continued and was not repaired.

- February 23, 2012 – rusted pipe in serval enclosure – The inspector testified that Respondent repaired the pipe. (Tr. 2, 116).

- September 14, 2011 – tiger swim - The inspection report and subsequent warning stated:

> During the tiger swim session the cub #2 (blue collar, black leash) was reluctant to move to the edge of the pool

[70] Complainant's counsel stated on the record that it was not contending that an allegation of failure to provide adequate veterinary care to Cleo the black leopard was evidence of bad faith. (Tr. 3, 103-104). Complainant also abandoned the alleged prior violation of May 4, 2010 (perimeter fence).

> and the handler pulled him by the leash. The cub was later passed from the side of the pool to the handler inside the pool and the cub was apparently under distress by vocalizing and moving around when handled inside the pool in apparent discomfort. After swimming for a short distance the cub swam towards the handler located at the pool wall and extended his paws towards the edge of the pool apparently wanting to get out of the pool. Instead of pulling the cat out of the water and stopping the encounter the handler decided to continue the swimming.

CX-3 at 53.

Respondent videotaped the inspection and strongly contends that the video tells a different story from the subjective allegations contained in the inspection report regarding the issue of whether the baby tiger was in discomfort. (RX-7; Tr. 4, 94-116). Consequently, Respondent appealed the report and sent APHIS the portion of the video showing the second cub referenced in the report. (RX-8; Tr. 4, 120). The agency then sent Stearns a letter advising that it had not received the video. (RX-9). Apparently it had become separated from the appeal and sent to Dr. Gaj. (Tr. 4, 122). The agency then denied the appeal without viewing the video. (RX-11). The agency's letter, written by Dr. Robert Willems, dated February 12, 2012, stated that the cub referenced in the inspection report (the second cub) was showing signs of distress. In contrast, "the other cub in the pool which did not exhibit these same signs of distress but seemed content with being in the water." (RX-11).

Dr. Willems wrote to Respondent again on February 24, 2012, stating that after review of the video, "it appears that the cub pictured is not the same one for which the citation was written. The cub in the video you submitted appears to be the other cub that was swimming in the pool at the time of the inspections. This was the cub we acknowledged was not distressed." (RX-27). Stearns was positive that she sent the agency video of cub two. (Tr. 4, 128). The video that Dr. Willems reviewed shows a cub that he admitted was not in distress. (Tr. 4, 129). After receiving the letter, Stearns called Dr. Willems and sent him the full version of the video with both cubs. She has yet to hear back. (Tr. 4, 126-127). Thus, Respondent

was not advised of any violation on September 14, 2011 regarding its tiger swim encounter.

Even more importantly, for purposes of considering Complainant's request to *revoke* Respondent's license, is that fact that the full nature and scope of the dangers posed by the Respondents swim program to the baby tigers were not clearly communicated to the Respondent even at the time of the inspections giving rise to the subject violations. The record reflects that the USDA investigators were not particularly concerned with the fact that the baby tigers weighed only about twenty pounds and were only about eight weeks old and should not have been in the unnatural and unprotected environment of a chlorinated swimming pool at all or that there were members of the public swimming in the pool with these wild animals. Luis Navarro, a veterinarian medical officer for the United States Department of Agricultural, APHIS Animal Care, and Mr. Gregory S. Gaj testified as follows:

Testimony of Dr. Navarro:
6/28/16 In Re: Stearns Zoological Rescue & Rehab Center

Page: 106
BY MR. JOCKEL:
Q. Let's look at Complainant's Exhibit 3, page 53. Are you there?
A Yes.
Q. And can you identify this document?
A Yes. This is an inspection report conducted September 14, 2011.
Q. Where did this inspection occur?
A At the facility on Blanton Road. That's the site 1 facility.
Q. And where in that facility particularly did that occur?
A. Let me read it here. The swim with the tiger session happens usually at the pool that's on the facility. At the time, there was one pool,

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I think, and now they have two pools; but I don't

think they use this other pool anymore.
Q. Was there a facility representative present?
A. Yes. Mrs. Stearns was present.
Q. And was anyone else from APHIS present?
A. Yes. Dr. Gaj was with me during that inspection. He's my supervisor.
Q. Okay. What can you recall was the problem that you observed with the tiger-swim session?
A. There were two tigers -- young tigers. The first tiger that did the swim session, we didn't notice too much issues with the tiger going into the water or during the swim session. At the end, he was getting tired, and I believe he was trying to reach for the border of the pool to get out.
The second tiger is the one that -- was the one we had an issue with, and it was because he was kind of reluctant to go into the water, and the handler had to pick him up, take him to the

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corner. He would come back from the pool and he would -- he didn't want to get into the water. And once he got into the water, he tried to swim out of the water, and that's where we find the issue with the tiger. He was kind of reluctant, and he had to be pulled by the leash to bring him towards the corner of the pool -- to the corner of the pool.

6/28/16 In Re: Stearns Zoological Rescue & Rehab Center

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Q. Let's start from the beginning. Were there members of the public present?
A. Yes.
Q. How many?

13 A. There were approximately two to four. I
14 can't recall the exact number.
15 Q. And were they located in the pool with
16 the tiger?
17 A. Yes. They would go into the pool with
18 the tiger.
19 Q. And you just testified that there were
20 two different tigers. What was the size of those
21 tigers?
22 A. These tigers were approximately -- I

Page: 109
1 would have to say approximately because I didn't
2 weigh them, but they were approximately 20, 22
3 pounds of weight, and I asked the owner, and she
4 told me it was around eight weeks of age
5 approximately.

Page: 110
1 BY MR. JOCKEL:
2 Q. How large was the pool?
3 A. Approximately like 20 feet by 15, I
4 would say, and they would use just half the pool
5 for exhibition. I guess they would use the lower
6 end where it was shallower.
7 Q. And how close did the patrons get to the
8 tigers?
9 A. They got close enough to take pictures
10 with them, and they could pet the tigers.

Testimony of Gregory S. Gaj
6/28/16 In Re: Stearns Zoological Rescue & Rehab Center

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6 Q. Have you conducted inspections along
7 with VMO Dr. Navarro at this particular facility?
8 A. Yes, I have.
9 Q. And did you conduct an inspection with
10 Dr. Navarro in September of 2011 that involved a

tiger swim?
A. Yes, I did.
Q. What happened during that inspection?
A. When we were doing the inspection for the tiger swim, we went to the pool, which was at Mrs. Stearns' home and that's where they were doing the tiger swim. We watched them take the first tiger, approximately eight weeks, and take it and put it into the pool to swim with the public.
JUDGE McCARTHY [*sic*]: Can I ask you a few questions about the pool. Is that a chlorinated?

6/28/16 In Re: Stearns Zoological Rescue & Rehab Center

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pool?
THE WITNESS: Yes, I believe it is.
JUDGE McCARTHY [*sic*]: Is that a standard-size pool for residential purposes, or was it a pool constructed specifically for the utilization of display with these animals?
THE WITNESS: It appeared to be just a standard pool for, you know, the owner. I don't think it was specifically designed in any way for exhibition.
JUDGE McCARTHY [*sic*]: All right, thank you.
THE WITNESS: So, we watched the first juvenile tiger do the swim with the tiger program, and what they did was they led him to the pool, picked up the tiger, handed it to a trainer, put it into the pool, and with the first juvenile tiger, they did have a momentary, you know, uncomfortableness in my opinion with him being put in the water, but the animal appeared to calm down fairly quickly. And then they proceeded to do the swim program, which allowed a member of the public to swim next to the tiger as it was swimming from

6/28/16 In Re: Stearns Zoological Rescue & Rehab Center

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one handler across the pool to the other. When they did the first swim with the tiger, I did not feel that there was enough of a problem to -- to say that it was dangerous for the public at that point. The animal seemed to calm down and be acclimated enough to the water to do the program.
JUDGE McCARTHY [*sic*]: When you say it swam from one handler to the other, was the animal restrained by a leash at all times?
THE WITNESS: I think there was a leash dangling behind the tiger, but it wasn't one that it was actually -- the tiger was actually swimming on its own. There may have been a leash behind it dragging in the water, but I don't think so.

The record reflects that it was not until the hearing that compelling testimony provided by USDA expert witness Dr. Laurie Gage fully demonstrated that Respondent's baby tiger swim program is simply not consistent with the requirements of 9 C.F.R. § 2.131(c)(3) that "(y)oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being."[71] Dr. Gage provided detailed testimony in support of her position on this issue including, but not limited to, testimony that

> . . . the size of the animal, the age of the animal . . . it's an animal which . . . should be in the nursery. . . They should be fully vaccinated, because people can carry a virus that's very tough in the environment, hard to kill, and lives for a long time and can be carried on people's clothing and their hands and brought into a situation like

[71] 9 C.F.R. § 2.131(c)(3).

> this...you're putting this animal in an unusual situation for its age.[72]

In light of the lack of clear communication to the Respondent regarding the full nature and scope of the problems with its baby tiger swim program, I cannot find bad faith based on prior warnings.

D. History of previous violations

Prior inspection reports show that Respondent has been inspected repeatedly without being written up. (RX-1; Tr. 4, 190-196).

The evidence establishes that, *inter alia*, Stearns Zoo repeatedly handled animals in a manner that placed the animals (and people) at risk of harm, and repeatedly failed to provide access for inspection, in willful violation of the Regulations. Complainant requests that Stearns Zoo be ordered to cease and desist from future violations, and that a civil penalty of $23,000.00 be assessed because APHIS believes that the evidence supports a finding that Stearns Zoo committed twenty-three violations. (The maximum civil penalty that could be assessed under the Act is $230,000.00). Because two of the alleged violations were not sustained, the civil money penalty is hereby adjusted to $21,000.00.

Complainant also requests that license 58-C-0883 be revoked. The Secretary may revoke an AWA license following a single, willful violation. U.S.C. § 2149(a); *Pearson v. USDA*, 411 F. App'x 866, 872 (6th Cir. 2011) ("An AWA license may be revoked following a single, willful violation of the Animal Welfare Act . . ") (citing *Cox v. USDA*, 925 F.2d 1102, 1 105 (8th Cir. 1991)). A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *Ash*, 71 Agric. Dec. 900, 913 (U.S.D.A. 2012); *Bauck*, 68 Agric. Dec. 853, 860-61 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 14, 2010); *D&H Pet Farms Inc.*, 68 Agric. Dec. 798, 812-13 (U.S.D.A. 2009): *Bond*, 65 Agric. Dec 92, 107 (U.S.D.A. 2006), *aff'd per curium*, 275 F. App'x 547 (8th Cir. 2008); *Stephens*, 58 Agric. Dec. 149, 180 (U.S.D.A. 1999); *Arab Stock*

[72] Tr. (6/28/16), 197:7-198:7.

Yard, Inc., 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). However, as reflected in *Esposito*, 38 Agric. Dec. 613, 633 (U.S.D.A. 1979), different degrees of seriousness of violations are recognized by the Judicial Officer and, of course, mitigating circumstances are always considered in determining the sanction to be issued and may be grounds for imposing a lesser sanction.

It is my determination that the lack of clear communication to the Respondent regarding the full nature and scope of the problems with its baby tiger swim program, the most serious of the subject violations, demonstrates mitigating circumstances which are appropriate for consideration of the imposition of a lesser sanction than revocation. The Judicial Officer has held that "[i]f the remedial purpose of the Animal Welfare Act is to be achieved, the sanction imposed must be adequate to deter Respondent and others from violating the Animal Welfare Act, the Regulations, and the Standards." *Volpe Vito*, 56 Agric. Dec. 269, 273 (U.S.D.A. 1997). The assessment of a $21,000.00 civil money penalty and a sixty-day suspension is supported by the record and will ensure address the Secretary's legitimate enforcement concerns without putting Respondent out of business.[73]

ORDER

1. Stearns Zoo, it agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations.

2. AWA license number 58-C-0883 is hereby suspended for a period of sixty (60) days from the date this Decision and Order becomes final.

3. Stearns Zoo is assessed a civil penalty of $21,000.00, to be paid by check made payable to the Treasurer of the United States and remitted

[73] The agency's regulations provide that no license may be issued to any applicant whose license has been revoked, and any person whose license has been revoked shall not be licensed. *See* 9 C.F.R. § 2.11(a)(3); 9 C.F.R. § 2.10(b); *see also* Ash, 72 Agric. Dec. 340, 343 (U.S.D.A. 2013) (Remand Order) ("[R]evocation of a person's Animal Welfare Act license bars that person from obtaining an Animal Welfare Act license at any time in the future.").

either by U.S. Mail addressed to USDA, APHIS, Miscellaneous, P.O. Box 979043, St. Louis, MO 63197-9000, or by overnight delivery addressed to:

US Bank, Attn: Govt
Lockbox 979043
1005 Convention Plaza
St. Louis, MO 63101

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

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In re: GRETCHEN MOGENSEN.
Docket No. 16-0042.
Decision and Order.
Filed March 22, 2017.

AWA.

Gretchen Mogensen, Petitioner, pro se.
Colleen A. Carroll, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Introduction

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [Rules of Practice], set forth at 7 C.F.R. § 1.130 *et seq.*, apply to adjudication of the instant matter. This case involves a letter filed by pro-se petitioner Gretchen Mogensen

[Petitioner] upon her objection to the United States Department of Agriculture's [USDA] [Respondent] denial of her application for an exhibitor's license under the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) [Act or AWA].

The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of USDA. 7 U.S.C. § 2133. Further, the AWA authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purpose of the Act. 7 U.S.C. § 2151. The Act and regulations fall within the enforcement authority of the Animal and Plant Health Inspection Service [APHIS], an agency of USDA. APHIS is the agency tasked to issue licenses under the AWA.

This matter is ripe for adjudication, and this Decision and Order[1] is based upon the documentary evidence and arguments of the parties as I have determined that summary judgment is the appropriate method of disposition of this case.

Issue

The primary issue is whether, considering the record, summary judgment may be entered in favor of USDA and Petitioner's request for hearing may be dismissed.

Procedural History

On October 8, 2014, Petitioner submitted to APHIS an application for a Class C Exhibitor's license under the AWA. By letter dated December 28, 2015, APHIS denied Petitioner's application.

On February 1, 2016, Petitioner filed with the Hearing Clerk for the Office of Administrative Law Judges [OALJ] [Hearing Clerk] a letter

[1] In this Decision and Order, documents submitted by Petitioner shall be denoted as "PX-#," and documents submitted by Respondent shall be denoted as "RX-#."

objecting to APHIS's denial and requesting a hearing before OALJ.[2] On February 25, 2016, counsel for Respondent filed a "Response to Petitioner's January 28, 2016, Letter."

By order issued June 16, 2016, I set a schedule for the exchange and filing of evidence by the parties. On July 18, 2016, Respondent filed a "Request to Modify Order," which I granted by order dated July 22, 2016.

On October 3, 2016, Respondent filed a Motion for Summary Judgment, together with supporting documentation and affidavits. On October 4, 2016, the Hearing Clerk sent Petitioner a copy of the Motion for Summary Judgment via certified mail. The Motion was returned unclaimed on October 27, 2016, and, pursuant to section 1.147 of the Rules of Practice (7 C.F.R. § 1.147(c)(2)), the Hearing Clerk remailed the Motion to the same address by regular mail on November 1, 2016. As of this date, Petitioner has not filed a response to the Motion.[3] Regardless, the record is sufficiently developed to allow me to conclude there are no material facts in dispute and that entry of summary judgment in favor of Respondent is appropriate.

All documents are hereby admitted to the record.

[2] Although it does not expressly request a hearing, the end of Petitioner's letter reads: "I am prepared to further discuss and answer any concerns USDA may have about my qualifications or past work history. I am available at your convenience. Thank you in advance for your consideration of this matter." Additionally, in correspondence to Petitioner dated February 5, 2016, the Assistant Hearing Clerk referred to Petitioner's letter as "the Request for Hearing." In consideration of the foregoing, I deem Petitioner's letter a request for hearing.

[3] When a motion for summary judgment has been sent by certified or registered mail and returned as unclaimed or refused, "it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address." 7 C.F.R. § 1.147(c)(1). In this case, the Motion for Summary Judgment was remailed by ordinary mail to the same address on November 1, 2016. Petitioner had twenty (20) days from the date of remailing to file a response. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Petitioner's response was due by November 21, 2016, but no response was filed.

Summary of the Evidence[4]

Documentary Evidence

RX-1 Application for License, dated 10/08/2014

RX-2 Letter from APHIS to Petitioner denying Petitioner's license application, dated 12/28/2015

RX-2(a) Business Entity Details – SCC e-File, dated 09/29/2016

RX-3 Affidavit of Karl Mogensen, dated 02/14/2015

RX-4 APHIS Inspection Report, dated 03/09/2015

RX-5 Affidavit of Jessica C. Jimerson, dated 01/28/2015

RX-6 Letter from APHIS to Petitioner ("RE: DANGEROUS ANIMAL LETTER"), dated 08/24/2015

On or about October 8, 2014, Petitioner submitted an application for an AWA's exhibitor's license for a "corporation" identified as "Zoo Impressions, LLC." (RX-1). Petitioner named herself as the owner of Zoo Impressions, LLC and indicated that the "largest number of animals" she "held, owned, leased or exhibited" during the previous business year was one ("wild/exotic" feline). (RX-1). The AWA application listed the address of Zoo Impressions, LLC as 5943 South Lee Highway, Natural Bridge, Virginia 24578. (RX-1).

By letter dated December 28, 2015, APHIS denied Petitioner's application on the grounds that the application was defective[5] and that APHIS had "reason to believe that [Petitioner] was unfit to be licensed, and that the issuance of a license to [Petitioner] would be contrary to the

[4] This summary judgment relies upon the pleadings and upon declarations and documentary evidence attached to Respondent's Motion.

[5] APHIS stated that Petitioner's application was "incomplete and contain[ed] conflicting information about the identity of the applicant." (PX-2). APHIS noted that Block 7 of the application identified the applicant as a corporation while the name in Block 1 of the application was "Gretchen K. Mogensen." (RX-1, RX-2).

purposes of the Act." (RX-2). Specifically, APHIS found that Petitioner had "mishandled a DeBrazza monkey while attempting to file down the animal's teeth." (RX-2).

In her letter filed February 1, 2016, Petitioner admitted that her application for an AWA exhibitor's license had been denied. Petitioner admitted that she was advised to make changes to her application or "fill out another one." With regard to APHIS's charge that Petitioner was unfit to be licensed due to Petitioner's mishandling of a DeBrazza monkey, Petitioner claimed that she had "provided an affidavit regarding the handling of the primate." Petitioner did not, however, file a copy of the affidavit with the Hearing Clerk. Additionally, Petitioner admitted that she "acted under the direct order, aid and supervision of the park manager and veterinary technician" and that she was "no longer employed with that park" and "left the facility due to various concerns [she] had with their housing and care protocols or lack thereof."

The handling at issue is described in an APHIS Inspection Report dated March 9, 2015, which references a video showing an "extremely agitated" DeBrazza monkey in an "undersized pet carrier . . . exhibiting signs of behavioral distress during attempts at provided a medical treatment by facility staff." (RX-4 at 13). According to the Inspection Report, the video showed, among other things, "the monkey being repeatedly jabbed with sticks" in an effort to move the monkey from "an airline-type plastic pet carrier" and into "a small squeeze cage." (RX-4 at 13). The Inspection Report indicates that "facility personnel" made loud noises "in apparent attempts to scare the monkey into the squeeze cage," and in turn the monkey began to "frantically" move back and forth in the small carrier. (RX-4 at 13). Additionally, Petitioner admitted in her February 1, 2016 letter that she "acted under the direct order, aid and supervision of the park manager and veterinary technician" and that she was "no longer employed with that park" and "left the facility due to various concerns [she] had with their housing and care protocols or lack thereof."

Legal Standards

Summary judgment is proper in cases where there is "no genuine issue as to any material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An administrative law judge may enter summary judgment for

either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Fed. R. Civ. P. 56(c).

An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat and otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp v. Catrett*, 477 U.S. 317, 323-24 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242-43 (1986).

Here, APHIS denied the license application primarily on the grounds that Petitioner was found unfit to be licensed and that to issue a license to Petitioner would be contrary to the purposes of the AWA. Pursuant to 9 C.F.R. § 2.11(a), a license shall not be issued to any applicant who:

> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or who has pled *nolo contendre* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6).

Discussion

The facts in this license-denial case are not in dispute. It is plain that APHIS properly denied Petitioner's application for an AWA exhibitor's license and that a hearing is not necessary.

APHIS denied Petitioner's license application the grounds that: (1) Petitioner's application was incomplete and contained "conflicting information about the identity of the applicant"; and (2) Petitioner was unfit to be licensed and that for APHIS to issue her a license would be "contrary to the purposes of the Act." The denial letter continued: ". . . [E]vidence shows that on or about May 20, 2014, [Petitioner] mishandled a DeBrazza monkey while attempting to file down the animal's teeth." RX-2 at 1.

The record establishes that Petitioner's license application was defective. Upon examination of the application, it is evident that the submitted sought a license for Zoo Impressions, LLC rather than for Petitioner as an individual. According to the Secretary of State for the Commonwealth of Virginia, the limited-liability company known as Zoo Impressions, LLC (SCC ID: S4584068) was formed by Petitioner on June 10, 2013, with Petitioner as its registered agent. (RX-3). The address of Zoo Impressions, LLC is the same address that appears on the AWA application. Zoo Impressions, LLC, however, is no longer chartered as a limited-liability company according to the Secretary of State, whose website shows the entity as "Canceled." (RX-3). Pursuant to AWA

regulations, a license may only be issued to a "person." 7 C.F.R. § 2.1(a). According to the Act, the term "person" includes "any individual, partnership, firm, joint-stock company, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a); *see also* 9 C.F.R. § 1.1. Zoo Impressions, LLC is no longer a legal entity and therefore cannot be licensed.

Petitioner argues in her February 2016 letter that at the time her license application was submitted the information provided on it was correct. She argues that Dr. Ellen Magid advised her that "it would be best to fill out another application" but that she never received a new application package. Petitioner argues that her attempts to contact Dr. Ellen Magid about not receiving the new application were met with "little response and no reply." Although Petitioner's explanation is understandable, it does not alter that fact that the sole application on file with APHIS was incomplete or inaccurate.

Further, the record establishes that APHIS had reason to find Petitioner unfit to be licensed under the AWA. Respondent submitted two APHIS inspection reports documenting Petitioner's mishandling of animals, such as a DeBrazza monkey, and other violations of AWA regulations (RX-4); these inspection reports were further supported by affidavits of Karl Mogensen (RX-3) and Jessica Jimerson (RX-5), along with correspondence addressed to Petitioner (RX-2, RX-6). I find this evidence sufficient to support APHIS's determination to deny Petitioner's application and a proper exercise of USDA's authority to regulate the AWA.

Furthermore, Petitioner has failed to file any documents or pleadings that would rebut Respondent's Motion for Summary Judgment. I find that the record is sufficiently developed to conclude that entry of summary judgment in favor of Respondent is appropriate.

Based on the foregoing, I find that a hearing is not necessary in this matter. Accordingly, Petitioner's request for hearing shall be denied.

Findings of Fact

1. Petitioner Gretchen Mogensen is an individual with a mailing address in Virginia.

2. On or about August 8, 2014, Petitioner submitted an application to APHIS for an Animal Welfare Act exhibitor's license for an entity identified on the application as "Zoo Impressions, LLC." (RX-1). A review of the application indicates that it seeks a license for Zoo Impressions, LLC and not for Petitioner as an individual. Petitioner identified herself as the owner of Zoo Impressions, LLC. (RX-1).

3. The limited-liability company known as Zoo Impressions, LLC (SCC ID: S4584068) was formed by Petitioner on June 10, 2013, with Petitioner as its registered agent. (RX-2(a) at 1).

4. The AWA application stated the address of Zoo Impressions, LLC as 5943 South Lee Highway, Natural Bridge, Virginia 24578. (RX-1). The address of Zoo Impressions, LLC is the same address that appears on the AWA application.

5. Zoo Impressions, LLC is no longer chartered as a limited liability company according to the Secretary of State, whose website shows that entity as "Canceled." (RX-3). Pursuant to the AWA, Zoo Impressions, LLC is no longer a legal entity and therefore cannot be licensed. 7 U.S.C. § 2132(a); 9 C.F.R. § 2.1(a).

6. By letter dated December 28, 2015, APHIS denied Petitioner's application because the application was defective and APHIS considered Petitioner unfit to be licensed. (RX-2).

7. APHIS denied Petitioner's application for good cause.

Conclusions of Law

1. The Secretary, USDA, has jurisdiction in this matter.

2. The material facts involved in this matter are not in dispute, and the entry of summary judgment in favor of Respondent is appropriate.

3. APHIS's denial of a license to Petitioner, pursuant to 9 C.F.R. § 2.11(a)(6), promotes the remedial nature of the AWA and is hereby AFFIRMED.

ORDER

1. Respondent's Motion for Summary Judgment is hereby GRANTED.

2. Petitioner's request for a hearing is hereby DISMISSED, with prejudice.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties with courtesy copies provided via email where available.

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FEDERAL CROP INSURANCE ACT

DEPARTMENTAL DECISIONS

In re: STEVE LANE.
Docket No. 15-0043.
Decision and Order.
Filed April 5, 2017.

FCIA – Arbitration – Carryover, failure to report – Inspection field review – "Know," definition of – Material – Tobacco – Violation, gravity of – Willful and intentional.

Administrative procedure — Credibility determination – Evidence, preponderance of – Evidence, weight assigned to – Issue preclusion – Judicial notice.

Mark Simpson, Esq., for Complainant.
George H. Rountree, Esq., and Robert F. Mikell, Esq., for Respondent.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Brandon Willis, Manager, Federal Crop Insurance Corporation [Manager], instituted this administrative proceeding by filing a Complaint on December 11, 2014. The Manager instituted the proceeding under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501-1524) [Federal Crop Insurance Act]; the regulations promulgated under the Federal Crop Insurance Act (7 C.F.R. §§ 400.451-.458) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Manager alleges Steve Lane violated the Federal Crop Insurance Act and the Regulations by willfully and intentionally providing false or inaccurate information relative to his 2009 crop insurance policy to Great American Insurance Company and to the Risk Management Agency,

United States Department of Agriculture [Risk Management Agency].[1] On December 30, 2014, Mr. Lane filed an Answer and Hearing Demand in which he denied the material allegations of the Complaint.

Administrative Law Judge Janice K. Bullard [ALJ] conducted an oral hearing in Savannah, Georgia, on June 23, 2015, through June 24, 2015.[2] George H. Rountree and Robert F. Mikell, Brown Rountree PC, Statesboro, Georgia, represented Mr. Lane. Mark R. Simpson, Office of the General Counsel, United States Department of Agriculture, Atlanta, Georgia, represented the Manager. On September 25, 2015, Mr. Lane filed a motion to reopen the record to submit additional evidence created post-hearing, and, on October 26, 2015, the ALJ, over the Manager's objection, granted Mr. Lane's motion and admitted the post-hearing evidence to the record.

On April 5, 2016, after Mr. Lane and the Manager filed post-hearing briefs,[3] the ALJ issued a Decision and Order: (1) concluding Mr. Lane willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the Great American Insurance Company with respect to an insurance plan or policy under the Federal Crop Insurance Act; (2) disqualifying Mr. Lane for five years from receiving any monetary or nonmonetary benefit under seven specific statutory provisions and any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities; and (3) imposing an $11,000 civil fine on Mr. Lane.[4]

On April 18, 2016, Mr. Lane appealed the ALJ's Decision and Order to the Judicial Officer.[5] On May 19, 2016, the Manager filed a response to

[1] Compl. ¶ III(c)-(d) at 9.
[2] References to the transcript of the June 23-24, 2015 oral hearing are designated as "Tr." and the page number; references to Mr. Lane's exhibits are designated as "RX" and the exhibit number; and references to the Manager's exhibits are designated as "CX" and the exhibit number.
[3] Respondent's Written Closing Arguments; Complainant's Closing Argument; Respondent's Reply to Complainant's Closing Arguments; Claimant's Response to Respondent's Reply to Complainant's Closing Argument.
[4] ALJ's Decision and Order ¶ V at 28, Order at 28-29.
[5] Respondent's Appeal to Judicial Officer [Appeal Petition] and Respondent's Brief in Support of Appeal.

Mr. Lane's appeal to the Judicial Officer,[6] and on May 23, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Mr. Lane's Request for Oral Argument

Mr. Lane's request for oral argument,[7] which the Judicial Officer may grant, refuse, or limit,[8] is refused because the issues raised in Mr. Lane's Appeal Petition are not complex and oral argument would serve no useful purpose.

Mr. Lane's Request that the Judicial Officer Take Judicial Notice

Mr. Lane requests that the Judicial Officer take judicial notice of Exhibit A attached to his Appeal Petition.[9] Exhibit A is a copy of a page from the United States Department of Agriculture, Office of Administrative Law Judges' website which contains the ALJ's biographical information. The Rules of Practice provide that official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character; however, the parties must be given an adequate opportunity to show that such facts are erroneously noticed.[10]

I do not find the ALJ's biographical information contained in Exhibit A attached to Mr. Lane's Appeal Petition relevant to any issue in this proceeding. Therefore, I deny Mr. Lane's request that I take official notice of Exhibit A attached to his Appeal Petition.

Mr. Lane's Appeal Petition

[6] Complainant's Response to Appeal to the Judicial Officer.
[7] Respondent's Request for Oral Hearing filed April 18, 2016.
[8] 7 C.F.R. § 1.145(d).
[9] Appeal Pet. Introduction at 4 n.2.
[10] 7 C.F.R. § 1.141(h)(6).

Mr. Lane raises six arguments in his Appeal Petition. First, Mr. Lane contends the ALJ's finding that drought did not ravage Mr. Lane's 2009 non-irrigated tobacco crop is not supported by substantial evidence, is unwarranted by the facts, and is arbitrary, capricious, and an abuse of discretion.[11]

The ALJ found "the preponderance of the evidence does not support that drought conditions ravaged [Mr. Lane's 2009] non-irrigated [tobacco] crop."[12] Mr. Lane contends the evidence presented by Stephen Jeffrey Underwood, a weather expert, and Wesley Harris, a tobacco agronomy expert, establishes that a pattern of wet weather followed by a terrible drought ravaged Mr. Lane's 2009 non-irrigated tobacco crop.[13]

The ALJ accorded substantial weight to a pre-harvest growing season inspection field review[14] in which Ned Day, an insurance loss adjuster, reported his August 12, 2009 observation that Mr. Lane's tobacco crop was in "very good condition."[15] The ALJ summarized Dr. Underwood's and Mr. Harris' expertise and testimony[16] and discussed her reasons for finding that, even in light of Dr. Underwood's and Mr. Harris' testimony, a preponderance of the evidence does not support a finding that drought ravaged Mr. Lane's 2009 non-irrigated tobacco crop, as follows:

> Despite Respondent's adjustor's August 12, 2009, field inspection that concluded that the crop looked good, Respondent prospectively filed a notice of loss for drought. Although Respondent concluded in August, 2009, "that if we didn't start getting some rain I couldn't harvest that tobacco" (Tr. at 314), weather expert Dr. Stephen Underwood "did not think there would be drought conditions in [August and September, 2009]". Tr. at 533. Tobacco expert Rex Denton testified that 21 days without rain after the crop was appraised on August 12, 2009, would have had little effect on the crop. Tr. at 250.

[11] Appeal Pet. ¶ I at 4-8, ¶ IV at 16.
[12] ALJ's Decision and Order ¶ III(3) at 20.
[13] Appeal Pet. ¶ I at 8.
[14] CX 12.
[15] ALJ's Decision and Order ¶ III(3) at 22.
[16] ALJ's Decision and Order ¶ III(1) at 12-16.

> Expert Wesley Harris testified that the amount of water needed after August 12, 2009 would not have mattered to the development of the crop. Tr. at 571. Dr. Underwood opined that the period from June to August 6, 2009, was the fifth driest on record, but Mr. Day's inspection on August 12, 2009, revealed a crop that looked good.
>
> Respondent proffered other claims of loss due to drought in 2009, but the evidence failed to establish that the claims were paid. In addition, the record does not establish that the conditions creating a loss of a corn or peanut crop to drought would similarly affect a tobacco crop. The evidence of other claims of loss due to drought has little probative value.

ALJ's Decision and Order ¶ III(3) at 21. The ALJ further found Mr. Harris' opinion about the look and color of Mr. Lane's tobacco was not probative, as Mr. Harris did not see the actual tobacco plants and could not determine from photographs of Mr. Lane's tobacco whether Mr. Lane's irrigated tobacco plants were more mature than Mr. Lane's non-irrigated tobacco plants. Similarly, the ALJ found Mr. Harris' opinion regarding the condition of Mr. Lane's fields that Mr. Harris inspected in 2015 is immaterial to the condition of Mr. Lane's fields in 2009.[17]

I find substantial evidence supports the ALJ's finding that "the preponderance of the evidence does not support that drought conditions ravaged [Mr. Lane's 2009] non-irrigated [tobacco] crop"[18] and reject Mr. Lane's contention that Dr. Underwood's and Mr. Harris' testimony is sufficient to reverse the ALJ's finding.

Second, Mr. Lane contends the ALJ's reliance on Mr. Day's August 12, 2009 pre-harvest growing season inspection field review is not supported by substantial evidence, is unwarranted by the facts, and is arbitrary, capricious, and an abuse of discretion.[19]

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[17] *Ibid.*
[18] ALJ's Decision and Order ¶ III(3) at 20.
[19] Appeal Pet. ¶ II at 8-10.

The ALJ accorded substantial weight to a pre-harvest growing season inspection field review[20] in which Mr. Day reported his August 12, 2009 observations of Mr. Lane's tobacco crop.[21] Mr. Lane contends the ALJ's reliance on Mr. Day's pre-harvest growing season inspection field review is error because Mr. Day's "appraisals are not guaranteed and just give an idea of what exists at a certain time," Mr. Day's "appraisal . . . does not take factors regarding maturity into account," and Mr. Day's "calculation is based on a formula using the number of leaves and is 'purely mathematical' with no discretion left to the adjuster." In short, Mr. Lane contends the ALJ's reliance on Mr. Day's August 12, 2009 pre-harvest growing season inspection field review is error because it "provides no reliable method to estimate ultimate production."[22]

Mr. Day worked as an insurance loss adjuster for thirty years. Tr. at 69. Mr. Day observed Mr. Lane's tobacco crop on August 12, 2009, the date of Mr. Day's pre-harvest growing season inspection field review. CX 12. The appraisal methodology used by Mr. Day to evaluate Mr. Lane's tobacco crop was the methodology used for mature tobacco. Tr. at 94-102. At the time of Mr. Day's field review, Mr. Lane's tobacco was mature.[23] Mr. Day testified that he had never had an appraisal that had a divergence between the estimated ultimate production and the actual production as great as the divergence between the estimated ultimate production in his August 12, 2009 pre-harvest growing season inspection field review and the actual production Mr. Lane asserts he had from his non-irrigated tobacco field in 2009. Tr. at 109-10.

Based on Mr. Day's experience and the appraisal methodology that Mr. Day followed when appraising Mr. Lane's 2009 tobacco crop, I reject Mr. Lane's contention that the ALJ's reliance on Mr. Day's August 12, 2009 pre-harvest growing season inspection field review, is error. Mr. Lane has not raised any meritorious basis upon which to find that the ALJ's according substantial weight to Mr. Day's August 12, 2009 pre-harvest growing season inspection field review, is error.

[20] CX 12.
[21] ALJ's Decision and Order ¶ III(3) at 22.
[22] Appeal Pet. ¶ III at 9.
[23] ALJ's Decision and Order ¶ III(1) at 6.

Third, Mr. Lane contends the ALJ erroneously found Mr. Lane was not credible.[24]

The ALJ found Mr. Lane was not credible and discussed the bases for her credibility determination, including Mr. Lane's varied ability to recall events relevant to the issue in this proceeding, Mr. Lane's changing version of the events relevant to the issue in this proceeding, and Mr. Lane's admission that he lied to Randy Upton, a Risk Management Agency investigator, regarding the events relevant to the issue in this proceeding.[25]

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[26] The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review

[24] Appeal Pet. ¶ III at 10-15.
[25] ALJ's Decision and Order ¶ III(3) at 19-24.
[26] *See also* Jenne, 74 Agric. Dec. 358, 366 (U.S.D.A. 2015); Perry, 72 Agric. Dec. 586, 646 (U.S.D.A. 2013) (Decision as to Perry and Perry's Wilderness Ranch & Zoo, Inc.); KOAM Produce, Inc., 65 Agric. Dec. 1470, 1474 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider); S. Minn. Beet Sugar Coop., 64 Agric. Dec. 580, 605 (U.S.D.A. 2005).

> on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review*. . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[27] I have examined the record in light of Mr. Lane's arguments that the ALJ erroneously determined that Mr. Lane was not credible. I find Mr. Lane's arguments have no merit and find no basis for reversing the ALJ's credibility determination regarding Mr. Lane.

[27] Jenne, 74 Agric. Dec. 358, 366 (U.S.D.A. 2015); Perry, 72 Agric. Dec. 586, 646 (U.S.D.A. 2013) (Decision as to Perry and Perry's Wilderness Ranch & Zoo, Inc.); KOAM Produce, Inc., 65 Agric. Dec. 1470, 1476 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider); Bond, 65 Agric. Dec. 1175, 1183 (U.S.D.A. 2006) (Order Den. Pet. to Reconsider).

Fourth, Mr. Lane contends the ALJ's conclusion that Mr. Lane's failure to report carryover tobacco was willful, intentional, and material, is error.[28]

The Regulations define the terms "material" and "willful and intentional," as follows:

> **§ 400.452 Definitions.**
>
> For purposes of this subpart:
> . . . .
> *Material*. A violation that causes or has the potential to cause a monetary loss to the crop insurance program or it adversely affects program integrity, including but not limited to potential harm to the program's reputation or allowing persons to be eligible for benefits they would not otherwise be entitled.
> . . . .
> *Willful and intentional*. To provide false or inaccurate information with the knowledge that the information is false or inaccurate at the time the information is provided; the failure to correct the false or inaccurate information when its nature becomes known to the person who made it; or to commit an act or omission with the knowledge that the act or omission is not in compliance with a "requirement of FCIC" at the time the act or omission occurred. No showing of malicious intent is necessary.

7 C.F.R. § 400.452. Mr. Lane contends his failure to report carryover tobacco was not material because "there is no evidence of monetary loss" and was not willful and intentional because his failure to report carryover tobacco was "inadvertent."[29] The definition of the term "material" makes clear that monetary loss to the crop insurance program is not a necessary prerequisite to a finding that a violation is material. A violation is material if it has the potential to cause a monetary loss to the crop insurance program or if it adversely affects crop insurance program integrity. Therefore, I reject Mr. Lane's contention that the ALJ's conclusion that

[28] Appeal Pet. ¶ V at 17-18.
[29] Appeal Pet. ¶ V at 17.

Mr. Lane's failure to report carryover tobacco was a material violation, is error.

Moreover, I reject Mr. Lane's contention that his failure to report carryover tobacco was inadvertent. Mr. Lane's insurance policy specifically required him to report his carryover tobacco.[30] The requirements of the Federal Crop Insurance Corporation include insurance policy provisions:

> **§ 400.452 Definitions.**
>
> For purposes of this subpart:
> . . . .
> *Requirement of FCIC*. Includes, but is not limited to, formal communications, such as a regulation, procedure, policy provision, reinsurance agreement, memorandum, bulletin, handbook, manual, finding, directive, or letter, signed or issued by a person authorized by FCIC to provide such communication on behalf of FCIC, that requires a particular participant or group of participants to take a specific action or to cease and desist from taking a specific action (e-mails will not be considered formal communications although they may be used to transmit a formal communication). Formal communications that contain a remedy in such communication in the event of a violation of its terms and conditions will not be considered a requirement of FCIC unless such violation arises to the level where remedial action is appropriate. (For example, multiple violations of the same provision in separate policies or procedures or multiple violations of different provisions in the same policy or procedure.)

7 C.F.R. § 400.452. The willful and intentional standard is based upon knowledge or having reason to know. The Regulations define the term "knows or has reason to know," as follows:

> **§ 400.452 Definitions.**

[30] ALJ's Decision and Order ¶ III(1) at 8; Tr. at 128-30.

> For purposes of this subpart:
> . . . .
> *Knows or has reason to know*. When a person, with respect to a claim or statement:
>
> (1)
> (i) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;
>
> (ii) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or
>
> (iii) Acts in reckless disregard of the truth or falsity of the claim or statement; and
>
> (2) No proof of specific intent is required.

7 C.F.R. § 400.452. I find the evidence cited by the ALJ establishes that Mr. Lane knew or should have known that he was required to report his carryover tobacco; therefore, I reject Mr. Lane's contention that the ALJ's conclusion that Mr. Lane's failure to report his carryover tobacco was willful and intentional, is error.

Fifth, Mr. Lane contends the ALJ erroneously failed to consider the gravity of Mr. Lane's violations of the Federal Crop Insurance Act and the Regulations when disqualifying Mr. Lane from participating in the crop insurance program and imposing a civil fine on Mr. Lane.[31]

The Regulations require, when imposing any disqualification or civil fine, the administrative law judge must consider the gravity of the violation.[32] The gravity of the violation includes consideration of whether the violation was material and, if the violation was material, fifteen factors which are listed in 7 C.F.R. § 400.454(c)(2)(i)-(xv). Mr. Lane specifically identifies four of these fifteen factors which he contends the ALJ failed to consider, namely, (1) the number or frequency of incidents or duration of the violation, (2) whether the violator engaged in a pattern of violation or

[31] Appeal Pet. ¶ VI at 18-19.
[32] 7 C.F.R. § 400.454(c).

has a prior history of violation, (3) whether and to what extent the violator planned, initiated, or carried out the violation, and (4) other factors that are appropriate to the circumstances of a particular case.[33]

The ALJ addressed the frequency, duration, and pattern of Mr. Lane's violations and Mr. Lane's direct involvement in the violations, as follows:

> I have found that Respondent willfully and intentionally provided false or inaccurate information to FCIC when he certified his production worksheet for Unit 104 with the knowledge that the information was not accurate. I have further found that Respondent willfully and intentionally failed to report the production of tobacco that he carried over for some time. Therefore, I find that Complainant's requested sanctions are appropriate.

ALJ's Decision and Order ¶ III(4) at 25. Therefore, I find the ALJ considered the gravity of Mr. Lane's violations when disqualifying Mr. Lane from participating in the crop insurance program and imposing a civil fine on Mr. Lane, and I decline to remand this proceeding to the ALJ for further consideration of the gravity of Mr. Lane's violations.

Sixth, Mr. Lane contends the issues in this proceeding are barred by issue preclusion. Specifically, Mr. Lane contends the issues in this proceeding were resolved by a Final Award of Arbitration issued by Robert N. Dokson, an arbitrator with the American Arbitration Association, in *In The Matter of the Arbitration between: Steve Lane, Claimant, Great American Insurance Company, Respondent*, Case No. 01-14-0001-2819.[34]

The ALJ rejected Mr. Lane's contention that the issues in this proceeding are barred by issue preclusion, as follows:

> I give little weight to the July 9, 2015, Decision of Arbitrator Robert N. Dockson [sic]. RX-35. That decision has no precedential value to my findings, and my

[33] Appeal Pet. ¶ VI at 19.
[34] Appeal Pet. ¶ VII at 19-26.

> conclusions are contrary to Arbitrator Dockson's [sic] finding that Respondent did not intentionally conceal the existence of carry-over tobacco. The Arbitrator accepted Respondent's contention that the unreported tobacco that he sold was carried over from 2006, and on that basis overturned [Great American Insurance Company's] voidance of Respondent's [Multiple Peril Crop Insurance Common Crop Insurance Policy] and [Great American Insurance Company's] finding of an overpayment. I do not know what evidence Arbitrator Dockson [sic] relied upon to reach his conclusion but I reject Respondent's contention that the source of all of the unreported tobacco that he sold in 2009 was carry over tobacco.

ALJ's Decision and Order ¶ III(3) at 23.

Issue preclusion refers to the effect of a judgment in foreclosing relitigation of an issue of fact or law that has been litigated and decided.[35] Issue preclusion bars parties and their privies from relitigating issues which have been adjudicated on the merits in a prior action.[36] The burden of proof is on the party seeking preclusion.[37]

The arbitration proceeding on which Mr. Lane relies for his contention that the issues in this proceeding are barred is styled "In The Matter of the Arbitration between: Steve Lane, Claimant, Great American Insurance Company, Respondent."[38] The instant proceeding was instituted by Brandon Willis, Manager, Federal Crop Insurance Corporation, and is styled "In re: Steve Lane, Respondent." The Manager was not named in the arbitration proceeding and the general rule is that a litigant is not bound by a judgment to which he was not a party.[39]

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[35] New Hampshire v. Maine, 532 U.S. 742, 748-49 (2001); Migra v. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984); Baloco v. Drummond Co., 767 F.3d 1229, 1251 (11th Cir. 2014).

[36] Baloco v. Drummond Co., 767 F.3d 1229, 1251 (11th Cir. 2014); Soro v. Citigroup, 287 F. App'x 57, 59-60 (11th Cir. 2008) (per curiam); I.A. Durbin, Inc. v. Jefferson Nat. Bank, 793 F.2d 1541, 1549 (11th Cir. 1986).

[37] Jones v. United States, 846 F.3d 1343, 1361 (Fed. Cir. 2017); Stan Lee Media, Inc. v. Walt Disney Co., 774 F.3d 1292, 1297 (10th Cir. 2014); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050-51 (9th Cir. 2008).

[38] *See* RX 36.

[39] Taylor v. Sturgell, 553 U.S. 880, 884 (2008); Hansberry v. Lee, 311 U.S. 32, 40-41

Moreover, the Manager is not in privity with Great American Insurance Company.[40] A person in privity with another is a person so identified in interest with another that he represents the same legal right.[41] The Manager instituted this administrative proceeding against Mr. Lane pursuant to the Federal Crop Insurance Act seeking to impose a sanction on Mr. Lane to improve compliance with, and the integrity of, the federal crop insurance program.[42] The arbitration proceeding relied upon by Mr. Lane concerned a contract between Mr. Lane and Great American Insurance Company in which Great American Insurance Company sought to void an insurance policy pursuant to section 27 of that policy. The Manager did not have an interest in the arbitration and could not have filed a section 27 claim against Mr. Lane.

I find no basis on which to reverse the ALJ's determination that *In The Matter of the Arbitration between: Steve Lane, Claimant, Great American Insurance Company, Respondent*, Case No. 01-14-0001-2819, has no preclusive effect on the instant proceeding. Mr. Lane has failed to carry his burden of proof that the instant proceeding is barred by issue preclusion.

Based upon careful consideration of the record, I find no change or modification of the ALJ's April 5, 2016 Decision and Order is warranted. The Rules of Practice provide, when the Judicial Officer finds no change or modification of the administrative law judge's decision is warranted, the Judicial Officer may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

(1940). *See also* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969) (holding the consistent constitutional rule has been that a court has no power to adjudicate a person's claim or obligation unless it has jurisdiction over the person of the defendant).

[40] Williams Farms of Homestead, Inc. v. Rain & Hail Ins., Serv., Inc., 121 F.3d 630, 633 (11th Cir. 1997); Old Republic Ins. Co. v. FCIC, 947 F.2d 269, 276 (7th Cir. 1991). *See also* Uniguard Security Ins. Co. v. North River Ins. Co., 4 F.3d 1049, 1054 (2d Cir. 1993); Gen. Reinsurance Corp. v. Mo. Gen. Ins. Co., 596 F.2d 330 (8th Cir. 1979).

[41] Stephens v. Jessup, 793 F.3d 941, 945 (8th Cir. 2015); Wayne Cnty. Hosp., Inc. v. Jakobson, 567 F. App'x 314, 317-18 (6th Cir. 2014); Jones v. HSBC Bank, 444 F. App'x 640, 644 (4th Cir. 2011); Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1230 (10th Cir. 2005).

[42] 7 U.S.C. § 1515(a)(1); 7 C.F.R. § 400.451.

§ 1.145 Appeal to Judicial Officer.

. . . .

(i) *Decision of the judicial officer on appeal.* . . . . If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's April 5, 2016 Decision and Order is adopted as the final order in this proceeding.

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FEDERAL MEAT INSPECTION ACT

COURT DECISION

UNITED STATES v. AOSSEY.
Nos. 16-1611, 16-1688, 16-1761.
Court Decision.
Filed April 14, 2017.

FMIA – False or misleading labeling – Jurisdiction of district court – Meat and poultry.

[Cite as: 854 F.3d 453 (8th Cir. 2017)].*

United States Court of Appeals,
Eight Circuit.

The Court affirmed the ruling of the district court, holding that sections 674 and 607(e) of the Federal Meat Inspection Act (FMIA) do not unambiguously remove prosecution from the district court's jurisdiction. In so holding, the Court rejected the defendants' argument that the Secretary of Agriculture has exclusive authority to take enforcement action when a party commits a violation of false or misleading labeling under the FMIA. It ruled that section 607(e) of the FMIA provides the Secretary an enforcement mechanism that supplements, rather than deprives, the authority of United States Attorneys to conduct criminal prosecutions in district courts. The Court held that although an exception in section 674 provides that administrative appeals are forwarded to the courts of appeals, the Secretary here did not act under section 607(e); therefore, the United States Attorney properly brought suit in the district court per 18 U.S.C. § 3231.

STEVEN M. COLLOTON, UNITED STATES CIRCUIT JUDGE, DELIVERED THE OPINION OF THE COURT.

OPINION

A grand jury charged Midamar Corporation, William Aossey, and Jalel Aossey with several criminal offenses arising from their sale of falsely labeled halal meat. The defendants moved to dismiss the indictment for lack of jurisdiction. Their theory was that Congress had reserved exclusive enforcement authority over the alleged statutory violations to the Secretary of Agriculture, and that the United States Attorney could not proceed

* *Petition for cert. filed*, 2017 WL 4685353 (U.S. Oct. 6, 2017) (No. 17-583).

against the defendants in a criminal prosecution. The district court[1] denied the motion, concluding that it was both untimely and incorrect on the merits.

Midamar Corporation and Jalel Aossey then pleaded guilty conditionally to one count of conspiracy to commit several offenses in connection with the scheme, while reserving the right to appeal the denial of their motion to dismiss. William Aossey proceeded to trial, and a jury convicted him of conspiracy, making false statements on export certificates, and wire fraud. The defendants appeal the district court's denial of their motion to dismiss for lack of jurisdiction. The government does not assert that the motion was untimely, but defends the district court's decision on the merits, and we affirm.

I.

Midamar Corporation sells and distributes halal-certified meat and other food products in the United States and internationally. William Aossey founded Midamar in 1974; in 2007, he transferred ownership of Midamar to his sons, Jalel and Yahya Aossey. The United States Department of Agriculture regulates the company, and Midamar's meat labeling is governed by the Federal Meat Inspection Act. 21 U.S.C. § 601, *et seq.* Under the Act, the Food Safety and Inspection Service is responsible for the inspection and oversight of meat packaging and labeling.

In February 2010, the USDA Office of Program Evaluation, Enforcement, and Review started an investigation into Midamar and its labeling practices. The Office concluded that between April 2007 and January 2010, Midamar employees, under the direction and supervision of the owners and managers, knowingly forged and falsified USDA export documents and certificates for shipments of purported halal beef. As a result of this investigation, the Inspection Service withdrew its services from Midamar. This withdrawal temporarily prevented Midamar from exporting meat products from its own facility. After Midamar proposed corrective and preventative measures, the Inspection Service gave notice

[1] The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

in July 2011 that it intended to reinstate services for the company.

Three years later, the government obtained an indictment against the defendants. A grand jury charged Midamar, Jalel Aossey, and others with conspiracy to make and use false statements, sell misbranded meat, and commit mail and wire fraud, in violation of 18 U.S.C. § 371. The indictment also charged them with making false statements on export certificates, in violation of 21 U.S.C. § 611(b)(5), wire fraud, in violation of 18 U.S.C. § 1343, money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A), and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). The grand jury charged William Aossey with the same violations in a separate indictment.

The defendants moved to dismiss, arguing that the district court lacked jurisdiction over the criminal case because the Meat Inspection Act gave the Secretary of Agriculture exclusive jurisdiction to address the specified violations. The district court denied the motion. Midamar and Jalel Aossey entered conditional guilty pleas, and William Aossey was convicted after a jury trial. The district court imposed sentences, and this appeal followed.

II.

The issue joined on appeal is whether two provisions of the Meat Inspection Act, 21 U.S.C. §§ 674 and 607(e), removed this case from the district court's jurisdiction. Although we have upheld convictions based on violations of the Meat Inspection Act in previous cases, *e.g.*, *United States v. Jorgensen*, 144 F.3d 550 (8th Cir. 1998) (addressing misbranding in violation of 21 U.S.C. § 610), the jurisdictional argument advanced here has not been raised and decided, so we must consider it as an original matter. *See Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97, 115 S. Ct. 537, 130 L.Ed.2d 439 (1994). We review the district court's conclusion on this legal issue *de novo*.

Under 18 U.S.C. § 3231, "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." The grand jury charged the defendants with committing such offenses, and the district court asserted jurisdiction under § 3231. Section 3231 is generally the "beginning and the end of the 'jurisdictional' inquiry," *United States v. White Horse*, 316

F.3d 769, 772 (8th Cir. 2003) (quotation omitted), but Congress can remove the district courts' jurisdiction over criminal prosecutions if it makes a "clear and unambiguous expression of the legislative will." *United States v. Morgan*, 222 U.S. 274, 282, 32 S. Ct. 81, 56 L.Ed. 198 (1911). The question here, therefore, is whether Congress unambiguously limited the district court's jurisdiction.

The defendants contend that two sections of the Meat Inspection Act, 21 U.S.C. §§ 674 and 607(e), show that Congress removed these prosecutions from the jurisdiction of the district courts. Section 674 provides: "The United States district courts ... are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of, this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, *except as provided in section 607(e) of this title*." Section 607(e), in turn, states that if the Secretary of Agriculture has reason to believe that a meat label is false or misleading, then the Secretary may direct that use of the label be withheld unless it is modified to conform to the Secretary's prescription. A person using the label may challenge the Secretary's determination by appealing to the United States Court of Appeals for the appropriate circuit.[2]

The defendants rely on the exception created in § 674 for matters described in § 607(e). They contend that when a party commits a violation

[2] Section 607(e) provides in full:

> If the Secretary has reason to believe that any marking or labeling or the size or form of any container in use or proposed for use with respect to any article subject to this subchapter is false or misleading in any particular, he may direct that such use be withheld unless the marking, labeling, or container is modified in such manner as he may prescribe so that it will not be false or misleading. If the person, firm, or corporation using or proposing to use the marking, labeling or container does not accept the determination of the Secretary, such person, firm, or corporation may request a hearing, but the use of the marking, labeling, or container shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless, within thirty days after receipt of notice of such final determination, the person, firm, or corporation adversely affected thereby appeals to the United States court of appeals for the circuit in which such person, firm, or corporation has its principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 194 of Title 7 shall be applicable to appeals taken under this section.

concerning false or misleading labeling as described in § 607(e), the Secretary of Agriculture has exclusive authority to take enforcement action. On this view, the only remedy available to the government is an order of the Secretary to cease using false or misleading labels. Unless a party acts in contempt of an order of the Secretary, the argument goes, the United States Attorney may not prosecute a corporation for any false or misleading labeling violations under the Meat Inspection Act. The defendants then expand their argument to assert that the government also may not prosecute them for committing any other criminal offense, such as conspiracy or fraud, that arises from a set of facts involving false or misleading labels.

In our view, §§ 674 and 607(e) do not constitute a "clear and unambiguous expression" of the legislative will to deprive the district courts of jurisdiction over criminal prosecutions for violations of the Meat Inspection Act and related violations. Section 674 grants the district courts jurisdiction over violations of the Act, and over all kinds of cases arising under the relevant statutes, with one exception. Under that exception, where the Secretary of Agriculture directs a party to withhold use of a label, the party may appeal the Secretary's determination to the court of appeals rather than the district court. But Congress's choice to channel administrative appeals to the courts of appeals does not address the separate question whether administrative action is the *only* enforcement tool available to the Executive in this context. As the Supreme Court explained in *Morgan*, "[r]epeals by implication are not favored, and there is certainly no presumption that a law passed in the interest of public health was to hamper district attorneys, curtail the powers of grand juries, or make them, with evidence in hand, halt in their investigation and await the action of the Department." 222 U.S. at 281-82, 32 S. Ct. 81.

The statute does not include a "clear and unambiguous expression" that Congress intended for the Secretary to have exclusive authority over false or misleading meat labeling. The better reading is that § 607(e) provides an administrative enforcement mechanism for the Secretary of Agriculture that supplements the authority of the United States Attorneys to pursue criminal prosecutions in the district courts. Congress thus afforded the Executive two independent avenues to address false or misleading meat labeling. The exception to the jurisdiction of the district courts in § 674 establishes only that administrative appeals are routed to the courts of

appeals. Here, the Secretary did not act under § 607(e), and the United States Attorney properly proceeded in the district court pursuant to § 3231. The district court did not err in denying the motion to dismiss.

* * *

The judgment of the district court is affirmed.

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: HOWARD HAMILTON & PATRICK W. THOMAS.
Docket Nos. 13-0365, 13-0366.
Decision and Order.
Filed June 28, 2017.

HPA.

Brian Hill, Esq., for Complainant.
Alicia A. Napier, Esq., for Respondents.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

Introduction

This proceeding was instituted under the Horse Protection Act ("Act"), as amended (15 U.S.C. § 1821 *et seq.*), by a complaint filed on September 23, 2013, by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"). The Complaint alleged that Howard Hamilton and Patrick Thomas (jointly referred to as "Respondents") violated the Act by entering "Don't Tread On Me" in the 50th Annual Guntown Lion's Club Walking Horse Show and "A Magic Stroke" in the Parker's Crossroads Walking Horse Show, while the horses were sore.[1]

On June 2, 2016, I conducted a telephone conference with counsel in the above-captioned case. After due consideration of the position of the parties regarding the procedural status of this case; including the fact that the Administrator's Complaint alleging two separate violations of the Horse Protection Act are based on incidents occurring on June 22, 2012 and July 21, 2012; the fact that there have been multiple withdrawals of counsel and continuances; and the fact that the Respondents have failed to show cause why a Decision and Order should not be entered on the record in this matter; an Order was issued on July 7, 2016 directing the parties to

[1] With respect to the horse "A Magic Stroke," Patrick Thomas was also charged with showing or exhibiting the horse. *See* Part II, ¶ 3 of the Complaint.

submit proposed pleadings setting forth their respective positions and evidence in support thereof for judicial review and findings on the record. Respondents complied with a filing submitted by Counsel on September 2, 2016, and Complainant complied with its filing submitted by Counsel on September 6, 2016.

The July 7, 2016 Order also directed the parties to engage in good faith settlement efforts to resolve this matter. It was my hope that after the exchange of pleadings setting forth their respective positions and evidence in support, it would give the parties a more realistic basis to resolve the issues in dispute by means of a settlement; yet, almost a year later that has not proven to be the case. Accordingly, it is time to move forward with the adjudication of this proceeding by means of this Decision and Order on the Record.

Pertinent Statutory Provisions

Congress enacted the Horse Protection Act to end the cruel practice of deliberately soring Tennessee Walking Horses for the purpose of altering their natural gait and improving their performance at horse shows. When a horse's front feet are deliberately made sore, usually by using chains or chemicals, "the intense pain which the horse suffers when placing his forefeet on the ground causes him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking Horse. H.R. Rep. No. 91-1597, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871.

Congress's reasons for prohibiting soring were twofold. First, soring inflicts great pain on the animals. Second, trainers who sore horses gain an unfair competitive advantage over trainers who rely on skill and patience. In 1976, Congress significantly strengthened the Horse Protection Act by amending it to make clear that intent to sore the horse is not a necessary element of a violation. *See Thornton v. U.S. Dep't of Agric.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

The Horse Protection Act defines the term "sore," as follows:

§ 1821. Definitions

> As used in this chapter unless the context otherwise requires:
>
> (3) The term "sore" when used to describe a horse means that-
>
> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any bum, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving. . . .

15 U.S.C. § 1821(3).

The Horse Protection Act creates a presumption that a horse with abnormal, bilateral sensitivity is sore, as follows:

> **§ 1825. Violations and penalties**
>
> **(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**
>
> (5) In any civil or criminal action to enforce this chapter or any

> regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

The Horse Protection Act prohibits certain conduct, including:

> **§ 1824. Unlawful acts**
>
> The following conduct is prohibited:
>
> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).

Violators of the Horse Protection Act are subject to civil and criminal sanctions. The Horse Protection Act provides for criminal penalties for "knowingly" violating the Horse Protection Act (15 U.S.C. § 1825(a)). This provision of the Horse Protection Act is not at issue in this proceeding. Civil sanctions include both civil penalties (15 U.S.C. § 1825(b)(l)) and disqualification for a specified period from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction." (15 U.S.C. § 1825(c)). The maximum civil penalty for each violation is $2,200 (15 U.S.C. § 1825(b)(1)).[2] In making the determination concerning the amount of the monetary penalty, the Secretary of Agriculture must take into account all factors relevant to

[2] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, is authorized to adjust the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(l) for each violation of 15 U.S.C. § 1824. The maximum civil penalty for violations of the Horse Protection Act occurring after May 7, 2010, is $2,200 (7 C.F.R. § 3.91(b)(2)(viii)).

such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. 15 U.S.C. § 1825(b)(l).

As to disqualification, the Horse Protection Act further provides, as follows:

> **§ 1825. Violations and penalties**
>
> (c) **Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**
>
> In addition to any ... civil penalty authorized under this section, any person . . . who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(c).

Discussion

I. Respondents Have Failed To Rebut The Statutory Presumption That "Don't Tread On Me" Was Sore.

Respondents previously admitted to the entering of both horses and Patrick Thomas to the showing or exhibiting of "A Magic Stroke"; accordingly, only the Complaint allegations of "soreness" in the horses remain at issue.[3]

[3] *See* Part I of Patrick Thomas's Answer on October 21, 2013 and Part I of Howard Hamilton's Answer on October 21, 2013.

On June 22, 2012, at the 50th Annual Guntown Lion's Club Walking Horse Show, Dr. Dussault examined "Don't Tread On Me" and found "raised cords of tissue (scars) extending from the pocket area" up and going medial and lateral along its pasterns, according to his sworn affidavit. (CX- 2). In that same affidavit, Dr. Dussault further noted what he termed as a "prohibited substance" of some sort which was covering the scars, which he had to rub off in order to inspect the area. Ultimately, his determination was that the horse was not in compliance with the scar rule and the custodian of the horse (Howard Hamilton) was notified. (CX-1, 2). Don Fox of the USDA photographed the scars present on this horse, which are found as Exhibits 4 and 5.[4] In those photos what Dr. Dussault identified as scars are visible, as the cords that he discussed can be seen emanating upwards and outwards on the pastern, from top to bottom.

As Dr. Dussault attested to in his affidavit, he has been employed by the USDA since November of 1985 and had been inspecting horses for compliance with the Act since then, which would have given him approximately twenty-six years of experience interpreting the Act at the time of this event. (CX-2). In addition to his personal experience, the inspection procedures that Dr. Dussault used to inspect "Don't Tread on Me" are based on over forty years of Horse Protection Act enforcement. It is designed specifically to distinguish horses that are "sore" from those that are not, and not just a general examination of the welfare of the horse. Soring practices primarily occur by two means: mechanical and chemical.[5] Regardless of the method, these soring practices are generally

[4] Digital photographs of Complainant's originally submitted photographs were electronically sent to the Hearing Clerk on June 23, 2016, providing clearer views of both horses' pasterns than the copied photos. Despite Respondents' claims on page 6 of their Proposed Decision and Order that said digital photographs are "admittedly digitally enhanced", no evidence exists for that claim. Respondents have misread the email in REX-29 to mean that the digital copy of CX-5 had "slight light adjustments" when in fact it was being pointed out that the two *printed* photos of CX-5 were the same photo, shown with different lighting, not that there was any manipulation of the digital photographs. (Respondents' Responsive Evidence and Brief in Support Thereof at 23).

[5] *See* Zahnd v. USDA, 479 F.3d 767, 768-69 (11th Cir. 2007) ("The purpose of [the pre-show] inspection is to determine whether the horse is sore, that is, whether a horse has been abused with chemical or mechanical devices and will feel pain when moving."); Young, 54 Agric. Dec. 208, 209 (U.S.D.A. 1995) ("The Horse Protection Act . . . prohibits the practice of 'soring' the legs of a Tennessee walking horse through the use of chemical or mechanical devices.").

confined to the pasterns of the horse's feet, and the USDA inspection is tailored to detect evidence of soreness in that area.[6] Part and parcel of that inspection was a visual analysis as well as physical inspection, which he described in some detail.[7]

In rebuttal, Respondents rely in part on the affidavits of two Designated Qualified Persons (DQPs).[8] (REX-15, 16) In their affidavits, both DQPs (Mr. Butler and Mr. Riner) discuss a purported interaction they had with USDA Veterinary Medical Officer Dr. Hammel. Both assert that Dr. Hammel told them that the Veterinary Medical Officers (VMOs) had been instructed to enforce the "scar rule" as written, which they assert is different than prior practice. (REX-15, 16). Although the affidavits are deemed admitted for this proceeding; even assuming arguendo that the affidavits are accepted for the truth of the matters asserted therein, the statements are too attenuated from the facts and circumstances of the examination performed by Dr. Dussault on June 22, 2012 of "Don't Tread On Me" at the 50th Annual Guntown Lion's Club Walking Horse Show to be of probative value in rebutting Dr. Dussault's findings of "raised cords of tissue (scars) extending from the pocket area" up and going medial and lateral along its pasterns, as described in his sworn affidavit. (CX- 2).

Respondents also attempt to rebut the findings contained in Dr. Dussault's affidavit by asserting that Dr. Dussault improperly inspected "Don't Tread On Me."[9] Much of Respondents' theory rests on the idea that Dr. Dussault simply referred to his examination of the horse as a "palpation," which they contend is inadequate to support a finding that the horse was "sore."[10] *Black's Veterinary Dictionary* has described palpation as "the method of examining the surface of the body, and the internal

[6] Bobo v. USDA, 52 F.3d 1406, 1409, 1412, 1415 (6th Cir. 1995); Edwards, 55 Agric. Dec. 892, 939 (U.S.D.A. 1996); Bennett, 55 Agric. Dec. 176, 180-81 (U.S.D.A. 1996).
[7] It must be noted that Dr. Dussault's affidavit incorrectly identifies the horse as "Do Tread On Me." (CX-2).
[8] A "DQP" is a person meeting the requirements of 9 C.F.R. § 11.7 who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the United States Department of Agriculture and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under 15 U.S.C. § 1823 to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purpose of enforcing the Horse Protection Act. *See* 9 C.F.R. § 11.1.
[9] *See* Respondents' Responsive Evidence and Brief in Support Thereof at 9.
[10] *See id.* at 10.

organs as to their size, position, shape, etc., by the method of feeling with the hand laid upon the skin gently manipulating the structures within reach."[11] Thus, the use of the term palpation is sufficient, particularly when considered in the context of his affidavit as a whole and other corroborating evidence of record, to support Dr. Dussault's findings.[12]

Likewise, the Respondents are incorrect in their assertion that "proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation" is a requirement for meeting the statutory definition of a scar rule violation.[13] In fact, that is only a requirement of the scar rule if it is found that the horse has "*uniformly* thickened epithelial tissue." 9 C.F.R. § 11.3(b) (emphasis added). Where an inspector believes that the bilateral scars on the pasterns are not uniformly thickened epithelial tissue, the horse will be adjudged sore without a further finding of aggravating circumstances.

Finally, Respondents argue that "Don't Tread On Me" was not sore because it was inspected by their private veterinarians who found it to be without issue.[14] One of Respondents' veterinarians is Dr. John Bennett. The date of Dr. Bennett's examination was October 10, 2013, more than fifteen months after the date of Dr. Dussault's inspection and finding.[15] A second veterinarian, Dr. Richard Wilhelm, apparently also inspected the horse on October 10, 2013.[16] Both of these private veterinarians assert that the horse was not sore on the date of their examination, i.e. on October 10, 2013, more than fifteen months after the date of Dr. Dussault's examination. (REX-19, 20). Even assuming arguendo that the affidavits are accepted for the truth of the matters asserted therein, the statements are too attenuated from the facts and circumstances of the examination performed by Dr. Dussault on June 22, 2012 of "Don't Tread On Me" at the 50th Annual Guntown Lion's Club Walking Horse Show to be of probative value in rebutting Dr. Dussalt's findings of "raised cords of tissue (scars) extending from the pocket area" up and going medial and

[11] GEOFFREY WEST, BLACK'S VETERINARY DICTIONARY 555 (A & C Black, 15th ed. 1982).
[12] Mitchell Butler states in his affidavit, REX-18, page 2 of 3, that he "palpate[s] vertically and horizontally spreading the skin with my thumbs, as I was trained to do, to see if the skin can be smoothed out."
[13] Respondents' Responsive Evidence and Brief in Support Thereof at 9, 10.
[14] *Id.* at 11, 12.
[15] REX-20.
[16] REX-19.

lateral along its pasterns, as described in his sworn affidavit. (CX- 2).

For much the same reason, the opinion presented by Dr. Lee Butler arising from an examination which purportedly took place closer to two weeks after the show is insufficient to rebut Dr. Dussalt's findings of "raised cords of tissue (scars) extending from the pocket area" up and going medial and lateral along its pasterns, as described in his sworn affidavit (CX-2) arising from his June 22, 2012 examination of "Don't Tread On Me." [17]

Furthermore, it is well settled that the contemporaneous examination of a USDA veterinarian should be given more weight than later examinations by private veterinarians.[18] As the veterinarian on site of the 50th Annual Guntown Lion's Club Walking Horse Show conducting a contemporaneous exam, Dr. Dussault, with his quarter century of experience administering the Act, found "Don't Tread On Me" to be out of compliance with the scar rule. (CX-2). There is no contemporary evidence from a comparatively experienced veterinarian, with accompanying evidence to dispute his findings, although Respondents were on notice immediately that the horse had been adjudged sore.

II. Respondents Have Failed To Rebut The Statutory Presumption That "A Magic Stroke" Was Sore.

Respondents previously admitted to the entering of both horses and Patrick Thomas to the showing or exhibiting of "A Magic Stroke"; accordingly, only the Complaint allegations of "soreness" in the horses remain at issue.[19]

On July 21, 2012, at the Parker's Crossroads Walking Horse Show, Dr. Baker examined "A Magic Stroke" and found "thickened ropes of hairless skin medial and lateral to the posterior midline" on both the left and right pastern of the horse. (CX-7). He also noted in his affidavit that the tissue

[17] REX-30. There are additional concerns with the reliability of his evidence as what is offered from him is an unsigned document, without accompanying photographs, including only a description of a finding.
[18] Thornton, 41 Agric. Dec. 870, 878-79, 890-94 (U.S.D.A. 1982).
[19] *See* Part I of Patrick Thomas's Answer on October 21, 2013 and Part I of Howard Hamilton's Answer on October 21, 2013.

in this area was "non-uniformly thickened and could not be flattened or smoothed out." (CX-7). Upon making this finding, Dr. Baker informed the custodian (Howard Hamilton) that the horse was not in compliance with the scar rule. (CX-6, 7). The findings are also bolstered by the photos of the horse's pasterns, taken by Robert Whiteley and marked as Complainant's Exhibit 9. (CX-9). These photos clearly show the thickened cords of hairless skin which Dr. Baker identified as scars.

Dr. Baker noted in his affidavit that he had been a VMO for the USDA since January of 2002, some 10 years prior to his inspection of "A Magic Stroke." (CX-7). Dr. Baker, per that affidavit, also noted that he first visually observed the horse, before then physically inspecting it. (CX-7). Much like any other USDA VMO, his inspection was designed specifically to distinguish horses that are "sore" from those that are not, and not just a general examination of the welfare of the horse. And as a licensed veterinarian, this training would have been augmented by his real world, practical and personal experience in examining animals of all types, and specifically horses. The physical inspection that ensued established quite conclusively his procedures and findings, as already stated.

Respondents maintain that because the horse was allowed to show after the opportunity for a pre-show inspection, it is a preclusion for finding the horse sore post-show, as this horse was by Dr. Baker.[20] Complainant responds to this argument by asserting that Respondents have conflated the findings of the DQP and that of the VMO. While DQPs do have a role in helping to promote the goals of the Act, a licensed veterinarian working specifically under the Act and aware of its enforcement provisions would add a level of expertise that DQPs do not possess.[21] Respondents' argument that a negative inference should follow from a horse having the opportunity to be inspected pre-show, but only being called out in a post-show inspection is unpersuasive for the additional reason that an opportunity to be inspected pre-show does nothing to refute the findings

[20] Respondents' Responsive Evidence and Brief in Support Thereof at 14.

[21] Routinely, DQP examinations are found to be less probative than United States Department of Agriculture examinations and the Judicial Officer has accorded less credence to DQP examinations than to United States Department of Agriculture examinations. Oppenheimer, 54 Agric. 221, 269 (U.S.D.A. 1995) (Decision as to C.M. Oppenheimer); Sparkman, 50 Agric. Dec. 602, 610 (U.S.D.A. 1991) (Decision as to Sparkman and McCook); Edwards, 49 Agric. Dec. 188, 200 (U.S.D.A. 1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

of an actual post-show examination by Dr. Baker, a licensed veterinarian who has practiced with APHIS since 2002. (CX-7).

Respondents also assert as a defense that the Dr. Baker was unaware of the basics of palpation with respect to findings related to the scar rule at the time of the show he worked.[22] Respondents seek to offer a transcript of an earlier DQP event in rebuttal of the findings Dr. Baker recorded contemporaneously with respect to this event. [23] That transcript, at best, stands for nothing more than the proposition that there may be different ways that a skilled veterinarian may conduct palpation to determine compliance under the scar rule. Not only does the transcript fail to address a contemporaneous examination of the subject horse, as previously explained, as a general rule DQP examinations are found to be less probative than United States Department of Agriculture examinations and the Judicial Officer has accorded less credence to DQP examinations than to United States Department of Agriculture examinations.[24]

Respondents again challenge Dr. Baker's findings by using the examinations of both Drs. Bennett and Wilhelm.[25] However, the evidence offered through these two witnesses on "A Magic Stroke" has the same weaknesses as it did for "Don't Tread On Me." Both examinations were made on October 10, 2013, nearly a full fifteen months after the show at which these horses were found sore by APHIS veterinarians. (REX-19, 20). Even assuming arguendo that the affidavits are accepted for the truth of the matters asserted therein, the statements are too attenuated from the facts and circumstances of the examination performed by Dr. Baker on July 21, 2012 of "A Magic Stroke" to be of probative value in rebutting Dr. Baker's findings of "thickened ropes of hairless skin medial and lateral to the posterior midline" on both the left and right pastern of the horse, as well as the fact that the tissue in this area was "non-uniformly thickened and could not be flattened or smoothed out." (CX-7). Upon making this finding, Dr. Baker informed the custodian (Howard Hamilton) that the horse was not in compliance with the scar rule. (CX-6, 7). Once again, Respondents had an opportunity to seek and receive an immediate and comprehensive examination of "A Magic Stroke", being on notice that

[22] Respondent's Responsive Evidence and Brief in Support Thereof at 24.
[23] *See supra* note 8.
[24] *See supra* note 21.
[25] *See* Respondents' Responsive Evidence and Brief in Support Thereof at 19-21.

it had been adjudged as sore. Apparently, they chose to do so only after being served with a complaint more than fourteen months later.

Findings of Fact

1. Respondent Howard Hamilton is an individual who resides in Cedar Grove, Tennessee. (Compl. ¶ 1; Answer at 1).

2. Respondent Patrick W. Thomas is an individual who resides in Auburntown, Tennessee. (Compl. ¶ 2; Answer at 1).

3. On or about June 22, 2012, Respondents Howard Hamilton and Patrick Thomas entered for the purpose of showing or exhibiting the horse known as "Don't Tread On Me," entry number 106, class number 5, in the 50th Annual Guntown Lion's Club Walking Horse Show in Guntown, MS. (Compl. ¶ 3; Answer at 1).

4. On or about July 21, 2012, Respondents Howard Hamilton and Patrick Thomas entered for the purpose of showing or exhibiting the horse known as "A Magic Stroke," entry number 301, class number 22, in the Parker's Crossroads Walking Horse Show in Parker's Crossroads, TN. (Compl. ¶ 4; Answer at 1).

5. On or about July 21, 2012 Respondent Patrick Thomas showed or exhibited the horse known as "A Magic Stroke," entry number 301, class number 22, in the Parker's Crossroads Walking Horse Show in Parker's Crossroads, TN. (Compl. ¶ 5; Answer at 1).

6. Dr. Clement Dussault examined the horse "Don't Tread On Me" (incorrectly identified at times as "Do Tread On Me") and determined it to be sore by reason of being out of compliance with the scar rule. (CX-2).

7. Dr. Jeffrey Baker examined the horse "A Magic Stroke" and determined it to be sore by reason of being out of compliance with the scar rule. (CX-7).

8. Dr. Dussault properly filled out and signed form 7077 which contained a drawing showing the location of the scars on "Don't Tread On Me."

(CX-1). He also prepared an affidavit noting his examinations and findings pertinent to this horse. (CX-2).

9. Dr. Baker properly filled out and signed form 7077 which contained a drawing showing the location of the scars on "A Magic Stroke." (CX-6). He also prepared an affidavit noting his examinations and findings pertinent to this horse. (CX-7).

Conclusions of Law

Section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)) prohibits "the entering for the purpose of showing or exhibiting in any horse show or horse exhibition any horse which is sore." Section 5(2)(A) of the Act (15 U.S.C. § 1824(2)(A)) similarly prohibits the "showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore." Section 6(b)(1) of the Act, 15 U.S.C. § 1825(b)(1)) further provides that "[a]ny person who violates section 5 of this Act shall be liable to the United States for a civil penalty of not more than $2,000 for each violation."[26]

As a result of a rulemaking, 9 C.F.R. § 11.3 was promulgated which laid out the framework of the "scar rule."[27] Under the auspices of the scar rule, "[h]orses subject to this rule that do not meet the following scar rule criteria shall be considered to be 'sore' and are subject to all prohibitions of section 5 of the Act." Illustrative of the prohibitions, 9 C.F.R. § 11.3 states that:

> (a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) much be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair. (b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket"

[26] In 1997 the Secretary of Agriculture adjusted the maximum civil penalty from $2,000 to $2,200 for each violation of section 5 of the Act (15 U.S.C. § 1824), in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (Pub. L. No. 101-410) as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134). *See* 28 U.S.C. § 2461 note, 7 C.F.R. § 3.91(b)(2)(vii).
[27] 44 Fed. Reg. 25172, April 27, 1979.

> may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. § 11.3.

The Horse Protection Act (15 U.S.C. § 1825(b)(l)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture "shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." 15 U.S.C. § 1825(b)(1).

The Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture consider specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period. While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[28]

Since, under the 1976 amendments, intent and knowledge are not

[28] Back, 69 Agric. Dec. 448, 464 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz, 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. 2005) (Decision as to Christopher Jerome Zahnd), *aff'd sub nom.* Zahnd v. USDA, 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1476 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 492 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, 61 Agric. Dec. 173, 209 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (l0th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

elements of a violation, few circumstances warrant an exception from the usual practice of imposing the minimum disqualification period for violations of the Horse Protection Act, in addition to the assessment of a civil penalty. The facts and circumstances of this case have been examined and do not warrant an exception to this policy.

1. The Secretary has jurisdiction in this matter.

2. On June 22, 2012, Respondents Howard Hamilton and Patrick Thomas, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), entered for the purpose of showing or exhibiting the horse known as "Don't Tread On Me," entry number 106, class number 5, in the 50th Annual Guntown Lion's Club Walking Horse Show in Guntown, MS, while the horse was sore (9 C.F.R. § 11.3(b)).

3. On July 21, 2012, Respondents Howard Hamilton and Patrick Thomas, in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), entered for the purpose of showing or exhibiting the horse known as "A Magic Stroke," entry number 301, class number 22, in the Parker's Crossroads Walking Horse Show in Parker's Crossroads, TN, while the horse was sore (9 C.F.R. § 11.3(b)).

4. On July 21, 2012, Respondent Patrick Thomas, in violation of section 5(2)(A) of the Act (15 U.S.C. § 1824(2)(A)), showed or exhibiting the horse known as "A Magic Stroke," entry number 301, class number 22, in the Parker's Crossroads Walking Horse Show in Parker's Crossroads, TN, while the horse was sore (9 C.F.R. § 11.3(b)).

5. The record is insufficient to establish that the maximum penalty of $4,400 per Respondent is appropriate in this case and is therefore modified to $2,200 per Respondent accordingly.

6. The record is insufficient to establish that Respondents Howard Hamilton and Patrick Thomas should each be disqualified for two uninterrupted years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agent, employee, family member or other device;

however, a period of disqualification of each Respondent for one year is supported and is hereby imposed accordingly.

ORDER

1. Respondent Howard Hamilton is assessed a civil penalty of $2,200.

2. Respondent Patrick Thomas is assessed a civil penalty of $2,200.

3. Respondents Howard Hamilton and Patrick Thomas are each disqualified for one uninterrupted year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agent, employee, family member or other device. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties with courtesy copies provided via email where available.

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: https://www.oaljdecisions.dm.usda.gov/misc-current.

ANIMAL HEALTH PROTECTION ACT

SWEENEY S. GILLETTE.
Docket No. 16-0024.
Order Denying Respondent's Request to Reopen Hearing.
Filed January 5, 2017.

SWEENEY S. GILLETTE.
Docket No. 16-0024.
Miscellaneous Order of Judicial Officer.
Filed March 2, 2017.

SWEENEY S. GILLETTE.
Docket No. 16-0024.
Order Granting Joint Motion for Modification of Summary Judgment Order.
Filed April 11, 2017.

ANIMAL WELFARE ACT

SNBL USA, LTD., a Washington corporation.
Docket No. 16-0187.
Miscellaneous Order.
Filed January26, 2017.

MANDY SWARTZ.
Docket No. 16-0024.
Order Terminating Proceeding.
Filed March 13, 2017.

STEARNS ZOOLOGICAL RESCUE & REHAB CENTER, INC., a Florida corporation d/b/a DADE CITY WILD THINGS.
Docket No. 15-0146.
Miscellaneous Order of Judicial Officer.
Filed March 20, 2017.

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Miscellaneous Order.
Filed April 25, 2017.

AWA.

Colleen A. Carroll, Esq., for Complainant.
Larry J. Thorson, Esq., for Respondents.
Initial Order Denying Motion to Intervene entered by Janice K. Bullard, Administrative Law Judge.
Order Setting Deadlines entered by William G. Jenson, Judicial Officer.

ORDER SETTING DEADLINES FOR FILING BRIEFS ON REMAND

In *Animal Legal Defense Fund, Inc. v. Vilsack*, No. 16-cv-00914 (CRC), 2017 WL 627379 (D.D.C. Feb. 15, 2017), the Court vacated and remanded my denial of Animal Legal Defense Fund, Inc.'s [ALDF] Motion for Leave to Intervene in this proceeding. The Court found ALDF is an "interested person" as that term is used in 5 U.S.C. § 555(b) and ordered on remand that I further consider ALDF's Motion for Leave to Intervene "in light of factors relevant to third-party participation in agency proceedings under [5 U.S.C. §] 555(b)."[1]

On April 24, 2017, I conducted a conference call with Larry J. Thorson, counsel for the Respondents, Colleen A. Carroll, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], and Christopher Berry,

[1] Animal Legal Defense Fund, Inc. v. Vilsack, No. 16-cv-00914 (CRC), 2017 WL 627379, at *1 (D.D.C. Feb. 15, 2017).

counsel for ALDF, to discuss the manner in which to proceed on remand.[2] Mr. Thorson and Ms. Carroll each requested the opportunity to file a brief on remand. Mr. Berry stated that the issues on remand have been briefed, further briefing is unnecessary, and ALDF's opportunity to participate in this proceeding may be negatively affected by my providing the Respondents, the Administrator, and ALDF time for briefing the issues on remand.

I find the Respondents and the Administrator have not had an adequate opportunity to brief the issues on remand and, therefore, provide the Respondents, the Administrator, and ALDF an opportunity to brief the issues on remand. Based on the agreement of the Respondents and the Administrator, any brief on remand filed by the Respondents, the Administrator, or ALDF must be filed with the Hearing Clerk no later than May 30, 2017. The Respondents, the Administrator, and ALDF may each file a reply brief on remand with the Hearing Clerk no later than June 9, 2017.[3]

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CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER THOMAS J. SELLNER, an Iowa general partnership, d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Miscellaneous Order of Judicial Officer.
Filed March 31, 2017.

[2] Ms. Marilyn Kennedy, Legal Secretary, Office of Administrative Law Judges, United States Department of Agriculture, also participated on the conference call.

[3] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, any brief on remand filed by the Respondents, the Administrator, or ALDF must be received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, May 30, 2017, and any reply brief on remand filed by the Respondents, the Administrator, or ALDF must be received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, June 9, 2017.

CIVIL RIGHTS

In re: EDDIE WISE & DOROTHY WISE.
Docket Nos. 16-0161, 16-0162.
Miscellaneous Order.
Filed January 10, 2017.

Civil rights.

Administrative procedure – Petition for review, dismissal of.

Corey Lea for Petitioners.
J. Carlos Alarcon, Esq., for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DISMISSING THE WISES' PETITION FOR REVIEW

PROCEDURAL HISTORY

On August 24, 2016, Eddie Wise and Dorothy Wise [Wises] instituted this proceeding by filing a "Complaint Expedited Formal Hearing on Ther [sic] Merits and Temporary Injunction" [Complaint] in which the Wises allege the United States Department of Agriculture [USDA]: (1) terminated financial assistance to the Wises; (2) discriminated against the Wises; (3) foreclosed on the Wises; (3) offset the Wises' retirement; (4) seeks to take more money from the Wises by way of offset; (5) changed the Wises' 2010 farm plan in order to deny the Wises a farm-operating loan; and (6) sold the Wises' farm without a determination by an arbitrator or a formal hearing on the merits by an administrative law judge (Compl. at 1, 3-5). The Wises seek damages and a hearing before an administrative law judge (Compl. at 1, 5).

On September 22, 2016, Administrative Law Judge Jill S. Clifton [ALJ] dismissed this proceeding, holding administrative law judges have no authority to grant the relief requested by the Wises and the doctrine of *res judicata* precludes consideration of the Wises' Complaint.[1] On

[1] Wise, Docket Nos. 16-0161 and 16-0162, 2016 WL 6235795 (U.S.D.A. Sept. 22, 2016) (Dismissal (With Prejudice)).

September 23, 2016, the Wises appealed the ALJ's dismissal of the proceeding, and, on appeal, I affirmed the ALJ's dismissal of the proceeding and dismissed the Wises' appeal petition.2

On December 28, 2016, the Wises filed a "Petition for Review and Request for a Formal Hearing before the Administrative Law Judge" [Petition for Review]3 again seeking damages and a hearing before an administrative law judge. On December 29, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration of the Wises' Petition for Review.

DISCUSSION

I issued a final agency Decision and Order in this proceeding on November 15, 2016.4 The Wises do not assert that *Wise*, Docket Nos. 16-0161 and 16-0162, 2016 WL 6956717 (U.S.D.A. Nov. 15, 2016), contains any error of law or fact or that there has been an intervening change in controlling law. Instead, the Wises' Petition for Review appears to be merely a vehicle for registering disagreement with *Wise*, Docket Nos. 16-0161 and 16-0162, 2016 WL 6956717 (U.S.D.A. Nov. 15, 2016). Absent highly unusual circumstances, which are not present in this proceeding, I would only grant the Wises' Petition for Review if I had committed an error of law or fact which would affect the outcome of this proceeding or if there had been an intervening change in the controlling law. As the Wises do not assert, and I cannot identify, any dispositive error in *Wise*, Docket Nos. 16-0161 and 16-0162, 2016 WL 6956717 (U.S.D.A. Nov. 15, 2016), or any change in controlling law, the Wises' Petition for Review must be dismissed.

For the foregoing reason, the following Ruling is issued.

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[2] Wise, Docket Nos. 16-0161 and 16-0162, 2016 WL 6956717 (U.S.D.A. Nov. 15, 2016).
[3] The Wises assert they are "pro se [p]laintiffs" (Pet. for Review at 1); however, Corey Lea signed the Wises' Petition for Review for "Eddie Wise" and "Dorothy Wise" and has represented the Wises since the inception of this proceeding on August 24, 2016.
[4] *See supra* note 2.

RULING

The Wises' Petition for Review, filed December 28, 2016, is dismissed.

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HENRY DOUGLAS.
Docket No. 17-0212.
Order of Dismissal.
Filed March 20, 2017.

MACARTHUR DOUGLAS.
Docket No. 17-0213.
Order of Dismissal.
Filed March 20, 2017.

VIOLA DOUGLAS.
Docket No. 17-0214.
Order of Dismissal.
Filed March 20, 2017.

LAWRENCE DOUGLAS.
Docket No. 17-0221.
Order of Dismissal.
Filed March 20, 2017.

ANTOINETTE DOUGLAS
Docket No. 17-0222.
Order of Dismissal.
Filed March 20, 2017.

ODESSA DOUGLAS.
Docket No. 17-0223.
Order of Dismissal.
Filed March 20, 2017.

ABRAHAM J. CARPENTER, JR.
Docket No. 17-0245.
Order of Dismissal.
Filed April 26, 2017.

DANNY CARPENTER.
Docket No. 17-0246.
Order of Dismissal.
Filed April 26, 2017.

KATIE CARPENTER.
Docket No. 17-0247.
Order of Dismissal.
Filed April 26, 2017.

ALBERT CARPENTER.
Docket No. 17-0248.
Order of Dismissal.
Filed April 26, 2017.

CARLOS CARPENTER.
Docket No. 17-0248.
Order of Dismissal.
Filed April 26, 2017.

BOBBIE JEAN CLARK.
Docket No. 17-0250.
Order of Dismissal.
Filed April 26, 2017.

ABRAHAM CARPENTER, SR.
Docket No. 17-0251.
Order of Dismissal.
Filed April 26, 2017.

MISCELLANEOUS ORDERS & DISMISSALS

GARY GRANT (FOR THE ESTATE OF MATTHEW AND FLORENZA GRANT).
Docket No. 17-0230.
Order of Dismissal.
Filed May 12, 2017.

ROD BRADSHAW (INDIVIDUAL AND ESTATE OF).
Docket No. 17-0231.
Order of Dismissal.
Filed May 12, 2017.

GREG EARVES.
Docket No. 17-0232.
Order of Dismissal.
Filed May 12, 2017.

HENRY BURRIS.
Docket No. 17-0233.
Order of Dismissal.
Filed May 12, 2017.

FRANKLIN KIRKSEY.
Docket No. 17-0234.
Order of Dismissal.
Filed May 12, 2017.

WILBERT FITZERALD, a/k/a WILBERT FITZGERALD.
Docket No. 17-0235.
Order of Dismissal.
Filed May 12, 2017.

HAYWOOD HOLLINGSWORTH.
Docket No. 17-0236.
Order of Dismissal.
Filed May 12, 2017.

CHARLES DENARD.
Docket No. 17-0237.
Order of Dismissal.
Filed May 12, 2017.

ROBERT LEE HILL.
Docket No. 17-0238.
Order of Dismissal.
Filed May 12, 2017.

RICHARD GLENN.
Docket No. 17-0239.
Order of Dismissal.
Filed May 12, 2017.

ABRAHAM CARPENTER.
Docket No. 17-0240.
Order of Dismissal.
Filed May 12, 2017.

FELDER DANIEL, a/k/a FELDER DANIELS.
Docket No. 17-0241.
Order of Dismissal.
Filed May 12, 2017.

WILLIE HEAD.
Docket No. 17-0242.
Order of Dismissal.
Filed May 12, 2017.

HORSE PROTECTION ACT

In re: CHARLES GLEGHORN, an individual.
Docket No. 17-0022.
Miscellaneous Order.
Filed May 30, 2017.

HPA.

Colleen A. Carroll, Esq., and Lauren Axley, Esq., for Complainant.
Raymond W. Fraley, Esq., for Respondent.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 23, 2016. The Administrator instituted the proceeding under the Horse Protection Act, as amended (15 U.S.C. §§ 1821-1831) [the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [the Rules of Practice].

The Administrator alleges, on or about August 27, 2016, and on or about August 28, 2016, Charles Gleghorn violated the Horse Protection Act.[1] The Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], served Mr. Gleghorn with the Complaint and the Hearing Clerk's service letter on January 10, 2017.[2] Mr. Gleghorn failed to file an answer to the Complaint within twenty days after the Hearing Clerk served Mr. Gleghorn with the Complaint, as required by 7 C.F.R. § 1.136(a).

On February 1, 2017, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [Motion for Default Decision] and a proposed Decision and Order by Reason of Default [Proposed Default Decision]. On February 1, 2017, after the Administrator filed the Motion for Default Decision and the Proposed Default Decision, Mr. Gleghorn filed an untimely Answer. On February 9, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] issued a Decision and Order by Reason of Default [Decision] in which the Chief ALJ: (1) concluded Mr. Gleghorn violated the Horse Protection Act, as alleged in the Complaint; (2) assessed Mr. Gleghorn a $6,600 civil

[1] Compl. ¶¶ 22-24 at the fifth unnumbered page.
[2] United States Postal Service Domestic Return Receipt for article number XXXX XXXX XXXX XXXX 5679.

penalty; and (3) disqualified Mr. Gleghorn from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for three years.[3] On February 9, 2017, the Hearing Clerk, by electronic mail, served Mr. Gleghorn with the Chief ALJ's Decision and the Hearing Clerk's service letter.[4]

On March 27, 2017, Mr. Gleghorn filed a Motion to Enter Appearance and Set Aside Default Judgment and Accept Late Answer of Respondent, and on March 28, 2017, the Administrator filed a Response to Motions to Enter Appearance, Set Aside Default Judgment and File Late Answer. On April 18, 2017, the Chief ALJ issued an Order Denying Respondent's Motion to Set Aside Default Judgment and Accept Late Answer [Order] in which the Chief ALJ held, as Mr. Gleghorn filed his March 27, 2017 motion twelve days after the Chief ALJ's Decision became final and effective, she "no longer [has] continuing jurisdiction to rule on [Mr. Gleghorn's] Motion."[5]

On May 3, 2017, Mr. Gleghorn filed an Appeal to Judicial Officer/and/or Motion to Reconsider to Vacate and Set Aside Judgment [Appeal Petition], and on May 23, 2017, the Administrator filed a Response to "Appeal to Judicial Officer/and/or Motion to Reconsider to Vacate and Set Aside Judgment." On May 25, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

The Rules of Practice provide that a party may appeal an administrative law judge's written decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk within thirty days after the Hearing Clerk serves that party with the written decision.[6] The Hearing Clerk served Mr. Gleghorn with the Chief ALJ's Decision on February 9, 2017;[7] therefore, Mr. Gleghorn was required to file his Appeal Petition with the

[3] Chief ALJ's Decision at the fourth unnumbered page.
[4] February 9, 2017 Certificate of Service signed by Renee Leach-Carlos, Hearing Clerk.
[5] Chief ALJ's April 18, 2017 Order at the fourth unnumbered page.
[6] 7 C.F.R. § 1.145(a).
[7] *See supra* note 4.

Hearing Clerk no later than March 13, 2017.[8] Instead, Mr. Gleghorn filed his Appeal Petition with the Hearing Clerk on May 3, 2017. Therefore, I find Mr. Gleghorn's Appeal Petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[9] The Chief ALJ's Decision became final thirty-five days after the Hearing Clerk served Mr. Gleghorn with the Chief ALJ's Decision.[10] Thus, the Chief ALJ's Decision became final on March 16, 2017. Mr. Gleghorn filed his Appeal Petition on May 3, 2017. Therefore, I have no jurisdiction to hear Mr. Gleghorn's Appeal Petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore,

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[8] Thirty days after the date the Hearing Clerk served Mr. Gleghorn with the Chief ALJ's Decision was Saturday, March 11, 2017. The Rules of Practice provide, when the time for filing a document or paper expires on a Saturday, the time for filing shall be extended to the next business day. 7 C.F.R. § 1.147(h). The next business day after Saturday, March 11, 2017, was Monday, March 13, 2017.

[9] *See, e.g.*, Britz, Docket Nos. 15-0005, 15-0006, 76 Agric. Dec. __, 2017 WL 550571 (U.S.D.A. Jan. 11, 2017) (Order Den. Late Appeal as to Bruce Britz) (dismissing the respondent's appeal petition filed one day after the chief administrative law judge's decision became final); Edwards, 75 Agric. Dec. 280 (U.S.D.A. 2016) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed three days after the chief administrative law judge's decision became final); Rosberg, 73 Agric. Dec. 551 (U.S.D.A. 2014) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one day after the administrative law judge's decision became final); Piedmont Livestock, Inc., 72 Agric. Dec. 422 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing Piedmont Livestock, Inc.'s appeal petition filed three days after the chief administrative law judge's decision became final and dismissing Joseph Ray Jones's appeal petition filed one day after the chief administrative law judge's decision became final); Custom Cuts, Inc., 72 Agric. Dec. 484 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one month twenty-seven days after the chief administrative law judge's decision became final); Self, 71 Agric. Dec. 1169 (U.S.D.A. 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed eighteen days after the chief administrative law judge's decision became final).

[10] *See* 7 C.F.R. § 1.139; Chief ALJ's Decision at the fourth and fifth unnumbered pages.

under the Rules of Practice, I cannot extend the time for Mr. Gleghorn's filing an appeal petition after the Chief ALJ's Decision became final. Accordingly, Mr. Gleghorn's Appeal Petition must be denied.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Gleghorn's Appeal Petition, filed May 3, 2017, is denied.

2. The Chief ALJ's Decision, issued February 9, 2017, is the final decision in this proceeding.

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JARRETT BRADLEY, an individual; JEFF BRONNENBURG, an individual; JOE FLEMING, d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JUSTIN HARRIS, an individual; and SAM PERKINS, an individual.
Docket Nos. 17-0120, 17-0121, 17-0123, 17-0124, 17-0126, 17-0128.
Miscellaneous Order of Judicial Officer.
Filed June 1, 2017.

JARRETT BRADLEY, an individual; JEFF BRONNENBURG, an individual; JOE FLEMING, d/b/a JOE FLEMING STABLES; SHAWN FULTON, an individual; JUSTIN HARRIS, an individual; and SAM PERKINS, an individual.
Docket Nos. 17-0120, 17-0121, 17-0123, 17-0124, 17-0126, 17-0128.
Miscellaneous Order of Judicial Officer.
Filed June 12, 2017.

JARRETT BRADLEY, an individual.
Docket No. 17-0120.
Miscellaneous Order of Judicial Officer.
Filed June 28, 2017.

SHAWN FULTON, an individual.
Docket No. 17-0124.
Miscellaneous Order of Judicial Officer.
Filed June 28, 2017.

MISCELLANEOUS ORDERS & DISMISSALS

SAM PERKINS, an individual.
Docket No. 17-0128.
Miscellaneous Order of Judicial Officer.
Filed June 29, 2017.

JOE FLEMING, an individual d/b/a JOE FLEMING STABLES.
Docket No. 17-0123.
Miscellaneous Order of Judicial Officer.
Filed June 30, 2017.

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DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL HEALTH PROTECTION ACT

DORIAN GABRIEL AYACHE, d/b/a THREE ANGELS FARMS.
Docket No. 17-0013.
Default Decision and Order.
Filed May 2, 2017.

ANIMAL WELFARE ACT

GERHARD FELTS, a/k/a GARY FELTS, d/b/a BLACK DIAMOND KENNEL.
Docket No. 17-0187.
Default Decision and Order.
Filed May 30, 2017.

HORSE PROTECTION ACT

CHARLES GLEGHORN, an individual.
Docket No. 17-0022.
Default Decision and Order.
Filed February 9, 2017.

RONNIE CAMPBELL, an individual d/b/a THE CAMPBELL PLACE.
Docket No. 17-0074.
Default Decision and Order.
Filed March 22, 2017.

JARRETT BRADLEY, an individual.
Docket No. 17-0120.
Default Decision and Order.
Filed April 11, 2017.

DEFAULT DECISIONS

JEFF BRONNENBURG, an individual.
Docket No. 17-0121.
Default Decision and Order.
Filed April 11, 2017.

JOE FLEMING, an individual d/b/a JOE FLEMING STABLES.
Docket No. 17-0123.
Default Decision and Order.
Filed April 11, 2017.

SHAWN FULTON, an individual.
Docket No. 17-0124.
Default Decision and Order.
Filed April 11, 2017.

JUSTIN HARRIS, an individual.
Docket No. 17-0126.
Default Decision and Order.
Filed April 11, 2017.

SAM PERKINS, an individual.
Docket No. 17-0128.
Default Decision and Order.
Filed April 11, 2017.

BETH BEASLEY, an individual.
Docket No. 17-0119.
Default Decision and Order.
Filed April 25, 2017.

AMELIA HASELDEN, an individual.
Docket No. 17-0127.
Default Decision and Order.
Filed April 25, 2017.

HARBERT ALEXANDER, an individual.
Docket No. 17-0159.
Default Decision and Order.
Filed May 4, 2017.

RAY BEECH, an individual.
Docket No. 17-0200.
Default Decision and Order.
Filed May 9, 2017.

DANNY BURKS, an individual.
Docket No. 17-0027.
Default Decision and Order.
Filed May 30, 2017.

HAYDEN BURKS, an individual.
Docket No. 17-0028.
Default Decision and Order.
Filed May 30, 2017.

MIKE DUKES, an individual.
Docket No. 17-0057.
Default Decision and Order.
Filed May 30, 2017.

KEITH BLACKBURN, an individual.
Docket No. 17-0094.
Default Decision and Order.
Filed May 30, 2017.

JORDAN CAUDILL, an individual.
Docket No. 17-0024.
Default Decision and Order.
Filed June 20, 2017.

COMMERCIAL TRANSPORTATION OF EQUINES TO SLAUGHTER ACT

DORIAN GABRIEL AYACHE, d/b/a THREE ANGELS FARMS.
Docket No. 17-0013.
Default Decision and Order.
Filed May 2, 2017.

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CONSENT DECISIONS

ANIMAL WELFARE ACT

Jeffery W. Ash, an individual d/b/a Ashville Game Farm.
Docket No. 16-0010.
Consent Decision and Order.
Filed January 31, 2017.

Randall Stoen, an individual.
Docket No. 16-0146.
Consent Decision and Order.
Filed March 17, 2017.

Marla Campbell Roger Campbell, a Kansas general partnership.
Docket No. 16-0132.
Consent Decision and Order.
Filed March 21, 2017.

Marla Campbell, an individual.
Docket No. 16-0133.
Consent Decision and Order.
Filed March 21, 2017.

Roger Campbell, an individual.
Docket No. 16-0134.
Consent Decision and Order.
Filed March 21, 2017.

Exotic Feline Rescue Center, Inc., an Indiana corporation d/b/a Exotic Feline Rescue Center.
Docket No. 15-0160.
Consent Decision and Order.
Filed March 30, 2017.

Joe Taft, an individual.
Docket No. 15-0161.
Consent Decision and Order.
Filed March 30, 2017.

Kevin Beauchamp, d/b/a Beauchamp's Puppy World.
Docket No. 16-0062.
Consent Decision and Order.
Filed April 4, 2017.

Nick Sculac, an individual.
Docket Nos. 11-0254, 12-0223, 15-0119.
Consent Decision and Order.
Filed May 18, 2017.

Big Cats of Serenity Springs, Inc., a Colorado corporation d/b/a Serenity Springs Wildlife Center.
Docket Nos. 11-0255, 12-0224, 15-0120.
Consent Decision and Order.
Filed May 18, 2017.

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Jack S. Way, an individual.
Docket Nos. 15-0072, 16-0019, 17-0026, 17-0075.
Consent Decision and Order.
Filed January 10, 2017.

Earsie Allen, an individual.
Docket No. 15-0098.
Consent Decision and Order.
Filed January 12, 2017.

Mike Hilley, an individual.
Docket No. 17-0133.
Consent Decision and Order.
Filed February 3, 2017.

Kenny Lawrence, an individual.
Docket No. 17-0066.
Consent Decision and Order.
Filed February 24, 2017.

CONSENT DECISIONS

Andrew Waites, an individual.
Docket No. 17-0089.
Consent Decision and Order.
Filed March 1, 2017.

Brent Coburn, an individual.
Docket No. 15-0141.
Consent Decision and Order.
Filed March 10, 2017.

Bill Callaway, an individual.
Docket No. 17-0169.
Consent Decision and Order.
Filed March 29, 2017.

John Allen Callaway, an individual.
Docket No. 17-0170.
Consent Decision and Order.
Filed March 29, 2017.

Vicki Self, an individual.
Docket No. 17-0174.
Consent Decision and Order.
Filed March 29, 2017.

Sonny McCarter, an individual.
Docket No. 17-0029.
Consent Decision and Order.
Filed March 31, 2017.

Ernest Upton.
Docket Nos. 14-0083, 17-0166.
Consent Decision and Order.
Filed April 12, 2017.

Rae Shumate-Tysor, an individual.
Docket No. 17-0067.
Consent Decision and Order.
Filed May 12, 2017.

Winston Groover, an individual d/b/a Groover Stables.
Docket No. 17-0146.
Consent Decision and Order.
Filed June 1, 2017.

Dr. Barbara L. Moersch, an individual.
Docket No. 15-0019.
Consent Decision and Order.
Filed June 27, 2017.

Sarah E. Moersch, an individual.
Docket No. 15-0020.
Consent Decision and Order.
Filed June 27, 2017.

FEDERAL MEAT INSPECTION ACT

Lebanese Butcher Slaughter House, Inc.
Docket No. 17-0220.
Consent Decision and Order.
Filed February 14, 2017.

ORGANIC FOODS PRODUCTS ACT

Global Organic Alliance, Inc.
Docket No. 16-0115.
Consent Decision and Order.
Filed April 20, 2017.

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