

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	
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Cricket Hollow Zoo, Inc., an Iowa corporation;)	Docket No. 15-0152 (AWA),
Pamela J. Sellner, an individual;)	Docket No. 15-0153 (AWA),
Thomas J. Sellner, an individual; and)	Docket No. 15-0154 (AWA), and
Pamela J. Sellner Tom J. Sellner, an Iowa general)	Docket No. 15-0155 (AWA)
partnership d/b/a Cricket Hollow Zoo,)	
)	
Respondents.)	

DECISION AND ORDER

Appearances:

Colleen Carroll, Esq. and Matthew Weiner, Esq. of the Office of the General Counsel, United States, Department of Agriculture ("OGC"), Washington, D.C., for Complainant, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"); and

Larry J. Thorson, Esq. of Ackley Kopecky & Kingery, L.L.P., Cedar Rapids, Iowa, for Respondents, 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 (collectively, "Respondents").

Before Administrative Law Judge, Channing D. Strother.

SUMMARY OF DECISION

This is a disciplinary proceeding under the Animal Welfare Act ("AWA").¹ The evidence shows that Respondents are hardworking and do not wish to harm their animals. And at least some of those who come to see, and even volunteer work at, this private zoo enjoy it. But the Animal and Plant Health Inspection Service ("APHIS"), although it did not prove every alleged violation, demonstrated in the record the zoo has had numerous violations over time, requiring repeated visits by APHIS inspection personnel. The record shows that there were insufficient zoo

¹ 7 U.S.C. §§ 2131 *et seq.*

employees to meet the AWA Regulations and Standards for the number of animals the zoo has, yet during the period of the violations at issue in this matter, the number of animals significantly increased. It is inconsistent with the AWA to allow a licensee with these chronic violations to continue to operate without sanctions. The violations are in such frequency and numbers that a fine is insufficient. Revocation of the license is necessary.

JURISDICTION AND BURDEN OF PROOF

The AWA regulates the commercial exhibition, transportation, purchase, sale, housing, care, handling, and treatment of “animals,” as that term is defined by the AWA and in the AWA regulations, 9 C.F.R. Part 1. Congress delegated to the Secretary of Agriculture (“USDA”) authority to enforce the AWA.²

The July 30, 2015 APHIS³ Complaint, which initiated this proceeding under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (“Rules of Practice”),⁴ alleges Respondents⁵ violated the AWA and the regulations and

² 7 U.S.C. § 2146.

³ Although the July 20, 2015 Complaint states the APHIS Administrator issued the Complaint and is signed by Kevin Shea, then and now the APHIS Administrator, the terms “APHIS” or “Complainant” and the pronoun “it” will be used to refer to the Complainant in this Decision and Order.

⁴ 7 C.F.R. §§ 1.130 *et seq.*

⁵ Respondents are Cricket Hollow Zoo, Inc. (sometimes referred to herein as “CHZI”), 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. In this Decision and Order the Respondents will be referred to, collectively, as simply “Respondents.” “The Sellners” refers to Pamela J. and Tom J. Sellner.

standards issued thereunder⁶ (“Regulations and Standards”). Respondents’ August 20, 2015 timely Answer, among other things, admits the jurisdictional allegations and certain others, and requests a hearing.

The case was reassigned by the Chief Administrative Law Judge to the undersigned on August 23, 2016. It is properly before me for resolution.

The burden of proof is on Complainant, APHIS.⁷ The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,⁸ such as this one, is the preponderance of the evidence.⁹ A preponderance of the evidence here supports findings that, in most but not all instances, Respondents violated the Regulations and Standards as alleged in the Complaint. At each of the relevant inspections conducted by APHIS, the inspectors documented their observations of Respondents’ facilities, animals, and records. The inspectors took photographs during the inspections, conducted post-inspection exit interviews with Respondents to explain their findings, and gave Respondents copies of inspection reports that described the deficiencies.

PROCEDURAL BACKGROUND

The July 30, 2015 APHIS Complaint alleges Respondents violated the AWA and Regulations on multiple occasions between June 2013 and May 2015. Respondents’ August 20,

⁶ 9 C.F.R. §§ 1.1 *et seq.*

⁷ 5 U.S.C. § 556(d). *See JSG Trading Corp.*, 57 Agric. Dec. 710, 721–22 (U.S.D.A. 1998).

⁸ 5 U.S.C. §§ 551 *et seq.*

⁹ *See JSG Trading Corp.*, 57 Agric. Dec. at 724 (a non-AWA proceeding discussing the application Administrative Procedure Act, 5 U.S.C. § 556(d), and citing precedent).

2015 Answer admits certain and denies other material Complaint allegations, and, as previously noted, requests a hearing.

On October 28, 2015, the Animal Legal Defense Fund (“ALDF”), which described itself as “a national non-profit organization dedicated to protecting animals, including animals exhibited by zoos and menageries,”¹⁰ moved to intervene as a party to this proceeding. Its intervention was opposed by both APHIS and the Respondents¹¹ and was denied on December 30, 2015 by then Presiding Administrative Law Judge Bullard. This denial was upheld by the Judicial Officer on March 14, 2016. On February 15, 2017 the United States District Court for the District of Columbia remanded the issue of ADLF’s intervention to the Judicial Officer.¹² On September 1, 2017, the Judicial Officer entered a decision and order denying ALDF’s Motion to Intervene. The denial of ALDF’s Motion to Intervene is not currently within my jurisdiction and will not be addressed in this Decision.

An oral hearing on the record was held before the undersigned January 24 through January 27, 2017 in Davenport, Iowa. The parties entered into written stipulations as to witnesses and exhibits, which were filed on January 31, 2017. APHIS introduced the testimony of six veterinarians: Dr. Robert M. Gibbens, APHIS Director of Animal Welfare Operations for Animal Care; APHIS Veterinary Medical Officers (“VMOs”) Drs. Margaret Shaver, Heather Cole, and Jeffrey Baker; and former APHIS VMOs Drs. Katheryn Ziegerer and Natalie Cooper.

¹⁰ ALDF Motion for Leave to Intervene at 1.

¹¹ See November 23, 2015 separate filings by APHIS and Respondents in opposition to ADLF intervention.

¹² *Animal Legal Defense Fund, Inc. v. Vilsack*, 237 F. Supp. 3d 15 (D.D.C. 2017).

Respondents introduced the testimony of Respondents Pamela Sellner and Thomas Sellner; Dr. John H. Pries, Respondents' former attending veterinarian; and Douglas Anderson, Compliance Investigator, Iowa Department of Agriculture and Land Stewardship ("IDALS"). Admitted to the record were APHIS's exhibits, identified as CX 1 through 39, CX 50, CX 52, CX 53, CX 58, CX 59, CX 62, CX 63, CX 65, CX 72, CX 72B, and CX 73 through 77; and Respondents' exhibits, identified as RX 1 through 10, RX 13 through 26, and RX 28.¹³ The parties were provided the opportunity to submit proposed transcript corrections, but the official files indicate that none were filed.

APHIS filed its Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order on April 4, 2017 ("APHIS Proposed Findings and Conclusions") and its Brief in Support ("APHIS Initial Brief" or "IB") on April 7, 2017. Respondents filed their Answering Brief ("Answering Brief" or "AB"), which includes proposed findings, on May 5, 2017. APHIS filed its Reply Brief (sometimes herein referred to herein as "RB") on May 23, 2017.

ANALYSIS

The APHIS allegations are generally based on twelve APHIS inspections, or attempted inspections, of Respondents' facilities, animals, and records on the following dates:

June 12, 2013—Inspection conducted by Drs. Margaret Shaver and Natalie Cooper (CX 2-13; 15-18).

July 31, 2013—Inspection conducted by Dr. Jeffrey Baker (CX 26-37).

¹³ APHIS exhibits will be referred to as "CX" followed by the number. Notwithstanding that Respondents' exhibits were labelled "RXT" in the record, Respondents' exhibits will be referred to as "RX" followed by the number, except in quoted text where exhibits were originally denoted "RXT."

September 25, 2013—Inspection conducted by Dr. Heather Cole (CX 39-49).
December 16, 2013—Inspection conducted by Dr. Heather Cole (CX 53-57).
January 9, 2014—Attempted inspection by Dr. Heather Cole (CX 59).
May 12, 2014—Attempted inspection by Dr. Heather Cole (CX 68).
May 21, 2014—Inspection conducted by Dr. Heather Cole (CX 69-69a).
August 5, 2014—Inspection conducted by Drs. Heather Cole and Margaret Shaver (CX 72-72a).
October 7, 2014—Inspection conducted by Drs. Heather Cole and Margaret Shaver (CX 72-72b).
February 19, 2015—Attempted inspection by Dr. Heather Cole (CX 74).
March 4, 2015—Inspection conducted by Dr. Heather Cole (CX 75-75a).
May 27, 2015—Inspection conducted by Drs. Heather Cole and Amanda Owens (CX 76-77).

The record is clear that APHIS inspectors found numerous AWA violations in many of the instances where they were successful in conducting inspections. *See* Analysis and Findings of Fact, hereinbelow. It is also clear from the record that there were times the APHIS inspectors showed up at the Respondents' facilities but were unable to conduct inspections because no one was able to let them onto the premises.

Respondents defend against APHIS's allegations by contesting individually most of the APHIS allegations¹⁴ and by contending in general terms: Respondents work hard;¹⁵ this case was

¹⁴ Respondents expressly admit certain APHIS allegations, often with qualifications. *See* AB at 12. These admissions will be noted in the discussion of each particular allegation, *supra*.

¹⁵ AB at 3-4.

initiated because of public complaints;¹⁶ Respondents corrected the deficiencies that APHIS inspectors identified;¹⁷ the Regulations and Standards are unconstitutionally vague and therefore unenforceable against Respondents;¹⁸ APHIS unreasonably demanded “perfection” of Respondents but did not provide information as to what such perfection would consist of;¹⁹ and Respondents’ veterinarian and a state inspector did not believe Respondents’ animals suffered.²⁰ Essentially, in many respects, Respondents blame APHIS for their failure to pass inspections. As discussed hereinbelow, these defensive contentions by Respondents are not supported by the AWA, the Regulations and Standards, or case law.

Being hardworking, having genuine affection for one’s animals and otherwise having a sincere subjective intent to take good care of and not to harm them, and correcting violations after they were found in inspections are all admirable things. But a good work ethic and good intentions are not defenses to objective AWA violations found by APHIS inspectors.

APHIS enforces the AWA and the Regulations and Standards through “unannounced” inspections. Licensees are responsible for violations found during such inspections. Violations corrected after they are found by inspectors still “count” as AWA violations.²¹ Licensees must

¹⁶ *Id.* at 2, 39; Tr. 545:22–546:7, 731:17–21.

¹⁷ AB at 39–40; Tr. 150:5–17.

¹⁸ AB at 7–10.

¹⁹ *Id.* at 5–6.

²⁰ *Id.* at 15, 33–34; Tr. 568:1–25, 569:1–6, 577:20–23, 580:23–25, 581:1–3.

²¹ *See Parr*, 59 Agric. Dec. 601, 624 (U.S.D.A. 2000) (“It is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred.”).

have a workforce sufficient to meet the AWA requirements and must be sufficiently knowledgeable as to the pertinent animal husbandry in order to meet the AWA requirements.²² While APHIS inspections and inspectors may provide some education to licensees as to what the AWA and the Regulations and Standards require, the primary role of such APHIS personnel must be enforcement, and the primary means of such enforcement is through unscheduled “surprise” inspections.²³ APHIS does not have the budget, workforce, or authority to educate licensees as to the requirements or to review licensee’s compliance, except through inspections that may have consequences for licensees if those inspections reveal AWA violations.²⁴

²² It is notable that during 2013 to 2015 period in which Cricket Hollow was being cited for the AWA violations at issue in this proceeding, it was acquiring more animals. In 2013, the Sellner Partnership represented to APHIS that it had custody of 160 animals; in 2014, 170 animals; and in 2015, 193 animals. Answer ¶ 5; CX 1; CX 14.

²³ See *Hodgins v. U.S. Dep’t of Agric.*, 238 F.3d 421, 2000 WL 1785733, at *7 (6th Cir. 2000) (“The purposes served by the Animal Welfare Act are such as to present a need for surprise inspections. Stolen animals, for example, like stolen cars, can be moved or disposed of quickly. Dirty cages could be cleaned, improperly-treated animals euthanized or hidden, and records falsified in short order should a search be announced ahead of time.”)(unpublished opinion; see 6 Cir. R. 32.1 (unpublished opinions are citable); *Berosini*, 54 Agric. Dec. 886, 908 (U.S.D.A. 1995) (“The success of the Animal Welfare Act regulatory program is critically dependent upon the ability of APHIS inspectors to conduct thorough inspections to monitor compliance with the applicable regulations and standards.”) (citing *Sema, Inc.*, 49 Agric. Dec. 176, 183 (U.S.D.A. 1990)); *Animal Welfare; Inspection, Licensing, and Procurement of Animals*, 69 Fed. Reg. 42,089, 42,094 (July 14, 2004) (to be codified at 9 C.F.R. pts. 1, 2) (“Enforcement of the AWA is based on random, unannounced inspections to determine compliance.”)).

²⁴ See *Davenport*, 57 Agric. Dec. 189, 209 (U.S.D.A. 1998) (“[I]t is the Respondent’s duty to be in compliance with the [Animal Welfare] Act, and the Regulations and Standards at all times. It is not the duty of APHIS inspectors to instruct licensees as to the details of meeting those requirements. Inspectors do not certify or otherwise approve facilities, and conveyances are not required to be inspected or approved before they can be used.”).

Licensees are obligated obtain the skills and knowledge to meet the AWA, Regulations, and Standards through means other than what licensees may be told by the inspectors.²⁵

Repeated violations by a particular licensee,²⁶ even where violations are corrected after the inspection and the violation are not exactly the same violation or violation-type as earlier violations, run afoul of APHIS's enforcement through surprise inspection program and unduly strain APHIS resources, as violations necessarily require follow-up for the particular violations and more frequent APHIS attention to the particular licensee that appears to not be meeting AWA requirements.²⁷

There is no pleasure in sanctioning licensees with warm feelings and subjectively good intentions. But in the circumstances here, sanctions must be applied to protect the animals, the public, and, indeed, the licensees themselves.

I. Respondents' Failure to Provide Access²⁸

The AWA and the Regulations each require that licensees provide APHIS inspectors access to facilities, animals, and records during "business hours"²⁹ and that "a responsible adult

²⁵ See *id.*; *Volpe Vito, Inc.*, 56 Agric. Dec. 166, 256 (U.S.D.A. 1997) (finding that respondent was "presumed to know the law" with regard to AWA requirements published in United States Code and was on constructive notice of AWA regulations published in Federal Register).

²⁶ The Sellners entered into two stipulated settlements with the USDA, one in April of 2007 (CX 64) and one in July of 2013 (CX 66), in which the licensee did not admit alleged violations. See Gibbens, Tr. 523. Respondents' state that these stipulations are not probative of repeated violations by them or any bad faith. I agree. For purposes of the current case, the stipulations are probative only of Respondent's general knowledge of AWA requirements that must be met.

²⁷ See Dr. Gibbens, Tr. 727:15-728:1.

²⁸ Complaint ¶ 9.

²⁹ See 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).

shall be made available to accompany APHIS officials during the inspection process.”³⁰ The Complaint alleges, Respondents admit, and the documentary and testimonial evidence establish that on the three occasions identified in the Complaint,³¹ APHIS VMO Dr. Heather Cole attempted to conduct inspections of Respondents’ facilities, animals, and records, and was unable to do so.³² Dr. Cole described what occurs when inspectors are unable to conduct an inspection and testified that on each occasion she followed her normal procedure.³³

Dr. Cole documented a January 9, 2014, attempted inspection in an inspection report, CX 59, and discussed this at Tr. 301:21-302:23. Dr. Cole documented a May 12, 2014, attempted inspection in an inspection report, CX 68, and discussed it at Tr. 304:3-13. Dr. Cole documented a February 19, 2015, attempted inspection in an inspection report, CX 74, and discussed it at Tr. 304:21-23.

Respondents, in their Answer and at the hearing, explained that (1) on January 9, 2014, their facility was not open for business; (2) on May 12, 2014, there were lightning storms;³⁴ and (3) on February 19, 2015, they were in Monticello, Iowa, on business. None of these explanations obviates the access violations. It is well settled that the failure of an exhibitor either

³⁰ 9 C.F.R. § 2.126(b).

³¹ Respondents, AB at 12, state that ¶ 9 of the Complaint alleges a January 9, 2010 failed inspection, which could not be “complained about now because it would or should have been included in the settlement agreement of April 29, 2013 (CX-66).” But, the Complaint at ¶ 9 refers to a January 9, 2014 failed inspection, and thus could not be covered by a 2013 settlement.

³² Complaint ¶ 9; Answer ¶ 9. In the latter, Respondents admit that APHIS inspectors were denied access on the three occasions.

³³ Tr. 305:4–6; 301:25–302:10.

³⁴ See AB at 12.

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). *See Perry*:³⁵

It is undisputed that Mr. Perry intentionally left his and PWR's place of business during business hours on December 15, 2009, without designating a person to allow Animal and Plant Health Inspection Service officials to enter that place of business, and that, during Mr. Perry's absence, an Animal and Plant Health Inspection Service official attempted to enter the place of business to conduct the activities listed in 9 C.F.R. § 2.126.

That Respondents' facility was not open to the public is not an excuse. "Business hours," for purposes of AWA inspections, does not mean only those times when a licensee's facility is open to the public; rather:³⁶

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.

In their Answer, Respondents state that on May 12, 2014, there were "lightning storms in both the morning and afternoon and it was not safe to walk through the Zoo."³⁷ A letter from Mrs. Sellner to APHIS states:³⁸

Our Facebook & website both state that the zoo will not be open when lightning is present. My insurance company and our rules here are that no one is to be outdoors in active thunderstorms. I will not accompany an inspector to the highest point on this farm in an open area, especially, when there is lightning present.

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

³⁶ 9 C.F.R. § 1.1. *See Perry*, 71 Agric. Dec. at 880.

³⁷ Answer ¶ 9; Tr. 665:2–666:17. *See AB* at 12.

³⁸ RX 2 at 4–5.

However, inspections may be conducted when a facility is not open to the public. Further, there is no reliable evidence that there was an “active thunderstorm” or that weather would have impeded an inspection at the time Dr. Cole arrived around noon. Mrs. Sellner wrote that she was not present from “just before noon” until 2:15 p.m.³⁹ Respondents did not introduce credible evidence to support their weather explanation or explain why there was no responsible person available. Moreover, Respondents’ facility is not located exclusively outdoors, and there is no evidence that an inspection on that day would have necessitated travel to “the highest point on this farm in an open area.”⁴⁰

That on February 19, 2015, no one was present to accompany Dr. Cole on an inspection because “the Sellners were filing farm taxes in Monticello, Iowa”⁴¹ is not a defense. The Regulation requiring exhibitors to allow APHIS access to conduct inspections during business hours is unqualified.⁴²

The fact that no one was at respondents’ place of business to allow APHIS officials access to the facilities, property, records, and animals is not a defense.⁴³

“[A] responsible adult” may act in the licensee’s stead.⁴⁴ Respondents, however, do not employ staff, and instead rely exclusively on volunteers.⁴⁵ Respondents have elected not to designate a

³⁹ RX 2 at 4.

⁴⁰ See RX 2 at 5.

⁴¹ Answer ¶ 9 (admitted).

⁴² 9 C.F.R. § 2.126(a).

⁴³ *Greenly*, 72 Agric. Dec. 603, 617 (U.S.D.A. 2013).

⁴⁴ 9 C.F.R. § 2.126(b).

⁴⁵ Tr.at 628:9 to 629:3 (Mr. Sellner).

responsible person or persons to conduct inspections when Mr. Sellner or Mrs. Sellner is not available. Therefore, that an inspection cannot be conducted because Mr. or Mrs. Sellner is offsite is, under the circumstances, not an excuse for failing to provide access for inspection.⁴⁶

II. Attending Veterinarian and Veterinary Care

The Regulations provide: "Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section" and provide requirements as to the retention of such a veterinarian.⁴⁷ An exhibitor must employ a veterinarian, full-time or part-time, under formal arrangements that include an accurate, up-to-date, written plan for the care of animals and for regular visits.⁴⁸ Exhibitors must ensure their animals receive adequate care and take appropriate steps to prevent and treat diseases and injuries, communicate with the attending veterinarian, and educate their personnel.⁴⁹

APHIS inspectors documented alleged deficiencies in compliance with the Regulations regarding veterinary care on nine inspections:⁵⁰

June 12, 2013. A capuchin monkey (Cynthia) had visible areas of hair loss on her abdomen, tail, thighs and arms, and was observed to be chewing on her tail, and Respondents had not had Cynthia seen by their attending veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2). *See* Complaint and Answer ¶ 10a; CX 2 and CX 3; Tr. 50:10-52:23; Dr. Cooper, Tr. 397:7-11. *See also* Dr. Shave, Tr. 49:1-10.

October 26, 2013. Respondents failed to provide adequate veterinary care to animals, and failed to establish and maintain programs of adequate veterinary care

⁴⁶ *See Perry*, 72 Agric. Dec. 635, 643 (U.S.D.A. 2013).

⁴⁷ 9 C.F.R. § 2.40(a).

⁴⁸ 9 C.F.R. § 2.40(a)(1),(2).

⁴⁹ 9 C.F.R. § 2.40(b)(1)–(5).

⁵⁰ Complaint ¶ 10.

that included the availability of appropriate facilities, equipment, and personnel, and specifically, Respondents housed a Meishan pig that was due to farrow outdoors, in cold temperatures, whereupon the pig gave birth to four piglets, all of which were exposed to the cold weather, and three of the piglets died. 9 C.F.R. §§ 2.40(a), 2.40(b)(1).

December 16, 2013. Respondents failed to provide adequate veterinary care to animals, and specifically, the hooves of three goats were excessively long. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

May 21, 2014. Respondents failed to communicate to the attending veterinarian that a female coyote had been bitten by another coyote three weeks earlier (on May 1, 2014), and failed to treat or to have the animal seen by a veterinarian, and the female coyote had a swollen digit on her right front foot that had hair loss, and was red, abraded, and moist, and the coyote was non-weight-bearing on that foot. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).⁵¹

May 21, 2014. Respondents failed to communicate to the attending veterinarian that a coatimundi had unexplained hair loss at the base of its tail, and Respondents failed to have the animal seen by a veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

May 21, 2014. Respondents failed to communicate to the attending veterinarian that a thin capybara had unexplained areas of scaly skin and hair loss around the base of its tail and on its backbone, and Respondents failed to have the animal seen by a veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

May 21, 2014. Respondents failed to provide adequate veterinary care to animals, and specifically, the hooves of a Barbados sheep were excessively long. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

August 5, 2014. Respondents failed to provide adequate veterinary medical care to a female Old English Sheepdog (Macey) who had large red sores behind both ears.... Respondents did not communicate with their attending veterinarian about Macey and did not obtain any veterinary care for Macey. Instead, Respondents represented that they were treating Macey themselves with an antiseptic ointment. The ointment that Respondents said that they used had expired in October 2007. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

⁵¹ Below I find that APHIS did not prove this alleged violation.

August 25, 2014–October 7, 2014. Respondents failed to provide adequate veterinary medical care to a tiger (Casper). On August 25, 2014, Casper was evaluated by Respondents' attending veterinarian because he was thin and had cuts and sores on his face and legs. Respondents' attending veterinarian did not make any diagnosis, recommend any treatment, or prescribe any medication for Casper at that time. On October 7, 2014, APHIS observed that Casper had a large open wound on the inside of his left front leg. The wound had not been treated in any manner. Casper was also observed to be thin, with mildly protruding hips and vertebrae. Between August 25, 2014, and October 7, 2014, Respondents have not had Casper seen by a veterinarian, and Casper has received no veterinary care, save Respondents' administration of a de-wormer in September 2014. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

Respondents had an attending veterinarian, Dr. Pries, during the period of the violations, but he appears to have been largely "hands-off."⁵² Mrs. Sellner, not Dr. Pries, filled out the written program of veterinary care for Dr. Pries's signature.⁵³ It appears from Dr. Pries's testimony that he relied on Mrs. Sellner's representations about the condition of Respondents' animals and the deficiencies cited by the APHIS inspectors; that he relied on Mrs. Sellner to draft the written programs of veterinary care and for environmental enrichment for nonhuman primates; and that he relied on Mrs. Sellner to trim hooves and to perform fecal tests in advance of administering deworming medication.⁵⁴

Respondents supplied few veterinary medical records. Dr. Pries indicated that records for

⁵² Tr. 486:13–487:2; 487:5–10 (“She had to have somebody listed that would check on things, but they didn’t always buy stuff from us. We’d done some surgeries for her and treated some sick cats that she brought up to our clinic.”); 505:13–19 (“I would do the inspections required by her licensing and I would, I would wait for her to need some assistance or ask questions.”).

⁵³ Tr. 498:22–500:19; *see* RX 5, RX 13.

⁵⁴ Tr. 495:19–497:3; 502:18–503:503:5 (“I don’t remember doing a fecal on any of them”). *See* Tr. 503:22–504:9.

animals he saw at Respondents' facility were maintained by Mrs. Sellner rather than by him.⁵⁵ It appears that he relied on visual, rather than physical or clinical, examinations.⁵⁶ Dr. Pries did not appear to have a great deal of experience with exotic species, other than those at Respondents' facility.⁵⁷ His practice was "predominately dairy and beef cattle and small animal...."⁵⁸ In particular, Dr. Pries had very little experience with nonhuman primates, other than those at Respondents' facility.⁵⁹

As to the testimony offered by state-agency employee Mr. Anderson concerning veterinary care, it was clear that his function is not to determine whether a person is in compliance with the AWA.⁶⁰ It does not appear that Mr. Anderson possesses the education, training or expertise to determine (1) whether an animal is in need of veterinary care or (2) what the AWA requirements

⁵⁵ CX 21 at 2; Tr. 497:4–22 (Dr. Pries did not examine Ana and had no records about her).

⁵⁶ *See, e.g.*, Tr. 501:7–502:9.

⁵⁷ Tr. 495:3–19.

⁵⁸ Tr. 469:3–15.

⁵⁹ Tr. 495:3–12. *See also* Tr. 720:11–19 ("Based on Dr. Pries' response that he hadn't worked on any nonhuman primates before he worked on Cricket Hollow Zoo's, no, he would not meet the definition of an attending veterinarian for the non-human primates.") (testimony of Dr. Robert Gibbens); 9 C.F.R. § 1.1 (definition of attending veterinarian). I do not reach any issue of whether Dr. Pries met the definition of an "attending veterinarian." Among other things, there was no allegation in the Complaint that he did not meet that definition.

⁶⁰ RX 25; Tr. 568:10–13 ("Well, we have our criteria that we walk around and look at, at the farm and sometimes things could be better or things could be improved and so we will offer suggestions to see if we can improve the situation."); Tr. 571:572:9; Tr. 588:18–590:3 (regarding characterization of Mr. Anderson's statements in report as opinions).

are with respect to adequate veterinary care.^{61 62}

A. June 12, 2013 (Cynthia)

During their inspection on June 12, 2013, Drs. Cooper and Shaver determined that a female capuchin monkey (Cynthia) was in need of veterinary care and had not been evaluated by a veterinarian.⁶³ They documented their observations in a contemporaneous inspection report, CX 2, and took photographs of Cynthia, all of which they authenticated and explained.⁶⁴ Dr. Cooper also prepared a declaration, CX 19, in which she stated:⁶⁵

[A]s I recall, the licensee was unable to provide myself and Dr. Shaver with a copy of the medical record pertaining to a female capuchin monkey named “Cynthia”. I do not recall reviewing medical records of environmental enhancement documentation addressing “Cynthia’s” hair loss condition which was observed and documented by myself and Dr. Shaver as a veterinary care non-compliance.

⁶¹ Tr. 588:23–589:22 (“I’m not terribly familiar with the USDA method of recording their US – or on their actual inspections.”); 590:1–3 (“I would have to say I’m not, I’m not familiar with the specifics of the USDA, only in a general sense they would be similar.”); 598:7–18 (regarding reliance on Dr. Cole); 601:22–24; 601:25–602 (Mr. Anderson’s “practical experience in examining animals” is having been a livestock inspector, and looking at “a lot of kennels and livestock...usually accompanied by either a veterinarian or another livestock inspector,” and “we would look for obvious signs of animals in distress, you know, from open wounds, sores, labored breathing, discharge from orifices.”). See Tr. 588:18–22.

⁶² Mr. Anderson could not confirm that RX 25 comprised “all of the reports from inspections conducted by IDALS between April 17, 2012, and October 7, 2014,” or whether there were other reports missing from RX 25. Tr. 585:3–11. Mr. Anderson acknowledged that RX 25, page 10, was not a complete copy of the report. *Id.*; Tr. 585:12–586:1; see also Tr. 586:2–9 (no photos attached to the record version of Dr. Eiben’s report, although it states photographs were attached).

⁶³ See Complaint ¶ 10a; Answer ¶ 10a.

⁶⁴ CX 3; Tr. 50:10–52:23. See CX 2 at 1.

⁶⁵ CX 19. See also Tr. 397:24–399:9.

Dr. Shaver described her observations of Cynthia, the Capuchin monkey, at the hearing.⁶⁶

In their Answer to the Complaint, Respondents admit that Cynthia “had hair loss and other behavioral problems,” but they also assert that (1) she “came to the Zoo with behavioral problems” and (2) “Dr. Pries saw this monkey both before and after the inspection by USDA referred to.”⁶⁷ Respondents’ Answering Brief, p. 13, contends the same and that the testimony of APHIS witness Dr. Cole, Tr. 243, suggested cures for these behaviors—apparently “[p]roviding a wide variety of enrichment,” Dr. Cole spoke only in general terms—which the Sellners were doing, and that Dr. Cole noted this type of behavior cannot always be eliminated. Respondents note that Dr. Shaver indicated he had looked at a plan the zoo had developed for Cynthia.⁶⁸

That Cynthia arrived at Respondents’ facility with a medical or behavioral problem does not mean that Respondents are not responsible for providing adequate veterinary care to her. The documentary evidence of the ways that Respondents addressed Cynthia’s problems are inconsistent. Respondents’ “Updated Primate Enrichment Program,” dated January 3, 2013, specifically states that Cynthia “doesn’t usually enjoy toys.”⁶⁹ Cynthia does not appear on the subsequent enrichment program, dated November 20, 2013.⁷⁰ Mrs. Sellner’s and Dr. Pries’s

⁶⁶ Tr. 49:25–50:9.

⁶⁷ Answer ¶ 10a.

⁶⁸ *Id.*, citing Tr. 180.

⁶⁹ CX 25 at 2.

⁷⁰ CX 52.

January 2014 affidavits, however, state that Respondents nevertheless were using toys as environmental enrichment for Cynthia.⁷¹

Second, although there is evidence that Respondents' then-attending veterinarian, Dr. Pries, saw Cynthia a week after Dr. Cooper's and Dr. Shaver's inspection, APHIS could locate no evidence that supports Respondents' assertion that Dr. Pries saw Cynthia beforehand. Mrs. Sellner's affidavit states:⁷²

This monkey had always had some hair loss since I obtained 4 or 5 years ago. She had plucked hair more recently before the inspection. She was housed outside in an enclosure. We always tried to provide her with different toys. We did have our veterinarian, Dr. Pries come out and examine her and there were no skin problems. Dr. Pries examined her on June 19, 2013. We then provided additional toys to enhance her environment even more.

None of Dr. Pries's documentation in the record reflects a visit pre-June 12, 2013 for examination of Cynthia. Dr. Pries's July 1, 2013, statement states:⁷³

On June 19th I checked a Capuchin monkey named 'Cynthia' for Pam. An inspector was concerned about hair loss on the shoulder and other areas. No infection or infestation was seen. Previous owner had reported the picking and hair pulling also. The monkey seems to do more when nervous, upset or bored. Pam is going to try placing her in a more calming environment to see if she lets the hair grow back. This may be by changing cage mates, moving to other Capuchins, or isolation in a comfortable pen.

⁷¹ CX 22 at 1 ("We always tried to provide her with different toys."); CX 21 at 1 ("Pam Sellner was using different toys at different times of the day to change things around and enhance the monkey's environment.").

⁷² CX 22 at 1.

⁷³ CX 23 at 1.

In his January 29, 2014, affidavit, Dr. Pries states:⁷⁴

Concerning a capuchin monkey by the name of 'Cynthia' cited for hair loss on the USDA inspection reports of June 12, 2013, and July 31, 2013:

I did examine this monkey and it was plucking its hair due to it being nervous. I did not observe any skin problems. I believe this monkey had some behavior problems when the Sellners obtained it. Pam Sellner was using different toys at different times of the day to change things around and enhance the monkey's environment. I have reviewed the Sellner's environment enhancement plan for their primates and when they make any changes to the plan, they always send me a copy for my review.

In his testimony, Dr. Pries explained that his "examination" of Cynthia was a visual examination only.⁷⁵

Mrs. Sellner's appeal letter states: "My vet came out June 19th to look at her again. On inspection day she probably did more tail biting because the inspectors were right in front of her and she acts out more in these circumstances."⁷⁶ In his affidavit, Dr. Pries states: "I do not believe that I have any records here at the clinic for the animals listed above. Since I would have examined the animals at the facility, Ms. Sellner would have any medical records or notes that I might have made concerning the animals."⁷⁷ APHIS could not locate among the documentary evidence any medical records or notes identifying other examinations of Cynthia by Dr. Pries.

⁷⁴ CX 21 at 1.

⁷⁵ Tr. 496:8-15. He did not conduct any other kinds of tests. Tr. 496:16-18. *See* Dr. Baker, Tr. 231 (He would have done things differently than Dr. Pries as to examining Cynthia, as a veterinary exam would commonly include palpation.).

⁷⁶ CX 15; *cf.* CX 25 at 2 (stating that Cynthia "interact[s] with zoo visitors").

⁷⁷ CX 21 at 2.

There is also mention in the record by Dr. Shaver of Cynthia being moved to a cage of a vervet, a nonhuman primate of a different species, possibly in an effort to address behavioral problems, but the plan for Cynthia had not been updated since the move.⁷⁸

APHIS has carried its burden to show by a preponderance of record evidence that, as of the June 12, 2013 inspection, Cynthia was in need of veterinary care and had not been evaluated by a veterinarian and that Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for Cynthia, who was self-mutilating. Although there is some evidence of record that Respondents had some environmental enhancement plan for Cynthia, Respondents have not brought forth the documentary evidence they were required to develop and keep or other evidence that would overcome APHIS's proof.

B. October 26, 2013 (Meishan Pigs)⁷⁹

It is undisputed that Respondents housed a pregnant Meishan pig who was due to farrow⁸⁰ in an outdoor enclosure, that the pig gave birth to four piglets, that three of the newborn piglets died, and that a zoo visitor notified Mrs. Sellner that the pig had given birth. In APHIS's December 16, 2013, inspection report, Dr. Cole wrote:⁸¹

On Sunday October 26th four piglets were born to a female Meishan pig, three of which died. The licensee stated that a zoo visitor notified her that the piglets were out in the cold. The licensee immediately checked on the piglets. The licensee was unaware that the piglets had been born that day. Three of the piglets were dead and the one surviving piglet was taken into the

⁷⁸ Dr. Shaver, Tr. 180–81.

⁷⁹ See Complaint ¶ 10(b); Answer ¶ 10(b).

⁸⁰ Farrowing means “to give birth.” Tr. 308:3–6.

⁸¹ CX 53 at 1. See also Tr. 305:7–307:20.

house and recovered. The licensee stated that she knew the female was due to farrow soon, but she did not get her moved into the warm barn prior to farrowing. The licensee stated that it was a colder and windy day and they did not intend to farrow outside in the cold weather.

In their Answer,⁸² Respondents state that “the Meishan pig was due to farrow a week later and would have been in the barn.”

The high temperature for that date was 54°. When it was discovered that the pig had farrowed early, it was too late to save three of the piglets. The fourth was saved. The sow can tolerate cold weather.

In her affidavit, Mrs. Sellner stated:⁸³

I had a pregnant Meishan pig. I had planned to move the pig to a barn before she had the pigs. The pig had the piglets a couple of days early. A zoo visitor saw them and told me about the piglets. I immediately went and moved the pigs and bottle fed and saved the live piglet. I assume that someone complained to the USDA about the pigs.

On brief,⁸⁴ Respondents argue APHIS “has not even approached its burden of proof with regard to this allegation”; “[t]he State inspector, Douglas Anderson, found no fault in this incident[] (See RX-25 p. 6 of 13)”; there was no contemporaneous inspection by any means by the USDA; “[t]he inspection report that dealt with this cites no evidence that the piglets were born alive and not stillborn (See CX-53, p. 1)”; and the sow in question had two later farrows where the majority of the litter was stillborn.

⁸² Answer ¶ 10(b).

⁸³ CX 22 at 18–19.

⁸⁴ AB at 13–14.

It is uncontroverted that Dr. Pries was not made aware of the pregnant Meishan pig, the conditions in which she was housed, or the subsequent deaths of the three piglets who were born outdoors.⁸⁵

The Respondents were responsible for ensuring that their animals received adequate veterinary care and for having a program of adequate veterinary care that included the availability of appropriate facilities. Respondents housed the pregnant sow outside and unattended, based on an expectation that she would farrow on a date certain.⁸⁶ Respondents failed to use an interior enclosure for the pregnant pig or some other means to ensure that the pig and her soon-to-be-born piglets would be protected from the weather, and failed to seek veterinary care for the pig in advance of her farrowing.⁸⁷

Respondents' witness, Mr. Anderson, and his written report indicate that the situation had been remedied because "the sow had been moved to a better shelter so she couldn't have pigs out in the cold in the winter again," which indicates that he had concerns about the sow giving birth out of doors in the weather at the time.⁸⁸

⁸⁵ CX 21 at 1 ("Concerning the death of 3 Meishan piglets reportedly being born out in the cold and dying on October 26, 2013, and cited on the USDA inspection report of December 16, 2013: I was not aware of this issue of the piglets being born and possibly dying due to cold weather."); Tr. 498:14-21.

⁸⁶ CX 22 at 18-19; CX 53 at 1; Answer ¶ 10(b); Tr. 578:4-12, 590:4-591:18; 655:13-25, 657:4-14.

⁸⁷ CX 22 at 18-19; CX 53 at 1; Tr. 578:4-12; 590:4-591:18; 655:13-25; 657:4-14.

⁸⁸ Tr. 590:4-591:18.

By Respondents' own admissions they did not intend this sow to farrow outside in the cold.⁸⁹ Regardless of whether or not the piglets would have been born dead or would have died before Mrs. Sellner attended to them even if they had been born inside in protected conditions, the record is clear that Respondents violated the AWA by allowing the sow to farrow, unattended, in the conditions she did.

C. December 16, 2013 (Goats)

On December 16, 2013, Dr. Cole observed that Respondents had failed to trim the hooves of three goats.⁹⁰ As she wrote in her inspection report:⁹¹

Three goats have excessively long hooves. Two older male goats have excessively long back hooves (one black Toggenburg, one black and white Alpine). One white and black pygmy goat has excessively long front hooves.

Excessively long hooves can cause pain and discomfort to the goats. Further, it may cause the goats to alter their stance or their gait and create musculoskeletal related issues.

The goats must have their hooves trimmed to remove the excessive growth and must be maintained routinely.

Dr. Cole testified about the physical problems that can result from permitting these animals' hooves to become too long.⁹² Dr. Cole's contemporaneous photographs corroborate her observations, her inspection report, and her testimony.⁹³

⁸⁹ CX 22 at 19.

⁹⁰ See Complaint ¶ 10(c); Answer ¶ 10(c).

⁹¹ CX 53 at 1.

⁹² Tr. 308:13–23.

⁹³ CX 54; Tr. 309:311:6.

In their Answer, Respondents assert three defenses: First, that “there was no lameness to any of the animals;” second, that “they had been trimmed in April of 2013,” but “the hooves had not worn down as usual” because “the year had been excessively wet;” and third, that they “were given until December 30, 2013 to correct this condition and did so on December 27, 2013.”⁹⁴ On brief,⁹⁵ they argue Dr. Pries testified longer toes on goats are common and that the Sellners would trim them, Tr. 484, and Mr. Anderson, the state investigator, was along for this inspection and testified the goats needed their hooves trimmed but were not suffering because of it, Tr. 577.

That the goats’ untrimmed hooves had not yet caused them to suffer lameness does not mean that there was not a violation of the veterinary care Regulations.

While there is no allegation in the Complaint that Respondents’ animals actually suffered injury, dehydration, or malnutrition, many of Respondents’ violations constitute threats to the health and well-being of the animals in Respondents’ facility.⁹⁶

That the goats’ hooves did not wear down “as usual” because of the weather does excuse letting their hooves go untrimmed for months, when they were visibly overgrown.

That the inspection report established a “correct by” date (which Respondents assert that they met), does not obviate the violations.

Tri-State and Mr. Candy’s corrections of their violations do not eliminate the fact that the violations occurred, and the Administrator is not barred from instituting a proceeding for

⁹⁴ Answer ¶ 10(c); CX 22 at 18.

⁹⁵ AB at 14.

⁹⁶ *Mitchell*, 60 Agric. Dec. 91, 128–29 (U.S.D.A. 2001).

violations of the Animal Welfare Act and the Regulations after the violations have been corrected.⁹⁷

Moreover, the evidence contains no indication that Respondents have established a program of veterinary care that provides for trimming the hooves of goats and sheep at regular intervals, that they used a farrier, or that their attending veterinarian at the time, Dr. Pries, was involved to any significant extent.⁹⁸

On cross examination, Mr. Anderson, conceded that he did not have any veterinary medical basis for concluding, in his IDALS report, that the goats' untrimmed hooves were not causing them to suffer.⁹⁹

In sum, the record demonstrates that the goats' hooves were overgrown, and APHIS showed why this condition is a failure to provide adequate veterinary care under the regulations.

D. May 21, 2014 (Coyote, Coatimundi, Capybara, Barbados Sheep)

On her May 21, 2014, inspection, Dr. Cole documented alleged veterinary care problems with respect to four animals.¹⁰⁰

⁹⁷ *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 175 (U.S.D.A. 2013) (citing *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).

⁹⁸ See Tr. 484:3–19. See also CX 21 at 1; Tr. 484:483:25–484:19; Tr. 498:23–13

⁹⁹ Tr. 593:22–594:1.

¹⁰⁰ Dr. Cole returned to Respondents' facility on the following week, May 28, 2014, for a focused inspection to determine whether Respondents had obtained veterinary care for these animals. CX 71.

1. *Coyote*.¹⁰¹

Dr. Cole observed that Respondents had failed to notify Dr. Pries about an injured coyote or to provide care for her.¹⁰² Dr. Cole's contemporaneous photograph of the coyote reveals a visible injury to the animal's paw.¹⁰³

Respondents' Answer, ¶ 10(d), denied the allegation, stating:

The coyote did not suffer a severe injury when she was bitten on May 1, 2014 by another coyote, and it did not require veterinarian care. The coyote was bitten again on May 21, 2014, the day the inspector arrived to do an inspection. Dr. Pries did put the coyote on an antibiotic as a preventive.

Respondents state that the female coyote was bitten for the second time on the same day that Dr. Cole inspected to show they did not have time to obtain care for the coyote.¹⁰⁴ They also contend, "the coyote bite from May 21, 2014 was healing according to Douglas Anderson, (RXT-25 p. 8)."

Respondents' witness, Mr. Anderson, did opine that he did not consider the coyote's bitten foot to be a serious situation "anymore," but admitted on cross-examination that he did not "know from a veterinary medical standpoint...whether the coyote, whose foot was bitten, was healing or not healing."¹⁰⁵

¹⁰¹ Complaint ¶ 10(d); Answer ¶ 10(d).

¹⁰² CX 69 at 1. *See* Tr. 317:17-318:9.

¹⁰³ CX 69a at 1; Tr. 320:3-7.

¹⁰⁴ AB at 14 (citing RX 25 at 8, a report by Mr. Anderson of IDALS).

¹⁰⁵ Tr. 596:2-5. *Cf.* Tr. 580:11-22. *See also* Tr. 597:12-598:6.

The record does not show that the coyote had an injury sufficient to require veterinary care prior to the time of the second bite, which was the day of the relevant inspection. Thus, this alleged violation has not been proven by APHIS.

2. *Coatimundi*.¹⁰⁶

Dr. Cole noted:¹⁰⁷

One of the coati mundi has an approximate 2 inch by 2 inch patch of hair-loss at the base of the tail (left side). The skin does not appear red or swollen. The licensee states no veterinarian has been consulted about this condition....

Failure to seek medical care for the conditions listed above can lead to unnecessary pain and discomfort for the animals.

The animals listed above must be examined by a licensed veterinarian BY 5:00 PM ON MAY 23, 2014 in order to ensure that an accurate diagnosis is obtained and an appropriate treatment plan is developed and followed. This information, including the diagnosis, treatment and resolution of the condition, must be documented and made available to the inspector upon request.

Dr. Cole's contemporaneous photograph of the coatimundi reveals a visible white area, which Dr. Cole explained was the area of hair loss.¹⁰⁸

Respondents' Answer denied the alleged violation, stating:¹⁰⁹

¹⁰⁶ Complaint ¶ 10(e); Answer ¶ 10(e).

¹⁰⁷ CX 69 at 1. See Tr. 318:10-21

¹⁰⁸ Tr. 320:8-17; CX 69a at 2.

¹⁰⁹ Answer ¶ 10(e). APHIS stated it could not locate testimony by the Sellners or Dr. Pries regarding the coatimundi's hair loss. APHIS assumes, as do I for purposes of this decision, as Respondents provided no further explanation in their Answering Brief, that Respondents' reference to the coatimundi's hair loss having been "addressed" by the veterinarians (presumably Dr. Pries), in "his response to USDA" was a reference to CX 1, Dr. Pries's affidavit. That

[T]here was inconsequential hair loss at the base of the coatimundi's tail that was lost in a brief scuffle with another male coatimundi. The veterinarian addressed this in his response to the USDA.

On brief, Respondents state:¹¹⁰

Douglas Anderson mentioned the coatimundi in his testimony but stated that the small patch of hair loss was not affecting this animal. In his report from the day of the inspection, he states that the area was not oozing and the animal was not scratching. (RXT-25, p. 8 of 13).

It does not appear that the Sellners or Dr. Pries testified regarding the coatimundi's hair loss. Mr. Anderson, however, testified on direct that the hair loss "[d]idn't appear to be affecting it at the moment."¹¹¹ Whether the hair loss appeared to Mr. Anderson "to be affecting" the coatimundi "at the moment" is itself of not determinative. APHIS is not required to prove that an animal is actively suffering, or visibly injured to establish a violation of the veterinary care Regulations. Mr. Anderson does not possess veterinary medical training, and lacks knowledge of the AWA Regulations.

Based on Dr. Cole's report and testimony, APHIS carried its burden of proof as to this allegation that Respondents failed to meet standards of veterinarian care.

3. *Capibara*.¹¹²

affidavit, however, was executed in January 2014, four months before Dr. Cole's May 2014 inspection, and APHIS could find no mention of a coatimundi in his affidavit.

¹¹⁰ AB at 14–15.

¹¹¹ Tr. 581:1–3.

¹¹² Complaint ¶ 10(f); Answer ¶ 10(f).

Dr. Cole noted:¹¹³

The capybara appears thin. The hip bones are prominent and the animal has scaly skin on the back half of the body with patches of hair-loss around the base of the tail and the backbone. The licensee states that this animal is old and no veterinarian has been consulted regarding these conditions.

Failure to seek medical care for the conditions listed above can lead to unnecessary pain and discomfort for the animals.

The animals listed above must be examined by a licensed veterinarian BY 5:00 PM ON MAY 23, 2014 in order to ensure that an accurate diagnosis is obtained and an appropriate treatment plan is developed and followed. This information, including the diagnosis, treatment and resolution of the condition, must be documented and made available to the inspector upon request.

Dr. Cole's contemporaneous photographs of the capybara corroborate her testimony.¹¹⁴

In their Answer Respondents denied the alleged violation. On brief, they simply referenced that Mrs. Sellners told Dr. Cole the animal is old and that the animal reflected the aging process.¹¹⁵ Neither the Sellners nor Dr. Pries appear to have testified as to this allegation. On direct examination, Mr. Anderson testified that the capybara "[d]id not appear to be" demonstrating "suffering or showing ill effects in any way," but on cross-examination Mr. Anderson conceded that he did not know, from a veterinary medical standpoint, that the capybara was not "suffering in any way."¹¹⁶

¹¹³ CX 69 at 1. See Tr. 318:22-319:8; 441:10-17.

¹¹⁴ CX 69a at 3-5; Tr. 320:8-321:4

¹¹⁵ AB at 15.

¹¹⁶ Tr. 595:19-596:1.

Based on Dr. Cole's report and testimony, APHIS carried its burden of proof as to this allegation that Respondents failed to provide adequate veterinary care.

4. *Barbados sheep.*

Dr. Cole noted:¹¹⁷

One Barbados wether has excessively long back hooves. The hooves are splayed and are curled up at the ends. The licensee states all sheep hooves were trimmed on December 27th, 2013.

Excessively long hooves can cause pain and discomfort to the animals. Further, it may cause the animals to alter their stance or their gait and create musculoskeletal related issues. This animal must have its hooves trimmed BY JUNE 4, 2014 to remove the excessive growth. The hooves must be maintained routinely in order to prevent and control diseases and injuries.

Dr. Cole's contemporaneous photographs of the Barbados wether corroborate her testimony.¹¹⁸

In their Answer, Respondents denied the allegation stating "[t]he Barbados sheep were in poor condition when they were sent to Respondents' Zoo."¹¹⁹ On brief Respondents do not make that contention, but contend that excessively long hooves on a Barbados sheep is "merely a cosmetic," not a veterinarian, issue, and cite that Dr. Pries stated longer toes on sheep are common, Tr. 484. They also state "[i]n her testimony, Dr. Cole...did not state that this was either a health or a veterinarian issue. (Tr. p. 319)."¹²⁰

Respondents did not offer testimony specifically on this allegation.

¹¹⁷ CX 69 at 1. See Tr. 319:9-15.

¹¹⁸ CX 69a at 6-7; Tr. 321:5-8.

¹¹⁹ Answer ¶ 10(g).

¹²⁰ AB at 15.

Respondents' Answer defense is without merit, as it does not appear that the Barbados wether was a recent arrival to Respondents' facility. According to Dr. Cole's inspection report, Mrs. Sellner stated that "all sheep hooves were trimmed on December 27, 2013," four months earlier. Presumably this included the one sheep whose hooves were the subject of Dr. Cole's concern.

As quoted above, Dr. Cole's inspection report explains: "Excessively long hooves can cause pain and discomfort to the animals [and] may cause the animals to alter their stance or their gait and create musculoskeletal related issues." Those are not merely cosmetic concerns, and Respondents proffered no evidence that they are. APHIS carried its burden on this allegation.

E. August 5, 2014 (Macey)¹²¹

On August 5, 2014, Drs. Cole and Shaver noted:¹²²

Adult, female Old English Sheepdog named "Macey" has sores behind both ears that are approximately one inch in diameter. The areas are red and moist but there is no discharge. The dog was not seen shaking her head or scratching the area. Skin lesions can be caused by trauma, parasites/pests, and other medical problems and can be painful. The licensee must have this animal examined by a licensed veterinarian in order to ensure that an accurate diagnosis is obtained and that an appropriate treatment plan is developed and followed. The licensee must document the outcome of this consultation and make it available to the inspector upon request.

The licensee stated that she is using "Nolvasan" antiseptic ointment on the sores near the ears of the Old English Sheepdog. The expiration date listed on the container is Oct 07. Expired medications can experience spoilage or have reduced efficacy.

¹²¹ Complaint ¶10(h); Answer ¶10(h).

¹²² CX 71 at 1.

This could lead to prolonged illness or suffering for the animals needing the drug. The licensee must ensure that all medications used in the facility are not expired and [are] labeled properly in accordance with standard veterinary practice.

Dr. Shaver testified about their observations about Macey, and about Respondents' use of the expired medication.¹²³ Dr. Cole testified that she concurred with what was written in the report, and that she took the photographs that appear at CX 71a.¹²⁴

Respondents' Answer denied the allegations stating: "The dog had scraped its head two days before the inspection. The infection was not fly related and was treated with antiseptic ointment and her condition cleared up in two days."¹²⁵ On brief, Respondents simply recite some of what APHIS alleges and the inspectors reported and said.¹²⁶ Respondents proffered no evidence supporting that the dog had scraped its head just two days before the inspection or that the condition had cleared up in two days and do not reprise them on brief. Therefore, I am unable to give any credence to those assertions. As quoted above, the report explains why use of—or even simply having on the premises—a medication nearly seven years expired, for an undiagnosed problem, no less, was inappropriate and could cause suffering in an animal.

Based on Drs. Cole and Shaver's report and testimony, APHIS carried its burden of proof as to this allegation that Respondents failed to meet standards of veterinarian care.

¹²³ Tr. 85:13–89:11; 141:21–142:20 (Dr. Shaver).

¹²⁴ Tr. 244:6–246:24.

¹²⁵ Answer ¶ 10(h). Notably, Respondents did not explain whether the dog's treatment and recovery was after it was examined by a veterinarian as required by the report.

¹²⁶ AB at 15.

F. August 25, 2014 - October 7, 2014 (Casper)¹²⁷

On October 7, 2014, Dr. Cole and Dr. Shaver noted:¹²⁸

There is [a] male, white tiger named 'Casper' (date of birth 6/04) with an open wound on the inside of the left leg that is about two inches by three inches in size. The skin around the wound is red and swollen and the skin is pulled back exposing red tissue in two places. Casper was seen licking this wound. The animal also has a moderately thin body condition with mildly protruding hip bones and vertebrae. This animal was acquired on 10 July 2014. According to the licensee, he was thin and had cuts and sores on his face and hands at that time and she had documented those problems. The attending veterinarian evaluated the tiger on 25 August 2014. No treatment guidelines were given to the licensee at that time. No treatment for the skin or wounds has been given to this animal. The licensee gave deworming medication to the animal on 14 September 2014 because of the thin body condition. The licensee states that the animal has not gained weight as she expected after the deworming medication was given. The attending veterinarian has not evaluated this animal since initial exam in August. Skin wounds can become infected and be painful for the animal. Also, a thin body condition can indicate other medical problems occurring in the animal. The licensee must have this animal examined by a licensed veterinarian by close of business on 9 October 2014 in order to ensure that an accurate diagnosis for the thin body condition and skin wound is obtained and that an appropriate treatment plan is developed and followed. The licensee must document the outcome of this consultation, including the diagnosis, treatment and resolution of the condition, and make it available to the inspector upon request.

The inspectors took a photograph and video of Casper.¹²⁹ Dr. Shaver testified at length about her observations about Casper.¹³⁰

¹²⁷ Complaint ¶ 10(i); Answer ¶ 10(i).

¹²⁸ CX 72 at 1.

¹²⁹ CX 72a; CX 72b.

¹³⁰ Tr. 107:19–110:16; 112:21–113:13; 145:2–146:22; 150:8–151:20; 153:156:25.

Respondents' Answer states "the tiger had issues," and "came in to the respondents' facility in questionable condition," and "den[ies] that the issues were the fault of the Respondents."¹³¹ It states that Dr. Pries "stated that the tiger was going to abscess out and heal."¹³² On brief Respondents contend:¹³³

Dr. Pries examined this tiger "Caspar" soon after it arrived at the Zoo. It was injured in transport and Dr. Pries' opinion was that the wound on its inner front leg needed to abscess and heal. (Tr. p. 501, see also the report of Douglas Anderson, IDALS inspector, who stated in his report that "it is old, has vision issues and poor body condition..." RXT-25, p. 10). His medical records reflect his examination of this cat. (RXT-26, p. 1 of 3 "exam of Caspar white tiger.") Mrs. Sellner was following the advice of her veterinarian. None of the veterinarians who testified are big cat specialists and none of them have as much experience as Dr. Pries in dealing with big cats.

Respondents' veterinary medical record for Casper contains only two notations: One noting a vaccination and declawing; and another noting administration of Panacur, which is a dewormer, on August 1, 2014.¹³⁴ The veterinary records contain no mention of the cuts, sores, wounds, or thinness observed and documented by Drs. Cole and Shaver. Dr. Pries' testimony about Casper reveals that his examination was visual only, and that he assumed that Mrs. Sellner "must have been gaining with the antibiotics because I didn't hear about it again."¹³⁵

Respondents' contentions concerning Dr. Pries' expertise as to big cats would be more

¹³¹ Answer ¶ 5.

¹³² *Id.*

¹³³ AB at 16.

¹³⁴ RX 10 at 15.

¹³⁵ Tr. 502:2-9.

compelling if there was evidence, especially medical records, of Dr. Pries being much involved in the ongoing treatment of an animal that clearly had, as Respondents admit, “issues.” The evidence shows that the Respondents violated the AWA as to Casper by providing inadequate veterinary care.

III. Handling

Congress intended that animals be handled safely and carefully so as to ensure their health and well-being. 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).]

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).]

A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of public contact. [9 C.F.R. § 2.131(d)(2).]

When climatic conditions present a threat to an animal’s health or well-being, appropriate measures must be taken to alleviate the impact of those conditions. An animal must never be subjected to any combination of temperature, humidity, and time that is detrimental to the animal’s health and well-being, taking into consideration such factors as the animal’s age, species, breed, overall health status, and acclimation. [9 C.F.R. § 2.131(e).]

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.]

The Complaint alleges three violations of the handling Regulations:¹³⁶

July 31, 2013. Respondents (1) failed to handle animals as carefully as possible, in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, (2) during exhibition, failed to handle animals so that there was minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the public so as to ensure the safety of the animals and the public, and (3) failed to have any employee or attendant present while the public had public contact with respondents' animals, including, *inter alia*, a camel, goats, sheep, and other hoofstock. 9 C.F.R. §§ 2.131(b)(1), 2.131(c)(1), 2.131(d)(2).

October 26, 2013. Respondents failed to handle Meishan pigs as carefully as possible, in a manner that does not cause excessive cooling, physical harm, or unnecessary discomfort, and specifically, respondents left a female Meishan pig that was about to farrow, outdoors in the cold, whereupon the pig gave birth to four piglets, three of whom died while housed outdoors by the respondents. 9 C.F.R. § 2.131(b)(1).

October 26, 2013. Respondents failed to take appropriate measures to alleviate the impact of climatic conditions that presented a threat to the health and well-being of one adult female Meishan pig, and four Meishan piglets, and, specifically, respondents exposed all five animals to cold temperatures, which exposure was detrimental to the animals' health and well-being. 9 C.F.R. § 2.131(e).

A. July 31, 2013

On July 31, 2013, VMO Jeffrey Baker documented alleged noncompliance with the handling Regulations, as follows:¹³⁷

There is not an identifiable attendant present at all times when the public is allowed contact with the animals. The public is allowed access to the area surrounding the enclosure that houses one goat

¹³⁶ Complaint ¶ 11.

¹³⁷ CX 27 at 1-2.

and one sheep. The public is also allowed access to the animals housed on either side of the long narrow corridor that runs from the coyote enclosures out to the llama field. These animals include goats, sheep, a camel, and other hoofstock. The public is allowed to contact the animals through the enclosure fencing. The absence of an attendant in these areas endangers the health of the animals by allowing activity (rough handling, improper feeding, etc.) that is harmful to these animals. The licensee must ensure that when the public is present an easily identifiable attendant is present in these areas.

He took contemporaneous photographs that corroborate his observations and testimony.¹³⁸

Respondents' Answer denied the allegation stating, "this facility was not required to have a barrier for years prior to this inspection and further state that there was an attendant present and available to handle any concerns and further state that the Zoo never had any problems in all the years that they did this."¹³⁹

On brief Respondents contend:¹⁴⁰

[T]he Zoo is laid out with one long main street going between the exhibit areas. There is a clear view from one end of the Zoo to the other. For a good overview of the layout of the Zoo, please see CX-27, p. 1 of 2 which shows the long walkway down the center of the Zoo. A person standing at one end of the Zoo can see the distance of the Zoo. There was no proof that Mrs. Sellner or her volunteers could not see the distance of the Zoo and keep a visual eye on what was going on.

In her affidavit, Mrs. Sellner stated that she is "always present in the area."¹⁴¹

¹³⁸ Tr. 169:7-170:13.

¹³⁹ Answer ¶ 11(a).

¹⁴⁰ AB at 16.

¹⁴¹ CX 22 at 4. Mrs. Sellner said that she believes she is "being singled out" because she knows "of other public parks that allow public feeding and contact and they do not provide any attendants." *Id.* ("I do not believe I need an additional attendant present as I am always in the area when the public is present."). Respondents did not offer evidence other than their own

But it is implausible that Mrs. Sellner has been or is capable of being “always present in the area,” given the other activities that she described in her testimony.¹⁴² The above was Respondents’ only evidence that “there was an attendant present and available to handle any concerns.” The preponderance of the evidence is that Respondents committed this handling violation.

B. October 26, 2013 (Meishan pigs)¹⁴³

The evidence introduced regarding the Meishan pigs supports a finding that Respondents did not handle these animals as carefully as possible, as required by the handling Regulations. As discussed above, even Respondents’ witness, Mr. Anderson of IDALS, testified that had Respondents placed the pregnant sow indoors in advance of farrowing, that the three piglets might not have died. Instead, Respondents took the chance that the sow would farrow on a date certain, and left her outside, notwithstanding the potential for adverse weather. This was not careful handling.

In their Answer, Respondents suggest, with no supporting evidence provided, that the sow gave birth “prematurely,” suggesting perhaps placement of blame on the sow herself for not having “farrowed when it was scheduled to.”¹⁴⁴ Even so, Respondents’ evidence with respect to

testimony to support this argument. If there are such other public parks that allow public feeding and contact and do not provide any attendant, they may well be in violation of the AWA. It is not a defense to violations by this zoo that other zoos have, apparently, for one reason or another, escaped sanctions for violations.

¹⁴² Tr. 707:24–709:4 (describing the time she spends at the dairy and at the zoo).

¹⁴³ Complaint ¶ 11(b).

¹⁴⁴ Answer ¶ 11(c).

the expected farrow date in contradictory. While Respondents averred that the sow gave birth a week early, according to their witness, Mr. Anderson, she was expected to farrow as soon as the next day. Regardless of the date that Respondents calculated, the careful thing do with a sow who was that close to giving birth, in late October, in Iowa, was to move her inside, and out of the elements. Respondents' failure to do so was not careful handling, and violated the handling Regulations as alleged in the Complaint.

On brief,¹⁴⁵ with respect to Complaint ¶ 11(b) Respondents simply referenced their brief on Complaint ¶ 10(b) that APHIS failed to carry its burden of proof to show a violation. But it appears that that brief's address of ¶ 11(c), which discusses the Meishan pig, is actually addressing ¶ 11(b). Respondents contend:

The only evidence as to weather has been presented by the Respondents in the form of a calendar that shows 48° for a high. (RXT-21, p. 3 of 4). There is no indication that that temperature is dangerous to the pigs or had anything to do with the death or stillborn piglets that day.

Whether or not the weather had anything to do with the actual death or stillborn piglets, the point is, as stated above, the most prudent course of action to take as to a sow that close to giving birth, in late October, in Iowa, was to move her inside and out of the elements. The Sellners themselves stated they did not intend to have the sow give birth outdoors because of the potential weather.

IV. Standards

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

¹⁴⁵ AB at 16.

part 3 of this subchapter for the humane handling, care, treatment, and transportation of animals....¹⁴⁶

APHIS alleges Respondents failed to meet the minimum standards in multiple respects, based on evidence gathered by APHIS inspectors during inspections on the following nine dates: June 12, 2013 (Drs. Cooper and Shaver); July 31, 2013 (Dr. Baker); September 25, 2013 (Dr. Cole); December 16, 2013 (Dr. Cole); May 21, 2014 (Dr. Cole); August 5, 2014 (Drs. Cole and Shaver); October 7, 2014 (Drs. Cole and Shaver); March 4, 2015 (Dr. Cole); May 27, 2015 (Drs. Cole and Owens).¹⁴⁷

A. June 12, 2013

The Complaint alleges that Respondents failed to meet the minimum standards as follows:¹⁴⁸

12. On or about June 12, 2013, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae. 9 C.F.R. § 3.10.

b. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. 9 C.F.R. § 3.75(c)(3).

c. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, the refrigerator in

¹⁴⁶ 9 C.F.R. § 2.100(a). This Regulation applies to each incident of alleged noncompliance with the standards promulgated under the AWA ("Standards").

¹⁴⁷ Initial Brief at 33–34.

¹⁴⁸ Complaint ¶ 12.

respondents' primate building was in need of cleaning and contained contaminated, fly-infested fruit. 9 C.F.R. § 3.75(e).

d. Respondents failed to maintain enclosures for nonhuman primates in good repair, and specifically, the fencing of the enclosure housing three baboons was bowed, compromising its structural strength. 9 C.F.R. § 3.80(a)(2)(iii).

e. Respondents failed to maintain enclosures for nonhuman primates in good repair, and specifically, the chain that secured the gate of the enclosure housing two macaques was rusted. 9 C.F.R. § 3.80(a)(2)(iii).

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence separating the enclosures housing fallow deer and Jacob's sheep was in disrepair, with bowed wire panels and separated wire. 9 C.F.R. § 3.125(a).

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure containing Santa Cruz sheep was in disrepair, with sharp wires protruding inward and accessible to the animals. 9 C.F.R. § 3.125(a).

h. Respondents failed to provide sufficient shade to allow all animals housed outdoors to protect themselves from direct sunlight, and specifically, respondents' enclosures for lions and cougars lacked adequate shade for all of the animals. 9 C.F.R. § 3.127(a).

i. Respondents failed to provide a suitable method of drainage, and specifically, the enclosure housing three Scottish Highland cattle contained standing water and mud. 9 C.F.R. § 3.127(c).

j. Respondents failed to provide potable water to two woodchucks, goats and sheep, and a coyote, as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

k. Respondents failed to clean enclosures housing a coyote, two chinchillas, and two Patagonian cavies, as required. 9 C.F.R. § 3.131(a).

I. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the enclosures housing two tigers, an armadillo, and a sloth. 9 C.F.R. § 3.131(d).

In their Answer, Respondents admitted ¶ 12(b) and denied the remaining allegations.¹⁴⁹

Dr. Shaver and Dr. Cooper conducted a compliance inspection and submitted their inspection report and photographs.¹⁵⁰ Dr. Shaver testified at hearing.¹⁵¹ She described her occupation and her background.

Dr. Cooper testified by telephone.¹⁵² She testified about this inspection and specifically testified that she wrote and concurred with the citations in CX 2.¹⁵³

1. Watering for dogs (9 C.F.R. § 3.10).¹⁵⁴

Dr. Shaver explained the alleged noncompliance with the Standards for dogs cited in the inspection report, and described the contemporaneous photograph.¹⁵⁵

On brief Respondent contended:¹⁵⁶

With regard to paragraph 12(a) and the dogs' water bowl having a buildup of algae this water was never tested by the USDA inspectors to see if this was true. The Sellners testified that the water in the bowl was potable and fresh. See Affidavit of Pam Sellner, CX-22, p. 1 of 21 under Section 3.10. She stated in that

¹⁴⁹ Answer ¶ 12.

¹⁵⁰ CX 2; CX 3–CX 13.

¹⁵¹ See Tr. 43:1–45:12; 45:24–48:2; 45:20–77.

¹⁵² See Tr. 395:23–396:15; 397:4–13. See also CX 19; Tr. 397:15–399:9.

¹⁵³ Tr. 397:4–13. See also CX 19; Tr. 397:15–399:9.

¹⁵⁴ Complaint ¶ 12(a).

¹⁵⁵ Tr. 52:24–54:13.

¹⁵⁶ AB at 17.

Affidavit that the bowl had been brushed that morning. The galvanization did have some dark green spots on it. Tom Sellner testified that he cleans the water bowls out all the time. (Tr. p. 620). Some of the bowls were stained with a greenish tint but they were not dirty. (Tr. p. 619). The photograph which the USDA has provided does not show greenish material. Instead it shows a slight green tint to the interior of the bowl and also shows the automatic waterer and hose attached to the bowl supplying fresh water. (See CX-4, p. 1 of 1). The USDA did not carry its burden with regard to this matter.

Admittedly there is somewhat conflicting evidence on whether the dog's water bowl had a build-up of algae. But Dr. Shaver's testimony and report¹⁵⁷ are clear that she found a build-up of green material. The CX 4 at 1 photograph is unclear. Mr. Anderson's, of IDALS, report¹⁵⁸ discusses algae build-up problems at the zoo and how difficult it is to keep algae from developing.

In this instance, I give substantial credibility to the APHIS inspectors and find that by a preponderance of evidence that there was a violation by Respondents due to a build-up of algae in the dogs' water bowl, and, thus, the violation of Complaint ¶ 12(a) was proved.

2. *Cleaning for non-human primates (9 C.F.R. § 3.75(c)(3)).*¹⁵⁹

As noted, Respondents admitted this violation.¹⁶⁰

¹⁵⁷ CX 2 at 1.

¹⁵⁸ RX 25 at 8.

¹⁵⁹ Complaint ¶ 12(b).

¹⁶⁰ Answer ¶ 12(c). See AB at 17.

*3. Food storage for non-human primates (9 C.F.R. § 3.75(e)).*¹⁶¹

Dr. Shaver explained the alleged noncompliance with the Standards for food storage cited in the inspection report and described the contemporaneous photographs she took.¹⁶²

On brief,¹⁶³ Respondents contend:

Paragraph 12(c) is denied and it is further stated that this is one of the allegations where the USDA inspectors use the term fly to refer to all flies without distinction between those that can actually be a vector for disease as opposed to fruit flies which two veterinarians testified were not vectors for disease because they did not land on feces but instead on fruit. See testimony of Dr. Pries, Tr. p. 504 (he was not concerned about fruit flies) and Dr. Shaver, Tr. p. 144 (admits that fruit flies are not the vector for disease that other flies are). Mrs. Sellner stated in her Affidavit that the leaves on the lettuce was turning brown so she disposed of the outer leaves. The lettuce itself was to be feed to the reptiles which are not Zoo animals. She also had done what a previous inspector told her and put up a sign that the food needed to be washed before feeding and she was still written up. (Sellner Affidavit CX-22, p. 2 of 21). The USDA had not carried its burden of proof.

This alleged violation largely goes to cleanliness, which a licensee is obligated to maintain. The allegation was not that only the lettuce was fly infested, but apples as well.¹⁶⁴ The refrigerator itself was in need of cleaning.¹⁶⁵

The preponderance of the evidence supports the alleged violation.

¹⁶¹ Complaint ¶ 12(c).

¹⁶² CX 2 at 2–3; CX 6; Tr. 55:2–57:18.

¹⁶³ AB at 17–18.

¹⁶⁴ CX 2 at 2.

¹⁶⁵ See Tr. 57 (Dr. Shaver).

4. *Enclosures for non-human primates (9 C.F.R. § 3.80(a)(2)(iii)).*¹⁶⁶

Dr. Shaver explained the instances of alleged noncompliance with the Standards for primary enclosures cited in the inspection report, and described the contemporaneous photographs she took of the baboon (bowed enclosure wall) and macaque (rusted chain) enclosures.¹⁶⁷ On brief,¹⁶⁸ Respondents contend:

Paragraph 12(d) again is an instance of an alleged violation that is unproven and speculative. The slight bulge in the fence was never shown to be a structural issue. (See CX-7, p. 1 and 2 of 3, see Affidavit of Mrs. Sellner CX-22, p. 2 of 21).

Dr. Shaver testified as to the bowing of the chain link fence,¹⁶⁹ which appears to be more than a “slight bulge” as shown in the photograph that is CX 7 at 2.¹⁷⁰ Among other things, she testified that the fence was bowing out, away from an anchor or support pole. Dr. Shaver testified that a baboon was pushing against the enclosure walls hard enough to make them move. Contrary to Respondents contention, that the bowed fencing was structurally compromised and the concern that the baboon’s activities made this a safety hazard as far as ensuring he was secured by the enclosure are well supported in the record.¹⁷¹

On brief,¹⁷² Respondents also contend:

¹⁶⁶ Complaint ¶¶ 12(d) and (e).

¹⁶⁷ CX 2 at 3; CX 7; Tr. 57:19–60:20.

¹⁶⁸ AB at 18.

¹⁶⁹ Tr. 57–60.

¹⁷⁰ Mrs. Sellner herself referred to it as “bowed out” in CX 22 at 2.

¹⁷¹ See CX at 2.

¹⁷² AB at 18.

Paragraph 12(e) is denied because there was no evidence that the rust on the chain affected its structure at all. There is no evidence as to the amount of the rust. A bit of rust in and of itself does not mean there is a structural defect. Testimony of Mrs. Sellner, (Tr. p. 680). (See also CX-7, p. 3) which clearly shows many of the links on the chain have no rust whatsoever.

The cited testimony by Mrs. Sellner supports that while the rather substantial chain may have been aesthetically compromised by superficial rust, it was not structurally compromised, and thus effectively rebuts APHIS's contentions. APHIS did not carry its burden of proof as to Complaint ¶ 12(e).

5. Structural strength (9 C.F.R. § 3.125(a)).¹⁷³

Dr. Shaver explained the noncompliance with the Standards for structural strength and construction and maintenance of animal facilities cited in the inspection report, and described the contemporaneous photographs she took of the fence separating the fallow deer and Jacob's sheep enclosures, and the fence for the Santa Cruz sheep.¹⁷⁴

On brief,¹⁷⁵ Respondents contend:

Paragraph 12(f) is contested to the extent that the defect mentioned was not dangerous to the animals (bowed and separated wires) and this was repaired immediately.

As discussed elsewhere herein subsequent repairs do not obviate violations. As to both Complaint ¶ 12(f) and (g), the cited APHIS testimony and evidence well support that a fence

¹⁷³ Complaint ¶¶ 12(f),(g).

¹⁷⁴ CX 2 at 3; CX 8; Tr. 60:21–63:11.

¹⁷⁵ AB at 18.

bowed and separated from support posts, concentrated toward the bottom of the fence, and chain-link fence bent inwards into the enclosure is structurally unsound and a danger.¹⁷⁶

6. Shelter (9 C.F.R. § 3.127(a)).¹⁷⁷

Dr. Shaver explained the alleged noncompliance with the Standards for shelter from sunlight cited in the inspection report, and described the contemporaneous photographs she took of the lion and cougar enclosures.¹⁷⁸

On brief, Respondents state: “The lions and cougars had sufficient shade because of the surrounding trees, their dens, and the large hollow logs shown in (CX-9, p. 1-4). Testimony of Pamela Sellner, (Tr. pp. 681-683).”¹⁷⁹

APHIS’s testimony and evidence, including photos, paint a credible and convincing picture of insufficient shade. In particular, the “large” hollow logs, as Respondents refer to them, do not seem large enough to provide sufficient shade for large felines. Mrs. Sellner’s testimony appears to rather overstate the shade available at the time of inspection. I give greater weight to APHIS’s witness and evidence and find that it has proven Complaint ¶ 12(h).

7. Drainage (9 C.F.R. § 3.127(c)).¹⁸⁰

Dr. Shaver explained the noncompliance with the Standards for drainage cited in the

¹⁷⁶ See CX 2 at 3; Tr. 62–63.

¹⁷⁷ Complaint ¶ 12(h).

¹⁷⁸ CX 2 at 3–4; CX 9; Tr. 63:12–64:14.

¹⁷⁹ AB at 19–20.

¹⁸⁰ Complaint ¶ 12(i).

inspection report, and described the photographs she took of the Scottish Highland cattle enclosure.¹⁸¹ This evidence demonstrates that the Scottish Highland cattle legs sank a substantial amount into the mud in the particular areas, regardless of whether they were up to their knees.¹⁸² The report, supporting photos, and testimony demonstrate that these cattle were penned into excessively muddy conditions. APHIS carried its burden in showing that the fact that water from a half inch of rain¹⁸³ did not drain away more quickly, is a violation.

8. *Watering (9 C.F.R. § 3.130).*¹⁸⁴

Dr. Shaver explained the noncompliance with the Standards for watering cited in the inspection report, and described the contemporaneous photographs she took of the water receptacles in the woodchuck, goat/sheep, and coyote enclosures.¹⁸⁵

Respondents state Mrs. Sellner swore they provided “clean receptacles and fresh water to the animals every morning,” citing CX 22 at 3, Section 3.130.

Ms. Sellner’s affidavit, CX 22 at 3, states “the water receptacle had two very small pieces of hay in the water” and the water receptacles had been cleaned that morning. The allegation of violation and supporting APHIS evidence, including photographs, is that there was much more than two pieces of hay in the water, and refers to build-ups of green material, which casts

¹⁸¹ CX 2 at 4; CX 10; Tr. 64:15–67:11.

¹⁸² AB at 19.

¹⁸³ AB at 20.

¹⁸⁴ Complaint ¶ 12(j).

¹⁸⁵ CX 2 at 4; CX 11; Tr. 67:12–70:9.

significant doubt on whether the receptacles could have been cleaned that morning. I find APHIS carried its burden as to Complaint ¶ 12(j).

9. Cleaning (9 C.F.R. § 3.131(a)).¹⁸⁶

Dr. Shaver explained the noncompliance with the Standards for cleaning cited in the inspection report, and described the contemporaneous photographs she took of the soiled shelter for a coyote, the accumulated hair in the wire frame of the chinchilla enclosure, and accumulated cobwebs and dust in the serval enclosure.¹⁸⁷

Respondents contend that the enclosures were cleaned “but could not be kept totally clean because of wet weather conditions. (See CX-22, p. 4)”¹⁸⁸

Mrs. Sellner’s cited affidavit refers to animals tracking mud into the enclosures as a reason the enclosures could not be kept totally clean. APHIS’s testimony and other evidence, however, demonstrates build-ups of other materials, that would not be explained by tracked-in mud. APHIS carried its burden as to Complaint ¶ 12(k).

10. Pest control (9 C.F.R. § 3.131(d)).¹⁸⁹

Dr. Shaver explained the noncompliance with the Standards for pest control cited in the inspection report, and described the contemporaneous photographs she took of the tiger enclosure, and the enclosure housing sloth and armadillo.¹⁹⁰

¹⁸⁶ Complaint ¶ 12(1).

¹⁸⁷ CX 2 at 5; CX 12; Tr. 70:10–75:7.

¹⁸⁸ AB at 20.

¹⁸⁹ Complaint ¶ 12(k).

¹⁹⁰ CX 2 at 5; CX 13; Tr. 75:8–77:12.

Respondents contend¹⁹¹ that Complaint has not identified what it means by a large number of flies or whether it has followed any internal definition of a large number of flies, citing Dr. Shaver, Tr. 139, and notes that Dr. Cooper testified it was a “judgment call,” Tr. 414-16.¹⁹² Respondents note that the zoo undertakes fly control, citing Mrs. Sellner, Tr. 658-69. Respondents reference the testimony of Dr. Pries to the effect that flies were not excessive at the zoo, and that Horn flies were not a problem and there was only the occasional deer or horse fly, citing Tr. 474-75. Respondents assert that Complaint’s photographs, CX 13 at 1-3, show few flies. They state: “The Government has failed to prove a violation even with its moving standard with regard to insect control.”¹⁹³

The cited photos alleged by APHIS to show flies are indistinct for that purpose, at best, although, Dr. Shaver identified¹⁹⁴ the black spots visible on the apples in CX 13 at 3, as flies, and those black spots are prominent, and she described what the other two photographs did not show distinctly. Dr. Shaver also referenced a “large number of flies” to be if they were collecting on food or collecting on animals such that the animals were reflecting discomfort by stomping and shaking their heads.¹⁹⁵ And she testified that she observed flies collecting on food and in various

¹⁹¹ AB at 20.

¹⁹² Respondents contend, AB at 20, that Dr. Cooper testified that if she looked at a piece of fruit and could not see the surface because it was covered by flies, that would be a large number. Respondents do not note that Dr. Cooper, in fact, specifically testified at Tr. 417 that the surface of a piece of fruit would not have to be entirely covered for flies for the to be a large number of flies.

¹⁹³ AB at 21.

¹⁹⁴ Tr. 76-77.

¹⁹⁵ Tr. 138. Dr. Cooper testified similarly. Tr. 416.

enclosures.¹⁹⁶ The APHIS's witnesses recognized that the zoo had undertaken fly control efforts, at least in some instances.¹⁹⁷

I find that APHIS's witnesses, who are trained and experienced inspectors, reasonably explained what excessive and a large number of flies were. I also find that their testimony demonstrated that there were large numbers of flies at the time of the subject inspection. The fact that Dr. Pries did not observe large numbers of flies at the time he was at the zoo, does not mean that they were not present at the time of this inspection.

B. July 31, 2013

The Complaint alleges that Respondents failed to meet the minimum standards as follows:¹⁹⁸

13. On or about July 31, 2013, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to provide guinea pigs with wholesome food, and specifically, there was a mixture of bedding and fecal matter inside the animals' food receptacle. 9 C.F.R. § 3.29(a).

b. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in a building housing nonhuman primates contained spiders. 9 C.F.R. § 3.75(e).¹⁹⁹

¹⁹⁶ Tr. 75.

¹⁹⁷ Tr. 417 (Dr. Cooper).

¹⁹⁸ Complaint ¶ 13.

¹⁹⁹ I find herein that Respondents did not incur any violation for having moldy fruit that would not be fed to animals.

- c. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Cynthia), who was self-mutilating. 9 C.F.R. § 3.81(c)(2).
- d. Respondents failed to remove excreta from the enclosure housing a baboon (Obi), as required. 9 C.F.R. § 3.84(a).
- e. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies near the bush babies, and rodent feces on the floor of the building housing lemurs. 9 C.F.R. § 3.84(d).
- f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, four enclosures (housing kangaroos, coyotes, capybara and bears) were all in disrepair. 9 C.F.R. § 3.125(a).
- g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in the food storage area contained spiders. 9 C.F.R. § 3.125(c).²⁰⁰
- h. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system. 9 C.F.R. § 3.127(d).
- i. Respondents failed to provide potable water to six animals, housed in five enclosures, as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.
- j. Respondents failed to remove excreta and/or food debris from the primary enclosures housing two bears and a capybara, as required. 9 C.F.R. § 3.131(a).

²⁰⁰ I find herein that Respondents did not incur any violation for having moldy fruit that would not be fed to animals.

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the presence of rodent feces on the floor of the coatimundi building, and the excessive amount of flies and other flying insects, as well as rodent feces in the food preparation and storage areas. 9 C.F.R. § 3.131(d).

l. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

In their Answer, Respondents admitted allegation 13(b), (g), and (h), with explanations and denied the remaining allegations.²⁰¹

Dr. Baker conducted a compliance inspection on this date, documented his observations in his inspection report, CX 26, as well as in numerous photographs, and testified at hearing as to his inspection.²⁰²

A. Feed for Guinea Pigs (9 C.F.R. § 3.29(a))²⁰³

Dr. Baker explained the noncompliance with the Standards for guinea pigs cited in the inspection report, and described the contemporaneous photographs.²⁰⁴

Respondents contend²⁰⁵ that Mrs. Sellner's affidavit, CX 22 at 5, proved that the guinea pigs had simply kicked some bedding into the food receptacle.

The photos reveal a substantial amount of non-food materials in the guinea pigs feeding bowl, including a substantial amount of feces—more than would be expected from kicking

²⁰¹ Answer ¶ 13. Respondents have no hamsters. The Complaint ¶ 13(a) was in error that there were. The parties agreed there was not a need to formally amend the Complaint. Tr. 170–71.

²⁰² CX 26; CX 27–36. See Tr. 167:12–194:14; 196:5–213:17.

²⁰³ Complaint ¶ 13(a).

²⁰⁴ CX 26 at 1; CX 28; Tr. 170:18–171:3; 171:11–172:9.

²⁰⁵ AB at 21.

being into the dish a short time in the past. APHIS bore its burden of proof with respect to Complaint ¶ 13(a).

B. Food Storage for Non-Human Primates (9 C.F.R. § 3.75(e))²⁰⁶

As noted, this violation was admitted.²⁰⁷

C. Environmental Enrichment for Non-Human Primates (9 C.F.R. § 3.81)²⁰⁸

Dr. Baker explained the noncompliance with the Standards for environmental enrichment for non-human primates cited in the inspection report, and documented in his declaration, specifically with reference to an inadequate plan for enrichment.²⁰⁹ Dr. Pries testified that Mrs. Sellner prepared the written programs for environmental enrichment, which Dr. Pries signed.²¹⁰

Respondents contend:²¹¹ Mrs. Sellner was following a Primate Enrichment Program,²¹² which Dr. Baker was given but never returned; Dr. Pries did not find it necessary to sedate Cynthia to examine her, and, after the inspection, Mrs. Sellner documented her enrichment program every day.²¹³

CX 22, the August 5, 2013 report, at 2-3, explains that the environmental plan had not been properly updated and was required to address the psychological problems Dr. Baker

²⁰⁶ Complaint ¶ 13(b).

²⁰⁷ AB at 21.

²⁰⁸ Complaint ¶ 13(c).

²⁰⁹ CX 26 at 2-3; CX 37; Tr. 177:7-181:8. *See* Tr. 203:9-25; 204:16-206:9.

²¹⁰ Tr. 500:20-501:1.

²¹¹ AB at 21-22.

²¹² RX 3.

²¹³ CX 22 at 6.

observed.²¹⁴ CX 22 also states the licensee must document the special attention given to the animal and provide this documentation to the inspector when requested. Essentially, Respondents are arguing that they corrected the violations at issue after the inspection.

As discussed elsewhere corrections after an inspection do not obviate a violation. APHIS's evidence proves the violation.

D. Cleaning for Non-Human Primates (9 C.F.R. § 3.84(a))²¹⁵

Dr. Baker explained the alleged noncompliance with the Standards for non-human primates for cleaning cited in the inspection report, and described his contemporaneous photographs of the enclosure housing a baboon (Obi).²¹⁶ CX 26 at 3 describes approximately fifty percent of the floor being covered with packed down feces.

Respondents contend,²¹⁷ among other things, that the photographs are blurry and Mr. and Mrs. Sellner testified that the pen would have been cleaned out that day, but for the inspection, as it was every day. None of this effectively countervails credible testimony that fifty percent of the pen was covered by packed down feces. I find APHIS met its burden as to this Complaint ¶ 13(d) allegation.²¹⁸

²¹⁴ See also CX 37 (declaration by Dr. Baker, among other things discussing these topics).

²¹⁵ Complaint ¶ 13(d).

²¹⁶ CX 26 at 3; CX 30; Tr. 181:9–23.

²¹⁷ AB at 22.

²¹⁸ In CX 22 at 2, Mrs. Sellner does state she does not think it was all feces on the floor.

E. Pest Control for Non-Human Primates (9 C.F.R. § 3.84(d))²¹⁹

Dr. Baker explained the noncompliance with the Standards for pest control for non-human primates cited in the inspection report, and described the contemporaneous photograph he took of the baboon enclosure.²²⁰

Respondents contend²²¹ that the use of the phrase “large amount of flies” is unfair to the licensee because that phrase can mean whatever the inspector wants it to mean, and while there are flies shown in the photograph that is CX 36 at 1, they do not meet Dr. Cooper’s definition. They also note that in CX 22 at 7, Mrs. Sellner states Dr. Baker arrived before the intended morning spraying of the facility, and they note that the zoo has a fly abatement program.

CX 36 at 1 shows what is to the undersigned be an excessive number of flies in the “Education Center” under any definition, and these are not fruit flies. Apparently, the Dr. Cooper definition of “excessive” Respondents are referring to is somewhere in Tr. 414-16, where, among other things, she said it was a “judgment call” and, if on animals, the animals were showing signs of being bothered by them, or if the flies covered the surface of a piece of fruit, which at Tr. 417 she clarified to mean not covering all surface area of the fruit, a point Respondents do not mention. I do not find any inconsistency between a finding of excessive flies in the Education Center with any Dr. Cooper testimony at Tr. 414-17.

²¹⁹ Complaint ¶ 13(d).

²²⁰ CX 26 at 3; CX 31; Tr. 181:24–182:23.

²²¹ AB at 22.

Respondents claim this is another instance of where the alleged violation would have been eliminated by actions the Respondents were intending to take later that day. The fact that Respondents were going to spray for flies later that day indicates a perception on their part that there was an excess of flies. The nature of an unannounced inspection is that it is something of a snapshot of conditions at the time it takes place, and violations have to be determined as of that point in time, nor based upon Respondent contentions as to their intents, held even prior to inspections, to correct conditions.

APHIS met its burden of proof as to Complaint ¶ 13(e).

F. Structural Strength (9 C.F.R. § 3.125(a))²²²

Dr. Baker explained the noncompliance with the Standards for structural strength and construction and maintenance of animal facilities cited in the inspection report, and described the photographs he took of the kangaroo, coyote and capybara enclosures.²²³

Respondents contend that the enclosures pose no danger to the animals and the photographs show this, citing CX 32 at 1-3, and, thus, these allegedly minor flaws are not violations.

CX 32 at 3 is intended to be a photograph of excess feces in the capybara shelter, which shows very little of the portion of the shelter shown said to be damaged. Contrary to Respondents' contentions, CX 32 at 1-2 shows rather severely damaged and compromised

²²² Complaint ¶ 13(f).

²²³ CX 26 at 4; CX 32; Tr. 182:24–184:15.

shelters, not “minor flaws.” The narrative description and discussion in CX 26 at 4 fully supports at finding of the violation alleged in Complaint ¶ 13(f).

G. Food Storage (9 C.F.R. § 3.125(c))²²⁴

Dr. Baker explained the noncompliance with the Standards for food storage cited in the inspection report, and described the contemporaneous photographs he took food storage areas.²²⁵

Respondents on brief²²⁶ simply refer back to their answer to Complaint ¶ 13(b), which is an admission. Thus, I find the violation alleged in Complaint ¶ 13(g) is admitted by Respondents.

H. Perimeter Fence (9 C.F.R. § 3.127(d))²²⁷

Dr. Baker explained the noncompliance with the Standards for perimeter fencing cited in the inspection report (CX 26 at 5), and described the contemporaneous photographs he took (CX 33) of the Respondents' fencing.²²⁸ Respondents admitted that their perimeter fence was damaged.²²⁹ Respondents “admit that a portion of the perimeter fence was damaged but [state] the height of the fence was always at least eight feet in height, the required height for a perimeter fence. (Sellner, Tr. p. 651).”²³⁰ As discussed herein, subsequent repairs do not obviate violations.

²²⁴ Complaint ¶ 13(g).

²²⁵ CX 26 at 4; CX 29; Tr. 184:16–23. *See* Tr. 199:25–201:18.

²²⁶ AB at 23.

²²⁷ Complaint ¶ 13(h).

²²⁸ CX 26 at 5; CX 33; Tr. 184:24–187:3; *see* Tr. 210:8–213:3.

²²⁹ Answer ¶ 13(h).

²³⁰ AB at 12.

Moreover, APHIS showed that “there were gaps between the panels of the perimeter fence; and...there was no perimeter fence around the camel enclosure that could function as a secondary containment system.” The cited testimony by Ms. Sellner refers only to a particular panel.

APHIS met its burden of proof as to Complaint ¶ 13(h).

I. Watering (9 C.F.R. § 3.130)²³¹

Dr. Baker explained the noncompliance with the Standards for watering cited in the inspection report and described the contemporaneous photographs taken of the water receptacles in the coyote and tiger enclosures.²³²

Respondents contend that the water was potable and came from automatic waterers, citing CX 22 at 9 and Tr. 620 (Mr. Sellner).

CX 26 at 5, proffered in support of this violation, states, for the most part, that the interior surfaces of the water bowls at issue were a green color. There is not an allegation that there was a build-up of algae or any other substance. Respondents’ points are well-taken. APHIS did not demonstrate that water that is refreshed by an automatic waterer each time an animal drinks is not potable simply because the interior of a water bowl surface has a tinge of green. APHIS failed to prove the allegation in Complaint ¶ 13(i).

²³¹ Complaint ¶ 13(i).

²³² CX 26 at 5; CX 34; Tr. 187:4–24.

J. Cleaning (9 C.F.R. § 3.131(a))²³³

Dr. Baker explained the noncompliance with the Standards for cleaning cited in the inspection report, and described the contemporaneous photographs he took of the bear enclosure.²³⁴

APHIS states on brief:²³⁵ “[a]lthough Dr. Pries acknowledged testified that there were housekeeping, maintenance, and cleaning problems, he said that he was only aware of such problems ‘way back like 2010 or something’... ‘but here in the past few years I thought things were looking pretty good.’”²³⁶ It is not clear for what purpose APHIS cites this statement. Dr. Pries’ testimony as to the conditions in 2010 or thereabouts are irrelevant to the violations alleged in the Complaint this proceeding. His testimony as to the general conditions in recent years is relevant, but I give it less weight than Dr. Baker’s testimony, report, and photographs, as to specific conditions on the day of the APHIS inspection.

On brief,²³⁷ Respondents contend the photograph of the bear enclosure, CX 35 at 1, shows only one spot of defecation and does not show the entire cage. Respondents state Dr. Baker “admitted that in his testimony. Tr. 207.” but it is not clear what Respondents mean. All Dr. Baker admits on that transcript page is a lack of memory. Respondents argue that Dr. Baker’s definition of excessive feces is where one cannot move freely without stepping on feces, and

²³³ Complaint ¶ 13(j).

²³⁴ CX 26 at 6; CX 35; Tr. 187:25–188:17; 207:7–24. *See also* CX 37 (declaration by Dr. Baker).

²³⁵ IB at 41.

²³⁶ Tr. 488:22–489:8; 498:23–490:5.

²³⁷ *Id.*

claim APHIS's evidence does not show this.²³⁸ However, Respondents neglect to mention that Dr. Baker also testified, Tr. 206-07: "[a]nother excessive amount is if it's not taken away in 1 time to prevent the accumulation of pests, excessive flies, rodents, that type of thing." At Tr. 188, Dr. Baker testified as to an excess of feces in the bear enclosure in a pile.

The contemporaneous report, CX 26 at 6, specifically states that feces were present throughout the bear enclosure. I find the photograph in CX 35 at 1 to be very unclear as to where feces might be, and, thus, it neither supports nor contradicts the allegation in Complaint 13(j). CX 26 at 6 also states that enclosures must be cleaned as often as necessary to promote appropriate husbandry standards. At Tr. 208, Dr. Baker explains that that might require cleaning more than once a day.

Although the evidence is somewhat confusing as to particulars, I find that APHIS met its burden to show that there were excess feces in the subject enclosures. Respondents' cross examination did not shake Dr. Baker from that observation and conclusion.

K. Pest Control (9 C.F.R. § 3.131(d))²³⁹

Dr. Baker explained the noncompliance with the Standards for pest control cited in the inspection report, and described the contemporaneous photographs he took of the education center and the porcupine enclosure.²⁴⁰

²³⁸ AB at 23-24.

²³⁹ Complaint ¶ 13(k).

²⁴⁰ CX 26 at 6; CX 36; Tr. 188: 18-189:18; 199:17-24.

Respondents, on brief,²⁴¹ contend Mrs. Sellner testified she has an effective rodent control program and the dead rodent shown in one of APHIS's exhibits demonstrates that it works, citing Tr. 652. Respondents again assert a lack of definition of "excessive" as applied to flies, and cite the zoo's allegedly extensive anti-fly measures, citing Tr. 657-59. Respondents assert that the photographs in CX 27-35 show a lack, not an excess, of flies.

CX 27-35 are alleged to show excess flies. CX 36 at 1 and 3 are alleged to, and do, and are the exhibits cited in support of this Complaint paragraph. The photographs in CX 29 at 1-4 and CX 36 at 2, certainly show rodent feces, evidence that Respondents' rodent control efforts have not been sufficiently effective.

APHIS met its burden of proof as to Complaint ¶ 13(k).

L. Employees (9 C.F.R. §§ 3.85, 3132)²⁴²

Dr. Baker cited Respondents for failing to comply with the Standard for employees.²⁴³ Respondents do not employ staff, and instead rely exclusively on the two of their efforts—all while operating an adjacent dairy farm²⁴⁴—and on volunteers. Mr. Sellner testified that Respondents have no employees, only "lots of volunteers" and "we're not going to have somebody else hired to come in and do our animals without our supervision because we're very careful on how our animals are taken care of."²⁴⁵

²⁴¹ AB at 24.

²⁴² Complaint ¶ 13(l).

²⁴³ CX 26 at 6-7.

²⁴⁴ Tr. 451:1-21, 627:18-23, 628:9-21, 644:5-18, 645:7-16.

²⁴⁵ RX 2 at 12 ("I feel I have adequate help at this time."); Tr. 628:9-629:3.

Respondents on brief contend:²⁴⁶

There is no basis for this allegation [of failure to meet the Standard for employees] other than speculation. Dr. Gibbens admitted in his testimony that he can't give an opinion as to whether the Zoo has enough volunteers to meet its needs. (Tr. p. 725). He stated that the number of volunteer hours does not show up in any inspection reports by the USDA. (Tr. p. 731). This information has been available to the USDA for years now. (See Affidavit of P. Sellner, CX-22, pp. 10-11). The Government has not met its burden of proof.

Mrs. Sellner's cited affidavit, CX 22 at 10-11, states the zoo has from 6 to 8 volunteers that "help with care of the animals" when the zoo is open in the summer. The animals need care all year round, but Mrs. Sellner seems to implicitly admit that there are no volunteers at other times of the year. Dr. Gibbens specifically testified²⁴⁷ that two people could not "maintain compliance with the regulations and standards at a facility with 200 animals that includes non-human primates, large carnivores, bears, the type of species that are present at the Cricket Hollow Zoo."²⁴⁸ He did admit, on the page following, that he had not reviewed information regarding volunteers at the zoo, and could not opine on the efforts of any such volunteers.²⁴⁹

That Respondents have not maintained an adequate work force in order to comply with the AWA, the Regulations, and Standards is discussed more fully below. But Complaints have clearly met their burden as to Complaint ¶ 13(1). Evidence includes that Respondents have clearly failed to meet the requirements of the AWA, the Regulations, and Standards. An

²⁴⁶ AB at 24.

²⁴⁷ Tr. 724.

²⁴⁸ See, e.g., Tr. 660 (Mrs. Sellner) for total number of animals.

²⁴⁹ Tr. 725.

alternative finding to finding there are insufficient zoo employees, would be to find that Respondents had the capability of meeting these requirements because they had sufficient employees, but consciously chose not to apply them to meet the Standards, or mismanaged employees and, thus, failed to meet the Standards. But the record does not show that Respondents chose not to comply. It shows that they did not comply and it shows that they have no staff.

As to Respondents' contentions that APHIS has not met its burden of proof because it has not analyzed and presented for the record the number of hours the volunteers may or may not have worked, APHIS is not contending that, even though Respondents met other requirements, Respondents failed to employ a sufficient number of trained and qualified personnel. No matter how many volunteer hours are being put in, apparently on a summer basis only—and it is notable that Respondents did not proffer such evidence themselves—the record is clear that sufficient man-hours are not being expended to properly take care of the animals. The reason for that is not that the Sellners are lazy or have an intent to perform poorly, but because they are trying to tend the animals all by themselves for the most part.²⁵⁰ In other words, if requirements were otherwise being met, which they clearly are not, there might well be no contention that Respondents failed to employ sufficient personnel.

APHIS carried its burden as to Complaint ¶ 13(1).

²⁵⁰ See RX 25 at 9 (June 24, 2014 “IDALS Compliance Report” of Doug Anderson, IDALS Compliance Investigator) stating “I agree with the federal crew’s assessment that there is a lack of help that allows this facility to lapse into disrepair and uncleanliness” and referring to the “Herculean task of caring for the numerous animals.”

C. September 26, 2013

The Complaint alleges that Respondents failed to meet the minimum standards as follows:²⁵¹

14. On or about September 25, 2013, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (three lemurs, two bush babies, one vervet, four baboons, two macaques) adequately, as required. 9 C.F.R. § 3.75(c)(3).

b. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Ana), who was exhibiting abnormal behaviors. 9 C.F.R. § 3.81(c)(2).

c. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large amount of flies around and within buildings housing primates, and the enclosures housing two macaques, one vervet, three baboons, and two bush babies, (ii) evidence of spiders in buildings containing enclosures for two lemurs, four baboons, two macaques, one vervet, and two bush babies, and (iii) evidence of rodents, including a live mouse, in the building housing two macaques, one vervet, and three baboons. 9 C.F.R. § 3.84(d).

d. Respondents failed to provide a suitable method of drainage in four enclosures, housing: two potbellied pigs, one fallow deer, two Meishan pigs, and two bears. 9 C.F.R. § 3.127(c).

e. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) a portion of perimeter fencing adjacent to exotic felids, bears and wolves was

²⁵¹ Complaint ¶ 14.

sagging and detached from the fence post; (ii) there were gaps between the panels of the perimeter fence; and (iii) there was no perimeter fence around the camel enclosure that could function as a secondary containment system. 9 C.F.R. § 3.127(d).

f. Respondents failed to keep feeders for coatimundi, wallabies, coyotes, and pot-bellied pigs clean and sanitary, and the feeders for these animals all bore a thick discolored build-up. 9 C.F.R. § 3.129(b).

g. Respondents failed to provide potable water to two sheep, a capybara and a llama as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

h. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing two pot-bellied pigs, capybara, coatimundi, serval, kinkajou, fennec fox, chinchillas, Highland cattle, bears, Patagonian cavy, and African crested porcupine. 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).

i. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) an excessive amount of flies throughout the premises and in the animal enclosures, including the enclosures for ferrets, kinkajou, Patagonian cavy, bears, African crested porcupine, fennec fox, chinchillas, skunk, sloth, and armadillo, (ii) evidence of spider activity throughout the facility, and (iii) evidence of rodent activity, including rodent feces in the food storage area, and a dead rat within the coyote enclosure. 9 C.F.R. § 3.131(d).

j. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

In their Answer, Respondents deny these allegations with explanations.

Dr. Cole conducted a compliance inspection on this date and documented her observations in a contemporaneous inspection report, as well as in numerous photographs.²⁵² She described her occupation and her background, in particular with respect to nonhuman primates.²⁵³ Dr. Cole testified about this inspection.²⁵⁴

1. Cleaning for non-human primates (9 C.F.R. § 3.75(c)(3)).

Dr. Cole explained the noncompliance with the Standards for cleaning cited in the inspection report and described the contemporaneous photographs she took of the housing facilities for non-human primates.²⁵⁵

On brief, Respondents assert that APHIS did not meet its burden of proof and challenge APHIS's use of the term "build-up" to describe Respondents' facilities.²⁵⁶ Respondents argue:

Paragraph 14(a) claims a failure to clean the facility because there is a "build-up" of dust, dirt, debris and grime on the facilities. Dr. Cooper did not precisely define what was meant by the term "build-up" but seemed to indicate that it was a "thickening." (Tr. P. 427). This is a puzzling definition and certainly not one a layperson could understand. She testified that she expected some dirt or debris when she goes on an inspection – she knows a Zoo or other exhibitor is not going to be perfect. (Tr. P. 424). She testified that piles of straw on the floor and cobwebs could happen overnight. (Tr. P. 426). Mrs. Sellner disagreed with Dr. Cooper's assessment of the housekeeping. (See P. Sellner Affidavit CX-22, p. 11). Mrs. Sellner also testified at trial that the primates can make the kind of mess shown in (for example) (CX-40, p. 11) in 12 to 24 hours and she takes a leaf blower to the premises to clean it out daily. (Tr. P. 688). The photographs do not demonstrate a buildup

²⁵² CX 39; CX 40–49.

²⁵³ Tr. 237:25–243:25.

²⁵⁴ Tr. 250:24–297:11.

²⁵⁵ CX 39 at 1–2; CX 40; Tr. 251:9–258:13; 258:21–265:19.

²⁵⁶ AB at 25.

of dirt or debris unless that term is defined as any dirt or debris. (See CX-40 – CX-47. Douglas Anderson, IDALS inspector, in his report stated that none of the housekeeping issues were “critical or excessive.” (RXT-25, p. 5).²⁵⁷

Contrary to Respondents’ argument, the evidence—including Dr. Cole’s inspection report, photographs, and testimony—demonstrate a build-up of dust, dirt, and/or debris throughout the facility. I find that the term “build-up,” as used in this case, means a “large amount” or “accumulation”²⁵⁸ indicating a “lack of cleaning.”²⁵⁹ Although Mr. Anderson stated in his report that the housekeeping issues were not “critical or excessive,”²⁶⁰ the Regulations do not require such issues to be “critical or excessive,” only that the accumulation be excessive, in order to constitute an AWA violation.²⁶¹

The preponderance of the evidence supports the alleged Complaint 14(a) violation.

2. *Environmental enrichment for non-human primates (9 C.F.R. § 3.81).*

Dr. Cole explained the noncompliance with the Standards for environmental enrichment for non-human primates cited in the inspection report and described the contemporaneous photographs she took of a macaque named Ana.²⁶²

²⁵⁷ AB at 25.

²⁵⁸ See Tr. 426:22–429:10.

²⁵⁹ Tr. 251:23–24.

²⁶⁰ RX 25 at 5 (“As for the rest of the facility . . . there were a number of housekeeping issues: cobweb, sharp points (minor), fecal matter in some of the cages, etc. None of it critical or excessive.”).

²⁶¹ See 9 C.F.R. § 3.75(c)(3).

²⁶² CX 39 at 2; CX 41; Tr. 265:20–270:6.

Respondents' Answer, ¶ 14(b), denies the allegation, stating that "this animal came to the Zoo with abnormal behavior" and "that she exhibited this behavior every time she came into heat."²⁶³ On brief, Respondents contend:

Paragraph 14(b) is another situation involving an animal that came to the Sellners with behavioral issues and the Sellners were attempting to deal with this. (P. Sellner Tr. Pp. 690-691). She was receiving environmental enhancement and this was being documented by the licensee. (See Affidavit of Mrs. Sellner, CX-22 p. 12, see also RXT-3, pp. 1-2). Dr. Cooper admitted in her testimony that Mrs. Sellner made progress with Obi and Ana. (Tr. P. 421). Dr. Cole stated that Mrs. Sellner had an environmental enrichment plan for the primates. (Tr. P 268). As of January 30, 2014, Ana had a perfect coat. (CX-22, p. 12).²⁶⁴

The fact that Ana arrived at Respondents' zoo already exhibiting abnormal behavior does not obviate the need for an environmental enrichment program; the Standards require special attention for non-human primates who "show signs of being in psychological distress through behavior or appearance," regardless of when or where those signs appeared.²⁶⁵ Although Mrs. Sellner's affidavit states that Respondents "provided new additional enhancement toys" and "documented all of this in the enhancement plan,"²⁶⁶ that plan is dated November 20, 2013 and was not in effect at the time of the inspection.²⁶⁷

²⁶³ Complaint ¶ 14(a); Answer ¶ 14(a).

²⁶⁴ AB at 25-26.

²⁶⁵ 9 C.F.R. § 9 C.F.R. 3.81(c)(2).

²⁶⁶ CX 22 at 12.

²⁶⁷ RX 3 at 1-2 (November 20, 2013 Primate Enrichment Program); Tr. 268:7-8.

The preponderance of the evidence establishes that Respondents did not have an environmental enhancement plan in place for Ana, a non-human primate who showed signs of psychological distress, on the date in question. That Ana later had a “perfect coat” or Dr. Cooper “made progress” with Ana did not eliminate Respondents’ duty to “develop, document, and follow an appropriate plan for environment enhancement adequate to promote [Ana’s] psychological well-being.”²⁶⁸ I find that APHIS met its burden of proof as to Complaint ¶ 14(b).

3. Pest control for non-human primates (9 C.F.R. § 3.84(d)).

Dr. Cole explained the noncompliance with the Standards for pest control for non-human primates cited in the inspection report and described the contemporaneous photographs she took of the spiders and cobwebs in the lemur enclosure and the primate building, as well as the flies and rodents she observed.²⁶⁹

Respondents deny the allegation.²⁷⁰ On brief, Respondents argue:

Paragraph 14(c) is denied for the reasons previously set forth herein and for the further reason that the fact that there were some flies, a couple of spiders and a mouse does not mean that effective measures were not taken to eliminate them. Dr. Shaver testified that you can take all the right measures to eliminate flies and still have them. (Tr. p. 140). In addition, the inspectors have shown a remarkable lack of knowledge about the differences between a granddaddy long legs (which is an arachnid but does not spin a web) and spiders which do spin webs. Dr. Baker apparently knows there is a difference but doesn’t know what it is. (Tr. pp. 230-231).²⁷¹

²⁶⁸ 9 C.F.R. § 3.81.

²⁶⁹ CX 39 at 2–3; CX 42 and CX 49; Tr. 270:7–272:2; 270:3–275:24.

²⁷⁰ Answer ¶ 14(c).

²⁷¹ AB at 26.

The inspection report, supporting photographs, and testimony of Dr. Cole plainly demonstrate the presence of flies, spiders, and rodents throughout Respondents' facility, indicating that, whatever the program in place for pest control, it was not sufficiently effective to pass muster.²⁷² The photographs show the presence of webs and cobwebs regardless of the fact that they also show non-web-building arachnids. I find that APHIS has carried its burden as to Complaint ¶ 14(c).

4. Drainage (9 C.F.R. § 3.127(c)).

Dr. Cole explained the noncompliance with the Standards for drainage cited in the inspection report and described the contemporaneous photographs she took of the enclosures housing pigs, deer, and bears.²⁷³

Respondents deny the allegation.²⁷⁴ On brief, Respondents contend:

Paragraph 14(d) is denied for the reason that the pig had just recently dug in the area referred to, the area was dry that afternoon. (Affidavit of P. Sellner, CX-22, p. 14). The pig had dry areas to walk in and did not use the area in question. The water in the bear area and other pens was all gone by the afternoon. (CX-22, p. 14).²⁷⁵

It is unclear whether the reason for the water in the pig exhibit was that the pigs "had just recently dug in the area."²⁷⁶ The inspection photographs show what appear to be fairly large

²⁷² See 9 C.F.R. § 3.84(d).

²⁷³ CX 39 at 3; CX 43; Tr. 270:7–272:2; 270:3–275:24.

²⁷⁴ Answer ¶ 14(d).

²⁷⁵ AB at 26.

²⁷⁶ AB at 26.

puddles, and Dr. Cole testified that she witnessed “a very large pool of water that [had] likely been sitting . . . for a while.”²⁷⁷ Nevertheless, the pig exhibit was not the only area with problems; Dr. Cole described drainage issues in four separate enclosures that housed two potbellied pigs, one fallow deer, two Meishan pigs, and two bears.²⁷⁸ Dr. Cole explained that the presence of standing water—which was present in the all of these enclosures—signifies that the water was not rapidly eliminated.²⁷⁹ When asked whether recent rainfall would mitigate noncompliance, Dr. Cole stated: “No. They should still have an ability or a way to rapidly eliminate excess water from the animal enclosure.”²⁸⁰

Moreover, Mrs. Sellner herself stated that there was a drainage problem.²⁸¹ In the inspection report, Dr. Cole noted: “There is an area approximately four by four feet in one corner of the enclosure that is wet and muddy with sitting water. The licensee states that this was created by recent rains and that *drainage in this area is a problem.*”²⁸² At hearing, Dr. Cole testified:

So that means the water was not draining.... During the inspection, when I mentioned this to the licensee, to Mrs. Sellner, she stated that the muddy area was created by the recent rains but that drainage in that area is a problem. So, although it had just rained, she let me know that *drainage was often an issue* in that corner.²⁸³

²⁷⁷ CX 43; Tr. 278:10–11.

²⁷⁸ Complaint ¶ 14(d).

²⁷⁹ Tr. 281:16–21.

²⁸⁰ Tr. 281:24–25.

²⁸¹ See CX 39 at 3.

²⁸² CX 39 at 3 (emphasis added).

²⁸³ Tr. 281:5–11 (emphasis added).

I find that the preponderance of the evidence supports the alleged violation.²⁸⁴ APHIS met its burden of proof as to the Complaint ¶ 14(d) allegation.

5. Perimeter fence (9 C.F.R. § 3.127(d)).

Dr. Cole explained the noncompliance with the Standards for perimeter fencing cited in the inspection report and described the contemporaneous photographs she took of the Respondents' fencing.²⁸⁵

Respondents' Answer, ¶ 14(e), denies the allegation, stating that "the APHIS inspectors changed their official view about the barrier around the camel on this date. Prior to this date there was no problem with the barrier."²⁸⁶ On brief, Respondents argue:

Paragraph 14(e) is denied and the licensee further swore in her Affidavit that the area has been like this for 10 years at the time of the inspection. (CX-22, p. 14). There is now a newer 11 foot chain link fence here. The camel had been next to the perimeter fence for over a year and a half prior to this citation (when apparently it was not a violation). (CX-22, p. 15).²⁸⁷

In her affidavit, Mrs. Sellner similarly states:

When I moved the camel into this area originally, he was next to the perimeter fence. He had been in this enclosure for at least a year and a half. No inspector had ever mentioned that he needed to have a secondary fence and could not be against the perimeter fence. We added a new fence line so the camel does not have access to the perimeter fence so this has been corrected.²⁸⁸

²⁸⁴ 9 C.F.R. § 3.81.

²⁸⁵ CX 39 at 4; CX 44; Tr. 282:20–286:13.

²⁸⁶ Complaint ¶ 14(e); Answer ¶ 14(e).

²⁸⁷ AB at 26–27.

²⁸⁸ CX 22 at 15.

Mrs. Sellner effectively admits there was no secondary fence at the time of the inspection. The fact that inspectors did not cite Respondents for their fence in the past does not negate that the fence did not comply with Regulations during this inspection. Similarly, Respondents' subsequent correction to the fence does not obviate the violation.²⁸⁹

Dr. Cole's testimony and inspection photographs establish that: (1) the perimeter fence surrounding the big cats, bears, and wolves was in disrepair, detached, and sagging from the fence post and patched with gaps between panels; and (2) in the camel enclosure, the only fence that contained an animal in the facility was an eight-foot perimeter fence. Therefore, I find that APHIS has carried its burden as to Complaint ¶ 14(e).

6. Feeding (9 C.F.R. § 3.129(b)).

Dr. Cole explained the noncompliance with the Standards for feeding cited in the inspection report and described the contemporaneous photographs she took of Respondents' fencing.²⁹⁰

Respondents' Answer, ¶ 14(f), denies the allegation, stating that "the only feeder that had grime was the pot-bellied pigs who root around in the mud."²⁹¹ On brief, Respondents contend: "Paragraph 14(f) is denied and further state that the feeders did not have a thick buildup. There

²⁸⁹ See, e.g., *Pearson*, 68 Agric. Dec. 685, 726–27 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).

²⁹⁰ CX 39 at 4; CX 49; Tr. 286:14–289:21.

²⁹¹ Complaint ¶ 14(f); Answer ¶ 14(f).

was a little dirt on them. (CX-22, p. 15). As Dr. Shaver testified, there can be some ‘stuff’ in the bowls – just not buildup. (Tr. p. 71).”²⁹²

An affidavit submitted by Mrs. Sellner states: “The receptacles may not have been perfect and there may have been a little dirt on the receptacles. We are now trying to rotate the feeders to make sure they are cleaned more often.”²⁹³

Contrary to Respondents’ assertions, I find that the feeders did, in fact, have significant buildup; the photographs show that there was more than “a little dirt” on them. Dr. Cole testified that she observed “a thick brown to black buildup within the feeders for a variety of the animals: the coatimundi, the wallaby, the coyotes, and pot-belly pigs.”²⁹⁴ The bucket feeder for the wallaby had some brownish-black material at the bottom,²⁹⁵ and there was similar build-up on the coyote feeder.²⁹⁶ The feeder for the coati mundi appeared to have some brownish material on it as well.²⁹⁷

The preponderance of the evidence supports the Complaint ¶ 14(f) violation alleged.

7. *Watering (9 C.F.R. § 3.130).*

Dr. Cole explained the noncompliance with the Standards for watering cited in the

²⁹² AB at 27.

²⁹³ CX 22 at 15.

²⁹⁴ Tr. 286:17–19.

²⁹⁵ CX 45 at 1–2; Tr. 286:24–287:2.

²⁹⁶ CX 45 at 3–4; Tr. 287:9–10.

²⁹⁷ CX 45 at 6–7; Tr. 287:14–18.

inspection report and described the contemporaneous photographs she took of the water receptacles in enclosures housing the capybara, one llama and two sheep.²⁹⁸

Respondents' Answer, ¶ 14(g), denies the allegation and further states that an "automatic waterer was installed."²⁹⁹ On brief, Respondents contend: "With regard to paragraph 14(g) the same response has been given to the lack of potable water is the response of the Respondents. The animals were all given fresh water daily. There is no proof the water was not potable."³⁰⁰

The photographs in the inspection report show significant build-up of what appears to be green algae in the capybara water receptacle and yellow algae in the water receptacle located in the pen housing one llama and two sheep.³⁰¹ This casts significant doubt on whether the animals could have been provided fresh water daily, as Respondents suggest. If fresh water was indeed provided daily, the presence of algae in receptacles should have alerted Respondents that the water needed to be changed more frequently.³⁰²

The preponderance of the evidence supports the alleged Complaint ¶ 14(g) violation.

8. Waste disposal (9 C.F.R. § 3.125(d)).

Although ¶14(h) of the Complaint cites a violation of 9 C.F.R. § 3.125(d), APHIS did not— either in its briefs or at hearing—establish a connection between Respondents'

²⁹⁸ CX 39 at 5; CX 46; Tr. 289:22–290:24.

²⁹⁹ Complaint ¶ 14(f); Answer ¶ 14(f).

³⁰⁰ AB at 27.

³⁰¹ CX 46 at 1–4; Tr. 288:18–289:21.

³⁰² See 9 C.F.R. § 3.130 ("If potable water is not accessible to the animal at all times, it must be provided as often as necessary for the health and comfort of the animal. . . All water receptacles shall be kept clean and sanitary.").

actions/inactions and that regulation. Therefore, I find that APHIS has not carried its burden as to the alleged violation of 9 C.F.R. § 3.125(d) in Complaint ¶14(h). The other allegations of Complaint ¶ 14(h) are treated in the next numbered subsection of this Decision.

9. *Cleaning (9 C.F.R. § 3.131(a)).*

Dr. Cole explained the noncompliance with the Standards for cleaning cited in the inspection report and described the contemporaneous photographs she took of multiple enclosures.³⁰³

Respondents deny the allegation.³⁰⁴ On brief, they contend:

With regard to paragraph 14(h) the Respondents deny the allegations that the enclosures and premises weren't clean and further state that the enclosures are spot cleaned daily and a skid loader is used to clean the cattle pens when needed. (*See Sellner Affidavit CX-22, p. 16*). The USDA does not provide any guidance as to what it means by the term "clean." There can be some waste in the pens. (*Dr. Shaver Tr. p. 73*). *See also* testimony by Dr. Cole that the standard is not that there can't be any dust or dirt in an animal area. (*Tr. p. 255*). There is no indication that it is excessive.³⁰⁵

Further, Mrs. Sellner states in an affidavit:

I don't really remember these cages being dirty but we would have spot cleaned them daily or as needed.... I cleaned all of the cobwebs and all the cages in these areas. The rain had blown in some of the enclosures so there was some dust but none of the cages were excessively dirty.³⁰⁶

³⁰³ CX 39 at 5; CX 47; Tr. 290:25-294:18.

³⁰⁴ Answer ¶ 14(h).

³⁰⁵ AB at 27.

³⁰⁶ CX 22 at 16.

Respondents' argument that USDA provides no guidance "as to what it means by the term 'clean'" is without merit. Section 3.131(a) of the Regulations and Standards—which bears the subheading "*Cleaning of enclosures*"—provides: "Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors."³⁰⁷

Here, the inspection photographs demonstrate that there was an abundance of animal waste in the enclosures for the porcupine, coatmundi, chinchilla, bear, and serval. APHIS has shown that there was significantly more than "some waste"³⁰⁸ in the pens, which indicates that Respondents had not been cleaning the enclosures as often as necessary.³⁰⁹ This evidence supports the finding of the Complaint ¶ 14(h) violation as alleged as to cleaning.

10. Housekeeping (9 C.F.R. § 3.131(c)).

Dr. Cole explained the noncompliance with the Standards for housekeeping cited in the inspection report and described the contemporaneous photographs she took of multiple enclosures.³¹⁰

Respondents' Answer, ¶ 14(h) denies the allegation. On brief, Respondents, as noted previously, contend:

With regard to paragraph 14(h) the Respondents deny the allegations that the enclosures and premises weren't clean and further state that the enclosures are spot cleaned daily and a skid loader is used to clean the cattle pens when needed. (*See Sellner*

³⁰⁷ 9 C.F.R. § 3.131(a).

³⁰⁸ AB at 27.

³⁰⁹ *See* Tr. 294:8–18.

³¹⁰ CX 39 at 6; CX 48; Tr. 294:19–297:11.

Affidavit CX-22, p. 16). The USDA does not provide any guidance as to what it means by the term “clean.” There can be some waste in the pens. (Dr. Shaver Tr. p. 73). *See also* testimony by Dr. Cole that the standard is not that there can’t be any dust or dirt in an animal area. (Tr. p. 255). There is no indication that it is excessive.³¹¹

At the hearing, Dr. Cole testified that she observed “a lot” of dust, dirt, and debris throughout Respondents’ facilities, including some that was “immediately adjacent” to primary enclosures.³¹² Although Dr. Cole stated that it is not a requirement that a facility “cannot have *any* dust or any dirt in an animal area,”³¹³ the photographs of Respondents’ facility show a significant amount of it.

Mrs. Sellner stated in her affidavit: “I took all the shelves out and power washed the entire area. I also covered all of the shelves on the walls with plastic curtains which helps keep them clean.”³¹⁴ Mrs. Sellner does not elaborate on when or how often she took such cleaning measures; nonetheless, the record makes clear that Respondents’ premises were not clean at the time of the inspection, in violation of the Standards and Regulations.

I find that APHIS met its burden of proof as to the housekeeping violations alleged in Complaint ¶ 14(h).

³¹¹ AB at 27.

³¹² Tr. 296:1–24.

³¹³ Tr. 255:16–21 (emphasis added).

³¹⁴ CX 22 at 17.

11. Pest control (9 C.F.R. § 3.131(d)).

Dr. Cole cited noncompliance with the Standards for pest control in the inspection report and took contemporaneous photographs of multiple enclosures.³¹⁵

Respondents deny the allegation but set forth no evidence of a pest-control program.³¹⁶

On brief, Respondents contend:

With regard to paragraph 14(i) the Respondents refer to their efforts to control flies, spiders and other insects. The problem with spiders is puzzling. One inspector admitted under cross examination that a cobweb in a corner might not be a husbandry issue. (Dr. Cooper Tr. p. 431). Furthermore, some of the inspectors for USDA knew there was a difference between a granddaddy longlegs and a spider and some didn't. (Tr. p. 230). There was no testimony from anyone that a spider posed a danger to any animal or was a vector for disease.³¹⁷

While Dr. Cooper did, in fact, testify that "if it's just simply just a cobweb up in the corner it might not" affect an animal's well-being or husbandry, he also went on to state that "if there are other indications of lack of cleaning and poor husbandry then that's what that cobweb indicates to me..."³¹⁸ In this case, APHIS has presented far more evidence than "simply just a cobweb up in the corner."³¹⁹

In the inspection report, Dr. Cole noted the presence of flies, cobwebs, and rodent droppings throughout Respondents' zoo:

³¹⁵ CX 39 at 6; CX 49.

³¹⁶ See Answer ¶ 14(i).

³¹⁷ AB at 27-28.

³¹⁸ Tr. 431:14-18.

³¹⁹ Tr. 431:14-15.

A large number of flies are present throughout the entire facility. There are flies flying around within the “reptile house”, outside facilities and “education center”. Flies are present within some of the animal enclosures and can be seen landing on the animals, food and animal waste. Flies are present within both indoor and outdoor enclosures. The animals present in these areas are the ferrets, kinkajou (“reptile house” and “education center”), Patagonian cavy, bears, African crested porcupine, fennec fox, chinchillas, skunk, sloth, and armadillo.

Cobwebs with spiders are present throughout the entire facility. The main areas where the spiders are located are within the “reptile house”, outside facilities and within the storage area in the “education center”. Some of the animal enclosures have cobwebs within them (serval, coati mundi).

There is evidence of rodents throughout the facility. There was a dead rat within one of the coyote enclosures. The licensee removed the rodent during the inspection. Rodent feces is present in several areas including the feed storage room within the “education center”.

The presence of pests can lead to health hazards for the animals. A safe and effective program for the control of pests, including flies, spiders and rodents, must be established and maintained.³²⁰

Moreover, photographs taken during the inspection support Dr. Cole’s narrative. They show flies within the kinkajou enclosure in the “reptile house”; a dead rodent within the coyote enclosure;³²¹ rodent droppings and dust covering the husbandry supplies in the storage area

³²⁰ CX 39 at 6 (emphasis added).

³²¹ Dr. Cole testified that the dead rodent was “likely a rat.” Tr. 275:24. Contrary to Respondents’ contentions the presence of a dead rat does not indicate an effective rodent control program when there are rodent droppings present.

within the “education center”; and multiple cobwebs within the serval enclosure.³²² Dr. Cole described these photographs at the hearing.³²³

Given the large presence of flies, cobwebs, and rodent droppings documented throughout Respondents’ facilities, I find that Respondents did not have a safe and effective program for the control of insects and pests. APHIS has carried its burden as to Complaint ¶ 14(i).

12. Employees (9 C.F.R. §§ 3.85, 3.132).

There were no citations for noncompliance with the Standards regarding employees in the inspection report dated September 25, 2013;³²⁴ however, the Complaint alleges that “Respondents failed to employ a sufficient number of trained and qualified personnel” in violation of the AWA on that date.³²⁵ On brief, APHIS argues that “[g]iven the numerous deficiencies with respect to animal husbandry, respondents failed to employ sufficient trained employees.”³²⁶

Respondents deny the allegation contending: “Paragraph 14(j) is denied for the reasons set forth above including the number of volunteers available and working and the fact that the USDA never incorporated any findings based upon the volunteer hours worked at the facility.”³²⁷

³²² CX 49.

³²³ Tr. 273:6–275:6; 275:19–24.

³²⁴ See CX 39.

³²⁵ Complaint ¶ 14(j).

³²⁶ RB at 45.

³²⁷ AB at 28.

In her affidavit, Mrs. Sellner states that she has “a group of volunteers (approximately 6 to 8) that come in and help with the care of the animals during the summer when [the zoo] [is] open.”³²⁸ Mrs. Sellner does not describe the staffing during the other seasons or when the zoo is closed to the public.³²⁹

At the hearing, there was no testimony regarding the staffing of Respondents’ facility on the specific date in question. However, several witnesses testified about the zoo’s staffing generally from 2012 through 2015.

Mr. Sellner testified that from 2012 through 2015, Cricket Hollow had no employees but “a lot of volunteers” who provided “help all the time.”³³⁰ Mr. Sellner explained that the only “steady personnel that were there regularly” were Mrs. Sellner and himself³³¹ and that they supervised the volunteers.³³² Mr. Sellner stated that he and his wife had more than 150 animals during the period 2012 through 2015.³³³

Similarly, Dr. Cole testified about her assessment of staffing at Respondents’ facilities on May 21, 2014:

Due to the high number of repeats and the serious noncompliances that we identified, the directs and the repeats, it was evident -- and the number of noncompliances in general, it was evident that there were not enough employees at the facility to carry out the

³²⁸ CX 22 at 10.

³²⁹ See CX 22 at 10–11.

³³⁰ Tr. 638:9–15.

³³¹ Tr. 638:16–21.

³³² Tr. 638:18–639:1.

³³³ Tr. 639:4–12.

husbandry duties necessary to comply with the regulations and standards.³³⁴

While Dr. Cole does not specifically address the staffing situation on September 25, 2013, I find that her references to “repeat” noncompliance suggest an ongoing employee issue that would most likely have affected the facilities at that time.

Further, Dr. Robert Gibbens testified about that he would expect a facility the size of Respondents’ zoo to have “regular employees”:

It’s not specifically detailed in the regulations how many employees they have to have, but they have to have a sufficient number of employees that are trained and experienced to carry out and ensure that the husbandry practice, the regulations and standards are complied with.³³⁵

Additionally, Dr. Gibbens testified:

I do not believe that two people can maintain compliance with the regulations and standards at a facility with 200 animals that includes non-human primates, large carnivores, bears, the type of species that are present at the Cricket Hollow Zoo.³³⁶

When asked whether his opinion would change if there are volunteers who assist, Dr. Gibbens explained that regularly scheduled volunteers who are not paid but are trained “would be viewed as employees.”³³⁷ However, he could not opine on whether the volunteers in this case were sufficient because he had not “heard how many volunteers there are or what they do.”³³⁸

³³⁴ Tr. 330:24–331:4.

³³⁵ Tr. 721:12–17.

³³⁶ Tr. 724:12–16.

³³⁷ Tr. 724:19–23.

³³⁸ Tr. 724:24–725:5.

Given the numerous deficiencies with respect to animal husbandry in this case and the fact that so few employees and volunteers were responsible for more 100 animals, I find that Respondents failed to employ sufficient trained employees as alleged in Complaint ¶ 14(j).

D. December 16, 2013

The Complaint alleges Respondents failed to meet the minimum standards as follows:³³⁹

15. On or about December 16, 2013, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

- a. The ceiling of the primate building was in disrepair, and specifically, there was exposed insulation, holes in the ceiling, and a panel that was detached from the ceiling. 9 C.F.R. § 3.75(a).
- b. Respondents failed to provide potable water to three chinchillas as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.
- c. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, 9 C.F.R. § 3.125(a), and specifically, (i) the enclosure housing cattle (one Watusi and one zebu) had broken fencing, (ii) the chain-link fencing of the enclosures housing approximately forty sheep, one fallow deer, two tigers and two cougars were in disrepair, with curled chain link at the bottom with sharp points that protruded into the enclosures and were accessible to the animals, and (iii) the windbreak at the back of the shelter housing Santa Cruz sheep was in disrepair.

Dr. Cole conducted a compliance inspection on this date and documented her observations in a contemporaneous inspection report, as well as in numerous photographs.³⁴⁰

³³⁹ Complaint ¶ 15.

³⁴⁰ CX 53; CX 54–57; Tr. 311:13–315:25.

1. Housing for non-human primates (9 C.F.R. § 3.75(a)).

Dr. Cole explained the noncompliance with the Standards for housing facilities for nonhuman primates cited in the inspection report and described the contemporaneous photographs she took.³⁴¹ This evidence supports the finding of the violation as alleged.

Respondents' Answer, ¶ 15(a), denies "that the ceiling was in disrepair in an 'animal area'" but states that "it did get repaired with new steel."³⁴² As previously emphasized herein, subsequent repairs do not obviate violations.

On brief, Respondents merely contend: "Paragraph 15(a) is denied and it is further stated that the inspector was talking about textured ceiling tile. If there were any holes, they were filled with expandable foam."³⁴³ Respondents' reference to "textured ceiling tile" is unfounded, and Respondents have failed to cite any exhibits or testimony to challenge the alleged violation. To the contrary, the testimony of Dr. Cole and photographic evidence provided by APHIS establish that the ceiling in Respondents' primate building was in obvious disrepair, with multiple holes of various sizes and a sagging panel exposing insulation. Accordingly, I find that APHIS carried its burden as to Complaint ¶ 15(a).

2. Watering (9 C.F.R. § 3.130).

Dr. Cole explained the noncompliance with the Standards for watering cited in the

³⁴¹ CX 53 at 2; CX 55; Tr. 311:13–312:14.

³⁴² Complaint ¶ 15(a); Answer ¶ 15(a).

³⁴³ AB at 28.

inspection report and described the contemporaneous photograph she took of the water receptacle in the enclosure housing the chinchillas.³⁴⁴ The photograph shows three chinchillas drinking from the same water bottle.³⁴⁵ Dr. Cole testified at hearing: “The water bottle was empty for the chinchillas, so I asked if the licensee could water the animals, and she did, and when she did, the three chinchillas in the enclosure drank continuously for over a minute.”³⁴⁶

On brief, Respondents state:

With regard to paragraph 15(b), it is admitted that the chinchillas did drink when offered water. (See Douglas Anderson report RXT-25, p. 6). The bottle after it was filled was still two-third full. About an hour later the chinchillas seemed content, body condition fine and demeanor fine. (RXT-25, p. 6). The chinchillas were watered at 4:30 on the previous day. They had played with the water bottle and the water dripped down into a tray below the cage. The chinchillas were playing with the water bottle as well as drinking on the day of the inspection. There now is a crock under the bottle so the water is still accessible to them when they do this. (Affidavit of Pamela Sellner, CX-22, p. 20).³⁴⁷

It is worth noting that the “Douglas Anderson report” to which Respondents cite states that “the chinchillas drank for an excessively long time, indicating dehydration.”³⁴⁸ The fact that the chinchillas were dehydrated suggests that potable water was not accessible “at all times” or “as often as necessary.”³⁴⁹

³⁴⁴ CX 53 at 2–3; CX 57; Tr. 315:11–22; *see also* 592:10–593:16; 594:2–14 (Anderson).

³⁴⁵ CX 57.

³⁴⁶ Tr. 315:15–18.

³⁴⁷ AB at 28.

³⁴⁸ RX 25 at 6.

³⁴⁹ 9 C.F.R. § 3.130.

Further, in contrast to Dr. Cole's observations, Mrs. Sellner states in her affidavit that the chinchillas were "just playing with the bottle"³⁵⁰ and were not thirsty:

The 3 chinchillas have a water bottle which they play with. They had played with the water bottle and all of the water had dripped down into a tray under the cage. I filled up the water bottle at the request of the inspector and they started to play with it. The inspector thought the chinchillas were thirsty but they were just playing with the bottle. Now I have placed a crock under the water bottle so when they play with it, the water drips down in the crock and they still have access to the water.³⁵¹

However, the fact that the chinchillas drank when offered water—which Respondents admit³⁵²—suggests the animals were thirsty and were not "just playing."

Given that the chinchillas had no water at the time of the inspection and showed signs of thirst and dehydration, I find that preponderance of the evidence supports the Complaint ¶ 15 (b) alleged violation.

3. Structural Strength (9 C.F.R. § 3.125(a)).

Dr. Cole explained the noncompliance with the Standards for structural strength and construction and maintenance of animal facilities cited in the inspection report and described the contemporaneous photographs she took of the enclosures housing fallow deer, Santa Cruz sheep, watusi, zebu and tigers.³⁵³ Dr. Cole found that "[t]here was a broken fence within the watusi and zebu enclosure, and there were several other enclosures where the

³⁵⁰ CX 22 at 20.

³⁵¹ CX 22 at 20.

³⁵² AB at 28 ("With regard to paragraph 15(b), it is admitted that the chinchillas did drink when offered water.").

³⁵³ CX 53 at 2; CX 56; Tr. 312:15–315:10.

fence was curled up at the bottom and the bottom edge had sharp points that extended into the enclosures, and there was a wind break that had been located on the back of the Santa Cruz shelter that was made of wood and had fallen off the shelter.”³⁵⁴

Respondents’ Answer, ¶ 15(c), denies the allegation “except admit[s] that the windbreak (plywood) partially came down.”³⁵⁵ On brief, Respondents contend:

With regard to paragraph 15(c), it is admitted that the cattle had broken one of the rails of the metal cattle gate but this posed no danger to the animals. The curled chain link had curled only a little at the bottom and it is hard to see how this posed any danger to the animals. (*See* P. Sellner Affidavit, CX-22, pp. 19-20, *see also* CX-56, pp. 1-5 and 7-12) which shows very little curling at the bottom edge of the fence. In any event, this item has been rectified. (CX-22, p. 20). The Respondents do admit that the plywood had been knocked down but it posed no danger and has been repaired. (CX-22, p. 20).³⁵⁶

The inspection report, supporting photographs, and testimony of Dr. Cole demonstrate that the fences and shelter were not in good repair and posed an injury hazard to the animals.

With regard to the watusi and zebu enclosure, the evidence supports—and Respondents admit—that a metal fence rail was broken and protruding into the enclosure.³⁵⁷ This indicates that the enclosure was structurally unsound, and the fact that Respondents made subsequent

³⁵⁴ Tr. 312:18–24.

³⁵⁵ Complaint ¶ 15(c); Answer ¶ 15(c).

³⁵⁶ AB at 28–29.

³⁵⁷ CX 53 at 2; CX 56 at 9–10; Tr. 312:18, 314:17–22.

repairs to the fence³⁵⁸ does not eliminate the fact that the violation occurred.³⁵⁹ Moreover, Respondents' claim that the broken fence "posed no danger to the animals"³⁶⁰ is not supported; the metal rail was described as bent in half, with one of its ends encroaching toward the inside of the enclosure near what appears to be the animals' eye or body level.

Photographs of the fallow deer exhibit,³⁶¹ Santa Cruz sheep exhibit,³⁶² and West sheep exhibit³⁶³ each depict a chain-link fence, curled up at the bottom with sharp points extending into the enclosures.³⁶⁴ Contrary to Respondents' contentions,³⁶⁵ I find that these fences posed a danger to the animals; an animal could be impaled or have its coat snagged by one of the sharp edges, or it could get a leg caught in the gap between the fence and ground. The fact that multiple fences had started to bend inward suggests they were structurally unsound and therefore inadequate to contain the animals.

Photographs of the tiger exhibit are not as clear.³⁶⁶ It is not obvious whether the bottom of the fence is actually curled upward, which would expose sharp points, or if the bottom is just

³⁵⁸ CX 22 at 19.

³⁵⁹ See, e.g., *Pearson*, 68 Agric. Dec. 685, 726–27 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).

³⁶⁰ AB at 28.

³⁶¹ CX 56 at 2.

³⁶² CX 56 at 3–5.

³⁶³ CX 56 at 8.

³⁶⁴ CX 53 at 2; CX 56 at 1–8; Tr. 312:19–21.

³⁶⁵ AB at 28.

³⁶⁶ CX 56 at 11–12.

covered by snow. However, Respondents admit that there was some curling at the bottom edge of the fence.³⁶⁷ That the issue “has been rectified” is does not obviate the violation.³⁶⁸

At hearing, Dr. Cole described the enclosure as follows:

Again, there’s a fence panel extending back from the front of the enclosure, and down at the bottom sort on the right side of the page, down at the bottom the fence is kind of curled up and there are sharp points that extend into the enclosure.³⁶⁹

In this instance, I give substantial credibility to the APHIS inspectors and find that part of the chain-link fence surrounding the tiger exhibit was curled up at the bottom, exposing sharp points.

Further, another photograph shows a wind break that had fallen off the Santa Cruz sheep shelter.³⁷⁰ Dr. Cole testified that although there is “no specific requirement” for a shelter with regard to wind breaks, it must protect the animals from the elements.³⁷¹ Dr. Cole’s testimony indicates this damaged wind break could not have protected animals from the elements: “It’s laying down on the ground just in front of the shelter. There are two wooden panels, and it looks like they’re covered with snow, and then a post extending forward from those panels.”³⁷²

³⁶⁷ AB at 28; CX 22 at 20.

³⁶⁸ See, e.g., *Pearson*, 68 Agric. Dec. 685, 726–27 (U.S.D.A. 2009), *aff’d*, 411 F. App’x 866 (6th Cir. 2011).

³⁶⁹ Tr. 315:6–10.

³⁷⁰ CX 56 at 6; Tr. 312:22–24.

³⁷¹ Tr. 313:23–314:1.

³⁷² Tr. 314:3–6.

Respondents admit “the plywood had been knocked down” but claim “it posed no danger and has been repaired.”³⁷³ While the wind break (“plywood”) might not have presented an immediate danger, it could not protect the sheep from the elements in its broken state. Plainly, the Santa Cruz sheep enclosure was not maintained in good repair.

Based on the foregoing, I find that APHIS has carried its burden as to Complaint ¶ 15(c).

E. May 21, 2014

The Complaint alleges that Respondents failed to meet the minimum standards as follows:³⁷⁴

16. On or about May 21, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:
 - a. Respondents failed to clean enclosures housing three wolf hybrids as required. 9 C.F.R. § 3.1(c)(3).
 - b. Respondents failed to store supplies of bedding for guinea pigs in facilities that protect them from deterioration, spoilage, or infestation or contamination by vermin. 9 C.F.R. § 3.25(c).
 - c. Respondents failed to provide potable water to four guinea pigs as required. 9 C.F.R. § 3.30.
 - d. Respondents failed to transfer four guinea pigs to a clean primary enclosure when the bedding in their enclosure became damp and soiled to the extent that it was moist and clumping, and uncomfortable to the four guinea pigs. 9 C.F.R. § 3.31(a)(2).
 - e. Respondents failed to clean the premises adjacent to the enclosure housing four guinea pigs, as required. 9 C.F.R. § 3.31 (b).

³⁷³ AB at 29.

³⁷⁴ Complaint ¶ 16.

- f. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (two lemurs, a vervet, four baboons, and two macaques) adequately, as required. 9 C.F.R. § 3.75(c)(3).
- g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, the refrigerator in a building housing nonhuman primates was non-functioning, and the refrigerator in another building housing nonhuman primates was in need of cleaning. 9 C.F.R. § 3.75(e).³⁷⁵
- h. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.
- i. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, seven enclosures (housing lions, bear, serval, camel, Meishan pigs, fallow deer, and sloth) were all in disrepair. 9 C.F.R. § 3.125(a).
- j. Respondents failed to remove animal waste, food waste, and old bedding as required, and specifically, there was a barrel directly behind the lion enclosure, which barrel contained animal and food waste, and/or old bedding, and there were other piles of such waste adjacent to other animal enclosures. 9 C.F.R. § 3.125(d).³⁷⁶
- k. Respondents failed to provide any shelter from the elements for two Patagonian caviés. 9 C.F.R. § 3.127(b).
- l. Respondents failed to provide a suitable method of drainage in the four-horned sheep, fallow deer, and bear enclosures. 9 C.F.R. § 3.127(c).

³⁷⁵ I find that Respondents did not incur any violation for having moldy fruit that would not be fed to animals. I also find that the refrigerator was nonfunctioning as a refrigerator was not proved a violation. *See* Dr. Cole, Tr. 330.

³⁷⁶ As discussed herein, I find no violation was proved from the presence of a "burn barrel" in some alleged proximity to the lion enclosure.

- m. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) there was a large gap between the perimeter fence and a gate, adjacent to the large felid enclosures; and (ii) the perimeter fence adjacent to the coatimundi enclosure was too close to prevent direct contact with the animals. 9 C.F.R. § 3.127(d).
- n. Respondents failed to provide potable water to degus, coyotes, porcupines, and gerbils as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.
- o. Respondents failed to remove excreta and/or food debris from the primary enclosures housing thirty-six (36) animals, as required. 9 C.F.R. § 3.131(a).
- p. Respondents failed to clean enclosures housing two kinkajous, two coatimundi, a capybara, two coyotes, two porcupines, two foxes, a serval, three chinchillas, and two ferrets, as required. 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).
- q. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing two ferrets, two kinkajous, tigers, and bears; and by a build-up of bird feces on the shelters for bobcats and skunks. C.F.R. § 3.131(d).

Dr. Cole conducted a compliance inspection on this date, and documented her observations in a contemporaneous inspection report, as well as in numerous photographs.³⁷⁷ Dr. Cole testified about this inspection.³⁷⁸

³⁷⁷ CX 69; 69a.

³⁷⁸ Tr. 316:23–351:16.

1. *Cleaning for dogs (9 C.F.R. § 3.1(c)(3)).*³⁷⁹

Dr. Cole explained the alleged noncompliance with the Standards for dogs (wolf-hybrids) cited in the inspection report, and described her contemporaneous photographs.³⁸⁰ Respondents Answer stated that the inspectors came to the zoo prior to daily chores being done in this area and clean-up would have been accomplished at that time. There was testimony that the inspections with the USDA would usually take the entire day.³⁸¹ On brief,³⁸² Respondents contend: “The standard testified to by the USDA inspectors at trial was that the animals had to have areas to walk in without stepping in the feces. CX-69A, pp. 8 and 9 clearly shows there are such areas in the wolf enclosure.”

CX 69 at 2 discusses a build-up of “old” feces and food, indicating that any daily chores were not addressing the problem. Contrary to Respondents’ contention, it is not clear to me that the photographs in CX 69A at 8 and 9 show that the animals have reasonable areas to walk in without stepping on feces and Respondents have not provided a citation that that would be the test of a violation. Those photographs do show that the floor of the cage depicted is dirty.

Thus, APHIS’s evidence supports the finding of the Complaint ¶ 16(a) violation as alleged.

2. *Standards for guinea pigs (9 C.F.R. §§ 3.25(c), 3.30, 3.31(a)(2), 3.31(b)).*³⁸³

³⁷⁹ Complaint ¶ 16(a).

³⁸⁰ CX 69 at 2; CX 69a at 8–10; Tr. 321:9–22.

³⁸¹ Tr. 689 (Mrs. Sellner).

³⁸² AB at 29.

³⁸³ Complaint ¶ 16(b)–(e).

Dr. Cole explained the alleged noncompliances with the Standards for guinea pigs cited in the inspection report, and described the contemporaneous photographs.³⁸⁴ On brief,³⁸⁵ Respondents contend as to Complaint ¶ 16(b): “the complaint appears to be that bedding (hay and straw) was not kept in a sealed container. There is no indication that this had any ill effect on the animals or even could have a bad consequence other than pure speculation. See CX-69A, p. 11 for a view of the plastic barrel with the cover over the bedding.”

Contrary to Respondents’ contentions, APHIS’s allegation was not simply that the bedding container did not have a tight fitting lid. CX 69 at 2 states that there were flies, a moth, and bird feces on the inside surface of the container, and that the storage system did not ensure that the bedding supply was protected from vermin and other contamination.

On brief,³⁸⁶ Respondents contend as to Complaint ¶ 16(c):

[T]he USDA inspector does not state that all four guinea pigs were needing water. According to the inspection report only one of the animals drank vigorously for over one minute. (CX-69, p. 2 3.30 direct NCI. Dr. Cole Tr. p. 322). The inspection report also states that the animals had been water the previous day. (CX-69, p. 2). The bedding in the enclosure was damp and moist indicating that the guinea pigs may have emptied the water from the bottle into their enclosure recently. (See CX-69, p. 3). Only one animal met even the definition given by the APHIS inspectors of a dehydrated animal.

On brief,³⁸⁷ Respondents contend as to Complaint ¶ 16(d):

³⁸⁴ CX 69 at 2–3; CX 69a at 11–16; Tr. 321:23–324:7.

³⁸⁵ AB at 29.

³⁸⁶ AB at 29–30.

³⁸⁷ AB at 30.

With regard to paragraph 16(d), it is denied because the guinea pigs obviously had recently dumped their water. This was not a long term situation and there is no evidence it was. This would seem to be supported by the fact that only one guinea pig was really thirsty. (CX-69, p. 2).

The APHIS evidence shows that the guinea pigs were without water and at least one of them exhibited sign of dehydration, indicating that it had been without water for some time.³⁸⁸

This supports the finding of the violation as alleged.

With regard to paragraph 16(e), Respondents contend on brief:³⁸⁹

[T]he pile of dirt (shown in one tidy pile) outside the guinea pigs cage had been swept up the night before by Mrs. Sellner (this was almost opening time at the Zoo—usually Memorial Day) and was going to be swept up that morning (until the process was interrupted by the inspection). (See CX-69A, p. 16. P. Sellner Tr. p. 691).

CX 69 at 3 describes a large amount of dust, dirt, and/or debris on the floor and walkaway, not limited to one pile. The enclosure needed to be kept clean at all times, not only when the zoo would be open. The APHIS's evidence supports the finding of the violations as alleged in Complaint ¶ 16(c), (d), and (e).

³⁸⁸ See also RX 25 at 8 (Report of Doug Anderson, IDALS Compliance Inspector, who attended this inspection).

³⁸⁹ AB at 30.

*3. Standards for non-human primates (9 C.F.R. §§ 3.75(c)(3), 3.75(e)).*³⁹⁰

Dr. Cole explained the alleged instances of noncompliance with the Standards for nonhuman primates cited in the inspection report, and described the contemporaneous photographs.³⁹¹

On brief,³⁹² Respondents state:

The Respondents deny paragraph 16(f) because there is no standard set forth for adequate cleaning of these facilities, and there is no disclosure of what steps should have been taken or how often to comply with whatever standard is being applied. One of the areas was in the primate enclosure and there is no indication that the “black grime” on the wall in the red ruffed lemur area was not a scent marking which shouldn't be eliminated according to the testimony of Dr. Cooper. (Tr. p. 442).

Contrary to Respondents' contentions, CX 69 at 3-4 describes large amounts of materials that needed to be cleaned. Among other things, it provides guidance and specifically sets out that “[h]ard surfaces with which non-human primates come into contact must be spot-cleaned daily and indoor primary surfaces must be sanitized at least once every two weeks or more if necessary....” It notes that surfaces scent-marked must be sanitized or replaced at regular intervals as determined by the attending veterinarian. The referenced testimony by Dr. Cooper was that scent markings should not be removed all at one time as that could distress the animal. But there is no evidence that the attending veterinarian had weighed in on removal of any scent

³⁹⁰ Complaint ¶ 16(f)–(g).

³⁹¹ CX 69 at 3–5; CX 69a at 17–30; Tr. 324:8–331:9.

³⁹² AB at 30.

markings and no evidence that Respondents were going to clean scent markings on any given schedule to avoid distress to the animal.

APHIS's evidence supports the finding of the violations as alleged in Complaint ¶16(f).

As to Complaint ¶16(g), Respondents contend on brief.³⁹³

With regard to paragraph 16(g), the strawberries mentioned in this alleged violation were going to be discarded. (See testimony of Pamela Sellner Tr. p. 678). The strawberries said to be moldy were still in their original cellophane wrappers and were not contaminating anything. (CX-69A, p. 30). The USDA has not met its burden with regard to this allegation.

I agree that APHIS did not meet its burden of proof with respect to Complaint ¶16(g) as to the moldy fruit.

4. Structural Strength (9 C.F.R. § 3.125(a)).³⁹⁴

Dr. Cole explained the alleged noncompliance with the Standards for structural strength and construction and maintenance of animal facilities cited in the inspection report, and described the contemporaneous photographs she took.³⁹⁵

On brief,³⁹⁶ Respondents contend:

The Respondents admit that some of the alleged deficiencies were repairs that should have been made but deny that any of the complaints about the metal doors or strength of those doors was legitimate. The inspection report claims that some of the doors had no locking mechanism. All the doors have pin locks and thresholds so the animal cannot lift the door. (P. Sellner Tr. p. 693). The door on the bear enclosure was not compromised, it is welded all the

³⁹³ AB at 31.

³⁹⁴ Complaint ¶ 16(i).

³⁹⁵ CX 69 at 5; CX 69a at 31–47; Tr. 331:10–337:17.

³⁹⁶ AB at 31.

way around. (P. Sellner Tr. p. 693). See CX-69A, p. 36 for photograph of the door. None of the alleged defects were health or safety issues. The report of Douglas Anderson agrees with this conclusion. (RXT-25, p 8). Tom Sellner testified about the weight of the doors (150 lbs.), the fact that they are smooth on the inside so the animal can't grip the door and the top rail is protected too. (T. Sellner Tr. p. 610).

Respondents' Answer admissions go to Complaint paragraphs other than 16(i). CX 69 at 5 cites certain "guillotine" doors as not having a locking mechanism and relying on weight to keep them closed "according to the licensee." Contrary to Respondents' contention on brief, it is not clear that Mr. Sellner testified that all "guillotine" doors had pins to lock them or just a subset of any such doors. At Tr. 610, where Mr. Sellner discusses the weight and smoothness of certain doors, he also refers to pin locks, but it is unclear whether his testimony is that all doors have them. The inspectors can hardly be faulted for relying on what the "licensee" told them as to whether the doors had locking mechanisms, which as evidence would be a party admission. Nevertheless, the record is unclear as to whether all guillotine doors have locking mechanisms or not, and according to Mr. Sellner, at least one does. Therefore, the "benefit of the doubt" goes to Respondents and I rule that APHIS has not carried its burden as to whether guillotine doors did not have locking mechanisms.

Mr. Sellner testified at Tr. 693, however, that the door on the bear enclosure was "welded all the way around" after "this noncompliance." As discussed elsewhere, post-violation repairs do not obviate that there was a violation.

Mr. Anderson's report, RX 25 at 8, states that "[t]here were some fence repair and shelter issues" but "*in my opinion*, do not pose *much* of a risk to the animals as far as adverse health or

suffering. At the same time, they need to be fixed to meet the code.” Emphasis added. The USDA inspectors have greater training and expertise as to applicable animal husbandry and regulation standards than does Mr. Anderson. I give greater weight to their observations and opinions as to whether the “issues” pose significant risks to the animals as to health or suffering.

APHIS met the burden for the violations as alleged in Complaint ¶ 16(i), except as to the guillotine doors.

*5. Waste disposal (9 C.F.R. § 3.125(d)).*³⁹⁷

Dr. Cole explained the alleged noncompliance with the Standards for waste disposal cited in the inspection report, and described the contemporaneous photographs she took.³⁹⁸

On brief,³⁹⁹ Respondents contend as to Complaint ¶ 16(j):

The burn barrel, which is common in the countryside was where it always was—outside the Zoo and not close enough to the lion's enclosure to cause a problem. The waste that is in it is burned as necessary. (P. Sellner Tr. p. 694). CX-69A, p. 48 clearly shows ashes in that barrel. The pile of waste referred to was raked out of the enclosure the day before and was awaiting transportation to be spread out on the farm fields (which was of course not happening because of this inspection). (P. Sellner Tr. pp. 694-695). All the waste outside Dandy Lion's enclosure (CX-69A, p. 51) and that shown entries no. 69 a pp. 52, 53 and 54 would have been picked up. These are not violations.

The CX 69A at 48 photograph of the “burn barrel” appears to show only ashes, and the evidence is not clear that the barrel was so close to the lions as to be a concern.⁴⁰⁰ It is unclear

³⁹⁷ Complaint ¶ 16(j).

³⁹⁸ CX 69 at 5-6; CX 69a at 48-55; Tr. 337:18-339:16.

³⁹⁹ AB at 32.

⁴⁰⁰ See Tr. 694 (Mr. Sellner).

from the record what violation was alleged as to the burn barrel.⁴⁰¹ APHIS has not carried its burden as to the burn barrel.

CX 69 at 6 states that the licensee stated that some of the piles had “been there for a long time.”⁴⁰² Mr. Sellner’s cited testimony, Tr. 694-95, cited in the above quoted portion of Respondents’ brief, does not, in fact, state that the piles were of debris raked out of enclosure the previous day, nor indicate when such material would have been collected and spread on the farm fields, much less that the inspection was interfering with that alleged process.

This evidence supports the finding of the violations as alleged in Complaint ¶ 16(j), except as to any violation as to the burn barrel.

6. Shelter (9 C.F.R. § 3.127(a)).⁴⁰³

As APHIS’s opening brief states,⁴⁰⁴ Dr. Cole explained the alleged noncompliance with the Standards for shelter from sunlight cited in the inspection report and described the contemporaneous photograph she took of the Patagonian cavy enclosure.⁴⁰⁵ On brief,⁴⁰⁶ Respondents state APHIS did not meet its burden of proof because it did not present any evidence, but do not assert any alleged inaccuracy in APHIS’s opening brief as to the evidence it

⁴⁰¹ At Tr. 339, Dr. Cole testified that she did not expect to see a “burn barrel” near the lion cage, but I do not find that this supports a finding of violation.

⁴⁰² See Tr. 338–39 (Dr. Cole confirming that is what she was told.).

⁴⁰³ Complaint ¶ 16(k).

⁴⁰⁴ IB at 49.

⁴⁰⁵ CX 69 at 6; CX 69a at 56; Tr. 339:17–340:5.

⁴⁰⁶ AB at 32.

presented as to the Complaint paragraph. I find none, and the cited APHIS evidence supports the finding of the violations as alleged in Complaint ¶ 16(k).

7. Drainage (9 C.F.R. § 3.127(c)).⁴⁰⁷

Dr. Cole explained the alleged noncompliance with the Standards for drainage cited in the inspection report and described the contemporaneous photographs she took of multiple enclosures.⁴⁰⁸ On brief,⁴⁰⁹ Respondents contend:

With regard to 16(1), there is no indication that there is improper drainage. Instead there were leaks in the automatic waterers that were repaired. There is no indication the problem with “drainage” continued after the repairs.

Respondents’ points are well-taken. The alleged violation was improper drainage, but the problem was actually leaky waterers. CX 69a at 57-64 appears to show small puddles and some mud in the bear, four-horned sheep, and fallow deer enclosures. Dr. Cole’s testimony does not indicate that there was a problem with drainage.⁴¹⁰ It is unclear from the record that Respondents failed to provide a suitable method of drainage to rapidly eliminate excess water; therefore, a “drainage” violation has not been demonstrated. There may have been equipment in need of repair, but that is not a matter of “improper” drainage.

APHIS did not prove the violation alleged in Complaint ¶ 16(l).

⁴⁰⁷ Complaint ¶ 16(l).

⁴⁰⁸ CX 69 at 6; CX 69a at 57-64; Tr. 340:6-342:9.

⁴⁰⁹ AB at 32.

⁴¹⁰ Tr. 340:6-342:9.

8. *Perimeter fence (9 C.F.R. § 3.127(d)).*⁴¹¹

Dr. Cole explained the alleged noncompliance with the Standards for perimeter fencing cited in the inspection report, and described the contemporaneous photographs she took of the Respondents' fencing.⁴¹²

Respondents contend on brief:⁴¹³

Paragraph 16(m) is disputed and also stated to be a *de minimis* allegation of violations. The fence was solid and complied with USDA regulations. (It was 11 feet tall and solid all the way around up to eight feet in height. (P. Sellner Tr. p. 651)). A variance was also obtained for a portion of the fence. (P. Sellner Tr. p. 653).

As Mr. Sellner testified, the variance was granted after the failed inspection and he also testified that that portion of the fence has been the way it was for 15 years with being found in noncompliance. On those grounds I find this violation to be *de minimis*.

However, aside from that portion of the fence, the allegation was not that the fence was not sufficiently tall, but that it was in bad repair, among other things. The evidence supports the finding of the violations as alleged in Complaint ¶ 16(m), except for the portion of the fence for which a variance was later obtained.

⁴¹¹ Complaint ¶ 16(m).

⁴¹² CX 69 at 6; CX 69a at 57–64; Tr. 340:9–342:9.

⁴¹³ AB at 32.

9. Watering (9 C.F.R. § 3.130)).⁴¹⁴

Dr. Cole explained the alleged noncompliance with the Standards for watering cited in the inspection report, and described the contemporaneous photographs she took.⁴¹⁵ On brief,⁴¹⁶

Respondents contend:

With regard to paragraph 16(n), the degus are basically food for the reptiles. They were watered the day before. The complaints about the water in the galvanized steel containers has been addressed previously and some animals get their water bowls dirty and add debris to them. (P. Sellner Tr. pp. 651-652).

Whether or not the degus were “basically food for the reptiles,” the evidence is clear that they were deprived of sufficient water. CX 69 at 7 recites far more than feed such as would fall from an animal’s mouth in the water provided for the various animals, including “debris and/or feces” and “bedding.”

This evidence supports the finding of the violations as alleged in Complaint ¶ 16(n).

10. Cleaning (9 C.F.R. § 3.131(a)).⁴¹⁷

Dr. Cole explained the alleged noncompliance with the Standards for cleaning cited in the inspection report, and described the contemporaneous photographs she took of multiple enclosures.⁴¹⁸ On brief,⁴¹⁹ Respondents contend:

⁴¹⁴ Complaint ¶ 16(n).

⁴¹⁵ CX 69 at 7–8; CX 69a at 68–70; Tr. 343:9–345:39.

⁴¹⁶ AB at 32–33.

⁴¹⁷ Complaint ¶ 16(o).

⁴¹⁸ CX 69 at 8; CX 69a at 71–94; Tr. 345:12–346:10; 347:1–351:13.

⁴¹⁹ AB at 33.

With regard to paragraph 16(o), there is little detail about what a buildup is. The Sellners have testified that they daily clean the pens for excreta and food waste. (Tom Sellner Tr. p. 607). The key question is whether there is excessive food waste and feces in these enclosures and the photographs supplied (CX-69A, p. 71) which purports to show a buildup of waste shows a tiny portion of a large enclosure and (CX-69A, p. 72) shows a small portion of the bear enclosure—do not support this allegation. (There are other photographs in the CX-69A series that take the same approach—extreme closeups of small areas in large enclosures.])

Even if the cited photographs were misleading, and given the other evidence, I do not find that they are, there is more evidence than simply these photographs as to excessive food waste and feces in various animal enclosures. There are contemporaneous written reports of Dr. Cole and her live testimony.⁴²⁰ I find her to be highly credible as to cleanliness with no motive or intent to present misleading photographs. Mr. Sellner did testify, Tr. 607, that the pens are cleaned daily, but the weight of the evidence is that the cleaning is not sufficient to meet the applicable standards.

The evidence supports the finding of the violations as alleged in Complaint ¶ 16(o).

11. Housekeeping (9 C.F.R. § 3.131(c)).⁴²¹

Dr. Cole explained the alleged noncompliance with the Standards for housekeeping cited in the inspection report, and described the contemporaneous photographs she took of multiple

⁴²⁰ See also RX 25 at 8, which is the report of Mr. Anderson of IDALS as to dirty conditions at the Zoo as of the May 21, 2014 inspection.

⁴²¹ Complaint ¶ 16(p).

enclosures.⁴²² On brief,⁴²³ Respondents cite their response to Complaint ¶ 16(o) and (j) as their response to ¶ 16(p).

I make the same finding as made with respect to those cited paragraphs. The evidence supports the finding of the violations as alleged in Complaint ¶ 16(p).

12. Pest control (9 C.F.R. § 3.131(d)).⁴²⁴

Dr. Cole cited noncompliance with the Standards for pest control in the inspection report.⁴²⁵

On brief, Respondents state:⁴²⁶

With regard to pest control allegations in paragraph 16(q), the Respondents believe they have addressed these allegations in previous responses to the allegations that they don't have pest control. They have pest control in spades. When the allegations get down to a single moth as an example of bad husbandry then obviously there would be no way for even the finest zoo that ever existed to meet this standard. See testimony of Dr. Cole that she saw a moth at the facility. (Tr. p. 323).

The alleged violations involve a failure of pest control because of an excessive number of flies in the housing for various animals and a build-up of bird feces on the shelters for bobcats and skunks. And moths are not listed among the pests that are of concern.⁴²⁷ "Pest control in spades" would not include a build-up of bird feces on bobcat and skunk enclosures.

⁴²² CX 69 at 8; CX 69a at 77-94; Tr. 346:11-17; 347:1-351:13.

⁴²³ AB at 33.

⁴²⁴ Complaint ¶ 16(q).

⁴²⁵ CX 69 at 8-9; CX 69a at 83-84; Tr. 346: 18-25; 349:11-18.

⁴²⁶ AB at 33.

⁴²⁷ See CX 69 at 9.

The weight of the evidence supports the finding that Respondents have failed to maintain an effective program of pest control. Thus, the violation allegations of Complaint ¶ 16(q) were proven.

F. August 5, 2014

The Complaint alleges that Respondents failed to meet the minimum standards as follows:⁴²⁸

17. On or about August 5, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean enclosures housing two wolf hybrids as required. 9 C.F.R. § 3.1(c)(3).

b. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae, dirt and debris. 9 C.F.R. § 3.10.

c. Respondents failed to establish and maintain an effective program of pest control for dogs, as evidenced by the excessive number of flies observed on the waste and on the ground in the enclosure housing two wolf-hybrids, and one of the wolf hybrids had sores that respondents attributed to flies. 9 C.F.R. § 3.1 l(d).

d. Respondents' enclosures housing three baboons were in disrepair, with broken wood panels and support boards. 9 C.F.R. § 3.75(a).

e. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. 9 C.F.R. § 3.75(c)(3).

f. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the primate building and adjacent to the lemur enclosures. 9 C.F.R. § 3.84(d).

⁴²⁸ Complaint ¶ 17.

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosures housing a sloth and Santa Cruz sheep, and the fence separating the camel and sheep enclosures, were all in disrepair. 9 C.F.R. § 3.125(a).

h. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing three pot-bellied pigs and two Meishan pigs contained standing water. 9 C.F.R. § 3.127(c).

i. Respondents failed to provide potable water to a capybara and three raccoons as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

j. Respondents failed to remove excreta and debris from the primary enclosures housing eighty-eight (88) animals, as required. 9 C.F.R. § 3.131(a).

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing a Patagonian cavy, a capybara, three pot-bellied pigs, two Meishan pigs, five cattle, seven tigers, one cougar, and two lions. C.F.R. § 3.131(d).

Dr. Shaver and Dr. Cole conducted a team inspection on this date, and documented their observations in a contemporaneous inspection report, as well as in numerous photographs.⁴²⁹

1. Paragraph 17(a).

On brief,⁴³⁰ Respondents contend:

Paragraph 17(a) is denied because the Sellers do a thorough job of spot cleaning each day as evidenced by their testimony and by the report of Douglas Anderson who stated there was no evidence of conditions that would cause adverse health or suffering to the animals at the facility. (RXT-25, p. 9).

⁴²⁹ CX 71; CX 71a; Tr. 82:20–107:16 (Dr. Shaver); 244:1–25; 245:1–246:23 (Dr. Cole).

⁴³⁰ AB at 33–34.

As discussed previously as to other violation allegations, the daily spot cleaning to which the Sellners testified is apparently inadequate to meet the applicable standards as the evidenced by the results, as demonstrated by the evidence presented by APHIS. As also discussed previously I weigh USDA inspectors' observations and views more heavily than those of Mr. Anderson, who does not have their veterinary training and expertise or expertise and experience as to the USDA requirements. Mr. Anderson, RX 25 at 9, recognizes that "inadequacies" and "issues" were found during the USDA inspection, he simply opines that conditions did not exist "that would cause adverse health or suffering...."

This evidence supports the finding of the violations as alleged in Complaint ¶ 17(a).

2. Paragraph 17(b).

On brief,⁴³¹ Respondents contend:

With regard to paragraph 17(b), the Respondents deny that this was a violation and again their testimony that water was supplied fresh each day is confirmed by the statement of Douglas Anderson in his report that the water was clear indicating fresh water. (RXT-25, p. 9). The issue with the bowls being stained or exhibiting a green tinge has been addressed earlier.

The allegation is that Respondents "failed to provide potable water." Mr. Anderson indicates that apparently clean water, because it is "for the most part...clear" is being put into "less-than-clean" receptacles, which does not mean potable water was being provided. CX 71 at 2 cites a "build-up of green material, dirt and/or debris," not simply algae. For the reasons cited previously, I give greater weight to the USDA inspectors than to Mr. Anderson.

⁴³¹ AB at 34.

The weight of the evidence supports the finding of this Complaint ¶ 17(b) violation.

3. Paragraph 17(c).

On brief,⁴³² Respondents contend:

Paragraph 17(c) is denied for a number of reasons including the fact that no photograph of the “excessive flies” either in the dog’s enclosure or in the wolf hybrid enclosure (see CX-71(a)) even though the inspector was taking photographs of other areas with flies. In addition, the efforts taken by the Sellners to deal with flies has been testified to by numerous witnesses and Dr. Pries testified that flies were not bad at the facility. (Tr. pp. 474-475).

That photographs were taken of flies in one area but not another does not tend to show there were no flies in the area for which there are no photographs. Dr. Pries testified that there were house flies at the facility, but that there were not excessive flies. As to the time of specific inspections, I give greater weight to the opinions of the USDA inspectors as to whether there were excessive flies, than the generalized testimony of Dr. Pries.

The weight of the evidence supports the finding of the alleged Complaint ¶ 17(c) violation.

4. Paragraph 17(d).

On brief,⁴³³ Respondents contend:

With regard to paragraph 17(d) the Respondents deny that the two broken boards were a health hazard or danger to the baboons. CX-71(a), pp. 18 and 19 show the boards which do not have sharp edges and the boards have a number of massive boulders in front of them to prevent any movement or further breakage of the boards.

⁴³² AB at 34.

⁴³³ *Id.*

See CX 71 at 2 for the report on this alleged violation.

“Massive boulders” is an exaggeration. The photos show large rocks. The report states issues of structural soundness and that the facility should be kept in good repair. The evidence shows a lack of structural soundness and a lack of good repair. The evidence supports a finding of the alleged Complaint ¶ 17(d) violation.

5. Paragraph 17(e).

Respondents admitted this alleged violation.

6. Paragraph 17(f).

Respondents contend:⁴³⁴

Paragraph 17(f) with regard to “pests” is denied based upon the testimony of the witnesses and the failure of the USDA to establish any meaningful standard other than a purely subjective approach to this matter.

See CX 71 at 3. Excessive flies have been a recurring issue.

I find that the USDA standard on elimination of pests is not purely subjective and the weight of the evidence is that Respondents have ongoing problems with excessive flies and conditions that could prompt problems with other pests. APHIS proved the allegations of Complaint ¶ 17(f).

7. Paragraph 17(g).

Respondents contend:⁴³⁵

Paragraph 17(g) is admitted to the extent that the fence is curled up but it is denied to the extent that the description is of sharp points

⁴³⁴ AB at 35.

⁴³⁵ *Id.*

on the curled part. Closely examining the photographs supplied there is no indication of sharp points in these photographs. (See CX-71(a), pp. 25 and 26).

The evidence supports a finding of a violation as stated. The points at issue are at the bottom of a chain link fence. They are not covered. There is no evidence that they have been filed off in order to be smooth or anything of that nature. In the normal course of things, they would be expected to be sharp and there is no evidence other than non-definitive photographs to the contrary.

APHIS proved the allegations of Complaint ¶ 17(g).

8. Paragraph 17(h).

Respondents contend:⁴³⁶

Paragraph 17(h) is denied because drainage was not the issue—it appears according to the photographs that the pipe supplying fresh water to the hog sipper had been recently used by the animals with some water surrounding the concrete pads the hogs would step on to reach the hog sipper. (See CX-71(a), pp. 20 and 21).

The allegation is supported by the weight of the evidence. The photographs show standing water. There is no allegation of a malfunctioning watering pipe. Drainage is necessary to remove water from whatever source it collects. APHIS proved the allegations of Complaint ¶ 17(h).

9. Paragraph 17(i).

Respondents contend:⁴³⁷

⁴³⁶ AB at 35.

⁴³⁷ *Id.*

Paragraph 17(i) is denied because fresh water was always available to the animals (through automatic waterers). The staining of the bowls was the only issue and there is no indication (testing or otherwise) that the water was not potable. See report of Douglas Anderson, (RXT-25, p. 9).

See CX 71 at 4, which does not refer exclusively to algae. Mr. Douglas' report does not say the water was potable. It says the water was "for the most part" clear, "indicating fresh water being put into less-than-clean receptacles." The report also states it is "very easy for water bowls to turn green, especially in the sun." But, the latter is not a statement that algae in a water bowl is not a problem, but rather may be a reason for zoo personnel to check on and clean out the bowls frequently. Less-than-clean receptacles are not evidence of potable water, regardless of the quality of the water before it was poured into them. The fact that fresh water would be available through automatic waterers, cannot justify providing the animals with unsatisfactory water bowls. The record indicates that unlike the situation described in CX 26 at 5, there was more than a mere tinge of green in the water bowls at issue here. In this instance the presence of automatic waterers does not obviate the alleged violation.

The weight of the evidence supports the finding of the alleged violation in Complaint ¶ 17(i).

10. Paragraph 17(j).

Respondents contend:⁴³⁸

Paragraph 17(j) is denied because the Sellners testified that they cleaned in the morning and afternoon and always did spot cleaning every day. The use of the term "as required" is vague and misleading according to the standards referred to by the inspectors

⁴³⁸ *Id.*

who testified they were not looking for a pristine environment but did not want excessive problems either.

As noted elsewhere, the cleaning the Sellners did was inadequate whatever the frequency. The alleged violation is not that cleaning was too infrequent, but that "Respondents failed to remove excreta and debris from the primary enclosures housing eighty-eight (88) animals, as required." "As required" is not vague. There is no basis whatsoever presented for finding that it is "misleading." The cleaning that is required is that sufficient to remove excreta and debris from the stated primary enclosures.

The weight of the evidence supports the finding of the alleged violation of Complaint 17(j).

11. Paragraph 17(k).

Respondents contend:⁴³⁹

Paragraph 17(k) with regard to the "excessive amount of flies" is denied by the Respondents and they incorporate their responses and evidence cited earlier.

As has been found with respect to similar alleged violations, the evidence supports the finding that, as evidenced by an excessive amount of flies, Respondents failed to establish an effective program of pest control. The weight of the evidence supports the finding of the alleged violation of Complaint 17(k).

⁴³⁹ AB at 35.

G. October 7, 2014

The Complaint alleges that Respondents failed to meet the minimum standards as follows:⁴⁴⁰

18. On or about October 7, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosure housing four llamas had bent and protruding metal bars, some of which were pointed inward and were accessible to the animals. 9 C.F.R. § 3.125(a).

b. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure housing goats had holes large enough to permit at least three goats to escape the enclosure. 9 C.F.R. § 3.125(a).

c. Respondents failed to provide thirty sheep with wholesome food, and specifically, respondents maintained a food dispenser for public use that contained old, caked, and discolored food. 9 C.F.R. § 3.129(a).

Dr. Shaver and Dr. Cole conducted a team inspection on this date and documented their observations in a contemporaneous inspection report, CX 72, as well as in numerous photographs.⁴⁴¹

⁴⁴⁰ This is the first of the two paragraphs numbered 18 in the Complaint.

⁴⁴¹ CX 72; CX 72a; Tr. 248:15–249:3; 249:4–250:5 (Dr. Cole).

1. Structural Strength (9 C.F.R. § 3.125(a)).⁴⁴²

Respondents admitted the alleged violations in ¶¶ 18(a) and 18(b) of the Complaint, but as to 18a also state the enclosures were later repaired.⁴⁴³ As discussed elsewhere herein, later repairs do not obviate the fact that there were violations—in these instances admitted violations. Complaint first ¶¶ 18(a) and 18(b) were, thus, admitted by Respondents.

2. Feeding (9 C.F.R. § 3.129(a)).⁴⁴⁴

Dr. Cole explained the noncompliance with the Standards for feeding cited in the inspection report, and described the contemporaneous photographs she took of the food provided by Respondents.⁴⁴⁵ Respondents contend APHIS did not prove a violation because “[t]he testimony of Dr. Shaver was that she couldn’t tell if the food was “molding” or if it was just a sticking problem. (Tr. p. 116).” However, the alleged violation is not that the food at issue was “molding” but that it “contained old, caked, and discolored food.” Dr. Shaver’s testimony at Tr. 116 and the other cited evidence presented by APHIS carries its burden of proof as to a finding of the violations as alleged in the Complaint first ¶ 18(c), and I so find.

H. March 4, 2015

The Complaint alleges that Respondents failed to meet the minimum standards as follows:⁴⁴⁶

⁴⁴² Complaint first ¶ 18(a) and (b).

⁴⁴³ AB at 36.

⁴⁴⁴ Complaint first ¶ 18(c).

⁴⁴⁵ CX 72 at 2; CX 72a at 2–4; Tr. 116:11–117:6 (Dr. Shaver).

⁴⁴⁶ This is the second of the two paragraphs numbered 18 in the Complaint.

18. On or about March 4, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean the enclosure housing a vervet as required, and specifically, there was waste build-up on the wall above the perch, in a crack between the wall and the perch, and in holes within the perch. 9 C.F.R. § 3.75(c)(3).

b. Respondents failed to remove excreta and debris from the primary enclosures housing twenty-four degus, as required, and specifically, there was a build-up of food waste, soiled bedding and/or animal waste in the enclosure. 9 C.F.R. § 3.131(a).

Respondents admitted the alleged second ¶ 18(a) violation of 9 C.F.R. § 3.75(c)(3).⁴⁴⁷ Dr. Cole explained the noncompliance with the Standards for cleaning cited in the inspection report and described the contemporaneous photographs she took of the degu enclosure.⁴⁴⁸

As to Complaint second ¶ 18(b), Respondents contend “[t]he photographs (CX-75(A)) which supposedly support this contention are of such poor quality that they don't show anything that would support this contention other than the fact that these degus do have bedding in their enclosure.”⁴⁴⁹ But the inspection report and Dr. Cole’s testimony are sufficient to carry APHIS’s burden of proof, regardless of any alleged poor quality of photographs. This evidence supports the finding of the violations as alleged in Complaint second ¶ 18(b).

⁴⁴⁷ Answer ¶ 18a; AB at 36.

⁴⁴⁸ CX 75 at 1; CX 75a; Tr. 353:10–355:14.

⁴⁴⁹ AB at 36.

I. May 27, 2015

The Complaint alleges that Respondents failed to meet the minimum standards as follows:⁴⁵⁰

19. On or about October 7, 2014, respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

- a. The “reptile” room, housing multiple non-human primates, was in disrepair, and specifically, there were soiled and damaged ceiling tiles, with exposed spongy material, adjacent to the animals’ primary enclosures. 9 C.F.R. § 3.75(a).
- b. The “reptile” room, housing multiple non-human primates, was not kept free of debris, discarded materials and clutter. 9 C.F.R. § 3.75(b).
- c. Respondents failed to maintain and clean the surfaces of the facilities housing nonhuman primates as required. 9 C.F.R. §§ 3.75(c)(2), 3.75(c)(3).
- d. Respondents failed to provide adequate ventilation in the building housing two bush babies. 9 C.F.R. § 3.76(b).
- e. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a singly-housed nonhuman primate (Obi), who was exhibiting abnormal behaviors. 9 C.F.R. § 3.81(c)(2).
- f. Respondents failed to keep the building housing nonhuman primates (vervet, macaque, bush babies) clean, as evidenced by the build-up of dirt, dust, and/or debris inside the structure and adjacent to the primate enclosures, excessive fly specks on the overhead fixtures and electrical outlets, and the presence of rodent feces. 9 C.F.R. § 3.84(c).
- g. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large number of live and dead flies inside the building housing two macaques and four baboons. 9 C.F.R. § 3.84(d).

⁴⁵⁰ Complaint ¶ 19.

h. Respondents failed to provide adequate ventilation in the building housing chinchillas, kinkajous, fennec foxes, and African crested porcupines. 9 C.F.R. § 3.126(b).

i. Respondents failed to provide adequate shelter from inclement weather for two Highland cattle and two beef cattle. 9 C.F.R. § 3.127(b).

j. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing fifty animals (three pot-bellied pigs, one camel, thirty-five Jacob's sheep, two Meishan pigs, three llamas, four cattle, one zebu, and one llama) were essentially covered in mud and/or standing water, to the extent that the aforementioned animals were required to stand in water and/or mud in order to access food. 9 C.F.R. § 3.127(c).

k. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing multiple animals (a black bear, chinchillas, degus, two raccoons, two kinkajous, serval, coatimundi, fennec foxes, and African crested porcupines). 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).

l. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large number of flies within the bear shelter, on the floor of the enclosure housing two raccoons, and surrounding the enclosure housing two kinkajou; (ii) the presence of maggots in the waste observed in the kinkajou enclosure; and (iii) rodent droppings in the food storage room and the "reptile" room. 9 C.F.R. § 3.131(d).

Dr. Cole testified extensively about her inspection on May 27, 2015, the inspection report that she wrote, and the many contemporaneous photographs that she took of the deficiencies that she found.⁴⁵¹

⁴⁵¹ CX 76; Tr. 356:19–383:2.

1. Complaint ¶ 19(a).

As to Complaint ¶ 19(a), Respondents state “the ‘spongy material’ referred to in this section apparently was just the normal texturing of this type of ceiling tile. See testimony of Dr. Cole who stated she thought it was part of the ceiling tile—just like the courtroom this hearing took place in. (Tr. p. 359, see photograph CX-76(a) p. 1).” But the allegation in Complaint ¶ 19(a) is of “soiled and damaged ceiling tiles, with exposed spongy material,” and the Inspection Report, CX 76 at 1, describes white tiles with “light brown stains throughout their surfaces” and states several had “holes into the tile material, exposing spongy type material underneath the surface” and “blackened” crevices. The fact that the spongy material was part of the tile—the inside part, which should remain inside the tile, and not exposed—supports the allegation, and the other evidence presented by APHIS is consistent and likewise supports the allegations.

This evidence supports the finding of the violations as alleged in Complaint ¶ 19(a).

2. Complaint ¶ 19(b).

Respondents contend:⁴⁵²

Paragraph 19(b) is denied and it is further stated that the reference to discarded materials and clutter has nothing to do with the health of the animals. What Dr. Cole claims is debris includes plastic buckets, portable radiator, a weed wacker, a dustpan and other objects that clearly are not “debris” or discarded. (See CX-76(A), pp. 1-14). Just for good measure, some of the photographs are of the same objects—sometimes in extreme close-up.

See CX 76 at 1. This report clearly states a build-up of dirt, dust, grime, and/or debris other than discarded materials and clutter. It is not clear that the report characterizes “plastic buckets,

⁴⁵² AB at 37.

portable radiator, a weed wacker, [and] a dustpan” as debris. Those items appear to be referred to as “an accumulation of miscellaneous objects” stored in the education house that were not necessary to activities there. Respondents may think “discarded materials and clutter has nothing to do with the health of the animals.” But as stated in the allegation of violation, they are prohibited by 9 C.F.R. § 3.75(b).

The evidence presented by Complaint proves the violations as alleged in Complaint ¶ 19(b).

3. Complaint ¶ 19(c).

Respondents contend:⁴⁵³

Paragraph 19(c) is denied and it is further stated that the primates can make the kind of “mess” in the walkways within 12 to 24 hours according to the uncontested testimony of Mrs. Sellner who further stated that she would clean this area with a leaf blower daily.

See CX 76 at 1-2. The report does not limit the violation allegation to anything that could or did accumulate within 12 to 24 hours, or that could possibly be cleaned with a leaf blower.

The weight of the evidence supports the finding of the violation as alleged in Complaint ¶ 19(c).

4. Complaint ¶¶ 19(d) and (h).

Respondents contend:⁴⁵⁴

Paragraph 19(d) is denied and it is further stated that the “foul odor” was the smell of an African porcupine. Mrs. Sellner testified that the odor of this animal is unforgettable and the smell was not

⁴⁵³ AB at 37.

⁴⁵⁴ AB at 37.

ammonia. See testimony of (P. Sellner, Tr. pp. 654-655). The inspector stated that they had no way to measure ammonia in the air and she did not know if African porcupines have a distinct smell. (Dr. Cooper, Tr. p 448).

As to Complaint ¶ 19(h), Respondents refer back to their discussion of ¶ 19(d).⁴⁵⁵ See CX 76 at 2-3. Consistent with the alleged violation, the problem identified was a lack of ventilation as evidenced in part by strong foul odors, an apt description of the odor produced by an African Porcupine based upon Ms. Sellner's testimony. A better identification of the source of the foul odor does not obviate the violation of the insufficient ventilation.

APHIS proved the alleged Complaint 19(d) and (h) violations.

5. Complaint ¶ 19(e).

Respondents contend:⁴⁵⁶

Paragraph 19(e) is denied and it is further stated that Obi was receiving food enrichment (as the inspection report indicates CX-76, p. 2) and Obi is specifically mentioned in RXT-3 "Primate Enrichment Program" p. 2. He had certain toys to entertain himself and was a juvenile at the time of this report.

See CX 76 at 2. Obi was observed by the USDA inspectors to exhibit abnormal behaviors associated with psychological distress. The report states that documentation provided shows that all primates receive some food enrichment, but there was no documentation that Obi received and special food enrichment and "[t]he licensee confirmed that 'Obi' had not received any special attention or enrichment due to the abnormal behaviors." It further states that the "current environmental enhancement plan does not specifically address the psychological distress

⁴⁵⁵ AB at 38.

⁴⁵⁶ AB at 37.

associated with the abnormal behaviors exhibited by 'Obi.'" The RX 3 "Primate Enrichment Program," p. 2, does not indicate otherwise.

APHIS's evidence demonstrated the alleged Complaint ¶ 19(e) violation. The evidence cited by Respondents is not to the contrary. The evidence shows an animal in distress, not receiving appropriate treatment.

6. Complaint ¶ 19(f).

Respondents contend:⁴⁵⁷

Paragraph 19(f) is denied. The USDA, since it did not find flies, is now resorting to "fly specks" or areas where flies may have landed to attempt to show noncompliance. There are rodents on the farm and facility but as was indicated earlier, there is a rodent extermination program in effect.

The inspectors did find flies.⁴⁵⁸ The allegation in ¶ 19(f) is a failure to maintain cleanliness as evidenced by such things as dirt, dust, and/or debris, and by fly specks "on the overhead fixtures and electrical outlets, and the presence of rodent feces." The issue here is not any rodent, or fly, extermination program but a lack of cleanliness, which the evidence demonstrates was the case.

7. Complaint ¶ 19(g).

Respondents contend:⁴⁵⁹

Paragraph 19(g) is denied for all the reasons set forth herein earlier and for the further reason that the citation contradicts the allegation that an effective fly control program was not effective when it talks

⁴⁵⁷ AB at 38.

⁴⁵⁸ See CX 76 at 3.

⁴⁵⁹ AB at 38.

about the large number of “dead flies” in the building housing the baboons. (See CX-76, p. 3).

The evidence (*see* CX 76 at 3) is that there was an excessive number of alive and dead flies at the building housing the baboons. The report states that the licensee stated she had recently sprayed for flies and had not yet cleaned up the dead ones. Spraying for flies and having numerous flies does not demonstrate an effective pest control program, and in fact tends to prove the opposite. The alleged allegation of Complaint ¶ 19(g) was demonstrated by a preponderance of the evidence.

8. Complaint ¶ 19(i).

Respondents admit.⁴⁶⁰

9. Complaint ¶ 19(j).

Respondents deny on the ground that there had been substantial rains before the inspection and the ground was draining but not dry at the time of the inspection.⁴⁶¹

The allegation is that “the enclosures housing fifty animals (three pot-bellied pigs, one camel, thirty-five Jacob’s sheep, two Meishan pigs, three llamas, four cattle, one zebu, and one llama) were essentially covered in mud and/or standing water, to the extent that the aforementioned animals were required to stand in water and/or mud in order to access food.” The response that it had rained a lot recently and the ground was draining but not dry, is an insufficient response to the above allegation that is demonstrated by record evidence. As CX 76 at 4 states, a suitable method must be provided to rapidly eliminate excess water from within the

⁴⁶⁰ AB at 38.

⁴⁶¹ *Id.*

enclosures. Drainage this slow was insufficient. The evidence demonstrates the alleged Complaint ¶ 19(j) violation.

10. Complaint ¶ 19(k).

Respondents state this allegation that they failed to kept animal enclosures clean, is denied for the reasons set forth in the testimony of the Sellners, but provide not citation to that testimony or description of it.⁴⁶²

I assume that the referenced testimony is that the Sellners clean every day. As discussed elsewhere herein, “cleaning” every day is insufficient if that cleaning does not result in sufficiently clean enclosures and the evidence is that the enclosures were not sufficiently clean.⁴⁶³

The evidence demonstrates the alleged Complaint ¶ 19(k) violation.

11. Complaint ¶ 19(l).

Respondents deny this allegation based on the testimony set forth above and the previous arguments made herein.⁴⁶⁴ For reasons similar to those stated elsewhere, I find that the allegations are supported by the record.⁴⁶⁵ The record evidence shows excessive insects and insufficient efforts to control for the conditions that cause problems with pests.

The evidence demonstrates the alleged Complaint ¶ 19(l) violation.

V. Respondents’ Overarching Contentions

⁴⁶² *Id.*

⁴⁶³ *See* CX 76 at 4.

⁴⁶⁴ AB at 38.

⁴⁶⁵ *See* CX 76 at 4.

A. Mr. and Mrs. Sellner's Undisputed Hard Work and Lack of Intent to Harm Animals Is Not a Defense to AWA Violations, and an Insufficient Workforce to Meet AWA Requirements at the Zoo, as Shown in the Record, Is an AWA Violation.

The Complaint does not allege, APHIS did not contend, and I do not find that Respondents do not work hard or that they have ill motives towards, or lack affection for, the animals in their custody.⁴⁶⁶ Respondents complain that APHIS “condemn[s] them as scofflaws....” A scofflaw is someone who flouts the law, and the record does not show that APHIS has accused Respondents of intentionally openly disregarding the law. Respondents have been demonstrated to have willfully violated the AWA, which is something different.

The record is undisputed that Mr. and Mrs. Sellner work hard. Among other things, they operate a dairy farm adjacent to the zoo. But a demonstrated good, even extraordinary, work ethic is not a defense to AWA violations.⁴⁶⁷

The zoo has no paid employees other than the Sellners.⁴⁶⁸ Mr. Anderson, the IDALS Compliance Investigator, June 24, 2014 report⁴⁶⁹ refers to the “Herculean task of caring for the

⁴⁶⁶ See Respondents' Brief at 3–4 (Mr. and Mrs. Sellner had “the animals' best interests at heart,” APHIS “condemn[s] them as scofflaws,” Mrs. Sellner “cares about the animals and works hard,” Mr. Sellner construct[ed] habitats” and “the animals are all named.”).

⁴⁶⁷ See *Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093, 1098–99 (U.S.D.A. 2007) (citing *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).

⁴⁶⁸ Tr. 628:9629:3 (Mr. Sellner).

⁴⁶⁹ RX 25 at 8. It is noteworthy that Respondents cite Mr. Anderson's opinions expressed in this report for various purposes. See, e.g., AB at 31. He does not have the training and expertise as to animal husbandry and USDA regulation standards that the USDA inspectors do, but his observations and opinions are entitled to some weight, especially where not contradicted by those USDA inspectors.

numerous animals” and states “I agree with the federal crew’s assessment that there is a lack of help that allows this facility to lapse into disrepair and uncleanliness.”

I conclude the record, given the numerous and repeated cited deficiencies, demonstrates by a preponderance of the evidence that the size of the facility and number of animals maintained are beyond the ability of the Sellners to manage alone (even with “volunteers”).⁴⁷⁰ The AWA requires that exhibitors employ a sufficient number of sufficiently trained persons to adequately care for the animals.⁴⁷¹ As noted in footnote 22, Respondents increased the number of animals at the facility from 2013 to 2015 from 160 to 193.⁴⁷² Given that Respondents were failing APHIS inspections, often for such violations as lack of cleanliness and maintenance, the acquisition of additional animals without additional workforce, is unreasonable and not a step in the direction of meeting USDA requirements.

As APHIS points out,⁴⁷³ the current case has similarities with *Mt. Wachusett Animal Forest Corp.*, 44 Agric. Dec. 158, 160–61 (U.S.D.A. 1984),⁴⁷⁴ which found:

[A] sad situation—the two ladies who are the owners are obviously animal lovers and would not intentionally do anything to harm the

⁴⁷⁰ See AB at 9. Respondents in addressing Complaint ¶ 16(b) state “the APHIS inspectors have never bothered to go to the records that would show the number of volunteers the Zoo has and provide some objective measure that this number is not sufficient.” But neither did Respondents attempt to show through such records that the number of volunteers was somehow objectively sufficient, when APHIS’s evidence was that the zoo was insufficiently maintained.

⁴⁷¹ See 9 C.F.R. § 3.132; *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 156 (U.S.D.A. 2013); *Zoocats, Inc.*, 68 Agric. Dec. 737, 747 (U.S.D.A. 2009); *Parr*, 59 Agric. Dec. 601, 618–19 (U.S.D.A. 2000); *Shepherd*, 57 Agric. Dec. 242, 287 (U.S.D.A. 1998).

⁴⁷² Answer ¶ 5; CX 1; CX 14.

⁴⁷³ AB at 5.

⁴⁷⁴ This is an unappealed ALJ decision and therefore not cannot be relied upon as precedent.

animals or the public. The *bona fides* of their intentions are not questioned. The evidence adduced at the hearing tends to indicate that they may have had a different approach to zoo keeping than is routinely accepted and recognized.

* * *

The amount of work and the enormity of the task, plus lack of trained personnel, and funds, have all been contributing factors in the areas of “deficiencies” found by the inspectors. The safety and well being of the animals, the owners themselves, and the public have all been taken into consideration in ordering a revocation of the respondents' license.

* * *

At the oral hearing, the complainant recognized that “ * * * this case involves two people who sincerely love exotic animals but who, quite simply and quite sadly, are not capable of maintaining a zoo in compliance with the Animal Welfare Act.” (Tr. 14).

That Respondents did not intend to harm their animals does not preclude the finding that they violated the AWA and the Regulations.⁴⁷⁵ The intent to cause harm is not necessary for an act to be willful under the AWA.⁴⁷⁶ A respondent's affection for animals has been held to be irrelevant.⁴⁷⁷ I find that Respondents' affection and good will toward their animals does not excuse them from AWA violations.

B. Respondents' Contentions that Public Complaints Were the Source of the APHIS Complaint Herein

Respondents contend that APHIS instituted the current proceeding because it “has been compelled by outside complaints filed by individuals and/or entities with their own agenda.”⁴⁷⁸

⁴⁷⁵ See *Lang*, 57 Agric. Dec. 59, 81–82 (U.S.D.A. 1998).

⁴⁷⁶ See *Davenport*, 57 Agric. Dec. 189, 219 (U.S.D.A. 1998).

⁴⁷⁷ See *Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093, 1100 (U.S.D.A. 2007).

⁴⁷⁸ AB at 2.

Given the ADLF's attempted intervention in this case, which both APHIS and Respondents opposed,⁴⁷⁹ there is no question that the Respondents' have attracted the attention of outsiders. However, there is no evidence that such outsiders did or could have any improper influence on APHIS's bringing of the complaint herein. The record is that APHIS has long had legitimate concerns about these Respondent licensees and pursued those concerns as a part of its role in enforcing AWA. Given the record in this case, these concerns were certainly not unexpected without being affected by any undue influence from outsiders.

The record is that APHIS was not "compelled" by anyone outside of APHIS to do anything. Among other things, APHIS witness Dr. Gibbens explained that APHIS issued two warning letters, entered into two stipulated settlements, and suspended Respondents' AWA license (84-C-0084) before commencing this proceeding.⁴⁸⁰ He further explained the steps that lead to the herein Complaint in Tr. 527:12-529:15. As Dr. Gibbens testified, the Complaint was the inexorable next step, given Respondents' repeated and continuing noncompliance after APHIS's previous enforcement efforts.⁴⁸¹

Respondents suggested that public complaints alone prompted more frequent inspections of Respondents' facility.⁴⁸² Dr. Gibbens explained that that the increase in the number of compliance inspections was also because of the "direct non-compliances" that APHIS inspectors

⁴⁷⁹ Nothing ADLF stated in its filings has been considered in this Decision.

⁴⁸⁰ Tr. 521:15-527:11; CX 63-66.

⁴⁸¹ Tr., 727:15-728:1.

⁴⁸² AB at 39.

observed and documented.⁴⁸³ Mr. Anderson of IDALS, in fact, recommended “continuing the frequent joint inspections” as a way of addressing the “numerous housekeeping and maintenance issues.”⁴⁸⁴ I do not understand Respondents to argue that IDALS has been influenced to hold inspections based upon public complaints alone.

As to Respondents’ contentions that APHIS inspectors have “a general attitude” that “they were going to find matters to cite even when there is no evidence of a violation or questionable evidence,”⁴⁸⁵ Respondents presented and cited no evidence in support. Such a claim is undercut by (1) the documentary, photographic, and testimonial evidence in this case, and (2) the fact the APHIS inspectors have on at least a few occasions, found no noncompliances at Respondents’ facility.⁴⁸⁶ The record does not support findings that Respondents were treated

⁴⁸³ Tr., 727:15–728:1; 545:22–546:10.

⁴⁸⁴ RX 25 at 8.

⁴⁸⁵ AB at 38–39.

⁴⁸⁶ See CX 62 (focused inspection on January 22, 2014); CX 70 (focused inspection on May 28, 2014); CX 73–73a (focused inspection on November 6, 2014); Respondents’ Brief at 11 (stating that four inspections between 2008 and 2014 “show no noncompliances,” citing RX 27). The last page of RX 27 appears to be page 7 of an inspection report dated September 27, 2013, signed by Dr. Heather Cole. RX 27 at 4. It is not from an inspection report of an inspection where no noncompliances were found. It is from the inspection report for an inspection conducted on September 25, 2013. The full inspection report documents multiple deficiencies and is in evidence. CX 39.

Respondents also challenge Dr. Gibbens’ testimony that “the facility has been out of compliance since the early 2000s” as “demonstrably not true.” Respondents’ Brief at 11. Although Dr. Gibbens was not asked what he meant, his appears to be a reasonable opinion, in light of APHIS’s having documented repeated noncompliance over many inspections over many years. See *Shepherd*, 57 Agric. Dec. 242, 287 (U.S.D.A. 1998) (“I disagree with the ALJ’s conclusion in his sanction discussion that the record does not support APHIS’s determination that Respondent is a “habitual” violator” (Initial Decision and Order at 20–21). Respondent has

in an unfair or unduly discriminatory manner. As Dr. Gibbens testified:⁴⁸⁷ “[A] facility with direct noncompliance and a lot of non-compliances is in our highest inspection frequency in the risk-based inspection system.” The record provides no support for a contention that increased frequency of inspections of the Respondents was unwarranted or that those inspections were carried out with undue fervor.

C. Respondents’ Contentions Concerning Subsequent Correction of Noncompliance

It is well-settled subsequent corrections do not obviate violations.⁴⁸⁸

Tri-State and Mr. Candy’s corrections of their violations do not eliminate the fact that the violations occurred, and the Administrator is not barred from instituting a proceeding for violations of the Animal Welfare Act and the Regulations after the violations have been corrected.

Dr. Gibbens explained that a licensee’s inability to identify and correct problems, without waiting for APHIS to point them out, is also an improper drain of APHIS resources.⁴⁸⁹

Q With respect to corrections following citations by the Animal and Plant Health Inspection Service, how does a regular practice of correcting only after APHIS has cited a facility play into the agency’s ability to enforce the Animal Welfare Act?

committed repeated violations over many inspections; therefore, the record supports a determination that Respondent is a “habitual violator.”).

⁴⁸⁷ Tr. 546

⁴⁸⁸ *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 175 (U.S.D.A. 2013) (citing *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).

⁴⁸⁹ Tr. 726:11–727:14.

A It greatly hinders our ability to enforce the Animal Welfare Act. We show up to a facility unannounced, and you can tell by the number of facilities versus the number of inspections that it's between one and two inspections a year, so one or two inspections a year we show up unannounced and we see what we see. It's a snapshot of what that facility looks like on any given day, and so for 364 days out of the year, 363—sorry, my math was off—we're not there telling them what they need to fix, and so, if they're not proactively assessing their own facilities, maintaining compliance, then 1 they're going to be out of compliance a good bit of the time.

Q And what is the effect of having facilities, licensed facilities that repeat the same kinds of violations over time, and how does that affect the program?

A Well, we have the resources to do on average one to two inspections of a facility per year. Now the last two years we have averaged six inspections of the Sellner[s'] facility, so this uses up a lot of our resources. We have limited resources to enforce the federal law at 8,000 facilities, so it takes our resources away from other inspections, other facilities. A facility like the Sellner[s'] that should operate essentially in compliance would normally be inspected once or twice a year.

For the reasons cited by Dr. Gibbens, Mr. Anderson's, of IDALS, recommendation that ongoing failures by Respondents' to be in compliance with USDA requirements—which Mr. Anderson expected to continue, at least from time to time, at least unless and until Respondents obtained more workers to help clean and maintain the facility—of “continuing the frequent joint inspections”⁴⁹⁰ is untenable. It is simply not the role of APHIS inspectors, and not within APHIS's resources, to ensure that a licensee is in compliance through frequent inspections and identification to it of violations and how to correct them. As Dr. Gibbens testified, APHIS simply does not have the resources to operate under this model.

⁴⁹⁰ RX 25 at 8.

Respondents argue⁴⁹¹ that “[t]he fact is that the Sellners addressed the concerns of the USDA inspectors” and “the Court must look at this with regard to the good faith of the Sellners.” This a mark in the Sellners’ favor. But the facts show that objectively they did not run their facility in a way would be expected to keep them in compliance with AWA requirements.

D. Respondents’ Contentions that the Regulations and Standards Are Vague and Impermissibly Subjective

Respondents contend that the Regulations and Standards are impermissibly vague and subjective.⁴⁹²

Respondents apparently conflate the Regulations with the Standards. The Regulations are at 9 C.F.R. Part 2; the species-specific Standards are at 9 C.F.R. Part 3.

Respondents appear to focus mainly on one of the Regulations governing handling, 9 C.F.R. § 2.131(b)(1), which requires all animals to be handled “as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.”⁴⁹³ (The Complaint in this case alleges three handling violations. Two of them are violations of Section 2.131(b)(1).⁴⁹⁴) According to Respondents, Section 2.131(b)(1), and specifically the phrase “as...carefully as possible,” is impermissibly vague and its enforcement violates due process.⁴⁹⁵

⁴⁹¹ AB at 39.

⁴⁹² AB at 5–11.

⁴⁹³ *Id.* at 5–10.

⁴⁹⁴ Complaint ¶ 11.

⁴⁹⁵ AB at 9.

This argument has been raised and rejected by the Judicial Officer.⁴⁹⁶

In any event, requirements that areas be kept clean and clutter free, that fences and other facilities dividing areas be kept in good repair, and that animals receive sufficient potable water, shade, and recreation are not obscure concepts requiring extensive definitions before requirements are rendered not impermissibly vague. Yet Respondents repeatedly failed to meet such fundamental requirements of protecting animals and the public. The record shows that Respondents did not fail to meet these requirements because they did not understand them. Respondents' extensive interactions with APHIS would have been an education in AWA requirements by itself, although licensees are required to develop an understanding of AWA requirements apart from interactions with APHIS.

The requirements were not met because Respondents simply did not do what was necessary to meet them, including the hiring of sufficient appropriate staff. But whatever the reason, the requirements were violated.

E. Respondents' Contentions that APHIS Demanded Perfection but Did Not Offer Advice

Respondents assert that APHIS expected their facilities to be perfect but did not offer meaningful instructions or advice.⁴⁹⁷

First, the documentary, photographic, video, and testimonial evidence introduced in this case proves almost all of the violations alleged in the Complaint. In no case were Respondents

⁴⁹⁶ *Greenly*, 72 Agric. Dec. 603, 618–19 (U.S.D.A. 2013), *aff'd per curiam*, 576 Fed. App'x 649 (8th Cir. 2014).

⁴⁹⁷ AB at 2–3 and 5.

cited for failure to achieve “perfection.” Dr. Gibbens addressed this contention, stating “the standards of the Animal Welfare Act do not represent nor do we expect perfection. These are the minimum standards that must be met by regulated facilities in order to be in compliance.”⁴⁹⁸ The Regulations and Standards are designed to establish minimum requirements “for humane handling, care, treatment, and transportation,” as mandated by Congress.⁴⁹⁹ Compliance with minimum standards is required at all times,⁵⁰⁰ but perfection is not required by the Regulations and Standards, and such a requirement of perfection was not required by the inspections or by APHIS in bringing this Complaint.⁵⁰¹

Moreover, the evidentiary record shows the agency and its inspectors, in fact, continually sought to educate and inform Respondents so that they would achieve compliance with the minimum standards. The inspection reports that the inspectors prepared were detailed and explicit about the problems found.⁵⁰² The warning letters and stipulated settlements likewise fully described the compliance problems.⁵⁰³ APHIS responded to Respondents’ inspection appeals and requests in writing.⁵⁰⁴

⁴⁹⁸ Tr. 520:10–521:9.

⁴⁹⁹ 7 U.S.C. §§ 2142, 2143.

⁵⁰⁰ *Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272–73 (U.S.D.A. 1997).

⁵⁰¹ See CX 18; Tr. 521:2–9.

⁵⁰² See CX 2; CX 26; CX 39; CX 53; CX 59; CX 67–69; CX 71; CX 72; CX 74; CX 75; CX 76.

⁵⁰³ See CX 63–66.

⁵⁰⁴ See CX 15–18; CX 38; CX 50; CX 58; CX 77.

Dr. Gibbens also described the multiple resources available to Respondents.⁵⁰⁵

It is settled that it is not APHIS's responsibility to act as a quality control or compliance consultant for licensees, or to provide step-by-step instructions about animal husbandry.⁵⁰⁶

F. Respondents' Contentions that While a Fine May Be Appropriate, Their License Should Not Be Revoked

As remedies in this case, APHIS seeks an order that respondents cease and desist from future violations, revoking AWA license 84-C-0084, and assessing a joint and several civil penalty of \$10,000.⁵⁰⁷

Respondents' contend:⁵⁰⁸ "A fine in some amount may be warranted, but the license of the Sellners who have been exhibiting for close to 25 years now should not be revoked based upon the evidence presented to the Court in this proceeding."

Penalties for AWA violations are governed by 7 U.S.C. § 2149(b). \$10,000 is the maximum civil monetary penalty set for any single violation of the AWA. That statutory provision provides that

The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

Although the violations demonstrated by the record are not the most egregious possible,

⁵⁰⁵ Tr. 543:24-544:15; 733:732:18-734:9 (describing APHIS's online publications, including fact sheets, tech notes, inspection guides, and policies).

⁵⁰⁶ See *Davenport*, 57 Agric. Dec. 189, 209 (U.S.D.A. 1998).

⁵⁰⁷ APHIS Proposed Findings and Conclusions at 37; RB at 2.

⁵⁰⁸ AB at 40.

and do not demonstrate any ill-feeling toward or lack of emotional caring about the animals involved or about the safety of the public, the violations have been substantial in number and recurring in the sense of new violations being found in frequent new inspections rather than the exact same uncorrected violations being found inspection to inspection. The record shows a facility that is not at all consistently meeting the minimum AWA requirements, even though it has received significant attention from APHIS inspectors. Moreover, the Respondents have not obtained more help in order to meet the USDA requirements, even as they have continued to obtain additional animals. A fine of \$10,000 is hardly excessive under the AWA standards and more than a fine is warranted in these circumstances. Revocation is necessary under the circumstances shown in this record.

FINDINGS OF FACT

1. The Secretary of Agriculture has jurisdiction in this AWA administrative enforcement matter. 7 U.S.C. §§ 2149(a), (b).
2. Cricket Hollow Zoo, Inc. ("CHZI"), is an Iowa corporation whose agent for service of process is Respondent Pamela J. Sellner, 1512 210th Street, Manchester, Iowa 52057. At all times mentioned in the complaint, CHZI was an exhibitor, as that term is defined in the AWA and the Regulations, did not hold an AWA license and, together with the other Respondents, operated a zoo exhibiting wild and exotic animals at Manchester, Iowa. Answer ¶ 1.
3. Pamela J. Sellner is an individual doing business as Cricket Hollow Zoo, and whose business address is 1512 210th Street, Manchester, Iowa 52057. At all times mentioned in the complaint, Mrs. Sellner was an exhibitor as that term is defined in the AWA and the

Regulations and, together with the other Respondents herein, operated a zoo exhibiting wild and exotic animals at Manchester, Iowa. Answer ¶ 2.

4. Thomas J. Sellner is an individual doing business as Cricket Hollow Zoo, and whose business address is 1512 210th Street, Manchester, Iowa 52057. At all times mentioned in the complaint, Mr. Sellner was an exhibitor as that term is defined in the AWA and the Regulations and, together with the other Respondents herein, operated a zoo exhibiting wild and exotic animals at Manchester, Iowa. Answer ¶ 3.

5. Pamela J. Sellner Tom J. Sellner (the "Sellner Partnership") is an Iowa general partnership whose partners are Mr. Sellner and Mrs. Sellner, and whose business address is 1512 210th Street, Manchester, Iowa 52057. At all times mentioned in the complaint, the Sellner Partnership was an exhibitor, as that term is defined in the AWA and the Regulations, and held AWA license 42-C-0084, and together with the other Respondents herein, operated a zoo exhibiting wild and exotic animals at Manchester, Iowa. Answer ¶ 4; CX 1, CX 14.

6. In 2013, the Sellner Partnership represented to APHIS that it had custody of 160 animals; in 2014, the Sellner Partnership represented to APHIS that it had custody of 170 animals; and in 2015, the Sellner Partnership represented to APHIS that it had custody of 193 animals. Answer ¶ 5; CX 1, CX 14.

7. On December 15, 2004, and May 26, 2011, APHIS sent Official Warnings to Mrs. Sellner, Mr. Sellner, and the Sellner Partnership, advising them of multiple instances of noncompliance with the Regulations and the Standards. Answer ¶ 7; CX 63; CX 65.

8. In April 2007, Mrs. Sellner, Mr. Sellner, and the Sellner Partnership entered into a stipulated settlement with APHIS with respect to alleged violations stemming from inspections in 2005 and 2006. Answer ¶ 8; CX 64. The fact of this stipulation is not relied upon for anything in this decision other than that Respondents had knowledge of certain AWA requirements. It is not probative of repeated violations by them or any bad faith.

9. In July 2013, Mrs. Sellner, Mr. Sellner, and the Sellner Partnership entered into a stipulated settlement with APHIS with respect to alleged violations stemming from inspections during 2011, 2012, and 2013. Answer ¶ 8; CX 66. The fact of this stipulation is not relied upon for anything in this decision other than that Respondents had knowledge of certain AWA requirements. It is not probative of repeated violations by them or any bad faith.

10. On or about June 10, 2015, APHIS suspended AWA license 42-C-0084 for 21 days, pursuant to section 2149(a) of the AWA. Answer ¶ 8.

11. On January 9, 2014, APHIS Veterinary Medical Officer (“VMO”) Heather Cole attempted to conduct a compliance inspection at Respondents’ facility, but no one was available to provide access or to accompany her. Dr. Cole prepared a contemporaneous inspection report. Answer ¶ 9 (essentially admitted); CX 59.

12. On May 12, 2014, Dr. Cole attempted to conduct a compliance inspection at Respondents’ facility, but no one was available to provide access or to accompany her. Dr. Cole prepared a contemporaneous inspection report. Answer ¶ 9 (admitted that access was not provided, citing lightening); CX 68.

13. On February 19, 2015, Dr. Cole attempted to conduct a compliance inspection at Respondents' facility, but no one was available to provide access or to accompany her. Dr. Cole prepared a contemporaneous inspection report. Answer ¶ 9 (admitted); CX 74

14. On the following occasions, APHIS inspectors documented noncompliance with the Regulations governing attending veterinarians and adequate veterinary care:

a. June 12, 2013. A capuchin monkey (Cynthia) had visible areas of hair loss on her abdomen, tail, thighs and arms, and was observed to be chewing on her tail, and Respondents had not had Cynthia seen by their attending veterinarian. *See* discussion, *infra*. Answer ¶ 10a; CX 2; CX 3; CX 15-23; CX 25 at 2.

b. October 26, 2013. Respondents housed a Meishan pig that was due to farrow outdoors, in cold temperatures, whereupon the pig gave birth to four piglets, all of which were exposed to the cold weather, and three of the piglets died. Answer ¶ 10b; CX 53.

c. December 16, 2013. The hooves of three goats were excessively long. CX 53; CX 54.

d. May 21, 2014. The record does not demonstrate a female coyote had an injury to its foot prior to May 21, 2014, the day of the inspection, severe enough to require reporting to a veterinarian.

e. May 21, 2014. Respondents failed to communicate to the attending veterinarian that a coatimundi had unexplained hair loss at the base of its tail, and Respondents failed to have the animal seen by a veterinarian. CX 69; CX 69a at 2.

f. May 21, 2014. Respondents failed to communicate to the attending veterinarian that a thin capybara had unexplained areas of scaly skin and hair loss around the base of its tail and on its backbone, and Respondents failed to have the animal seen by a veterinarian. CX 69; CX 69a at 3-5

g. May 21, 2014. The hooves of a Barbados sheep were excessively long. CX 69; CX 69a at 6-7.

h. August 5, 2014. A female Old English Sheepdog (Macey) had large red sores behind both ears, and was observed to be shaking her head and scratching those areas. Respondents did not communicate with their attending veterinarian about Macey and did not obtain any veterinary care for Macey. Instead, Respondents represented that they were treating Macey themselves with an antiseptic ointment. The ointment that Respondents said that they used had expired in October 2007. CX 71; CX 71a at 1-4.

i. August 25, 2014–October 7, 2014. On August 25, 2014, a tiger (Casper) was evaluated by Respondents' attending veterinarian because he was thin and had cuts and sores on his face and legs. Respondents' attending veterinarian did not make any diagnosis, recommend any treatment, or prescribe any medication for him at that time. On October 7, 2014, APHIS observed that Casper had a large open wound on the inside of his left front leg. The wound had not been treated in any manner. Casper was also observed to be thin, with mildly protruding hips and vertebrae. Between August 25, 2014, and October 7, 2014, Respondents have not had Casper seen by a veterinarian, and

Casper had received no veterinary care, except Respondents' administration of a dewormer in September 2014. Answer ¶ 10i; CX 72; CX 72a at 1; CX 72b.

15. On or about the following dates, APHIS inspectors documented noncompliance with the Regulations governing the handling of animals:

a. July 31, 2013. Respondents (1) failed to handle animals as carefully as possible, in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, (2) during exhibition, failed to handle animals so that there was minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the public so as to ensure the safety of the animals and the public, and (3) failed to have any employee or attendant present while the public had public contact with Respondents' animals, including, *inter alia*, a camel, goats, sheep, and other hoofstock. CX 26; CX 27; CX 37.

b. October 26, 2013. Respondents left a female Meishan pig that was about to farrow, outdoors in the cold, whereupon the pig gave birth to four piglets, three of whom died while housed outdoors by the Respondents. CX 53. Whether or not the cold was the cause of the death of the piglets, having the pig outside at that time of year when it might give birth was inappropriate

c. October 26, 2013. Respondents exposed one adult female Meishan pig, and four Meishan piglets, to cold temperatures, which exposure could have been detrimental to the animals' health and well-being. CX 53.

16. On June 12, 2013, APHIS inspectors Drs. Natalie Cooper and Margaret Shaver documented noncompliance with the Standards, as follows:

a. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae. CX 2; CX 4.

b. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. Answer ¶ 12(b) (admitted; *see also* AB at 12 and 17);⁵⁰⁹ CX 2; CX 5.

c. Respondents failed to properly store supplies of food, specifically, the refrigerator in Respondents' primate building was in need of cleaning and contained contaminated, fly-infested fruit. CX 2; CX 6.⁵¹⁰

⁵⁰⁹ While Respondents admit this allegation, they note that "this matter was remedied by washing the bags after the inspection. (CX 22, p. 1)." AB at 17. Subsequent corrections do not obviate violations.

⁵¹⁰ Respondents contend, AB at 18, the "flies" referenced in Complaint ¶ 12(c) were fruit flies that are not a vector for disease as other flies are. *See* Pries, Tr. 504 (he is not concerned about fruit flies) and Shaver, Tr. 144 (fruit flies are not the vector for disease other flies are). Respondents also note, *id.*:

Mrs. Sellner stated in her Affidavit that the leaves on the lettuce was turning brown so she disposed of the outer leaves. The lettuce itself was to be feed to the reptiles which are not Zoo animals. She also had done what a previous inspector told her and put up a sign that the food needed to be washed before feeding and she was still written up. (Sellner Affidavit CX-22, p. 2 of 21).

Vector for disease or not, a fly infestation is evidence of a lack of cleanliness, which is otherwise supported, too, which appears to be APHIS's overriding point as to these ¶ 12(c) allegations. I find that Respondents' contentions as to the lettuce are supported and un rebutted, and thus are not a part of the above finding, which is otherwise supported by the record.

d. Respondents failed to maintain enclosures for nonhuman primates in good repair, and specifically, the fencing of the enclosure housing three baboons was bowed, compromising its structural strength. Complaint ¶ 12(d); CX 2; CX 7, at 1-2.⁵¹¹

e. The chain referenced in Complaint ¶ 12(e) that secured the gate of the enclosure housing two macaques was rusted (CX 2; CX 7 at 3), but this does not rise to the level of an AWA violation because there was no showing that the amount of rust affected its structural integrity. *See* Sellner, Tr. 680-81; CX 7 at 3 (showing relatively moderate rust).

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence separating the enclosures housing fallow deer and Jacob's sheep was in disrepair, with bowed wire panels and separated wire. Complaint 12(f); CX 2; CX 8 at 1, 3, 5-6.

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure containing Santa Cruz sheep was in disrepair, with sharp wires protruding inward and accessible to the animals. CX 2; CX 8 at 2 4, 7.

h. Respondents failed to provide sufficient shade to allow all animals housed outdoors to protect themselves from direct sunlight, and specifically, Respondents'

⁵¹¹ Respondents contended the bulge in the fence was not shown to be a structural issue, citing CX 7 at 1-2, *see* Affidavit of Mrs. Sellner CX 22 at 2. I find the photograph and the opinion of the inspector to be sufficient support for the finding that the structure was compromised.

enclosures for lions and cougars lacked adequate shade for all of the animals. CX 2; CX 9.

i. Respondents failed to provide a suitable method of drainage, and specifically, the enclosure housing three Scottish Highland cattle contained standing water and mud. CX 2; CX 10.

j. Respondents failed to provide potable water to two woodchucks, goats and sheep, and a coyote, as often as necessary for their health and comfort, and with consideration for their age and condition. CX 2; CX 11.

k. Respondents failed to clean enclosures housing a coyote, two chinchillas, and two Patagonian caviaries, as required. CX 2; CX 12.

l. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the enclosures housing two tigers, an armadillo, and a sloth. CX 2; CX 13.

17. On July 31, 2013, APHIS inspector Dr. Jeffrey Baker documented noncompliance with the Standards, as follows:

a. Respondents failed to provide guinea pigs with wholesome food, and specifically, there was a mixture of bedding and fecal matter inside the animals' food receptacle. CX 26; CX 28.

b. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the

refrigerator in a building housing nonhuman primates contained spiders. Answer ¶ 13(b) (admitting most of the Complaint ¶ 13(b) allegations except those pertaining to moldy fruit);⁵¹² CX 26; CX 29.

c. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Cynthia), who was self-mutilating. *See* discussion, *infra*. CX 26; CX 37.

d. Respondents failed to remove excreta from the enclosure housing a baboon (Obi), as required. CX 26; CX 30.

e. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies near the bush babies, and rodent feces on the floor of the building housing lemurs. CX 26.

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and

⁵¹² APHIS alleged an AWA violation because moldy fruit was found in a refrigerator in the food storage area. Respondents defended that the moldy fruit was wrapped in plastic and was going to be removed from the Zoo, and would not be fed to animals. *See* AB at 12. I find Respondents' defense credible, and find no violation with respect to the moldy fruit, even though it was unquestionably in the food storage area. *See* Cole, Tr. 172:23 to 173:4 (“[T]here's a reference to the licensee saying that she washed the fruit before it was fed and disposed of all fruit that was bad.... The food storage area has to be clean.”) There was much evidence to show that the food storage area was unclean aside from the presence of any blemished or rotted fruit. The fact that there was blemished and/or rotten fruit among useable fruit present, where collectively the fruit was going to undergo selection and processing before being feed to animals, would not standing alone—which it does not in this instance—make an area unclean. The implication was that spoiled fruit was going to be, improperly, fed to the animals, and Ms. Sellner's credible testimony, and thus the record, is to the contrary.

specifically, four enclosures (housing kangaroos, coyotes, capybara and bears) were all in disrepair. CX 26; CX 32.

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in the food storage area contained spiders. Answer ¶ 13g (admitting, except for alleged moldy fruit violations);⁵¹³ CX 26; CX 29.

h. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system. Answer ¶ 13(h) (admitted in part);⁵¹⁴ CX 26; CX 33.

i. APHIS *failed* to prove Respondents failed to provide potable water to six animals, housed in five enclosures, as often as necessary for their health and comfort, and with consideration for their age and condition. CX 26; CX 34.

⁵¹³ As previously noted, Respondents denied some of the allegations with regard to “moldy” fruit or other produce either frozen, enclosed in plastic or about to be sorted to determine its nutritional quality. (See, for example, testimony of Dr. Baker, Tr. pp. 199–202).” AB at 12. I find that APHIS did not demonstrate that moldy fruit was actually going to be fed to the animals.

⁵¹⁴ Respondents “admit that a portion of the perimeter fence was damaged but [state] the height of the fence was always at least eight feet in height, the required height for a perimeter fence. (Sellner Tr. p. 651).” AB at 12. As discussed herein, subsequent repairs do not obviate violations. Moreover, APHIS showed that “there were gaps between the panels of the perimeter fence; and...there was no perimeter fence around the camel enclosure that could function as a secondary containment system.” The cited testimony by Ms. Sellner refers only to a particular panel.

j. Respondents failed to remove excreta and/or food debris from the primary enclosures housing two bears and a capybara, as required. CX 26; CX 35.

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the presence of rodent feces on the floor of the coatimundi building, and the excessive amount of flies and other flying insects, as well as rodent feces in the food preparation and storage areas. CX 26; CX 36.

l. Respondents failed to employ a sufficient number of trained and qualified personnel. CX 26.

18. On September 25, 2013, Dr. Cole documented noncompliance with the Standards, as follows:

a. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (three lemurs, two bush babies, one vervet, four baboons, two macaques) adequately, as required. CX 39; CX 40.

b. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Ana), who was exhibiting abnormal behaviors. CX 39; CX 41.

c. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large amount of flies around and within buildings housing primates, and the enclosures housing two macaques, one vervet, three baboons, and two bush babies, (ii) evidence of spiders in buildings containing enclosures for two lemurs, four baboons, two macaques, one vervet, and two bush babies, and (iii) evidence of

rodents, including a live mouse, in the building housing two macaques, one vervet, and three baboons. CX 39; CX 42.

d. Respondents failed to provide a suitable method of drainage in four enclosures, housing: two potbellied pigs, one fallow deer, two Meishan pigs, and two bears. CX 39; CX 43.

e. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) a portion of perimeter fencing adjacent to exotic felids, bears and wolves was sagging and detached from the fence post; (ii) there were gaps between the panels of the perimeter fence; and (iii) there was no perimeter fence around the camel enclosure that could function as a secondary containment system. CX 39; CX 44.

f. Respondents failed to keep feeders for coatimundi, wallabies, coyotes, and pot-bellied pigs clean and sanitary, and the feeders for these animals all bore a thick discolored build-up. CX 39; CX 45.

g. Respondents failed to provide potable water to two sheep, a capybara and a llama as often as necessary for their health and comfort, and with consideration for their age and condition. CX 39; CX 46.

h. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures

housing two pot-bellied pigs, capybara, coatimundi, serval, kinkajou, fennec fox, chinchillas, Highland cattle, bears, Patagonian cavy, and African crested porcupine. CX 39; CX 47.

i. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) an excessive amount of flies throughout the premises and in the animal enclosures, including the enclosures for ferrets, kinkajou, Patagonian cavy, bears, African crested porcupine, fennec fox, chinchillas, skunk, sloth, and armadillo, (ii) evidence of spider activity throughout the facility, and (iii) evidence of rodent activity, including rodent feces in the food storage area, and a dead rat within the coyote enclosure. CX 39; CX 48 at 4; CX 49.

j. Respondents failed to employ a sufficient number of trained and qualified personnel. CX 39; CX 47; CX 48.

19. On December 16, 2013, Dr. Cole documented noncompliance with the Standards, as follows:

a. The ceiling of the primate building was in disrepair, and specifically, there were holes in the ceiling. CX 53; CX 55.

b. Respondents failed to provide potable water to three chinchillas as often as necessary for their health and comfort, and with consideration for their age and condition. CX 53; CX 57.

c. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and

specifically, (i) the enclosure housing cattle (one Watusi and one zebu) had broken fencing, (ii) the chain-link fencing of the enclosures housing approximately forty sheep, one fallow deer, two tigers and two cougars were in disrepair, with curled chain link at the bottom with sharp points that protruded into the enclosures and were accessible to the animals, and (iii) the windbreak at the back of the shelter housing Santa Cruz sheep was in disrepair. CX 53; CX 56.

20. On May 21, 2014, Dr. Cole documented noncompliance with the Standards, as follows:

- a. Respondents failed to clean enclosures housing three wolf hybrids as required. CX 69; CX 69a at 8-10.
- b. Respondents failed to store supplies of bedding for guinea pigs in facilities that protect them from deterioration, spoilage, or infestation or contamination by vermin. CX 69; CX 69a at 11-13.
- c. Respondents failed to provide potable water to four guinea pigs as required. CX 69; CX 69a at 14.
- d. Respondents failed to transfer four guinea pigs to a clean primary enclosure when the bedding in their enclosure became damp and soiled to the extent that it was moist and clumping, and uncomfortable to the four guinea pigs. CX 69; CX 69a at 15.
- e. Respondents failed to clean the premises adjacent to the enclosure housing four guinea pigs, as required. CX 69; CX 69a at 16.

f. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (two lemurs, a vervet, four baboons, and two macaques) adequately, as required. CX 69; CX 69a at 17-26.

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically the refrigerator in a building housing nonhuman primates was in need of cleaning.⁵¹⁵ CX 69; CX 69a at 27-30.

h. Respondents failed to employ a sufficient number of trained and qualified personnel. CX 69.

i. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, seven enclosures (housing lions, bear, serval, camel, Meishan pigs, fallow deer, and sloth) were all in disrepair. CX 69; CX 69a at 31-47.

j. Respondents failed to remove animal waste, food waste, and old bedding as required. CX 69; CX 69a at 48-55.⁵¹⁶

⁵¹⁵ APHIS showed that the refrigerator in the building housing nonhuman primates contained moldy fruit, but consistent with other findings herein, I find that APHIS did not establish that moldy fruit would have actually been fed to animals. *See* Baker, Tr. 172:14 to 173:4, 175:14-24 discussing photograph that is CX29, p. 5; Cole, Tr. 325:25 to 326:4. Also, APHIS alleged that the refrigerator at a primate building was “nonfunctioning.” In their answer, ¶ 16(g) Respondents stated that this refrigerator was being used for dry storage, thus, was not intended to be functioning. Dr. Cole, Tr. 330, appears to admit that the fact that the refrigerator was not functioning as a refrigerator did not cause any food to spoil, and, thus, was not the cause of any violation, and I so find.

⁵¹⁶ As discussed above, I find that APHIS did not prove that a “burn barrel” in some proximity to the lion enclosure amounted to a violation.

k. Respondents failed to provide any shelter from the elements for two Patagonian caviés. CX 69; CX 69a at 56.

l. It was *not* proven by APHIS that Respondents failed to provide a suitable method of drainage in the four-horned sheep, fallow deer, and bear enclosures. CX 69; CX 69a at 57-64.

m. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) there was a large gap between the perimeter fence and a gate, adjacent to the large felid enclosures; and (ii) the perimeter fence adjacent to the coatimundi enclosure was too close to prevent direct contact with the animals. CX 69; CX 69a at 65-67.

n. Respondents failed to provide potable water to degus, coyotes, porcupines, and gerbils as often as necessary for their health and comfort, and with consideration for their age and condition. CX 69; CX 69a at 68-70.

o. Respondents failed to remove excreta and/or food debris from the primary enclosures housing thirty-six (36) animals, as required. CX 69; CX 69a at 71-94.

p. Respondents failed to clean enclosures housing two kinkajous, two coatimundi, a capybara, two coyotes, two porcupines, two foxes, a serval, three chinchillas, and two ferrets, as required. CX 69; CX 69a at 71-94.

q. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive number of flies in the enclosures housing two ferrets, two kinkajous, tigers, and bears; and by a build-up of bird feces on the shelters for bobcats and skunks. CX 69; CX 69a at 83-84.

21. On August 5, 2014, Drs. Cole and Shaver documented noncompliance with the Standards, as follows:

a. Respondents failed to clean enclosures housing two wolf hybrids as required. CX 71; CX 71a at 42-43.

b. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae, dirt and debris. CX 71; CX 71a at 12.

c. Respondents failed to establish and maintain an effective program of pest control for dogs, as evidenced by the excessive number of flies observed on the waste and on the ground in the enclosure housing two wolf-hybrids, and one of the wolf hybrids had sores that Respondents attributed to flies. CX 71.

d. Respondents' enclosures housing three baboons were in disrepair, with broken wood panels and support boards. CX 71; CX 71a at 18-19.

e. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. Answer ¶ 17e; CX 71.

f. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the primate building and adjacent to the lemur enclosures. CX 71.

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosures housing a sloth and Santa Cruz sheep, and the fence separating the camel and sheep enclosures, were all in disrepair. CX 71; CX 71a at 25-26, 46-47.

h. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing three pot-bellied pigs and two Meishan pigs contained standing water. CX 71; CX 71a at 20-21, 32-35.

i. Respondents failed to provide potable water to a capybara and three raccoons as often as necessary for their health and comfort, and with consideration for their age and condition. CX 71; CX 71a at 13-14.

j. Respondents failed to remove excreta and debris from the primary enclosures housing eighty-eight (88) animals, as required. CX 71; CX 71a at 5-11, 16, 23-24, 27-31, 36-41, 44-45.

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing a Patagonian cavy, a capybara, three pot-bellied pigs, two Meishan pigs, five cattle, seven tigers, one cougar, and two lions. CX 71; CX 71a at 15, 17, 22,

22. On October 7, 2014, Drs. Shaver and Cole documented noncompliance with the Standards, as follows:

a. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosure housing four llamas had bent and protruding metal bars, some of which were pointed inward and were accessible to the animals. Answer ¶ 18a (admitted, but noting later repair); CX 72; CX 72a at 5-14; AB at 12.

b. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure housing goats had holes large enough to permit at least three goats to escape the enclosure. Answer ¶ 18b; CX 72; CX 72a at 5-14.

c. Respondents failed to provide thirty sheep with wholesome food, and specifically, Respondents maintained a food dispenser for public use that contained old, caked, and discolored food. CX 72; CX 72a at 5-14 at 2-4.

23. On March 4, 2015, Dr. Cole documented noncompliance with the Standards, as follows:

a. Respondents failed to clean the enclosure housing a vervet as required, and specifically, there was waste build-up on the wall above the perch, in a crack between the wall and the perch, and in holes within the perch. Answer at Second ¶ 18a (admitted; *see* AB at 12); CX 75.

b. Respondents failed to remove excreta and debris from the primary enclosures housing twenty-four degus, as required, and specifically, there was a build-up of food waste, soiled bedding and/or animal waste in the enclosure. CX 75; CX 75a.

24. On May 27, 2015, Dr. Cole documented noncompliance with the Standards, as follows:

a. The “reptile” room, housing multiple non-human primates, was in disrepair, and specifically, there were soiled and damaged ceiling tiles, with exposed spongy material, adjacent to the animals’ primary enclosures. CX 76; CX 76a at 1-3

b. The “reptile” room, housing multiple non-human primates, was not kept free of debris, discarded materials and clutter. CX 76; CX 76a at 5-14.

c. Respondents failed to maintain and clean the surfaces of the facilities housing nonhuman primates as required. CX 76; CX 76a at 5-14, 16.

d. Respondents failed to provide adequate ventilation in the building housing two bush babies. CX 76.

e. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a singly-housed nonhuman primate (Obi), who was exhibiting abnormal behaviors. CX 76; CX 76a at 45-46.

f. Respondents failed to keep the building housing nonhuman primates (vervet, macaque, bush babies) clean, as evidenced by the build-up of dirt, dust, and/or debris inside the structure and adjacent to the primate enclosures, excessive fly specks on

the overhead fixtures and electrical outlets, and the presence of rodent feces. CX 76; CX 76a at 16-33.

g. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large number of live and dead flies inside the building housing two macaques and four baboons. CX 76; CX 76a.

h. Respondents failed to provide adequate ventilation in the building housing chinchillas, kinkajous, fennec foxes, and African crested porcupines. CX 76.

i. Respondents failed to provide adequate shelter from inclement weather for two Highland cattle and two beef cattle. CX 76; CX 76a at 47-49.

j. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing fifty animals (three pot-bellied pigs, one camel, thirty-five Jacob's sheep, two Meishan pigs, three llamas, four cattle, one zebu, and one llama) were essentially covered in mud and/or standing water, to the extent that the aforementioned animals were required to stand in water and/or mud in order to access food. CX 76; CX 76a at 47-91.

k. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing multiple animals (a black bear, chinchillas, degus, two raccoons, two kinkajous, serval, coatimundi, fennec foxes, and African crested porcupines). CX 76; CX 76a at 15, 92-106.

1. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large number of flies within the bear shelter, on the floor of the enclosure housing two raccoons, and surrounding the enclosure housing two kinkajou; (ii) the presence of maggots in the waste observed in the kinkajou enclosure; and (iii) rodent droppings in the food storage room and the “reptile” room. CX 76; CX 76a at 107-109.

CONCLUSIONS OF LAW

1. On January 9, 2014, May 12, 2014, and February 19, 2015, at Manchester, Iowa, Respondents willfully violated the AWA and the Regulations governing access for inspections (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126).

2. On or about the following dates, Respondents willfully violated the Regulations governing attending veterinarian and adequate veterinary care (9 C.F.R. § 2.40), by failing to provide adequate veterinary care to the following animals and/or failing to establish programs of adequate veterinary care that included the availability of appropriate facilities, personnel, equipment, equipment and services, and/or the use of appropriate methods to prevent, control, and treat diseases and injuries, and/or daily observation of animals, and a mechanism of direct and frequent communication in order to convey timely and accurate information about animals to the attending veterinarian, and/or adequate guidance to personnel involved in animal care:

a. June 12, 2013. A capuchin monkey (Cynthia) had visible areas of hair loss on her abdomen, tail, thighs and arms, and was observed to be chewing on her tail, and Respondents had not had Cynthia seen by their attending veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

b. October 26, 2013. Respondents failed to provide adequate veterinary care to animals, and failed to establish and maintain programs of adequate veterinary care that included the availability of appropriate facilities, equipment, and personnel, and specifically, Respondents housed a Meishan pig that was due to farrow outdoors, in cold temperatures, whereupon the pig gave birth to four piglets, all of which were exposed to the cold weather, and three of the piglets died. 9 C.F.R. §§ 2.40(a), 2.40(b)(1). This is a violation regardless of whether the cold was the cause of the piglet's death.

c. December 16, 2013. Respondents failed to provide adequate veterinary care to animals, and specifically, the hooves of three goats were excessively long. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

d. May 21, 2014. Respondents did not violate the AWA by failing to communicate to the attending veterinarian that a female coyote had been bitten by another coyote three weeks earlier (on May 1, 2014), because the record does *not* demonstrate the severity of that injury apart from a similar injury to that same animal on the same leg on the May 21, 2014 date of the relevant inspection. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

e. May 21, 2014. Respondents failed to communicate to the attending veterinarian that a coatimundi had unexplained hair loss at the base of its tail, and Respondents failed to have the animal seen by a veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

f. May 21, 2014. Respondents failed to communicate to the attending veterinarian that a thin capybara had unexplained areas of scaly skin and hair loss around the base of its tail and on its backbone, and Respondents failed to have the animal seen by a veterinarian. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

g. May 21, 2014. Respondents failed to provide adequate veterinary care to animals, and specifically, the hooves of a Barbados sheep were excessively long. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

h. August 5, 2014. Respondents failed to provide adequate veterinary medical care to a female Old English Sheepdog (Macey) who had large red sores behind both ears, and Macey was observed to be shaking her head and scratching those areas. Respondents did not communicate with their attending veterinarian about Macey and did not obtain any veterinary care for Macey. Instead, Respondents represented that they were treating Macey themselves with an antiseptic ointment. The ointment that Respondents said that they used had expired in October 2007. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

i. August 25, 2014-October 7, 2014. Respondents failed to provide adequate veterinary medical care to a tiger (Casper). On August 25, 2014, Casper was evaluated by Respondents' attending veterinarian because he was thin and had cuts and sores on his face and legs. Respondents' attending veterinarian did not make any diagnosis, recommend any treatment, or prescribe any medication for Casper at that time. On October 7, 2014, APHIS observed that Casper had a large open wound on the inside of

his left front leg. The wound had not been treated in any manner. Casper was also observed to be thin, with mildly protruding hips and vertebrae. Between August 25, 2014, and October 7, 2014, Respondents had not had Casper seen by a veterinarian, and Casper had received no veterinary care, save Respondents' administration of a dewormer in September 2014. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2), 2.40(b)(3).

3. On or about the following dates, Respondents willfully violated the Regulations governing the handling of animals:

a. July 31, 2013. Respondents (1) failed to handle animals as carefully as possible, in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, (2) during exhibition, failed to handle animals so that there was minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the public so as to ensure the safety of the animals and the public, and (3) failed to have any employee or attendant present while the public had public contact with Respondents' animals, including, *inter alia*, a camel, goats, sheep, and other hoofstock. 9 C.F.R. §§ 2.131(b)(1), 2.131(c)(1), 2.131(d)(2).

b. October 26, 2013. Respondents failed to handle Meishan pigs as carefully as possible, in a manner that does not cause excessive cooling, physical harm, or unnecessary discomfort, and specifically, Respondents left a female Meishan pig that was about to farrow, outdoors in the cold, whereupon the pig gave birth to four piglets, three of whom died while housed outdoors by the Respondents. 9 C.F.R. § 2.131(b)(1).

c. October 26, 2013. Respondents failed to take appropriate measures to alleviate the impact of climatic conditions that presented a threat to the health and well-being of one adult female Meishan pig, and four Meishan piglets, and, specifically, Respondents exposed all five animals to cold temperatures, which exposure could have been detrimental to the animals' health and well-being. 9 C.F.R. § 2.131(e).

4. On or about June 12, 2013, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae. 9 C.F.R. § 3.10.

b. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. 9 C.F.R. § 3.75(c)(3).

c. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, the refrigerator in Respondents' primate building was in need of cleaning. 9 C.F.R. § 3.75(e). Respondents did not incur violations by possession of moldy fruit that would not have been fed to animals.

d. Respondents failed to maintain enclosures for nonhuman primates in good repair, and specifically, the fencing of the enclosure housing three baboons was bowed, compromising its structural strength. 9 C.F.R. § 3.80(a)(2)(iii).

e. Respondents did not fail to maintain enclosures for nonhuman primates in good repair. Specifically, the chain that secured the gate of the enclosure housing two macaques was rusted but was not shown to have been structurally compromised. 9 C.F.R. § 3.80(a)(2)(iii).

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence separating the enclosures housing fallow deer and Jacob's sheep was in disrepair, with bowed wire panels and separated wire. 9 C.F.R. § 3.125(a).

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure containing Santa Cruz sheep was in disrepair, with sharp wires protruding inward and accessible to the animals. 9 C.F.R. § 3.125(a).

h. Respondents failed to provide sufficient shade to allow all animals housed outdoors to protect themselves from direct sunlight, and specifically, Respondents' enclosures for lions and cougars lacked adequate shade for all of the animals. 9 C.F.R. § 3.127(a).

i. Respondents failed to provide a suitable method of drainage, and specifically, the enclosure housing three Scottish Highland cattle contained standing water and mud. 9 C.F.R. § 3.127(c).

j. APHIS did not prove Complaint ¶ 13(j) that Respondents failed to provide potable water to two woodchucks, goats and sheep, and a coyote, as often as necessary

for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

k. Respondents failed to clean enclosures housing a coyote, two chinchillas, and two Patagonian cavies, as required. 9 C.F.R. § 3.131(a).

l. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the enclosures housing two tigers, an armadillo, and a sloth. 9 C.F.R. § 3.131(d).

5. On or about July 31, 2013, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to provide guinea pigs with wholesome food, and specifically, there was a mixture of bedding and fecal matter inside the animals' food receptacle. 9 C.F.R. § 3.29(a).

b. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in a building housing nonhuman primates contained spiders. 9 C.F.R. § 3.75(e). Respondents did not incur any violation for having moldy fruit that would not be fed to animals.

c. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Cynthia), who was self-mutilating. 9 C.F.R. § 3.81(c)(2).

d. Respondents failed to remove excreta from the enclosure housing a baboon (Obi), as required. 9 C.F.R. § 3.84(a).

e. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies near the bush babies, and rodent feces on the floor of the building housing lemurs. 9 C.F.R. § 3.84(d).

f. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, four enclosures (housing kangaroos, coyotes, capybara and bears) were all in disrepair. 9 C.F.R. § 3.125(a).

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and specifically, among other things, the food storage areas were dirty and in need of cleaning, with rodent droppings, feces, and old food on the floor, the refrigerator in the food storage area contained spiders. 9 C.F.R. § 3.125(c).

h. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system. 9 C.F.R. § 3.127(d).

i. Respondents failed to provide potable water to six animals, housed in five enclosures, as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

j. Respondents failed to remove excreta and/or food debris from the primary enclosures housing two bears and a capybara, as required. 9 C.F.R. § 3.131(a).

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the presence of rodent feces on the floor of the coatimundi building, and the excessive amount of flies and other flying insects, as well as rodent feces in the food preparation and storage areas. 9 C.F.R. § 3.131(d).

l. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

6. On or about September 25, 2013, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (three lemurs, two bush babies, one vervet, four baboons, two macaques) adequately, as required. 9 C.F.R. § 3.75(c)(3).

b. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a nonhuman primate (Ana), who was exhibiting abnormal behaviors. 9 C.F.R. § 3.81(c)(2).

c. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large amount of flies around and within buildings housing primates, and the enclosures housing two macaques, one vervet, three baboons, and two bush babies, (ii) evidence of spiders in buildings containing enclosures for two lemurs, four baboons, two macaques, one vervet, and two bush babies, and (iii) evidence of

rodents, including a live mouse, in the building housing two macaques, one vervet, and three baboons. 9 C.F.R. § 3.84(d).

d. Respondents failed to provide a suitable method of drainage in four enclosures, housing: two potbellied pigs, one fallow deer, two Meishan pigs, and two bears. 9 C.F.R. § 3.127(c).

e. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) a portion of perimeter fencing adjacent to exotic felids, bears and wolves was sagging and detached from the fence post; (ii) there were gaps between the panels of the perimeter fence; and (iii) there was no perimeter fence around the camel enclosure that could function as a secondary containment system. 9 C.F.R. § 3.127(d).

f. Respondents failed to keep feeders for coatimundi, wallabies, coyotes, and pot-bellied pigs clean and sanitary, and the feeders for these animals all bore a thick discolored build-up. 9 C.F.R. § 3.129(b).

g. Respondents failed to provide potable water to two sheep, a capybara and a llama as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

h. Respondents failed keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures

housing two pot-bellied pigs, capybara, coatimundi, serval, kinkajou, fennec fox, chinchillas, Highland cattle, bears, Patagonian cavy, and African crested porcupine. 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).

i. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) an excessive amount of flies throughout the premises and in the animal enclosures, including the enclosures for ferrets, kinkajou, Patagonian cavy, bears, African crested porcupine, fennec fox, chinchillas, skunk, sloth, and armadillo, (ii) evidence of spider activity throughout the facility, and (iii) evidence of rodent activity, including rodent feces in the food storage area, and a dead rat within the coyote enclosure. 9 C.F.R. § 3.131(d).

j. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

7. On or about December 16, 2013, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. The ceiling of the primate building was in disrepair, and specifically, there were holes in the ceiling. 9 C.F.R. § 3.75(a).

b. Respondents failed to provide potable water to three chinchillas as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

c. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, 9 C.F.R. §

3.125(a), and specifically, (i) the enclosure housing cattle (one Watusi and one zebu) had broken fencing, (ii) the chain-link fencing of the enclosures housing approximately forty sheep, one fallow deer, two tigers and two cougars were in disrepair, with curled chain link at the bottom with sharp points that protruded into the enclosures and were accessible to the animals, and (iii) the windbreak at the back of the shelter housing Santa Cruz sheep was in disrepair.

8. On or about May 21, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean enclosures housing three wolf hybrids as required. 9 C.F.R. § 3.1(c)(3).

b. Respondents failed to store supplies of bedding for guinea pigs in facilities that protect them from deterioration, spoilage, or infestation or contamination by vermin. 9 C.F.R. § 3.25(c).

c. Respondents failed to provide potable water to four guinea pigs as required. 9 C.F.R. § 3.30.

d. Respondents failed to transfer four guinea pigs to a clean primary enclosure when the bedding in their enclosure became damp and soiled to the extent that it was moist and clumping, and uncomfortable to the four guinea pigs. 9 C.F.R. § 3.31(a)(2).

e. Respondents failed to clean the premises adjacent to the enclosure housing four guinea pigs, as required. 9 C.F.R. § 3.31(b).

f. Respondents failed to clean the surfaces of housing facilities for nonhuman primates (two lemurs, a vervet, four baboons, and two macaques) adequately, as required. 9 C.F.R. § 3.75(c)(3).

g. Respondents failed to store supplies of food in a manner that protects them from spoilage, and the refrigerator in a building housing nonhuman primates was in need of cleaning. 9 C.F.R. § 3.75(e). Respondents did not incur any violation for having moldy fruit that would not be fed to animals, or for the use of a nonfunctioning refrigerator for food storage that did not result in spoilage. *See* Dr. Cole, Tr. 330.

h. Respondents failed to employ a sufficient number of trained and qualified personnel. 9 C.F.R. §§ 3.85, 3.132.

i. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, seven enclosures (housing lions, bear, serval, camel, Meishan pigs, fallow deer, and sloth) were all in disrepair. 9 C.F.R. § 3.125(a).

j. Respondents failed to remove animal waste, food waste, and old bedding as required, and specifically. 9 C.F.R. § 3.125(d). As discussed above. I find no violation proved as to a "burn barrel" alleged to be in close proximity to the lion enclosure.

k. Respondents failed to provide any shelter from the elements for two Patagonian caviés. 9 C.F.R. § 3.127(b).

l. It was *not* proven by APHIS that Respondents failed to provide a suitable method of drainage in the four-horned sheep, fallow deer, and bear enclosures. 9 C.F.R. § 3.127(c).

m. Respondents failed to enclose their zoo by an adequate perimeter fence of sufficient height and constructed in a manner so as to protect the animals, and to keep animals and unauthorized persons from having contact with the animals, and that could function as a secondary containment system, specifically (i) there was a large gap between the perimeter fence and a gate, adjacent to the large felid enclosures; and (ii) the perimeter fence adjacent to the coatimundi enclosure was too close to prevent direct contact with the animals. 9 C.F.R. § 3.127(d).

n. Respondents failed to provide potable water to degus, coyotes, porcupines, and gerbils as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

o. Respondents failed to remove excreta and/or food debris from the primary enclosures housing thirty-six (36) animals, as required. 9 C.F.R. § 3.131(a).

p. Respondents failed to clean enclosures housing two kinkajous, two coatimundi, a capybara, two coyotes, two porcupines, two foxes, a serval, three chinchillas, and two ferrets, as required. 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).

q. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing two

ferrets, two kinkajous, tigers, and bears; and by a build-up of bird feces on the shelters for bobcats and skunks. C.F.R. § 3.131(d).

9. On or about August 5, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean enclosures housing two wolf hybrids as required. 9 C.F.R. § 3.1(c)(3).

b. Respondents failed to provide potable water to two dogs as often as necessary for their health and comfort, and specifically, the dogs' water receptacle contained a build-up of algae, dirt and debris. 9 C.F.R. § 3.10.

c. Respondents failed to establish and maintain an effective program of pest control for dogs, as evidenced by the excessive number of flies observed on the waste and on the ground in the enclosure housing two wolf-hybrids, and one of the wolf hybrids had sores that Respondents attributed to flies. 9 C.F.R. § 3.11(d).

d. Respondents' enclosures housing three baboons were in disrepair, with broken wood panels and support boards. 9 C.F.R. § 3.75(a).

e. Respondents failed to clean two enclosures housing nonhuman primates as required, and specifically, the cloth hanging nesting bags for bush babies were soiled and in need of cleaning. 9 C.F.R. § 3.75(c)(3).

f. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large amount of flies in the primate building and adjacent to the lemur enclosures. 9 C.F.R. § 3.84(d).

g. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the enclosures housing a sloth and Santa Cruz sheep, and the fence separating the camel and sheep enclosures, were all in disrepair. 9 C.F.R. § 3.125(a).

h. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing three pot-bellied pigs and two Meishan pigs contained standing water. 9 C.F.R. § 3.127(c).

i. Respondents failed to provide potable water to a capybara and three raccoons as often as necessary for their health and comfort, and with consideration for their age and condition. 9 C.F.R. § 3.130.

j. Respondents failed to remove excreta and debris from the primary enclosures housing eighty-eight (88) animals, as required. 9 C.F.R. § 3.131(a).

k. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the excessive amount of flies in the enclosures housing a Patagonian cavy, a capybara, three pot-bellied pigs, two Meishan pigs, five cattle, seven tigers, one cougar, and two lions. C.F.R. § 3.131(d).

10. On or about October 7, 2014, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and

specifically, the enclosure housing four llamas had bent and protruding metal bars, some of which were pointed inward and were accessible to the animals. 9 C.F.R. § 3.125(a).

b. Respondents failed to maintain animal enclosures structurally sound and in good repair so as to protect the animals from injury and to contain them, and specifically, the fence of the enclosure housing goats had holes large enough to permit at least three goats to escape the enclosure. 9 C.F.R. § 3.125(a).

c. Respondents failed to provide thirty sheep with wholesome food, and specifically, Respondents maintained a food dispenser for public use that contained old, caked, and discolored food. 9 C.F.R. § 3.129(a).

11. On or about March 4, 2015, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

a. Respondents failed to clean the enclosure housing a vervet as required, and specifically, there was waste build-up on the wall above the perch, in a crack between the wall and the perch, and in holes within the perch. 9 C.F.R. § 3.75(c)(3).

b. Respondents failed to remove excreta and debris from the primary enclosures housing twenty-four degus, as required, and specifically, there was a build-up of food waste, soiled bedding and/or animal waste in the enclosure. 9 C.F.R. § 3.131(a).

12. On or about May 27, 2015, Respondents willfully violated the Regulations, 9 C.F.R. § 2.100(a), by failing to meet the Standards, as follows:

- a. The "reptile" room, housing multiple non-human primates, was in disrepair, and specifically, there were soiled and damaged ceiling tiles, with exposed spongy material, adjacent to the animals' primary enclosures. 9 C.F.R. § 3.75(a).
- b. The "reptile" room, housing multiple non-human primates, was not kept free of debris, discarded materials, and clutter. 9 C.F.R. § 3.75(b).
- c. Respondents failed to maintain and clean the surfaces of the facilities housing nonhuman primates as required. 9 C.F.R. §§ 3.75(c)(2), 3.75(c)(3).
- d. Respondents failed to provide adequate ventilation in the building housing two bush babies. 9 C.F.R. § 3.76(b).
- e. Respondents failed to develop, document, and follow an adequate plan for environmental enhancement for a singly-housed nonhuman primate (Obi), who was exhibiting abnormal behaviors. 9 C.F.R. § 3.81(c)(2).
- f. Respondents failed to keep the building housing nonhuman primates (vervet, macaque, bush babies) clean, as evidenced by the build-up of dirt, dust, and/or debris inside the structure and adjacent to the primate enclosures, excessive fly specks on the overhead fixtures and electrical outlets, and the presence of rodent feces. 9 C.F.R. § 3.84(c).
- g. Respondents failed to establish and maintain an effective program of pest control, as evidenced by the large number of live and dead flies inside the building housing two macaques and four baboons. 9 C.F.R. § 3.84(d).

h. Respondents failed to provide adequate ventilation in the building housing chinchillas, kinkajous, fennec foxes, and African crested porcupines. 9 C.F.R. § 3.126(b).

i. Respondents failed to provide adequate shelter from inclement weather for two Highland cattle and two beef cattle. 9 C.F.R. § 3.127(b).

j. Respondents failed to provide a suitable method of drainage, and specifically, the enclosures housing fifty animals (three pot-bellied pigs, one camel, thirty-five Jacob's sheep, two Meishan pigs, three llamas, four cattle, one zebu, and one llama) were essentially covered in mud and/or standing water, to the extent that the aforementioned animals were required to stand in water and/or wade in order to access food. 9 C.F.R. § 3.127(c).

k. Respondents failed to keep the premises and animal enclosures clean, as required, and/or failed to remove excreta and/or food debris from the primary enclosures housing multiple animals (a black bear, chinchillas, degus, two raccoons, two kinkajous, serval, coatimundi, fennec foxes, and African crested porcupines). 9 C.F.R. §§ 3.125(d), 3.131(a), 3.131(c).

l. Respondents failed to establish and maintain an effective program of pest control, as evidenced by (i) the large number of flies within the bear shelter, on the floor of the enclosure housing two raccoons, and surrounding the enclosure housing two kinkajou; (ii) the presence of maggots in the waste observed in the kinkajou enclosure; and (iii) rodent droppings in the food storage room and the "reptile" room. 9 C.F.R. § 3.131(d).

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the AWA and the Regulations and Standards issued thereunder.

2. AWA license number 42-C-0084 is hereby revoked.

3. Respondents are jointly and severally assessed a civil penalty of \$10,000, to be paid in full no later than 120 days after the effective date of this order, by check (or checks) made payable to USDA/APHIS and remitted by U.S. Mail addressed to USDA, APHIS, Miscellaneous, P.O. Box 979043, St. Louis, MO 63197-9000.

4. Each check shall include a docket number for this proceeding, 15-0152.

5. 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.⁵¹⁷

Copies of this Decision and Order shall be served upon the parties.

Issued this 30th day of November 2017 in Washington, D.C.


Channing D. Strother
Administrative Law Judge

⁵¹⁷ 7 C.F.R. § 1.145.

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